



**Adjudicating austerity: an empirical analysis of judicial
decision-making in the challenges to the law and policy
that implemented austerity in the UK**

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Abstract

The 2008 global financial crisis had a major impact on the UK's public finances. In response, the 2010 and 2015 governments implemented an austerity programme to reduce spending. It was achieved by primary legislation, delegated legislation and discretionary decision-making powers. The central question this thesis answers is whether, in adjudicating judicial review claims that challenged the law and policy that implemented austerity, the limits of adjudication envisaged by political constitutionalism were exceeded.

Political constitutionalism holds that the resolution of disagreements about what policy or course of action ought to be adopted are best resolved by ordinary democratic and political processes rather than legal processes. Some political constitutionalist scholarship claims, in reliance on examples of decision-making in judicial review, that political decision-making has become increasingly subject to judicial control. There is existing literature which suggests these claims are problematic empirically because of the selective use of case law. This thesis therefore tests the claims of political constitutionalism empirically in the context of the case law in challenges to the austerity programme.

The methodological approach is to identify: (1) the adjudicated judicial review claims that challenged the law and policy that implemented austerity; and (2) the limits of adjudication envisaged by political constitutionalism. The thesis then assesses whether those limits were exceeded in the identified judicial review claims in three modes of judicial decision-making: the interpretation of legislation; the application of common law grounds of review; and adjudication by reference to the European Convention on Human Rights and European Union law.

The thesis finds limited evidence of the judiciary exceeding the limits envisaged by political constitutionalism. It finds, however, some support for political constitutionalism in identifying clear evidence of the judiciary adopting more intensive and less deferential standards of review in challenges to political decision-making relating to the administration of justice.

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List of abbreviations

- AG Attorney General
- AME annually managed expenditure
- BAILII British and Irish Legal Information Institute
- BoE Bank of England
- CA Carers Allowance
- CCL climate change levy
- CDS credit default swap
- CMO collateralised mortgage obligation
- CPI consumer prices index
- DCLG Department for Communities and Local Government
- DEL departmental expenditure limit
- DHP discretionary housing payment
- DLA Disability Living Allowance
- DLAC Director of Legal Aid Casework
- DLR discretionary leave to remain
- DWP Department for Work and Pensions
- ECtHR European Court of Human Rights
- EHRC Equality and Human Rights Commission
- EAT Employment Appeal Tribunal
- ET Employment Tribunal
- EU European Union
- FTT First Tier Tribunal
- GDP Gross Domestic Product
- GFC Global Financial Crisis
- GSE government-sponsored enterprise
- HB Housing Benefit
- HE higher education
- HMRC Her/His Majesty's Revenue and Customs
- HMT Her/His Majesty's Treasury
- IFS Institute for Fiscal Studies
- ILF Independent Living Fund
- IMF International Monetary Fund
- IPT insurance premium tax

- IS Income Support
- JPP Judicial Power Project
- JSA Jobseekers Allowance
- LA local authority
- LAA Legal Aid Agency
- LC Lord Chancellor
- LHA Local Housing Allowance
- LSC Legal Services Commission
- LC Lord Chancellor
- LCCSA London Criminal Courts Solicitors' Association
- LSE London School of Economics
- MBS mortgage backed security
- MWRF Manifestly without reasonable foundation
- NAO National Audit Office
- NIC National Insurance contributions
- OBR Office for Budget Responsibility
- ONS Office for National Statistics
- OTD originate to distribute
- OTH originate to hold
- PFI Private Finance Initiative
- PIP Personal Independence Payment
- PLP Public Law Project
- QE quantitative easing
- RPI retail price index
- RSE renewable source exemption
- SEN special education needs
- TEU Treaty on European Union
- TFEU Treaty on the Functioning of the European Union
- TME total managed expenditure
- UC Universal Credit
- UNCRC UN Convention of the Rights of the Child
- UT Upper Tribunal
- VAT value added tax
- ZLB zero lower bound

Chapter 1

Introduction

The central question this thesis answers is whether the limits of adjudication envisaged by political constitutionalism were exceeded when determining the judicial review claims that challenged the law and policy that implemented the austerity programme in the UK from 2010 to 2019. The purposes of this chapter are: to provide context to that question; to set out the methodology adopted for answering that question; to identify how this thesis makes an original and valuable contribution to knowledge; and to provide a guide to the seven subsequent chapters.

The economic, political and legal context

The central question arises in a specific economic, political and legal context and this section explains that context in that order and from a high level. Economically, the 2008 Global Financial Crisis (GFC) was the most serious economic crisis since the Great Depression that followed the 1929 Wall Street crash. The critical feature of the GFC was the liquidity and then solvency of major national and international financial institutions. As is common with financial crises, the GFC also had an impact on real economic activity. Financial flows were disrupted and spending contracted. During the GFC, gross domestic product (GDP) in developed economies fell by around 5%.¹ In the UK, GDP fell by 5.9% over five successive quarters from the first quarter of 2008 and unemployment rose from 5.2% to 8.4%.² Moving from the economic to the political, the governments and central banks of developed countries recognised that an economic catastrophe more severe than

¹ See, for example, Thomas Piketty, *Capital in the Twenty-First Century* (Arthur Goldhammer tr, Harvard 2014), 472.

² Office for National Statistics (ONS), 'The 2008 recession 10 years on' (ONS, 30 April 2018) <<https://www.ons.gov.uk/economy/grossdomesticproductgdp/articles/the2008recession10yearson/2018-04-30>> accessed 1 May 2025.

the Great Depression (when US GDP fell by around 25%) was likely and they prevented it with financial support and guarantees that halted a wave of insolvencies of banks and other financial institutions.³

The UK government led by Gordon Brown played a significant role in international efforts to tackle the GFC. On a national level, the Brown government averted the insolvency of major UK banks, notably RBS, HBOS and Lloyds TSB,⁴ with bailout packages from October 2008. Having avoided the first order problem of the collapse of the banking system essential to the functioning of the UK's economy and society, there was the second order problem of the fall in GDP that had a major impact on the public finances as receipts from taxation fell, budget deficits rose, and government debt increased. The initial political response to the fall in GDP by the Brown government was broadly Keynesian and spending was increased in some areas to stimulate economic demand.

The 2010 general election marked a significant change of approach. The Conservative/Liberal Democrat coalition government led by David Cameron implemented public spending cuts to try to reduce budget deficits and control government debt. The programme of spending cuts became commonly known as the 'austerity programme' or 'austerity'. Austerity continued after the May 2015 general election and the majority Conservative government led by Cameron (until he resigned in June 2016 after the referendum on the UK's membership of the European Union (EU)); and the Conservative

³ While the GFC and the financial interventions can be described in unremarkable terms, it is important not to lose sight of the historic nature of the crisis: 'The ferocity of the financial crisis in 2008 was met with a mobilisation of state action without precedent in the history of capitalism', Adam Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (Allen Lane, 2018) 166.

⁴ The insolvency and nationalisation of Northern Rock, a medium size mortgage lender, a year earlier following the first significant run on a UK bank for 150 years, was trivial compared to the potential insolvency of RBS, HBOS and Lloyds TSB.

governments led by Theresa May before and after the June 2017 general election (until she resigned in May 2019 after failing to get parliamentary approval for her EU withdrawal agreement). The austerity programme is generally considered to have ended with the September 2019 Spending Round.

The implementation of the austerity programme is described in chapter 2, but three important points are made now. First, austerity was - at least until after the EU referendum - the central policy programme of the 2010 and 2015 governments and affected almost all areas of state activity. The general view is that public spending cuts were on a scale unprecedented since the end of the second world war.⁵ As a long-term political project, austerity was at least as significant as - say - the privatisation programme of the Conservative governments of the 1980s. Second, successive governments implemented austerity using the policy levers at their disposal: securing the passage of primary legislation through Parliament and making delegated legislation, both of which had the purpose and effect of reducing public spending; and the exercise of ministerial discretionary decision- or policy-making powers to reduce public spending. Third, measured against its objectives - reducing the deficit and restoring GDP growth - the evidence of success is limited. The consensus view among academic economists is that austerity led to a delayed economic recovery and a sustained reduction in GDP growth

⁵ See, for example, Paul Johnson, Carl Emmerson and Nick Ridpath, 'The Economy' in Anthony Seldon and Tom Egerton (eds), *The Conservative Effect 2010-2024: 14 wasted years?* (Cambridge 2015), 87. For a contrary view see Christopher Hood and Rozana Himaz, *A Century of Fiscal Squeeze Politics: 100 Years of Austerity, Politics and Bureaucracy in Britain* (Oxford 2016), 26, 195. Hood and Himaz describe the cuts to spending as a 'soft squeeze' on expenditure, though their analysis only covers the period 2010 to 2015.

which meant reducing the deficit took longer and required greater cuts to spending.⁶ If the austerity programme is measured against matters other than its objectives, any assessment of the policy is much worse given the harm it caused to the UK population.⁷

Moving on from the economic, the next high-level context is legal and judicial, and is the 'growth' of judicial review since the 1960s, where judicial review is defined as the legal process by which the legality of enactments and decisions, actions or failures to act in relation to the exercise of public functions can be challenged in the courts.⁸ Whilst there is much about the growth of judicial review that is contested - not least its causes and effects - that it has been transformed since the early 1960s is unarguable. *Wednesbury* is conventionally cited to demonstrate the deference shown by the courts to executive decision-making in the initial post-war period;⁹ and then four cases ('the quartet') decided by the House of Lords in the 1960s are taken to signal the emergence of modern judicial

⁶ The central argument is that reducing spending and relying on low interest rates to stimulate economic demand was ineffective because interest rates were at or close to zero. See, for example, Simon Wren-Lewis, 'Covering up the austerity mistake' (2015) vol 144/5258 *New Statesman*; Simon Wren-Lewis, 'A general theory of austerity' (May 2016) Blavatnik School of Government, University of Oxford BSG-WP-2016/014 <<https://www.bsg.ox.ac.uk/sites/default/files/2018-05/BSG-WP-2016-014.pdf>> accessed 1 May 2025; Paul Krugman, 'How the "unforced error" of austerity wrecked Britain' *The Guardian* (London, 28 June 2024) <<https://www.theguardian.com/politics/ng-interactive/2024/jun/28/how-the-unforced-error-of-tory-austerity-wrecked-britain>> accessed 1 May 2025. The ability of the UK government to run larger budget deficits and higher government debt was proved by the COVID-19 crisis. For a less critical analysis see Johnson, Emmerson and Ridpath (n 5).

⁷ The the most stark impact of austerity related to life expectancy. See, for example, Maria Teresa de Haron Moro and others, 'A new era of inequality: profound changes to mortality in England, Scotland, and 10 major British cities' (2025) 35 *Eur J of Public Health* 235; Yonatan Berman and Tora Hovland, 'The Impact of Austerity on Mortality and Life Expectancy' (June 2024) LSE International Inequalities Unit Working Paper 139 <https://eprints.lse.ac.uk/123915/1/WP_139.pdf> accessed 1 May 2025, which suggests cuts to welfare benefits and healthcare spending set-back progress in life expectancy by 3 years between 2010 and 2019, equivalent to about 3% of all deaths or 190,000 excess deaths.

⁸ The CPR Part 54 definition is as serviceable as any other.

⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA). *Nakkuda Ali v Jayaratne* [1951] 1 AC 66 (PC) is often cited as an alternative. Both concerned the fairness of administrative licensing decisions.

review.¹⁰ In the most general terms, the grounds or principles of judicial review have been expanded and developed by the judiciary; and an increasing range of governmental functions have become amenable to review, whether in relation to the exercise of statutory, prerogative or *de facto* powers. The UK's membership of the EU and the incorporation of the European Convention on Human Rights (the Convention) gave rise to new grounds of judicial review to ensure compliance with EU law and the Convention.¹¹ Major procedural developments in judicial review include: the creation in 1978 of a unified and streamlined procedure under RSC Ord 53; the Senior Courts Act 1981 (SCA 1981) which put judicial review procedure, including remedies, on a statutory footing;¹² and CPR Part 54 which in 2000 implemented further procedural reforms, including the creation of the specialist Administrative Court to replace the Crown Office List. In addition to the major procedural reforms, there have been other procedural changes of greater or lesser significance by way of amendments to the SCA 1981 and CPR Part 54. While the headline figures in terms of the number of cases can be misleading, the volume of judicial review claims has grown markedly since the 1970s.¹³ Behind the increase in the number of claims lay complex factors including: the growth or reduction in certain types of legal dispute (notably

¹⁰ TT Arvind and others, 'Introduction: Judicial Review and the Quartet' in TT Arvind and others (eds), *Executive decision-making and the Courts: revisiting the origins of modern judicial review* (Hart 2021), 3. The four cases are: *Padfield v Minister of Agriculture* [1968] AC 997, *Conway v Rimmer* [1968] AC 910, *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 and *Ridge v Baldwin* [1964] AC 40. See also Carol Harlow, 'Judicial Encroachment on the Political Constitution?' in Richard Johnson and Yuan Yi Zhu, *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart, 2023), 41.

¹¹ The grounds were effectively created by the European Communities Act 1972 (ECA 1972) and the Human Rights Act 1998 (HRA 1998) respectively. Strictly speaking the Convention is the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950.

¹² Senior Courts Act 1981, ss 29 and 31, though enacted as the Supreme Courts Act 1981.

¹³ Maurice Sunkin and Vardy Bondy, 'The Use and Effects of Judicial Review: Assumptions and Empirical Evidence' in John Bell and others, *Public Law Adjudication in Common Law Systems* (Hart 2016). The number of civil judicial review claims excluding immigration and asylum claims remained broadly stable between 2000 and 2019. There were 1,700 claims in 2000, a peak of around 2,000 claims each year between 2005 and 2013, and then a fall to 1,500 claims in 2019. Carol Harlow and Richard Rawlings, *Law and Administration* (4th edn, Cambridge 2022), 839.

in the field of immigration/asylum and housing); the extension of judicial review to more governmental functions; the availability of legal aid; and the shifting of certain types of claim out of the jurisdiction of the High Court, most significantly to the Tribunal system. From a constitutional perspective, the growth of judicial review is understood to represent a shift to a more legal, as opposed to political, form of constitutionalism; and an increase in judicial power with a corresponding decrease in legislative and executive power.

The final high-level context is legal and academic: there is a distinct stream of work - political constitutionalism - that has been developed, sustained and influential in public law scholarship in the UK for over four decades.¹⁴ While political constitutionalist thought is diverse, it has been argued that four tenets are commonly held.¹⁵ In summary, these are: (a) in a political community, reasonable disagreement about the management of that community, including as to what rights are protected, is inevitable; (b) such disagreement ought to be resolved by ordinary, effective political and democratic processes; (c) the constitution, both in terms of processes and rights, ought not to remove the resolution of disagreements about the management of that community, including disagreements about the constitution itself, from political and democratic processes; and (d) the essential but limited role of the courts ought to be to give effect to the outcomes of the processes of democratic and political contestation. As to what justifies those tenets, these may be normative, including by reference to democratic values such as political equality; and

¹⁴ Two examples bookend the period: John Griffith, 'The Political Constitution' (1979) 42 MLR 1; Richard Johnson and Yuan Yi Zhu, 'Introduction: the Case for the Political Constitution' in Richard Johnson and Yuan Yi Zhu, *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart 2023).

¹⁵ Robert Grealley, 'Ideologies of Political Constitutionalism' (2024) 44 OJLS 949, 951.

ideological in that they accord with aspects of democratic socialist, liberal, republican and conservative political beliefs.¹⁶

What is important for the purposes of this thesis is that political constitutionalism is minimally sceptical about, and maximally robustly opposed to, some or all of the growth of judicial review since the 1960s. Further, within political constitutionalism there are explicit or implicit claims as to the limits of adjudication in judicial review in the sense that there are issues on which, or ways in which, courts ought not to adjudicate because they concern questions which have been, or ought to be, resolved politically rather than by adjudication.¹⁷ These claims are often made or illustrated by reference to specific cases or judgments in judicial review claims where it is argued the limits of adjudication have been exceeded.

That is, then, the economic, political and legal context to the central question: between 2010 and 2019 UK governments implemented - using primary and secondary legislation, and discretionary decision-making - a major political programme to reduce public spending in circumstances where the powers of the judiciary to declare unlawful the law and policy implementing that programme were, on the face of it, at an historic high. And the central question is: whether the judiciary exceeded the limits of adjudication envisaged by political constitutionalism in determining the judicial review claims that challenged that law and policy. While the central question can be expressed in those simple terms, behind it lay a series of more precise and instructive questions, including whether and in what ways the

¹⁶ Ibid.

¹⁷ Fuller usefully defined the limits of adjudication in the US context as 'What kinds of social tasks can properly be assigned to courts and other adjudicative agencies? What are the lines of division that separate such tasks from those that require an exercise of executive power or that must be entrusted to planning boards or public corporations?'. Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard LR 353, 354.

limits were exceeded in relation to: (a) specific forms of governmental action (the making of legislation or discretionary decision-making); (b) specific areas of public policy (for example welfare benefits or legal aid); (c) certain grounds of judicial review (for example common law or Convention grounds); and (d) by certain judges or courts in the judicial hierarchy.

Overview of methodology

As to the methodology for tackling the central question, this thesis defines a test for identifying judgments in claims that challenged the law and policy that implemented austerity which is: whether the implementation of the austerity programme was a substantial policy objective or reason for the legislation, policy, decision, or failure to act being impugned in the judicial review claim. These judgments are defined as ‘austerity adjudications’.

This thesis then defines a 10-year eligibility window for austerity adjudications: cases where judgment was given between 1 June 2010 and 31 May 2020 inclusive. The window was fixed on the broad basis that the austerity programme started with the formation of the Conservative/Liberal Democrat coalition government after the May 2010 general election, and ended with the Spending Round in September 2019. The above test was applied to all first instance judgments within the 10-year window listed in the ‘England and Wales High Court (Administrative Court)’ category of the British and Irish Legal Information Institute (BAILII) website. 66 first instance austerity adjudications that challenged central government policy and decision-making were identified. Any appeals in these cases were identified and added to the pool of judgments to be analysed.

To facilitate and structure the analysis of the judgments as to whether the limits of adjudication were exceeded, a taxonomy of grounds of judicial review was developed to reflect the specific concerns within political constitutionalist thought as to different modes of adjudication. The three top level categories are: statutory grounds of review; common law procedural and common law substantive grounds of review; and Convention and EU Law grounds of review. Each of those was further divided into sub-categories. All the grounds argued in the austerity adjudications were coded in accordance with the taxonomy and also coded for success and failure. The taxonomy and coding scheme are set out in the appendix. In relation to each taxonomical category and sub-category, a broad doctrinal baseline was established as to the limits of adjudication envisaged by political constitutionalism, together with indicia as to whether and when the limits of adjudication would be exceeded. Finally, each of the austerity adjudications, at first instance and on any appeals, was analysed to identify if those limits had been exceeded. After the austerity adjudications were identified, it became clear that most cases fell within two broad public policy areas: welfare benefits (24 first instance judgments) and administration of justice (22 first instance judgments). This left a third 'other' category (20 first instance judgments). The analysis of the austerity adjudications in chapters 5, 6 and 7 is structured around the taxonomy and those three policy umbrellas.

As to the limits of this methodology, these are identified in detail in chapter 4 but the primary risks are: under-inclusion in the application of test for austerity adjudications given the sometimes limited availability of evidence in the judgment or extrinsically as to policy objectives; under-inclusion in that judgments in challenges to the law and policy that implemented austerity may have continued to be given after the 10-year window; under-inclusion in that not all Administrative Court judgments appear on the BAILII website; and under-inclusion in that the law and policy that implemented austerity could be challenged

before a First-tier Tribunal and on appeal to the Upper Tribunal, and judgments in these cases do not appear in the BAILII 'England and Wales High Court (Administrative Court)' category. To these limits can be added the general risk of subjectivity or human error in relation to the process of identification and analysis.

As to validity, the risks of under-inclusion are addressed as follows. The systematic analysis of the law and policy that implemented the austerity programme (in chapter 2) minimises the risks of not identifying austerity adjudications when applying the test. A further legal database (Westlaw) was used to confirm whether there were a significant number of austerity adjudications that do not appear on the BAILII website. While it is likely that a small number of judgments in austerity adjudications were given after the 10-year window, the risks are limited given most of the law and policy was implemented after the 2010 and 2015 general elections. As to human error, it is no doubt possible that an odd case has been missed, though it seems significant that, when analysing the cases, only two further austerity adjudications were identified as a result of being cited in other cases. The risk of subjectivity is minimised by making the process for identifying and then analysing the austerity adjudications as transparent as possible.

The significance of the central question and this thesis

Given the context and methodology identified above, where is this thesis located within the much larger terrain of academic work on administrative law? The tasks involved in answering the central question are: identifying the limits of adjudication from the political constitutionalist thought described in chapter 3; identifying from a much larger pool those judgments in judicial review claims that challenged the law and policy that implemented the austerity programme described in chapter 2; and then analysing those judgments to

identify whether and in what ways the limits of adjudication were exceeded, which takes place in chapters 5, 6 and 7.

Given those tasks, it is possible to ‘zoom in’ to locate the fields to which this thesis relates in the overall terrain of academic work in administrative law. Starting with what this thesis is not, the compass is narrow given that the raw materials are the political constitutionalist thought in chapter 3 and a tranche of judgments in judicial review claims. This thesis is concerned with administrative law in a narrow sense of the law relating to the control of legislative and executive power by the courts; and not administrative law in a much broader sense of the law relating to the exercise of governmental powers or how that law is created or functions in practice.¹⁸ In addition to this thesis being concerned only with the pathology of litigation, its forensic scope is further limited in that it is not interested in: litigation that did not lead to a judgment on the grounds of the claim; litigation procedure in the sense of permission, time limits, pleadings, disclosure, etc; and litigation impact in the sense of the wider value and effects of judicial review. Further, this thesis is not comparative: in a cross-jurisdictional sense (it only concerns England and Wales); in an historical sense (it only analyses judgments given between 1 June 2010 and 31 May 2020);¹⁹ and in a disciplinary sense (it only engages with the academic discipline of law). Yet further, the institutional scope is limited in that this thesis engages only with court judgments, primarily those of the Administrative Court, but also judgments of appellate courts where there were appeals.

¹⁸ Contrast the conceptions of ‘administrative law’ in Christopher Forsyth and Julian Ghosh, *Wade & Forsyth’s Administrative Law* (12th edn, Oxford 2022), 4; and Harlow and Rawlings (n 13) 1.

¹⁹ Though some historical comparisons are necessary to identify if the scope or intensity of review has changed from earlier jurisprudence.

As to the fields of work to which this thesis is relevant, there are several. It engages, in a limited way, with political constitutionalist thought in chapter 3 and much of that work has been characterised as representing a theoretical turn in public law.²⁰ Some of the political constitutionalist thought in chapter 3 has, for example, been identified as a form of political constructivism in providing a normative basis for the political nature of the British constitution;²¹ and some has been identified as a form of deconstructivism in seeking to expose the realities of and demystify public law.²² The engagement with theory is limited, however, since the purpose of this thesis is not to establish whether the claims made by political constitutionalism are normatively justified or descriptively accurate. The engagement is for the limited purpose, as is made clear below, of identifying the limits of adjudication envisaged by political constitutionalism.

This thesis is doctrinal - and these are critical points - in two aspects. First, the limits of adjudication envisaged by political constitutionalism function at doctrinal level in that it identifies, implicitly or explicitly, what judges ought or ought not to be doing when deciding cases.²³ So, for example, political constitutionalism may argue that a decision made by a public authority should only be quashed on a conventional *Wednesbury* test ('[the decision] must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to it');²⁴ and not a more intense

²⁰ Samuel Tschorne and Martin Loughlin, 'Mapping the theoretical turn in British public law scholarship' in Paul Daly and Joe Tomlinson, *Researching Public Law in Common Law Systems* (Elgar 2023), 176.

²¹ *ibid* 187 in relation to the work of Adam Tomkins.

²² *ibid* 192 in relation to the work of John Griffith.

²³ As to the analytical challenge for political constitutionalism in relation to doctrinal principles, see Paul Craig, 'Political Constitutionalism and the Judicial Role: A Response (2011) 9 Intl J of Constitutional L 112, 115.

²⁴ *Wednesbury* (n 9), 230.

Wednesbury or proportionality standard. Second, the process of judicial review is doctrinal in that claimants argue (plead) one or more grounds of review (for example, a decision ought to be quashed because it is *Wednesbury* unreasonable in that no reasonable body could have come to it), and judges determine whether the argued (pleaded) grounds are made out on the evidence.

This thesis is also empirical - again this is a critical point - in that it involves the systematic collection and analysis of data, a process described in chapter 4.²⁵ The data are the judgments in the determined judicial review claims (at first instance and in any appeals) that challenged the law and policy that implemented austerity in the UK. The empirical methodology is described above and engages the final field to which this thesis is relevant in that the analysis involves the study of judicial decision-making.

Given all the above, this thesis can perhaps be located in the subfield which has been described as ‘doctrinal empiricism’ or ‘systematic study’.²⁶ Examples of such work include Sarah Nason’s bottom-up reinterpretation of the purposes and grounds of judicial review based on an analysis of a sample of Administrative Court judgments;²⁷ Joanna Bell’s ‘pulling apart’ of judicial review case law to reveal its inherent complexity, specifically in

²⁵ This thesis does much of what is contained in Cane and Kritzer’s definition of empirical research ‘... the systematic collection of information (“data”) and its analysis according to some generally accepted method. Of central importance is the systematic nature of the process, both of collecting and analyzing the information. The information can come from a wide range of sources including surveys, documents, reporting systems, observation, interviews, experiments, decisions, and events. ... systematic analysis will often involve coding or tagging ... The analysis can involve simple counting, sophisticated statistical manipulation, grouping into like sets, identification of sequences ..., matching of patterns, or simple labelling of themes’. Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2012), 4.

²⁶ Jason Varuhas, ‘Mapping Doctrinal Methods’ in Daly and Tomlinson (n 20) 90.

²⁷ Sarah Nason, *Reconstructing Judicial Review* (Bloomsbury 2016).

relation to legislative frameworks;²⁸ and Richard Kirkham's and Elizabeth O'Loughlin's work on whether the academic accounts of administrative law match the empirical reality of judicial review challenges to decisions of ombuds.²⁹ What this thesis shares with all that work is technique, in the sense of being concerned with a careful analysis of judgments in judicial review cases; and purpose, in terms of seeking to assess what judges do when adjudicating judicial review claims matches existing understandings. It has been claimed that such work is an 'an allergic reaction to high theory and the rise of ideology' or 'reductionism'.³⁰ Whether or not those claims are justified, this thesis is defended on the basis: there is significant value in the academic enterprise of seeking to systematically assess whether and in what ways the concerns of significant stream of public law thought as to the limits of adjudication being exceeded are valid; and to do so by reference to judicial review challenges relating to one of the most important areas of political decision-making of the last 20 years.

Moving forward with the claims as to value, originality, and contribution made by this thesis: as identified above, political constitutionalist thought commonly develops arguments about the limits of adjudication being exceeded by reference to specific controversial or problematic judicial decisions.³¹ It then uses those decisions to generalise in the sense of identifying broader principles as to the limits of adjudication, or to make

²⁸ Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020).

²⁹ Richard Kirkham and Elizabeth O'Loughlin, 'Judicial review and ombuds: a systematic analysis' [2020] PL 680. See also Richard Kirkham and Elizabeth O'Loughlin, 'A Content Analysis of Judicial Decision-Making' in Naomi Creutzfeldt, Marc Mason, Kirsten McConnachie (eds), *Routledge Handbook on Socio-Legal Theory and Method* (Routledge 2019).

³⁰ Varuhas (n 26).

³¹ This is not universally true since Richard Bellamy to an extent, and Adam Tomkins to a lesser extent, start with claims about democratic values and then seek to identify the limits of adjudication in judicial review by reference to those values. These different approaches have been recognised. See, for example, Mark Elliott, 'Judicial Power and the United Kingdom's Changing Constitution' (2017) 36 U Queensland LJ 273, 273.

claims that those decisions are indicative or representative of wider problems in the limits of adjudication being exceeded. The identification of individual controversial or problematic decisions is, however, of limited probative value as to the frequency, circumstances or extent to which the limits of adjudication are being exceeded. Just because some cases are controversial or problematic from a political constitutionalist perspective, does not mean they are representative. The crux here is the concern that, while political constitutionalism can identify specific cases in which it is claimed the limits of adjudication have been breached, there is limited systematic enquiry into the frequency, circumstances or extent to which the limits are being breached.

The following examples, all of which relate to political constitutionalist thought analysed in chapter 3, illustrate this concern. The first is Adam Tomkins' argument as to *Wednesbury* unreasonableness:

The difficulty with this [*Wednesbury*] ruling is that it is impossible to predict what the courts will hold to be unreasonable and what they will not. Such an approach to public law seeks to control the problem of executive discretion simply by replacing it with untrammelled judicial discretion. For sure, a constitution should guard against capricious or arbitrary executive action. But so too should it guard against capricious or arbitrary judicial decision-making. The creation by the courts of general principles of legality is no way to control arbitrariness in public life, as the use and abuse of the *Wednesbury* doctrine in English law has shown.

These are bold if not polemical claims, not least those of 'untrammelled judicial discretion', and 'the use and abuse of the *Wednesbury* doctrine'. What is missing, though, is robust

empirical evidence from decided judicial review cases to justify those claims. The second and third examples relate to the work conducted, and presumably funded, by Policy Exchange,³² and the Judicial Power Project (JPP).³³ In May 2016 the JPP published a list of 50 problematic cases where it was said that the judiciary had ‘departed from the proper limit of the judicial function’, and the list contained ‘some of the more flagrant and well-known occasions (as well as some less well-known occasions) where the courts ignored well-established and ... appropriate limits on their role’.³⁴ Notwithstanding the admitted limitations of the exercise,³⁵ the list attracted significant criticism, including on the bases: that there was no clear rationale for inclusion on the list; the case analysis was limited to bare summaries, some of which were inaccurate; and the exercise was of limited academic value.³⁶ In a similar vein to the ‘50 Problematic Cases’, in October 2024, Policy Exchange published ‘The Impact of the Human Rights Act 1998 in Twenty-Five Cases’ which includes trenchant criticism of the HRA 1998 on the basis that it requires courts to consider political questions unsuitable to judicial determination and unsettles the

³² Policy Exchange is a think tank founded by two Conservative politicians, Francis Maude and Archie Norman. Its first director and chairman were Nick Boles and Michael Gove respectively. Policy Exchange, ‘About Policy Exchange’ (Policy Exchange) <<https://policyexchange.org.uk/about/>> accessed 1 May 2025.

³³ The Judicial Power Project (JPP) is an adjunct of Policy Exchange and its focus is ‘... on the proper scope of the judicial power within the constitution. Judicial overreach increasingly threatens the rule of law and effective, democratic government. The project aims to address this problem – restoring balance to the Westminster constitution – by articulating the good sense of separating judicial and political authority. Judicial Power Project, ‘About the Judicial Power Project’ (JPP) <<https://judicialpowerproject.org.uk/about/>> accessed 1 May 2025.

³⁴ Richard Ekins and Graham Gee, ‘Judicial Power: 50 Problematic Cases’ <<https://judicialpowerproject.org.uk/judicial-power-50-problematic-cases/>> accessed 1 May 2025. The list was compiled by writing to around 40 academics, lawyers and retired officials who were invited to nominate problematic cases. The list of 50 cases includes one case which is considered by this thesis: *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820.

³⁵ *ibid*, ‘this was not a scientific exercise, and we make no claims about the robustness of our methodology’.

³⁶ Paul Craig, ‘Judicial Power, the Judicial Power Project and the UK’ (2017) 36 U Queensland LJ 355.

constitution by distorting legislative deliberation and policy-making.³⁷ The list of 25 cases was compiled by selecting 'one striking case that illustrates some of the problems to which the [HRA 1998] gives rise' for each year the HRA 1998 has been in force.³⁸ While the analysis of each of the 25 human rights cases is more detailed than the 50 problematic cases, it can hardly be claimed - and it appears not to be claimed - to amount to a systematic investigation into the frequency, circumstances or extent to which the limits of adjudication are being breached in adjudication by reference to the HRA 1998. As with Tomkins' claims about *Wednesbury*, the claims made in relation to the 50 problematic cases and 25 human rights cases have a distinctly polemical tone; and it is implicit or explicit in the claims that the cases are in some way indicative or representative of more widespread problems as to the proper limits of adjudication being exceeded.³⁹

A central issue for this thesis, then, is this: while political constitutionalism argues that the limits of adjudication are being exceeded by reference to judgments in decided cases, there is limited systematic and empirically rigorous work that seeks to establish the frequency, circumstances or extent to which the limits are being breached. This is not a claim that political constitutionalism is wrong about where it envisages the limits of adjudication in judicial review, nor that the analysis of political constitutionalism is necessarily wrong in relation to the cases it cites as examples. Rather, that holding up certain decisions - often appellate judgments which may suggest they are difficult or

³⁷ Richard Ekins, Stephen Laws and Conor Casey, 'The Impact of the Human Rights Act 1998 in Twenty-Five Cases' (Policy Exchange 2024). The list of 25 cases includes two cases that are considered by this thesis: *R (Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] AC 453; *Tigere* (n 34); and one case which is linked to cases considered by this thesis: *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 WLR 6430.

³⁸ *ibid*, 9.

³⁹ This point was made by Craig in response to the 50 problematic cases. Craig (n 36). Mark Elliott identified the traditional parameters of judicial power and a schemata for identifying whether and when they had been exceeded by reference to traditional constitutional parameters. Elliott (n 31) 273.

problematic cases - as indicative or representative of wider problems lacks rigour; and opens the door to claims of cherry-picking of evidence, or leads to an unhelpful war of examples which, as a method of resolving whether and in what ways the limits of adjudication are being exceeded, is unlikely to be fruitful.⁴⁰

Given that context, this thesis is important and original in that it is the first systematic study to assess whether the limits of adjudication envisaged by political constitutionalism have been exceeded by identifying and analysing all the determined judicial review claims in a particular area of public policy-making. That importance and originality flows down to the series of more precise and instructive questions identified above as to whether the limits of adjudication were exceeded in relation to: specific forms of governmental action; specific areas of public policy; certain grounds of judicial review; and by certain judges or courts in the judicial hierarchy. As to claims to importance and originality incidental to addressing the central and more precise questions, this thesis is also the first detailed study of the case law generated by the judicial review challenges to the implementation of the austerity programme.

In addition to the methodological limits identified above, the limits of this thesis are essentially all that which is outwith the central question. There is no engagement with the adjudications in judicial review claims that are not in the 10-year window. Within the 10-year window, there is no engagement - beyond identifying them as irrelevant - with the adjudications in judicial review claims that were not challenges to the law and policy that

⁴⁰ Where there are several cases which are claimed to support the claims of political constitutionalism, there is the Texas sharpshooter fallacy or clustering illusion. The fallacy is illustrated by a person with a gun randomly shooting into a barn wall who then paints a circle round a fortuitous but random cluster of bullet holes to declare himself a sharpshooter. Gary Smith, *Standard Deviations: Flawed Assumptions, Tortured Data and Other Ways to Lie with Statistics: the truth about flawed statistics, AI and Big Data* (Duckworth, 2016).

implemented austerity. And there is no engagement with the judicial review claims that were not adjudicated because they were withdrawn, refused permission, conceded or otherwise compromised. There is the possibility the limits of adjudication envisaged by political constitutionalism have been exceeded to such an extent that the prospects of success in defending some claims was sufficiently poor to make doing so not worth the candle. While this thesis cannot analyse those claims, some inferences are drawn in chapter 8.

Chapter by chapter outline

There are seven further chapters which follow this first introductory chapter. Chapter 2 ('The global financial crisis and austerity') is economic and political in that it: provides a high-level overview of macroeconomic policy-making and public spending in the UK; identifies the causes of the GFC and its impact on the public finances in the UK; discusses and defines the concept of austerity; and then works chronologically through the development and implementation of the austerity programme from 2010 to 2019. The broad conclusions are that the size of the public spending cuts and the length of time over which they were implemented were unprecedented in the postwar period; the balance was heavily weighted (80:20) towards spending cuts rather than tax rises; and the distributional impact on household finances was borne most heavily by households in the bottom half of the income distribution. In terms of the specific areas of government spending that were most affected, these include: welfare benefits for those of working age; central government funding for local government; public sector pay and pensions; education spending other than schools. And the following departments experienced particularly large reductions in spending: the Home Office; Ministry of Justice; Ministry of Defence; and the Departments of Transport, Environment, Food and Rural Affairs, and Culture, Media and Sport.

Chapter 3 ('The development of political constitutionalist thought') is legal and theoretical in that it charts the development of political constitutionalism from John Griffith's 1978 Chorley Lecture. The focus is on five contributors to political constitutionalist thought: Griffith, Tomkins, Richard Bellamy, Richard Ekins and Graham Gee. All the contributors are primarily focussed on the UK in terms of their analysis. In broad terms the chapter adopts the view that there have been three phases or waves of political constitutionalist thought.⁴¹ The three waves have normative and ideological aspects, and are in some sense reactions to developments - actual or proposed - to the UK's constitution. The chapter describes the attributes or beliefs that are shared by political constitutionalism and then identifies what these mean in terms of the constitutional role envisaged for the courts in judicial review. The chapter argues that political constitutionalism essentially raises different issues in relation to three modes of judicial decision-making which are: the interpretation and application of legislation; the imposition of common law grounds of judicial review; and judicial review by reference to EU law and the Convention.

Chapter 4 ('Methodology - purpose, value, development and implementation') locates this thesis within the field of academic work on public and administrative law, and identifies the empirical techniques adopted from other work. It makes detailed claims as to originality and value in light of the existing scholarship. It then shifts to explaining the methodology and explains how austerity adjudications were defined and then identified from the much larger pool of judicial review claims where judgment was given between 1 June 2010 and 31 May 2020 inclusive. Various issues, problems and limitations of the methodology are identified and illustrated. The position at the end of chapter 4 is that 66 first instance austerity adjudications are identified which challenged primary or delegated legislation, or

⁴¹ See, for example, Marco Goldoni and Chris McCorkindale, 'Three Waves of Political Constitutionalism' (2019) 30 Kings LJ 74.

discretionary central government policy- and decision-making. Those 66 austerity adjudications raised a total of 199 grounds of review of which 65 related to statutory interpretation, 75 were common law grounds and 59 were EU law or Convention grounds.⁴² There are 29 judgments of the Court of Appeal and ten judgments of the Supreme Court, some of which relate to more than one first instance judgment in that cases were conjoined on appeal. There is a broad three-way split in that there were 24 first instance cases in relation to welfare benefits (raising 63 grounds); 22 in relation to the administration of justice (67 grounds); and 20 cases in other policy areas (69 grounds). All the austerity adjudications and grounds are set out in the Appendix to this thesis.

Chapter 5 ('Grounds relating to the interpretation and application of legislation') analyses statutory grounds of review. The grounds are dealt with sequentially: challenges to delegated legislation on the basis it was *ultra vires* the enabling powers; challenges on equalities grounds (mostly alleged breaches of one or more of the provisions of the Equality Act 2010); and then challenges to discretionary decision-making under statutory powers. The conclusion in relation to statutory grounds is that there is limited evidence of the judiciary exceeding the limits of adjudication envisaged by political constitutionalism. There were no decisions which did not rely on a plausible reading of the statutory provisions, and little evidence of strained or tendentious interpretation. What does seem clear, however, is that there was an elasticity of approach to interpretation and in some cases, most significantly in relation to the availability or payments of legal aid, the interpretive approach protected entitlement.

⁴² These figures are in some sense imprecise since the extent to which grounds were argued or determined separately involves a degree of interpretation.

Chapter 6 ('Procedural and substantive common law grounds of review') analyses common law grounds of review. Again, they are taken sequentially: common law procedural grounds, of which adequacy of consultation was the most significant ground; common law substantive grounds, rationality, proportionality and substantive legitimate expectation; and then common law grounds that engaged principles of legality, systematic unfairness and common law constitutional rights. Subject to two important qualifications, the conclusion is that there is minimal evidence of the limits of adjudication envisaged by political constitutionalism being exceeded. The first qualification is that the standard of review in cases relating to the administration of justice was generally more intense, both in terms of judicial willingness to engage with evidence and the standards to which decision-makers were held. The second qualification is that when it came to cases relating to the administration of justice, the courts were willing to identify common law norms or principles that significantly curtailed political decision-making.

Chapter 7 ('Grounds of review relating to the Convention and EU law') deals with grounds of review relating to the Convention and EU law. There are far more of the former than the latter, and the former grounds raise some extremely complex and difficult issues relating to article 14 (Prohibition of discrimination) when read with one or more of the substantive articles. In relation to adjudication by reference to the Convention and EU law, while all of this was in some sense problematic from a political constitutionalist perspective, it is less problematic than might have been expected. In particular, it seems clear that the judiciary sought to interpret obligations relating to the Convention and EU law in such a way as to afford maximum respect for, or deference to, political decision-making, whether in relation to primary and delegated legislation, or discretionary decision-making.

Chapter 8 (Conclusions and further research) is the final chapter and it reaches some overall conclusions in relation to issues that cut across chapters 5, 6 and 7, including: the significance of unincorporated international treaties; the relevance and weight attached by the courts to delegated legislation being approved by Parliament; and whether any differences of approach can be identified between individual judges and courts in the hierarchy. Second it recaps the broad findings of the research in relation to the central and subsidiary questions. Finally, chapter 8 identifies further opportunities for research given the findings of the thesis.

Chapter 2

The Global Financial Crisis and austerity in the UK

1. Introduction

The central question this thesis answers is whether the limits of adjudication envisaged by political constitutionalism were exceeded by the judiciary when determining judicial review claims that challenged the law and policy that implemented the austerity programme in the UK from 2010 to 2019. Having provided an overview of the thesis in chapter 1, this chapter provides context to the central question by describing the causes of the 2008 global financial crisis (GFC) and its economic impact in the UK;¹ setting out the changing political responses; and then chronicling the development and implementation of the austerity programme. The purpose is to centre the austerity programme in its economic and political context, and to enable the identification of the adjudicated judicial review claims that challenged the law and policy that implemented austerity. That process is described in chapter 4 and is followed in chapters 5, 6 and 7 by the analysis as to whether the limits of adjudication were exceeded.

As to the structure of this chapter, the second part provides a high-level overview of macroeconomic policy and public spending in the UK. The aim is to ‘clear the decks’ by dealing with concepts and terminology and it includes: an explanation of monetary and fiscal policy in the UK; a definition of austerity; how fiscal policy - political tax and spending decisions - are given legal effect; and an overview of how departmental spending works. The third part of this chapter then sets out the background to austerity and is economics focussed. It describes the causes and effects of the GFC that ostensibly precipitated

¹ ‘Global Financial Crisis’ or ‘Great Financial Crisis’ are both commonly used to describe the crisis. ‘Global’ seems to better capture the nature of the crisis.

austerity, and the response of the Labour government led by Gordon Brown. It ends with the general election in May 2010.

The fourth part of this chapter focuses on the development of the austerity programme and the election of the Conservative/Liberal Democrat coalition government led by David Cameron. It works chronologically through the implementation of austerity, identifying the significant tax and spending decisions. The fifth and final part is a summary of the austerity programme which describes its central features and the major policy changes. It is this material that is then used in chapter 4 to assist in identifying judicial review claims that challenged the law and policy that implemented austerity.

As to the contribution made by this chapter, while both the GFC and macroeconomic management in the UK are central issues, no claim is made to advancing existing understanding. This chapter does, though, make a contribution in relation to the implementation of austerity and the economic constitution more widely. There is limited existing work here,² and, apparently, no contemporary political constitutionalist analysis.³ From a constitutional perspective some of the responses to the GFC are striking. The Banking (Special Provisions) Act 2008, for example, gave the Treasury the power by order to transfer UK banks and building societies into public ownership or to another body where 'it appears to the Treasury to be desirable' for the purpose of maintaining financial stability and protecting the public interest.⁴ The Act was passed in three days in February 2008,

² The major exception is: Tony Prosser, *The Economic Constitution* (Oxford 2014). See also: Danny Nichol, the *Constitutional Protection of Capitalism* (Bloomsbury 2010); and Julia Black, 'The Credit Crisis and the Constitution' in Dawn Oliver, Tony Prosser, Richard Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford 2010).

³ Griffith was, of course, concerned with where economic power lay. John Griffith 'The Political Constitution' (1979) 42 MLR 1.

⁴ Banking (Special Provisions) Act 2008, s 2.

from first reading to Royal Assent, with limited parliamentary scrutiny. The power to take banks and building societies into public ownership bears comparison with powers secured by governments in the context of the First and Second World Wars. Similarly, the power to use unconventional monetary policy - quantitative easing (QE) - in response to the GFC is significant. The Bank of England Act 1998 had transferred from government to the Bank of England (BoE), the UK's central bank, the power to set interest rates, and represented a major shift of economic power from government, politically accountable to Parliament, to the BoE, primarily accountable to the BoE's unelected directors. It is perhaps surprising that these powers have received limited analysis in public law scholarship.⁵ Further, while some of the challenges to the law and policy that implemented austerity have received significant analysis,⁶ there is limited work on austerity as a whole from a public law perspective. While austerity was a major, long-running policy programme, it appears to be a neglected area of study in public law.⁷ This chapter starts to address that neglect by putting the austerity programme in its economic and political context and identifying its central features.

⁵ A search of Public Law journal articles returns only one citation of the Banking (Special Provisions) Act 2008, and very few citations of the Bank of England Act 1998. These include: a book review, Tony Prosser, 'The Constitutional Protection of Capitalism' [2005] PL 208, reviewing Nichol (n 2); Robert Hazell, 'Time for a new convention: parliamentary scrutiny of constitutional bills 1997-2005' [2006] PL 247. Hazell's purpose was 'to review the adequacy of the procedural safeguards in the process of constitutional change, by examining the scrutiny of all constitutional Bills passed between 1997 and 2005'. The Bank of England Bill did not count as a 'first class' constitutional Bill 'measured by the test of taking its committee stage on the floor of the Commons.'

⁶ The two most significant cases are: *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 153; and *R (Unison) v Lord Chancellor (Nos 1 & 2)* [2017] UKSC 51, [2020] AC 869.

⁷ Scholarship on the impact of austerity on the justice system is an exception. See, for example, Jon Robins and Daniel Newman, *Justice in a Time of Austerity: Stories From a System in Crisis* (Bristol 2021). See also Carol Harlow and Richard Rawlings, *Law and Administration* (4th edn, Cambridge 2022) 79.

2. Economic management, taxation and spending in the UK

In terms of UK government economic policy, neoliberalism became dominant from the mid-1970s when Keynesian demand management was apparently unable to respond to persistent high levels of inflation.⁸ Taken on its own terms, neoliberalism is the belief that a free-market economy protects freedom and provides economic prosperity. Its policy manifestations include: low levels of taxation; business and financial deregulation; privatisation of state-owned companies; contracting-out of public services; flexible labour markets and limits on trade union power; limited welfare state provision; and the reduction of barriers to the flow of capital, goods and services internationally.⁹ The implementation of neoliberal reforms was the dominant political project of the Conservative governments between 1979 and 1997. While the Labour governments between 1997 and 2010 provided for significantly greater investment in public services (notably in health and education) and were more redistributive (notably to address child and old-age poverty), there was only a limited departure from the neoliberal economic consensus.¹⁰

Neoliberalism is associated with a monetary policy framework where an independent central bank controls or targets inflation by setting interest rates.¹¹ As noted above, the

⁸ See, for example, Colin Crouch, *The Strange Non-Death of Neoliberalism* (Polity 2012), ch 1. It is important to state that, while the dominance of neoliberalism in the UK (and elsewhere) from the mid-1970s is indisputable, its nature and purposes are contested. It is beyond the scope of this thesis to seriously engage with, still less resolve, these issues.

⁹ See, for example, Vivien Schmidt and Mark, 'Why are neoliberal ideas so resilient in Europe's political economy?' (2014) 8 *Critical Policy Studies* 340.

¹⁰ See, for example, Florence Faucher-King, Patrick Le Galés and Gregory Elliott, *The New Labour Experiment: Change and Reform under Blair and Brown* (Stanford 2010); Matt Beech, 'Neoliberalism, New Labour, and the Welfare State' in Roger Backhouse (and others) (eds) *Liberalism and the Welfare State: Economists and Arguments for the Welfare State* (Oxford 2017).

¹¹ Commonly referred to as new consensus in macroeconomics framework (NCM) see, for example, Philip Arestis and Malcolm Sawyer 'A critical reconsideration of the foundations of monetary policy in the new consensus macroeconomics framework' (2008) 32 *Cambridge J Economics*, 761.

BoE was given operational independence to manage UK monetary policy in 1998, an example of the commitment of the 1997 Labour government to neoliberalism.¹² The BoE's Monetary Policy Committee sets the Bank Rate which is the interest rate paid to banks that deposit money with the BoE and it affects the interest rates the banks then charge borrowers and pay savers. The BoE's statutory objective is to maintain price stability and, subject to that, to support the government's economic policy, including for growth and employment.¹³ The Chancellor of the Exchequer (the minister who heads HM Treasury, the UK's finance and economics ministry) specifies what constitutes price stability.¹⁴ Since 2003, the Chancellor has set price stability at 2% annual inflation by reference to Office for National Statistics (ONS) Consumer Prices Index (CPI).¹⁵

Conventional monetary policy involves the BoE raising or lowering the Bank Rate. Lowering the Bank Rate generally encourages borrowing and spending rather than saving, which then increases demand, which then increases the rate of inflation; and raising the Bank Rate has the reverse effect. During the GFC, conventional monetary policy ostensibly ceased to be effective because of the liquidity trap/zero lower bound (ZLB) problem. As interest rates in the UK approached zero and the rate of inflation fell to zero or below (deflation), there was no disadvantage to holding cash (as opposed to spending it), and possible advantages if prices started to fall, risking a deflationary spiral. Central banks, including the BoE, responded with unconventional monetary policy by engaging in

¹² Bank of England Act 1998, pt 2. In the United States, the Federal Reserve manages monetary policy and is operationally independent from the US government. Its mandate is set by Congress and is to achieve maximum employment and price stability.

¹³ Bank of England Act 1998, s 11.

¹⁴ In this thesis 'Chancellor' means the Chancellor of the Exchequer. The Lord Chancellor, the UK's government's justice minister, is abbreviated to LC.

¹⁵ HM Treasury, 'HMT open letters between the Governor of the Bank of England and the Chancellor of the Exchequer' <<https://www.gov.uk/government/collections/inflationary-targets>> accessed 1 May 2025.

QE which involved the BoE printing electronic money to buy financial assets, principally government debt, to push up the price of the assets to encourage selling, which increased the money supply to encourage lending and spending.¹⁶ Quantitative tightening is the reverse process, the BoE sells financial assets, which lowers the price to encourage buying, which decreases the money supply and reduces spending. The legal basis for QE in the UK is a Deed of Indemnity between HM Treasury and the BoE made in 2009 and periodically updated. The Deed indemnifies the BoE for QE spending and exposes the public finances to the financial risks of QE. The Deed was only disclosed (with redactions) in 2024 after a decision of the Information Commissioner.¹⁷

Along with monetary policy, fiscal policy is the other major aspect of economic policy and refers to how a government uses taxation and spending to manage the public finances and the economy more widely. In the UK, fiscal policy is the responsibility of the Chancellor. Fiscal policy terminology includes: government expenditure or spending, which is the amount of money spent by government; and government revenue or receipts is the amount of money received by government from taxation and other sources. Governments can have balanced budgets, budget deficits and budget surpluses; where, respectively,

¹⁶ As to a fuller explanation of QE, see, for example: Independent Evaluation Office. 'IEO evaluation of the Bank of England's approach to quantitative easing' (BoE, January 2021) <<https://www.bankofengland.co.uk/independent-evaluation-office/ieo-report-january-2021/ieo-evaluation-of-the-bank-of-englands-approach-to-quantitative-easing>> accessed 1 May 2025; Andrew Haldane and others, 'Staff Working Paper No. 624 - QE: the story so far' (BoE, October 2016) <<https://www.bankofengland.co.uk/-/media/boe/files/working-paper/2016/qe-the-story-so-far.pdf>> accessed 1 May 2025. Gilts are bonds issued by the UK government. A gilt can - say - have a £1000 face value with a coupon of 2%, £20 is paid annually by the government until the gilt matures. Gilts are traded other than at face value. If gilt prices go up, the effective rate of return falls, which encourages selling and discourages investment. If gilt prices go down, the effective rate of return rises, encouraging investment.

¹⁷ Information Commissioner's Office, 'Freedom of Information Act 2000 Decision notice IC-303901-B2V6' (21 October 2024) <<https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4031572/ic-303901-b2v6>> accessed 1 May 2025. As to the Deed, see HM Treasury <https://assets.publishing.service.gov.uk/media/673b2204a804531e2f499a9d/Asset_Purchase_Facility_deed_of_indemnity.pdf> accessed 1 May 2025.

government spending equals revenue, is more than revenue, or is less than revenue. The government debt is the total debt owed by a state, and goes up or down depending on whether governments run budget deficits or surpluses. Deficits and surpluses are expressed over a given period, commonly financial years which in the UK run from April in one calendar year to March the following year, inclusive. The primary budget deficit (or surplus) is what the deficit (or surplus) would be if interest payments on government debt were excluded from government spending. A government can run a primary surplus but have a budget deficit because of interest payments on its debt.

Gross domestic product (GDP) is 'a measure of the total goods and services produced in a given year within the borders of a given country'.¹⁸ It is calculated by the ONS in the UK.¹⁹ In addition to having a long term upward trend, GDP fluctuates around the trend as a result of the business cycle which consists of economic expansions or contractions of GDP of greater or lesser magnitude and length. GDP also increases due to inflation and GDP figures are commonly adjusted using GDP deflators to remove the effects of inflation, thereby showing whether the production of goods and services is increasing or decreasing in real terms. The structural budget deficit is the amount by which spending exceeds revenue if GDP was on trend. It is that part of the deficit that does not disappear and continues to increase the debt when the business cycle improves. Government receipts,

¹⁸ Piketty's definition is as serviceable as any other. Thomas Piketty, *Capital in the Twenty-First Century* (Arthur Goldhammer tr, Harvard 2014), 43.

¹⁹ The ONS publishes statistics on the public finances, spending by government departments and the economy more widely, both independently and jointly with HM Treasury. ONS statistics are often expressed to be 'outturn' in that they are based on the latest information available. Outturn figures change as the information available changes and changes may be significant. The ONS also publishes statistics in current and constant price terms. Constant price values are given in the prices of a reference year to create a time-series where the effect of changes in prices (inflation or deflation) have been removed. The price index used by the ONS in relation to the public finances to give real or constant prices is the GDP deflator, a measure of whole economy inflation that is broader than, say, the CPI that measures only certain prices.

spending and debt are routinely expressed in nominal or current price terms (unadjusted for changes in prices); in real or constant price terms (where the nominal amount is adjusted for changes in prices); or as percentages of GDP. Government debt is generally given at a fixed point, commonly at the end of a financial year. The size of government debt in nominal terms is a less useful measure than its size relative to GDP. A further economic concept is the trade balance or the difference in the value of goods and services imported and exported, so a trade deficit occurs when the value of imports is greater than the value of exports and a trade surplus is the reverse.

As to the definition of ‘austerity’ in an economic sense, the term is not used in a consistent way.²⁰ The most significant use of austerity in the UK before the 2010s was during and after the Second World War.²¹ It was then used not to describe a situation where public spending was limited (though it was, other than on military spending), but where private spending was limited (not least by rationing, including of food, clothes and fuel); and, after the war, to divert products for export to earn foreign currency. As to the contemporary use of ‘austerity’, it is used in the context of budget deficits rather than balance of trade deficits; and signifies fiscal policy as opposed to monetary policy. Perhaps where matters are less clear is whether austerity relates solely to efforts to reduce public spending, or both reductions in public spending and increases in taxation. An alternative term is ‘fiscal

²⁰ The Oxford English Dictionary identifies its first use in an economic sense to John Maynard Keynes and a 1937 article in *The Times* on how to manage economic booms and recessions by, as might be expected, government intervention to stabilise the economy. John Maynard Keynes, ‘How to Avoid a Slump, Dear Money, the Right Time for Austerity’ *The Times* (London, 13 January 1937). Keynes’ argument - ‘The boom not the slump is the right time for austerity at the Treasury’ - was that the government ought to reduce aggregate economic demand in a boom by raising taxes and postponing capital expenditure.

²¹ For a collaboration between economists and linguists analysing austerity discourse, see Kate Power, Tanweer Ali, and Eva Lebdusková (eds) *Discourse Analysis and Austerity: Critical Studies from Economics and Linguistics* (Routledge 2019). Of particular relevance is the chapter: Leslie Jeffreys and Brian Walker, ‘Austerity in the Commons: a corpus critical analysis of austerity and its surrounding grammatical context in Hansard (1803 - 2015)’ which investigates the use of the word ‘austerity’ in parliamentary debates.

squeeze' and there have been numerous such episodes in the UK over the last 100 years, characterised as hard or soft, and spending or revenue based.²²

In this thesis, austerity is used in preference to fiscal squeeze because it was the term commonly used to describe fiscal policy from 2010; and the working definition is: concerted government policymaking to limit public spending and raise taxes to reduce government deficits and/or debt. Given that meaning, the key aspects of any austerity programme are: the size of spending cuts and tax rises (in absolute terms or relative to GDP); the period over which the spending cuts and tax rises are implemented;²³ the balance between spending cuts and tax rises; whether the spending cuts are to capital or resource spending; and, of course, the distributional impact - who gains and who loses - from the spending cuts and tax rises.

To conclude this part, there is a brief description of the political, financial and legal aspects of fiscal policy in the UK.²⁴ As stated above, the Chancellor is responsible for fiscal policy in the UK and s/he oversees the preparation of and presentation to Parliament of the (usually) annual budget which contains the government's plans for taxation and spending. In addition to the budget, there is usually one other 'fiscal event' each year where the Chancellor makes a 'statement' to Parliament (described in different ways, often by reference to the prevailing season - usually autumn or spring - and precipitated by political or economic developments) that are less significant than the budget but which announce

²² Christopher Hood and Rozana Himaz, *A Century of Fiscal Squeeze Politics: 100 Years of Austerity, Politics and Bureaucracy in Britain* (Oxford 2017).

²³ The quick and slow approaches are referred to by Hood and Himaz *ibid* as, respectively, 'surgery without anaesthetics' and 'boiling frogs'.

²⁴ For a comprehensive analysis of the legal and constitutional aspects of economic management in the UK, see Prosser (n 2).

changes to fiscal policy.²⁵ Spending reviews have been held periodically in the UK since 1998 and set spending for government departments.²⁶ They replaced HM Treasury's annual spending rounds on the basis that setting spending for a longer period allowed for better planning and greater certainty and stability. They may or may not coincide with a budget or statement, relate to longer or shorter periods, and are always subject to revision.

Tax policy is given legal effect by the following process. Following a budget speech, the Chancellor proposes motions to the Commons on the collection of taxes and duties which, if passed, become budget resolutions which 'have statutory effect as if contained in an Act of Parliament...' for a period of up to seven months.²⁷ The government must in that period get a Finance Bill through the Commons which is then enacted as the (usually) annual Finance Act.²⁸ How spending policy is given legal effect is more complex. In broad terms, supply motions are proposed to the Commons which become supply resolutions if passed. These have legal effect only if approved by a Supply and Appropriation Bill.²⁹ There are usually two Supply and Appropriation Bills each financial year which authorise the issue of money from the Consolidated Fund (the government's bank account at the BoE). A Supply and Appropriation (Main Estimates) Bill approves the main estimates (total government spending and maximum spending for each government department). Since a Main

²⁵ A recent notable example was Chancellor Kwasi Kwarteng's statement to Parliament in September 2022. HM Treasury, *The Growth Plan 2022* (CP 743, September 2022).

²⁶ HM Treasury, *Stability and Investment for the Long Term: Economic and Fiscal Strategy Report 1998* (Cm 3978, June 1998); and HM Treasury, *Modern Public Services for Britain: Investing in Reform, Comprehensive Spending Review: New Public Spending Plans 1999-2002* (Cm 4011, July 1998).

²⁷ Provisional Collection of Taxes Act 1968, s1.

²⁸ Finance bills do get a first and second reading in the Lords, but the role of the Lords on taxation is to agree and not amend. There is no committee stage, so the third reading is a formality.

²⁹ Supply and Appropriation Bills are certified as Money Bills by the Speaker of the House of Commons under the Parliament Act 1911, s 3 and are passed by the Lords without amendment.

Estimates Bill is not passed until part way through the financial year, a Supply and Appropriation (Anticipation and Adjustments) Bill provides for the ‘vote on account’ that approves advance funding for the following financial year; and, as might be expected, makes adjustments to existing authorisations. Some spending is authorised other than by a Supply and Appropriation Act.

The total amount the government spends in a year is Total Managed Expenditure (TME). This is allocated to give each government department a Departmental Expenditure Limit (DEL) and Annually Managed Expenditure (AME). The difference between DEL and AME is that the former represents spending that is more discretionary in terms of planning and control whereas the latter cannot be limited (for example legally obligated spending on benefits). DEL and AME are further broken down by resource or capital spending to give resource DEL (or RDEL), capital DEL (or CDEL), etc. Departmental spending varies enormously in amount and the proportions of DEL/AME and capital/resource spending.³⁰ So, for example, DWP spending is dominated by resource AME spending (non-discretionary spending on benefits and pensions, over £294 billion in 2024-25), whereas the Department for Transport’s biggest spend is capital DEL (discretionary capital spending on roads and rail, £20.6 billion in 2024-25).³¹ As will become clear in part 4 of this chapter, when it came to implementing austerity, some departmental spending could be cut by reducing discretionary DEL spending, whether resource or capital. For non-discretionary AME spending, however, it was necessary to change the relevant department’s legal obligations.

³⁰ For a graphical representation of this, see Catherine Haddon, Gemma Tetlow and Thomas Pope ‘How to get to grips with departmental budgets: A practical guide for ministers’ (Institute for Government) 8 <<https://www.instituteforgovernment.org.uk/sites/default/files/2023-08/ifg-academy-departmental-budgets.pdf>> accessed 1 May 2025.

³¹ Pete Brook and others, ‘Revised Government spending plans for 2024-25’ (House of Commons Library 18 February 2025).

Having cleared the decks in terms of macroeconomic context, economic management in the UK, and taxation and spending, the focus now switches to the GFC and its impact on public finances in the UK.

3. The Global Financial Crisis and the response of the UK government

The broad context of the GFC is the growth of global capitalism in the sense of the internationalisation of production (the manufacture and distribution of products) and of finance (banking, investment, borrowing, lending, etc).³² The US played a central role in this globalisation since it emerged from the First World War as the dominant world political and economic power and from the Second World War in a yet more dominant position. The 1944 Bretton Woods agreement implemented an international monetary system of fixed exchange rates that pegged the currencies of member countries to the US dollar (within narrow bands, and subject to revaluation), and tied the dollar to US gold reserves (albeit without domestic convertibility). The International Monetary Fund oversaw the system in terms of achieving exchange rate stability and eliminating exchange restrictions to facilitate trade.³³

³² The account of the GFC here owes much to Adam Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (Allen Lane 2018). This might, perhaps, lead to a charge of a lack of academic rigour. Tooze's work is, however, widely recognised as the pre-eminent analysis of the GFC. See, for example, Simon Wren-Lewis, 'Bait and Switch' (2018) 40(25) *London Review of Books* 25 October 2018 ('Adam Tooze sets himself the mammoth task of making sense of the [GFC] and its consequences over the last ten years. By and large he succeeds brilliantly'); Cédric Durand, 'In the Crisis Cockpit' (2019) 116/117 *New Left Review* 201 ('Rich in illuminating detail, Adam Tooze's book offers the most extensive chronicle to date of the great financial crisis ...'); or Avinash Persaud, 'Adam Tooze's *Crashed*' (2019) 38 *Contributions to Political Economy* 74, ('[Tooze] describes the financial crisis, its context, and causes with an acuity, precision, and comprehensiveness that is second to none...'). The most significant critique of Tooze's analysis comes from Perry Anderson and the charge that Tooze is, as a left-liberal, unable to engage in a deeper structural critique of capitalism. Whether or not this is accurate, it hardly undermines Tooze's description of the financial mechanics of the GFC. Perry Anderson, 'Situationism à L'envers' (2019) 119 *New Left Review* 47.

³³ For an accessible introduction to the Bretton Woods system, see Robert Skidelsky, 'Inventing the World's Money' (2014) LXI(1) *New York Review of Books*.

From the 1960s, the US experienced significant budget and trade deficits due to, in broad terms, the declining relative competitiveness of US industry, Keynesian economic policies, the Great Society social programmes, and the Vietnam war. The consequent growth in the number of dollars held overseas made it increasingly difficult to maintain the relative value of the dollar and convertibility for gold. With the French government continuing to exchange its dollar reserves for gold, the link between the dollar and gold was broken in 1971, effectively ending the Bretton Woods system and leading to a system of floating exchange rates and limited capital controls.³⁴ The end of Bretton Woods accelerated capital flows and increased the globalisation of production and finance in which investment banks played an important role.³⁵ The broad historical context, then, of the GFC is that over the course of the 20th century the US dollar became an increasingly important currency in terms of global trade and finance. It was held in increasing volumes internationally by central banks and other financial institutions. The significant consequence of this for the GFC was to create demand for low-risk dollar-based investments.

The narrower context of the GFC were changes to the US system of mortgage financing.

Two major developments were the growth of the originate-to-distribute (OTD) as opposed

³⁴ Commonly referred to as the 'Nixon Shock'.

³⁵ Investment (in the US) or merchant (in the UK) banks are not, in contrast to commercial banks, funded by deposits from the public, though some commercial banks have investment banking arms or subsidiaries. They manage investments on their own behalf and for institutional and corporate investors and wealthy individuals. They engage in a range of activities including financing foreign trade and industrial finance; underwriting rights issues; advising on mergers and acquisitions; and providing financial services and advice to governments, companies and wealthy individuals. They create and trade in a range of assets including securities (an asset based on a contract, such as shares and government or company debts), and derivatives (a security the value of which is derived from the actual or expected price of an underlying asset). The scale of investment banking and the size of investment banks grew rapidly from the mid-1970s and some converted from partnerships by issuing shares and going public to attract further investment.

to the originate-to-hold (OTH) model of lending. OTH is conventional lending: institutions receive deposits and lend that money to mortgagors. The mortgage sits on the institution's balance sheet as an asset secured against the mortgaged property and, depending on the type of mortgage, repayments are interest (return on capital) and of the principal sum. With OTD the institution lends money to borrowers and sells the debt to an investor and the proceeds are used to make further loans. The second change was securitisation whereby mortgages are bundled and shares in the bundles sold to investors.³⁶ Mortgage-backed securities (MBSs) were designed to minimise capital risk by creating portfolios of mortgages across the US, thereby limiting the risk of default. Conventional MBSs have disadvantages in that capital value decreases over time as mortgages are repaid and if borrowers repay early - particularly where interest rates are low - the capital is released at the point where interest rates for reinvestment are low. Collateralised mortgage obligations (CMOs) and collateralised debt obligations (CDOs) were developed by the investment banks to address the limitations of conventional MBSs. With CMOs and CDOs, the MBSs are owned by an entity that allocates the payments of interest and capital to tranches that have different risk, return and term profiles to meet investor needs.³⁷ The investment banks, subject to decreased regulation, developed other exotic securities and derivatives including credit default swaps (CDSs) that managed the risk of default on the mortgage based assets. A CDS is a form of insurance where the holder pays the premiums and the insurer pays out if the investment defaults. CDSs can be traded independently of the

³⁶ Securitisation was initially undertaken by government-sponsored enterprises (GSEs) in the US. The names of the GSEs may be familiar: the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Government National Mortgage Association (Ginnie Mae). None of the GSEs lend directly to the public and their purpose is to increase the supply of money available for mortgage lending and to reduce borrowing costs. They could attract funding at lower cost because they were understood to be backed financially by the US government.

³⁷ These can be subject to further derivation as with synthetic CDOs (or CDOs²) that bundle tranches of CDOs and sell tranches of these.

ownership of the insured asset and profit made if the asset defaults or when the market price of the CDS increases.

That was the context in which there was a US house price bubble and collapse. The Federal Reserve reduced interest rates in 2000 in response to the dot-com stockmarket crash and early-2000s recession. The fall in rates prompted a huge volume of mortgage refinancing and lending and a significant proportion of that lending was fed not through the GSEs with higher standards but through private institutions subject to limited regulation. Each stage of the process - making loans, securitisation, trading in securities and derivatives, and insuring against default - offered opportunities for profit. The system was thought to spread the low risk of mortgage default, but the reality was different. The financial incentives meant the focus was on volume and not quality of lending. Because the OTD model of lending meant mortgages no longer sat on an institution's balance sheet and most were not fed through a GSE, it incentivised sub-prime lending (loans to those who may have difficulty maintaining repayments) and dis-incentivised debt management (keeping on top of debtors who are behind with repayments). A high proportion of the MBSs were rated AAA - as secure as US government debt - based on historic data on the risk of mortgage default and a different model of lending. There was an incentive for the ratings agencies to give high ratings because there were a limited number of institutions issuing securities and they were paying the rating agencies. The US house price bubble was inflated by a combination of low interest rates, including for sub-prime borrowers; rising property prices that people wanted to take advantage of; a system of lending that incentivised volume without adequate regard to risk; and a high - and crucially global - demand for low-risk dollar-based investments. In 2006, 70% of new mortgages were sub-

prime and securitised by the private sector and by 2007 over \$5 trillion in private sector sub-prime debt had been securitised.³⁸

The first stage of the GFC was the bursting of the US housing bubble in late-2006. Interest rates had been rising for several years; there was a payment shock as borrowers shifted from introductory interest rates; mortgage arrears and defaults started to rise; consumer spending fell as people reduced debts; and US house prices fell by up to a third. The value of the MBSs started to fall which precipitated the second stage of the GFC, the near-collapse of the global banking system. There are, very broadly, two reasons why the bursting of the US housing bubble nearly collapsed the global banking system. First, a significant proportion of the MBSs, in particular less attractive, less marketable and riskier tranches, were owned by investment and other banks and other financial institutions. In addition to US banks, European banks had taken advantage of profits by investing and trading in MBSs or by integrating the US mortgage business directly into their operations. European banks were the largest purchasers of US assets and largest foreign lenders to the US in the run up to the crisis. The City of London handled huge volumes of capital invested from around the world. Both US and European banks were directly exposed to losses on MBSs.

Second, the investment and commercial banks relied on the value of the MBSs to run their day-to-day operations, including through the shadow banking system, in particular on the repurchase (repo) market. In broad terms, the shadow banking system dis-intermediates conventional banking by facilitating lending and borrowing without an intermediary. With the repo market, an institution that needs cash sells a security to the party that has cash

³⁸ Tooze (n 32) 57, 66.

and agrees to later buy the security back at a slightly higher price. For the party with the security, this is cheaper than borrowing from a bank; and for the party with the cash, it provides a better rate of return than conventional banking. Not only were some US and European banks directly exposed to losses on MBSs, they relied on MBSs maintaining their value to run their day-to-day operations.

The downward spiral started in 2007. As the value of the MBSs fell, there was first a liquidity and then solvency crisis of US and European banks and other financial institutions. The sub-prime lenders started to go out of business and larger financial institutions started to write-down the value of their MBSs. In June 2007, global investment bank Bear Stearns bailed out two funds that had suffered heavy losses on MBSs. In July and August two smaller German banks had to be rescued because of exposure to MBSs. In September the UK's fifth largest mortgage lender Northern Rock failed. It had limited exposure to losses on MBSs but 80% of its funding was from institutions that were exposed. When the run on Northern Rock started, £4.6 billion was withdrawn over a few days and the government nationalised it in February 2008 when no private buyer could be found.

On the shadow banking market, funding dried up as those with cash refused to lend on the security of MBSs. Those with the assets had to take increasingly large 'haircuts' in terms of the gap between the value of the assets they were selling (effectively lending) and the cash raised (effectively borrowing). As it became increasingly difficult to raise money on the shadow banking market, institutions holding MBSs started to sell them to maintain liquidity, further depressing prices. The opaque and complex nature of MBSs depressed prices yet further since it was impossible to assess the risk of the investments defaulting. Bear Stearns had to be taken over in March 2008 and Lehman Brothers, the fourth largest

investment bank, filed for bankruptcy in September 2008. As the value of MBSs continued to fall and as default became more likely, the size of the losses threatened the solvency of the insurers - notably the huge US insurer AIG - that had issued the CDSs that insured the MBSs. The possibility that the insurance would not pay out further drove down their value. The Federal Reserve provided AIG with an \$85 billion loan two days after Lehman Brothers collapsed. Consumer and business lending fell as banks tried to suck in cash to remain solvent and repair their balance sheets. Household consumption and business investment and activity fell, precipitating a global recession that further risked the stability of the global financial system.

The GFC was, then, a conventional capitalist financial crisis in terms of an asset price bubble and collapse, but one where the value of particular assets was critical to the functioning of the global financial system including US and European banks. In evidence to the US Financial Crisis Inquiry Commission in 2009, Ben Bernanke, Chair of the Federal Reserve, stated 'I honestly believe that September and October of 2008 was the worst financial crisis in global history, including the Great Depression' and 'out of 13 of the most important financial institutions in the United States, 12 were at risk of failure within a period of a week or two'.³⁹ A wave of insolvencies was averted by government and central bank support in the form of loans, recapitalisation, asset purchases and guarantees. Tooze estimates that \$7 trillion of commitments were made by states or their central banks.⁴⁰ In bald terms the Federal Reserve, and to a lesser extent other central banks, flooded the financial system with liquidity to avert a wave of bank insolvencies and a catastrophic economic depression.

³⁹ Alexandra Frean, 'We faced worst financial crisis in history, says Bernanke' *The Times* (London, 28 August 2014) 41.

⁴⁰ Tooze (n 32) 167.

In the UK, between September 2007 and December 2009 the government and BoE took unprecedented action to maintain the solvency of UK banks and prevent the financial system collapsing. The National Audit Office (NAO) calculates the total peak support at £133 billion in spending with a further £1,029 billion of guarantee commitments.⁴¹ As to the allocation of that support: £256 billion was for RBS; £276 billion for Lloyds Banking Group; £60 billion for Northern Rock; £46 billion for Bradford and Bingley; and £513 billion of sector wide support costs. As at 31 March 2020, the net spending had reduced to £32 billion with the sale of assets or repayments. Guarantees had fallen to £13.5 billion. In 2020, the Office for Budget Responsibility (OBR) estimated an overall cost of £26.9 billion (1.7% of 2008-09 GDP) for the interventions in the financial sector as a result of the GFC, observing 'The costs of the crisis would almost certainly have been much greater in the absence of direct interventions to restore the financial system to stability'.⁴²

The most significant impact of the GFC in relation to the UK's public finances was the fall in GDP and the most severe recession since the Second World War, leading to a major reduction in tax receipts and a rapid increase in budget deficits and debt. The first fall in GDP came in the second quarter of 2008 and the impact of the GFC can be seen from Table 1 below (25 years of public spending in the UK) which shows public sector receipts, total managed expenditure (TME), public sector borrowing, cyclical adjusted budget deficit, and public sector debt in both nominal terms and as a percentage of GDP for the 25 year

⁴¹ NAO, 'Taxpayer support for UK banks: FAQs' (November 2020) <<https://www.nao.org.uk/highlights/taxpayer-support-for-uk-banks-faqs/>> accessed 28 December 2024. The guarantees were provide by the Asset Protection scheme, Credit Guarantee scheme and Special Liquidity scheme.

⁴² OBR, 'Economic and fiscal Outlook March 2020' (CP 230, March 2020), 146.

period (financial years) to 2019-20.⁴³ The impact of the GFC was that GDP fell by 2.4% in 2008-09 and a further 2.5% in 2009-10 and the shrinking tax base reduced receipts in current terms in both financial years. The combination of falling receipts, higher spending, and falling GDP amplified the impact of the GFC on the public finances when TME, public sector net borrowing and public sector net debt are expressed as percentages of GDP. TME as a percentage of GDP grew from 40% of GDP in 2007-08 to 46% of GDP in 2009-10 when net borrowing peaked at 10% of GDP, and debt increased rapidly from 34% of GDP in 2007-08 to 80% in 2014-15.

Figure 1 below (25 years of public sector borrowing and debt in the UK) graphs: public sector net borrowing as a percentage of GDP (left hand scale); GDP percentage change latest year on previous year (left hand scale); and public sector net debt as a percentage of GDP (right hand scale). The impact of falling GDP in 2007-2008 and 2008-9 on the deficit and debt are striking.

⁴³ All the data is extracted from: OBR, 'Public finances databank' (January 2021) <<https://obr.uk/public-finances-databank-2020-21/>> accessed 1 May 2025; save for the final column which is extracted from: ONS, 'GDP - data tables - quarterly national accounts' <<https://www.ons.gov.uk/economy/grossdomesticproductgdp/datasets/uksecondestimateofgdpdatatables>> accessed 1 May 2025.

TABLE 1 - 25 YEARS OF PUBLIC SPENDING IN THE UK

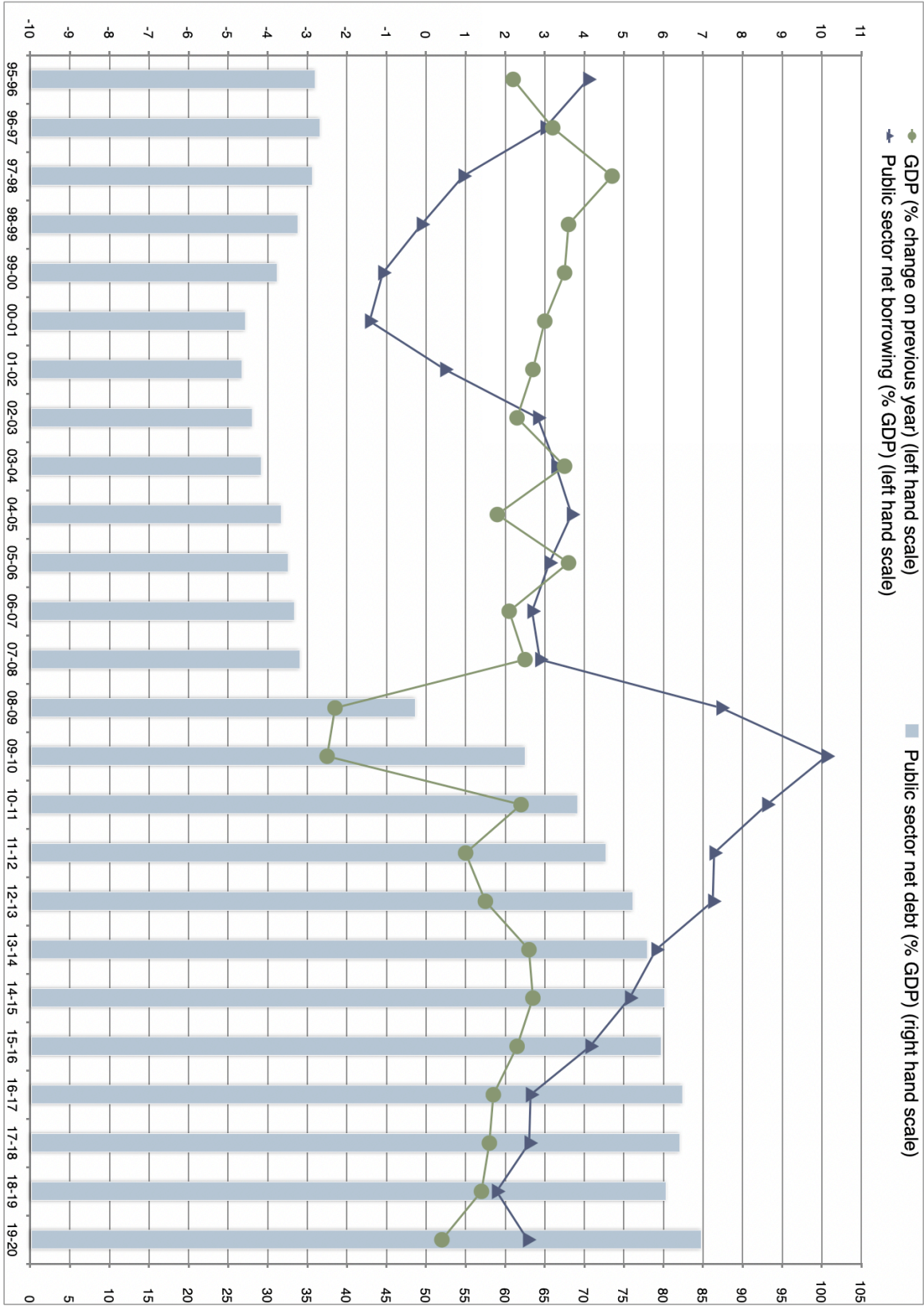
PUBLIC SECTOR SPENDING ¹	Public sector current receipts (£ billion)	Public sector current receipts (% GDP)	Total managed expenditure (£ billion)	Total managed expenditure (% GDP)	Public sector net borrowing (£ billion)	Public sector net borrowing (% GDP)	Cyclically adjusted current budget deficit (% GDP)	Public sector net debt (£ billion)	Public sector net debt (% GDP)	GDP percent change latest year on previous year ²
ONS series ID	JWZO		KXSQ		-J5II			HF6W		ABMI
Financial year										
1995-96	287.4	33.3	322.7	37.4	35.3	4.1	2.0	322.1	36.1	2.2
1996-97	299.6	32.6	327.3	35.6	27.7	3.0	2.4	347.0	36.7	3.2
1997-98	334.2	34.7	343.3	35.7	9.0	0.9	1.8	350.1	35.7	4.7
1998-99	355.6	35.2	354.4	35.1	-1.2	-0.1	0.7	348.9	33.9	3.6
1999-00	379.6	36.0	368.1	34.9	-11.5	-1.1	-0.3	338.8	31.3	3.5
2000-01	406.5	36.7	390.7	35.3	-15.8	-1.4	-0.8	307.0	27.2	3.0
2001-02	412.0	35.9	417.4	36.4	5.5	0.5	-0.0	314.0	26.8	2.7
2002-03	417.7	34.6	451.8	37.4	34.1	2.8	1.4	348.0	28.1	2.3
2003-04	452.0	35.6	493.7	38.8	41.7	3.3	1.9	381.3	29.3	3.5
2004-05	484.4	36.3	533.5	40.0	49.1	3.7	2.3	435.6	31.8	1.8
2005-06	521.6	36.8	565.7	39.9	44.2	3.1	1.7	474.4	32.6	3.6
2006-07	552.1	37.1	592.0	39.8	39.9	2.7	1.2	509.5	33.4	2.1
2007-08	583.8	37.3	628.8	40.1	45.0	2.9	2.0	543.5	34.2	2.5
2008-09	569.2	36.2	686.4	43.6	117.3	7.5	4.2	755.6	48.7	-2.3
2009-10	564.0	36.2	721.7	46.3	157.7	10.1	5.1	995.3	62.6	-2.5
2010-11	603.8	37.2	743.7	45.8	139.9	8.6	4.6	1138.6	69.2	2.4
2011-12	624.6	37.4	746.2	44.7	121.6	7.3	4.2	1235.0	72.8	1.0
2012-13	636.5	36.9	761.4	44.2	124.9	7.2	4.1	1341.3	76.2	1.5
2013-14	663.3	36.7	768.2	42.5	104.9	5.8	3.1	1441.1	78.0	2.6
2014-15	690.1	36.8	786.5	42.0	96.4	5.1	2.6	1526.1	80.2	2.7
2015-16	714.4	36.9	794.7	41.0	80.3	4.1	2.2	1574.6	79.8	2.3
2016-17	760.5	37.7	813.8	40.4	53.3	2.6	0.5	1692.3	82.5	1.7
2017-18	782.6	37.6	836.8	40.2	54.3	2.6	0.4	1742.0	82.1	1.6
2018-19	815.9	37.7	854.5	39.5	38.6	1.8	-0.1	1765.4	80.4	1.4
2019-20	828.2	37.3	885.2	39.8	57.0	2.6	0.7	1798.2	84.8	0.4

¹ Save for note 2 below, all the data is extracted from the OBR public finances databank January 2021.
<https://obr.uk/public-finances-databank-2020-21/> accessed 05/02/2021.

² GDP at market prices. Chained volume. Reference year 2018. Extracted from Table N, Quarterly National Accounts Q3 (Jul to Sep) 2020.
<https://www.ons.gov.uk/economy/grossdomesticproductgdp/datasets/uksecondestimateofgdpdatabank> <accessed 05/02/2021>

² All data excludes public sector banks
<https://www.ons.gov.uk/economy/grossdomesticproductgdp/datasets/uksecondestimateofgdpdatabank> <accessed 05/02/2021>

FIGURE 1 - 25 YEARS OF PUBLIC SECTOR BORROWING AND DEBT IN THE UK



When the GFC hit, the Labour Party had been in government since 1997 with Tony Blair as Prime Minister and Brown as Chancellor of the Exchequer. Blair resigned in June 2007 and was replaced by Brown who appointed Alistair Darling as Chancellor. When Labour came to power in 1997 it established two fiscal rules for conduct of the public finances: the ‘golden rule’ for spending was to keep resource (as opposed to capital) spending and revenue in balance over the business cycle; and the sustainable investment rule was to keep public sector debt at less than 40% of GDP at the end of every financial year of the business cycle. These fiscal rules were broadly met before the GFC, albeit there seems to have been some goalpost-moving, notably in relation to when the business cycle started.⁴⁴ In any event, at the start of the GFC in 2006-07 public sector debt was lower (33.4%) than when Labour came to power in 1997 (35.7%) and the cyclically-adjusted current budget deficit was 1.2% of GDP. While an argument can be made that it would have been better if government debt had been lower,⁴⁵ there is little to suggest a problem with the public finances before the GFC hit. Further, while the GFC plainly had a major impact on the UK’s public finances; there is nothing to suggest that UK tax and spending policy, either in general or specific areas, had precipitated the crisis.

Having prevented the collapse of the UK’s banking system, there was then the question of what to do about the severe recession caused by the GFC and its impact on the public finances. In the November 2008 pre-budget Report, Darling announced significant

⁴⁴ For a full discussion, see: Robert Chote and others. ‘The IFS Green Budget: January 2009 (Institute for Fiscal Studies, January 2009), ch 5 <<https://ifs.org.uk/publications/ifs-green-budget-january-2009>> accessed 1 May 2025.

⁴⁵ See, for example: Simon Wren-Lewis, *The Lies We Were Told: Politics, Economics, Austerity and Brexit* (Bristol, 2018), 21.

changes to fiscal policy.⁴⁶ These changes included: a temporary reduction of VAT from 17.5% to 15%, bringing forward £3 billion of capital spending and some welfare benefit increases. There were additional restrictions on personal allowances and tax increases for those earning over £100,000 and increases in National Insurance Contributions (NICs). Overall, the changes amounted to a fiscal stimulus of £9 billion in 2008-9 and £16 billion in 2009-10 with a plan for 'a sustained fiscal consolidation from 2010-11 when the economy is expected to be recovering and able to support a reduction in borrowing'.⁴⁷ The April 2009 budget added a further stimulus of £5 billion with, in spending terms, increased support for employment and businesses, £600 million funding for home building and a vehicle scrappage scheme; and, in revenue terms, an increase in the highest rate of income tax to 50% and reduced relief on pension contributions for those earning over £150,000 and increases in fuel duty.⁴⁸ There was a commitment to planned levels of spending in 2010-11 and for public sector resource spending to grow by an average of 0.8% in real terms from 2011-12 to 2014-15 but with significant cuts to capital spending.

The March 2010 budget - delivered shortly before the general election - was fiscally neutral with minor policy changes to promote growth, largely funded by above-inflation increases in fuel, alcohol and tobacco duties.⁴⁹ Darling's last budget indicated a significant fiscal consolidation from 2011-12, calculated to be an average reduction in departmental spending of 12% to 2014-15. In broad terms, then, the policy response of the Labour government to the recession caused by the GFC was limited fiscal stimulus in 2008-09 and 2009-10; followed by policies that were broadly fiscally neutral but with support

⁴⁶ HM Treasury, *Pre-Budget Report 2008* (Cm 7484, November 2008).

⁴⁷ *ibid* 13.

⁴⁸ HM Treasury, *Budget 2009* (HC 407, April 2009).

