# Crowdfunding Public Interest Judicial Reviews: A Risky New Resource and the Case for a Practical Ethics

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In their classic work on public interest litigation ('PIL'), Harlow and Rawlings define "pressure through law" as the "use of the law and legal techniques as an instrument for obtaining wider collective objectives."[1] They observe that the use of the courts by organisations seeking policy change was not just an American trend, it was happening in the UK and nor was it new.[2] The quickly-growing literature on PIL has studied how some organisations deploy the law and legal techniques to pursue wider objectives.[3] Much of the international debate around this "mobilization of law"—from Vose's early account of disadvantage theory in the 1950s[4] through to current debates on "legal opportunity structures"[5]—has a consistent thread: the availability of financial resources often has a profound effect on the fate of individual PIL cases and the wider pattern of PIL in different jurisdictions. The proposition that funding is a key variable in determining patterns of PIL is an utterly uncontroversial one, and one which has sustained over time. In the context of judicial review in the UK, traditional funding for

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[1] C. Harlow and R. Rawlings, *Pressure Through Law* (London: Routledge, 1992).

[2] Above p.1.

[3] See *e.g.* V. Bondy, L. Platt, and M. Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (London: The Public Law Project, 2015); C. Hilson, "New social movements: the role of legal opportunity" (2002) 9(2) *Journal of European Public Policy* 238; The Public Law Project, *Third Party Interventions: A Practical Guide* (London: Public Law Project, 2008); The Public Law Project, *Guide to Strategic Litigation* (London: Public Law Project, 2014). I will not discuss the legitimacy of this use of the courts, for a critical analysis see: C. Harlow, "Public Law and Popular Justice" (2002) 65(1) M.L.R. 1.

[4] C. Vose, *Caucasians Only* (Berkeley: University of California Press, 1959), pp.119, 240.

[5] *e.g.* C. Hilson, "New social movements: The role of legal opportunity" (2002) 9 J.E.P.L 238; E.A. Andersen, *Out of the closets and into the courts: Legal opportunity structure and gay rights litigatio*n (Ann Arbor: University of Michigan Press, 2006); L. Vanhala, "Legal opportunity structures and the paradox of legal mobilization by the environmental movement in the UK" (2012) 45 *Law & Society Review* 523. For earlier, similar work, see. C.R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

litigation has become less available in recent years.[6] While it is important to recognise that the relationship between money and access to judicial review is a densely complex one, many now claim that funding a judicial review is increasingly difficult. In this space, crowdfunding—using an online platform to raise third-party funds—has become an increasingly-used tool, with many PIL challenges now being funded by this method.[7] There has, however, been no systematic analysis of this phenomenon in the UK, and relatively little internationally.[8]

In this article, it is considered whether crowdfunding is a possible answer to the increasing scarcity of traditional resources in the context of PIL in the UK. In other words, can crowdfunding support reform through the provision of resources for PIL? The question of whether this mode of litigation funding ought to be encouraged or whether it is problematic is also addressed. I argue that crowdfunding can—in certain cases—solve the resource shortage and, ultimately, be useful in procuring reform.[9] However, it is far from a foolproof solution and there are multiple risks inherent in its use. The nature and extent of these risks are such that the crowdfunding of PIL should be approached with great caution. It is therefore suggested here that we need to develop a practical ethics of crowdfunding in this context.

The analysis in this article has four main parts. The first part explains the present funding context for judicial review in the UK. It is imperative this context is understood as it provides the conditions in which crowdfunding has grown. The second part of this article introduces how crowdfunding works, how it has become increasingly relied-upon as a method for funding judicial review cases, who the key actors are, and examples of crowdfunding in action. The third part considers the main benefits and risks of the increased role that crowdfunding is playing in the UK. The final part of this article sets out the case for developing

[6] PIL does not necessarily have to take the form of judicial review. See for instance the actions documented in G. Howells, *The Tobacco Challenge: Legal Policy and Consumer Protection* (Abingdon: Routledge, 2011). There is an argument that all cases have, in a way, a public interest justification, as explained in *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2017] 3 W.L.R. 409. The focus here, however, is judicial review, which is the primary means of PIL in the UK.

[7] This is an international trend. Here I focus on providing a detailed study of the UK experience.

[8] See E. Hamman, "Save the Reef! Civic crowdfunding and public interest environmental litigation" (2015) 15(1) Q.U.T.L.R. 159; M.A. Gomez, "Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Financing Tool" (2015) 49 U.S.F.L.R. 307; M. Elliot, "Trial by Social-Media: The Rise of Litigation Crowdfunding" (2016) 84(2) U.C.L.R. 529; R. Perry, "Crowdfunding Civil Justice" (2018) B.C.L.R. (forthcoming).

[9] The notion of "public interest" litigation is fiercely contested. I simply use it here to mean the use of the law and legal techniques as an instrument for obtaining wider collective objectives. This may simply involve the settle of legal questions and need not be informed by any ideology.

a practical ethics for crowdfunding PIL and sketches out the form that such a practical ethics may take.

**Access to Judicial Review, Financial Resources, and Funding**

The suggestion that legal procedures cost significant amounts of money and that there should be practical mechanisms for managing such expenses is not new, nor is it particular to public law.[10] The concern that judicial review is too expensive for ordinary citizens has also long been discussed.[11] Yet, the complex socio-economic dimensions of judicial review litigation have not been squarely confronted by public law researchers in the UK.[12] Indeed, the topic is so little discussed by scholars that Rawlings suggests it is part of "the secret history" of judicial review: where the widely-observed expansion of judicial review grounds in recent decades has been quietly "engendered on the back of large-scale exclusion" of people.[13]

In recent years, concerns about the expense of judicial review have been put under the spotlight by the general programme of austerity implemented by the UK government from 2010 onwards,[14] as well as the reforms undertaken and attempted concerning judicial review specifically.[15] Notably, when the UK Government proposed changes to the judicial review system in 2012, the consultation process cited the growing number of "weak or ill-founded claims" that were taking up "large amounts of judicial time and costing the court system money."[16] The impact of these changes—and the associated political rhetoric about the government-side expense of judicial review—has led to growing concern about access to justice and the limiting of who is able to hold public bodies to account via the process. The position now is that the costs of judicial review for both claimants and public authorities have been largely without empirical study but those same issues have become more central to the

[10] See, for example, the historical debate in civil justice traced in J. Sorbaji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge: CUP, 2014).

[11] This issue was recently raised again in a prominent blog, see: T. Hickman, "Public Law's Disgrace" (February 9 2017) *UK Constitutional Law Blog, https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/* [Accessed February 22, 2018].

[12] See the discussion in Bondy, Platt, and Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (2015), pp.47-58.

[13] R. Rawlings, "Modelling Judicial Review" (2008) 61(1) C.L.P. 95, 109.

