The Language of Legislation and the Politicisation of British Judges

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For Claire

Acknowledgements

I would like to make it absolutely clear that there is no way that this project would have been possible without the support that I have received, and the patience with which I have been endured. The deepest debt is due to my ever-loving parents whose unconditional support for my education both made this project possible and gave me some hope that I could actually finish it. Thank you both very much. Indeed my whole family have been the source of any success I have ever had, and have kindly ignored any mistakes I have made along the way. Particular thanks and love go to the lovely grandmother who will be sorely missed.

My new family connections that will be formalised in August this year are all wonderful and undoubtedly provide the best roast lunch and the warmest atmosphere any son-in-law could hope for. My sister and her new family have also played a crucial role in providing distractions and reminding me that the world should be enjoyed on occasions rather than just seen as a place of endless work. My fantastic friends in Oxford, Bristol and London have similarly provided a constant source of inspiration, fun and embarrassing photos. In particular my contact at the Department of Health has (legally) been a crucial source of ideas and information. Also during the past few years in Oxford there have been many important epiphanies, proclamations and attempts to untangle rotaxanes that have been vital distractions.

I have been very lucky that David Robertson, my fantastic thesis supervisor, put up with my early ramblings and intellectual experiments. There are not many tutors that would indulge such nonsense, but I always wanted to try and say something a bit different and he has always supported me in that, for which I am very grateful. Paul Martin of Wadham has also provided very important support as my College adviser, for both my DPhil and my career, and I am very thankful for this. Nick Owen and Stewart Wood of the Oxford Politics Department both provided superb feedback along the way that has helped me improve the project. I am very grateful to them both, and was thrilled by my trip to Downing Street for my transfer exam. I also want to thank very much Petra Schleiter and Alan Renwick for supporting my early teaching career; I hope to have a bit more time to dedicate to you now. Also Arthur Dyevre of the Centro de Estudios Politicos y Constitucionales has consistently provided fantastic encouragement and support for this thesis, and I was very grateful for the invitation to present my work in Madrid.

I would also like to thank all of those that considered my project and pointed me in more fruitful directions. This includes various senior judges and politicians who have asked to remain anonymous. The help I have received from all quarters has been indispensable, and any errors in the final text are of course of my own manufacture.

Finally I want to thank the amazing lady to whom this work is dedicated. She has shown in her love and patience the model of a person that I wish I could approximate.

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> "Parliament makes the laws, the judiciary interpret them... Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral."
>
> Lord Diplock in *Duport Steels Ltd and others v Sirs and others*[1] at 541.

> "Worse legislation hands more power to judges because in practice they, rather than subsequent amending legislation, have the task of ironing out the incompleteness or ambiguities of laws and the inconsistencies between them."
>
> (Foster, 2000, p. 340)

Abstract

Over the course of the 20th and 21st Centuries the judiciary have increasingly made decisions that have affected the substantive content and the procedural implementation of public policy. The aim of this thesis is to provide an explanation for this political behaviour in judges by introducing the *Legislative Politicisation of the Judiciary Theory* to the debate. The theory proposes that the key independent causal variable is the language of Parliamentary legislation.

The argument is that as legislation has been increasingly used to delegate power from Parliament to its various agents, the language used has become more indeterminate in order to enable discretion. Such indeterminacy creates an institutional problem where the orders of the sovereign Parliament are not clear, and to resolve this uncertainty in the Rule of Law the judges must intervene. The political behaviour of judges is therefore stimulated by a change in the legislative supply-side

[1] [1980] 1 All ER 529.

rather than a change in the behavioural demand-side, and the judges are acting as professional technocrats charged with ensuring the efficacious implementation of Parliamentary legislation.

A new discourse analysis methodology has been created for this thesis that provides evidence of change in the language of legislation between 1920 and 2010. A total of 8,328 sections of primary and secondary legislation have been hand-coded, with results showing that 3% of sections in 1920 (21 sections in real terms) were "Henry VIIIth clauses", where power to make new law was delegated by Parliament; by 2010 this had increased to 16% (400 sections in real terms).

Introduction

Some judges are born political, some seek out political power, and others have political power thrust upon them. This thesis seeks to demonstrate that the latter is the most fitting description of developments in the political behaviour of British judges over the course of the late 20th and early 21st Centuries. It will be argued that judges have been politicised by the increased enactment of indeterminate legislation by Parliament. Judges must interpret indeterminate legislation in order to clarify the intention of Parliament and to maximise certainty in the Rule of Law, and through this process of statutory interpretation the judges are forced to engage in political disputes. The key point is that the political behaviour of judges can be explained and justified as an institutionalist reaction to change in the legislative supply-side. This explanation therefore seeks to counter theories that concentrate on the demand-side, and explain the increased political behaviour of the judiciary in terms of the changed preferences of the judges themselves.

This theory is called the *Legislative Politicisation of the Judiciary Theory*. The choice of terminology is designed to clarify the proposed causal mechanism. The political behaviour of judges can alternatively be conceptualised as the "judicialisation of politics", rather than the "politicisation of the judiciary". Judicialisation has been defined as "the expansion of the province of courts or the judges at the expense of the politicians and of the administrators" (Sunkin, 1994, p. 125; Tate & Vallinder, 1995, p. 13). As the judicial role expands, it is said that "governing with judges also means governing like judges", where behavioural tropes from the legal profession are adopted by executive and legislative actors (Stone Sweet, 2000, p. 204). The concept of "judicialisation" is used for a variety of theoretical positions, but it evokes the impression that the causal direction of change was from the judiciary to politics, and by using the conceptual marker of "politicisation" this thesis aims to clearly argue instead that the causal direction of change was from politics to the judiciary. It is important to note that it would be overly simplistic to suggest that the causal direction was *either* from the judiciary *or* to the judiciary – far more likely is that the causal mechanism is cyclical with various complex feedback loops between judicial and political elites that are difficult to discern. However the key independent causal variable it will be argued is the increased indeterminacy of Parliamentary legislation, and all other variables are epiphenomenal as they cannot explain as much variation in the political behaviour of judges.

For this thesis the definition of "political behaviour in judges" refers to both vertical and horizontal interventions in the interpretation of public policy, with implications for the execution, legislation and constitutional status of Parliamentary law. On the vertical plane that connects the state to its citizens, judges have

increasingly intervened in disputes concerning the substantive content and the procedural implementation of public policy. Whilst on the horizontal plane that connects private citizens to each other, judges have increasingly clarified the legal rights and responsibilities of individuals, again with significant implications for public policy. Where the resolution of a public policy dispute cannot be achieved through literal interpretation of statutory language or the direct application of Common Law precedent (in England, Wales and Northern Ireland), the judges must create new legal precedent from various sources including existing legal material, foreign legal material, morality, sociology and politics. This judge-made law with public policy implications has been increasingly observed since 1960 such that the modern Rule of Law in Britain has new substantive content and procedural safeguards that did not exist previously. The source of this new law is the key controversy: unelected and socially unrepresentative judges have increasingly been intervening in public policy and making new politically significant law, and the aim of this thesis is to work out why. Indeed the precise motivation for this thesis was to seek a resolution to the following riddle offered by Robert Stevens (2005, p. xv):

> "As a result of a series of events, *some not easily explained*, the courts in the later 1960s took on a new lease of life. Litigation revived; legal aid expanded and by the early 1970s the courts were regaining their importance." [Emphasis added]

Why did the courts regain their importance in the late 1960s? What changed during that decade, or before, that led to the current position where the political behaviour of judges plays a significant role in public policy? Without truly understanding the source of political behaviour in judges it is difficult to have an informed debate on its merits and its potential dangers. Given recent developments such as the *Human Rights Act 1998* have propelled the judiciary into the forefront of political controversy it is a

very pressing research issue that the factors underpinning this judicial role are "not easily explained."

It is in this context that this thesis was conceived of. In order to attempt a resolution to the riddle, a wholly new theory has been developed, as well as a new methodology, and a new data set comprising a total of 8,328 sections of primary and secondary legislation from 1920 to 2010. This introduction to the thesis will begin with an outline of the Legislative Politicisation of the Judiciary Theory (I), after which the specific argument of the thesis and the observable implications will be set out (II), this will be followed by a clarification of the key concepts of "indeterminate legislation" and "political behaviour of judges" (III), following on from this the nature of the evidence that will be used to demonstrate the validity of the theory will be discussed (IV), and finally a literature review will consider the contribution that is being made to the debate (V). These five sections will set up the main body of the thesis that will consider whether and to what extent the language of legislation has changed since 1920 (Chapter Two), the impact this change has had on judicial behaviour in political disputes with central government (Chapter Three), local government (Chapter Four), and the impact of supranational law (Chapter Five). The final chapter (Chapter Six) will consider the impact of the *Human Rights Act 1998* (HRA) in order to show that despite the new tools of statutory interpretation, the HRA has not disrupted the supply-side causal mechanism proposed by this thesis.

I: The Legislative Politicisation of the Judiciary Theory

The Legislative Politicisation of the Judiciary Theory is a new theory that proposes that the increased enactment of indeterminate legislation by Parliament has led to increased political behaviour in judges who seek an appropriate resolution to the institutional requirement of certainty in the Rule of Law. Such a theory, based on the assumption that judges respond to institutional requirements, directly disputes strategic and attitudinal judicialisation accounts that argue that political decision-making by judges was predominantly a product of the judges pursuing their own personal interests on the demand-side. The theory also differs from alternative explanations of supply-side institutional change such as the impact of the introduction of legal aid in 1949, the increased use of tribunals, membership of the European Economic Community, the introduction of the Application for Judicial Review under Order 53 of the *Rules of the Supreme Court* in 1978 and the *Supreme Court Act 1981*, the incorporation of the *European Convention on Human Rights* with the *Human Rights Act 1998*, the creation of a Supreme Court with the *Constitutional Reform Act 2005*, and the modernisation of the tribunal system with the *Tribunals, Courts and Enforcement Act 2007*. This theory also disputes the idea that the key change was cultural, in the sense of a move to a more litigious society underpinned by a pervasive rights consciousness. All of these alternative demand-side and supply-side explanations for political behaviour in judges are important, but operate in subordination to the key causal mechanism that underpins judicial politicisation, which is argued to be the increased indeterminacy of legislation.

The theory is founded on the following reasoning. When resolving a case, judges must identify the legality of an action taken by a public authority or a private individual. The legality conditions of action are either clearly enumerated by Parliament in the form of *vires* or else they need to be inferred from legality conditions that are inherent in the Rule of Law[2]. The problem with interpreting legislation in order to identify the conditions of legality is that it depends on the "four corners of the law" being objectively identifiable. If the four corners are not identifiable the judges must make the legality conditions themselves, because the court must decide what is and is not legal. Thus the primary cause of increased political behaviour in judges was due to a change in the clarity of legislation enacted, and the judicial behaviour was reactive and institutionally bounded. Ian Loveland explains the problem of identifying the four corners of the law with the following analogy (Loveland, 2006, p. 504):

> "…the content of legislation, in so far as it can be presented as having a geometrical shape, may look less like a neat rectangle and more like a blob of custard dropped from a great height onto a hot plate."

The crucial change in the language of legislation over the course of the 20th and 21st Centuries has been an increase in pragmatic indeterminacy. Pragmatics is one of the three elements of linguistics that are collectively known as semiotics. The other two elements are the better known semantics and syntactics. Pragmatics refers to language whose meaning depends on the addition of new information that is not expressed.

[2] This idea will be discussed in greater detail below, as it is a controversial point to make. The idea that some of the legal limits to action are inherent in the Rule of Law and can be identified by judges is for some merely an unfalsifiable justification for a range of political decisions that a judge may wish to make. The aim of this thesis is to demonstrate that maximising certainty in the Rule of Law and identifying the legality conditions of action in a modern state is based on complex judicial reasoning and is the appropriate action to be taken by judges.

Typically this means language whose meaning depends on the context in which it is used, or certain normative principles that are understood by those engaged in the communication:

> "…successful communication is determined by contextual and normative aspects… over and above the strictly semantic properties of the words used. As a consequence, the study of these factors – 'pragmatics' broadly conceived – has taken on a larger role in theories of linguistic communication" (Marmor & Soames, 2011, pp. 6-7)

Pragmatic indeterminacy in legislative language refers to legislation that is contextually flexible, and whose meaning can be elaborated in conjunction with normative principles rather than literal interpretation. Essentially it refers to legislation that is incomplete and must be elaborated outside of Parliament. Such legislation is increasingly enacted by Parliament to maximise the discretion available to its agents in the pursuit of complex social policy aims, and it therefore has considerable advantages for the government, and has been used to expand the responsibilities and capability of the state. However the increase in executive discretion also leads to an increase in judicial discretion as the judges must clarify the meaning of the legislation if it is challenged in court. Thus the judges perform a vital technocratic function by intervening in public policy disputes.

Of course it would be naïve to suggest that a judge's personal morality plays absolutely no role in the resolution of a case. The key point is that the personal morality of the judge is epiphenomenal to the institutional requirement of maximising certainty in the Rule of Law. The discretion that judges have as a result of indeterminate legislation is not simply a licence for their own interests to flourish, but a complicating deviation from certainty in the Rule of Law. Therefore the judicial methodology has not significantly changed since 1960, but the substance and form of

the legal materials the judges are interpreting has. Changes in the legislative supply-side arguably reflect changes in modern governance, and the expansion of state power in response to a globalised market economy.

To illustrate the problem of pragmatic indeterminacy in legislation consider the following, section 3(5)(a) of the *Immigration Act 1971*:

> "A person who is not a British citizen shall be liable to deportation from the United Kingdom… if the Secretary of State deems his deportation to be conducive to the public good"

The meaning of this section is highly uncertain due to pragmatic indeterminacy of language where meaning depends on various unexpressed contextual and normative information. Such legislation has encouraged clarifying litigation from those against whom it was used, and this litigation has drawn judges into resolving a number of politically significant questions. In interpreting this legislation the judges have to resolve a moral question – "What is conducive to goodness"; a policy question – "What is the public good"; and a psychological question – "Does the Secretary of State deem the deportation to be conducive to the public good?". These questions address the contextual and normative underpinnings of the legislation, and they must be resolved in order to identify the will of the sovereign Parliament. Indeed this section of legislation grants such wide discretion to the Secretary of State that it critically undermines the Rule of Law and practically initiates Rule by Man in deportation decisions. Thus one can see that the political behaviour of judges is a reaction to expansions in state power, and the precise point at which cause meets effect is through legislative language.

From considering the above section of legislation we can theorise that both litigant demands for judicial review of deportation decisions, and the discretionary area of judgement utilised in the judicial review itself are primarily caused by a supply-side change in the legislation, rather than a spontaneous demand-side change in the interests of the litigants or judges. Clearly more evidence is required to demonstrate this contention, and it will be shown that such indeterminate legislative language has increased in quantity and in the level of indeterminacy over the course of the 20th and 21st Centuries.

The primary aim of this thesis is not to conclude that indeterminacy in legislation is suboptimal, inefficient or immoral. Indeed indeterminacy in legislation is arguably the best available means of creating a state capable of addressing the heightened policy demands of its citizens. Legislation, as a legal format, may not be ideally suited to this task, but without abandoning democracy it is difficult to imagine an effective alternative. Thus it is not the aim of this thesis to wistfully lament the passing of a golden age of judicial politics. Rather than seeking to criticise legislative indeterminacy, the aim is to empirically evaluate its effects. The drafting of indeterminate legislation grants discretionary power to the government and its administrators to interpret the law outside the rigorous confines of Parliament's legislative procedures, it also grants discretion to judges to determine the meaning of the legislation in terms of the Rule of Law, and the only institution that significantly loses power as a result of Legislative Politicisation is Parliament in its legislative function. Whilst it could be argued that the discretion granted to judges allows them to maximise their personal preferences, detailed theory and evidence will be used to demonstrate that judicial discretion is predominantly bounded by the institutional norm of maximising certainty in the Rule of Law. In other words there is a "Logic of

Appropriateness" that guides judicial discretion when interpreting legislative indeterminacy (March & Olsen, 1989). There are three core elements to this theory that must be considered in turn – the nature of British constitutionalism, the judge as professional technocrat, and the "Logic of Appropriateness" itself.

The Nature of British Constitutionalism

First of all it will be necessary to explain why variance in the determinacy of legislation is so important in a country with an uncodified constitution. The central assumption of the theory is that the UK legal system is dominated by Parliamentary sovereignty as the "ultimate political fact" of the British constitution (Wade, 1955, p. 188). Most other modern democracies have power dispersed amongst separated branches of the state that operate under a constitution that takes precedence over all other sources of law. Under the British system there is no higher source of law than Parliamentary legislation. Therefore the causal impact of indeterminate legislation is based on the institutional problem that the sovereign has not made its commands sufficiently clear to resolve a legal case without controversy. Where indeterminacy does arise, the judges must interpret the available law in such a way as to ensure the implementation of the sovereign will, and this entails maximising certainty in the Rule of Law where all subject to the sovereign will can understand its commands. Therefore an absolute political sovereign by definition requires a robust and carefully sustained Rule of Law, and to conceptually separate political constitutionalism from legal constitutionalism is arguably to make a false dichotomy (Griffith, 1977). As per A.V. Dicey:

> "Parliamentary sovereignty has favoured the rule of law, and that the supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality." (Dicey, 1915, p. 273)

H.L.A. Hart argued that Parliamentary legislation had, in his lifetime, become more prone to having "gaps" which allowed a free judicial hand in deciding what to fill them with (Hart, 1961). This thesis contends instead that legislation does not have gaps – they are indeterminacies. A gap is nothingness, whereas indeterminacy is something that creates confusion. Such confusion means that the supreme legal authority has issued a command regarding the extent and operation of the law that cannot be identified with certainty. This must not be left unresolved by the judges otherwise the intentions of Parliament will be mistaken or ignored, and both of these scenarios are fundamentally against the point of having a supreme legal authority. Even in situations where the indeterminacy is literally a gap in the legislation – or a *casus omissus* – this is still a positive source of confusion in the Rule of Law (Auchie, 2003). The gap still creates an actual problem, despite its being literally nothing, because supreme legal authority cannot be delegated into a vacuum.

Therefore what Lon Fuller described as natural law is, in the UK, an aspect of positive law (Fuller, 1964). Specifically you cannot have law that has no certain meaning and provides no unequivocal guidance as to acceptable behaviour. In other countries, legislative indeterminacy can be resolved by reference to a constitutional text or a Civil Code, but this is not possible in the UK. Parliament is the pinnacle of the constitution, so if its commands cannot be understood there is a real constitutional dilemma regarding the validity of acts allegedly taken under the jurisdiction of the law. Indeterminate legislation thus negates the possibility of a "black-letter" literal interpretation of statutory language, even for those judges personally determined to

act restrictively. Indeterminate legislation has therefore thrust a measure of political behaviour on to the reluctant conservative judges, including Lord Templeman, as much as it has empowered the "iconoclastic" judges, such as Lords Denning and Reid. Judges cannot escape the need to establish the meaning of indeterminate legislation and their role in this respect is entirely reactive, and not "activist". Indeed if a judge refused to resolve a legislative indeterminacy that would be an inappropriate political act, potentially motivated by personal preferences. A judge therefore faces a Catch-22 situation where to do nothing would be to shirk a constitutional responsibility, whereas to do something is liable to be misconstrued as activism and may encourage criticism from the government and the public.

The Judge as Professional Technocrat

Therefore the political behaviour of judges should be conceptualised as an institutional safeguard that ensures the efficacious application of sovereign commands. Without such a facility those subject to the law would not understand the nature and extent of the laws they were subject to, with the likely consequences being inefficient, unrepresentative, and unaccountable government; which in turn would undermine the legitimacy of the polity (Hirschman, 1970). The judges therefore act as a professionalised technocracy, with the specific task of elaborating the meaning of sovereign commands (Abel & Lewis, 1988; Barak, 2006). The reason that this technocratic function has expanded in scale and scope in the 20th and 21st Centuries is because of increased indeterminacy in legislation. However why is there increased indeterminacy?

There is insufficient space in this thesis to fully explore this question as it would take a separate research project to examine properly. The aim of this thesis is to demonstrate that legislation has become more indeterminate and to evaluate its effects; and therefore the following explanation of the cause of increased indeterminacy in legislation is speculative rather than empirically verified. A compelling explanation behind the expansion in quantity and increased indeterminacy in quality of legislation has been due to the increased recognition by voters of the role the state can play in resolving social problems. Where pre-1939 the role of the state was largely viewed with suspicion and hence was limited (Pelling, 1979; Lloyd, 1985), the state has steadily taken on greater responsibility for its citizens' well-being through a range of social and economic policy instruments. The change in the role of the state is therefore underpinned by a shift in political culture towards acceptance and perhaps even reliance on state intervention. This cultural change has led to public pressure for legislative responses from the government to resolve social problems, even where legislation is not the ideal solution. Despite this significant cultural change, alone it cannot explain the causal mechanism, as the precise nexus of cause and effect is the medium of communicating this new political reality into law. The aim of this thesis is a precise, micro-foundational analysis of political behaviour in judges, rather than a macro-level causal explanation that links culture, history and politicisation.

The expanded size and responsibilities of the state have necessitated a new form of legislative authorisation of government action. Essentially, greater discretion is required to implement complex social policies without the strictures of legal precision. Parliament therefore delegates significant discretionary power to its agents, including the central executive, local government, tribunals and the judiciary.

Friedrich von Hayek and Harry Jones both anticipated that a state committed to its citizens' welfare would create tensions with individual liberties that would enhance the role played by judges. Carol Harlow and Richard Rawlings have summarised these two scholars' positions as respectively the "red light" and "green light" positions (Harlow & Rawlings, 2006). Hayek's "red light" position holds that collectivist welfare and individual liberty are mutually exclusive goods and you must either have one, or neither. Jones's "green light" position was more willing to accept that an accommodation between individual liberty and collective welfare was possible, albeit difficult. The considerable demands placed on successive governments have encouraged the adaptation of political tools already at hand to a job that they are not necessarily best suited to. Such a mismatch of problem and solution has been called the "garbage-can model" by Cohen, March and Olsen, implying that rather than developing a bespoke legal instrument to deal with a new policy pressure, governments simply adapted Parliamentary legislation to a new policy function, and thereby solutions preceded problems rather than problems leading to solutions (Cohen, March, & Olsen, 1972).

In many policy spaces legislation is a solution that is ill-suited to the problem. In Britain, legislation is a medieval legal instrument originally developed to resolve a specific pathology in the Common Law (Goldsworthy, 2004). A command or "statutum" (the origin of the word "statute") would be delivered by the sovereign Parliament to the courts. Such a command is best suited to being short and precise, and employing imperative rather than subjunctive language. Lord Thring, the first ever head of the Office of the Parliamentary Counsel, put it thus:

> "Clearness is the main object to be aimed at in drawing Acts of Parliament. Clearness depends, first, on the proper selection of words; secondly, on the arrangement and construction of the sentences.

> An enactment in its simplest form is a declaration of the legislature, directing or empowering the doing or abstention from doing of a particular act or thing." (Thring, 1902, p. 61)

Clearly one should not look for the "good old days" as legislation has never perfectly attained "clearness", and indeed excessive clarity can be just as problematic. For instance the first employed parliamentary draftsmen in the 19th Century were drawn from the world of conveyancing, and judges often complained that their Acts were too detailed as they attempted to anticipate all possible eventualities, which thereby made the law very difficult to apply. Whilst excessive clarity in legislation is not ideal, nor is excessive indeterminacy, and the adaptation of the statutory command to a new era of discretionary governance has created uncertainty in the Rule of Law that has had to be resolved by the judiciary.

Evidence for the era of discretionary governance includes studies that show the UK political system has become to an extent "presidentialised" (Poguntke & Webb, 2005), with the separation of powers between Commons, Lords and Monarch being undermined by a strong party system and a dominating Cabinet and Prime Minister. It has been argued that the result has been a new form of governance, where the Westminster model of Parliamentary power has been "hollowed-out" to different centres of executive government from the EU level downwards (Rhodes, 1996; Rhodes, 1997). The changes in the nature of the state and the institutions of government are such that it has been argued that the UK has a new constitution in the 21st Century (Bogdanor, 2009).

This thesis aims to demonstrate that the constitution has not changed, but within the constitutional framework the old models of power delegation from Parliament in terms of principal-agent, delict-sanction, contract-property do not apply

so clearly anymore. Legislation is increasingly contextual, malleable and contingent. In a word legislation is increasingly indeterminate, and arguably this more anything else explains the change in the political behaviour of judges. The judiciary fulfil the role of a professional technocracy, where the expertise of the judges is utilised to maximise certainty in the Rule of Law, and thereby ensure the efficacious implementation of Parliament's will.

The "Logic of Appropriateness"

A key point of this theory therefore is that political behaviour in judges is an institutionally appropriate response to indeterminacy in legislation. What is meant by "appropriateness" in this context? The term is used to make it clear that there is no single institutionally *correct* response to indeterminate legislation, but rather there are more or less appropriate resolutions, where the contextual and normative uncertainty is clarified by reference to existing principles of law. Therefore understanding the "Logic of Appropriateness" will allow us to understand why certain interpretations were reached over others, and which resolutions are the most conducive to an efficacious clarification of the sovereign will.

Fundamentally the judicial role in political disputes is to provide meaning to existing law via interpretation, and certainly not to create new law that is untethered to existing legal principles via legislation. The conceptual distinction between interpretation and legislation is not easy to establish, and is not uncontroversial (Shapiro & Stone Sweet, 2002). The distinction cannot be made with reference to

necessary and sufficient conditions, as both interpretation and legislation create legal ligatures that establish new meaning to the Rule of Law, and therefore the difference between them is more a matter of degree than kind. Such conceptual markers are therefore best distinguished according to a more "fuzzy" family resemblance approach to conceptualisation where "interpretation" and "legislation" are at opposite ends of a single continuum (Goertz, 2006). Fundamentally the difference is that interpretation creates meaning for indeterminate legislation from existing sources of public meaning – namely positive law and legal principles. Therefore the resolution of the case is best achieved by providing "integrity" to the whole legal system, where past principle and current problem are synthesised (Dworkin, 1986, p. 225). An appropriate resolution to a case is more than fitting the case to conventional reasoning, it is also the elaboration of that conventional reasoning in new and unforeseen circumstances. As Dworkin suggests, interpretation is like writing a chapter in a novel with multiple authors, where later cases build on the principles established in earlier cases in order to propel the story towards its logical conclusion (Dworkin, 1986, p. 228). Joseph Raz similarly argued that the Rule of Law is a mechanism to:

> "…facilitate the integration of particular pieces of legislation with the underlying doctrines of the legal system." (Kavanagh, 2009, p. 349).

In contrast, legislation creates new meaning to the Rule of Law without the need for a connection to existing law or principle.

For this thesis the distinction between interpretation and legislation will be reconceptualised according to the institutional motivations underpinning the different actions. It will be argued that judicial interpretation is motivated by the "Logic of

Appropriateness", whereas legislation is motivated by the "Logic of Consequences" (March & Olsen, 1989). It is because interpretation and legislation are different institutional devices for creating legal meaning that the "Logic of Appropriateness" will be used for this thesis, as it is important to understand under what circumstances judges choose to interpret, and under what circumstances they defer to legislators on account of a perceived lack of capacity, competence or a lack of collective legitimacy (Dahl, 1970; Strom, Mueller, & Bergman, 2003). Hence we need to look beyond judicial political behaviour as being led by the judges' preferences, and we need to consider the underpinning institutionalist motivation for adjudication.

The method of statutory interpretation is highly complex which is why it cannot be assessed in terms of *correct* and *incorrect* interpretations, instead they are more or less appropriate. Indeed as Dworkin has argued, the task of adjudication is so complex that even Hercules himself would struggle to balance the various sources of law to achieve the best resolution (Dworkin, 1986). The theoretical underpinnings of the use of the "Logic of Appropriateness" are due to the limitations of a purely positive evaluation of judicial behaviour. For H.L.A. Hart the "rule of recognition" could be positively observed and was not normative, in the sense of being a hermeneutic or inter-subjective interpretation of reality (Hart, 1961). However in the absence of a clearly codified constitution the rules of recognition cannot be positively identified, but must be extrapolated from principles inherent in the Rule of Law, and the context of the case. Due to the complexity of the Rule of Law the criteria of legal validity are *persuasive* rather than *demonstrative*.

This is the crucial contribution of Neil MacCormick, who argued that the key to understanding change in the law was according to a *post-positivist* analysis that

considered institutional and normative factors as inseparable – precisely as normative institutionalism in political science does (MacCormick, 2005). Therefore to understand why the Rule of Law has changed so much over the course of the 20th and 21st Centuries, and why judges display more political behaviour, one must analyse how positive law has changed and encouraged a normative institutionalist reaction from the judiciary to reconcile the new law with existing legal principles. As Guido Calabresi has argued in relation to American law, judges have increasingly created a "Common Law for the Age of Statutes", where rapid changes in legislation have prompted an assimilation of new positive law with extant legal principles (Calabresi, 1982).

Therefore where a literal interpretation of legislation is impossible, judges utilise the language of the legislation as far as is possible, and they will also seek to understand the intention of Parliament, as well as the general scheme of the legislation and the best means of ensuring justice in the immediate case (Cross, Bell, & Engle, 1995). Having done all of this, the judges will also seek to synthesise the various clear elements of the legislation with principles in the Common Law, international law (such as European Union law and the *European Convention on Human Rights*) and even academic analysis. There is no single correct method of statutory interpretation, but rather a "Global method" that utilises different tools of interpretation only to the extent that they contribute to certainty in the Rule of Law (Bennion, 2008). The point is that the greater the indeterminacy, the greater the need for judicial intervention to establish clear meaning. However there are more or less appropriate means of resolving legislative indeterminacy, with the interpretation that best secures the efficacious implementation of the sovereign will being the most appropriate. The "Logic of Appropriateness" encourages judges to tether legislative indeterminacy to a

web of existing positive law and legal principle, thereby maximising certainty and in turn maximising the efficaciousness of the legislation. On top of this, the appropriate resolution to a case indicates a strong normative aspect to the judicial role, that they must be seen not to be engaging in legislative politics, as they are enforcing the sovereign will, not their own will, and the continued legitimacy of the bench depends on the judges being seen to transcend the rather scurrilous interest-maximisation associated with legislation. It is because there is rarely one single possible solution to a legal dispute that institutional and normative considerations overlap, where in response to an institutional problem the best response is not an objectively correct interpretation, but rather an interpretation that can be robustly defended as most in accordance with the institutional requirements of the law and the normative principles that underpin the law. The "Logic of Consequences" on the other hand would be an inappropriate resolution to indeterminacy as it would not link the legislative uncertainty to any existing legal principles through which its meaning could be elaborated, nor would it accord with the expected behaviour of the judiciary and it could bring the judicial role in politics into public disrepute.