⁴⁹ HM Treasury, *Budget 2010* (HC 451, March 2010).

directed at businesses and employment in 2010-11; and then significant planned, though unallocated, spending cuts and tax rises thereafter. Turning to monetary policy, the inflation target remained unchanged at 2%; and the response of the BoE to raise inflation to hit that target was to cut the Bank Rate in stages from 5.5% at the end of 2007 to 0.5% by April 2009.⁵⁰ As the BoE reduced interest rates close to zero, conventional monetary policy was ostensibly ineffective because of the ZLB problem described above. The response of the BoE from March 2009 was to engage in a major programme of QE.⁵¹ Brown asked the Queen to dissolve Parliament on 6 April 2010 and there was a general election on 6 May 2010.

Having set out the causes and effects of GFC and the initial political and economic response of the Brown Labour government, the focus now turns to the development of austerity as a policy and its implementation after the 2010 election.

4. The development and implementation of the austerity programme

After losing the 2005 general election, Conservative party leader Michael Howard resigned and David Cameron was elected leader of the opposition in December 2005. Cameron appointed George Osborne as Shadow Chancellor. Before the GFC, Osborne was committed to public spending increases. At the October 2006 Conservative party conference, Osborne pledged to 'share the proceeds of growth between the lower taxes this country needs and the increases in spending on public services every government

⁵⁰ Bank of England, 'Official Bank Rate History' <<https://www.bankofengland.co.uk/boeapps/database/Bank-Rate.asp>> accessed 1 May 2025.

⁵¹ As to the scope of that programme, see: Independent Evaluation Office. 'IEO evaluation of the Bank of England's approach to quantitative easing' (Bank of England, January 2021) <<https://www.bankofengland.co.uk/independent-evaluation-office/ieo-report-january-2021/ieo-evaluation-of-the-bank-of-englands-approach-to-quantitative-easing>> accessed 1 May 2025.

should provide'.⁵² In September 2007 he committed the Conservatives to matching Labour's spending plans: 'The result of adopting these spending totals is that under a Conservative government there will be real increases in spending on public services, year after year. The charge from our opponents that we will cut services becomes transparently false'.⁵³ Osborne did not express any significant concerns about government debt, indeed a primary concern was the high rate of personal debt and the impact of financial exclusion of those unable to access mainstream credit.

As the GFC developed, Osborne's approach shifted. In his October 2007 conference speech he said that 'a decade of debt leaves Britain exposed to financial turbulence on the world credit markets' and blamed Brown who had built 'the private debt, and built up the public debt that has left us exposed'.⁵⁴ In his 2008 conference speech Osborne said 'Labour failed to fix the roof when the sun was shining' (a recurring theme), that 'borrowing was out of control', and he would 'put the government finances on a path out of the red and into the black. Our goal over time will be to balance the current budget and ensure falling national debt'.⁵⁵ His speech was followed the next day with a leader in *The Times* headlined 'The Age of Austerity. George Osborne is right: there is no more money', opining 'Britain has been living on a mountain of debt ... and the Government's cupboard is

⁵² BBC News, 'George Osborne speech - Osborne dismisses tax cut calls' (Conservative Party conference, Bournemouth, 3 October 2006) <http://news.bbc.co.uk/1/hi/uk_politics/5400474.stm> accessed 1 May 2025.

⁵³ Alex Barker, 'Osborne makes key spending pledge' *Financial Times* (London, 3 September 2007) <<https://www.ft.com/content/c61c3b9c-598b-11dc-aef5-0000779fd2ac>> accessed 1 May 2025.

⁵⁴ BBC News, 'George Osborne speech - It's Time for Aspiration' (Conservative Party conference, Blackpool, 1 October 2006) <http://news.bbc.co.uk/1/hi/uk_politics/7022498.stm> accessed 1 May 2025.

⁵⁵ George Osborne, 'Speech to Conservative party conference' (Conservative Party conference, Birmingham, 29 September 2008) *The Guardian* (London, 29 September 2008) <<https://www.theguardian.com/politics/2008/sep/29/toryconference.georgeosborne>> accessed 1 May 2025.

bare'.⁵⁶ These were more than contestable claims, not least given the BoE's monetary response, underwritten by the government, in the form of QE. *The Times* approved of Osborne's apparent declaration of a 'new Age of Austerity' where bankers 'should pay to help clear up the mess they created' while telling the 'poorest people in society that there is no help without conditions'.

Perhaps Osborne's most significant accounts of the economic policies of a future Conservative government were speeches at the London School of Economics (LSE) in October 2008,⁵⁷ and his Mais lecture in February 2010.⁵⁸ The LSE speech was just before the fiscally expansionary November 2008 pre-budget report and Osborne's position was that he accepted the necessity and fiscal implications of the automatic stabilisers (for example spending on unemployment benefits) in a recession but rejected any additional increase in spending to stimulate economic demand on the basis that extra debt risked increasing the costs of borrowing, damaging consumer and business confidence, and recovery because of future tax increases. Osborne was instead committed to the use of monetary policy and limited and targeted tax cuts to stimulate demand. In his Mais lecture, Osborne argued that the boom and bust had been caused by the UK's economic policy framework of the previous decade and the deficit and public debt needed to be tackled immediately in order to ensure economic growth. Again, these were more than contestable

⁵⁶ Leader, 'The Age of Austerity. George Osborne is right: there is no more money' *The Times* (London, 30 September 2008). Perhaps the first use of 'austerity' in relation to Conservative part economic policy was: Matthew Parris, 'Enough cuddliness. Now for lean and mean' *The Times* (London, 15 March 2008), 'David Cameron, George Osborne and their team should present themselves as a hit squad of top-flight company doctors, sent in to rescue a flabby and flailing corporation on the verge of insolvency. Tories should not fear or duck the implication that there will be victims, sacrifices and cuts. ... A shard of austerity must enter the Tory leadership's aura'.

⁵⁷ ⁵⁷ George Osborne, 'Recovery through fiscal responsibility' (LSE, London, 31 October 2008) <https://www.lse.ac.uk/assets/richmedia/channels/publicLecturesAndEvents/transcripts/20081031_Osborne_tr.pdf> accessed 1 May 2025.

⁵⁸ Forrest Capie and George Wood (eds), *Policy Makers on Policy: The Mais Lectures* (Routledge 2011).

claims given the causes and effects of the GFC.⁵⁹ Osborne's arguments were that without a credible plan to deal with the deficit, credit rating agencies were likely to downgrade the UK's AAA credit rating, making government borrowing more expensive and risking a devastating loss of market confidence and loss of access to borrowing that would require more drastic tax rises and public spending cuts. Osborne concluded that making an early start on reducing the deficit was necessary to instil business confidence and establish credibility with the markets.⁶⁰ The three stage approach would be to: establish the OBR;⁶¹ deliver a budget that would set out fiscal policy to eliminate the structural deficit over one Parliament; and conduct and publish a spending review on departmental budgets.

⁵⁹ For a detailed analysis of the disparity between Osborne's analysis (a 'crisis of debt') and the IMF's analysis (a 'crisis of growth'), see Ben Clift, *The IMF and the Politics of Austerity in the Wake of the Global Financial Crisis* (Oxford 2018) 150, 151. Clift records that 'the IMF urged a slower pace of cuts, and an altered composition to shift the burden of adjustment away from the poorest groups' and IMF chief economist Olivier Blanchard remarked that 'the UK authorities were "playing with fire" by pursuing an excessively harsh austerity programme which threatened a prolonged and deepened recession'. Simon Wren-Lewis argues that the OBR's estimate that austerity reduced GDP growth by 1% in both 2010-11 and 2011-12, therefore amounting to a 2% reduction, is an underestimate. Simon Wren-Lewis, 'The Macroeconomic Record of the Coalition Government (2015) 231 National Institute Economic Review R5, R12.

⁶⁰ Some academic support for this argument came from Reinhart and Rogoff whose research identified that growth rates in advanced economies with public debt over 90% of GDP experienced significantly lower GDP growth rates. See: Carmen Reinhart and Kenneth Rogoff, 'Growth in a Time of Debt' (2010) 100 American Economic R 573. Unfortunately, the research suffered from 'selective exclusion of available data, coding errors and inappropriate weighting of summary statistics [which led] to serious miscalculations that inaccurately represent the relationship between public debt and GDP growth among 20 advanced economies. Over 1946–2009, countries with public debt/GDP ratios above 90% averaged 2.2% real annual GDP growth, not –0.1%'. See Thomas Herndon, Michael Ash and Robert Pollin, 'Does high public debt consistently stifle economic growth? A critique of Reinhart and Rogoff' (2014) 38 Cambridge J Economics 257. That analysis has been confirmed: 'We find that with further hindsight, and from a time series perspective, there is little to no support for the view that higher levels of debt cause reductions in economic activity ...we suggest that economic slumps tend to cause debt build-ups rather than vice versa'. See Juergen Amann and Paul Middleditch, 'Revisiting Reinhart and Rogoff after the crisis: a time series perspective' (2020) 44 Cambridge J Economics 343.

⁶¹ The OBR was created in 2010 and then put on a statutory footing by the Budget Responsibility and National Audit Act 2011. The main duty of the OBR is to examine and report on the sustainability of the public finances.

When it came to the Conservative 2010 election manifesto, the ‘early start’ elements of the Mais lecture’s ‘early start on reducing the deficit’ were clear, but there was little indication of what was coming.⁶² The primary focus was on the ‘Big Society’ and ‘We are all in this together’ themes and the headline promises on spending were to ‘safeguard Britain’s credit rating with a credible plan to eliminate the bulk of the structural deficit over a Parliament’; to ‘reform public services to deliver better value for money’ and ‘raise productivity growth in the public sector in order to deliver better schools and a better NHS’. Concrete spending promises included: cutting a net £6 billion of wasteful departmental spending in the financial year 2010-11; freezing public sector pay for one year, excluding one million lowest paid workers; bringing forward the rise in state pension age; and stopping tax credits to better-off families with incomes over £50,000. On taxation, the headline promises were reducing corporation tax to 25p and creating the most competitive tax system (presumably the one with lowest rate of taxation) in the G20 in five years. In relation to welfare benefits specifically, the tone was to ‘create a welfare system that is firm but fair’ with an increase in conditionality and sanctions.⁶³

There were yet fewer signs of what was coming in the Liberal Democrat 2010 election manifesto where the focus was on fairness in taxation, education, the environment and politics.⁶⁴ The manifesto identified ‘£15 billion of savings in government spending per year’ though since any cuts risked undermining the recovery, the timing would be based ‘on an

⁶² Conservative Party, *Invitation to Join the Government of Britain: The Conservative Manifesto 2010* (April 2010).

⁶³ Conditionality and sanctions are recurring concepts in this thesis. Conditionality refers to policies that make receipt of benefits, usually for people who are not working, conditional on claimants performing certain tasks, whether applying for jobs, participating in programmes to find work, or doing unpaid work. Sanctions are imposed when the conditions are not complied with and involve losing entitlement to benefits for a period.

⁶⁴ Liberal Democrats, *Liberal Democrat Manifesto 2010: Change that works for you: building a fairer future* (April 2010).

objective assessment of economic conditions, not political dogma. Our working assumption is that the economy will be in a stable enough condition to bear cuts from the beginning of 2011–12'. Concrete plans included a £400 cap on pay rises for public sector workers, restriction of tax credits and ending government payments to child trust funds. On taxation, the Liberal Democrats promised to put '£700 back in the pockets of tens of millions of low and middle-income families, paid for by ensuring the wealthy paid their fair share', and to free '3.6 million low earners and pensioners from income tax completely' to be 'paid for in full by closing loopholes that unfairly benefit the wealthy and polluters' and limiting tax relief on pensions to the basic rate.

The results of the May 2010 election in terms of vote%~seats~seat% on a turnout of 65.1% were: Conservative 36%~306~47.1%; Labour 29%~258~39.6%; Liberal Democrats 23%~57~8.8%, leaving no party with an overall majority.⁶⁵ Following the election, Cameron and Nick Clegg, leader of the Liberal Democrats, negotiated a coalition that was formalised in a Coalition Agreement of 11 May 2010 that dealt with the constitutional mechanics of coalition government but was silent as to policy.⁶⁶ The coalition's Programme for Government was published on 20 May 2010. In the foreword, Cameron and Clegg agreed that 'the most urgent task facing this coalition is to tackle our record debts' and that 'Difficult decisions will have to be taken in the months and years ahead, but we will ensure

⁶⁵ Richard Cracknell, Elise Uberoi and Matthew Burton, 'UK Election Statistics: 1918-2022: A Long Century of Elections' (House of Common Briefing Paper, 24 February 2023) <<https://commonslibrary.parliament.uk/research-briefings/cbp-7529/>> accessed 1 May 2025.

⁶⁶ Coalition Agreement for Stability and Reform (May 2010) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78978/coalition-agreement-may-2010_0.pdf> accessed 1 May 2025. For a discussion as to the constitutional implications of the arrangement, Martin Loughlin and Cal Viney 'The Coalition and the Constitution' in Anthony Seldon and Mike Finn (eds), *The Coalition Effect 2010 - 2015* (Cambridge 2015).

that fairness is at the heart of those decisions so that those most in need are protected'.⁶⁷

The detail of the programme included to 'significantly accelerate the reduction of the structural deficit over the course of a Parliament, with the main burden of deficit reduction borne by reduced spending rather than increased taxes', to 'protect those on low incomes from the effect of public sector pay constraint and other spending constraints', 'modest cuts of £6 billion to non-front-line services within the financial year 2010-11', and a full spending review in the autumn. Perhaps most significantly, there was no question - as suggested by the Liberal Democrat manifesto - of delaying spending cuts until later in the economic cycle when the economy had recovered from the fall in GDP in 2008-09 and 2009-10.

How austerity would be implemented was established by the emergency Budget in June 2010, and the detailed departmental spending plans in the October 2010 Spending Review. In the emergency budget Osborne set out his fiscal rules: to achieve a cyclically adjusted balanced budget by 2015-16; and to get government debt as a percentage of GDP falling by 2015-16.⁶⁸ The June 2010 Budget planned to eliminate the bulk of the structural deficit by fiscal consolidation of £40 billion per year by 2014-15; with 80% of the deficit to be eliminated by spending cuts and 20% by tax rises. The plan to achieve this included: spending cuts of £32 billion per year by 2014-15, including £11 billion of welfare reform savings and a two year public sector pay freeze, except for those earning less than £21,000 a year. Tax rises of £8 billion per year, including an increase in VAT to 20% and increases to rates in Insurance Premium Tax (IPT) to 6% (standard) and 20% (higher). The main rate of corporation tax was to be reduced from 28% to 24% over four financial years.

⁶⁷ HM Government, 'The Coalition: our programme for government' (May 2010) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf> accessed 1 May 2025.

⁶⁸ HM Treasury, *Budget 2010* (HC 61, June 2010).

The 2010 Spending Review announced very significant spending cuts up to and including the 2014-15 financial year.⁶⁹ The plan was for departmental budgets, other than health and overseas aid, to be cut by an average 19% over four years. The Spending Review foreshadowed a range of major policy changes, including: the replacement of a range of benefits with Universal Credit (UC); withdrawal of child benefit from higher rate taxpayers; the introduction of a benefit cap; bringing forward the rise in state pension age; reform of public sector pay and pensions; and major cuts in central government funding of local authorities. In terms of what was protected, NHS spending was to increase in real terms each year, the state pension triple-lock (uprating by the highest of average earnings, prices or 2.5%) was to remain in place, and the overseas aid budget protected. The total reduction in resource DEL spending was planned at 8.3% in real terms and some departments losing around a quarter of their resource DEL budget.⁷⁰ The total reduction in capital DEL spending was planned at 20%, but some departments lost around 30%,⁷¹ and others 50%,⁷² or more of their capital DEL spending. AME spending was reduced by over £10 billion, most of which was attributable to welfare benefit changes affecting those of working age.

The 2011 Budget was fiscally neutral with only minor changes to tax and spending.⁷³ What was of greater significance is that the public spending situation had deteriorated due to

⁶⁹ HM Treasury, *Spending Review 2010* (Cm 7942 61, October 2010).

⁷⁰ Including: Transport; Home Office; Justice; Communities and Local Government; Business, Innovation and Skills; Culture, Media and Sport; and Environment, Food and Rural Affairs.

⁷¹ Including: Culture, Media and Sport; and Environment, Food and Rural Affairs.

⁷² Including: Education; Home Office; Justice; and Business, Innovation and Skills.

⁷³ HM Treasury, *Budget 2011* (HC 836, March 2011). The main tax changes were a further reduction in corporation tax to 23%; a further increase in the personal tax allowance; and a council tax freeze.

higher than expected inflation and the OBR had downgraded its growth forecast such that there would continue to be a budget deficit by 2015-16. The 2012 Budget also contained limited changes to tax and spending.⁷⁴ Again, what was of greater significance was the worsening of the economic and fiscal forecasts in terms of GDP growth with the result that the deficit would fall more slowly than forecast. The 2012 Autumn Statement contained more bad news in that the OBR forecast for GDP was reduced which meant that Osborne's fiscal rule to get public debt falling as a percentage of GDP by 2015-16 would not be met.⁷⁵ The 2013 Budget provided for limited fiscal loosening for 2014-15 and 2015-16 before fiscal tightening for the following two financial years.⁷⁶ GDP growth forecasts had again been downgraded. The 2013 Spending Round covered spending plans up to and including the 2015-16 financial year.⁷⁷ The total reduction in resource DEL spending was planned at 2.7% in real terms with some departments having spending cut by a further 5% to 10%.⁷⁸ While capital DEL spending was more protected than in 2010, some departments had cuts of between 17% and 57%.⁷⁹ AME spending was reduced by over £640 million to 2015-16, most of which was again attributable to cuts to welfare benefit spending for working age claimants. The 2014 Budget was again fiscally neutral

⁷⁴ HM Treasury, *Budget 2012* (HC 1853, March 2012). The main tax changes were a further reduction in corporation tax to 22%; and a further increase in the personal tax allowance.

⁷⁵ HM Treasury, *Autumn Statement 2012* (Cm 8480, December 2012). The changes were: a further reduction in corporation tax to 21%; scrapping the increase in fuel duties; pensions tax relief reform; limiting the increase in working age benefits to 1% for three years and cutting welfare spending by a further £3.6 billion; and cuts to department resource DEL budgets by 1% in 2013/14 and 2% in 2014-15.

⁷⁶ HM Treasury, *Budget 2013* (HC 1033, March 2013). The fiscal loosening was to take place before the general election and the fiscal tightening afterwards. The main tax changes were a further reduction in corporation tax to 20% and a further increase in the personal tax allowance.

⁷⁷ HM Treasury, *Spending Round 2013* (Cm 8639 61, June 2013).

⁷⁸ Including: Transport; Communities and Local Government; Business, Innovation and Skills; Home Office; Justice; Energy and Climate Change; Environment, Food and Rural Affairs; Culture, Media and Sport; and Work and Pensions.

⁷⁹ Including: Communities and Local Government; Home Office; Culture, Media and Sport; and Work and Pensions.

with only limited changes to taxation and spending.⁸⁰ While the March 2015 Budget was again fiscally neutral, announcements included plans to sell shares and assets taken into public ownership during the GFC; plans to reduce the deficit in the next Parliament with £30 billion of cuts in 2016-17 and 2017-18; £10 billion of efficiency savings by 2017-18; but then to allow spending to rise after 2018-19.⁸¹

The Conservative Party Manifesto for the general election on 7 May 2015 included:⁸²

a further £30 billion in fiscal consolidation over the next two years, on top of the £120 billion that we have already identified and delivered over this Parliament. We will find £13 billion from departmental savings, the same rate of reduction as in this Parliament. We will find £12 billion from welfare savings, on top of the £21 billion of savings delivered in this Parliament. And we will raise at least £5 billion from continuing to tackle tax evasion, and aggressive tax avoidance and tax planning, building on the £7 billion of annual savings we have delivered in this Parliament. This £30 billion of further consolidation is necessary to ensure that debt keeps falling as a share of GDP and to deliver a balanced structural current budget in 2017-18 ...⁸³

⁸⁰ HM Treasury, *Budget 2014* (HC 1104, March 2014). The main tax changes were to the tax changes to make saving for retirement more attractive; and a further increase in the personal tax allowance. The major spending changes were the introduction of tax free childcare.

⁸¹ HM Treasury, *Budget 2015* (HC 1093, March 2015). The main tax change was a further increase in the personal tax allowance.

⁸² In accordance with the Fixed-term Parliaments Act 2011, s 1(2).

⁸³ Conservative Party, *The Conservative Manifesto 2015: Strong leadership, a clear economic plan, a brighter more secure future*: (April 2010).

The results of the 2015 general election in terms of vote%~seats~seat% on a turnout of 66.2% were: Conservative 36.8%~330~50.7%; Labour 30.4%~232~35.6%; Liberal Democrats 7.9%~8~1.2%, leaving the Conservative party with a small overall majority.⁸⁴ What was significant about the 2015 election was not the swing to the Conservatives of 0.7%, nor the swing to Labour of 1.4%, but the swing away from the Liberal Democrats of 15% that reduced their MPs from 57 to 8.⁸⁵

The election was followed by a further budget in July 2015,⁸⁶ the first by a Chancellor of a Conservative government in 18 years; and a Spending Review and Autumn Statement in November 2015.⁸⁷ As for the July 2015 Budget, borrowing forecasts rose and the new fiscal rules were to eliminate the deficit by 2019-20 and to have debt falling as a percentage of GDP from 2016-17. There was a four year freeze on working age benefits, tax credits and local housing allowances, and a cap on public sector pay increases of 1% per year for four years from 2016-17.⁸⁸ The 2015 Spending Review included significant spending cuts up to and including the 2020-21 financial year. In terms of resource DEL, while the review was neutral overall, some departments continued to have their budgets cut significantly.⁸⁹ There was a further planned £12 billion cut to spending on welfare benefits by 2019-20. The 2016 Budget took place against the background of worsening

⁸⁴ Cracknell, Uberoi and Burton (n 65).

⁸⁵ The collapse of the Liberal Democrat vote is attributed to their support for the austerity programme and reversal of policy on student fees and VAT increases. See, for example, David Cutts and Andrew Russell, 'From Coalition to Catastrophe: The Electoral Meltdown of the Liberal Democrats' (2015) 68 *Parliamentary Affairs* 70.

⁸⁶ HM Treasury, *Summer Budget 2015* (HC 264, July 2015).

⁸⁷ HM Treasury, *Spending Review and Autumn Statement* (Cm 9162, November 2015).

⁸⁸ Other measures included: further increase in the personal tax allowance; and a further reduction in corporation tax from 20% to 18% by 2020.

⁸⁹ Including: Work and Pensions; Business, Innovation and Skills; Transport; Energy and Climate Change; Culture Media and Sport; and Communities and Local Government

forecasts by the OBR in relation to GDP growth; and included a further £3.5 billion to be saved by a department efficiency review by 2019-20 with austerity planned to continue until 2021-21.⁹⁰

Under pressure from Conservative MPs, Cameron had promised in January 2013 an in-out referendum on the UK's membership of the EU if a Conservative government were elected.⁹¹ After the 2015 election, the European Union Referendum Act 2015 was passed and the referendum held on 23 June 2016. Leave won by 52:48 on a turn out of 72%. Having campaigned for remain and lost, Cameron resigned as Conservative party leader on 23 June 2016. Theresa May became party leader on 11 July following Andrea Leadsom's withdrawal after the second ballot and May was appointed Prime Minister on 13 July 2016. She appointed Philip Hammond as Chancellor. The Autumn Statement 2016 took place against a worsening economic outlook, the predicted surplus in 2019-20 became a deficit and the fiscal rules were changed to reduce the cyclically-adjusted deficit below 2% of GDP by 2020-21, and debt to be falling as a percentage of GDP by 2020-21.⁹² The plan remained to deliver the departmental savings in the 2015 Spending Review with some additional capital spending to try to boost growth. The 2017 Spring Budget contained only minor changes to taxation and spending plans; and announced the move to a single fiscal event - an Autumn Budget - each year.⁹³

⁹⁰ HM Treasury, *Budget 2016* (HC 264, July 2015). The main tax changes were: a further increase in the personal tax allowance; a further reduction in corporation tax to 17%; cuts to business rates; and cuts to capital gains tax.

⁹¹ David Cameron, 'David Cameron's EU speech - full text' *The Guardian* (London, 23 January 2013) <<https://www.theguardian.com/politics/2013/jan/23/david-cameron-eu-speech-referendum>> accessed 1 May 2025.

⁹² HM Treasury, *Autumn Statement 2016* (Cm 9362, November 2016).

⁹³ HM Treasury, *Spring Budget 2017* (HC 1025, March 2017). The main measure included an increase in NIC contributions and a reduction in dividend allowances to level the financial playing field between the employed and self-employed. The move to a single fiscal event appears to have proven impossible.

Having enjoyed large opinion poll leads and seeking a larger majority to strengthen her prospects of securing parliamentary approval for a Brexit deal with the EU, May obtained the two-thirds majority in the Commons required for an early election on 8 June 2017.⁹⁴ The UK's departure from the EU had eclipsed austerity as the central political issue and the Conservative manifesto was thin on economic detail, promising only to continue to increase the personal allowance and reduce corporation tax. The results of the 2017 general election on 8 June 2017 in terms of vote%~seats~seat% on a turnout of 68.8% were: Conservative 42.3%~317~48.8%; Labour 40.0%~262~40.0%; Liberal Democrats 7.4%~12~1.8%, leaving the Conservative party with no overall majority and forming a government on the basis of a confidence and supply agreement with the Democratic Unionist Party and its 10 MPs.⁹⁵ The main feature of the Autumn 2017 Budget which followed the election was the reduced growth forecasts by the OBR which made the deficit and debt position significantly worse, further delaying the end of austerity.⁹⁶ The OBR had, however, upgraded the health of the public finances by the 2018 Budget.⁹⁷ There were for the first time suggestions that austerity was coming to an end with planned substantial increase in NHS and departmental spending, though with planned savings on benefits for the working aged still to be delivered.

Having failed to get her Brexit deal through Parliament and narrowly surviving a no confidence vote in the Commons in January 2019, May resigned as Conservative party leader on 24 May 2019. Boris Johnson and Jeremy Hunt were the final two candidates

⁹⁴ Fixed-term Parliaments Act 2011, s 2(1).

⁹⁵ Cracknell, Uberoi and Burton (n 65).

⁹⁶ HM Treasury, *Autumn Budget 2017* (HC 587, November 2017).

⁹⁷ HM Treasury, *Budget 2018* (HC 1629, October 2018).

after the ballots of MPs. Johnson was elected leader by the Conservative party membership with 66% of the vote on 24 July 2019 and appointed Prime Minister on 24 July 2019. Johnson appointed Sajid Javid as Chancellor on the same day. If the 2018 Budget had suggested the end of austerity was coming, it was confirmed by the Spending Round in September 2019 which announced significant increases in departmental resource (up 4% per year) and capital (up 5% per year) spending for 2019-20 and 2020-21.⁹⁸ The increases were not spread evenly across departments with the main increases being in health and social care, education, and policing. By the end of the 2018-19 financial year, the cyclically adjusted deficit had just about been eliminated while overall debt had risen to 85% of GDP from its pre-crisis level of around 35%. For the purposes of this thesis, it is fortunate that a line can be drawn under the austerity programme in September 2019 before the start of the COVID-19 pandemic in 2020. The pandemic had a huge impact on the public finances in terms of spending, deficits and debt. If the economic impacts of the pandemic demonstrated anything, it was the ability of the government to run even larger deficits (15% of GDP in 2020-21) and debt (almost 100% of GDP in 2022-23) than occurred as a result of the GFC.⁹⁹

The final part of this chapter seeks to draw some conclusions as to the overall scope of the austerity programme implemented between the June 2010 Budget and September 2019 Spending Round.

5. Conclusions as to the austerity programme

As identified above, the key facets of any austerity programme are the size of spending cuts and tax rises; the period of implementation; the balance between spending cuts and

⁹⁸ HM Treasury, *Spending Round 2019* (CP 170, September 2019).

⁹⁹ Office for Budget Responsibility, 'Economic and fiscal outlook' (CP 1169 October 2024).

tax rises; whether the spending cuts are to capital or resource spending; and the distributional impact. Tackling those facets in that order: the size of the spending cuts were unprecedented in the postwar period as was the timescale over which the cuts were implemented.¹⁰⁰ Reducing the deficit took much longer - two Parliaments, rather than one - and required much more severe cuts than was anticipated. As to the balance, the plan was for an 80:20 split between spending cuts and tax rises. By 2015, however, the majority of the consolidation had been done by spending cuts with the split being 86:14.¹⁰¹ As to resource and capital spending, in the early stages capital spending was cut more heavily, presumably because it was less likely to affect the provision of front-line services. In the later stages, capital spending was prioritised in some areas in part as a means to increase growth and also in recognition of the deterioration of public infrastructure.

The issues in relation to distributional impact are more complex, and include both financial impacts and impact in terms of the availability and quality of public services, and public investment. Taking taxation first where the impact is inevitably financial, the major changes were: VAT was increased from 17.5% to 20%; National Insurance was raised from 11% to 12%; substantial cuts to pension contribution tax relief; corporation tax was reduced from 28% to 19%; capital gains tax was reduced; the income tax allowance was increased by a third in real terms, reducing the amount of income tax paid for all earners, and removing low earners from liability for income tax altogether; and fuel duties (charged at pence per litre rather than as a percentage) were frozen causing the real rate to fall. The higher rate of income tax was reduced from 50p to 45p, though the threshold was reduced which

¹⁰⁰ See, for example, Paul Johnson, Carl Emmerson, Nick Ridpath 'The Economy' in Anthony Seldon and Tom Egerton (eds), *The Conservative Effect 2010-2024: 14 Wasted Years?* (Cambridge 2024).

¹⁰¹ Carl Emmerson and Gemma Tetlow, 'UK Public Finances From Crisis to Recovery' (2015) 36 *Fiscal Studies* 555, 576.

meant more people became higher rate taxpayers. In addition to the major taxation changes, there were significant adjustments to thresholds, allowances, tapers, etc.

As for the purely financial impact of spending cuts on individuals, while there was a significant long-term squeeze on public sector pay and pensions, the major impact was on welfare benefits. The state pension was protected by the triple-lock, but state pension age equalisation between men and women and increase to 67 years was accelerated, and then increased to 68 years. The other welfare benefit reforms were perhaps the most significant aspect of the austerity programme.¹⁰² The reforms included: the phased implementation of Universal Credit (UC) to replace a range of other benefits; the replacement of Disability Living Allowance (DLA) with Personal Independence Payment (PIP) for adults; the closure of the Independent Living Fund (ILF); increases in conditionality and sanctions; the benefit cap; the bedroom tax;¹⁰³ and the imposition of the two-child limit. These reforms were almost entirely focussed on working age claimants and their families; and, in addition to the reforms and unlike for pensioners, benefit rates were frozen for extended periods or subject to below inflation increases. As to other financial impacts, the Education Maintenance Allowance for 16 to 18 year olds was

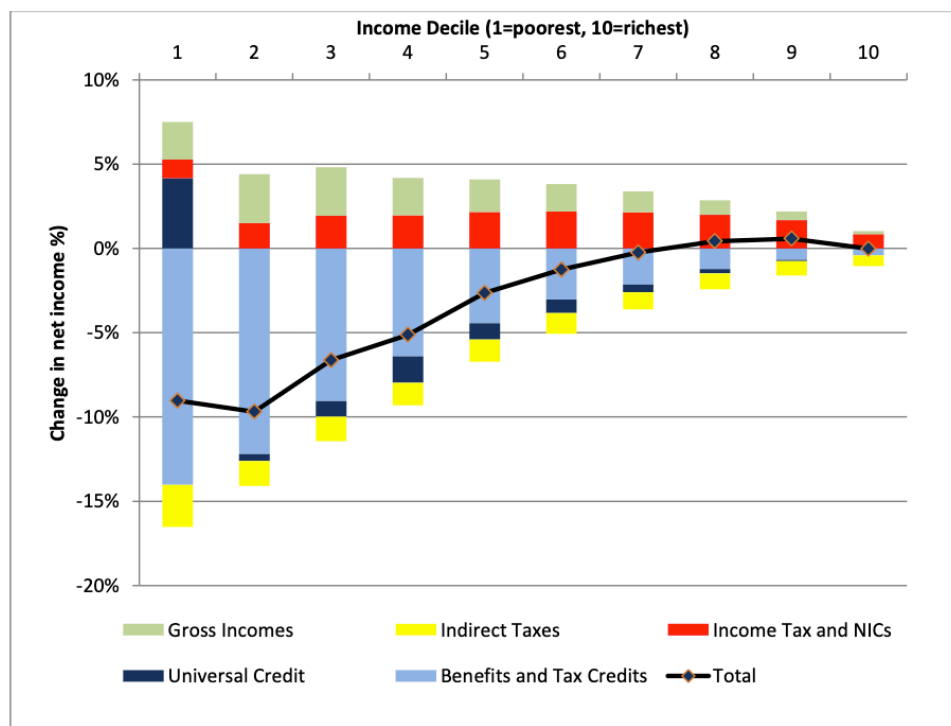
¹⁰² For a comprehensive account of the welfare benefit reforms between 2010 and 2016, see David Freud, *Clashing Agendas: Inside the Welfare Trap* (Nine Elms 2021). Freud was the Minister for Welfare Reform in the Lords and responsible for formulating and implementing the reforms. The ‘clashing agendas’ are between Freud, who wanted to implement reforms to incentivise work, and Osborne, who wanted to ‘slash the cost of welfare’. Freud lays bare the political conflicts and casts serious doubt on some of the government’s policy objectives provided to the courts in some of the challenges to the law implementing the benefit reforms. Perhaps most significantly, Freud was personally opposed to both the bedroom tax and the benefit cap. There are some striking differences between Freud and Cameron as to the necessity and merits of the benefit cap and bedroom tax. See David Cameron, *For the Record* (Collins 2019).

¹⁰³ It is recognised that the term ‘the bedroom tax’ is politically loaded. The alternatives are ‘the spare room subsidy’ or ‘the standard size criteria’. The policy is referred to as the bedroom tax throughout this thesis because the cases that challenged the policy are generally referred to as ‘the bedroom tax cases’. See, for example, the judgment of Lord Wilson JSC in *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289. The bedroom tax was implemented by reductions in Housing Benefit (HB) and UC.

abolished in England in 2011; and university tuition fees were increased from £3,000 to £9,000 in 2012 and then £9,250 in 2017. While the latter represented a cut in education spending, it did increase university budgets.

There have been various pieces of research that have modelled the overall distributional impact of austerity across the household income range. Research by the Equality and Human Rights Commission (EHRC) published in 2018 (figure 2 below) shows the cash impact of reforms between May 2010 and January 2018 implemented by 2021-22.¹⁰⁴ In general, the lower the income decile, the greater the percentage loss.

Figure 2 Percentage impact of tax and welfare reforms by household net income decile, 2021–22 tax year: Great Britain

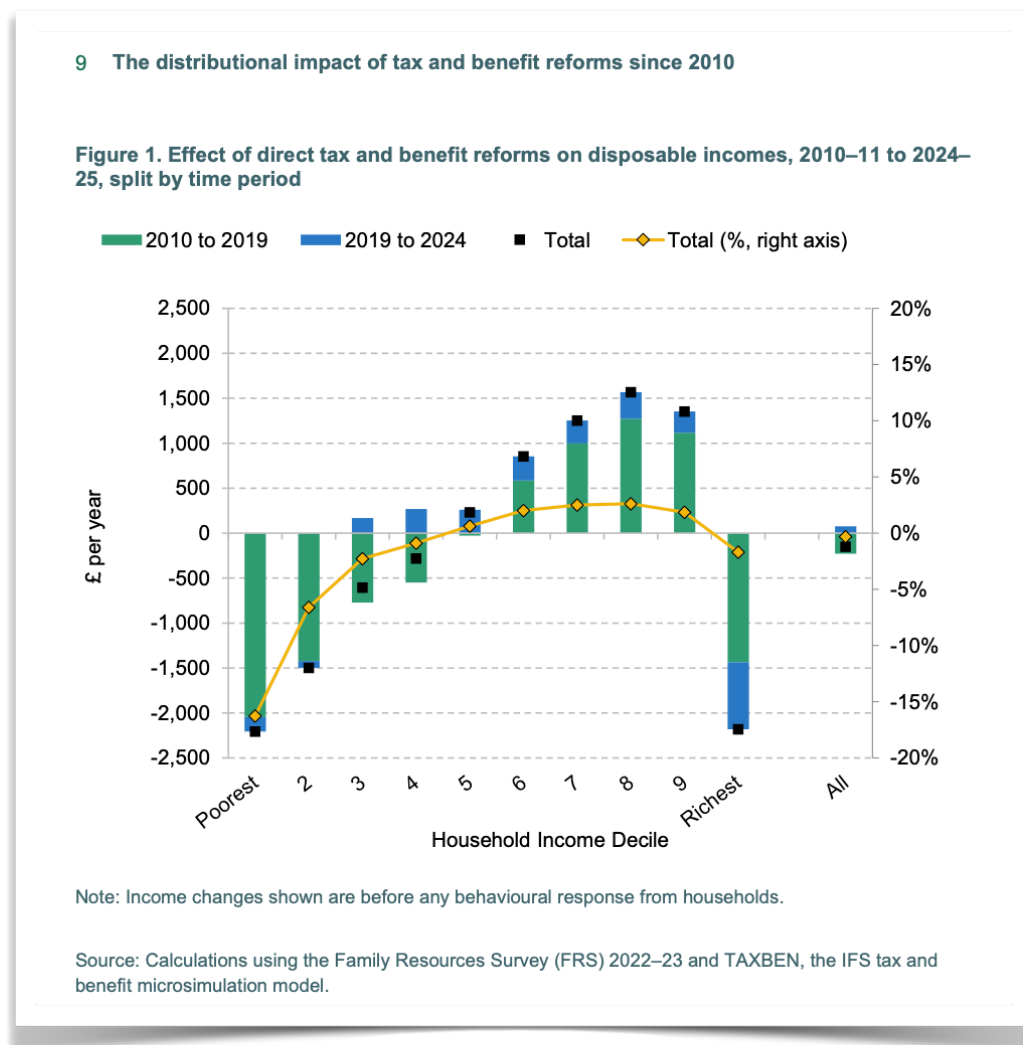


Source: Landman Economics tax-transfer model using FRS pooled dataset 2012–13 to 2015–16, and LCF pooled dataset 2010 to 2015–16.

¹⁰⁴ Jonathan Portes and Howard Reed, *The cumulative impact of tax and welfare reforms* (Equality and Human Rights Commission, March 2018), 18.

Behind the decile data, lay stark distributional and intersectional impacts. Examples include: households with at least one disabled adult and a disabled child lost 13% of net income; lone parents in the lowest quintile lost 25% of their net income; disabled lone parents with at least one disabled child fare lost 30% of their net income; and 1.5 million more children were expected to be living in poverty.¹⁰⁵

More recent research by the IFS in 2024 (figure 3 below) on disposable incomes is along the same lines, though takes into account tax and benefit changes after 2017 and models separately the changes between 2010 to 2019 and 2019 to 2024.¹⁰⁶



¹⁰⁵ ibid 18, 19, 20.

¹⁰⁶ Tom Water and Thomas Waterman, 'IFS Report 319: The distributional impact of tax and benefit reforms since 2010' (IFS, June 2024), 9.

It seems safe to conclude that the distributional impact of austerity in financial terms has been highly unequal and has been borne by the poorest households.

In terms of the impact of austerity other than on cash transfers, some spending was ring-fenced, including on the NHS, schools and overseas aid.¹⁰⁷ While schools were protected, education spending was reduced with significant cuts to spending in further education and funding for the Sure Start scheme was unprotected leading to closure of centres. The biggest percentage cuts were in central government funding for local authorities (LAs). Real terms resource spending was reduced by 55% between 2010-11 and 2019-20, affecting all LA services, but in particular social care, transport and culture.¹⁰⁸ LAs that relied more on government funding, generally poorer authorities, were hit harder. In terms of government departments, the most significant reductions in real terms resource DEL spending between 2010 and 2019 were in the Department of Transport (-62%); the Department of Environment, Food and Rural Affairs (-30%); the Ministry of Justice (-25%); and the Home Office (-23%).¹⁰⁹

That concludes the analysis of the austerity programme. In summary, it was a major, long-term, controversial political project that was central to government activity between 2010 and 2017. Had Brown won the election in 2010, there would no doubt have been a period

¹⁰⁷ Although NHS funding was protected, the rate of increase was significantly reduced. NHS spending had grown by an average of 5.6% in real terms each year under the 1997 to 2010 Labour governments, whereas the real terms increase was 1% between 2010 and 2015. Sarah Arnold and Danielle Jefferies, 'The NHS budget and how it has changed' (The Kings Fund, 25 March 2025) <<https://www.kingsfund.org.uk/insight-and-analysis/data-and-charts/nhs-budget-nutshell>> accessed 1 May 2025.

¹⁰⁸ Kate Ogden and David Philips, 'IFS Report R324: What is the outlook for English councils' funding?' (IFS, June 2024), 9.

¹⁰⁹ Johnson, Emmerson and Ridpath (n 100) 90.

of austerity, though its facets in terms of timing, scale, and distributional impact would surely have been very different. Cameron's account of the austerity programme in 2013 reveals some of its purpose when he stated 'It also means something more profound. It means building a leaner, more efficient state. We need to do more with less. Not just now, but permanently'.¹¹⁰

Chapter 4 returns to austerity and the process of identifying the adjudicated judicial review claims that challenged the law and policy that implemented it. Before that, though, is chapter 3 which charts the development of political constitutionalist thought and which is, in broad terms, a reaction to constitutional changes in the UK such that political decision-making has become increasingly subject to judicial control.

¹¹⁰ David Cameron 'Lord Mayor's Banquet 2013: Prime Minister's speech' (Lord Mayor's Banquet, London, 11 November 2013) <<https://www.gov.uk/government/speeches/lord-mayors-banquet-2013-prime-ministers-speech>> accessed 1 May 2025.

Chapter 3

The development of political constitutionalist thought

1. Introduction

Answering the central question posed by this thesis requires the identification of the proper limits of adjudication as envisaged by political constitutionalism. This chapter makes progress towards identifying those limits by describing and analysing the development of some contributions to political constitutionalist thought. Along with chapter 2, which set out the context and detail of the austerity programme, and chapter 4, which explains the methodology for identifying the adjudicated judicial review claims that challenged the law and policy that implemented austerity; this chapter builds towards the rest of this thesis which assesses whether, from the perspective of political constitutionalism, the limits of adjudication were exceeded in those judicial review claims.

Political constitutional thought has been a significant stream of academic work in public law in the UK for over 40 years, and contributions have proliferated over the past 20 years. While political constitutionalism is not a province occupied exclusively by UK public law scholarship, much of the work is UK-centred and focussed on the UK's specific constitutional arrangements. Perhaps the key reason for this is that several of the main institutional arrangements associated with political constitutionalism have traditionally found expression in the UK Constitution. This includes, for example, the sovereignty of Parliament and the absence of constitutional review of statute law,¹ and the holding to account of the exercise of executive power by political rather than judicial means. This chapter adopts the analytical framework that the growth and development of political

¹ Subject to the qualifications that declarations of incompatibility can be made under the Human Rights Act 1998, s 4; and statute could be dis-applied for non-compliance with EU law, *R v Secretary of State for Transport, ex p Factortame Ltd* (No 2) [1991] 1 AC 603 (HL).

constitutionalist thought can be understood as a series of waves (functionalist, normative and reflexive),² and as ideological responses (including democratic socialist, republican and conservative),³ that are, to an extent, reactions to actual, perceived or proposed changes to the UK's constitution since the mid-1970s. As to what those changes are, they were identified in chapter 1 and the growth of judicial review in terms of (a) the creation and development of common law grounds of review by the judiciary since the 1960s; (b) the progressive expansion of judicial review to an increasing number of governmental powers and functions; and (c) the increase in judicial power as a result of the UK's membership of the EU and the incorporation the Convention. From a constitutional perspective, this growth is often understood to represent a shift to a less political and more legal form of constitutionalism, and amounts to an increase in judicial power with a corresponding decrease in executive and legislative power.⁴

In terms of structure, this chapter is divided into four further parts, the next three of which address the work of selected contributors to political constitutionalist thought. The parts reflect the successive waves of political constitutionalism. First, there is an analysis of the work of John Griffith; next, an analysis of the work of Adam Tomkins and Richard Bellamy; and this is followed by an analysis of the work of Graham Gee, Grégoire Webber and Richard Ekins. While there is overlap both chronologically and thematically, the contributions are essentially taken in chronological order starting with Griffith. The fifth and final part of this chapter draws some conclusions as to where, in general terms, the political constitutionalist thought analysed in this chapter locates the limits of adjudication

² Marco Goldoni and Chris McCorkindale, 'Three Waves of Political Constitutionalism' (2019) 30 King's LJ 74.

³ Robert Grealley, 'Ideologies of Political Constitutionalism' (2024) 44 OJLS 949.

⁴ See, for example, Mark Elliott and Robert Thomas, *Public Law* (5th edn, Oxford 2024) 61 'the second of our three key themes is that the direction of constitutional travel in the UK is towards a more legal form of constitutionalism'.

in judicial review. It also starts to develop the framework to answer the central question posed by this thesis. Theoretical, normative and doctrinal debates about the proper scope of judicial review are not, of course, exclusive to political constitutionalism. The analysis that follows does not reach conclusions about these debates, rather the aim is to get a clear understanding of the limits of adjudication as envisaged by political constitutionalism.

The central claims or arguments of political constitutionalism are discussed further in the final part of this chapter, but in terms of a starting point, and recognising that political constitutionalist scholarship is not monolithic, the central claims are as follows. First, that political and democratic processes are more effective and more legitimate at: (a) managing and resolving disagreements about how society ought to be organised, including disagreements about rights; and (b) holding those with political power to account. And, second, the constitution - in terms of the distribution of power - ought to be political in the sense that it is not legally fixed and justiciable, but conducive to change and development primarily by ordinary political and democratic processes.⁵

As to the limitations of this chapter, no claim is made to have analysed all the work of those contributors identified, nor is any claim made to have considered the work of all those who have made significant contributions to political constitutionalist thought.⁶ This thesis is exclusively focussed on judicial review in England and Wales and the contributors

⁵ The converse claims of legal constitutionalism are, broadly, that there exist certain higher-order principles, generally conceptualised as fundamental or constitutional rights, that limit political decision-making. The judiciary perform an important constitutional role in enforcing these legal principles or rights because: (a) Parliament is unable to effectively control or scrutinise the exercise of government power politically because of executive dominance of the legislature; and (b) majoritarian democracy puts at risk the rights of minorities or marginalised groups. As to an explanation and justification for these claims, see for example: Paul Craig, *Administrative Law* (9th edn, Sweet and Maxwell 2021) [1-027].

⁶ An obvious omission is the work of Jeremy Waldron. See Jeremy Waldon, *Law and Disagreement* (Oxford 1999); Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale LJ 1346.

chosen are largely writing from a domestic perspective and primarily focussed on the UK's constitution.⁷ A further limit is that this chapter does not seek to critique the work of the contributors and, again, the purpose is to get a clear understanding of where they locate the limits of adjudication.⁸ The analysis is, therefore, painted with a broad brush and no claim is made to any original insight or analysis as to the work covered. The contribution this chapter does make is that it starts to develop an analytical framework for assessing whether the limits of adjudication envisaged by political constitutionalism have been exceeded by the judiciary in adjudicating judicial review claims and this framework is based around three modes of judicial decision-making: the interpretation or application of legislation; the application of common law principles of judicial review; and adjudication by reference to the Convention and EU law. This framework is further developed in chapter 4 and then implemented in chapters 5, 6 and 7 to analyse whether and in what ways the limits of adjudication were exceeded in the austerity adjudications.

2. Griffith and the first wave of political constitutionalism

The first wave of political constitutionalism is associated with John Griffith,⁹ in particular his 1978 Chorley lecture, 'The Political Constitution', subsequently published in the *Modern Law Review*.¹⁰ Griffith's Chorley lecture is understood to be an account of the UK's constitution from a functionalist perspective, where the functionalist style of public law emerged at the end of the 19th century and, in broad terms, conceives of public law as the

⁷ Richard Bellamy's work is an exception since it engages with the constitutional arrangements of both the UK and the United States.

⁸ There is work that critiques the arguments of political constitutionalism on its own terms. See, for example, Paul Craig, 'Political Constitutionalism and Judicial Review' in Christopher Forsyth and others (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford 2010); Marco Goldoni, 'Two Critiques of Political Constitutionalism' (2012) 10 *Int J Const L* 926.

⁹ Goldoni and McCorkindale (n 2).

¹⁰ John Griffith, 'The Political Constitution' (1979) 42 *MLR* 1.

law of public institutions, and instrumentally as a means of achieving social improvement by government.¹¹ The functionalist style is associated with socialism or social democracy and is about enabling or facilitating, rather than limiting, legislative and executive intervention in society.¹² The primary purpose of Griffith's Chorley lecture was to argue against the constitutional reforms then proposed by, principally, Lord Hailsham (Quintin Hogg) and Ronald Dworkin, where those reforms included a justiciable Bill of Rights and entrenched provisions limiting legislative and executive power.¹³ Griffith provides context to his arguments with an account of his own political and intellectual development and its historical context.¹⁴ He places himself in a legal and sociological positivist tradition concerned with the realities of political and economic power and identifies, in what now seems somewhat archaic, as a democratic socialist opposed to the authoritarian structures of western capitalism or eastern communism.¹⁵

¹¹ There has been significant analysis of Griffith's Chorley Lecture. Examples include: Thomas Poole, 'Tilting at Windmills? Truth and Illusion in 'The Political Constitution' (2007) 70 MLR 250; Graham Gee and Grégoire Webber, 'What is a Political Constitution' (2010) 30 OJLS 273; Martin Loughlin 'Appreciation: John Griffith' [2010] PL 643; Martin Loughlin, 'The Political Constitution Revisited' (2019) 30 Kings LJ 5; Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30 Kings LJ 43; Carol Harlow, 'Judicial Encroachment on the Political Constitution' in Richard Johnson and Yuan Yi Zhu, *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart 2023).

¹² Martin Loughlin, *Public Law and Political Theory* (Oxford, 1992) 134 'the functionalist style tends to incorporate an empiricist rather than metaphysical view of law. It is less concerned with what law is rather than with what law does'. See also Martin Loughlin, 'The Functionalist Style in Public Law' (2005) 55 U Toronto LJ 361 where the ten main characteristics of the functionalist style are identified.

¹³ The arguments are primarily contained in: Quintin Hogg, *The Dilemma of Democracy: Diagnosis and Prescription* (Collins 1978) and Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977).

¹⁴ Griffith identifies as being of the generation born during or immediately after the First World War and his account is a robust rejection of liberalism and its ideals by reference to the, on any view, catastrophic political and economic events of the first four decades of the 20th century.

¹⁵ Griffith (n 10) 6. Specifically, Griffith identifies with the attempts made by Alexander Dubček in Czechoslovakia and Josip Tito in Yugoslavia to create a form of syndicalism or worker-controlled market socialism.

Having set his stall out, Griffith delivers his arguments against the proposed constitutional reforms. His first critique is that they are based on natural law arguments - with appeals to concepts such as 'community morality' or 'the conscience of the commonalty' - that fail to recognise that social and political conflict is endemic in human societies.¹⁶ In relation to Lord Hailsham, Griffith understands the reforms to be, in addition to lacking essential detail, Conservative or Liberal proposals antithetical to democratic socialism. Lord Hailsham's concerns to avoid 'elective dictatorship' and to institutionalise a 'theory of limited government' will prevent a future Labour government, perhaps elected by a minority of voters under first past the post, from implementing a socialist manifesto.¹⁷ In a similar way, Griffith doubts Dworkin's claims in relation to rights that judges ought to search for and apply - somehow independently of their own political and moral convictions - principles that sit above rules of law that are a requirement of justice and fairness.

Developing his arguments 'politically', Griffith argues that adopting a Bill of Rights is problematic because it would not be possible to reach agreement as to what rights should be protected and to what extent. Adopting the Convention would not resolve the problem since the qualified rights do not resolve conflicts about rights but perpetuate conflicts by legal rather than political means: what is 'necessary in a democratic society' for the specified reasons sounds 'like the statement of a political conflict pretending to be a resolution of it'.¹⁸ And these conflicts will then be resolved 'by the legal profession as they embark on the happy and fruitful exercise of interpreting woolly principles and even woollier exceptions'.¹⁹ The solution to such conflicts is not imprecise Bills of Rights and

¹⁶ *ibid* 12.

¹⁷ Lord Hailsham's concerns presumably became less pressing with the election in 1979 and re-election in 1983 and 1987 of Conservative governments led by Margaret Thatcher.

¹⁸ Griffith (n 10), 14.

¹⁹ *ibid*.

illiberal judicial instincts but the political resolution of disputes and, where individual interests are insufficiently protected, by the specific statutory reform that would in practice be frustrated by a Bill of Rights.²⁰ Griffith objects to a Bill of Rights because it would introduce natural law concepts that shift the law from its function as a means to an end, and the law becomes something 'sacred and untouchable' thereby throwing 'a protective sanctity around certain legal and political institutions and principles'.²¹ The fundamental political objection to the proposals for reform is that 'law is not and cannot be a substitute for politics' and the reforms will pass political decisions from ministers to judges, who are neither accountable or removable.²² Further, that the only way to defeat authoritarianism is by open government subject to political control.

Griffith's further objections to the proposals for reform are that they are based on the concept of rights. He rejects the idea that individuals have fundamental and inherent rights. Rather, people make claims, as individuals and groups, on the authorities that control society and these claims may be recognised and perhaps given legal status. In this sense there are no rights, only political claims on those in authority. The arguments for the protection of rights by a Bill of Rights and a written constitution are flawed in that they seek 'to resolve political conflicts in our society in a particular way, to minimise change, to maintain (so far as possible) the existing distribution of political and economic power'.²³

²⁰ Part of the context to these arguments was the ECtHR finding a breach of article 10 (freedom of expression) where the House of Lords in *Attorney General v Times Newspapers* [1974] AC 273 had upheld an injunction on the basis of contempt of court against publications by the *Sunday Times* that would assist parents of children affected by the drug thalidomide in litigation with the UK distributor. The Convention did not feature in the domestic litigation. In *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245, the plenary court held (11 votes to 9) that, while the interference was prescribed by law, it could not be justified by a pressing social need and was therefore not necessary. Griffith was in favour of statutory reform that came in limited form with the Contempt of Court Act 1981.

²¹ Griffith (n 10) 15.

²² *ibid* 16.

²³ *ibid* 17.

What should be widely contestable questions of politics and economics become questions of law for judges. Rather than limiting the scope for change, Griffith is concerned with creating a situation where groups of individuals are more able to have their political claims heard and where the acceptance or rejection of those claims is in the hands of politicians who, unlike judges, can be replaced if they reach answers unacceptable to the electorate.

Having set out the essence of Griffith's arguments in his Chorley Lecture, there are then his responses to the arguments of two judicial proponents in favour of the incorporation of the Convention and the common law development of the constitution: John Laws,²⁴ and Stephen Sedley.²⁵ In broad terms, Griffith identified both as liberal individualists in favour of judges using the common law to develop the constitution to limit legislative and executive power so as to protect individuals from abuse of such power. Griffith observes that this development would necessarily involve a significant shift in power away from Parliament and government to the judiciary. As in his Chorley lecture, Griffith does not argue that justiciable limits on legislative and executive power are 'unconstitutional or unhistorical or logically perverse',²⁶ or 'illegitimate' or 'improper'.²⁷ The constitution is still what happens and Griffith's central argument remains that judicially imposed limits on Parliament and government are politically and democratically undesirable.²⁸

²⁴ John Laws, 'Is the High Court the guardian of fundamental constitutional rights?' [1993] PL 59; John Laws, 'Law and Democracy' [1995] PL 72; John Laws, 'The constitution: morals and rights' [1996] PL 622.

²⁵ Stephen Sedley 'The sound of silence - constitutional law without a constitution' (1994) 110 LQR 270.

²⁶ John Griffith, 'The Brave New World of Sir John Laws' (2000) 63 MLR 159, 175.

²⁷ John Griffith, 'The Common Law and the Political Constitution' (2001) 117 LQR 42, 43. This was largely a response to Stephen Sedley's 1998 Hamlyn Lectures. For a brief analysis of the apparently acrimonious debate with Sedley, see Harlow (n 8).

²⁸ Notwithstanding the view that Griffith's work precedes the normative wave of political constitutionalism, there is a normative aspect to his arguments: 'it is difficult to escape the conclusion that, for Griffith, Britain's political constitution exemplified a 'good' constitution and to which normative weight ought to be attached' Gee and Webber (n 11) 280.

Finally, there are Griffith's two books on the judiciary: *The Politics of the Judiciary* ran to five editions between 1977 and 1997;²⁹ and *Judicial Politics Since 1920* was published in 1993.³⁰ A central argument in both books is that judges in the UK cannot be politically neutral because they are required in adjudication to resolve what are essentially political questions that turn on what the public interest requires. In general, judicial attitudes are conservative and 'the judges have supported the conventional, established and settled interests. And they have reacted strongly against challenges to those interests'.³¹ As to broad conclusions, then, Griffith's political constitutionalism is largely a function of his ideological commitment to democratic socialism. Griffith was sceptical about rights and distrustful of courts, and in favour of keeping social and political conflicts in the political arena because this maximised the potential of these conflicts being resolved in ways which aligned with his ideological views and, ultimately, subjected the exercise of public power to electoral politics.³²

3. Tomkins, Bellamy and the second wave of political constitutionalism

The second wave of political constitutionalism has been described as normative, in the sense that it emerged in the late 1990s 'as a reaction to the hegemonic position attained by (so-called) legal constitutionalism'; the fear of 'an impending judicialisation of politics'; and the 'growing hegemony of liberal nomativism', manifested by the growth of judicial

²⁹ John Griffith, *The Politics of the Judiciary* (5th edn Fontana 1997).

³⁰ John Griffith, *Judicial Politics since 1920: A Chronicle* (Blackwell 1993).

³¹ Griffith (n 29), 340.

³² Griffith's ideological commitments are perhaps clearest in John Griffith, 'Why need a revolution' (1960) 40 *Political Quarterly* 383.

review.³³ Whether the second wave of political constitutionalism represents the development of, or departure from, Griffith's analysis is disputed, but it appears most of those writing from a political constitutionalist perspective view it as the former.³⁴ Two of the major contributors to the second wave are Adam Tomkins and Richard Bellamy and their contributions are analysed in turn.

Adam Tomkins' most significant contribution is his 2005 book *Our Republican Constitution*.³⁵ Tomkins' purpose in the book is to argue against the 'dangerously misguided' model of legal constitutionalism, and for the return to an 'older, political, approach to the constitution' grounded on the 'values and practices of republicanism' that can be found within it.³⁶ He starts by 'idealising' the UK constitution on the basis that government is responsible to Parliament. In particular, the government's legislative proposals and spending require Parliament's approval; the government's ministers are individually and collectively accountable to Parliament; and, ultimately, the government requires the confidence of Parliament to continue in office. Tomkins' view is 'What is beautiful about the British constitution is that 'it uses politics as the vehicle through which the purpose of the constitution (that is, to check the government) may be accomplished'.³⁷

³³ Goldoni and McCorkindale (n 2), 78. Kavanagh (n 11). As to an account of common law constitutionalism or liberal normativism and the numerous contributions, see for example: Paul Craig (n 5) [1-027]; Thomas Hickman, 'In Defence of the Legal Constitution' (2005) 55 U Toronto LJ 981.

³⁴ Loughlin (n 11) 'The Political Constitution Revisited' 12. 'Griffith's Chorley Lecture was adopted as a palimpsest ... The revisionists adopted the lecture as a symbolic expression of something quite different from what Griffith had intended. The expression 'the political constitution' signified for Griffith an empirical method of studying the constitution of a polity shaped by the interplay of political forces. But this was repackaged as an alternative normative theory'.

³⁵ Adam Tomkins, *Our Republican Constitution* (Hart, 2005). See also: Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 OJLS 157; Adam Tomkins, 'The Struggle to Delimit Executive Power in Britain' Paul Craig and Adam Tomkins (eds) *Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford 2005); Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 U Toronto LJ 1.

³⁶ *ibid* *Our Republican Constitution* vii.

³⁷ *ibid* 3.

And this is beautiful: ‘first, because it is democratic and secondly because it can actually work. Politics really can stop governments from abusing their authority’.³⁸ In contrast, where the courts and law are used to hold government to account, democracy and effectiveness are endangered because judges cannot match the democratic legitimacy of elected politicians, nor are they as effective at securing accountability.

Having set out the constitutional ideal of political accountability, Tomkins identifies how this has been challenged (‘the British constitution has taken a real beating, coming under sustained and unprecedented criticism’,³⁹) by: the incorporation of the Convention; the devolution of power to Scotland, Wales and Northern Ireland; membership of the EU; the growth in the common law of judicial review; and what, it seems, is conceptualised as a cultural change in the outlook of the political and legal class precipitated by ‘the simple exposure of European ideas to domestic practitioners who would formerly have been unaware of them’.⁴⁰ Tomkins argues that what underlies most of these developments is the view that the UK’s ‘traditional, political manner of dealing with the problem of constitutional accountability is no longer (even if it ever was) the best method, and that a better approach would be to turn instead to the courts’.⁴¹ Tomkins does not argue that all the constitutional changes were mistaken, nor that the constitution is not in need of further reform; his argument is that the shift towards a more legal form of constitutionalism is undesirable because it is undemocratic and ineffective.

³⁸ *ibid.*

³⁹ *ibid* 7.

⁴⁰ *ibid* 8. It is not clear what Tomkins means here and his argument that the ‘simple exposure of European ideas’ to those formerly unaware of them surely requires some explanation.

⁴¹ *ibid* 7.

Developing his analysis, Tomkins sets out six tenets that underpin legal constitutionalism and identifies the flaws in these. His conclusions are, in the broadest of terms, as follows: resolving disputes about the use and misuse of executive powers politically is better than resolving them judicially because, from a democratic perspective, the judiciary is not accountable; access to the law is limited by the nature of two-party adversarial litigation, rules of standing and costs; and judges are neither representative nor reflective of the public. Further, from the perspective of efficacy: litigation is usually between two parties and subject to rules of evidence that limit the range of materials and arguments that a court can consider in determining cases. In contrast, parliamentary decision-making is far more open and plural. Finally, the judicial record, in terms of case law, demonstrates that the judiciary is ineffective at checking abuses of governmental power, in particular in relation to individual liberty.

Tomkins' purpose in the rest of *Our Republican Constitution* is to advance his thesis on the republican underpinnings of the UK's constitution. The normative argument for this is based on republican themes or values that Tomkins organises under the headings: anti-monarchism and popular sovereignty; freedom and non-domination (including political equality, open government in the public interest and participatory citizenship); and the institutional design of accountability. Tomkins then identifies these republican values as being inherent to the constitutional order that emerged from the conflicts of the 17th century. The outcome of these conflicts represented the failure of the common law constitution and the success or restoration of a republican constitution.⁴² In the final chapter Tomkins identifies how the UK's constitution could be reformed to give better effect to the republican values he has identified, in particular by enhancing the ability of Parliament to hold the government to account.

⁴² For a specific critique of these arguments see Craig (n 5).

Richard Bellamy's work is similar in some ways to Tomkins' work in that it is based on republican and democratic ideas. His most significant contribution to political constitutionalism is his 2007 book *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*.⁴³ Bellamy's central thesis is that 'democracy provides a form of political constitutionalism that is superior both normatively and empirically to the legal constitutional devices that are regularly proposed as necessary constraint on it'.⁴⁴ As might be expected, this political constitutionalism contemplates constraints on adjudication to protect democratic decision-making. In contrast to Tomkins' focus (in *Our Republican Constitution* at least) on government accountability to Parliament, Bellamy's focus is on the superiority of law made by Parliament to law made by judges.

Bellamy argues that legal constitutionalism is an attempt to constrain or supplant democracy on the basis of two claims. The first is that we can come to a rational consensus on the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect for each citizen should achieve, where such outcomes are best expressed in terms of human rights and should form the fundamental law of a democratic society. The second is that the judicial process is more reliable than the

⁴³ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge 2007). See also: Richard Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 Int J Const L 86; Richard Bellamy, 'Democracy as Public Law: The Case of Constitutional Rights' (2013) 14 German LJ 1017; Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2014) 25 Eur J Int L 1019; Richard Bellamy, 'Turtles All the Way Down? Is the Political Constitutionalist Appeal to Disagreement Self-Defeating? A Reply to Cormac Mac Amhlaigh' (2016) 14 Int J Const L 204; Richard Bellamy, 'The Republican core of the case for judicial review: A reply to Tom Hickey. Why political constitutionalism requires equality of power and weak review' (2019) 17 Int J Const L 317

⁴⁴ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007), viii.

democratic process at identifying these outcomes.⁴⁵ Bellamy identifies the first claim as problematic because of reasonable disagreement as to what outcomes ought to be achieved and what rights ought to be protected. And the second claim is doubtful because, first, there is no 'correct' conclusion for judges to reach in the face of reasonable disagreement; and, further, there is limited evidence that the conclusions reached by courts are 'better' than those reached by democratic politics.

Bellamy then identifies the claims of political constitutionalism that correlate with the claims of legal constitutionalism. The first is that we reasonably disagree about the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve. The second is that the democratic process is more legitimate and effective than the judicial process at resolving these disagreements.⁴⁶ On this political conception of the constitution, the democratic process offers a framework for resolving disagreements and is itself subject to political debate and change.⁴⁷ All of this is necessarily identified with the political rather than the legal system with the emphasis on collective self-government, normatively underpinned by democratic republican values 'viewing all citizens as equal participants in the collective endeavour to frame a just social order'.⁴⁸

Having set out the claims that, on his account, underpin legal and political constitutionalism, Bellamy engages in a critique of legal constitutionalism and defence of

⁴⁵ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007), 3.

⁴⁶ *ibid* 4.

⁴⁷ Bellamy's pithy aphorism is that constitutional procedures 'must be left open so we may rebuild the ship at sea', *ibid* 174.

⁴⁸ *ibid* 7.

political constitutionalism, both of which are highly developed and detailed. The latter accounts for the second half the book and is, in the very broadest terms, constructed around the republican and democratic values of non-domination; individual autonomy and the need to treat people with equal concern and respect; and self-government based on citizens having equal status. Bellamy's view is that 'the normal democratic process involves far more legitimate and effective constitutional protections than a legal constitution can hope to provide'.⁴⁹

In contrast to Tomkins' account of political constitutionalism based on the UK's traditional constitutional arrangements, Bellamy's account relies on contemporary republican thought and political science. Given this material is directed towards the benefits of politics and democracy, it has limited relevance to identifying the limits of adjudication inherent in Bellamy's political constitutionalism. What is of more relevance is his critique of legal constitutionalism. The critique is based on the argument that rights belong to the 'circumstances of politics: namely, a situation where we need a collectively binding agreement, because our lives will suffer without it, yet opinions and interests diverge as to what its character should be and no single demonstrably best solution is available'.⁵⁰ Disagreement about rights is inherently political and he is against judicial adjudication in relation to rights because litigation fails for 'input' reasons in that, compared to democracy, participation in judicial decision-making is limited, generally to the parties in the litigation and by court procedures; and for 'output' reasons in that there is no evidence that, overall,

⁴⁹ *ibid* 141.

⁵⁰ *ibid* 21. The reference is to Jeremy Waldron's circumstances of politics, which Waldron defines as: 'the circumstances of politics come as a pair. Disagreement would not matter if there did not need to be a concerted course of action; and the need for a common course of action would not give rise to politics as we know it if there was not at least the potential for disagreement about what the concerted course of action should be'. Jeremy Waldron, *Law and Disagreement* (Oxford 1999) 102. The nub of the circumstance of politics seems to be: agreement that there needs to be a common course of action, but potential disagreement as to what that course ought to be.

adjudication by the courts arrives at better or more effective decisions on rights than the political system. He suggests that the modest but vital role of judicial review is for 'maintaining consistency throughout both the casuistical interpretation of the law and by supplying a means of challenging failures to apply it in an equitable manner'.⁵¹

As to broad conclusions, then, Tomkins' and Bellamy's political constitutionalism is a function of their arguments as to the normative desirability and actual effectiveness of republican democracy. For Tomkins, this is framed by the UK's traditional constitutional arrangements which are both democratic and effective in holding government to account, whether that be by requiring approval of taxation and spending, approval of legislative proposals, individual and collective ministerial responsibility, and ultimately that MPs are democratically accountable to the electorate. For Bellamy, this is framed in more abstract or theoretical terms based on political decision-making processes which afford equal respect and concern for each citizen, non-domination, majoritarian politics, and effective self-government.

4. Gee, Webber and Ekins and the third wave of political constitutionalism

It has been argued that the third wave of political constitutionalism has emerged, and goes beyond normative claims, in being an exercise in understanding 'not only the grammar of public law but in so doing understanding precisely what it is that is political about the political constitution'.⁵² It is 'much less concerned by the rise of judicial power ... [and] more focused on analysing the circumstances which make possible the emergence, the development and the preservation of a political constitution', and 'the works of the third

⁵¹ *ibid* 16.

⁵² Goldoni and McCorkindale (n 2) 74.

wave are more prone to look beyond formal institutional arrangements and to inquire into political practices, governing arrangements and customs'.⁵³

Perhaps the clearest example of this is an article from 2010 by Graham Gee and Grégoire Webber which seeks to answer the question: 'what is a political constitution?'.⁵⁴ By way of an analysis of the work of Griffith, Tomkins and Bellamy, Gee and Webber explore whether those accounts of political constitutionalism are descriptive of the UK's constitutional arrangements or normative accounts of how a real world political constitution should work. They recognise that the indicia of a legal constitution, such as an entrenched constitutional text or constitutional principles that function as higher law by which courts invalidate ordinary law, are easily identified. The formalised legal instruments of a legal constitution provide 'detailed and strong prescriptions as to the basic character, content and workings of the constitution, including, for example, prescriptions on which rights to include in a written bill of rights and on which grounds to exercise judicial review'.⁵⁵

In contrast to the indicia of a legal constitution, Gee and Webber's political constitution 'offers no comparable, definitive prescriptions: no formalised legal instruments, no immutable statement of rights or architectural arrangements, no procedures entrenching the constitution, and no fixed constitutional boundaries to be policed'.⁵⁶ Given that a political constitution is not rationalised or systemised into a series of hierarchical rules, it is more difficult to identify both the normative content and workings of a political constitution. They argue that 'a political constitution works primarily, and often imperceptibly, inside

⁵³ *ibid* 82, 83.

⁵⁴ Graham Gee and Grégoire Webber, 'What is a Political Constitution?' (2010) 30 OJLS 273.

⁵⁵ *ibid* 286.

⁵⁶ *ibid*.

Parliament and the executive and, where visible, its workings will often appear less dignified and more haphazard than court proceedings'.⁵⁷ While this may obscure the normativity of a political constitution and make it hard to distinguish from day-to-day political activity, Gee and Webber argue that 'it would be wrong to conclude from this alone that the normativity of a legal constitution is more compelling than that of its political counterpart'.⁵⁸ They argue that, at its simplest, a political constitution requires minimal conditions of 'an electoral process based on some notion of equal votes and to ensure that the political process is based on some notion of holding those in power to account'.⁵⁹ Anything more than this cannot be prescribed since it would preclude the possibility of change by ordinary political process and constitution-making is an ongoing process in the circumstances of politics directed by the people acting primarily through their elected members of Parliament.

As to the charge that this allows political actors too much latitude and might lead to inadequate regard for the rights of minorities and the boundaries of constitutional government, Gee and Webber rely empirically on the historical record of unconstrained politics to realise good ends, and the claims of Tomkins and Bellamy as to the effectiveness of ministerial responsibility to Parliament to check the power of the executive and the defence Parliament provides to the rule of law and individual rights. While the normativity of the political constitution may escape reification and easy identification and classification, it is nonetheless a normative model. In the broadest of terms, political constitutionalism becomes more than Griffith's defence of the political nature of the UK's constitution in the face of proposals to limit politics by law; and more than Tomkins' and

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ *ibid* 287.

Bellamy's construction of a political constitution as one that holds government accountable to Parliament and Parliament legislatively supreme.

Gee and Webber conclude by arguing that, in common with all real-world constitutions, the UK's constitution cannot be categorised as either entirely legal or political and, while the terms of the debate about the degree to which the constitution draws on a legal or political model can be subject to different understandings and commitments, both models are critical to understanding the UK's constitution. Unlike the accounts of Griffith, Tomkins and Bellamy, this account of political constitutionalism is less concerned about identifying limits of adjudication in relation to the exercise of executive and legislative power. Implicitly, the ordinary political process must be able to define and change these limits, and the judiciary must respect these and, more broadly, avoid extending their powers such that courts trespass on the circumstances of politics. It is in that sense about creating a culture amongst constitutional actors such that the political aspects of the constitution are respected and valued.

Gee does, however, address the limits of adjudication explicitly in a 2017 article with Richard Ekins that challenges the growth of judicial power in the UK.⁶⁰ Their starting point is that the expansion of judicial power is a function of 'political choices to confer new powers and responsibilities on domestic courts and to accept the jurisdiction of foreign courts', and also as a result of 'how many judges, lawyers and scholars are coming to understand the idea of judicial power itself'.⁶¹ These constitutional changes 'privilege irresponsible law-making, and undercut democratic self-government', and they 'ought to be

⁶⁰ Richard Ekins and Graham Gee 'Putting Judicial Power in its Place' (2017) 36 U Queensland LJ 375.

⁶¹ *ibid.*

wound back'.⁶² Gee and Ekins argue that the judicial role should be limited in accordance with their account of the common law constitutional tradition. Judges should 'contribute to securing the rule of law by resolving disputes impartially and in accordance with the law, and by keeping faith with past legal commitments, whether common law or statutory'.⁶³ While this includes upholding the legal rights of persons in dispute with the executive or administrative agencies, the courts are 'not ... responsible for the constitution's coherence or justice, or for upholding constitutional norms in general'.⁶⁴ The possibility of judicial review against unlawful executive action supports the rule of law and complements parliamentary accountability but should eschew judicial second-guessing of the merits of policy choices.

As to broad conclusions, then, the work of Gee and Webber is less concerned than the work of Tomkins and Bellamy about normatively justifying specific political constitutionalist arrangements, and more concerned with political constitutionalism as an explanatory model for understanding the complex and ill-defined day-to-day political aspects of the constitution. The work of Gee and Ekins is more explicitly conservative in that it is opposed to the growth of judicial review, both in terms of the development of the common law and the influence of the Convention and EU law on judicial decision-making, in that it essentially represents an ideological shift away from a more traditional and conservative approach to adjudication to one which is increasingly suffused with liberal values.

⁶² *ibid.*

⁶³ *ibid* 376.

⁶⁴ *ibid.*

4. Political constitutionalism and the limits of adjudication

While it is no doubt useful to understand political constitutionalism as a series of waves or ideological responses, it raises the question as to what are the shared core attributes or central beliefs of political constitutionalist thought; and whether and how these manifest themselves in relation to the limits of adjudication in judicial review. Notwithstanding its development in waves, and different views on its underpinning ideological attachments, it has been argued that there are shared attributes and beliefs common to all political constitutionalist thought.⁶⁵ At a high level of abstraction these are as follows.

- There is the recognition that there will be disagreement within a political community about what is for the best in terms of what policy or course of action ought to be adopted, or what rights or interests ought to be protected; and disagreement as to the processes by which these disagreements are to be resolved, including constitutional processes.
- The resolution of these disagreements ought to be by democratic or political processes because they are normatively or ideologically more desirable, or in practice produce better outcomes.
- The constitution itself should be political and it ought not put beyond reach disagreements such that they cannot be resolved by democratic and political processes, and this includes disagreements about the constitution itself.

As to what these attributes or beliefs mean for the constitutional role of the courts and judiciary, that role is essential but limited. In his 1961 essay on the Forms and Limits of Adjudication, Lon Fuller identified adjudication as a form of social ordering and that some

⁶⁵ See, for example, Greally (n 3) and Goldoni (n 8).

issues were not amenable to being ordered by adjudication.⁶⁶ Political constitutionalism does not argue that judicial review is in itself an impermissible or improper form of social ordering. Rather, it contemplates a minimal role for judicial review in social ordering in the sense of it not resolving disagreements about what is the right policy or course of action, or what rights or interests ought to be protected; and in terms of not resolving disagreements about processes, constitutional or otherwise, for the resolution of disagreements. On the political constitutionalist account, these are matters for politics and democracy, rather than law. The question for this thesis is what are the limits of adjudication in judicial review, or what judges ought and ought not to be doing, that can be identified from these shared attributes and beliefs. To start the process, there follows some analysis as to what the core attributes or central claims of political constitutionalism mean when it comes to the relationships between the courts and Parliament, and the courts and government.

In terms of the relationship between the courts and Parliament, political constitutionalism understands Parliament to be the institution that has a primary role in resolving disagreements about what the right policy or course of action is, and the resolution of such disagreement is expressed in primary legislation. Given that understanding, the judicial role, then, is to respect and give effect to the provisions of primary legislation. The task of the judiciary is to support the political constitution in the resolution of disputes by giving effect to the intention of Parliament expressed in statute. This necessarily means that the courts ought not to have the power to strike down primary legislation as somehow unconstitutional. Further, it would appear to exclude judicial approaches to interpreting

⁶⁶ Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard LR 353. Fuller observed 'the permissible forms and the proper limits of adjudication have probably been under discussion ever since something equivalent to a judicial power first emerged in primitive society'. It seems fair to say these discussions show no sign of abating.

primary legislation that fail to give effect to legislative intent by, for example, engaging in strained or implausible (or worse) readings of the provisions or purposes of statute, or imposing common law principles at odds with legislative intent. It is less clear as to the extent to which these principles apply to delegated legislation, whether approved by Parliament under the affirmative resolution procedure or not blocked under the negative procedure. As to how this translates to judicial review, where primary legislation provides powers or imposes duties on government, then the courts ought to give effect to the intention of Parliament by ensuring that the government does not exceed its powers and meets its duties. The role of the courts is to essentially police the boundaries of legislative intent. And from a political constitutionalist perspective, the Convention and EU law are problematic because they may require the courts to do other than give effect to the intentions of Parliament in primary legislation. Both the EU law and the Convention create interpretative duties which may require the courts to frustrate or fail to give effect to legislative intent. Further, EU law is (or was) supreme and may require the courts to go as far as to dis-apply statutory provisions. While the incorporation of the Convention does not permit courts to strike down primary legislation, a declaration of incompatibility may amount to a *de facto* political trump in that it obliges government or Parliament to act to cure the incompatibility.

In terms of the relationship between the courts and government, political constitutionalism understands that the executive has its own political and democratic legitimacy and that the primary way of holding the government to account for its policy- or decision-making, whether by exercise of discretionary decision making powers (of whatever source) or the making of delegated legislation, is through political processes, the most important of which are parliamentary. While political constitutionalism accepts judicial review in ensuring government does not exceed its statutory powers and meets its statutory duties, common

law grounds of review are problematic because the judiciary has no independent locus to police government decision-making, and the judiciary overriding government policy or decision-making is problematic from the perspective of both democratic legitimacy and institutional competence. Breaking that down more specifically, what is problematic is the courts overriding government policy- or decision-making on the basis that the process does not accord with judicial standards as to what was required. What is yet more problematic is the courts overriding government policy- or decision-making on the basis that the outcome, in terms of the merits of the policy or decision, does not accord with judicial standards. In those cases the judiciary are essentially usurping or supplanting democratic and political processes or outcomes. Again, the Convention and EU law are problematic because they give the courts the power to frustrate policy decisions reached by government, both in relation to the making of delegated legislation and the exercise of discretionary decision- or policy-making powers under statutory, prerogative and *de facto* powers.

These broad observations are the starting point as to how political constitutionalist thought conceives of the relationship between the courts and Parliament, and the courts and government, as to the limits of adjudication. Further, given these broad observations, it can be seen that political constitutionalism understands different modes of judicial decision-making to be more or less problematic. So, for, example, political constitutionalism accepts judicial review where the courts police the boundaries of legislative intent terms of ensuring government does not exceed its powers and meets its duties. Matters are problematic where the judiciary imposes common law principles of judicial review which frustrate executive decision- or policy-making processes, and more problematic where common law principles of judicial review are used to supplant executive decision or policy-making on the merits. And matters are similarly problematic where principles or doctrines

relating to the Convention or EU law are used to override the decisions of Parliament or government.

Given the central question - whether the limits of adjudication envisaged by political constitutionalism were exceeded by the judiciary when determining the judicial review claims that challenged the law and policy that implemented the austerity programme - a potential framework of analysis to answer the question becomes clear. That framework is to categorise the grounds of judicial review into: (a) statutory grounds, where the primary issue is the judicial interpretation and application of legislation; (b) common law grounds, where the primary issue is whether there has been compliance with principles created by the judiciary; and (c) Convention and EU law grounds where the judiciary are deciding whether there has been compliance with the requirements of the Convention or EU law. This framework is useful because each of those three modes of judicial decision-making raises different, albeit overlapping, issues given the shared attributes and beliefs common to political constitutionalist thought.

This framework is not without theoretical and empirical problems in that there are no bright line distinctions between the three modes of judicial decision-making. To give obvious examples: principles of statutory interpretation may be the creation of the common law;⁶⁷ common law duties may be in some way implicit in a statutory scheme; and deciding cases by reference to the Convention or EU law may require the interpretation of statutes. But, even allowing for those problems, political constitutionalist thought raises distinct issues as to the proper limits of adjudication - both in terms of what judges ought to be doing and how they ought to be doing it - in relation to each mode of adjudication.

⁶⁷ Sometimes referred to as the canons of construction or interpretation. See, for example, Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) [20.1].

To conclude, the purpose of this chapter was to make progress towards identifying the limits of adjudication in judicial review envisaged by political constitutionalism. It did so by analysing the contributions of Griffith, Tomkins, Bellamy, Gee, Webber and Ekins. The contributions have been taken on their own terms in the sense that there has been no critique of the arguments, and the analysis has been necessarily painted with a broad brush given the scale and complexity of some of the scholarship. In chapter 4 there is a shift of focus to address a different aspect of the central question: the methodology for identifying and analysing the adjudicated judicial review claims that challenged the law and policy that implemented austerity. The arguments of political constitutionalism are, however, revisited in chapters 5, 6 and 7. Each chapter is focussed on one of the three different modes of judicial decision-making identified above; and the second part of each chapter further ‘pins down’ where political constitutionalism locates the limits of adjudication in relation to the grounds analysed in that chapter.

Chapter 4

Methodology: purpose, value, development and implementation

1. Introduction

It has been said that ‘Lawyers are notorious among scholars of the humanities and social sciences for failing to engage in detailed analysis of methodology’.¹ This chapter seeks to avoid such notoriety by being transparent about - as the chapter title suggests - the purpose and value of the methodology, and then describing how it was developed and implemented. It is the final building block - after chapter 2 on austerity and chapter 3 on political constitutionalism - before this thesis turns to address the central question of whether the limits of adjudication envisaged by political constitutionalism were exceeded by the judiciary in determining the judicial review claims that challenged the law and policy that implemented the austerity programme. That question is answered in chapter 5 in relation to statutory grounds of review, chapter 6 in relation to common law grounds of review, and chapter 7 in relation to EU law and Convention grounds of review.

This chapter has seven further parts. Part 2 starts to explain the purpose and value of the methodology, or what this thesis does and why it does it. Part 3 is a broad overview of some of the existing empirical work in administrative law that is relevant to this thesis. It also sets out how this thesis fits in with, and follows on from, that scholarship. The chapter then turns to the design and implementation of the methodology: part 4 explains how a pool of judgments in judicial review claims was constructed; and part 5 sets out the test developed for identifying from that pool those cases that challenged the law and policy that implemented austerity, and such cases are defined as ‘austerity adjudications’. Part 6

¹ Paul Daly and Joe Tomlinson, ‘Introduction to Researching Public Law in Common Law Systems’ in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar 2023), 1.

seeks to make the process transparent by explaining how the austerity adjudications were identified; and by giving examples of the issues that arose in identifying austerity adjudications, and how those issues were resolved. Part 7 starts to develop the framework for analysing the austerity adjudications; and part 8 draws some initial conclusions and sets up the chapters that follow.

As to claims to originality and contribution, there is little in this chapter which is methodologically novel in terms of empirical techniques in that most are adopted from the research that is cited below.² What is original, though, is the development and application of the techniques to: (a) identify and then analyse decisions in judicial review claims that challenged the law and policy implementing austerity, a major, long-term, controversial political project; and (b) assess whether the limits of adjudication envisaged by political constitutionalism, a significant stream of public law scholarship, were exceeded in determining those claims.

2. Methodology - purpose and value

None of the political constitutionalist thought analysed in chapter 3 is entirely abstract or theoretical in that, at some level, it engages with constitutional developments in the UK since the 1970s. Some of the work is, however, more abstract in that it starts with high-level claims that political and democratic processes are more legitimate or effective at managing and resolving disagreements about how society ought to be organised; and some is more concrete in that it critiques, by reference to specific examples of judicial decision-making in judicial review, the expanded role of the judiciary in resolving disagreements, in particular the power to second-guess legislative decisions by Parliament

² As to a discussion of the various strands of research, see Sarah Nason, 'Public law and Empirical Legal research' in Daly and Tomlinson (n 1).

and governmental decision-making processes and decisions. All the work contains arguments about the judicial role, or what judges should and should not be doing, in a political constitution, whether the arguments are delivered in more or less abstract or concrete terms.

As to the more theoretical work, in particular that of Richard Bellamy and Adam Tomkins, it is limited empirically in that while claims are made about what judges ought or ought not to be doing in judicial review, there is limited engagement with the case law to identify the extent to which, whether and in what ways, judges are adjudicating issues they ought not to be. As to the more applied work, in particular some of the work of Graham Gee and Richard Ekins, while there is greater engagement with the case law, it too is limited empirically in that claims about the limits of adjudication being exceeded are based on a limited number of high profile judicial review cases rather than a representative sample. There is a tendency in political constitutionalist thought to focus on cases that support the conclusions being made and these are often apex court decisions that are more likely to be problematic or controversial cases that generate strong opinions.³ Without a robust empirical underpinning, however, it may be that too much significance is being attributed to these cases because they are unrepresentative or, worse, anomalies or aberrations.⁴

³ As to examples of the tendency, see: Richard Ekins and Graham Gee, 'Putting Judicial Power in its Place' (2017) 36 U Queensland LJ 375; Richard Ekins, Stephen Law and Conor Casey, 'The Impact of the Human Rights Act 1998 in Twenty-Five Cases' (Policy Exchange 2024). This is not to suggest that the decisions of apex courts do not change the constitutional parameters of judicial review, see: T T Arvind and others (eds), *Executive Decision-Making and the Courts: Revisiting the Origins of Modern Judicial Review* (Bloomsbury 2021).

⁴ Nason (n 2) 224 argues 'conclusions about the broader practice of the judiciary in public law (especially so-called 'judicial activism') are seemingly presented as 'facts', but are actually based on a selection of high-profile final appellate judgments'.

So, to be clear, the starting point here is not that political constitutionalist scholarship is wrong and the courts have not exceeded the limits of adjudication envisaged by political constitutionalism.⁵ Rather, the starting point is that: (a) political constitutionalist thought is influential and makes important claims, whether explicit or implicit, about the limits of adjudication being exceeded in judicial review; and (b) it lacks a structured and methodologically robust approach to determining the extent to which the limits have been exceeded. Given (a) and (b), there is value and originality in identifying, by way of an empirical method which casts the net wider and engages in a more systematic analysis of the evidence, the extent to which the limits have been exceeded.

The next part of this chapter engages with some of the relevant literature in a structured and detailed way, but for present purposes it is sufficient to record that the existence of this lacuna - a lack of robust empirical analysis as to the limits of adjudication being exceeded - is recognised in existing scholarship. The value and originality of this thesis is, therefore, that it addresses that lacuna in relation to a major area of public policy-making, specifically the judicial review claims that challenged the law and policy that implemented the austerity programme described in chapter 2. While the central question can be expressed in simple terms, behind it lays a series of more precise and instructive questions, including whether and in what ways the limits of adjudication were exceeded in relation to: (a) specific forms of governmental action (the making of primary or delegated legislation, or discretionary decision-making); (b) specific areas of public policy (for example welfare benefits or legal aid); (c) certain grounds of judicial review (for example common law or Convention grounds); and (d) by certain judges or courts in the judicial hierarchy. Having set out the

⁵ Indeed, some of the scholarship makes compelling arguments that the limits of adjudication have been exceeded. See, for example, the arguments of Ekins and Gee in relation to *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787 that the court departed from the legislative intent of Parliament in the Freedom of Information Act 2000, s 53. Ekins and Gee (n 3).

purpose and value of this thesis, the focus shifts to how this work adopts and advances existing empirical scholarship on judicial review.