[14] The effects of austerity have affected many parts of the administrative justice system, not just the judicial review system. For an overview and analysis, see R. Thomas and J. Tomlinson, "Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach" (2017) 39(3) J.S.W.F.L. 380.

[15] Ministry of Justice, *Judicial Review: Proposals for further reform* (London: Cm 8703, 2014).

[16] Ministry of Justice, "Judicial review consultation–Press Release" (13 December 2012), *https://www.gov.uk/government/news/judicial-review-consultation* [Accessed February 22, 2018].

shaping of government policy—and the public debate—on judicial review. Though this article is not the place to provide it, there is certainly an urgent need for a thorough and wide-ranging assessment of the "economy" of the modern judicial review system.

The core concern of this article—crowdfunding—relates specifically to the *funding* of judicial review cases.[17] In respect of funding a case, two issues need to be considered by any prospective judicial review claimant at the outset: paying their own legal fees and expenses, and budgeting to pay the other side's costs if the claim fails. There are three main ways for claimants to pay their own lawyer costs: paying from existing funds; entering into a conditional fee agreement (a "CFA") with solicitors and/or counsel; or obtaining a grant of legal aid.[18]

For those paying from their own pockets, solicitors typically bill their time at hourly rates depending on the seniority of the fee earner, or at a fixed fee (for the whole case or for stages of it), or a combination of both. The level of funds needed for lawyer fees and disbursements varies widely per case. It is clear, however, the cost of bringing a judicial review claim that goes to a full hearing may be considerable (lessened if the claimant wants to bring a claim as a litigant in person). A 2007 estimate placed the costs in the region of £10,000 to £20,000 for a straightforward case, possibly much higher for a more complex matter.[19] This has likely increased in the decade since the estimate was made. Hickman, writing in 2017, estimates that a "very simple two hour judicial review against a government department" would cost around £8,000 to £10,000.[20] A "moderately complex claim lasting a day and not brought against a central government department" would run in excess of £40,000, plus VAT. For a "substantial two day judicial review," Hickman estimates costs will run to £80,000 and £200,000. While there is an absence of recent systematic data, legal fees are clearly significant amounts. It must also be noted that if a claimant is unsuccessful, they are likely to be liable for the defendant's costs as well as their own. They are therefore looking at a legal bill of

[17] Other key aspects of the "economy" of judicial review include court fees, costs rules, *etc.*

[18] Legal aid grants come with a level of costs protection too. 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.

[19] The Public Law Project, *How to fund a judicial review claim when public funding is not available* (London: The Public Law Project, 2007), para.1, which was informed by discussion which 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.

[20] Hickman, "Public Law's Disgrace".

upwards of £30,000 if they lose, and they must be prepared for this eventuality, while all the time bearing in mind the general unpredictability of judicial review proceedings, adjudication, and costs orders.

CFAs are sometimes referred to as "no win no fee agreements." In judicial review cases, they are agreements between claimants and their lawyers that require the lawyers to agree to act in a case on the basis that they will only be paid if the case is successful. 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 CFA expensive and unattractive. For this reason, many judicial review claimants will only be able to proceed if they can agree a particular type of CFA commonly known as a "CFA-Lite". This is an agreement which limits the costs payable to the solicitor to the amount of costs that may be recovered from the other side (which the claimant has to agree to pursue), and does not require the claimant to pay the lawyers a success fee. If the case is successful and an *inter partes* costs order is obtained, the claimant's lawyers can recover their full fees. CFA-Lites may be used in conjunction with fixed fees.

A fixed fee can be agreed with lawyers to perhaps get around some of the difficulties faced with high fees. However, agreeing fixed fees at the outset is risky for lawyers since they will not generally have had an opportunity to fully engage with the case papers, and judicial review litigation is often unpredictable even if well prepared. As such, fixed fees are often charged in conjunction with a CFA, as a means of reducing the lawyers' exposure, with full fees payable in the event that an *inter partes* costs order is obtained—this is commonly called a Discounted Fee Agreement.

Legal aid is another key source of funding. The specific provisions governing the grant of legal aid in judicial review have a byzantine complexity. Broadly speaking, there are two types of legal aid relevant to judicial review. There is Legal Help, which covers initial advice and assistance. There is also Legal Representation. Legal Help is a type of "controlled work," which solicitors have contractual rights to self-grant. Lawyers are paid a fixed fee, currently £259, regardless of the amount of work carried out, unless actual costs exceed the fixed fee by a factor of three or more, in which case, an hourly rate can be claimed in the full amount (this assessed on a case by case basis by the Legal Aid Agency). The Legal Representation

category itself involves two types of legal aid: Investigative Representation, which typically covers work to be done to establish the merits of a potential claim; and Full Representation, which covers work to be done from the issuing of proceedings. Investigative and Full Representation are categories of work known as "licensed work" for which, save in certain prescribed exceptional circumstances, permission needs to be sought in advance from the Legal Aid Agency. Lawyers are paid per hour at rates fixed by regulation.[21] Solicitors prepare a bill at the end of a case, including all the disbursements incurred such as counsels', experts', and court fees. Each bill is assessed either by the Legal Aid Agency (if either the bill is less than £2500, or if proceedings were not issued), or by the court. If an order is obtained that another party must pay the legally aided person's costs, the solicitors send the bill to the paying party for payment. If agreement on the size of the bill cannot be reached, the solicitors for the receiving party can commence assessment proceedings to get the bill assessed by the court. Eligibility for legal aid is governed by legislation, the provisions and applications of which determines: whether a claim if of a kind that is 'within scope' and eligible for legal aid;[22] whether the applicant for legal aid satisfies the 'means test';[23] and whether the merits of the claim are sufficient to satisfy the merits test.[24]

Recent reforms to legal aid have caused widespread concern in the legal community.[25] In the context of judicial review, Hickman has argued powerfully that they are part of an access to justice crisis that is "public law's disgrace."[26] He argues that the most important component of legal aid, at least as it applies in the field of public law, is not that it provides a source of funding for a person's lawyers but because it comes with protection against an adverse costs order. He observes that "today very few people now qualify for legal aid."[27] This is, in large part, because of substantial restrictions on the scope of legal aid and the application of the means test.[28] For Hickman, 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

[21] Civil Legal Aid (Remuneration) Regulations 2013 (SI 2013/422) Sch.1 para.3.
[22] Legal Aid Sentencing and Punishment of Offenders Act 2012 s.9 and s.10.
[23] Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (SI 2013/480) (as amended).
[24] Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104) (as amended).
[25] The statutory lynchpin of these reforms was the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Such concern was, for instance, well-documented in the discussion around the Bach Commission, see The Bach Commission, *The Right to Justice* (London: Fabien Society, 2017).
[26] Hickman, "Public Law's Disgrace".
[27] Above.
[28] Legal Aid Agency, *Means Assessment Guidance* (April 2015). See further: D. Hirsch, *Priced out of Justice? Means testing legal aid and making ends meet* (Law Society: London, 2018).

