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Crowdfunding and the changing dynamics of public interest judicial review

Judicial review is the system through which an individual ought to be able to go to a court and ask for a review of whether state action in respect of a certain issue is lawful. If the answer is no, there are various remedies the court can deploy to ensure government complies with the law. In performing this role, the courts are often said to be doing the job of upholding the Rule of Law. This simple account of judicial review is, as Harry Street once observed, ‘a nice idea ... but we just don’t have it.’¹ This has been so for a range of reasons in recent history. Perhaps the primary failing of the present judicial review system is one of expense: judicial review is a ‘Rolls-Royce’ process that few can afford.² This state of affairs was recently described as ‘public law’s disgrace.’³ It is while facing this reality that potential claimants

¹ Street, Harry (1975) *Justice in the Welfare State* (2nd edn), London: Stevens and Sons, p 65.

² Hickman, Tom (2017) ‘Public law’s disgrace’, 9 February, UK Constitutional Law Blog, 9 February (<https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace>).

³ *Ibid.*

have started to use crowdfunding platforms to raise money in order to bring judicial review claims.⁴ Crowdfunded claims have included high-profile ‘public interest’ challenges on new policies relating to junior doctors’ pay⁵ and the triggering of Brexit under Article 50 of the Treaty on European Union.⁶ Although there is an increasing volume of crowdfunded judicial reviews, little has been said about this change – a shift which is, essentially, citizens using technology to gain access to an administrative justice processes in a way they may not have otherwise been able to.

In this chapter I explain how crowdfunding works and the changes in practice we have seen in recent years, particularly in relation to public interest judicial review cases. My argument is that these changes may be changing the model of public interest litigation from *closed* to *open*. I also argue that, while it may bring benefits of various kinds, in its present state crowdfunding is an unstable practice and, without some level of regulation, it risks unintended consequences.⁷ I propose in this chapter that such

⁴ Hamman, Evan (2015) ‘Save the reef! Civic crowdfunding and public interest environmental litigation’, *Queensland University of Technology Law Review*, 15(1), 159; Gomez, Manuel, A. (2015) ‘Crowdfunded justice: On the potential benefits and challenges of crowdfunding as a litigation financing tool’, *University of San Francisco Law Review*, 49(2), 307; Elliot, Michael (2016) ‘Trial by social-media: The rise of litigation crowdfunding’, *University of Cincinnati Law Review*, 84(2), 529; Perry, Ronen (2018) ‘Crowdfunding civil justice’, *Boston College Law Review*, 59, 1357–95.

⁵ *Justice for Health v Secretary of State for Health* [2016] EWHC 2338; [2016] Med LR 599. See also Dyer, Clare (2016) ‘Junior doctors’ High Court challenge to Jeremy Hunt’, *British Medical Journal*, 13 September, 354 (www.bmj.com/content/354/bmj.i4975).

⁶ See, for example, *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583; *R (Webster) v Secretary of State for Exiting the EU* [2018] EWHC 1543 (Admin).

⁷ I have developed wider aspects of this argument in more detail in Tomlinson, Joe (2019) ‘Crowdfunding public interest judicial reviews: A risky new resource and the case for a practical ethics’, *Public Law*, 166.

regulation ought to be orientated at lawyers who bring or act in crowd-funded judicial review cases.

The developing use of crowdfunding for judicial review

Within the context of a policy of fiscal austerity,⁸ recent years have seen the government claim to have concerns about the expense of the justice system, and judicial review has been part of this. In a judicial review case, the government incurs two main costs, which are, of course, ultimately met by the taxpayer: first, defending the claim; and second, providing funds to support the court system in processing the case (for example, the provision of a hearing venue, a judge and court staff). At the same time of justice budgets being cut, there was talk of judicial review being a forum for ‘weak or ill-founded claims’ that were taking up ‘large amounts of judicial time and costing the court system money.’⁹ Subsequently, there were reforms that sought to restrict access to judicial review.¹⁰ Reforms to the judicial review process were also completed in a context where funding cuts across the justice system were being made. For instance, there was a vast reduction in the amount of legal aid available to publicly fund cases. These changes had consequences for the bringing of judicial reviews.