The "Logic of Appropriateness" has been adapted for this thesis from the normative institutionalism set out in March and Olsen's book *Rediscovering Institutions: The Organizational Basis of Politics* (March & Olsen, 1989). Normative institutionalism is a sociological branch of the new institutionalism school of comparative politics. New institutionalism is founded on the assumption that institutions (defined as rules of political engagement) are crucial independent causal variables that direct the behaviour of individual agents (Hall & Taylor, 1996). Normative institutionalism goes further by rejecting a clear distinction between behavioural norms and institutions, by arguing that norms are institutions, in the form

of communally recognised "cognitive maps" that act as binding institutions within a society because they provide meaning to social interaction. This understanding of institutions can be contrasted with rational choice institutionalism, which stresses that all individuals are self-interested with exogenously fixed preferences, and institutional rules interact with individual self-interest leading to predictable behaviour. Where rational choice institutionalism suggests that self-interested actors are motivated by a purely utilitarian "Logic of Consequences", normative institutionalism suggests an alternative, where cooperative agency seeks common goods that are pursued via acceptable behaviour patterns according to the "Logic of Appropriateness". This is the best means of resolving indeterminacy as it reconciles indeterminate law with existing legal principle in a publicly justifiable manner.

The key theoretical problem that has been associated with normative institutionalism is the difficulty in explaining change in the behaviour of actors or change in the norms (Hall & Taylor, 1996, pp. 953-955). This is because normative institutionalism traditionally focusses on macro-level norms that are assumed to be highly stable, and identifying dynamic factors can be difficult. This problem is avoided if change can be identified in the context or resources that are exogenous to the institutions (March & Olsen, 1989). In a similar vein this thesis will focus on the supply-side change that has led to a change in behaviour despite stable norms.

An important theoretical advance that concentrates on dynamic factors within a stable institutional environment has been offered by Vivien Schmidt with "discursive institutionalism" (Schmidt, 2008). This approach focusses on inter and intra-institutional discourse as being the source of change within stable institutions. This sub-discipline of new institutionalism has emerged out of the "turn to ideas" of

institutionalism in political science, and constructivism in international relations (Hay, 2008). Both movements are a reaction against the explanatory problems associated with interest-based explanations of rational actor behaviour on the one hand, and dehumanising structural explanations on the other (Blyth, 2003). For this thesis the focus is on change in what Schmidt has conceptualised as "coordinative discourse". This is the discourse between public policy elites, and the particular focus of this thesis is legislative discourse between law-makers in Parliament and adjudicators in the courts. Schmidt has also conceptualised "communicative discourse", which is discourse between policy elites and citizens (Schmidt, 2008, p. 305). This is also an important dynamic factor for the Legislative Politicisation Theory, where increasing indeterminacy in the language of legislation will encourage litigants adversely affected by an interpretation of the legislation to contest its meaning in the courts.

Whilst this thesis is concerned with change in discourse as being the key dynamic factor in an otherwise stable normative environment, in order to understand the effects of a change in legislative discourse it will be necessary to focus very carefully on the norms by which judges interpret legislative language. In other words it is not only the change in the language of legislation that this thesis seeks to investigate, but also the means by which judges utilise institutional norms to create clear meaning from the legislation. As a result this thesis shall utilise normative institutionalism as a general theoretical anchor, in order to signal an interest in both the change in discourse and the resolution of the discursive indeterminacy by application of established substantive and procedural norms.

There is however a key problem with judges performing this technocratic exercise, which is that if the principles of the Rule of Law are indeterminate and

Parliamentary legislation is increasingly indeterminate, does that not make the interpretation of the law entirely relativistic and thereby open to manipulation from judges seeking to further their own personal interests? Arguably not, the "Logic of Appropriateness" assumes that there are some publicly accessible legal principles that can be applied by judges to help in the resolution of legislative indeterminacy. The most important principles are arguably inherent substantive and procedural underpinnings to the sovereign power of Parliament. As discussed, the robust implementation of the Rule of Law is necessary to ensure the maximal certainty of the sovereign's commands. This certainty has two elements – substantive equality and procedural justice – that are expected to be enforced except where Parliament explicitly rules otherwise. This suggestion that there is normative content in the Rule of Law that assists the efficacious operation of Parliamentary sovereignty is controversial, as there are those who argue that the there is legally nothing underpinning Parliamentary sovereignty as it is the zenith of the constitution (Wade, 1955). However such an argument cannot successfully respond to a cosmological question – if Parliament is omnipotent, where did this power come from? Parliament is fundamentally a body of representatives that come together to enact law and govern the country. Parliament is hence a forum for expressing the public will that it *represents*, but therefore Parliament cannot be the beginning and end of all political power, as it is just a means for representing the true sovereign power – the people (Hart, 1961, p. 72). Therefore if Parliament represents and communicates the will of the people its continued power depends on maintaining that link with the people. This means that since all citizens have equal access to the power nexus in Parliament, its continued sovereignty depends on the principles of substantive equality and procedural justice amongst citizens (Jowell, 1994). Therefore the existence of a

sovereign Parliament as the highest source of law implies by extension the importance of certainty in the Rule of Law, as well as equality and justice in the treatment of citizens. Normative certainty in the form of equality and justice can only be breached by the explicit instruction of the collective sovereign represented in Parliament. Where exceptions are not made, judges can assume that indeterminacies should be reconciled with these basic principles of law.

Therefore in order to be appropriate a judicial decision must resolve indeterminacy in the law, where a literal interpretation of the meaning of the legislation is impossible due to the enactment of pragmatically indeterminate legislation where the meaning depends on context and the norms of law. In cases brought under such legislation, the appropriate resolution will resolve the uncertainty as far as possible by utilising the latent principles of the Rule of Law that underpin the sovereignty of Parliament. It is because equality and justice do not have objective content that they are enforced in a manner that can persuasively convince those subject to the law that it is the best synthesis of positive law and legal norms. The judicial role is therefore institutionally important, but based on applying normative principles. The certainty achieved in judicial interpretation will never be absolute, but rather a shared understanding that the resolution is the best accommodation of principle and legislation.

II: The Theory and its Observable Implications

Observing "appropriate" and inappropriate interpretations of the law is clearly highly complex and requires precise elaboration of the theory and an explanation of the observable implications. The theory to be tested is that the language of legislation has become increasingly indeterminate between 1920 and 2010 and therefore the legality conditions laid out by Parliament increasingly require judicial clarification. The most significant change in legal language is that it increasingly delegates portions of Parliamentary Sovereignty to the government and other agents via pragmatic indeterminacy in legal language. By granting this discretion to government agents, Parliament has also granted discretion to judges. Therefore successive governments over the course of the 20th and 21st Centuries have used Parliament to enact a qualitatively different form of legislation that enables the government and its agents to act as the trustees of Parliament, rather than as its delegates. This creates a problem for judges who must determine the will of Parliament where the commands of the ultimate sovereign are not clear. Ultimately this institutional problem elicits an institutional response where the judges will utilise the positive law and normative principles of law to maximise certainty in the Rule of Law. Thus the specific hypothesis to be tested is as follows:

> Political behaviour in judges will be observed in legal cases disputing indeterminate legislative language, and the optimal resolution to the indeterminacy is through an institutionally appropriate interpretative methodology that maximises certainty in the Rule of Law.

The alternatives to this theory that need to be falsified are that the political behaviour of judges is not causally connected to the language of the legislation; or if it is so

connected, the resolution sought by the judiciary is not in accordance with the "Logic of Appropriateness".

The precise distinction between appropriate and inappropriate statutory interpretation needs to be specified with clear observable implications of the theory. Appropriate political behaviour denotes an intervention in public policy that is justifiable as being conducive to certainty in the Rule of Law, and inappropriate behaviour denotes an intervention where indeterminacy is sustained or exacerbated. There are six categories by which judicial interventions can be evaluated with reasonable accuracy. These six categories have been adapted for this thesis from a seminal analysis of political behaviour in the US Supreme Court by Richard Hodder-Williams (Hodder-Williams, 1997). The first four of these categories are institutionally appropriate examples of political behaviour in judges, and the last two are inappropriate:

Empirical – Litigants bring cases concerning public policy to court as an alternative means of settling their political grievances. Therefore the source of cases and their content is independent of the judges' personal interests. The Logic of Appropriateness leads to the expectation that the selection of cases by docket control will prioritise those with the most important legal questions to be resolved. Therefore "Empirical" here refers to the source of judicial power.

Definitional – The courts main task is to provide substantive meaning and clarity to the Rule of Law. The substantive content of legal meaning that is established by the courts is expected to be justified as a careful synthesis of the positive law with clearly discernible legal principles.

Systemic – The courts oversee the implementation of the law throughout the legal system, and it is expected that in cases dealing with indeterminate legislation the courts will seek to maximise coherence in legal and quasi-legal institutions by the elaboration of procedural regularities and safeguards.

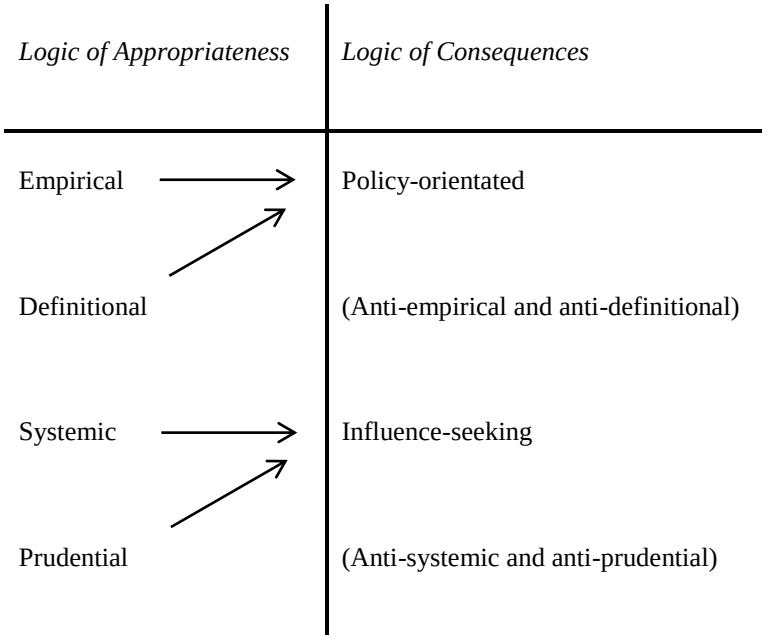
Prudential – Judges are expected to recognise a capability asymmetry in certain cases, where the courts are incapable of resolving the indeterminacy through interpretation. In such cases the judges will defer to another agent of Parliament with greater capacity, competence or collective legitimacy (Dahl, 1970; Strom, Mueller, & Bergman, 2003).

Policy-orientated – This refers to cases where the judges behave much like legislators and use the power of the court to further their personal policy agendas. Such behaviour would be anti-empirical where cases are selected not according to their legal importance, or anti-definitional where the substantive decision fails to clarify the meaning of the legislation in accordance with existing positive law or legal principles. It would be wrong to argue that appropriate statutory interpretation is insensitive to public policy, the key point is that this should be of secondary importance to maximising certainty in the Rule of Law.

Influence-seeking – This refers to cases where the judges seek to maximise their personal power, or the power of the courts in relation to the other branches of government. Such behaviour would be anti-systemic where the procedural limitations of legal power were ignored. It could also be a case of anti-prudential behaviour, where the courts seek to resolve a case despite lacking capability – as may be the case for instance in making decisions pertaining to national security policy.

The distinctions between the Logic of Appropriateness and the Logic of Consequences are summarised in the following table:

Table 1.1: Observable Implications of the Legislative Politicisation Theory



The six observable implications of the theory will provide a conceptual framework for reasonably accurate evaluations of judicial behaviour. As it is not possible to provide an objective measure of behaviour this is arguably the best alternative. It is important to note that all appropriate judicial decisions are expected to show evidence of empirical, definitional, and systemic behaviour, however it will not always be the case that it is appropriate for the courts to prudentially defer to another agent of Parliament. The point at which the courts defer can only be appropriate where there is a justified belief that the courts are the inappropriate forum to resolve the indeterminacy. For instance *Liversidge v Anderson*[3] is a much lamented example of inappropriate deference by the courts, where the internment policy of the government during the Second World War was not questioned according to legal principle and was automatically accepted as within the government's capability. In this case the indeterminacy in the Rule of Law was sustained and exacerbated, and hence the

[3] [1942] AC 206

decision was inappropriate. A case where insufficient prudence was arguably demonstrated was *Re S (A Care Plan)*[4], where the Court of Appeal was overruled by the House of Lords for excessively intervening in the making of local authority child care orders. This was therefore an example of an inappropriate policy-orientated decision by the Court of Appeal being anti-definitional, where the substance of the law was not clarified according to existing principles. It also demonstrated influence-seeking by being anti-prudential as the court made a policy decision that was beyond its capability.

As well as understanding the conceptual distinction between appropriate and inappropriate statutory interpretation, it is important to understand the precise meaning of the proposed independent and dependent variables, to which we now turn.

III: Concepts

Identifying the causation of change in judicial behaviour is very complicated, and there is a heavy reliance on theory as a result of the difficulty of directly observing the nexus of cause and effect. Furthermore, the field is located in an inter-disciplinary space between politics, law, sociology and philosophy; and therefore clarity of conceptual definition is vital. The most important concepts to clarify are the independent variable – "indeterminate legislation", and the dependent variable – "political behaviour of judges", and these will be discussed in order.

[4] [2002] UKHL 10

The Independent Variable – Indeterminate Legislation

This section aims to clarify the concept of "indeterminate legislation" by first of all considering what type of legislation is to be studied, and why the concept of "indeterminacy" is to be used instead of the more commonly used "ambiguity". The reason for this, as will be discussed, is because "indeterminacy" can cover all three of the elements of semiotics, whereas "ambiguity" is typically associated with just semantics and syntactics. This will lead on to a more detailed explanation of pragmatics in legislative language and the different forms it can take. After this it will be possible to outline the four labels that will be used to group the different observable elements of legislative indeterminacy into more manageable blocks. Finally there will be a brief discussion of how the volume of legislation has increased since 1900, and why this should not be considered as the key causal factor in the political behaviour of judges, rather the change in quantity has simply magnified the problem of the change in quality.

Firstly what is legislation and what makes it indeterminate? In this thesis legislation refers to public statute law enacted by Parliament. This can be contrasted with private and hybrid acts, which are also passed by Parliament but are specific legislative requests from private organisations. Statute law should also be dissociated from other sources of primary legislation in the UK, notably Measures of the General Synod of the Church of England.

"Indeterminacy" of legislative language refers to language where more than one interpretation would be possible without misreading (Dyevre, 2005; MacCormick, 2005). This is similar to "ambiguity" of language (Empson, 1953), but

where ambiguity typically concentrates on semantic and syntactic elements of language, "indeterminacy" broadens the area of study to include the third element of semiotics – pragmatics (Morris C. W., 1946). In other words, ambiguity denotes confusion intrinsic to the language used, where indeterminacy adds to this confusion created by extrinsic disconnection between language and context. Thus in legislation a section of an Act may be semantically and syntactically unambiguous and yet the true meaning of the law is totally dependent on context and norms. The most famous example of this in law was H.L.A. Hart's hypothetical example that a law banning vehicles from a park would create a problem of interpretation where a jeep was intended for use as a statue (Hart, 1958). The sentence "no vehicles are allowed in the park" has neither semantic nor syntactic ambiguity, and yet it is still capable of indeterminacy as a change in context can change the meaning. The jeep was not going to be used in the normal sense of the word "vehicle", and thus contextual and normative elements create uncertainty despite the superficial clarity of the law. "Indeterminacy" therefore will be used in this thesis to measure all three of the semiotic elements within legislative language. As such this thesis moves beyond other concepts previously used in the debate over legislative language that have focussed more on semantic and syntactic elements of language, including "ambiguity" (Edelman, 1992), "indefiniteness" (Freund, 1920)[5], "irrelevant considerations" (Taylor, 1976)[6], and "vagueness" (Post, 1994). Semantic and syntactic indeterminacy of legislative language are also important variables and the extent of change over time will also be measured. Indeed it is important to note that no two types of legislative

[5] This concept has been used in the dicta of US judges. It was famously declared in *Winters v New York*, 333 U.S. 507, 524 (1948) that "indefiniteness is not a quantitative concept".

[6] Relevant and irrelevant considerations are more common to the British judicial review tradition. See Woolf, H., Jowell, J. & Le Sueur, A., (2007) *De Smith's Judicial Review, 6th ed* (London: Sweet and Maxwell).

indeterminacy are mutually exclusive, and different forms of linguistic indeterminacy interact.

Arguably the most crucial development in pragmatic indeterminacy has been the delegation of decision-making power from Parliament to its agents in the executive branches of the state. Here the law is drafted with indeterminate language so that an agent can with discretion flesh out its meaning to adapt to differing contexts, and to apply conventional or normative principles in creative ways to achieve policy goals. Perhaps the most notorious form of pragmatic indeterminacy in legislation is the "Henry VIIIth Clause". This appellation is commonly used to refer to a range of legislative instruments; as we can see from the following statement by the former Justice Secretary Jack Straw:

> "…a Henry VIII clause is a power in a Bill which enables primary legislation to be amended or repealed by secondary legislation. Such provisions are included in legislation for a variety of reasons. Due to the diverse nature of this type of power, we cannot be sure that we have captured every instance. However we estimate that there are around 70 such powers contained within legislation enacted so far this Session."[7]

This thesis will present a more precise means of identifying Henry VIIIth Clauses as the combination of specific measures of pragmatic indeterminacy in language. In total there are eight measures of indeterminacy that have been used to evaluate change on all three of the forms of linguistic indeterminacy: semantic, syntactic and pragmatic elements. The eight measures are best understood in collective labels. This thesis has adapted four conceptual labels that were used by March and Olsen to observe ambiguity in institutional form and function (March & Olsen, 1989, pp. 42-3). These

[7] House of Commons Hansard for the 8th December 2009 Column 272W. Retrieved on 18/05/2011.

labels are plurality, volatility, decentralisation and mobility, and they work well as a framework to study legislative linguistics.

Firstly, indeterminacy means *plurality*. In legislation this refers to language composed in a syntactic form where many relevant pieces of information are expressed in the same sentence. Secondly, indeterminacy means *volatility*. This is a semantic measure that looks for words that have no objective meaning, therefore the meaning of the language depends on an individual's interpretation of the specific words. Thirdly, indeterminacy means *decentralisation*. This is a pragmatic measure of legislative language where there is uncertainty about who is responsible for the implementation of the legislation, and how much power they have been delegated. This is the measure for a Henry VIIIth Clause where the meaning of law depends on an agent of Parliament. Finally, indeterminacy means *mobility*. This is again a pragmatic measure that signifies a law whose meaning is unstable in that it depends on changes in context, which is pragmatics without the role of an agent to determine the meaning. All of these categories will be explained in detail in the next chapter. March and Olsen were using these four conceptual labels to measure institutional change, and given that legislation is a collection of rules intended to accomplish institutional change, the application of the four labels to this project is arguably ideal.

It is crucial to be clear that the aim is not to demonstrate that legislative indeterminacy in general, or pragmatic indeterminacy in particular is anything new to British judicial politics. Rather the incidence of pragmatic indeterminacy has significantly increased as a proportion of the legislation enacted, and has also increased in real terms such that judicial intervention in public policy is increasingly common. To find examples of semantic and syntactic indeterminacy one can go as far

back as *Heydon's Case*[8] of 1584 where the Baron of Exchequer created the Mischief Rule in order to make sense of Parliament's legislation. Legislation that empowers the government via pragmatic indeterminacy to act with discretion is also not new, but where in the early 20th Century it was used sparingly and in response to critical emergencies, it will be shown that such language is increasingly becoming a very common means to deal with various areas of government policy. Pre-war there was the *Official Secrets Act 1911*, the *Public Order Act 1936*, and the *Emergency Powers (Defence) Act 1939* which all delegated Parliamentary power to the government to respond to emergency situations (Ewing, 2010, p. 268). Lord Hewart vehemently denounced such draconian legislation that sought, "to subordinate Parliament, to evade the Courts, and to render the will, or the caprice, of the Executive unfettered and supreme" (Hewart, 1929, p. 17). Clearly such legislation is not new, and this thesis is not arguing that there was a single identifiable point in time that marks a "critical juncture" (Collier & Collier, 2002), or a "constitutional moment" (Ackerman, 1989), but rather there was an increase in the size and responsibilities of the state which was achieved with an observable increase in pragmatic indeterminacy of legislative language.

A final important point to emphasise is that there has been a conspicuous quantitative change in the volume of legislation passed that may distract attention from the more subtle qualitative changes that are the focus of this thesis. A quantitative change in legislation is significant[9], but one would not expect a qualitative change in judicial behaviour without a qualitative change in the raw material of statutory interpretation. It is the combination of a quantitative and

[8] (1584) 76 ER 637.
[9] See for instance the speech made by the Lord Chief Justice, Lord Judge, at the Mansion House on 14th July 2009: http://www.judiciary.gov.uk/media/speeches/2009 Retrieved on 18/05/2011

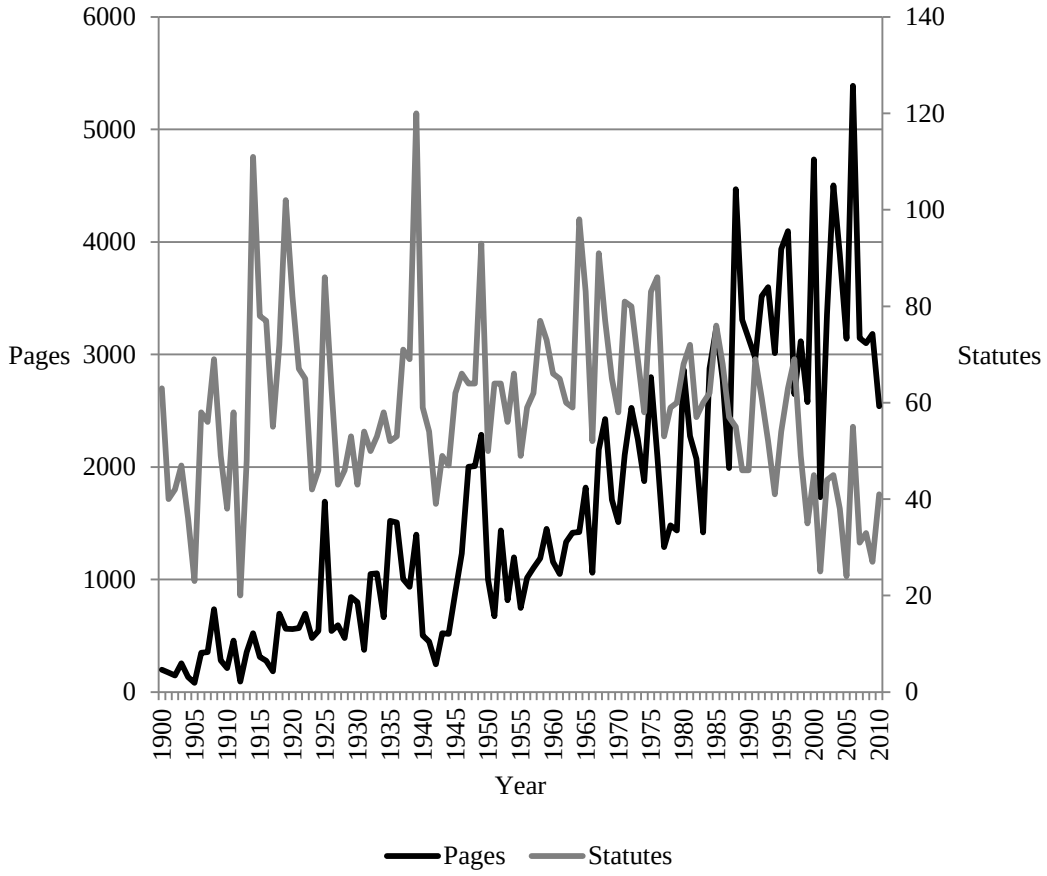
qualitative supply-side change that has led to the increased politicisation of judges. Consider the following statement by Lord Phillips of Sudbury in oral questions in the House of Lords to the minister Lord McNally:

> "I am grateful to my noble friend for that reply, but is he aware that we legislate at between 200 and 400 per cent the rate of any comparable country in Europe? Is he aware that the cumulative effect of making legislation at the rate of between 11,000 and 13,000 pages a year [this figure includes secondary legislation] over the past 15 years has been a state of indigestion in this country that some might call citizen constipation, which has parlous consequences?" [10]

Graph 1.1 shows the quantitative change to legislation between 1900 and 2010. The primary y-axis displays change in the total number of pages of primary legislation enacted each year, with results represented by a black line. The secondary y-axis displays change in the total number of statutes passed each year, with the results represented by a grey line:

[10] House of Lords Hansard for the 17th January 2011 Column 3. Retrieved on 18/05/2011

Graph 1.1: Quantitative Changes in Legislation, 1900-2010[11]



The graph clearly shows that there has been a significant rise in the total number of pages of legislation enacted each year over the course of the 20th and early 21st centuries. The lowest level was in 1905 when 82 pages of legislation were enacted, in comparison to an astonishing 5,388 pages in 2006. The *Income and Corporation Taxes Act 1988* on its own is 1,317 pages long, making it a sixteen times greater output than all the legislation of 1905 taken together. Alongside this incredible increase in the total volume of legislation, there has been a gradual yet haphazard decline in the total number of statutes from a high of 120 in 1939 to a low of just 24 in

[11] The source for this graph was i) 1900-1925, *The Public General Acts of the United Kingdom of Great Britain and Ireland* (London: George Edward Eyre and William Spottiswoode), ii) 1926-1972, *The Public General Acts and the Church Assembly Measures* (London: Council of Law Reporting), and iii) 1973-2010, *The Public General Acts and Church Assembly Measures* (London: Parliamentary Law Reports).

2005; although there were only 20 statutes enacted in 1912. The overall picture is that Parliament has increasingly enacted a smaller number of significantly longer statutes. The average statute length was just three pages in 1900, but peaked at 131 pages in 2005.

Despite the significant increase in the volume of legislation, this is not theorised to be the major causal variable of political behaviour in judges. If there was a considerable amount of reasonably determinable law the judiciary would not be called upon so often to make public policy interventions by clarifying the meaning of the law. Simply increasingly the volume of legislation cannot on its own change the qualitative behaviour of judges, which is why the theorised independent variable is "indeterminate legislation".

The Dependent Variable – Political Behaviour of Judges

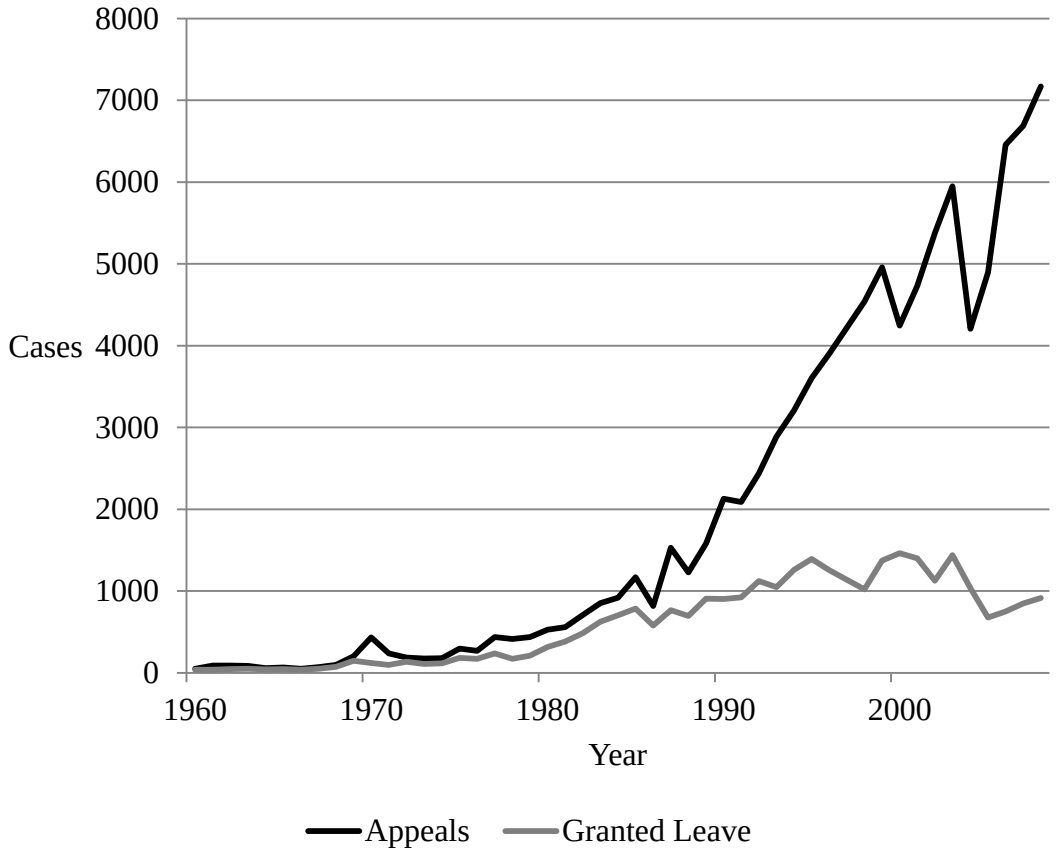
Political behaviour of judges refers to any judicial decision that has the consequence, whether intentionally or not, of intervening in the public policy process. An intervention is an exercise of power that can take the form of a positive decision or a negative veto (Lukes, 1974). An intervention will thereby change or block the implementation of policy by the executive, or amend by interpretation the content of the original legislation. This thesis seeks to explain the behaviour of British judges by concentrating on decisions taken in appeal cases at the top of the curial hierarchy that have implications for all of the United Kingdom. However it is important to note the separation of English and Welsh law from Scots law and Northern Irish law. The

contextual and normative considerations that guide appropriate statutory interpretation are likely to differ depending on the jurisdiction; especially as regards the Scottish Civil Law tradition.

