**The Proportionality of an Economic Crisis**

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Despite rhetorical invocations to ‘Build Back Better’, the UK has implemented policies that have exacerbated the inequalities revealed by COVID-19. A public sector pay freeze has already been implemented in the UK, the £20 uplift to Universal Credit (the major source of social benefits for those on low income or out of work) has been discontinued and other punishing restrictions to accessing social benefits (such as the two-child limit and the benefits cap) remain in place. There is a ‘bill to pay’ for the health care and economic relief measures implemented during the height of the pandemic. In paying that bill it appears the UK will revert back to, or in fact continue to implement, policies of austerity.[[1]](#footnote-1) The regularity of ‘unprecedented’ fiscal emergencies means there is now a substantial body of social science evidence and jurisprudence that explores the equality impacts and role of the legal right to equality in an economic crisis. One of the key lessons from the recovery measures implemented in light of the 2008 banking crisis is that austerity both cemented and exacerbated pre-existing inequalities. Elson and Sharples, and Reeves et al in their chapters in this collection paint a vivid portrait of the exponentially rising inequalities in the UK under the post-2008 austerity policies. Equality seeking groups in the UK have challenged the discriminatory impact of austerity on individuals with protected characteristics. The results of this litigation are decidedly mixed. More often than not, the courts have accepted that the discrimination against women, children or disabled persons was justified in pursuit of economic recovery. This chapter explores the jurisprudence from the UK, focusing on the role of justification in reviewing equality impacting measures implemented in response to an economic crisis. This provides a clearer picture on the potential role of courts in reviewing emergency measures implemented in light of COVID-19 or other future crises that undermine the right to equality.

The chapter begins by canvassing the origins of the 2008 economic crisis. To prevent the collapse of the financial sector, governments bailed out the banks using public funds. In response to the increase in debt, the UK implemented austerity, a series of cuts, freezes and restrictions on public spending and social services. After canvassing the theory and critiques of austerity, Section I argues that austerity was used as a tool, by first the coalition government of Conservatives with the Liberal-Democrats and then the Conservative government, to advance its political ideology. Austerity operated to disguise the role of the financial sector in the crisis and to blame the rise in fiscal debt on welfare spending as the ‘cuts disproportionately [fell] upon the already marginalised and exploited.’[[2]](#footnote-2) Women, children and disabled persons who bore the burnt of austerity unsuccessfully challenged the welfare reforms as discriminatory under Article 14 of the European Convention on Human Rights (ECHR). Section II analyses these cases. The UK Supreme Court generally accepted that the reforms are indirectly discriminatory and held that imposing income poverty on women, children and disabled persons is a justifiable equality-limiting measure. Through a highly deferential, light-touch review, the role of the economic crisis in prompting the welfare reforms is minimised and, echoing the political rationale for austerity, the recklessness of unchecked welfare spending is emphasized. Section III seeks to rebalance the justification analysis by placing the need for discriminatory austerity policies within its full context. A more searching justification analysis, that uses a high intensity proportionality framework, can accurately account for the economic emergency. This in turn shifts the analytical focus at justification away from the perceived over-dependence of welfare recipients and towards questioning whether it is fair to ask the most vulnerable and marginalised to bear the costs of the crisis. It also unearths the contestable assumptions on the effectiveness of austerity and queries orthodox economic discourse that discriminatory austerity welfare measures are the only method for restoring fiscal health. In undertaking this type of assessment, the courts should not be seen as exceeding their institutional role but as demanding the evidence that is perquisite to justify limiting equality rights. A meaningful interrogation of the government’s rationale for austerity must be sensitive to the background of the crisis. And in doing so, courts need not be by-standers in the face of economic emergency but can ensure that due weight is given in policy responses to the equality rights of the most disadvantaged and marginalised.

1. **Smoke and Mirrors: The Banking Crisis, Fiscal Deficit and Austerity**

The 2008 economic crisis has been described as the greatest “bait and switch” in history.[[3]](#footnote-3) The banking industries’ recklessness in granting high-risk mortgages and then repackaging that risk through a series of financial products created an economic bubble that ultimately went bust. To avoid the collapse of the banks, public funds were used to bail them out. The mistakes, and the costs of those mistakes, were transferred from the banks to the public ledger. After ensuring the solvency of the financial sector, with a staggering level of irony, it was demanded ‘that the state get their own house in order or face the prospects of having their credit rating downgraded and their own ability to borrow restricted.’[[4]](#footnote-4) This is a repeated pattern; ‘a banking crisis is followed by a sovereign debt crisis 80 percent of the time.’[[5]](#footnote-5) Indeed the pattern of private risks becoming public debts has been true for the UK. Gordon Brown, the Chancellor of the Exchequer during the peak of the crisis ‘spent, lent or otherwise guaranteed about 40 percent of the British [Gross Domestic Product] to save the banks.’[[6]](#footnote-6) The UK debt rose by £850 billion as a result of bailing out and propping up the banks.[[7]](#footnote-7)