3. Existing empirical scholarship in administrative law

Administrative law scholarship encompasses a diverse range of methodologies and an extremely broad field of study.⁶ All the work is surely empirical in some sense in that it observes and engages with what is happening, and analyses and describes how administrative law functions, whether that be doctrinally, procedurally, institutionally or normatively.⁷ No administrative law scholarship is entirely abstract in the sense of being estranged from what happens in the real world in terms of the law and practice relating to the creation, exercise and control of governmental powers and the redress mechanisms that exist. Turning to what characterises work that is explicitly empirical, such scholarship is generally understood to involve:

the systematic collection of information ('data') and its analysis according to some generally accepted method. Of central importance is the systematic nature of the process, both of collecting and analyzing the information. ...

Ultimately, the analyst engages in a process of interpreting the results of the analysis in order to link those results to the question motivating the research. ...

⁶ For an illustration of the breadth of such scholarship, see Marc Hertogh and others, *The Oxford Handbook of Administrative Justice* (Oxford 2021).

⁷ Simon Halliday makes the point: 'The exposition of public law in the textbooks is inevitably premised on an empirical claims about the identity of the major landmarks on the map, traditionally noted as the Crown, the House of Parliament, Ministers of the Crown and the courts'. Simon Halliday, 'Public Law' in Caroline Hunter (ed), *Integrating Socio-Legal Studies into the Law Curriculum* (Palgrave 2012).

Of central importance is the systematic nature of the process, both of collecting and analyzing the information.⁸

If this definition is used to narrow the the field of administrative law research, there is an important body of scholarship that is empirical, but not doctrinal and not court centred. The work includes socio-legal work on administrative decision-making, redress mechanisms - internal and external - other than judicial review, and the significance and effectiveness of those redress mechanisms.⁹ In broad terms, this socio-legal work takes a wide perspective on administrative law and explores how it functions. Given the central question posed by this thesis, and that it is focussed on administrative law in the narrow sense of decided judicial review claims, this thesis does not engage with or contribute to this work.

Turning towards empirical work that is court or litigation centred and focussed on judicial review, the most significant stream is that undertaken by Maurice Sunkin in collaboration with others (or vice-versa), often linked to the Public Law Project (PLP) and the University of Essex. The stream is perhaps best characterised as a continuing effort to understand the growth, functioning, and significance of judicial review over the last 40 years; and is

⁸ Peter Cane and Herbert Kritzer, 'Introduction' in Peter Cane and Herbert Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford 2010) 4.

⁹ For an account of this work, see: Marc Hertogh, 'Administrative Justice and Empirical Legal Research: Debunking the Ordinary Religion of Legal Instrumentalism' in Hertogh (n 6).

directed at evaluating previous, or shaping future, developments and reforms.¹⁰ The most relevant research in this stream for this thesis is that published by the PLP in 2015 which analysed judicial review claims that went to a final hearing in a 20 month period from July 2010 to February 2012.¹¹ Judgments from the British and Irish Legal Information Institute (BAILII) website were supplemented with judgments from Westlaw UK and information from solicitors where cases were unreported. As will be seen in part 4 of this chapter, this thesis adopts a similar approach to constructing a pool of judgments from which austerity adjudications are then identified.

Doctrinal empiricism

Narrowing the field yet further, there is a strand of work which has been described as ‘doctrinal empiricism’ or ‘systematic study’,¹² that is focussed on an empirical analysis of decisions in judicial review claims. There are differences of opinion about the value of this scholarship. Jason Varuhas has criticised the work as occupying an ‘an uneasy methodological space between doctrinal and empirical method’ and that there is a risk of

¹⁰ The work includes: an empirical study on judicial review claims from 1981 to 1986 (Maurice Sunkin, ‘What is Happening to Applications for Judicial Review’ (1987) 50 MLR 432); research to establish information on claimants and defendants; legal representation; reliance on legal aid; permission; and the progression and outcome of cases (Lee Bridges, George Meszaraos and Maurice Sunkin, *Judicial Review in Perspective* (2nd edn, Cavendish 1995)); research on the impact of judicial review (Genevra Richardson and Maurice Sunkin, ‘Judicial review questions of impact’ [1996] PL 79); the impact of the Bowman reforms (Maurice Sunkin, Kerman Calvo and Varda Bondy, ‘Judicial Review in Action - An Empirical Perspective’ (2006) 11 JR 275); mapping the unequal distribution of claims against local authorities (Lucinda Platt, Todd Landman, Maurice Sunkin and Kerman Calvo, ‘Mapping the use of judicial review to challenge local authorities in England and Wales’ [2007] PL 545); declining rates of permission (Varda Bondy and Maurice Sunkin, ‘Accessing Judicial Review’ [2008] PL 647); and settlement in judicial review claims (Varda Bondy and Maurice Sunkin, ‘Settlement in judicial review proceedings’ [2009] PL 237). This is by no means a comprehensive list of the work. See also: Robert Thomas, ‘Mapping immigration judicial review litigation an empirical legal analysis’ [2015] PL 652; Robert Thomas and Joe Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (Palgrave 2021)

¹¹ Varda Bondy, Lucinda Platt and Maurice Sunkin, ‘The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences’ (Public Law Project, 2015) 6.

¹² Jason Varuhas. ‘Mapping doctrinal methods’ in Daly and Tomlinson (n 1) 90.

reductionism leading to 'doctrinal aimlessness'.¹³ As suggested above, doctrinal study must in some sense be empirical in that the 'data' are the decided cases that doctrinal scholarship seeks to first describe and from there to derive, systemise and interpret principles. Varuhas' critique appears to go to the granularity of the analysis rather than the mode of analysis as such. Doctrinal work and 'systematic study' are both about analysing decided cases.

A contrary view on the value of such empirical work, of particular relevance to Varuhas' arguments and this thesis, is advanced by Paul Craig.¹⁴ In the context of claims of judicial overreach, essentially that the conventional limits of adjudication are being exceeded by the courts, Craig argues that such claims suffer from two methodological flaws. The first is mining and lumping such that examples of judicial overreach are mined and then lumped together to justify the conclusion of judicial overreach.¹⁵ The second is path dependency or the tendency to follow established intellectual tracks, ignoring evidence contrary to a conclusion of judicial overreach.¹⁶ These critiques echo the arguments in part 2 above as to the limitations of some political constitutional scholarship. If the empirical work is designed to test whether - in general, or in a particular policy area, or in relation to a particular doctrinal principle - the analysis of conventional doctrinal scholarship has been derived, systemised and interpreted so as to accurately reflect judicial decision-making, it

¹³ *ibid.*

¹⁴ Paul Craig, 'Judicial review methodology and reform' [2022] PL 19. This follows on from Craig's arguments in relation to the JPP's identification of 50 problematic cases said to illustrate the growth of judicial power. He argued the claims being made in relation to the problematic cases were powerful and important, and 'the more far-reaching the claim, the better must be the empirical and normative grounding for the argument'. See Paul Craig 'Judicial Power, the Judicial Power Project and the UK' (2017) 36 U Queensland LJ 355.

¹⁵ *ibid* 21.

¹⁶ *ibid* 27.

is hard to see why such work is not a legitimate academic enterprise that ought to be encouraged rather than deprecated.

As to examples of ‘systematic study’, the starting point is Craig’s work above. His corrective to mining and lumping and path dependence was an empirical analysis of the evidence in relation to the principle of legality from *Simms*.¹⁷ Craig’s methodology was to use Westlaw UK to identify judgments over a 20 year period where the principle was argued to assess whether the courts have gone beyond the conventional bounds of judicial review in applying the principle. While his analysis of cases that engaged the doctrinal principle of legality in *Simms* is perhaps less systematic than some of the work below, it has similar quantitative and qualitative aspects. Craig’s test for judicial overreach was whether the *Simms* principle was used by the courts to effectively trump legislative or executive decision-making expressed in primary or delegated legislation; or where the intensity of review is too stringent in terms of the court’s analysis of the decision-maker’s reasoning.

Craig identified only 24 cases out of around 208 in a 20-year period where the claimant succeeded on the basis of the *Simms* principle. Craig’s conclusion is that the courts routinely decline to apply the principle because the right being claimed is not within the remit of the principle, or the legislation precludes its application because it is not sufficiently general or ambiguous such that the principle can be applied. He argues that Varuhas’ doctrinal analysis of the principle is incomplete because of a lack of analysis of the cases where the courts declined to apply the principle, and there are more of these

¹⁷ *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL). In *Simms* it was held that an indiscriminate ban on serving prisoners being interviewed by journalists was unlawful on the basis that it infringed the principle of legality.

cases than those where the claimant was successful.¹⁸ While this thesis offers no conclusions on Craig's claims as to mining and lumping or path dependence, it shares his analysis that the claims of political constitutionalism in relation to the limits of adjudication being exceeded are susceptible to, and ought to be subject to, a robust empirical analysis. This thesis also adopts some of Craig's approaches in seeking to reach both quantitative and qualitative conclusions about the extent to which the limits of adjudication have been exceeded, albeit that the cases in this thesis are chosen by reference to a specific area of policy-making rather than a specific doctrinal principle.

As to other work that might be understood as 'systematic study', three further examples are the work of Sarah Nason, Richard Kirkham and Elizabeth O'Loughlin, and Lewis Graham.¹⁹ Nason's work - based on a sample of 482 Administrative Court judgments - is a reinterpretation of judicial review in England and Wales away from a conventional doctrinal understanding framed around the grounds of judicial review and towards an explanation that it is concerned with the advancement of justice and good governance.²⁰ Using an empirical analysis aimed at identifying the operative reasons for deciding cases, Nason groups the reasons into six taxonomical categories: (1) procedural impropriety, (2) mistake (whether of logic, fact or law), (3) illegality (most commonly misinterpretation of a statutory power), (4) discretionary impropriety (relevant/irrelevant considerations and lack of justification), (5) breach of an ECHR right and (6) significant claims based on common law constitutional values, rights or allocation of powers and public interest claims.²¹ While the

¹⁸ Craig (n 14); Jason Varuhas, 'The Principle of Legality' (2020) 79 Cambridge LJ 578.

¹⁹ There is other such work, notably that of Joanna Bell. See Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020).

²⁰ Sarah Nason, *Reconstructing Judicial Review* (2016, Hart). Nason analysed all reported Administrative Court judgments in two periods (1 January 2013 to 31 July 2013 and 1 January 2015 to 31 July 2015). There are other aspects of the work that include surveys and interviews.

²¹ *ibid*, 25.

aims of this thesis are more modest than seeking to reconstruct judicial review, it shares Nason's 'ground-up' empirical approach in that it identifies a body of decided judicial review claims and engages in a close analysis of the decisions.

The work of Kirkham and O'Loughlin relevant to this thesis is their analysis of judgments in cases relating to the decisions of ombuds in the UK, including applications for permission and substantive decisions.²² They start from the position - similar to that adopted by Craig above - that judicial decision-making may not reflect administrative law principles in textbooks in that: the focus there tends to be on decisions of appellate courts; the analysis may be affected by research biases; and debates are conducted through an unproductive 'war of examples'.²³ The method adopted by Kirkham and O'Loughlin was to code the arguments advanced by the claimants into six categories (statutory interpretation, procedural impropriety, discretionary impropriety, mistake, breach of the ECHR, and quality of decision) and then to use that taxonomy as a basis for a detailed analysis of the decisions.

Kirkham and O'Loughlin's broad findings are that most cases were entirely orthodox in terms of judicial approaches to statutory interpretation, common law grounds, and the use of precedent; but with evidence of the judiciary performing what are essentially hortatory

²² Richard Kirkham and Elizabeth O'Loughlin, 'Judicial review and ombuds a systematic analysis' [2020] PL 680; and Richard Kirkham and Elizabeth O'Loughlin 'A Content Analysis of Judicial Decision-Making' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2020). Kirkham's work goes beyond studying judicial review challenges to the decision of ombuds. See, for example, Richard Kirkham, 'Judicial review litigation effects and the ombudsman' (2018) 40 *Journal of Social Welfare and Family Law* 110.

²³ Kirkham and O'Laughlin cite some interesting work from the US which suggests that the evidential basis for doctrinal claims is unclear or imprecise and argues for a more exacting methodology in the form of 'systematic reviews'. See William Baude, Adam Chilton, and Anup Malani 'Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews' (2017) 84 *U Chicago LR* 37.

functions in relation to imposing standards on ombuds as to procedural fairness and the quality of reasoning; and also a degree of institutional design work in terms of the respective responsibilities of complainants, public bodies, and ombuds. Perhaps the most significant aspect of the work of Kirkham and O'Loughlin for this thesis is the use of coding to facilitate analysis and the identification of criteria which suggested the judiciary had gone beyond the conventional parameters of judicial review. The criteria included such matters as: the employment of non-traditional approaches to statutory interpretation; departure from precedent; reliance on substantive as opposed to procedural grounds of review; and development of the common law. As will be seen below, this thesis codes the grounds of review using a taxonomy, though one that is specifically tailored to the limits of adjudication envisaged by political constitutionalism. It also adopts similar criteria, albeit applied in a more qualitative way, to determine whether the limits of adjudication were exceeded.

Lewis Graham's work relevant to this thesis includes his analysis of whether the Supreme Court has become more restrained or deferential in public law cases in recent years.²⁴ Graham's analysis is framed around the relationships between the Court and the legislature, and the Court and the executive. In relation to Parliament, Graham identifies that the Court has adopted a more deferential approach to primary legislation in assessing its compatibility with the Convention, both in its own terms and by taking a conservative approach to the jurisprudence of the European Court of Human Rights (ECtHR); and, in relation to delegated legislation, subjecting it to a less intensive standard of review

²⁴ Lewis Graham, 'Has the UK Supreme Court Become More Restrained in Public Law Cases?' (2024) 87 *Modern Law Review* 1073. Graham's monograph on decision-making in the Supreme Court over its first ten years was published too recently to be taken account of here. See: Lewis Graham, *Judicial Individuality on the UK Supreme Court* (Hart 2025).

because it had been subject to parliamentary scrutiny.²⁵ In relation to government, Graham argues that there is evidence of the Court showing increased deference to discretionary decision- and policy-making in a range of administrative law contexts in the application of both common law procedural and substantive grounds of review. In both cases, what seems to be driving the restraint or deference is the Court conceptualising some issues as involving political choices and being matters for Parliament and government, in particular when it comes to the allocation of resources and social policy.²⁶ Graham argues the evidence of restraint is weaker when it comes to the Court's relationship with lower courts, in terms of upholding or reversing decisions; and its approach to statutory interpretation. The significance of Graham's work to this thesis is: its quantitative and qualitative empirical analysis of a body of decided cases, albeit that his work relates to decisions of a specific Court rather than a particular area of public policy-making; his use of coding to analyse cases; and his framework for analysing judicial restraint or deference.

The limits of adjudication

Finally in this part, there is specific work that identifies how the conventional limits of adjudication have been understood in cases that raise issues about public spending or the allocation of resources; and work that identifies how to assess if the limits have been exceeded. From a general perspective, Tony Prosser's work includes a detailed study of the economic constitution which engages with the constitutional mechanics of fiscal and monetary policy in descriptive and normative terms.²⁷ He engages with the significance of

²⁵ Significantly, this thesis arrives in chapter 8 at a more nuanced conclusion as to the relevance and weight attached to parliamentary scrutiny and approval of delegated legislation in the austerity adjudications.

²⁶ Several of the cases Graham cites are identified as austerity adjudications by this thesis and analysed in subsequent chapters.

²⁷ Tony Prosser, *The Economic Constitution* (OUP 2014).

judicial review in relation to fiscal policy, in particular the contrast between taxation and spending, and central and local government. In relation to central government, Prosser identifies that the 'area of economic management by central government is one in which the courts have traditionally been reluctant to intervene by judicial review, and this has been especially so in relation to decisions involving resource allocation',²⁸ which is contrasted with local government where the courts have been more interventionist and interpreted statutory powers narrowly and developed the concept of a fiduciary duty owed to those funding local authority (LA) spending.²⁹ Prosser cites the *Pergau Dam* case as perhaps indicative of a more interventionist approach in relation to central government where a statutory power was narrowly and controversially construed.³⁰ In relation to spending, Prosser also argues that the courts have taken a strict approach to the imposition of specific taxation while being less strict in relation to the formulation of tax policy more generally. Further, while the courts have continued to show considerable deference to public authorities on matters of economic policy, both the Convention and EU law offer the possibility of the courts engaging in a more intense standard of review. The extent to which the Convention and EU law have led to a more exacting standard of review is a central issue in chapter 7 which considers challenges on EU law and Convention grounds to the law and policy that implemented austerity.

²⁸ *ibid* 53, 54, 114, 115, 116. Prosser cites Lord Scarman in *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240 (HL), 250 'the levels of public expenditure and the incidence and distribution of taxation are matters for Parliament'.

²⁹ *ibid* 53. Prosser cites the GLC Fares Fair case *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 (HL); *Credit Suisse v Allerdale Borough Council* [1997] QB 306 (CA).

³⁰ *R v Secretary of State for Foreign and Commonwealth Affairs, ex p the World Development Movement Ltd* [1995] 1 WLR 386 (DC). Prosser also cites *R (Luton BC) v Secretary of State for Education* [2011] EWHC 217 (Admin). The grounds of review in *Luton BC* are considered in both chapters 5 and 6.

Jeff King's work on the justiciability of resource allocation is doctrinally focussed and seeks to explain and render more coherent - though not defend - the approaches of the courts to the justiciability of resource allocation disputes in administrative law.³¹ King identifies the concept of 'discretionary allocative decision-making' where a decision-maker decides to allocate resources under a discretionary power. Whether or not, or perhaps the extent to which, a power is discretionary is a complex issue. In broad terms, King identifies three strands of cases. The first is the familiar use of 'may' or 'shall' in legislation where the former indicates a discretionary power subject only to review for an allowable purpose. The second is where the statutory language appears to confer on the decision-maker the power of deciding whether the conditions required for the exercise of the power are met. Here, the subjective discretion is more or less pure in the sense of being more or less conditioned by statutory terms which are capable of limiting or conditioning the discretion. The third is where a subjective discretion exists even where subjective language is not used, but the court concludes that the decision-maker is in a better position than the court to define an ambiguous term relating to the exercise of the power. This third issue raises the question of whether the courts are applying a 'correctness' or 'rationality' standard to the decision-maker's understanding of the ambiguous term and King observes that political values may affect judicial decisions here.

King argues that where: (a) a decision-maker decides to allocate resources under a discretionary power (whether in statute or delegated legislation); (b) the financial cost of the allocation is relevant to the correctness, reasonableness, or propriety of the decision; and (c) the challenge is on *Wednesbury* grounds; then the courts treat the decision as

³¹ Jeff King, 'The Justiciability of Resource Allocation' (2007) 70 MLR 197.

raising non-justiciable issues.³² This aligns with Mark Elliott's analysis below in relation to non-justiciability as a parameter by reference to which the conventional limits of adjudication can be identified. Where, however, the decision-maker eschews the argument that cost of the allocation is a relevant consideration, then the non-justiciability bar does not arise.³³ King's conclusion is:

- (1) if the power is defined using 'may' with no further qualification, and the power applies to the subject-matter at issue, then it is likely to be discretionary;
- (2) if it is a grant of pure subjective discretion, it is likely to be discretionary; (3) if it is a grant of mixed subjective discretion, it is liable to review for error of law and not just *Wednesbury* review, the scope of review to be determined by the meaning of terms constraining the discretion and the evidence of the grounds of decision; and (4) if it is a statutory term requiring interpretation, and not a power, it is a question of judgment and not discretion, but deference may be appropriate and should be evaluated on a case-by-case basis.³⁴

Finally, King identifies exceptions where the non-justiciability principle does not apply. First, there is the concept of super-*Wednesbury* and the justiciability bar not applying where the decision-maker acts in bad faith or for an improper purpose; or in cases of manifest

³² King cites as authority: *Nottinghamshire CC* (n 28); *R v Secretary of State for the Environment, ex p Hammersmith and Fulham LBC* [1991] 1 AC 521 (HL) in relation to matters of national economic policy; and *R v Cambridge Health Authority, ex p B* [1995] 2 All ER 129 (CA) 137 in relation allocative decision-making.

³³ King cites *R (Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392, [2006] 2 WLR 2649 as an example.

³⁴ King (n 31) 207.

absurdity.³⁵ Second, in cases which engage substantive legitimate expectation.³⁶ And third, the above analysis does not apply in cases where the challenge is on the basis that the exercise of discretion is other than in conformity with the Convention where there is 'a mandate for a more robust review of discretion' which engages issues as to proportionality and the margin of appreciation.³⁷ At the centre of King's analysis is the complex issue of the circumstances in which the courts ought to defer to the decision-maker where Parliament has, to a greater or lesser extent, given the discretion to the decision-maker; and when the courts ought not to defer because the discretion has been exercised other than in accordance with the intention of Parliament. As with the other work, King's analysis provides a useful structure for analysing whether the conventional limits of adjudication have been exceeded, in particular a structure for analysing whether the courts have avoided the non-justiciability doctrine, or where judicial values appear to have had an impact on the degree of deference shown in a way that is inconsistent with the statutory words.

The final contribution in this part is from Elliott, who has - in a similar way to Kirkham and O'Loughlin - identified three parameters by which judicial overreach could be measured based on conventional constitutional understandings.³⁸ The three are: (a) the principle of parliamentary sovereignty and the role of the courts being to take the legislation enacted by Parliament and give effect to it in the way that best implements the intention that Parliament was taken to have had; (b) the appeal-review distinction between the merits

³⁵ King cites *Hammersmith and Fulham* (n 32); and see also Paul Daly, 'Wednesbury's reason and structure' [2011] PL 238,

³⁶ King cites *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 (CA).

³⁷ King (n 31) 220.

³⁸ Mark Elliott, 'Judicial Power and the United Kingdom's Changing Constitution' (2017) 36 U Queensland LJ 273.

and legality of discretionary decision-making, and the traditionally limited role of the courts as to the former; and (c) the concept of non-justiciability in that some matters are in an absolute sense not amenable to being examined by the courts. Having identified the parameters, Elliott goes on to analyse two controversial cases, one of which is *Evans*,³⁹ and his conclusion is that three of the five judges who formed the majority in the Supreme Court construed the power of ministerial veto in the Freedom of Information Act 2000 so narrowly as to be exercisable only in unlikely circumstances. Elliott argues that while judicial latitude exists, a plausible reading of statute ‘lies at the very core of the notion of parliamentary sovereignty’, and ‘the fact that the plurality assigned to the veto provision a construction that rendered it something close to a dead letter might well be thought to signify that any interpretive latitude was plainly exceeded’.⁴⁰ Elliott’s analysis is particularly relevant to chapter 5 in relation to statutory interpretation and chapter 6 in relation to common law substantive grounds.

What, then, can be made of this scholarship in the context of this thesis? Developing the points made in the second part of this chapter, it is recognised that, in general, ‘there is more going on’ than can be accounted for by conventional doctrinal scholarship on administrative law. Further, there are good arguments that there is an evidential or empirical lacuna in relation to claims of judicial overreach or that the limits of adjudication have been exceeded, whether that lacuna results from a limited engagement the case law, or the influence of specific narratives as to what the judiciary are doing in judicial review, or some other reason. Given that position, and turning back the purpose of this thesis, there is value and originality in using a rigorous empirical method to test whether and in what

³⁹ *Evans* (n 5). The other case was *Miller v Secretary of State for Exiting the EU* [2017] UKSC 5, [2018] AC 61.

⁴⁰ Elliott (n 38) 283.

ways the limits of adjudication envisaged by political constitutionalism were exceeded in the judicial review challenges to a major, long-term, controversial area of public policy-making. Helpfully, there also exists within the above literature various techniques or approaches, both quantitative and qualitative, which can be adopted or adapted to arrive at a robust empirical methodology to answer the question of whether and in what ways the limits of adjudication were exceeded in the challenges to the law and policy that implemented the austerity programme. The methodology has to fit the purpose of this thesis and the remainder of this chapter describes the development and implementation of that methodology.

4. Creating the pool of potential austerity adjudications

This part describes the process for constructing a pool of judgments in decided judicial review claims from which the cases that challenged the law and policy that implemented the austerity programme described in chapter 2 were identified. The two main issues for constructing the pool were: (a) the period of time for inclusion; and (b) the source(s). A similar approach was adopted as in some of the work identified above.

In relation to the period of time, judicial review claims have a number of significant dates, including: the date of the event or events that gave rise to the claim; the date on which the claim was issued; the date of any hearings; and the date of the judgment. The date of judgment is usually later than the other dates, save where an extemporaneous judgment is given. Of these dates, it is only the date of the judgment that is recorded as a piece of metadata (data that gives information about other data) in legal databases that can be used for searching and sorting purposes. Since extracting the other dates from the judgments was not - without a Stakhanovite effort or the effective use of artificial intelligence - possible, then the date of judgment had to be used for setting the time period

for the pool. The formation of the coalition government after the May 2010 general election marked the political start of austerity and the first significant announcements came in the emergency budget on 22 June 2010. The chosen start date was judgments given on or after 1 June 2010 on the basis that it was unlikely that claims challenging the law and policy that implemented austerity were handed down before that date, and yet more unlikely that expedited claims were adjudicated before then.

Any end date is to a degree arbitrary since it is not possible to state definitively when the austerity programme ended, still less when all the claims challenging the law and policy implementing austerity had all been adjudicated. The political demise of austerity was being announced from late-2018 while some of the implementing law and policy continued to come into effect. On the basis that the September 2019 spending round announced significant spending increases,⁴¹ a cut-off date of 31 May 2020 for judgments was chosen to give a round ten-year period. Having completed the process of identifying and analysing judgments, there is merit in the argument that the period ought to have been two years longer to ensure all cases were ‘caught’. In particular, there is at least one relevant judgment in a welfare benefits cases given after 31 May 2020.⁴² However, given: (a) the cut-off date is nine months after the austerity programme is generally considered to have ended; and (b) the total period is ten years; then, given those limitations are made explicit, the risk of missing some judgments does not significantly impair the validity or value of this thesis. As will be seen below, any appeals in cases where judgment at first instance was given in the ten-year time period are included in the analysis even where the appeal judgments were given after the end of the ten-year period.

⁴¹ HM Treasury, *Spending Round 2019* (CP 170, September 2019).

⁴² *R (TP) Secretary of State for Work and Pensions* [2022] EWHC 123 (Admin), [2022] PTSR 1092.

When it came to constructing the pool, the obvious starting point was Administrative Court judgments because that Court generally determines judicial review claims at first instance, and its decisions can be identified in legal databases using the neutral citations given to Administrative Court judgments since 2001.⁴³ There are three issues with this approach. First, it limits the analysis to England and Wales.⁴⁴ Scotland and Northern Ireland were not immune from public spending cuts,⁴⁵ and the law and policy that implemented austerity identified in chapter 2 extended beyond England and Wales, notably in relation to taxation and welfare benefits in Scotland where the administration is undertaken by HMRC and the DWP respectively for England, Wales and Scotland.⁴⁶ The consequence of using Administrative Court judgments as a starting point is that it only includes judgments in claims issued in England and Wales, and the subsequent analysis is therefore limited to England and Wales.

Second, using Administrative Court neutral citations cannot identify all judicial review judgments because the Administrative Court does not have exclusive first-instance jurisdiction. The Upper Tribunal (UT) has had a limited jurisdiction to deal with judicial

⁴³ Neutral citations allocated by the court were introduced for every division of the High Court and Court of Appeal with effect from 11 January 2001 by *Practice Direction (Judgments: Form and Citation)* [2001] 1 WLR 194. Judgments of the Administrative Court are in the form: '[YEAR] EWHC (Admin) XXX'.

⁴⁴ Judicial review claims in Scotland are made to the Court of Session Outer House under Chapter 58 of the Court of Session rules; and in Northern Ireland are made to the High Court under Order 53 of the Rules of the Court of Judicature (NI) 1980.

⁴⁵ Block grant funding for Scotland from the UK government fell by 6% in real terms between 2010 and 2018. David Phillips, 'IFS Briefing Note BN321 - How and why has the Scottish Government's funding changed in recent years?' (Institute for Fiscal Studies, March 2021).

⁴⁶ The Scotland Act 2016 pts 2 and 3 did shift some taxation and welfare benefits powers to the Scottish Parliament and Government.

review claims since 2008,⁴⁷ and sometimes the Court of Appeal effectively determines claims at first instance.⁴⁸ In relation to the UT, Practice Directions have been issued to allow the transfer of two classes of case: challenges to decisions of the First-tier Tribunal (FTT) under the Criminal Injuries Compensation Scheme where there is no other right of appeal;⁴⁹ and challenges to immigration and asylum decisions on leave to enter or remain outside the immigration rules, and immigration decisions of the FTT where there is no right of appeal to the UT.⁵⁰ The latter jurisdiction specifically excludes challenges to the validity of primary or subordinate legislation, and declarations of incompatibility. These cases must still be heard in the Administrative Court. Given the limited jurisdiction of the UT in judicial review, in terms of the type if not the number of cases,⁵¹ using only Administrative Court cases to construct the pool of judgments is defensible because UT judicial review claims

⁴⁷ The Tribunals, Courts and Enforcement Act 2007, s 19 inserted by the Senior Courts Act 1981, s 31A 'Transfer of judicial review applications to Upper Tribunal' and was in force from 3 November 2008 (The Tribunals, Courts and Enforcement Act 2007 (Commencement No 6 and Transitional Provisions) Order 2008, SI 2696/2008, art 5. Amendments to s 31A were made the Crime and Courts Act 2013, s 22.

⁴⁸ In *R (Howard League for Penal Reform) v Lord Chancellor* [2014] EWHC 709 (Admin), permission was refused by a Divisional Court on a challenge to reduce the availability of legal aid for prison law. Permission was granted by the Court of Appeal in *R (Howard League for Penal Reform) v Lord Chancellor* [2015] EWCA Civ 819 and it retained jurisdiction to determine the claim and did so in *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244, [2017] 4 WLR 92. *Howard League* is a significant case analysed in chapter 6.

⁴⁹ *Practice Direction (Upper Tribunal: Judicial Review Jurisdiction)* [2009] 1 WLR 327.

⁵⁰ *Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) (No 2)* [2012] 1 WLR 327. Subsequently revised: See also: *Practice Direction: Immigration Judicial Review in the Immigration and Asylum Chamber of the Upper Tribunal* <<https://www.judiciary.uk/wp-content/uploads/2013/11/uti-ac-immigration-claim-01112013.pdf>> accessed 1 May 2025.

⁵¹ The transfer of most immigration and asylum cases from the Administrative Court to the Upper Tribunal accounts for the fall in judicial review applications from around 15,500 in 2013 to around 4,000 in 2014. Ministry of Justice, 'National Statistics: Civil Justice Statistics Quarterly: October to December 2020' (March 2021) <<https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2020/civil-justice-statistics-quarterly-october-to-december-2020#judicial-reviews3>> accessed 1 May 2025. As to an analysis of this, see Thomas and Tomlinson (n 10).

are unlikely - subject to the third issue below - to include judgments in cases that challenged the law and policy that implemented the austerity programme.⁵²

Third, the law and policy that implemented austerity could be challenged other than by judicial review. In particular, it could be challenged by appeals to FTTs and the UT, and then on further appeal to the Court of Appeal and Supreme Court. This is of particularly relevance in welfare benefits cases. So, for example, *Carmichael* was an appeal against decisions of the DWP to a FTT, the UT and then the Court of Appeal about the imposition of the bedroom tax and the appellant argued the relevant regulations should be dis-applied since they had been found by the Supreme Court to breach the Convention.⁵³ There are a limited number of such challenges to various aspects of the welfare benefit reforms that were implemented as part of the austerity programme.⁵⁴ Using Administrative Court judgments as a starting point means challenges which originate in the FTT are excluded from consideration.⁵⁵

While using Administrative Court judgments as the pool to identify adjudicated claims that challenged the law and policy that implemented the austerity programme created certain limitations, some limits were necessary if the scope of this thesis was to be kept within manageable bounds. While the above issues do narrow the scope of this thesis, they are

⁵² There was a judicial review challenge to the legality of aspects of an amended Criminal Injuries Compensation Scheme implemented as part of the austerity programme which was heard at first instance in the Administrative Court. *R (A) v Criminal Injuries Compensation Authority* [2017] EWHC 2 (Admin).

⁵³ *Secretary of State for Work and Pensions v Carmichael* [2018] EWCA Civ 548, [2018] 1 WLR 3429.

⁵⁴ Other examples are *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117; *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250; *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 WLR 6430.

⁵⁵ This was a finely balanced decision. The decision was reached on the basis that including these cases would not significantly contribute to answering the central question.

explicit and are not of a nature or degree to significantly impair its ability to answer the central question.

When it came to the mechanics of constructing the pool, BAILII and Westlaw UK were used. Neither database will, however, process a search query that provides a complete set of Administrative Court judgments for the specified ten year period. The search queries are blocked by the BAILII and Westlaw websites, presumably because they place too great a demand on the servers or indicate unauthorised activity. Lists of judgments in spreadsheet form for the ten-year period were obtained from BAILII,⁵⁶ and Westlaw.⁵⁷ There were around 5,900 judgments in the BAILII spreadsheet and 9,500 in the Westlaw spreadsheet. Both spreadsheets included case names and neutral citations. There were some immaterial errors in the data.⁵⁸ The spreadsheets were combined into a single Microsoft Excel file and a function used to establish whether the neutral citations on the BAILII sheet appeared on the Westlaw sheet and vice versa. On the basis of neutral citations, there were around 500 judgments unique to BAILII, 4,000 judgments unique to Westlaw, and

⁵⁶ In response to an email request, BAILII's database administrator, Roger Bell-West, ran a database query that produced a CSV spreadsheet of all judgments in BAILII's 'England and Wales High Court (Administrative Court) Decisions' category for the 10 year period.

⁵⁷ In response to an email request, an unknown database administrator at Westlaw ran a database query that produced an Excel spreadsheet of all judgments in Westlaw's 'Administrative Court' category for the 10 year period.

⁵⁸ The errors include: (a) the BAILII spreadsheet included two judgments where the case name was in the neutral citation field; (b) the spreadsheets included non-Administrative Court judgments that BAILII and Westlaw appear to have wrongly classified as Administrative Court judgments; and (c) the spreadsheets included judgments where the court had wrongly allocated a non-Administrative Court neutral citation but where BAILII or Westlaw have correctly classified the judgment as Administrative Court. So, for example, *R (MA) v Secretary of State for Work and Pensions* [2013] EWHC 2213 (QB) and *R (Newman) v Parliamentary and Health Service Commissioner* [2017] EWHC 3336 (TCC) are Administrative Court cases despite being having Queen's Bench and Chancery and Technology and Construction Court neutral citations respectively.

10,000 judgments in total.⁵⁹ Having constructed the pool, the next stage was to identify the austerity adjudications.

5. Identifying austerity adjudications - developing the test

This part describes the test for identifying from the pool those judgments in claims that challenged the law and policy that implemented the austerity programme, defined as ‘austerity adjudications’. While the definition of austerity adjudications has the advantage of being succinct, it has the disadvantage of being potentially misleading. The definition does not mean only those adjudications that challenged the merits of aspects of the austerity programme implemented from 2010, either in general or in a specific area of public policy. As will be seen below, the definition is wider. Nor does the definition mean adjudications made in the circumstances of austerity in the sense of where spending cuts affected the operation of the justice system or availability of legal aid.⁶⁰ There are, though, a number of austerity adjudications where the challenge was to court closures, tribunal fees, and the reduced availability of legal aid.

As to what the definition of austerity adjudication does mean, it was not defined in advance and then applied to the pool, but was developed iteratively as judgments were considered.

An initial pilot study was undertaken to identify austerity adjudications from judgments published by BAILII in the category of ‘England and Wales High Court (Administrative

⁵⁹ The most likely explanation for Westlaw having significantly more judgments is that provided by BAILII: where judgments are given orally rather than handed down on paper, copyright in the transcript may be owned by the shorthand-writer or law report publisher. These judgments cannot be added to BAILII without the consent of the shorthand-writer or publisher and BAILII does to have the funds to licence the content. BAILII, ‘FAQs - Why are there not more English High Court judgments available on BAILII?’ <<http://www.bailii.org/bailii/faq.html#ewhc>> accessed 1 May 2025. Judgments that were previously released to BAILII have been released to the National Archives since 19 April 2022.

⁶⁰ As to this issues, see for example: Jon Robbins and Daniel Newman, *Justice in a Time of Austerity: Stories From a System in Crisis* (Bristol 2021).

Court) Decisions' for 2012.⁶¹ Aside from the citation and case name, the judgments are not further differentiated on BAILII in terms of the nature of the claim.⁶² The problem raised by the pilot study was how to define austerity adjudications given the complexity of the jurisdiction of the Administrative Court and the scale of its decision-making.⁶³ There are two dimensions of complexity to address.

The first dimension essentially amounts to a further limitation of this thesis. Many Administrative Court judgments determine a range of interim and procedural issues (including permission, interim relief, evidence and remedies) rather than adjudicating the substantive grounds of judicial review. While all judicial review claims raise interim and procedural issues, whether an issue generates a published judgment depends on whether the parties can agree matters between themselves, in that uncontested issues maybe resolved by consent, whether by way of a consent order or less formally; and whether the contested issue is decided judicially in a written judgment, rather than extemporaneously or otherwise without a judgment. While interim and procedural issues are relevant to the limits of adjudication (most obviously in relation to permission, amenability and

⁶¹ <<http://www.bailii.org/ew/cases/EWHC/Admin/2012/>> accessed 1 May 2025. There are approximately 750 judgments in the category.

⁶² Though, of course, the case name gives a fair idea of the type of claim. So, for example, claims where the defendant is the name of a magistrates' court are almost certainly appeals by way of case stated and claims where the defendant is the name of a local authority are highly likely to be either planning cases or cases challenging the decision of a local authority in relation to service provision.

⁶³ As to the complexity, variety and 'messiness' of administrative law in terms of legislative frameworks and legal relationships, see Joanna Bell (n 19) ch 3.

remedies),⁶⁴ judgments on interim and procedural matters are excluded from the definition of austerity adjudications because they do not, by definition, adjudicate the substantive challenges to the law and policy that implemented austerity. This thesis is only concerned with the limits of adjudication insofar as they relate to the grounds of judicial review and it therefore only needed to identify judgments that determined those grounds.⁶⁵

The second dimension of complexity is the range of Administrative Court claims that give rise to judgments. The jurisdiction includes (or included at the time) claims relating to: *habeas corpus*;⁶⁶ applications for civil proceedings restraint orders under its own motion or on the application of the Attorney General (AG);⁶⁷ appeals ‘by way of case stated’ and judicial review of decisions of magistrates’ courts and the Crown Court;⁶⁸ applications in

⁶⁴ There were several interesting austerity-related permission decisions. See, for example, *R (Fawcett Society) v HM Treasury* [2010] EWHC 3522 (Admin) (Ouseley J) was a challenge to the June 2010 Emergency Budget on the basis that there had been a breach of the equality duty under the Sex Discrimination Act 1975, section 76A. The Chancellor argued against permission on the basis that the various budget decision made the preparation of an equality impact assessment inappropriate and because of the ‘the polycentric nature of the decision-making process’. Permission was refused. Ouseley J agreed [8] ‘... if the analysis of gender equality impacts can be adequately be undertaken by consideration of the line items in the Budget, the duty is fulfilled or rather not breached by its being dealt with in that way at that stage’. See chapter 5 for the many case where permission was granted to challenge the law and policy that implemented the austerity programme on the grounds of breach of one or more of the equalities duties.

⁶⁵ An important qualification here is that some judgments determine both substantive and interim or procedural issues are not excluded. Most significantly are judgments in ‘rolled-up’ hearings where both permission and substantive issues are determined in the same judgment having being dealt with at the same hearing either sequentially or contemporaneously. Such judgments are only analysed in relation to grounds where permission is granted. CPR 54 makes no provision for ‘rolled-up’ hearing. The procedure is most recently set out in Courts and Tribunal Judiciary, ‘The Administrative Court - Judicial Review Guide 2024’ (October 2024) 65 <https://www.judiciary.uk/wp-content/uploads/2022/09/24.85_HMCTS_Administrative_Court_Guide_WEB1.pdf> accessed 1 May 2025.

⁶⁶ See CPR 87.

⁶⁷ Senior Courts Act 1981, s 42 and CPR 3.11 and PD 3C.

⁶⁸ The jurisdiction in relation to the Crown Court is limited by the Senior Courts Act 1981, s 29(3) to matters except those ‘relating to trial on indictment’.

relation to inquests and coroners;⁶⁹ enforcement of duties in relation to public contracts;⁷⁰ appeals in relation to extradition proceedings;⁷¹ applications for fines or committal for contempt of court;⁷² appeals against suspension, fitness to practise and similar decisions reached by a range of self-regulating and externally regulated professions;⁷³ various applications and appeals relating to planning,⁷⁴ highways and footpaths,⁷⁵ and commons;⁷⁶ various applications relating to statutory undertakings;⁷⁷ age assessment for eligibility for LA children's services;⁷⁸ appeals in relation to decisions on injury benefits for police officers;⁷⁹ and various applications in relation to the proceeds of crime, including civil recovery and unexplained wealth orders.⁸⁰

⁶⁹ Including the Coroners Act 1988, s 13 which contains powers to order an inquest and quash inquest findings.

⁷⁰ Public Contract Regulations 2005 SI 2015/102, pt 3.

⁷¹ Extradition Act 2003, ss 103 to 116.

⁷² Contempt of Court Act 1981, s 14 and CPR 87.

⁷³ Three examples: the Administrative Court deals with appeals against decisions of the Nursing and Midwifery Council's Conduct and Competence Committee under The Nursing and Midwifery Order 2001 (SI 2002/253), art 38; appeals against registration and disciplinary decisions of Architects Registration Board or its Professional Conduct Committee under the Architects Act 1997, s 22; and appeals against prohibition orders made by the Secretary of State under the Teachers' Disciplinary (England) Regulations 2012 (SI 2012/560), reg 8.

⁷⁴ For example, planning decisions and enforcement notices under the Town and Country Planning Act 1990, ss 288 and 289 respectively; and planning strategies and plans under Planning and Compulsory Purchase Act 2004, s 113.

⁷⁵ For example, decisions in relation to highways under the Highways Act 1980, sch 2; and decision in relation to footpaths under the Wildlife and Countryside Act 1981, ss 53, 54 and sch 15.

⁷⁶ Commons Act 2006, s 19.

⁷⁷ For example, enforcement decisions and penalties in relation to regulated providers or undertakers under the Electricity Act 1989, s 27E, Gas Act 1986, s 30E, and the Water Industry Act 1991, s 21.

⁷⁸ An age-assessment decision of a local authority of a person for the purposes of the Children Act 1989 is not subject to review on conventional judicial review grounds but a question of precedent fact to be determined on the balance of probabilities by the court. *R (A) v Croydon LBC* [2009] UKSC 8, [2009] 1 WLR 2557.

⁷⁹ Police (Injury Benefit) Regulations 2006 (SI 2006/932), reg 34.

⁸⁰ The jurisdiction is largely covered by the Proceeds of Crime Act 2002.

Most of these claims relate to decisions, actions or failures to act in the exercise of public functions where there might conceivably be some nexus between the decision being challenged and the austerity programme in that spending considerations influenced the decision. Two illustrations are provided. First, when it comes to a decision of the AG on making an application for a civil restraint order, it is not obvious how a decision could be significantly influenced by the austerity programme. That said, financial considerations could be a relevant factor in terms of the costs of bringing the claim, whether alone or balanced against the costs to the justice system of not doing so and allowing a vexatious litigant unrestricted access to the courts. Second, a decision by a local authority in relation to the age of a person may be influenced by austerity-related spending considerations.⁸¹ Where an LA decides a person is a child, this gives rise to duties to provide accommodation and other services that have significant financial implications. It seems reasonable to infer, given the impact of the austerity programme on LA finances, that such decisions are not entirely immune from budgetary pressures.

The nub of the problem, then, is that the exercise of all public functions takes place in the context of financial considerations; and the issue was where to draw the line between those judgments that were in some significant sense challenges to the law and policy implementing austerity, and those judgments where public spending restrictions or cuts merely formed part of the context to the exercise of the public function. No doubt there are a range of potential tests that might be formulated and applied. After some refinement in the course of the pilot study, the test adopted here as to what constituted an austerity adjudication was: whether the implementation of the austerity programme was a

⁸¹ (n 78) and Children Act 1989

substantial policy objective or reason for the legislation, policy, decision, or failure to act being impugned in the judicial review claim.

Applying the test to individual judgments requires an assessment of the available evidence as to the policy objectives behind the legislation, policy or decision impugned. Such evidence may be intrinsic in the sense of being contained in the judgment, whether the judge's own words or the judge citing evidence (witness statements or documents exhibited) filed by the parties in the proceedings as to the policy objectives; or may be extrinsic in the sense of any evidence available - essentially online - as to the policy objectives behind the legislation, policy or decision being impugned. Where the challenge is to legislation, extrinsic evidence is generally available as to the policy objectives because the government routinely consults on and publishes policy documents (including green and white papers), impact assessments and other explanatory material.⁸² Where the challenge is to policy or decision-making other than legislatively - essentially the exercise of discretionary decision-making in relation to public functions - the position is more difficult. While, again, evidence may be intrinsic or extrinsic, there is generally less extrinsic evidence available in relation to the policy reasons for the exercise of discretion by central government than in relation to legislation, and still less available evidence when it comes to LAs and other bodies exercising public functions.⁸³ To illustrate the issues, the next part provides examples.

⁸² Two significant examples are the explanatory notes for primary legislation and the explanatory memoranda for delegated legislation.

⁸³ In relation to local authorities, they routinely publish a range of documents in relation to policy-making and decision-making. For other public authorities, annual reports may provide the same information.

6. Identifying austerity adjudications - illustrations of the application of the test

The purpose of this part is to demonstrate the application of the test in a way which evidences transparency and minimal subjectivity.⁸⁴ The first examples are those judgments in claims that were challenges to legislation, policy or decisions where the implementation of the austerity programme was obviously a substantial policy objective or reason for the impugned legislation, policy or decision. In relation to legislation, the challenge in *Reilly (No 2)* was to the Jobseekers (Back to Work Schemes) Act 2013.⁸⁵ The Act retrospectively validated regulations that were found to be *ultra vires* in earlier litigation.⁸⁶ The regulations implemented the policy of increased conditionality and sanctions that required claimants to take part in unpaid 'work for your benefit' schemes with benefits being withheld for non-compliance. As to intrinsic evidence of whether the austerity programme was a substantial policy objective, the judge states: 'I readily understand that a government faced with the prospect of substantial repayments would consider it in the public interest not to pay them. Particularly since the DWP aims to reduce its benefits bill as part of the overall deficit reduction programme'.⁸⁷ As to the extrinsic evidence, the government's 2010 white paper on welfare reform states 'The Coalition Government is determined to reform the benefit system to make it fairer, more affordable and better able to tackle poverty, worklessness and welfare dependency', and would 'introduce important changes to the existing conditionality and sanctions regime to strengthen the link between people receiving

⁸⁴ An aspect of the work of Kirkham and O'Loughlin (n 22) is that both reviewed and coded the judgments independently, and resolved differences of view collectively, to reduce the risk of subjectivity. This is not an option available for this thesis and the analysis being done by one person must realistically increase the risk of subjectivity.

⁸⁵ *R (Reilly and another) v Secretary of State for Work and Pensions (No 2)* [2014] EWHC 2182, [2015] QB 573.

⁸⁶ The Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011, SI 2011/917; *R (Reilly) v Secretary of State for Work and Pensions* [2013] EWCA Civ 66, [2013] 1 WLR 2239.

⁸⁷ *Reilly (No 2)* (n 85) [107].

benefits and meeting their responsibilities’ and ‘will begin to make these changes in the existing benefits system and they will be carried forward under Universal Credit, with adjustments as necessary’.⁸⁸ Clearly, the austerity programme was a substantial policy objective behind the Act and *Reilly (No 2)* was classed as an austerity adjudication.

An example of an austerity adjudication which relates not to legislation but to more general discretionary policy or decision-making is *Dudley MBC* where the challenge was to an April 2011 decision to change the basis of payment of a grant for Dudley’s 1998 private finance initiative (PFI) scheme for IT in schools.⁸⁹ From 1999 to 2011, grant payments were made by the Department for Communities and Local Government (DCLG) on a declining balance basis such that a percentage of the capital cost of the PFI scheme was paid yearly by the government irrespective of the term of the PFI contract, rather than on an annuity basis where payments were made each year to meet the capital cost of the PFI scheme over its term. The DCLG decided to shift from a declining balance to an annuity basis. While the cost implications were disputed, it is clear that the decision was reached to reduce spending. As to the intrinsic evidence, the judge states ‘the whole point of the change in 2011 was to save the Government the “great expense” involved, as it was put [in a witness statement filed on behalf of the defendant]’.⁹⁰ Further the judge cited letters from the DCLG which stated ‘many aspects of Government expenditure have been under scrutiny’, and ‘Ministers decided to confirm the decision to end PFI grant payments on a declining balance basis. They have concluded that it is not sustainable to continue with such never

⁸⁸ Department for Work and Pensions, *Universal Credit: Welfare that Works* (Cm 7957, 2010) 3, 26.

⁸⁹ *R (Dudley MBC) v Secretary of State for Communities and Local Government* [2012] EWHC 1729 (Admin).

⁹⁰ *ibid* [33].

ending financial commitments, especially in the current fiscal climate'.⁹¹ As with *Reilly* (No 2), implementing the austerity programme was a substantial policy objective for the decision to change the basis of payment for PFI schemes and *Dudley MBC* was classed as an austerity adjudication.

Similar to *Dudley* but involving local rather than central government decision making is *JG* where the challenge was to decisions made by Lancashire County Council in early 2011 to raise the eligibility threshold for meeting assessed adult social care needs from moderate to substantial or critical; and to significantly raise charges for social care services.⁹² It is clear from the evidence in the judgment that the austerity programme was the substantial reason for the decisions. The judge states that Lancashire CC 'in common with many, if not all, local authorities in England and Wales has recently faced unprecedented financial pressures, driven primarily by the very significant cuts following the Government's 2010 Comprehensive Spending Review... ', and 'In response to these unprecedented financial pressures the Council has sought to achieve savings across all of its directorates, including adult and community services, children and young people services, and environmental services'.⁹³ Clearly, the austerity programme was a substantial policy objective behind the decisions on eligibility and charging for social care and *JG* was classed as an austerity adjudication.

Two further examples are given to illustrate cases that fall either side of the line of being austerity adjudications. In *Drax Power* the challenge was to the removal of the renewable

⁹¹ *ibid* [23].

⁹² *R (JG and MB) v Lancashire County Council* [2011] EWHC 2295 (Admin). There are many similar challenges to local authority decision-making in relation to funding for social care, both residential and non-residential.

⁹³ *ibid* [1], [2].

source exemption (RSE) to the climate change levy (CCL).⁹⁴ The decision was announced in the Budget on 14 July 2015 which followed the May 2015 general election. The RSE scheme was complex, but in essence it provided an exemption to the CCL, a tax levied on the supply to businesses and the public sector of electricity and fossil fuels, for energy providers from renewable sources. The impact of the removal of the RSE to eligible suppliers (the claimants generated electricity using biomass and gas from landfill sources) was to increase the cost of their energy. As to intrinsic evidence of whether reducing spending was a substantial policy objective, the material is limited but the judge cites the evidence of a senior Treasury civil servant that:

there was a strong policy and value for money argument to end the RSE Exemption. Critically, the benefit provided by the RSE Exemption was regarded as inefficient compared to other support mechanisms for renewable generation, supported foreign generation and was diffused across the supply chain. Removing the RSE Exemption would also help eliminate the deficit, which is a primary fiscal objective for this Parliament.⁹⁵

As to the extrinsic evidence, the reasons given in the July 2015 Budget are, as the judge observed,⁹⁶ limited, but the removal of the RSE was announced as a budget policy decision as part of 'action the government will take to: eliminate the deficit and run an overall surplus to start paying down debt, while increasing spending on defence and the NHS'.⁹⁷ The suspicion is that the austerity programme or reducing the deficit was perhaps

⁹⁴ *R (Drax Power Ltd) v HM Treasury* [2016] EWHC 228 (Admin).

⁹⁵ *ibid* [51].

⁹⁶ *ibid* [144].

⁹⁷ HM Treasury, *Summer Budget 2009* (HC 264, July 2015).

not a carefully considered policy objective behind the decision to abolish the RSE with limited notice; and more an afterthought that would find favour when the legality of the decision was challenged. Notwithstanding this suspicion, the austerity programme was, on the evidence, a substantial policy objective behind the decision and *Drax Power* was classed as an austerity adjudication.

A case that falls on the other side of the line in that the austerity programme was not a substantial policy objective behind the legislation is *Gibraltar Betting & Gaming Association*,⁹⁸ where the challenge was to a new taxation regime (Remote Gaming Duty) for remote gambling based on place of consumption rather than supply. The broad policy background was the increasing popularity of internet gambling and that only 10% of such gambling by UK customers was subject to UK gaming duties. The shift to a place of consumption basis of taxation was announced in the 2012 Budget and implemented by the Finance Act 2014. The new regime meant the claimant's members were obliged to pay tax on gross gambling profits derived from UK-based customers and it was argued that the new system of taxation was incompatible with Article 56 of the Treaty on the Functioning of the European Union. The intrinsic evidence as to the purpose of the new regime was from HMRC and 'to level the playing field between UK operators and overseas operators', 'to ensure that the UK can exercise proper fiscal supervision over this section of the gambling market', 'to enable the UK to maintain the coherence of the UK tax system in relation to that activity and preserve the integrity of the tax base', and 'to increase the UK's tax revenues'.⁹⁹ The extrinsic evidence came from a consultation paper where the policy

⁹⁸ *R (Gibraltar Betting & Gaming Association Ltd) v Revenue and Customs Commissioners* [2015] EWHC 1863 (Admin). The claim is also an example of a judgment on interim and procedural issues given reference was made to the CJEU under Article 267 TFEU.

⁹⁹ *ibid* [91].

context was that ‘gambling operators face strong incentives to supply to the UK from outside the UK duty regime’ and:

A place of consumption basis of taxation for remote gambling will level the playing field, providing a fairer basis for competition between remote gambling supplied from the UK and overseas. ... the reform will also enhance the competitiveness of the UK tax system, removing a disincentive for remote gambling businesses to locate in the UK and helping retain existing operators. ... The reformed remote gambling tax regime will also improve the sustainability of the UK’s tax base by ensuring that remote gambling, alongside other gambling products, makes a fair contribution to public finances.¹⁰⁰

While there is reference to the sustainability of the tax base and the public finances, there is no clear evidence to suggest the austerity programme was a substantial policy objective behind the decision; and the evidence suggests that other policy objectives, in particular around tax and regulation, drove the policy-making. *Gibraltar Betting & Gaming Association* was therefore not classed as an austerity adjudication.

An example of a similar, but more finely balanced case in relation to central government discretionary decision-making is *Badger Trust*.¹⁰¹ The challenge was to a July 2011 policy to authorise Natural England to license farmers and landowners to cull badgers by shooting in two pilot areas to try to reduce the transmission and incidence of bovine

¹⁰⁰ HM Treasury and HM Revenue & Customs, ‘Taxing remote gambling on a place of consumption basis: consultation on policy design’ (April 2012) 3.

¹⁰¹ *R (Badger Trust) v Secretary of State for the Environment, Food and Rural Affairs* [2012] EWHC 1904 (Admin).

tuberculosis (bTB).¹⁰² The decision to license farmers and landowners to cull by shooting was, in broad terms, chosen in preference to government-led or managed culling or vaccination of badgers. As to the intrinsic evidence, the judge quotes from a 2010 consultation paper which states that government-led culling and vaccination were 'not considered affordable in the current public spending climate'. In terms of the extrinsic material, there is the 2010 consultation paper cited by the judge,¹⁰³ and the 2011 policy which states:

The 2010 Spending Review settlement requires Defra to reduce its overall expenditure by 29% over the period 2011-15. This will have an impact on the level of Government funding available for TB controls and we will need to make sure that we maximise the benefits from the available funding.¹⁰⁴

This is finely balanced. The austerity programme was a significant consideration in relation to the exercise of discretion as to which policy was chosen; but the implementation of the austerity programme was not of itself a substantial policy objective or reason for the impugned policy choice - which was to reduce the incidence of bTB - and the judgment was therefore not classed as an austerity adjudication. It was a decision to adopt one policy rather than another and was made in the context of financial considerations rather than being driven by financial considerations.

¹⁰² Under the Protection of Badgers Act 1992, s10(2)(a).

¹⁰³ Department for Environment, Food and Rural Affairs, 'Bovine Tuberculosis: The Government's approach to tackling the disease and consultation on a badger control policy' (September 2010), 44.

¹⁰⁴ Department for Environment, Food and Rural Affairs, 'Bovine TB Eradication Programme for England' (July 2011), 16.

The final example which illustrates the issues in identifying austerity adjudications, and which contrasts with *JG* above, is *R (W)*, a challenge to Croydon LBC's decision to cease funding for a specialist residential placement for an adult costing £4,800 per week.¹⁰⁵ Croydon's reasons for the decision were that the placement was not meeting *W*'s needs and it was more than twice what Croydon would expect to pay. While the suspicion is that financial pressures were central in local authority decisions in cases such as this,¹⁰⁶ there was no intrinsic or extrinsic evidence to suggest that the austerity programme was a substantial reason for Croydon's decision. More generally, decisions such as *W* have been described as 'own fact' cases where the 'claimant challenges the application of a particular law or policy to their own individual circumstances, rather than challenging the broader legitimacy of that law and policy itself'.¹⁰⁷ This classification is not unproblematic since all judicial review claims to an extent turn on their own facts, and the line between cases involving a challenge to the application of a policy, and cases which challenge the substance of the policy is not always an easy one to draw.¹⁰⁸ In cases such as *R (W)*, where the challenge is to a decision affecting an individual rather than, as in *JG*, a broader policy decision, it is less common to find intrinsic evidence as to the significance of the austerity programme to the decision and there is no extrinsic evidence since local authorities do not, unlike with more general policies, publish information about decisions in individual cases. Given the limited evidence as to the significance of pressures on local

¹⁰⁵ *R (W) v Croydon LBC* [2011] EWHC 696 (Admin).

¹⁰⁶ Croydon Council has repeatedly struggled to finance its spending over an extended period of time and has had to make significant cuts. See Matthew Fright, Croydon Council's struggle to balance the books (IFS, 20 December 2022) <<https://www.instituteforgovernment.org.uk/comment/croydon-council-section-114>> accessed 1 May 2025.

¹⁰⁷ Nason (n 20) 2.

¹⁰⁸ An example here is *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622, [2015] 1 WLR 2247 which were six challenges to decision on exceptional case funding for legal aid. While they were all 'own fact' cases, they were test cases that effectively challenged the Lord Chancellor's interpretation of the statutory scheme.

government spending to decisions such as in *R (W)*, such cases were not identified as austerity adjudications. The general position is that the ‘narrower’ the challenge, the less likely it is that there is evidence that the implementation of the austerity programme was a substantial policy objective or reason for the decision.

The above examples demonstrate some of the strengths and weaknesses of the approach to defining austerity adjudications by reference to whether the austerity programme was a substantial policy objective or reason for the legislation, policy or decision being impugned in judicial review claim. In relation to intrinsic evidence in the judgment as to the policy objectives, there is an issue as to whether ‘playing the public finances card’ by defendants in evidence or submissions will assist the public authority in defending the claim. In some cases, while public spending constraints may have been actually relevant to the impugned policy or decision, if the constraints were not legally relevant, then it seems most unlikely defendants would rely on them in evidence or submissions.¹⁰⁹ Similarly, while public spending constraints may have not been significant to the impugned policy or decision, defendants may subsequently seek to rely on them to justify the policy or decision. It seems at least possible that evidence is ‘trimmed’ to achieve the desired outcome in litigation. As to the extrinsic evidence, the obvious limitation is that as the claims move away from challenges to the enactment of primary or the making of delegated legislation, through the creation of policy and the exercise of discretionary powers by central government, to policy-making by less publicly accountable authorities, and then to discretionary decision-making in individual cases; the less likely it is that extrinsic evidence of policy objectives is publicly available online.

¹⁰⁹ Presumably, for example, local authorities would not refer to public spending constraints in age-assessment cases because it would automatically vitiate the decision since they are an obviously irrelevant consideration when assessing age.

The effect of this is to introduce a degree of uncertainty as to the application of the test and there is a risk of mis-classification when it comes to austerity adjudications. There appears to be no way of fully addressing this problem. However, the claim here is that the uncertainty is not sufficient to invalidate the overall approach because the intrinsic or extrinsic evidence is generally sufficient for a decision on whether a claim meets the definition of austerity adjudication to be made with confidence. In any event, these limitations are reduced because, as identified below, the subsequent analysis is limited to judgments where the challenge was to primary legislation, delegated legislation, and central government or ministerial decision-making (thereby excluding local government decision-making) because the total number of austerity adjudications identified was too large to permit detailed analysis of all the judgments.

The final issue in relation to the identification of austerity adjudications is how they were identified in practice. This consisted of what might be described as a brute-force attack in that, starting with the BAILII judgments, every judgment was reviewed individually. A first sift was undertaken by using keywords in the case names to sequentially identify, group and filter cases that were unlikely to be austerity adjudications and which could be reviewed and discarded quickly.¹¹⁰ After the first sift there were approximately 550 of 5,900 BAILII judgments remaining. A second and more detailed sift led to a list of 134 austerity adjudications. Turning to the 4,000 Westlaw judgments, when the first sift was started in relation to these judgments it became apparent that it was an unproductive exercise because the judgments related to cases which could not be austerity adjudications or

¹¹⁰ So, for example, appeals by way of case stated were identified and eliminated by filtering case names for 'magistrates', 'Crown Court' and 'Director of Public Prosecutions'; and extradition cases identified by filtering for 'France', 'Spain', 'Poland' etc.

related to interim issues (notably permission).¹¹¹ A batch of 400 Westlaw judgments from 2015 was reviewed and no additional austerity adjudications were identified. The decision was made not to further review the Westlaw judgments.

7. Austerity adjudications - the framework for analysis

Given the work involved in identifying the austerity adjudications, the decision was taken that a detailed analysis of 134 austerity adjudications was beyond the scope of this thesis. There were 66 cases that challenged primary or delegated legislation or central government policy- or decision-making, and it is only these cases that are analysed in chapter 5, 6 and 7.¹¹² While this limitation further narrows the scope of this thesis, it has the advantage that, as identified above, when it comes to legislation and central government policy- and decision-making, there is generally more evidence available as to whether the austerity programme was a substantial policy objective. The limitation is also made less significant since political constitutionalist scholarship is generally concerned with the relationship between the courts and Parliament, and the courts and government, rather than, say, the relationship between the courts and local authorities. It does mean, however, that it is not possible to test Prosser's analysis that courts are more interventionist and interpret statutory powers more narrowly when it comes to LA revenue

¹¹¹ Almost all the 'Westlaw only' judgments related to: judicial review in criminal cases; immigration, asylum and extradition; planning; and regulation of the professions.

¹¹² Had this been known from the start, it would have been easier to identify austerity adjudications since the list of government departments published under the Crown Proceedings Act 1947, s 17 could have been used to identify defendant ministers.

and spending decisions.¹¹³ The 68 austerity adjudications that were challenges to local government policy- and decision-making are an obvious avenue for further research.¹¹⁴

Turning to the framework for analysing the austerity adjudications, it is clear that - at least on the surface - decision-making in judicial review is structured around grounds of judicial review where the grounds function as pegs on which to hang claims. Essentially, claimants bring and argue (plead) cases on the basis of one or more grounds of review that function as doctrinal principles of greater or lesser complexity; and judges engage in an analytical process and decide whether those grounds are made out on the evidence. While the mode of argumentation and decision-making is framed around the grounds, there is a degree of uncertainty in that grounds may be unclear or overlap. As identified in chapter 3, the limits of adjudication envisaged by political constitutionalism function at a doctrinal level in the sense of what judges ought and ought not to be doing; and there are different issues as to the limits in relation to three broad modes of judicial decision-making: the interpretation and application of legislation; the development and application of common law grounds of review, whether procedural or substantive; and adjudication by reference to EU law and the Convention.

What is required, then, is an analytical framework that engages with the grounds of review argued and determined in the austerity adjudications in a structured way to assess whether the limits of adjudication envisaged by political constitutionalism were exceeded.

¹¹³ Prosser (n 27).

¹¹⁴ There are undoubtedly some significant cases in the 68. Perhaps the most significant is *R (Moseley) v London Borough of Haringey* [2014] UKSC 56, [2014] PTSR 1317 where the Supreme Court endorsed the consultation criteria. In *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168 (HC) and *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 (CA). Grounds relating to consultation are analysed in chapter 6.

There are, of course, a number of classifications or taxonomies of the grounds of judicial review. The classic starting point is Lord Diplock's three-fold classification in *CCSU*:

one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community;¹¹⁵

In broad terms, Lord Diplock's classification understands illegality to mean the decision-maker must understand and give effect to the law that regulates the power being exercised; irrationality means *Wednesbury* unreasonableness; and procedural impropriety means the failure to observe rules of natural justice or failure to act with procedural fairness. There have been significant developments since 1985 and each of the two principal practitioner texts develop a taxonomy of grounds that reflect those developments.

In Part II of *De Smith's Judicial Review* there are ten chapters each covering a different ground of review.¹¹⁶ The chapter on illegality comes first and encompasses legal errors in the construction of a legislative provision, failure to comply with statutory duties, failure to act in accordance with the purpose for which statutory power was conferred/acting for an

¹¹⁵ Council for Civil Service Unions v Minister for the Civil Service [1985] AC 374 (HL), 411.

¹¹⁶ Ivan Hare KC, Catherine Donnelly SC and Joanna Bell (eds), *De Smith's Judicial Review* (9th edn, Sweet and Maxwell 2023).

improper purpose, failure to consider a relevant matter/consideration of an irrelevant matter, and unlawful delegation of statutory power. The next two chapters cover substantive review and legitimate expectations; and the five that follow consider separate aspects of procedural fairness. The final two chapters cover Convention rights and review under EU-related law. In *Supperstone, Goudie and Walker on Judicial Review*, illegality is split into two separate chapters and covers illegality both in relation to the exercise of statutory and common law powers.¹¹⁷ It is followed by separate chapters on unreasonableness and proportionality, a chapter on procedural rules and consultation, chapters on natural justice and bias, and then a final chapter that mops up other grounds of review including bad faith and mistake of fact. From an academic perspective, *Wade and Forsyth's Administrative Law* organises the grounds in a similar way to the practitioner texts with three separate parts dealing with powers and jurisdiction, the exercise of discretionary powers and the requirements of natural justice.¹¹⁸

Given the central question raised by this thesis, the taxonomy of grounds required is one that facilitates the assessment of whether and in what ways the limits of adjudication were exceeded in adjudicating the claims. The form of the taxonomy must be determined by its function and there was no need to create a universal or comprehensive taxonomy applicable to all grounds in every judicial review claim. If a ground of review was not argued in the 66 austerity adjudications, it is essentially irrelevant for the purposes of this thesis. On that basis, the appropriate taxonomy is one that reflects the different arguments made by political constitutionalism as to the three modes of judicial decision-making. While none of the above taxonomies map perfectly onto those modes, some aspects or elements

¹¹⁷ Michael Supperstone, James Goudie, Paul Walker, *Supperstone, Goudie and Walker: Judicial Review* (7th ed, LexisNexis 2023).

¹¹⁸ William Wade, Christopher Forsyth and Julian Ghosh, *Wade & Forsyth's Administrative Law* (12th edn, OUP 2022), parts IV, V and VI.

of them do and they are useful. As with the definition of austerity adjudication, the taxonomy was not determined in advance, but developed and refined as the grounds in the austerity adjudications were analysed. The result was that the grounds in the austerity adjudications were classified into three main categories, each of which was sub-divided as necessary.

The three main categories and subcategories are defined here, but chapters 5, 6 and 7 provide a more detailed explanation and illustrate difficulties and issues. The first main category is statutory grounds and includes those grounds where it was argued that the defendant had acted beyond the scope of their statutory powers and duties, whether that was by reference to the words of the relevant statutory provisions (literal or strict *ultra vires*), or by reference to the broader objects or purposes of the statute (*Padfield* or statutory purpose *ultra vires*).¹¹⁹ The category is sub-divided into: challenges based on primary legislation, challenges based on delegated legislation and challenges based on ministerial guidance or policy. Judicial decision-making on these grounds of review is in principle unproblematic from a political constitutionalist perspective if the courts are giving effect to the outcome of political decision-making whether that outcome be primary legislation or delegated legislation. These grounds are analysed in chapter 5.

The second main category is common law procedural and common law substantive grounds where these are understood as general principles imposed by the courts largely independently of statutory words or purposes.¹²⁰ The second category is, in relation to

¹¹⁹ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

¹²⁰ It is recognised, of course, that judicial review in relation to statutory words and purposes is in some sense 'common law' given the decisions in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R v Hull University Visitor, ex p Page* [1993] AC 682 (HL); *Padfield* *ibid*.

procedural grounds, further divided into: adequacy of consultation (which covers procedural legitimate expectation), relevancy of considerations, duty of sufficient enquiry, adequacy of reasons, fettering of discretion, and failure to consider alternative options. And in relation to substantive grounds, further divided into: *Wednesbury* unreasonableness, proportionality, substantive legitimate expectation, and other common law rights and duties. There is significant overlap and complexity in these grounds and these issues are addressed in chapter 6 by reference to specific cases. Judicial decision-making on these grounds of review is in general more problematic from a political constitutionalist perspective since the courts are imposing common law principles independently of statutory words or purposes. Similarly, adjudication on substantive grounds is more problematic than procedural grounds given the courts are engaging with the merits of decisions; and the same applies to the imposition of novel and the application of existing grounds with unwarranted intensity. Common law grounds are analysed in chapter 6.

The third main category is international grounds of review where these are challenges based on legal obligations which arise from the Convention or EU law. These challenges are in some sense statutory in that they relate to obligations that flow from the Human Rights Act 1998 or the European Communities Act 1972. They are treated separately since they raise different issues than 'ordinary' statutory interpretation and political constitutionalist thought raises distinct issues in relation to these grounds. Convention and EU law grounds are considered chapter 7.

Various issues arose in relation to the categorisation of the grounds of review argued in the austerity adjudications both between the main categories and within them; and the exercise was in some sense interpretive. A best-fit approach was adopted and, as

indicated above, the essential touchstone as between the first main category (statutory grounds) and the second category (common law grounds) was whether the ground was - in argument by the parties or in adjudication by the judge - constructed primarily as a function of the words or purposes of a provision of legislation or as a function of the common law. What this means in practice is that where a ground relating to, say, adequacy of consultation or relevancy of considerations is primarily argued and determined on the basis of statutory words or purposes, then this is categorised as a statutory ground; but where consultation or considerations are primarily argued and determined other than by reference to statutory words or purposes, then this is categorised as a common law procedural ground. A case that illustrates the difficulty here is *Moseley* where the challenge was to the fairness of consultation in relation to a Council Tax Reduction Scheme following the abolition of Council Tax Benefit. Since this case was a challenge to the decision of a local authority, it is not one of the cases analysed in detail. However, in *Moseley* in the Supreme Court there was a stark difference of opinion as to whether the duty to consult arose from the common law duty of procedural fairness and/or from the statutory context.¹²¹ None of the cases which are analysed in this thesis raised this or similar issues in such problematic terms.

¹²¹ *Moseley* (n 114). The relevant provision was the Local Government Finance Act 1992, sch 1A, para 3 which required local authorities to ‘... (b) publish a draft scheme in such manner as it thinks fit, and (c) consult such other persons as it considers are likely to have an interest in the operation of the scheme’. Lord Wilson SCJ’s view [23] was ‘irrespective of how the duty to consult has been generated [i.e. by statute or common law], that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted’. In contrast, Lord Reed SCJ’s view [34] was ‘I am generally in agreement with Lord Wilson JSC, but would prefer to express my analysis of the relevant law in a way which lays less emphasis upon the common law duty to act fairly, and more upon the statutory context and purpose of the particular duty of consultation with which we are concerned’. Lord Kerr SCJ agreed with Lord Wilson; and Baroness Hale DPSC and Lord Clarke JSC agreed with both [44] ‘There appears to us to be very little between them [Lord Wilson and Lord Reed JJSC] as to the correct approach. ... In these circumstances we can we think safely agree with both judgments’. As to the significance of the differences of view, see: Jason Varuhas, ‘Judicial Review at the Crossroads’ (2015) 74 Cambridge LJ 215; and Alistair Mills, ‘An Update on Consultation’ (2015) 20 JR 1757.

Any appeals were identified using Westlaw UK and the grounds of review in the austerity adjudications were coded in line with the above taxonomy and also coded for success or failure. The coding scheme and the results are set out in the Appendix.

8. Austerity adjudications - initial analysis and conclusions

As to an initial analysis of the 66 cases and the areas of policy to which they related: 24 cases related to welfare benefits or pensions administered by the DWP or HMRC; and 22 cases related to the administration of justice (including courts, legal aid and prisons). This left a residual 'other' category of 20 cases that relate to a diverse range of policy areas, including: claims by LAs relating to central government funding; claims relating to public sector pay and pensions; claims relating to funding for students in HE; and claims relating to subsidies of the generation of electricity from renewable sources.

The table below sets out the grounds that were argued at first instance by the main categories and policy areas. The upper figure in each cell is the number of grounds argued; the middle figure is the number of grounds on which the claimant succeeded; and the lower figure is the percentage success. A ground is identified as successful where one or more of the claimants succeeded to an extent. Failure for the claimant on a ground is, therefore, complete success for the defendant on that ground in relation to all claimants.

Some grounds were effectively undetermined, usually where the court did not go on to determine one or more ground where the claimant had succeeded on one or more ground. Success for a claimant does not necessarily mean the claimant secured the remedy sought. It is difficult to deal with remedies in a methodologically robust way, not least since many of the judgments where the claimants succeeded end with a judicial formula such as 'In the circumstances, I am satisfied that the claims must succeed. I will hear counsel on

the appropriate relief which I should grant'.¹²² The impact of all this is that the figures in the table overstate success for claimants in terms of achieving their aims in the litigation and in terms of securing tangible benefits.

Type of case		Statutory	Common law - procedural	Common law - substantive	ECHR/EU/ int law	Total
Welfare benefits Cases = 24	grounds=	20	5	10	28	63
	success=	2	1	2	6	11
	% success=	10%	20%	20%	21%	17%
Administration of justice Cases = 22	grounds=	24	12	14	17	67
	success=	6	2	4	4	16
	% success=	25%	17%	29%	24%	24%
Other cases Cases = 20	grounds=	21	16	18	14	69
	success=	5	3	1	2	11
	% success=	24%	19%	6%	14%	16%
Total Cases = 66	grounds=	65	33	42	59	199
	success=	13	6	7	12	36
	% success=	20%	11%	17%	20%	18%

The table includes only first instance decisions and any conclusions must be tentative given the low number of grounds in some areas. What perhaps is clear is the generally low success-rate of claimants in challenging the law and policy that implemented the austerity

¹²² The example is from *R (DA) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin) [42].

programme.¹²³ In relation to the different policy areas, grounds which challenged policy- or decision-making in relation to the administration of justice were more successful than grounds which challenged policy- or decision-making in relation to welfare benefits and other areas.

That concludes the explanation of the methodology and the initial analysis. The analysis here is revisited in chapter 8 after the grounds of review are analysed in chapters 5, 6 and 7 and those chapters follow broadly the same format. There is a general introduction which sets out the structure of the chapter and provides context. This is followed an analysis of where political constitutionalist thought locates the limits of adjudication in relation to the grounds analysed in that chapter; and, to provide some structure, the detailed analysis of the grounds which follows is structured around the taxonomy (so grounds are considered in tranches); the different types of challenge (for example to delegated legislation or discretionary decision-making); and the categories of public policy areas identified above (welfare benefits, the administration of justice and ‘other’ cases). Again, the austerity adjudications and any appeals are set out in tables in the Appendix where the various grounds argued are listed and ‘pinpointed’ by references to paragraphs of the judgments.

¹²³ See Bondy, Platt and Sunkin (n 11) 12. Their findings in relation to first-instance decisions was ‘Of the 502 cases in the judgment dataset, 221 claims (44%) were allowed in whole or in part and 280 (56%) were dismissed’. Direct comparisons are problematic because a high proportion of the judgments in terms of subject-matter in their dataset are in excluded from the dataset in this thesis (significant examples include immigration and asylum cases and licensing cases). That said, one of the lowest success-rates in their dataset was housing cases at 20%. Perhaps what can be said is that the claimant success-rate in the austerity adjudications appears low compared to the success-rate of judicial review claims in general.

Chapter 5

Grounds relating to the interpretation of legislation

1. Introduction

This is the first of three chapters, each focussed on different grounds of review, that analyse the austerity adjudications from a political constitutionalist perspective. This chapter answers whether and in what ways the limits of adjudication envisaged by political constitutionalism were exceeded by the judiciary in deciding grounds relating to the interpretation and application of legislation.¹ As to the context of much of the litigation, Carol Harlow and Richard Rawlings describe matters accurately:

Executive law-making, we are sharply reminded, is not merely routine and technical. Financial retrenchment has been a chief driver as ministers have sought to curtail or remove schemes and entitlements across major swathes of the welfare state, with campaigners then scanning the primary legislation and general sources of law for pegs on which to hang claims of illegality.²

To give a broad quantitative overview: 43 of 66 austerity adjudications raised statutory grounds, of which 15 related to the administration of justice, 14 related to welfare benefits and 14 related to ‘other’ cases. There were 65 statutory grounds argued in total (24 administration of justice, 20 welfare benefits and 21 other).³ Of these, 13 (20%) succeeded to some extent at first instance (six administration of justice, two welfare benefits and five

¹ There are a few cases that relate to ministerial guidance and policy and these are considered in this chapter for convenience. Cases which challenged guidance and policy on Convention or EU law grounds are considered in chapter 7.

² Carol Harlow and Richard Rawlings, *Law and Administration* (4th edn, Cambridge 2022) 738.

³ Some care needs to be taken with these headline figures since they are in part a function of how the grounds were argued, in particular whether strict and *Padfield ultra vires* ground were argued separately. See the discussion below.

other). There were no reversals for claimants after all appeals are taken into account, and some successes in that three statutory grounds succeeded on appeal (two welfare benefits cases and one administration of justice case).

This introductory section provides context and is followed by six further parts. Part 2 identifies where political constitutionalist thought locates the limits of adjudication in relation to the interpretation and application of legislation. Part 3 starts the analysis with grounds that challenged delegated legislation on the basis it was *ultra vires* the enabling power(s). Part 4 turns to challenges on equalities grounds (mostly alleged breaches of provisions of Equality Act 2010 (EA 2010)) to both delegated legislation and discretionary decision making. Part 5 covers other challenges to discretionary decision-making under statutory powers and mops up a few remaining grounds

Finally, part 6 reaches some overall conclusions which are, in broad terms, that there is limited evidence of the limits of adjudication being exceeded from a political constitutionalist perspective. There are, though, some significant findings. When it came to interpreting the enabling powers in primary legislation relating to the making of delegated legislation that narrowed the scope of eligibility or payments for legal aid, it appears the provisions were interpreted to maintain eligibility. There was no evidence of this in the welfare benefits/pensions cases. There was some evidence of judicial under-reach in relation to the standard of review for compliance with equalities duties. Here, the courts seemed to row-back from or narrow the pre-austerity case law and take an indulgent view of what was required evidentially to demonstrate compliance with equalities duties. It seems, overall, that there is little to trouble political constitutionalism here; and, indeed, an argument can be made that the courts were too deferential in relation to statutory interpretation in the welfare benefits cases and in relation to equalities duties generally. A

difference of approach in relation to the legal aid cases is a recurring theme and addressed in the conclusion to this chapter and chapter 8.

The basis on which a ground was classified as statutory is that it was constructed - in argument by the parties or in adjudication by the judge - primarily as a function of the words or purposes of legislation. While statutory interpretation engages various common law principles,⁴ the courts were, on the face of it, seeking to give effect to legislative intent. The approach varies, but such grounds are often conceptualised as strict or narrow *ultra vires* grounds where the court has to decide whether the power has been exercised in accordance with the wording of the relevant provisions; and broad or *Padfield ultra vires* grounds where, notwithstanding that the power has been exercised within the wording of the relevant provisions, the court has to decide whether it has been exercised in accordance with the broader objects or purposes of the statutory scheme.⁵

For the purposes of this thesis, the dividing line is drawn between these challenges and, for example, interpretation by the application of the principle of legality where common law norms (whether expressed as common law or constitutional rights or not) are used in a

⁴ Diggory Bailey and Luke Norbury describe these as ‘linguistic canons of construction’. Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) [20.1].

⁵ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL). *Padfield* is one of the quartet of cases understood to be central to the growth of judicial review. See T T Arvind and others (eds), *Executive Decision-Making and the Courts: Revisiting the Origins of Modern Judicial Review* (Bloomsbury 2021). Sometimes review on *Padfield* grounds is described as review for propriety of purpose. Sometimes strict and *Padfield ultra vires* are dealt with compendiously and sometimes the ground seems to fall somewhere in the middle. As to an example of the strict or broad conceptualisation, see *R (Ben Hoare Bell Solicitors) v Lord Chancellor* [2015] EWHC 523 (Admin), [2015] 1 WLR 4175. It illustrates the porous nature of the grounds, since the availability of review on *Padfield* grounds is a product of the common law. As to the view that *Padfield* is a dimension of reasonableness, see John Laws, ‘*Wednesbury*’ in Christopher Forsyth and Ivan Hare, *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Oxford 1998).

more significant way.⁶ When it comes to legality, the courts are in a sense no longer using common law tools to find and give effect to legislative intent but to use common law norms to limit or supplement statutory words or purposes.⁷ Grounds that raised the principle of legality (including common law or constitutional rights) are therefore considered in chapter 6. The essential reason is that, from a political constitutionalist perspective, the imposition of common law norms raises different issues and is more problematic. While the drawing of the dividing line might not be entirely defensible (or even possible) in every case, all grounds are considered one way or another.

The essential question for the court in relation to statutory grounds is whether the power has been exercised *ultra vires*. The role of the courts here is understood to be: (a) to give effect to primary legislation in accordance with Parliament's legislative intent, whether the dispute relates to the validity of delegated legislation, or the exercise of discretionary powers by ministers; and (b) to give effect to delegated legislation in accordance with legislative intent where the dispute relates to the exercise of discretionary powers by ministers. The idea that a single legislative intent exists is problematic for reasons that include: genuine ambiguity in statutory language; legislation is made by people with differing subjective intentions; and there is sometimes stark judicial disagreement about legislative intent.⁸ The pre-eminent text on statutory interpretation describes the search for legislative intent as 'not a search for the actual subjective intention of a particular group of

⁶ The line is illustrated by *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531 which was determined on the basis of statutory purposes; and *R (UNISON) v Lord Chancellor (Nos 1 & 2)* [2017] UKSC 51, [2020] AC 869 which was determined on the principle of legality. The former is analysed in this chapter and the latter in chapter 6. Harlow and Rawlings (n 2) 744 identify that *UNISON* '... represents a step on from *Padfield* in certain, judicially determined, categories of case'.

⁷ It is recognised that the principle of legality is generally understood to be a principle of statutory interpretation. See, for example, Jason Varuhas, 'The Principle of Legality'

⁸ For an extensive discussion as to the nature of legislative intent, see Richard Ekins, *The Nature of Legislative Intent* (Oxford 2012).

politicians, but an objective search for the intention that must be imputed to the legislature by reference to the meaning of the words used and the context in which they are used'.⁹

Given the limited scope for evidential and factual disputes in judicial review and the centrality of the *ultra vires* doctrine, the legal contest is mostly focussed on competing arguments as to legislative intent. As such, statutory interpretation is understood here as a form of decision-making in that it does not involve discovering the one true interpretation, but involves deciding between more or less plausible competing interpretations advanced by the parties.¹⁰ Tom Bingham's view, in the context of his doubts about the declaratory school of judging, was that judges 'know from experience that the cases which come before them do not in the main turn on sections of statutes which are clear and unambiguous in their meaning' and 'raise questions of statutory interpretation which apparently involve genuine lacunae or ambiguities' such that there is an obvious truth that 'decisions involve issues of policy'.¹¹ Political constitutionalist thought recognises this and the next part identifies where it locates the limits of adjudication in interpreting and applying legislation.

⁹ Bailey and Norbury (n 4) [10.9] citing *McNutt v Transport for London* [2019] EWHC 365 [27] (Julian Knowles J). Stephen Sedley, reviewing an earlier edition of *Bennion* originally in the London Review of Books gives the view: 'If deciding what to write is tough, interpreting what gets written is tougher. Turgid texts need unravelling; obscure provisions need deciphering; occasional nonsense needs correcting; perfectly clear texts may be impossible to apply to novel situations'. Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice* (Cambridge 2011) 325.

¹⁰ See, for example, Robert French 'The Principle of Legality and Legislative Intention' (2019) 40 Statute Law Review 40; and Carol Harlow 'Judicial Encroachment on the Political Constitution' in Richard Johnson and Yuan Yi Zhu, *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart 2023).

¹¹ Tom Bingham, *The Business of Judging: Selected Essay and Speeches* (Oxford, 2000) 28.

2. The limits of adjudication in interpreting and applying legislation

John Griffith was content with the judiciary ensuring government bodies do not act beyond their statutory powers and that statutory procedures are followed.¹² What concerned Griffith was that illegality 'contains all the possible variations of statutory interpretation based on what the courts decide Parliament may or may not have intended'.¹³ The nub of the problem is that judges have significant leeway in interpreting statutes to achieve what they think is in the public interest or politically desirable, thereby eclipsing decisions made by Parliament or government on the public interest or what is politically desirable. Griffith's views are perhaps clearest in his critiques of the arguments of John Laws,¹⁴ and Stephen Sedley.¹⁵ In relation to the latter, Griffith states 'I consider that the review of substantive policy decisions made by public authorities acting within the four corners of their statutory ... powers should be out of bounds to the courts',¹⁶ and identifies *Anisminic*,¹⁷ *Padfield*,¹⁸ and *Pergau Dam*,¹⁹ as examples where the limits of adjudication

¹² John Griffith, *The Politics of the Judiciary* (5th edn, Fontana 1997) 292: 'Governments have extensive powers and, with adequate parliamentary majorities, can add to them without too much difficulty. This being so it is well that judges should be willing to ensure that government bodies do not seek to act beyond those powers. ... So also where statutes lay down procedures to be followed before powers are exercised, the court should insist that those procedures are followed and may even add their own gloss to ensure that governmental bodies do not act unfairly or in bad faith'.

¹³ *ibid* 341.

¹⁴ John Griffith, 'The Brave New World of Sir John Laws' (2000) 63 MLR 159.

¹⁵ John Griffith, 'The Common Law and the Political Constitution' (2001) 117 LQR 42.

¹⁶ *ibid* 63. Perhaps this is a reference to *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 and Lord Greene at 213 'The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere'.

¹⁷ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

¹⁸ *Padfield* (n 5).

¹⁹ *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386.

were exceeded. *Anisminic* and *Padfield* were decided in 1968 and are half of the quartet of cases that played a key role in the growth of judicial review.²⁰ In *Anisminic*, the House of Lords avoided an ouster clause by deciding that it only applied to lawful determinations made by the Foreign Compensation Commission, apparently depriving the ouster clause of effect since all arguably unlawful determinations became reviewable. In *Padfield*, statutory provisions conferring a broad discretion were limited by the court in that they could only be used to promote the policy and objects of the statute which were matters of law to be judicially determined. The *Pergau Dam* case was decided on the same principle. Commenting on *Padfield* in detail, Griffith stated the judiciary allocated themselves the power 'of re-defining the purpose of a statute so as to reverse its meaning' and courts cross the boundary when they 'misinterpret the political purpose of the policy as expressed in the statute'.²¹ In summary the problem is that 'judges are prepared to ... positively ... strike down the exercise of ministerial discretion, expressly authorised by the plain words of the statute, where they conclude that the exercise is in conflict with their own definition of parliamentary purpose'.²²

Adam Tomkins' view is that the task of the judiciary 'is to ensure that the government acts only within (and not beyond) its statutory powers, strictly construed';²³ 'the position that the court should have the power to declare government action unlawful where it flouts a specific rule that Parliament has laid down is uncontroversial' and 'the courts must be fearless in ruling where the government has overstepped the line or, indeed, in ruling

²⁰ Arvind and others (n 5).

²¹ Griffith (n 14) 175.

²² Griffith (n 15) 57.