First of all we must consider why the political behaviour of judges is such an important research problem. The aim is to explain a sharp increase in the frequency and significance of public policy interventions by judges from approximately 1960 onwards (Stevens 2005). A simple means of observing change in the public policy interventions of judges is to look at the increased judicial review case load. The following graph shows the number of cases appealed to the English High Court for judicial review of executive action, and the number of those cases that were granted leave between 1960 and 2008[12].

[12] All data was taken from the annual judicial statistics issued in print and online.

Graph 1.2: Increase in Judicial Review Caseload



The above graph shows that applications for judicial review increased rapidly after 1960, from 49 applications to 7,169 in 2008. The proportion of cases granted leave increased less rapidly, but nevertheless grew from 36 allowed leave in 1960, to a peak of 1,464 in 2000. This is of course a very basic measure of interventions in public policy, but it shows with simple clarity the significant change in the frequency of political intervention by the courts. It is important to recall that judicial review is not the only means by which judges may intervene in a public policy dispute, as there are also cases where private law is disputed in the courts, which may also have significant public policy implications.

The increased judicial intervention in public policy has meant that the principles of the Rule of Law have had to be interpreted in many new contexts which

has led to elaboration of the substantive and procedural content of the Rule of Law. The following table breaks down some of the most notable substantive and procedural parameters in the left-hand column, and cites a significant case where fundamental change was achieved in the right-hand column:

Table 1.2: Significant Judicial Developments of the Rule of Law

Development of the Rule of Law	*Critical Case*
Access to Justice	
Rules of Standing	*O'Reilly v Mackman* (1983)
Remedy	*Roy v Kensington and Chelsea and Westminster Family Practitioners Committee* (1992)
Substantive	
Illegality	*Anisminic Ltd v Foreign Compensation Commission* (1969)
	Pepper (Inspector of Taxes) v Hart (1993)
Irrationality	*Associated Provincial Picture Houses v Wednesbury Corporation* (1948)
	Secretary of State for Education and Science v Tameside Metropolitan Council (1977)
Legitimate Expectations	*R v North & East Devon Health Authority ex p Coughlan* (1999)
Proportionality	*R v Secretary of State for the Home Department ex p Leech (No.2)* (1994)
Procedural	
Right to a fair hearing	*Ridge v Baldwin* (1964)
Protection against bias	*R v Gough* (1993)
Governance	
Local government	*Bromley London Borough Council v Greater London Council* (1981) "The Fare's Fair case"
European Community Law	*R v Secretary of State for Transport ex p Factortame Ltd (No.2)* (1990)
Human Rights	*A and Others v Secretary of State for the Home Department* (2004). "The Belmarsh Case"
Constitutional review	*Council of Civil Service Unions v Minister for the Civil Service* (1985) "The GCHQ Case".

Therefore the judiciary has gradually elaborated the substantive and procedural principles inherent in the Rule of Law significantly since 1960.

It is important to note that not all of the political behaviour of judges can be traced to change in the nature of legislation. Much of the political behaviour of judges was developed by the conscious efforts of successive governments to reform the court system. Intended institutional developments have been pursued on all four of the key parameters outlined in Table 1.2. Firstly in terms of access to the courts, the power of the courts to hear cases against representatives of the Crown was established by the *Crown Proceedings Act 1947*. This allowed individuals to pursue a claim against any member of the government, thereby greatly enhancing the extent of judicial review. Similarly, access to the courts for poorer litigants was expanded with the *Legal Aid Act 1949*. This reduced the advantage of money in appellate justice which had in the past allowed the richer party to muscle out the poorer by appealing the case to a higher authority.

In terms of the substantive underpinning of the Rule of Law, Parliament granted the courts the power to apply European Court of Justice jurisprudence to British cases via section 2 of the *European Communities Act 1972*. Also the *Human Rights Act 1998* gave the courts the power to directly apply the provisions of the *European Convention on Human Rights* in British law. In terms of the procedural content of the Rule of Law, the *Rules of the Supreme Court* of 1978 and the *Supreme Court Act 1981* created a new public law review power called the "application for judicial review" which was later simplified by the *Civil Procedure Act 1997*. These were hugely significant developments that made it easier for individuals to make claims against the decisions of politicians and administrators. Finally the power of the judges to review different levels of governance was given a boost of legitimacy by the creation of a new Supreme Court and Judicial Appointments Commission established by the *Constitutional Reform Act 2005*. Therefore a great deal of the political

behaviour of judges can only be understood as the result of the intended efforts of politicians to modernise judicial institutions. The powers intentionally granted to the judiciary by Parliament are hugely significant, but simply making justice easier to obtain will not lead to increased political intervention by judges. The various institutional reforms described are of subordinate importance to the key causal nexus of increased indeterminacy in legislation leading to increased public policy interventions. All other variables are epiphenomenal to this.

It is important to note that by categorising judicial behaviour as "political" one is in danger of tacitly criticising the court for not being "judicial". However this thesis seeks to avoid pejorative labelling, and thus political and judicial are not considered to be antonymous, but rather two sides of the same coin. Many judicial decisions have some form of political impact, and to try and suggest that courts are apolitical would be a misclassification of what it means to be "political". The important issue is what motivates the political decision – if the motivation is to maximise the institutional norm of certainty in thr Rule of Law that is appropriate; if the motivation is to maximise personal interests, that is not.

One also needs to avoid concept-stretching (Sartori, 1970), as by defining "political" too loosely we risk it meaning everything, and therefore nothing. This is why this thesis focuses on interventions by the court in public policy. Such policy may cover relations between the state and citizens, or may be policy where the state regulates the behaviour of citizens in their private affairs. Therefore "political" does not refer to legal decisions on issues such as trusts that have no public significance, because the state is not involved in a regulatory capacity, only in an arbitrating capacity. The most conspicuously political aspect of judicial decision-making in the

UK is judicial review of administrative action on the vertical plane between state and citizen. This public law brings the courts into political controversy where the judgement of the court can directly challenge the judgement of elected and accountable state agents (Taylor, 1976). Such controversies bring the courts into contact with what Ran Hirschl has called "mega" or "pure" politics, where resolution of a case relies on balancing deference to democratic legitimacy with consistency and certainty in the Rule of Law (Hirschl, 2006). When judges review administrative decision-making and establish the conditions of legality they may consider their decision to be "speaking truth to power", but the politicians invariably consider it to be a usurpation of their democratic legitimacy, and thus the political behaviour of judges can be a highly contentious issue.

As an example of a judicial decision in public law with significant political impact one can take the pre-*Human Rights Act* case of *R v Secretary of State for the Home Department ex p Simms*[13]. The Law Lords decided in this case that rules issued by the Home Secretary for a blanket ban against interviews between prisoners and journalists potentially breached the prisoner's basic right to investigate the soundness of their conviction. The decision had considerable impact on public policy, by establishing a right for prisoners to cooperate with investigations into their case, and by challenging the decision taken by the Home Secretary. The litigant sought a review of the Home Secretary's decision due to the indeterminacy of the Prison Rules, under the authority of which the prisoner's rights had been restricted. The Rules were made in secondary legislation in accordance with the parent legislation – the *Prison Act 1952* – which did not specifically authorise the denial of access to journalists, and the

[13] [1999] 3 All ER 400.

judges had to assume that without explicit authorisation Parliament could not have intended this outcome. As per Lord Hoffmann:

> "[412] Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights… But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words… In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

Whilst such examples of public law are important sources of political behaviour, private law on the horizontal plane also presents important evidence of appropriate political behaviour. The orthodox interpretation of English Law as set out by A.V. Dicey is that there is no legal separation between public and private law (Dicey, 1915). Dicey had sought to avoid the adoption of anything resembling the Droit Administratif used in France to regulate relations between the state and citizens, and his logic was that all individuals were equally subject to the law of the land, and no one could claim a privileged status except the monarch. As such, if an individual had a dispute with a government minister it could be resolved in a normal civil action – as occurred in the famous case of *Entick v Carrington* of 1765[14]. In this case Carrington broke into the house of Entick and stole documents under the instructions of Lord Halifax (Secretary of State for the Northern Department) on the mere suspicion that Entick was a seditious supporter of John Wilkins. Entick won the case on the grounds that his right to property was sacrosanct, implying that the state agents had no more right to be there than a common thief.

However this project will work on the basis that there is a division between public law and private law because the orthodox position of Dicey arguably no longer

[14] EWHC KB J98.

exists (Feldman, 2004). Since the *Rules of the Supreme Court Order 53* came into force in 1978, there have been special procedures for resolving public law disputes that have been separate from private law procedures, thereby institutionalising a "Droit Public – English style" (Woolf, 1995). The public law procedure of judicial review requires the judges to resolve a dispute between an elected or accountable state agent and a private party; or between different state agencies, such as between central and local governments.

In addition to this, judges can and do make important political decisions in private law. Many private law cases depend on statutory interpretation to reach a resolution and the Legislative Politicisation Theory applies to these cases just as it does to public law. For instance anti-discrimination and equality law has both public and private law implications. This will be discussed further in Chapter Five on the impact of European Union anti-discrimination legislation on the political behaviour of British judges.

However it is important to note that not all case law of importance to public policy is based on statutory interpretation. One could argue that there have been significant legal developments in the Common Law that have not involved any legislative dispute. Of course such a rigid distinction between Common Law and Statute Law is misleading given their close interaction in English Law. For instance, since the coming into force of the *Human Rights Act* in October 2000, the courts have developed a Common Law right of privacy by balancing the conflicting rights set out in Articles 8 (privacy) and 10 (freedom of expression) of the *European Convention on Human Rights*. The rights developed have been enforced by legal instruments

including the controversial "super-injunction". These instruments were the product of both statutory and Common Law interpretations.

The existence of political behaviour in the Common Law of course shows that not all political behaviour in judges can be directly traced back to indeterminate legislation. This is very important, and it is worth noting that this thesis cannot provide empirical evidence for all developments in the political behaviour of judges. What is intended is to provide evidence for the vast majority of politically significant decisions taken by *British* judges. Developments in the Common Law have an impact in England and Wales, and in a separate jurisdiction Northern Ireland. However this thesis seeks to assess developments over time in the British judiciary, and this primarily means looking at judicial decisions across the whole country, and in turn focuses attention on the sovereign Parliament and its influence on judicial behaviour via legislation. On top of this, political development of the Common Law arguably derives from the same institutional need to resolve indeterminacy in the Rule of Law. For instance judges may seek to establish what the law is on a subject that Parliament has, for whatever reason, failed to legislate. This is the ultimate legislative indeterminacy, and is the key factor in explaining Common Law developments in privacy. In other examples of public policy intervention via the Common Law the same causal mechanism emerges where judges are responding to indeterminacy in the law with political behaviour. For example in the *GCHQ* case[15] the Prime Minister had banned workers of the secretive organisation from taking strike action and the Royal Prerogative to manage the civil service was reviewed by the courts. The Royal Prerogative powers are Common Law rather than statutory, but nevertheless the same causal mechanism as described by the Legislative Politicisation Theory emerged. This

[15] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

was because the Royal Prerogative is a form of primary law, and its precise form and extent are highly indeterminate. In this particular case it was not clear whether the prerogative conflicted with Trade Union legislation, and a judicial clarification was required.

Another important case to consider was in 1992 when the House of Lords developed the criminal law to make a crime of rape committed in marriage[16]. This is unquestionably a case with significant public policy implications and was justified on the basis that the law on rape needed to be clarified. This raises the possibility that "indeterminacy" is not inherent in the law, but is created when social values and law move apart as if tectonic plates. Thus the Legislative Politicisation Theory could be endogenous to a macro-level causal mechanism where changes in political culture lead to changes in judicial behaviour, and changes in legislative language are epiphenomenal (Klarman, 1996). The criminalisation of marital rape suggests that society demanded such a change in the law, and "indeterminacy" was only to the extent that it was perplexing that the law was so anachronistic and could not be understood in the context of modern social demands taken in conjunction with the substantive principles of equality in the law. This brings up the prospect that we should perhaps focus on the demand-side to truly explain changes in judicial behaviour, rather than the supply-side[17]. Also worth considering in the judge-made Common Law are recent developments to tort law including contributory negligence, and misfeasance in public office (Robertson, 1998). It could be argued that these also reflect changes in social demands or judges' personal demands for change in the supply of indeterminate legislation.

[16] *R v R* [1992] 1 A.C. 599
[17] This debate will be dealt with in greater detail below in the Literature Review section.

This could be seen to pose a critical challenge to the Legislative Politicisation Theory. However as discussed above, it is quite likely that the causal explanation for the political power of judges did depend on changes in social demand for a differently organised state, nevertheless the aim of this thesis is to focus precisely on the micro-foundations of cause and effect – where political power shifts onto the judiciary, and this is predominantly via the supply of indeterminate legislation. There will be cases that display public policy implications that are not based on a dispute of legislative language, however these cases are rare, and not the basis for a precise causal inference. Secondly, and more importantly, Common Law developments of the Rule of Law will either draw on jurisprudential developments achieved in legislative disputes or they will draw on the underpinning principles of the Rule of Law that inform the "Logic of Appropriateness". Arguably the key stimulus that led to a rapid reconsideration of the role of the Rule of Law in a modern state was in reaction to the legislation that had enabled such a state. A general theory of judicial behaviour based on Common Law developments would only explain a small portion of variation on the dependent variable, where in most cases a legislative source of dispute can be identified.

IV: Literature Review

The Legislative Politicisation of the Judiciary Theory proposes a new causal explanation for the increased political behaviour of British judges, however it defends an orthodox view of judicial behaviour as rule-bound by institutional norms. How does this theory contribute to the existing literature from political science and legal

scholarship, and what alternative explanations are there for the political behaviour of judges? This section will begin with a discussion of normative institutionalism and the influence of MacCormick's post-positivism. This will be followed by a more detailed consideration of supply-side theory and the alternatives offered by the existing literature. Thirdly the potential criticisms of the "Logic of Appropriateness" will be considered, with specific focus on its logical consistency and falsifiability. This will lead to a consideration of the ontology of indeterminacy in legislation, and whether determinate law exists at all. Finally literature specific to British judicial politics will be discussed.

Normative Institutionalism and the Impact of Neil MacCormick's *Rhetoric and the Rule of Law*

The first issue to discuss is the use of normative assumptions and how these relate to the wider literature. This thesis rests on the assumption that law as an ordered system depends on coherence that is sustained and reinforced by normative underpinnings to the Rule of Law. Whilst the judges are seeking to maximise certainty in the Rule of Law (consequentialism) the means of achieving this end are varied and cannot be objectively identified, which leads judges to adopt specific rule-bound behavioural patterns that are accepted by other judges as appropriate. As mentioned above this normative position draws from the political science writings of March and Olsen who proposed the idea of normative institutionalism (March & Olsen, 1989). The use of normative assumptions in studies of "political jurisprudence" has developed gradually since the early 1980s as the individualist

assumptions of behavioural social science were challenged. Austin Sarat noted a shift in approach towards greater academic pluralism:

> "Historical, doctrinal, descriptive, institutional, normative approaches all seem relevant. Indeed, one can hardly imagine good graduate training today that ignored any approach." (Sarat, 1983, p. 552)

The assumption that political jurisprudence is conducted within rule-bound, normative decision-making is most fiercely rejected by Martin Shapiro:

> "The Godfather of this jurisprudence of values is of course Dworkin, and Dworkin's work in turn is part of a far broader movement in moral and political philosophy. That movement rejects the notion that moral values are simply undebatable matters of personal preference such as "I like vanilla." The tendency of contemporary moral philosophy is toward showing that some ethical statements are clearly more true, or at least more appealing, satisfying, or persuasive than others so that morals is not simply a matter of individual preference or positing. Because this movement is also a reaction to utilitarianism it is sometimes called "post consequentialist" ethics." (Shapiro, 1983, p. 542)

However this thesis does not equate norms with "ethical statements", but rather with institutional requirements that are generally accepted. Hence the Legislative Politicisation Theory does not seek to reject positivism, as the institutional role of the judges is a form of practical reasoning where a source of law purporting to provide a positive source of validity cannot be recognised due to indeterminacy, and the act of statutory interpretation resolves this positivist problem. Language is the cause of the problem and a synthesis of language and norms are the solution. Thus post-positivism goes beyond the deconstructionism of Derrida and the post-modernists who claim there is "nothing outside the text" (Derrida, 1997). The precise method of statutory interpretation adopted is less important than the aim, hence it is a form of rule utilitarianism where what matters is maximising certainty in the Rule of Law and the optimal means of achieving this is a rule-bound normative approach

called the “Logic of Appropriateness” where the resolution of indeterminacy will be most persuasive.

This normative institutionalism combines institutions and norms to explain the behaviour of judges. In other words institutionalism cannot be separated from interpretivism, and difficulties in interpretation arising in a new legal problem are based in an institutional problem of recognising valid law. As such the Legislative Politicisation Theory was inspired by the legal scholarship of Neil MacCormick and his post-positivism that proposed a link between positive law and norms, as he put it: “Law is institutional normative order.” (MacCormick, 2005, p. 2).

This thesis therefore owes a great deal to the late MacCormick who developed institutional theory in the study of legal reasoning. MacCormick sought to provide the theory behind the practical reasoning of judges, to show the link between positive law and norms of the legal order. This thesis seeks to provide empirical evidence for this link from a political science perspective, and in doing so it utilises legal theory to resolve the pernicious political science problem of why judges have increasingly resorted to political behaviour to resolve cases.

The first step is to show that the legal order has faced a significant challenge from positive law that threatens that order with collapse into uncertainty. This requires us to look at changes on the supply-side because it is theoretically implausible that the legal order could be coherently amended by the judges acting on their own self-interests, or by creating new legal norms unilaterally and forcing the political system to conform. Instead this thesis aims to show that positive law changed on the supply-side which elicited a reaction from judges in order to maximise

certainty in the Rule of Law and thereby ensure the normative legal order persisted. As MacCormick argued:

> "Respecting the Rule of Law is of profound political value in states… To have properly published and prospective laws, equality of citizens before them, and limitation of official power with respect to them, are foundations for democratic liberty and essentials for a stable economy. This would not be possible if laws and arguments about them gave only a sham of intelligibility. In that case, once it came to applying them, anything would go, on account of the radical indeterminacy of legal texts and absence of any reasonable grounds for preferring one construction of them to another." (MacCormick, 2005, p. 2)

The political behaviour of judges can be traced back to this "radical indeterminacy" that has undermined the certainty of the normative legal order and has required judicial intervention in public policy to restore certainty to the Rule of Law. MacCormick's post-positivism therefore synthesises positivism with interpretivism. Hart had previously argued that the meaning of law entirely depends on its linguistic content. Dworkin however argued that law is far more than a simple disagreement over the meaning of words, and accused Hart of falling into the "semantic sting", where the complexity of legal discourse is denigrated to the level of dictionary definitions. For Dworkin, interpreting the meaning of law is a hugely complex task, requiring the ability to ensure justice is achieved in accordance with accepted principles (Dworkin, 1986, pp. 239-240). In a similar vein MacCormick suggested that to resolve incoherence in the law requires tethering individual judgements to a seam of judicial and political reasoning that can create more certain meaning. Thus to explain the political behaviour of judges one should not focus on the judges themselves but on changes to the key raw material of statutory interpretation – primary legislation.

Supply-Side Theory

According to J.M. Keynes, Say's Law states that "supply creates its own demand" (Keynes, [1961]). Whilst Keynes sought to undermine supply-side economics, the terminology is here being used to refocus our attention on a much overlooked element in the causal mechanism that underpins judicial behaviour. The use of the supply-side/ demand-side distinction is intended to simplify the debate by clarifying the key features of causation (Clayton C. W., 2002). Demand is ultimately the reason behind political behaviour in judges, as demands for state expansion and demand for litigation to resolve disputes thrown up by such state expansion are the drivers of change. However the link between macro-level demands and individual micro-level judicial behaviour is argued to be indirect and channelled through the medium of indeterminate legislation. This is the supply-side of the causal mechanism that is often overlooked, but is arguably the key link in the causal chain that we must focus on to truly understand the connection between the changed role of the state and the political behaviour of judges.

Much theory in judicial politics has focussed on changes on the demand-side, but this does not explain with clarity how political demand and judicial behaviour are connected. Martin Shapiro for instance has argued that the key to understanding political behaviour in judges is as a reaction to litigant demand for the resolution of grievances created by an expanded state. This work was a hugely important inspiration for this thesis, and the aim is not to discredit it, but to test its precepts with micro-foundational theory and modern comparative politics methodology. Specifically Shapiro proposed that the effects of a centralised and powerful state are,

i) a decline in judicial independence as the workload of the judiciary is dominated by reaction to political events; ii) a demand for the protection of limited government and the Rule of Law from litigants who lose out from the centralised state (Shapiro, 1981); and underpinning both of these is iii) the functionalist use of the judiciary as an alternative avenue to resolve political disputes via "political jurisprudence" (Shapiro, 1964). Alec Stone Sweet has argued that judges fulfil one of the most basic political functions – that of a third party resolving disputations between two other parties (Stone Sweet, 2000, pp. 12-20). He therefore suggests, in a Weberian vein, that "triadic dispute resolution (TDR)" by legal institutions increasingly replaces previously existing normative structures of dispute resolution as the dispute resolvers develop strategies to inculcate behavioural norms within the society.

The key contribution made by this thesis is that it seeks to identify the precise point where an expanded state creates demand for political behaviour in judges, and what form that political behaviour can take. The demand is generated in response to the supply of new law used to enable the functioning of a new state. Thus one could argue that the separation of demand and supply-side is unnecessary and misleading as both are intimately connected. However the same may be said of studies of economics, and the point is to show that demand for political behaviour in judges is not spontaneous and unidentifiable, but is observable as a direct reaction to changes in the supply of legislation. The key problem with demand-side explanations of change in judicial behaviour that focus on the judges, politicians or litigants is that they are unable to explain why demands spontaneously changed in the same direction from roughly 1960. The relative coherence of judicial behaviour implies that change came from outside the judiciary with litigants and counsel pursuing a legal claim where there were discrepancies in the legislation.

Such a focus on legislation as an independent causal variable in political science is relatively new and a range of interesting theories and methods are being developed. Much of the research has focussed on the causal impact of legislation on bureaucratic behaviour. Epstein and O'Halloran for instance used a transaction cost analysis to explain why legislators delegated power to the executive (Epstein & O'Halloran, 1999). Similarly Huber and Shipan have sought to explain why politicians sometimes draft very detailed legislation that seeks to micro-manage the policy implementation process and why they sometimes draft "vague" legislation that creates bureaucratic discretion (Huber & Shipan, 2002). They suggest that discretion is often deliberately granted via vague legislation in order to strategically achieve policy outcomes over the long-term. What is arguably not intended when drafting vague legislation is that judges will intervene in deciding policy outcomes. Indeterminate legislation will create disputes amongst aggrieved litigants as to the precise meaning of the law, and these grievances will be resolved in court. Thus the overriding intention of this Legislative Politicisation Theory is to apply a micro-foundational analysis and thereby to attain a greater level of causal precision than is possible by using more abstract models. Aiming for such a precise explanation of actor behaviour brings this theory into line with the cutting edge of comparative politics by utilising micro-foundational analysis (Lichbach & Zuckerman, 2009).

Appropriateness of Judicial Behaviour

One could argue that linking indeterminate legislation with political behaviour in judges is one point, but the appropriateness of that behaviour is an entirely separate

point that does not follow logically. If legislation is increasingly indeterminate then why is the response most likely to be appropriate? The link between indeterminacy and appropriateness comes through the supply-side, in that indeterminate legislation creates an institutional problem in identifying the validity of acts taken under the authority of the law. This creates uncertainty in the Rule of Law that must be resolved in order to ensure the continued efficacy of the legal order. Resolving this problem in positivism is difficult as there is no single correct solution, but the solutions most likely to effectively resolve the problem are those that can be accepted by the judiciary as appropriate, in the sense of tethering the indeterminacy to existing positive law or principles in the Rule of Law.

The Legislative Politicisation Theory is therefore a defence of judicial political behaviour as an important technocratic exercise in ensuring the longevity and legitimacy of the law. As Martin Shapiro has argued, politicians take a risk when they institutionalise strong courts, rather like an individual who buys a junkyard dog to defend his land, most of the time the dog defends against external attack, but occasionally it will bite its owner (Shapiro & Stone Sweet, 2002, p. 163). Thus it is arguably wrong to suggest that the courts are acting unconstitutionally or anti-democratically as they are fulfilling their constitutional role of ensuring government limited by the law (Rogers, 2006). By supporting the idea that political jurisprudence is crucial to limited government this thesis takes the position of Richard Fallon (1997), and is against the position of Mark Tushnet (2000). Jeremy Waldron (2005) would argue that the inability for individuals to participate in the judicial process is fundamentally undemocratic. This argument cannot be disputed, but strong courts, as with any technocracy, have been delegated power to achieve their task with greater efficiency than could be achieved by representatives of the citizenry. Any delegation

of power from the principals leads to “agency loss”, but that is a price worth paying for an efficiently operating Rule of Law (Strom, Mueller, & Bergman, 2003).

In defending the institutional role of the judges this thesis is adopting what legal scholars call an “orthodox” position, which is commonly contrasted with the legal “realist” position. This fundamental cleavage in the literature at its most simplistic represents a division between the supply-side and demand-side position. Whilst orthodox theories focus on the importance of the law and changes that occur externally to the judiciary, realist theories understate the importance of law and instead suggest a change in demand from the judges or other significant actors as the key causal variable. Another means of classifying these divergent approaches is to argue that orthodox theories are strictly institutionalist by stressing the bounded behaviour of judges, whilst realists favour more of a mixture of institutional and behavioural variables. Realists have followed the 19th Century US pragmatist philosophers, and the American judge Oliver Wendell Holmes Jr (1920), in arguing that the decision a judge reaches depends as much on what he ate for breakfast as it does on the content of the law. According to this view, the study of law involves predicting how a judge will behave, rather than establishing the content of legal discourse. One needs to be aware that the term “legal realism” classifies a theory of the academic study of the law. Political science has theories based on very similar assumptions of judicial behaviour but which are classified differently. The realist position is represented in political science as the attitudinalist model that argues that the judges’ personal ideologies are the most important factor in explaining judicial behaviour (Schubert, 1965; Gibson, "Judges" Role Orientations, Attitudes and Decisions: An Interactive Model, 1983; Sisk, Heise, & Morriss, 1998; Segal & Spaeth, 2002); and the strategic model that argues that judges are rational preference

maximising actors who will seek to manipulate their institutional position to affect policy (North & Weingast, 1989; Eskridge Jr & Ferejohn, 1992; Epstein & Knight, 1998; Garrett, Keleman, & Schulz, 1998; Carrubba, Gabel, & Hankla, 2008). What links the attitudinalist and strategic positions is their focus on the demands of the judges as being the primary factor, and what separates them is the greater concentration on institutional variables in strategic theories.

Another theory proposes that the key change in demand came not from judicial actors, but from political elites who have used the judiciary to preserve their elite hegemony (Hirschl, 2004). Other authors focus on demand changes in society at large, for instance following a "rights revolution" during the post-war period (Epp, 1998), or following more specific changes in social attitudes that filter through to judicial decisions (Klarman, 1996). Other notable changes that affected both demand and supply in the law include the global influence of the US legal system as a model for other countries, especially in the context of post-authoritarian Europe in the 1950s and 60s (Tate & Vallinder, 1995).

This thesis accepts that a change in social demand is crucial to a change in judicial behaviour, but only indirectly through the supply of a qualitatively different form of legislation. This thesis rejects the proposition that the key change was in judicial demands. The problem with demand-side analyses is that the precise link between demand and judicial behaviour is assumed and cannot be explained. Therefore in order to achieve a micro-foundational analysis of judicial behaviour, an orthodox theory that focuses on the institutional impact of changes in legislative language is arguably required. The orthodox position argues that the best means of predicting judicial behaviour is from the content of the law, and the institutional

norms of the judicial branch. Such an assumption faces two key intellectual problems that must be successfully surmounted if any empirical leverage is to be achieved. The first problem is that orthodox arguments often mix institutional and behavioural elements and the resulting theory can lack logical consistency. The second problem is that establishing with clarity the falsification criteria of orthodox arguments is very difficult.

The first intellectual problem, of consistent logical theory, was laid down by David Robertson who outlined the logic of the classic orthodox position and showed that it was flawed:

> "(1) Discretion [for judges] does exist, because statutes are sometimes vague, or precedents missing or conflicting. (2) Most judges most of the time will try very hard to stick within the clear meaning of the statute or the guidance of precedent. Some will from time to time try to develop the law to fit modern needs, but this "public policy horse" is dangerous, to be ridden seldom and cautiously. (3) Where "difficult cases" do crop up, some judges will act from personal idiosyncrasy, but these are mainly self-cancelling unsystematic quirks, not representing an intrusion of class ideology, and too limited to fit the realist model of permanent intuition." (Robertson, 1982, p. 2)

The problem with this logic is that steps two and three do not follow from the first proposition, and thus as Robertson argues, there are different "observation languages" at work. The first proposition is based on institutional variables, namely the existence of discretion due to statutory "vagueness"; whereas steps two and three introduce unrelated behavioural variables, namely the caution of the judges and the rare imposition of personal idiosyncrasy. To create a seamless syllogism one must employ only institutional, or only behavioural variables, rather than a mixture of the two. This thesis seeks to achieve just that and would propose the following syllogism:

> "(1) Judicial discretion exists when legislation is indeterminate. (2) Such indeterminacy requires a judicial resolution to remove uncertainty in the Rule of Law where the sovereign Parliament's commands cannot be identified with clarity. Therefore (3) the optimal resolution

> to this uncertainty is that which can be recognised according to the institutional norms of the judiciary as being appropriate."