Rather than openly acknowledging that the public had taken on banking debts, the fiscal deficit was explained as being the result of proliferate public spending. Cameron’s Coalition government which came to power in 2010, argued that spending cuts were needed to ‘get the public finances back under control.’[[8]](#footnote-8) George Osborne, the Chancellor of the Exchequer under the Coalition government, invoked the spectre of Greece and its reputation for careless spending to justify re-engineering the public expenditure: ‘you can see in Greece an example of a country that didn’t face up to its problems and that is the fate I want to avoid.’[[9]](#footnote-9) The right-wing press was even more explicit. *The Sun* explained that ‘the nation is clear who it blames for Britain’s debts: LABOUR’ and *The Daily Telegraph* blamed irresponsible spending that allowed people to ‘wallow in state-sponsored idleness.’[[10]](#footnote-10) Blyth argues that the misdirection on the origins of the economic crisis were used to turn ‘the politics of debt into a morality play, one that has shifted the blame from the banks to the state.’[[11]](#footnote-11) This, however, is not the end of the blame game. The fault then shifts to those who depend on the state. These morality twists are evident in 2009, as then Leader of the Conservative Party and soon-to-be Prime Minister, David Cameron, explained that the ‘the age of irresponsibility is giving way to the age of austerity.’[[12]](#footnote-12)

The smoke and mirrors on the causes of the fiscal deficit is not benign but is used by political actors to legitimatise austerity. This is a political and economic ideology that seeks to reduce public spending so as to restore private-sector confidence and enhance international competitiveness.

Austerity pits the public and private sector against each other. Investment in public services is characterized as money that is directed away from business and as a result private-sector innovation will shift elsewhere in the world. On the flip side, austerity measures are said to generate fiscal savings and reduce the deficit on the assumption that this will create space for the highly prized private market investment. Under this line of thinking, fiscal consolidation will create economic growth as investors ‘anticipate long run tax deductions because of cuts in expenditure.’[[13]](#footnote-13) By cutting public spending, there will be a return to economic prosperity. The history of austerity, however, suggests that the equation between consolidation and fiscal growth is false.[[14]](#footnote-14) After canvassing the failures of austerity policies, Blyth succinctly concludes that ‘it doesn’t work’.[[15]](#footnote-15) It is only effective in a highly specific set of circumstances that arguably no longer exist in the modern world.[[16]](#footnote-16) Despite austerity’s dim track record, economists and politicians continuously claim there is no alternative.[[17]](#footnote-17) Any failures of austerity to achieve the promised economic growth, it is claimed, can only be solved with more austerity. This explains why austerity policies, such as in the UK or in Greece, can be in place for over a decade. Little credence is given to other economic theories on how best to respond to the banking crisis and sovereign debt.[[18]](#footnote-18) The fidelity to austerity is, in part, because it reflects a neo-liberal ideology on the role of the state and of markets. Austerity is not only an economic theory but is a set of beliefs on which institutions are better equipped to ensure flourishing and who should benefit from that flourishing.

Austerity measures were proposed in a series of successive budgets by Cameron’s Coalition and then the majority Conservative government and solidified in various statutes and regulations. These budgets were presented as the unpleasant, but necessary medicine needed to correct the supposed over-spending on social welfare and to restore the banks’ confidence in the UK economy.[[19]](#footnote-19) The theory of expansionary fiscal consolidation was particularly evident in the 2010 emergency budget as the Treasury described it as ‘a springboard for a private sector-led recovery.’[[20]](#footnote-20) These successive budgets contain a wide array of austerity measures, but a significant focus was placed on reducing the spending on social welfare benefits.[[21]](#footnote-21) This included, *inter alia*, the “bedroom tax” which reduced the housing benefit if the individual was deemed to have under-utilised bedrooms.[[22]](#footnote-22) It also included the “two-child limit” which limited the eligibility for child tax credit, a non-contributory means-tested benefit designed to assist in the costs of raising children, to the first and second children in a family.[[23]](#footnote-23) The central pillar of the austerity motivated benefit reforms was the benefit cap and work conditionalities. Despite being entitled to a range of benefits, the amount any individual could receive is now capped[[24]](#footnote-24) and the income poverty of the cap can only be escaped if a certain amount of work is performed in the paid labour force.[[25]](#footnote-25) George Osborne claimed that the initial 2010 austerity budget was ‘tough but fair’[[26]](#footnote-26) and that the pain of austerity was equally spread as ‘those with the broadest shoulders should bear the greatest burden.’[[27]](#footnote-27) Numerous studies have demonstrated the opposite.[[28]](#footnote-28) Elson and Sharples, and Reeves et al in their chapters, forensically investigate the exponential growth of inequalities under austerity. The debt rose by 33.4 per cent of gross domestic product between 2009 and 2013[[29]](#footnote-29) and austerity has been argued ‘to set back the economic recovery.’[[30]](#footnote-30) Beyond the balance sheet, there was a rise in exploitative employment, child poverty, foodbank uses and ill-health.[[31]](#footnote-31) Austerity has unnecessarily inflicted ‘great misery’ and ‘wrought the most harm to the fabric of British society.’[[32]](#footnote-32)