²³ Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 U Toronto LJ 1, 8.

where the line is too blurred to be meaningful'.²⁴ Further, where there is uncertainty about the scope of powers, the 'courts should not construe ambiguous, unclear, or uncertain governmental powers against the interests of individual liberty' and only uphold a power to interfere with individual liberty where 'it is unambiguous, clear, and certain that Parliament has conferred such a power on the government'.²⁵

Richard Bellamy recognises that 'democratic legislation still has to be interpreted and acted upon by judges and officials', and this inevitably raises issues of legislative indeterminacy, linguistic ambiguity, and mechanical applications producing unjust or dysfunctional outcomes which cannot be resolved by appeals to legislative intent.²⁶ The solution is not 'to outlaw judicial interpretation altogether, but to see if a form of judging exists that is consistent with the circumstances of politics and the primacy of democratic legislation'.²⁷ Bellamy argues that judges should focus on the details of the case and look for parallels with other cases in settled parts of the law; reason analogically to overcome the vagueness of legal rules; and achieve consistency by drawing parallels or contrasts with previous cases, while allowing incremental change to take account of new circumstances.²⁸ Bellamy's conclusion is that 'Law operates within rather than above the "circumstances of politics"' and 'The role of the courts is to uphold the resulting laws consistently and impartially'.²⁹

²⁴ Adam Tomkins, *Our Republican Constitution* (Hart 2005), 22.

²⁵ Tomkins (n 23), 1.

²⁶ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge 2007), 83.

²⁷ *ibid* 84. It is unclear how judicial interpretation might be outlawed. Or, indeed, if an attempt was made, how judges might interpret legislation seeking to outlaw judicial interpretation.

²⁸ *ibid*. A response to this analysis might be: 'What do you think judges are doing if they are not doing these things already?'

²⁹ *ibid* 88. As to the circumstances of politics, see Waldron (n 50) in ch 3 above.

For Richard Ekins and Graham Gee the position is short and clear:

In interpreting statutes, the judge strives to find and give effect to the intention of the enacting legislature, insofar as it is made out by the statutory text read in the context of enactment. The judge rightly presumes that the legislature does not intend to depart from the existing constitutional order, or to qualify or change settled legal rights, but this presumption is defeasible.³⁰

What conclusions, then, can be drawn about the limits of adjudication envisaged by political constitutionalism when it comes to statutory grounds of review? There seem to be three essential conclusions. First, review on statutory grounds is in principle unproblematic from a political constitutionalist perspective. It is accepted that the courts perform an important constitutional role in judicial review by ensuring government does not go beyond statutory powers and procedures. Second, the ambiguity and indeterminacy of legislation is recognised and that courts necessarily have to resolve this. Third, the problem arises where courts interpret legislation other than in accordance with legislative intent. As to evidence of the limits of adjudication being exceeded, the indicia seem to be: strained or implausible interpretation of provisions and/or judges taking a view of the purposes of legislation which is at odds with legislative intent. For Griffith, it seems review on *Padfield* grounds by reference to the objects or purposes of the legislation is unacceptable, but for Tomkins, Gee and Ekins, reference to the broader policy context is acceptable. The essence seems to be that the judiciary cross the line when they misinterpret or misconstrue statutory provisions so as to limit or defeat the true policy or purposes of

³⁰ Richard Ekins and Graham Gee, 'Putting Judicial Power in its Place' (2017) 36 U Queensland LJ 375, 377. See also Ekins (n 8).

provisions; and, where provisions confer a broad discretion on ministers, the courts ought to defer to that discretion and not seek to limit it, in particular by substituting their own view as to what the public interest requires. While this can be stated in fairly simple terms, the problem is, of course, trying to unpick whether it has happened in individual cases. The following parts engage in that analysis.

3. Challenges to delegated legislation on *ultra vires* grounds

The first tranche of cases analysed in this chapter are challenges to delegated legislation on the basis it was *ultra vires* the enabling statutory provision(s). It includes both strict and *Padfield* grounds, but excludes equalities grounds which are considered in the next part. There is a general overview and the analysis is conducted under separate headings which tackle ten significant challenges (three in relation to legal aid, six in relation to welfare benefits and pensions, and one other case); and then various less significant challenges. Rather than reaching a conclusion on each case separately, conclusions are consolidated for groups of cases.

The broad political context is that there are advantages to implementing policy by delegated rather than primary legislation. Parliamentary time available for primary legislation is extremely limited.³¹ Parliament's role in considering delegated legislation depends on the provisions of the enabling statute - the main processes being the negative and affirmative procedures - but it is fundamentally limited, both in committee and in both

³¹ Cabinet Office, *Guide to Making Legislation 2025* (Cabinet Office, 2025) [2.4]. The Parliamentary Business and Legislation (PBL) Cabinet Committee 'usually receives around twice as many bids for legislative slots as there are slots available in each session'. And 'Before seeking a slot in the legislative programme, departments should consider whether legislation is necessary. Parliamentary time is limited and departments should always consider whether the ends they wish to achieve could be reached by purely administrative means' [5.1].

houses. Parliament cannot amend delegated legislation and instances of delegated legislation being voted down are extremely rare.³²

Given the pressure on parliamentary time and the reality of parliamentary scrutiny of delegated legislation, it would be surprising if governments did not seek to achieve policy aims by delegated legislation even where it was sometimes uncertain whether the legislation was *ultra vires* the enabling statute or some other statutory provision.

Government ministers must sometimes be advised about the legal jeopardy of an *ultra vires* finding in relation to delegated legislation, but nonetheless seek to achieve policy ends by that method. In the same way, judges must surely recognise the political context, in particular that where they decide that certain policy ends cannot be achieved by delegated legislation, there may be limited prospect of securing those ends by primary legislation.

Challenges to legal aid delegated legislation on *ultra vires* grounds

The first three significant judgments to be considered relate to delegated legislation made under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA 2012) where the effect of the delegated legislation was to narrow eligibility or limit payments for legal aid. The political context to LASPOA 2012 was the 2010 Coalition Agreement which stated that the government would ‘carry out a fundamental review of Legal Aid to make it

³² In 2014 the Hansard Society identified that ‘16 SIs out of over 169,000 – or 0.01% – in nearly 65 years have been rejected. Since 1950 the House of Commons has rejected just 11 instruments and the House of Lords has rejected five’. Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 6. For detailed discussions, see: Adam Tucker, ‘Parliamentary Scrutiny of Delegated Legislation’ in Alexander Horne, Gavin Drewry and Jeff King (eds), *Parliament and the Law* (2nd edn, Oxford 2018); Hayley Hooper, ‘Delegated Legislation in an Unprincipled Constitution’, in Johnson and Zhu (n 10).

work more efficiently'.³³ The subsequent green and white papers signalled major reforms and these were implemented by LASPOA 2012.³⁴ Stripped to the essentials, the Legal Services Commission was abolished and legal aid became more closely managed by the Lord Chancellor (LC) with administration undertaken by civil servants in an executive agency - the Legal Aid Agency (LAA) - of the Ministry of Justice. There are two heads of entitlement for civil legal aid: 'general cases' where legal aid is available for specified issues (colloquially, 'in scope');³⁵ and 'exceptional cases' which do not relate to the specified issue but where legal aid is nonetheless available ('out of scope').³⁶ In order to qualify for legal aid, various eligibility criteria (primarily means and merits related) and procedural criteria (filling in the forms etc) have to be met, the detail of which is largely set out in delegated legislation.³⁷ Since it was a novel statutory scheme, there was limited authority on the interpretation of the provisions. There is a tension between Parliament specifying in primary legislation when legal aid is available and government, seeking to reduce public spending, providing further criteria for entitlement in delegated legislation. Litigation as to whether the delegated legislation was consistent with the statutory scheme was perhaps inevitable.

³³ HM Government, 'The Coalition: our programme for government' (May 2010) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf> accessed 1 May 2025.

³⁴ Ministry of Justice, 'Proposals for the Reform of Legal Aid in England and Wales' (Cm 7967, November 2010); and Ministry of Justice, 'Reform of Legal Aid in England and Wales: the Government Response' (Cm 8072, June 2011).

³⁵ LASPOA 2012 s 9 and Sch 1, Pt 1.

³⁶ LASPOA 2012 s 10.

³⁷ LASPOA 2012, s 11.

In *Ben Hoare Bell*,³⁸ the challenge was to a regulation that provided for payment for judicial review only if the court gave permission, or neither refused nor gave permission and the LC considered that it was reasonable to pay remuneration in the circumstances.³⁹ The main purpose of the regulation was to incentivise providers to give more careful consideration to the merits of applications for permission. The case was argued on both strict *ultra vires* and *Padfield* grounds. The strict argument failed on the basis that the regulation was within the wording of the enabling provision,⁴⁰ and the effect was not to remove work done on permission applications from scope. The *Padfield* ground succeeded on the basis that the regulation put providers at risk of not being paid, and individuals at risk of not being provided a service, in three situations that were beyond their control, including where the defendant withdrew the decision in response to an application for permission.⁴¹ The court found there was no rational or proportionate connection (though the court did not apply the tests of rationality or proportionality since this was a case of statutory interpretation) between the purpose and effect of the regulation and it was incompatible with statutory scheme. The purpose of the regulation was to prevent work being done on applications for permission in ‘weak’ cases, but its effect was that work

³⁸ *R (Ben Hoare Bell Solicitors) v Lord Chancellor* [2015] EWHC 523 (Admin), [2015] 1 WLR 4175 [4], [20], [31] (Beatson LJ, Ousely J).

³⁹ Civil Legal Aid (Remuneration) Regulations 2013, SI 2013/422 reg 5A, inserted by Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations 2014, SI 2014/607 reg 2. There was also an ground in this case argued on the basis that by not making payment the LC required solicitors to breach their professional duties to their clients or their contractual duties to the LAA. The court did not hear full argument and did not express a concluded view on this ground.

⁴⁰ LASPOA 2012, s 2(3) ‘The Lord Chancellor may by regulations make provision about the payment of remuneration by the Lord Chancellor to persons who provide services under arrangements made for the purposes of this Part’.

⁴¹ Also where the court ordered an oral hearing of the permission application; or the court ordered a rolled-up hearing.

done on ‘strong’ applications - those that caused defendants to compromise - would not be paid.⁴²

In *Rights of Women*,⁴³ the challenge was to amendments to regulations that specified the evidence necessary to support an application for legal aid in family law domestic violence cases.⁴⁴ The amendments provided that legal aid would not be granted without documentary evidence of domestic violence in the 24-month period before the application for legal aid.⁴⁵ During debate in the Lords on LASPOA 2012 an amendment was passed such that in domestic violence cases no evidential time limit would apply, but the amendment was rejected by the Commons. As with *Ben Hoare Bell*, the case was argued on the basis of strict *ultra vires* and *Padfield* grounds. Both failed at first instance. The amendment was within the wording of the enabling provision and the effect was not to remove domestic violence cases from scope.⁴⁶ The *Padfield* ground failed because the regulation did not frustrate the purpose of LASPOA 2012 to remove family law proceedings from scope and encourage alternative forms of dispute resolution, while preserving legal aid for victims of domestic violence in need of protection. On appeal to the Court of

⁴² One other ground - the ‘chilling effect’ ground - was unsuccessfully argued and it is analysed in chapter 5 since it broadly aligns with similar common law grounds.

⁴³ *R (Rights of Women) v Lord Chancellor* [2015] EWHC 35 (Admin), [2015] 2 FLR 823 [1], [30], [31] (Fulford LJ, Lang J).

⁴⁴ Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098, reg 33 as amended by Civil Legal Aid (Procedure) (Amendment) Regulations 2014, SI 2014/814, reg 2.

⁴⁵ Acceptable documentary was exhaustively defined as evidence: from a health professional that the applicant had suffered injuries consistent with domestic violence; from a domestic violence support organisation that the applicant had been admitted to a refuge or had been refused admission due to a shortage of places; from a member of a multi-agency risk assessment conference that the applicant was a victim of domestic violence and a plan had been put in place to protect the applicant; from a social services department that the applicant had been a victim or was at risk of being a victim of domestic violence; that the perpetrator had been on police bail for a domestic violence offence; or of various court orders relating to domestic violence.

⁴⁶ LASPOA 2012, s 12(3) ‘Regulations under subsection (2) [making provision about the making and withdrawal of determinations] may, in particular, include ... (g) provision requiring information and documents to be provided, ...’

Appeal, the strict *ultra vires* ground failed again, but the *Padfield* ground succeeded on the basis that the 24-month period frustrated the statutory purpose since there was clear evidence that applicants for legal aid who had suffered from or were at risk of domestic violence had been refused legal aid where Parliament intended it to be available.⁴⁷ Taking an egregious example, the effect of the amendment was that where the partner of an applicant for legal aid had been imprisoned for a period of 24 months or more for a domestic violence related offence against the applicant (necessarily a serious offence admitted or proved beyond reasonable doubt) the applicant could not qualify for legal aid when the partner was released from prison (the point at which the risk of further domestic violence precipitated) and made an application in family law proceedings.

The third case, *PLP*,⁴⁸ is of greater significance since the LC sought to use the Henry VIII power in LASPOA 2012, s 9 to make an order not to ‘vary or omit’ the specified services for which legal aid was to be made available, but to remove availability, subject to exceptions, of the specified services to those who failed a residence test.⁴⁹ LASPOA 2012, s 41(2)(b) expressly provided that such orders ‘may make provision by reference to ... services provided for a particular class of individual.’ The claim was argued on the basis of whether the power was being used to promote the objects of the statute which was to make legal aid available on the basis of need. The argument succeeded at first instance.⁵⁰

⁴⁷ *R (Rights of Women) v Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91, [2016] 1 WLR 2543 [3], [34], [37] (Longmore, Kitchin, Macur LJ).

⁴⁸ *R (Public Law Project) v Secretary of State for Justice* [2014] EWHC 2365 (Admin), [2015] 1 WLR 251 (Moses LJ, Collins, Jay JJ). The draft order was the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014. As a draft, the order was not given an SI number.

⁴⁹ LASPOA 2012, s 9(2) ‘The Lord Chancellor may by order— (a) add services to Part 1 of Schedule 1, or (b) vary or omit services described in that Part, (whether by modifying that Part or Part 2, 3 or 4 of the Schedule).

⁵⁰ *Public Law Project* (n 48) [3], [33], [51].

On appeal, the Court of Appeal reversed the decision because the power was exercisable by reference to the object of saving public funds and not only by reference to need; and the residence test was within the scope of that objective.⁵¹ That decision was reversed by the Supreme Court,⁵² on the basis that: (a) while the amendments were within the literal meaning of the enabling power, they might nonetheless be outside Parliament's contemplation and doubts about the scope of a power to amend primary legislation by delegated legislation would be resolved by a restrictive approach; (b) the purpose of the statute was to direct civil legal aid on the basis of 'need' related criteria (including the importance of the issue, and the availability of alternative funding or remedies) and the residence test applied a completely different type of criterion (a personal characteristic or circumstance unrelated to 'need'). The amendments were therefore *ultra vires*.

In all three of these cases, the delegated legislation was within the wording of the relevant provisions, but was quashed on *Padfield* grounds because the power had been exercised other than to promote the objects or purposes of LASPOA 2012, as determined by the courts. This is, on the face of it, problematic territory for political constitutionalism in that the courts went beyond the statutory words to determine the cases on a judicial view as to the objects and purposes of the statute. As to how problematic this is, and for Griffith any review by reference to broader objects and purposes is unacceptable, the decisions are perhaps less problematic because there was material which justified the courts' decisions. In *Ben Hoare Bell* and *Rights of Women* it was clear from the pre-legislative material cited that Parliament intended legal aid to be available for judicial review and domestic violence cases on the basis of need, but the effect of the delegated legislation was to essentially

⁵¹ *R (Public Law Project) v Lord Chancellor* [2015] EWCA Civ 1193, [2016] 2 WLR 995 [4], [10] (Laws, Kitchin, Christopher Clarke LJJ).

⁵² *R (Public Law Project) v Lord Chancellor* [2014] UKSC 39, [2016] AC 1531 [4], [10] (Neuberger PSC, Hale DPSC, Mance, Reed, Carnwath, Hughes, Toulson JJSC).

limit such entitlement in ways that were unrelated to need. Similarly, in *Public Law Project*, it was not obviously unreasonable to conclude that a central object or purpose of LASPOA 2012 was to target legal aid on the basis of need and ability to pay, and the delegated legislation excluded a group of people on the basis of a personal circumstances unrelated to need or ability to pay.⁵³ None of these cases seems to have attracted significant comment from a political constitutionalist perspective. Harlow and Rawlings, however, identify *Public Law Project* and *Rights of Women* as illustrating ‘forceful approaches’ and demonstrating ‘the potency and elasticity of so-called “ordinary” common law technique’ when it comes to statutory interpretation.⁵⁴ While allowing for potency and elasticity, there is limited evidence of the courts obviously misconstruing the objects or purposes of the statutory provisions such as to limit or defeat the policy or political purposes of the legislation. The issue as to the weight attached by the courts to parliamentary scrutiny or approval of delegated legislation cuts across chapters 5, 6 and 7 and is addressed in chapter 8.

Challenges to welfare benefits/pensions delegated legislation on *ultra vires* grounds

The next six significant judgments relate to delegated legislation made in relation to welfare benefits. The political context was the 2010 Coalition Agreement which focussed on ‘welfare to work’ and increased conditionality, sanctions, and shifting claimants from Incapacity Benefit (IB) to Jobseeker’s Allowance (JSA). The subsequent green and white

⁵³ Given the relevant provisions of LASPOA 2012 (enacted after extensive consultation and debate) came into force on 1 April 2013 and within 12 months the government was seeking to impose restrictions, the unstated suspicion must have been that the government was seeking to achieve by delegated legislation that for which it could not have secured parliamentary consent in primary legislation. Perhaps significantly, the draft order precipitated strong reactions from a range of justice organisations. See, for example, Justice, ‘Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014: Briefing for MPs and Peers’ (30 June 2014) <<https://files.justice.org.uk/wp-content/uploads/2015/01/06171943/JUSTICE-Briefing-Residence-Test-Regulations-June-2014.pdf>> accessed 1 May 2025.

⁵⁴ Harlow and Rawlings (n 2) 738.

papers signalled reforms far beyond the scope of the Coalition Agreement.⁵⁵ The reforms were enacted by the Welfare Reform Act 2012, with the detail and implementation dealt with by an inevitable volume of delegated legislation. Stripped to the essentials, Universal Credit (UC) gradually replaced a range of benefits (JSA, Income Support (IS) and Housing Benefit (HB)); Personal Independence Payment (PIP) replaced Disability Living Allowance (DLA) for adults; and caps were imposed on the amount of benefit payable in a range of circumstances. The government sought to get ahead with some of the policy objectives on caps, conditionality and sanctions by using delegated legislation under existing powers. As noted in chapter 4, it is possible to challenge the provisions of delegated legislation in appeals to the First-tier Tribunal (FTT), Upper Tribunal (UT) and then to the Court of Appeal, and these cases are not considered. As with the legal aid cases, there is an obvious tension between Parliament specifying in primary legislation broad conditions of entitlement to benefit, and a government, seeking to reduce public spending, imposing criteria in delegated legislation that limits entitlement. Litigation was again perhaps inevitable.

The first case is *Child Poverty Action Group*,⁵⁶ which was an unsuccessful challenge to regulations that changed the basis for calculating HB.⁵⁷ The changes related to local housing allowance (LHA) which set an amount of HB payable in respect of private sector tenancies by geographical area. HB is a means tested benefit which funds accommodation for those who could not otherwise afford it. The two changes were: (a) the introduction of

⁵⁵ DWP, '21st Century Welfare' (Cm 7913, July 2010); and DWP, 'Universal Credit: welfare that works.' (Cm 1957, June 2011).

⁵⁶ *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2011] EWHC 2616 (Admin) [23], [44] (Foskett J).

⁵⁷ Rent Officers (Housing Benefit Functions) (Amendment) Order 2010, SI 2010/2836, art 2; and Housing Benefit (Amendment) Regulations 2010, SI 2010/2835, reg 2.

maximum weekly caps on the amount of HB payable; and (b) the reduction of the maximum size of accommodation for calculating to the cap from five to four bedrooms. The impact of the changes were most significant in London where rents are higher. The applicable statutory provisions are in various pieces of primary legislation and it is not necessary to analyse them since the argument was *Padfield* on the basis that the purpose of the HB scheme was to fund accommodation such that claimants are not made homeless and HB must be set at levels to achieve the statutory purpose.⁵⁸ The arguments and analysis are lengthy, and there was extensive reference to previous authority, but the essential conclusion was:

The purpose of the scheme is to assist [HB] claimants with rent, while also protecting the public purse. The authorities to which I have been referred make clear that the scheme is designed to enable the Defendant to strike an appropriate balance between the interests of claimants and of taxpayers.⁵⁹

In *Zacchaeus Trust*,⁶⁰ the challenge was to an order which amended the basis on which HB payable for private sector tenancies was capped.⁶¹ The enabling powers provided for the cap 'to be ascertained in the prescribed manner by reference to rent officer determinations' such determinations being those made 'by a rent officer in the exercise of functions under section 122 of the Housing Act 1996',⁶² which in turn provided that the

⁵⁸ *Child Poverty Action Group* (n 56) [23].

⁵⁹ *ibid* [36].

⁶⁰ *R (Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions* [2013] EWHC 233 (Admin), [2013] PTSR 785 [3], [6] (Underhill J).

⁶¹ Housing Rent Officers (Housing Benefit Functions) (Amendment) Order 2012, SI 2012/646, art 2 which amended Rent Officers (Housing Benefit Functions) Order 1997 SI 1997/1984, art 4B.

⁶² Social Security Contributions and Benefits Act 1992. s 130A.

Secretary of State ‘may by order require rent officers to carry out such functions as may be specified...’.⁶³ Previously, changes to the cap had been based on actual rent levels determined by expert Valuation Office Agency rent officers. The effect of the order was that rent officers ‘determined’ that the cap was frozen for 12 months and in future the cap would be increased by the lower of: (a) the existing rent officer method based on ‘actual determinations’; or (b) inflation measured by the consumer price index (CPI) ‘determination’. The argument that the cap was *ultra vires* because it was not being set by reference to rent officer determinations is not entirely unattractive given the Secretary of State was effectively determining the rent officers’ determinations for them. Nonetheless, the *ultra vires* challenge failed at both first instance and on appeal to the Court of Appeal,⁶⁴ on the basis that the purpose of the HB scheme (a finding which veers towards being a *Padfield* conclusion) was to balance public spending while preventing homelessness and the Secretary of State was entitled to specify the functions he required rent officers to carry out to achieve what he regarded as the right balance.

In *Reilly*,⁶⁵ the challenge was to regulations that obliged JSA claimants in prescribed circumstances to participate in ‘work for your benefit’ schemes intended to assist them to obtain employment.⁶⁶ The enabling power permitted regulations that imposed on ‘claimants in prescribed circumstances a requirement to participate in schemes of any prescribed description’.⁶⁷ The regulations identified an ‘Employment, Skills and Enterprise

⁶³ Housing Act 1996, s 122(1).

⁶⁴ *R (Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1202, [2013] PTSR 1427 [2], [20] (Maurice Kay, Sullivan, Ryder LJ).

⁶⁵ *R (Reilly) v Secretary of State for Work and Pensions* [2012] EWHC 2292 [5], [7], [24], [89] (Foskett J) .

⁶⁶ Jobseeker’s Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011, SI 2011/917, reg 2.

⁶⁷ Jobseekers Act 1995, s 17A, inserted by Welfare Reform Act 2009, s 1.

Scheme’ but there was no ‘prescribed description’ of what the scheme required in terms of the nature or hours of work. The Secretary of State purported to make sub-schemes under the regulations, the ‘sector-based work academy scheme’ and the ‘Community Action Programme’. The *ultra vires* ground failed at first instance but then succeeded before the Court of Appeal on the basis that there was no description of the scheme in the delegated legislation.⁶⁸ The name ‘Employment, Skills and Enterprise Scheme’ did not amount to a ‘prescribed description’ and added nothing of substance that Parliament required to be in the delegated legislation. The prescribed description issue was litigated again in *Smith and Smith (No 2)*,⁶⁹ where it was decided that the descriptions of schemes in other regulations were adequately prescribed, essentially on the basis: they specified the number of hours of work and the period for which the work had to be performed (*Smith*); and the training was designed to assist claimants to obtain skills needed to obtain employment (*Smith (No 2)*).⁷⁰ In both cases, the courts emphasised the need for the Secretary of State to have the flexibility in describing schemes to provide assistance suitable to a claimant’s individual needs and circumstances and no more than an indication of the character of the scheme was required. So, while *Reilly* established that ‘prescribed description’ required some

⁶⁸ *R (Reilly) v Secretary of State for Work and Pensions* [2013] EWCA Civ 66, [2013] 1 WLR 2239 [27], [51], [63] (Pill, Black LJ, Sir Stanley Burnton). The Secretary of State won the further appeal to the Supreme Court because, while the Court agreed with the analysis below, the Jobseekers (Back to Work Schemes) Act 2013 retrospectively validated the regulations. *R (Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] AC 453 [27], [43], [53] (Lord Neuberger PSC, Lord Mance, Lord Clarke, Lord Sumption, Lord Toulson JJSC). The retrospective validation of the regulations gave rise to a second round of litigation on the ground that the validation infringed article 6 of the Convention. This is covered in chapter 7.

⁶⁹ *R (Smith) v Secretary of State for Work and Pensions* [2014] EWHC 843 (Admin) [2], [15] (Hickinbottom J); and *R (Smith) v Secretary of State for Work and Pensions* [2015] EWCA Civ 229 [17] (Richards, Underhill and Briggs LJ). *R (Smith) (No 2) v Secretary of State for Work and Pensions* [2015] EWHC 2284 (Admin) [68], [71] (Hickinbottom J).

⁷⁰ The relevant regulations were the Jobseeker’s Allowance (Mandatory Work Activity Scheme) Regulations 2011, SI 2011/688, reg 2; and the Jobseeker’s Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013, SI 2013/276, reg 3.

description, the subsequent cases established that only a description of the most perfunctory kind was required.

The final case is the first *FDA* case, the challenge to the decision of the Secretary of State to uprate benefits and public sector pensions by reference to the Consumer Price Index (CPI) rather than the Retail Price Index (RPI).⁷¹ CPI (introduced in 1996) is generally lower than RPI (which dates from the 1950s) because CPI averages prices in such a way as to infer some product substitution where there is an exceptional increase in the price of a specific item in the basket of goods and services; and RPI includes some direct taxes (including TV licences, vehicle tax and council tax) and some housing costs (including mortgage interest payments and building insurance).⁷² The claim raised both strict *ultra vires* and *Padfield* grounds, though the *Padfield* ground was identical to a relevancy of considerations ground.⁷³ The central statutory provision was the Social Security Administration Act 1992, s 150 and the ostensibly broad powers conferred on the Secretary of State to review in each tax year a range of benefits and pensions ‘in order to determine whether they have retained their value in relation to the general level of prices obtaining in Great Britain estimated in such manner as the Secretary of State thinks fit’. And then ‘where it appears to the Secretary of State that the general level of prices is greater at the end of the period under review than it was at the beginning of that period, he shall lay before Parliament the draft of an up-rating order’.

⁷¹ *R (FDA) v Secretary of State for Work and Pensions* [2011] EWHC 3175 (Admin) [38], [39], [44], [52] (Elias LJ, McCombe, Sales JJ).

⁷² *ibid* [7] - [15] for the complete explanation.

⁷³ *FDA* is one of many cases that illustrate the overlapping nature of the grounds. There is a discussion in chapter 6 as to when considerations arise from statutory words or purposes, as in *FDA*, or from the common law.

The strict *ultra vires* ground was argued on the basis that CPI did not, given the way it was calculated, compare ‘the general level of prices’; and the *Padfield* ground on the basis that the change from RPI to CPI was for the improper purpose of reducing public spending rather than for selecting the most appropriate measure for determining ‘the general level of prices’. The strict ground failed because, while there were differences of opinion between economists and statisticians as to the merits of each index, both sought to model spending patterns and behaviour of average households to assess the impact of inflation on the ‘general level of prices’. It was therefore implausible to suppose that Parliament had intended to exclude an index calculated using the CPI methodology.

The *Padfield* ground is more complex. In deciding whether to increase some benefits the Secretary of State was entitled to have ‘regard to the national economic situation and any other matters which he considers relevant’, but not in relation to other benefits.⁷⁴ The nub of the argument was that, where the Secretary of State could act for purposes related to, or have regard to, the ‘national economic situation’, the statute said so; but where it did not, he could not have such regard. It is not an unattractive argument, but the majority (Elias LJ and Sales J) decided that, while the national economic situation was specifically identified in relation to some increases, it did not mean it was an impermissible consideration when deciding which index to adopt. Further, the majority accepted the evidence of the government that both the Secretary of State and the Chancellor independently came to the view that, notwithstanding the public spending implications, CPI was chosen to further the statutory purposes of identifying an index which reflected the general level of prices. There was robust dissent from McCombe J who decided the sole policy and objects of the provision was to decide whether the relevant benefits had

⁷⁴ Social Security Administration Act 1992, s 150(2)(a) and (b).

retained their value and it was unlawful 'to search out generally acceptable methods of estimation and to make the selection guided by exterior considerations such as a desire to make savings'.⁷⁵ And, on the evidence, it was clear that this is what had happened.⁷⁶ The decision of the majority was upheld unanimously by the Court of Appeal on both the strict *ultra vires* and *Padfield* ground with Lord Neuberger concluding 'It therefore seems to me unrealistic to say that the Secretary of State is required to ignore the wider economic realities, irrespective of the circumstances, when carrying out his functions under section 150'.⁷⁷

It is difficult to argue that, individually, any of these decisions involved implausible interpretations of the relevant statutory provisions. There appear, however, to be differences between the welfare benefits/pensions cases and the legal aid cases. In the welfare benefits/pensions cases and strict *ultra vires*, a converse finding in *Zacchaeus Trust* would have been reasonable since, on the face of it, Parliament intended HB to be calculated by reference to expert rent officer determinations. Had Parliament wanted to give the Secretary of State the power to set HB, it could have done so; and the decision essentially rendered redundant rent officer determinations by which Parliament had intended HB to be decided. In *Reilly, Smith and Smith (No 2)*, while the courts declined to deprive the words 'prescribed description' of any meaning or effect, they imposed minimal

⁷⁵ *FDA* (n 71) [124].

⁷⁶ The government had disclosed a meeting memo from two days after the 2010 government was formed which stated 'We met yesterday to discuss uprating. You were not attracted to pursuing legislation to recoup the 1.5% advance that some benefit recipients received following last year's Pre-Budget Report [a reference to the previous government bringing forward benefit increases to stimulate economic demand]. You asked us to come back to you with advice on: alternative uprating levers we could use to achieve savings, together with their likely impacts on individuals and families; and other ways in which we might make AME savings, without primary legislation ... Recommendation: To consider whether any of the alternative options for realising savings are ones you would wish us to consider further ...'

⁷⁷ *R (FDA) v Secretary of State for Work and Pensions* [2012] EWCA Civ 332, [2013] 1 WLR 444 [4], [5], [38], [48] (Lord Neuberger MR, Maurice Kay, Sullivan LJ).

requirements as to what could amount to a 'prescribed description'. As to the *Padfield* grounds in the welfare benefits/pensions cases, in *Child Poverty Action Group*, *Zacchaeus Trust*, and the first *FDA* cases, the legislative purposes were found to include 'protecting the public purse' and the 'national economic situation'.

In contrast, when it came to the legal aid cases, except in the Court of Appeal in *PLP*, the saving of public money was not relevant to interpreting words and purposes. In short, there appears to be a difference of judicial approach between the legal aid and welfare benefits cases. In *Rights of Women*, Longmore LJ starts his judgment, reversing the decision of a Divisional Court, with the statement:

Legal aid is one of the hallmarks of a civilised society. Domestic violence is a blot on any civilised society but is regrettably prevalent. It is therefore no surprise that in an age of austerity, when significant reductions in the availability of legal aid are being made by Parliament, legal aid is preserved for victims of domestic violence who seek protective court orders or who are parties to family law proceedings against the perpetrator of the violence.⁷⁸

None of that is in any sense wrong, but there is a contrast with *Zacchaeus Trust*, where the judgment of Sullivan LJ includes the statement:

The underlying statutory purpose of the housing benefit scheme has been described as 'a balancing exercise'. One element of the balance is the need to protect the public purse. The other is the need to devise a scheme that does not

⁷⁸ *Rights of Women* (n 47) [1].

produce homelessness or require what has been described as ‘a radical deterioration in . . . a person’s residential circumstances’ ...⁷⁹

Again, none of that is in any sense wrong and no claim is made that requiring victims of domestic violence to provide evidence before they can get legal aid is comparable with ceasing to cap private sector tenants’ HB payments by reference to rent officer determinations.⁸⁰ What seems clear, however, is that in both cases - under both statutory schemes and in relation to both pieces of delegated legislation - reducing public spending was a relevant issue;⁸¹ but the public spending implications or the language of ‘striking a balance’ did not feature in interpreting the provisions in the legal aid cases. Had it done so, and as *PLP* in the Court of Appeal shows, it would mean the delegated legislation was not unlawful.⁸² Notwithstanding similar public spending issues, the statutory objects and purposes were more narrowly construed in *Rights of Women* than *Zacchaeus Trust*. The conclusion is that the legal aid cases demonstrate most robust or less deferential approaches to statutory interpretation and the evidence, whereas the welfare benefits cases demonstrate weaker or more deferential approaches.

Other *ultra vires* challenges to delegated legislation

There are a number of other *ultra vires* challenges to delegated legislation that can be dealt with shortly because they raise no issues from a political constitutionalist perspective

⁷⁹ *Zacchaeus Trust* (n 64) [47].

⁸⁰ The incommensurability issue arises in chapters 5, 6 and 7 and is addressed in chapter 8.

⁸¹ In some of the welfare benefits cases there were some stark references to public spending figures that appeared to verge into normative loaded statements that were absent from the legal aid cases. In *Reilly* (n 68) [15], for example, it was stated ‘Forecast expenditure for jobseeker’s allowance in the year 2011/12 was £4.9 billion. Subject to retirement age, there is no limit upon the period of time during which the allowance may be claimed’.

⁸² *Public Law Project* (n xx).

in being unremarkable examples of statutory interpretation; or where the analysis occurs in subsequent chapters because the key challenges were on common law or Convention grounds.

Law Society was the one case where the delegated legislation seeking to reduce legal aid spending was made under enabling powers in the Access to Justice Act 1999 (AJA 1999), which governed legal aid before LASPOA 2012. The challenge was to an amendment order which cut criminal legal aid fees such that no fee was payable for committal proceedings before magistrates' courts.⁸³ Only the Crown Court fee was payable and the result was substantially lower payments to solicitors. There were in effect two strict *ultra vires* and a *Padfield* ground: the order was beyond the wording of AJA 1999, s 14 since it required solicitors to work for no remuneration and the provision required the LC to fund representation;⁸⁴ and AJA 1999, s 25(3) required the LC to have regard to the need to secure the provision of services by a sufficient number of competent persons and bodies;⁸⁵ and it was made for an improper purpose, which was to encourage solicitors to advise clients in either-way case not to elect Crown Court trial. The grounds were unsuccessful on basis that the relevant wording did not require the LC to fund a specific piece of work where it was remunerated as part of a larger whole; and, on the evidence, the court could not find that the LC did not take into account the need to secure services; and there was no evidence the order was made for an improper purpose.

⁸³ *R (Law Society) v Lord Chancellor* [2012] EWHC 794 (Admin) [4], [35], [74], [51] (Stanley Burnton LJ and Treacy J). The Criminal Defence Service (Funding) (Amendment) Order 2011, SI 2011/2065, art 25 amended the Criminal Defence Service (Funding) Order 2007, SI 2007/1174, sch 2, para 12B.

⁸⁴ *ibid* [35]; AJA 1999, s 14(1) provides: '... and the [Legal Services Commission] shall fund representation to which an individual has been granted, or provisionally granted, a right in accordance with [Schedule 3].'

⁸⁵ *ibid* [51]; AJA 1999, s 25(3) provides: 'When making any remuneration order the Lord Chancellor shall have regard to the need to secure the provision of services of the description to which the order relates by a sufficient number of competent persons and bodies, ...'

In *Howard League* the *ultra vires* challenge to regulations narrowing the scope of legal aid for prison law was on the basis of the LC's statutory duty to uphold the rule of law.⁸⁶ The ground was rejected ('As a legal submission this goes nowhere').⁸⁷ The common law ground that succeeded in the Court of Appeal is considered in chapter 6. In *R (A)* the challenge was to the 2012 Criminal Injuries Compensation Scheme that sought to limit eligibility.⁸⁸ The argument was that a statutory discretion as to when awards 'may be withheld' was being interpreted by the minister as 'must be withheld'.⁸⁹ The argument was rejected on the basis the 'may' was permissive to allow the Secretary of State to make a scheme where awards were withheld where the scheme rules so provided.

RF was a challenge to PIP regulations and is dealt with in chapter 7 since it essentially succeeded on a Convention ground.⁹⁰ The final case here is *Williams* which was a challenge to the decision not to include a fee exemption scheme for destitute children

⁸⁶ *R (Howard League for Penal Reform) v Lord Chancellor* [2014] EWHC 709 (Admin) [53] (Rafferty LJ and Cranston J) and the Constitutional Reform Act 2005, s 1 'This Act does not adversely affect - (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle. Permission was refused on this ground but it is included since permission was granted by the Court of Appeal.

⁸⁷ *ibid* [53].

⁸⁸ *R (A) v Criminal Injuries Compensation Authority* [2017] EWHC 2 (Admin) [3], [114] (Wilkie J), also known as *R (McNiece) v Criminal Injuries Compensation Authority*. Strictly speaking the Criminal Injuries Compensation Scheme is not delegated legislation, but it is approved by Parliament.

⁸⁹ Criminal Injuries Compensation Act 1995, s 3(1). A compensation scheme 'may, in particular, include provision (a) as to the circumstances in which an award may be withheld or the amount of compensation reduced ...'

⁹⁰ *R (RF) v Secretary of State for Work and Pensions* [2017] EWHC 3375 (Admin), [2018] PTSR 1147 [62] (Mostyn J) [40], [62] 'Mr Eadie [counsel for the Secretary of State] in his skeleton at para 72 more or less conceded that were I to find [the Convention ground] proved in the way that I have, then it would follow that the parent statute would not grant the power to pass a subsidiary measure which has this effect'.

seeking registration as a British citizen on the basis of continuous residence.⁹¹ The right to citizenship arose under the British Nationality Act 1984 (BNA 1984), s 1(4) and an application had been made but rejected because the fee of £673 had not been paid.⁹² The power to set fees was in the Immigration, Asylum and Nationality Act 2006, s 51 which included the power to provide exemptions but the power had not been exercised. The ground was essentially *Padfield* on the basis that the fee frustrated the purpose of the BNA 1984 to grant citizenship, though it shaded into breach of the principle of legality since citizenship was a fundamental right. The ground was rejected on the basis that Parliament had intended fees to be payable and the amount of the fee did not frustrate the statutory purpose of the BNA 1984 and this was upheld by the Court of Appeal.⁹³ A further Convention ground is analysed in chapter 7.

None of these cases raise significant issues in the sense of the limits of adjudication being exceeded and might be described as ‘run of the mill’ cases of statutory interpretation. A final point of significance in this part is that a high proportion of the challenges to delegated

⁹¹ *R (Williams) v Secretary of State for the Home Department* [2015] EWHC 1268 (Admin) (Hickinbottom J) [2(i)], [69].

⁹² The fee was chargeable under the Immigration and Nationality (Fees) Order 2011, SI 2011/455 and specified in the Immigration and Nationality (Fees) Regulations 2013, SI 2013/749.

⁹³ *R (Williams) v Secretary of State for the Home Department* [2017] EWCA Civ 98, [2017] 1 WLR 3283 [2], [37] (Davis, Underhill, Macur LJ) [37]. For the sake of completeness, a common law rights ground was raised on appeal and rejected on the basis it was ‘based on the wrong premise that the potential entitlement to be registered as a citizen ... is some kind of “fundamental right”, as opposed to a right which Parliament has chosen to bestow. At all events if the argument cannot succeed on a proper interpretation of the legislative provisions which create and implement the right, as it cannot, and if it cannot succeed under the Convention, as it cannot, then in my view it cannot succeed at common law’ [80]. *Williams* was classified as an austerity adjudication because the judgment identifies the purpose was generate incomes from fees so as to ‘protect ... the public interest in reducing the burden on the public purse’ *Williams* (n 91) [18]. There was a later case, *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2019] EWHC 3536 (Admin), which was not identified as an austerity adjudication but perhaps should have been. That claim was also ultimately unsuccessful before the Supreme Court on principle of legality/common law constitutional rights. *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255.

legislation, and all the challenges to delegated legislation relating to legal aid, were decided by Divisional Courts (all unanimously except *FDA*) at first instance.⁹⁴ The obvious inference is that the judiciary consider cases challenging delegated legislation likely to raise issues of general public importance.⁹⁵

4. Challenges on equalities grounds

This part analyses the challenges - both to delegated legislation and discretionary policy- and decision-making - on equalities or discrimination grounds. There were a significant number of cases where it was argued the government had not complied with various duties under equalities legislation. Of the 65 statutory grounds, 26 were equalities grounds, most of which related to the public sector equality duty (PSED).

The various equalities and discrimination duties recognise that those with certain protected characteristics, notably age (specifically in relation to children and older people), disability, race, and sex (specifically women) are more likely to be economically or socially disadvantaged. Since public spending, both in terms of cash transfers (welfare benefits and pensions) and services, are redistributive to those who are disadvantaged, public spending cuts have a disproportionate impact on those with protected characteristics. The political context here was rapid decision-making with the aim of reducing public spending. It is unsurprising that equalities grounds were argued in a high proportion of cases: they were useful pegs on which to hang challenges to the law and policy implementing

⁹⁴ The exceptions are: (*Smith*) and (*Smith (No 2)*) (n 69), *Zacchaeus Trust* (n 60), *RF* (n 90). *Public Law Project* (n 48) and *FDA* (n 71) were heard by a Divisional Court of three judges, presumably an arrangement reserved for cases that raise exceptionally most important issues.

⁹⁵ Senior Courts Act 1981, s 66 'Divisional courts may be held for the transaction of any business in the High Court which is, by or by virtue of rules of court or any other statutory provision, required to be heard by a divisional court'. The most recent version of 'The Administrative Court Judicial Review Guide 2024' (October 2024) provides at 14.3 that Divisional Courts '... are generally convened for cases that raise issues of general public importance'.

austerity. Matters are made slightly more complex in that the EA 2010, which superseded previous equalities legislation, came into force after the austerity programme started to be implemented. Some of the early cases therefore argued grounds based on breaches of earlier equalities legislation.⁹⁶ The key duties are: the PSED in EA 2010, s 149; the duty not to discriminate directly in EA 2010, s 13; and the duty not to discriminate indirectly in EA 2010, s 19. Given the number of PSED grounds, the material provisions of EA 2010, s 149 are set out in full:

s 149 Public sector equality duty

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—
 - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- (2) ...
- (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and

⁹⁶ The explanatory note to EA 2010, s 149 summarises the position: 'This section replaces section 71 of the Race Relations Act 1976, section 49A of the Disability Discrimination Act 1995 and section 76A of the Sex Discrimination Act 1975. These provisions imposed similar public sector equality duties in relation to race, disability and gender (including pregnancy and maternity as an implicit part of gender, and partly covering gender reassignment) respectively. There were no equivalent public sector equality duties for age, religion or belief or sexual orientation in previous legislation. The section extends the new public sector equality duty to cover gender reassignment in full, age, religion or belief and sexual orientation.' The position in relation to ss 13 and 19 is similar in that the duties were, subject to exceptions, extended to all the protected characteristics.

persons who do not share it involves having due regard, in particular, to the need to—

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) - (6) ...

- (7) The relevant protected characteristics are— age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

The three central issues are, first, the scope is broad in that it applies to functions of all public authorities and to all the protected characteristics; second, what constitutes 'due regard' is undefined; but, third, 'due regard' includes the need to advance equality of opportunity, which involves removing or minimising disadvantage, taking steps to meet needs, and encouraging participation in public life.

This is an area of law relevant to this thesis where there has been, by Aileen McColgan, significant analysis of cases that raised the PSED ground in the context of public spending

cuts.⁹⁷ McColgan interprets cuts broadly to include all expenditure-driven decisions and identified 62 ‘cuts cases’ to 2015 where the success rate for claimants on the PSED ground was just under 40% for cases that reached a final hearing.⁹⁸ McColgan’s doctrinal analysis is detailed and covers a wider selection of cases than are considered here, including a number of significant challenges to local authority decision-making and in cases which do not raise spending issues. McColgan’s analysis is not repeated and the focus here is on the intensity of review in assessing compliance with the PSED.

The pre-austerity case law established a list of six PSED principles, summarised as follows:

- (1) ‘... those in the public authority who have to take decisions that do or might affect [people with a protected characteristic] must be made aware of their duty to have "due regard" to the identified goals ... Thus, an

⁹⁷ Aileen McColgan, ‘Litigating the Public Sector Equality Duty: The Story So Far’ (2015) 35 OJLS 453. McColgan identifies that in May 2012 the coalition government announced a review of the PSED, the outcome of which was generally hostile. See also: Lisa Busch ‘Austerity and Equality’ (2013) 18 JR 6. Harlow and Rawlings also have a chapter focussed on equalities, Harlow and Rawlings (n 2), ch 18 ‘Litigation: Equalities focus’.

⁹⁸ *ibid* 478. McColgan’s research was discovered after the austerity adjudications had been identified. The existence of her table of 62 ‘cuts cases’ was received with trepidation. There are, though, no cases in McColgan’s list of 62 which ought to have been identified as austerity adjudications by this thesis given the limitations identified in chapter 4. McColgan was presumably able to identify cases by searching for those that cited the EA 2010, s 149, a course of action not available for this thesis given the net is cast much wider to include all challenges to the law and policy that implemented austerity, rather than a single statutory ground. The additional cases identified by McColgan that were not identified as austerity adjudications fell into one or more of the following categories: decided before the 10-year period (eg *R (Elias) v Secretary of State for the Home Department* [2005] EWHC 1435 (Admin)); challenged local authority as opposed to central government (eg *R (Sefton Care Association) v Sefton Council* [2011] EWHC 2676 (Admin)); did not meet the definition of austerity adjudication since the austerity programme was not a substantial reason for the policy (eg *R (Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2014] EWHC 232 (Admin)); or were challenges that arose from an appeal to a Tribunal (eg *Sanneh v Secretary of State for Work and Pensions* [2015] EWCA Civ 49)). That there were no additional cases identified by McColgan adds weight to the conclusion that the process adopted by this thesis for identifying austerity adjudications was methodologically robust.

incomplete or erroneous appreciation of the duties will mean that "due regard" has not been given to them ...'

- (2) 'the "due regard" duty must be fulfilled before and at the time that a particular policy that will or might affect [people with a protected characteristic] is being considered by the public authority in question. It involves a conscious approach and state of mind. ... Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough to discharge the duty ...'
- (3) '... the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of "ticking boxes." ... the fact that the public authority has not mentioned specifically [the duty to have due regard] is not determinative of whether the duty under the statute has been performed...'
- (4) '... the duty imposed on public authorities that are subject to the section [PSED] is a non-delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the [PSED] duty'.
- (5) '... the duty is a continuing one ...'
- (6) '... it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered [the PSED] and pondered relevant questions. Proper record - keeping encourages transparency and will discipline those carrying out the relevant function to undertake their ... duties conscientiously. If records are

not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed ...'.⁹⁹

Parliament must have intended the PSED to have some 'bite' and it seems unlikely the principles are controversial from a political constitutionalist perspective given they are consistent with legislative intent. Public authorities routinely (at least after the early litigation) demonstrate compliance with the principles by producing an equality impact assessment (EIA) which then assumes evidential significance in litigation. The equalities grounds are analysed here in three tranches: 'other' cases, welfare benefits cases, and administration of justice cases. Almost all the grounds failed, and it is only the significant cases - generally the ones that succeeded - that are analysed in detail.

Equalities challenges in 'other' cases

In relation to cases other than welfare benefits or administration of justice, nine claims raised equalities duties grounds of which three succeeded at first instance and there were no relevant appeals. There were challenges to: the decision by the Secretary of State for Communities and Local Government to change the basis on which it made payments to Dudley MBC in respect of a PFI project for IT in schools;¹⁰⁰ the decision by the Secretary of State for Education to cut Essex CC's grant for capital spending on early years provision,¹⁰¹ and the further decision to cut Essex CC's grant after the original decision

⁹⁹ *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506 [90] (Scott Baker, Aikens LJ) [90]. Harlow and Rawlings identify this as 'Amounting to a mini-codification of PSED elements, this is a particularly strong example of the educational or hortatory function of judicial review', Harlow and Rawlings (n 2) 788.

¹⁰⁰ *R (Dudley MBC) v Secretary of State for Communities and Local Government* [2012] EWHC 1729 (Admin) [4(4)], [84] (Singh J). The ground was breach EA 2010, s 149.

¹⁰¹ *R (Essex CC) v Secretary of State for Education* [2012] EWHC 1460 (Admin) [30(3)], [39] (Mitting J). The grounds were breach DDA 1995, s 49A and RRA 1971, s 71.

was quashed;¹⁰² regulations made by the Secretary of State for Business Innovation and Skills which allowed universities to charge tuition fees of up to £9,000 per year;¹⁰³ the decision by the Secretary of State for Education to cut capital spending for Luton BC and five other local authorities to build new schools;¹⁰⁴ the decision by the Minister for the Cabinet Office to amend the Civil Service pension scheme to reduce benefits on redundancy or early retirement;¹⁰⁵ the failure by the Chancellor of the Exchequer and the Secretary of State for Education to allocate sufficient funding for special educational needs (SENs);¹⁰⁶ the decision in the first *FDA* case to increase public sector pensions by reference to CPI rather than RPI;¹⁰⁷ and the decision of the Secretary of State for Health to reduce the remuneration of pharmacies for dispensing medicines and the provision of other services.¹⁰⁸

Taking the three most important cases, *Hurley* was an early austerity-related challenge to the tuition fee increase.¹⁰⁹ In a significant decision, Elias LJ stated:

¹⁰² *R (Essex CC) v Secretary of State for Education* [2016] EWHC 1724 (Admin) [32(4)], [47] (Holman J). The ground was breach EA 2010, s 149.

¹⁰³ *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) [4(1)], [66] (Elias LJ and King J). The challenge was to the Higher Education (Basic Amount) Regulations 2010 (SI 2010/3021); and the Higher Education (Higher Amount) Regulations 2010 (SI 2010/3020). The grounds were breaches of DDA 1995, s 49A; RRA 1971, s 71; and SDA 1975, s 76. Somewhat confusingly there are two *Hurley* cases. *R (Hurley) v Secretary of State for Work and Pensions* [2015] EWHC 3382 (Admin) was a benefit cap challenge

¹⁰⁴ *R (Luton BC) v Secretary of State for Education* [2011] EWHC 217 (Admin) [44(v)], [98] (Holman J). The grounds were breaches of DDA 1995, s 49A; RRA 1971, s 71; and SDA 1975, s 76.

¹⁰⁵ *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin), [2018] ICR 269 [5(4)], [83] (Sales LJ and Whipple J). The ground was breach EA 2010, s 149.

¹⁰⁶ *R (Simone) v Chancellor of the Exchequer* [2019] EWHC 2609 (Admin) [3], [56] (Lewis J). The ground was breach EA 2010, s 149.

¹⁰⁷ *FDA* (n 71). The PSED ground was not appealed to the Court of Appeal.

¹⁰⁸ *R (Pharmaceutical Services Negotiating Committee) v Secretary of State for Health* [2017] EWHC 1147 (Admin), [2017] PTSR 1451 [50] (Collins J). The ground was breach EA 2010, s 149.

¹⁰⁹ *Hurley* (n 103).

I do not accept that ... it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then ... it is for the decision maker to decide how much weight should be given to the various factors informing the decision. The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If [counsel for the claimants'] submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making.¹¹⁰

The evidence in *Hurley* was complex, but Elias LJ essentially decided that the Secretary of State had not complied with the PSED because the main EIA was completed in June 2011, some six months after the relevant regulations were made; and that, while there had been a lack of rigorous attention to the PSED, there had been appropriate analysis or substantial compliance. He found for the claimants on the PSED ground, but declined to

¹¹⁰ *ibid* [77], [78].

quash the regulations referring to various factors including: that this was ‘an area of macro-economic judgment, where decisions have to be taken about prioritising public resources. If charging fees of this magnitude is unlawful, public resources will have to be provided, at the expense of other competing and pressing interests’, ‘significant leeway must be given to the democratically accountable Secretary of State as to how the objective of providing sustainable and quality higher education can be best secured’ and quashing the regulations ‘would cause administrative chaos, and would inevitably have significant economic implications’. Principles (2) and (3) above were not applied with any rigour, and the bar was set at *Wednesbury* unreasonableness for ‘due regard’ in that the weight was a matter for the decision-maker. The significance of *Hurley* is addressed below following the analysis of all the PSED grounds.

The two ‘other’ claims that succeeded on the PSED ground were the first *Essex CC* case and *Luton BC*. In the first *Essex CC*, the decision was made by the Secretary of State and the court declined to infer the PSED had been met in circumstances where ‘there is no express reference [to the duty] in any of the contemporaneous documents, including the briefing note to the Secretary of State’.¹¹¹ While allowing the claim, the judge rejected the argument that the Secretary of State could not delegate the duty (thereby lowering the bar for principle (4)) and decided, on the basis of the *Carltona* principle, consideration of the PSED could be delegated to officials who could themselves be satisfied the duty had been met.¹¹² The judge presumably recognised the difficulties and the volume of litigation that

¹¹¹ *Essex CC* (n 101) [44].

¹¹² *ibid* [43] and *Carltona v Commissioners of Works* [1943] 2 All ER 560 (CA).

would ensue if ministers had non-delegable duty in relation to the PSED. *Luton BC* was decided on essentially the same basis as *Essex CC*.¹¹³

Equalities challenges in welfare benefits cases

In relation to welfare benefits, ten claims raised PSED grounds of which none succeeded at first instance, and one succeeded after appeals. These were challenges to: the introduction of a cap on LHA and the reduction of the maximum size criteria;¹¹⁴ a descriptor relating to mobility for PIP;¹¹⁵ the initial decision to close the Independent Living Fund (ILF);¹¹⁶ the subsequent decision to close the ILF after the initial decision was quashed;¹¹⁷ the bedroom tax as it affected those who had a sanctuary scheme safe room to protect them from domestic violence;¹¹⁸ the bedroom tax as it affected households including a person with disabilities;¹¹⁹ the benefit cap as it related to larger families and lone

¹¹³ *Luton BC* (n 104) [113]. Holman J concluded 'Whilst the absence of such references or records [the the qualities duties] is not determinative (as the third and sixth *Brown* principles make clear), I regret to say that in this case I regard the absence as glaring and very telling. I am simply not satisfied that any regard was had to the relevant duties at all, let alone rigorous regard'

¹¹⁴ *Child Poverty Action Group* (n 56) [2(i)], [44]. The grounds were breaches of DDA 1995, s 49A; RRA 1971, s 71; and SDA 1975, s 76.

¹¹⁵ *R (Sumpter) v Secretary of State for Work and Pensions* [2014] EWHC 2434 (Admin) [93], [135] (Hickinbottom J). The challenge was to the Social Security (Personal Independence Payment) Regulations 2013, SI 2013/377. The ground was breach EA 2010, s 149.

¹¹⁶ *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWHC 897 (Admin) [31], [40] (Blake J). The ground was breach EA 2010, s 149.

¹¹⁷ *R (Aspinall) v Secretary of State for Work and Pensions* [2014] EWHC 4134 (Admin) [11], [89] (Andrews J). The ground was breach EA 2010, s 149.

¹¹⁸ *R (A) v Secretary of State for Work and Pensions* [2015] EWHC 159 (Admin) [43(2)], [67] (HHJ Worster sitting as a High Court Judge). The challenge was to the Housing Benefit (Amendment) Regulations 2012, SI 2012/3040. The ground was breach EA 2010, s 149.

¹¹⁹ *R (MA) v Secretary of State for Work and Pensions* [2013] EWHC 2213 (Admin) [3(2)], [71] (Laws LJ and Cranston J). The challenge was to the Benefit Cap (Housing Benefit) Regulations 2012, SI 2012/2294. The ground was breach EA 2010, s 149.

parents;¹²⁰ the operation of UC as it related to self-employed claimants;¹²¹ the basis of the calculation on which HB was capped for private sector tenants;¹²² and the lack of transitional protection where claimants were transferred to UC from legacy benefits.¹²³

The one welfare benefits case that succeeded was *Bracking*, the initial decision to close the ILF.¹²⁴ The PSED ground failed at first instance but succeeded on appeal.¹²⁵ The ILF provided direct financial payments to those with severe disabilities to enable them to lead independent lives in the community rather than residential care. Its closure - stopping all payments - was clearly going to reverse rather than advance equality of opportunity, as was confirmed by the consultation exercise with users. In that context, the court was essentially invited to infer that the Minister for Disabled People must have been aware of the PSED duty, or must have realised the impact of the closure of the ILF, despite: the EIA making no specific reference to the PSED; and there being a single reference to the PSED in the ministerial papers that were in evidence. McCombe LJ decided ‘admittedly with some reluctance’ that:

¹²⁰ *R (JS) v Secretary of State for Work and Pensions* [2013] EWHC 3350 (QB), [2014] PTSR 23 [28(1)] (Elias LJ and Bean). The challenge was to the Benefit Cap (Housing Benefit) Regulations 2012, SI 2012/2294. The ground was breach EA 2010, s 149.

¹²¹ *R (Parkin) v Secretary of State for Work and Pensions* [2019] EWHC 2356 (Admin) [2], [123] (Elisabeth Laing J). The challenge was to the Universal Credit Regulations, SI 2013/376. The ground was breach EA 2010, s 149.

¹²² *Zacchaeus Trust* (n 60) [3], [25]. The ground was breach EA 2010, s 149.

¹²³ *R (TD) v Secretary of State for Work and Pensions* [2019] EWHC 462 (Admin) [40(3)], [83] (May J). The ground was breach EA 2010, s 149.

¹²⁴ *Bracking* (n 116).

¹²⁵ *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 [3], [35] (LJJ Elias, Kitchin, and McCombe). Both at first instance and on appeal there was an intervention by Equalities and Human Rights Commission (EHRC) in support of the claimants.

... there is simply not the evidence, merely in the circumstance of the Minister's position as a Minister for Disabled People and the sketchy references to the impact on ILF fund users by way of possible cuts in the care packages in some cases, to demonstrate to the court that a focussed regard was had to the potentially very grave impact upon individuals in this group of disabled persons, within the context of a consideration of the statutory requirements for disabled people as a whole.¹²⁶

Aspinall was the challenge to the subsequent decision to close the ILF and, second time around, there was an abundance of material in the ministerial papers and the EIA to show the PSED had been engaged with. The conclusion was 'there is no substance in any of the Claimants' criticisms' and the ground was a 'misconceived attempt to get the Court to "micro-manage" the information gathering aspect of the PSED and should be resisted'.¹²⁷

The other significant welfare benefits case is *MA* which, when it got to the Supreme Court, encompassed two conjoined PSED challenges to the bedroom tax, both supported by the EHRC.¹²⁸ The Supreme Court was unanimously satisfied that the PSED duties had been

¹²⁶ *ibid* [61]. The conclusion of Kitchen LJ was along the same lines '...it is simply not possible to infer that the Minister ever considered the proposals with a proper focus on the particular matters to which she was required to have due regard. There is no evidence she directed her mind to the need to advance equality of opportunity' [69]; as was the conclusion of Elias LJ who accepted 'the documents placed before the Minister painted a Panglossian view as to the effects of the proposed decision on those who would cease to receive payments from the fund' [73]. This was another case where McCombe LJ took a less indulgent view of the government's evidence, see *FDA* (n 71).

¹²⁷ *Aspinall* (n 117) [123].

¹²⁸ *R (MA) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550, [2016] UKSC 58 [3], [67] (Lord Neuberger PSC, Lady Hale DPSC, Lord Mance, Lord Sumption, Lord Carnwath, Lord Hughes, Lord Toulson JJSC). The conjoined cases were *R (A)* (n 118) and *R (MA)* (n 119).

met in relation to disabled people,¹²⁹ and satisfied by a 5:2 majority (Lady Hale and Lord Carnwath dissenting) that there was no breach of the PSED duty in relation to sex, notwithstanding that the relevant EIA had not identified the differential impact on women who were proportionally much more likely to have a safe room to protect them from domestic violence. There was no breach of the PSED given the small number of women affected and there was no automatic correlation between having a safe room and the need for an extra bedroom.¹³⁰ As with the issue as to the weight attached to parliamentary scrutiny and approval of delegated legislation, the divergences of view in the Supreme Court in several cases (essentially as to the intensity of review) cuts across chapters 5, 6 and 7 and is addressed in the concluding chapter.

Equalities challenges in administration of justice cases

In relation to the justice system, four claims raised equalities grounds of which two succeeded at first instance or after appeals.¹³¹ They were: *Robin Murray*, a challenge to the LC's decision to close Sittingbourne magistrates' court;¹³² the first *Law Society* case on committal fees referred to above;¹³³ *Coll*, a challenge to the continuing failure of the

¹²⁹ In part on the evidence that the Secretary of State had increased the funding for discretionary housing payments to mitigate the impact of the standard size criteria on households including a person with disabilities.

¹³⁰ Unlike with *Rights of Women* (n 47) ('Legal aid is one of the hallmarks of a civilised society. Domestic violence is a blot on any civilised society but is regrettably prevalent') there were no ringing normative appeals by the majority in *R (MA)* when it came to HB sufficient to fund safe rooms for those who must presumably have been assessed to be at risk of serious domestic violence where judicial protection was inadequate. The issue is considered in more detail in chapter 7 when the Convention ground in *MA* is considered.

¹³¹ There was fifth claim that raised the PSED - a challenge to the operation of the ECF scheme in legal aid - but the ground was not considered, see *R (S) v Director of Legal Aid Casework* [2015] EWHC 1965 (Admin), [2015] 1 WLR 5283.

¹³² *R (Robin Murray & Co) v Lord Chancellor* [2011] EWHC 1528 (Admin) [38], [54] (Elias LJ, Beatson, Hickinbottom JJ). The claim alleged breach of the PSED equivalent duty in the Disability Discrimination Act 191995, s 49A.

¹³³ *Law Society* (n 83).

Secretary of State for Justice to make provision for women prisoners;¹³⁴ and the first *UNISON* case on Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) fees.¹³⁵

Coll challenged a failure to make adequate geographical provision for approved premises for women released from prison on licence.¹³⁶ As to the alleged breach of the PSED, it succeeded at first instance on the basis there was no evidence that the government had considered since 2008 whether the PSED applied and the Secretary of State was directed to undertake the analysis necessary to fulfil the PSED.¹³⁷ The discrimination grounds are considered below. In *UNISON* it was argued there had been a breach of the PSED at first instance and on appeal.¹³⁸ The conclusion of the Court of Appeal was that ‘the court should go no further in its review than to identify whether the essential questions have been conscientiously considered and that any conclusions reached are not irrational’.¹³⁹ On that test there had been compliance with the PSED. This was despite the EIA concluding the fee regime would not deter claimants, which was followed by a dramatic and persistent fall in claims. That the EIA was wrong did not mean there had not been

¹³⁴ *R (Coll) v Secretary of State for Justice* [2013] EWHC 4077 (Admin) [44], [61] (Cranston J). *Coll* is a case that demonstrates the issue raised in chapter 2 in relation to identifying austerity adjudications. While the government argued that establishing premises for women was ‘... unlikely to be possible in the current financial climate’, it seems likely that that this was relied on in litigation to justify the existing policy rather than the reason for limited provision for women.

¹³⁵ *R (UNISON) v Lord Chancellor* [2014] EWHC 218 (Admin), [2014] ICR 498 [18], [57], [70] (Moses LJ and Irwin J).

¹³⁶ The factual matrix was that approved premises were single-sex institutions with relatively strict regimes where offenders released on licence would stay for around 80 days before returning to the community. There were 94 approved premises for men, but only six for women because proportionately many more men needed to be accommodated in approved premises.

¹³⁷ *Coll* (n 134) [65]. The outcome here illustrates the sometimes meagre consequences of success.

¹³⁸ *UNISON* (n 135) [57].

¹³⁹ *R (UNISON) v Lord Chancellor (Nos 1 & 2)* [2015] EWCA Civ 935, [2016] ICR 1 (Moore-Bick, Davis, Underhill LJ) [116].

conscientious consideration of the PSED duty, nor that its conclusions were irrational. The PSED grounds failed in all the other administration of justice cases.

In *Coll* and both *UNISON* cases, discrimination grounds under the EA 2010 were also argued. *Coll* argued both direct and indirect discrimination. Both grounds failed at first instance and before the Court of Appeal,¹⁴⁰ on the basis that, respectively, the policy treated men and women equally in terms of allocating places (though a place closer to home was less likely to be available for women); and the arrangements were a proportionate means of achieving a legitimate aim. On appeal to the Supreme Court, the ground succeeded on a narrow basis. While there was direct discrimination and separate provision for men and women could be justified, the Ministry of Justice had not, on the evidence, directly addressed whether the separate and limited provision for women was a proportionate means of achieving a legitimate aim.¹⁴¹ It was left to the Secretary of State to assess whether this was justified and financial considerations were obviously relevant.

In addition to the PSED ground, *UNISON* and *UNISON (No 2)* challenged the *vires* of regulations introducing ET fees in that they amounted to discrimination on the grounds of sex.¹⁴² Both grounds were maintained to the Court of Appeal where the cases were conjoined,¹⁴³ and the indirect discrimination ground maintained to the Supreme Court.¹⁴⁴

¹⁴⁰ *R (Coll) v Secretary of State for Justice* [2015] EWCA Civ 328, [2015] 1 WLR 3781 [44], [48], [58] (Lord Dyson MR, Elias, Sharp LJ).

¹⁴¹ *R (Coll) v Secretary of State for Justice* [2017] UKSC 40, [2017] 1 WLR 2093 (Lady Hale DPSC, and Lord Clarke, Lord Wilson, Lord Hodge and Lord Toulson JJSC) [20], [26], [43]. This was the effect of EA 2010, s 29 and such 3 para 26.

¹⁴² *UNISON* (n 135) [18(iv)], [70]; and *R (UNISON) v Lord Chancellor (No 2)* [2014] EWHC 4198 (Admin), [2015] ICR 390 [2], [65], (Elias LJ and Foskett J).

¹⁴³ *UNISON* (n 139).

¹⁴⁴ *R (UNISON) v Lord Chancellor (Nos 1 & 2)* [2017] UKSC 51, [2020] AC 869 [3], [121], (Lord Neuberger PSC, Lady Hale DPSC and Lords Mance, Kerr, Wilson, Reed, and Hughes JJSC).

The ground was essentially left undetermined since the claimants succeeded on other grounds. The Supreme Court's judgment in *UNISON (Nos 1 and 2)* is one of the few cases analysed in this thesis to have received significant criticism from a political constitutionalist perspective, in particular the court's approach to the 'upstream' evidence of impact. Given the significance of the common law and EU law grounds, chapters 6 and 7 engage with *UNISON* in detail. When it comes to the statutory discrimination grounds in both *Coll* and *UNISON*, however, there is little to trouble political constitutionalism given it was a reasonable interpretation of the statutory provisions.

Conclusions as to PSED grounds

If the discrimination grounds raise little of significance from a political constitutionalist perspective, the PSED grounds justify more robust conclusions. Qualitatively, two issues arise. First, when it came to the principles summarised above, these were not applied with any intensity in the austerity adjudications. Indeed, the evidence required to demonstrate the principles had been met (in particular (1) complete appreciation of the duties; (2) fulfilled before and at the time policy is being considered; and (3) duty exercised in substance and with rigour) was minimal. Further, the only cases where claimants succeeded was where the government had not provided evidence that it had meaningfully engaged with the PSED (*Essex CC*, *Luton BC*, *Coll* and *Bracking*);¹⁴⁵ and it was only in *Essex CC*, *Luton BC* and *Bracking* where the decisions were quashed. In *Essex CC*, once an EIA had been completed it rendered the subsequent decision essentially non-justiciable. Second, when it came to the standard of review as to whether 'due regard' had

¹⁴⁵ *Essex CC* (n 101), *Luton BC* (n 104) and *Bracking* (n 126).

been had, *Hurley* confirmed that once there had been a proper and conscientious focus on the statutory criteria, weight was a matter for the public authority.¹⁴⁶

As to the quantitative evidence, McColgan identifies a 39% success rate (24 of 62) in claims that succeeded on the PSED ground in her 'cuts' cases. When only challenges to central government are counted, her success rate is 36% (8 of 22). The equivalent success rate for the austerity adjudications that raised the ground is 21% (5 of 23) and this counts *Hurley* and *Coll* as successes, despite the lack of a remedy of any practical value. The qualitative and quantitative evidence is that the intensity of review as to the PSED was low in the austerity adjudications.

In 2013 it was argued that the PSED was of constitutional significance and 'PSED challenges are capable of generating substantive legal and political effects in a variety of ways';¹⁴⁷ and the PSED ensured 'equality considerations are put at the forefront of public service provision'.¹⁴⁸ There is limited evidence of this in the austerity adjudications. An obvious inference is that the judiciary were alive to the political ramifications - they were explicit in *Hurley* - of applying the existing PSED jurisprudence to the process of making, and then the merits of, the law and policy that implemented austerity. The result would, if the six principles had been applied with rigour, have derailed much of the law and policy implementing austerity temporarily; and, in relation to a standard of review more intensive

¹⁴⁶ *Hurley* (n 103). As to an earlier view that *Wednesbury* was not the appropriate standard of review, see, for example, *R (JM and NT) v Isle of Wight Council* [2011] EWHC 2911 (Admin) (Lang J) [104] 'The question of whether "due regard" has been paid is for the Court itself to review – the Court should not merely consider whether there was no regard to the duty at all, or whether the decision was *Wednesbury* unreasonable'.

¹⁴⁷ Tom Hickman, 'Too hot too cold or just right: the development of the public sector equality duties in administrative law' [2013] PL 325, including *Brown* (n 99) from which the six principles are drawn.

¹⁴⁸ *ibid* 333.

than *Wednesbury*, have derailed some of the programme substantively and involved the judiciary in review on the merits in a huge number of cases. An interesting and irresolvable counter-factual is how the PSED jurisprudence might have developed had the political and economic climate been different. It is arguable there was a change of judicial tack which was attributable not to the legislative intent of Parliament - this obviously did not change - but to the understanding of the judiciary as to the consequences of their decisions. Harlow and Rawlings identify that the PSED 'clearly demonstrates a cycle of juridification' and 'major judicial policy choices include a strong but flexible line on the PSED'.¹⁴⁹ In relation to the austerity adjudications, any juridification was limited given the intensity of review, and they appear to demonstrate more judicial flexibility than strength.

5. Ultra vires challenges to discretionary decision-making

Having dealt with the challenges to delegated legislation and equalities grounds, this penultimate part addresses the other statutory grounds of review. Again the position is that the courts are policing the boundaries of legislative intent, but there are differences in that the appeal-review distinction assumes a greater significance. The legal context is that judges are presumably keen, for reasons of constitutional propriety and for fear of opening the floodgates, to avoid scrutinising the merits of decisions, while being alive to cases where the decision-maker has misunderstood the nature or extent of their statutory powers or duties.

¹⁴⁹ Harlow and Rawlings (n 2) 791, 810.

Legal aid cases relating to discretionary decision-making powers

The cases here relate to the exercise of discretion in deciding eligibility for legal aid under the exceptional case funding (ECF) scheme.¹⁵⁰ The key case is *Gudanaviciene*,¹⁵¹ where six claimants challenged refusals of legal aid in relation to immigration matters shortly after the LASPOA 2012 provisions came into force. There were appeals by the LC to the Court of Appeal in relation to five claimants.¹⁵² Two issues of statutory interpretation were raised. First, whether the heading ('Exceptional cases') to LASPOA 2012, s 10 imposed a requirement of 'exceptionality' or whether 'exceptional' merely referred to funding other than for 'general cases' where legal aid was available for specified issues or 'in scope'.¹⁵³ And, second, the meaning of the statutory words setting out the tests of exceptionality.¹⁵⁴ The first issue was, perhaps unsurprisingly, unequivocally resolved by the Court of Appeal in favour of the latter view that 'The fact that section 10 is headed "exceptional cases" and that it provides for an "exceptional case determination" says nothing about whether there are likely to be few or many such determinations. Exceptionality is not a test', and the tests were those in s 10(3)(a) and (b).¹⁵⁵ It is difficult to see why it was argued, both in

¹⁵⁰ LAPOSA 2012, s 10.

¹⁵¹ *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWHC 1840 (Admin) [18], [40] (Collins J). *Gudanaviciene* raises the complex question as to whether the challenge was to the law implementing the austerity programme or to the application of the law in individual cases. *Gudanaviciene* and the similar legal aid cases here were classed as austerity adjudications because they were effectively challenges to the LC's interpretation of the meaning or effect of law implementing austerity.

¹⁵² *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622, [2015] 1 WLR 2247 [4], [25] (Lord Dyson MR, Richards, Sullivan LJ).

¹⁵³ LASPOA 2012 s 9 and Sch 1, Pt 1.

¹⁵⁴ Either under LASPOA 2012, s 10(3)(a) where '... it is necessary to make the services available ... because failure to do so would be a breach of ...' the Convention or EU law; or s 10(3)(b) where '... it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.'

¹⁵⁵ *Gudanaviciene* (n 152) [29].

Gudanaviciene and in an earlier case *R (M)*,¹⁵⁶ that exceptionality imposed an additional test, since a further test of exceptionality would have required the court to find that the LC had the power to refuse legal aid where it was required by the Convention or EU law, thereby enabling that which the relevant statutory provision was intended to avoid.

In relation to the meaning of the words containing the statutory tests for eligibility for ECF, the judgment at first instance provided an interpretation of the statutory tests in terms of how likely a breach of EU law or the Convention had to be before legal aid must be provided. This interpretation did not survive in that the Court of Appeal declined to ‘gloss’ the statutory words and concluded the words meant what they said: if the Director of Legal Aid Casework (DLAC) decided it was necessary to grant legal aid to avoid a breach of the Convention or EU law, then he had to grant ECF; and next, if he could not decide it was necessary, he had to decide if it was appropriate, having regard to any risk that the failure to grant legal aid would be a breach of the Convention or EU law.¹⁵⁷ The court identified the relevant factors by reference to Convention and EU law jurisprudence. The claimants’ cases covered a spectrum of ‘need’ in relation to legal aid. At one end was a Nigerian national (IS) who had lived in the UK for at least 13 years who was blind and cognitively impaired such that he lacked litigation capacity who had been refused legal aid to seek to regularise his immigration status to qualify for health and social care services. At the other end was a Jamaican national (Edgehill) who had lived in the UK for 14 years and had an established family life here and had been refused legal aid for an appeal to the Court of Appeal where leave had been granted to appeal a decision to refuse leave to remain.

¹⁵⁶ *M v Director of Legal Aid Casework* [2014] EWHC 1354 (Admin) (Coulson J).

¹⁵⁷ *Gudanaviciene* (n 152). The DLAC is the currently the LAA’s Chief Executive and actual decision-making on applications for legal aid is delegated to LAA caseworkers and providers under LASPOA 2012, s 5.

Having set out the meaning of the statute and the relevant factors, the court applied the provisions to the cases and concluded that three of the claimants (including IS) were or would have been entitled to legal aid. Plainly, there is an issue here with the appeal-review distinction in that, rather than quashing the DLAC's decisions, the courts engaged in a detailed assessment of the facts and reached conclusions on the application of the statutory provisions in each case. The effect is that the cases were dealt with as if they were appeals against decisions of the DLAC both at first instance and on appeal to the Court of Appeal. A further case, *Rrapaj*,¹⁵⁸ appeared to raise ECF issues but turned on the nature of the dispute for which legal aid was being sought.

As to the statutory interpretation issues in the ECF cases, there is little of significance from a political constitutionalist perspective. After some initial confusion, the decision of the Court of Appeal was obviously in accordance with legislative intent, both in terms of the tests and who had the statutory responsibility to decide if the tests had been met. While the courts in *Gudanaviciene* effectively determined eligibility for legal aid, there was no objection from the LC to that course of action. While the effect was to collapse the appeal-review distinction, simply quashing the decisions risked a further round of litigation when fresh decisions were reached. The courts have a high level of institutional competence in determining whether the Convention and EU law require legal aid to be provided and it was essentially a legal question. While the approach may have been constitutionally questionable on the basis that the courts stood in the LC's shoes, there were obvious advantages from a pragmatic perspective

¹⁵⁸ *Rrapaj v Director of Legal Aid Casework* [2013] EWHC 1837 (Admin) [12] (Ouseley J).

Other cases relating to statutory powers

There are then a variety of other cases that do not fall into the above categories, some of which seem to defy categorisation. *Henderson* was a challenge to the refusal of a Crown Court judge to award an acquitted defendant his costs out of central funds.¹⁵⁹ In broad terms, LASPOA 2012 amended the Prosecution of Offences Act 1985 such that acquitted defendants could no longer recover their private costs from central funds where their income was above a defined threshold.¹⁶⁰ The statutory ground was that the relevant statutory provisions were ‘in conflict with the 1688 Bill of Rights and common law notions of fairness, balance and justice with the result that the courts should fashion a new common law entitlement to costs despite the statutory prohibition’.¹⁶¹ Perhaps there are two grounds in one here, but it is treated as a statutory ground in that the Bill of Rights is a constitutional statute and not subject to implied repeal.¹⁶² The ground was refused on the basis that the Crown Court judge’s interpretation was right and the relevant provisions of the Bill of Rights related to who should bear the costs of proceedings before the various courts in existence in 1688 and did not impinge on LASPOA 2012. The Convention ground in *Henderson* is dealt with in chapter 7.

¹⁵⁹ *R (Henderson) v Secretary of State for Justice* [2015] EWHC 130 (Admin) [4(ii)], [37] (Burnett LJ, Goss J).

¹⁶⁰ LASPOA 2012, sch 7 para 7 amended Prosecution of Offences Act 1985, s 16 and inserted s 16A. Criminal Legal Aid (Financial Resources) (Amendment) Regulations 2013, SI 2013/2791 introduced an upper income threshold for defendants in the Crown Court whose household disposable exceeded £37,500.

¹⁶¹ *Henderson* (n 159) [4] and the relevant provisions the Bill of Rights were: ‘Levying Money. That levying Money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament for longer time or in other manner then the same is or shall be granted is Illegall’; and ‘Grants of Forfeitures. That all Grants and Promises of Fines and Forfeitures of particular persons before Conviction are illegall and void.’

¹⁶² See *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151. Again, this demonstrates the porosity of grounds since the existence of constitutional statutes and their precedence can only be sensibly understood as a common law principle.

Two cases relate to decisions to withdraw subsidies to cut spending on schemes that encouraged the generation of renewable electricity. While the operation of the schemes was extremely complex financially, the legal issues were relatively straightforward. The first case was *Homesun Holdings*, a challenge to a proposal in consultation to retrospectively reduce the Feed-in Tariff (FIT) paid in relation to certain small-scale installations for the generation of solar photovoltaic (solar PV) electricity.¹⁶³ The context was the financial incentives to encourage domestic solar PV installations, but where take-up in terms of installations had been unexpectedly successful, in part as a result of falling cost, leading to much greater costs with implications for public spending.¹⁶⁴ The nub of the proposal was to reduce the FIT for small-scale solar PV installations installed after 12 December 2011 by a contemplated modification to delegated legislation which was to be made sometime in 2012 and probably before 1 April 2012.¹⁶⁵ The statutory grounds were that the Secretary of State did not have the power to: (a) amend the feed-in tariff (an issue first raised by the judge);¹⁶⁶ and (b) modify the fee-in tariff retrospectively.¹⁶⁷ At first instance, the first ground was not determined because of the parties' 'lack of enthusiasm' for it;¹⁶⁸ but the second

¹⁶³ *R (Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change* [2011] EWHC 3575 (Admin) [22], [28], [34] (Mitting J). Arguably the challenge was to delegated legislation making powers, but since the two cases are similar, and the delegated legislation was never actually made, it is considered here. The FIT was reduced from 43.3p per kWh to 21p per kWh.

¹⁶⁴ This is an example of a case where it is unclear from the judgment itself whether reducing public spending was significant. The relevant consultation states, however, 'The 2010 Spending Review made clear for the first time that there are spending parameters within which the FITs scheme must operate and stipulated the need to make 10% (£40 million) savings to the scheme in 2014-15 compared with original projections.' Department of Energy and Climate Change, 'Feed-in Tariffs Scheme: Summary of Responses to the Fast-track Consultation and Government Response' (9 June 2011) 4.

¹⁶⁵ The FIT scheme depended on a combination of delegated legislation and the Standard Licence Conditions for electricity supply licences under the Electricity Act 1989, s.6(1)(d). The policy change would have been effected by amendment of the Feed-in Tariffs (Specified Maximum Capacity and Functions) Order 2010 (SI 2010/678) and the Standard Licence Conditions.

¹⁶⁶ The relevant provisions were the Energy Act 2008, s 41 and the Electricity Act 1989, s 11A.

¹⁶⁷ The relevant provision was the Energy Act 2008, s 42.

¹⁶⁸ *Homesun Holdings* (n 163) [33]

ground succeeded on the basis that the statutory process for modifying the FIT was: consultation, laying of the deleted legislation before Parliament, parliamentary approval, and then making of the modification. The strong presumption against retrospective legislation, in particular retrospective secondary legislation, subject to clear parliamentary intent that such power was intended. The overall conclusion was that the retrospective changes would be both strict and *Padfield ultra vires* on the basis that purposes of the relevant provisions were to encourage small-scale low-carbon generation of electricity.¹⁶⁹ The decision was upheld on essentially the same grounds on appeal.¹⁷⁰

In *Solar Century Holdings*, the challenge was to the decision to close early - in 2015 rather than 2017 - the renewable obligations (RO) scheme that provided financial incentives for the creation of large-scale generation capacity using renewable sources.¹⁷¹ The context was, again, unexpectedly rapid installation of solar PV capacity due to falling costs.¹⁷² The issue was whether the decision to end the scheme early was *Padfield ultra vires* the enabling provisions.¹⁷³ The essence of the ground was that while closing the RO scheme early was obviously within the wording of the statutory provisions, the explanatory note stated: 'The EMR White Paper proposed that the transition phase would end on 31 March 2017, after which the RO would be closed to new generating capacity'. The ground was

¹⁶⁹ *ibid* [34].

¹⁷⁰ *R (Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change* [2012] EWCA Civ 28 (Lloyd, Moses, Richards LJ) [12], [42].

¹⁷¹ *Solar Century Holdings Ltd v Secretary of State for Energy and Climate Change* [2014] EWHC 3677 (Admin) [4(a)], [38] (Green J). This is an example of a rolled-up hearing where permission was granted.

¹⁷² In December 2012, it was anticipated that RO scheme would lead to 900 MW of capacity by the end of March 2017. By the end of March 2014 (15 months gone and 36 months still to go) 545 MW had already been accredited and the indications were 3.2 GW of solar PV could be deployed under the RO scheme by the end of March 2015.

¹⁷³ The relevant provisions were the Electricity Act 1989, ss 32LA and 32LB.

rejected at first instance and on appeal on the basis that closing the scheme early was obviously within the object and purposes of the statute.¹⁷⁴ Neither *Homesun Holdings* or *Solar Century Holdings* raise any issues from a political constitutionalist perspective.

Pharmaceutical Services Negotiating Committee, briefly referred to above in relation to the PSED, was a challenge to the decision of the Secretary of State for Health to make substantial reductions to the remuneration of pharmacies for dispensing medicines and the provision of other services.¹⁷⁵ The statutory ground was that the decision was *ultra vires* the National Health Service Act 2006, s 1C which required the Secretary of State to ‘have regard to the need to reduce inequalities between the people of England with respect to the benefits that they can obtain from the health service.’ At both first instance and on appeal, the court found that the ‘regard’ in s 3C was essentially a matter for the Secretary of State given he had ‘to have regard to a wide and disparate range of factors and aims in exercising those functions, which are both complex and potentially conflicting, particularly as the discharge of the functions will inevitably involve the allocation of limited resources’ and ‘It is self-evident that these various considerations are complex, socio-economic in nature and potentially in conflict’.¹⁷⁶ In a similar vein is *Simone*, also briefly referred to above in relation to the PSED, which was a challenge to decisions relating to SEN funding, on the basis of a failure by the Secretary of State to meet ‘the general duty ... to promote the well-being of children in England in the Children and Young Persons Act 2008, s 7.’¹⁷⁷

¹⁷⁴ *Solar Century Holdings Ltd v Secretary of State for Energy and Climate Change* [2016] EWCA Civ 117 (Tomlinson, Treacy, Floyd LJ) [4(i)], [61].

¹⁷⁵ *Pharmaceutical Services Negotiating Committee* (n 108) [46]. The real terms cut was from £2,800 million in 2015-16 to £2,592 million in 2017-18, so around 10% of NHS funding for pharmacies.

¹⁷⁶ *R (Pharmaceutical Services Negotiating Committee) v Secretary of State for Health* [2018] EWCA Civ 1925, [2019] PTSR 885 [3], [72], [76] (Irwin, Hickinbottom LJ, Sir Jack Beatson)

¹⁷⁷ *Simone* (n 107) [3], [76].

Applying established principles in relation to general statutory duties, the court concluded the provision ‘does not give rise to an obligation ... to make specific allocations of funding or to make specific bids for particular funding from the Treasury which are enforceable by an individual claimant through the courts’.¹⁷⁸ These cases are uncontroversial from a political constitutionalist perspective in finding that general statutory duties are essentially non-justiciable.

There were two cases that raised statutory grounds in challenges by various trade unions and other representative organisations to Civil Service pension reforms. The first *PCSU* case was a challenge to changes to the pension scheme to reduce payments on redundancy and early retirement and the statutory ground turned on the meaning of ‘compensation benefits’ which were payable ‘by reason only’ of loss of employment under the Superannuation Act 1972 (SA 1972), s 2(3B).¹⁷⁹ Save in relation to ‘compensation benefits’, the Secretary of State was required to obtain union consent for changes to the scheme. It was argued that payment of a pension immediately on redundancy or early retirement was not a ‘compensation benefit’ ‘by reason only’ of loss of employment because members were entitled to receive the pension based on contributions. The Court found the early payment of a pension was a ‘compensation benefit’. The second *PCSU* case was a statutory consultation ground where the SA 1972, ss 1(3) and 2(3D) provided ‘Before making any scheme under this section the minister ... shall consult with persons appearing to the minister ... to represent persons likely to be affected by the proposed scheme’ and ‘the duty to consult ... is a duty to consult with a view to reaching agreement

¹⁷⁸ *ibid* [81].

¹⁷⁹ *R (Public and Commercial Services Union) v Minister for the Civil Service* [2011] EWHC 2041 (Admin) [3], [65] (McCombe J).

with the persons consulted' respectively.¹⁸⁰ The Secretary of State had consulted on one set of changes to the pension scheme and then sought to implement a different set of changes without going back to the consultees; and set as a condition that unions engaging in discussions about the proposed changes constituted agreement to the proposals forming the basis of any agreement. The court decided this conduct breached the statutory provisions. Both *PCSU* cases are examples of unexceptional statutory interpretation.

Cases relating to powers in delegated legislation and the application of policy

There were two cases where a breach of delegated legislation was alleged. In *Reilly*, the 'work for your benefit' case, it was alleged that some of the information provided to the claimants which required them to participate in the schemes was defective by reference to the regulations in that it did not provide adequate information about the schemes or the consequences of failing to participate in them.¹⁸¹ The decisions of the court at first instance, the Court of Appeal,¹⁸² and the Supreme Court,¹⁸³ are entirely unremarkable in identifying whether the regulations had been complied with in terms of the provision of information. The same issue was litigated in *Smith (No 2)* where more detailed notices were found to comply with the regulations.¹⁸⁴

¹⁸⁰ *Public and Commercial Services Union* (n 105) [5(1)], [49].

¹⁸¹ *Reilly* (n 66) [7], [89]. Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011, SI 2011/917.

¹⁸² *Reilly* (n 68) [27], [63].

¹⁸³ *Reilly* (n 68) [27], [53].

¹⁸⁴ *Smith (No 2)* (n 69) [68], [78]. The Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013, SI 2013/276, reg 5.