significant assets, do not qualify for legal aid."[29] Added to this, the government also introduced a "no permission, no fee" arrangement, where representatives only get fees for legal aid work at permission stage if the application is granted.[30] The effect of these arrangements was challenged via judicial review and, as a result, payment is now available in cases where the defendant withdraws the decision under challenge, the court orders an oral hearing, or the court orders a rolled-up hearing of both the permission and substantive issues at the same time.[31] The general principle of the arrangement, however, still remains in force. Hickman's analysis—and its characterisation of access to judicial review as a "disgrace"—struck a chord with practitioners, both in portraying the role of legal aid in judicial review and highlighting the wider issue of costs. Assessing the precise size of the problem is difficult without clear empirical data.[32] A limited amount of administrative data is, however, available.[33] Table 1 shows the total amount of applications for legal aid made in judicial review cases from 2006 to 2017. Table 2 shows data taken from the Administrative Court COINS database on how many may judicial reviews are recorded as being supported by legal aid from 2000 to 2016. The overall upshot which can be taken from these two data sets is that legal aid is nowalso more difficult to secure for cases with a clear public interest dimension.

*Table 1: total amount of applications for legal aid made in judicial review cases over the last ten years*

| Year | Granted | Not Granted |
|---|---|---|
| 2006-07 | 5,085 | 758 |
| 2007-08 | 4,925 | 730 |
| 2008-09 | 5,605 | 724 |
| 2009-10 | 6,589 | 875 |
| 2010-11 | 5,484 | 914 |
| 2011-12 | 5,491 | 1,128 |
| 2012-13 | 6,298 | 1,103 |
| 2013-14 | 5,313 | 2,008 |
| 2014-15 | 3,718 | 1,311 |

[29] Hickman, "Public Law's Disgrace".
[30] Civil Legal Aid (Remuneration) (Amendment)(No 3) Regulations 2014 (SI 2014/607).
[31] *R. (on the application of Ben Hoare Bell Solicitors & Ors) v The Lord Chancellor* [2015] EWHC 523 (Admin); The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 (SI 2015/898).
[32] Much helpful data is kept by the government. Much of it is published but much of what is available on government systems may be genuinely outside of the provisions of FOIA.
[33] This was made available via an FOIA request by the author, see FOIA Request No. 171020004.

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|---|---|---|
| 2015-16 | 3,842 | 1,560 |
| 2016-17 | 3,131 | 970 |

*Table 2: amount of judicial review cases recorded as being supported by legal aid on the Administrative Court COINS database*

| Year | Number of judicial reviews | Number of judicial reviews with legal aid | As a % |
|---|---|---|---|
| 2000 | 4238 | 1163 | 27.44% |
| 2001 | 4722 | 1733 | 36.70% |
| 2002 | 5372 | 1586 | 29.52% |
| 2003 | 5938 | 1938 | 32.64% |
| 2004 | 4200 | 913 | 21.74% |
| 2005 | 5356 | 930 | 17.36% |
| 2006 | 6421 | 1077 | 16.77% |
| 2007 | 6684 | 921 | 13.78% |
| 2008 | 7093 | 1024 | 14.44% |
| 2009 | 9098 | 1440 | 15.83% |
| 2010 | 10553 | 1340 | 12.70% |
| 2011 | 11360 | 799 | 7.03% |
| 2012 | 12429 | 1246 | 10.02% |
| 2013 | 15594 | 933 | 5.98% |
| 2014 | 4065 | 240 | 5.90% |
| 2015 | 4679 | 205 | 4.38% |
| 2016 | 4300 | 195 | 4.53% |

Overall, the general picture of judicial review funding in the UK, at least in terms of the sources of funding that have been available in recent years, is one of increasing scarcity. Fees are still high, legal aid grants are decreasing, and other kinds of agreements—such as CFAs—are far from ideal in judicial review. In this context, PIL finds itself in a new, even more hostile environment than before; the key funding variables are shifting. Certainly, 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 baron than it was in the recent past.[34]

[34] The longer history of funding for judicial reviews is, of course, a more complex story.

**Crowdfunding and Judicial Review**

A relatively recent phenomenon is the possibility of raising money for litigation via online crowdfunding platforms. Crowdfunding in general has risen in prominence across the UK economy—a trend often attributed to the failure of banks and other traditional funding sources to meet demand—and the crowdfunding market has grown massively in size, seeing huge year-on-year growth. In 2013, £666 million was raised through crowdfunding platforms, which rose to £1.74 billion and £3.2 billion in 2014 and 2015 respectively.[35] A review by Nesta adopted the view that crowdfunding is now a key aspect of the "alternative finance economy," and an industry which "is quickly becoming an important part of the UK economy," one where an "innovative, technology led approach has improved access to finance for [small and medium enterprises] and seems to be having a positive impact on social and charitable enterprises."[36] The move toward this new alternative finance industry was supported by the government, and so was the use of crowdfunding specifically. In 2012, to demonstrate its support, the Coalition Government invested £20 million in businesses via crowdfunding platforms and made a further £40 million investment in 2014.[37] At the same time, there have been growing concerns about the general regulation of crowdfunding activities and increased regulation is likely to develop in the coming years.[38]

In the litigation context, crowdfunding is, in essence, a form of third party litigation funding arrangement. This was defined by Jackson LJ 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

[35] B. Zhang, P. Baeck, T. Ziegler, J. Bone and K. Garvey, *Pushing Boundaries: The 2015 UK Alternative Finance Industry Report* (Nesta: London, 2015).

[36] Above p.5.

[37] Department for Business, Innovation & Skills, "New £40 million investment by British Business Bank to support £450million of lending to smaller businesses—Press" (25 February 2014), *https://www.gov.uk/government/news/new-40-million-investment-by-british-business-bank-to-support-450-million-of-lending-to-smaller-businesses* [Accessed February 22, 2018].