1. **Unsuccessful Equality Challenges to Austerity**

The unequal impact of austerity points towards using the legal right to equality in the courts to challenge these policies. Despite the theoretical promise of equality, the courts have repeatedly held that perpetuating discrimination is justified to ensure the economic well-being of the state. Discrimination becomes the cost of the fiscal crisis. This chapter focuses on a narrow subset of cases where equality seeking groups have challenged the disproportionate impact of austerity. It homes in on the unsuccessful challenges to the benefit cap, bedroom tax, work conditionalities and the two-child limit. These cases were brought by disabled persons, women, and children and, despite some doctrinal twists and turns, epitomise the Court’s decontextualized and highly deferential approach to evaluating the government’s justifications for austerity. All these claims are brought on the basis of indirect discrimination. Analytically this requires an investigation into the disproportionately prejudicial effects of a neutral policy.[[33]](#footnote-33) The Court, however, does little to unearth the exponentially unequal impact of austerity policies on protected groups.[[34]](#footnote-34) The aim of this chapter is not to retread these arguments, but to focus on the Court’s assessment of the government’s arguments to justify limiting equality in response to an economic crisis. This section briefly sketches the nature of the claims and the Court’s conclusions on whether benefit discrimination was a justified measure needed to restore the fiscal health of the country. In doing so it argues that the Court employs an overly deferential standard of review to assess the government’s rationale for regressive benefits reforms that not only fails to accurately capture the background context of the economic crisis but also contributes to exponential inequalities by stigmatizing poverty.

In *SG and others v Secretary of State for Work and Pensions*, lone mothers challenged the benefit cap as being indirectly discriminatory against women.[[35]](#footnote-35) The impact of the cap was most felt by those receiving high levels of benefits, namely lone mothers.[[36]](#footnote-36) They challenged the cap as discriminatory under Article 14 of the ECHR read in conjunction with Article 1 of Protocol No 1 (peaceful enjoyment of possessions) (A1P1). The government conceded the cap was indirectly discriminatory.[[37]](#footnote-37) Lord Reed, for the lead majority judgment, held that since the benefit cap involved ‘controversial issues of social and economic policy’ and the ‘determination of those issues is pre-eminently the function of democratically elected institutions’, it was only appropriate to subject the benefit cap to a minimal amount of scrutiny.[[38]](#footnote-38) The low level of scrutiny is further justified as the Court failed to fully engage with the multi-faceted, exponential inequalities resulting from the imposition of the cap.[[39]](#footnote-39) The Court accepted, on the basis of the manifestly without reasonable foundation (MWRF) test, that:

1. curtailing welfare dependency by limiting the upper level of benefits any individual could claim from the state was reasonable;
2. there was a rationale basis to hold that the benefit cap would motivate those on welfare to support themselves exclusively through work in the paid labour force; and
3. the cap was a legitimate method for reducing public spending at a time when it was necessary for the economic health of the state.[[40]](#footnote-40)

These justifications entwine to create the impression that the large fiscal debt is a function of welfare dependency and the work-shy behaviour of individuals who live in poverty. They are emblematic of the misdirection of the causes of the sovereign debt crisis, as nowhere in the judgment is there acknowledgment of the role of financial organisations in precipitating the debt. Rather, the judgment tacitly endorses the government’s argument that the crisis is the result of welfare spending. By obscuring the true origins of the deficit and accepting the narrative of imprudent public spending, the Court legitimatises the income poverty imposed upon women through the application of the benefit cap.

The bedroom tax was held in *Carmichael and Rourke and others v Secretary of State for Work and Pensions* to be lawful discrimination against disabled persons and women who experience gender-based violence.[[41]](#footnote-41) Similar to *SG*, the restrictions on the housing benefits were based on Article 14 taken together with Article 1 of A1P1 and Article 8 (right to private life) of the ECHR. Beside a throw away line in Appendix 2 explaining that the bedroom tax was ‘part and parcel of the Government’s deficit reduction strategy’ in the 2010 emergency budget, there is a glaring absence of any analysis as to whether discriminatorily reducing the housing benefit for supposed under-occupation is a justifiable response to the economic crisis. Should disabled people bear the burdens of mistakes made in the financial sector? Instead of asking this question, using the MWRF test, the Court interrogated the nature of the disability and co-habitation relationships between household members to conclude for all but one of the disabled claimants that the bedroom tax was justified.[[42]](#footnote-42) On a similar basis, the majority of the Court found that it was lawful to discriminate against women in reducing housing benefit for under-occupation of sanctuary homes (homes specially equipped to protect women against domestic violence). There was no “objective” need for the additional space and thus, according to Lord Toulson, it could not be said that ‘the approach taken by the Secretary of State was manifestly without reasonable foundation.’[[43]](#footnote-43)Again, there was no explicit assessment on whether imposing the bedroom tax on women who experienced gender-based violence was a justifiable response to the bank induced fiscal emergency. This decision was partially overruled by the European Court of Human Rights which held the bedroom tax was discriminatory against women who experienced gender-based violence.[[44]](#footnote-44)

In *DA and others v Secretary of State for Work and Pensions*, the companion case to *SG*, lone parents (in this case, all lone mothers) challenged the work conditionalities to escape the income poverty imposed by the cap.[[45]](#footnote-45) Due to their caring commitments, lone parents of young children argued they were less able to obtain 16 hours of work in the paid labour force. The Court found that there was prima facie indirect discrimination against lone parents of young children based on Article 14 read together with Article 8 of the ECHR and once again the majority applied the MWRF test to assess justification. Lord Wilson held, on a narrow basis, that the work conditionality was justified as there was a reasonable foundation to conclude that there were ‘better long-term outcomes for children who live in households in which an adult works.’[[46]](#footnote-46) Unlike *SG*, but similar to *Carmichael and Rourke*, the role of fiscal deficit in prompting regressive welfare reforms was absent from the Court’s analysis. *DA* emphasized combatting welfare dependency. This gives credence to Blyth’s arguments that banking debt becomes a morality play, with welfare recipients cast as blameworthy.