There were four cases that argued grounds that challenged guidance or policy.¹⁸⁵ The first was *MA*,¹⁸⁶ a challenge to the benefit cap for those with disabilities, where it was argued a departmental circular was an unlawful vehicle for prescribing maximum HB following the decision in *Burnip*.¹⁸⁷ Given maximum HB was required to be specified in delegated legislation, the court found the use of guidance to be unlawful. In *R (M)* it was unsuccessfully argued that the LC's ECF guidance was unlawful in that it conflicted with the statutory tests in LASPOA 2012, s 10. The court rejected the argument on the basis that a reference to ECF being granted in 'rare cases' was broadly accurate given the circumstance in which the Convention or EU law required legal aid to be provided.¹⁸⁸

Fletcher was an imprisonment for public protection (IPP) sentence case in relation to the failure to provide systems and resources such that the claimants could demonstrate detention was no longer necessary.¹⁸⁹ The common law challenges were significant and are covered in chapter 6. A narrow policy ground succeeded on the basis that the Secretary of State had mistakenly failed to follow his own written policy in relation to one of the claimants. *Nyoni* was a challenge to a decision by the Secretary of State for

¹⁸⁵ There is an argument that some of these grounds ought to be classified as common law since the somewhat flexible obligations as to only departing from policy for good identifiable reasons are primarily judicial creations. See, for example, *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58 [2006] 2 AC 148 [21]; and *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; [2015] 1 WLR 4546 at [30] and the 'public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute'. For a comprehensive analysis see Ivan Hare KC, Catherine Donnelly SC and Joanna Bell (eds), *De Smith's Judicial Review* (9th edn, Sweet and Maxwell 2023) [5-183].

¹⁸⁶ *MA* (n 119) [89].

¹⁸⁷ Circular HB/CTB U2/2013. *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117.

¹⁸⁸ *R (M)* (n xx) [119].

¹⁸⁹ *Fletcher v Governor of HMP Whatton* [2014] EWHC 3586 (Admin), [2015] 3 All ER 558 (Dingemans J) [57], [79]

Business, Innovation and Skills to refuse a student loan.¹⁹⁰ The context was the decision of the Supreme Court in *Tigere*, a significant Convention case analysed in chapter 7 which challenged the blanket refusal of student loans to those with discretionary leave to remain.¹⁹¹ After the decision in *Tigere*, the Secretary of State implemented an interim policy for student loans for certain students who were not settled but had long periods of residence in the UK. The policy grounds in *Nyoni* were, first, that the Secretary of State had misapplied the policy and, second, the policy was unlawful given *Tigere*. Neither ground succeeded and the court deferred to the decision of the Secretary of State notwithstanding that the facts of *Nyoni* were close to *Tigere*. *Nyoni* succeeded on a common law ground analysed in chapter 6.

Assuming that political constitutionalism envisages: (a) ministers being required to comply with their own delegated legislation; and (b) ministers being allowed significant discretion to formulate policy, but the discretion does not extend to creating unlawful policy or not following the policy without good reason; there is nothing to trouble political constitutionalism here.

5 Conclusions

The essential position in relation to the statutory grounds of review is that there is limited evidence of the judiciary exceeding the limits of adjudication from a political constitutionalist perspective. Certainly, when it came to interpreting and applying legislation there is, applying Ekins and Gee's test above, minimal evidence to suggest

¹⁹⁰ *R (Nyoni) v Secretary of State for Business Innovation and Skills* [2015] EWHC 3533 (Admin) [2], [22], [29] (Sir Brian Keith).

¹⁹¹ *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820, [2015] UKSC 57 which challenged eligibility for loans. Since the challenges in *Tigere* succeeded on Convention grounds, it is considered in chapter 7.

judiciary were not seeking to give effect to the intention of the enacting legislature by reference to the statutory text read in the context of enactment. Or, adopting Elliott's test from chapter 4, there were no decisions which did not rely on a plausible reading of the statutory text. There are no cases such as, say, *Evans* or *Privacy International* where it was tolerably clear that the judiciary were seeking to avoid rather than give effect to statutory words or purposes.¹⁹² Perhaps Griffith would have been unhappy with the cases that relied on *Padfield* grounds and the judicial determination of statutory objects and purposes, but taken individually, there is limited evidence of objects or purposes being misconstrued.

The most significant conclusions are those reached above in relation to the challenges to delegated legislation relating to legal aid in comparison to welfare benefits and pensions; and those relating to the PSED. As to the former, it seems clear that, as Harlow and Rawlings have argued, *PLP* and *Rights of Women* illustrate 'forceful approaches' that demonstrate the potency and elasticity of interpretation when it came to protecting eligibility and payments in legal aid; and that such approaches were absent when it came to the welfare benefits and pensions cases. Again, the language about the government needing to use its powers to 'balance' eligibility and payments against public spending in the welfare benefits and pensions cases was absent from the legal aid cases.

As to other discretionary decision-making and the appeal-review distinction, there are no problematic cases, save for *Gudanaviciene*; and, again, in that case the issue was one on which the court had a high level of institutional competence, the issues were essentially legal and there were sound pragmatic reasons for deciding eligibility and there was no

¹⁹² *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787; *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491.

objection from the LC. As to the review of other exercise of discretionary powers, the standard of review was low and, given it related to issues of public spending or resource allocation, along the lines of that envisaged by King and Prosser as set out in chapter 4. There is limited evidence to suggest the limits of adjudication envisaged by political constitutionalism in relation to statutory grounds were exceeded in challenging the law and policy that implemented austerity.

Two issues are being carried forward for evaluation in subsequent chapters because the analysis in chapters 6 (common law grounds) and 7 (Convention and EU law grounds) assists in resolving them. Those issues are: the relevance and weight attached to delegated legislation being subject to parliamentary scrutiny and approval; and whether any differences of approach can be identified between different judges.

Chapter 6

Common law procedural and substantive grounds of review

1. Introduction

This is the second of three chapters that analyse the austerity adjudications from a political constitutionalist perspective. This chapter answers whether and in what ways the limits of adjudication envisaged by political constitutionalism were exceeded by the judiciary in determining common law procedural and common law substantive grounds of judicial review. As with chapter 5, the political and economic context of the litigation is the government seeking to reduce spending, and individuals or organisations identifying grounds of review as pegs on which to hang challenges to the law and policy implementing austerity. Some of the cases in this chapter were analysed in chapter 5 because one or more statutory grounds were argued in addition to one or more common law grounds. Other cases are new because they did not raise statutory grounds. Where the detail of a case was set out in chapter 5, it is not repeated in this chapter.

To give a broad quantitative overview: at first instance, 40 of 66 austerity adjudications raised common law grounds, of which 13 related to the administration of justice, 13 related to welfare benefits and 14 related to 'other' cases. There were 75 common law grounds argued in total (26 in administration of justice cases, 15 in welfare benefits cases and 34 in other cases).¹ Of these, 13 (17%) succeeded at first instance (six in administration of justice cases, three in welfare benefits cases and four in other cases). After all appeals are taken into account, there were no reversals on common law grounds for the parties in welfare benefits or other cases. There was, however, one reversal and two successes for

¹ As with chapter 5, some care needs to be taken with these headline figures since they are in part a function of how the grounds were argued, in particular the extent to whether grounds were argued or adjudicated separately or compendiously.

claimants on appeal on common law grounds in administration of justice cases. The successes were *Howard League* on the availability of legal aid for prison law issues;² and *UNISON (Nos 1 & 2)* on the introduction of Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) fees.³ Perhaps what was unusual about those cases - both of which are analysed below - was that the successful common law grounds only became significant on appeal.

This chapter adopts the same structure as chapter 5. This introductory part provides context and is followed by seven further parts. Part 2 identifies where political constitutionalist thought locates the limits of adjudication in relation to common law grounds of review. Part 3 starts the process of case analysis with common law procedural grounds argued on the basis of adequacy of consultation, a ground which accounts for about half of the common law procedural grounds. Part 4 covers other common law procedural grounds under separate headings (relevancy of considerations, duty of sufficient enquiry, adequacy of reasons, fettering of discretion, and failure to consider alternative options). Part 5 starts to analyse common law substantive grounds with rationality and proportionality; and part 6 follows on with substantive legitimate expectation. Part 7 is then the most significant part of this chapter from a political constitutionalist perspective and covers grounds relating to legality, systematic unfairness, and other common law obligations. As might be expected, it is not always easy to categorise grounds as procedural or substantive, nor always easy to further sub-categorise them. A best fit approach is adopted and all the grounds are considered one way or another.

² *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244, [2017] 4 WLR 92 (Gloster, Patten, Beatson LJ).

³ *R (UNISON) v Lord Chancellor (Nos 1 & 2)* [2017] UKSC 51, [2020] AC 869 (Lord Neuberger PSC, Baroness Hale DPSC, Lord Mance, Lord Kerr, Lord Wilson, Lord Reed, Lord Hughes JJSC).

With the grounds in chapter 5, the essential issue for the court was whether the law, policy or decision was in accordance with the powers or duties in primary or delegated legislation; and, while the dividing line is blurred, such challenges were conceptualised as *ultra vires* grounds, either strict (not in accordance with the wording of the relevant provisions) or *Padfield* (not in accordance with the broader objects or purposes of the legislation). In contrast, the grounds analysed in this chapter are understood to be common law in that they are conceptualised as general principles developed by the courts largely independently of statutory words or purposes.⁴ It is recognised that this view of the grounds is contested and raises theoretical and empirical issues. As to the theoretical issues, some accounts of the *ultra vires* model of judicial review hold that all grounds are statutory in the sense that in enacting or making legislation Parliament and government implicitly intend that powers will not be exercised in a procedurally unfair or unreasonable way.⁵

Notwithstanding the arguments in favour of this view, this thesis understands the grounds in this chapter as a product of the common law in that they have been created, developed and refined by the judiciary in the course of adjudication. In that sense, they are procedural and substantive standards or principles imposed by the judiciary on the exercise of public

⁴ It is recognised, of course, that judicial review in relation to statutory words and purposes is in some sense common law given the development of judicial review by the courts, including in: *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL); *R v Hull University Visitor, ex p Page* [1993] AC 682 (HL); and *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997 (HL).

⁵ See, for example, Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 CLJ 122. For an assessment of the *ultra vires* debate and a list of the many academic contributions to it, see Paul Craig, *Administrative Law* (9th edn, Sweet & Maxwell 2021) [1-002] - [1-017] in particular footnotes 26 to 28.

power. As to the empirical problems, there are undoubtedly cases where it is unclear as to whether a particular ground is or ought to be classified as statutory or common law.⁶ As stated in chapter 4, the primary reason this thesis classifies the grounds in the way it does is that, from a political constitutionalist perspective, the imposition of judicially created principles is more problematic than enforcing compliance with legislation. While the drawing of the dividing line might not be entirely defensible, all the grounds are, again, considered one way or another.

Part 8 reaches overall conclusions that are, in broad terms, that there is limited evidence of the limits of adjudication envisaged by political constitutionalism in relation to common law grounds being exceeded by the judiciary in adjudicating the challenges to the law and policy that implemented the austerity programme described in chapter 2. In general, the intensity of review is low and considerable deference was shown to government decision-making. Sometimes the deference is greater than the existing jurisprudence might have warranted. There are, though, two important qualifications to this conclusion. First, the intensity of review appears to be generally greater across the piece in the administration of justice cases. Second, the courts are willing to impose common law norms, both procedural and substantive, that trump executive policy- and decision-making. While these were most often used in cases concerning the administration of justice, they are not limited to that area of policy-making.

While the scope for evidential and factual disputes in judicial review remains limited in relation to common law grounds, the legal contest offers more (or perhaps different) opportunity for argument than with statutory grounds. In particular: judicial precedent

⁶ See *Moseley* [2014] UKSC 56, [2014] PTSR 1317 (n 119) in chapter 4 where there was a divergence of view in the Supreme Court as to whether the duty to consult arose from the statutory context or the common law.

becomes more significant given the grounds originate and have been developed in case law; evidence as to the decision-making process becomes more significant in relation to procedural grounds of review; and evidence as to the reasons for decisions becomes more significant in relation to substantive grounds of review. Political constitutionalist scholarship recognises these issues and the next part seeks to identify where it locates the limits of adjudication in relation to common law grounds of review.

2. The limits of adjudication and common law grounds of review

John Griffith was content, presumably referring to common law procedural grounds, with judges adding 'their own gloss' to statutory procedures to 'ensure that governmental bodies do not act unfairly or in bad faith'.⁷ The use of 'gloss' and 'bad faith' suggest a much more limited role for the judiciary than the creation and development of common law grounds of review that function independently of statutory provisions and procedures. Writing in 2001, Griffith stated:

Hitherto, control by the courts has been directed to cases where Government has purported to exercise powers which it does not possess either under statute or the prerogative; where its procedures are contrary to widely accepted principles concerning bias or irrelevance or bad faith; or, exceptionally, where the decision is manifestly absurd. Beyond these categories the argument becomes one about the desirable distribution of power. Political decisions need to be made to determine in what ways and for what purposes the exercise of Government power has undesirable outcomes and to what extent and how that exercise should be curtailed by the courts.⁸

⁷ John Griffith, *The Politics of the Judiciary* (5th edn, Fontana 1997) 292.

⁸ John Griffith, 'The Common Law and the Political Constitution' (2001) 117 LQR 42, 56.

And:

While I am content when judges use judicial review to insist on the general precepts laid down by Lord Greene in *Wednesbury* being followed, I am unhappy with any substantial extension of their jurisdiction.⁹

In relation to common law grounds, Griffith appears to accept adjudication as to the extent of prerogative powers;¹⁰ and then, given the reference to Lord Greene and *Wednesbury*, the scope of review is limited to relevancy of considerations; and rationality where the bar is set at the high level of bias, bad faith or manifest absurdity.¹¹ Griffith was opposed to adjudication on a proportionality test in relation to the Convention and must surely have been similarly opposed to it as a common law ground.¹² In framing the limits of adjudication by reference to *Wednesbury*, Griffith clearly had a minimalist view of the judicial role when it came to scope and intensity of common law grounds of review.

Adam Tomkins does not engage with individual common law grounds of review in a significant or structured way,¹³ but raises specific concerns in relation to legality and rationality. As to the former, he objects to principles of legality ‘which are the creations of

⁹ *ibid* 65.

¹⁰ None the cases in this thesis concern the exercise of prerogative powers, though *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWHC 897 (Admin) relates to de facto powers since the ILF was constituted as a trust by the Secretary of State for Work and Pensions other than by statutory powers.

¹¹ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA) 229.

¹² John Griffith, ‘The Political Constitution’ (1979) 42 MLR 1, 14.

¹³ Perhaps this is a function of how Tomkins conceptualises the grounds of review, see: Adam Tomkins, ‘The Struggle to Delimit Executive Power in Britain’ in Paul Craig and Adam Tomkins (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford 2006) 42 where Tomkins identifies irrationality and procedural impropriety as common law grounds of review and the court having fashioned ‘a complex body of case law governing the legality of executive decision-making’.

the courts' and 'defined widely by reference to the rule of law or common law constitutional principles'.¹⁴ Citing *Leech*, a challenge by a prisoner to a governor censoring correspondence with his solicitor,¹⁵ Tomkins specifically objects to courts identifying and protecting common law constitutional rights: 'Never before had such a right been recognised in English law, and nowhere in the court's judgment is it made clear what in the future will be added to the list of constitutional rights recognised by the common law'.¹⁶ As to the latter, Tomkins identifies the problem with reasonableness review is that it 'seeks to control the problem of executive discretion simply by replacing it with untrammelled judicial discretion'; and 'For sure, a constitution should guard against capricious or arbitrary executive actions. But so too should it guard against capricious or arbitrary judicial decision-making'.¹⁷ As with Griffith, Tomkins appears to set the bar for reasonableness review at a high level of capricious or arbitrary decision-making.

Richard Ekins and Graham Gee take a similar position to Tomkins on legality in that 'The courts are not "the guardians of the constitution": they apply positive law, not the constitution writ large. They are not, in other words, responsible for the constitution's coherence or justice, or for upholding constitutional norms in general'.¹⁸ Further, while the

¹⁴ Adam Tomkins, *Our Republican Constitution* (Hart 2005) 22.

¹⁵ *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198 (CA) (Neill, Steyn and Rose LJ) at 210A 'Now we turn to a principle of greater importance. It is a principle of our law that every citizen has a right of unimpeded access to a court. In *Raymond v Honey* [1983] 1 AC 1 (HL), 13, Lord Wilberforce described it as a "basic right." Even in our unwritten constitution it must rank as a constitutional right.'

¹⁶ Tomkins (n 14) 23.

¹⁷ *ibid* 22.

¹⁸ Richard Ekins and Graham Gee, 'Putting Judicial Power in its Place' (2017) 36 U Queensland LJ 375, 376.

existence of common law grounds of review is accepted in principle,¹⁹ this is limited by the concept of 'settled law' and the judicial role is to 'find and apply the law as it was, or should now be understood to have been, at the time of the contested action', and 'In relation to the common law, the judge strives to articulate principled rationales for the decisions of earlier courts', where development of the common law is limited by the 'responsibility for fair adjudication in accordance with settled law'.²⁰ As to the growth of common law grounds, Ekins and Gee argue against:

the trend in ordinary judicial review to introduce ever more grounds of review and to intensify their application. The origins of the growth of judicial review can be traced back to the 1960s, but the expansion of the availability and intensity of judicial review has accelerated since the 1980s. Over time, the traditional posture that judicial review of administrative action is concerned only with the legality of decisions, not with their merits, has largely withered away; hence the long-running debate about whether to introduce proportionality as a general ground of review,²¹

And:

Interestingly, the courts have in the last three or four years revived a discourse of common law constitutional rights. This may be an attempt to avoid neglecting

¹⁹ *ibid.* 'Courts can contribute to securing the rule of law by resolving disputes impartially and in accordance with the law, and by keeping faith with past legal commitments, whether common law or statutory. This includes upholding the legal rights of persons in dispute with the executive or administrative agencies.'

²⁰ *ibid.*

²¹ *ibid* 382.

the common law and to square rights adjudication with our legal history and tradition.²²

What conclusions, then, can be drawn about the limits of adjudication envisaged by political constitutionalism when it comes to common law grounds? There are clearly differences of view and emphasis, but there seem to be three essential conclusions. First, this is obviously more difficult territory from a political constitutionalist perspective. While political constitutionalism accepts that the courts perform an important constitutional role in ensuring government does not go beyond statutory powers and procedures, the imposition of judicially created common law principles that limit executive law- and decision-making are more problematic. Common law grounds engage more clearly - for the reasons discussed in chapter 3 - concerns about the democratic legitimacy and accountability of the courts, and their institutional processes and competence. Second, in relation to common law substantive grounds and review on the merits, it seems political constitutionalism is opposed to a standard of review more intense than conventional *Wednesbury* set at a high level (bad faith or manifest absurdity), and definitively opposed to proportionality as common law standard of review. Further, it is opposed to the imposition of judicially determined norms or principles of legality and common law constitutional rights.

Third, in relation to common law procedural grounds, the position is more complex, but political constitutionalism envisages limited procedural grounds of review applied with limited intensity. As with statutory grounds of review in chapter 5, Griffith appears to draw the line at an earlier stage in the development of judicial review than Gee and Ekins. For the former, it seems the development of common law grounds after the 1960s is

²² *ibid* 381.

problematic;²³ whereas for the latter it is the further development of grounds since the 1980s. Drawing a line at a particular point of time is difficult since common law grounds are not developed in an entirely orderly or linear way. Further, political constitutionalist thought is shaped by contemporary concerns. Judicial decisions that exercised Griffith in the 1980s have limited salience to Tomkins, Ekins and Gee some 20 or 30 years later.²⁴ Perhaps the position can be summarised by the proposition that the continued expansion of judicial review after the *CCSU* case in the mid-1980s, whether in terms of the expansion of the grounds of review and/or the intensity of their application, marks the point at which the concerns of political constitutionalism about the limits of adjudication being exceeded become more pressing.²⁵ As with the statutory grounds in chapter 5, while it is possible to summarise in fairly simple terms the limits of adjudication envisaged by political constitutionalism in relation to common law grounds, the problem is trying to unpick whether they were exceeded in individual cases. The following parts engage in that analysis, starting with grounds relating to consultation.

3. Grounds relating to the adequacy of consultation

The first tranche of cases analysed are challenges on the ground of inadequate consultation and includes procedural legitimate expectation grounds since these were all

²³ Though, as noted above, Griffith accepts the justiciability of the exercise of prerogative powers established by *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

²⁴ Critiquing judicial intervention in industrial (now employment) relations and in disputes about local government funding and spending were important aspects of Griffith's work. Disputes about central government funding of local government continue (there are six such adjudicated cases analysed in this thesis); but when it comes to employment relations, the courts are now as likely to adjudicate claims brought by - rather than against - trade unions and there are four such adjudicated cases analysed in this thesis. 40 or so years earlier, such claims were more likely to be resolved by industrial action rather than litigation. While political constitutionalists might object to courts resolving disputes about pay and conditions, one suspects that - Griffith excepted - they might also object to those disputes being resolved by the exercise of trade union power. As to the development of political constitutionalist thought on the right, see: Graham Gee, 'The Political Constitution and the Political Right' (2019) 30 Kings LJ 148.

²⁵ *CCSU* (n 23).

argued on the basis of consultation. 17 of the 33 common law procedural grounds related to consultation. The grounds are considered below under the headings: welfare benefits (four grounds in three cases of which one succeeded); other cases (eight grounds in seven cases, two successes); and administration of justice (five grounds in four cases, two successes). The political context here was the government seeking to reduce public spending by way of delegated legislation or discretionary decision-making in circumstances where it was inevitable that the cuts would adversely affect individuals or bodies that had some sort of expectation that central government funding would be made available or continue to be available. Given the political and economic context, it was - as with some of the grounds considered in chapter 5 - perhaps inevitable that adequacy of consultation would be argued in a significant number of cases.

The legal context is the development of the law of consultation by the judiciary over several decades. There is some disagreement in the practitioner and academic commentary on the evolution of consultation duties, in particular whether the duties arise from legitimate expectation or fairness,²⁶ and whether from the specific statutory context or the common law.²⁷ As indicated in the introduction to this chapter, the consultation duties in this chapter are understood as requirements of the common law because they arose other than from statutory words or purposes.²⁸ As to when the duty to consult arises, the leading cases include: *CCSU* where a prior practice of consultation may give rise to a duty to

²⁶ See, for example, Ivan Hare, Catherine Donnelley, and Joanna Bell, *De Smith's Judicial Review* (9th edn, Sweet & Maxwell 2023) [7-003], [9-067] where the duty to consult is conceptualised as a requirement of legitimate expectation or of a fair procedure; and James Goudie, Michael Supperstone and Paul Walker, *Supperstone, Goudie & Walker: Judicial Review* (7th edn, LexisNexis Butterworths 2024) ch 10 where the duty to consult is conceptualised as a requirement of statute or an essentially freestanding common law ground.

²⁷ See *Moseley* (n 6).

²⁸ There was one case in chapter 5 where the duty to consult arose under and was resolved by reference to specific statutory provisions: *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin), [2018] ICR 269.

consult;²⁹ *McInnes* where a duty to consult may arise particularly in relation to forfeiture of an existing right or deprivation of an existing benefit;³⁰ and *Bhatt Murphy* which distinguished between a primary case of procedural legitimate expectation (the duty to consult arises from a promise to do so) and a secondary case of procedural legitimate expectation (where the duty to consult arises from a policy that affects a specific person or group who in the circumstances are entitled to rely on the continuation of the policy).³¹

As to the standard of consultation where a duty to consult arises, the general position is that the requirements are fact and context sensitive, and the somewhat circular test is whether the process has been so unfair as to be unlawful. The requirements for a lawful consultation were set out in *Gunning* such that:

A lawful consultation must (a) take place at a time when proposals are still at a formative stage, (b) give reasons for any proposal so as to permit intelligent consideration and response, (c) give adequate time for consideration and response and (d) give the product of the consultation conscientious consideration.³²

Those principles were approved by the Court of Appeal in *Coughlan*,³³ and by the Supreme Court in *Moseley*.³⁴ The cementing into administrative law of common law

²⁹ *CCSU* (n 23) 412D.

³⁰ *McInnes v Onslow-Fane* [1978] 1 WLR 1520 1528 (CA).

³¹ *R (Bhatt Murphy (A Firm)) v Independent Assessor* [2008] EWCA Civ 755 [50].

³² *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 (HC).

³³ *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 (CA) [108].

³⁴ *Moseley* (n 6).

consultation duties is a relatively recent phenomena and there are numerous cases that address whether a duty to consult arises in a particular administrative law context, and what the standard of consultation is in that context. At first blush, this looks problematic from a political constitutionalist perspective in that the courts have created and extended duties to consult largely independently of statutory words and purposes that do not explicitly require consultation;³⁵ and/or imposed requirements as to the form and standard of consultation. These issues are addressed further after the consultation grounds are considered.

Welfare benefits consultation grounds

Three welfare benefits cases raised adequacy of consultation as grounds of review. What is perhaps surprising about the benefits cases and consultation is that, given the extensive statutory duties to consult when making welfare benefit regulations, all the consultation grounds are common law.³⁶ In all three cases, the duty to consult was conceded and the arguments related to the adequacy of the consultation. The three cases are: *Bracking*;³⁷ *RF*;³⁸ and *Sumpter*.³⁹ *Bracking* was the challenge to the initial decision to close the Independent Living Fund (ILF). The court applied the *Gunning* principles and, notwithstanding deficiencies in the consultation process in relation to disclosure of

³⁵ Though the publication and revision by the government of political codes of practice relating to consultation is surely significant. See, for example *Bhatt Murphy* (n 31). As to the political codes and their revision, see Craig (n 5) [15-021].

³⁶ See, for example, the Social Security Administration Act 1992, Pt XIII. Perhaps the consultation requirements in welfare benefits legislation are sufficiently clear, well-known, or not onerous that governments do not fall foul of them.

³⁷ *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWHC 897 (Admin) [29], [33] (Blake J)

³⁸ *R (RF) v Secretary of State for Work and Pensions* [2017] EWHC 3375 (Admin), [2018] PTSR 1147 [40(iii)], [62] (Mostyn J).

³⁹ *R (Sumpter) v Secretary of State for Work and Pensions* [2014] EWHC 2434 (Admin) [93], [94], [125] (Hickinbottom J).

information to consultees, decided that the consultation was lawful and the decision was upheld on appeal.⁴⁰ In *RF* the challenge was to regulations which amended the eligibility descriptors for Personal Independent Payment (PIP) such that psychological distress was treated as irrelevant for the purposes of the ability to plan and carry out journeys. There was effectively no consultation at all in relation to a change of considerable magnitude. The claim essentially succeeded on the Convention ground and, since the common law ground was dealt with very briefly, the case is analysed in chapter 7.⁴¹

The most significant of the three welfare benefits cases is *Sumpter*, a challenge to a descriptor relating to the mobility component for Personal Independence Payment (PIP).⁴² There were two consultation grounds argued: a failure to consult on the threshold for the enhanced mobility component being set at the ability to walk 20 metres, rather than the 50 metres which had been used for Disability Living Allowance (DLA), the benefit PIP replaced;⁴³ and consultees were not provided with sufficient information to enable an intelligent response. The original consultation material contained no explicit reference to the proposed 20 metre threshold; and the consultation was described at first instance as ‘at best, convoluted, inherently unclear, ambiguous and confusing’, and ‘mind-boggling

⁴⁰ *Bracking* (n 37); *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 [3], [27] (Elias, Kitchin, McCombe LJ). *Bracking* was one of the few cases to succeed on the PSED ground. The alleged deficiencies in consultation included failures to: reveal the costs of closure; consult on advice to ministers that postponement of closure was not in the best interests of ILF users; and explain why closure of the ILF was being proposed.

⁴¹ *RF* (n 38) [63]. The decision on the consultation ground was: ‘Similarly, I am of the view that a measure which introduces a change (and I emphasise introduces) of this magnitude should have been consulted on, and that the failure to do so was unlawful’.

⁴² *Sumpter* (n 39). The challenge was to the Social Security (Personal Independence Payment) Regulations 2013, SI 2013/377.

⁴³ But only for those between ages 16 and 65.

opaque’;⁴⁴ and the Court of Appeal agreed.⁴⁵ The regulations setting the threshold at 20 metres had been made on 25 February 2013 and after the claim was issued on 28 March 2013, the Secretary of State embarked on a further consultation to give consultees an opportunity to comment on the 20 metre threshold;⁴⁶ and on 21 October 2013 decided not to change the threshold. The consultation ground was unsuccessful at both first instance and on appeal, where the Court of Appeal identified the overriding principle as being ‘that consultations must be “fair”, an easy concept to state, but sometimes rather less easy to apply in practice. The application of the duty is “intensely case-sensitive”, a finding which appears to open the door to considerable judicial discretion.⁴⁷ By consulting after taking the decision and making the regulations, the Secretary of State managed to repair what would otherwise have been unlawful. There are two points of significance: the courts were clearly alive to the risk that quashing the relevant provisions of the regulations would derail a key aspect of the law governing eligibility for PIP; and the courts accepted the Secretary of State’s evidence that the second consultation was done with an open mind, despite the regulations having being made before the lawful consultation started.

In the welfare benefits cases, the government accepted a duty to consult so the courts were not imposing novel duties to consult as such, though this issue is discussed further in the conclusion to this part. Given that: (a) the only case where the consultation ground

⁴⁴ *Sumpter* (n 39) [105].

⁴⁵ *R (Sumpter) v Secretary of State for Work and Pensions* [2015] EWCA Civ 1033 (Patten, McCombe, Gloster LJ) [2], [39], [47].

⁴⁶ The consultation stated ‘we are carrying out this consultation in a fully open-minded manner and will carefully examine all the evidence provided. If we consider that we need to make changes to the moving around activity once we have analysed all the representations received, we will do so’. The advice received by the Secretary of State was ‘Should you wish to change 20 [metres] to 50 [metres], this would create a [Departmental Expenditure Limit] cost of £3m and reduce scored PIP [Annually Managed Expenditure] savings by £936m by 2018. [HM Treasury] are highly likely to ask DWP to fund both from existing budgets’ [34]. *Sumpter* (n 39) [32], [34].

⁴⁷ *Sumpter* (n 45).

succeeded was where there had been a complete failure to consult on a change of significant magnitude; and (b) the consultation ground failed in one case where the consultation took place only after the decision had been reached and given effect in delegated legislation; there is no evidence of an intensive standard of review. In light of the *Gunning* principle that consultation should take place at a time when proposals are still at a formative stage, it might be argued that the court showed excessive deference in *Sumpter*.

'Other' consultation cases

There were seven 'other' adequacy of consultation cases, four of which were challenges by local authorities (LAs) to central government decision-making. In chronological order, those are: *Luton BC*, a challenge to the decision to withdraw Building Schools for the Future (BSF) funding for some projects;⁴⁸ *Cheshire East BC*, a challenge to the decision not to fund a household waste separation plant;⁴⁹ the first *Essex CC* case, a challenge to the initial decision to reduce Early Years Foundation Stage (EYFS) funding;⁵⁰ and *Dudley MBC*, a challenge to the decision to change the basis on which payments were made for a private finance initiative (PFI) project for IT in schools.⁵¹ All the cases involved similar factual issues in that central government funding for LAs was withdrawn or reduced in circumstances where, putting things neutrally, the LAs had some basis for believing that funding would be forthcoming or continue to be available. As with the factual issues, the

⁴⁸ *R (Luton BC) v Secretary of State for Education* [2011] EWHC 217 (Admin), [2011] EWHC 556 (Admin) [44(iv)], [83] (Holman J).

⁴⁹ *R (Cheshire East BC) v Secretary of State for Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin) [35], [68] (Langstaff J).

⁵⁰ *R (Essex CC) v Secretary of State for Education* [2012] EWHC 1460 (Admin) [30(1)], [31] (Mitting J).

⁵¹ *R (Dudley MBC) v Secretary of State for Communities and Local Government* [2012] EWHC 1729 (Admin) [4(1)], [39] (Singh J).

legal issues were similar in terms of whether there was a duty to consult (either by legitimate expectation or as a function of fairness) and whether the consultation had been adequate.

In *Luton BC*, six LAs challenged decisions to cancel school building or refurbishment projects, all of which were to be delivered in partnerships between the LAs, the Department for Education's (DfE) Partnership for Schools Agency, and the LAs' private-sector partners that did the work.⁵² Project approval was a staged process and all the LAs had schools at various stages of the funding 'pipeline'. On 5 July 2010, the Secretary of State for Education announced a retrospective cut-off in relation to projects that had not received final approval by 1 January 2010. The factual context was a continuing and intense dialogue to drive projects forward between the DfE and LA officers over many years that continued between the retrospective cut-off date and the announcement; the LAs had continued to progress and spend on the projects between the cut-off date and the announcement (some had reached the point of starting to build) and would be left with significant financial liabilities; and the BSF funding was of major financial importance to the LAs. There were also a limited number of projects to which the retrospective cut-off applied. The Secretary of State's argument that consultation was impractical was not assisted by having considered representations in relation to the cancellation of some academy school projects (as opposed to projects for LA maintained schools) and projects in some LA areas; nor that the cancelled projects had been specifically identified a month before the cancellation decision was announced such that consultation could have taken

⁵² *Luton* (n 48) [2]. There were 735 schools in the pipeline.

place in this period.⁵³ The court found there was a procedural legitimate expectation as to consultation before retrospectively cancelling projects at the stage before final approval; and cancelling the projects without consultation amounted to an abuse of power.⁵⁴

In *Dudley MBC*, the challenge was to the decision of the Secretary of State for Communities and Local Government to change the basis on which Dudley would be paid for an ongoing PFI contract for IT in schools. Some of the arcane details of the PFI funding were explained in chapter 4 and the detail is not repeated here. In summary, the change was to the financial detriment of Dudley, and it had extended the PFI contract having chosen to continue to receive payments on the existing basis, and this had been approved by the previous government. Citing *Luton BC*, the judge decided the failure to consult amounted to an abuse of power. In both *Luton BC* and *Dudley MBC* there were separate

⁵³ The announcement of the withdrawal of BSF funding caused political problems: ‘The DfE had identified Labour’s £55 billion [BSF] programme as one that could be scrapped, and it was [Michael] Gove’s responsibility to inform the House in person. But when asked by MPs which schools would be affected he could not provide an accurate list on two occasions in the House. He apologised profusely, but such was the outcry that he went to David Cameron to ask whether he should resign.... But faced with a third session in the Commons that week, he secretly sought out the advice of Dominic Cummings, ... Cummings advised him to go on the attack. While preparing, it emerged that there had not been a list when Gove had asked for it, but without him being told, one had been quickly cobbled together. Called to account by the Commons, he successfully put the blame on the body that ran BSF and his officials’. Alan Smithers, ‘Education’ in Anthony Seldon, and Tom Egerton (eds) *The Conservative Effect, 2010-2024 : 14 Wasted Years?* (Cambridge 2024) 158.

⁵⁴ As to the intensity of review in *Luton* (n 48) Holman J stated [8] ‘However the case remains one of judicial review. It is not a detailed public inquiry into the demise of the BSF programme, nor does it require fact-finding on disputed facts after hearing oral evidence. All judicial review requires scrutiny. Cases involving torture, persecution or other grave threats to human rights require anxious scrutiny; but this is not such a case and, as the claimants are themselves public authorities, no human rights issues arise. So although a measure of scrutiny is required, the essential character of the present case is one of review of the minister’s decision and decision making process. ... My own view is that if, on any one or more of the grounds alleged, the Secretary of State, when personally making patently political, large scale macroeconomic decisions, has acted irrationally or unlawfully, that ought to be apparent without unduly detailed or sophisticated enquiry. I asked [counsel for the Secretary of State] ... whether such an impressionistic approach is heretical. He assured me it is orthodox. I thus propose to consider this case in a relatively impressionistic way, focussing on the wood rather than the trees, and without over-immersion in, or reference to, the mass of detail in both the facts and the arguments which have been advanced’.

judgments dealing with the quashing of the decisions.⁵⁵ The consultation grounds failed in *Cheshire East BC* and the first *Essex CC* case essentially on the basis that, on the evidence, there had been no express promise to consult prior to the withdrawal or reduction of funding, nor were the claimants entitled to rely on the continuance of previous policies.

In chronological order, the three other 'other' consultation cases were as follows. The first *FDA* case was the challenge by a group of trade unions and representative organisations to the decision to increase public sector pensions by reference to the Consumer Price Index (CPI) rather than the Retail Price Index (RPI).⁵⁶ The consultation ground failed on the basis of *Bhatt Murphy* and there being no promise to consult and, in any event, 'the relevant unions ... [the appropriate consultees] did engage in vigorous representations to Ministers after the initial policy change was announced but before the Orders were made'.⁵⁷ The second *FDA* case was a challenge to guidance that limited Civil Service pay awards.⁵⁸ Both consultation grounds failed because, on the evidence, there was no duty to

⁵⁵ *R (Luton BC) v Secretary of State for Education* [2011] EWHC 556 (Admin); *R (Dudley MBC) v Secretary of State for Communities and Local Government* [2012] EWHC 1964 (Admin). In *Dudley MBC Singh J* stated [2] 'The defendant also accepts that the test which the court should apply in exercising its discretion, exceptionally, to refuse to make a quashing order is to ask itself whether it is inevitable that that decision would be the same even if a lawful and fair procedure were adopted. I am not prepared to reach the conclusion that that would be inevitable in this case' [2]. This was before the amendments to the Senior Courts Act 1981, s 31 which provides courts 'must refuse to grant relief on an application for judicial review ... if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred'.

⁵⁶ *R (FDA) v Secretary of State for Work and Pensions* (also known as *Staff Side of the Police Negotiating Board v Secretary of State for Work and Pensions*) [2011] EWHC 3175 (Admin) [41] (Elias LJ, McCombe, Sales JJ). The change from RPI to CPI affected most public sector employees. The strict and *Padfield ultra vires* grounds were considered in chapter 5. There was an appeal but not on the consultation ground.

⁵⁷ *ibid* [83].

⁵⁸ *R (FDA) v HM Treasury* [2018] EWHC 2746 (Admin) [80], [99] (Simler J).

consult on the basis of *Bhatt Murphy*, nor did the degree of engagement between the parties mean that the *Gunning* principles applied.

Finally, *Pharmaceutical Services* was a decision to reduce the remuneration of NHS pharmacies for dispensing medicines and the provision of other services.⁵⁹ This was a case where there was a statutory duty to consult, but the claim was essentially determined on whether the consultation was adequate on the *Gunning* principles. There was also some overlap with the *Tameside* ground considered below. The consultation ground was argued on the basis of non-disclosure of information relating to the supposed pharmacy operating profit margin of 15%, but which was based only on financial data for 52 pharmacies obtained from Companies House. Notwithstanding the conclusion ‘Clearly there had been a significant lack of disclosure of any material on which the proposals were based’, the consultation process was held to be lawful in the circumstances given the need to make savings.⁶⁰ The decision was upheld by the Court of Appeal which concluded ‘It was regrettable that the process was not more open as to any assumed profit margin, but since no such margin was treated as a critical point in the decision, the point could not render the process unfair’.⁶¹

As with the welfare benefits consultation cases, there is limited evidence to trouble political constitutionalism here. In the two cases that succeeded, the finding of a duty to consult hardly suggests an intensive standard of review given the case law and the facts. *Dudley MBC* had elected to continue PFI funding on one basis and the government had reversed

⁵⁹ *R (Pharmaceutical Services Negotiating Committee) v Secretary of State for Health* [2017] EWHC 1147 [19], [80], [99] (Admin) (Collins J).

⁶⁰ *ibid* [37].

⁶¹ *R (Pharmaceutical Services Negotiating Committee) v Secretary of State for Health* [2018] EWCA Civ 1925, [2019] PTSR 885 [3], [67] (Irwin, Hickinbottom LJ, Sir Jack Beatson).

the election without consultation. And in *Luton BC*, the government was retrospectively withdrawing BSF funding. If political constitutionalism envisages that courts will intervene where decision-making is capricious or in bad faith, then *Dudley MBC* must get close to such a test and *Luton BC* must meet the test given the government engaged in consultation with academy providers and other LAs, and that the decision was retrospective in that LAs had been encouraged to move projects forward (including by agreeing contracts, spending funds, and in some cases starting work) only to then find that funding was retrospectively withdrawn without consultation. In both *Dudley MBC* and *Luton BC* there appeared to be a greater judicial willingness to engage with the evidence than in the other cases, though perhaps this was to justify a finding of inadequate consultation. As for the cases where the consultation ground did not succeed, the intensity of review demonstrated significant deference to government decision-making, ostensibly greater than was due on the *Gunning* principles.

Administration of justice consultation cases

There were five adequacy of consultation cases that related to the administration of justice. In chronological order, the first two cases were *Robin Murray* and *Vale of Glamorgan* and the decisions to close Sittingbourne and Barry magistrates' courts respectively.⁶² Adequacy of consultation was an overlapping ground of review. In *Robin Murray*, the consultation was held to be fair notwithstanding the LC's failure to disclose information to consultees about the criteria used to assess court facilities which would

⁶² *R (Robin Murray & Co) v Lord Chancellor* [2011] EWHC 1528 (Admin) [38], [39]; and *Vale of Glamorgan Council v Lord Chancellor* [2011] EWHC 1532 (Admin) [17(1)], [20]. The cases were heard by Divisional Courts consisting of Elias LJ, Beatson and Hickinbottom JJ on 25 May 2011 (in London) and 8 June 2011 (in Cardiff) with both judgments delivered on 16 June 2011.

have allowed them to establish if the criteria had been correctly applied.⁶³ In *Vale of Glamorgan*, the consultation ground failed on the basis:

There was no express statutory duty to consult and subject to considerations of fairness, it was for the Lord Chancellor himself to determine the scope of any consultation. In a context where he was rationalising the court estate, he was perfectly entitled to conclude that he would consult only about proposed closures. There was nothing irrational or unfair about that particularly given that this was part of a wider process of national consultation in which urgent steps to save costs were being implemented.⁶⁴

Howard League was the challenge to regulations narrowing the scope of legal aid for prison law.⁶⁵ The case is unusual in that permission was refused on five grounds at first instance, but then granted by the Court of Appeal which then retained jurisdiction.⁶⁶ The consultation ground was rejected as first instance on the basis that there was no duty to consult given the limited scope of the changes.⁶⁷

⁶³ The LC's failure to disclose the evidence and criteria on which the proposal were made effectively prevented consultees expressing views as to whether the evidence was true or the criteria made sense.

⁶⁴ *Vale of Glamorgan Council* (n 62) [25].

⁶⁵ *R (Howard League for Penal Reform) v Lord Chancellor* [2014] EWHC 709 (Admin) (Rafferty LJ, Cranston J).

⁶⁶ *Howard League* (n 2). Permission was granted on the basis that denying prisoners advice and assistance gave rise to an unacceptable risk of interference with the right of access to justice guaranteed by common law. That ground is considered in detail below

⁶⁷ *Howard League* (n 65) [36].

In the second *Law Society* case,⁶⁸ the challenge was to the amendment of regulations reducing by 40% the maximum number of pages of prosecution evidence (PPE) for which lawyers were paid in some cases.⁶⁹ PPE was used as a proxy for how much time a case would take and to determine the fee payable. What ostensibly precipitated the amendment was an increase in legal aid costs following the decision of a costs judge which broadened the scope as to what counted as PPE.⁷⁰ The consultation ground was argued on the basis that the LC had not disclosed: (a) the Legal Aid Agency (LAA) projection of the impact of the costs decision in terms of increasing overall criminal legal aid costs; and (b) the analysis on which the LAA projection was based. The court found these matters were central to the decision to reduce the PPE limit; issues on which consultees were well-placed to respond; and were based on a misunderstanding of the impact of the costs decision.⁷¹ The omission of the analysis made the consultation documents positively misleading and the consultation process was unlawful. It is worth setting out the Court's response to the LC's argument that the claimants were not prejudiced by the non-disclosure of relevant information:

It is difficult to express in language of appropriate moderation why we consider these arguments without merit. The first point, which should not need to be made but evidently does, is that consultees are entitled to expect that a

⁶⁸ *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649 (Leggatt LJ, Carr J).

⁶⁹ Criminal Legal Aid (Remuneration) Regulations 2013 (Litigators' Graduated Fee Scheme), SI 2013/435, amended by Criminal Legal Aid (Remuneration) (Amendment) Regulations 2017, SI 2017/1019.

⁷⁰ The costs decision was *R v Napper* [2014] 5 Costs LR 947.

⁷¹ *Law Society* (n 68) [4(1)], [66].

Government ministry undertaking a consultation exercise will conduct it in a way which is open and transparent.⁷²

There were no similar ringing endorsements as to transparency in *Pharmaceutical Services*, *Sumpter* or *Bracking*. In the first *LCCSA* case,⁷³ the sole ground of challenge was adequacy of consultation in relation to the LC's February 2014 decisions to (a) reduce the number of duty provider contracts for solicitors firms from 1,600 to 525; and (b) to reduce criminal legal aid fees by 8.75% in both 2014 and 2015.⁷⁴ The consultation ground was argued on the basis that the LC ought to have disclosed as part of the consultation two independent reports that contained assumptions, including those as to financial modelling, upon which the LC was basing his decisions. The ground succeeded in relation to the reduction of duty contracts essentially because the financial modelling assumptions in one of the independent reports were both critical to the decision and contestable; and matters on which consultation 'might have provided significant illumination'.⁷⁵ When combined with the impact on firms and access to justice, the failure to consult was 'so unfair as to result in illegality' and the decision to reduce the number of contracts to 525 was quashed.⁷⁶ The decision on the reduction in fees was not quashed because consultation would not have led to a different decision on fees and it was driven 'by an immediate financial imperative'.⁷⁷

⁷² *ibid* [93].

⁷³ *R (London Criminal Courts Solicitors Association) v Lord Chancellor* [2014] EWHC 3020 (Admin) [34], [37] (Burnett J).

⁷⁴ The reduction of fees in 2014 was to be achieved by the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2014, SI 2014/415. It is arguable that a freestanding procedural legitimate expectation ground was also advanced but this was dealt with as an aspect of the overall fairness of consultation. *Ibid* [51] - [52].

⁷⁵ *London Criminal Courts Solicitors Association* (n 73) [48].

⁷⁶ *ibid* [50], [54].

⁷⁷ *ibid* [55].

The position is that in both the second *Law Society* case and the first *LCSA* case, non-disclosure of information to consultees vitiated the decision, but not in the *Pharmaceutical Services*, *Sumpter* or *Bracking* cases. The issue is further addressed in the conclusion to this part.

Conclusions in relation to consultation grounds

What overall conclusions, then, can be reached in relation to the consultation cases? First, as to the existence of duties to consult, the existing case law was applied conservatively when it came to finding a duty to consult, and in most cases the duty was essentially conceded such that the issue was the adequacy of consultation. It might be argued that concessions as to duties to consult were in some sense forced upon the government by the case law, but it seems the better view is that government generally accepts consultation as part of decision-making processes.

Second, as to the adequacy of consultation and the *Gunning* principles, they were generally applied with minimal rigour as evidenced by *Pharmaceutical Services*, *Sumpter* and *Bracking*. In *Sumpter*, the political and practical consequences of a finding that the consultation was inadequate - partially derailing the implementation of a major benefit reform - appeared be significant in terms of the intensity of review and the government being shown significant deference. What appears relevant, however, is evidence of a heightened intensity of review in the two legal aid cases: *Law Society* and *LCCSA*. There are several aspects to this. There appeared to be more judicial willingness to engage with the facts, issues and evidence in *Law Society* and *LCCSA*, though perhaps this was, again, to justify a finding of inadequate consultation. When it comes to the intensity of review, however, judicial expectations of what material had to be disclosed to consultees

appears higher in *Law Society* and *LCCSA* than in *Pharmaceutical Services*, *Sumpter* and *Bracking*. No doubt the consultees in *Pharmaceutical Services*, *Sumpter* and *Bracking* had significant expertise in, respectively, delivering pharmacy services and benefits for disabled people, just as the consultees in *Law Society* and *LCCSA* had significant expertise in delivering criminal legal aid services. When it came to non-disclosure of information to consultees, however, it was only the non-disclosure in the legal aid cases that rendered the consultation unlawful.

The judicial characterisation of the requirements of lawful consultation as being ‘intensely case sensitive’ in *Sumpter*, might again be met with the observation that this creates significant scope for judicial discretion and judges appear to be more sensitive to deficiencies in consultation in some cases rather than others. This echoes the finding in chapter 5 and the clear impression is that the intensity of review in the legal aid cases is significantly greater than in the welfare benefits and other cases. In the legal aid cases, there was, again, no issue of having to ‘balance’ what was required by way of a fair consultation against the need to reduce spending as there was in the welfare benefits and other cases. The issue as to the intensity of review in legal aid cases cuts across chapters 5, 6 and 7 and is discussed in chapter 8.

Finally in relation consultation, while the political constitutionalist scholarship analysed in chapter 3 does not specifically engage with consultation as a ground of review, the judicial imposition of standards of consultation is in some sense paradoxical from a political constitutionalist perspective. On the one hand political constitutionalism is opposed to the expansion of the scope and intensity of judicial review, but on the other hand any expansion in relation to consultation might be understood to support or advance that which political constitutionalism is in favour of. There are a number of linked points. First, the

judicial imposition of standards of consultation is minimally problematic in that they only apply to executive law- and policy-making and not to primary legislation, so there are no consultation requirements for primary legislation. Further, the standards of consultation only go to process and not outcome, so there is no question of the courts imposing substantive limits on political decision-making; and, where a decision is quashed on the basis of flawed consultation, the government can - as the cases demonstrate - choose to consult and then generally reach the same decision having engaged in lawful consultation. Perhaps political constitutionalism would argue that consultation delays decision-making or frustrates effective decision-making processes. It is, though, difficult to justify this argument in relation to the austerity adjudications given the basis on which the consultation grounds succeeded. Lawful consultation would not have delayed or frustrated decision-making.

Second, political constitutionalism understands political and democratic accountability to go beyond narrow electoral politics or ministerial accountability to Parliament. The central claims of political constitutionalism include that political and democratic processes are more effective and more legitimate at (a) managing and resolving disagreements; and (b) holding those with political power to account. Given these claims, the judicial imposition of standards of consultation might be understood to facilitate such processes and improve political and democratic decision-making. Consultation does not remove decisions from the circumstances of politics, but - at least in theory - opens up the political resolution of disagreements to wider participation.⁷⁸ In particular, where: (a) the decision-maker is obliged to: consult the public before reaching a decision; publish information relevant to the options under consideration; and consider the responses received; then (b) this ought

⁷⁸ As to the circumstances of politics, see Waldron (n 50) in chapter 3. Similarly, the imposition of standards of consultation might be expected to accord with Richard Bellamy's arguments about collective self-government and 'viewing all citizens as equal participants in the collective endeavour to frame a just social order'. Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007), 7.

to lead to decisions that are epistemically more informed and democratically more legitimate. There is also the argument that consultation contributes to political accountability in that decision-making processes and decisions are more transparent. Given that at least some political constitutionalist thought is in favour of ‘opening up’ political decision-making,⁷⁹ it is surprising that there has been no specific engagement in political constitutionalist scholarship with the development and imposition by the judiciary of standards of consultation. In enforcing minimal standards of consultation, it might be argued that the judiciary perform an important hortatory function which furthers the ends of political constitutionalism.

4. Other common law procedural grounds

This part accounts for the 16 of the 33 common law procedural grounds other than consultation and they are taken in the following order: relevancy of considerations (seven grounds); duty of sufficient enquiry or *Tameside* (four grounds); and then other common law procedural grounds (five grounds).

Relevancy of considerations grounds

There were seven relevancy of considerations grounds argued in six cases at first instance (two administration of justice and three other cases) and in one appeal.⁸⁰ The legal context is *Wednesbury* and Lord Greene’s statement:

⁷⁹ See, for example, Griffith (n 12) 16 ‘And we need to force governments out of secrecy and into the open. ... It is not by attempting to restrict the legal powers of government that we shall defeat authoritarianism. It is by insisting on open government’; and Tomkins (n 14) 134 ‘In order for effective scrutiny of government to be possible information about what the government is doing and is proposing to do must be freely available. No system of accountability, whether parliamentary, judicial or of any other kind, can hope to be successful without an informed understanding of what the government is doing and is proposing to do’.

⁸⁰ Some of the *Padfield* grounds did, as identified in chapter 5, shade into relevancy of considerations grounds, notably the first *FDA* case (n 56).

If in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.⁸¹

While review for relevancy of considerations is generally understood as an issue of statutory interpretation,⁸² the grounds are taken as common law here because the disputed considerations in the cases arose not from the words or purposes of the relevant statutory provisions, but from the courts being invited to find that certain considerations were nonetheless relevant (and in one case irrelevant). The distinction was recognised by Laws LJ in *Khatun* such that where the ‘discretionary power provides no lexicon of the matters to be treated as relevant’ then it is for the decision-maker to decide what is relevant subject only to *Wednesbury* review.⁸³ Relevancy of considerations is treated as a procedural ground since not taking or taking something into account suggests a flaw in the decision-making process. Such judicial decision-making is problematic from a political constitutionalist perspective because it gives the court the power to decide for the decision-maker what considerations are relevant (or irrelevant), and the court does so

⁸¹ *Wednesbury* (n 11) 228.

⁸² See, for example, Paul Craig, ‘The Nature of Reasonableness Review’ (2013) 66 CLP 131, 132. Hare, Donnelley and Bell (n 26) [5-101] identify that the relevance or otherwise of considerations may arise expressly or impliedly from legislation or from ‘obvious materiality’, which is essentially a judicial finding.

⁸³ *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37 [37]. *Khatun* is a case where relevancy of considerations, duty of sufficient enquiry, and the right to be heard run into each other.

independently of statutory words or purposes. The discretion of the decision-maker is to a degree supplanted by the discretion of the court.

Three challenges by LAs to central government funding decisions unsuccessfully argued a failure to take account of relevant considerations, two of which were analysed above in relation to consultation grounds. In *Dudley MBC*, the challenge to the decision to change the basis on which payments were made for a PFI project for IT in schools, it was argued that the relevant consideration not taken into account was that the Secretary of State had extended the PFI contract.⁸⁴ The ground was rejected on the basis that the evidence showed the minister was aware of that consideration. In *Cheshire East BC*, the challenge to the decision not to fund a household waste separation plant, it was argued that the Secretary of State had failed to take account of the environmental benefits of the project and future capacity.⁸⁵ The argument was rejected on various grounds, including that the arguments did not come close to showing irrationality or bad faith. The second *Essex CC* case was the further challenge to the initial decision to reduce EYFS funding where the original decision had been quashed on the Public Sector Equality Duty (PSED) ground covered in chapter 5. Second time around, it was argued that the Secretary of State had failed to take account of the LA's arguments as to the making of exceptions in relation to the withdrawal of funding for some projects.⁸⁶ The judge found the argument misconceived since the projects being exceptionally funded were on the basis that the Secretary of State

⁸⁴ *Dudley MBC* (n 51) [4(4)], [82]. The ground was characterised as 'Failure to take relevant facts into account/error of fact' and might, therefore, have been categorised as an error of fact ground.

⁸⁵ *Cheshire East BC* (n 50) [35], [84].

⁸⁶ *R (Essex CC) v Secretary of State for Education* [2016] EWHC 1724 [32(2)], [37] (Admin) (Holman J). The ground was argued on the basis the minister had adopted 'an unlawful and unfair approach to the making of exceptions'. It is categorised as relevancy of considerations since the LA's submission 'in relation to exceptions was not properly or fairly summarised to the Minister'. It might also have been categorised as an error of fact or fettering of discretion ground.

would not make a decision less favourable to the LA than the first decision that had been quashed.

Relevancy of considerations grounds were argued in the two court closure cases referred to above in relation to consultation grounds. In *Vale of Glamorgan*, the challenge to the decision to close Barry magistrates' court, it was argued that the LC had failed to take account of: (a) the quality of service provided at Barry, the quality of the premises (recently improved at a cost of £1.9 million), and that it had a specialist domestic violence court; and (b) the economic impact on Barry of the closure of its court.⁸⁷ The former ground was rejected on the basis that the issue was weight not relevance and it 'is not for the court to carry out the balancing exercise and to substitute its view on the merits for the Lord Chancellor, save where a *Wednesbury* irrationality challenge can successfully be mounted';⁸⁸ and the latter on the basis that the economic impact was not, absent a statutory requirement, a mandatory consideration and 'whether or not it may be politically prudent to have regard to that factor is a matter for the Lord Chancellor; but in our judgment he was under no legal obligation to do so'.⁸⁹ *Robin Murray* was the one case where it was argued that an irrelevant consideration had been taken into account in the form of a national 'journey to court survey' about the modes of transport taken by court users. The court concluded 'In our judgment, it [the survey] plainly had some relevance. Thereafter it was for the Lord Chancellor to decide how much weight it should be given'.⁹⁰

⁸⁷ *Vale of Glamorgan* (n 62) [17(2)(3)], [28], [31].

⁸⁸ *ibid* [30].

⁸⁹ *ibid* [36].

⁹⁰ *Robin Murray* (n 62) [38], [50].

Starting from the position that review for relevancy of considerations where the considerations are judicially identified is problematic in principle from a political constitutionalist perspective, there is no evidence to justify further concern in terms of the intensity of review. In summary: the ground did not succeed in any case; the courts identified few considerations that were relevant or irrelevant; there was a low evidential threshold for demonstrating that considerations had been taken account of; the intensity of review was low in that weight was for the government; and the judgments suggest a willingness to only intervene in cases of irrationality on a *Wednesbury* standard of manifest absurdity or bad faith.

Duty of sufficient enquiry grounds

Breach of the duty of sufficient enquiry or *Tameside* ground was argued in four cases at first instance and two cases on appeal.⁹¹ As with relevancy of considerations, this is problematic territory from a political constitutionalist perspective. In *Tameside* the House of Lords declined to enforce the Secretary of State for Education's exercise of a broad statutory power to give directions to a local education authority (LEA) where the Secretary of State was satisfied that the LEA was proposing to act unreasonably.⁹² The nub of the decision was that, while it was for the minister to decide if the LEA's proposed act was unreasonable, the test was whether no sensible LEA could have decided to act in the same way; and, on Lord Diplock's formulation, the minister had to 'ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly'.⁹³ In *Tameside* the effect of refusing to enforce the

⁹¹ *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 (HL).

⁹² The applicable power was the Education Act 1944, s 68 and 'If the Secretary of State ... is satisfied ... that any [LEA] have acted or are proposing to act unreasonably ... he may ... give such directions ... as appear to him to be expedient'.

⁹³ *Tameside* (n 91) 1065B.

power was to substitute the discretionary decision of the minister with the decision of the court. Griffith was particularly critical of *Tameside* in that, despite the statutory power being conferred in broad subjective terms, the House of Lords essentially imposed its own view on the merits.⁹⁴ As with relevancy of considerations, it seems the *Tameside* ground largely functions independently of statutory words and purposes in that it gives the judiciary the power to decide what the right question is and what information is relevant to that question.

The sufficient enquiry case law post-*Tameside* was reviewed by a Divisional Court in *Plantagenet Alliance* in 2014 and the court extracted six principles, several of which indicate a *Wednesbury* standard of review. On the face of it, the principles narrow *Tameside* as a ground of review.⁹⁵ There remain differences of view as to whether the *Tameside* ground exists as an aspect of *Wednesbury* unreasonableness or as a requirement of procedural fairness, specifically in terms of relevancy of considerations.⁹⁶

⁹⁴ See Griffith (n 7) 109, 111, 112; and John Griffith, *Judicial Politics since 1920: A Chronicle* (Blackwell 1993) 126. In the former Griffith's conclusion on *Tameside* was that the decision 'was based on almost no judicial authority at all' and 'one is often left with the feeling that in this area of law judges rely almost entirely on their own sense of justice or on their own personal conception of what is best'.

⁹⁵ *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin). The six principles were: (1) the obligation upon the decision-maker is only to take such steps to inform himself as are reasonable; (2) subject to a *Wednesbury* challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken; (3) the court should not intervene merely because it considers that further inquiries would have been sensible or desirable, it should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision; (4) the court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient; (5) the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion; and (6) the wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it.

⁹⁶ See, for example, Hare, Donnelley and Bell (n 26) [6-040] where the duty is conceptualised as a category of unreasonableness; and Goudie, Supperstone and Walker (n 26) ch 10 where the duty is conceptualised as procedural.

It is dealt with separately here because it was argued as a distinct *Tameside* ground in each of the cases, and it is dealt with as a procedural ground since a failure of sufficient enquiry - the basis on which it was argued in all the cases - suggests something has gone wrong with the decision-making process. While the decision in *Tameside* itself left the minister with no opportunity to identify the right information, the ground does not automatically preclude the decision-maker having another go at making the decision.

Even starting from the position that *Tameside* is in principle problematic from a political constitutionalist perspective, there is limited evidence to cause further concern given that it succeeded in none of the four cases it was argued at first instance, and in neither of the two cases where the first instance decisions were appealed. As to how *Tameside* was applied in practice, three cases can be disposed of quickly. *JS* was a challenge to the introduction of the benefit cap.⁹⁷ At first instance and on appeal it was decided that the Secretary of State was acquainted with issues relating to families fleeing domestic violence and living in temporary accommodation; and the ground was effectively that he 'should have given greater weight to the significance of these features; But weight is for the Secretary of State, and there is no challenge to the merits of the decision itself'.⁹⁸ On appeal, it was decided that, on the basis that the regulations had been approved by Parliament under the affirmative procedure, 'there is no room in the particular circumstances of this case for the application of the *Tameside* principle'.⁹⁹ As noted in

⁹⁷ *R (JS) v Secretary of State for Work and Pensions* [2013] EWHC 3350 (QB), [2014] PTSR 23 [28(4)], [96] (Elias LJ, Bean J). The challenge was to the Benefit Cap (Housing Benefit) Regulations 2012, SI 2012/2294. The court appears to have given this case the wrong - (QB) and not (Admin) - neutral citation.

⁹⁸ *ibid* [98].

⁹⁹ *R (JS) v Secretary of State for Work and Pensions* [2014] EWCA Civ 156, [2014] PTSR 619 [23(v)], [96], [109] (Dyson MR, Longmore, Lloyd Jones LJJ).

chapter 5, the significance of parliamentary scrutiny and approval of delegated legislation cuts across chapters 5, 6 and 7 and is considered further in chapter 8.

The second *FDA* case was the challenge to guidance which limited Civil Service pay awards and is analysed above on the consultation ground. The *Tameside* ground was framed on the basis of a duty to obtain the views of the Civil Service unions before finalising the awards, and the court decided it could only intervene where no reasonable decision-maker could conclude that the inquiries made were sufficient; and it was rational for ministers to conclude that they could fix pay awards without obtaining the views of the unions.¹⁰⁰ *Pharmaceutical Services* was the challenge to the decision to reduce the remuneration of NHS pharmacies for dispensing medicines and the provision of other services where a consultation ground was unsuccessfully argued.¹⁰¹ The *Tameside* ground was framed on the basis of a duty to consult representative bodies as to the impact of the cuts to establish the likely extent of pharmacy closures, in particular in deprived urban areas. At both first instance and on appeal, the court found it was not irrational not to seek the information as to potential closures. It was for the decision-maker to decide on the manner and intensity of inquiry; and the court should only intervene if no reasonable authority could have been satisfied it possessed the information necessary for the decision.¹⁰²

Perhaps of greater significance is the second *LCCSA* case, where the challenge was to the LC's further decision to reduce the number of provider contracts after the initial decision was quashed on the basis of inadequate consultation. The alleged failure as to

¹⁰⁰ *FDA* (n 58) [93].

¹⁰¹ *Pharmaceutical Services Negotiating Committee* (n 59) [16].

¹⁰² *Pharmaceutical Services Negotiating Committee* (n 61) [3], [67].

the duty of sufficient enquiry at both first instance,¹⁰³ and on appeal,¹⁰⁴ was: while the decision was based on modelling in a KPMG report commissioned by the LC, the model explicitly did not take account of the investment finance needed to improve efficiency and restructure as a result of the changes. In essence it was argued the KPMG model meant the LC could not be sure that firms would break-even or obtain the investment required and this put at risk the delivery of criminal legal aid services. While the intensity of review in the second *LCCSA* case was greater than in the other *Tameside* cases in the sense that the judicial engagement with the evidence, the outcome was the same and the Court of Appeal agreed.¹⁰⁵ The argument that the court ought to apply a heightened *Wednesbury* standard in the second *LCCSA* case is addressed below in relation to the rationality challenge.

In conclusion, the *Tameside* ground: failed in all four cases at first instance and on appeal; the courts applied a conventional *Wednesbury* standard of review; and the courts declined to adopt a more intensive standard of review in a case that, on the LC's own evidence, raised legitimate concerns about access to justice. As stated above, while *Tameside* as a ground of review might be problematic from a political constitutionalist perspective, there is no evidence that it was applied with any intensity. And, even in the legal aid case, the courts accepted that, notwithstanding the risk the decision created that statutorily required services might be unavailable, the duty to enquire as to whether those risks would materialise was limited.

¹⁰³ *R (London Criminal Courts Solicitors' Association) v Lord Chancellor* [2015] EWHC 295 (Admin) (Laws LJ, Cranston J).

¹⁰⁴ *R (London Criminal Courts Solicitors' Association) v Lord Chancellor* [2015] EWCA Civ 230, [2016] 3 All ER 296 (Dyson MR, Elias, Sales LJ).

¹⁰⁵ *ibid* [18].

Other common law procedural grounds

Three other common law grounds were argued in the austerity adjudications: failure to give adequate reasons; fettering of discretion; and failure to consider alternative options.

The analysis here is limited since none of the grounds succeeded and none raised significant issues from a political constitutionalist perspective. As with the other common law procedural grounds, the grounds are understood as common law requirements since the duties arose other than from statutory words or purposes.

Two cases raised adequacy of reasons grounds. The legal context is *Doody* and ‘The law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied, ...’.¹⁰⁶ Where there is a duty to give reasons, the leading authority as to their quality is *South Bucks DC*.¹⁰⁷ Assuming political constitutionalism accepts that reasons are required in some administrative law contexts, the matters of concern are presumably the courts extending the circumstances in which reasons are required, and the standard of review in relation to the quality of the reasons. There is no evidence to validate such concerns in the two reasons cases.

Vale of Glamorgan, the challenge to the decision to close Barry magistrates’ court, the court rejected the LC’s arguments that there was no obligation to give any reasons at all:

¹⁰⁶ *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, 564E.

¹⁰⁷ *South Bucks District Council v Porter (No 2)* [2004] UKHL 33, [2004] 1 WLR 1953. Lord Brown [36] ‘The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the “principal important controversial issues”, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration.’

because there had been consultation, the LC was obliged to give reasons sufficient to indicate why, notwithstanding the responses, he had reached the decision.¹⁰⁸ Applying *South Bucks DC*, the court found the degree of particularity depended upon the nature of the decision and it was necessary to address only the principal issues and not every material consideration. There could be no doubt as to the basis of the LC's decision was to reduce public spending and his 'response was much fuller than strict compliance with the legal obligations would have required'.¹⁰⁹ And in the second *Essex CC* case, the challenge to the further decision to reduce EYFS funding after the original decision was quashed, the court concluded the reasons in the decision letter would have been clear to the informed reader and, again citing *South Bucks DC*, there was no substantial prejudice caused by any lack of reasons.¹¹⁰ None of this is suggestive of an intensive standard of review.

Two cases raised fettering of discretion as a ground. The legal context is *British Oxygen* and 'The general rule is that anyone who has to exercise a statutory discretion must not "shut his ears to an application". ... What the authority must not do is to refuse to listen at all',¹¹¹ confirmed in the context of central government funding of local government in *ex p Brent LBC* and the obligation to 'receive any new representations which the applicants wish to make. ... To this extent the reference to keeping an open mind does not mean an empty mind. His mind must be kept "ajar"'.¹¹² The two cases were *Luton BC*, the

¹⁰⁸ *Vale of Glamorgan* (n 62) [17(5)].

¹⁰⁹ *ibid* [38].

¹¹⁰ *Essex CC* (n 86) [32(3)], [42].

¹¹¹ *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL), Lord Reid at 625C.

¹¹² *R v Secretary of State for the Environment, ex p Brent LBC and Others* [1982] QB 593 (CA), Ackner LJ at 643G. Ackner LJ based his statement on Lord Reid's statement in *Ridge v Baldwin* [1964] AC 40 at 80 that 'The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case.'

challenges to the decision to withdraw BSF funding,¹¹³ and *Dudley MBC*, the challenge to the decision to change the basis of payments for a PFI project for IT in schools.¹¹⁴ In *Dudley MBC*, the argument was framed on the basis that the policy had been applied ‘in a rigid and inflexible way’, but was rejected because the evidence showed the Secretary of State was prepared to consider representations and consider making an exception to his policy.¹¹⁵ In *Luton BC*, the ground was framed on the basis that in applying the retrospective cut-off to BSF funding, there was in effect a policy that permitted no exceptions. The judgment concludes in relation to fettering of discretion ‘the rules were indeed applied, and continued to be applied, in a hard edged way, with no residual individual discretion, is well illustrated by a letter [from the Chief Executive of the DfE’s Partnership for Schools agency]’ but does not then go on to reach a clear conclusion on the ground.¹¹⁶ From a political constitutionalist perspective, this all looks like the application of the *British Oxygen* principle with limited intensity.

The final common law procedural ground is failing to consider alternative options and it was argued unsuccessfully in *Vale of Glamorgan Council*, the decision to close Barry magistrates’ court.¹¹⁷ The ground demonstrates the overlapping nature of the grounds since it was linked to both the inadequate consultation and reasons grounds. It was argued that the LC had ‘to identify possible alternative ways of achieving the relevant efficiency savings and either to consult on those alternatives or to give cogent reasons why he was

¹¹³ *Luton BC* (n 48) [44(ii)], [49].

¹¹⁴ *Dudley MBC* (n 51) [4(3)], [79].

¹¹⁵ *ibid* [81].

¹¹⁶ *Luton BC* (n 48) [61].

¹¹⁷ *Vale of Glamorgan* (n 62) [17(1)], [20].

not doing so',¹¹⁸ relying on *Medway Council*.¹¹⁹ The ground was rejected on the basis that the LC:

was perfectly entitled to conclude that he would consult only about proposed closures. There was nothing irrational or unfair about that particularly given that this was part of a wider process of national consultation in which urgent steps to save costs were being implemented. ... No doubt alternatives could be suggested with respect to most, if not all, of the 110 courts proposed for closure.¹²⁰

The tenor of the judgment is clear, both in relation to the low standard of review being applied, whether as to alternative options or consultation; and the significance of 'urgent steps to save costs'. *Vale of Glamorgan* and Barry magistrates' court make a final appearance in the next part - reasonableness and proportionality - since the six common law grounds included a rationality challenge.

Failure to consider alternative options ground concludes the analysis of common law procedural grounds. The two significant issues of likely concern to political constitutionalism in relation to common law procedural grounds - adequacy of consultation and the intensity of review in the legal aid cases - are considered further in the concluding section of this chapter.

¹¹⁸ *ibid* [20].

¹¹⁹ *R (Medway Council and others v Secretary of State for Transport* [2002] EWHC 2516 (Admin) where it was decided that, in a national planning context, a consultation was unlawful where it excluded the building of an additional runway at Gatwick airport.

¹²⁰ *Vale of Glamorgan* (n 62) [25].

5. Rationality and proportionality grounds

The first tranche of common law substantive grounds considered are challenges on the basis of rationality or proportionality. Rationality and reasonableness are taken to mean the same thing; and the one case here that argued proportionality did so at common law (Convention proportionality cases are considered in chapter 7). The quantitative overview is that 19 cases raised rationality or proportionality common law grounds. At first instance: eight were in administration of justice cases (of which two succeeded), five were in welfare benefits cases (one success), and there were five in other cases (one success). The sole appeal, an administration of justice case on a rationality ground, was rejected. The broad qualitative overview is that none of the cases that argued rationality relied solely on that ground and, in general, cases that raised rationality challenges relied on other stronger grounds that received greater judicial analysis. The impression is that rationality grounds generally functioned as makeweights to other grounds and were speculative in the sense of having limited prospects of success.¹²¹ As identified below, the rationality grounds often received short judicial shrift. Given that broad overview, the analysis of the rationality grounds is limited and the focus is on those cases where the ground succeeded or the case has some other significance.

The starting point in terms of legal context is, of course, *Wednesbury* and ‘a conclusion so unreasonable that no reasonable authority could ever have come to it...’,¹²² and then *CCSU* and ‘a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be

¹²¹ This raises an issue as to why permission was granted on these grounds. Presumably, having granted permission on other grounds, the judiciary took the view that there was limited benefit in refusing permission on the rationality grounds.

¹²² *Wednesbury* (n 11), 234.

decided could have arrived at it'.¹²³ There have been shifts in the common law intensity of review both in relation to rights and non-rights cases since *CCSU*.¹²⁴ It was stated in *Kennedy* that 'The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle'; and there are various cases cited that demonstrate the variable intensity of review.¹²⁵ As to reasonableness in the specific context of macroeconomic policy and resource allocation decisions, in *ex p Nottinghamshire CC* the challenge was to central government rate-capping decisions. The standard of review was limited to bad faith, improper motive or manifest absurdity, sometimes referred to as super-*Wednesbury*.¹²⁶ A similar decision was reached in *ex p Hammersmith and Fulham LBC*.¹²⁷ *Cambridge HA* is an example of a challenge to a resource allocation decision and the court declined to interfere with a decision of a health authority on the merits where scarce resources meant potentially life-saving treatment for a child was refused.¹²⁸

¹²³ *CCSU* (n 23), Lord Diplock at 410G.

¹²⁴ See, for example, *Craig* (n 5) [21-010].

¹²⁵ *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455, Lord Mance [51].

¹²⁶ *R v Secretary of State for the Environment, ex p Nottinghamshire County Council* [1986] AC 240 HL). In relation to the *Wednesbury* ground, Lord Scarman said at 247C 'for the courts to intervene on the ground of 'unreasonableness' to quash guidance framed by the Secretary of State and by necessary implication approved by the House of Commons, ... I refuse in this case to examine the detail of the guidance or its consequences... Such an examination by a court would be justified only if a prima facie case were to be shown for holding that the Secretary of State had acted in bad faith, or for an improper motive, or that the consequences of his guidance were so absurd that he must have taken leave of his senses'. A statutory interpretation ground was also argued.

¹²⁷ *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 (HL), Lord Bridge at 597F 'it is not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity. ... the implementation of national economic policy are matters depending essentially on political judgment'. There was a major local government funding case litigated during the 10-year period covered by this thesis: *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6 [2015] PTSR 322. It did not meet the test for an austerity adjudication since it concerned the allocation of EU Structural Funds to regions or local authorities within the UK.

¹²⁸ *R v Cambridge DHA, ex p B* [1995] 1 WLR 898 (CA).

Turning to the academic analysis, there is a considerable volume of scholarship on reasonableness and proportionality review.¹²⁹ As to how the ground functions doctrinally, this thesis adopts Craig's analysis that reasonableness was used in two senses by Lord Green in *Wednesbury*.¹³⁰ The first sense includes taking account of irrelevant considerations and acting for improper purposes. The grounds relating to the former have been considered above, and the grounds relating to the latter were analysed as *Padfield* grounds in chapter 5. As indicated above, the grounds in this part are *Wednesbury* in Craig's substantive second sense as decisions so unreasonable that no reasonable public body could have made them. This part also adopts Craig's analysis that reasonableness 'is concerned with review of the weight and balance accorded by the primary decision-maker to factors that have been or can be deemed relevant in pursuit of a *prima facie* allowable purpose';¹³¹ though, it must be said, the judicial analysis is often applied with a much broader brush than a structured assessment of weight and balance. From a political constitutionalist perspective, unreasonableness is perhaps the ground where the limits of adjudication can be stated in the simplest terms: there is little or no appetite for a test more exacting than conventional *Wednesbury*; and a test of proportionality is entirely unpalatable. The grounds are dealt with below under the headings: welfare benefits cases, 'other' cases, and administration of justice cases.

Welfare benefits rationality cases

There were four welfare benefits cases that unsuccessfully raised rationality or proportionality challenges: *Cotton*, a challenge to the bedroom tax as it applied to parents

¹²⁹ As to a major example, see Hannah Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015).

¹³⁰ Craig (n 5) [19-002].

¹³¹ *ibid* [21-010] and Craig (n 82) 132.

who shared care for their children;¹³² *TD*, a challenge to the implementation of Universal Credit (UC);¹³³ *Parkin*, a challenge to UC entitlement for the self-employed;¹³⁴ and *Hurley*, a challenge to the benefit cap as it applied to claimants who cared for disabled relatives.¹³⁵ In *Parkin* the rationality ground was argued on the basis that the purpose of the statutory scheme was to make work pay, but the effect of the regulations was to make the claimant better off if she gave up self-employment.¹³⁶ On the basis that the further purposes of the statutory scheme were to simplify the system, reduce fraud and error, and to encourage people to consider giving up unprofitable self-employment, the conclusion was:

The Regulations were subject to the highest level of Parliamentary scrutiny. ...

They deal with matters of social policy, and with the allocation of taxpayers'

money. ... In those circumstances, the threshold of irrationality is high. I am not

satisfied that it has been reached.¹³⁷

¹³² *R (Cotton) v Secretary of State for Work and Pensions* [2014] EWHC 3437 (Admin) [5(c)], [62] (Males J). The challenge was to the Housing Benefit (Amendment) Regulations 2012, SI 2012/3040.

¹³³ *R (TD) v Secretary of State for Work and Pensions* [2019] EWHC 462 (Admin) [40(2)], [81] (May J). The challenge was to the Universal Credit (Transitional Provisions) Regulations 2014, SI 2014/1230 and related to entitlement to legacy benefits.

¹³⁴ *R (Parkin) v Secretary of State for Work and Pensions* [2019] EWHC 2356 (Admin) [2], [119] (Elisabeth Laing J). The challenge was to the Universal Credit Regulations 2013, SI 2013/376 and the operation of the minimum income floor (MIF) which attributed to the self-employed more income from self-employment than they were receiving.

¹³⁵ *R (Hurley) v Secretary of State for Work and Pensions* [2015] EWHC 3382 (Admin), [2016] PTSR 636 [3], [41] (Collins J). The challenge was to the Benefit Cap (Housing Benefit) Regulations 2012, SI 2012/2994.

¹³⁶ This is another example which illustrates the overlapping nature of the grounds of review. The ground here was explicitly framed as a rationality challenge but might have been framed as a *Padfield* or relevancy of considerations ground.

¹³⁷ *Parkin* (n 134) [122].

Again, the significance of parliamentary scrutiny and approval of delegated legislation cuts across chapters 5, 6 and 7 and is considered in chapter 8. In *Hurley* there was a robust effort to argue for a heightened *Wednesbury* or common law proportionality test which, after a careful review of the case law including *Kennedy* above, was rejected on the basis:

It may be that the Supreme Court will decide that irrationality in the sense of a decision which no reasonable person could make is no longer to be the correct approach even outside the Convention or European Union law. But the decision of the House of Lords in *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696 is binding unless the Supreme Court decides that it should be overruled.¹³⁸

The one welfare benefits case that succeeded on a rationality ground was *SC* and on a narrow basis as to the operation of the two-child limit as it applied to friend or family carers who chose to care for a child where it was likely that the child would otherwise need to be looked after by an LA (colloquially be ‘in care’).¹³⁹ The provisions operated such that where a family had one child and then chose to be a family or friend carer for another child, then that child ‘counted’ for the purposes of the two-child limit and no additional benefit was payable for an additional child born to the family. But: if the family had two children and then chose to be a family or friend carer for a third child, then

¹³⁸ *Hurley* (135) [42]. Having rejected a heightened *Wednesbury* or proportionality test at common law, the Convention ground succeed on a proportionality test and this ground is analysed in chapter 7.

¹³⁹ *SC v Secretary of State for Work and Pensions* [2018] EWHC 864 (Admin), [2018] 1 WLR 5425 (Ouseley J). The relevant legislative provisions were the Welfare Reform and Work Act 2016, s 13 which amended the Tax Credits Act 2002, s 9; and the Child Tax Credit (Amendment) Regulations 2017, SI 2017/387, regs 4 and 5 which amended the Child Tax Credit Regulations 2002, SI 2002/2007, regs 7, 9 and 12.

benefits were payable for the third child. The purpose of the limited exception to the two-child limit for friend and family carers was to encourage (or avoid discouraging) friend and family carers to look after a child because this: (a) was better for the child than being in care; and (b) reduced public spending by avoiding the child being in care.

The Secretary of State's only argument in favour of the sequencing provision was that the disentitlement to benefit for additional children would encourage family and friend carers to treat or value the cared for child as they would a natural child of the family. The argument was, in effect, that a subsequent financial penalty for caring for the child would encourage the family or friend carers to value the child more. The claimant's evidence was that HMRC had advised her that she could avoid the sequencing provision by placing the cared for child back in the care of the LA before having a second natural child, and then agreeing to start caring again for the cared for child. While HMRC denied giving that advice, it conceded that the sequencing provision could be avoided in this way. The court dealt with the rationality point shortly and with limited reference to authority and concluded there was no justification for the provision because it was not rationally connected to the purposes of the legislation and discouraged that which it was intended to encourage.¹⁴⁰ The decision in *SC* is analysed further at the end of this part.

'Other' rationality cases

There were five 'other' cases that unsuccessfully raised rationality challenges, most of which have been analysed in relation to other grounds. They were: *Cheshire East BC*, the challenge to the decision not to fund a household waste separation plant;¹⁴¹ both the first

¹⁴⁰ *ibid* [215]. This is another example of the overlapping nature of the grounds. While this ground was framed as a rationality challenge, it might equally have been framed as a *Padfield* challenge.

¹⁴¹ *Cheshire East BC* (n 49) [35], [36].

and second *Essex CC* cases, the challenge to the initial decision to reduce EYFS funding and the subsequent challenge where the initial decision was quashed on the PSED ground;¹⁴² *Luton BC*, the challenges to the decision to withdraw BSF funding for some schools;¹⁴³ and *Simone*, which was the challenge to decisions relating to SEN funding.¹⁴⁴ In some of the cases, for example *Cheshire East BC*, the ground was constructed narrowly around a specific factor; and in other cases, for example the second *Essex CC*, more broadly as to the overall merits of the decision. Either way, there is no evidence of an intensive standard of review. While there was greater engagement with the often complex facts and arguments in the cases where LAs were challenging central government funding decisions, the rationality grounds were rejected fairly comprehensively. The conclusion in the first *Essex CC* case is broadly typical:

The rationality challenge is similarly unarguable. The Secretary of State was entitled to choose to achieve cuts in funding by making those cuts which imposed the least burden on the public purse, including on the purse of local authorities.¹⁴⁵

The one ‘other’ case that did succeed on the ground of rationality was *Nyoni*.¹⁴⁶ The background was *Tigere* and the Supreme Court decision that the complete exclusion from eligibility for higher education tuition fee loans based on immigration status, including students with limited leave to remain who were highly likely to be given

¹⁴² *Essex CC* (n 50) [30(2)], [37]; and *Essex CC* (n 86) [32(1)], [33].

¹⁴³ *Luton BC* (n 48) [44(i)], [47].

¹⁴⁴ *R (Simone) v Chancellor of the Exchequer* [2019] EWHC 2609 (Admin) [3], [88] (Lewis J).

¹⁴⁵ *Essex CC* (n 50), [37].

¹⁴⁶ *R (Nyoni) v Secretary of State for Business Innovation and Skills* [2015] EWHC 3533 (Admin) (Sir Brian Keith).

indefinite leave to remain, was discriminatory and contrary to the Convention right of access to education.¹⁴⁷ In response, the Secretary of State issued an interim policy with criteria for eligibility. Nyoni was not eligible under the interim policy because she had not spent more than half her life in the UK. The Secretary of State also considered her case on an exceptional basis and decided she was not eligible. The rationality ground was argued on the basis of *Rogers* and the principle that where a policy allows for departure in exceptional cases, the policy-maker must be able to envisage cases that are exceptional.¹⁴⁸ The essential facts of *Nyoni* were that she had successfully completed the first year of her degree course in 2014-15 with the fees paid by her, her family and the university; if she decided to leave the course and wait a year, she would have to start the course afresh in 2016-17, but she was certain to be accepted at a university and would then qualify for a loan, though it would be limited since she had already had one year of higher education; and, finally, on the Secretary of State's evidence, Nyoni was the only student the Secretary of State was aware of who was not eligible under the interim policy who had completed one year of her course. As with *SC*, *Nyoni* is further analysed at the end of this part.

Administration of justice rationality cases

There were seven administration of justice cases where the rationality challenges were unsuccessful: *Fletcher*, the imprisonment for public protection (IPP) sentence case and the failure to provide systems and resources such that the claimants could demonstrate

¹⁴⁷ *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57. *Tigere* is analysed in chapter 7 because it succeeded on Convention grounds.

¹⁴⁸ *R (Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392, [2006] 1 WLR 2649. *Rogers* was a case relating to the PCT's policy of providing the drug herceptin to patients with breast cancer. The policy was to not to fund the drug save in unstated exceptional circumstances. Because the PCT was unable to envisage what the exceptional circumstances may be, the policy amounted to a policy of refusal and not exceptionality and was therefore unreasonable. Jeff King cites *Rogers* as an exception to the principles that discretionary allocative decision-making is non-justiciable. Jeff King, 'The Justiciability of Resource Allocation' (2007) 70 MLR 197, 199.

detention was no longer necessary;¹⁴⁹ *R (A)*, the challenge to the 2012 Criminal Injuries Compensation Scheme that sought to limit eligibility;¹⁵⁰ *Howard League*, the challenge to reduction of availability of legal aid for prison law;¹⁵¹ the first *Law Society* case, the removal of the fee for committal proceedings before magistrates' courts;¹⁵² the second LCCSA case, the challenge to the further decision to reduce the number of provider contracts and reduce criminal legal aid payments;¹⁵³ *Thompson*, one of the Exceptional Case Funding (ECF) legal aid cases;¹⁵⁴ and *Vale of Glamorgan*, the decision to close Barry magistrates' court.¹⁵⁵

Two of these cases merit further analysis since they illustrate contrasting approaches to judicial analysis, but similar conclusions as to the standard of review. In *Vale of Glamorgan*, the rationality ground was rejected on the basis 'It is a rare case indeed where it can be said that a decision is so irrational that no reasonable Minister, properly directing himself in law, could have made it. This is not such a case'.¹⁵⁶ While there was much greater judicial engagement with the evidence and issues in the second LCCSA case, the result was the same in that it was 'not demonstrated to the *Wednesbury* standard' that no

¹⁴⁹ *Fletcher v Governor of HMP Whatton* [2014] EWHC 3586 (Admin), [2015] 3 All ER 558 [3], [56], [76] (Dingemans J).

¹⁵⁰ *R (A) v Criminal Injuries Compensation Authority* [2017] EWHC 2 (Admin) (Wilkie J) [3(d)], [134]. Also known as *R (McNiece) v Criminal Injuries Compensation Authority*.

¹⁵¹ *R (Howard League for Penal Reform) v Lord Chancellor* [2014] EWHC 709 (Admin) [49] (Rafferty LJ, Cranston J).

¹⁵² *R (Law Society) v Lord Chancellor* [2012] EWHC 794 (Admin) [4(3)], [40] (Stanley Burnton LJ, Treacy J).

¹⁵³ *London Criminal Courts Solicitors' Association* (n 103) [7], [52].

¹⁵⁴ *Thompson v Director of Legal Aid Casework* [2017] EWHC 230 (Admin) [35] (Nicol J).

¹⁵⁵ *Vale of Glamorgan* (n 62) [17(4)], [37].

¹⁵⁶ *ibid.*

reasonable decision-maker could have reached the LC's decision,¹⁵⁷ and the decision was affirmed by the Court of Appeal.¹⁵⁸

What is interesting about the second *LCCSA* case, however, are the arguments for a heightened standard of review on both the *Tameside* ground above and the rationality ground analysed here. The case for a heightened standard of review was argued on the basis that, first, the case related to 'the administration of criminal justice, whose integrity is a benchmark of the rule of law' and 'The court has a particular responsibility as its guardian'; and, second, the duty imposed by LASPOA 2012 on the LC to secure advice and assistance for detained criminal suspects.¹⁵⁹ The LC's arguments against a heightened standard of review were explicitly made on the basis of arguments advanced by political constitutionalism in that the court 'enjoys neither a high level of institutional competence nor of constitutional legitimacy'.¹⁶⁰ As to the former, the LC argued that the funding of criminal legal aid was conditioned by complex economic factors; and, as to the latter, since there was no current breach of LASPOA 2012, the standard of review ought to be no more intensive than for any other public law discretionary power. The LC also argued that if the *Tameside* or rationality ground succeeded, the consequent delay would alter the effects of the LC's policy on funding of criminal legal aid and the court would effectively be 'involved' in the decision-making process. At first instance, Laws LJ concluded the conventional *Wednesbury* standard applied on the basis:

¹⁵⁷ *London Criminal Courts Solicitors Association* (n 103) [73].