The most effective way of resolving uncertainty in the Rule of Law is by the application of the appropriate interpretation approaches outlined above – empirical, definitive, systemic and prudential. Thus the links between premise and conclusion in the above syllogism are institutional rather than behavioural and they rest on the assumption that the role of the judge is institutionally defined as maximising certainty in the Rule of Law. This supply-side institutionalist theory largely removes behavioural assumptions therefore, and explains judicial intervention in political controversies as institutionally appropriate. Thus the personal idiosyncrasies of the judges are not considered to be relevant factors. This theory seeks to build on successful theories that have similarly avoided making assumptions about the personal ideologies of the judges as being independent of other external variables (Levi, 1948; Dahl, 1957; Merryman, 1981; Edwards H. T., 1984; McGuire & Stimson, 2004).

The second challenge to be overcome for any orthodox theory is falsifiability. Orthodox theories founded on behavioural assumptions often seek evidence of some manifestation of "good faith" in judicial behaviour, and such a concept is impossible to falsify as almost any behaviour could be so described, and one could not clearly delineate what evidence would be required to disprove the presence of good faith (Braman, 2006). However, much the same criticism can be made against attitudinalist studies that seek to observe "activist" (Dickson, 2007) or "supremacist" behaviour (Rozenburg, 1997). In order to avoid the problem of unfalsifiable concepts many judicial politics theories, including those seeking to make the case for judicial self-

aggrandisement, develop concepts that are parsimonious and empirical. Segal and Spaeth (2002) for instance, developed an attitudinalist theory to criticise the power of the US Supreme Court justices in *Bush v Gore*, and their theory relied on an observable and value-neutral concept of "judicial policy-making". By seeking to measure the "political behaviour of judges" this thesis arguably avoids the falsification problem often associated with the orthodox position. Whilst the nature of the political behaviour as being appropriate or inappropriate cannot be assessed objectively, there is a strong conceptual framework that utilises six observable political behaviour tropes. This delineation of observable patterns of behaviour is more nuanced and verifiable than the simplified dichotomy of "activist" and "restrained", or "liberal" and "conservative", and it goes some way to resolving the problem of falsifiability.

Another problem facing falsification of the Legislative Politicisation Theory concerns the ontology of "indeterminacy". Brian Flanagan for instance, denies that there is such thing as a literal meaning to any legal instrument, and thus no legal language is entirely determinate and it must all be to some extent indeterminate (Flanagan, 2010). If all legal language is indeterminate then it would be impossible to objectively measure determinate law, and thus the existence of indeterminacy could not be falsified. To resolve this issue, this thesis will argue that there is indeed no such thing as objectively determinate law, but indeterminacy is not an absolute and there is a continuum of more or less inter-subjectively determinable law that can be observed. This position is underpinned by the post-positivism of MacCormick, who asserted that the language of law is the most important source of legal meaning, but that the language is not demonstrative, but persuasive. Thus pure positivism, in the sense of objective meaning in legal language is impossible, but more or less determinable

language that achieves some measure of inter-subjective clarity is possible. Although laws that arbitrarily prohibit driving for those under the age of seventeen, or drinking for those under the age of eighteen come close to being fully determinate legislation.

Therefore legislative language has a very complicated causal force and one must be very careful in theory testing. Many of the challenges thrown up by the literature have been considered, but such a new and untested theory as this cannot hope to explain all variation in judicial politics, not least because of the enormous complexity of observing and measuring political behaviour in judges. It is very important to stress the limitations of the Legislative Politicisation of the Judiciary Theory, as any conclusions drawn in such an early stage of theory testing are inevitably contingent (King, Keohane, & Verba, 1994).

British Legal Scholarship

The inspiration for this thesis came from some fascinating literature in legal studies and political science concerning changes in the nature and application of the Rule of Law in Britain from approximately 1960. The key changes, as discussed above, were elaborations of the substantive and procedural requirements of law in conjunction with a sovereign Parliament. These legal instruments have arguably expanded beyond the *ultra vires* doctrine in some cases in order to resolve indeterminacy in the law. Ultra vires is a legality test that was adapted from commercial privity law during the 19th Century, the aim of which was to classify when individuals had gone beyond the power granted to them by legislation. Some have strongly argued that ultra vires is the foundation stone of all judicial review in

English law (Forsyth, 1996). The role of the judge in this conception was to make a declaration of the law by determining the limits of the vires. Recent scholarship however has argued that ultra vires could not have been the basis for the considerable developments that have occurred in judicial review and the Rule of Law since the 1960s (Craig, Ultra Vires and the Foundations of Judicial Review, 1998; Oliver, 2000). Essentially these authors suggest that statutory interpretation requires more than simply identifying the vires, and that it occasionally entails establishing the legality conditions by adapting existing principles of law to a new social or legal context. Not all accept this to be true (Forsyth, 2000), and it is important to note that it is only in relatively unusual "hard cases" that the legality conditions must be elaborated by judges to maximise certainty in the Rule of Law. Whilst these cases have a disproportionate impact on the course of the law, it arguably would be wrong to say that ultra vires has been entirely abandoned as a foundation for judicial intervention in public policy (Elliott, 2000). Nevertheless it is argued here that a modern state acting within the Rule of Law cannot have its actions evaluated simply according to enumerated powers when those powers are indeterminately defined. In such a situation judges make new legal ligatures to resolve the uncertainty by using the dispute over the legal language as their starting point. Such political behaviour is crucial to defend constitutionalism and the Rule of Law.

This is not to say that modern constitutionalism is a means of limiting the power of democracy, rather constitutionalism improves the efficacy of democratic power by improving clarity, oversight and accountability. These features of law do not hold back democracy, but make it considerably more effective in achieving consensual public policy change. This thesis is therefore trying to challenge the distinction drawn by politicians and the media between Parliamentary sovereignty and

the Rule of Law. These are seen as separate as a result of the uncodified constitution, with the content of the Rule of Law conceptualised as amorphous and purely at the whim of judicial discretion. Vernon Bogdanor summed up the popular perception in an article in *The Times* (2011):

> "MPs and judges are both coming to believe that the other has broken the constitution. Many MPs believe that judges are thwarting the will of Parliament, usurping the power of judicial review so that it is being transformed into judicial supremacy…The British constitution is coming to mean something different to judges from what it means to Parliament. The argument from parliamentary sovereignty points in one direction, the argument from the Rule of Law in another. How will this be resolved?"

The content and transformation of the Rule of Law was based on institutional factors that are required to defend parliamentary sovereignty, such that the two should not be seen as separate. The Rule of Law has developed in response to a change in the way that parliament's sovereignty is being enacted into law, with judges seeking to reconcile the meaning of the sovereign's will with some basic institutional requirements concerning certainty, and the underpinning principles of equality and justice. This is not to say that there are never cases where judges develop the Rule of Law without intending to clarify uncertainty in the law. However such decisions are institutionally inappropriate, and by failing to resolve the uncertainty such legal precedents will themselves be indeterminate and will quickly be reviewed by the courts until the law becomes sufficiently clear to form an effective part of the Rule of Law. It is not novel to emphasise the increased volume of legislation in the UK, and the increased variety of policy spaces that have been occupied by the state (Seaward & Silk, 2003). Nor, is it novel to link judicial political behaviour with expansions in the power and responsibilities of the state (Lee, 1994). What is novel is the use of

political science theory and methods to elaborate a micro-foundational model that can help explain the political behaviour of judges.

Some scholars would argue that judges hide their behaviour in the garb of constitutionalism and "appropriateness", when in fact they are acting in their own interests. A famous proponent of the view that judges were fundamentally undemocratic and biased was J.A.G. Griffith (1977). He used a class-based model that was founded on assumptions similar to the attutudinalist school in political science, that what matters in judicial politics are the ideological biases of the individual judges. The argument was that judges are socially homogenous, and are subsumed by their class identity into protecting a "public interest" that is fundamentally bourgeois, by maintaining private property, minimising "moral danger", and generally supporting the interests of the Conservative Party. The problem with this position is that it is fundamentally unverifiable, and is therefore not empirical political science. Assuming that a judge is biased and can only make decisions according to socialised values is at once demeaning to the judges' independence of mind, and a misreading of British legal history. Judges protected the interests of the bourgeois state because that was what the Rule of Law demanded of them in a bourgeois and democratic country. Had they sought to use the bench to redistribute economic power that would certainly have been constitutionally indefensible. Griffith's argument is therefore targeting the wrong actors in its disapproval, as it is not the judges to blame for class antagonism in post-war Britain, it is the politicians. Therefore this thesis seeks to show that if we want to assess changes in judicial behaviour we are better off looking outside the judiciary to the political class.

There has been a great deal of compelling scholarship from legal studies and political science that has aimed to solve the mystery of why the Rule of Law has developed since 1960. The bench-mark year of 1960 is of course arbitrary, but it is a useful temporal guideline to consider variation over the 20th and 21st Centuries. Some studies focus on the 1960s on account of the key dramatis personae such as the Reid-Wilberforce partnership in the House of Lords, the role of Lord Denning as Master of the Rolls, or the emergence following 1954 of less reactionary Lords Chancellor in succession to Viscount Simonds (Blom-Cooper, Dickson, & Drewry, 2009). Other studies focus on crucial case law that emerged in the 1960s with enormous repercussions for the political role of the judiciary (Feldman, 2004; Loveland, 2006). These cases include *Ridge v Baldwin*[18], *R v Minister of Agriculture ex p Padfield*[19], and *Anisminic v Foreign Compensation Commission*[20]. Therefore drawing a line in the sand at 1960 is simply for the sake of clarity, and it is not a precise "critical juncture". This thesis will attempt to show that whilst the dramatis personae and the notable cases are important factors, they depended on the extent of indeterminate legislation and are therefore epiphenomal. The aim of this thesis is not to dispel previous contributions to the debate, but to offer a more detailed causal account. The key causal variable was arguably the indeterminacy of legislation that had to be resolved according to the norms of the judicial institutions as per the "Logic of Appropriateness". It is often said that "hard cases make bad law", this thesis argues that "indeterminate legislation makes hard cases".

[18] [1964] AC 40
[19] [1968] AC 997
[20] [1969] 2 AC 147, [1969] 2 WLR 163.

V: Testing the Legislative Politicisation Theory

In order to test the theory a combination of methods will be used. Firstly in order to demonstrate that the language of legislation has changed over time, a new discourse analysis methodology has been developed to measure the linguistic attributes of legislation between 1920 and 2010. This is a large-N quantitative methodology that counts observable alterations in legislative language. A total of 8,328 sections of legislation have been hand-coded creating a new data set with utility for studies of judicial politics, administrative discretion and the "Presidentialisation" of the executive. However such a large-N approach will only give evidence of a change in the independent variable, and in order to carefully trace the complex causal mechanism that links indeterminate legislation to political behaviour in judges a series of detailed qualitative comparisons have been performed on legal cases that have been brought under indeterminate legislation and more determinable legislation. This comparative analysis has been used in relation to the three levels of governance in the modern British state separately: i) national government – immigration law (Chapter Three), ii) local government – homelessness law (Chapter Four), and iii) supranational government – EU anti-discrimination law (Chapter Five). For each of these levels of government, two statutes have been identified as varying on the independent variable, and the case law that has disputed these statutes has been studied to draw inferences as to whether indeterminacy is the key causal variable, and whether the optimal resolution is in accordance with the "Logic of Appropriateness". This approach to comparison thereby utilises Mill's "Method of Difference".

The mixed-method research design that utilises large-N quantitative evidence to guide case selection for small-N comparative analysis is in keeping with the cutting edge of political science by adopting the approach of the "historical turn" in comparative politics (Capoccia & Ziblatt, 2010; Kreuzer, 2010). This methodological movement stresses that large-N provides a researcher with evidence of a correlation, and only when coupled with small-N qualitative methods will it provide evidence of causation. A more detailed explanation of the methodology and the results of the discourse analysis will be presented in the next chapter.

Conclusion

This chapter has introduced the Legislative Politicisation of the Judiciary Theory, which seeks to explain the increased political behaviour of British judges over the course of the 20th and 21st centuries as a supply-side phenomenon. The political behaviour of the judiciary was stimulated by the increased supply of indeterminate legislation, where Parliamentary power is delegated to an agent via language that cannot with certainty communicate the validity conditions for that power. Therefore the theory is that the most significant political behaviour in judges will be observed in legal cases disputing indeterminate legislative language, and that the optimal resolution of this indeterminacy is through an institutionally appropriate statutory interpretation. The judges are thereby performing a crucial technocratic function that ensures the efficacy of Parliamentary sovereignty. This theory offers a new defence of the legal orthodox position, and seeks to avoid the problems of empirical verification commonly associated with such a position.

The implications of this theory are that criticisms of judges as being personally motivated to make changes in the Rule of Law are unjustified. Indeed the political role of judges would be unnecessary if legislation was drafted with greater clarity. This may not be possible or even desirable in a modern state with considerable social responsibility, but one should expect that if the executive is delegated power via indeterminate legal instruments that the role of the judiciary in politics will by necessity be prominent. One could argue that a strong and flexible executive is generally considered to be desirable for modern governance needs, however there are some legislative practices that are unnecessary and involve politicians creating a rod for their own backs. For instance the overlaying of existing law with new law, some of which is never implemented, simply in order for ministers to be seen as activist and "can-do". For example Andrew Harrop of Age UK responded to a Law Commission report regarding care for the elderly thus:

> "At the moment we have this complicated mess of fifty years of legislation all lying on top of each other. It's incoherent, and what that means is that too often Councils who are meant to enforce people's rights, either don't understand the law or sometimes wilfully ignore it."[21]

A great deal of law on many subjects could be consolidated to clarify its meaning in the modern world. The reason that there has not been a consolidation of, for example, all criminal law is that it would be an incredibly complex undertaking. However this would be a strong reassertion of Parliament's sovereignty, and it leads one to conclude that the political behaviour of the judiciary is directly related to the behaviour of politicians. If politicians wanted to they could reduce the political role of the judiciary and they are choosing not to due to the complexity of resolving the

[21] BBC Radio 4 *Today Programme* 11/5/2011

legislative confusion that abounds. Whilst excessive clarity of legislative language can lead to arbitrariness and inflexibility, too much indeterminacy creates uncertainty in the Rule of Law which undermines the efficacy of the sovereign power. The following chapters test the theory and present strong evidence for an observable link between indeterminate legislative language and the political behaviour of British judges.

Chapter Two: Observing Variation in the Independent Variable – Measuring Indeterminate Legislation

> FERDINAND: It was proclaimed a year's imprisonment, to be taken with a wench.
> COSTARD: I was taken with none, sir: I was taken with a damsel.
> F: Well, it was proclaimed "damsel".
> C: This was no damsel, neither, sir; she was a virgin.
> F: It is so varied, too; for it was proclaimed "virgin".
> C: If it were, I deny her virginity: I was taken with a maid.
>
> *Love's Labour's Lost* Act 1 Scene 1

Introduction

In the excerpt quoted above, Costard seeks to manipulate the indeterminacy in the law by twisting its meaning such that Ferdinand (the King) cannot successfully prosecute him. Costard relies on the semantic indeterminacy in the law to protect himself, whilst the king manipulates the flexibility of the pragmatic indeterminacy to pursue his suit. How would a judge resolve such a case without engaging in a political dispute?

The first step towards testing the Legislative Politicisation of the Judiciary Theory is to measure change in the independent variable – indeterminate legislation. To achieve this, a new discourse analysis methodology has been developed from an amalgam of methods successfully utilised in previous socio-legal research. The data set developed from this analysis is made up of measurements of the linguistic properties of 4,886 legislative sections, covering the years 1920 to 2010. In addition to this data set, 3,314 sections were coded for the following subject-specific chapters.

There is a risk in socio-legal studies that one will fall between the two stools of political science and law when attempting to demonstrate a theory (Banakar & Travers, 2005). There is also a tendency to poor communication between these two camps. Therefore the motivation for this project was to use political science methods to test the position more commonly taken by legal scholars – that judges, generally speaking, react to their political environment and they do not actively try and manipulate that environment. Therefore this thesis is attempting to cross the barricades, which is a risky endeavour that can encourage severe objections from both camps. Nevertheless this issue demands serious empirical attention, and by using political science methods and concepts, this thesis is certainly not falling between two stools: it is political science.

The results show statistically significant developments in indeterminacy on all of the four linguistic parameters outlined in the introductory chapter: Plurality, Volatility, Decentralisation and Mobility. It is interesting to note that indeterminacy in terms of syntactics has declined since 1920. However, indeterminacy of legislation in terms of semantics and pragmatics (how the language interacts with context and norms) has significantly increased since 1960. As argued in the introductory chapter, it is language that delegates power from Parliament to its agents that creates the greatest problem for judges in clarifying the Rule of Law in a public policy dispute. Measuring change in the indeterminacy of legislative language over time is an important first step in demonstrating the Legislative Politicisation Theory. This chapter will first of all describe the discourse analysis methodology in detail (I), this will be followed by a discussion of the potential criticisms of the method (II), and finally the results will be presented and analysed (III).

I: The Discourse Analysis Methodology

Discourse analysis is a method of close textual analysis that is rarely used in political science but can be utilised to great effect in assessing structured language. The most common aims of discourse analysis are to measure the structure of language and its situated meaning (the meaning that is given to language in a context), and to measure the cultural meaning of language (the interaction of individuals via language with cultural and social norms) (Gee, 2005). As such discourse analysis is more often used in social anthropology, cultural studies and literature. Initially the intention had been to perform a content analysis for this thesis, as it is a method that is better known to political science. However content analysis is more appropriate for assessing the subject-matter of communication such as newspaper articles and election manifestoes (Krippendorff, 1980), whereas discourse analysis focusses on the structure of the communication rather than its content. As such discourse analysis has, since the 1960s, been seen as the superior method to measure the linguistic properties of law (Trosborg, 1997).

This discussion of the methodology will firstly explain how the discourse analysis method used for this thesis was constructed and why it is a good means of measuring change in legislative language over time. Secondly this section will discuss potential criticisms and alternative approaches to measuring legal language.

Constructing the Discourse Analysis Codebook

Discourse analysis uses a codebook of individual measures to observe hypothetically important elements of language. Most discourse analyses of legal language have concentrated on the semantic and syntactic features of the language, rather than its pragmatic features. For instance, regarding semantics, Brenda Danet performed a lexical study to show how legal language is "frozen" as it employs more archaic terms than everyday language (Danet, 1985). She highlighted the use of common terms with uncommon meanings, the use of tautological doublets such as "null and void", the use of unusual prepositional phrases, and a frequent use of "any".

Considerably more discourse analyses of legal language have dealt with the syntactics of law. For instance Danet (1980) looked at "whiz" deletion where a sentence omits the wh-words; as in "agreement [*which is*] herein obtained or applied". Marita Gustafsson (1975) showed that in a sample of legal documents there were far more clauses per sentence than in other structured forms of language. In a similar vein, Butt and Castle (2007) launched a campaign for "plain language" drafting of legal documents. One particular problem they highlighted was the use of vague modal verb "may", which unlike "shall" does not provide a reliable basis for predicting behaviour. Further linguistic elements that have been studied include the high incidence of prepositional phrases (Charrow & Charrow, 1979), and the use of complex conditional phrases that use conjunctions such as "if", "when", and "or" (Crystal & Davy, 1969).

This project is concerned with pragmatics, as well as with semantics and syntactics. Pragmatics evaluates language in terms of its probable effect in context

and in accordance with norms; thus where semantic and syntactic studies measure the internal attributes of discourse, pragmatics studies the external impact of the language on those who use it. There have been few analyses of legal pragmatics, but an important contribution by Dennis Kurzon (1986) concentrated on the nature of "speech acts" in legal discourse.

Existing discourse analyses of law have measured change in all types of legal language including contract law and legislation, and therefore this thesis by using a discourse analysis to measure changes in legislative language is following a well-established methodological path. In such a complicated field of study it is important to ensure that the method works, and that similar methods have been successfully utilised before gives some credibility to the approach adopted. Finally it is important to note that the discourse analysis methodology seeks to measure descriptive linguistics, in other words forms of language that can be measured with reasonable objectivity. Unlike content analysis where the subject-matter of communication is interpreted, in discourse analysis the structure of language is measured and should therefore minimise interpretative bias that could undermine the results.

The specific measures developed for this thesis are presented in the discourse analysis codebook in the following table, and have all been adapted from several of the studies discussed above (with the exception of the identification of subjunctive language, and adjectives, which are new measures that have been developed independently for this thesis). It is important to stress that the primary measure of indeterminacy in legislation is the decentralisation interaction which measures the presence of indeterminate modal verbs, enabling powers and the lack of a clearly specified agent. The other measures of semantic, syntactic and pragmatic linguistics

assess the linguistic complexity, but do not focus directly on indeterminacy which refers to incompleteness in the law. Decentralisation of power is the key source of political behaviour in judges as a determination must be made of not only the literal meaning of the language, but also the constitutional implications of the decentralisation. Therefore indeterminacy as a concept primarily refers to the law being incomplete and requiring judicial intervention to elaborate the law in the context of a case. The other forms of legislative complexity can exacerbate the indeterminacy when found in conjunction with the decentralisation of power, but taken on their own they are not the primary source of political behaviour in judges.

The following coding frame lists all the indices and how they relate to the four elements of "indeterminacy" discussed in the concepts section of the introductory chapter. Examples for each measure will be considered after the table.

Table 2.1: Discourse Analysis Codebook

Aspect of Indeterminacy	*Linguistic Attribute*	*Observable Manifestation*
Pluralism	Syntactic	Use of embeddings
Volatility	Semantic	Use of subjunctive language Use of adjectives
Decentralisation	Pragmatic	Use of the indeterminate modal verb "may" Use of enabling powers Lack of clear agency
Mobility	Pragmatic	Use of conditional language Refers to other legal provisions

i) Use of Embeddings:

This is a syntactic measure where clauses are separated by an embedded subordinate clause, with the most significant problem in terms of indeterminacy being the separation of subject and verb, or the separation of the subject or the verb from a qualifying clause. For example section 3(7)(a) of the *Terrorism Act 2006*:

> "…something that is likely to be understood, by any one or more of the persons to whom it has or may become available, as a direct or indirect encouragement or other inducement…"

Here the verb (understood) and its qualifier (encouragement or inducement) are separated by the subject of the sentence. There is regrettably insufficient space to show how bad this problem can be, as it is not unknown for a single sentence of legislation to stretch beyond the length of a page. The extent of the problem in European Community Directives was measured in a discourse analysis carried out by Butt and Castle:

> "…the average length of the 34 sentences is 45.9 words. This is almost twice the average sentence length suggested by plain English proponents. The range of sentence lengths, 7 to 126 words, is wide. There are 71 full clauses containing an average 22.0 words and a total of 53 reduced clauses. There are, therefore, 124 clauses in 34 sentences. This is an average of 3.7 full and reduced clauses per sentence, and this suggests the likelihood of syntactic complexity.
>
> The average number of words in the 10 disruptions to the subject/verb nexus is 63.5. Disruptions of this magnitude are likely to cause comprehension difficulties. In the three-verb/object disruptions, there is an average of 3.7 words. The small number of these disruptions results from 35 uses of the passive." (Tanner, 2006, p. 156)

Whilst embedding is significant in terms of the law being understood by the general public, it does not necessarily present a significant indeterminacy problem to judges seeking to identify the meaning of the law. The problem with this measure is that it

depends too much on the length of the clauses, the number of subordinate clauses and the use of qualifiers. The reason for keeping this measure is as a guide to see how this syntactic element of legislative language has changed, because although it may not necessarily have a significant influence on the political behaviour of judges, it is significant in terms of the public understanding of the law.

ii) Use of Subjunctive Language:

Subjunctive language is where the language projects a desired state of affairs, and is the opposite of indicative language which states how the world actually is. Such aspirational language does not lay out what the law is, but rather what it ought to be. For instance section 1(1) of the *Overseas Development and Co-Operation Act 1980*:

> "The Secretary of State shall have power, for the purpose of *promoting the development or maintaining the economy* of a country or territory outside the United Kingdom, or the welfare of its people, to furnish any person or body with assistance, whether financial, technical or of any other nature."

This indeterminate section was litigated in the hugely important *Pergau Dam* case[22]. In this case, the World Development Movement successfully challenged the decision of Douglas Hurd, the Foreign Secretary, to grant £234m of aid to the Malaysian government for the purposes of building a dam. The claimants were able to challenge the Foreign Secretary's decision by appealing to the court to clarify the meaning of

[22] *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement Ltd* [1995] 1 ALL ER 611.

"promoting the development or maintaining the economy" in a specific context. The intervention of the judges in a public policy dispute was in response to the supply of indeterminate legislation, and by clarifying the substantive content of the law the resolution was arguably appropriate.

iii) Use of Adjectives:

This measure considers semantic subjectivity introduced to legislation by adjectives, adverbs and qualifying nouns. For instance section 1 of the *Transport (London) Act 1969* called for the provision of "economic, efficient and integrated" transport. This particular indeterminacy led to the famous "Fare's Fair" case[23], where the Greater London Council under the leadership of Ken Livingstone, was blocked by the judiciary from offering discounted bus fares as such a policy could not be justified under the loose terms of the parent Act.

There is clearly potential overlap between subjunctive language and adjectives, and individual parts of the legislative language will often display more than one significant linguistic feature. However there are many adjectives that are not subjunctive because they do not state the law in terms of promoting certain outcomes, instead they indicate the aim of the law albeit with unclear language. Note that the subjunctive legislation discussed above called for the promotion of development, rather than the provision of development.

[23] *Bromley v Greater London Council* [1981] UKHL 7

iv) Use of the indeterminate modal verb "may":

This is the first pragmatic measure to be considered. The indeterminate modal verb "may" does not say whether or not an action "will" or "shall" be performed. It is therefore vague and leaves discretion to an agent. For instance section 16B(1)(b) of the *Disability Discrimination Act 1995*:

> "…an application [for employment as a disabled person] will *or may be determined to any extent*…"

Of course "may" can also be used in an imperative sense, as in "The Secretary of State may not…", or a conditional sense, as in "As the case may be". However where "may" was used as an imperative or conditional it was not recorded, and it was only recorded where it was used in conjunction with an action that could potentially be performed by an agent. The argument is that "may" is almost always intended to grant discretion whereas "shall" limits discretion. Take for example section 7(2) of the *Roads Act 1920*, where the distinction between may and shall was clearly recognised:

> "In paragraph (c) of subsection (1) of section four of the *Motor Car Act*, 1903, the words 'may cause' shall be substituted for the words 'shall cause'."

Compare this with section 28 of the *Digital Economy Act 2010*:

> "(2) In subsection (1) for "must do all that they can to" substitute "may"…(4) Accordingly, in the heading of the section, for "Duty" substitute "Power"."

One can see that the use of "may" is intended to provide power to government, rather than assign duties. Such flexibility is an important requirement of modern government, but comes with increased judicial intervention in public policy where the content of the law is indeterminate.

v) Use of Enabling Powers:

This measure of pragmatics is theorised to be more important than any other single measure. Enabling powers are those that allow an agent to amend the law outside the usual procedure for primary legislation. This includes the power to make delegated legislation, which is a key component of a Henry VIIIth Clause, as in for instance s 71(2) of the *Race Relations Act 1976*:

> "The Secretary of State may by order impose…such duties as he considers appropriate for the purpose of ensuring the better performance by those persons of their duties…"

Enabling powers also includes the grant of discretion to change the operation of the law with a change in the rules, operating contracts, personnel and even creating or abandoning institutions. With enabling language the law is incomplete, and its meaning depends on the decisions taken outside of Parliament by various agents.

vi) Lack of clear agency:

This is also a pragmatic measure of indeterminacy that records where Parliament has failed to specify exactly which agent is responsible for the delegated power. For instance when "the Secretary of State", or "Her Majesty" appears in legislation it can represent any member of the government, including any member of the civil service upon application of the *Carltona* principle[24]. This makes accountability and responsibility for the law potentially complicated. Ideally in legislative language the intended holder of the delegated power is specified at the start or finish of the Act, or is to be read in accordance with the *Ministers of the Crown Act 1975*, but often it is left indeterminate which allows considerable flexibility in the execution of the law.

vii) Use of Conditional Language:

Again this is a pragmatic measure where the meaning of the legislation depends on circumstance. Clearly all law to some extent depends on circumstance, but conditional language means that the meaning of the law will change radically with a change in circumstance. For instance section 3(3) of the *Public Order Act 1936*:

> "Any person…with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence."

[24] *Carltona Ltd v. Commissioners of Works* [1943] 2 All ER 560 (CA).

This section demands considerable foresight on the part of the Chief Officer of Police to decide when "a breach of the peace is likely to be occasioned". There have been two very different interpretations of the *Public Order Act* emerging as a result of its contextual confusion. In *Jordan v Burgoyne*[25] a fascist march in Trafalgar Square was deemed illegal, whereas in *Brutus v Cozens*[26], an anti-apartheid protest at Wimbledon was not.

viii) Refers to Other Legal Powers:

This phenomenon is known as referential law. It means that to truly understand the law one must refer to other legal provisions, be they other Acts of Parliament, delegated legislation, or the legislation of a sub or supra-national body. It has long been the case that referential legislation is not used in the US at the federal level, and in thirty-three of the states, because it is felt that the legal provisions should be kept together in one document (Carr, 1940). Nevertheless this is another measure (rather like Embedding) whose significance is difficult to gauge from simply identifying its existence. In some cases a reference may be made to another piece of legislation that further confuses the law, or it may in fact considerably clarify the position for the judges. This measure was included to track patterns in referential legislation over time, but it is unable to tell us clearly what substantive impact such references will have.