And in the final case, *SC and CB v Secretary of State for Works and Pensions*,[[47]](#footnote-47) the UK Supreme Court unanimously upheld the two-child limit for receipt of child tax credit, thirteen years after the 2008 banking crisis. The Court held that the reform was prima facie indirectly discriminatory against women and children in households with two or more children. The case once again turned on justification. In light of developments from the European Court of Human Rights, the UK Supreme Court restricted the application of the highly deferential MWRF test and acknowledged that for suspect grounds, such as gender, weighty reasons were needed to justify discrimination. Lord Reed adopted a proportionality analysis, but the thin application of proportionality raises questions as to whether the Court understood the conceptual difference between MWRF and proportionality.[[48]](#footnote-48) In justifying the discrimination, the Court held that the two-child limit was a proportionate measure to manage the fiscal deficit and ensure a fair benefit system that encouraged individuals to reflect on their financial readiness to have additional children.[[49]](#footnote-49) Similar to *SG*, the Court entwined public debt and welfare spending implying a cause-and-effect relationship between the economic ill-health of the country and financially supporting women in poverty in the care of children. The lynchpin of proportionality in *SC* was inquiring whether Parliament decided these aims were sufficiently important to discriminate against women and children. The Court accepted that they were and concluded there was no legal basis for the Court to disagree with the Parliament.[[50]](#footnote-50)

1. **Rebalancing the Proportionality of Austerity**

In these cases, rather than rigorously protecting the equality rights of women, children and disabled persons, the Court all too willingly accepts the need for discriminatory cuts to the welfare system. At the justification stage, through light touch scrutiny, the role of the economic crisis is minimised and even invisiblised. The judgments all implicitly accept that high degrees of welfare dependency are linked to the economic ill-health of the state and thus they contribute to the prejudice against individuals in poverty. Accurately accounting for causes of fiscal debt, however, can reshape this assessment. Given the doctrinal guidance in *SC* that suspect grounds, such as those at stake in these cases, require weighty reasons to justify discrimination, this section applies a high intensity proportionality review. Proportionality can not only ensure that weighty reasons are given for limiting equality rights, but it can also bring to the fore the true causes of the crisis. This is of immense value to using legal equality rights in challenging policymaking after an economic emergency, as it flushes out the demonization of poverty and permits a more transparent weighing and balancing of the burdens of the crisis.

This section uses the proportionality test articulated by the UK Supreme Court in *Bank Mellet*, which evaluates whether:

* 1. the government’s objectives are sufficiently important to justify limiting the individual’s rights;
	2. the measures are rationally connected to the government’s objectives in bringing in these benefit reforms;
	3. a less intrusive measure could have been used; and
	4. having regard to these matters and to the severity of the consequences; a fair balance has been struck between the rights of the individual and the interests of the community.[[51]](#footnote-51)

Acknowledging that the economic situation is not the result of supporting the welfare state but of ideological choices to allow the recklessness of the financial sector and the decision to publicly underwrite the banking debt opens new lines of inquiry at the justification stage. Through a searching proportionality analysis, that places the burden of proof on the government,[[52]](#footnote-52) courts should be demanding evidence that there is a rational connection between the government’s aims and austerity and that austerity is the less intrusive way to respond to an economic crisis; and conducting a transparent balancing exercise in determining who in the community should bear the costs of the crisis.

1. *Identifying with Precision the Sufficiency of the Government’s Aims*

The first step in the proportionality analysis is to assess whether the government’s aims in bringing the welfare reforms into effect are sufficient. There is a tendency to uncritically accept the government’s aims as legitimate.[[53]](#footnote-53) A closer inspection of the government’s objectives is warranted as the Court’s approach is highly de-contextualised.[[54]](#footnote-54) Under the umbrella of securing the economic well-being of the state,[[55]](#footnote-55) there are a cluster of aims that are repeated throughout the jurisprudence:

1. to make fiscal savings;[[56]](#footnote-56)
2. to incentivise individuals to make certain choices such as moving to smaller accommodation, entering the paid labour force, or reflecting on financial readiness to have children;[[57]](#footnote-57)
3. to improve benefit fairness and increase public confidence in the welfare system by not rewarding non-working people with benefits that would exceed the income of average working people.[[58]](#footnote-58)

Through a two-stage process, these three reasons operate not only to camouflage the role of the banking crisis in prompting discriminatory austerity measures but also serve to legitimatise demonising welfare recipients.