¹⁵⁸ *London Criminal Courts Solicitors Association* (n 104) [7], [83].

¹⁵⁹ *ibid* [25].

¹⁶⁰ *ibid* [30].

Restraint is not only dictated in this case by the danger that relief granted by the court might distort the decision-making process. It is true that we are not asked to examine a decision of macro-economic policy, for the change to dual contracts, and the dictates of economic austerity behind it, are not themselves the subject of any challenge: if it were otherwise, an especially 'light-touch' approach would be appropriate ... But we are dealing with a decision-making process larded with technical complexity, as to whose refinements we plainly have no special expertise. To this extent [the LC's] submission that the court possesses no particular institutional competence has force. His linked submission that we may claim no special constitutional legitimacy has support from the fact that as I have said these claims' true target is action taken under [LASPOA 2012, s 2(1)] a function which quintessentially involves the making of discretionary judgments.¹⁶¹

Laws LJ accepted the LC's arguments on institutional competence and constitutional legitimacy and the decision was upheld on appeal. While the intensity of review in the second *LCCSA* was greater than in relation to most of the other rationality grounds in that the court engaged in a granular review of the facts and evidence, the outcome was the same in relation to the standard of review applied.

The one administration of justice case to succeed on a rationality ground was the second *Law Society* case, the challenge to the amendment of regulations reducing by 40% the maximum number of PPE for which lawyers were paid in some cases.¹⁶² Having already

¹⁶¹ *ibid* [32].

¹⁶² *Law Society* (n 68) [4(1)], [98]. This was a case where the ground was compendious and might also have been classified as an error of fact or reasonableness ground.

succeeded on the adequacy of consultation ground, the claimant also succeeded on the basis that the LC's decision had been reached on the LAA's analysis that did not take account of trial length and pre-existing costs trends. The success of the rationality ground meant the LC could not consult and then reach the same decision. The Law Society was given permission to rely on expert evidence that showed the LAA's decision had been reached on flawed statistical analysis as to the length of trials and the number of defendants. After a review of the expert evidence, the court decided the LC's decision was 'unlawful because it was reached on the basis of a flawed analysis on which no reasonable authority would have relied'.¹⁶³ This is another example of the variable intensity of review in legal aid cases in that the court was exceptionally willing to admit expert evidence and engage in a granular review of the facts and evidence.

What conclusions can, then, be drawn in relation to rationality and proportionality grounds? Quantitatively, that so few of the grounds succeeded is hardly indicative of an intense standard of review. Qualitatively, and subject to what is set out below in relation to the three cases that succeeded, there is no evidence of a standard of review higher than conventional *Wednesbury* and, in the two cases where a heightened standard of review was argued for - *Hurley* and the second *LCCSA* case - it was rejected. In the latter, it was rejected explicitly on the basis of arguments advanced by political constitutionalism in that the courts lacked institutional competence and constitutional legitimacy. There is not, in general, any evidence of the courts adopting a more intensive standard of review than that established by *Nottinghamshire CC* and *Cambridge HA* cases referred to above in relation to macroeconomic policy and resource allocation.¹⁶⁴ Presumably, the application of those standards of review is acceptable to political constitutionalism.

¹⁶³ *ibid* [123].

¹⁶⁴ *Nottinghamshire CC* (n 126); and *Cambridge HA* (n 128).

That does, though, leave the three cases where rationality challenges succeeded. Long-standing criticisms of *Wednesbury* include: a finding of unreasonableness lacks transparency and rigour, and 'encourages suspicion that prejudice or policy considerations may be hiding underneath *Wednesbury's* ample cloak'; the test is unrealistic in that courts quash decisions that are not manifestly absurd; and the test is tautologous in defining an unreasonable decision as one that no reasonable decision-maker would reach.¹⁶⁵ No doubt political constitutionalism shares those concerns and they present difficulties in terms of assessing objectively what the intensity of review was in an individual case.

With those difficulties in mind, it is nonetheless hard to see how the sequencing provision for family and friend carers that was successfully challenged in *SC* was anything other than manifestly absurd. The provision discouraged that which it sought to encourage; its effect was to increase public spending and potentially burden children with the disadvantages of being in care; there were no sensible arguments or factors to weigh in favour of the provision; and the provision could be 'gamed' at the cost of increasing public spending and to the detriment - albeit temporary - of a child.

In relation to *Nyoni* and the second *Law Society* case, the decisions being challenged were less obviously absurd in that there was something that had weight - reducing spending - in favour of the decisions. In *Nyoni*, it is perhaps significant that the finding of irrationality related to one person with almost no impact on public spending but with significant benefit to Nyoni herself. And, in the second *Law Society* case, the decision was irrational on the basis that the expert evidence showed that the decision was based on a

¹⁶⁵ See, for example, Jeffrey Jowell and Anthony Lester, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' [1987] PL 368 [372].

flawed statistical analysis. A sceptical view is that 'prejudice or policy' were in play in these two cases. Perhaps allowing a student to continue in higher education and ensuring lawyers are paid for the work they do aligns with judicial values? That judges are presented with essentially binary choices and how that may affect decision-making is addressed in chapter 8. While there are, perhaps, reasons to be sceptical about these two cases, the overall picture as to rationality and proportionality grounds provides little support for the view that the limits of adjudication envisaged by political constitutionalism were exceeded, let alone systematically exceeded.

6. Substantive legitimate expectation grounds

The second tranche of cases that relate to substantive common law grounds are challenges on the basis of substantive legitimate expectation. Nine cases raised ten legitimate expectation grounds and the breakdown of cases at first instance is: one administration of justice case, one welfare benefits case, and seven 'other' cases. Substantive legitimate expectation appears to have been a significant ground in the 'other' cases because LAs sought to retain central government funding and public sector employees sought to maintain existing entitlements.

The legal context is *ex p Hamble* where it was suggested that fairness might require decision-makers to be held to substantive as well as procedural legitimate expectations;¹⁶⁶ *Hargreaves* where the view that substantive legitimate expectation could be protected on anything other than *Wednesbury* grounds was identified as heresy;¹⁶⁷ and then *Coughlan* where a local health authority was held to a substantive legitimate

¹⁶⁶ *R v Ministry of Agricultural, Fisheries and Food ex p Hamble* [1995] 1 CMLR 533, [1995] 2 All ER 714 (HC) (Sedley J).

¹⁶⁷ *R v Secretary of State for the Home Department ex p Hargreaves* [1997] 1 WLR 906 (CA) (Hirst, Peter Gibson, Pill LJ).

expectation on non-*Wednesbury* grounds.¹⁶⁸ As to the case law since *Coughlan*, the doctrinal position appears to be that: a substantive legitimate expectation can be created by express representations to an individual, practices and policies, and public statements if made by a person with authority; and departure from the legitimate expectation is unlawful where frustrating the expectation is so unfair that to adopt a different course will amount to an abuse of power.¹⁶⁹

This is problematic from a political constitutionalist perspective because the courts have, independently of statutory words or purposes, developed a ground or principle of substantive review which allows the court to overrule political policy- and decision-making. However, since none of the nine cases that argued substantive legitimate expectation succeeded at first instance, and the one appeal on legitimate expectation grounds failed, it is significantly less problematic than it might have been.

The welfare benefits case that raised substantive legitimate expectation was *Delve*, the challenge to the equalisation of state pension age (SPA) to 65 for women and then its increase to 68 by four Pensions Acts between 1995 and 2014.¹⁷⁰ The argument was primarily substantive in that the claimants had a legitimate expectation as to when they would receive their state pension, albeit that this was protected by a procedural legitimate expectation of notice of any change at least 10 years ahead of SPA. Perhaps there is an

¹⁶⁸ *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 (CA). Stephen Sedley - a judge in both *Hamble* and *Coughlan* - observes 'I have at least enjoyed the experience of first being declared a heretic by my judicial superiors for advancing the boundaries of what citizens can legitimately and enforceably expect from the state and then, as heretics do if they are spared the flames, watching the heresy become orthodoxy' *Ashes And Sparks: Essays on Law and Justice* (Cambridge 2011) ix.

¹⁶⁹ As to a critique of the doctrinal and theoretical focus on legitimate expectation, see Joe Tomlinson, 'Do we need a theory of legitimate expectations?' (2020) 40 LS 286.

¹⁷⁰ *R (Delve) v Secretary of State for Work and Pensions* [2019] EWHC 2552 (Admin) [2], [86], [114] (Irwin LJ, Whipple J).

argument that this ground ought to have been classed as common law procedural, but in any event the ground failed on the basis: there was no undertaking or promise that Parliament would not change the SPA; in relation to notice, a failure to give notice could not abrogate a statute; and no breach of any common law principle of fairness could allow a court to suspend the operation of primary legislation.¹⁷¹

The one administration of justice case in which substantive legitimate expectation was argued was the second *Law Society* case, the challenge the decision to reduce by 40% the maximum number of PPE.¹⁷² The ground appears not to have been advanced in oral submissions and failed on the basis that the relevant ministerial statement by the LC could not have been understood as a commitment not to reduce fees before a formal review of the operation of the scheme had been completed.

As to the seven other cases that raised substantive legitimate expectation grounds, four cases related to central government funding of local authorities, three of which - *Luton BC*, *Dudley MC* and *Cheshire East MBC* - were analysed above in relation to consultation.¹⁷³

The fourth case was *Liverpool CC* where several LAs challenged the ongoing failure of the Secretary of State for Health to provide funding for LAs to implement the statutory

¹⁷¹ *Delve* is a case which appears to have been explicitly political in the sense that it appears to have been brought primarily for political or campaigning ends rather than in any expectation it would succeed. It was brought as part of the WASPI (Women Against State Pension Inequality) campaign to challenge successive rises in SPA for women born in the 1950s. It is hard not to have some sympathy with the campaign given that the changes can mean a one-year difference in date of birth has a three-year difference in retirement age; and some women were given one-year's notice of a 6-year rise in SPA.

¹⁷² *Law Society* (n 68) [4(1)], [63].

¹⁷³ *Cheshire East BC* (n 49) [35], [43]; *Dudley MBC* (n 51) [4(2)], [71]; and *Luton BC* (n 48) [4(iii)], [62].

deprivation of liberty (DoL) safeguards regime.¹⁷⁴ *Liverpool CC* is considered in more detail below since it raised a ‘systemic risk of illegality’ ground. All the claims failed on the basis there had been no promises sufficiently clear and unambiguous and devoid of relevant qualifications; or that it was obvious that funding was subject to political changes of government.

Two cases related to public sector pensions. The first *PCSU* case was the challenge to the amendment of the Civil Service pension scheme to reduce benefits paid to scheme members on redundancy and early retirement.¹⁷⁵ The overriding of any substantive legitimate expectation was justified on the basis that Parliament implicitly overrode any expectation by passing the Superannuation Act 2010 which allowed for the reduction of pension benefits and enforcing the expectation would require the court to go behind a government decision in the political/macroeconomic sphere. The first *FDA* case was the challenge to delegated legislation that uprated pensions by CPI rather than RPI and the ground failed on the basis there was never any promise that could give rise to a substantive legitimate expectation.¹⁷⁶ And the final substantive legitimate expectation case is *Solar Century*, the challenge to the decision to the early closure of the renewable obligations (RO) scheme that provided financial incentives for the creation of large-scale generation capacity using renewable sources.¹⁷⁷ The ground was argued on two bases, both of which were rejected at first instance and on appeal to the Court of Appeal on the

¹⁷⁴ *R (Liverpool CC) v Secretary of State for Health* [2017] EWHC 986 (Admin) [72] (Garnham J). *Liverpool CC* was brought two days short of the three month time limit and the claim was also rejected on the basis that it had not been brought promptly.

¹⁷⁵ *R (Public and Commercial Services Union) v Minister for the Civil Service* [2011] EWHC 2041 (Admin) [3], [68] (McCombe J).

¹⁷⁶ *FDA* (n 56) [40], [70].

¹⁷⁷ *Solar Century Holdings Ltd v Secretary of State for Energy and Climate Change* [2014] EWHC 3677 (Admin) (Green J) [4(b)(c)], [64], [69]. The first procedural legitimate expectation ground overlapped with the *Padfield* ground analysed in chapter 5.

basis that no legitimate expectation had been created that the RO scheme would continue.¹⁷⁸

In conclusion, the courts appear to have set a high bar evidentially in terms of establishing a substantive legitimate expectation, and most of the claimants failed to get over the bar. Insofar as a legitimate expectation was established, it was of no effect because it was trumped by primary legislation or because the claim related to macroeconomic decision- or policy-making. While political constitutionalism may object to substantive legitimate expectation as a ground of review, it was applied with minimal intensity in the austerity adjudications.

7. Other common law grounds

The final grounds are described somewhat loosely as other common law obligations and rights. They functioned as challenges on the basis of various principles conceptualised as: public law duties, common law fairness, principles of legality and common law rights. The grounds generally relied on existing jurisprudence and, while they were sometimes linked to other grounds, they justify separate analysis. Given their slightly nebulous nature, no attempt is made to define or classify the grounds in advance; and the relevance of the cases to the limits of adjudication envisaged by political constitutionalism is addressed at the conclusion of this part. The cases are again dealt with under the headings: welfare benefits cases, ‘other’ cases, and then administration of justice cases.

¹⁷⁸ *Solar Century Holdings Ltd v Secretary of State for Energy and Climate Change* [2016] EWCA Civ 117 (Tomlinson, Treacy, Floyd LJJ) [64], [69].

Welfare benefits cases

In *Delve*, the progressive raising of the SPA for women from 60 to 68 without adequate notice was described ‘as conflicting with minimum requirements of fairness pursuant to common law’ and this was argued independently of the legitimate expectation ground.¹⁷⁹ The judgment characterises the fairness argument as misconceived and ‘even if the court were able to impose obligations of notice-giving proceeding from common law fairness, no breach could commit or empower the court to suspend the operation of primary legislation. There would be no remedy for any such breach’.¹⁸⁰ In short, there is nothing in *Delve* to trouble political constitutionalism.

Reilly was the challenge to regulations which obliged Jobseekers Allowance claimants in prescribed circumstances to participate in ‘work for your benefit’ schemes intended to assist them to obtain employment.¹⁸¹ The issue was whether the notices served on the claimants were lawful. The ground was argued on the basis that, notwithstanding there was no statutory duty to have such a policy, the Secretary of State had a duty to set out the schemes in a published policy that explained the features of each scheme, including the type of work a person can be compelled to undertake; when they could be required to undertake it and for what period; and the consequences of not participating. Without such a policy, the notices should be quashed and there was no requirement to

¹⁷⁹ *Delve* (n 162) [2], [86]. The claimants sought to rely on *Re: Finucane* [2019] HRLR 7, [2019] UKSC 7 and ‘it is for the court to decide what fairness requires’. The argument was comprehensively rejected.

¹⁸⁰ *ibid* [119].

¹⁸¹ *R (Reilly) v Secretary of State for Work and Pensions* [2012] EWHC 2292 (Foskett J). See also (n 185) above in chapter 3 in relation to policy and guidance. *Reilly* is taken as a common law ground because it was effectively a challenge on the basis there was no policy.

participate.¹⁸² At first instance it was held that the Secretary of State had such a duty.¹⁸³ This was reversed on appeal;¹⁸⁴ and, while the Supreme Court did not reverse that decision, it stated:

Fairness therefore requires that a claimant should have access to such information about the scheme as he or she may need in order to make informed and meaningful representations to the decision-maker before a decision is made. Such claimants are likely to vary considerably in their levels of education and ability to express themselves in an interview at a Jobcentre at a time when they may be under considerable stress. ...

the Secretary of State owed a duty as a matter of fairness to see that [the claimants] were respectively provided with sufficient information about the [schemes], in order for them to be able to make informed and meaningful representations to the decision-maker before a notice requiring their participation was served on them. However, it would be wrong to be prescriptive as to how that information should be given. It is a proper matter for a court to determine whether, and if so what, information is required to be communicated by the government, and whether a particular means of communication satisfied

¹⁸² *ibid* [6], [54]. The ground relied on *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 [2012] 1 AC 245, a decision as to the legality of immigration detention by reference to an unlawful and unpublished Home Office policy. There was a published policy on the circumstances in which immigrants would be detained but the unpublished policy conflicted with the published policy and included a near blanket ban

¹⁸³ *Reilly* (n 181) [66].

¹⁸⁴ *R (Reilly) v Secretary of State for Work and Pensions* [2013] EWCA Civ 66, [2013] 1 WLR 2239 [27], [62] (Pill, Black LJ, Sir Stanley Burnton).

that requirement. However, it should not, absent unusual circumstances, be for the court to prescribe a specific means of communication.¹⁸⁵

Perhaps this can be summarised as: due to the potentially serious impact on claimants - withdrawal of a means-tested benefit for an extended period - common law fairness required sufficient information to be provided to enable claimants to make informed representations before notice was served obliging participation in a scheme. *Reilly* is considered further after the final welfare benefits case.

R (C),¹⁸⁶ was a challenge by two claimants to delays of 13 months and 10 months respectively in the determination of PIP claims, the benefit that replaced DLA.¹⁸⁷ The Secretary of State seems to have conceded a public law duty to determine PIP applications within a reasonable period, but argued the length taken to process the claims did not breach that duty. The volume of claims was within what was predicted and the claims were for a non-means tested benefit for seriously disabled people where delay could give rise to acute and irreparable hardship. The court decided that, given the impact on the claimants of any delay, the reasonable period had to be fairly modest. A declaration was made that the delay in determining the applications for PIP was unlawful. A mandatory order in relation to delay was not sought.

¹⁸⁵ *R (Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] AC 453 [27], [58] (Lord Neuberger PSC, Lord Mance, Lord Clarke, Lord Sumption, Lord Toulson JJSC).

¹⁸⁶ *R (C) v Secretary of State for Work and Pensions* [2015] EWHC 1607 (Admin) [1(i)], [34] (Patterson J).

¹⁸⁷ PIP replaced DLA for those aged between 16 and 65. There was detailed evidence from the DWP that claimants were waiting lengthy period for decisions. In January 2015, 37% of claims had been waiting more than 20 weeks, 24% had been waiting over 30 weeks, 13% had been waiting more than 40 weeks and 4% had been waiting over 52 weeks. The intervener, Zacchaeus 2000 Trust, provided evidence showing the determination periods were between seven and 12 months; and case studies showing claimants had undergone mental, physical and financial hardship which was not adequately remedied by back-payment.

It seems that in both *Reilly* and *R (C)* the courts imposed on government what were essentially procedural duties relating to the treatment of benefit claimants based on judicial norms of fairness. The courts were essentially deciding what was ‘fair’ in terms of conduct. From a political constitutionalist perspective, this is perhaps problematic since it amounts to interference by the judiciary with political decisions as to what information should be given to claimants or what resources should be allocated to processing claims for PIP. Given the cases and the outcomes, though, a fair conclusion might be that the interference was minimal and was in relation to government conduct that was, on the face of it, unfair. It is somewhat difficult to see how the government might legitimately refuse to provide claimants with sufficient information to make informed representations before being served notice requiring participation, or to take over a year to process a benefit claim for someone with severe disabilities.

Other cases

There are two ‘other’ cases that raised similar issues. *Liverpool CC*, the challenge by four LAs to the ongoing failure of the Secretary of State for Health to provide funding for LAs for the statutory DoLS regime, briefly appeared above in relation to substantive legitimate expectation.¹⁸⁸ Reduced to its essentials, the LAs’ argument was: (a) following the decision of the Supreme Court in the *Surrey CC* case, there was a huge increase in the number of people whose deprivation of liberty had to be authorised under the DoLS regime, and this led to a massive increase in LA costs;¹⁸⁹ and (b) the LAs had no power to raise local taxation, and their budgets had shrunk as a result of austerity and would continue to

¹⁸⁸ *Liverpool CC* (n 174).

¹⁸⁹ *Surrey County Council v P* [2014] UKSC 19, [2014] AC 896. The decision established that, where people with mental disorders or disabilities lived in care and were under continuous supervision and control and not free to leave, then they were deprived of their liberty and periodic independent reviews were required to establish if the arrangements were in their best interests. There was around a ten-fold increase in DoLS applications after the Supreme Court’s decision with a significant impact on LA budgets.

shrink; and therefore (c) this created an unacceptable risk of illegality contrary to public law principles in terms of LAs meeting their DoLS duties. *Liverpool CC* was argued on the basis of *Refugee Legal Centre* and *Detention Action* where the fast track asylum appeal process had been challenged on grounds that the government could not operate a system that placed asylum seekers at unacceptable risk of being processed unfairly.¹⁹⁰ The arguments were comprehensively rejected on several grounds, including: the increase in costs was precipitated by a decision of the Supreme Court and not the government, and the LAs could not challenge the high level macroeconomic funding decisions made by the government; there was no authority that established that an unacceptable risk of illegality was a general principle of public law; and, even if there were such a principle, the claim would fail on the evidence since the LAs were unable to show they could not meet the costs of their DoLS obligations. *Liverpool CC* is addressed further in the conclusion to this part.

The final ‘other’ case was *Solar Century*, the challenge to the decision to the early closure of the RO scheme, on the basis that the decision was retrospective and unlawful. A similar argument was made in *Homesun Holdings*, but it was considered in chapter 5 since it was resolved by analysing the relevant statutory provisions.¹⁹¹ In *Solar Century* the ground was argued on the more general common law presumption against retrospectivity,¹⁹² and the

¹⁹⁰ *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 148, [2005] 1 WLR 2219; and *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840, [2015] 1 WLR 5341.

¹⁹¹ *R (Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change* [2011] EWHC 3575 (Admin) [22], [34].

¹⁹² As with the principle of legality, it is recognised that the principle of non-retrospectivity is generally understood to be a principle of statutory interpretation. See, for example, Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) [7.13]. It is considered here since in *Homesun Holdings* it functioned independently of statutory words and purposes.

decision was ‘conspicuously unfair in a public law sense’.¹⁹³ At first instance, the court identified a degree of retrospectivity, but on the application of ‘a basic fairness or rationality test which takes into account the level of retrospection which applies...’ there was no unfairness.¹⁹⁴ On appeal, the court doubted there was any significant retrospectivity and it was for the Secretary of State to balance considerations and there was no unfairness in a public law sense.¹⁹⁵ There appears to be nothing here to trouble political constitutionalism in terms of the intensity of review.

Administration of justice cases

There are then seven administration of justice cases all of which raised similar issues. In *Fletcher*,¹⁹⁶ three claimants challenged the failure by the Secretary of State for Justice to provide resources such that prisoners serving indeterminate sentences for public protection (IPPs) could demonstrate to the Parole Board that they no longer needed to be detained for public protection.¹⁹⁷ The three claimants had been sentenced to IPPs with tariff periods of 20 months, three years and four months, and two years and six months. All had completed the tariff period but had no prospect of being recommended for release until they had completed the Healthy Sex Programme (HSP) course. At the date of the judgment, the claimants had been waiting two years for the course and faced waits of over six years. It was argued that there had been a breach of the public law duty ‘to

¹⁹³ *Solar Century* (n 177) [4(d)], [91].

¹⁹⁴ *ibid* [104].

¹⁹⁵ *Solar Century* (n 178) [40(iv)], [67].

¹⁹⁶ *Fletcher* (n 149) [3]. [55], [58].

¹⁹⁷ IPPs came into effect on 4 April 2005 and were abolished on 3 December 2012. Criminal Justice Act 2002, s 225 and Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 123 respectively. Notwithstanding the obvious resource implications of IPPs, they were introduced as cost-neutral measure and demand for rehabilitation courses soon exceeded supply. The issue is addressed both in the conclusion to this chapter and the final conclusion but on any view the IPP sentencing regime was a major failure of public policy whether viewed from the perspective of individual prisoners, protection of the public, or public resources.

provide the systems and resources that prisoners serving [IPP] sentences needed to demonstrate to the Parole Board that, by the time of the expiry of their tariff periods, or reasonably soon thereafter, it was no longer necessary for the protection of the public that they should remain in detention'.¹⁹⁸

The Secretary of State accepted it was implicit in the statutory scheme that provision had to be made so IPP prisoners could demonstrate there was no longer a need for detention. The court decided that the public law duty did not involve a discretionary choice about resources and required sufficient resources to be made available for its fulfilment.

Although the allocation of resources was not a matter for the court, the duty could not be avoided by identifying a lack of resources. If Parliament retained sentences of IPPs for the claimants, as it had done and was entitled to do, the Secretary of State had to provide resources such that the public law duty could be fulfilled. The court made a declaration the public law duty had been breached and adjourned the question of a mandatory order so that information could be provided to show there had been compliance with the duty. *Fletcher* is considered further below.

In *R (S)*, the challenge was to decisions on eligibility for legal aid under the ECF scheme and the operation of the scheme more generally. The basis of ECF eligibility was set out in chapter 5 and the detail is not repeated here.¹⁹⁹ In relation to the operation of the ECF scheme generally, it was held at first instance that it was unlawful because applicants could not present their cases without obvious unfairness due to obstacles that included: (a) the forms were too complex for a lay person to complete; (b) funding was not available

¹⁹⁸ *R (James) v Secretary of State for Justice* [2009] UKHL 22, [2010] 1 AC 553.

¹⁹⁹ The key case on ECF eligibility is: *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWHC 1840 (Admin); *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622, [2015] 1 WLR 2247.

for solicitors to conduct investigatory work to decide if an ECF application ought to be made; (c) emergency funding was not available; and (d) the merits criteria were unfair given legal representation was required to establish prospects of success. This decision was reversed on appeal,²⁰⁰ on the basis that while *Refugee Legal Centre*, the fast track asylum appeal process case cited above, established that a system that carried an ‘unacceptable risk of unfairness’ was unlawful;²⁰¹ *Tabbakh*, a case relating to the imposition of licence conditions, established that a very high risk of the system leading to unlawful action was insufficient and it needed to be shown that the system was not capable of operating fairly in the generality of cases.²⁰² Since there was no proof of systematic failure with the ECF scheme, as opposed to numerous examples of unfairness, the evidence did not show the scheme was outside the range of lawful choices open to the LC.

Ben Hoare Bell was the challenge to regulations that provided payment for judicial review claims would only be made if the court gave permission, or neither refused nor gave permission and the LC considered that it was reasonable to pay remuneration in the circumstances.²⁰³ The case was analysed in chapter 5 and succeeded on the *Padfield* ground. The common law ground was that the regulations were ‘likely to have a “chilling effect” on access to the High Court in the sense that providers who risk not being paid will apply criteria that are stricter than those in [LASPOA 2012] and the Regulations made

²⁰⁰ *R (S) v Director of Legal Aid Casework* [2016] EWCA Civ 464, [2016] 1 WLR 4733 (Laws, Briggs, Burnett LLJ). Briggs LJ dissented in finding the ECF scheme was inherently unfair. Laws LJ stated [57] ‘The extent of the difficulties is however troubling. No doubt the LAA and the Lord Chancellor will be astute to look for improvements, and will do so on a continuing basis’.

²⁰¹ *Refugee Legal Centre* (n 190).

²⁰² *R (Tabbakh) v Staffordshire Probation Trust* [2014] EWCA Civ 827, [2014] 1 WLR 4620.

²⁰³ *R (Ben Hoare Bell Solicitors) v Lord Chancellor* [2015] EWHC 523 (Admin), [2015] 1 WLR 4175 [4], [67] (Beatson LJ, Ousely J).

under it' which would mean 'the Lord Chancellor will be in breach of his statutory duty to secure that legal aid services are made available to persons who qualify'.²⁰⁴ While at first sight this might look like a statutory ground, it was argued on the basis that the regulations created an inherent risk of unlawfulness. There was evidence of a 23% drop in the number of applications for legal aid in judicial review cases. *Tabbakh* was again cited and the conclusion was 'had it been necessary to decide this point, we would have concluded that the high threshold has not been met in this case'.²⁰⁵

The next case was *Howard League*, the challenge to regulations narrowing the scope of legal aid for prison law, where permission was granted by the Court of Appeal on the ground that denying prisoners advice and assistance gave rise to an unacceptable risk of interference with their rights of access to justice guaranteed by the common law.²⁰⁶ The case was primarily argued on the basis of *Osborn*, where the Supreme Court established what the common law duty of fairness required in relation to Parole Board hearings;²⁰⁷ and *Detention Action* cited above where fast track rules for the Immigration and Asylum Chamber were systematically unfair.²⁰⁸ In contrast to *R (S)* and *Ben Hoare Bell*, the narrowing of eligibility for legal aid crossed the high threshold for a finding of inherent or

²⁰⁴ *ibid* [4].

²⁰⁵ *ibid* [70].

²⁰⁶ *R (Howard League for Penal Reform) v Lord Chancellor* [2015] EWCA Civ 819 (Sir Brian Leveson P, Tomlinson, Sharp LJ). The five areas for which legal aid was removed which were contested were: (i) pre-tariff reviews by the Parole Board where the board did not have the power to direct release but advised the Secretary of State whether the prisoner was suitable for a move to open conditions; (ii) categorisation reviews of Category A prisoners; (iii) access to offending behaviour programmes and courses; (iv) disciplinary proceedings where no additional days of imprisonment or detention could be awarded; and (v) placement in close supervision centres. The challenge was to Criminal Legal Aid (General) Regulations 2013, SI 2013/9, as amended by the Criminal Legal Aid (General) (Amendment) Regulations 2013, SI 2013/2790.

²⁰⁷ *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

²⁰⁸ *Detention Action* (n 190).

systemic unfairness in relation to pre-tariff reviews by the Parole Board, and Category A reviews and placement in close supervision centres.²⁰⁹

Harlow and Rawlings have developed the concept of structural procedural review (SPR) in response to some of the cases cited above and other cases. They describe SPR as:

an examination of systems, the approach typically involves a broad enquiry into the risk of harm or injustice inherent in the policy framework - or, in more robust terms, whether the decision-making regime is overly stacked in favour of the executive by the executive. This type of case, then, is not about the poor operation of a system, or the procedures in individual cases, or indeed a lack of consistency in the procedural design. Rather, the concern is with unfairness written into the governing rules and structures, all too consistently.

Conceptually speaking, this is ‘upstream’ review of administrative process, the focus of the inquiry being on decisions relating to the design of the system and hence on the source(s) of multiple individual difficulties. As such, the development represents a creative response to the limitations of a classical or ‘downstream’ form of procedural review directed at particular decisions made by public officials within an administrative process. In practical terms, a dual form of legal control is thus put in place, geared to respectively to proven, in-built risk and to actual realisation of harm ...²¹⁰

²⁰⁹ The court decided that entitlement to legal aid depended on: (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of individuals to represent themselves without legal assistance. It was relevant that some of the individuals were vulnerable, including those with learning disabilities and mental illness.

²¹⁰ Harlow and Rawlings, *Law and Administration* (4th edn, Cambridge 2022) 717. See also Carol Harlow, ‘Judicial Encroachments on the Political Constitution?’ in Richard Johnson and Yuan Yi Zhu (eds) *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart 2023).

Harlow and Rawlings characterise SPR as ‘upstream’ review and ‘a new high point of judicial activism’.²¹¹ The significant features of SPR include that: it has emerged in the administration of justice field (specifically the areas of: asylum, prisons and parole and legal aid); it ‘entails some bold assumptions about the judicial role and capacities in moving beyond “fire-fighting” to “fire-watching”, or beyond control of bad decisions to actively promoting “good” decision-making’; and, of specific relevance to this thesis, that there has been a ‘strong use of the technique to defend judicialised procedures in the face of austerity...’, and it has ‘often seen the the courts corralling scarce resources in the service of the adjudicative process’.²¹²

Several observations can be made given Harlow and Rawlings’ analysis. First, while two welfare benefits cases - *Reilly* in relation to provision of information about work for your benefit schemes and *R (C)* in relation to PIP delays - do not amount to SPR, they are evidence of the courts being willing to consider the fairness of administrative systems in other areas on a similar basis. While those claims were brought by the individuals affected, they functioned as challenges as to how the systems operated, and they were resolved essentially by a judicial assessment of what was fair. Second, in relation to the administration of justice cases, these cases show the judiciary engaging in a detailed analysis of evidence, which is often complex and statistical, as to how the relevant systems are operating, and then applying a common law test as to systemic unfairness, leading in some cases to findings that the systems are not operating lawfully.

²¹¹ *ibid* 718.

²¹² *ibid*. See also Abi Adams-Prassl and Jeremias Adams-Passl, ‘Systemic Unfairness, Access to Justice and Futility: A Framework’ (2020) 40 OJLS 561.

While it appears that political constitutionalism has not engaged specifically with these developments in those terms, it might be expected that all of this is in some sense problematic from a political constitutionalist perspective. There appear to be two key points given the concerns of political constitutionalism. First, the standard of review is high as demonstrated by *Detention Action* where Lord Dyson explained:

(i) in considering whether a system is fair, one must look at the full run of cases that go through the system; (ii) a successful challenge to a system on grounds of unfairness must show more than the possibility of aberrant decisions and unfairness in individual cases; (iii) a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself; (iv) the threshold of showing unfairness is a high one; (v) the core question is whether the system has the capacity to react appropriately to ensure fairness (in particular where the challenge is directed to the tightness of time limits, whether there is sufficient flexibility in the system to avoid unfairness); and (vi) whether the irreducible minimum of fairness is respected by the system and therefore lawful is ultimately a matter for the courts.²¹³

That the test for systemic unfairness has been set at a high level in practice is demonstrated most clearly by *R (S)* where there were, on the face of it, serious systemic failings with the ECF scheme but this did not cross the threshold for the majority in the Court of Appeal.²¹⁴ Given the result in *Liverpool CC*, there appears to be limited judicial appetite for extending systematic unfairness.²¹⁵ *Liverpool CC* is an interesting case in that

²¹³ *Detention Action* (n 190) [27].

²¹⁴ *R (S)* (n 200). This was the case in which Briggs LJ dissented on the basis that the threshold was passed.

²¹⁵ *Liverpool CC* (n 174) [50].

the LAs bringing the claim must have understood there was some prospect of avoiding the strictures of *Nottinghamshire CC* because of the nature of the function being exercised - quasi-judicial decision-making by LAs in relation to deprivation of liberty - to justify increased central government funding. The attempt was, however, comprehensively rebuffed and it is perhaps significant that there were no other cases which sought to challenge central government funding of LAs other than in relation to specific narrow funding decisions. Second, what is significant about the test of systematic unfairness is that where it applies, the availability or allocation of resources does not appear to be relevant. While the test is high, it does not engage the conventional principles that limit the intensity of review or increase the degree of deference shown in relation to cases involving the allocation of resources.

Finally in this part are three cases that share similarities with the SPR or systemic unfairness cases, in that they engage common law standards of fairness but have more substantive aspects. *PLP* was the challenge to the LC's purported use of the Henry VIII power to amend LASPOA 2012 to remove availability, subject to exceptions, of legal aid for those issues unless a residence test was met.²¹⁶ *PLP* is analysed in chapter 5 and the *Padfield* ground succeeded at first instance, was reversed on appeal,²¹⁷ and then succeeded before the Supreme Court.²¹⁸ The relevance of *PLP* here is that it was argued at first instance that 'such a discriminatory provision is contrary to common law or breaches article 6 read with article 14 of the [Convention]' and the court's unfocussed

²¹⁶ *R (Public Law Project) v Secretary of State for Justice* [2014] EWHC 2365 (Admin), [2015] 1 WLR 251 [3], [51] (Moses LJ, Collins, Jay JJ). The draft order was the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014. As a draft, the order was not given an SI number.

²¹⁷ *R (Public Law Project) v Lord Chancellor* [2015] EWCA Civ 1193, [2016] 2 WLR 995 [4], [29] (Laws, Kitchin, Christopher Clarke LJJ).

²¹⁸ *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531 (Lord Neuberger PSC, Baroness Hale DPSC, Lord Mance, Lord Reed, Lord Carnwath, Lord Hughes, Lord Toulson JJSC).

conclusion was ‘It does not seem to me necessary to choose between the many different ways in which PLP seeks to advance the same argument, whether it is equal treatment under the common law, or a breach of article 14, read with article 6 [of the Convention]’.²¹⁹ While the decision of the Court of Appeal reversed the first instance decision, there was no real analysis of the common law or legality ground, nor was it pursued to the Supreme Court.²²⁰ *PLP* was ultimately resolved without reference to common law rights or principles of legality.

The next and most significant cases are *R (UNISON) v Lord Chancellor*,²²¹ and *R (UNISON) (No 2) v Lord Chancellor*,²²² where the challenges were to an order that introduced substantial fees, subject to a remission scheme, for ET and EAT cases from 29 July 2013.²²³ The aims of the order were to transfer the cost burden from taxpayers to users, to deter unmeritorious claims, and to encourage settlement. The order had two classes of claims (type A and type B) subject to different fees.²²⁴ Type B claims included most discrimination claims and attracted higher fees than type A claims. There were conjoined appeals to the Court of Appeal;²²⁵ and Supreme Court.²²⁶ The statutory

²¹⁹ *Public Law Project* (n 216) [3], [88].

²²⁰ *Public Law Project* (n 217) [29]. Laws LJ stated ‘As for the ‘principle of legality’, this vague but popular expression is generally taken to denote the requirement that fundamental rights may only be curtailed or abrogated by clear statutory words. ... There is no such curtailment, actual or threatened’

²²¹ [2014] EWHC 218 (Admin), [2014] ICR 498 (Moses LJ, Irwin J).

²²² [2014] EWHC 4198 (Admin), [2015] ICR 390 (Elias LJ, Foskett J).

²²³ Employment Tribunals and Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893), arts 3 and 4.

²²⁴ For single claimants: costs for type A claims were £390, £160 for issue and £230 for hearing; and costs for type B claims were £1,200, £250 for issue and £950 for hearing.

²²⁵ *R (UNISON) v Lord Chancellor (Nos 1 & 2)* [2015] EWCA Civ 935, [2016] ICR 1 (Moore-Bick, Davis, Underhill LJ).

²²⁶ *UNISON* (n 3).

grounds argued at first instance and on the appeals - breach of the PSED and direct and indirect discrimination - were analysed in chapter 5; and the EU law and Convention grounds are analysed in chapter 7. Unlike at first instance and in the Court of Appeal, when it came to the Supreme Court the case was 'argued primarily on the basis of the common law right of access to justice'.²²⁷ The nub of the decision was that the enabling statutory provision did not authorise the prevention of access to ETs and the EAT,²²⁸ and since the evidence showed there was a real risk that the order effectively prevented access to justice, the order was unlawful at common law.²²⁹

The decision of the Supreme Court in *UNISON* is one of relatively few cases analysed in this thesis to have received specific criticism from a political constitutionalist perspective. Following Jonathan Sumption's 2019 BBC Reith Lectures 'Law and the Decline of Politics',²³⁰ Ekins argued:

As [Sumption's lectures] make clear, the scope of judicial review has been sharply extended so that many questions that would formerly have been for ministers to decide, and for which they would be accountable to Parliament, are now open to challenge by way of litigation. Recent examples include ...

²²⁷ *ibid* [64].

²²⁸ The enabling power was the Tribunals, Courts and Enforcement Act 2007, s 42.

²²⁹ The evidence showed a fall of around 70% in the number of ET claims; that the fees were unaffordable for households on low incomes; and that it may be futile or irrational to bring a claim in some cases given the prospects of recovering fees and the low monetary value of the claims.

²³⁰ Jonathan Sumption, 'The Reith Lectures 2019' (BBC 2019) <<https://www.bbc.co.uk/programmes/m00057m8>> accessed 23 March 2025.

[*UNISON*] ... in which the Supreme Court quashed the government's exercise of its statutory power to set employment tribunal fees.²³¹

Ekin's criticism of *UNISON* based on Sumption's Reith Lectures is somewhat undermined in that Sumption himself, hardly a sceptic when it comes to the thesis that there has been an undesirable expansion of judicial review, took a different view:

In 2017 the Supreme Court held that the language of the Act was not clear enough to authorise fees so large that many employees would be unable to enforce their rights in court. The decision has been criticised. But I think it was perfectly orthodox. The law must have a measure of coherence. MPs looking at the words of the bill as it went through Parliament would not have suspected that the power to charge fees under this statute would be used to stifle the rights of employees under other statutes.²³²

Sumption conceptualises *UNISON* as a *Padfield* case in that the level of the fees were outwith the objects or purposes of the enabling legislation in terms of legislative intent. While the Supreme Court could have decided the case on that basis, there is - as identified below - more to it than *Padfield*. Also from a political constitutionalist perspective, Stephen Laws has argued that *UNISON*:

²³¹ Richard Ekins, 'Protecting the Constitution: How and why Parliament should limit judicial power' (Policy Exchange 2019). See also Richard Ekins and Graham Gee, 'Putting Judicial Power in its Place' (2017) 36 U Queensland LJ 375, 382 where *UNISON* is cited as the basis of the contention: 'This is clearest in relation to 'legality', now sometimes a device that courts engage to justify departing from Parliament's clear law-making intent'.

²³² Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books 2019) 37.

represents a significant expansion of the concept of the rule of law: from a set of principles about how policy should be implemented, into a doctrine that operates, in practical terms, for regulating the content of public policy. ... that the executive must comply with the law transforms itself, in the reasoning of the judgment, into the idea that there are at least some areas of policy (the financial management of the justice system, it seems, is one) that are to be subjected to a judicial 'success test' under which the judiciary is able, with the benefit of hindsight, to second-guess and overturn political policy decisions by reference not to how they were made or implemented, but rather by reference to what, it turns out, has been their effect in practice.²³³

While Laws objects to the decision on the basis that it represents a significant expansion of the rule of law, it is doubtful that the principles: 'means must be provided for resolving disputes without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve' and 'adjudicative procedures provided by the state should be fair' represent a significant expansion of the rule of law or the scope of judicial review.²³⁴ And the view that courts are precluded from considering evidence as to the consequences of policy and decision-making in assessing legality would turn much of judicial review into an artificial exercise. Specifically in relation to *UNISON*, had evidence as to how the LC's fee exemption scheme was operating in practice been excluded, then the proceedings would have had an air of unreality.²³⁵

²³³ Stephen Laws, 'Second guessing policy choices: The rule of law after the Supreme Court's *UNISON* judgment' (Policy Exchange, undated) 5.

²³⁴ Tom Bingham, *The Rule of Law* (Penguin 2010) 85, 90. See, for example, *Ridge v Baldwin* [1963] AC 40.

²³⁵ The same applies to the various exemption or concession schemes - notably discretionary housing payments - in the welfare benefits cases. As often as not, it is the government which seeks to rely on evidence of how such schemes function to establish the legality of what would otherwise be unlawful. This issue is significant in some of the Convention grounds analysed in chapter 7.

As with SPR, Harlow and Rawlings' analysis here is persuasive. The surely uncontroversial starting point is that the Supreme Court used the principle of legality or common law norms to limit the statutory power to set fees.²³⁶ Harlow and Rawlings then argue that *UNISON* 'represents a step on from *Padfield* in certain judicially determined categories of case' and that it:

lies at the centre of a web of interconnecting developments in the case law. The feeding of judicial power at the expense of executive law making is epitomised, with the trio of searching approach to powers and effects, high-level constitutionalising of rights, and thickened principle of legality all playing important roles. For future generations of public lawyers, *UNISON* should serve as a benchmark for the growth of judicial power in general.²³⁷

The various strands are: the intensity of review; the engagement with a wide evidence base, often complex and statistical; and the willingness to develop and impose common law norms. Laws' argument about the judicial consideration of evidence of impact is correct, but it is the degree of engagement rather than engagement as such that is significant; and Ekins' view that the scope of judicial review has been extended is correct, but it is incremental rather than sharp. Nonetheless, all of this is squarely within the concerns of political constitutionalism in that political decision-making is subject to a particularly intensive form of review by reference to judicially determined common law norms.²³⁸ As with SPR, what is significant is that the availability or allocation of resources

²³⁶ Jason Varuhas, 'The Principle of Legality' (2020) 79 CLJ 578.

²³⁷ Harlow and Rawlings (n 210) 742.

²³⁸ See Tomkins (n14) 23; Ekins and Gee (n 18).

does not appear to be relevant, and the conventional principles that limit the intensity of review or increase the degree of deference shown are not engaged. These issues are addressed further in chapter 8.

The final case in this part and this chapter is the second *Law Society* case, the challenge to the amendment of regulations reducing by 40% the maximum number of pages of prosecution evidence (PPE) for which lawyers were paid in some cases. The ground was that the relevant regulations ‘constitute a disproportionate and unjustified interference with the right of access to justice protected by the common law’ and much of the case law identified above was cited.²³⁹ The consultation and rationality grounds had already succeeded and the court concluded that the evidence ‘does not show, or provide any reasonable basis for inferring, that there is a real risk that the [regulations] will have the systemic effect of preventing some criminal defendants from obtaining adequate legal assistance’.²⁴⁰ While this demonstrates the test has been set at a high level, it again shows the capacity of *UNISON*-style review to be available to challenge political decision-making in relation to legal aid.²⁴¹

8. Conclusions on common law grounds

Subject to the two important qualifications below, there is limited evidence to support the view that the limits of adjudication envisaged by political constitutionalism were exceeded in relation to common law procedural grounds. Ekins and Gee’s claim that there is a ‘trend in ordinary judicial review to introduce ever more grounds of review and to intensify their

²³⁹ *Law Society* (n 68) [4(3)], [125]

²⁴⁰ *ibid* [136].

²⁴¹ As to an example of an unsuccessful attempt to expand the scope of *UNISON*, see *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255.

application' receives some support in relation adequacy of consultation in that it was a relatively novel and significant ground of review in some cases. In relation to the other procedural grounds, however, these could hardly be described as novel. As to the intensity of application of procedural grounds they were - new and old - applied with limited intensity. In relation to adequacy of consultation and the *Gunning* principles, they were not applied with any rigour and an argument can be made for the judiciary showing excessive deference to political decision-making given *Gunning* and its approval by the Supreme Court. Further, the deference was often a result of the courts giving way to the government's public spending agenda and the recognition of the political consequences of a finding of unlawful consultation. The consultation cases that did succeed, notably *Luton BC* and *Dudley MBC*, were fairly characterised as cases of abuse of power. As to the other procedural grounds (relevancy of considerations, duty of sufficient enquiry or *Tameside*, alternative options, and adequacy of reasons), the intensity of review was low and usually functioned at a conventional *Wednesbury* standard. No doubt political constitutionalism would object to the availability of some or all of these grounds of review in principle, but in practice they were, again, applied with minimal intensity and in a way that demonstrated significant deference to political decision-making.

In relation to common law substantive grounds, there is very limited evidence of an intensive standard of review in relation to rationality. In the cases where a robust effort was made to persuade the courts to apply a heightened intensity of review - the second *LCCSA* case and *Hurley* (the welfare benefits case, not the students fees case) - it was rebuffed. While the three cases where the rationality ground succeeded may raise concerns, they hardly support Tomkins' concern about 'untrammelled judicial discretion'.²⁴²

²⁴² Tomkins (n 16), 22.

None of the substantive legitimate expectation grounds came close to succeeding. Overall, there is, in general, limited evidence of the judiciary doing anything other than applying settled law in relation to the grounds and doing it with the limited intensity and conventional deference shown in cases involving macroeconomic decision-making and resource allocation. If *Nottinghamshire CC* and *Cambridge HA* are taken to typify the conventional approaches, there is limited evidence of a departure from those approaches.

All of that is, though, subject to two important qualifications. The first is that, in general, the intensity of review in cases and grounds relating to the administration of justice, specifically in relation to legal aid and tribunal fees, was greater both in the sense of judicial willingness to engage with the facts and evidence of the cases and in relation to the standards to which governmental was held. This is perhaps clearest from the consultation cases in legal aid where the intensity of review was greater. The second important qualification relates to the SPR cases and *UNISON* where it seems clear that - aligned with the greater willingness to engage with the facts and evidence and higher standard of review in the administration to justice cases - the judiciary was willing to identify common law norms as to fairness or rights that functioned as trumps to political decision-making. This is clearly significant from a political constitutionalist perspective and raises issues in relation to institutional competence, democratic legitimacy, and polycentricity. Those issue are addressed further in chapter 8 along with: the relevance and weight attached to delegated legislation being approved by Parliament in determining legality; and whether any differences of approach can be identified between different judges. Before that, though, the next chapter analyses Convention and EU law grounds which provide further evidence to be fed into chapter 8.

Chapter 7

Grounds of review relating to the Convention and EU law

1. Introduction

This is the third of three chapters that analyse the austerity adjudications from a political constitutionalist perspective. This chapter answers whether and in what ways the limits of adjudication envisaged by political constitutionalism were exceeded by the judiciary in determining grounds relating to the Convention and EU law.¹ As with chapters 5 and 6, the political and economic context of the litigation is the government seeking to reduce spending, and individuals or organisations identifying grounds of review as pegs on which to hang challenges to the law and policy implementing the spending cuts. Some of the cases in this chapter were analysed in chapter 5 or 6 because one or more statutory or common law grounds were argued. Other cases are new because they did not raise statutory or common law grounds. Where the detail of a case was set out in chapter 5 or 6, it is not repeated in this chapter.

Quantitatively, there were very few EU law grounds. At first instance, six cases raised nine EU law grounds: one welfare benefits cases raised two grounds, neither of which succeeded; one 'other' cases raised two grounds, neither of which succeeded; and four administration of justice cases raised five grounds, of which one succeeded. There was no appeal in the welfare benefits case, the appeal in the 'other' case was unsuccessful on both EU law grounds. The only change came in the administration of justice cases where there were four appeals and an EU law ground eventually succeeded in one case,

¹ Strictly speaking, the Convention for the Protection of Human Rights and Fundamental Freedoms opened for signature in Rome on 4 November 1950, and which came into force on 3 September 1953.

UNISON in the Supreme Court.² It appears that EU law was of limited relevance to the law and policy that implemented austerity. Convention grounds were far more numerous and complex. At first instance, 34 of 66 austerity adjudications raised Convention grounds. 53 Convention grounds were argued in total (15 in administration of justice cases, 26 in welfare benefits cases and 12 in other cases).³

This chapter adopts a similar structure to chapter 5 and 6. This introductory part is followed by nine further parts. Part 2 identifies where political constitutionalist thought locates the limits of adjudication in relation to Convention and EU law grounds. Part 3 analyses EU law grounds. Part 4 deals with the one case where a declaration of incompatibility was sought and made. Part 5 addresses some initial issues in relation to Convention grounds, in particular those relating to article 14. In contrast to chapter 5 which was structured around the modes of decision-making (legislative or discretionary) and chapter 6 which was structured around the various common law grounds of review, parts 6, 7 and 8 analyse Convention grounds sequentially by reference to specific policy areas. So, part 6 analyses the Convention grounds in ‘other’ cases; part 7 analyses the Convention challenges in the field of welfare benefits; part 8 analyses the challenges in the field of the administration of justice.

The chapter ends with part 9 which draws conclusions as to whether the limits of adjudication were exceeded in relation to the Convention and EU law grounds of review.

² *R (UNISON) v Lord Chancellor (Nos 1 & 2)* [2017] UKSC 51, [2020] AC 869 (Lord Neuberger PSC, Lady Hale DPSC, Lord Mance, Lord Kerr, Lord Wilson, Lord Reed, and Lord Hughes JJSC).

³ These headline figures need taking with more care than the figures in chapter 5 and 6. The primary reason is that grounds alleging a breach of a substantive Convention article and a breach of article 14 read with a substantive article were sometimes argued or adjudicated separately and sometimes compendiously. Some grounds were also inextricably linked with arguments as to the relevance and weight attached to international law.

The broad conclusion is that, while all of this adjudication is in some sense problematic from a political constitutionalist perspective, it is significantly less so than might have been expected. In general, there is very limited evidence of the judiciary taking an expansive view as to the requirements of the Convention or EU law. The judiciary sought, so far as possible, to interpret and apply the Convention and EU law in such a way as to limit the judicial role and maximise deference to political decision-making. The Convention and EU law jurisprudence, both domestic and international, was applied conservatively. In relation to the cases analysed here, there is almost no evidence - as some strands of political constitutionalist thought argue - that the judiciary use the Convention or EU law to push the boundaries of adjudication.

As to the high level legal context, the UK is a dualist state so the Convention and EU treaties are not, as treaty-based international law, directly enforceable as a matter of domestic law. The Convention is, and EU treaties were, given effect in the UK by the Human Rights Act 1998 (HRA 1998) and the European Communities Act 1972 (ECA 1972) respectively. The way Convention and EU law grounds of judicial review function is a result of the way in which the Convention and EU treaties are, or were, given effect. In relation to Convention grounds, HRA 1998, s 6 makes it unlawful for a public authority to act in a way that is incompatible with a Convention right. By HRA 1998, s 7, a person who claims this duty has been (or will be) breached may bring a claim; and by HRA 1998 s 8, where a court finds an act (or a proposed act) of a public authority unlawful, it may grant such relief or remedy as within its powers as is just and appropriate. In relation to judicial review, these provisions function by giving the courts the power to declare unlawful delegated legislation made under statutory or prerogative powers; and declare unlawful the exercise (or failure to exercise) discretionary policy- or decision-making powers, whether the source of the powers are statutory, prerogative, or *de facto*. Almost all the Convention grounds in

this chapter were challenges to delegated legislation or discretionary decision-making under statute. Two cases engaged HRA 1998, s 4 in that the claimant sought a declaration of incompatibility in relation to primary legislation. Also of relevance are HRA 1998, ss 2 and 3 which oblige UK courts to: (a) take account of judgments and decisions of the European Court of Human Rights (ECtHR); and (b) so far as possible, to interpret primary and subordinate legislation in a way which is compatible with the Convention. Finally in relation to the Convention, the HRA 1998 gives effect to the rights and fundamental freedoms in articles 2 to 12 and 14 of the Convention and articles 1 to 3 of the First Protocol. The grounds analysed in this chapter include alleged breaches of article 2 (right to life), article 4 (prohibition of slavery and forced labour), article 5 (right to liberty and security), article 6 (right to a fair trial), article 8 (right to respect for private and family life), article 9 (freedom of thought, conscience and religion), article 11 (freedom of assembly and association), article 12 (right to marry and found a family), article 1 of the First Protocol (A1P1, protection of property), and article 2 of the First Protocol (A2P1, right to education). These grounds were raised on a free-standing basis or in conjunction with article 14 (prohibition of discrimination).

In relation to EU law grounds, ECA 1972, s 1 gave effect to EU law in the UK. EU law consists of: Treaties (as made, amended and consolidated from time to time);⁴ secondary EU law (again, as in force from time to time);⁵ and the jurisprudence of the judicial bodies of the EU, the Court of Justice of the EU (CJEU) or its predecessors.⁶ The legal effect of

⁴ The relevant treaties in force for the period covered by this thesis were the Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (TEU); and the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).

⁵ Defined in TFEU, Art 288 as regulations, directives, decisions, recommendations and opinions, of which only the first three are binding.

⁶ The judicial body of the EU is referred to throughout as the CJEU notwithstanding earlier nomenclature.

EU law has been litigated and judicially determined by both EU and national courts. In broad terms: much of EU law was directly effective in that individuals could rely on it before UK courts and tribunals;⁷ directly effective EU law was supreme over domestic law;⁸ and the courts had the power to dis-apply primary legislation.⁹ The CJEU has developed general principles in relation to the interpretation and application of EU law, some of which are now given effect legislatively and include, for example, proportionality,¹⁰ and legal certainty and non-retroactivity.¹¹ All the EU law grounds in this chapter were challenges to legislation or discretionary decision-making under statute on the basis it was incompatible with EU law. Finally in relation to EU law, the window for austerity adjudications defined in chapter 4 was first instance judgments handed down between 1 June 2010 and 31 May 2020 inclusive, to which are added appeals in those cases. Fortunately, the repeal of the ECA 1972 by the European Union (Withdrawal) Act 2018 which brought direct effect and the supremacy of EU law to an end on 31 December 2020 was not an issue in any of the cases.¹²

⁷ In broad terms: Treaty articles were directly effective if they were ‘unconditional’ and ‘sufficiently precise’ - Case 26/62 *Van Gend en Loos* [1963] ECR 1; Regulations were directly effective by virtue of TFEU, Art 288; Directives were vertically directly effective if they met the *Van Gend en Loos* criteria - Case 41/74 *Van Duyn v Home Office (No 2)* [1974] ECR 1337 - and the time for implementation had passed.

⁸ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585 and given effect in the UK by ECA 1972 s 2(4) ‘... any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section.’

⁹ *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603. *Factortame* established that ECA 1972 s 2(4) is a rule of priority and not just interpretation.

¹⁰ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 and TEU, Art 5(4).

¹¹ Case 70/81 *Kloppenburg* [1984] ECR 1075.

¹² Notwithstanding its repeal on exit day (31 January 2020), the ECA 1972 continued to have effect by virtue the EU (Withdrawal) Act 2018, s 1A (inserted by the European Union (Withdrawal Agreement) Act 2020, s 1) during the implementation period which ended on implementation period completion day, defined in s 39 as 31 December 2020.

The grounds analysed in this chapter are in some sense *ultra vires* grounds since they amount to alleged failures to comply with the duties relating to the Convention and EU law established by the HRA 1998 or the ECA 1972. The grounds are, however, considered separately in this chapter for two linked reasons. First, what is being contested is generally not the meaning and effect of the HRA 1998 or ECA 1972, or how UK statutes ought to be interpreted, but rather the meaning and effect of the Convention or EU law to which those statutes require compliance. The adjudicative process is, therefore, different to the ‘ordinary’ statutory interpretation grounds analysed in chapter 5. Second, the political constitutionalist thought analysed in chapter 3 raises different and particular issues in relation to adjudication by reference to the Convention and EU law, as will be seen from part 2 below which outlines these issues.

Finally, while the scope for evidential and factual disputes in judicial review remains limited, the legal contest offers considerably greater scope in relation to two issues. First, the often extensive jurisprudence of the CJEU or ECtHR is in play; and, second, as will be seen primarily in relation to the welfare benefits cases, the application of the test of proportionality opens the door to a significant volume of evidence about the purposes and effects of the law and policy being challenged. Both of these issues are of concern to political constitutionalism and the next part identifies where it locates the limits of adjudication in relation the Convention and EU law.

2. The limits of adjudication and Convention and EU law grounds of review

Having identified in broad terms how Convention and EU law grounds function, there is the issue of where the political constitutionalist thought in chapter 3 envisages the limits of adjudication in relation to those grounds. Whether the courts ought to adjudicate disputes by reference to the qualified rights of the Convention was a central issue in John Griffith’s

1978 Chorley Lecture.¹³ The context for Griffith's analysis was a finding by the ECtHR of a breach of article 10 (freedom of expression) in relation to a decision of the House of Lords which upheld an injunction on the basis of contempt of court in relation to publications by the *Sunday Times* that would assist the parents of children affected by the drug thalidomide in litigation with the UK distributor of the drug.¹⁴

Griffith was firmly against such adjudication, arguing that, when it came to the balancing of exceptions, article 10 'sounds like the statement of a political conflict pretending to be a resolution of it', and that Bills of Rights 'merely pass political decisions out of the hands of politicians and into the hands of judges or other persons'.¹⁵ Griffith's view was that such issues ought to be resolved by political deliberation culminating in black-letter statutory law reform and not 'by the legal profession as they embark on the happy and fruitful exercise of interpreting woolly principles and even woollier exceptions', or by reference to 'the imprecisions of Bills of Rights or the illiberal instincts of judges'.¹⁶ Writing in the early 2000s, after the HRA 1998 was enacted but before it came into force, Griffith's view had not changed, 'so open-textured are the incorporated provisions that the judges will be obliged to exercise their political judgments in the process of interpretation much more widely than in the past' and, in relation to the test of proportionality, 'the incorporation of

¹³ John Griffith, 'The Political Constitution' (1979) 42 MLR 1. Griffith makes one reference to EU law in identifying the legal limits on government: 'they may not infringe the legal rights of others unless expressly authorised to do so under statute or the prerogative', 'if they wish to change the law ... they must obtain the assent of Parliament', and 'some would add a third: that the Government is bound by the regulations and directives which emanate from the Commission and the Council of Ministers under the Treaty of Rome'. He offers no view as to the merits of that limit.

¹⁴ *Attorney General v Times Newspapers* [1974] AC 273. The Convention was not cited in argument in the domestic litigation. In *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245, the plenary court held (11 votes to 9) that, while the interference was prescribed by law, it could not be justified by a pressing social need was therefore not necessary.

¹⁵ *ibid* 16.

¹⁶ *ibid* 14. Limited statutory reform came with the Contempt of Court Act 1981.

the Convention has shifted a substantial area of decision-making from the democratically elected minister or local authority to the courts'.¹⁷ Further, the decisions of the courts 'will be a political assessment of what is necessary in a democratic society. It will not be based on any known principle of law'.¹⁸

In much the same way as Griffith, Adam Tomkins identifies the central problem as being adjudication by reference to the qualified rights of the Convention. Tomkins accepts that whether an interference is in accordance with the law 'may indeed be a matter that lends itself to resolution in a court room. Deciding what is "in accordance with the law" seems on the face of it to be an appropriate activity for a judge'.¹⁹ As to whether interferences are necessary in a democratic society, however, 'it is far from self-evident that these questions are appropriate for determination by judges' and 'Why should a judge rather than the electorate have the last word on whether the policy choices made by the democratically elected Parliament are "proportionate" or sufficiently "pluralist"'.²⁰ In relation to what is necessary for promoting the specified objectives 'Are these issues that lend themselves to resolution through the adjudicative techniques of the courts or through the political processes of parliamentary government?'.²¹

Richard Ekins and Graham Gee mount a more wide-ranging critique - helpful in terms of detail - of the impact of the Convention and EU law in terms of adjudication. As to EU law, the problems include that 'EU law is a superior source of law to domestic law' and that the

¹⁷ John Griffith, 'The Brave New World of Sir John Laws' (2000) 63 MLR 159, 170, 171.

¹⁸ John Griffith, 'The Common Law and the Political Constitution' (2001) 117 LQR 42, 60.

¹⁹ Adam Tomkins, *Our Republican Constitution* (Hart, 2005) 20.

²⁰ *ibid* 21.

²¹ *ibid*.

CJEU goes beyond the Treaties in aiming to strengthen the EU in relation to member states and it 'is both politically astute and institutionally secure, enjoying considerable freedom to make law in the course of adjudication, with limited prospects of resistance from member states or other EU bodies'.²² All this has:

... implicated domestic courts in reasoning and action that departs sharply from the common law's perception of the sound limits on judicial power. Most obviously, applying EU law has required domestic judges to take Acts of Parliament to be limited by reference to EU law. It has also required domestic judges to assume other novel responsibilities, including evaluating the proportionality of legislative and executive measures, and anticipating and/or following the CJEU's approach to the interpretation of EU Treaties and legislation.²³

In relation to the ECtHR, it too is controversial, in particular in its approach to the Convention 'as a so-called "living instrument", assuming responsibility for updating its meaning and for developing and elaborating its requirements in light of what its judges deemed to be contemporary social and moral attitudes across Europe'.²⁴ When it comes to the HRA 1998, the effect is to change:

the kind of reasoning required of domestic courts, which now extends to questions including: how rights should be understood; whether particular legislation or executive action is a proportionate limitation on some general

²² Richard Ekins and Graham Gee, 'Putting Judicial Power in its Place' (2017) 36 UQLJ 375, 379.

²³ *ibid.*

²⁴ *ibid* 380.

interest; how ECtHR case law, which is often opaque or uncertain, comes to bear in a particular case; and whether it is possible to read and give effect to legislation in line with Convention rights or whether it ought to be declared out of line. This is a remarkable and difficult set of responsibilities, the interpretation of which has itself been a major challenge.²⁵

Ekins and Gee then advance five specific problems which are caused by adjudication by reference to the Convention. These problems are summarised as follows. First, legal uncertainty in relation to legislative and executive action is engendered because Convention rights are incomplete and open to interpretation, a position which is aggravated by the doctrine of proportionality and the often incoherent and unstable case law of the ECtHR. Second, in relation to primary legislation, the interpretative duty under HRA 1998, s 3(1) undermines the stability of statutes, irrespective of when enacted, both in terms of certainty as to how a statute will be interpreted, and certainty as whether a statute will be read and given effect so as to comply with the Convention, or whether a declaration of incompatibility will be required. Third, in relation to subordinate legislation, the power to declare such legislation invalid because it is incompatible with Convention rights permits invalidation on uncertain grounds, which encourages litigation and creates ongoing uncertainty in relation to a major source of law. Fourth, the rule of law in the sense of consistent decision-making is threatened because judges are more likely to find a policy proportionate and lawful where it considers cases on an individual basis rather than by reference to general rules. Fifth, courts are encouraged to adjudicate with an eye on political outcomes rather than legal rights, most obviously in relation to deciding whether to

²⁵ *ibid.*

interpret to achieve compatibility or make a declaration of incompatibility. Ekins and Gee conclude 'The domestic reception and elaboration of Convention rights departs from the common law judicial tradition, undermines legal certainty, and tempts judges to reason politically'.²⁶

The overall position appears to be that all adjudication by reference to the Convention and EU law exceeds the limits of adjudication envisaged by political constitutionalism. There is an apparent paradox here in that political constitutionalist scholarship targets its most wide-ranging critique of adjudication on those grounds of judicial review that arguably rest on the most solid political foundations.²⁷ The jurisdiction in relation to the Convention and EU law grounds was not, in contrast with statutory and common law grounds, developed by the judiciary and to some degree validated by Parliament.²⁸ Rather, politics - government and Parliament - charged the judiciary with determining Convention and EU law grounds by enacting the HRA 1998 and ECA 1972. Notwithstanding this apparent paradox, it seems all adjudication by reference to the Convention and EU law is beyond the limits of adjudication in the sense that the grounds raised by the Convention and EU law interfere with legislative and discretionary choices made by Parliament and government.

Moving from the general to the particular, specific indicia of problematic adjudication by reference to the Convention and EU law includes: the 'living instrument' approach to

²⁶ *ibid* 387.

²⁷ Ekins and Gee recognise this observing that 'the rise of judicial power in the UK is a function in part of the exercise of political responsibility (notably, dubious political choices to confer new powers and responsibilities on domestic courts and to accept the jurisdiction of foreign courts)...' *ibid* 375.

²⁸ See, for example, Senior Courts Act 1981, s 31; and Civil Procedure Act 1997, s 1 and sch 1.

interpretation of the Convention; application by domestic courts of contentious decisions of the ECtHR and CJEU that expand the boundaries of the Convention or EU law; the application of the test of proportionality, particularly in relation to primary and subordinate legislation and with any intensity or lack of deference; tenuous or strained interpretation of primary legislation to achieve compatibility with the Convention or EU law; in relation to primary legislation, declarations of incompatibility under the Convention and dis-application under EU law; invalidation of subordinate legislation on the basis of incompatibility with the Convention or EU law; and the quashing of policies that contain general rules on the basis that they do not leave scope for discretion. It seems that of the three main modes of adjudication - the interpretation and application of legislation, the application of common law grounds of review, and adjudication by reference to the Convention and EU law - it is the latter which is the most problematic from a political constitutionalist perspective. The following parts analyse whether and in what ways the concerns of political constitutionalism were realised in the austerity adjudications.

3. EU law grounds of review

There were, as indicated above, a limited number of challenges on EU law grounds. Given there were relatively few challenges, the cases are analysed and then conclusions reached at the end of this part as to the extent to which the limits of adjudication were exceeded.

EU law - the welfare benefits case

Two EU law grounds were argued in *De/ve*, the challenge to the equalisation of state pension age (SPA) to 65 for women and its increase to 68 by four Pensions Acts between

1995 and 2014.²⁹ Two unsuccessful common law grounds were considered in chapter 6 and two ECHR grounds are considered below. The first EU law ground was that the equalisation of SPA was contrary to the general principles of non-discrimination in EU law and non-discrimination on the grounds of age. This ground failed on the basis that the Pensions Acts were domestic law which did not implement and were not within the scope of EU law.³⁰ The second EU law ground was that the equalisation was direct or indirect sex discrimination contrary to EU law.³¹ This ground failed on the basis that the Directive on which the claimants sought to rely excluded from its scope the fixing of SPA and authorised different ages for men and women.

EU law - the 'other' case

Drax Power was a challenge to the decision to remove the tax exemption for renewable source electricity (RSE),³² a decision announced in the budget on 8 July 2015 following the general election in May 2015. *Drax Power* is the only austerity adjudication where the constitutional mechanics of the budget set out in chapter 2 were relevant. The budget resolution relating to the withdrawal of the RSE was passed on 15 July 2015, took effect

²⁹ *R (Delve) v Secretary of State for Work and Pensions* [2019] EWHC 2552 (Admin) [2], [33], [56] (Irwin LJ, Whipple J). *Delve* is a case which appears to have been explicitly political in the sense that it appears to have been brought primarily for political or campaigning ends rather than in the expectation it would succeed. See (n 171) in chapter 6 above.

³⁰ State pension is not pay for the purposes of TFEU, Art 157; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/6 excludes social security.

³¹ Primarily on the basis it was contrary to Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/24.

³² *R (Drax Power Ltd) v HM Treasury* [2016] EWHC 228 (Admin) [5(1)(2)], [72], [128] (Jay J). The claimants were Drax Power, operator of the eponymous biomass-fuelled power station in north Yorkshire; and Infinitis Energy, which captures methane from landfill sites to generate electricity. *Drax Power* was one of three renewables cases, the other two being: *R (Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change* [2012] EWCA Civ 28; *Solar Century Holdings Ltd v Secretary of State for Energy and Climate Change* [2016] EWCA Civ 117.

on 1 August 2015 and was given final effect by the Finance (No 2) Act 2015, s 49 which came into force on 18 November 2015. The challenge was therefore to primary legislation. The claimants effectively had 24 days notice (between the budget on 8 July 2015 and the resolution taking effect on 1 August 2015) of a change which harmed their financial interests and affected their property rights in relation to agreed contracts to supply electricity. It was argued that withdrawing the RSE exemption without a lead time of at least two years violated the EU law principles of: (a) foreseeability, legal certainty and protection of legitimate expectations; and (b) proportionality. It was accepted at first instance and on appeal that EU law applied since the RSE exemption was within the spirit and intendment of two pieces of EU secondary legislation.³³

Both grounds failed at first instance and on appeal.³⁴ As to legitimate expectation, what was required was the giving of ‘a precise, unconditional and unambiguous assurance, whether by words or conduct, of an expectation as to how [the state] will behave in future’.³⁵ Notwithstanding a government consultation that suggested the RSE exemption would continue until 2017 and the practice of giving warnings and lead times of at least two years before changing the statutory scheme, the court declined to find any assurance. As to the EU law test of whether a legitimate expectation is created, it is in much the same terms as the common law test described in chapter 6, and appears to have been applied with similar intensity. Since *Drax Power* was a challenge to primary legislation, a common

³³ Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity [2003] OJ L283/51, art 15 permitted member states reduce tax on electricity of renewable origin. Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources [2009] L140/16, art 3 obliged member states to ensure that at least 15% of energy came from renewable sources by 2020.

³⁴ *R (Drax Power Ltd) v HM Treasury* [2016] EWCA Civ 1030, [2017] QB 1221 [23], [42] (Lord Etherton MR, Lloyd Jones, Sales LJ).

³⁵ *ibid* [45].

law substantive legitimate expectation ground could not be argued. As to proportionality, the court applied established Supreme Court authority, which established that decisions concerning macroeconomic and fiscal questions require review at the less intensive end of the spectrum. Further it was not for the court to second-guess the institutional competence of HM Treasury. The Court decided the government's case was, given the intensity of review, sufficiently compelling notwithstanding that: (a) the withdrawal of RSE exemption had an immediate and significant adverse impact on the claimants' financial interests;³⁶ and (b) the contemporaneous documentation suggested limited justification for immediate withdrawal and errors and misunderstandings in the decision-making process.

EU law - administration of justice cases

There were four administration of justice cases that raised EU law grounds at first instance. In *R (A)*, the challenge was to the legality of aspects of the 2012 Criminal Injuries Compensation Scheme in that it excluded those with unspent criminal convictions that resulted in a custodial or community sentence.³⁷ The EU law challenge was that the Scheme was unlawful given the provision of an EU Directive which required victims of human trafficking to have access to a compensation scheme.³⁸ The ground failed on both a literal and purposive construction of the Directive, essentially because the claimants had access, in the sense of being able to apply, to the scheme as victims of trafficking but there was nothing in the Directive that suggested the scheme could not limit or exclude awards,

³⁶ The evidence as to this issue was opaque since it was commercially sensitive and dealt by the court on a confidential basis. *Drax Power* (n 33) [59].

³⁷ *R (A) v Criminal Injuries Compensation Authority* [2017] EWHC 2 (Admin) [4(i)], [120] (Wilkie J).

³⁸ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims [2011] OJ L101/1.

including on the basis of unspent criminal convictions, particularly where these pre-dated and were not linked to having been trafficked. The decision was upheld on appeal.³⁹

The second and third administration of justice cases that raised EU law grounds were *UNISON*,⁴⁰ and *UNISON (No 2)*,⁴¹ the challenges to the order that introduced fees for Employment Tribunal (ET) claims and Employment Appeal Tribunal (EAT) appeals.⁴²

There was detailed analysis of these cases in chapter 6 since the argument that the fees interfered with the common law right of access to justice succeeded before the Supreme Court. On the conjoined appeals,⁴³ the judgment of the Court of Appeal identified 24 rights derived from EU law which were enforceable, most of which exclusively, by ETs.⁴⁴ These included core employment rights including: the right to a written statement of terms and conditions; the right to maternity leave and pay; the right to equal pay; the right not to be discriminated against on the ground of sex, race, disability, sexual orientation, religion or belief, and age; and rights in relation to working time and paid leave. Access to ETs and the EAT were inevitably within the scope of EU law.

The grounds argued at first instance were that the fees breached the EU law principle of effectiveness in making it excessively difficult or virtually impossible to exercise rights

³⁹ *R (A) v Criminal Injuries Compensation Authority* [2018] EWCA Civ 1534, [2018] 1 WLR 5361 [18(i)], [19] (Gross, Sharp, Flaux LJ). While there was an appeal to the Supreme Court, it was solely on the Convention ground analysed below.

⁴⁰ *R (UNISON) v Lord Chancellor* [2014] EWHC 218 (Admin), [2014] ICR 498 [18(i)(ii)], [19], [48] (Moses LJ, Irwin J).

⁴¹ *R (UNISON) (No 2) v Lord Chancellor* [2014] EWHC 4198 (Admin), [2015] ICR 390 [2], [23] (Elias LJ, Foskett J).

⁴² Employment Tribunals and Employment Appeal Tribunal Fees Order 2013, SI 2013/1893.

⁴³ *R (UNISON) v Lord Chancellor (Nos 1 & 2)* [2015] EWCA Civ 935, [2016] ICR 1 [29(1)(2)], [30], [32] (Moore-Bick, Davis, Underhill LJ).

⁴⁴ *ibid* annex 2.

conferred by EU law;⁴⁵ and the EU law principle of equivalence in that the fees for exercising EU law rights were less favourable than those governing similar domestic causes of action.⁴⁶ There was no significant dispute about the law or legal principles that applied, only whether the tests were met on the evidence. The equivalence ground was rejected at first instance on the basis that county court fees for equivalent non-EU law based claims were similar and the risk on costs for claimants was far greater, and this ground was not argued on any of the appeals.⁴⁷

The principle of effectiveness ground was rejected at first instance on the basis that interference with the right of access to a court was not unlawful provided it was not disproportionate. Notwithstanding the fall in the number of claims, and that cost might make it excessively difficult or virtually impossible to bring a claim, the court could only conclude the fees breached the principle of effectiveness if there was evidence from individuals affected. On appeal, there was a shift in that the Court of Appeal accepted the evidence relating to the impact of fees on ‘notional’ or ‘example’ claimants. However, the fee regime would not interfere with the right of effective access unless it made access in practice impossible. That depended on whether the fees were unaffordable and it was uncertain whether the fall in the number of claims was for affordability reasons (‘can’t pay’) as opposed to claimants choosing not to pay the fees to bring claims (‘won’t pay’).⁴⁸ The

⁴⁵ Case C-326/96 *Levez v T H Jennings (Harlow Pools) Ltd* [1998] ECR I-7835 [22] and TEU Art 19 which provided ‘member states shall provide remedies sufficient to ensure effective legal protection in the fields covered by [EU] law’. The test was whether the domestic procedural provision renders it virtually impossible or excessively difficult to exercise the EU right based on an assessment of the procedural rules in their factual legal context - case C-473/00 *Cofidis SA v Fredout* [2002] ECR I-10875 [37]

⁴⁶ Case C-33/76 *Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 [21], [26].

⁴⁷ *UNISON* (n 41) [48].

⁴⁸ *UNISON* (n 44) [68].

Court observed that: it ought not to strike down the order if the fee remission scheme could be operated so as to protect the effectiveness principle; and the decline in the number of claims merited careful analysis, such that the fees and remission scheme needed to be revisited if there were grounds for concluding claimants were unable to afford to bring claims. The effectiveness ground succeeded before the Supreme Court which took a more generous view of the evidence and legal materials in relying on articles 6 and 14,⁴⁹ of the Convention and articles 47 and 52 of the Charter of Fundamental Rights of the European Union (the Charter).⁵⁰ By the time the appeal got to the Supreme Court it was clear from the ET statistics that the fees: were not deterring unmeritorious claims (the success rate of claims had fallen); and were not encouraging settlement (fewer cases were settling).⁵¹ The Supreme Court concluded that because the fees were:

in practice unaffordable by some people, and that they are so high as in practice to prevent even people who can afford them from pursuing claims for small amounts and non-monetary claims, it follows that the [fees order] imposes limitations on the exercise of EU rights which are disproportionate ...

⁴⁹ Article 14 is the right to an effective remedy.

⁵⁰ Article 47 is the right to an effective remedy and to a fair trial. It provides '(1) Everyone whose rights and freedoms guaranteed by [EU law] are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. (2) Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. (3) Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'. Article 52 is the scope of guaranteed rights. It provides 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the [EU] or the need to protect the rights and freedoms of others'.

⁵¹ *UNISON* (n 2) [3], [105].

and the order was therefore unlawful under EU law.⁵² Perhaps this is further evidence of the heightened intensity of review in *UNISON*, both evidentially and legally, discussed in chapter 5. On the other hand, given that many of the EU law rights were only enforceable in ETs and the evidence on affordability, the fees did render many of the EU rights essentially unenforceable for those on low or middle incomes.

The final administration of justice case was *Gudanaviciene*, the challenge by six claimants to the LC's decision to refuse exceptional case funding (ECF) that was analysed in chapter 5.⁵³ The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA 2012), s 10 required legal aid to be provided where '... it is necessary ... because failure to do so would be a breach of ... any rights of the individual to the provision of legal services that are enforceable EU rights' or 'that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach'. The EU law challenge was to the LC's Guidance on ECF which, without going into the detail, mirrored the LC's understanding that heading to s 10 'Exceptional cases' imposed a requirement of 'exceptionality' beyond the words of the provision as to when legal aid should be provided. The Court of Appeal decided, largely on the basis of article 47 of the Charter, that the Guidance was unlawful in that it 'impermissibly sends a clear signal to caseworkers and the Director that the refusal of legal aid will amount to a breach [of EU law] only in rare and extreme cases'.⁵⁴

⁵² *ibid* [117].

⁵³ *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWHC 1840 (Admin), [2015] 3 All ER 827 [18], [19] (Collins J)

⁵⁴ *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622, [2015] 1 WLR 2247 [4], [33], [59], [181] (Lord Dyson MR, Richards, Sullivan LJ).

What conclusions, then, can be drawn in relation to EU law grounds from a political constitutionalist perspective? Quantitatively, given (a) the scale of the law and policy that implemented the austerity programme described in chapter 2; and (b) the relatively few EU law grounds which challenged that law and policy, and the yet fewer grounds that succeeded; the evidence to support the view that EU law posed a significant legal obstacle to UK political decision-making is limited to *UNISON*. Qualitatively, there is some evidence to support the criticisms of political constitutionalism in that the jurisprudence of the CJEU is uncertain or contradictory (*Drax Power*); and that the CJEU makes law in the course of adjudication (*UNISON* and the principles of effectiveness and equivalence), though the principle of effectiveness was codified in the TFEU in 2007. On the other hand, it can hardly be said that when it came to deciding whether EU law was engaged, that the courts adopted an expansive approach; nor that when it came to satisfying the requirements of EU law that the courts were obliged or chose to depart from domestic principles of interpretation (*R (A)* and *Delve*).

As to the principles, the test of legitimate expectation in *Drax Power* appears no more onerous than the common law test; and, in terms of proportionality, the court showed significant deference to political decision-making given the public spending context. None of the decisions frustrated the operation of primary legislation, whether interpretively or otherwise. That there were so few EU law grounds hardly suggests that EU law created legal uncertainty. There is no evidence that the courts sought to advance the boundaries of EU law. When it comes to citation of domestic and European jurisprudence, around half of the cases cited by the Court of Appeal in the conjoined appeals in *UNISON* were domestic authorities, and it was two-thirds in the Supreme Court. While some of the domestic authorities no doubt raised EU law issues, there is limited evidence that the scale or scope of the EU law jurisprudence was more onerous or demanding than the domestic. As will be

seen from what follows, however, these conclusions in relation to EU law grounds are not repeated in relation to Convention grounds.

4. *Reilly* (No 2) the declaration of incompatibility case

The only declaration of incompatibility was made in the second round of *Reilly* litigation.⁵⁵ The context is the first round of *Reilly* litigation where the challenges were to regulations that obliged Jobseekers Allowance (JSA) claimants in prescribed circumstances to participate in ‘work for your benefit’ schemes or face benefit sanctions.⁵⁶ The regulations were quashed at first instance because the schemes were *ultra vires* in not being adequately prescribed as required by the enabling statute. On 12 February 2013, the Court of Appeal upheld the High Court’s decision in *Reilly*.⁵⁷ The Secretary of State’s response was to appeal to the Supreme Court and promote in Parliament the Jobseekers (Back to Work Schemes) Bill to retrospectively validate the regulations, schemes and sanctions. The government’s concern was having to pay benefits that had been sanctioned. The first reading of the Bill was on 14 March 2013, Royal Assent was on 26 March 2013 and the Jobseekers (Back to Work Schemes) Act 2013 came into force on the same day.⁵⁸ After the Act was passed, the Supreme Court heard the Secretary of State’s appeal against the decision of the Court of Appeal and allowed the appeal on the *ultra*

⁵⁵ *R (Reilly) v Secretary of State for Work and Pensions (No 2)* [2014] EWHC 2182 (Admin) (Lang J). Declarations of incompatibility were unsuccessfully sought in *R (PCSU) v Minister for the Civil Service* [2011] EWHC 2041 (Admin) and *R (SC) v Secretary of State for Work and Pensions* [2018] EWHC 864 (Admin), [2018] 1 WLR 5425, both of which are considered below.

⁵⁶ *R (Reilly) v Secretary of State for Work and Pensions* [2012] EWHC 2292. The enabling provisions was the Jobseekers Act 1995, s 17A and the relevant regulation were the Jobseeker’s Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011, SI 2011/917.

⁵⁷ *R (Reilly) v Secretary of State for Work and Pensions* [2013] 1 WLR 2239, [2013] EWCA Civ 66.

⁵⁸ There is a highly critical Select Committee report on the Bill being fast-tracked: House of Lords Constitution Committee, *12th Report of Session 2012-13, Jobseekers Back to Work Bill* (HL 2012-13, HL 155).

vires grounds because the Act had retrospectively validated the regulations.⁵⁹ The second round of litigation - *Reilly (No 2)* - challenged the Act on the basis that it was incompatible with: first, article 6 in relation to those who had appealed the benefit sanctions; and, second, A1P1 in relation to the benefit sanctions.⁶⁰

At first instance in *Reilly (No 2)* the High Court engaged in a comprehensive review of ECtHR and domestic authorities. It identified the clear principle in *Zielinski* that article 6 precluded, save on compelling grounds of the general interest, any interference by the legislature with the administration of justice by influencing the judicial determination of a dispute to which the state is a party, and that the case and principle had been relied on by the Supreme Court.⁶¹ The government argued there were compelling grounds to justify the legislation on the grounds: (a) the costs involved; (b) the claimants did not deserve repayments; (c) the decision in *Reilly* had retrospective effect; and (d) the government fundamentally disagreed with the decision in *Reilly*. It is difficult to see how the latter two arguments could be compelling grounds since, where *ultra vires* challenges to delegated legislation succeed, the legislation is generally voided *ab initio*; and litigants must routinely disagree with judicial decisions when they lose. As to the former two arguments, the court decided these were not compelling grounds because: cost alone was not a justification since, if it were, it would amount to a compelling ground in all cases; the flaws in the regulations had been identified to the DWP but it decided to make them; the Act applied to all those who had been sanctioned and not only those who had appealed against sanctions; and the claimants did deserve the payments because the court had decided

⁵⁹ *R (Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] AC 453.

⁶⁰ *R (Reilly) v Secretary of State for Work and Pensions (No 2)* [2014] EWHC 2182 (Admin), [2015] QB 573 [1], [55], [130] (Lang J).

⁶¹ *Zielinski v France* (1999) 31 EHRR 532 [57]. *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868.

they had been unlawfully deprived of them. The court rejected the A1P1 ground on the basis that the claimants who had not appealed sanctions were not deprived of an existing possession in that the sanctions related to future entitlement. The impact of A1P1 in the austerity adjudications in the field of welfare benefits is assessed further below.

The Court made a declaration of incompatibility insofar as the Act affected claimants who had appealed against sanctions before the Act came into force. The first instance decisions were upheld for the same reasons by the Court of Appeal on the appeal and cross-appeal.⁶² As to the financial impact, the Court of Appeal observed that the £130 million cost claimed by the government was calculated on the basis that around 250,000 claimants had been sanctioned. Given, however, there were only around 2,500 appeals, the actual cost of the declaration of incompatibility was around 1% of this or £1.3 million. The government responded to the declaration of incompatibility by making a remedial order amending the Act such that it did not apply to those who had appealed decisions made under the regulations.⁶³

Reilly (No 2) is one of relatively few cases analysed in this thesis to attract specific criticism from a political constitutionalist perspective. The analysis of Ekins, Stephen Laws and Conor Casey is:

Reilly (No 1) [the first round of litigation] ... unsettled the legal position as it stood before that judgment, which the 2013 Act then restored. Despite this, the court issued a declaration of incompatibility under s 4 HRA in relation to the

⁶² *R (Reilly) v Secretary of State for Work and Pensions (No 2)* [2016] EWCA Civ 413, [2017] QB 657 [32], [37], [83], [111] (Underhill, Burnett LJ, Dame Janet Smith).

⁶³ The Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2020, SI 2020/1085, which inserted ss 1A and 1B into the Act.

effect of the 2013 Act on those claimants who had already appealed against their sanctions. In this way, the judgment provided a startling example of judicial interference in an essentially political matter involving economic and social policy, which helps to discredit the much-vaunted claim that when courts make decisions with which Parliament disagrees, Parliament is always free to intervene with corrective legislation.⁶⁴

This analysis is not entirely accurate. As identified in chapter 5, Parliament required the ‘work for your benefit’ schemes in regulations to be of a ‘prescribed description’ and the relevant regulations had essentially no description.⁶⁵ The courts took a minimalist view of what amounted to a prescribed description, but drew a line at no description at all being provided.⁶⁶ Political constitutionalism recognises that the judiciary play an important role in ensuring the government does not act beyond powers provided by Parliament. What unsettled the legal position was not the judiciary in *Reilly*, but the government acting beyond its statutory powers. What then further unsettled the legal position was the government seeking to reverse *Reilly* by fast-tracking primary legislation to retrospectively validate what the courts had reasonably identified as a case where the government had acted beyond its statutory powers.

As to the declaration of incompatibility, it was hardly a ‘startling example of judicial interference in an essentially political matter involving economic and social policy’. First,

⁶⁴ Richard Ekins, Stephen Laws and Conor Casey, ‘The Impact of the Human Rights Act 1998 in Twenty-Five Cases’ (Policy Exchange 2024) 44. Their case summary of *Reilly* is ‘... the Court of Appeal denounced Parliament’s legislation retrospectively validating regulations about welfare entitlement’ which seems both fervent and inaccurate.

⁶⁵ *Reilly* (n 65) and (n 68) in chapter 5.