[25] [1963] 2QB 744
[26] [1973] AC 854

ix) Decentralisation Interaction

As discussed this is theoretically the most important source of indeterminacy in legislation. This is a measure of pragmatic indeterminacy that combines the three measures of "decentralisation". In sections where the three measures interact is for this thesis the definition of a "Henry VIIIth Clause". Therefore this is where a section has the vague modal verb "may", enables an agent of parliament to change the law, and does not clearly specify which agent of Parliament is to enforce the law. This is therefore a grant of discretionary power from Parliament to the government, with limited means for the latter to hold the former to account. For instance section 7 of the *Crime and Security Act 2010*:

> "(1) In this Part, "qualifying offence" means— (a) an offence specified in subsection (2) below, or (b) an ancillary offence relating to such an offence… (3) The Secretary of State may by order made by statutory instrument amend subsection (2) above."

In this section a whole range of qualifying offences are listed, but the Secretary of State may change the contents of this list by secondary legislation. The secondary legislation can only be passed with the positive resolution procedure of Parliament, however it is far less onerous than enacting new legislation, and critically it means that the law has no fixed meaning but depends on implementation by a Parliamentary agent. Of course the existence of a Henry VIIIth Clause is not a sufficient condition of political behaviour in judges, because clarifying litigation will depend on that section being used by the government, which not all are. Nevertheless the will of Parliament is fundamentally indeterminate as it can be changed with relative ease, and if the government does change the law, it is up to the judiciary to determine whether the

amendments accord with the will of the sovereign Parliament and the principles of the Rule of Law.

The discourse analysis codebook therefore has a total of eight separate measures and one interaction measure. Unlike the discourse analysis studies that have inspired these measures, this thesis has recorded observations by using a simple binary system (0/1). This more basic measurement system has been used in order to simply observe multiple elements of legislative language over long periods of time. Although detail will be lost for each individual measure, this is a necessary sacrifice for a project that intends to consider several theoretically significant aspects of language. For each of the eight measures there will be a percentage of sections in each year that display the linguistic problem of interest, and this will enable the easiest comparison across time.

Every single section of legislation for the years 1920 and 2010 was analysed using the discourse analysis codebook in order to bookend the period with results that are not based on samples. However due to the vast quantity of legislation that has been enacted a sample was used for the years between 1920 and 2010. Individual sections of legislation were sampled using a systematic sample. That is for every 19th page of legislation the first section starting after that point was read and the eight measures were recorded (0/1). A random sample was rejected as it did not as effectively represent the chronological range of different legislation passed in a year. However if a sampled page had no sections as it was a schedule, then a random sample of the parent Act was taken. The reason that every 19th page was sampled was because in an initial pilot study it was shown that a sample of just over 5% of all

pages of legislation would be the optimal sample from which to predict with 95% statistical confidence what the overall levels of indeterminacy are. All of the primary legislation from every five years was sampled from 1925, 1930, and so on up to and including 2005, creating a total of nineteen years. The data set comprises 720 sections for 1920, 1,672 sampled sections from 1925-2005 and 2,494 sections for 2010. For the years that used a sample an average was taken on each of the eight measures, and this sample average was used to calculate confidence intervals using the formula $\bar{Y} \pm z\hat{\sigma}_{\bar{Y}}$, where $\hat{\sigma}_{\bar{Y}} = \frac{s}{\sqrt{n}}$ [27]. This formula calculates the range of values above and below the sample mean within which the real value lies with 95% probability, and a similar formula was used to test for 90% and 99% confidence. The theory that the language of legislation has become increasingly indeterminate over the course of the 20th and 21st Centuries will be partially demonstrated if the sample mean for the years after 1920 increase beyond the baseline level for 1920 with 95% confidence.

II: Potential Criticisms of the Method:

Discourse analysis is a means of quantifying basic trends in legislative language over time. It is important to note that it is a simple metric, which is precisely why subsequent chapters will use a more detailed qualitative approach to achieve greater leverage over the causal theory. Simple methods and the adoption of multiple

[27] $\bar{Y}$ = The sample average. z = The test statistic. Assuming a normal distribution, where $z = 1.96$ this calculates confidence to the 95% level.

$\hat{\sigma}_{\bar{Y}}$ = The standard error of the sample mean. s = The sample standard deviation. n = The sample size.

methodological approaches is an important way of providing preliminary empirical verification for a new and complex causal argument (Laitin, 2002; Rogowski, 2004). Simplicity is important, but the methods must be valid and reliable, and these issues will be considered in turn.

Firstly does the discourse analysis validly measure indeterminacy in sections of legislation? There are eight separate measures of indeterminacy, but how many measures must a section have for it to be indeterminate? A section of legislation could have just one of the eight linguistic problems, and yet that one could be so substantial that the meaning of the section is totally indeterminate. Take for instance the phrase "on his arrival" in the recent case of *Kola and another v Secretary of State for Work and Pensions*[28]. This is a prepositional phrase which other legal discourse analyses have directly measured, but that was felt to be better measured by the umbrella measure of conditional language for the purposes of this thesis. The whole case turned on how "on his arrival" would be read in the context of an asylum seeker who had to claim for asylum immediately. As per Lord Brown of Eaton-under-Heywood:

> "[13] The Secretary of State submits that the claims were rightly rejected. He contends that the phrase "on his arrival" requires in this context that the asylum claim be made to an immigration officer on duty at the port of entry. Nothing else will do. If the asylum seeker reaches the country otherwise than at an immigration-staffed port of entry—for example at a beach or an undesignated port or a private airfield—he cannot satisfy the requirement. Nor can he do so if the immigration staff have gone off duty. Nor if he is so ill on landing that he has to be rushed to hospital."

The discourse analysis is a relatively simple tool and such subtle nuances of indeterminacy would be extremely difficult to create a workable coding frame for that would cover a long sweep of history and such a large data set. The discourse analysis

[28] [2007] UKHL 54

aims to generally test whether the language of legislation has become increasingly indeterminate over time. This does not require an ordinal scale determining what scores on the discourse analysis count as "determinate", "indeterminate", or "very indeterminate". All that needs to be shown is that as time has progressed, indeterminacy has increased on the specific measures.

Another potential criticism of the validity of the discourse analysis is that focussing on individual sections is an insufficient means of analysing legislation. Every statute has a "scheme" of meaning, and a judge will rarely rely on one section to analyse Parliament's intention. The "golden rule" has long been a means of resolving an interpretative difficulty in one part of an Act by reference to the general intent of the whole legislation (Cross, Bell, & Engle, 1995). However litigation usually focuses on single sections, and where meaning is particularly unclear, the golden rule cannot be used on its own to establish meaning. Also of importance, this thesis will not be coding scheduled material in legislation because these are not the central legal instrument of legislation and are instead a repository for extra material. Nevertheless this extra material can be crucial in deciding a case, as occurred in the 2010 Supreme Court case of *Noone*[29] which turned on the clashing meaning of scheduled material in two Acts. Clearly the discourse analysis risks over-simplification through quantification, but this is of course the risk of any quantitative measurement – it cannot tell us what is substantively significant, just what is statistically significant. That again is precisely why a multi-method design will be used to test the Legislative Politicisation Theory so that substantive and statistical analysis can complement each other.

[29] *R (on the application of Rebecca Noone) v (1) the Governor of HMP Drake Hall, (2) Secretary of State for Justice* [2010] UKSC 30

The second major concern to be raised regarding the discourse analysis is its reliability. The method and results must be replicable by another researcher. The discourse analysis required the single-handed coding of 8,328 sections of legislation (4,886 for this chapter alone), and in content analysis it is common for scholars to perform inter-coder reliability tests where two or more individuals code a sample of the material of interest to see if they come up with similar answers to the author (Krippendorff, 1980). As mentioned, content analysis deals with the subject-matter of communication, whereas a discourse analysis deals with the grammatical and linguistic structure of communication. Therefore content analysis requires subjective interpretation, rather than the more objective identification of linguistic features which is possible with a discourse analysis. That said it was necessary to perform a self-coder reliability test by re-coding five per cent of the sections to check that the same results occurred. This was to ensure that none of the measures were accidentally missed or wrongly assigned to any of the sections.

The problem of reliability could be ameliorated by computer-assisted coding, which would also allow a far greater sample to be taken – potentially every section of legislation ever enacted. QSR's NVIVO software (the latest incarnation of the NUD*IST package) is popular for content analysis, but when used in a pilot study for this project it was shown to be unable to achieve accurate measurements for discourse analysis. For instance in testing whether a section used the indeterminate model verb "may" the computer could not discern the discretionary usage from the imperative or the conditional usage. Even the month "May" would be recorded by the software. The same problem occurred when the Wordscores application for STATA was tried. This software has recently been used for important content analysis work (Laver, Benoit, & Garry, 2003), it has also been used to measure the language of judicial opinions

(McGuire & Vanberg, 2005), and the advocacy briefs submitted to the court (Evans, McIntosh, Lin, & Cates, 2007). The problem is that a computer cannot easily distinguish which uses of language are indeterminate by simply counting the incidence of certain words or phrases. Therefore there are certain limitations to the discourse analysis method, nevertheless the method has been developed from previously successful scholarship, and it should achieve the aim of showing change over time in the independent variable of indeterminate legislative language.

III: Results

Before proceeding to the results of the discourse analysis, it is first important to clarify what the observable implications of the Legislative Politicisation of the Judiciary Theory are. The theory predicts that legislative language has changed to a significant extent since 1920 and particularly accelerated from 1960 onwards. Thus one should see in the results a slight change in the linguistic patterns from 1920 to 1960 followed by a definite increase in the level of indeterminacy thereafter. Of the eight measures the most significant in terms of the theory are those that test linguistic pragmatics, and especially those categorised as "decentralisation" where the power to decide the meaning of the law was delegated by Parliament. As argued in the introductory chapter, it is the increase in pragmatic indeterminacy that is expected to have had the most significant impact on judicial behaviour since 1920. Semantic and syntactic indeterminacy are also important in conjunction with pragmatic indeterminacy, and as such the results will present a tabulation of the proportionate increase on all of the measures, this will be followed by graphs that will enable a more detailed discussion of the change.

The following tables displays the overall results for the discourse analysis as proportions (2.2) and in real terms (2.3):

Table 2.2: Proportionate Change in Indeterminacy, 1920-2010

Year	*Emb*	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
1920	80	2	30	37	4	26	31	57	3
1925	90***	3	33	43	4	21	52***	29***	1*
1930	86	0	43*	57***	5	26	57***	36***	4
1935	85	0	30	48	3	21	55***	45	0
1940	81	4	35	42	8	19	54**	69	4
1945	80	7*	43*	37	2	20	50***	52	0
1950	85	6	44**	54**	4	25	54***	50	4
1955	82	0	38	54**	8	31	49**	41**	8
1960	80	7*	40*	47	10*	27	58***	40***	10
1965	83	3	43***	37	7	33	33	49*	6
1970	81	3	49***	38	9*	23	61***	43***	6
1975	77	1	52***	46**	9**	35**	45***	55	9**
1980	76	7***	46***	55***	17***	30	71***	54	13***
1985	76	5**	54***	55***	16***	26	66***	44***	10***
1990	74*	10***	74***	59***	26***	51***	84***	48**	22***
1995	72**	16***	68***	54***	36***	39***	78***	52	25***
2000	52***	11***	70***	50***	24***	39***	73***	56	22***
2005	51***	5*	67***	43	23***	45***	78***	44***	19***
2010	41	8	65	29	19	57	82	43	16
Increase	-0.37	0.09	0.45	0.02	0.28	0.31	0.41	0.03	0.24
R^2	0.65	0.39	0.82	0.003	0.7	0.64	0.58	0.008	0.76

Emb = Embedding – The legislation utilises subordinate clauses. **Sub = Subjunctive** – The use of subjunctive language. **Adj = Adjectives** – The use of adjectives, adverbs or qualifying nouns. **Mod = Modal** – The use of vague model verbs (may). **Enb = Enabling** – An agent of Parliament is enabled to amend the law. **Age = Agency** – The agent intended to implement the law is not clearly specified. **Con = Conditional** – The use of conditional language. **Ref = Referential** – The use of a reference to another piece of legislation. **Dec = Decentralisation** – The decentralisation interaction, which displays the combined measure of vague modal verbs, enabling power and unclear agency.

The figures are percentages of sections for each year that displayed the indeterminacy of interest from the total data set of 4,886 sections. The stars indicate the degree of confidence with which we may state that the level of indeterminacy has changed since 1920. One star represents 90% confidence, two stars is 95%, and three stars is 99%. There are no stars for 2010 because this year was not sampled, but rather the entire population of 2,494 sections was coded so we can state with absolute confidence that indeterminacy in 2010 was different to 1920. The "Increase" in the

bottom left-hand of the table refers to the linear trend-line gradient for the data and therefore shows the average increase per year for the ninety-year period. The R^2 shows the degree of fit of the individual results to this linear average, where 1 would mean 100% fit and 0 would mean no fit whatsoever.

The results show clearly that there have been very large and statistically significant changes in the indeterminacy of legislative language over the course of the 20th and 21st Centuries. Only in embedding do we observe a decrease in the level of indeterminacy over the period, whereas all other measures show an increase. Whilst indeterminacy has always been a feature of legislative language, the significant increase does suggest a qualitative change in the nature of Parliamentary law over the ninety year period. On top of this the results show modest changes until 1960-70 where change becomes more rapid. Thus the general trend is as theorised.

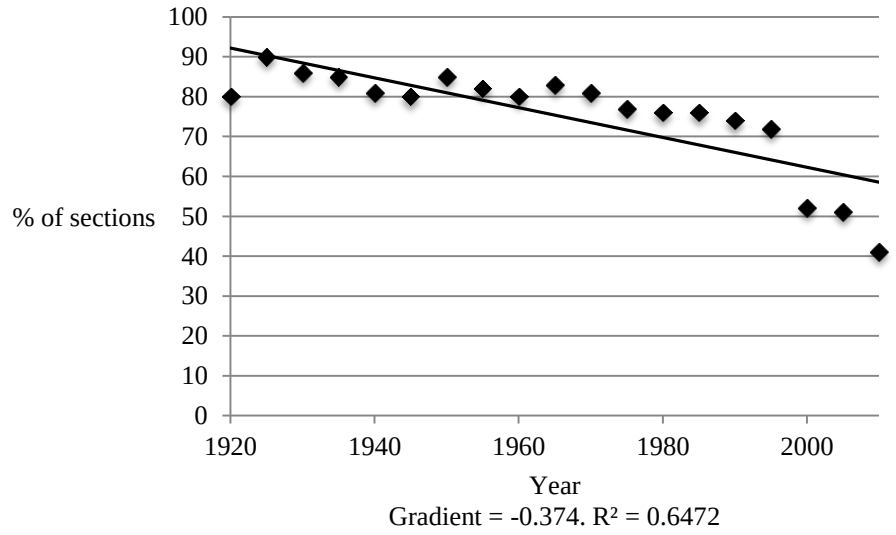
The proportionate change shows there was a qualitative difference in the indeterminacy of legislation enacted, but when this is translated into real terms the change is astonishing, and on none of the measures was there a decrease:

Table 2.3: Real Terms Change in Indeterminacy

Year	*Emb*	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
1920	576	14	216	266	29	187	223	410	21
1925	1820	61	667	869	81	425	1051	586	21
1930	692	0	346	459	40	209	459	290	36
1935	535	0	189	302	19	132	346	283	0
1940	364	18	157	189	36	85	242	310	17
1945	729	64	392	337	18	182	456	474	0
1950	852	60	441	541	40	251	541	501	39
1955	703	0	326	463	69	266	420	351	66
1960	903	79	452	531	113	305	655	452	113
1965	1335	48	691	595	113	531	531	788	102
1970	1200	44	726	563	133	341	903	637	94
1975	1785	23	1205	1066	209	811	1043	1275	205
1980	1912	176	1157	1384	428	755	1786	1359	335
1985	2262	149	1607	1637	476	774	1964	1309	298
1990	1351	183	1351	1077	475	931	1533	876	394
1995	1461	325	1380	1096	730	791	1583	1055	504
2000	1448	306	1949	1392	668	1086	2032	1559	606
2005	1214	119	1595	1023	547	1071	1856	1047	444
2010	1025	193	1609	720	467	1434	2039	1063	400
Increase	9.39	2.7	18.71	10.53	7.66	12.53	20.68	11.88	6.33
R^2	0.25	0.58	0.82	0.49	0.78	0.81	0.75	0.66	0.76

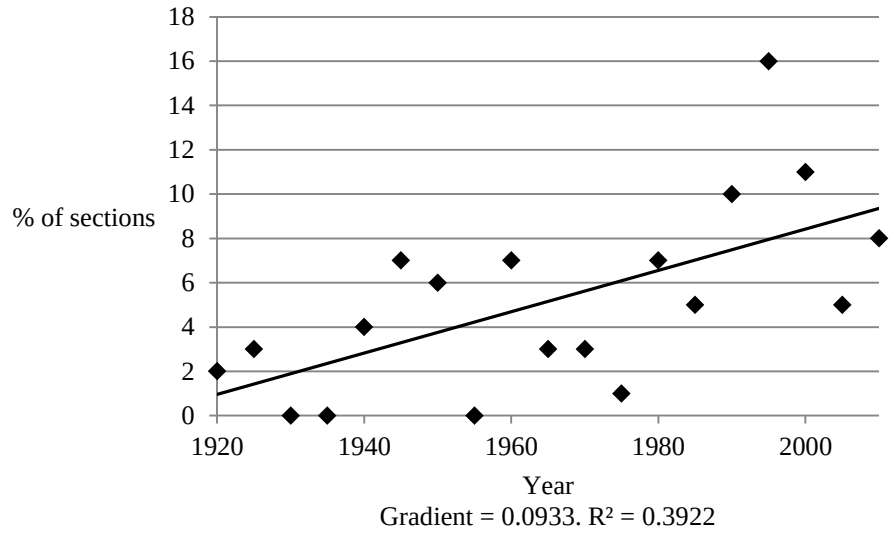
These results will be discussed in conjunction with the following nine graphs that show the results for each of the eight individual measures of indeterminacy as well as the decentralisation interaction:

Graph 2.1: Plurality - Use of Embedding



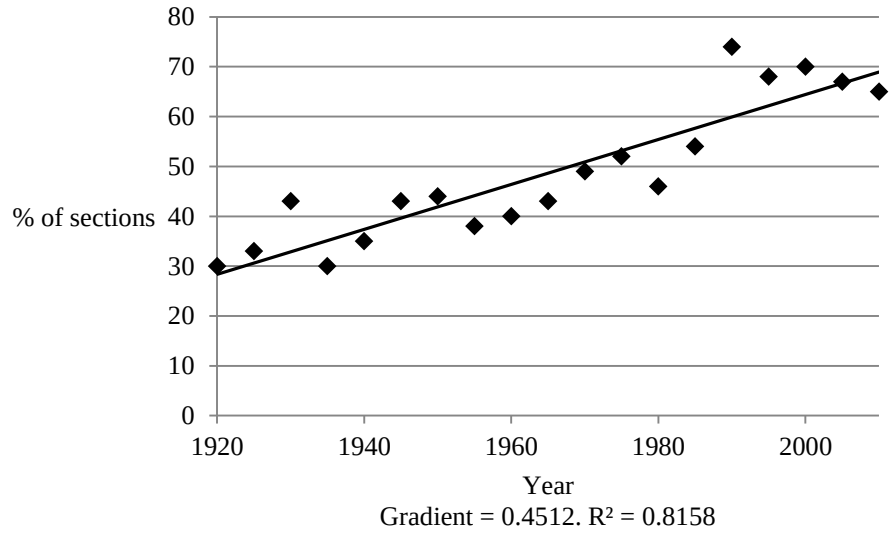
As one can see the proportion of embedding declined over the period, with a sharp and statistically significant drop from 1995 onwards, below the 80% baseline figure for 1920. The lowest result was recorded in 2010 with 41% of sections displaying embedded clauses. This implies that the syntactic clarity of the law has actually improved over the period. However in real terms, there was an increase from 572 sections in 1920 to 1,025 in 2010. This syntactic phenomenon theoretically has little impact on the political behaviour of judges, although the proportionate decrease in indeterminacy is an important sign for the "Plain Language" campaign that in terms of sentence structure the syntactic quality is improving. There were other important changes by the turn of the century that have improved the syntactic quality of legislation such as improved page lay-outs. However these are superficial improvements that mask the increase in pragmatic indeterminacy of language that is considered below.

Graph 2.2: Volatility – Use of Subjunctive Language



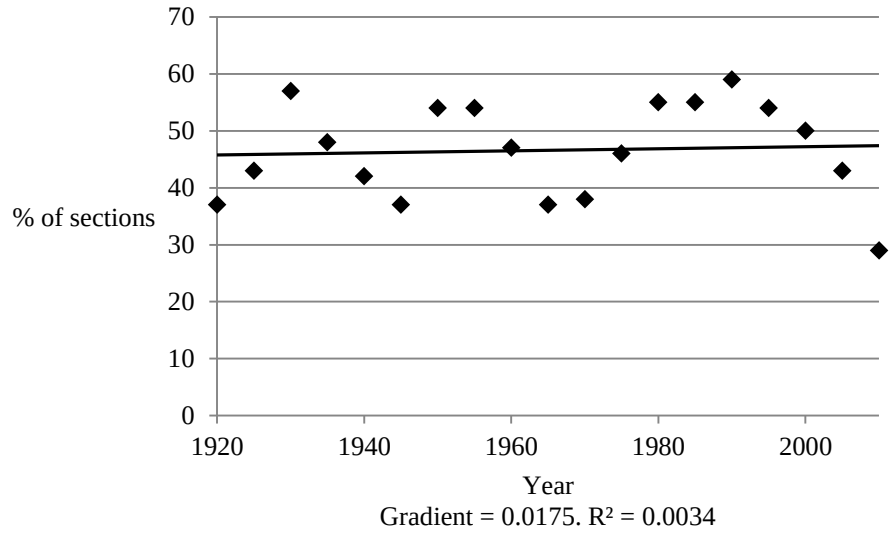
In terms of volatility in the semantics of legislative language, the first measure of subjunctive language shows a sharp increase over the period. This feature of language is not observed often in legislation with the highest recorded proportion being 16% in 1995. This is still a very significant result as 325 sections of legislation in that year have been predicted to display aspirational language, which is highly indeterminate and likely to result in confusion that may need to be clarified by the courts.

Graph 2.3: Volatility – Use of Adjectives



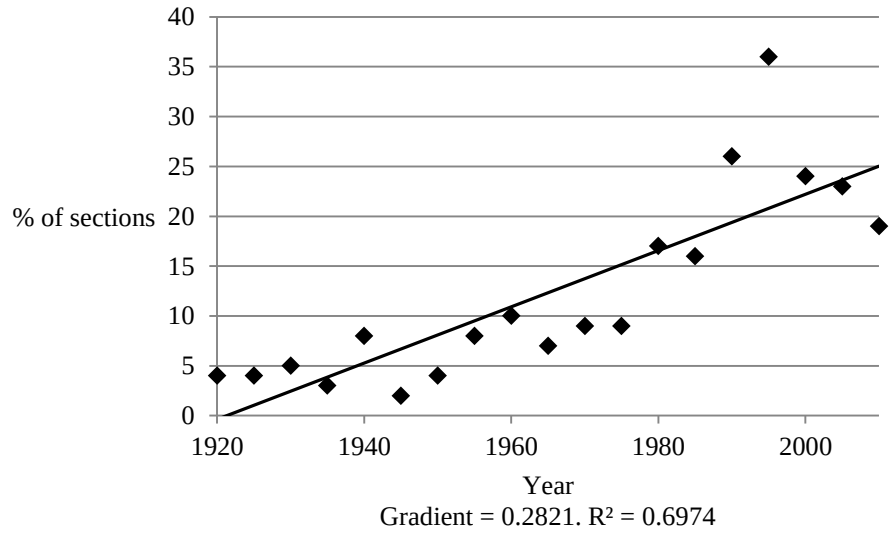
The use of adjectives has also increased very sharply over the period, from being observed in under a third of sections in 1920 (216 sections in real terms) to a high of just under three-quarters in 1990 (1,351 sections in real terms). This increase is highly important for this thesis as such a high quantity of semantic indeterminacy could be a key factor in the increased intervention in public policy by the judiciary. The trend also displays a very high R^2 (0.81) that means that the increase has been stable and not particularly haphazard.

Graph 2.4: Decentralisation – Use of the Indeterminate Modal Verb "may"



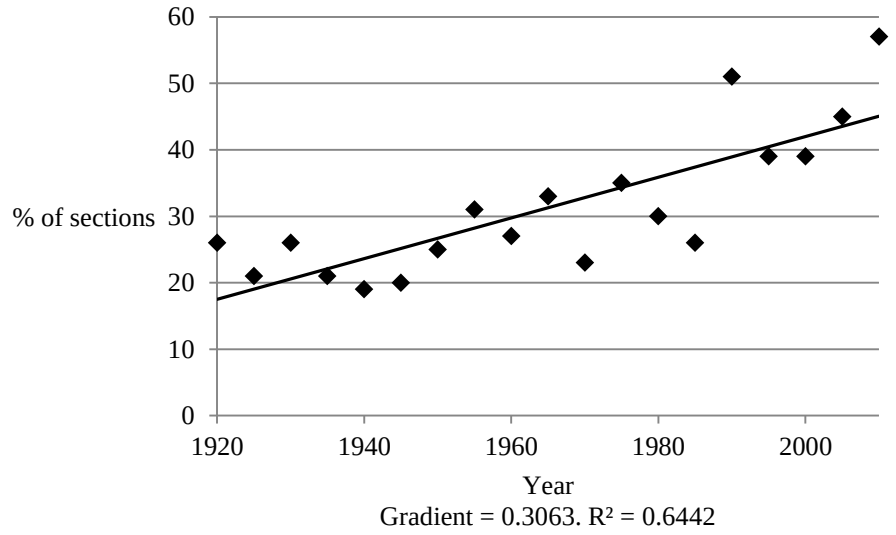
The change in the use of the indeterminate modal verb "may" has been far more haphazard over the period as can be seen from the very low R^2 of 0.003. Indeed the proportion in 1920 (37%) was higher than in 2010 (29%), and the rate of increase over the period is very low as represented by the gradient of the trend line at just 0.02% change per year. Nevertheless in real terms the change was from 266 sections in 1920 to almost three times as many in 2010 with 720. Also the use of vague modal verbs depends on the subject of the verb and the specific action for which the agent has been granted discretion. This is why it was important to measure the decentralisation interaction, because the impact of "may" is far more significant when used in a Henry VIIIth Clause.

Graph 2.5: Decentralisation – Use of Enabling Language



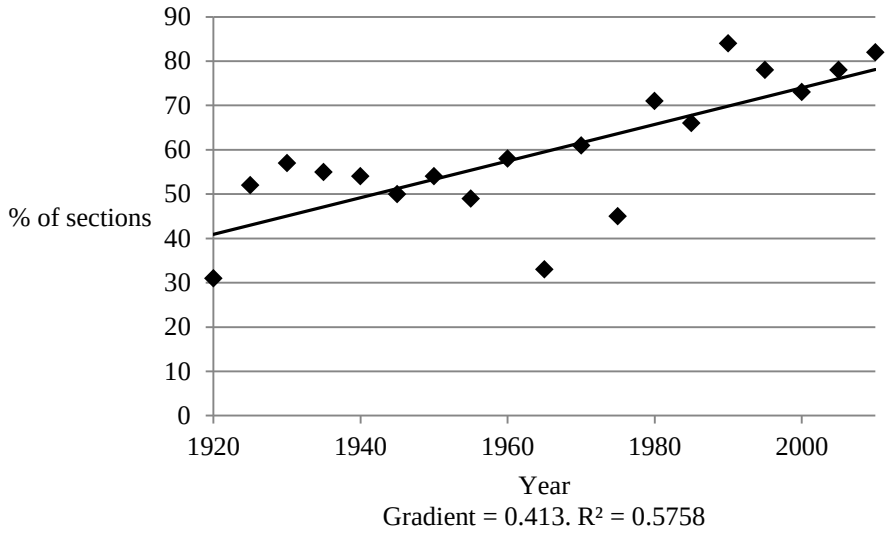
In contrast to the use of vague modal verbs that has not systematically changed over the period, the use of language that enables an agent of Parliament to change primary law has increased rapidly and with fairly low variation (as shown by a high R^2 of 0.7). From a modest baseline position of 4% in 1920, use of enabling language increased throughout the century and peaked at 36% in 1995 before declining again to 19% in 2010. In real terms there were just 29 sections in 1920 that enabled an agent to amend the law, and by 2010 this had increased by a factor of sixteen to 467 sections. This is a very strong indication that pragmatic indeterminacy increased greatly between 1920 and 2010 and the impact of having so many sections whose meaning is left to be clarified by an agent of Parliament is theoretically crucial to explaining the political behaviour of judges. Indeed it is only after 1960 that we are able with any confidence to say that the sample results are different to the result achieved in 1920. After 1980 the levels of enabling are so high that one can conclude with 99% confidence that the sample was higher than the 1920 baseline.