Making sense of the economics of the judicial review process is no easy task. There is a complex landscape of costs rules, courts

⁸ For an overview and analysis of the effects of austerity on the wider administrative justice system, see Thomas, Robert and Tomlinson, Joe (2017) ‘Mapping current issues in administrative justice: austerity and the “more bureaucratic rationality” approach’, *Journal of Social Welfare and Family Law*, 39(3), 380–99.

⁹ Ministry of Justice (2012) ‘Judicial review consultation’, Press release, 13 December (www.gov.uk/government/news/judicial-review-consultation).

¹⁰ Ministry of Justice (2014) *Judicial Review: Proposals for Further reform*, Cm 8703; Criminal Justice and Courts Act 2015.

fees, cost caps and other features, which are all interconnected.¹¹ There is only limited empirical evidence on how this economic dimension of judicial plays out in practice.¹² Crowdfunding is connected with this wider economic landscape in multiple ways, but it is primarily a funding method.

For those trying to fund a judicial review, there are a few options at present. You could simply pay privately if you have deep enough pockets. You will have to, typically, pay the costs of a solicitor and counsel on an hourly basis. Alternatively, you may be able to agree a fixed fee in advance. However, some lawyers may be unwilling to provide fixed fee arrangements if a case is unpredictable or they have not had the opportunity to fully develop a view on the nature and merits of the case. Because of this, sometimes fees are fixed initially, but if the claim is successful, then full fees as paid (something usually called a discounted fee agreement). A conditional fee agreement is also possible – sometimes referred to as ‘no win now fee agreements’.¹³ If a claim fails, a claimant may also need to cover the costs of the government’s legal fees, or part of them.

How much a judicial review costs varies widely from case to case. If a case settles early, costs may be limited. But if it goes to a full hearing, they may be considerable. One estimate, from 2007, suggests that a typical judicial review can incur costs from

¹¹ Low Beer, Ravi and Tomlinson, Joe (2018) *Financial Barriers to Judicial Review*, London: Public Law Project.

¹² Bondy, Varda, Platt, Lucinda and Sunkin, Maurice (2015) *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences*, London: Public Law Project.

¹³ Lawyers are able to charge a success fee of up to 100% if the case is won to compensate them for the risk of being paid nothing. However, since April 2013, success fees are no longer recoverable from the defendant, but must instead be paid by the claimant. Given the non-monetary nature of judicial review, the prospect of paying a success fee often makes a conditional fee agreement expensive and unattractive.

£10,000 to £20,000.¹⁴ However, complex cases can be much more expensive. In 2017, Tom Hickman, a judicial review practitioner, suggested that a ‘very simple’ case that took a two-hour hearing would cost around £8,000 to £10,000.¹⁵ By contrast, a ‘moderately complex claim lasting a day and not brought against a central government department’ could cost beyond £40,000. For a ‘substantial’ judicial review heard over two days, Hickman estimates costs will run to between £80,000 and £200,000. There is no clear data on this, but it is clear that costs for cases that go to a full hearing can be significant.

Public funding, in the form of legal aid, is available for some cases.¹⁶ The rules relating to legal aid are incredibly complex. Broadly speaking, to get funding a claimant has to be ‘within scope’ and eligible for legal aid,¹⁷ satisfy a means test,¹⁸ and prove that the merits of the claim are sufficient to satisfy the merits test.¹⁹ In recent years, access to legal aid has been restricted and the overall budget vastly reduced. This has caused great concern

¹⁴ Public Law Project (2007) *How to Fund a Judicial Review Claim When Public Funding Is Not Available*, London: Public Law Project, para 1, which was informed by a discussion with practitioners. Further and similar estimates are available in a response to a Ministry of Justice consultation made available via a Freedom of Information Act 2000 (FOIA) request; see FOIA Request No 171204020.

¹⁵ Hickman (note 2 above).

¹⁶ Legal aid grants also come with a level of costs protection. Before the event insurance policies (typically included in home and motor insurance policies) fund various types of litigation, but are ill suited to non-monetary claims where remedies are discretionary, and so are not generally available to cover judicial review proceedings.

¹⁷ Legal Aid Sentencing and Punishment of Offenders Act 2012, Sections 9 and 10.

¹⁸ Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (SI 2013/480) (as amended).