The first stage in this decontextualizing process is to obliterate the role of financial sector in precipitating the rise in debt. The Court does this by failing to ask any questions on the origin of the deficit. In *SG* and *Carmichael and Rourke*, the Court accepts that the cap was designed to ‘reduce the structural deficit’ and ‘achieve savings in public expenditure at a time when such savings are necessary in the interests of the economic well-being of the country.’[[59]](#footnote-59) Lord Hughes in *SG* goes so far as to hold that ‘at a time of national economic crisis it was also legitimate to seek to reduce overall expense...’[[60]](#footnote-60) At best this is a vague nod towards the 2008 crash. The economic risk-taking and the political decisions to underwrite the risk that underlie the fiscal deficit and the corresponding cuts in welfare spending plays no role in the Court’s justification assessment. Although the lower courts do refer to the bedroom tax and work conditionalities as part of the government’s austerity package,[[61]](#footnote-61) the term ‘austerity’ is not used in the UK Supreme Court. This linguistic choice obscures the connection between 2008 economic crisis and retrogressive welfare measures. Blyth, however, argues that the crisis does in fact have a specific origin:

the cost of…saving the global banking system, has been depending on…how you count it, between 3 and 13 trillion dollars. Most of that has ended up on the balance sheets of governments…which is why we mistakenly call a sovereign debt crisis when it is in fact a transmuted and well-camouflaged banking crisis.[[62]](#footnote-62)

In later judgments, this context is stripped out to an even greater degree.[[63]](#footnote-63)

Failing to account for the role of the financial sector in austerity is not merely an inaccurate recounting of recent history, but it creates a vacuum. This leads to the second stage in decontextualizing the aims of the reforms. The government and the Court fill the deficit causation vacuum by characterising welfare recipients as scroungers who are plunging the state into fiscal ruin. Lord Reed in *SC* explicitly draws these threads together. He explains that ‘the excessively high level of public spending on welfare benefits’ has led to a ‘resulting...large fiscal deficit.’[[64]](#footnote-64) This implicitly places the blame for debt onto lone mothers needing financial support from the state to care for their children or on disabled persons who are deemed to under-utilise space in subsidised housing and ignores its macro-economic roots. In a similar vein, incentivising work and placing limits on the total amount of benefits the cap is explicitly framed by the Court in *SG* as a facet of economic well-being.[[65]](#footnote-65) This re-enforces the narrative that the economic well-being of the country has been jeopardized by welfare spending. The fiscal deficit becomes the result of welfare recipients living unwarranted luxurious lifestyles, with taxpayers shouldering their irresponsibility and idleness. Regressive welfare reforms are then perceived to be a prudent measure to incentive these wayward members of the community into economically productive lifestyles and to ensure sound management of the state’s finances. The decisions of financial and political elite in precipitating the financial crisis are ignored. By accepting the narrative of over-spending on welfare, it then becomes legitimate to impose discrimination and income poverty on individuals with protected characteristics.

The argument here is neither that the economic well-being of the country is an illegitimate aim nor that ensuring that individuals can support themselves through decent work is unfair. It is in fact that stripping out the context of the economic ill-health of the state and then characterizing the need for austerity in a manner that stigmatises individuals in poverty is less than legitimate.

1. *Demanding Evidence of a Rational Connection*

Refusing to place the government’s aims in pursuing retrogressive and discriminatory welfare reforms in the context of the 2008 financial crisis has knock-on effects on the justification analysis and prevents the Court from grappling with whether austerity is a proportionate economic recovery measure. This is evident at the rational connection step. This limb of the test requires the government to demonstrate that there is a means-end fit between its aims and the measures chosen to achieve those aims. The Court repeatedly fails to demand evidence that there is a rational connection between austerity and economic well-being. This subsection critically assesses the Court’s lackadaisical evaluation of rational connection and drawing on heterodox economics, demonstrates how the justification analysis can be used to expose assumptions surrounding austerity.

Generating fiscal savings through cuts in welfare spending is uncritically presumed to guarantee the economic well-being of the state. At no point in any of the four judgments is the conflation of welfare spending, cuts to public expenditure and fiscal health questioned. The Court is conceptualising sovereign debt as akin to managing personal or household debt with the simple solution to cut spending to reduce costs and creating fiscal solvency. Lord Reed repeatedly characterises welfare funding as ‘excessively high.’[[66]](#footnote-66) In *SG*, the Court accepts the government’s figures that the cap will result in meaningful savings. The cap is projected to save £110m in 2013-14 and £185m in 2014-15 and optimistically, this level of ‘savings is expected to continue over the longer term.’[[67]](#footnote-67) In *SC*, Lord Reed holds that

there is clearly a rational connection between the objectives pursued by the legislation and Parliament’s decision to limit entitlement to the individual element of the child tax credit to the amount [payable] in respect of two children. It is not in dispute that the measure, by imposing that limitation, will achieve savings in public expenditure, and thus contribute to reducing the fiscal deficit.[[68]](#footnote-68)