[38] J. Armour and L. Enriques, "The Promise and Perils of Crowdfunding: Between Corporate Finance and Consumer Contracts" (2018) 81(1) M.L.R. 51. The Financial Conduct Authority are also now taking various steps in respect of crowdfunding platforms. For instance, they consider certain forms of crowdfunding—loan-based crowdfunding and investment-based crowdfunding—as regulated activities under the Financial Services and Markets Act 2000.

of the recovery sum; and (ii) the funder is not entitled to payment should the claim fail."[39] Long prohibited under the ancient principles[40] of barretry, maintenance, and champerty, the past century saw a gradual liberalisation on third-party funding for litigation.[41] Jackson LJ considered that third party funding is in principle "beneficial and should be supported," because, amongst 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."[42] In a crowdfunding arrangement, online donations are made to a collective pot. The pot of funds then essentially is the third-party fund, with the donors the funders. A distinction can 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 non-existent. [43]

Two organisations in the UK currently offer bespoke crowdfunding services for judicial review claims and are particularly prominent: CrowdJustice and the Good Law Project. CrowdJustice offers a platform for case owners (those seeking funding) to publicise and fundraise for a prospective case. Case owners, with support from CrowdJustice, develop a webpage setting out details of the case for which funding is sought, a target amount, and a deadline for raising it. The page is typically publicised through social media and online donations are accepted. If the target is met, then funds are transferred into the case owner's solicitors' client account. CrowdJustice takes a 6% "platform fee," plus VAT, from the overall total raised. The payment process also has a charge of 1.7% plus 20p per pledge. If the case owner's target is not met, CrowdJustice do not take a fee, pledges are cancelled, and backers' cards are not charged. If the case proceeds, any funds that are unused at the conclusion of the case are returned by the solicitors to CrowdJustice. The case owner can elect to put such unused funds towards another case on CrowdJustice, or failing that, they are donated to the Access to Justice Foundation. Those who donate over £1,000 are given the option of a pro

[39] Lord Justice Jackson, *Review of Civil Costs: Final Report* (2009), p.xv. However, Jackson LJ recognised that third party funding is "not usually feasible where non-monetary relief, such as an injunction or declaration, is the main remedy sought."
[40] M. Radin, 'Maintenance by Champerty' (1935) 24 *California Law Review* 48, 49; *Giles v Thompson* [1994] 1 AC 142, p.153 (Lord Mustill).
[41] For an overview, see Lord Neuberger, "From Barretry, Maintenance and Champerty to Litigation Funding" (Harbour Litigation Funding Lecture, 2013).
[42] Above Ch.11, para.1.2.
[43] Perry, "Crowdfunding Civil Justice" (2018) B.C.L.R. (forthcoming).

rata refund. CrowdJustice does not offer any legal advice. All information about the case comes from the case owners and their lawyers.

The Good Law Project was founded by its Director, Jolyon Maugham QC—a successful tax barrister. It is not itself a crowdfunding platform—it uses CrowdJustice—but crowdfunding is a key part of its operation. It is an expressly political project, whose aims are to use litigation to drive the demand for change. It has particular areas of interest, including tax, workers' rights, and Brexit. The general way in which the Good Law Project works was set out in a lecture by its Director.[44] In essence, the Director seeks potential cases which meet the Project's case selection criteria, secures pro bono advice from counsel, and seeks solicitors and counsel willing to act on terms consistent with the crowdfunding exercise at Government lawyer rates, and then crowdfunds at the letter before claim stage. The first case the Good Law Project related to the argument ultimately decided by the Supreme Court in *Miller*.[45] After the Article 50 argument was floated in an online blog, Maugham crowdfunded initial advice (though this effort was one of multiple efforts and the Good Law Project did not take part in the litigation).[46] Since then, it has crowdfunded a challenge to Uber's alleged VAT avoidance (valued at around £1bn) and a challenge to the Electoral Commission's investigation into Vote Leave's spending returns, the latter arguing that the Electoral Commission's investigation applied the wrong test of law and was inadequate on the facts.

Both CrowdJustice and the Good Law Project have taken a different approach to vetting prospective claims, to try to ensure that they are supporting meritorious cases. CrowdJustice requires that every individual or group taking a case either have a qualified solicitor or barrister who has been instructed, or that the case is being taken by a non-profit, and then leaves it to "campaign" to persuade donors of the merit of the case. The Good Law Project uses the resources of its Director for this purpose, which places a limit on the number of cases it can support.

It is important to note that those engaged with crowdfunding judicial reviews are a much more diverse group than the two organisations highlighted here. Many charities, for

[44] J. Maugham QC, "The Lawyer as Political Actor" (Annual Queen Mary University of London Law and Society Lecture, 2017).

[45] *R (Miller) v Secretary of State for Exiting the European* Union [2017] UKSC 5; [2017] 2 W.L.R. 583.

[46] The legal argument was outlined in N. Barber, T. Hickman and J. King, "Pulling the Article 50 'Trigger': Parliament's Indispensable Role" (June 27 2016) *UK Constitutional Law Blog*, *https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/* [Accessed February 22, 2018].

instance, who bring litigation to pursue their aims rely upon crowdfunding. So too do individuals lacking sufficient means to bring a case. However, the crowdfunding model is open to use by a wide variety of actors and therefore potentially abuse of various kinds by both the malevolent or misguided. There have been no major scandals yet that relate to crowdfunded litigation, but there are anecdotal reports of dubious crowdfunding propositions being circulated and much of crowdfunding activity, despite being online, may not be particularly visible.[47] The landscape being effectively devoid of tailored regulation does not assist in ensuring problems are detected. At present, the crowdfunding "community" is an ambiguous entity.

One example of a crowdfunded judicial review in the UK is the junior doctors' case.[48] The claimant group, Justice for Health, argued that a new contract imposed by the Secretary of State was "unsafe and unsustainable" and that the Secretary of State for Health—Jeremy Hunt MP—did not have the legal power to impose it. Put simply, the new contract changed the way doctors were to be reimbursed for weekend working. Instead of Saturdays and Sundays being divided up between "normal" and "unsocial" hours, supplements were to be paid which depended on how many weekends a doctor works. Health ministers argued that the contract was necessary to improve medical cover at weekends.[49] The argument led to various strikes by junior doctors and led to the first all-out strike in NHS history. Green J., sitting in the High Court, concluded that Mr. Hunt had acted "squarely" within his legal powers. The claimants also argued that Mr Hunt's approach lacked clarity and transparency, and that it was irrational to contend that imposing the contract would improve weekend care. Green J. rejected all of these arguments, finding that the Secretary of State was legally entitled to adopt the view that changing staffing at weekends would have "some, material" impact on medical cover. What is significant for the purposes of this article is that the claimant in this case, Justice for Health, was a company formed of junior doctors who were "directly affected by the introduction of the contract."[50] They raised money—£300,000—via CrowdJustice, based on donations by more than 5,000 donors.[51] The litigation was led by an

[47] This area is ripe for further investigation.
[48] *Justice for Health v Secretary of State for Health* [2016] EWHC 2338; [2016] Med. L.R. 599.
[49] There were disputes about the evidence used by the government to support its case.
[50] *Justice for Health* [2016] EWHC 2338; [2016] Med. L.R. 599 [15].
[51] C. Dyer, "Junior doctors' High Court challenge to Jeremy Hunt" (13 September 2016) *British Medical Journal, http://www.bmj.com/content/354/bmj.i4975* [Accessed February 22, 2018].

established public law firm. Green J. observed that the case was "financed by a large number of individuals who have contributed on a crowd-funding basis all of whom it is said oppose the introduction of the new contract" and how support had been "forthcoming from many sources, including senior members of the medical profession."[52] Early on in the case, a cap was placed on how much costs could be recovered.[53] It is unclear whether this case—though it ultimately failed—would have been possible without crowdfunding. If it had succeeded, the reform would have essentially been crowdfunded.