¹⁹ Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104) (as amended).

about an access to justice crisis.²⁰ In respect of judicial review in particular, Hickman has argued powerfully that they are part of an access to justice crisis that is ‘public law’s disgrace.’²¹ He suggests that the ground-level reality is that ‘people who have £169.15 or more per week for themselves and their family to live off, or who have any significant assets, do not qualify for legal aid.’²² Available data indicates that there are now considerably fewer judicial reviews supported by legal aid than just a few years ago.²³

Overall, the landscape for judicial review funding is, at present, one where resources have become scarce. However, costs are still high. Public interest judicial review (that is, those cases that seek to raise points of general public importance or change an approach to an issue) also finds itself within that landscape. There is now an extensive literature which discusses public interest litigation and the availability of funding – and the expense of courts processes more broadly – is widely discussed as a key factor in what litigation is actually brought.²⁴ As funding becomes scarcer, litigation that makes wider public interest arguments

²⁰ This was clear in the discussion around the Bach Commission; see The Bach Commission (2017) *The Right to Justice: The Final Report of the Bach Commission*, Fabian Policy Report, London: Fabien Society. See also Hickman (note 2 above).

²¹ Hickman (note 2 above).

²² Ibid.

²³ Data on this issue was made available under an FOIA request; see FOIA Request No 171020004.

²⁴ For an early example, see Vose, Clement (1959) *Caucasians Only*, Berkeley, CA: University of California Press, pp 119, 240. For a more recent discussion, see Hilson, Chris (2002) ‘New social movements: The role of legal opportunity’, *Journal of European Public Policy*, 9(2), 238–55; Andersen, Ellen Ann (2006) *Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation*, Ann Arbor, MI: University of Michigan Press; Vanhala, Lisa (2012) ‘Legal opportunity structures and the paradox of legal mobilization by the environmental movement in the UK’, *Law & Society Review*, 46(3), 523–56.

may also become more difficult.²⁵ It is in these conditions of greater scarcity and concerns about access to justice in which crowdfunding took off in the UK.

Crowdfunding is a method of raising money for a project via an online platform. The general use of crowdfunding across different parts of society has expanded rapidly in the last few years. It primarily emerged because, after the global financial crash of 2008, banks could not meet the demand for finance and an ‘alternative finance economy’ developed. This alternative finance economy is quickly becoming an important part of the UK economy.²⁶ In 2013, £666 million was raised in the UK through crowdfunding platforms. This went up to £1.74 billion and £3.2 billion in 2014 and 2015 respectively.²⁷ Government has also signalled its support for crowdfunding. In 2012, at a time of sweeping public spending cuts, the Coalition government invested £20 million in businesses via crowdfunding platforms and made a further £40 million investment in 2014.²⁸ Perhaps unsurprisingly, the speedy growth of this form of fundraising has left many questioning whether regulation now needs to adapt to these new activities.²⁹

²⁵ Various third party funders – such as charitable trusts or the Equality and Human Rights Commission – still sometimes back judicial reviews, but the overall funding landscape remains more barren than it was in the recent past.

²⁶ Zhang, Brian, Baeck, Peter, Ziegler, Tanya, Bone, Jonathan and Garvey, Kieran (2015) *Pushing Boundaries: The 2015 UK Alternative Finance Industry Report*, Nesta.

²⁷ *Ibid*, p 11.

²⁸ BIS (Department for Business, Innovation & Skills) (2014) ‘New £40 million investment by British Business Bank to support £450million of lending to smaller businesses’, Press release, 25 February (www.gov.uk/government/news/new-40-million-investment-by-british-business-bank-to-support-450-million-of-lending-to-smaller-businesses).

²⁹ Armour, John and Enriques, Luca (2018) ‘The promise and perils of crowdfunding: Between corporate finance and consumer contracts’, *Modern Law Review*, 81(1), 51–84. The Financial Conduct Authority is also now

As a method of litigation funding, crowdfunding is best seen as a form of third party funding.³⁰ Historically this type of funding was prohibited, but the rules changed in recent decades, and now third party funding is seen as a key part of the justice system.³¹ Lord Justice Jackson, in his landmark review of civil litigation costs, considered that third party funding is in principle ‘beneficial and should be supported’, because, among other benefits, it ‘provides an additional means of funding litigation and, for some parties, the only means of funding litigation [and thus] promotes access to justice.’³² With crowdfunding, money donated through the online platform forms a fund, which is the third party funder of the case. Some have drawn a distinction between ‘investment-based’ crowdfunding models, where investors have a financial stake in a monetary claim and seek to make profit, and ‘non-investment-based’ crowdfunding models, where the investor’s reward is non-monetary or non-existent.³³

There are multiple players on the UK crowdfunding scene at present. Two seem particularly important in the context of judicial review. First, there is CrowdJustice, an organisation

taking various steps in respect of crowdfunding platforms. For instance, it considers certain forms of crowdfunding – loan-based crowdfunding and investment-based crowdfunding – to be regulated activities under the Financial Services and Markets Act 2000.