⁶⁶ *Smith and Smith (No 2)* (n 69) in chapter 5.

the courts performed the task allocated to them by Parliament in the manner specified by Parliament. They determined the compatibility of the Act by reference to article 6 and A1P1. The courts analysed and applied the ECtHR jurisprudence in the same way as domestic jurisprudence. The courts applied clear and settled Convention jurisprudence. Had the courts not made a declaration of incompatibility, the claimants would likely have made applications to the ECtHR. Second, it was only a very limited interference in a political matter involving economic and social policy since the declaration only applied to the 1% of claimants who had ongoing appeals, and not the 99% of claimants - about whom the analysis of Ekins, Laws and Casey is entirely silent - who were subject to unlawful sanctions that were then validated retrospectively. This hardly undermines the claim that when courts make decisions Parliament is free to disagree and intervene. Parliament's intervention was 99% effective; accepted by the Supreme Court in *Reilly (No 1)*; and the only thing the legislature could not do - absent compelling reasons - was to change the law to 'win' ongoing appeals to which the state was a party. It might be argued this was a startling example of political interference.

That judicial declarations of incompatibility in relation to primary legislation may function as effective trumps to political and legislative choices is no doubt problematic from a political constitutionalist perspective. While there may be sound arguments against the availability of such declarations, if the limits of adjudication in *Reilly (No 2)* were exceeded, then it was as a result of political and legislative choices in enacting the HRA 1998 rather than a 'startling example of judicial interference'.

5. Introduction to Convention grounds of review

Many of the cases that challenged the law and policy that implemented austerity on grounds relating to the Convention are complex in terms of evidence, law and reasoning.

The grounds that alleged a straightforward breach of substantive articles of the Convention were relatively few and generally easily resolved. The much more numerous and far less straightforward grounds alleged a breach of article 14 read with one or more of the substantive articles.⁶⁷ Carol Harlow and Richard Rawlings again get to the nub of things by describing some of this litigation as follows:

Article 14 cases in the socio-economic sphere, as represented in a welter of Supreme Court litigation concerning welfare benefit and tax credits, have provided particularly challenging for all concerned. ... A running battle between repeat players, including those on the bench is a suitable characterisation.⁶⁸

In addition to the welter of challenging Supreme Court litigation, this thesis has to contend with first instance decisions and appeals to the Court of Appeal. Before starting the analysis, three overarching issues are dealt with. The first issue is the proportionality test and the generally (but not universally) adopted formulation in the cases analysed below is that of Lord Sumption in *Bank Mellat* who, after reviewing the authorities, identified that proportionality required:

an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the

⁶⁷ Article 14 provides 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. There are various linguistic formulations that cover the combining of article 14 with other articles. The 'read with' formulation is adopted here for consistency even where a different formulation was used in the judgments.

⁶⁸ Carol Harlow and Richard Rawlings, *Law and Administration* (4th edn, Cambridge 2022) 805.

objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.⁶⁹

While Lord Sumption's formulation is expressed in relatively simple terms, it depends on 'an exacting analysis on the factual case advanced in defence of the measure' and 'the severity of the consequences'. The scale of the evidence as to these issues accounts for much of the complexity in the case law. The second issue is the decision of the ECtHR in *Stec*, a challenge to the equalisation of state pension age for men and women in the UK on the basis it breached article 14 read with A1P1. The Grand Chamber decided that the state enjoyed a broad margin of appreciation in relation matters that involved complex economic and social judgments, and formulated the manifestly without reasonable foundation (MWRF) test:

The scope of this margin will vary according to the circumstances, the subject matter and the background ... As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment [by reference to article 14] based exclusively on the ground of sex as compatible with the Convention ... On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their

⁶⁹ *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 [20].

society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation".⁷⁰

As Harlow and Rawlings observe 'To the ears of of an English common lawyer, "manifestly without reasonable foundation" sounds awfully like *Wednesbury*'.⁷¹ As will be seen, it not only sounds like a *Wednesbury* test, it also resembles a *Wednesbury* test. The third and final issue is Harlow and Rawlings' useful template or analytical framework for understanding the issues in article 14 cases, which consists of four overlapping issues:

- (i) *Zone*: Is the subject matter within the ambit of a substantive Convention right?
- (ii) *Equalities*: Is there a relevant ground or protected status in play?
- (iii) *Differences and similarities*: Is there (a) different treatment from others who are similarly situated, or alternatively, (b) similar treatment to others who are differently situated?⁷²
- (iv) *Justification/discrimination*: Is the interference proportionate/manifestly without reasonable foundation?⁷³

While not all the cases analysed below engage these issues, many of them do; and the issues are central to the cases that raised article 14, which includes many of the most

⁷⁰ *Stec v United Kingdom* (2006) 43 EHRR 1017

⁷¹ Harlow and Rawlings (n 69) 805.

⁷² This is often referred to in the case law as *Thlimmenos* discrimination following the decision of the ECtHR in *Thlimmenos v Greece* (2000) 31 EHRR 15.

⁷³ Harlow and Rawlings (n 62) 800.

significant cases. The next three parts deal with the Convention grounds starting with 'other' cases, then welfare benefits cases, and concluding with administration of justice cases. There are though, two further issues that were significant and contested in many of the cases covered in the next three parts. These are, first, the significance and weight attached to delegated legislation being approved by Parliament; and, second, the significance of international law, primarily the UN Convention of the Rights of the Child (UNCRC). These issues cut across chapters 5, 6 and 7 and are dealt with in chapter 8.

6. Convention grounds of review - 'other' cases

There were nine 'other' cases which raised 11 Convention grounds. None of the grounds succeeded at first instance and, after all appeals, only one ground succeeded. Most of the cases have been analysed in relation to other grounds and can be dealt with shortly. Two cases involved challenges to the financial support or subsidies for generation of electricity from renewable sources. *Drax Power* was the challenge to primary legislation analysed in detail above in relation to the EU law grounds and the claimant also argued a breach of A1P1 in relation to contracts concluded before the RSE exemption was withdrawn.⁷⁴ The Convention ground failed on essentially the same basis as the EU law proportionality ground in terms of the institutional competence of the courts and the intensity of review given the withdrawal of the RSE exemption was a legislative choice by Parliament.

Homesun Holdings was the challenge to the proposal to retrospectively reduce the Feed-in Tariff (FIT) paid in relation to certain small-scale installations for the generation of solar photovoltaic (solar PV) electricity. The claim succeeded on the statutory ground analysed

⁷⁴ *Drax Power* (n 33) [53], [152]. On appeal the A1P1 ground fell away since it only arose if the EU law grounds of legitimate expectation or proportionality succeeded. *Drax Power* (n 35) [23], [105].

and the A1P1 ground was not determined.⁷⁵ In both *Drax Power* and *Homesun Holdings*, the Convention was of marginal relevance to the resolution of the dispute.

There were two public sector pensions cases that argued A1P1 and article 11 grounds. Both *PCSU* cases were challenges to amendments to the Civil Service pension scheme to reduce benefits paid to members on redundancy and early retirement. In the first *PCSU* case,⁷⁶ the court accepted that pension benefits were possessions for the purposes of A1P1, the amendments to the scheme amounted to interference, but that the interference was proportionate. The court was reluctant to be drawn ‘into areas of macro-economics which the court is not equipped to judge and which falls well inside the area of the state's margin of appreciation’; and it was ‘impossible for the court to “second guess” the government's assessment of what is affordable. Nor can it be for the court to interfere with the government's assessment of spending priorities’.⁷⁷ While Convention jurisprudence referring to the MWRF test was cited, the test was not applied explicitly. The conclusion was that the interference did not go beyond what was reasonably necessary to achieve the legitimate aim of reducing the budget deficit. The article 11 ground was framed on the basis that the previous scheme was protected as the product of collective bargaining and the new scheme nullified the bargain. The court concluded ‘This case simply gets nowhere close to a situation where the right to freedom of assembly and association is infringed’.⁷⁸ In the second *PCSU* case, the statutory ground analysed in chapter 5 succeeded on the

⁷⁵ *R (Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change* [2011] EWHC 3575 (Admin) [22], [40] (Mitling J).

⁷⁶ *R (PCSU) v Minister for the Civil Service* [2011] EWHC 2041 (Admin) [3], [23], [74] (McCombe J).

⁷⁷ *ibid* [59], [60].

⁷⁸ *ibid* [77]. The challenge to the compatibility of the Superannuation Act 2010 with the Convention was not considered given the other findings [64].

basis that the Secretary of State had not consulted in good faith.⁷⁹ The article 11 ground was not determined on the basis that the statutory ground had succeeded.⁸⁰ As to the A1P1 ground, the Court relied on on the previous *PCSU* case in finding that pension entitlements were possessions, but that:

Turning to the question of objective justification, although the present context is somewhat different from that [in the first *PCSU* case] I consider that the minister's case on objective justification is made out, essentially for the same reasons ... It remains a critical declared objective of the Government that there is still an imperative need to reduce the budget deficit and the further savings to be achieved by the changes to the [pension scheme] will make a material contribution to that objective. The decision to introduce the ... amendments cannot be said to be manifestly without reasonable foundation. ... In light of the wide margin of appreciation which is applicable, the ... amendments do not fail to strike a fair balance between persons affected and the community as a whole, nor are the individuals affected required to bear a disproportionate or excessive burden.⁸¹

In relation to the test of proportionality, the claimed need to reduce public spending in both *PCSU* cases justified the amendments given the wide margin of appreciation on the MWRF test. This is a recurring theme which is addressed in the conclusion to this chapter.

⁷⁹ *R (PCSU) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin), [2018] ICR 269 [5], [62], [68] (Sales LJ and Whipple J). The Secretary of state had consulted on one set of changes and then tried to implement a different set of changes.

⁸⁰ *ibid* [62]. the court observed 'The [ECtHR] case law in relation to article 11 is not always easy to interpret and apply ... and it would not be helpful to try to embark upon such an exercise in this case where the issue does not arise'.

⁸¹ *ibid* [74].

Williams was the challenge to the decision not to include a fee exemption scheme for destitute children seeking registration as a British citizen on the basis of continuous residence.⁸² The Convention ground was argued on the basis of breaches of article 8 and article 14 read with article 8. The ground was comprehensively rejected at first instance and then on appeal on the basis that: article 8 alone was not engaged since non-registration did not interfere with the right to family life given there had been a grant of leave to remain and, in any event, the interference was legitimate and proportionate given the purposes of the fee regime to fund the immigration control system; and that impecuniosity was not ‘other status’ for the purposes of article 14, and, in any event, the difference of treatment was proportionate on the purposes of the fee regime.⁸³

There are then four cases that raised grounds based on A2P1 and the right to education, of which *Tigere* was the most significant since the ground eventually succeeded before the Supreme Court. Taking the other cases first, *Simone* was the high level challenge to special educational needs (SEN) funding following the 2018 budget and was argued on the basis of article 14 read with A2P1 and article 8.⁸⁴ The Convention grounds failed at the first hurdle in that the differential treatment of children with SENs - a separate legal regime

⁸² *R (Williams) v Secretary of State for the Home Department* [2015] EWHC 1268 (Admin) [2(i)], [82] (Hickinbottom J).

⁸³ *R (Williams) v Secretary of State for the Home Department* [2017] EWCA Civ 98, [2017] 1 WLR 3283 [2], [53], [65]. For the sake of completeness, a common law rights ground was raised on appeal and rejected on the basis it was ‘... based on the wrong premise that the potential entitlement to be registered as a citizen ... is some kind of “fundamental right”, as opposed to a right which Parliament has chosen to bestow. At all events if the argument cannot succeed on a proper interpretation of the legislative provisions which create and implement the right, as it cannot, and if it cannot succeed under the Convention, as it cannot, then in my view it cannot succeed at common law’ [80].

⁸⁴ *R (Simone) v Chancellor of the Exchequer* [2019] EWHC 2609 (Admin) [3], [93] (Lewis J).

for assessment and making of educational provision - was justified on the basis of their needs.⁸⁵

There were then three higher education (HE) tuition fee and student loans cases. *Hurley* was the challenge to the increase in tuition fees to £9,000.⁸⁶ The grounds alleged breaches of A2P1 and article 14 read with A2P1. The claim was unrealistic given the Convention jurisprudence established there was no obligation to fund students in higher education and the fee scheme was operated in non-discriminatory way. The court concluded:

this is an area of macro-economic judgment, where decisions have to be taken about prioritising public resources. If charging fees of this magnitude is unlawful, public resources will have to be provided, at the expense of other competing and pressing interests. Moreover, there is an inevitable tension between widening higher education so as to catch everyone who can benefit from it whilst maintaining the highest standards, and funding that increase. In my judgment, significant leeway must be given to the democratically accountable Secretary of State as to how the objective of providing sustainable and quality higher education can be best secured.⁸⁷

⁸⁵ *ibid* [93]. The court was invited to take account of the UN Convention on the Rights of Persons with Disabilities (entered into force 3 May 2008) 2515 UNTS 3 in interpreting article 14, but the argument was rejected. Again, the relevance and weight of international law is considered in chapter 8.

⁸⁶ *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) [4(i)], [26] (Elias LJ, King J). The challenge was to the Higher Education (Basic Amount) Regulations 2010, SI 2010/3021; and the Higher Education (Higher Amount) Regulations 2010, SI 2010/3020.

⁸⁷ *ibid* [63]. The court was invited to take account of the UN International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 993 UNTS 3 in interpreting article 14, but the argument was rejected.

In *Kebede* the grounds were again A2P1 and article 14 read with A2P1 in that the student loan system was discriminatory in not making loans available for those who had yet to achieve humanitarian protection status or indefinite leave to remain.⁸⁸ As with *Hurley*, there was no obligation on the state under the Convention to fund students in HE; and, while the claimants were subject to differential treatment on the basis of their immigration status, the government enjoyed a wide margin of appreciation and the regulations were not MWRP.

The one student loans case that succeeded on Convention grounds was *Tigere* where it was argued that the blanket refusal of a student loan to those with discretionary leave to remain (DLR) breached A2P1 and article 14 read with A2P1.⁸⁹ Given *Hurley* and *Kebede*, much of the relevant law was agreed and the grounds were effectively dealt with compendiously. The case hinged on whether the 'bright line' policy in relation to entitlement could be justified on a test of proportionality. The claimant succeeded at first

⁸⁸ *R (Kebede) v Secretary of State for Business, Innovation and Skills* [2013] EWHC 2396 (Admin), [2014] PTSR 92 [1], [23] (Burnett J). The relevant regulations were the Education (Student Support) Regulations 2011, SI 2011/1986. There is an issue as to whether both *Kebede* and *Tigere* below ought to be classified as austerity adjudications since the evidence as to the policy reasons for limiting entitlement is sparse. The explanatory memorandum to the regulations states 'This restriction of eligibility for support has been introduced to manage increased pressures on the student support budget' and the need to save costs was argued by the Secretary of State, *Kebede* [40]. It was decided that this was sufficient evidence given the wider political context to policy-making on HE funding.

⁸⁹ *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2014] EWHC 2452 (Admin) [19(i)(ii)], [20] (Hayden J). Tigere was described as 'a Zambian national who having been born on the 29th August 1985, is now 18 years old. She was brought into the United Kingdom by her parents when she was 6 years old, legally entering as a dependent of her father on his student visa. She has lived in the United Kingdom [in York] with her mother ever since, in effect for the majority of her life. Her entire education has been through the English system. The Claimant's father left the United Kingdom in early 2003 and has played no active part in her upbringing. Those bald facts indicate a challenging start to life but they have been overcome. The Claimant has worked extremely hard and been very successful at school. In her senior school Burnhome Community College she was Head Girl and obtained 7 GCSE's and 4 A-levels, (A) business information and communications; (A star) technology; and (C) media. She is not only hard working, she is plainly ambitious and has great plans for her future. I have no doubt that these have been encouraged and re-enforced by her mother who has been present at court with her during the course of this hearing'.

instance essentially on the basis there had been ‘no real engagement by the Defendant in a justification of the rationality or proportionality of this “catch all” measure or “blanket exclusion”...’.⁹⁰ This decision was reversed on appeal. While the Court did not think ‘the test for a proportionate decision in this field is helpfully expressed by the blunt instrument “manifestly without reasonable foundation” ...’, the ‘Secretary of State, promulgating rules concerning education loans, is entitled to rely on the legality, the propriety in public law terms, of the Immigration Rules relating to settled status’ because the ‘approach serves the need of certainty and the avoidance of an arbitrary rule’.⁹¹

There was unanimity in the Supreme Court that the policy had legitimate objectives in terms of restricting funding to those integrated into the community who were likely to remain in the UK and contribute to the economy; and it was easier to collect repayments from those remaining in the UK.⁹² The 3:2 split came with the majority (Lady Hale, Lord Kerr and Lord Hughes) finding that: the Secretary of State had not applied his mind to the specific issues raised by those with DLR. Given Tigere’s close connection to the UK, the bright line rule was not rationally connected to the objectives; and, notwithstanding the public spending context, the bright line rule was not proportionate in that it did not strike a fair balance between Tigere’s interests and the interests of the community and a less restrictive rule could have been adopted. The minority (Lord Sumption and Lord Reed) decided:

⁹⁰ *ibid* [40].

⁹¹ *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2014] EWCA Civ 1216 [30], [58], [51] (Laws, Floyd, Vos LJ).

⁹² *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820 [2], [23] (Lady Hale DPSC, Lord Kerr, Lord Sumption, Lord Reed, Lord Hughes JJSC).

In a case concerned with the allocation of public expenditure in order to fulfil objectives of social and economic policy, the degree of respect paid by the court to the judgment of the legislature or executive, and the consequent width of the discretion afforded to the primary decision-maker, must be substantial. That is reflected in the test of whether the policy choice is manifestly without reasonable foundation.⁹³

The essence of the split, which recurred in the welfare benefits cases below, was in relation to the intensity of review. *Tigere* is squarely within Ekins and Gee's argument in part 2 above that the Convention 'unsettles' the rule of law in the sense of consistent decision-making because judges are more likely to find a policy lawful where it considers cases on an individual basis. *Tigere* has also received specific criticism from a political constitutionalist perspective. The analysis of Ekins, Laws and Casey is:

the Supreme Court took an expansive approach to the scope of the right to education, holding that it encompasses a right (an unstated right) to be given a student loan if the right of access to a relevant institution is to be practical and effective rather than theoretical and illusory. This is itself problematic, for here the court quickly arrives at a novel right to taxpayer support for tertiary education. The court then held that a blanket exclusion of non-settled immigrants was disproportionate. On this question, the court relied on its view that there could be an alternative scheme which, within the bounds of administrative practicality, nonetheless allows for discretion to accommodate students without settled status when their circumstances are compelling. The

⁹³ *ibid* [93].

court also thought the regulations failed to strike a fair balance between the public interest in the prudent allocation of public resources and the impact on the individual applicant. Although the court accepted that the applicant's access to funds was not foreclosed, but merely delayed, they nonetheless held the impact of the delay was excessively severe. How best to structure and administer this kind of scheme, and how to manage the public finances to pay for it, are questions the courts lack both the ability and the democratic legitimacy to answer. More deference to the judgment of political authorities was warranted than the Supreme Court was prepared to afford. ... Practical policy-making becomes impossible if policy makers are confronted with the possibility of a judicial veto on their own decision and little useful guidance in practice on what alternative rules would be acceptable, even if they might potentially exclude a meritorious case, and which are also within the constraints imposed by the limited resources available.⁹⁴

As with *Reilly*, this analysis is not entirely accurate. The Supreme Court did not take an expansive approach to the right to education. It decided that the state had no obligation to provide or fund access to higher education, but if the state did fund access to HE, then it had to comply with the Convention in terms of discrimination. Having decided to fund access to HE by providing student loans, the government had adopted a policy that was discriminatory in that it excluded those who lived in the UK but who did not have indefinite leave to remain. The narrow issue was whether this discrimination was justified under the Convention. Ekins, Laws and Casey's criticism is on firmer ground in relation to four

⁹⁴ Richard Ekins, Stephen Laws and Conor Casey, 'The Impact of the Human Rights Act 1998 in Twenty-Five Cases' (Policy Exchange 2024) 44. Their case summary of *Tigere* is '... the Supreme Court quashed regulations that limited non-citizen entitlement to student loans and ordered that the applicant receive a student loan'.

issues: the standard of review; whether the discrimination was justified; that Tigere would in due course become eligible for a student loan; and the advantages of a 'bright line' policy on entitlement. Perhaps the majority in *Tigere* can be criticised for adopting a test that was effectively more intense than MWRF, but this was not altogether unreasonable given the ECtHR jurisprudence; and, on the government's own case as to purpose - funding HE for those integrated to the UK who were likely to remain and contribute to the economy - this applied as much to Tigere as it did to students who were entitled to loans. Realistically, *Tigere* was a marginal case. Given what happened in subsequent cases, it seems that the minority view in *Tigere* would have been the majority with a different panel, but, again, it is hard to characterise this as the Supreme Court taking an expansive approach to the Convention. The significance of *Tigere* is addressed further in the conclusion to this chapter.

7. Convention grounds of review - welfare benefits

The next tranche of cases analysed are the numerous and complex Convention challenges to the welfare benefit reforms, most of which engage the issues identified above in relation to *Bank Mellat* and proportionality, *Stec* and the MWRF test, and Harlow and Rawlings' template for Convention cases and article 14. The political context is the numerous benefit reforms introduced by the 2010 coalition and 2015 Conservative governments that include: the increase in conditionality and sanctions; the benefit cap; the bedroom tax implemented by reductions in housing benefit (HB) and Universal Credit (UC); the two-child limit; the acceleration of the increase of the SPA to 65 for women, and the further increase to 68; the phased implementation of UC to replace a range of other benefits; and the replacement of Disability Living Allowance (DLA) by Personal

Independence Payment (PIP). A central purpose of all these reforms were to reduce spending.⁹⁵

Excluding the declaration of incompatibility case above, there were 15 first instance welfare benefits cases in which one or more Convention ground was argued; there were eight appeals to the Court of Appeal in relation to ten first instance cases; and five appeals to the Supreme Court in relation to seven first instances cases. The scale of the litigation meant the jurisprudence was developing as the cases were being heard at first instance and then appealed. Many of the case involved multiple claimants covering a spectrum of factual situations in what were essentially test cases to establish the legality of the benefit reforms. Some of the cases changed name as they were consolidated for appeal or as claimants dropped out of the litigation for whatever reason. Most of the grounds were not challenges to specific welfare benefit reforms as such, but to the alleged discriminatory impact on the basis of the specified article 14 grounds (including sex, race and religion) or ‘other status’. The scale and complexity of the challenges preclude a detailed analysis of every judgment, so the aim here is to identify the issues that are most relevant to the limits of adjudication envisaged by political constitutionalism. So far as possible, the cases are taken chronologically and are dealt with under the headings: challenges to the benefit cap;

⁹⁵ See (n 102) in chapter 2 above and David Freud’s comprehensive account of the formulation and implementation of the welfare benefit reforms. Freud was Minister for Welfare Reform between 2010 and 2016. It might be argued that the UC reforms were not part of the austerity programme, but were implemented for the purposes of modernising and rationalising the welfare benefits system, and increasing incentives to work. This argument cannot survive Freud’s account and a central purpose of the UC reforms and the way they were implemented was to reduce public spending. It seems fair to say that there were fierce and unattractive political battles between Freud and others who wanted to achieve what they understood to be ‘simplicity’ and ‘fairness’; and George Osborne and others who wanted to ‘slash the costs of welfare’. Freud’s account casts doubt as to the normative claims of political constitutionalism in relation to democratic processes and political accountability. For example, Freud wanted to remove Guardian’s Allowance from the benefit cap, ‘He [Iain Duncan Smith, then Secretary of State for Work and Pensions] told me (somewhat unrealistically) “Do it without telling anyone”’. David Freud, *Clashing Agendas: In side the Welfare Trap* (Nine Elms 2021) 117, 272, 277, 285, 313. See also (n 104) below.

challenges to the bedroom tax; challenges to the two-child limit; and other welfare benefits challenges.⁹⁶

Challenges to the benefit cap

The first group of claims analysed are the challenges to the benefit cap. In broad terms, the cap imposed a limit on the total amount of welfare benefits payable and functioned by reducing entitlement to HB or UC such that total benefits received were not above the level of the cap.⁹⁷ Some benefits were disregarded in calculating the cap and some claimants were exempt from the cap, notably lone parents working 16 hours per week or more and couples working a total of 24 hours a week or more. Various interrelated factors made the cap more likely to 'bite' and to increase the amount 'lost'. The following groups were more likely to be affected: lone parents (more likely to be women and less likely to work, for various reasons); lone parents and couples with more children (benefits or premiums for children 'counted' for the cap, or were not disregarded); lone parents or couples with a disabled adult and/or child (less likely to work and less likely to be able to work because of caring responsibilities); and families who lived in areas where rent was higher (essentially greater London). The cap was fully implemented by September 2013 and initially set at £350 per week for a single claimant and £500 for families. From November 2016 the amounts were reduced to £257.69 per week for a single claimant (£296.35 in greater

⁹⁶ It is perhaps worth mentioning cases that might be expected to feature here but do not. They are the cases which originated in FTTs and the UT: *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117; *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250; *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 WLR 6430.

⁹⁷ The policy was implemented for claimants not in receipt of UC by limiting entitlement to HB, Welfare Reform Act 2012 (WRA 2012), s 96 and the Benefit Cap (Housing Benefit) Regulations 2012, SI 2012/2994. For UC claimants policy was implemented by the Universal Credit Regulations 2013, SI 2013/376. The further reduction was by amendments made by the Welfare Reform and Work Act 2016, s 8.

London) and £384.62 for families (£442.31 in greater London).⁹⁸ Local authorities (LAs) received a central government grant to make discretionary housing payments (DHPs) to top-up HB payments which could mitigate the adverse impact of the benefit cap in the short to medium term. The availability of DHPs was relevant to proportionality and the MWRF test. None of the benefits cap cases were challenges to the cap as such, but to its allegedly discriminatory impact on certain groups. The benefits cap cases were: *JS/SG* where claims were brought by the mothers and the youngest child of three single parent families whose benefits had been capped;⁹⁹ *Hurley* where the challenge was to Carers Allowance (CA) counting towards the cap;¹⁰⁰ and *DA/DS* where claims were brought by single parent mothers of children under 2, or who had four or more children.¹⁰¹

JS/SG was argued on the basis that the cap discriminated against women and larger families contrary to article 8 and article 14 read with article 8 and A1P1.¹⁰² The factual basis was that, since the cap did not disregard benefits for children or have an exception for larger families, it discriminated against women (both generally and as victims of domestic violence), since they were more likely to be lone parents than men (90% of lone parents with children are women), and against certain religious groups (including orthodox Jews and Catholic Roma) who were more likely to have larger families. The courts found

⁹⁸ The amounts in the Welfare Reform and Work Act 2016, s 8 are annualised but the amounts are given as weekly figures for comparison.

⁹⁹ *R (JS) v Secretary of State for Work and Pensions* [2013] EWHC 3350 (QB), [2014] PTSR 23 [28(2)], [55] (Elias LJ, Bean J). It was *R (JS)* at first instance, on appeal and then became *R (SG)* before the Supreme Court.

¹⁰⁰ *R (Hurley) v Secretary of State for Work and Pensions* [2015] EWHC 3382 (Admin), [2016] PTSR 636 [3], [43], [57] (Collins J). Again, there are two *Hurley* cases, the benefit cap case and the tuition fee case.

¹⁰¹ *R (DA) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin), [2017] PTSR 1266 [5] (Collins J). The challenge was to the Benefit Cap (Housing Benefit and Universal Credit) (Amendment) Regulations 2016, SI 2016/909.

¹⁰² *JS* (n 100).

there was no free-standing breach of article 8 because there was no Convention jurisprudence to suggest a failure by the state to provide financial support could breach article 8; and, while there was some debate about whether the discrimination was within the scope of article 14 read with article 8 and A1P1, the central issue was whether the discrimination was justified.

At first instance it was held that the government's aims - making financial savings, introducing greater fairness in the benefits system, and increasing incentives to work - were legitimate and the policy was proportionate on the MWRF test.¹⁰³ This was the case despite it being recognised that the policy would cause genuine and real hardship for some groups. The decision was upheld by the Court of Appeal which stated that the MWRF test 'is a stringent test because decisions as to the criteria to be applied in the distribution of state benefits are an aspect of political and governmental life in which the court should be very slow to substitute its own view for that of the legislature or executive'.¹⁰⁴ That decision was upheld by a 3:2 majority (Lord Reed, Lord Carnwath and Lord Hughes) in the Supreme Court on the same basis.¹⁰⁵ The minority (Lady Hale and Lord Kerr) held that the policy was MWRF on the evidence, essentially taking a different view as to the weight to be attached to the best interests of children and the interests of the government; and on the effect of the UNCRC. As noted above, the relevance and

¹⁰³ While the claimed purposes in *JS/SG* included 'greater fairness', Freud's view is that the benefit cap 'made little sense in a system designed to provide each family what it needed' and 'it was a parallel welfare policy that cut across both the simplicity and fairness we were trying to create with [UC]'. Freud records Rupert Harrison, Osborne's Chief of Staff, telling him 'I know [the benefit cap] didn't make much in the way of savings but when we tested the policy it polled off the charts. We've never had such a popular policy'. Needless to say, the government did not put in evidence in *JS/SG* that the benefit cap savings were minor or that the policy 'polled off the charts'. If Freud's account of the development and implementation of the benefit cap policy is right, it raises the possibility that government's evidence to the courts was 'trimmed'. Freud (n 96) 117.

¹⁰⁴ *R (JS) v Secretary of State for Work and Pensions* [2014] EWCA Civ 156, [2014] PTSR 619 [23(i)(ii)(iii)], [24], [76], [82] (Lord Dyson MR, Longmore, Lloyd Jones LJ).

¹⁰⁵ *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449.

weight of unincorporated international law arose in a number of cases and is addressed in chapter 8. A pattern as to differences of opinion in the Supreme Court is becoming apparent given the judgments in *JS/SG* and *Tigere* above and this issue is also analysed in chapter 8.

Following the decision of the Supreme Court in *JS/SG*, *Hurley* was a challenge to the inclusion of Carer's Allowance (CA) for the purposes of calculating the cap.¹⁰⁶ CA is a benefit paid to those who provide unpaid care for a severely disabled relative for at least 35 hours per week. Those receiving CA were less able to work and avoid the cap since, by definition, they were providing care for at least 35 hours per week. If those receiving CA started work to avoid the cap, the severely disabled relative risked 'losing' the care; the person providing the care risked 'losing' CA; and it was likely that further demand would be placed on LA social care budgets. It was held that including CA in the cap was indirectly discriminatory under article 14 read with article 8 (for the severely disabled relative) and A1P1 (for the carer). While the policy had a legitimate aim, none of the government's policy material addressed the impact of loss of care on those who were being cared for by recipients of CA and, therefore, the policy of including CA in the cap was MWRP. Collins J made his views clear as to the merits of the cap with the comment:

I would only add that whether or not the defendant accepts my decision reconsideration will I hope be given to whether the present regulatory regime is appropriate having regard to the hardship it can and does produce and the lack of real benefit to the state in terms of the objectives of the benefit cap.¹⁰⁷

¹⁰⁶ *Hurley* (n 101).

¹⁰⁷ *ibid* [75].

It seems unlikely Collins J's views weighed heavily with the government,¹⁰⁸ but in any event the law was changed and CA was removed for the purposes of calculating the cap.¹⁰⁹

The final round of benefit cap litigation was *DA/DS* which followed the reduction of the cap by the Welfare Reform and Work Act 2016.¹¹⁰ In *DA* at first instance, the claimants succeeded on the basis that the evidence showed the damaging impact of the cap in relation to what could be provided for children affected in comparison to what children should have; that DHPs did not adequately mitigate the impact of the cap; and the difference in treatment was MWRF.¹¹¹ That decision was reversed by the Court of Appeal on a 2:1 majority (Leveson P, Sir Patrick Elias with McCombe LJ dissenting) on the basis that the differential treatment was not MWRF because lone parents with children under two did not face substantially greater difficulties than lone parents with older children in obtaining employment and it was not therefore unfair to subject them to the same rules; and the availability of DHPs helped ameliorate the impact of the cap.¹¹² *DS* was stayed at

¹⁰⁸ When I was a solicitor practising administrative law (primarily in education and community care), the listing of a case before a specific High Court judge generally precipitated a reaction from counsel. The two most significant reactions were in relation to Andrew Collins J and Stanley Burnton J. As to the former, the reaction was of good cheer because he was seen as very claimant-minded; and as to the latter, the reaction was of optimism on account of his fearsome ability to rapidly assimilate facts and law, and then reach a fair view; and his ability not to get distracted by counsel for the LA 'banging the drum of scarce resources' and pleading 'difficult decisions requiring the balancing of competing interests'.

¹⁰⁹ This was achieved by the Welfare Reform and Work Act 2016, s 8 that amended the Welfare Reform Act 2012, s 96 to specify which benefits counted towards the cap. The challenge was to the decision not to exclude the claimants from the cap in the Benefit Cap (Housing Benefit and Universal Credit) (Amendment) Regulations 2016, SI 2016/909, so there was no challenge to the statutory provisions, nor was a declaration of incompatibility sought.

¹¹⁰ *R (DA) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin), [2017] PTSR 1266 (Collins J).

¹¹¹ *DA* (n 102).

¹¹² *R (DA) v Secretary of State for Work and Pensions* [2018] EWCA Civ 504, [2018] PTSR 1606 [9], [13].

first instance pending the outcome of *DA* in the Court of Appeal and, after the stay was lifted, permission was granted, but the claim dismissed without a full hearing and a leapfrog certificate granted.¹¹³ *DA* and *DS* were consolidated when the Supreme Court granted permission to appeal in both cases.

The issues in *DA/DS* before the Supreme Court were similar to *JS/SG*, save that the claimants were all women who were single parents who faced difficulties avoiding the cap by working for 16 hours or more per week because: their children were aged under two ('the *DA* cohort'); or they had four or more children of various ages ('the *DS* cohort').¹¹⁴ In relation the *DA* cohort, it was argued that the revised cap was discriminatory under article 14 read with article 8 and A1P1 because they were subject to the same treatment as others who were in a materially different situation from them (other adults without children under two) and their treatment was therefore unlawful. In relation to the *DS* cohort, it was argued that the revised cap was discriminatory under article 14 read with article 8 and A1P1 because they were subject to the same treatment as others who were in a materially different situation from them (other adults who were dual-care parents or lone parents of older children) and their treatment was therefore unlawful.¹¹⁵

The factual basis of the arguments - it was more difficult for the single parents to work the 16 hours needed to avoid the cap because they had to care for their children - clearly has some force. The government's justification for the cap was: to improve the fairness of the

¹¹³ *R (DS) v Secretary of State for Work and Pensions* [2018] EWHC 698 (Admin) (Lang J). Administration of Justice Act 1969, s 12 on the basis of points of public law of general importance.

¹¹⁴ There were two claimants in the *DS* cohort, the first had four children aged between 9 and 12 years; and the second five children aged between 2 and 13 years.

¹¹⁵ *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 (Lady Hale PSC, Lord Reed DPSC, Lord Kerr, Lord Wilson, Lord Carnwath, Lord Hodge JJSC, Lord Hughes).

welfare benefits system, in particular not to reward a non-working family with an income which exceeded that of an average working family; to make fiscal savings and deploy resources more usefully elsewhere; and to incentivise parents or parent in a non-working family to obtain work on the basis that an ethic of work within a family inculcated better outcomes for its children.

The Supreme Court accepted or assumed the revised cap fell within the ambit of article 14 read with article 8 and A1P1 and that the claimants were in a relevantly different situation from others who had been treated similarly by being subject to the revised cap such that the non-exemption of the claimants from the cap had to be justified. The standard of justification and who bore the burden of satisfying it were critical issues. The decision is significant for confirming that it was largely for the claimants to establish that a measure was MWRP and the test applied at all stages of the proportionality analysis. The latter issue was, perhaps, unclear following the decision of the Supreme Court in *R (A)* on the availability of abortion service in Northern Ireland;¹¹⁶ and *In re Recovery of Medical Costs* on the legislative competence of the National Assembly for Wales.¹¹⁷ Giving the leading judgment in *DA/DS*, Lord Wilson stated

It was in the course of my judgment in [*R (A)*], that I cited the judgment of Lord Mance JSC in [*Recovery of Medical Costs*] and asserted it to have become clear that, of the four aspects of an inquiry into justification under the Convention of the effect of a measure of economic or social policy, the fourth,

¹¹⁶ *R (A) v Secretary of State for Health* [2017] UKSC 41, [2017] 1 WLR 2492.

¹¹⁷ *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016.

relating to a fair balance, fell to be answered by the court for itself and not by reference to whether it was manifestly without reasonable foundation.

We may put aside consideration of whether the Government decision impugned in the *A* case was of a character, unlike its rules of entitlement to welfare benefits, which made my suggested approach to its justification sound in law. For, even if so, I expressed myself too widely. ... For by then there was and there still remains clear authority both in the *Humphreys* case [2012] UKSC 18, [2012] 1 WLR 1545] ... and in the bedroom tax case [*MA*]... for the proposition that, at any rate in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it.

How does the criterion of whether the adverse treatment was manifestly without reasonable foundation fit together with the burden on the state to establish justification ...? For the phraseology of the criterion demonstrates that it is something for the complainant, rather than for the state, to establish. The rationalisation has to be that, when the state puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular to a burden of proof, is more theoretical than real. The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the

claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable.¹¹⁸

The door was firmly closed on the courts exercising a more intensive standard of review than MWRF at stage four of the proportionality test; and, while the court would in some sense hold the ring, it was for the claimant to demonstrate the impugned policy was MWRF. As for the dissentients, while Lady Hale essentially accepted the MWRF test, she disagreed that a fair balance had been struck between: the interests of the community; and the damage done to the family lives of young children and their lone parents of either being forced to work or having to live on less than they need. Lord Kerr agreed with Lady Hale and further dissented on the MWRF test because:

The importation of the test “manifestly without reasonable foundation” to all aspects of the national court’s consideration of proportionality imperils the proper discharge of its duty. This was a technique devised by the Strasbourg court in order to promote the proper application of the margin of appreciation. In my view, it has no place in the national court’s consideration of whether a measure which interferes with a Convention right is proportionate, since, as Lord Mance JSC observed in [*Recovery of Medical Costs*], at the domestic level, the margin of appreciation is not applicable. Indeed, in the national setting, this court, in a number of cases, has articulated an approach to examination of the proportionality of the interference where consideration of the question whether it was “manifestly without reasonable foundation” is conspicuously absent.

¹¹⁸ DA (n 102) [64], [65].

Lady Hale's and Lord Kerr's dissent is significant given the bedroom tax case below that was determined by the ECtHR. Lord Kerr's view as to the 'importation' of the margin of appreciation to the national courts' assessment of proportionality is addressed at the end of this part.

Challenges to the bedroom tax

The litigation relating to the bedroom tax mostly took place before the second round of the benefit cap litigation and *DA/DS*. The bedroom tax operated to reduce the amount of HB that was payable by setting a limit for the maximum number of bedrooms a claimant's household was deemed to need.¹¹⁹ In broad terms, the number of bedrooms is calculated as follows: one bedroom is allowed for a couple; one bedroom for each person who is not a child; and one bedroom for each child, but two children under 10 of either sex, and two children of the same sex under 16, are expected to share a bedroom. A maximum amount of HB payable was set by reference to the deemed number of bedrooms. There were limited exceptions which provided for extra rooms in some circumstances and, as will be seen below, these became significant. As with the benefit cap, LAs received a central government grant to make DHPs to top-up HB payments in the short to medium term where claimants suffered hardship as a result of the bedroom tax.

Various challenges were brought by those affected by the bedroom tax. *R (A)* was a challenge to the bedroom tax as it affected a claimant who had an extra room under a Sanctuary Scheme which provided adaptations, essentially a secure room, to protect her

¹¹⁹ The policy was implemented by the Housing Benefit (Amendment) Regulations 2012, SI 3040/2012 which amended the Housing Benefit Regulations 2006, SI 2006/213.

from domestic violence.¹²⁰ *Rutherford* was a challenge in relation to a child with profound mental and physical disabilities who needed round the clock care and an additional bedroom was required for the overnight carers to sleep in.¹²¹ While the regulations made provision for an extra bedroom for adults who required overnight care, there was no similar provision for children. *MA* was a group of challenges brought by or on behalf of adults and children with disabilities who needed an extra room because their disabilities meant: they could not share a room as a couple, share a room with another child, or required an additional room to store the equipment required due to their disability.¹²² *Cotton* was a challenge by parents who were divorced or separated and had shared care arrangements and who were not entitled to HB for bedrooms for their children since they were not the primary carers.¹²³

In broad terms, the challenges were decided in much the same way as the benefits cap cases. In *Cotton*, the one bedroom tax case that was not appealed, it was argued that the bedroom tax breached article 8 and article 14 read with article 8. The court's primary decision was that, since DHPs had or would have compensated for the reduction in HB, there was no interference with article 8. The secondary decisions were that if the bedroom tax obliged the claimants to move to smaller accommodation, this would not interfere with article 8; and, in any event, the bedroom tax policy as it applied to those who had shared care arrangements was not MWRP.

¹²⁰ *R (A) v Secretary of State for Work and Pensions* [2015] EWHC 159 (Admin) [43(1)(3)], [44], [81] (HHJ Worster).

¹²¹ *Rutherford v Secretary of State for Work and Pensions* [2014] EWHC 1631 (Admin) [42] (Stuart-Smith J).

¹²² *R (MA) v Secretary of State for Work and Pensions* [2013] EWHC 2213 (Admin) [3(1)], [35] (Laws LJ, Cranston J).

¹²³ *R (Cotton) v Secretary of State for Work and Pensions* [2014] EWHC 3437 (Admin) [5(a)(b)], [31], [58] (Males J)

The other bedroom tax cases are more complicated in that there were conjoined appeals to the Court of Appeal and then to the Supreme Court. None of the Convention grounds succeed at first instance. *MA* was appealed unsuccessfully to the Court of Appeal.¹²⁴ After some delay waiting for the judgment of the Supreme Court in the first benefit cap case *JS/SG, R (A)* and *Rutherford* were successfully appealed to the Court of Appeal;¹²⁵ and then all three cases were conjoined before the Supreme Court as *Carmichael*, though for convenience, it is referred to here as *MA*.¹²⁶

The Supreme Court decided that in relation to disability in general, it was reasonable for the Secretary of State to regard DHPs as an appropriate method of dealing with disability rather than having an exhaustive set of 'bright line' rules. However, two aspects of the relevant regulations were unanimously found to be MWRP. First, it was unreasonable not to allow an extra bedroom for an adult with a disability who had a transparent medical need for the extra bedroom, given that the regulations made provision for children with disabilities who had a need for an extra bedroom. Second, it was unreasonable not to make provision for an extra bedroom for overnight carers for children, given that the regulations made provision for an extra bedroom for adults who required overnight carers. Those were the only two bases on which the disability claims succeeded. The Secretary of State sought to justify the regulations on the basis that an extra bedroom for a child with disabilities who could not share was justified on the basis that the best interests of the

¹²⁴ *R (MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13, [2014] PTSR 584 [38] (Lord Dyson MR, Longmore, Ryder LJ).

¹²⁵ *Rutherford v Secretary of State for Work and Pensions* [2016] EWCA Civ 29 [45], [61] (Lord Thomas CJ, Tomlinson, Vos LJ).

¹²⁶ *R (on the application of Carmichael) v Secretary of State for Work and Pensions*, also known as *R (MA) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550, [2016] UKSC 58 (Lord Neuberger PSC, Lady Hale DPSC, Lord Mance, Lord Sumption, Lord Carnwath, Lord Hughes, Lord Toulson JJSC)

child required an extra bedroom, and this consideration did not apply to adults. As both the Court of Appeal and the Supreme Court observed, if that was the Secretary of State's case on justification, it was difficult to understand why an extra bedroom for overnight carers for a child was not justified on the same basis of the best interests of the child; and why an extra bedroom for overnight carers for an adult was justified.¹²⁷

There was not unanimity in relation to *R (A)*, the Sanctuary Scheme claim, where the majority essentially decided that, while the Secretary of State could have allowed an exception for victims of domestic violence who need to remain in their existing accommodation, the decision to rely on DHPs was not MWRF. The dissentients again included Lady Hale, but with Lord Carnwath rather than Lord Kerr as in *DA/DS*. Again, while the MWRF test was accepted, the difference of opinion turned on the intensity of review. On the basis that it was accepted that the claimant in the Sanctuary Scheme probably needed to stay in her existing accommodation, the availability of DHPs could not - as with the disability claims that succeeded - justify the discrimination. Again this dissent becomes significant when an application was made to the ECtHR.

In *JD*, applications were made to ECtHR by the claimant in *R (A)* and by one of the claimants who did not succeed in a disability claim and whose daughter had severe mental and physical disabilities and whose home had been specially adapted to meet those disabilities.¹²⁸ The claims were argued on the basis that the claimants needed to stay in their existing accommodation. The First Section of the ECtHR identified that the claimants were treated in the same way as other HB recipients even though their circumstances were significantly different. As to the applicable test, the ECtHR decided:

¹²⁷ *ibid* [46].

¹²⁸ *JD and another v UK* (2020) 48 BHRC 36.

the margin of appreciation the States enjoy in establishing different legal treatment for people with disabilities is considerably reduced ... and that because of the particular vulnerability of persons with disabilities such treatment would require very weighty reasons to be justified ... The Court has also considered that as the advancement of gender equality is today a major goal in the member States of the Council of Europe, very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention ...¹²⁹

The position of the ECtHR seems to be that the margin of appreciation is limited in some cases and that weighty reasons are required to justify differential treatment. While the availability of DHPs met the proportionality test in the disability case, the decision of the majority of the ECtHR in the Sanctuary Scheme case was:

the Court notes that the legitimate aim of the present scheme – to incentivise those with ‘extra’ bedrooms to leave their homes for smaller ones – was in conflict with the aim of Sanctuary Schemes, which was to enable those at serious risk of domestic violence to remain in their own homes safely, should they wish to do so ...

Given those two legitimate but conflicting aims the Court considers that the impact of treating the second applicant, or others housed in Sanctuary Schemes, in the same way as any other Housing Benefit recipient affected by

¹²⁹ *ibid* [88].

the impugned measure, was disproportionate in the sense of not corresponding to the legitimate aim of the measure. The Government have not provided any weighty reasons to justify the prioritisation of the aim of the present scheme over that of enabling victims of domestic violence who benefitted from protection in Sanctuary Schemes to remain in their own homes safely. In that context, the provision of DHP could not render proportionate the relationship between the means employed and the aim sought to be realised where it formed part of the scheme aimed at incentivising residents to leave their homes, as demonstrated by its identified disadvantages ...

Accordingly, the imposition [of the relevant regulation] on this small and easily identifiable group has not been justified and is discriminatory. In coming to that conclusion, the Court also recalls that in the context of domestic violence it has found that States have a duty to protect the physical and psychological integrity of an individual from threats by other persons, including in situations where an individual's right to the enjoyment of his or home free of violent disturbance is at stake ...¹³⁰

The ECtHR essentially decided that weighty reasons were required to justify the discrimination along the same lines of the more intensive form of review envisaged by the minority in the Supreme Court. The bedroom tax cases are considered further in the conclusion to this chapter.

Challenges to the two-child limit

¹³⁰ *ibid* [88], [103]. [104], [105].

SC encompassed several challenges to the two-child limit. Subject to certain exceptions, the two-child limit operated such that where a family made a claim for welfare benefits, no additional benefit or premiums would be paid for a child born on or after 6 April 2017 if the family was already receiving benefits for two or more children.¹³¹ There were four claimants and the grounds alleged breaches of the Convention on the basis of articles 8 and 12, and article 14 read with article 8 and A1P1. As with the benefit cap, women were more likely to be affected by the two-child limit since they were more likely than men to care for children in single parent families. The factual basis was that the two-child limit discriminated against the claimants as women compared to men; against children compared to adults whose benefits had not been limited; and against children in larger families compared to children in smaller families who were unaffected by the cap.

At first instance, all the grounds failed save in relation to the sequencing provisions relating to a child who would otherwise be in LA care and those provisions were found to be irrational on the ground analysed in chapter 6.¹³² The first instance decision included the findings that the two-child limit did not breach articles 8 or 12, nor engage article 14 read with article 8 or A1P1. The Court of Appeal agreed that there were no breaches of articles 8 or 12, but that the two-child limit did engage article 14 read with article 8 and A1P1 on the basis that ‘other status’ could include being a member of a family containing three or more children.¹³³ The issue was, therefore, whether the differential treatment was justified and the court found the two-child limit was not MWRP.

¹³¹ In relation to existing benefits, the two-child limit was implemented by the Welfare Reform and Work Act 2016, s 13 which amended the Tax Credits Act 2002, s 9. A declaration of incompatibility was sought in relation to s 13.

¹³² *R (SC) v Secretary of State for Work and Pensions* [2018] EWHC 864 (Admin), [2018] 1 WLR 5425 [3], [56], [81] (Ouseley J).

¹³³ *R (SC) v Secretary of State for Work and Pensions* [2019] EWCA Civ 615, [2019] 1 WLR 5687 [2], [39], [47] (Patten, Leggatt, Nicola Davies LJ).

The appeals were heard by a Supreme Court panel of seven, though on this occasion the Court was unanimous on all issues.¹³⁴ As to the article 8 and 12 grounds, there was no breach since the Convention did not oblige the state to provide additional income for every child and there was no positive obligation to provide financial support to enable people to found a family. As to the discrimination grounds on article 14, the Court decided the legislation discriminated against: women in comparison to men contrary to article 14 read with article 8 and A1P1; and children in families containing three or more children in comparison to families with one or two children contrary to article 14 read with article 8. There was then the issue of justification. Lord Reed gave the only judgment and identified as one of the issues to be determined:

whether the approach to proportionality under article 14 set out by this court ... to the effect that the court will respect the policy choice of the executive or the legislature in relation to general measures of economic or social strategy unless it is “manifestly without reasonable foundation”, accurately reflects the approach of the [ECtHR] and should continue to be followed.¹³⁵

The issue primarily arose as a result of the decision of the ECtHR in *JD*, the bedroom tax case above, and the requirement of weighty reasons. The essential conclusions in Lord Reed’s lengthy judgment, which included a very detailed review of the relevant ECtHR and domestic authorities, were as follows. A low intensity of review was generally appropriate in cases concerned with judgments of social and economic policy in the field of welfare

¹³⁴ *R (SC) v Secretary of State for Work and Pensions* [2022] UKSC 26, [2022] AC 223 90 [2], [24], [34], [39], [55] (Lord Reed PSC, Lord Hodge DPSC, Lord Lloyd-Jones, Lord Kitchin, Lord Sales, Lord Stephens JJSC, Lady Black).

¹³⁵ *ibid* 73.

benefits and pensions, such that decisions of Parliament and government ought to be respected unless they were MWRF. However, the intensity of review would be influenced by a wide range of factors depending on the circumstances of the particular case. Where a difference of treatment was on what are described as 'suspect' grounds - which include race and sex - the standard of review would be higher and, as a general rule, differential treatment on grounds such as sex or race requires cogent justification. As to the MWRF test, it functioned to describe a wide margin of appreciation and, rather than seeking to define the test, the better approach was to focus on the appropriate margin of judgment. In relation to article 14 cases generally, Lord Reed stated:

In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure [the Welfare Reform and Work Act 2016, s 13] when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process.

As to the outcome of all of this and the manner in which the principle was applied in *SC*, the aims of the two-child policy were to reduce spending on benefits to address the fiscal deficit and to achieve fairness between those who were receiving benefits and those who were working, such that those in receipt of benefits did not continue to receive a rise in income for every subsequent child. Lord Reed identified that both were legitimate objectives and there was a rational connection between the objectives pursued and the policy. In terms of the discrimination against women, this was indirect and it was inevitable if the aims of the policy were to be achieved given that 90% of single parents are women and 33% of families receiving benefits were single parents families. Lord Reed concluded:

Once it is understood that the legitimate aims of the measure could not be achieved without a disproportionate impact on women, arising from the demographic fact that they form the majority of parents bringing up children, the only remaining question which can be asked, in relation to proportionality, is whether the inevitable impact on women outweighed the importance of achieving the aims pursued. Parliament decided that the importance of the objectives pursued by the measure justified its enactment, notwithstanding its greater impact on women. I see no basis on which this court could properly take a different view.¹³⁶

In terms of the discrimination against children living in families of three or more children, the differential treatment was not in an area where ‘very weighty reasons’ were required and Lord Reed concluded that, while the courts had to bear in mind the best interests children, the assessment of proportionality:

¹³⁶ *ibid* [199].

ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning. There are no legal standards by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies.¹³⁷

In the very broadest of terms, there appears to have been recognition that the MWRF test may need to be adjusted in some circumstances, but the two-child limit was not one of those circumstances and a high degree of deference was due.

Other challenges

There were then various other cases that challenged more minor aspects of the benefit reforms. In chronological order, these were as follows. In *Reilly*, the ‘work for your benefit’ case where the relevant regulations were found to be *ultra vires*, the Convention ground was that the schemes amounted to forced or compulsory labour in breach of article 4.¹³⁸ At first instance, the court applied established ECtHR case law to find there was no forced or

¹³⁷ *ibid* 208.

¹³⁸ *Reilly* (n 57) [8], [169].

compulsory labour and the purpose of article 4 was to prevent colonial exploitation of labour. The court observed that while the Convention is a living instrument, the work for your benefit schemes were not analogous to forced labour in the colonies.¹³⁹ The Court of Appeal agreed, albeit on a slightly opaque basis, that article 4 was not engaged;¹⁴⁰ and the Supreme Court concluded there was still no breach of article 4 despite the claimant now being obliged to comply with the scheme since its legality had been retrospectively validated by Parliament.¹⁴¹

R (C) was a challenge by two claimants to delays of 13 months and 10 months respectively in the determination of PIP claims.¹⁴² The claim succeed on the common law fairness ground analysed in chapter 6. The Convention ground was breach of article 6 and it was argued that the delay infringed the right to a determination as to civil rights within a reasonable time. The ground failed on the basis that article 6 was not engaged since there was no dispute between the parties until the PIP claims had been processed and decisions made.¹⁴³

RF was the challenge was to regulations which amended the PIP eligibility descriptors.¹⁴⁴ The statutory *ultra vires*, common law consultation and Convention grounds overlapped,

¹³⁹ *ibid* [174].

¹⁴⁰ *Reilly* (n 58) [27], [65].

¹⁴¹ *Reilly* (n 60) [27], [77].

¹⁴² *R (C) v Secretary of State for Work and Pensions* [2015] EWHC 1607 (Admin) [1(ii)(ii)], [104], [116] (Patterson J).

¹⁴³ *ibid* [104]. At the hearing the claimants also sought permission to rely on an A1P1 ground, and Patterson J permission would have been refused

¹⁴⁴ *R (RF) v Secretary of State for Work and Pensions* [2018] PTSR 1147, [2017] EWHC 3375 (Admin) [40(i)], [41] (Mostyn J). The challenge was to the Social Security (Personal Independence Payment) (Amendment) Regulations 2017, SI 2017/194 which amended the Social Security (Personal Independence Payment) Regulations 2013, SI 2013/377.

and the case was essentially determined on the Convention ground. The factual background was a decision of the Upper Tribunal (UT) in relation to PIP which rejected the Secretary of State's case that effectively excluded entitlement to the mobility component of PIP if the inability to plan and carry out journeys was caused by psychological distress as opposed to physical disabilities. The Secretary of State had amended the regulations to reverse the UT's decision. It was argued that this amounted to discrimination on the basis of article 8 and article 14 read with A1P1. The ground essentially succeeded on the basis that the Secretary of State could not justify the differential treatment between physical and psychological conditions and the regulations were MWRF.

Parkin was a challenge to UC entitlement for the self-employed.¹⁴⁵ The ground was article 14 read with A1P1 on the basis that self-employment was 'other status'. The Court accepted that the subject matter was within the scope of A1P1 and there was a difference in treatment. However, the Court decided that the claimant was not in an analogous situation to someone who was employed, so the claim failed on that basis; and further, the way in which self-employed people were treated was not MWRF.

Delve was the challenge to the equalisation and increase of the SPA for women and breaches of A1P1 and article 14 read with A1P1 were argued.¹⁴⁶ The grounds were comprehensively rejected on the basis that: (a) the ECtHR jurisprudence was clear in that a state had to be able to adjust the pension system and an applicant could not claim equal treatment in time; (b) the legislation was not MWRF given the purpose was to equalise

¹⁴⁵ *R (Parkin) v Secretary of State for Work and Pensions* [2019] EWHC 2356 (Admin) (Elisabeth Laing J) [2], [119]. The challenge was to the Universal Credit Regulations 2013, SI 2013/376 and the operation of the minimum income floor (MIF) which attributed to the self-employed more income from self-employment than they were receiving.

¹⁴⁶ *Delve* (n 30) [2], [43], [67].

pension age to achieve fairness and ensure affordability; and (c) there was no discrimination or less favourable treatment in removing an advantage which had previously been available only to women.

Finally, there were three UC cases that raised the MWRF test when the claimants - all of whom had significant disabilities or serious illnesses, or cared for children with significant disabilities - were transferred from legacy benefits to UC. *R (P)* and *TP* were linked cases involving claimants who had moved to a different LA area and had been obliged to claim UC or had moved within an LA area and had been wrongly advised that they needed to claim UC which then ended their entitlement to legacy benefits.¹⁴⁷ *TD* involved claimants whose entitlement to legacy benefits were stopped by the DWP and the claimants were then obliged to claim UC which provided for lower payments in relation to disability. The DWP subsequently revised the decisions on legacy benefits such that the claimants were re-entitled to legacy benefits, but because they had now claimed UC, this operated as a bar to entitlement to legacy benefits (the 'lobster pot' principle).¹⁴⁸ In each case the financial losses were significant. The cases were argued on the basis of breaches of Article 14 read with A1P1. All the claims succeeded either at first instance or on appeal on the basis that the discriminatory impact of the regulations were MWRF.¹⁴⁹ Again, conclusions in relation to all these cases are drawn in the final part of this chapter after

¹⁴⁷ *R (P) v Secretary of State for Work and Pensions* [2018] EWHC 1474 (Admin), [2019] PTSR 238 [3], [50], [75] (Lewis J); *R (TP) v Secretary of State for Work and Pensions* [2019] EWHC 1116 (Admin) [2019] PTSR 2123 [41]. It must surely have been relevant that one claimant in *R (P)* had moved to a smaller property to avoid losing benefit as a result of the bedroom tax and then lost even more benefit as a result, and another claimant had moved to secure specialist cancer treatment.

¹⁴⁸ *R (TD) v Secretary of State for Work and Pensions* [2019] EWHC 462 (Admin) [40(1)], [41] (May J)

¹⁴⁹ *R (TP) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37, [2020] PTSR 1785 [3], [4], [61], [65], [69]; *R (TD) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618 (Singh, Rose, Arnold LJ).

consideration to the Convention grounds that were argued in the administration of justice cases.

8. Convention grounds of review - administration of justice

The challenges in the field of administration of justice were fewer and generally less complex than in the welfare benefits claims. Most of the cases have, at least to an extent, been covered in chapters 5 and 6 since they raised statutory and common law grounds.

There were two cases that raised A1P1 challenges. *R (A)* was the challenge to the legality of aspects of the 2012 Criminal Injuries Compensation Scheme in that it excluded those with unspent criminal convictions that resulted in a custodial or community sentence.¹⁵⁰

The Convention grounds at first instance were that the refusal of compensation breached A1P1 and article 14 read with A1P1.¹⁵¹ The A1P1 ground failed at on the basis of domestic authority and an expectation as to future property is not a possession unless earned or there is an enforceable claim; and the article 14 ground failed on the basis that excluding those with unspent convictions from compensation was not MWRP. On appeal, a new Convention ground was that the refusal of compensation breached article 4 read with article 14 on the basis that two of the claimants had been trafficked and subject to labour exploitation. The argument was rejected by the Court of Appeal,¹⁵² and the Supreme Court.¹⁵³ While the scheme was within the scope of article 14 read with article 4, and there was differential treatment between those who had and did not have unspent criminal

¹⁵⁰ *R (A)* (n 38) [3(a)], [3(b)], [4(ii)], [51], [65], [120].

¹⁵¹ The first Convention ground was argued at first instance and the second Convention ground argued on the appeals.

¹⁵² *R (A)* (n 40) [18(i)], [46].

¹⁵³ *R (A) v Criminal Injuries Compensation Authority* [2021] UKSC 27, [2021] 1 WLR 3746 (Lord Lloyd-Jones, Lady Arden, Lord Hamblen, Lord Burrows, Lord Stephens JJSC) [1], [21].

convictions; the differential treatment was justified on the MWRF test since the scheme operated in the field of social welfare policy.

In the second *LCCSA* case,¹⁵⁴ the challenge to the decision to reduce the number of criminal legal aid contracts, it was argued that there would be a breach of A1P1 on the basis that the goodwill of those firms not awarded contracts would be lost. The argument was rejected on the basis that what was being lost was not goodwill but future income which, on clear ECtHR authority, A1P1 did not protect.

Fletcher was analysed in chapter 6 and alleged a failure by the Secretary of State for Justice to provide resources such that prisoners serving indeterminate sentences for public protection (IPPs) could demonstrate to the Parole Board that they no longer needed to be detained for public protection.¹⁵⁵ In addition to the common law ground that succeeded, the claim raised a Convention ground on the basis that continued detention breached article 5. The grounds were dismissed on the basis there was no breach given the magnitude of the failures and binding Supreme Court authority.¹⁵⁶

There were several cases that raised Convention grounds in relation to funding or legal aid.¹⁵⁷ *Henderson* was the challenge to the refusal to order the payment of costs out of

¹⁵⁴ *R (London Criminal Courts Solicitors' Association) v Lord Chancellor* [2015] EWHC 295 (Admin) [7], [90] (Laws LJ, Cranston J).

¹⁵⁵ *Fletcher v Governor of HMP Whatton* [2014] EWHC 3586 (Admin), [2015] 3 All ER 558 [4], [85] (Dingemans J).

¹⁵⁶ *ibid* [85] and *R (James) v Secretary of State for Justice* [2009] UKHL 22, [2010] 1 AC 553.

¹⁵⁷ In on case an article 6 ground was not determined: *R (Law Society) v Lord Chancellor* [2012] EWHC 794 (Admin) [85] in relation to the abolition of committal fees.

central funds where the defendant had been acquitted of an offence at the Crown Court.¹⁵⁸ The court rejected the Convention ground on the basis of a series of ECtHR decisions that established a failure to reimburse the costs of an acquitted defendant did not breach article 6. *Howard League* was the challenge to regulations narrowing the scope of legal aid for prison law which succeeded before the Court of Appeal on the common law ground of inherent or systematic unfairness. At first instance the article 6 challenge was held to be unarguable because the ECtHR jurisprudence was clear that provision of legal aid was not mandatory save in exceptional cases.¹⁵⁹

The Convention ground in *Gudanaviciene* was the same as the EU law ground analysed above, save that it related to those aspects of the LC's Guidance on ECF that were incompatible with the Convention. The Court of Appeal decided the Guidance was unlawful insofar as it was inconsistent with the words of LASPOA 2012, s 10 as to when the Convention required legal aid to be provided.¹⁶⁰ *Letts* was a similar challenge to the legality of the LC's guidance relating to legal aid for next of kin at inquests.¹⁶¹ The LC's guidance to caseworkers was misleading in suggesting that legal aid should only be granted if the state was arguably in breach of its article 2 duty to the deceased. The guidance was unlawful in not recognising that legal aid might need to be provided to next of kin to be represented at an inquest to satisfy the investigative duty under article 2. The guidance was therefore unlawful. None of the Convention legal aid cases are controversial

¹⁵⁸ *R (Henderson) v Secretary of State for Justice* [2015] EWHC 130 (Admin) [4(i)], [17] (Burnett LJ, Goss J).

¹⁵⁹ *R (Howard League for Penal Reform) v Lord Chancellor* [2014] EWHC 709 (Admin) [41], [46] (Rafferty LJ, Cranston J).

¹⁶⁰ *Gudanaviciene* (n 55) [4], [60].

¹⁶¹ *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin), [2015] 1 WLR 4497 [1], [16] (Green J).

in that the courts essentially decided that legal aid had to be available where the jurisprudence of the ECtHR required it to be available.

Finally, there are the Convention grounds that were argued in *PLP* and *UNISON*. Both cases have been analysed extensively in relation to other grounds. *UNISON* was the challenge to ET and EAT fees and the Convention ground was article 6 and article 14 read with article 6 on the basis that the higher fees in Type B cases discriminated against women, ethnic minorities and the disabled who were more likely to bring Type B claims. At first instance, the Court was unable to resolve the issue as to whether there was discrimination on the evidence but concluded ‘we have a strong suspicion that there will be some disparate effect on those who fall within a protected class ... We will, accordingly, go on to consider the arguments in relation to justification’.¹⁶² Its conclusion in relation to justification was, however, that ‘it is not possible, and would be wrong for this court, to reach a conclusion as to objective justification, dependent as that exercise is on weighing the extent of the disparate effect’.¹⁶³ Neither the Court of Appeal nor the Supreme Court dealt with the Convention issues separately from the other grounds, including the EU law ground analysed above.

PLP was the challenge to the use of a Henry VIII power to limit eligibility for legal aid on the basis of a residence test. The Convention ground was article 14 read with article 6 on the basis that limiting access to legal aid by reference to residence test was discriminatory. The ground is interesting because it squarely raised the issue as to whether the standard of review was - as with the welfare benefits cases - MWRP. At first instance the court identified that the residence test was discriminatory, and the key question was: ‘whether

¹⁶² *R (Unison) v Lord Chancellor* [2014] ICR 498, [2014] EWHC 218 (Admin) [84].

¹⁶³ *ibid* [88].

the provision of legal assistance other than in fulfilment of a legal obligation is analogous to the payment of welfare benefits. If it is analogous, then a residence test ... can be justified without difficulty'.¹⁶⁴ Moses LJ's answer was:

These cases seem to me to be different from the distribution of welfare benefits because the Government has already reached the conclusion that certain categories of case demonstrate such a high priority of need as to merit litigation supported by taxpayers' subsidy.

...

In such a context, when what is at stake is the protection which domestic law accords to all who fall within its jurisdiction, it seems to me that the provision of legal assistance is far from analogous to the distribution of welfare benefits.

...

The mere saving of cost cannot justify discrimination.¹⁶⁵

The line of reasoning is that because the LASPOA 2012 focussed legal aid on the basis of need, and because the availability of legal assistance was more important than the distribution of welfare benefits, then the MWRF test did not apply. This decision was reversed by the Court of Appeal where Laws LJ concluded:

In light of all these considerations, the "manifestly without reasonable foundation" test for justification constitutes in my judgment the law's default position in any discrimination case where the subject matter is one of broad, or

¹⁶⁴ *R (Public Law Project) v Lord Chancellor* [2014] EWHC 2365 (Admin), [2015] 1 WLR 251 [3], [51]

¹⁶⁵ *ibid* [71], [78], [82].

strategic, economic and/or social policy. It will however be disapplied, and a more vigorous, intrusive approach adopted, where either the grounds of discrimination or the context of the case call for the law's special protection: the former because of the law's attribution of value to every individual, the latter because of the law's special responsibility in certain areas such as access to justice.

...

In my judgment it is clear that PLP cannot look to the courts to exercise an intrusive judgment by reference to the grounds of discrimination which are inherent in the Order under challenge. Place of residence - the ground in question - is not a characteristic, such as sex or race, which is specially protected by the law on the footing I have described.

...

I would hold that the test for justification in this discrimination case is whether the residence test is "manifestly without reasonable foundation". Plainly, that test is not met.¹⁶⁶

While Laws LJ was willing to countenance that certain forms of discrimination in relation to certain rights would be subject to a more stringent test, the application of a residence test for legal aid was subject to the MWRF test. PLP were given permission to appeal on the discrimination issue. The Supreme Court's conclusion on that issue, having agreed unanimously that the fees order was *ultra vires* LASPOA 2012 was 'subject to the parties seeking to persuade us otherwise, it would be wiser not to deal with the discrimination issue. The parties did not seek to dissuade us from this course, and therefore it would be

¹⁶⁶ *R (Public Law Project) v Lord Chancellor* [2015] EWCA Civ 1193, [2016] 2 WLR 995 [38], [39], [45] (Laws, Kitchin, Christopher Clarke LJ).

inappropriate to say anything more about it'.¹⁶⁷ Given the decisions of the Supreme Court in relation to welfare benefits, it seems likely that there was again judicial disagreement about the applicability or outcome of the MWRF test.

9. Conclusions on Convention grounds

While much of the litigation involving Convention grounds was extremely complex and long running, conclusions in relation to whether it exceeded the limits of adjudication envisaged by political constitutionalism can be stated fairly shortly and with a high degree of confidence.

First, the Convention did enable a substantial number of challenges to political decision-making and this is particularly striking in the field of welfare benefits. In Griffith's terms, the Convention at least presented the possibility of a substantial shift in decision-making power from Parliament and government to the judiciary. In Ekins and Gee's terms, the Convention grounds: required domestic courts to engage in forms or modes of reasoning that are different from the common law tradition, particularly in relation to article 14; required the judiciary to evaluate the proportionality of primary and secondary legislation; required the courts to engage with the jurisprudence of the ECtHR in general; and required the courts to engage with the ECtHR jurisprudence which treats the Convention as a living instrument in relation to article 14 and the development what constitutes discrimination and 'other status'. Given the scale of the litigation, in particular in relation to welfare benefits, it appears the Convention did encourage litigation and create legal uncertainty. It seems fair to say that the article 14 cases specifically engendered uncertainty given the significant judicial disagreement in the numerous cases as to what amounted to discrimination under

¹⁶⁷ *R (Public Law Project) v Lord Chancellor* [2016] AC 1531, [2016] UKSC 39 [39] (Lord Neuberger PSC, Lady Hale DPSC, Lord Mance, Lord Reed, Lord Carnwath, Lord Hughes, Lord Toulson JJSC)

article 14, and the applicability and outcome of the MWRF test. Perhaps the matters that can be entered on the other side of the ledger are that the scale of the litigation at least in part reflected the scale of political decision-making, the significant impact of the policies on benefit claimants, and the lack of apex court authority on how the Convention applied; and, as to discrimination, domestic law experiences many of the same complexities as the Convention when it comes discrimination and the identification of comparators.

Second, there is limited evidence to support other critiques made by political constitutionalism. There is no evidence that the interpretative duty under HRA 1998, s 3(1) created uncertainty as to how statutes would be interpreted or undermined the stability of primary legislation. There was only one declaration of incompatibility - *Reilly* - and that was in unusual circumstances and of very limited effect. There is no evidence of the courts reasoning politically when it comes to choosing whether to interpret to achieve compatibility or make a declaration of incompatibility. In relation to the jurisprudence of the ECtHR, subject to the qualification that what follows does not apply to the article 14 cases, there was no evidence that the case law of the ECtHR presented particular difficulties in terms of it being opaque, unstable or contradictory; and no evidence that the need to interpret the Convention as a living instrument created problems. Most of the cases involved the routine application of clear domestic or ECtHR jurisprudence and in general the courts deferred to political decision-making. Insofar as *Gudanaviciene* and the other legal aid cases are exceptions, given eligibility turned on a statutory provision that required legal aid to be provided where the Convention so required, in these cases the courts had a high degree of institutional competence in terms of when it was required.

Third, and perhaps this is the most significant conclusion from a political constitutionalist perspective, the Supreme Court chose to minimise the impact of the Convention on

political decision-making, whether in primary or delegated legislation, both by adopting the MWRF test and then applying it with limited intensity. There are a number of linked issues. Realistically, the MWRF test was the least intensive standard of review available given HRA 1998, s 2 and the need to take into account the ECtHR jurisprudence. Adopting a lower test would likely have led to successful applications to the ECtHR. Notwithstanding the decision of the ECtHR in *JD*, the Supreme Court maintained its position in *SC* as to the applicability of the MWRF test. It was, putting the matter at its lowest, open to the judiciary to adopt a more intensive standard of review than MWRF because, while the ECtHR may find a measure within the margin of appreciation of a state, there is no obligation on domestic courts to give the executive or legislature a similar margin of appreciation.¹⁶⁸ As the disagreements within the Supreme Court show, other more intensive standards of review were available.

To give one illustration as to the application of the MWRF test, as to consequences in *DA/DS*, Lord Wilson stated:

Does the revised cap inflict poverty on those subject to it? The answer is hotly contested. But since the Government cannot sensibly argue that the computation of welfare benefits is intended to provide a family with more than it

¹⁶⁸ It is at least arguable that the jurisprudence of the ECtHR requires domestic courts not to apply the margin of appreciation. See *A v UK* (2009) 49 EHRR 29 [184] ‘The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of state at the domestic level’. As to the arguments as to the transferability of the margin of appreciation and that it is ‘... an international jurisprudential tool for demarcating State and Court responsibilities in the application of the Convention, not a domestic public law mechanism’, see Alistair Mowbray, ‘Subsidiarity and the European Convention on Human Rights’ (2015) 15 Human Rights LR 313; Dean Spielmann, ‘Whither the Margin of Appreciation?’ (2014) 67 CLP 49. As to specific analysis of the issues in relation to the MWRF test and the welfare benefits cases, see Jed Meers ‘Problems with the manifestly without reasonable foundation test’ (2020) 27 Journal of Social Security Law 12.

needs, it follows that a reduction of those benefits will provide it with less than it needs. Of course the concept of needs is to some extent elastic: they can be assessed with somewhat greater or lesser stringency. But the Government does not seek to argue that the lower figures set for the revised cap have been reached by reference to any scale of needs. Equally, in a speech in 2016 relied on by the Government, Mr Cameron, then the Prime Minister, acknowledged that the effect of welfare benefits was 'to push people's incomes just above the poverty line'. It follows that a substantial reduction in them pulls their incomes well down below the poverty line. In my view there are sound reasons for accepting the evidence given by the Child Poverty Action Group in the *DS* case that the effect of the cap is to reduce a family well below the poverty line, judged by the generally accepted measure of less than 60% of median United Kingdom income equivalent to the size of the household.

...

There ensues striking evidence adduced on behalf of the DA appellants about the effect on children of an early life of poverty. Professor Atkinson, the former Children's Commissioner for England, echoing evidence from Jonathan Bradshaw, Professor of Social Policy at York University, offers this summary:

Living in poverty has a serious impact on children's lives, negatively affecting their educational attainment, health, and happiness as well as having long term adverse consequences into adulthood . . . Even a few years of poverty can have negative consequences for a child's

development and is especially harmful from the ages of birth to five.¹⁶⁹

As to the purpose of incentivising work on the basis that an ethic of work within a family inculcated better outcomes for its children, Lord Kerr's conclusion was:

One can only incentivise parents to obtain work if that is a viable option. The evidence in this case overwhelmingly shows that in most cases in the *DA* and *DS* cohorts, this is simply not feasible. In particular, lone parents are placed in an impossible dilemma. If they go out to work, they must find the resources for childcare. Those in the *DA* and *DS* groups will routinely find it impossible to obtain employment which will remunerate them sufficiently to make this a sensible choice. They also face the difficulty of obtaining suitable childcare, irrespective of whether they can afford it.¹⁷⁰

Given there was very limited prospect of achieving better outcomes for children by their single parent actually working, the effect of the policy was simply to impose on children the consequences described by the Children's Commissioner. As to the further identified purpose in *DA/DS* of fiscal savings, Lord Wilson identified this as appearing to be '0.03% of the state's overall annual expenditure on welfare benefits for those of working age'.¹⁷¹ The fair conclusion seems to be that the intensity of review on the MWRF test is low.

¹⁶⁹ *DA* (n 113) [105].

¹⁷⁰ *ibid* [190].

¹⁷¹ *ibid* [32]. Spending on benefits for pensioners - protected by the triple lock - accounts for around half of the DWP's AME.

As to the cases that succeeded on the MWRF test, these were generally where the differential treatment was in some sense obviously unfair or illogical. Examples include: the differential and obviously contradictory treatment of disabled children and adults in the bedroom tax cases; the differential and unfair treatment of claimants in the legacy benefits/ UC cases; the differential treatment of those with mental and physical disabilities in the PIP case; and in *Tigere* where, on the face of it, the claimant was in the same position as those who were entitled to students loans. It seems that, assessing all the cases analysed above in the round, the intensity of review on the MWRF test functions at or near a conventional *Wednesbury* standard.

The significance of *SC* has been recognised from a political constitutionalist perspective and Ekins' analysis is:

The force of Lord Reed's rhetoric, writing for a unanimous Supreme Court, is striking. The judgment may nuance the "manifestly without reasonable foundation" formulation, but it would seem that, where art 14 is concerned, the Supreme Court will not question Parliament's reasoning about the fair balance of considerations. This is an important constitutional development. Taken together with the court's disavowal of jurisdiction to consider compliance with unincorporated treaty obligations and the limitation of the use of parliamentary materials, it is a welcome restoration of constitutional principle. That said, the jurisprudential path to this conclusion has been tortuous and the legal status of the propositions outlined in *SC* must be to some extent contingent.¹⁷²

¹⁷² Richard Ekins, 'Convention rights child tax credits and the constitution' (2022) 138 LQR 551, 556.

Ekins is no doubt right about the MWRF test being only 'nuanced' by Lord Reed in *SC*; and his point about Parliament's reasoning not being questioned applies in the same way to delegated legislation. Ekins' points about treaty obligations and the use of parliamentary materials are both matters considered further in chapter 8, along with what seems to be a marked difference of judicial approach to the intensity of review and degree of deference shown in administration of justice cases and welfare benefits cases.

Chapter 8

Conclusion

Having completed the analysis of statutory, common law, and Convention and EU law grounds of review, the first two parts of this chapter set out the contribution made by this thesis, and identify the limitations of the conclusions. The three parts that follow tackle the issues that have been carried over from chapters 5, 6 and 7: the relevance and weight attached to international law; the relevance and weight attached to parliamentary scrutiny and approval of delegated legislation; and differences of judicial attitude. The final part reaches some overall conclusions in relation to the central question and whether the limits of adjudication envisaged by political constitutionalism were exceeded when determining the judicial review claims that challenged the law and policy that implemented the austerity programme in the UK from 2010 to 2019.

Value and contribution

It is suggested that this thesis makes two important contributions to administrative law scholarship. The first relates to the critique of political constitutionalist thought identified in chapters 1 and 4 which is that it is limited empirically. While some political constitutionalist scholarship develops arguments about the limits of adjudication based on specific controversial or problematic judicial decisions, it does not engage more systematically with the evidence. Although there has been some work that engages in an empirical analysis of claims as to judicial overreach, it has been relatively limited in scope. While, as identified below, this thesis has its own limitations, it has engaged with the evidence as to the existence of judicial overreach in a more structured and detailed way, and in relation to major, long-term, controversial political project.

The second contribution flows from the first and is that there has been limited scholarship on the nexus between the austerity programme implemented in the UK between 2010 and 2019 and judicial review. This thesis is the first piece of work to engage in an overarching way with the legal challenges to the law and policy that implemented the austerity programme and to make findings about the extent to which the courts frustrated that law and policy. In relation to both the first and second contributions, it has been argued that administrative law scholarship (in the narrow sense of judicial review) is focussed on: (a) decisions of the Court of Appeal and the Supreme Court to the neglect of the Administrative Court; (b) certain grounds of review to the relative neglect others.¹ No doubt these arguments apply to political constitutionalist scholarship. While this thesis has - as identified below - engaged with a high number of appellate decisions relative to the number of first instance decisions, it has engaged with a significant body of first instance decisions that were not challenged on appeal. Conclusions as to all of this are made below after the limitations of this thesis are identified.

The limits of this research

Before making any conclusions, the limitations of this research ought to be set out. As identified in chapters 1 and 4, the limits are essentially everything outwith the central question and include the following. The focus has been entirely on judicial review litigation and only on litigation that led to a substantive judgment on the grounds of review together with any appeals. It seems likely there were a significant number of cases that challenged the law and policy that implemented austerity where permission was refused or cases were withdrawn or compromised on unknown terms pre- or post- permission. There is research that suggests a high proportion of judicial review claims are settled on terms that

¹ Joe Tomlinson, 'Do we need a theory of legitimate expectations?' (2020) 40 LS 286, 297. Many of the exceptions to the focus on appellate courts were cited in part 3 of chapter 3.

benefit claimants pre- or post-permission,² but other research that suggests in some areas settlement on terms that benefit claimants is less common.³ It raises the possibility, again one identified in chapter 4, that the focus on decided judicial review claims does not give a true picture as to whether the limits of adjudication envisaged by political constitutionalism were exceeded because it does not engage with cases that are conceded or compromised. It is possible that the limits have been sufficiently exceeded that the government is unable to defend some claims because its prospects of success are so poor.

What does, however, appear significant is that much of the litigation analysed by this thesis was ‘hard-fought’ in the sense that it was unlikely to be withdrawn or compromised once permission had been granted. From the perspective of many claimants, while the prospects of success may have been low - an apparently inevitable conclusion given so few of the grounds succeeded - the benefits were high. So, for example, in relation to the challenges by local authorities (LAs) to central government funding decisions and the challenges by renewable energy providers to reduced or withdrawn subsidies, the cost/benefit analysis discouraged claimants from withdrawing. The potential financial benefits militated against settlement, and the litigation was worth the candle. In relation to many of the legal aid and welfare benefits cases, and the claims by trade unions in relation to pay,

² Varda Bondy and Maurice Sunkin, 'Settlement in judicial review proceedings' [2009] PL 237. Bondy and Sunkin estimate that over 60 per cent of judicial review threats are resolved by dialogue between solicitors; and, in their sample, a third of issued cases ended before reaching the permission stage, and over half were settled after permission had been granted.

³ Richard Kirkham, 'Judicial review, litigation effects and the ombudsman' (2018) 40 J Social Welfare and Family Law 110. Kirkham's analysis, based on an FOI request to the Parliamentary and Health Service Ombudsman in 2016, identified 68 potential claims at the pre-action stage. One complaint was reopened, one complaint resulted in a new investigation, one complaint was withdrawn, and in seven complaints the case was referred for review or reconsideration. In Kirkham's sample of ombuds claims only 7% of cases were successful in securing permission at an oral hearing.

conditions and pensions, while much of this litigation was brought in the name of individuals, it was campaigning litigation funded or managed by organisations with the wider purpose of frustrating the law and policy implementing austerity. A high proportion of the litigation was strategic and brought by highly sophisticated ‘repeat players’ often represented by teams of lawyers led by leading counsel at the peak of the profession.⁴ They were often assisted by interventions from a range of organisations similarly represented, including the Equality and Human Rights Commission. From the perspective of the government, it was presumably similarly disinclined to compromise given its prospects of success in many of the cases were conversely high.

This thesis has identified and analysed 66 first instance judgments; 29 judgments of the Court of Appeal (in relation to 32 first instance decisions) and 10 judgments of the Supreme Court (in relation to 13 first instance decisions). The number of appeals is relatively high,⁵ which perhaps confirms: (a) the strategic or campaigning nature of much of the litigation and the commitment of both sides, though particularly claimants, to succeeding; and (b) the recognition of the judiciary that the litigation raised important issues.⁶ So, while this research only engages with judicial review claims where the

⁴ To give two examples: in *UNSION* before the Supreme Court, leading counsel were Dinah Rose QC and Karon Monaghan QC; and in *DA*, leading counsel for the claimants and interveners were Richard Drabble QC, Ian Wise QC, Caoilfhionn Gallagher QC and Helen Mountfield QC.

⁵ As to research on appeals in judicial review, see Varda Bondy, Lucinda Platt and Maurice Sunkin, ‘The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences’ (Public Law Project, October 2015). In that research, based on 502 judicial review claims, there were appeals in 23% of cases. The equivalent figures for this research are that 48% of cases were appealed to the Court of Appeal and 24% of cases were appealed to the Supreme Court. The significance of the fact that of the 66 first instance decisions, 18 were of the Divisional Court, 12 of which related to the administration of justice, is addressed below. No equivalent data on Divisional Courts is available in the Bondy, Platt and Sunkin research.

⁶ In relation to the article 14 cases, Harlow and Rawlings observe ‘Future historians may well remark on the propensity if the Supreme Court to hear discrimination cases and dispute about them. Judicial power and discretion are laid bare’. Carol Harlow and Richard Rawlings, *Law and Administration* (4th edn, Cambridge 2022) 810.

grounds were substantively determined, the quality and quantity of the litigation might be expected to provide good evidence on which to reach conclusions about where the limits of adjudication lay, and whether they were exceeded from a political constitutionalist perspective. While this research cannot, given the exclusive focus on adjudicated claims, amount to a complete picture, it does provide a significant body of evidence on which to base conclusions.

While four further overlapping limitations are implicit in what is above, they ought to be made explicit. First, the analysis in this thesis only relates to parliamentary decision making (in the few challenges to primary legislation) and law- policy- and decision-making by central government. 134 austerity adjudications were identified, but only the 66 cases that challenged legislation or government policy-making have been analysed. This left 68 judgments unanalysed, mostly challenges to local authority policy- and decision-making relating to the implementation of austerity. While this is a limitation as to the scope of this thesis, it does offer opportunities for further research.⁷ The most obvious is as to similarities or differences in the intensity of review in relation to the exercise of discretionary powers under statute by local as opposed to central government.

Second, the analysis in this thesis relates only to cases where the implementation of the austerity programme was a substantial policy objective or reason for the legislation, policy, decision, or failure to act being impugned in the judicial review claim. As set out in chapter 4, the intensity of review is conventionally low, and deference conventionally high, in cases

⁷ Tony Prosser identifies that ‘The Courts have assumed a major constitutional role in scrutiny of local government expenditure. This has taken a number of forms, including strict application of the rules of *ultra vires* and the development of a common law ‘fiduciary duty’ emphasising local authority requirements to have regard to the interests of those providing funding. ... By contrast, in relation to central government ... the courts have taken a much more restricted role.’ Tony Prosser, *The Economic Constitution* (Oxford 2014).

that relate to macroeconomic decision-making and the allocation of resources. There were, necessarily, numerous references to the economic context and the need to reduce spending in the judgments, and the parties and judges were aware of the political and economic context. While the 66 austerity adjudications amount to a significant body of evidence, when it comes to identifying whether the limits of adjudication envisaged by political constitutionalism have been exceeded, the body of evidence relates to public-spending related law- and policy-making which narrows the scope. No claim is made that the conclusions here can be generalised to government decision-making where public spending issues were not raised in such clear terms.

Third while the public spending implications of deciding the cases - one way or the other - analysed by this thesis varied hugely, and it was not always clear what those implications were, many of the cases had significant financial consequences. To give a range of examples: at one end of the spectrum is *Nyoni* where the cost of losing was providing the claimant with a tuition fee loan for two years (£18,000) at least some of which was likely to be recovered in repayments. *UNISON* seems likely to be the most costly defeat for the government in the administration of justice cases and, given spending on ET and EATs returned to a similar level as before the introduction of fees, the cost of losing was around £30 million annually.⁸ The welfare benefits cases varied enormously. The initial imposition of the benefit cap was expected, after spending on discretionary housing payments

⁸ Doug Pyper, Feargal McGuinness and Jennifer Brown, 'House of Commons Briefing paper: Employment tribunal fees' (number 7081, 18 December 2017) 22 <<https://researchbriefings.files.parliament.uk/documents/SN07081/SN07081.pdf>> accessed 20 April 2025.. Ministry of Justice, 'Proposal for reform: Introducing Fees in the Employment Tribunals and the Employment Appeal Tribunal (29 January 2024) 6 <https://consult.justice.gov.uk/digital-communications/introducing-fees-employment-tribunals-eat/supporting_documents/employmenttribunalsemploymentappealtribunalfeesconsultation.pdf> accessed 1 May 2025.

(DHPs), to save around £45m in 2013-14 and £150m in 2014-15;⁹ and the further reduction expected to save £42 million per year.¹⁰ In contrast, the two-child limit that applied to births after 6 April 2017, was expected to save £2.1 billion per year by 2020-21.¹¹ The one welfare benefits case that succeeded at very significant cost to the government was *RF*, the challenge to regulations which amended the Personal Independence Payment (PIP) eligibility descriptors such as to exclude entitlement if the inability to plan and carry out journeys was caused by psychological distress rather than physical disability. The cost was estimated at £900 million per year.¹² In *Drax Power*, the Treasury estimated that maintaining the renewable source electricity exemption would cost £485m in the year it was abolished and £535m the following year.¹³ In the first *FDA* case, the challenge to the decision in the 2010 budget to up-rate pensions by reference to the consumer price index (CPI) rather than the retail price index (RPI), the estimated saving was £6 billion per year the end of the Parliament.¹⁴ While the public spending implications varied hugely, the cases as a whole are surely unrepresentative of judicial review cases generally given what was at stake financially.¹⁵ On the one hand, as is clear from the

⁹ *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 [45], [58].