Graph 2.6: Decentralisation – Use of Unclear Agency



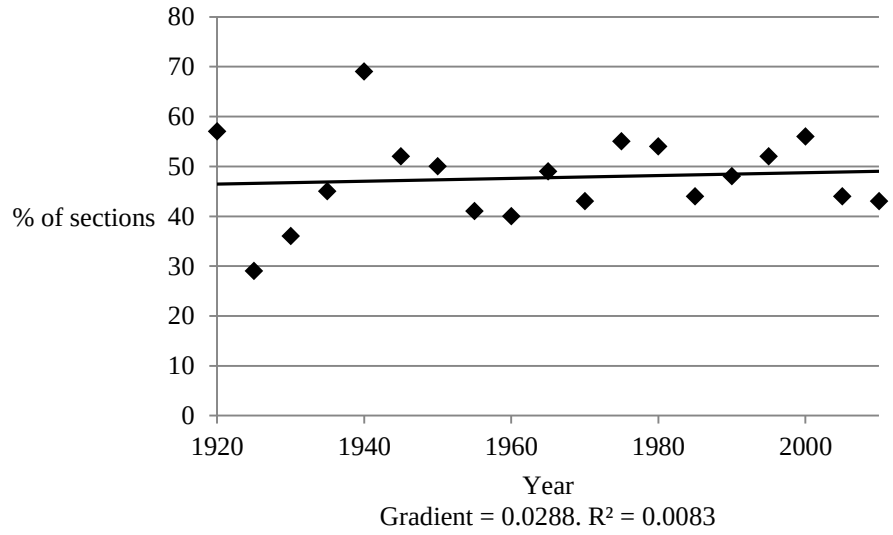
Again in terms of the legislation not explicitly specifying the agent that was responsible for its implementation there has been an increase from 26% in 1920 (187 sections) to 57% in 2010 (1,434 sections). Many of the sections in 1920 would not have required any agent at all for their implementation, but by 2010 not only did the majority of legislation require an agent for its implementation, that agent was not directly named but rather the government as a whole (or some department thereof such as the Treasury) was named as beneficiary of the new law.

Graph 2.7: Mobility – Use of Conditional Language



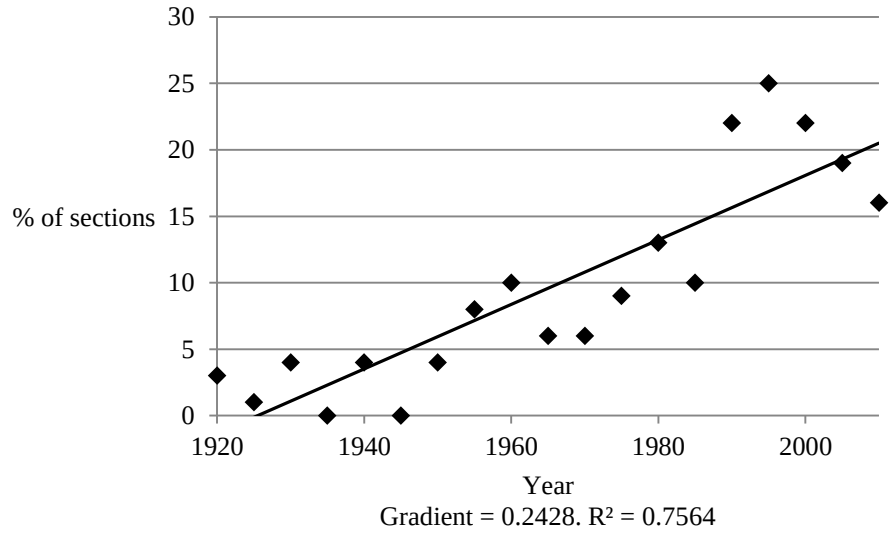
The use of conditional language has also increased with slightly greater variance over the period, but with a reasonably high R^2 of 0.58. In 1920 31% of sections displayed conditional language (223 sections). This peaked at 84% in 1990 and was 82% in 2010 (2,039 sections). This is an astonishing result as it shows that in eight out of every ten sections conditional language allowed for multiple scenarios to be included or excluded from the ambit of the law. This indeterminacy in meaning is another crucial source of public policy intervention from the bench.

Graph 2.8: Mobility – Use of Referential Language



The measure of referential language (as with the use of vague modal verbs) does not show a systematic change in either increase or decrease over the period. The variance in the results is considerable as shown by a very small R^2 of 0.008, and once again the proportion observed in 2010 at 43% was lower than that observed in 1920 at 57%. In real terms there was an increase from 410 sections to 1,063 between 1920 and 2010, however this measure, as with embedding, cannot be so clearly assumed to create an institutional difficulty that the judges have to resolve. It depends on what law is being referred to, and these statistics alone do not tell us much. This is therefore in comparison to the extent of enabling power which clearly shows an institutional problem where the will of Parliament has been delegated to an agent to implement.

Graph 2.9: The Decentralisation Interaction



The most important source of indeterminacy in parliamentary legislation is theorised to be in Henry VIIIth Clauses that display the three elements of decentralisation simultaneously – vague modal verbs, enabling language and unclear agency. The increase in this interaction over the period has been large and fairly stable as can be seen from a high R^2 of 0.76. In 1920 3% of sections displayed the interaction (21 sections), the highest recorded incidence was an astonishing 25% in 1995 (504 sections), which dropped to 16% in 2010 (400 sections). This clearly shows how much legislative language has changed from 1920 to 2010 with the increased use of the Henry VIIIth Clause that is totally against the original model of statute law as a precise and determinative amendment to the Common Law. With so much law requiring an agent for implementation and allowing that agent to make amendments in reaction to context the law has become very uncertain, and this demonstrates the institutional problem faced by the judiciary.

To appreciate the institutional problem created by indeterminacy in legislation the following section is illustrative as it displays all of the types of indeterminacy

simultaneously (with the single exception of a reference to another law). Section 1(3) of the *Prevention of Terrorism Act 2005*:

> "(3) The obligations that may be imposed by a control order made against an individual are any obligations that the Secretary of State or (as the case may be) the court considers necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity."

This section enables the creation of Control Orders against terrorist suspects, it uses "may" as a modal verb rather than "will" or "shall", and it empowers the "Secretary of State" or "the court" without specifying whether or not the Secretary of State means the Home Secretary, and whether the power can be performed by a civil servant à la *Carltona*. The section shows all three types of decentralisation simultaneously, and one can see how they would interact to make a very powerful legal instrument in the government's hands that would be bound to lead to demands from litigants affected by the law for clarification of which obligations the Secretary of State may impose. As well as the decentralisation interaction the section also uses adjectives, subjunctive language and conditionals. One can see from this section the enormous difficulties that the indeterminacy creates where a judge would have to assess whether the Secretary of State believed the obligations imposed were "necessary". This law is essentially incomplete, and the will of the sovereign is thereby uncertain.

Conclusion

The evidence presented in this chapter shows that there has always been indeterminacy of legislative language, but since 1960 the level of indeterminacy has rapidly increased in proportion and in real terms. As theorised, the most important development in the legal language has been the increase in pragmatic indeterminacy, especially where power is delegated by Parliament. The decentralisation interaction displays a very considerable increase over the period, suggesting a qualitative change to Parliamentary legislation has emerged over the course of the 20th and 21st Centuries. Essentially parliamentary law is increasingly incomplete, to be elaborated outside of Parliament by the government and the judiciary.

Such a qualitative change in legislation demands an adaptation of traditional statutory interpretation techniques as judges are forced to resolve what the law is amidst a huge amount of indeterminate legal material. Therefore judges have political decision-making thrust upon them. This goes some of the way to testing the Legislative Politicisation of the Judiciary Theory, but more evidence is needed to directly observe the causal link between indeterminate language and the political behaviour of judges, which is the aim of the following chapter.

Chapter Three: Indeterminacy in Immigration Legislation

> "This [decision] is reinforced by the constitutional principle requiring the Rule of Law to be observed. That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the corner decisions or knocks on doors in the early hours. That is not our system."
>
> Lord Steyn in *R (Anufrijeva) v Secretary of State for the Home Department and another* - [2004] 1 AC 604 at 621.

Introduction

Lord Steyn in his dictum described why judges have been drawn into politically sensitive decision-making. It was not because they were seeking to enhance their personal preferences, but because the role of the state has changed such that if judges did not police the political activities of the state they would be entirely neglecting their constitutional duty to uphold the Rule of Law. To test the Legislative Politicisation of the Judiciary Theory it is necessary to observe the nexus of cause and effect in a specific area of the law. This chapter will consider interventions by the judiciary in a crucial public policy area that is controlled by the central government: asylum and immigration law (from here referred to as immigration law). This chapter will build on the last chapter's investigation into changes over time in legislative language by seeking to observe the connection between change in legislative language and the increased political behaviour of judges. The expectation is that such behaviour depends predominantly on the language of the legislation, and thus the more indeterminate the language, the more likely it is that the judiciary will intervene; however the precise nature of the political behaviour is expected to be appropriate.

This means that the judicial intervention is exercised to maximise certainty in the Rule of Law, and not for the personal interests of any individual judge. This chapter will firstly discuss developments over time in immigration legislation and will outline the two Acts that were selected for comparative analysis (I). This will be followed by an explanation of the qualitative method of comparison used to analyse cases brought under the two Acts (II). Finally the results will be presented and discussed (III).

I: The History of Immigration Legislation and the Selection of Cases for Comparison

Immigration law was selected for study firstly because the discourse analysis of all legislation between 1920 and 2010 showed that there was more variation in the independent variable (the level of indeterminacy of legislative language) in this policy area than in most other national policy spaces. Secondly, immigration law is important for evidence of the dependent variable (the political behaviour of judges) as it is an area of law where clashes between politicians and judges are common, and interventions by judges in the policy space are very controversial. The aim of this chapter is to use comparative analysis of the judges' ratio decidendi for all the cases taken from two linguistically different pieces of legislation. This will allow an evaluation of whether the judicial intervention is compelled by linguistic indeterminacy and whether the resolution has generally been in accordance with the logic of appropriateness. A discourse analysis of all immigration legislation was used to select two Acts that were passed within ten years of each other; both dealt with national immigration policy, and both are roughly the same length, but they differ in

their levels of indeterminacy, which allows comparison in accordance with Mill's "Method of Difference". It was very important that the selection of the two Acts was led by their variance on the independent variable. This is a crucial methodological difference of this study over other studies of judicial politics that have selected cases on the dependent variable, and thereby seek to understand the political behaviour of judges by examining cases that display political behaviour in judges.

The selections made were the *Immigration Act 1988* which is comparatively determinable, and the *Asylum and Immigration Act 1996* which achieved the highest results in terms of indeterminacy for almost all legislation of the last twenty years. The expectation was that the more complete 1988 Act would not lead to as much political behaviour in the judicial interventions, whereas the indeterminate 1996 Act would, but that the political behaviour would be an appropriate response to the linguistic problem. The 1988 Act and the 1996 Act were both restrictive pieces of immigration law, but the linguistic structure of the former was such that the judges could not intervene in the policy space even if they had wanted to. Of great importance is the fact that several of the 1988 Act's cases had to be appealed to the European Court of Justice and the European Court of Human Rights because the litigants could not achieve their aims in the UK appellate system. The 1996 Act on the other hand was more loosely drafted, with the result that the judiciary were able to resolve many of the litigants' grievances by using the discretion gifted by Parliament. In order to observe the effect of the language of the two Acts, all of the cases that interpreted these Acts at every appellate court in the UK (including Scottish and Northern Irish appellate courts) from the High Court level upwards were studied to look for the connections between indeterminacy of language and political behaviour in judges. The results taken from these 135 cases heard between the passage of the

Acts and the present day are discussed below and show good evidence for the theorised causal relationship.

To place the *Immigration Act 1988* and the *Asylum and Immigration Act 1996* into context a brief discussion of immigration legislation will consider how and why immigration policy has changed over time, how these Acts were selected as cases, and why immigration legislation is such an important area of study for this thesis.

It is intuitive that immigration legislation would form a growth area of litigation, because so many victims of law are created here. The stakes for individual claimants are so much higher than in other branches of law that discrepancies in the interpretation of the law will be quickly challenged by litigants and counsel, thereby creating enormous demand for judicial intervention into policy. Immigration is also a highly salient political issue in modern democratic states, and as a policy area it can have a considerable electoral impact for political parties.

Indeed one of the primary elements of sovereignty involves making the difficult policy decisions regarding who does and does not qualify for citizenship. The details of immigration policy are typically decided on the basis of national self-interest, rather than concern for the well-being of the individual migrants (Bevan, 1986). As such there is a constant friction between the popularity of tough immigration law set against the economic benefits of the free movement of labour, as well as the international and domestic commitments to basic standards of human rights for asylum seekers and immigrants. Randall Hansen (2009) has identified three important waves of immigration to Britain since 1800; starting with Jewish immigration during the 19th Century, Commonwealth immigration up to the 1971 *Immigration Act*, and economic immigration from the European Union "A8"

countries since 2004 and "A2" countries since 2007. The high saliency of these waves of immigration as a democratic issue is understandable as the policy space is a crossroads for many volatile topics including national security, social security, economics, culture, and race relations. The difficulty of institutionalising policy has led to an incoherence of strategy amongst most of the Old World liberal democracies (Freeman, 1995). There have however been roughly identifiable phases of institutionalised policy in Britain, firstly with a liberal immigration regime established from the *British Nationality Act 1948* and lasting up to the *Commonwealth Immigrants Act 1962*. After this point a more restrictive policy was adopted in response to fears from the electorate about immigrants from the "New" Commonwealth countries of Africa and the West Indies. Further restrictions were introduced with the *Commonwealth Immigrants Act 1968* that was rushed through Parliament in 48 hours in order to issue restrictive immigration vouchers to East African Asians. The Home Secretary at the time, James Callaghan, confided to the Cabinet that in any nation with a written constitution such an obvious attack on civil liberties would not be tolerated (Bevan, 1986). Alongside these restrictive laws came measures to alleviate some of the more egregious effects of restrictive immigration policy through the *Race Relations Acts 1965* and *1968*, and the first immigration appeals system that was established with the *Immigration Appeals Act 1969*.

A critical change came with the *Immigration Acts 1971* and *1981* that removed Common Law jurisdiction over immigration. The Common Law and Royal Prerogative had up to that point dominated the law on citizenship, but mass immigration had made the medieval system not fit for task. The content of the Common Law on citizenship was based on the feudal idea of fealty to one's Lord by dint of birth in his domains (jus soli). Whereas modern immigration law, since the

Immigration Acts 1971 and *1981*, has rejected this formula, and now citizenship is only guaranteed through blood relationship with another citizen (jus sanguinis) (Bevan, 1986; Stolcke, 1995). The 1988 and 1996 Acts both came in the midst of this restrictive phase that briefly ended with the election of the New Labour government in 1997. After 1997 immigration policy changed once more to reflect the economic benefits of skilled and unskilled migration as entry conditions were briefly relaxed. This liberal phase was short-lived as the security implications of 9/11 led to a significant tightening up. On top of this, the decision to allow free migration from the new EU member states after 2004 led to a significant popular backlash against the more liberal immigration regime (Hansen, 2009).

The 1988 and 1996 Acts were purposely selected for this chapter as being within the same policy arc in order to minimise the variance in judicial behaviour caused by a change in policy content. The two Acts were additional amendments to the over-arching policy that had been institutionalised since the 1960s. On top of this both Acts are roughly the same length at 12 and 13 sections long respectively. Finally the two Acts vary on the independent variable of indeterminacy of legislative language. The similarities in terms of policy and length make the two Acts good for comparison on the basis of the very different linguistic content. The Acts were selected using a discourse analysis of all immigration legislation enacted between the *British Nationality and Status of Aliens Act 1922* and the *Borders, Citizenship and Immigration Act 2009*. The discourse analysis methodology is exactly the same as was used for the samples of all legislation between 1920 and 2010 in the previous chapter, with the crucial difference being that for this chapter every single section was coded rather than a sample taken. The complete coding involved a total of 841 sections of legislation.

The following table (3.1) shows the major findings of the discourse analysis for all immigration legislation, and the complete results are available in the appendix:

Table 3.1: Discourse Analysis Results for all Immigration Legislation, 1922-2009

	Emb	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
Increase %	-0.68	0.06	0.56	0.28	0.33	0.22	0.58	-0.11	0.38
R^2	0.5	0.05	0.38	0.14	0.23	0.12	0.47	0.01	0.4
Real Terms	0.26	0.05	0.49	0.45	0.24	0.49	0.63	0.52	0.22
R^2	0.1	0.21	0.2	0.2	0.3	0.2	0.2	0.25	0.3

Emb = Embedding – The legislation utilises subordinate clauses. **Sub = Subjunctive** – The use of subjunctive language. **Adj = Adjectives** – The use of adjectives, adverbs or qualifying nouns. **Mod = Modal** – The use of vague model verbs (may). **Enb = Enabling** – An agent of Parliament is enabled to amend the law. **Age = Agency** – The agent intended to implement the law is not clearly specified. **Con = Conditional** – The use of conditional language. **Ref = Referential** – The use of a reference to another piece of legislation. **Dec = Decentralisation** – The decentralisation interaction, which displays the combined measure of vague modal verbs, enabling power and unclear agency.

Table 3.1 shows the gradient of the linear trend lines for each of the measures and the R^2 values. The linear gradient measures the rate of change per year, with the "Increase %" showing the change in the proportion of sections displaying the indeterminacy per year, and the "Real Terms" displaying the change in the absolute number of sections showing the indeterminacy. Therefore the figures may seem low but they represent change over eighty-seven years which in aggregate amounts to a significant shift. Also the R^2 values do not present the degree of model fit but rather the degree of variance in the data. This is because unlike in other statistical methodologies, this project has coded every single section of immigration legislation rather than a sample, so we can categorically say that there has been an increase on all measures in real terms, and only a proportionate decrease in terms of embedding and referential law. Thus the R^2 simply show how haphazard the change has been and a

low value should not be interpreted as poor model fit, because the universal data set was used rather than a predictive model.

The results displayed in Table 3.1 show a similar trend to the results achieved for all legislation as discussed in the last chapter. The theoretically important measures have all seen an increase in proportions and in real terms over the period. As mentioned, only embedding and referential law saw a proportionate decrease over the period, but these are not expected to be as important in explaining the political behaviour of judges. The decrease in the use of referential language is different to the results for all legislation, although the slow decrease and the low R^2 point to a very haphazard change over the period. On all other measures a clear change in the level of indeterminacy was observed. Firstly the semantic measures of subjunctive language and adjectives increased proportionately by 0.06% per year and 0.56% per year respectively. The slow increase in subjunctive language was expected due to the relatively rare incidence of this linguistic feature. The increase in the use of adjectives is remarkable with over half a per cent increase per year, which amounts to almost a 49% increase over the period. This clearly shows the change in the linguistic properties of immigration law. Secondly, and more importantly, the pragmatic measures of decentralisation all saw a rapid increase over the period, in terms of the use of "may" (0.28% pa), the use of enabling language (0.33% pa), and unclear agency (0.22% pa). Indeed the decentralisation interaction shows one of the highest increases of any measure (0.38% pa), and with a high R^2 that implies a relatively uniform change (0.4). This result means that there was a stunning increase in the use of Henry VIIIth Clauses in immigration law, which is crucial to understanding the institutional uncertainty that judges have had to resolve. As a specific example, the first Act to display the use of a Henry VIIIth Clause was the *British Nationality and*

Status of Aliens Act 1943 with just one such clause, as compared with the *Immigration, Asylum and Nationality Act 2006* with 27 such clauses. Finally in terms of conditional language we see the greatest change at 0.58% pa. This amounts to an astonishing 50% increase in the use of conditional phrases over the period. This factor, coupled with the increased use of delegated powers suggests that an extraordinary level of indeterminacy has emerged in immigration legislation over the period.

This leads us to consider the differences between the 1988 Act and the 1996 Act in terms of their indeterminacy. The following table (3.2) shows the real terms comparison of the number of sections that displayed indeterminacy in both Acts:

Table 3.2 Real Terms Differences Between the 1988 Act and the 1996 Act

	Emb	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
1988 Act	9	0	1	5	4	5	10	10	3
1996 Act	11	0	10	5	8	10	11	12	4

Table 3.2 shows that the 1996 Act is significantly more indeterminate in terms of the use of adjectives (1 section in the 1998 Act to 10 sections in the 1996 Act), the enabling of an agent to change the law (4 sections against 8 sections) and the lack of clarity as to which agent is responsible for the law (5 sections against 10 sections). Therefore the 1996 Act is considerably less complete as a legal command than the 1988 Act, and interventions from the bench are as a result more likely. That said both Acts have similar numbers of Henry VIIIth Clauses (3 sections against 4 sections), and are similar in terms of embedding, subjunctive language, the use of "may", conditional language and referential language. Hence it would be misleading to say that the 1988 Act does not have indeterminate elements; however it was the only Act

in the period that was similar in content to the 1996 Act but differed enough in its language to allow a fruitful comparison.

Both Acts were intended by Parliament as small amendments that continued the restrictive immigration policy pursued at that time. The *Immigration Act 1988* was intended to reduce the decision-making powers of immigration adjudicators which had been considerable under section 19(1) of the Act of 1971, as an adjudicator could question the discretion of the Secretary of State to reach a decision. Section 5(1) of the Act of 1988 limited the adjudicators' role to deciding whether on the basis of the facts there were sufficient grounds to deport an individual. Thus it became more difficult to appeal against the Home Secretary's deportation decisions. This Act therefore aggrandised the power of the executive further, but it did so using relatively clear legislative language, therefore providing a more specific set of instructions from the sovereign Parliament to its agents. With a similarly restrictive intention, the *Asylum and Immigration Act 1996* was enacted in order to limit access by asylum seekers to benefits. The Act was passed after government regulations attempting much the same were ruled ultra vires in *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants*[30]. Both Acts therefore have content that was likely to create victims who would seek to dispute the law, but it is the 1996 Act that offers the greater opportunity for success in such an attempt.

[30] [1996] 4 All ER 385

II: The Comparative Methodology

This section will firstly explain why qualitative comparison of judicial dicta has been used, how it has been used, and what potential criticisms there are for this approach. The most important reason why small-N qualitative comparison has been used is to provide detailed empirical verification of a new theory. The Legislative Politicisation of the Judiciary Theory contends that judicial behaviour depends on legislative language, where qualitative changes in the language will encourage predictable responses from the judiciary. Such a new theory that develops supply-side ideas, and considers the micro-foundations of causation needs detailed and inductive analysis rather than only using large-N quantitative methods that would not be able to trace out the causal processes (Pierson & Skocpol, 2002). The difference between small-N and large-N is taken to be the deliberate limitation of the number of cases to a manageable maximum, thereby allowing greater detail to be taken from the causal process. Whereas on the other end of the scale, a single case study approach, where only one judicial decision would be studied in detail would lead to the problem of "many variables – small-N" where there are more observable implications of the theory than there are cases (Lijphart, 1971).

The comparative method will concentrate on qualitative analysis of the resolution of indeterminacy via judicial reasoning (the *ratio decidendi*). Identifying the ratio can be complicated and controversial, which is why a qualitative (or interpretative) approach to analysis has been adopted in order to sensitively extract inferences from the 135 cases. It would be arguably impossible to quantify judicial reasoning without losing a great deal of detail. Quantitative analysis is superb for

presenting correlations, but less useful in demonstrating causation. Other methods such as analytic narratives were rejected because the rationality assumption is not considered to be the primary underpinning of judicial behaviour, and such assumptions draw our attention to variation on the demand-side in terms of changes to judicial preferences (Bates et al, 1998). Qualitative methods can of course lead to biased interpretations of the evidence, however where a parsimonious and verifiable conceptual framework is used (in this case the six observable implications of the "Logic of Appropriateness") there should be robust results that can demonstrate the causal mechanism (Brady & Collier, 2004). The qualitative approach will arguably be better able to answer the how and why questions of judicial behaviour than quantitative, formal or rationalist approaches. The essential point is that at the first stage of theory building cautious empirical verification is required, and this is arguably best achieved with small-N qualitative analysis (Elman & Elman, 2001).

Despite the utilisation of judicial dicta as the source of evidence this thesis is most definitely political science rather than legal scholarship. This is because the cases are used as evidence of political behaviour in response to the delegation of power from parliament. The 135 cases have been selected on the independent variable to maximise their explanatory leverage, so that tentative inferences can be made regarding the causal nexus between legislative language and the political behaviour of judges. This approach is very much in line with current methodological trends in political science of accepting on the one hand the need for scientific rigour (King, Keohane, & Verba, 1994), and yet also appreciating the importance of complex and interesting theory over deductive reasoning and data mining (Brady & Collier, 2004). The aim has been to develop a brand new micro-foundational theory of judicial behaviour, and the empirical verification is by necessity inductive and tentative

(Ragin, 2000; Gerring, Social Science Methodology: A Criterial Framework, 2001; Rogowski, 2004; Munck, 2007).

The next requirement is to explain how the comparative analysis was performed. The method involved comparing the cases brought under the 1988 Act with cases brought under the 1996 Act to see first of all whether the task of statutory interpretation was more difficult under the more indeterminate 1996 Act, and secondly to see how the judges resolved the indeterminacy and whether the "Logic of Appropriateness" was adhered to. There were 34 cases for the 1988 Act, and 101 cases for the 1996 Act, all taken from the LexisLibrary website. The cases show what litigants demanded of the judiciary, and how the judiciary responded through their adjudications. In each case the behavioural impact of the legislative language can be observed under any one of, or any combination of, the following six qualitative categories discussed in the introductory chapter (Hodder-Williams 1997):

> Empirical – Cases are selected in recognition of their legal importance.
>
> Definitional – The judiciary seek to maximise the substantive clarity of the law.
>
> Systemic – The judiciary seek to apply consistent procedural standards when overseeing the implementation of the law.
>
> Prudential – The judges defer in cases where they lack capacity and competence or where legitimate collective action would be the best means of maximising certainty.
>
> Policy-orientated – The judges behave in an anti-empirical and anti-definitional fashion by not tethering their decisions to existing principles of law. Such behaviour is akin to policy-making by legislators and members of the executive branch.
>
> Influence-seeking – The judges behave in an anti-systemic, or anti-prudential fashion, by indefensibly seeking dominance over their fellow judges, or by failing to defer despite lacking capacity, competence, or legitimate collective action.

Potential Criticisms of the Method:

There are two criticisms that could be raised against this qualitative approach to testing the Legislative Politicisation Theory. The first is that quantitative methods could be used and would yield more generalisable results; the second is that comparing the causal impact of two Acts cannot, on its own, demonstrate causation.

Regarding the first issue, the discourse analysis data could have been correlated with quantitative "jurimetric" data of judicial behaviour, thereby enabling a large-N quantative analysis. Jurimetric tests have been performed by McGuire and Vanberg (2005) on decisions of the US Supreme Court, and by David Robertson (1998) on decisions of the House of Lords. By this method one could generate quantitative results from which more objective inferences could be drawn. However the judicial politics scholar Margit Cohn (2001) suggested that to test the theory presented by this thesis an elaborate logit regression would be required where data on legislative language was regressed with data on executive discretion and data on judicial decision-making. Given the complexity of the Legislative Politicisation Theory, and the fact that it has not yet been tested it would be better to build the theory carefully and not rely on over-elaborate verification techniques. In addition a potential problem with large-N quantitative analysis is that it can be ambiguous as to the observable implications of the theory, and cases can be selected on the dependent variable simply to confirm the theory rather than test it (Green & Shapiro, 1994). The principal advantage of small-N comparison is the clarity with which causal processes can be analysed. In addition, great care has been taken to select the cases on the independent variable so that they will test the theory and not simply validate it. There are of course limitations to what can be demonstrated in all areas of political science

due to the need to control so much variation. Being aware of the limitations of the Legislative Politicisation Theory is therefore very important.

The second major concern regarding this theory is that reliance on just two Acts is far too small a sample. Firstly, the two Acts represent 135 cases so there are considerably more cases than the six political behaviour variables to be observed. Secondly as Lijphart argues, the small number of cases would only really matter if a statistical regression was being used (Lijphart, 1971, pp. 684-5). That said, clearly more cases would provide a better basis for generating causal inferences, but once again the general defence is that at an early stage of theory building modest empirical verification is the most prudent strategy in terms of rigorously tracing out the causal process.

III: Results

This results section will produce evidence for each of the six variables of "political" behaviour as displayed in the 34 appeal cases that dealt with the *Immigration Act 1988,* and the 101 cases that dealt with the *Asylum and Immigration Act 1996*. There must be evidence of appropriate political behaviour that is motivated by legislative indeterminacy for the theory to be viable. If however there is strong evidence of inappropriate political behaviour the theory will be falsified. Firstly evidence for the theory will be presented under each of the four appropriate judicial responses to legislative indeterminacy: empirical, definitional, systemic and prudential. There is overlap between these categories, but for the sake of clarity the

evidence will be considered separately. This will be followed by a consideration of the two inappropriate measures of policy-orientated and influence-seeking behaviour.

Appropriate Political Behaviour I: Empirical

The first variable to consider is the empirical variable: that the courts select cases according to their legal importance. This variable is of crucial importance to the Legislative Politicisation of the Judiciary Theory which predicts that as legislative language becomes more indeterminate, there will be more cases that pose an institutional problem to the Rule of Law. Simple but powerful evidence for the theorised link between legislative language and judicial behaviour would be that as indeterminacy increased, litigation to the courts increased, implying that leave was given for cases to proceed on account of the need to resolve indeterminacy.

It is important to consider how judges select cases that are heard. As was discussed in Chapter One there are many more cases that are brought to the courts than are granted leave to receive a hearing, therefore how do the courts discriminate between cases? There are several rules on who may bring a case to court (locus standi) and which cases are most appropriately dealt with by the courts (justiciability). Within the broad range of cases that can be resolved by the courts there are evaluations made as to which demonstrate the greatest merit by contesting crucial principles of law.

The rules on standing, justiciability and merit vary depending on the nature of the legal dispute, with separate rules for public law and private law disputes. More specifically in public law, there are separate rules for judicial review, cases brought

under the *Human Rights Act 1998*, and appeal cases against the decision of a lower court. In judicial review the claimant must demonstrate "sufficient interest" in accordance with section 31(3) of the *Supreme Court Act 1981*[31]. With the *Human Rights Act 1998* there is a stricter test set out in section 7 that an individual must demonstrate "victimhood". Finally an appeal from a first instance decision will be granted leave by the court of first instance or by the appellate court without a consideration of standing but rather a focus on the legal principles raised by the case. The rules that control access to the courts are flexible rather than prescriptive, with the key concept of "sufficient interest" for instance being indeterminate which has led to significant differences of interpretation.