³⁰ This was defined by Lord Justice Jackson as funding by a ‘party who has no pre-existing interest in the litigation, usually on the basis that (i) the funder will be paid out of the proceeds of any amounts recovered as a consequence of the litigation, often as a percentage of the recovery sum; and (ii) the funder is not entitled to payment should the claim fail’; see Lord Justice Jackson (2009) *Review of Civil Costs: Final Report*, p xv.

³¹ For an overview, see Lord Neuberger (2013) ‘From Barretery, Maintenance and Champerty to Litigation Funding’, Harbour Litigation Funding Lecture (www.supremecourt.uk/docs/speech-130508.pdf). See also Radin, Max (1935) ‘Maintenance by Champerty’, *California Law Review*, 24, 48–78, p 49; *Giles v Thompson* [1994] 1 AC 142, p 153 (Lord Mustill).

³² Lord Justice Jackson, p 117 (note 30 above).

³³ Perry (note 4 above).

that provides and manages an online platform for those seeking to raise funds for a case. CrowdJustice allows ‘case owners’ to develop a page on the its website, to promote the case and facilitate online donations. On these pages, there is a target amount and deadline. These pages can then be circulated online to encourage donations. CrowdJustice does not offer legal advice – it simply facilitates the fundraising. The platform requires that users of the site have instructed a qualified lawyer and leaves the details of the case, and how it is presented to the public, to individual case owners. If a funding target is met, CrowdJustice takes a 6% ‘platform fee’, plus VAT, from the overall total raised, and transfers the rest into the case owner’s solicitors’ client account. Where a target is not met, the platform does not take a fee, pledges are cancelled and donations are not taken. When a case goes forward but there is money left over, the money goes back to CrowdJustice, but the case owner can decide to put that to another case on the site or to the Access to Justice Foundation. In the case of donations beyond £1,000, donors have the option of a pro rata refund.

Another key organisation on the UK crowdfunding scene is the Good Law Project. This is not a crowdfunding platform but it is a new organisation that is, in essence, a creature of crowdfunding success. The director of the Good Law Project, Jolyon Maugham QC, had a career as a successful tax barrister before he gained significant traction on social media. He used crowdfunding to fund judicial reviews he was bringing that had some wider political motivation. These activities evolved into the Good Law Project. It is an expressly political project, which seeks to drive social change through litigation.³⁴ Its focus areas include tax, workers’ rights and Brexit. The first case the Good Law Project was involved centred on the argument regarding

³⁴ Details of the background of the organisation are set out in Maugham, Jolyon QC (2017) ‘The Lawyer as Political Actor’, Annual Queen Mary University of London Law and Society Lecture.

the Brexit process ultimately decided by the Supreme Court in *Miller*.³⁵ The argument in this case was famously published in a blog shortly after the referendum.³⁶ Maugham then crowdfunded initial advice on the basis of the blog (although this was one of multiple efforts around the same issue). After that initial foray, cases have included a high-profile challenge to the Electoral Commission's response to accusations of misconduct in the Brexit referendum.³⁷

Beyond the high-profile work of Mr Maugham QC, the crowdfunding community more widely is ambiguous. Further research on who is involved and their experiences could shine fresh light on how this new platform is being used.

Emerging politics of crowdfunding

The emerging politics around crowdfunding is complicated. There are various strands that interact at various points. First, there is the politics of particular crowdfunded campaigns. The politics of campaigns are, quite naturally, often specific to the case. Challenges around Brexit have, in recent years, been a particular hotspot for successful campaigns. These campaigns have large groups of receptive and politically active donors. However, some campaigns pursued via crowdfunded cases can also bring up local issues. Given the need to campaign and given that crowdfunding requires donors that are capable of accessing and using the internet, social media has become a key space for

³⁵ *R (Miller) v Secretary of State for Exiting the European Union* (see note 6 above).