Another example of a case supported by crowdfunding—a less well-managed instance—is *Webster*.[54] This case formed part of a string of cases, brought after the *Miller* litigation, which sought to challenge the notice of withdrawal sent by the UK to the EU. After the claim was brought considerably out of time, permission was rejected on the papers by Supperstone J as 'unarguable.' The claimants renewed their application at an oral renewal hearing. The second time around, Gross LJ and Green J found the application to be totally without merit: "[p]ut bluntly, the debate which the claimant seeks to promote belongs firmly in the political arena, not the courts."[55] Remarkably, despite the merits of the case always being weak, the underlying crowdfunding campaign raised £190,000. It was also a campaign not conducted with much transparency—unlike some other examples of successful crowdfunding, details of the arguments to be put and the key litigation documents were not made public.

A word of warning about examples such as the two outlined above is needed. Just as there are examples of successful crowdfunding attempts, there are many more examples of cases that gather hardly any support. In many respects, these failed attempts are more interesting than the headline-grabbing cases as they may expose some of the ground-level funding gaps in the justice system and, more broadly, failures of the state. These are not the cases, however, that get much attention in the discussion around crowdfunding. Great care must be taken to ensure that focus is now directed only on high-profile, successful crowdfunding campaigns which may, in reality, the be exception to the usual result.

[52] *Justice for Health* [2016] EWHC 2338; [2016] Med. L.R. 599 [15].
[53] Cost capping was agreed to by the Secretary of State. Cost capping received seminal judicial consideration by the Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600. See further: Criminal Justice and Courts Act 2015 s.88.
[54] *R (Webster) v Secretary of State for Exiting the EU* [2018] EWHC 1543 (Admin).
[55] Above [10]; [24].

Finally, it should be note that cost capping appears to be ] an important part of the evolving practice around crowdfunding. Costs capping orders (and their judge-made predecessors, protective costs orders) are sought and made at an early stage in the proceedings, conferring costs protection on a party regardless of the outcome of the proceedings.[56] The law relating to protective costs orders was codified, with some changes, in the Criminal Justice and Courts Act 2015, which introduced costs capping orders.[57] The conditions that have to be met before the court can make a costs capping order are that: permission to apply for judicial review has been granted; the court is satisfied that the proceedings are public interest proceedings; and the court is satisfied that, without a costs capping order, the applicant would be acting reasonably by withdrawing or ceasing to participate in the proceedings. Proceedings are considered "public interest proceedings" only if: an issue that is the subject of the proceedings is of general public importance; the public interest requires the issue to be resolved; and the proceedings are likely to provide an appropriate means of resolving it. A number of factors must be taken into account by judges considering an application, including: the number of people likely to be directly affected if relief is granted to the applicant for judicial review; how significant the effect on those people is likely to be; and whether the proceedings involve consideration of a point of law of general public importance.[58] If an order is made, a reciprocal cap must also be imposed, restricting the costs the beneficiary of the costs capping order is able to recover.[59] Furthermore, it is required that any application for a costs capping order is supported by evidence of the applicant's financial resources, including "the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties."[60] Cost capping may be helpful to crowdfunders of limited means and its appears to be the case that crowdfunded claimants do seek such orders routinely. Recently, Cheema-Grubb J granted a cost capping order for a judicial review brought by five claimants, including Professor Stephen Hawking, challenging the lawfulness

[56] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 W.L.R. 2600.
[57] Sections 88-90, Criminal Justice and Courts Act 2015. A Costs Capping Order is defined in section 88(2) as 'an order limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection with any stage of the proceedings.'
[58] Section 88(8), Criminal Justice and Courts Act 2015.
[59] Section 89(2), Criminal Justice and Courts Act 2015.
[60] Section 89(1)(a), Criminal Justice and Courts Act 2015.

of the government's policy to create accountable care organisations.[61] That particular ruling demonstrated a positive judicial attitude to crowdfunded claims in respect of cost capping orders. Cheema-Grubb J observed that where a judicial review application is crowdfunded, the public is funding both sides: the government by tax payers and the claimants by crowdfunding. It was also noted that crowdfunding is inherently uncertain and the certainty provided by a costs capping order was helpful to enable individuals to take a public interest case forward. Cheema-Grubb J ordered a cap of £160,000 in total for defendants' costs (two were involved) and a reciprocal cap of £115,000 in respect of the claimant's costs. This was against a backdrop of the claimants raising nearly £265,000 via crowdfunding and private donations, meaning the ruling enabled relatively substantial funds to meet the costs of the claimants' lawyers. We are, with cases such as this, witnessing the start of practices developing and little is certain, but it is likely that applications for cost capping orders are likely to be a common feature of crowdfunding judicial review litigation in the coming years.

**Solving the Resource Problem through Crowdfunding?**

Connecting the points set out above, an important question arises: is crowdfunding a possible answer to the issue of lack of resources in the context of PIL? Can it, in other words, provide new fuel for reform through PIL? It is argued here that crowdfunding can—in certain cases—solve the resource dilemma. There are, however, many risks that are attached to crowdfunding in this context. My aim in this part of the article is, therefore, to elaborate the main possible benefits and risks.[62]

At the outset, it must be observed that it is clear that crowdfunding models do possesses the potential to quickly raise the sums required for judicial reviews. The junior doctors case is a good example of this, raising over £300,000. But such success is, of course, not guaranteed and failed attempts appear to be much more common.[63] The proposed case ultimately needs to find favour with some willing donors. Unless an issue in the proposed case already has a strong place within the public consciousness, gains media traction, or has a specialist (and preferably not poor) set of supporters, it may be the case that some level of

[61] *R. (on the application of Hawking) v Secretary of State for Health and Social Care* (22 February 2018, unreported). A costs cap was initially refused by Mr Justice Peter Walker, when he granted permission.

[62] The analysis provided in this section—except where explicitly stated—is general and not targeted at any particular platform or organisation.

[63] There is no clear data published on this.

investment is needed to promote donations via the crowdfunding platform. Put simply, it may cost money to drum up a crowd in the first place. In practice, this could prove to be a serious barrier to crowdfunding having wide-ranging impact on PIL. It could also have particular implications for the viability of crowdfunding for genuinely unpopular claimants brining public law challenges.