There are multiple cracks in this equation that should prompt questions as to whether the government has discharged its burden to demonstrate a rational connection. It is not a mathematical certainty that reducing welfare spending will result in increased savings. In recognition of the punishing levels of income poverty imposed by the benefit cap, work conditionality and bedroom tax, the government increased the funding to the discretionary housing payments scheme.[[69]](#footnote-69) These benefits are designed to assist in securing accommodation, for example to ‘pay the deposit on a new home and the initial instalment of rent.’[[70]](#footnote-70) Over 2013-15, an additional £100m was earmarked for discretionary housing payments. The government’s projected £295m in savings does not account for the increased funding for these payments. In *SG*, early in the judgment, Lord Reed does acknowledge this incomplete accounting, also observing that the government has not accounted for the costs of implementing the cap.[[71]](#footnote-71) Despite flagging this issue, later at the justification stage in *SG*, the Court does not demand evidence from the government that the cap actually generates appreciable savings. At a minimum to justify discriminatory welfare measures that are aimed to generate fiscal savings, the government should be required to give a thorough and accurate audit of the economic costs and savings of the measure. When the bedroom tax was challenged in Strasbourg, the European Court of Human Rights criticized the government for failing to put forward ‘any detailed reasons as to how imposing the measures…might achieve the stated aims of reducing benefit payments.’[[72]](#footnote-72) Lady Hale in dissent in *DA* undertakes a more robust rational connection analysis that holistically explores the links between fiscal savings and cutting welfare spending. She accounts not only for the increase in the discretionary housing payments, but also the costs of ‘rehousing families made homeless as a result of the cap.’[[73]](#footnote-73) This leads her to conclude that the fiscal savings ‘are very small and liable to [be] offset.’[[74]](#footnote-74)

The other substantial crack in the rational connection analysis is the unexamined operating background assumption that austerity measures will assist in recovering the economy. Pro-austerity economic theory holds that there is a rational connection between imposing discriminatory welfare measures and recovering from 2008 banking and sovereign debt crisis.[[75]](#footnote-75) A high-intensity proportionality review should place this claim under the judicial microscope. The previous subsection highlighted the Court’s reluctance to undertake this contextual analysis. Economic policymaking is often presented as a rigorous and neutral science or a strict mathematical exercise.[[76]](#footnote-76) The empirical evidence, however, reveals that austerity is not so much an unimpeachable formula but a reflection of conservative, neo-liberal ideology. The implementation of austerity in Greece, Latin America and Sub-Saharan Africa resulted in slow and even negative economic growth, destroyed gross domestic product, and increased sovereign debt.[[77]](#footnote-77) In Spain, Portugal and Italy, ‘the interaction between austerity and structural reforms generated a downward spiral of shrinking [gross domestic product] and continued increases in sovereign debt.’[[78]](#footnote-78) For Spain, Greece and Portugal, austerity resulted in a second recession.[[79]](#footnote-79) The tough medicine of austerity in the UK did not result in the promised balanced budget by 2015.[[80]](#footnote-80) This is not the first time austerity failed in the UK. It was also ineffective in the 1930s.[[81]](#footnote-81) In understanding the intellectual history of austerity, Blyth demonstrates that contemporary and highly influential arguments for the effectiveness of austerity in the last economic crisis boil down to boastful and unsupported claims.[[82]](#footnote-82) The government bears the burden, and the Court should demand evidence that shows a link between discriminatory benefit reforms and economic well-being. Recent history suggests that there is weak rational connection evidence between austerity and economic health. Notwithstanding the repeated failures of austerity, it still has a gravitational pull among policymakers. It is a quintessential example of zombie economics, a term coined by Quiggin to describe economic theories ‘that persist even when the evidence that seemed to support them fails.’[[83]](#footnote-83) Despite the ‘ugly facts’ of austerity,[[84]](#footnote-84) it survives because it is not purely concerned with economic well-being but reflects political beliefs on the role of private markets being the driver of economic recovery.

Examining the rational connection between welfare reforms, austerity and economic well-being might be argued to be beyond the institutional competence of the Court. For instance, Yowell argues that courts do not have the skill to ‘acquire and assess empirical research’ and may ‘make mistakes in understanding statistical analysis and social science methodology.’[[85]](#footnote-85) Lord Carnwath makes this observation in *DA*. He notes that the Court has been ‘faced with detailed submissions based on conflicting factual and statistical evidence’ and is skeptical as to whether that evidence can ‘be properly tested within the limitation of this court’s proper function.’[[86]](#footnote-86) This position misunderstands the role of Courts. Courts are not being asked to conclusively rule on competing economic theories. They are tasked with requiring the government to provide evidence for the rational basis for austerity motivated welfare cuts. They fail in their role if they unreflectively and uncritically accept this connection. Courts routinely weigh and balance the veracity of conflicting pieces of evidence. The weak empirical basis for austerity should prompt the Court to demand that the government provide reasons for why austerity was adopted after the crash. The government can respond with arguments such as the epistemic uncertainty of an economic crisis, or circumstances unique to the crisis, to defend the viability of austerity. A robust, context sensitive rational connection evaluation can expose the normative assumptions about markets, the role of government, the causes of the crisis and the work ethic of individuals in poverty that underpin the continued belief in austerity. This is not overstepping the role of the Court but giving due weight to equality rights to ensure discrimination is only justified when it is proportionate.