³⁶ The legal argument was outlined in Barber, Nick, Hickman, Tom and King, Jeff (2016) 'Pulling the Article 50 "trigger": Parliament's indispensable role', UK Constitutional Law Blog, 27 June (<https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role>).

³⁷ *R (The Good Law Project) v Electoral Commission & Others* [2018] EWHC 2414 (Admin).

the expression of the political components of crowdfunding. Often, individuals leading crowdfunding campaigns seek to engage in public debate on platforms such as Twitter, both as part of wider campaigning activities but also to draw attention to the crowdfunded case. This raises the question of whether the campaigning is for the case or whether the case is an instrument of political campaigning. Traditional public interest litigation organisations have typically been more restrained in engaging in political argument in the social media and crowdfunding contexts. Instead, they typically adopt conventional campaigning practices with integrated crowdfunding links.

Beyond the politics of individual case campaigns, the crowdfunding platforms responsible for hosting and administering campaigns have particular objectives. For instance, CrowdJustice states its mission to be ‘to give more access to the legal system. We’re a team of lawyers, technologists and campaigners and we built CrowdJustice as a way to level the playing field.’ The platform is an important player as it exerts control over the form of campaigns and how they are administered. So far, key platforms seem to be acting independently, professionally and in a manner consistent with traditional organisations concerned with issues such as access to justice. However, the ‘mission’ aspect of the platform is still an emerging dynamic, and it will be interesting to see how this area evolves in the coming years.

As for the government, there appears to be no clear policy position on crowdfunding justice. As noted above, government has promoted crowdfunding in other areas of policy but has not yet gone so far in the justice sphere. On the one hand, supporting crowdfunding may be an attractive policy for a government that has dramatically cut public funding for the justice system in recent years. If crowdfunding is a success, this may lead to a view that it could be a useful substitute for public

funding in some circumstances.³⁸ On the other hand, supporting crowdfunding in the justice system may lead, especially with recent spending cuts in mind, to a view that crowdfunding is a second-rate substitute for legal aid. There is no evidence at all that crowdfunding is or could be an effective like-for-like substitute for public funding.

How crowdfunding integrates into the government's general policies on judicial review is also yet to be seen. In respect of the judicial review, the government wears two hats as principal designer and constant participant in the process. This means that it exerts a large degree of control over the judicial review process and can react to new developments. If there is a growth in public interest judicial review due to crowdfunding or crowdfunding has negative effects on how such judicial reviews are managed, there could be long-term effects. Harlow and Rawlings have mapped this terrain well. They explain that government can take action to restrict litigation through 'clamping down.'³⁹ This is a 'process' that involves 'structural or procedural change to the judicial review process or, put differently, procedural constraint designed to blunt substantive legal action.' If many crowdfunded cases are poorly managed, it is difficult to imagine a clamp down of some kind not happening.

³⁸ Some argue, however, that public funding may not be necessary in the way many often suggest; see Higgins, Andrew (2017) 'The costs of civil justice and who pays', *Oxford Journal of Legal Studies*, 37(3), 687–713. There is also a powerful argument for considering judicial review costs as distinct from standard civil disputes; see Fordham, Michael (2009) 'Rethinking costs in judicial review', *Judicial Review*, 306; *R (Davey) v Aylesbury Vale District Council* [2007] EWCA Civ 1166; [2008] 1 WLR 878 [18] (Sedley LJ).

³⁹ Harlow, Carol and Rawlings, Richard (2016) "Striking Back" and "Clamping Down": An Alternative Perspective on Judicial Review', in John Bell, Mark Elliott, Jason N.E. Varuhas and Philip Murray (eds) *Public Law Adjudication in Common Law Systems: Process and Substance*, Oxford: Hart Publishing, Chapter 13.

The views on crowdfunding within the judiciary may also be significant in the long term. Much of judicial review remains discretionary. In practice, this means that judicial attitudes and thought can have meaningful impacts in cases. In terms of possible negative consequences, crowdfunding may risk irritating the judiciary by bringing explicitly political campaigning to the courts. There have also been concerns expressed about the effects of crowdfunding on litigation behaviour, such as it leading to grandstanding by lawyers. More broadly, increasing use of crowdfunding may generate unrealistic expectations that claimants should crowdfund if they require litigation funding. However, judges may also be receptive to crowdfunding as a means of increasing access to justice, and there are past examples of the judiciary liberalising gateways for public interest litigation.⁴⁰ Moreover, there are already examples of the judiciary reacting positively to crowdfunding.⁴¹

The politics of crowdfunding is incredibly diverse and complex. It is still also in a formative stage and we can expect further crystallisation of different views in the coming years, as the experience with crowdfunded judicial reviews grows. What is remarkable, even at this point, is that there are very few (public) critical voices on crowdfunding.