There are some tough questions around the practical management of crowdfunding, which gives rise to some ethical quandaries. First, when should the funding be sought? Too early, and the action seems speculative. Too late, and delays—which can be fatal in the judicial review context—may arise. Second, how much should be crowdfunded at each stage? This involves determining what amount is required and when. Some crowdfunding campaigns seize upon any initial "buzz" and raise as much as possible at the start. This may be good litigation strategy in many respects, but it also has problems. A reputation may be damaged by having to return funds (something which may not be logistically easy). There may also be a "useful discipline" in "putting yourself in a position where you have to make an ongoing case for people to support the litigation."[64] Third, there is the issue of what crowdfunding is sought for, *i.e.* what should be pitched to the public. Some crowdfunding attempts only give very board overviews of the case they intend to bring. At the same time, the "crowd" will be a section of the public and a public-facing pitch will be necessary. Furthermore, cases develop and change when, for instance, more information is disclosed during the course of litigation; while an accurate label may be printed when funds are sought, there is a chance that the contents of the tin may change.

There is also the question of the terms of the crowdfunding arrangement, and particularly the operation of sections 85 and 86 of the Criminal Justice and Courts Act 2015. Section 85(1) provides that no application for judicial review will be granted leave unless the applicant has "provided the court with any information about the financing of the application that is specified in rules of court for the purposes of this paragraph."[65] The clear effect of this provision is to eliminate the discretion of the High Court to grant permission unless certain financial information is provided. Section 86 places a requirement on the Court to have regard to information provided under section 85 when it is "determining by whom and to what

[64] J. Maugham QC, "The Lawyer as Political Actor" (Annual Queen Mary University of London Law and Society Lecture, 2017).
[65] This amends the Senior Courts Act 1981 s31(3).

extent costs of and incidental to judicial review proceedings are to be paid."[66] The court must "consider whether to order costs to be paid by a person, other the proceedings, who is identified in [the information referred to in section 86(3)] as someone who is providing financial support for the purposes of the proceedings or is likely or able to do so."[67] Sections 85 and 86 sections are not yet in force, but are alluded to in CrowdJustice's terms and conditions, under the heading "Risks of Funding Litigation":

> "In our view UK case law indicates that pure funders – Backers who don't have a personal interest in the Case, don't stand to benefit from it and don't control the course of the Case – will not typically have any liability beyond their initial Pledge…We make no warranties or representations as to costs or other risks of donating to any particular Case… New legislation that came into effect in the UK in April 2015 indicates that in judicial review cases, people who donate over a certain amount may have to be identified to the courts. That amount has been set at £3,000. This requirement could expose backers who give over £3,000 to judicial reviews in certain instances to further costs risks. The requirement brought in by this legislation will exist whether you donate to a case online or offline."

In addition, it is stipulated that backers "acknowledge and agree that [they] do not have, and [their] contribution (whether financial or otherwise) does not entitle [them] to have, any rights in or to any Case, including any ownership, control or rights to advise on the conduct or legal strategy of a Case." The purpose of this clause appears to be to minimise the risk that backers are held liable for in costs orders, since the exercise of some control over case management is one of the features that distinguishes a non-party who may be subject to a non-party costs order, from a pure funder (who is not normally so subject). If crowdfunding grows in this sphere and the sections are brought into force, the extent to which donors are exposed to court orders may become a key factor in determining the volume of donations and their amount, and will bring further ethical considerations into play.

Looking more broadly, it is difficult to see at what point a crowdfunding project will be considered authentic. In other words, how many donors are needed for there to be a

[66] Criminal Justice and Courts Act 2015 s86(1).
[67] Criminal Justice and Courts Act 2015 s86(3).

genuine "crowd" and not just a few private backers? One of the main distinctions often observed between crowdfunding and other types of online donation methods is that, with crowdfunding, donors become aware of each other through the "campaign." This, it has been argued, produces a "collective energy" and has the effect of informing donors.[68] The junior doctors case, for instance, attracted 5,000 donors.[69] This could be said to stand as evidence of broad-based participation—a good number of the community was willing to put money to the cause in the case. This could allow cases to make claims to some kind of popular approval. However, where the number of donors is limited or a crowdfunding attempt fails, that could stand as evidence that the crowdfunding attempt is either a gimmick or lacks community support.[70] The suggestion that popularity matters to whether a case is brought or not also sits particularly uncomfortably with the nature of public law and judicial review, which is often observed to provide—at least in part—the function of protecting the individual and often that protection is from majority or popular views. It would certainly rub up against much liberal constitutional thought if the ability to fundraise from the community became somehow conflated with whether there was a public interest in a case being brought.[71]

Another important question is how the distinction 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 is handled.[72] Perry argues that that use of the former should be encouraged, but the latter constrained. This is because in investment-based crowdfunding models, investors have an interest in the proper evaluation of the merits of a claim, so the funding process facilitates claims that would not otherwise be brought but minimises the risk that the claims will be unmeritorious. In non-investment based crowdfunding models, Perry concludes that the lack of any financial interest in a claim reduces the incentive for investors to vet the merits of the case, legal or otherwise (indeed, investors in this context may be better understood as "donors" or "backers"). Perry therefore recommends that in non-investment based crowdfunding models, claims should be subject to a professional vetting process to minimise

[68] R. Davies, *Civic Crowdfunding: Participatory Communities, Entrepreneurs and the Political Economy of Place* (Master of Science Thesis, Massachusetts Institute of Technology, 2014), p.26.
[69] C. Dyer, "Junior doctors' High Court challenge to Jeremy Hunt".
[70] This, of course, may not be fair, but it is a possibility.
[71] The specific tenets that may be in tension include the notion that the law can protect individuals from the "tyranny of the majority" and the responsiveness of democratic politics to short-term interests *etc.*
[72] Perry, "Crowdfunding Civil Justice" (2018) B.C.L.R. (forthcoming).

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 have a qualified solicitor or barrister who has been instructed, or that the case is being taken by a non-profit, The Good Law Project uses the resources of its Director for this purpose. It is unclear what vetting standards are operating across the crowdfunding "community" as a whole.

Generally speaking, the possible change in the vetting processes used raises the prospect of a very different breed of PIL to that which the UK is familiar with, which are typically brought by organisations with expertise in public law litigation (*e.g.* Liberty or JUSTICE) or some specialist policy area (*e.g.* Greenpeace). Traditionally, litigation—being perceived as complex and risky—has been approached carefully by many organisations. One upshot is that the same few organisations appear again and again on the headnotes of judicial reviews—in recent history, UK public interest judicial reviews have often involved organisations with similar bundles of core beliefs.[73] As Rawlings observes: "[a]s chief repeat players, Liberty and JUSTICE may not yet have been assigned offices in the… Supreme Court building but they might as well be."[74] The implications of crowdfunding in this respect may be diverse. One possible outcome is that we could see more PIL. Of course, anyone with money could have always set up some kind of organisation or simply brought cases.[75] But crowdfunding potentially opens up this possibility to those causes where concentrated funds have not been readily available previously, and it could also be seen as removing the barrier of those with funds having to put their own money in.