1. *Challenging Whether a Less Intrusive Measure than Austerity Could Have Been Used*

The less intrusive measures step of proportionality considers whether there are other measures that would achieve the government’s goals of economic well-being that do not discriminate against women, children, or disabled persons. The Court is not tasked with “dreaming up” any potential measure. This would exceed its institutional role and draw courts into inappropriate policymaking, particularly in the context of an emergency where decisions are made in high pressure environments and with incomplete knowledge. This limb of the justification analysis requires the government to present credible evidence that no less intrusive measures other than the benefit cap, bedroom tax, work conditionalities and two-child limit would have been as effective in achieving fiscal health. The decontextualized understanding of the government’s aims also skews this stage of the justification analysis as the Court does not consider whether other measures could have effectively and non-discriminatorily responded to the economic crisis, but instead scrutinises the government’s line-drawing exercise in relation to the scope of the specific benefits.

Thus, in the case law, the less intrusive measures stage focuses on tinkering with the boundaries of the various schemes and considering whether exemptions could be crafted. For example, there are two less intrusive measures canvassed in *SG*. The claimants had argued that child-related benefits could have been exempted from being capped and that the cap should have been set at a different level.[[87]](#footnote-87) The Court rejected both of these arguments on the basis that these alternatives would have unacceptably compromised the government’s aims. According to the Court, first, ‘excluding child-related benefits would reduce the savings and the number of households affected by the cap by 80 to 90%’[[88]](#footnote-88) and ‘the fiscal savings would be less’ if the level of the cap was raised.[[89]](#footnote-89) According to this argument, the only way to achieve fiscal health is to impose income poverty disproportionately on women, disabled persons and children. There is no engagement with any other line items in the national budget or any exploration of other areas of life in which fiscal savings could be made. In *SC*, Lord Reed notes that spending on child tax credit has trebled over the last ten years and that ‘there is no evidence that there has been a comparable increase in expenditure on…other benefits.’[[90]](#footnote-90) However, this unduly narrows the scope of the assessment to welfare spending and fails to examine the budget in its entirety. Second, the government defends against a more generous cap holding that it ‘would have effectively resulted in there being no limit to the amount of benefit a household could receive.’[[91]](#footnote-91) The lead judgment by Lord Reed in *SG* accepts this argument holding that the harshness of the cap is an inevitable consequence of addressing the perception that welfare spending is excessive.[[92]](#footnote-92) The arguments made at the less intrusive measure stage rely on pernicious stereotypes on individual in poverty as work-shy, benefit-suckers and implicitly links welfare spending to the cause of the economic crisis.

In *Carmichael and Rourke*, the analysis is also focused on whether there is a practical or affordable way to exclude disabled persons or women who experience gender-based violence from the bedroom tax.[[93]](#footnote-93) This devolves into an evaluation of whether these are precise, stable and identifiable enough classes so that the exemption would not be too broad or leave out too many.[[94]](#footnote-94) There was also a long assessment of the sufficiency of discretionary housing payments and the Court held that, notwithstanding the indeterminacy and administrative difficulties, the discretionary scheme was a sufficient method to compensate for an overly broad categorisation in the welfare system.[[95]](#footnote-95) In *SC*, the argument was that there should be exemptions for consensual unplanned pregnancies or for women who have a third child when they ‘believe they will be able to support the child out of their own resources, only for some misfortune to render them dependent on welfare benefits.’[[96]](#footnote-96) The Court held that this would ‘be completely impractical.’[[97]](#footnote-97)

The third step of the proportionality analysis in the benefit case law is another form of misdirection. Focusing on the lack of precision in creating categories for welfare benefits obfuscates a more fundamental question on whether there are alternative measures to austerity that would achieve the government’s aims without discriminating against marginalised groups. In mainstream economic and political discourse, austerity is presented as the exclusive way for the government to restore ‘credibility in financial markets.’[[98]](#footnote-98) The unavoidability of austerity is so ubiquitous that there is now a shorthand language for this position in economic discourse: TINA or ‘there is no alternative.’[[99]](#footnote-99) Gamble observes that ‘Osborne insisted…there was no Plan B and the Government would not be deflected from its path.’[[100]](#footnote-100) This tone is echoed in the judgments. Lord Reed repeatedly describes the discrimination against women as ‘inevitable’ or ‘inherent.’[[101]](#footnote-101) Even if the boundary-drawing in welfare benefits is broad, this merely amounts to an ‘unfortunate consequence.’[[102]](#footnote-102) However, discriminatory austerity is not unavoidable and all too ‘frequently [it is] taken without sufficient consideration of less harmful policy options.’[[103]](#footnote-103) There is a wide range of measures that heterodox economists have proposed that could be employed in light of the banking and then subsequent sovereign debt crisis. This includes raising or imposing taxes on high-income earners, implementing a one-time capital levy, addressing tax evasion, letting the banks fail, tackling corruption, regulating the banking and financial industry, investing in health, education, childcare and other public services, and cutting spending on other areas of life such as defense.[[104]](#footnote-104) The Women’s Budget Group demonstrated that a financial transactions tax at only 0.01 per cent would raise approximately £25b per year in revenues, alleviating the need for discriminatory welfare cuts.[[105]](#footnote-105)

Similar to a robust rational connection argument, the role of the Court under the less intrusive measure limb is not to squarely adjudicate on the effectiveness of different economic policy responses to the crisis. Its task is more nuanced. Taking seriously its commitment to guarantee the equality of marginalised groups, the government needs to demonstrate that other non-discriminatory measures would not have been effective in protecting the economic system of the state. The Court does not need to select or create an economic recovery plan, but it needs positive evidence that discriminatory welfare reforms are in fact necessary to redress the economic crisis of 2008. If the government cannot do this, they have not discharged their burden under the proportionality analysis. In *SC*, Lord Reed held that ‘the appellants have not suggested any way in which the legitimate aims of the measure might have been achieved without affecting a greater number of women than men.’[[106]](#footnote-106) The Court confuses the burden of proof. It is not for the appellant but for the government to demonstrate the necessity of austerity by demonstrating that other less intrusive measures fell short of achieving the desired aims.