Despite the various rules on access to the courts, the primary metric by which cases brought to the courts are assessed is in accordance with their merits; or more specifically the importance of the principles of law that are raised by the case. Even the concept of sufficient interest that guides the rules of standing is increasingly subordinated to the merits of the case, rather than just the interests of the individual. The *IRC* case[32] was one of the earliest cases to interpret sufficient interest, and it has formed the basis of a "fusion" approach where decisions to grant a hearing are based on consideration of the standing and the merits simultaneously (Craig, 2008, pp. 798-800). The result being that access is typically granted to those cases disputing a crucial principle of law and seeking to vindicate the public interest regardless of the claimant possessing a contestable interest in the case (Craig, 2008, p. 808). An

[31] This provision was not amended by the *Civil Procedure Act 1997* that modernised the application for judicial review.
[32] *R v Inland Revenue Commissioners ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617

important comparison can be made with the cases of the *Rose Theatre*[33] and *Pergau Dam*[34]. In both of these cases there was no direct interest that was suffered by the claimants, but rather they claimed to be representing the public interest. In *Rose Theatre*, a group was formed to fight planning permission for a development on the site of an Elizabethan theatre in London. It was felt that the case had no chance of success and therefore displayed little merit and the hearing was denied. Whereas in the *Pergau Dam* case a group representing the public interest presented a claim of a significant illegality on the part of the Foreign Office in using tax-payers' money to invest in an uneconomic infrastructure project in Malaysia. As a result of the conspicuous merit of this case it was granted a hearing despite the tenuous interest of the claimant. The "fusion" approach of *IRC* has been distinguished in subsequent cases, as there has been a general trend towards liberalising access to the courts. As Paul Craig has said of post-*IRC* cases such as *Argyll*[35] and *Dixon*[36]:

> "In reaching the decision to accord the applicant standing the court did not undertake any *detailed* analysis of the nature of the relevant statutory powers, apart from adverting to the seriousness of the alleged illegality." [Emphasis in original] (Craig, 2008, p. 803)

Standing will typically be denied if the claimant has no "legitimate interest" in the case, and is effectively a busy-body. However if the claimant is pursuing a crucial public interest the courts are more willing to allow access following a brief evaluation of the merits of the case.

An individual judge or a group of judges granting a hearing on the basis of an assessment of the merits of a case could well raise the prospect that judges act as gate-keepers and allow or deny cases a hearing in accordance with their personal

[33] *R v Secretary of State for the Environment ex p Rose Theatre Trust Co* [1990] 1 QB 504
[34] *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement Ltd* [1995] 1 ALL ER 611.
[35] *R v Monopolies and Mergers Cs ex p Argyll Group Plc* [1986]1 WLR 763
[36] *R v Somerset County Council and ARC Southern Ltd ex p Dixon* [1998] Env LR III

policy-orientation, rather than in accordance with considerations of clarity in the Rule of Law. Without more detailed research into which cases are and are not granted a court hearing it is difficult to make firm conclusions about the appropriateness of the decisions taken to allow cases to be heard. However one can suggest that an inappropriate policy-orientated approach to granting a hearing would be observed if many cases that were granted a hearing showed little or no merit by not displaying any significant indeterminacy in the language of the law. This would imply that cases were not necessarily selected in accordance with contestable principles of legal significance. Therefore this empirical measure is limited in what it can tell us about the appropriateness of judicial behaviour, but it is an important component of four interconnected measures, and if all or most of the cases studied demonstrate some indeterminacy of language we may tentatively conclude that decisions to grant a hearing are driven by uncertainty in the law, rather the personality of the judge. This links to the ideas of post-positivism discussed in the introduction where the judge must persuade his peers and the general public that the decision taken was the most appropriate. If there were many cases heard with no obvious indeterminacy it would be difficult for the judges to persuasively demonstrate that their primary concern was the Rule of Law.

Immigration law is an important source of evidence for appropriateness in the selection of cases. This is because first of all, as one would expect from such a complex policy area, a considerable volume of legislation has been enacted in order to create a statutory framework within which successive governments could implement their policies. Legislation on immigration has become longer as the 20th and 21st Centuries have progressed, and amending legislation has been enacted with increasing frequency. After 1960, when immigration policy became more restrictive,

the volume of legislation and the frequency with which it was passed increased greatly. It should however be noted that there has been considerable variance in the length of legislation. This reflects the regular enactment of short policy-amending legislation, and the relatively rare enactment of long policy-changing legislation. Examples of the latter include the *Immigration and Asylum Act 1999* at 170 sections long, and the *Nationality, Immigration and Asylum Act 2002* at 164 sections long. In response to the rapid changes in legislation, and the increased indeterminacy of its language, there has been a huge increase in the number of litigants appealing to the courts. Indeed immigration is the greatest source of public law litigation in the courts system. For instance, initial determinations on immigration appeals to immigration adjudicators rose from 16,118 in 1999 to 107,174 in 2004. Appeals from the adjudicators to the Immigration Appeal Tribunal rose from 14,012 in 1999 to 50,918 in 2004[37]. This boom in demand for legal services coincides with the incorporation of the *European Convention on Human Rights* with the HRA, and the concomitant rise in the role played by human rights organisations in legal interventions at appeals cases (Brooke, 2007). However as will be discussed in chapter six, the HRA is another source of legislative indeterminacy that has forced the judiciary into seeking appropriate resolutions to the uncertainty.

As regards the 1988 and the 1996 Acts the expectation is that the more indeterminate 1996 Act will have had more litigation than the more determinable 1988 Act. This can be seen immediately from the fact that 34 cases disputed the 1988 Act (10 of which were lost by the public authority), as opposed to 101 cases against the 1996 Act (45 of which were lost by the public authority). More specifically one

[37] The Stationery Office (May 2005) *Judicial Statistics England and Wales for the year 2004*. http://www.official-documents.gov.uk/document/cm65/6565/6565.pdf Retrieved on 30/10/2011.

would expect that those sections within *both* Acts that are indeterminate in terms of decentralisation of legislative language will have the highest levels of litigation. The following tables (3.3–4) show the discourse analysis results for the 1988 and 1996 Acts respectively. The results for each section are presented alongside the number of indeterminate elements for each section, the total number of cases that specifically litigated that section, and the number of years the section was in force without amendment or repeal. The discourse analysis results show the binary record of results for each measure of legislative indeterminacy:

Table 3.3: Discourse Analysis Results for the *Immigration Act 1988*

Section	*Emb*	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Total*	*Cases*	*In Force*
1	0	0	0	0	0	0	0	1	1	0	24
2	1	0	0	0	0	0	1	1	3	2	24
3	1	0	0	0	0	0	1	1	3	1	24
4	1	0	0	0	0	0	1	1	3	0	24
5	1	0	0	1	1	1	1	1	6	9	12
6	1	0	0	0	0	0	1	1	3	0	24
7	1	0	0	1	1	1	1	1	6	8	24
8	1	0	0	1	0	0	1	1	4	0	12
9	1	0	0	1	0	1	1	0	5	0	12
10	0	0	0	0	0	0	0	1	1	0	24
11	0	0	0	0	0	1	1	0	2	0	24
12	1	0	1	1	1	1	1	1	7	1	24

Table 3.4: Discourse Analysis Results for the *Asylum and Immigration Act 1996*

Section	*Emb*	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Total*	*Cases*	*In Force*
1	1	0	1	0	1	1	1	1	6	4	3
2	1	0	1	0	1	1	1	1	6	37	3
3	1	0	1	0	1	1	1	1	6	1	3
4	0	0	1	0	0	0	1	1	3	0	3
5	1	0	1	0	0	1	1	1	5	0	6
6	1	0	0	0	0	0	0	1	2	0	14
7	1	0	1	1	0	1	1	1	6	0	3
8	1	0	1	1	1	1	1	0	6	8	10
9	1	0	1	1	1	1	1	1	7	24	3
10	1	0	0	0	1	1	1	1	5	16	3

Section	*Emb*	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Total*	*Cases*	*In Force*
11	1	0	1	1	1	1	1	1	7	20	3
12	0	0	0	0	0	0	0	1	1	0	14
13	1	0	1	1	1	1	1	1	7	8	3

The Legislative Politicisation Theory makes the case that the most important linguistic factor is the decentralisation of language where the meaning of law is delegated to a trustee of Parliament. Firstly it should be noted that the most critical measure of decentralisation – that of enabling language – appeared in 33% of the sections of the 1988 Act, as opposed to 62% of the sections of the 1996 Act. One can see that sections without enabling language have fewer cases and have been in force for far longer than those sections that do display this core feature of linguistic decentralisation. Thus there is evidence that the indeterminacy of legislative language does affect how many cases will need to be resolved by litigation. In one particular case regarding the 1996 Act, the Home Secretary himself appealed to the Court of Appeal seeking a determination of the meaning of the legislative language because there were 650 cases pending in lower courts[38]. The case involved the denial of benefits to asylum seekers and the courts had to untangle several legislative provisions including s 95 of the *Immigration and Asylum Act 1999*, s 55(1) of the *Nationality, Immigration and Asylum Act 2002*, and most importantly for this chapter, s 8 of the *Asylum and Immigration Act 1996*. As one can see from Table 3.4, section 8 displays six types of indeterminacy including all three types of decentralisation of meaning. The confusion created by this mass of indeterminate law had encouraged many asylum seekers to use the *Human Rights Act 1998* to claim an infringement of

[38] *R (on the application of Limbuela) v Secretary of State for the Home Department; R (on the application of Tesema) v Secretary of State for the Home Department; R (on the application of Adam) v Secretary of State for the Home Department* - [2005] 3 All ER 29

their right to be safe from degrading or inhuman treatment as per Art 3 ECHR. It is clearly important if even the Home Secretary demands the technocratic services of the judiciary.

There is no evidence that case selection by the judges was led by any other considerations than the indeterminacy of the language, as there were no cases brought against any section that did not display an important form of indeterminacy. Of course this cannot be used on its own as evidence that the judicial resolution was appropriate because the judges could simply have had policy preferences that coincided with the most indeterminate sections. Therefore further analysis of the resolutions of the cases is required.

Appropriate Political Behaviour II: Definitional

It is important to move beyond the general connection between legislative language and the number of cases, and to look at the more specific causal impact of indeterminate legislation. The second appropriate form of political behaviour is definitional – whereby the judiciary maximise certainty in the law by linking substantive uncertainty to existing principles of law.

As one can see in Table 3.3, section 5 of the *Immigration Act 1988* was one of the most indeterminate sections of that Act, and it is also the most substantively controversial part of that Act as it sought to remove the right to appeal against variation of leave if a deportation order is made. This was a radical restriction in the legal redress available to immigrants and was couched in indeterminate language

which led to confusion regarding when exactly appeal rights disappeared. This confusion was an institutional problem that the senior judiciary had to resolve:

> "5 (1) A person to whom this subsection applies shall not be entitled to appeal under section 15 of the principal Act against a decision to make a deportation order against him… except on the ground that on the facts of his case there is in law no power to make the deportation order for the reasons stated in the notice of the decision.
>
> (2) Subsection (1) above applies to any person who was last given leave to enter the United Kingdom less than seven years before the date of the decision in question *but the Secretary of State may by order exempt any such persons from that subsection in such circumstances and to such extent as may be specified in the order*." [Emphasis added]

There were nine cases where this section was challenged at a senior court, and the section was in force for 12 years before it was amended. All of the cases against section 5 came between 1989 and 1992, after which point no more high-level appeals were granted leave. This in itself shows that the courts rapidly ameliorated the meaning of the section and established a binding precedent. For instance in *Mundowa and Ors*[39], a case against section 5, the Court of Appeal received a claim for judicial review from three applicants against the Home Secretary's decision to deport them and deny them a right to appeal. The problem was that all three had been granted leave before the 1988 Act had been enacted. Thus the court had to decide whether Parliament intended for the restriction on rights of appeal to be applied retrospectively to those whose expectations of appeal rights were different when they first arrived. The court thus had to make an extremely difficult and politically sensitive decision, and in the end it was ruled that retrospective effect had been intended by Parliament. Thus one can see that through the use of indeterminate language, the courts were forced to make a hugely important political decision regarding the implementation of section 5 of the 1988 Act.

[39] *R v Secretary of State for the Home Department, ex parte Mundowa and related applications and appeals* [1992] 3 All ER 606

Another important case for section 5 of the 1988 Act showed the House of Lords establishing a firm precedent so as to stop excessive levels of judicial review from litigants testing the meaning of the law[40]. It was not at all clear from section 5 whether appeal was available against the existence of the power to deport, or only against the exercise of that power. The Lords decided that the existence of the power could not be questioned on appeal, and that appeal was only possible in terms of the exercise of the power, as per well-established Common Law principles. Here again one can see the courts being drawn into political controversy and making a final resolution of the substantive legal meaning for the sake of certainty. The judicial resolution of section 5 was restrictive but in accordance with the principles of parliamentary sovereignty and the Rule of Law. Therefore by linking the indeterminacy of the section to well-established principles the cases ensured the efficacy of the legislation. It is beyond the constitutional role of the courts to evaluate the existence of power in the abstract, without the concrete specifics of a case to highlight the potential illegality of that power. Hence the indeterminacy in the 1988 Act created the need for the courts to seek a resolution that linked the linguistic problem to existing principles of law, and this is what the cases brought under the 1988 Act show.

The *Asylum and Immigration Act 1996* also contains indeterminacy that had to be resolved by the senior courts. Section 9 limited entitlement to housing assistance for those under immigration control. As one can see from Table 3.4 this section was very indeterminate, encouraged 24 cases, and was only in force without amendment for three years:

[40] *Oladehinde v Secretary of State for the Home Department; Alexander v Secretary of State for the Home Department* [1990] 3 All ER 393

> "9 (1) Each housing authority shall secure that, so far as practicable, no tenancy of, or licence to occupy, housing accommodation provided under the accommodation Part is granted to a person subject to immigration control unless he is of a class specified in an order made by the Secretary of State…
>
> (3)An order under this section— (a)may make different provision for different circumstances or for accommodation or assistance of different descriptions."

This law is incomplete and needed to be fleshed out by the Secretary of State and the courts. When cases arose to dispute this section, the courts had to find a substantive anchor upon which to tether the indeterminacy of the section. The courts in particular were asked to determine whether this section repealed by implication the *National Assistance Act 1948*. Parliament had not expressly repealed the earlier law which guaranteed basic rights to housing assistance, and given the abject deprivation that would result from section 9, a very careful process of judicial definition was required. Many cases dealt with this difficulty for the brief period that the section was still in force, but the courts rapidly moved towards a settled definition of section 9, one that frustrated the government but that the courts believed was the correct construction intended by Parliament. As per Mr Justice Collins[41]:

> "I do not regard this conclusion as in any way frustrating the will of Parliament in enacting the 1996 Act. I find it impossible to believe that Parliament intended that an asylum seeker…should be left destitute, starving and at risk of grave illness and even death because he could find no-one to provide him with the bare necessities of life. Clearly Parliament intended that, unless they applied on entry, asylum seekers should find it very difficult to exist in this country. No doubt, it was hoped that the bogus would thereby be deterred from coming or forced to return whence they came. But if an entrant faced the dilemma and decided that he had to stay, because to return would be to court persecution, I am sure that Parliament would not have intended that he must nonetheless be left to starve."

Essentially the courts had to resolve the incomplete substance of section 9 in accordance with existing positive law (the 1948 Act) and the underpinning substance

[41] *R v London Borough of Hammersmith and Fulham, ex parte M; R v London Borough of Lambeth, ex parte P; R v Westminster City Council, ex parte A; R v London Borough of Lambeth, ex parte X*. The Times 18 October 1996.

of the Rule of Law that individuals should be treated equally unless Parliament has expressly stated otherwise. Similarly as per Sir Christopher Staughton[42]:

> "[358] What change since 1948 has affected the treatment of that question in the *National Assistance Act 1948*?…the real change lies in the deprivation of benefits imposed by the *Asylum and Immigration Act 1996*. It was that Act which created a new need. If Parliament had intended it to be resolved by rewriting the *National Assistance Act 1948*, it had only to say so."

The cases brought under section 9 raised the greatest definitional indeterminacy faced in dealing with the 1996 Act. The evidence suggests that the courts reasoned according to well established legal principles to resolve the indeterminacy. The definitional role was more in evidence with the 1996 Act because its language is slightly more indeterminate, thus more cases were heard on the same section, and more difficult resolutions had to be made regarding the deprivation of benefits to asylum seekers. This is all supportive of the theory that judicial political behaviour depends on legislative language, and that indeterminacy of language encourages appropriate political behaviour from the bench.

Appropriate Political Behaviour III: Systemic

The next observable manifestation of appropriateness that was observed in the cases coming under the two Acts is the systemic impact of decisions. The Legislative Politicisation Theory predicts that indeterminate legislation will lead to cases where a government trustee of Parliament uses the discretion granted by the indeterminate

[42] *Regina v Secretary of State for Health, ex parte Hammersmith and Fulham London Borough Council and others* [1999] LGR 354

language to employ judicial or legislative powers that are challenged in litigation. Judges will evaluate the legality of such actions with a response that draws on well-established procedural rules and methods of construction including the Common Law rules of legality, fairness and reasonableness; and occasionally methods of international law including proportionality. By utilising existing procedural mechanisms the courts ameliorate the legislative indeterminacy by integrating the legislation into an existing institutional framework. By this means the judges influence the balance of power within the entire political system, not with the intention of advancing their personal goals but of advancing institutional certainty in the Rule of Law.

Once again the evidence shows that the *Immigration Act 1988* had fewer cases where existing procedural principles of law were required to interpret the legislation, because the language of that Act was more easily determinable by the judges. There were just two cases where Common Law legality principles formed the basis for the judicial review, in the *Malhi* case heard at the High Court[43] and the Court of Appeal[44]. These cases considered the indeterminate section 5 of the 1988 Act (discussed above) that limited the right to appeal against a deportation decision taken under the *Immigration Act 1971*. In these cases, Sonia Malhi, was contesting the procedural propriety of her deportation. This is a well-established point of administrative law, and her counsel cited some classic legal precedents relating to Common Law legality including *Wednesbury*[45] and *Anisminic*[46]. The claimant referred to the Common Law because the procedure by which she was given notice of

[43] *Regina v Secretary of State for the Home Department, Ex parte Malhi* (1989) Times, 8 November
[44] [1991] 1 Q.B. 194
[45] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223
[46] *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147

deportation was manifestly unfair, and this was therefore not just a definitional issue, but also concerned the extent of power enjoyed by the executive branch where Parliament had not given precise instructions. Mahli had been invited to an interview with immigration officers to consider her case but had not attended because her husband had hidden the invitation from her. She was then told of the Home Secretary's decision to deport her and she claimed it was procedurally unfair as she had been denied a chance of defending herself. In the end the judiciary in these cases ruled that the relevant procedural content of section 5(1) was not indeterminate, but how it applied in the context was. This shows the impact of pragmatic indeterminacy, and the need for the courts to assimilate the operation of the Act into the existing framework of legal and executive power.

The use of existing procedural rules in the Common Law and international law to resolve indeterminacy was far more prevalent in cases regarding the *Asylum and Immigration Act 1996*, largely because that Act was far more indeterminate in its linguistic properties and had to be clarified by a range of legal instruments. Procedural oversight by the courts includes oversight of the quasi-judicial functions performed by executive agencies. The "systemic" coherence of jurisprudence therefore extends beyond the confines of the curial hierarchy, and engages consideration of prudential behaviour, where the courts choose whether to intervene in executive decision-making on the basis of capacity and competence. The following cases will be considered in this systemic section because the courts chose to intervene to improve the procedural mechanics of quasi-judicial decision-making by the executive branch. In six important cases under the 1996 Act, the procedure by which decisions were made was assessed in accordance with a rationality test. This test was

used to resolve three of the cases: *Bouheraoua & Kerkeb*[47], *Dahmas*[48], and *Zeqiri*[49]; and was rejected in *Berisha*[50], *Gangera*[51], and *Sirghl*[52]. A reasonableness test is a very significant legal instrument, and that so many cases employed it to resolve indeterminacy in the 1996 Act is astonishing. It is a test where the actions of a public authority are deemed illegal on the basis that the decision was "…so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"[53]. This would be a truly appalling indictment for any administrative decision, and hence very rarely is it successful in court. Nevertheless the linguistic state of the 1996 Act was such that three cases made a decision on these grounds.

All of the cases, bar *Gangera*, were concerned with section 2(2) of the 1996 Act; which as one can see from Table 3.4 was very indeterminate with six measures on the discourse analysis, a total of thirty-seven cases litigated its meaning, and after all it was only in force without amendment for three years. Section 2(2) empowered the Secretary of State (in this case the Home Secretary) to certify which countries were safe and thereby acceptable places to return an asylum seeker. Issuing such certificates was legally fraught with complications in terms of the international human rights commitment to non-refoulement – the principle that refugees will not be returned to a hostile country. Many of the cases concerned certificates issued regarding countries that were intuitively safe third countries, however the issue was

[47] *R v Secretary of State for the Home Department, ex parte Bouheraoua; R v Secretary of State for the Home Department, ex parte Kerkeb*
[48] *R v Secretary of State for the Home Department, ex parte Dahmas*
[49] *R (on the application of Zeqiri) v Secretary of State for the Home Department* - [2001] All ER (D) 120 (Mar)
[50] *R v Secretary of State for the Home Department, ex parte Berisha and another*
[51] *R (on the application of Gangera) v London Borough of Hounslow*
[52] *R v Secretary of State for the Home Department, ex parte Sirghl*
[53] Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410

whether the certification of these countries had been done rationally, such that the Secretary of State was confident that the individuals would not be refouled which would breach Britain's commitments to the *Geneva Convention Relating to Status of Refugees 1951* and the European Union's *Dublin Regulation*. For example the *Zeqiri* case concerned whether the certification of Germany as a safe third country had been rationally undertaken. This case was lost by the Home Secretary at the Court of Appeal on the "heightened *Wednesbury*" test of rationality. Although this decision was overruled by the House of Lords, the Court of Appeal were satisfied that the Home Secretary had taken the power delegated by Parliament and acted in a totally irrational manner. As per Lord Phillips, when he was Master of the Rolls:

> "[70] In a case such as this, where important human rights are in play, a particularly rigorous examination of the decision is required in accordance with the guidance given by Sir Thomas Bingham, MR, in *Reg. v Ministry of Defence ex parte Smith* [1996] 1 QB 517 at pp.554-5. Whichever approach is adopted the result in this case is the same. The Secretary of State has not sought to advance any considerations of public interest in support of his decision. For the reasons that I have given I find that his decision to remove the appellant to Germany rather than determine his entitlement to asylum in this country was unreasonable and should be quashed."

The court accepted that it would be preposterous to suggest that Germany was unsafe, but it was not rational for the Secretary of State to deport an individual without giving diligent attention to the particulars of the case. The reasonableness test is so critical of administrative action that it is rarely employed and always resented by those that are labelled as having acted unreasonably. The fact that six cases considered a reasonableness test shows the extraordinary amount of power that was delegated to the government by the 1996 Act through extremely indeterminate language. The courts had to establish the grounds of legality of a certificate under section 2(2) in order to ensure clarity in the Rule of Law. Whilst it could be argued that the courts were being inappropriate in questioning the rational judgement of the Secretary of

State, this power to review the rationality of a decision has emerged precisely in response to the enormous discretion enjoyed by the government due to delegations of power from Parliament. It would have been quite inappropriate for the judges to have stopped examining the decisions of the Secretary of State simply because it concerned Germany. This surely would be evidence of the courts inappropriately making a substantive assessment of the safety of Germany when their only constitutional task is to assess the legality of the actions taken by the Home Secretary. The Lords allowed the appeal but only when it could be shown that the decision was reasonable, and it had not been wrong for the Court of Appeal to have checked the procedural background of the decision.

The development of the "heightened *Wednesbury*" test of rationality in the case of *Smith* was in recognition of the uneasy conflict between principles of law that underpinned Parliamentary sovereignty and the enormous discretion that was being enjoyed by the government. In that case the discretion was used to restrict homosexuality in the armed forces, and the adaptation of the Common Law to deal with such incursions into rights and liberties was a natural reaction to the incredible indeterminacy thrown up by Parliamentary legislation.

Appropriate Political Behaviour IV: Prudential

The final measure of appropriate political behaviour is prudential behaviour, where judges intentionally limit the impact of their decision in consideration of the lack of capacity, competence or the need for the legitimation of collective action. It is important first of all to consider whether the exercise of restraint can really be

conceptualised as a "political" act. Arguably the denial of power is as important politically as is its exercise. Such an analysis was powerfully established by Stephen Lukes (1974) with the second dimension of power – the power of non decision-making. There is a risk however of a pernicious reductionism whereby all judicial behaviour is conceptualised as political. However as discussed in the introductory chapter, as the courts are an important political actor all of their behaviour in terms of public policy is political, but "political" is not a simple concept and cannot always be used in a pejorative sense when referring to judges. What is important is the distinction between appropriate and inappropriate political behaviour. Senior judges cannot help making politically significant decisions, but what matters is what motivates those decisions.

One means by which the prudence of the courts can be observed is where the official ratio decidendi recognises the meaning of the law and the lack of capability of the British courts to question it, despite obiter recognition of the inadequacies of the policy. Indeed the causal link between legislative language and judicial behaviour can be clearly observed from cases appealing the *Immigration Act 1988*. As that Act was reasonably determinable the judges felt unable to interpret the language away from the restrictive consequences of the policy. As a result several cases were appealed to the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) as litigants felt that the British courts were not upholding their substantive rights. For instance in *Carpenter v Secretary of State for the Home Department*[54], the ECJ used a proportionality test to rule that the British government, in trying to deport the Pilipino national Mary Carpenter, would breach her right to a family life with her

[54] (Case C-60/00) - [2003] QB 416

British husband. The British judges could not reach the decision that the European Court considered was reasonable in the specific circumstances of the case.

Evidence for the link between legislative language and judicial behaviour is even more compelling as regards the *Asylum and Immigration Act 1996*. In a number of cases the judges declared obiter that they personally found the policy repugnant, but they nevertheless faithfully followed the strict meaning of the words because some of the sections of the 1996 Act were reasonably determinable. For instance in *Dupovac v Secretary of State for the Home Department*[55], Lord Justice Chadwick and the Court of Appeal could not stretch the wording of the *Immigration Act 1971*, nor the amendments brought in with Schedule 2 to the 1996 Act:

> "If the words "by reason of the appellant leaving the United Kingdom" have not been included in order to restrict cases of abandonment to those in which the appellant has left the United Kingdom, then there is no escape from the question: for what other purpose have they been included? In my view, the only answer which can be given to that question is that the words have been included in order to require the adjudicator, or the Appeal Tribunal, to treat an appeal as abandoned on the appellant leaving the United Kingdom, without further inquiry into the facts of the particular case. That may seem a draconian result; but I see no escape from it."

The judge clearly signals the harshness of the policy enacted by the 1971 and 1996 Acts, and yet quite appropriately denies his political power to resolve this case. Clearly the consequences of a judge manipulating clear legislative language would be inappropriate policy-orientated behaviour and would quite rightly encourage opprobrium.

A very similar situation was faced by Lord Justice Brooke in the *Salem*[56] case where the meaning of the 1996 Act was challenged:

[55] [2000] All ER (D) 54
[56] *R. v Secretary of State for the Home Department, ex. p. Salem* [1999] Q.B. 805

> "[829] It also seems to be very unsatisfactory that a vulnerable person's statutory right to benefit should be stopped without any reasons being given for the stoppage, save that the benefit authorities have been told by the Home Department that his/her asylum claim has been refused for some unexplained reason, although this appears to be the clear effect of the Act and the regulations we have had to construe."

This is good evidence in support of the theory that legislative language encourages an appropriate response from the judiciary, as they will refuse to exercise power if to do so would be to exert a greater capacity, competence or legitimacy where none existed.

Inappropriate Political Behaviour I: Policy-orientated

It is not sufficient to merely collect evidence in support of the theory, and attempts should be made to falsify it as well. Therefore the theory would be disproved if evidence could be found that the judges did not select cases according to their legal importance (anti-empirical), or did not seek to resolve substantive uncertainty in the law by establishing links with existing principles (anti-definitional). As the Tables 3.3 and 3.4 suggest, there is absolutely no evidence for anti-empirical behaviour in the judges, as all of the cases concerned a manifest pragmatic indeterminacy in the law. Therefore attention must be focussed on finding evidence that the definitional role of the courts was inappropriately implemented.

Such behaviour could be observed with judicial dissents from the majority, which would imply multiple mutually exclusive resolutions to the definitional indeterminacy. There is no such evidence from the 1988 Act. First of all there were few cases beyond section 5 that required any definitional clarification because of the relative determinacy of that Act. Of those cases that did emerge, the ratios show the

courts carefully crafting links with existing legal principles. Indeed there were just three dissents in all 34 of the cases that considered the 1988 Act, and there were only five separate dissents in all 101 cases for the 1996 Act. The judicial consensus on the substantive content of the law is clearly very stable, even in radically different case situations.

Indeed when one looks closely at the dissentients, there is no evidence at all that their motivations are personal policy-orientation as their opinions are highly respectful of the majority opinion, and most importantly they are based on very careful analysis of the institutional requirements of the law. This shows the difficulty the judges face when interpreting indeterminate legislative language, and that the resolution is persuasive rather than demonstrative. So long as the proposed resolutions are justified according to existing principles of law, the behaviour will be appropriate.