From a closed to open model of public interest judicial review

The growing use of crowdfunding forces us to revisit traditional models of judicial review.⁴² In particular, it is perhaps changing how we ought to understand public interest judicial review.

⁴⁰ See, for example, *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

⁴¹ See, for example, *Stephen Hawking and others v Secretary of State for Health & Social Care and National Health Service Commissioning Board* (unreported), 22 February 2018.

⁴² There is limited modelling work on judicial review. The key authority on this is Rawlings, Richard (2008) 'Modelling judicial review', *Current Legal Problems*, 61(1), 95–123, p. 109.

In recent decades, public interest judicial reviews in the UK have often been brought by organisations with expertise of such litigation (for example, Liberty or JUSTICE) or some particular policy area (for example, Greenpeace). This litigation, being complex, expensive and unpredictable, was treated very carefully. Indeed, the same few organisations were frequent players. These organisations, it was often observed, had similar missions. Public interest litigation conducted by such organisations usually involved experienced lawyers and senior members of the organisation. Organisations, in the conduct of litigation, had various pressures that generally led them to litigate with discipline and care. For instance, they were often accountable to a board, and sometimes their wider membership. In a sense, we could say that this was a *closed* model of public interest judicial review. This is not meant in a pejorative sense, but is rather to say the activity was almost a niche and a specialist one. As a result, it was a relatively stable area of litigation overall.

With crowdfunding, the closed model of public interest litigation could be dislodged if there are more cases brought by litigants from outside of the traditional group of actors. It has always been the case that, if a person had sufficient funds, they could use their own funds to challenge government via judicial review.⁴³ Yet, the promise of crowdfunding is that it can overcome financial barriers to judicial review for the wider population. In so doing, it is likely that public interest judicial review in the UK – as an area of litigation – may become more diversified if crowdfunding continues to grow in importance. New focus areas for litigation may arise. New groups and people may become involved. In this way, crowdfunding may produce a shift from a closed to a more *open* model of public interest litigation in the UK. However, at the same time, the

⁴³ The spread-betting tycoon Stuart Wheeler, who challenged the UK's ratification of the Lisbon Treaty, is a good example; see *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin); [2008] ACD 70.

structures that made patterns of public interest litigation relatively stable in recent years may not be present in the same ways. The story is therefore more nuanced than simply the potential democratisation and diversification of public interest litigation.

Design considerations for an institutional response

The design of crowdfunding is a difficult topic as the state has done little to address this quickly developing sphere of legal activity. In the absence of a formal state institution of which to examine the design, here I provide a survey of some of the key considerations that may go to informing any future design.

It is clear crowdfunding can work in some cases. Some cases have raised vast amounts of money. However, success is far from guaranteed. For a crowdfunding campaign to be a success, there needs to be willing donors who are in a position to donate money. Sometimes, it may be the case that significant time and even money is required to bring attention to the campaign. This may not be so difficult if the issue already has a high profile but, for some, it could be a key barrier to crowdfunding. For those who are bringing claims that may not have a high level of popularity (such as claims by prisoners), crowdfunding may be of little utility. The central design question for any institutional response to crowdfunding is how to provide an effective framework to ensure risks are managed while benefits are optimised.