Crowdfunding could also see less experienced participants coming to the PIL scene. Jolyon Maugham QC—though probably considered part of a liberal, metropolitan elite often associated with PIL in the UK—is a good example of the possibility of crowdfunding opening-up who is involved in PIL. No doubt, Maugham has the credentials of a well-regarded tax silk. But tax law is a very different beast to public interest judicial review. This is something Maugham freely admits, acknowledging that "organisations in the UK that have a far longer history of engagement in the cause lawyering field" than himself and that this means, in his

[73] These are often observed to be "left-of-centre" or "liberal."
[74] Rawlings, "Modelling Judicial Review" (2008) 61(1) CLP 95, p.103.
[75] 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] A.C.D. 70.

own words, that he suffers the "advantages and suffer the consequences of who [he is]."[76] This is not to say that Mr. Maugham is not suited to his new vocation, but demonstrates how resources from crowdfunding can lead to an opening up of who can lead PIL. These organisations, when considering and conducting PIL, have generally been responsive to internal checks, governance systems (such as boards of trustees), and duties to wider membership. While such organisations can of course use crowdfunding, the platform offered by crowdfunding allows for individual lawyers and campaigners to transcend the traditional model of PIL. The "causes" operating beyond such litigation may therefore become diversified and, in the absence of traditional organisational structure, transfer more power to the individuals bringing these cases and their lawyers. At the same time, there is also the possibility that the "craft" of PIL—knowing when to bring a case, knowing when to appeal, knowing when to give up *etc.*—may be diluted. It may be said that, ultimately, vetting is done by the donors. After all, "if you are asking people to dip their hands into their pockets to fund a case you need to be able to justify that decision to yourself – and to them."[77] But, again, this is a departure from conventional vetting norms—donors are a very different group than staff at civil society organisations.

There is also the issue of how the government may respond to any increased role for crowdfunding in PIL.[78] If crowdfunding (and other private funding methods) can be effective in partially filling the resource gap, government may take this an indicator that public funds are not necessary.[79] It has been argued that the increased efforts of the pro bono community in the wake of legal aid reforms stopped the reforms from failing outright, and that this pro bono work ultimately supports an ill-designed system through good deeds. If there are crowdfunding successes, governments in the future might choose to lean on such "successes" to prompt otherwise restrictive reform in the area. There is, to be clear, not an ounce of systematic evidence that crowdfunding somehow fills the gap left by recent reductions in the

[76] Maugham, "The Lawyer as Political Actor" (2017).
[77] Maugham, "The Lawyer as Political Actor" (2017).
[78] There is much literature considering the impact of judicial review, see P. Cane, "Understanding judicial review and its impact" in M. Hertogh and S. Halliday (eds.), *Judicial Review and Bureaucratic Impact* (Cambridge: CUP, 2004), p.16-17.
[79] Some argue, though, that public funding may not be necessary in the way many often suggest, see A. Higgins, "The Costs of Civil Justice and Who Pays" (2017) 37(3) O.J.L.S. 687. There is also a powerful argument for considering judicial review costs as distinct from standard civil disputes, see M. Fordham, "Rethinking Costs in Judicial Review" [2009] J.R. 306; *R (Davey) v Aylesbury Vale District Council* [2007] EWCA Civ 1166; [2008] 1 W.L.R. 878 [18] (Sedley LJ).

availability of legal aid.

More broadly, how government may respond to poorly-managed PIL, or simply to a possible increase of activity in PIL, due to crowdfunding is an important question. Braibant, in a seminal article, outlined three main strategies that government bodies could use to avoid implementing judgments: they could delay, *e.g.* through appeals; they could simply retake procedurally flawed decision; or they could legislate.[80] Harlow added a fourth possibility, that "government would simply disobey."[81] Harlow and Rawlings further highlighted how government may react by taking pre-emptive actions to curb further litigation, which they call "clamping down."[82] 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." In *Pressure Through Law,* Harlow and Rawlings also make clear that pre-emptive "clamping down" does not have to be directed at the judiciary but can be aimed at discouraging particular claimants or groups. In that text—published in 1992—it was suggested that the UK government might move to clamp down on judicial review. Among the possibilities discussed then were: direct steps to exclude claims, *e.g.* through ouster clauses; procedural changes to judicial review, *e.g.* amendments to standing criteria and the permission test; increasing the cost of judicial review by reducing legal aid or increasing court fees.[83] Since *Pressure Through Law*, there have been multiple examples of clamping down—aside from the costs and funding issues discussed above, there have been many other instances.[84] Indeed, it could be said that there has been a protracted process of clamping down on judicial review in recent decades. If crowdfunding is effective in providing resources for public interest judicial reviews, new reactions—whether "striking back" in individual cases or "clamping down" on the judicial review system itself—may be on the cards. If crowdfunded cases are poorly managed, it is difficult to imagine a clamp down of some kind not happening.

Beyond the question of the government's reaction, there is also the question of how the judiciary may respond to any increased role for crowdfunding in PIL. Judicial review is in

[80] G. Braibant, "Remarques sur l'efficacité des annulations pour excès de pouvoir" [1961] E.D.C.E. 53.
[81] C. Harlow, "Administrative Reaction to Judicial Review" [1976] P.L. 116.
[82] C. Harlow and R. Rawlings, "'Striking Back' and 'Clamping Down': An Alternative Perspective on Judicial Review" in J. Bell, M. Elliott, J.N.E. Varuhas, P, Murray (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart, 2016).
[83] Harlow and Rawlings, *Pressure Through Law* (1992).
[84] For discussion of one such episode, see: R. Rawlings, "Review, Revenge and Retreat" (2005) 68(3) M.L.R. 378; R. Thomas, "After the ouster: review and reconsideration in a single tier tribunal" [2006] P.L. 674.

many respects a discretionary jurisdiction, providing lots of scope for judicial attitudes (whether hostility or embrace) to have practical consequences. In the event that there is more poorly-managed, or simply a greater volume of, PIL due to crowdfunding, judicial discretion may come to be presumed to operate against crowdfunded cases. It may even be the case that common law principles with baked-in hostility follow. The mere presence and use of crowdfunding platform may also generate a—possibly very unhelpful and unrealistic—expectation that claimants seek to fundraise independently. Of course, the opposite could happen too. There are examples of the judiciary liberalising gateways for PIL funding. The ruling on protective costs order in *Corner House* is a famous instance[85] and there have been some cases where judges appear to take the presence of crowdfunding as positive feature of a claimant's case.[86] The conduct of crowdfunded cases may be a key factor in this respect.