1. *A Fair Balancing*

The last step of the proportionality analysis assesses whether the deleterious effects of discrimination against women, children and disabled persons via the application of the benefit cap, bedroom tax, work conditionalities and two-child limit is fairly balanced against the benefits of achieving the government’s aims. Jackson argues the final balancing process provides clarification and a degree of transparency of community values.[[107]](#footnote-107) This is not an easy task as it ‘entails balancing rights against neoliberal economic “imperatives”,’[[108]](#footnote-108) but at a minimum it requires a contextualised understanding of the economic crisis as the question of fair balance is sensitive to the underlying factual matrix. The Court’s approach ignores the reality of the 2008 economic crisis and defers, or arguably abdicates, balancing to what the Parliament determines is fair. In *SG*, Lord Reed explained that the ‘level of benefits…is inherently a political question on which opinions within a democratic society may reasonably differ widely. It is not the function of the courts to determine how much public expenditure should be devoted to welfare benefits.’[[109]](#footnote-109) This abdication is repeated in *SC*. Parliament has decided that importance of cutting welfare expenditure is fair, economically desirable and socially acceptable and the resulting discriminatory impacts do not outweigh these aims. Lord Reed holds that there is ‘no basis on which this court could properly take a different view.’[[110]](#footnote-110) Drawing on the separation of powers arguments, he further explains that ‘democratically elected institutions are in a far better position than courts to reflect…where the balance of fairness lies.’[[111]](#footnote-111)

Remembering that the government must provide weighty reasons to justify discrimination on suspect grounds, the Court needs to conduct an open assessment of the costs of achieving economic well-being through discriminatory measures.[[112]](#footnote-112) As argued elsewhere, the Court minimises the exponential inequalities that have arisen as a result of austerity-motivated benefit reforms.[[113]](#footnote-113) On the other side of the scale, the strength of the government’s aims is unquestionably assumed by the Court. But the gains from discriminatory welfare reforms do not withstand scrutiny. Piecing together evidence from the judgments, raises serious questions on whether the negative impacts are in fact outweighed by the marginal level of fiscal savings. There also should be a more transparent evaluation of whether the burden of economic recovery is fairly distributed. If austerity is the necessary medicine after the fiscal emergency, the reforms can only be proportionate if all groups bear the costs. There were invocations of banding together to recover from the economic crisis.[[114]](#footnote-114) This belies the darker reality that the austerity measures have required individuals in poverty to accept greater disadvantage to save the banking industry and restore the state’s financial competitiveness. Blyth argues that ‘austerity is not just the price of saving the banks. It’s the price that the banks want someone else to pay.’[[115]](#footnote-115) And the UK has asked lone mothers, children, disabled persons, victims of gender-based violence to bear the cost. The Women’s Budget Group revealed that ‘women shoulder[ed] 70 per cent of the budget cuts, with the cuts fall[ing] especially harshly on [lone] mothers.’[[116]](#footnote-116) Appreciating the origins of fiscal crisis draws attention to whether it is fair to require marginalised groups to bear the costs of the reckless economic decisions by the financial elite in the private sector. Bilchitz argues that a fair approach to austerity would place the burdens on those most culpable for the crisis.[[117]](#footnote-117) By collapsing the last stage of proportionality into an assessment of Parliament’s calculation of fairness, the Court fails to engage with these fundamental questions on the proportionality of an economic crisis.

1. **Conclusion**

In theory, courts are well-placed to adjudicate claims for equality in the context of austerity after an economic crisis. A robust proportionality analysis can dissect the government’s claims that there is a rational connection between excessive welfare spending and fiscal debt, demand evidence that less intrusive measures were meaningfully considered, and weigh and balance the individual’s right to equality against the interests of the state. However, this promise has not been realised.

Through a light-touch review that accepts the political-economic narrative that the economic emergency was caused by welfare spending and the idleness of individuals in poverty, the UK Supreme Court is unable to accurately evaluate whether discrimination is a proportionate measure to restore economic well-being after propping up the financial sector. The scale and severity of the exponential inequalities against women, children and disabled persons in poverty demands a searching and context sensitive approach that fully accounts for the role of the crisis. Currently, the Court ‘dismisses the legal equality rights of individuals who live in poverty and instead consigns them to political vicissitudes.’[[118]](#footnote-118) These decisions also contribute to a culture of impunity as there is little institutional accountability or responsibility for inequalities that have been exacerbated by the economic crisis. Taking seriously the role of the economic crisis in perpetuating inequalities can challenge the accepted political-economic orthodox narrative and call into question whether the discrimination against protected groups who live in poverty can be justified in the name of austerity.

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