¹⁰ *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 [32]. It is not wholly clear but, it seems, the estimated saving were £110 million per year and the costs of implementing the cap and DHPs was £68 million per year.

¹¹ *R (SC) v Secretary of State for Work and Pensions* [2018] EWHC 864 (Admin), [2018] 1 WLR 5425 [47].

¹² *R (RF) v Secretary of State for Work and Pensions* [2017] EWHC 3375 (Admin), [2018] PTSR 1147 [34].

¹³ *R (Drax Power Ltd) v HM Treasury* [2016] EWCA Civ 1030, [2017] QB 1221 [19].

¹⁴ *R (FDA and others) v Secretary of State for Work and Pensions* [2012] EWCA Civ 332, [2013] 1 WLR 444 [26].

¹⁵ For comparison the government contribution to the Pergau Dam was £234 million. *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386, 392G. In civil litigation more generally huge sums may be at stake. The Pan NOx Emissions litigation is valued at over £6 billion if the claimants succeed. *Pan NOx Emissions Litigation* [2024] EWHC 1718 (KB) [28].

judgments, the judiciary were aware of the financial implications of their decisions and it seems likely that the greater the financial implications, the more heavily these weighed when it came to judicial decision-making.¹⁶ On the other hand, the judiciary must have been aware that in most of the cases the government could have effectively reversed their decisions by primary legislation.¹⁷

Fourth, the cases analysed in this thesis were effectively challenges to the broader legitimacy of the law and policy implementing austerity rather than the application of a specific law or policy to the claimant. In addition to being financially ‘high-stakes’, the cases were legally and politically ‘high-stakes’ in that conceding or losing the litigation would mean reversing often significant aspects of the austerity programme. That the judiciary understood the cases as raising important issues is further demonstrated by the number of cases that were heard at first instance by Divisional Courts: 12 administration of justice cases; and three each in the welfare benefits and ‘other’ cases.¹⁸ The inference is that the judiciary understood the cases as more likely to raise issues of general public importance and much more likely to raise such issues in the administration of justice cases.¹⁹ A further point is that the cases perhaps evidence the flexibility of the ‘realistic prospect of success’ test for permission in that, given the low proportion of claims that succeeded, an obvious inference is that permission was granted in some of the cases and/

¹⁶ Sometimes this was explicitly recognised and obviously did weigh heavily on judicial decision-making, see for example: *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin).

¹⁷ *FDA* (n 13) is surely an example here in that, had the courts decided the change from RPI to CPI was *ultra vires* the Social Security Administration Act 1992, then primary legislation would have been passed to give the government the power to make the change.

¹⁸ See (n 4) above as to the non-availability of comparative data from other research.

¹⁹ As to when a Divisional Court is convened, see: Courts and Tribunals Judiciary. ‘The Administrative Court: Judicial Review Guide 2024’ (October 2024), 110. There is a question here as to whether the issues in the administration of justice cases were subjectively important to the judiciary, as opposed to objectively of general public importance.

or on some of the grounds because, as the case law on permission establishes, 'arguability cannot be judged without reference to the nature and gravity of the issue to be argued'.²⁰ The essential point here is that this research has not engaged with what might be described as 'run of the mill' judicial review claims and this must limit the extent to which any conclusions can be generalised.

As to the further limits, primarily under-inclusion of cases, it remains a possibility that some cases have been missed. However, in the one area where there has been broadly similar research - that relating to the public sector equality duty (PSED) by Aileen McColgan referred to in chapter 5 - there were no further cases identified by that work that were not identified by this research;²¹ and only two other cases were identified by being cited in the cases that were identified. There were some cases where the route to challenging the law and policy that implemented austerity was by way of tribunals, but in the field of welfare benefits the issues have been caught by the cases analysed by this thesis.

Before reaching overall conclusions, there are the issues that cut-across chapters 5, 6 and 7 where the analysis was postponed. These are: the relevance of and weight attached to international law; divergences of approach between different judges or courts in the hierarchy; and the relevance of and weight attached to delegated legislation having being scrutinised or approved by Parliament. These issues are addressed now in that order.

²⁰ *Sharma v Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 780, [14].

²¹ Aileen McColgan, 'Litigating the Public Sector Equality Duty: The Story So Far' (2015) 35 OJLS 453.

The relevance of international law

There were a significant number of cases that raised issues as to the effect of international law other than EU law and the Convention. Reliance on international law did not generally function as a separate ground, but was argued to support or supplement other grounds, by far the most common of which were Convention grounds. That unincorporated international law may influence the decision-making of domestic courts is explicitly problematic in some strands of political constitutionalist thought. Richard Ekins and Graham Gee describe the common law constitutional tradition as being grounded on:

the assessment that a people ... should be free to exercise self-government by way of national, parliamentary democracy. The law by which subjects are governed is their law, either the common law as developed and articulated by the polity's judges, or those legislative choices freely adopted by the Westminster Parliament. In this tradition, the realm is represented as one agent in the international domain and in that capacity undertakes obligations that bind in international law. However, these obligations do not govern within the realm unless and until adopted by Parliament. The task of the courts has been to uphold domestic law, to which international law is irrelevant unless incorporated, most notably by statute.²²

The nub of the concern is that unincorporated international instruments ought not to displace domestic law unless incorporated; and the issue as to the limits of adjudication is whether and in what ways international law influenced judicial decisions. While the issue is complex, arose in a significant number of cases, and caused some stark differences of

²² Richard Ekins and Graham, 'Putting Judicial Power in its Place' (2017) 36 University of Queensland Law Journal 375, 377.

judicial opinion, the outcome - as set out below - is essentially uncontroversial in that the position argued for by Ekins and Gee eventually held sway.

As to evidence of international law being used to interpret statutes, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),²³ was cited in *Rights of Women*, the challenge to amendments to regulations that specified the evidence necessary to support an application for legal aid in family law domestic violence cases.²⁴ CEDAW had been given statutory effect by an amendment to LASPOA 2012, sch 1 which incorporated the CEDAW definition of domestic violence.²⁵ Such reliance is therefore uncontroversial from a political constitutionalist perspective. In *MA*, one of the challenges to the bedroom tax on the basis of disability,²⁶ it was argued at first instance that the PSED in the Equality Act 2010 (EA 2010) ought to be interpreted in light of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD),²⁷ and the United Nations Convention on the Rights of the Child (UNCRC).²⁸ This was rejected on the basis that the meaning of the relevant statutory provisions were not ambiguous. There were no further

²³ Convention on the Elimination of All Forms of Discrimination against Women (entered into force 3 September 1981) 1249 UNTS 1.

²⁴ *R (Rights of Women) v Lord Chancellor* [2015] 2 FLR 823, [2015] EWHC 35 (Admin); and *R (Rights of Women) v Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91 [2016] 1 WLR 2543.

²⁵ The amendment was by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2013, SI 2013/748. Though this was, at least in part, a result of the decision of the Supreme Court in *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 WLR 433.

²⁶ *R (MA) v Secretary of State for Work and Pensions* [2013] EWHC 2213 (Admin).

²⁷ United Nations Convention on the Rights of Persons with Disabilities (entered into force 3 May 2008) 2515 UNTS 3.

²⁸ United Nations Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNCTS 3. The full text of art 3.1 is 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

cases where the interpretation of legislation or application of common law grounds was influenced by the provisions of unincorporated international instruments.²⁹

The position in relation to Convention grounds is more complex and there were a number of cases where efforts were made to rely on unincorporated international law as relevant and to add weight to Convention grounds.³⁰ A clear case of international law being used was *RF*, the challenge to PIP regulations cited above.³¹ As to whether the relevant provision was manifestly without reasonable foundation (MWRF) under article 14 read with article 8 and A1P1, Mostyn J's conclusion was:

I have no hesitation in so concluding. In my judgment, the [regulations] introduced (and I emphasise introduced) criteria ... which were blatantly discriminatory against those with mental health impairments and which cannot be objectively justified. The wish to save nearly £1bn a year at the expense of those with mental health impairments is not a reasonable foundation for passing this measure. ... This conclusion is fortified by the written submissions of [counsel for the Equality and Human Rights Commission as intervener]. She explains how the measure infringes article 19 of the [UNCPRD] I fully agree

²⁹ For a summary of the relevant jurisprudence as to when this may happen, see Lord Kerr's judgment in *SG* (n 9) [239], [241].

³⁰ In addition to the cases cited in this part, the list also includes: *R (Drax Power Ltd) v HM Treasury* [2016] EWHC 228 (Admin); *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622, [2015] 1 WLR 2247; *Hurley* (n16); *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531; *R (Simone) v Chancellor of the Exchequer* [2019] EWHC 2609 (Admin); and *R (Williams) v Secretary of State for the Home Department* [2017] EWCA Civ 98, [2017] 1 WLR 3283.

³¹ *RF* (n 12).

with this. It is another reason why the discrimination within the measure cannot be objectively justified.³²

Clearly, the UNCRPD carried some weight in *RF*. The most important further cases are the two benefit cap cases and the two-child limit case decided by the Supreme Court. In all three cases a central issue was the relevance to proportionality and the MWRP test of the UNCRC, specifically the article 3.1 duty to treat the best interests of children as a primary consideration.³³ In *JS/SG*, the first benefit cap case,³⁴ there were multiple differences of opinion as to the significance of the UNCRC. There was agreement that the UNCRC was relevant to the interpretation of Convention rights relating to children. However, even if it was accepted (Lord Carnworth) or assumed (Lord Reed and Lord Hughes) that the government could not show the policy in the regulations was compatible with article 3.1 UNCRC, this was not relevant to discrimination between men and women in relation to A1P1. The applicable test was whether the regulations were MWRP and not whether they breached article 3.1. As to the minority opinions, the essential conclusion of Lady Hale was that since a primary consideration was the best interests of children affected by the cap, the discrimination against women who were much more likely to care for children was not proportionate; and Lord Kerr, who agreed with Lady Hale, but also concluded ‘that article 3.1 of the UNCRC is directly enforceable in United Kingdom domestic law’.³⁵

³² *ibid* [59], [60], [61].

³³ The full text of art 3.1 is ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.

³⁴ *SG* (n 9).

³⁵ *ibid* [257].

Much the same arguments arose in *DA*, the second benefit cap case, with the same outcome.³⁶ There is detailed analysis of *DA* in chapter 7, but the essence of the UNCRC issue is as follows. Lord Wilson gave the leading judgment for the majority, (Lord Wilson, Lord Reed, Lord Carnwath, Lord Hodge and Lord Hughes) and identified that the ‘overarching enquiry is whether [the] decision not to exempt the [claimants] from the cap was [MWRF]. ... a foundation for the decision not made in substantial compliance with article 3.1 might well be manifestly unreasonable’.³⁷ While the UNCRC was relevant to the MWRF test, Lord Wilson concluded that the government had ‘by a narrow margin’ met its duty in relation to the UNCRC by evaluating the impact of the cap on single parents with children and the policy was not MWRF. As with *JS/SG* the dissent came from Lady Hale and Lord Kerr whose opinion was that the UNCRC was relevant to assessing justification and, having weighed the evidence, the failure to have sufficient regard to the UNCRC meant the revised benefit cap could not be justified.

The final case is *SC*, the two-child limit case, where there was a move away from *DA* on the relevance of the UNCRC.³⁸ Lord Reed gave the unanimous judgment and identified the issue as ‘whether it is appropriate for our domestic courts to determine whether the United Kingdom has violated its obligations under unincorporated international law’. After reviewing the domestic and ECtHR jurisprudence, including Lord Wilson’s judgment in *DA* above, Lord Reed stated:

The remaining question is whether the [HRA 1998] has given domestic legal effect to unincorporated treaties. Clearly, it has not. ... There is, accordingly, no

³⁶ *DA* (n 10).

³⁷ *ibid* [78].

³⁸ *R (SC) v Secretary of State for Work and Pensions* [2022] UKSC 26, [2022] AC 223.

basis in the case law of the [ECtHR] as taken into account under the [HRA 1998], for any departure from the rule that our domestic courts cannot determine whether this country has violated its obligations under unincorporated international treaties.³⁹

As noted at the end of chapter 7, Ekins' conclusion in relation to *SC* is that 'the court's disavowal of jurisdiction to consider compliance with unincorporated treaty obligations ... is a welcome restoration of constitutional principle'.⁴⁰ As Ekins also observes, this conclusion must be to a degree contingent; and Carol Harlow and Richard Rawlings' description of the litigation as 'a running battle between repeat players, including those on the bench, ...' is apposite as to the significance of international law.⁴¹ When it comes to judicial choices about the relevance of and weight attached to international law, however, those choices were, in terms of overall outcomes and notwithstanding the dissent, made in a way that afforded maximum deference to legislative and executive decision-making. The conclusion is that, when it comes to unincorporated international law, and even taken at the high points of *RF* and *DA*, there is limited evidence to suggest the limits of adjudication in relation to international law, even as envisaged by the less moderate wing of political constitutionalism, have been exceeded.⁴²

³⁹ *ibid* [78], [84].

⁴⁰ Richard Ekins, 'Convention rights child tax credits and the constitution' (2022) 138 LQR 551, 556.

⁴¹ Carol Harlow and Richard Rawlings, *Law and Administration* (4th edn, Cambridge 2022) 805.

⁴² As to the more restrained approach of the Supreme Court, see Lewis Graham, 'Has the Supreme Court Become More Restrained in Public Law Cases' (2024) MLR. Graham cites *SC* extensively as an example of a more restrained approach.

Differences in judicial attitude

As to attitudinal differences between judges - whether doctrinal, political or ideological - identifying differences is difficult other than in the context of the Supreme Court decisions where there were obviously differing attitudes about the principles or outcome in the same case or in similar cases. Beyond that, any analysis - quantitative or qualitative - is hampered because, at first instance and on appeal, the cases were determined by a high number of judges who heard very few cases.⁴³ Nonetheless, it is possible to identify some apparent differences and the evidence is clearest with Laws LJ who sat on two first instance cases as a member of a Divisional Court and on three Court of Appeal cases.

As to Laws LJ's first instance decisions, the second *LCCSA* case was the challenge to the decision of the Lord Chancellor (LC) to reduce the number of provider contracts after the initial decision was quashed on the adequacy of consultation ground. On both the *Tameside* and rationality grounds, Laws LJ was robust in rebuffing arguments for a more intense standard of review than conventional *Wednesbury*.⁴⁴ He was similarly robust in *MA*, one of the challenges to the bedroom tax on the basis of disability.⁴⁵ As to justification, the MWRF test was 'a function of democratic rule', and 'the strategic aims of the policy: not only to save public funds, but also to shift the place of social security support in society'

⁴³ In all 134 austerity adjudications, the first instance decisions were reached by 81 judges, which included a number of deputy High Court judges, the vast majority of whom heard three or fewer cases. Much of scholarship on judicial attitudes relies on quantitative analysis of a significant body of non-unanimous decisions in apex courts. See Emmett Macfarlane 'Studying judicial decision-making' in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar 2023).

⁴⁴ *R (London Criminal Courts Solicitors' Association) v Lord Chancellor* [2015] EWHC 295 (Admin) (Laws LJ, Cranston J) [32], [33]. The relevant quote appears in chapter 6, see (n 152) and (n 153).

⁴⁵ *R MA* (n 23) (Laws LJ, Cranston J).

were sufficient to ensure the policy was not MWRF.⁴⁶ Both decisions were upheld on appeal.⁴⁷

Of greater significance are Laws LJ's decisions in the Court of Appeal. In *PLP*, the challenge to the use of the Henry VIII power in LASPOA 2012 to remove eligibility for legal aid for those who did not meet a residence test, Laws LJ reversed the first instance decision of a three-member Divisional Court on all three grounds: *Padfield*, the principle of legality, and the article 14 ground.⁴⁸ As to the *Padfield* ground, Laws LJ's conclusion was that the enabling provisions ought not to be read narrowly and the objects and purposes were wide enough to include 'the saving of public funds' and the 'residence test is well within the scope of such a strategy'.⁴⁹ As to the article 14 ground, Laws LJ's robust conclusion on the MWRF test was:

In my view the question whether state funding of legal expenses in civil matters should (subject to exceptions) be limited to recipients resident in the United Kingdom is essentially a political question, concerned as it is with the strategic distribution of scarce public resources; and one upon which, as I have said, reasonable people may entertain contrary opinions. In those circumstances one would expect that the law, in setting the criterion by which the discrimination involved may be justified, will allow a very considerable margin of discretion to

⁴⁶ *ibid* [56].

⁴⁷ *R (London Criminal Courts Solicitors' Association) v Lord Chancellor* [2015] EWCA Civ 230, [2016] 3 All ER 296. *R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 4550. The disability case that succeeded in *MA* was *Rutherford v Secretary of State for Work and Pensions* [2016] EWCA Civ 29.

⁴⁸ *R (Public Law Project) v Lord Chancellor* [2014] EWHC 2365 (Admin), [2015] 1 WLR 251 (Moses LJ, Collins, Jay JJ). *R (Public Law Project) v Lord Chancellor* [2015] EWCA Civ 1193, [2016] 2 WLR 995 (Laws, Kitchen Christopher Clarke LJ).

⁴⁹ *ibid* [23].

the elected arms of government. The decision of such questions is their particular responsibility, and it is an important muscle in our democracy that that should be so.⁵⁰

On appeal to the Supreme Court, Laws LJ's conclusion on the *Padfield* ground was reversed, but the article 14 ground was not determined. It seems fair to conclude that, had the claim not succeed on the *Padfield* ground, there would have again been significant divergences of opinion in the Supreme Court about the applicability and outcome of the application of the MWRF test. *R (S)* was the challenge to the operation of the exceptional case funding (ECF) scheme which was found to be systematically unfair at first instance.⁵¹ Giving the leading judgment for the majority, Laws LJ reversed that decision stating:

while I recognise that such a judgment is inexact and even impressionistic, I have concluded that the scheme is not inherently or systematically unfair. I recognise that it is heavily dependent on the participation of providers, given the difficulties clearly faced by lay applicants and the absolute need of assistance for those with disabilities. However our knowledge of the attitudes of providers to the scheme is partial at best. So far as we can ascertain, their response to its challenges is by no means uniform, and in the nature of things will not be static: the learning curve will continue. ... while as I have said there have plainly been many difficulties, and the complexity of the ECF form has been common to many of them, the state of the evidence does not justify an across-the-board conclusion that the scheme is of itself so unfair as to lie outside the range of

⁵⁰ *ibid* [32].

⁵¹ *R (S) v Director of Legal Aid Casework* [2015] EWHC 1965 (Admin), [2015] 1 WLR 5283 (Collins J).

lawful choices open to the Lord Chancellor and the LAA in the administration of [LASPOA 2012]. ... The extent of the difficulties is however troubling. No doubt the [Legal Aid Agency (LAA)] and the Lord Chancellor will be astute to look for improvements, and will do so on a continuing basis.⁵²

In bare terms, it seems Laws LJ was more willing to give the LC the benefit of the doubt than some of his colleagues. Finally, there is *Tigere*, the challenge to the blanket refusal of student loans to those with discretionary leave to remain. In reversing the first instance decision,⁵³ Laws LJ, giving the unanimous judgment, identified it as a case ‘in which the legal challenge is directed at a national strategic policy for the distribution of scarce resources in a field of great social importance’; and, while the blunt instrument of the MWRF test was unhelpful, the Secretary of State was justified in adopting ‘a criterion dependent on settlement’ which ‘serves the need of certainty and the avoidance of an arbitrary rule’.⁵⁴ The decision was reversed by a majority in the Supreme Court on the basis that the bright line rule was disproportionate.

The position is, then, that Laws LJ gave two robust first instance decisions in favour of the government; he reversed two first instance decisions that had been against the government; there was dissent in favour of the claimants in one of his appellate decisions in favour of the government; and two of his appellate decisions in favour of the government were reversed by the Supreme Court, albeit on limited grounds. These conclusions apply

⁵² *R (S) v Director of Legal Aid Casework* [2016] EWCA Civ 464, [2016] 1 WLR 4733 [55], [56], [57] (Laws, Briggs, Burnett LJJ).

⁵³ *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2014] EWHC 2452 (Admin) (Hayden J).

⁵⁴ *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2014] EWCA Civ 1216 [29], [51].

in relation to statutory interpretation (*PLP*), a common law ground (*R (S)*) and a Convention ground (*Tigere*). It seems the fair conclusion is that Laws LJ had a more deferential approach to government policy-making than other members of the judiciary.⁵⁵

As to attitudes at the other end of the spectrum, there were some explicit negative judicial views on the merits of the austerity programme, notably from Collins J whose decision in *R (S)* was reversed by Laws LJ. In two of the benefits cap cases *DA* and *Hurley*, Collins J's judgments included the following:

I would only add this. Whether or not the defendant accepts my judgment, the evidence shows that the cap is capable of real damage to individuals such as the claimants. They are not workshy but find it, because of the care difficulties, impossible to comply with the work requirement. Most lone parents with children under two are not the sort of households the cap was intended to cover and, since they will depend on [discretionary housing payments (DHPs)], they will remain benefit households. Real misery is being caused to no good purpose.⁵⁶

And

I would only add that whether or not the defendant accepts my decision reconsideration will I hope be given to whether the present regulatory regime is

⁵⁵ Perhaps there is an irony here in that John Griffith criticised John Laws' extra-curial writing on the basis his proposals 'openly advocate a massive shift of power from the executive and Parliament to the judiciary'. In terms of Laws LJ's judgments, however, the evidence suggests a significantly more deferential approach to political decision-making in curtailing the welfare state than his colleagues and he based his decisions on principles that would find favour with political constitutionalist scholarship. John Griffith, 'The Brave New World of Sir John Laws' (2000) 63 MLR 159, 173.

⁵⁶ *R (DA) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin), [2017] PTSR 1266 [43].

appropriate having regard to the hardship it can and does produce and the lack of real benefit to the state in terms of the objectives of the benefit cap. As I have said, a bright line approach is available by simply exempting those single recipients of [carers allowance] who provide family care.⁵⁷

Collins J's negative views of the impact of the relevant policies on specific groups in the context of what were, relatively speaking, limited savings of public funds seem clear; and presumably this affected his decision-making on justification.⁵⁸ Beyond the examples of Laws LJ and Collins J, for which the evidence of attitudinal differences seems clear, there are two further impressionistic conclusions. First, some judges, including Laws LJ, adopted a more 'there is a need to cut public spending' approach, whereas others judges adopted a more 'the government says there is a need to cut public spending' approach. It seems this might plausibly be attributed to political or ideological differences as to the necessity of the austerity programme. The impression is that some judges were more accepting of austerity as a political project. Second, some judges, notably McCombe LJ, appeared less willing to accept the evidence in witness statements filed on behalf of the government where it was inconsistent with the contemporaneous documentary evidence of decision-making.

As indicated above, there was clear evidence of attitudinal differences in the Supreme Court with Lady Hale, Lord Kerr and Lord Carnwath, in general favouring a more intensive standard of review and a more eclectic approach to legal materials. These differences took

⁵⁷ *R (Hurley) v Secretary of State for Work and Pensions* [2015] EWHC 3382 (Admin), [2016] PTSR 636 [75].

⁵⁸ Collin J's views on the merits of the benefit cap were shared by David Freud, Minister for Welfare Reform. See (n 102) in chapter 2, and (n 96 and n 104) in chapter 7. David Freud, *Clashing Agendas: Inside the Welfare Trap* (Nine Elms 2021).

place within fairly narrow bounds, though Lord Kerr's view that the UNCRC ought to be directly enforceable is an exception. This was again all part of what Harlow and Rawlings describe as a 'running battle' on the bench, and included *Tigere*,⁵⁹ *JS/SG*,⁶⁰ and *MA*.⁶¹ There is existing research on the ideology of senior judges,⁶² and specific research on judicial individuality in the Supreme Court published too recently to be taken account of here.⁶³ While that research is based solely on apex court decisions and the focus of this research is wider, this thesis offers support for the conclusion that there are attitudinal differences between judges. Moving on from individual differences of judicial attitude, there is no evidence from the austerity adjudications that the Court of Appeal or the Supreme Court adopted a different institutional approach in relation to the austerity adjudications, save that *PLP*, *Howard League* and *UNISON* were significant decisions and they are addressed further below.

In relation to individual judges, perhaps the firmest way in which the conclusion can be put is that there were divergences of judicial attitude when it came to the merits or necessity of specific aspects of the law and policy that implemented austerity and these essentially functioned as differences as to the intensity of review or the degree of deference shown to executive law- and policy-making. It is recognised that this hardly seems like an unexpected, original, or useful conclusion though, again, save for evidence in relation to

⁵⁹ *R (Kebede) v Secretary of State for Business, Innovation and Skills* [2013] EWHC 2396 (Admin), [2014] PTSR 92.

⁶⁰ *SG* (n 9) [239], [241].

⁶¹ *MA* (n 47).

⁶² Arvind, T T and Stirton, Lindsay, 'Legal Ideology, Legal Doctrine and the UK's Top Judges' [2016] PL 418.

⁶³ Lewis Graham, *Judicial Individuality on the UK Supreme Court* (Hart 2025).

outliers such as Laws LJ or Collins J, the high number of judges hearing few cases makes more detailed analysis difficult.

Parliamentary approval of delegated legislation

The relevance of and weight attached to parliamentary scrutiny and approval arose in many of the challenges to delegated legislation, and there were a number of apparently conflicting judicial statements. The arguments arose in relation to statutory, common law and Convention grounds. The starting point, and an oft-cited case in the austerity adjudications, is Lord Sumption's opinion in *Bank Mellat (No 2)* which might usefully be set out at length:

If a statutory power to make delegated legislation is subject to limitations, the question whether those limitations have been observed goes to the lawfulness of the exercise of the power. It is therefore reviewable by the courts. In principle, this applies as much to an implied limitation as to an express one, and as much to a limitation on the manner in which the power may be exercised as it does to a limitation on the matters which are within the scope of the power. The reason why this does not intrude on the constitutional primacy of Parliament is not simply that delegated legislation, however approved, does not have the status of primary legislation. It is that a statutory instrument is the instrument of the minister (or other decision-maker) who is empowered by the enabling Act to make it. The fact that it requires the approval of Parliament does not alter that. The focus of the court is therefore on his decision to make it, and not on Parliament's decision to approve it.

Where the courts have declined to review the procedural fairness of statutory orders on the ground that they have been subject to parliamentary scrutiny, they have not generally done so on the ground that parliamentary scrutiny excludes the duty of fairness in general or the duty of prior consultation in particular. These decisions have generally been justified by reference to three closely related concepts which for my part I would not wish to challenge or undermine in any way. First, when a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy. Second, there is a very significant difference between statutory instruments which alter or supplement the operation of the Act generally, and those which are targeted at particular persons. ... Third, a court may conclude in the case of some statutory powers that parliamentary review was enough to satisfy the requirement of fairness, or that in the circumstances Parliament must have intended that it should be. It is particularly likely to take this view where the measure impugned is a general legislative measure.⁶⁴

It is submitted that this is uncontroversial from a political constitutionalist perspective and is a conventional account as to the judicial role in challenges to delegated legislation. It was not always applied in practice, though the issues are nuanced. To illustrate these nuances, examples are provided under the headings of *ultra vires*, common law and

⁶⁴ *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 [43], [44].

Convention grounds and the purpose is to highlight what appears to be differences in judicial approach.

Ultra vires challenges

Two examples are given in relation to welfare benefits cases, and one other case. In *Smith*, a conditionality and sanctions case, Hickinbottom J stated:

I draw some comfort (albeit, I accept, faint) from the fact that the ... Regulations were the subject of the negative Parliamentary procedure; and were therefore laid before Parliament (albeit for only half an hour) before they came into force.⁶⁵

In *Zacchaeus Trust*, a housing benefit cap case, Sullivan LJ stated:

By specifying the functions that rent officers are required to carry out in connection with housing benefit, the 1997 Order sets out the manner in which rent officer determinations must be made. The 1997 Order and any order amending it, such as the 2012 Order, are themselves subject to parliamentary scrutiny by way of negative resolution: see section 122(6) of the 1996 Act.

...

Parliament has expressly authorised the regulations to prescribe the manner in which [maximum housing benefit (HB)] is to be determined by reference to rent

⁶⁵ *R (Smith) v Secretary of State for Work and Pensions* [2015] EWHC 2284 (Admin) [75].

officer determinations, and the manner in which rent officers must make their determinations is set out in an order which is subject to parliamentary scrutiny.⁶⁶

In *Williams*, the citizenship fees case, that ‘the amount of fees required can only be exacted after prior scrutiny of both Houses of Parliament’ carried some weight with the Court of Appeal.⁶⁷ The fair conclusion here is that, when it came to *vires*, delegated legislation receiving parliamentary scrutiny or approval was relevant in these cases and some weight was attached to it.

Turning to the legal aid cases, in *Rights of Women*, the challenge to the 24-month time limit for evidence of domestic violence, during debate in the Lords on LASPOA 2012 an amendment was passed such that in domestic violence cases no evidential time limit would apply. The amendment was rejected by the Commons. When it came to the *vires* of regulations seeking to impose the 24-month time limit, Longmore LJ concluded:

The doctrines of ultra vires and frustration of the purposes of the statute in its *Padfield* form are not susceptible to a ... blanket respect for the legislature. I have already said that for the purposes of the *Padfield* doctrine it is for the court to ascertain the parliamentary purpose from the words of the statute. The fact that the House of Commons has rejected proposed amendments to the statute which would have better promoted the statutory purpose cannot absolve the court from considering whether regulations, in their final form, when laid before

⁶⁶ *R (Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1202, [2013] PTSR 1427 [32], [33].

⁶⁷ *Williams* (n 30) [50].

the House and approved by way of negative resolution, do in fact frustrate or thwart that purpose.⁶⁸

Notwithstanding that the regulations implemented an evidential time limit where a legislative bar to it had been rejected by the Commons, no weight was attached to parliamentary approval of the regulations. In *PLP*, the challenge to regulations removing eligibility for legal aid for those who did not meet a residence test, the regulations had been approved by the Commons but then withdrawn after the judgment at first instance. As to the relevance of parliamentary approval, the judgments at first instance and before the Court of Appeal are clear:

... it is not enough to assert that the measure will be subject to scrutiny by Parliament, if, on a true construction of the statutory powers in their context, no power to introduce such a measure can be found.⁶⁹

There was some reference in the course of argument to two further points. Mr Fordham [counsel for the claimants] had something to say about the principle of legality; Mr Eadie [counsel of the government and First Treasury Counsel] about the fact that the Order was subject to the affirmative resolution procedure in Parliament ... I am unable to see how the latter circumstance casts any light on the correct construction of [the relevant statutory provision].⁷⁰

⁶⁸ *Rights of Women* (n 24) [50].

⁶⁹ *R (Public Law Project) v Lord Chancellor* [2014] EWHC 2365 (Admin), [2015] 1 WLR 251 [48].

⁷⁰ *R (Public Law Project) v Lord Chancellor* [2015] EWCA Civ 1193, [2016] 2 WLR 995.

Similarly, in *Ben Hoare Bell*, the challenge to legal aid payments in judicial review claims, the regulations were subject to the negative procedure, but parliamentary approval carried no weight. Again, the point is nuanced, but it seems that, when it comes to *vires*, the relevance of and weight attached to parliamentary scrutiny or approval of delegated legislation was flexible and no weight was attached to it in the legal aid cases.

Common law grounds

In *Parkin*, a challenge to UC entitlement for the self-employed, Elisabeth Laing J, on a conventional application of Lord Sumption's analysis in *Bank Mellat* as to rationality, decided:

The Regulations were subject to the highest level of Parliamentary scrutiny. They are part of a policy which ... has been developed over some time, and with the help of various contributors. They deal with matters of social policy, and with the allocation of taxpayers' money. ... In those circumstances, the threshold of irrationality is high. I am not satisfied that it has been reached.⁷¹

In *JS/SG*, the first benefit cap case, the *Tameside* ground was argued before the Court of Appeal and, in reliance on Lord Sumption's analysis in *Bank Mellat*, Lord Dyson MR stated:

However, we have difficulty in seeing how [*Tameside*] can be applied to the circumstances of the present case where the Secretary of State introduced a Bill in Parliament which was debated in great detail in both Houses before

⁷¹ *R (Parkin) v Secretary of State for Work and Pensions* [2019] EWHC 2356 (Admin).

receiving the Royal Assent, and then adopted secondary legislation which was itself debated in Parliament before being approved by affirmative resolution. ... the principle of the cap, the detailed policy of the cap (including exclusions) and the level of the cap were all subjected to detailed parliamentary scrutiny. ... In our view there is no room in the particular circumstances of this case for the application of the *Tameside* principle.

In *JS/SG*, then, parliamentary scrutiny and approval of the regulations had the effect of rendering the *Tameside* principle irrelevant. In contrast is *UNISON*, the Employment Tribunal (ET) fees case, where a draft of the order was laid before Parliament, debated and approved by both Commons and Lords.⁷² Lord Reed stated:

At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced.⁷³

While the regulations in *UNISON* had been subject to the same parliamentary process as the regulations in *JS/SG*, this did not form part of Lord Reed's analysis and no weight was attached to parliamentary scrutiny and approval. This was the case despite Lord Sumption's statements in *Bank Mellat* as to 'considerable caution', 'respect for

⁷² *R (Unison) v Lord Chancellor (Nos 1 & 2)* [2017] UKSC 51, [2020] AC 869.

⁷³ *ibid* [68].

Parliament's constitutional function' and that 'a court may conclude in the case of some statutory powers that parliamentary review was enough to satisfy the requirement of fairness'. While *Bank Mellat* was referred to by the parties, it was not cited in Lord Reed's judgment. In *Howard League*, the challenge to the availability of legal aid for prison law issues, the regulations were subject to the negative procedure, but debated in Parliament.⁷⁴ In the second *Law Society* case, the challenge to legal payments in criminal cases, the regulations were subject to the negative procedure.⁷⁵ In neither case was any weight attached to parliamentary approval of delegated legislation. Taken together, it again appears that the weight attached to, or deference shown to, parliamentary scrutiny or approval of delegated legislation on common law grounds was flexible and ultimately no weight was attached to such scrutiny or approval in the legal aid or *UNISON* cases.

Convention grounds

There were several references to parliamentary scrutiny and approval of delegated legislation in relation to article 14 grounds. In *JS/SG*, the first benefit cap case, Lord Reed, cited Lord Sumption's opinion in *Bank Mellat* and concluded:

As I have explained, the Regulations were considered and approved by affirmative resolution of both Houses of Parliament. ... Many of the issues discussed in this appeal were considered by Parliament prior to its approving the Regulations. That is a matter to which this court can properly have regard ...⁷⁶

⁷⁴ *R (Howard League for Penal Reform) v Lord Chancellor* [2015] EWCA Civ 819.

⁷⁵ *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649.

⁷⁶ *SG* (n 9) [94]

There is a contrast here with Lord Reed's judgement in *UNISON* in that weight was attached to parliamentary scrutiny and approval of the regulations that was absent in the *UNISON* case. The overall conclusion as to the relevance of, and weight attached to, parliamentary scrutiny or approval of delegated legislation is that it appears to a significant extent to have been a matter of judicial discretion rather than strict doctrinal principle and less deference was shown in the cases relating to the administration of justice.

Overall conclusions

What, then are the general conclusions as to whether the limits of adjudication envisaged by political constitutionalism were exceeded? The starting point here is a broad assessment of the overall successes for claimants in frustrating the law and policy that implemented austerity. Determining what counts as success and failure is difficult since some of the claims succeeded but to a very limited extent;⁷⁷ some of the claims succeeded, but success did not affect the law or policy;⁷⁸ and some cases succeeded, for example on consultation grounds, but the final outcome is not known.⁷⁹ A broad brush approach is adopted, such that success is measured by reference to whether there was ultimately some impact to the law and policy as a result of the initial litigation, any further litigation, and in both cases any appeals.⁸⁰

⁷⁷ Example: *SC* (n 11) where regulations imposing the two-child limit were quashed, but only in relation to the sequencing provision for children who would otherwise be in LA care.

⁷⁸ Example: *Hurley* (n 16) where the PSED challenge to regulations increase fee to £9,000 succeeded but had no impact on the fee regime.

⁷⁹ *R (Luton BC) v Secretary of State for Education* [2011] EWHC 217 (Admin) and *R (Luton BC) v Secretary of State for Education* [2011] EWHC 556 (Admin).

⁸⁰ It is recognised that this is somewhat simplistic and there is a significant body of valuable research which is beyond the scope of this thesis which addresses the wider impact of judicial review. Harlow and Rawlings (n 4) 868, analyse the main contributions this work.

Looking at the overall position across the three policy areas of welfare benefits, administration of justice and other cases, the position is as follows. In the welfare benefits cases there were tangible successes in the challenges to: the bedroom tax as it applied unequally to disabled adults and disabled children;⁸¹ the benefit cap as it applied to those receiving carers allowance;⁸² sanctions imposed on JSA claimants who had appealed sanctions before primary legislation was passed to retrospectively validate them;⁸³ the mobility descriptor for PIP for those with mental health problems as opposed to physical disabilities;⁸⁴ and in relation to the unequal implementation of Universal Credit (UC).⁸⁵ It seems fair to conclude that, despite the scale of the litigation in relation to welfare benefits, the successes were marginal and limited to tolerably clear examples of unfair law- or policy-making. As to the ‘other’ cases, there were tangible successes in the cases brought by local authorities (LAs);⁸⁶ in one of the challenges to the removal of subsidies for the generation of electricity by renewable resources;⁸⁷ in one of the public sector pensions cases;⁸⁸ and in two of the student loans cases.⁸⁹

⁸¹ *MA* (n 47).

⁸² *Hurley* (n 57).

⁸³ *R (Reilly) (No 2) v Secretary of State for Work and Pensions* [2016] EWCA Civ 413, [2017] QB 657.

⁸⁴ *RF* (n 12).

⁸⁵ *R (TP) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37, [2020] PTSR 1785.

⁸⁶ *R (Dudley MBC) v Secretary of State for Communities and Local Government* [2012] EWHC 1729 (Admin); and *Luton BC* (n 79).

⁸⁷ *R (Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change* [2012] EWCA Civ 28.

⁸⁸ *R (Public and Commercial services Union) v Minister for the Civil Service* [2011] EWHC 2041 (Admin).

⁸⁹ *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820; *R (Nyoni) v Secretary of State for Business Innovation and Skills* [2015] EWHC 3533 (Admin).

What is striking are the successes in the field of administration of justice in relation to: the availability of systems and resources for prisoners serving IPP sentences;⁹⁰ the availability of legal aid for prison law cases;⁹¹ legal aid payments for judicial review claims;⁹² legal aid payments for criminal cases;⁹³ the availability of legal aid for inquests;⁹⁴ the availability of legal aid for domestic violence cases;⁹⁵ the availability of legal aid under the exceptional case funding (ECF) scheme;⁹⁶ the availability of legal aid for those not ordinarily resident;⁹⁷ and in relation to ET fees.⁹⁸ Much of the litigation in the administration of justice field, in particular in relation to legal aid, achieved its purposes. There seems, on the face of it, to be a significant disparity here in terms of success between the different policy areas and the significance of this for the limits of adjudication envisaged by political constitutionalism is addressed below.

Turning to the different grounds of review - statutory, common law and Convention - conclusions were reached in chapters 5, 6 and 7 respectively, but they are worth re-stating along with some additional points. As to statutory grounds, there is limited evidence of the judiciary exceeding the limits of adjudication from a political constitutionalist perspective. There were no decisions that did not rely on a plausible reading of statutory words or

⁹⁰ *Fletcher v Governor of HMP Whatton* [2014] EWHC 3586 (Admin), [2015] 3 All ER 558.

⁹¹ *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244, [2017] 4 WLR 92.

⁹² *R (Ben Hoare Bell Solicitors) v Lord Chancellor* [2015] EWHC 523 (Admin), [2015] 1 WLR 4175.

⁹³ *Law Society* (n 75).

⁹⁴ *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin), [2015] 1 WLR 4497.

⁹⁵ *Rights of Women* (n 24).

⁹⁶ *Gudanaviciene* (n 30).

⁹⁷ *Public Law Project* (n 30).

⁹⁸ *UNISON* (n 72).

purposes and little evidence of strained or tendentious interpretation of legislative provisions. The intensity of review was generally low in relation to the PSED ground that was argued in a significant number of cases. The approach to interpretation appears to have been, however, more robust in the legal aid cases, the most significant examples of which are *PLP*, *Rights of Women* and *Ben Hoare Bell* where the judicial determination as to the objects and purposes of LASPOA 2012 led to regulations limiting entitlement or payments being *ultra vires*. As Harlow and Rawlings argue, these cases demonstrate ‘forceful approaches’ that show the elasticity of interpretative techniques when it came to protecting eligibility for legal aid.

As to common law grounds, the overall picture is that the intensity of review was, as might be expected given the public spending context, low. It was, however, higher in the administration of justice cases as demonstrated in relation to consultation and rationality in the second *Law Society* case; structural procedural review (SPR) in *Fletcher* and *Howard League*; and in *UNISON* in relation to legality. As Harlow and Rawlings again observe, there was in general a greater willingness in these cases to engage in a dense factual analysis as to the impact of the policies and then make what were essentially value judgments as to the acceptability to the common law - the judiciary - of those impacts.

As to Convention grounds, comparisons are difficult since few administration of justice cases were resolved by reference to Convention grounds. It is, perhaps, significant that while three major administration of justice challenges raised article 14 grounds, the claimants ultimately succeeded other than on Convention grounds: *Howard League* and *UNISON* on common law grounds; and *PLP* on the *Padfield* ground. Had the Convention grounds in those cases been determined by the Court of Appeal or Supreme Court, it would have been interesting to see whether the MWRF test or some other standard of

review was applicable, and then what the outcome of applying the standard was. In relation to the welfare benefits claims, judicial choices were exercised so as to provide for a minimal intensity of review and maximum deference to political decision-making.

So, subject to the qualifications below, the overall conclusion must be that there is limited evidence that limits of adjudication envisaged by political constitutionalism were exceeded in the challenges to the law and policy implementing austerity. Notwithstanding the 'growth' of judicial review, the courts have continued the traditional reluctance to intervene in cases involving macroeconomic decision-making or resource allocation and continued to show considerable deference to the government in relation to public spending. There is no evidence of the courts going beyond the conventional limits as demonstrated by cases such as *Nottinghamshire CC* and *Cambridge HA*.⁹⁹ It is perhaps significant that there were no challenges to the implementation of the enormous funding cuts imposed on LAs by central government; and the few claims by LAs that succeeded were on procedural grounds in relation to narrow decisions to withdraw funding for specific projects where LAs had some basis for believing that funding would not be withdrawn.¹⁰⁰

Harlow and Rawlings' identify a process of juridification in relation to equalities duties as a result of the EA 2010, in particular the PSED, and the jurisprudence of the ECtHR in

⁹⁹ *Nottinghamshire CC v Secretary of State for the Environment* [1986] AC 240 as to matters of national economic policy; and *R v Cambridge Health Authority, ex p B* [1995] 2 All ER 129 (CA) 137 in relation to discrete allocative decisions.

¹⁰⁰ Tony Travers observes in relation to local government funding 'Nothing as severe as this reduction had been attempted since 1945. At first the response from councils and their representatives was stunned shock. ...most councillors and officers privately believed that reductions on this scale could never be achieved. Seeing the Treasury's figures in black and white, while shocking, did not produce a particularly anguished response. Fatalistic acceptance was close to a fair description of local government's initial view.' Tony Travers. 'Home affairs and local government' in Anthony Seldon and Mike Finn, *The Coalition Effect 2010-2015* (Cambridge 2015) 231. Presumably LAs took legal advice on whether there were grounds on which to challenge the cuts but, save in limited cases, were told there were no arguable grounds.

relation to article 14.¹⁰¹ This must be right and, particularly in relation to article 14, the courts have been required to determine grounds of review that previously could not have been argued. While such juridification may, in and of itself, be problematic from a political constitutionalist perspective, such juridification as there has been is a function of political and legislative choices which allowed claimants to bring and obliged the courts to decide those grounds. As to the judicial contribution to such juridification, it has been minimal in the cases analysed by this thesis given: (a) the low intensity of review in the PSED cases; and (b) the adoption of the MWRF test in relation to article 14.¹⁰² Griffith's critique of Convention rights was the 'danger of arguing from rights is that the real issues can be evaded. What are truly questions of politics and economics are presented as questions of law'.¹⁰³ In the cases analysed by this thesis, the judiciary generally decided that the Convention grounds raised questions of politics and economics, save where they related to tolerably clear examples of unfair or unjustifiably differential treatment.¹⁰⁴

More broadly, and again subject to the qualifications below, chapter 2 identified the austerity programme as a major, long-term, controversial political project that was central to government activity between 2010 and 2017; and which was not just about making difficult decisions on public spending, but about seeking to permanently create a leaner state. While the scale of the litigation, in particular in relation to welfare benefits, was significant in its own terms; it was limited in comparison to the scale of the law and policy implementing austerity. Although the litigation analysed by this thesis may not seem peripheral from an administrative law perspective, not least given the significance of some

¹⁰¹ Harlow and Rawlings (n 6) 810.

¹⁰² *Tigere* (n 89).

¹⁰³ John Griffith, 'The Political Constitution' (1979) 42 MLR 1, 17.

¹⁰⁴ Examples include *RF* (n 12) in relation to PIP descriptors; and *SC* (n 11) in relation to the sequencing provision for the two-child limit as it applied to children who would otherwise be in care.

of the cases, it must have been to a degree peripheral from the perspective of the government, and was certainly peripheral in terms of frustrating the law and policy implementing austerity. The conclusion must be that, save in limited cases, the government got what it wanted and this aligns with the views of political constitutionalism identified in chapter 3 as to the appropriate distribution of constitutional power and, at least in theory, the efficacy and legitimacy of political and democratic processes.

There are then the qualifications. The cases analysed by this thesis appear to show that the intensity of review was higher in the administration of justice cases than the welfare benefits cases. Before turning to explanations for this, there are perhaps two confounding variables. First, as identified above, the public spending implications in the administration of justice cases were generally lower, which may have eased the path to allowing those claims. Second, the difference may be accounted for doctrinally in that many of the welfare benefits cases were resolved on Convention grounds, whereas very few of the administration justice cases were. It seems, however, that these variables cannot wholly account for the difference of approach in relation to the interpretation of legislation; and a more intensive standard of review was adopted both doctrinally and evidentially in the administrative of justice cases, whereas minimal standards were adopted doctrinally in the welfare benefits cases on Convention grounds.

That the intensity of review was higher in cases relating to the administration of justice is recognised by Harlow and Rawlings who, albeit in relation to appellate cases, identify ‘some striking developments, not least in terms of constitutionalising rights and, in the face of competing government priorities, in respect of the judges’ home turf of access to

justice’;¹⁰⁵ and ‘The proactive role of the courts in developing and pressing their own values is illuminated through a particular emphasis on the constitutional connotations of the rule of law...’.¹⁰⁶ It is submitted that the cases analysed by this thesis support those conclusions and, perhaps, bolder conclusions are justified in relation to the austerity adjudications. In these cases, the courts were presented with choices within a framework of established doctrinal principle and the evidence. Rather than mechanistically applying doctrine to the facts, the judiciary made choices in relation to statutory, common law and Convention grounds of review; and how those choices were exercised was significantly influenced by the field of public policy to which the litigation related.

When it came to legal aid and ET fees, the judiciary made choices to protect access to justice. Established doctrinal principles were used or developed and the evidence marshalled in such a way to protect eligibility or availability of legal aid and access to ETs, and these choices significantly frustrated government policy-making. In contrast, when it came to welfare benefits, save in relation to tolerably clear examples of unfair differential treatment, the doctrinal principles were used or developed in such a way as to afford maximum respect to, and effectively validate, governmental policy-making. Here, in terms of judicial choices, discretion was exercised to minimise the scope for successful challenges to policy-making in the field of welfare benefits.

As to what may account for the differences of approach and outcome between the different areas of public policy, there is academic work that argues that, when it comes to cases involving welfare benefits, Supreme Court judges have limited professional experience in the field and it creates a problem of perspective which ‘alegalises’ social security law and

¹⁰⁵ Harlow and Rawlings (n 6) 774.

¹⁰⁶ Harlow and Rawlings (n 6) 810.

treats it as a matter of politics rather than law.¹⁰⁷ No doubt the same arguments can be made of the judiciary more generally. The outcome is that the courts are less likely to exercise discretion to defend access to welfare benefits than defend access to justice. There is force in the argument. In *UNISON* Lord Reid stated:

It may be helpful to begin by explaining briefly the importance of the rule of law, and the role of access to the courts in maintaining the rule of law. It may also be helpful to explain why the idea that bringing a claim before a court or a tribunal is a purely private activity, and the related idea that such claims provide no broader social benefit, are demonstrably untenable.¹⁰⁸

Save for the dissenting judgments, it was not considered helpful in the welfare benefits cases to explain the importance of providing children and families with a subsistence level of income and the role of the benefits system in minimising poverty and social exclusion; or that ensuring children are not brought up in material need is not purely a private activity that provides no broader social benefit. In *SC*, the two-child limit case, Lord Reed identified the problem of ‘an excessively high level of public spending on welfare benefits, resulting in a large fiscal deficit’ and the fact that claimants were:

guaranteed a rise in income for every additional child they might choose to have, without limit. That situation was regarded as unfair to persons supporting

¹⁰⁷ Charlotte O’Brien, ‘The professional diversity deficit the UK Supreme Courts social security law blind spot’ (2025) 32 *Journal of Social Security Law* 18.

¹⁰⁸ *UNISON* (n 72) [67].

themselves solely through work, and as an unreasonable burden to impose on the taxpayers who pay for the scheme.¹⁰⁹

That the situation would be regarded as unfair by ‘others’ contrasts with Lord Reed’s views in *UNISON* where he did not consider that allowing people to bring ET claims without limit might be regarded as an unreasonable burden to impose on taxpayers who pay for the scheme, despite a purpose of the fees being to shift that burden from taxpayers to ET users.

Harlow argues that the Supreme Court presided over by Lord Reed since January 2020 has changed direction and that ‘The years of progressive liberalism are seemingly at an end; there has been reversion to restraint and the formalist style of earlier years’, and that the Court ‘has adopted a very different style to the court that decided *Miller & Cherry*, *Privacy International* and *Evans*’.¹¹⁰ Two issues arise. First, it seems possible that the change in direction may be due to the critiques of political constitutionalism and the political controversy generated by the *Miller* and *UNISON* cases. Second, even before Lord Reed became President in 2020 and, given the intensity of review and the outcome of the challenges to the benefit cap and the bedroom tax, the evidence of progressive liberalism in the Supreme Court is limited. While it may have been apparent in some of the judgments of Lady Hale and Lord Kerr, they were in the minority. Such evidence for progressive liberalism that there is in the cases analysed by this thesis, it is much more apparent in the legal aid cases and *UNISON* than in the other cases, and more apparent in

¹⁰⁹ SC (n 38) [191].

¹¹⁰ Carol Harlow, ‘Judicial Encroachment on the Political Constitution?’ in Richard Johnson and Yuan Yi Zhu, *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart, 2023), 51. *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373; *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491; *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787.

relation to *Collins J* at first instance. It is perhaps significant that both *Privacy International* and *Evans* also related to what Harlow and Rawlings describe as the judiciary's 'home turf'.

Taken in isolation, few of the austerity adjudications are problematic from a political constitutionalist perspective. Taken collectively, however, what must be problematic is the unequal intensity of review in relation to different public policy areas. While in some of the legal aid cases, notably *Gudanaviciene* when the Convention or EU law required legal aid to be provided in accordance with the statutory test,¹¹¹ the judiciary had a high level of institutional competence and the issue was essentially legal. In the other legal aid cases and *UNISON*, however, it is difficult to see how the judiciary has the institutional competence or democratic legitimacy to decide that spending in these areas ought to be protected. While there may be good arguments that access to justice or maintaining the rule of law ought to be privileged over other areas of spending, political constitutionalism would no doubt argue that these issues ought to be resolved by political and democratic processes rather than legal processes such that the judiciary can, to a significant extent, frustrate government policy-making.

The variability of the intensity of substantive review is well-recognised in administrative law scholarship. Mark Elliott has identified a risk 'that an undue focus upon doctrine may ultimately prove to be a distraction, with the doctrinal trees serving to obscure the normative wood'.¹¹² Elliott develops the concept of adjudicative deference which contemplates differing standards of justification for policy depending on the 'normative

¹¹¹ *Gudanaviciene* (n 30).

¹¹² Mark Elliott, 'From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification' [64] in Hannah Wilberg and Mark Elliott *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2017).

significance of the value impugned by the decision and hence the appropriate scale of the decision-maker's justificatory burden', where the 'court may exhibit adjudicative deference in recognition of the fact that it may be less well placed than the decision-maker to perform this sort of assessment'. In relation to statutory interpretation, the concept and existence of interpretive deference has been similarly recognised.¹¹³

My own view is that there is force in Elliott's analysis, and - to make the point explicit - in determining the challenges to the law and policy implementing austerity, the deference shown in cases concerning access to justice was significantly lower than in the welfare benefits and 'other' cases. As Elliott argues, conventional doctrinal analysis may be a distraction; and, as Harlow and Rawlings argue, the judiciary are bringing their values to the adjudicative process.¹¹⁴ As to the importance of this, chapter 4 referred to the criticism from the perspective of conventional doctrinal scholarship of 'doctrinal empiricism' or 'systematic study' that is focussed on an empirical analysis of decisions in judicial review claims.¹¹⁵ I suggest this criticism is unwarranted and there is a problem with narrow doctrinal scholarship if it is unable to recognise that implicit or explicit judicial values influence judicial approaches and outcomes in cases relating to access to justice. That there is 'more going on here' than is accounted for by conventional doctrinal scholarship is

¹¹³ For a discussion, see Hannah Wilberg and Mark Elliott, 'Deference on Questions of Law: A Survey of Taggart's Contribution and Themes in the Wider Literature' in Wilberg and Elliott *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2017)

¹¹⁴ My partner, who has read this thesis and does some legal aid work, offers a simpler explanation of judicial decision-making in the legal aid cases: judges are keen to protect access to legal aid because where parties are unrepresented, judicial time and energy is sucked up dealing with applications that are confusing and/or of little merit; and judges essentially have to perform the tasks that would otherwise be done by lawyers in terms of sorting the wheat from the chaff and explaining the law. The higher courts protecting access to legal aid is of tangible and direct benefit to their colleagues at lower levels. There is evidence that the cuts to legal aid have shifted costs onto the courts: National Audit Office, 'Ministry of Justice and Legal Aid Agency: Implementing reforms to civil legal aid' (HC 784, November 2014).

¹¹⁵ Jason Varuhas. 'Mapping doctrinal methods' in in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar 2023).

a significant finding that merits further research and analysis. While it may be particularly problematic from a political constitutional perspective in that it may frustrate political and democratic decision-making in a particular area, it is something that judicial review scholarship more broadly ought to engage with. While existing judicial review scholarship may recognise differing standards of adjudicative and interpretive deference in somewhat abstract terms, this research appears to provide evidence as to circumstances when those differing standards apply.

In relation to further research in relation to those differing standards, there is considerable scope for more work. This thesis focussed on the challenges which related to law and policy that implemented the austerity programme. As the work of Kirkham and O'Loughlin relating to judicial decision-making relating to ombuds cited in chapter 4 shows, there is considerable scope for assessing in other areas the extent to which conventional doctrinal analysis provides a complete account of what judges are doing.

In relation to the type of cases analysed by this thesis, the challenges to macroeconomic decision-making and the allocation of resources to the justice system continue. A third *Law Society* case was decided by a Divisional Court in January 2024, where the challenge was to the LC's decision not to implement recommendations made by the Independent Review of Criminal Legal Aid, including that criminal legal aid fees should be raised by £100 million per year.¹¹⁶ The common law again provided the judges with a remedy on their 'home turf' and the claim succeeded on the grounds that the LC's decision was *Wednesbury* unreasonable and there had been a breach of the *Tameside* duty. Similarly, the challenge

¹¹⁶ *R (Law Society) v Lord Chancellor* [2024] EWHC 155 (Admin), [2024] 1 WLR 3097 (Singh LJ and Jay J). Sir Christopher Bellamy, 'Independent Review of Criminal Legal Aid' (29 November 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf> accessed 14 April 2025.

by the Independent Schools Council to the Labour government's decision - a manifesto commitment - to remove the VAT exemption for private school fees was heard in early-April 2025 by a three-member Divisional Court.¹¹⁷ The removal of the exemption is expected to raise £460 million in 2024-25 and then £1.5 billion in 2025-26.¹¹⁸ The case raises article 14 and A2P1 grounds. It will be interesting to see what the court makes of: (a) the evidence and arguments as to the impact on pupils at private schools, including those with special education needs, and consequent additional spending on state schools; and (b) assuming the court accepts or is willing to assume the policy is within the ambit of article 14 read with A2P1, whether the MWRF test is the appropriate standard of review. There is considerable scope for further testing the conclusions reached by this thesis.

¹¹⁷ The increase was given effect by amendments to the Value Added Tax Act 1994 by the Finance Act 2025, ss 46 and 47.

¹¹⁸ Antony Seely, 'House of Common Research Briefing: VAT on private school fees' (1 April 2025) <<https://researchbriefings.files.parliament.uk/documents/CBP-10125/CBP-10125.pdf>> accessed 20 April 2025.

Coding scheme

The grounds are coded in the format: **G1_ST1_F [3(a)], [51]** in the tables of cases below.

- ‘**G1**’ refers to the ground number, where the grounds of review are numbered sequentially in each case. Every effort has been made to transpose the first instance ground numbers across to any appeals.
- ‘**ST1**’ refers to statutory ground 1, breach of primary legislation, and the other grounds are listed in the table below.
- ‘**F**’ means failed, ‘**S**’ means succeeded, ‘**O**’ means undetermined. Failure means complete failure on the ground for all claimants. Success means some success for one or more claimants on the ground. Success does not mean the claimant got the remedy sought.
- **[3(a)] [51]** are pinpoints to paragraphs in the judgment. Generally, the first reference is to the where the judge lists the ground(s), and the second reference is to where the analysis of the ground starts. There may or may not be a further note to the ground such as UV (*ultra vires*), Padfield, or PSED (public sector equality duty).

Statutory grounds

ST_1	Statutory illegality	Breach of primary legislation
ST_2	Statutory illegality	Breach of subordinate legislation
ST_3	Statutory illegality	Breach of guidance/policy.

Convention/EU law grounds

IN_1	EU/ECHR/ international law	Breach HRA 1998/ECHR
IN_2	EU/ECHR/ international law	Breach ECA 1972/EU law.
IN_3	EU/ECHR/ international law	Breach international law

Common law procedural grounds

CP_1	Common law procedural	Adequacy of consultation
CP_2	Common law procedural	Procedural legitimate expectation
CP_3	Common law procedural	Relevant and/or irrelevant considerations
CP_4	Common law procedural	Mistake/error of fact
CP_5	Common law procedural	Alternative options
CP_6	Common law procedural	Duty of sufficient enquiry/ <i>Tameside</i>
CP_7	Common law procedural	Adequacy of reasons
CP_8	Common law procedural	Fettering of discretion

Common law substantive grounds

CS_1	Common law substantive	<i>Wednesbury</i> irrationality or unreasonableness
CS_2	Common law substantive	Proportionality at common law
CS_3	Common law substantive	Substantive legitimate expectation
CS_4	Common law substantive	Common law obligations and rights

	ADMINISTRATION OF JUSTICE CASES		
	First instance	Court of Appeal	Supreme Court
1 ST CS IN	R (A) v Criminal Injuries Compensation Authority [2017] EWHC 2 (Admin) High Court - 12/01/2017 Criminal injuries compensation G1_IN_1_F [3(a)], [51] G2_IN_1_F [3(b)], [65] G3_ST_1_F [3(c)], [114] UV G4_CS_1_F [3(d)], [134] G5_IN_2_F [4(i)], [120] G6_IN_1_F [4(ii)], [51], [134]	R (A) v Criminal Injuries Compensation Authority [2018] EWCA Civ 1534, [2018] 1 WLR 5361 03/07/2018 G5_IN_2_F [18(i)], [19] G6_IN_1_F [18(i)], [46]	R (A) v Criminal Injuries Compensation Authority [2021] UKSC 27, [2021] 1 WLR 3746 09/07/2021 G6_IN_1_F [1], [21]
2 ST CS	R (Ben Hoare Bell Solicitors) v Lord Chancellor [2015] EWHC 523 (Admin), [2015] 1 WLR 4175 Divisional Court - 12/01/2017 Legal aid - judicial review G1_ST_1_F [4], [20] UV G2_ST_1_S [4], [31] Padfield G3_CS_4_O [4], [67]		
3 ST	R (Coll) v Secretary of State for Justice [2013] EWHC 4077 (Admin) Approved premises for female prisoners High Court - 19/12/2013 G1_ST_1_F [44], [48] direct discrim G2_ST_1_F [44], [58] indirect discrim G3_ST_1_S [44], [61] PSED	R (Coll) v Secretary of State for Justice [2015] EWCA Civ 328, [2015] 1 WLR 3781 31/05/2015 G1_ST_1_F [19], [38] direct discrim G2_ST_2_F [19], [50] indirect discrim	R (Coll) v Secretary of State for Justice [2017] UKSC 40, [2017] 1 WLR 2093 24/05/2017 G1_ST_1_S [20], [26] direct discrim G2_ST_2_F [20], [43] indirect discrim

	ADMINISTRATION OF JUSTICE CASES		
	First instance	Court of Appeal	Supreme Court
4 ST CS IN	Fletcher v Governor of HMP Whatton [2014] EWHC 3586 (Admin), [2015] 3 All ER 558 High Court - 03/11/2014 IPP sentences case G1_CS_4_S [3], [55], [58] G2_CS_1_F [3], [56], [76] G3_ST_3_S [57], [79] G4_IN_1_F [4], [85]		
5 ST IN	R (Gudanaviciene) v Director of Legal Aid Casework [2014] EWHC 1840 (Admin), [2015] 3 All ER 827 High Court - 13/06/2014 Legal aid - ECF G1_IN_1_S [18], [19] G2_IN_2_S [18], [19] G3_ST_1_S [18], [40] UV	R (Gudanaviciene) v Director of Legal Aid Casework [2014] EWCA Civ 1622, [2015] 3 All ER 827 15/12/2004 Court of Appeal - 15/12/2014 G1_IN_1_S [4], [60] G2_IN_2_S [4], [33] G3_ST_1_S [4], [25]	
6 IN	R (Henderson) v Secretary of State for Justice [2015] EWHC 130 (Admin) Divisional Court - 27/01/2015 Criminal courts - defence costs G1_IN_1_F [4(i)], [17] G2_ST_1_F [4(ii)], [31] UV		

	ADMINISTRATION OF JUSTICE CASES		
	First instance	Court of Appeal	Supreme Court
7 ST CP CS IN	R (Howard League for Penal Reform) v Lord Chancellor [2014] EWHC 709 (Admin) Divisional Court - 17/03/2014 Legal aid - prison law G1_CP_1_F [36] G2_CS_4_F [41], [46] G3_IN_1_F [41], [46] G4_CS_1_F [49] G5_ST_1_F [53] UV	R (Howard League for Penal Reform) v Lord Chancellor [2015] EWCA Civ 819; [2017] EWCA Civ 244, [2017] 4 WLR 92 28/07/2015 G2_CS_4_S [2], [33]	
8 ST CP CS IN	R (Law Society) v Legal Services Commission [2012] EWHC 794 (Admin) Divisional Court 30/03/2012 Legal aid - criminal defence G1_ST_1_F [4(1)], [35] UV G2_ST_1_F [4(2)], [74] Padfield G3_CS_1_F [4(3)], [40] G4_ST_1_F [4(4)], [51] UV G5_IN_1_O [4(5)], [85] G6_ST_1_F [4(6)], [79] PSED		
9 CP CS	R (Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649 Divisional Court - 03/08/2018 Legal aid - criminal defence G1_CP_1_S [4(1)] [66] G2_CS_1_S [4(2)] [98] G3_CS_4_F [4(3)] [125] G4_CS_3_F [4(4)] [63]		

	ADMINISTRATION OF JUSTICE CASES		
	First instance	Court of Appeal	Supreme Court
10 IN	R (Letts) v Lord Chancellor [2015] EWHC 402 (Admin), [2015] 1 WLR 4497 High Court - 20/02/2015 Legal aid - inquests G1_IN_1_S [1], [16]		
11 CP	R (London Criminal Courts Solicitors' Association) v Lord Chancellor [2014] EWHC 3020 (Admin) High Court - 19/09/2014 Legal aid - criminal defence G1_CP_1_S [34], [37]		
12 CP CS IN	R (London Criminal Courts Solicitors' Association) v Lord Chancellor [2015] EWHC 295 (Admin) Divisional Court - 18/02/2015 Legal aid - criminal defence G1_CP_6_F [7], [52] G2_CS_1_F [7], [52] G3_IN_1_F [7], [90]	R (London Criminal Courts Solicitors' Association) v Lord Chancellor [2015] EWCA Civ 230, [2016] 3 All ER 296 25/03/2015 G1_CP_6_F [7], [83] G2_CS_1_F [7], [83]	
13 ST CP	M v Director of Legal Aid Casework [2014] EWHC 1354 (Admin) High Court - 02/05/2014 Legal aid - ECF G1_ST_1_F [58] UV G2_ST_3_F [73]		

	ADMINISTRATION OF JUSTICE CASES		
	First instance	Court of Appeal	Supreme Court
14 ST CS IN	R (Public Law Project) v Lord Chancellor [2014] EWHC 2365 (Admin), [2015] 1 WLR 251 Divisional Court - 15/07/2014 Legal aid - residence test G1_ST_1_S [3], [33] Padfield G2_CS_4_S [3], [51] G3_IN_1_S [3], [51]	R (Public Law Project) v Lord Chancellor [2015] EWCA Civ 1193, [2016] 2 WLR 995 25/11/2015 G1_ST_1_F [4], [10] Padfield G2_CS_4_F [4], [29] G3_IN_1_F [4], [30]	R (Public Law Project) v Lord Chancellor [2016] UKSC 39, [2016] AC 1531 13/07/2016 G1_ST_1_S [4], [10] Padfield
15 ST CS	R (Rights of Women) v Lord Chancellor and Secretary of State for Justice [2011] EWHC 35 (Admin) Divisional Court - 22/01/2015 G1_ST_1_F [1], [30] UV G2_ST_1_F [1], [31] Padfield	R (Rights of Women) v Lord Chancellor and Secretary of State for Justice [2016] EWCA Civ 91, [2016] 1 WLR 2543 18/02/2016 G1_ST_1_F [3], [34] UV G2_ST_1_S [3], [37] Padfield	
16 ST CP	R (Robin Murray & Co) v Lord Chancellor [2011] EWHC 1528 (Admin) Divisional Court - 16/06/2011 Court closures G1_CP_1_F [38], [39] G2_CP_3_F [38], [50] G2_ST_1_F [38], [54] PSED		
17 ST	R (Rrapaj) v Director of Legal Aid Casework [2013] EWHC 1837 (Admin) High Court - 02/07/2013 Legal aid - ECF G1_ST_1_S [12] UV		

ADMINISTRATION OF JUSTICE CASES			
	First instance	Court of Appeal	Supreme Court
18 CS IN	R (S) v Director of Legal Aid Casework [2015] 1 WLR 5283, [2015] EWHC 1965 (Admin) High Court - 15/07/2015 Legal aid - ECF G1_CS_4_S [1], [4]	R (S) v Director of Legal Aid Casework [2016] EWCA Civ 464, [2016] 1 WLR 4733 20/05/2016 G1_CS_4_F [1], [13]	
19 CP CS IN	R (Thompson) v Director of Legal Aid Casework [2017] EWHC 230 (Admin) High Court - 15/02/2017 Legal aid - EC G1_CS_1_F [35]		
20 ST CS IN	R (Unison) v Lord Chancellor [2014] EWHC 218 (Admin), [2014] ICR 498 Divisional Court - 07/02/2014 ET/EAT fees G1_IN_2_F [18(i)], [19] G2_IN_2_F [18(ii)], [48] G3_ST_1_F [18(iii)], [57] PSED G4_ST_1_F [18(iv)], [70] direct and indirect discrim G5_IN_1_F [18(iv)], [70]	R (Unison) v Lord Chancellor (Nos 1 & 2) [2015] EWCA Civ 935, [2016] ICR 1 26/07/2015 G1_IN_2_F [29(1)], [32] G2_IN_2_O [29(2)], [30] G3_ST_1_F [29(4)], [110] PSED G4_ST_1_F [29(3)], [76] indirect discrim	R (Unison) v Lord Chancellor (Nos 1 & 2) [2017] UKSC 51, [2020] AC 869 26/08/2017 G1_IN_2_S [3], [105] G4_ST_1_O [3], [121] indirect discrim G8_CS_4_S [3], [65]
21 ST IN	R (Unison) v Lord Chancellor (No 2) [2014] EWHC 4198 (Admin), [2015] ICR 390 Divisional Court - 17/12/2014 ET/EAT fees G6_IN_2_F [2], [23] G7_ST_1_F [2], [65] indirect discrim		

	ADMINISTRATION OF JUSTICE CASES		
	First instance	Court of Appeal	Supreme Court
22	R (Vale of Glamorgan Council) v Lord Chancellor [2011] EWHC 1532 (Admin)		
CP	Divisional Court - 16/06/2011		
CS	Court closures		
	G1_CP_5_F [17(1)], [20]		
	G2_CP_1_F [17(1)], [20]		
	G3_CP_3_F [17(2)], [28]		
	G4_CP_3_F [17(3)], [31]		
	G5_CS_1_F [17(4)], [37]		
	G6_CP_7_F [17(5)], [38]		

	WELFARE BENEFITS CASES		
	First instance	Court of Appeal	Supreme Court
1 ST IN	R (A) v Secretary of State for Work and Pensions [2015] EWHC 159 (Admin) High Court - 29/01/2015 Bedroom tax - Sanctuary Scheme G1_IN_1_F [43(1)], [44] G2_ST_1_F [43(2)], [67] PSED G3_IN_1_F [43(3)], [81]	Rutherford v Secretary of State for Work and Pensions [2016] EWCA Civ 29 27/01/2016 G1_IN_1_S [45] G2_ST_2_F [57] PSED	R (MA) v Secretary of State for Work and Pensions [2016] UKSC 58, [2016] 1 WLR 4550 09/11/2016 G1_IN_1_S [3], [25], [43] G2_ST_2_F [3], [67] PSED
2 IN	Rutherford v Secretary of State for Work and Pensions [2014] EWHC 1631 (Admin) High Court 14/05/2014 Bedroom tax - disability G1_IN_1_F [42]	G1_IN_1_S [61]	G1_IN_1_F [3], [56]
3 ST IN	R (MA) v Secretary of State for Work and Pensions [2013] EWHC 2213 (QB) Divisional Court 30/07/2013 Bedroom tax - disability G1_IN_1_F [3(1)], [35] G2_ST_1_F [3(2)], [71] PSED G3_ST_3_F [3(3)], [89]	R (MA) v Secretary of State for Work and Pensions [2014] EWCA Civ 13, [2014] PTSR 584 21/02/2014 G1_IN_1_F [38] G2_ST_1_F [83] PSED	G1_IN_1_S [3], [21], [28]
4 ST	R (Aspinall) v Secretary of State for Work and Pensions [2014] EWHC 4134 (Admin) High Court - 08/12/2014 ILF closure G1_ST_1_F [11], [89] PSED		

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	First instance	Court of Appeal	Supreme Court
5 ST CP	R (Bracking) v Secretary of State for Work and Pensions [2013] EWHC 897 (Admin) High Court - 24/04/2014 ILF closure G1_CP_1_F [29], [33] G2_ST_1_F [31], [40] PSED	R (Bracking) v Secretary of State for Work and Pensions [2013] EWCA Civ 1345 06/11/2013 G1_CP_1_F [3], [27] G2_ST_1_S [3], [35] PSED	
6 CS IN	R (C) v Secretary of State for Work and Pensions [2015] EWHC 1607 (Admin) High Court - 05/06/2015 PIP delays G1_CS_4_S [1(i)], [34] G2_IN_1_F [1(ii)], [104] G2_IN_1_F [1(iii)], [116]		
7 ST	R (Child Poverty Action Group) v Secretary of State for Work and Pensions [2011] EWHC 2616 (Admin) High Court - 13/10/2011 HB - local housing allowance and maximum size G1_ST_1_F [2(i)], [23] UV G2_ST_1_F [2(i)], [44] PSED		

WELFARE BENEFITS CASES			
	First instance	Court of Appeal	Supreme Court
8 CS IN	R (Cotton) v Secretary of State for Work and Pensions [2014] EWHC 3437 (Admin) High Court - 22/10/2014 Standard size criteria - shared parenting G1_IN_1_F [5(a)], [31] G2_IN_1_F [5(b)], [58] G3_CS_1_F [5(c)], [62]		
9 IN	R (DA) v Secretary of State for Work and Pensions [2017] EWHC 1446 (Admin), [2017] PTSR 1266 High Court - 22/06/2017 Benefit cap G1_IN_1_S [5]	R (DA) v Secretary of State for Work and Pensions [2018] EWCA Civ 504, [2018] PTSR 1606 15/03/2018 G1_IN_1_F [9], [13]	R (DA) v Secretary of State for Work and Pensions [2019] UKSC 21, [2019] 1 WLR 3289 15/05/2019 G1_IN_1_F [12], [35]
10 CS IN	R (Delve) v Secretary of State for Work and Pensions [2019] EWHC 2552 (Admin) Divisional Court - 03/10/2019 State pension age for women G1_IN_2_F [2], [33] G2_IN_1_F [2], [43] G3_IN_2_F [2], [56] G4_IN_1_F [2], [67] G5_CS_3_F [2], [86], [114] G6_CS_4_F [2], [86], [114]		
11 CS IN	R (Hurley) v Secretary of State for Work and Pensions [2015] EWHC 3382 (Admin) High Court - 26/11/2015 Benefit cap - carers allowance G1_CS_2_F [3], [41] G2_IN_1_F [3], [43] G3_IN_1_S [3], [57]		

	WELFARE BENEFITS CASES		
	First instance	Court of Appeal	Supreme Court
12 ST CP IN	R (JS) v Secretary of State for Work and Pensions [2013] EWHC 3350 (QB), [2014] PTSR 23 Divisional Court - 05/11/2013 Benefit cap G1_ST_1_O [28(1)], PSED G2_IN_1_F [28(2)], [55] G3_IN_3_F [28(3)], [42] G4_CP_6_F [28(4)], [96]	R (JS) v Secretary of State for Work and Pensions [2014] EWCA Civ 156, [2014] PTSR 619 21/02/2014 G2_IN_1_F [23(i), (iii), (iv)], [24], [76], [82] G3_IN_3_F [23(ii)], [67] G4_CP_6_F [23(v)] [107]	R (SG) v Secretary of State for Work and Pensions [2015] UKSC 16, [2015] 1 WLR 1449 18/03/2015 G2_IN_1_F [1], [60] G3_IN_3_F [78]
13 ST CS IN	R (Parkin) v Secretary of State for Work and Pensions [2019] EWHC 2356 (Admin) High Court - 19/09/2019 UC - self employed G1_IN_1_F [2], [90] G2_CS_1_F [2], [119] G3_ST_1_F [2], [123] PSED		
14 ST CP CS IN	R (Reilly) v Secretary of State for Work and Pensions [2012] EWHC 2292 (Admin) High Court - 06/08/2012 Conditionality and sanctions G1_ST_1_F [5], [24] UV G2_CS_5_F [6], [54] G3_ST_2_S [7], [89] UV G4_IN_1_F [8], [169]	R (Reilly) v Secretary of State for Work and Pensions [2013] EWCA Civ 66, [2013] 1 WLR 2239 21/02/2014 G1_ST_1_S [27], [51] G2_CS_5_F [27], [62] G3_ST_2_S [27], [63] G4_IN_1_F [27], [65]	R (Reilly) v Secretary of State for Work and Pensions [2013] UKSC 68, [2014] AC 453 18/03/2015 G1_ST_1_F [27], [43] G2_CS_5_F [27], [58] G3_ST_2_F [27], [53] G4_IN_1_F [27], [77]
15 IN	R (Reilly) v Secretary of State for Work and Pensions (No 2) [2014] EWHC 2182 (Admin), [2015] QB 573 High Court - 04/07/2014 Conditionality and sanctions G1_IN_1_S [1], [55] G2_IN_1_F [1],[130]	R (Reilly) v Secretary of State for Work and Pensions (No 2) [2016] EWCA Civ 413, [2017] QB 657 29/04/2016 G1_IN_1_S [32], [83] G2_IN_1_F [37], [111]	

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	First instance	Court of Appeal	Supreme Court
16 ST CP IN	R (RF) v Secretary of State for Work and Pensions [2017] EWHC 3375 (Admin), [2018] PTSR 1147 High Court 21/12/2017 PIP - mobility descriptor G1_IN_1_S [40(i)], [41] G2_ST_1_S [40(ii)], [62] UV G3_CP_1_S [40(iii)], [62]		
17 IN	SC v Secretary of State for Work and Pensions [2018] EWHC 864 (Admin), [2018] 1 WLR 5425 High Court - 20/04/2018 Two-child limit G1_IN_1_F [3], [56] G2_IN_1_F [3], [81] G3_CS_1_S [215]	SC v Secretary of State for Work and Pensions [2019] EWCA Civ 615, [2019] 1 WLR 5687 16/04/2019 G1_IN_1_F [2], [39] G2_IN_1_F [2], [47]	SC v Secretary of State for Work and Pensions [2021] UKSC 26, [2022] AC 223 09/07/2021 G1_IN_1_F [2(1), (2)], [24], [34] G2_IN_1_F [2(3), (4)], [39], [55]
18 ST	R (Smith) v Secretary of State for Work and Pensions [2014] EWHC 843 (Admin) High Court - 27/03/2014 Conditionality and sanctions G1_ST_1_F [2], [15] UV	R (Smith) v Secretary of State for Work and Pensions [2015] EWCA Civ 229 19/03/2015 G1_ST_1_F [17] UV	
19 ST CS	R (Smith) v Secretary of State for Work and Pensions [2015] EWHC 2284 (Admin) High Court - 31/07/2015 Conditionality and sanctions G1_ST_1_F [68], [71] UV G2_ST_2_F [68], [78] UV G3_ST_1_F [68], [87] UV G4_CS_4_F [68], [101]		

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	First instance	Court of Appeal	Supreme Court
20 ST CP	R (Sumpter) v Secretary of State for Work and Pensions [2014] EWHC 2434 (Admin) High Court - 22/07/2014 DLA to PIP transfer G1_CP_1_F [93], [94] G2_CP_1_F [93], [125] G3_ST_1_F [93], [135] PSED	R (Sumpter) v Secretary of State for Work and Pensions [2015] EWCA Civ 1033 15/10/2015 G1_CP_1_F [2], [39] G2_CP_1_F [2], [44]	
21 IN	R (TD) v Secretary of State for Work and Pensions [2019] EWHC 462 (Admin) High Court - 01/03/2019 UC - legacy benefits G1_IN_1_F [40(1)], [41] G2_CS_1_F [40(2)], [81] G3_ST_1_F [40(3)], [83] PSED	R (TD) v Secretary of State for Work and Pensions [2020] EWCA Civ 618 12/05/2020 G1_IN_1_S [21]	
22 ST CP	R (P) v Secretary of State for Work and Pensions [2018] EWHC 1474 (Admin), [2019] PTSR 238 High Court - 14/06/2018 UC - disability premiums on transfer G1_IN_1_F [3], [50] G2_IN_1_S [3], [75]	R (TP) v Secretary of State for Work and Pensions [2020] EWCA Civ 37, [2020] PTSR 1785 12/05/2020 G1_IN_1_F [4], [61] G2_IN_1_S [4], [65]	
23 IN	R (TP) v Secretary of State for Work and Pensions [2019] EWHC 1116 (Admin), [2019] PTSR 2123, [2018] EWHC 3892 (Admin) High Court 03/05/2019 UC - disability premiums on transfer G3_IN_1_S [41]	G3_IN_1_S [3], [69]	

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	First instance	Court of Appeal	Supreme Court
24 ST	R (Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions [2013] EWHC 233 (Admin), [2013] PTSR 785 High Court - 15/02/2013 HB cap G1_ST_1_F [3], [6] UV G2_ST_1_F [3], [25] PSED	R (Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions [2013] EWCA Civ 1202, [2013] PTSR 1427 31/07/2013 G1_ST_1_F [2], [20] UV G2_ST_1_F [2], [55] PSED	

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	First instance	Court of Appeal	Supreme Court
1 CP CS	R (Cheshire East BC) v Secretary of State for Environment Food and Rural Affairs [2011] EWHC 1975 (Admin) High Court - 26/07/2011 PFI - wasted disposal G1_CS_1_F [35], [36] G2_CS_3_F [35], [43] G3_CP_1_F [35], [68] G4_CP_3_F [35], [84] G5_CP_3_F [35], [109]		
2 IN	Drax Power Ltd v HM Treasury [2016] EWHC 228 (Admin) High Court - 10/02/2016 Renewables G1_IN_2_F [5(1)], [72] G2_IN_2_F [5(2)], [128] G3_IN_1_F [5(3)], [152]	Drax Power Ltd v HM Treasury [2016] EWCA Civ 1030, [2017] QB 1221 10/02/2016 G1_IN_2_F [23], [42] G2_IN_2_F [23], [42] G3_IN_1_F [23], [105]	
3 ST CP CS	R (Dudley MBC) v Secretary of State for Communities and Local Government [2012] EWHC 1729 (Admin), [2012] EWHC 1964 (Admin) High Court - 25/06/2012 PFI - education G1_CP_1_S [4(1)], [39] G2_CS_3_F [4(2)], [71] G3_CP_8_F [4(3)], [79] G4_CP_3_F [4(4)], [82] G5_ST_1_F [4(4)], [84] PSED		

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	First instance	Court of Appeal	Supreme Court
4 ST CP CS	R (Essex CC) v Secretary of State for Education [2012] EWHC 1460 (Admin) 17/05/2012 PFI - education G1_CP_1_F [30(1)], [31] G2_CS_1_F [30(2)], [37] G3_ST_1_S [30(3)], [39] PSED		
5 ST CP CS	R (Essex CC) v Secretary of State for Education [2016] EWHC 1724 (Admin) High Court - 06/07/2016 PFI - education G1_CS_1_F [32(1)], [33] G2_CP_3_F [32(2)], [37] G3_CP_7_F [32(3)], [42] G4_ST_1_F [32(4)], [47] PSED		
6 ST CP CS	R (FDA and others) v Secretary of State for Work and Pensions (also known as Staff Side of the Police Negotiating Board) [2011] EWHC 3175 (Admin) Divisional Court - 02/12/2011 Public sector pensions G1_ST_1_F [38], [44] UV G2_ST_1_F [39], [52] Padfield G3_CS_3_F [40], [70] G4_CP_1_F [41], [83] G5_ST_1_F [42], [85] PSED	R (FDA and others) v Secretary of State for Work and Pensions [2012] EWCA Civ 332, [2013] 1 WLR 444 20/03/2012 G1_ST_1_F [4], [38] UV G2_ST_1_F [5], [48] Padfield	

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	First instance	Court of Appeal	Supreme Court
7 CP CS	R (FDA) v HM Treasury [2018] EWHC 2746 (Admin) High Court - 24/10/2018 Public sector pensions G1_CP_1_F [80] G2_CP_6_F [93] G3_CP_1_F [99]		
8 ST CS IN	R (Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change [2011] EWHC 3575 (Admin) High Court - 21/12/2011 Renewables G1_ST_1_F [22], [28] UV G2_ST_1_S [22], [34] UV and Padfield G3_CS_5_O [22], [40] G4_IN_1_O [22], [40]	R (Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change [2012] EWCA Civ 28 25/01/2012 G2_ST_1_S [12], [42]	
9 ST IN	R (Hurley) v Secretary of State for Business, innovation and Skills [2012] EWHC 201 (Admin) High Court - 17/02/2012 Student finance G1_IN_1_F [4(1)], [26] G2_ST_1_S [4(1)], [66] PSED		
10 IN	R (Kebede) v Secretary of State for Business, Innovation and Skills [2013] EWHC 2396 (Admin), [2014] PTSR 92 High court - 31/07/2013 Student finance G1_IN_1_F [1], [23]		

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	First instance	Court of Appeal	Supreme Court
11 CS	R (Liverpool CC) v Secretary of State for Health [2017] EWHC 986 (Admin) High Court - 02/05/2017 Local government finance G1_CS_4_F [50] G2_CS_3_F [72]		
12 ST CP CS	R (Luton BC) v Secretary of State for Education [2011] EWHC 217 (Admin), [2011] EWHC 556 (Admin) High Court - 11/02/2011 PFI - education G1_CS_1_F [44(i)], [47] G2_CP_8_S [44(ii)], [49] G3_CS_3_F [44(iii)], [62] G4_CP_1_S [44(iv)], [83] G5_ST_1_S [44(v)], [98] PSED		
13 ST CS	R (Nyoni) v Secretary of State for Business Innovation and Skills [2015] EWHC 3533 (Admin) High Court - 04/12/2015 Student finance G1_ST_3_F [2], [22] G2_ST_3_F [2], [29] G3_CS_1_S [2], [34]		

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	First instance	Court of Appeal	Supreme Court
14 ST CS IN	R (PCSU) v Minister for the Civil Service [2011] EWHC 2041 (Admin) High Court - 10/08/2011 Public sector pensions G1_IN_1_F [3], [23] G2_ST_1_F [3], [65] UV G3_CS_3_F [3], [68] G4_IN_1_F [3], [74]		
15 ST IN	R (PCSU) v Minister for the Cabinet Office [2018] ICR 269, [2017] EWHC 1787 (Admin) Divisional Court - 18/07/2017 Public sector pensions G1_ST_1_S [5(1)], [49] UV G2_IN_1_O [5(2)], [62] G3_IN_1_F [5(3)], [63] G4_ST_1_F [5(4)], [83] PSED		
16 ST CP	R (Pharmaceutical Services Negotiating Committee) v Secretary of State for Health [2017] EWHC 1147 (Admin) High Court - 18/05/2017 NHS funding G1_CP_6_F [16] G2_CP_1_F [19] G3_ST_1_F [46] UV G4_ST_1_F [50] PSED	R (Pharmaceutical Services Negotiating Committee) v Secretary of State for Health [2018] EWCA Civ 1925, [2019] PTSR 885, 23/08/2018 G1_CP_6_F [3], [55] G2_CP_1_F [3], [67] G3_ST_1_F [3], [72], [76]	

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	First instance	Court of Appeal	Supreme Court
17 ST CS IN	R (Simone) v Chancellor of the Exchequer [2019] EWHC 2609 (Admin) High Court - 07/10/2019 SEN funding G1_ST_1_F [3], [56] PSED G2_ST_1_F [3], [76] UV G3_CS_1_F [3], [88] G4_IN_1_F [3], [93]		
18 CS	R (Solar Century Holdings Ltd) v Secretary of State for Energy and Climate Change [2014] EWHC 3677 (Admin) High Court - 07/11/2014 G1_ST_1_F [4(a)], [38] Padfield G2_CS_3_F [4(b)], [64] G3_CS_3_F [4(c)], [69] G4_CS_4_F [4(d)], [91]	R (Solar Century Holdings Ltd) v Secretary of State for Energy and Climate Change [2016] EWCA Civ 117 01/03/2016 G1_ST_1_F [40(i)], [61] Padfield G2_CS_3_F [40(ii)], [64] G3_CS_3_F [40(iii)], [49] G4_CS_4_F [40(iv)], [67]	
19 IN	R (Tigere) v Secretary of State for Business, Innovation and Skills [2014] EWHC 2452 (Admin) High Court - 17/07/2014 Student finance G1_IN_1_F [19(i)], [20] G2_IN_1_F [19(ii)], [20]	R (Tigere) v Secretary of State for Business, Innovation and Skills [2014] EWCA Civ 1216 31/07/2014 G1_IN_1_F [2], [19] G2_IN_1_F [2], [19]	R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] 1 WLR 3820, [2015] UKSC 57 29/07/2015 G1_IN_1_F [2], [23] G2_IN_1_F [2], [23]
20 ST IN	R (Williams) v Secretary of State for the Home Department [2015] EWHC 1268 (Admin) High Court - 11/05/2015 Nationality - fees G1_ST_1_F [2(i)], [69] Padfield G2_IN_1_F [2(ii)], [82]	R (Williams) v Secretary of State for the Home Department [2017] EWCA Civ 98, [2017] 1 WLR 3283 28/02/2017 G1_ST_1_F [2], [37] Padfield G2_IN_1_F [2], [53], [65]	

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