Crowdfunding of PIL can perhaps avoid the "ethical arguments" that investment-based crowd funders often face, *i.e.* that they are in it to get rich. In judicial review, there is likely to be no immediate "pot of gold" to be seized by taking a case, thereby alleviating any concerns that crowd funders might be chasing a pecuniary end or that there might be a conflict of interest with either the litigant or the lawyers in the case. That said, lawyers will likely get paid out of crowdfunded pots of money. The impression that PIL is a "feeding trough for lawyers" is potentially problematic.[87]

Finally, it is common to hear the argument that crowdfunding is not a genuinely new practice, it just puts online something that communities have done for many years: getting together to raise money for litigation. Some might say that, on this basis, the risks identified here ought not to be of concern. There is, no doubt, an element of truth to this. Indeed, many judicial review claimants may still, informally, ask family, friends or their local community for help with funding a case. But crowdfunding is more than simply the digitalisation of an existing practice. Though it may be able to claim its heritage is in informal community fundraising initiatives, crowdfunding is qualitatively different in multiple respects. For instance, the fact the fundraising takes place online means it is more widely accessible and that fundraising campaigns are likely to be more widely circulated. Similar, campaigns are

[85] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.
[86] *e.g. Stephen Hawking and others v Secretary of State for Health & Social Care and National Health Service Commissioning Board* (unreported) (22 February 2018).
[87] The Good Law Project's approach is to pay Government rates to lawyers it uses, and explain that certain things may have to be done pro bono during the case.

perhaps more likely to become a national political issue or be connected to an existing national issue. This may be beneficial in many respects, but it is still a substantial difference. The use of online systems also creates a new, important actor: the platform that hosts the campaigns. Platforms such as CrowdJustice are now key players in this area and possess power to affect how fundraising campaigns operate. The centralisation of this task therefore represents a material change to the old practice. Crowdfunding could well be overall beneficial but we should certainly resist any suggestion that crowdfunding campaigns are the same as, for instance, a few members of a local community getting together to challenge an unwelcome planning decision.

**Towards a Practical Ethics**

What the above analysis shows is that crowdfunding is best considered a risky resource in the PIL context. It is risky as it may unsettle various established parts of the current landscape and have a range of unforeseen consequences. At the same time, crowdfunding is still a resource despite its possible flaws and consequences, and has the potential to provide litigation funding where there otherwise is none. The next challenge is devising an approach which optimises its benefits while minimising risk. In other words, to create a practical ethics of crowdfunding in the judicial review context.[88] The demand for this is, in many ways, exemplified by Jo Maugham QC's reflections on his experiences of the practice of crowdfunding PIL—which often can be read as a lawyer seeking to understand the crowdfunding of PIL within the framework his own professional ethics.[89] In this final part of the article, I sketch the shape a specific ethics of crowdfunding PIL could take.

The first key issue is *who* ought to be regulated. The story of the rise of crowdfunding is one involving numerous actors: judges, lawyers, NGOs, crowdfunding platforms *etc.* While all of these actors ought to act carefully and ethically in respect of crowdfunding, lawyers seem the best to orientate a practical ethical code on crowdfunding towards. It is lawyers who wield the most significant amount of power in the bringing and conduct of crowdfunded PIL. Platforms often use lawyers as the vetting mechanism for cases too. In addition, lawyers

[88] Of the broad type described in P. Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 3rd Edn, 2011).
[89] Maugham, "The Lawyer as Political Actor" (2017).

are familiar with dealing closely with the ethics of their practice and the complexities that arise out of ethical codes, and established regulators are already in place.[90]

The second and third issues are how lawyers ought to be regulated and how we should reason out the principles that constitute the practical ethics. Instructive guidance on these questions can be found by looking at how solicitors' and barristers' ethics are presently regulated. This is done primarily through flexible codes enforced by established regulatory bodies.[91] These codes—though often framed in the language of "duties"—are broad principles of ethical decision-making which seek to procure a range of outcomes, such as access to justice, effective representation, fair hearings *etc*.[92] They are not hard legal rules but soft framework principles that are designed to help those involved in legal practice to work through challenges which arise in the course of their work. Some of the principles, such as the cab-rank rule, have a long history but many principles shift with time and societal development. For instance, in recent years the rule relating to what barristers can say to the press have changed.[93] Developments in the use of technology have also been a cause for revisiting the ethical principles regulating legal professionals. Recently, for example, the Bar Standards Board issued new guidance on the use of social media.[94] There is no reason why the crowdfunding activities of legal professionals—or legal professionals involved in crowdfunded litigation—ought not to be subject to guidance of this kind. It could be argued that it is best to leave this area of legal practice unregulated and lawyers ought to be able to navigate their way through crowdfunding litigation themselves, relying out the general principles of legal practice ethics. However, such a view would fail to properly take account of the very real and particular risks presented by crowdfunding. Moreover, it is clear—merely from examining common high-profile examples of crowdfunded PIL, such as the junior doctors' case, *Webster*, and litigation by the Good Law Project—that lawyers are taking very different approaches to conducting cases. For instance, the approach to the extent which skeleton arguments and other key litigation documents are disclosed via the crowdfunding

[90] The Bar Standards Board and the Solicitors Regulation Authority are the two key regulators.
[91] See Bar Standards Board, *Handbook* (3rd edn, 2018); Solicitors Regulation Authority, *SRA Handbook* (Version 19, 2017).
[92] See *e.g.* Bar Standards Board, *Handbook* (2018), p.22 (listing core duties demonstrative of a range of underlying goals).
[93] Bar Standards Board, 'Media Comment Guidance.'
[94] Bar Standards Board, 'Guidance for barristers using social media' (February 2017).

platform differs radically. There is no need to place a straightjacket on litigation strategy, but setting a general ethical baseline on issues such as this is a practical necessity.

Finally, there is a need to engage closely with all stakeholders in creating an ethical framework for crowdfunding. The understanding of crowdfunding in practice is developing quickly but it is still forming. As such, it is vital that experience and insight is drawn from a range of actors involved. At minimum, it seems important to involve judges, lawyers (especially those experienced with crowdfunding), regulators, charities (again, especially those experienced with crowdfunding PIL), professional associations, and crowdfunding platforms. All of these actors have an interest in ensuring an appropriate ethical baseline is in place.

**Conclusion**

This article has shown the role that crowdfunding may play in PIL in the UK and how it has developed in recent years. No doubt, crowdfunding can—in certain cases—solve the resource shortage and be a key part of procuring reform via PIL. At the same time, many aspects of it are problematic or hold the potential to become problematic. The nature and extent of the possible risks are such that the crowdfunding of PIL should be approached with great caution. The peril here is that this apparently empowering means of providing resource to mobilise the law may ultimately have consequences which undermines the project of PIL as a whole. To this end, there is clear merit in considering the production of new guidelines for crowdfunding PIL—principles which seek to balance the risks and opportunities in this area. To do this, there is a need to devise a coherent practical ethics of crowdfunding in this context. Here, I have sketched out both the key concerns which a practical ethics must be informed by and the shape that such an ethics could take. It is hoped this suggestion is taken forward in the coming years by the Bar Standards Board and the Solicitors Regulation Authority. At the same time, it is hoped that all actors involved in crowdfunding judicial reviews consider closely what their responsibilities are.