Crowdfunding campaign web pages are incredibly variable, and the extent of the variation demonstrates how the practicalities of managing a crowdfunded case give rise to some difficult ethical and strategic questions for lawyers. One key issue is when fundraising should take place. Asking for funding for a case can be speculative at an early stage of litigation, but there is only a short time window (typically three months) in which judicial reviews can be brought. There is also the issue of how much should be crowdfunded. A tension may arise

here between the aims of not wanting to raise more than is necessary from the public and wanting to know that a case is properly funded. It has been argued that there may be a 'useful discipline' in 'putting yourself in a position where you have to make an ongoing case for people to support the litigation.'⁴⁴ The presentation of the crowdfunding pitch also raises some tricky questions. Crowdfunding campaigns are directed to the public, and therefore there is a need for them to be put in simple terms. However, some may suggest that, given this is a legal case seeking funding, details of the claims and evidence being put are required. Some crowdfunding attempts only give very broad overviews of the case they intend to bring, whereas others provide detailed pleadings and other documents. Related to this, some crowdfunding campaigns provide clear updates on the progress of a case, with new documents, whereas others do not. At the moment, practice in the management of crowdfunded cases seems to vary significantly. The need for a consistent baseline of ethical practice is an important question for any institutional framework in this area.

With the possible shift from a more closed to a more open model of public interest judicial review that crowdfunding may bring, there is the chance of new actors to come on to the scene. Jolyon Maugham QC is a good example of the possibility of crowdfunding opening up who is involved in public interest litigation.⁴⁵ As noted above, organisations that have traditionally been active in public interest judicial reviews had various pressures which generally led them to litigate with discipline and care (for example, being accountable to a board and their membership). These structures are not necessarily replicated for Mr Maugham QC and others following in his footsteps. Crowdfunders are more likely to see themselves as accountable to their base of donors: 'if you are asking people to dip their hands

⁴⁴ Maugham (note 34 above).

⁴⁵ *Ibid.*

into their pockets to fund a case you need to be able to justify that decision to yourself – and to them.⁴⁶ With this change, there may be changes to the practice of public interest judicial review in some cases. Any institutional response to crowdfunding must consider the dynamics of this new landscape.

An important distinction can also be drawn between ‘investment-based’ crowdfunding models, where investors have a financial stake in a monetary claim, and ‘non-investment based’ crowdfunding models, where the investors’ reward is non-monetary or intangible.⁴⁷ Ronan Perry argues that investment-based crowdfunding is more secure as the incentives of the person putting their money into the case provides a kind of filtering, whereas in judicial review cases, where claims are primarily about the legality of government action and not monetary compensation, there is less of an incentive for donors to properly examine the merits of a case.⁴⁸ Perry recommends that in non-investment-based crowdfunding models, claims should be subject to a professional vetting process to minimise the risk of generating unmeritorious claims. Different organisations involved with crowdfunding take different approaches to vetting. As outlined above, CrowdJustice requires that every individual or group taking a case either has a qualified solicitor or barrister who has been instructed, or that the case is being taken by a non-profit organisation. The Good Law Project uses the resources of its director for this purpose. What level of vetting is required and how to ensure it in practice are key design questions.

Recommendations

Overall, crowdfunding represents a risky resource. It has the potential to generate unforeseen consequences by disrupting

⁴⁶ Ibid.

⁴⁷ Perry (note 4 above).

⁴⁸ Ibid.

relatively stable patterns and practices of public interest judicial review litigation. Equally, however, crowdfunding has helped support valuable cases that would not otherwise have been brought. The cost of judicial review, and the diminished public funding available for it, make crowdfunding potentially more important. Given the contrasting aspects of crowdfunding, the challenge for any institutional response is to design frameworks that promote optimisation while minimising risk. I have argued elsewhere that regulation ought to be focused on lawyers as they possess the most significant amount of power in the bringing and conduct of crowdfunded judicial reviews.⁴⁹ I have also suggested that guidance on the form of regulation can be derived from looking at existing professional codes.⁵⁰ There is no need to place a straitjacket on litigation strategy, but setting a general ethical baseline similar to those seen in existing professional codes would be beneficial.

Going forward, ethical regulation of crowdfunding, based on detailed consultation with relevant stakeholders, should be considered by the appropriate regulators. For this exercise to be as effective as possible, a more robust empirical evidence base would be hugely beneficial. In the interim, key organisations involved in public interest judicial reviews should consider developing their own policies on responsible practices for crowdfunding for litigation.

⁴⁹ Tomlinson (note 7 above).

⁵⁰ See Bar Standards Board (2018) *Handbook* (3rd edn), p 22; SRA (Solicitors Regulation Authority) (2017) *SRA Handbook* (Version 19). For an example of a recent technology-led amendment, see Bar Standards Board (2017) 'Guidance for barristers using social media', February (www.barstandardsboard.org.uk/media/1821624/bsb_social_media_guidance_.pdf).