For example in the case of *Remilien*[57] the appellants were EEA nationals who sought clarification of the *Income Support (General) Regulations 1987* in conjunction with the 1988 Act. The court majority accepted the submission of the claimants that "required to leave" under the 1987 Regulations could not be communicated by a letter as this had no legal force to communicate such a judgement, and in the interim the 1988 Act provided that EEA nationals did not require leave to remain. Lord Slynn of Hadley rejected the majority interpretation that "required to leave" could not be communicated by a letter from the Secretary of State. In so concluding, was his interpretation of the legislation inappropriate, or was the majority resolution inappropriate? Arguably neither proposed resolution was inappropriate, because both

[57] *Secretary of State for Social Security v Remilien; Chief Adjudication Officer v Wolke* - [1998] 1 FLR 444

attempted to resolve indeterminacy in accordance with existing principles of law, and the dissent was caused by extreme indeterminacy in the 1987 Regulations in conjunction with the 1988 Act. As per Lord Slynn:

> "[132] The appeal turns on the proper interpretation of the words 'is required by the Secretary of State to leave the United Kingdom' in reg 21(3)(h) of the 1987 regulations (as amended) and on the question whether the relevant letters constituted such a requirement. The word 'required' has different shades of meaning and compulsion.
>
> Your Lordships have been given dictionary definitions and examples to show that the word may or may not connote a legal power to enforce what is 'required'. *It plainly depends on the context* in which the word is used. It is for that reason necessary to consider the scheme of the legislation providing for income support and the immigration legislation relative to the appellants' presence in the United Kingdom." [Emphasis added]

This is a stunning example of the importance of pragmatic indeterminacy and the difficulty it creates for statutory interpretation. As Lord Slynn acknowledged, the words themselves are incapable of communicating meaning, and resolution depends on context. Thus the courts were required to tie legal and extra-legal material together in the clearest resolution of the indeterminacy that was possible. Arguably the majority decision was the most appropriate as it rested on a presumption that EEA nationals could not be required to leave without direct legal communication, however it would be wrong to denounce Lord Slynn for being inappropriate. His judgement also sought a resolution of the legal indeterminacy, but his approach favoured a presumption towards executive discretion in deportation decisions, which would have arguably confused the position of EEA nationals in relation to domestic law. In this judgement Slynn followed an identical dissent in the Court of Appeal from the Master of the Rolls, Lord Phillips. These dissents offered an alternative resolution to the legal indeterminacy and do not display the kind of individualism that one would expect of a judge motivated purely by personal preferences.

Inappropriate Political Behaviour II: Influence-seeking

As argued in the introductory chapter, it is very difficult to measure a judge behaving in a politically inappropriately manner according to personal preferences. In none of the 135 cases studied did a judge admit to basing a ratio on personal political beliefs. Indeed only in obiter statements did judges ever make hints to their personal disapproval of a policy that they felt unable to avoid implementing. Nevertheless it is important to test the legislative politicisation theory by examining the assumption of attitudinal and strategic studies that judges always determine a case according to their personal preferences. Even if the judges talk the language of the law, they could be simply hiding their true intentions through clever reasoning. A clear means of observing such inappropriate behaviour without having to measure the preferences of the judges would be to assess cases in terms of whether the courts failed to apply existing procedural principles to a new case (anti-systemic), or failed to defer to another agent of Parliament despite a lack of capacity or competence (anti-prudential).

The most contentious cases that potentially display anti-systemic or anti-prudential behaviour of the 135 cases studied, were four conjoined appeals brought to the Administrative Court regarding the 1996 Act in conjunction with a range of other pieces of legislation[58]. The cases concerned the right of asylum seekers to claim benefits. Collins J held that the asylum seekers were eligible for support despite

[58] *R v London Borough of Hammersmith and Fulham, ex parte M; R v London Borough of Lambeth, ex parte P; R v Westminster City Council, ex parte A; R v London Borough of Lambeth, ex parte X* (1996) Times, 10 October

having their claims rejected by the statutory authority, the National Asylum Support Service, because they had not claimed for asylum "on arrival" which was stipulated by section 9 of the 1996 Act. Collins J construed section 21(1)(a) of the *National Assistance Act 1948* as continuing to provide the legal basis for supporting asylum seekers despite the intervention of the 1996 Act. This conclusion was vigorously opposed by the Home Secretary on appeal to the Court of Appeal, as the government had specifically enacted the 1996 Act to overturn a similar conclusion in *R v Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants and R v Secretary of State for Social Security, ex parte B*[59]. Therefore was Collins J being anti-systemic by ignoring new procedural guidelines set out in the 1996 Act, or was he being anti-prudential by undermining the executive discretion to deny benefits to certain asylum seekers? Arguably not, as Lord Woolf stressed when rejecting the Home Secretary's appeal from Collins's decision[60]:

> "The result is that section 21(1)(a) should enable assistance to be provided at least in the case of some asylum seekers… This court's task is limited to seeking to clarify the proper interpretation and scope of section 21(1)(a) which having been done means this appeal should be dismissed."

Therefore the key to understanding the decision of Collins J was as an attempt to fully resolve the indeterminacy in the law for which the 1996 Act had added great confusion. Collins J could only do as Parliament had ordered him to do, but with the 1996 Act, Parliament had made its orders very unclear and the judge had to interpret what the most likely intention of Parliament was. In the absence of clear guidance the courts were bound to assume that Parliament did not intend to cause undue hardship. Parliament cannot create orders based on such loose definitions without the courts

[59] [1996] 4 All ER 385
[60] 30 HLR 10

having to intervene to maximise clarity in the law. The Home Secretary may have rejected the decision as inappropriate influence-seeking, however this would be a total misunderstanding of the British Constitution. Parliament's intentions are represented by legislation that is enacted by the Queen, Lords and Commons; and its commands cannot be represented by the opinions of the executive as this would be to turn the clock back to before the 1689 constitutional settlement. Complaints of inappropriate influence-seeking behaviour, or indeed "judicial activism", would be justified if the legislative language stated absolutely explicitly that: "…benefits are denied to asylum seekers, and this policy overrides any international legal commitments and any domestic rights". One can see the difficulty faced by politicians in constructing popular immigration policy, but it is wrong to blame the judges when the legislation was indeterminate.

Conclusion

This chapter has presented the results of comparative analysis of the impact of legislative language on judicial behaviour. The evidence is good for a link between indeterminate legislative language and appropriate political responses from the judiciary. Conversely there is little evidence that the legislation was not a causal factor or that judges simply followed their personal preferences in making a judgement. The very indeterminate *Asylum and Immigration Act 1996* led to a great deal more political behaviour than the more determinable *Immigration Act 1988*, and the political behaviour was appropriate to ameliorate the indeterminacy in the Rule of Law. It is very important to note the limitations of this conclusion, and accept that much cannot be demonstrated (King, Keohane, & Verba, 1994). The theory that the

behaviour of senior judges is reactive to the institutional requirement of maximising certainty in the law in response to the language of legislation is new, and as such these results are tentative attempts at empirical verification, but they are nevertheless promising and they point the way to more ambitious and elaborate testing methodologies.

Before moving on to examining the impact of indeterminacy on judicial interventions in local government, it is important to consider a theoretical situation where Parliament enacts a fully determinate piece of legislation that goes diametrically against all established constitutional principle. What would be the appropriate judicial response, where to implement the law would be to undermine the principles of underpinning certainty in the Rule of Law? The courts have fortunately not had to resolve this dilemma, although they came very close when clause 14 of the *Asylum and Immigration Bill 2004* was proposed:

> "(6) No appeal shall lie to the House of Lords from any decision of an appellate court in relation to the giving of an opinion under this section."

This "ouster" clause sought to remove the legal jurisdiction of the highest courts in appeals against asylum decisions taken by an executive tribunal. The government faced severe criticism for even proposing such a law, and Lord Woolf the Lord Chief Justice commented in the press, ideas that he had postulated in a lecture in 1994:

> "Both parliament and the courts derive their authority from the rule of law, so both are subject to it and cannot act in a manner which involves its repudiation." (Dyer, 2004)

Therefore by denying the role of the courts in policing the Rule of Law it had been suggested that the courts might adopt the "nuclear option" and refuse to enforce a

fully determinate piece of Parliamentary legislation. This was largely a threat, and led to a government climb-down, but it raised very interesting questions about when theoretically it would be possible for the courts to overrule the explicit instructions of the sovereign. It is significant that this thought exercise was provoked in relation to asylum and immigration law where there is such distinct tension and confusion as regards sovereign power and legal principle.

Chapter Four: Indeterminacy in Homelessness Legislation

> "Mr Jan Luba QC, for the Appellant, and Mr Andrew Arden QC, for the Respondent in this appeal, both agree that amendments to s 193 of the *Housing Act 1996*, made by the *Homelessness Act 2002*, are not happily drafted."
>
> Lord Justice May in *Griffiths v St Helen's Metropolitan Borough Council* [2006] EWCA Civ 160 para 1.

> "…semantic nightmare"
>
> Sheriff Sinclair's appraisal of the composite legal definition of 'becoming homeless intentionally'. (Luba & Davies, 2010, p. 502)

Introduction

The above quotes are a tantalising glimpse into the dense complexity of homelessness legislation, and the reaction to it from judges. The reason for focussing on homelessness is that in order to observe and analyse the political behaviour of judges it is necessary to assess not only their institutional role at the central government level, but also that same role in relation to local government. This chapter will focus on local government in England and Wales due to the different legislation that empowers local government in Scotland and Northern Ireland. The aim of this chapter is to provide evidence from another level of government in support of the contention that the key causal factor underpinning political behaviour in judges is the language of the legislation, and the optimal resolution is in accordance with the "Logic of Appropriateness".

The constitution and powers of local government are almost entirely based in statute law and therefore changes in the supply-side of homelessness legislation ought to significantly affect not only the provision of local services, but also their judicial supervision. In addition to this, local government has been, and continues to be, a hugely important source of public law litigation on account of the highly significant resource allocations made at the local level. In some policy spaces it has been contended that local government no longer fulfils the role of a democratic check on central power but increasingly acts as the facilitator of central policy, thereby making local government litigation in some cases a vicarious litigation against the policies of the central government (Feldman, 2004). This should be seen in the context of "New Public Management" reforms to bureaucracy and service delivery in the UK during the 1980s and 1990s that has led to a change in the nature of local government and a concomitant change in the role of the judiciary:

> "…the government's determination to change the role of local government away from that of service provider, aroused significant opposition (and non-compliance) from local authorities, especially but not only those controlled by the Labour Party. The territory was increasingly 'juridified' with both the creation of a vast complex of statutory constraints and duties, much poorly drafted, and the development of a significant body of case law in which the courts, with some reluctance, took on the role of umpire." (Feldman, 2004, p. 253).

Therefore, in order to fully understand the political role of the senior judiciary in the British state, local government is a crucial source of evidence. This chapter will focus in particular on the provision by local government of social housing to the homeless. After immigration, homelessness has for a long time been the second largest source of judicial review caseload at the Administrative Court[61], and has been selected for

[61] The Law Commission (1994) *Administrative Law: Judicial Review and Statutory Appeals* (LAW COM.No.226), p. 12. The House of Commons Parliamentary Papers (2003/04) *Department for Constitutional Affairs. Judicial Statistics England and Wales for the year 2003* (Cm 6251), p. 20.

analysis in order to see how differences in legislative language in this field translate into different judicial responses.

This chapter will begin with a discussion of the constitutional position of local government in England and Wales, and the role of the judiciary in mediating between centre and periphery in the delivery of public services (I). Particular focus will be placed on the meaning of 'homelessness' and the powers and duties of local authorities in relation to the allocation of social housing. Secondly the discourse analysis results for all legislation pertaining to homelessness will be presented and the two Acts chosen for comparison will be examined – the *Housing Act 1996 Part VII* and the *Homelessness Act 2002* (II). Finally the results of the comparison will be discussed on the six observable measures of political behaviour – empirical, definitional, systemic, prudential, policy-orientated, and influence-seeking (III).

I: The Powers and Duties of Local Government in Response to Homelessness

The constitution of local government in England and Wales is primarily based in statute law and is therefore not legally entrenched. As such the powers and duties of local government are complex and malleable. However there are elements of local government constitutionalism which approach entrenched status without actually being entrenched. For instance, as a result of local government enjoying elected legitimacy the courts have made it clear that none but the most explicit legislation can infringe their powers. In addition, the UK since 1997 has been a signatory to the *Council of Europe Charter of Local Self-Government*, which commits the government

to local democracy and subsidiarity of decision-making. However the Charter is not enforced by a Europe-wide court in the same manner as the *European Convention on Human Rights*. Instead it depends on being enacted in the member states' domestic legislation and being enforced by the domestic courts. Much of the substantive content of the Charter was enshrined by the *Local Government Act 2000*, and thus one can say that the powers of local government have pseudo-constitutional status.

Notwithstanding the constitutional position of local government, the powers and duties that are delegated to the local level to deal with homelessness involve complex questions of legal, territorial and fiscal jurisdiction, all of which play out in the standard political context of scarce resources and excess demand. The jurisdictional complication can be seen from the fact that there are 347 different authorities responsible for housing allocation in England and Wales. This includes 201 non-metropolitan boroughs, 55 unitary authorities, 36 metropolitan districts, 33 London boroughs, and 22 unitary authorities in Wales. The number and structure of these governmental bodies responsible for housing has changed significantly over the course of the 20th Century, and the current structure is based on major reforms instituted by the *Local Government Act 1972*. The extent of the housing problem that these authorities contend with can be roughly gauged from the number of households that Local Authorities in England estimated as requiring the "main housing duty", which was 42,390 in 2010, down from 111,340 a decade earlier[62].

The provision of housing as a welfare service to those found to be destitute dates back to a Royal Commission established by Lord Salisbury in 1883. From this

[62]Department for Communities and Local Government (2011) *Housing: Notes and Definitions for Homelessness Data,* http://www.communities.gov.uk/housing/housingresearch/housingstatistics/housingstatisticsby/homelessnessstatistics/notesdefinitions/ Retrieved on 30/10/2011.

first step there gradually emerged a policy of housing provision that rejected a Bismarkian model of social insurance, and instead pioneered a Beveridgian model of a social safety net. However that safety net is established for those who lack a strong political constituency and as a result the policy is subjected to regular shifts in ideological commitment. As such housing has been dubbed "the wobbly pillar under the welfare state" due to the limited stock of social housing and the enormous geographic disparities in both supply of, and demand for, social housing (Torgersen, quoted in Fahey & Norris, 2010).

Therefore how do the senior judiciary ensure the maintenance of the Rule of Law in such a controversial policy space that is regularly subject to ideologically-driven amendments, and entails service provision from 347 legally separate entities? It is difficult to provide an answer to this question because there is a paucity of evidence, and it is evidence in response to this question that this chapter aims to contribute. On top of this there has been little specific focus on judicial decision-making in homelessness law (Luba & Davies 2010 is an exception). General theories concerning the role of the judiciary in local government include the orthodoxy that the role of the courts in local government is to enforce the will of Parliament through use of the ultra vires doctrine. Others have focussed on the opportunity presented by local government to politically ambitious judges to enforce their own policy preferences. This latter contention was illustrated by the opening quote to John Griffith's (1977) *The Politics of the Judiciary*, from Lord Atkinson in *Roberts v Hopwood*[63]:

> "The council would, in my view, fail in their duty if, in administering funds which did not belong to their members alone, they put aside all their aims to the ascertainment of what was just and reasonable remuneration to give for the services rendered to them, and allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy,

[63] 1925 AC 578

> or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour."

This quote, seen by Griffith to be indicative of judicial bias against local democracy, could just as easily be evidence of strict construction of statute, albeit packaged in slightly eccentric language. The case of *Roberts v Hopwood* is considered as one of a number of other significant cases of judges intervening inappropriately in local democracy – including most notably *Tameside*[64], and "*Fare's Fair"*[65]. In the former case the Labour government was blocked by the House of Lords from enforcing the implementation of its policy for comprehensive schooling in the Conservative-led Tameside council. In the latter case the Labour-led Greater London Council were blocked by the Lords from enforcing a policy of subsidised bus fares in all of the individual London boroughs. These cases have been interpreted by Griffith and others as evidence of a conservative bench undermining Labour policies. However the problem with such evidence is that it involves selection on the dependent variable – where controversial political judgements are taken as evidence that judges make controversial political judgements. On top of this, these cases can all be construed not as manifestations of personal will, but as appropriate resolutions to extraordinary indeterminacy in the legislation – the *Education Act 1944* and the *London (Transport) Act 1969* respectively (Loveland 2006, pp. 371-382). As discussed in previous chapters, this thesis selects evidence on the independent variable, and thereby seeks to focus attention on changes to the supply-side of legislation, and the nature of the judicial reaction. By analysing the judicial interpretation of two specific statutes selected due to their variance on the independent variable this project is able to avoid

[64] *Secretary of State for Education and Science v Tameside Metropolitan Council* [1977] AC 1014, HL.
[65] *Bromley London Borough Council v Greater London Council* [1983] CA, HL.

selection bias and to demonstrate the difficulties the judiciary face. The complexity of maximising certainty in the Rule of Law amidst overlapping levels of government and amidst shifts in ideological priorities must not be underestimated. The role of the courts is to weave coherence out of considerable complexity.

The complexity specifically related to social housing starts with the meaning of "homelessness". The meaning of this concept will be outlined and then the powers and duties that local authorities have to resolve the problem will be considered. The key legal definition of homelessness is that it does not just mean "rooflessness", in the sense of an individual that sleeps rough on the street. A person is homeless according to statute if they do not have accommodation that it would be "reasonable… to continue to occupy"[66]. Reasonableness depends on the "suitability" of the accommodation, which is defined according to various parameters that can be amended by the Secretary of State by regulation[67]. Key considerations are the level of over-crowding and the hygiene of the available accommodation. An individual may be homeless therefore, despite living under a roof.

A perhaps even more complex concept is the idea of being "threatened with homelessness" where accommodation that it is reasonable for an individual to occupy is for some reason under threat from either the individual concerned or a third party. An individual becomes intentionally threatened with homelessness if they fail to keep up with their rent payments for instance. Meanwhile an individual unintentionally becomes threatened with homelessness if domestic violence is escalating and making the accommodation unsuitable. Such examples will be considered in greater detail below when we come to consider the definitional role of the judiciary in homelessness

[66] *Housing Act 1996* s 175(3).
[67] *Housing Act 1996* s 210.

law. This brief sketch serves to demonstrate that "homelessness" as a legal concept is pragmatically indeterminate as it is highly dependent on context and changes in social attitude, and as such judges help to elucidate its meaning but are incapable of providing a rigid and permanent definition. As one can see from s 177(2) of the *Housing Act 1996*:

> "In determining whether it would be, or would have been, reasonable for a person to continue to occupy accommodation, regard may be had to the general circumstances prevailing in relation to housing in the district of the local housing authority to whom he has applied for accommodation or for assistance in obtaining accommodation."

A more rigid definition of "homelessness" would arguably not be desirable, as the result would in all likelihood entail arbitrary adjudication in individual cases (Endicott, 2011). Nevertheless it is important to note the discretion given by Parliament to central government, local authorities and the judiciary to establish a workable meaning for the term as the law contains considerable semantic, syntactic and pragmatic indeterminacy.

This leads us to consider the powers and duties held by local authorities in law to seek to alleviate the problem of homelessness. This will be a sketch of the various powers and duties, as these have been the subject of litigation and as such will be considered in greater detail below. Firstly it is important to be clear that homelessness is not a social policy problem that can be easily pigeon-holed. Multiple agencies and departments working under different legislation have responsibility for the problem, including housing authorities, social services, the Department for Communities and Local Government, the Home Office and the Treasury. In all two-tier local governments the district level deals with housing, whilst the county level (or equivalent) deals with social services. Therefore in cases concerning children that are

threatened with homelessness there is an uneasy overlap in jurisdiction, and there is legal overlap in the *Children Act 1989* and the *Housing Act 1996*[68]. On top of this, central government has considerable impact on the provision of social housing to the homeless – from the Treasury providing credit to local authorities to build new houses (Fahey & Norris 2010), to the Home Office creating new offences such as begging becoming assigned as "anti-social behaviour" (Laurie, 2004). There is hence a severe difficulty in providing a "joined-up" and strategic approach to the homelessness problem (Roche, 2004). Therefore once more it is important to be clear as to the enormous complexity of the law on this subject which underpins the crucial role played by the courts in establishing some certainty in the rule of homelessness law.

Central government, in the form of the Treasury, the Home Office and most recently the Department for Communities and Local Government, has become increasingly interventionist in local policies to reduce homelessness in England and Wales. Therefore how has homelessness law evolved over the 20th Century, and what is the position today? Following on from Lord Salisbury's Commission there were several ad hoc initiatives, but the starting point in terms of law came in 1919 when local authorities were given powers and subsidies from central government to construct housing that would be provided at below the market rate. The *Housing and Town Planning Act 1919*, was a radical addition to Lloyd George's nascent welfare state. By seeking to protect and improve lives through state intervention the 1919 Act adopted a different approach to the self-improvement doctrine of Poor Law legislation that had existed in one form or another since Tudor England (Elton, 1953). That said,

[68] See for instance *Holmes-Moorhouse v Richmond-upon-Thames London Borough Council* [2009] UKHL 7

the Poor Law continued in existence until 1948[69], and the 1919 Act was not specifically concerned with homelessness, but instead sought to house the "working classes" provided they could show evidence of being deserving.

The results of Treasury loans to local government were dramatic, with new housing estates such as Becontree in Essex emerging as the world's biggest, with 170,000 new homes to relieve London slums. Demand for these houses was very high and the government further empowered local authorities with the discretion to discriminate between candidates according to a rubric of "reasonable preference". The key principle was that social housing was distributed on the basis of desert rather than need, and this approach persisted until it was reversed with the *Housing (Homeless Persons) Act 1977*. From this point, central government sought greater control over the provision of social housing by restricting the discretion of local authorities (Fitzpatrick & Stephens, 1999). It also marked a sea change in the provision of social housing with those in "priority need" being owed a duty to be allocated social housing. Priority need for housing was defined in statute as being for those with children or in pregnancy, those suffering from a mental or physical disability, or those becoming homeless on account of a disaster[70].

This brings us to the current legal position that is enshrined in two statutes: the *Housing Act 1996 Pt VII* and the *Homelessness Act 2002*. According to these statutes, local authorities owe the "main housing duty"[71] to those who are i) eligible in terms of not being subject to immigration control, ii) in "priority need", and iii) being homeless or threatened with homelessness unintentionally. However the nature of the

[69] *National Assistance Act 1948*
[70] s 2 1977 Act.
[71] s 193(2) 1996 Act.

housing duty has changed significantly, as the Conservative governments of the 1980s and 1990s amended the 1977 Act in order to end the perception that certain individuals were able to "jump the queue" for social housing simply through having children. The response was the 1996 Act that established that those defined as "unintentionally homeless" and with a priority need were owed *temporary* accommodation for at least two years, after which the duty to house disappears, although the authority has the power to provide permanent accommodation. The aim of the 1996 Act was to reinstate the idea of permanent housing allocation based on desert, however the coordinating role of central government that had emerged in 1977 was not reversed. The government set the duties of local authorities and pushed for reasonable preference to shift to those with good tenancy records that had waited the longest. Authorities also had a duty to provide advice and assistance to those making a claim for social housing (Luba & Davies, 2010, p. 684). In addition, each local authority was required by ss. 161-5 to draw up a single housing register that would avoid the fast-tracking of those perceived to be in "need" over those perceived to be more deserving.

Significant amendments were made with the 2002 Act, although much of the basic substance of the law, and in particular the coordinating role of central government remained. Firstly the requirement of a single register was removed by the 2002 Act[72], which also reinstated the idea that reasonable preference must return to those that had become homeless or threatened with homelessness unintentionally[73]. In addition the Welsh Assembly[74] and the Secretary of State[75] added new categories of

[72] s 14 2002 Act.
[73] s 16(3) 2002 Act.
[74] *The Homeless Persons (Priority Need) (Wales) Order 2001*. SI 2001/607 (W 30).
[75] *The Homelessness (Priority Need for Accommodation) (England) Order 2002*. SI 2002/2051.

"priority need" with Regulations under the 1996 Act in order to include new categories of vulnerability such as, amongst others, those discharged from the military, or those released from prison. The 2002 Act retained considerable central government oversight of housing policy as it mandated authorities to conduct regular reviews and to draw up a "Homelessness strategy"[76] with a focus being placed on weaving housing policy into the broader anti-social behaviour policy space (Fitzpatrick & Jones, 2005). The 2002 Act also sought to create greater opportunities for choice to those applying for social housing, in order to create more "sustainable communities"[77]. Although in many housing authorities choice is restricted by the limited housing stock (Laurie 2004). Therefore the 2002 Act has retained some of the allocation according to desert framework of the 1996 Act, rather than fully returning to the emphasis on need enshrined in the 1977 Act. Furthermore, in the aftermath of the English riots in the summer of 2011, Ed Miliband at the Labour Party Conference on 27th September set out a policy for allocating social housing to those that contribute to the community through work or volunteering. On top of this the *Localism Act 2011* developed by the Coalition government includes a similar policy, and therefore there is a cross-party commitment to desert over need in the allocation of social housing (Bury, 2011).

The history of homelessness law is a picture of fluctuating ideological priorities between letting to the deserving and allocating to those in need, all the while underpinned by an increase in the level of central government control of local implementation. Such indeterminacy in law and policy places a difficult burden on local authorities and the courts to ensure equality and justice for individual applicants

[76] s 1 2002 Act.
[77] *Department of the Environment, Transport and the Regions, Quality and Choice: A Decent Home for All* (London: DETR, 2000)

and thereby to ensure certainty in the application of the law. This indeterminacy in legislation is why homelessness is an ideal policy space to observe the impact of language on judicial behaviour.

II: The Discourse Analysis Results and Selection of Cases for Comparison

For this chapter a discourse analysis of 931 sections of primary legislation was conducted to cover all sections pertaining to homelessness from the *Housing (Sc) Act 1920* to the *Housing and Regeneration Act 2008*. Much of the legislation on homelessness was included in compendious housing or social security legislation, and where this was the case only the sections that related to homelessness were coded. This was because otherwise thousands more sections that do not relate to homelessness would need to be coded and would distort the results. For instance the *Housing Act 1985* is 625 sections long, of which only 44 sections directly relate to homelessness, whilst the vast bulk of the legislation covers other housing issues such as the "right to buy" scheme. The sections for coding were selected using a text book relating to homelessness law (Luba & Davis 2010), and from a search performed on the LexisLibrary website. Some of the sections relating to homelessness that were taken from Acts are very short and this also risked distorting the results. However it is arguably better not to code a huge bulk of irrelevant material, even if some of that which is coded is unrepresentatively short. The results of the discourse analysis were used to select the two Acts that have been compared using a qualitative analysis. The reason for selecting these particular Acts will be explained as the results are presented.

As with the previous chapter, the following table (4.1) displays the linear gradients for the proportionate change in legislation per year ("Increase %") and the real terms change in the absolute number of sections ("Real Terms"). Also R^2 values are displayed, which as before denote the level of variance, rather than model fit, as the universal data set was used rather than a predictive sample. This is a summary of the major findings and more detailed results are available in the appendix:

Table 4.1: Discourse Analysis Results for all Homelessness Legislation, 1920-2008

	Emb	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
Increase %	-0.47	0.05	0.38	0.11	0.34	0.18	0.35	-0.12	0.33
R^2	0.25	0.02	0.14	0.01	0.38	0.03	0.1	0.01	0.36
Real Terms	-0.03	0.01	0.1	0.05	0.07	0.08	0.1	-0.004	0.06
R^2	0.004	0.03	0.05	0.01	0.24	0.03	0.05	0.0002	0.26

Emb = Embedding – The legislation utilises subordinate clauses. **Sub = Subjunctive** – The use of subjunctive language. **Adj = Adjectives** – The use of adjectives, adverbs or qualifying nouns. **Mod = Modal** – The use of vague model verbs (may). **Enb = Enabling** – An agent of Parliament is enabled to amend the law. **Age = Agency** – The agent intended to implement the law is not clearly specified. **Con = Conditional** – The use of conditional language. **Ref = Referential** – The use of a reference to another piece of legislation. **Dec = Decentralisation** – The decentralisation interaction, which displays the combined measure of vague modal verbs, enabling power and unclear agency.

As with the results for immigration legislation, table 4.1 shows that there has been an increase in all measures of indeterminacy apart from in embedding and referential language where there was a decline. The proportionate increases are particularly significant in terms of the use of adjectives (0.38% pa), enabling powers (0.34% pa), and conditional language (0.35% pa). Therefore again increases have been observed on all of the theoretically significant measures of indeterminacy. Once again the increases may seem modest, but the figures represent the annual change, and thus a change of 0.34% per annum in the use of enabling powers translates into a 30% change over the period. The R^2 results are small for most of the measures which indicates a high degree of variance in the results. The variance is particularly notable in regards to the real terms changes, because of the very haphazard change in the

volume of legislation pertaining to homelessness over the period. Indeed this is the only policy space considered for this thesis where there has not been an overall increase in the quantity of legislation. Nevertheless the significant increases in the proportions of indeterminacy observed in the legislation demonstrate that legislation has qualitatively changed which is the key contention of this thesis.

Therefore the results show very clearly the extraordinary change in legislative language, and in particular the change in semantic and pragmatic forms of language, which are theorised to create the necessity for political behaviour in judges. Indeed the most important increase has been in the use of decentralising language which increased by 0.33% per year over the period. This means that the use of decentralisation in homelessness law has gone from being virtually non-existent to accounting for almost a third of all homelessness law in the course of nearly a century. There was also lower variance in this increase with a reasonably high R^2 of 0.36. This is very strong evidence that the language of homelessness legislation has become significantly more indeterminate.

More specifically, of the thirty-nine Acts passed prior to 1960 there were just seven pieces of legislation that displayed the decentralisation interaction at all. Of these seven the highest value was recorded in the *Housing Act 1925* at 8%. On the other hand twelve of the twenty-one Acts coded after 1960 displayed the interaction, with the highest value being an astonishing 83% in sections relating to homelessness in the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004*. Section 13(3)(a) of that Act shows the indeterminacy created by the interaction of the pragmatic measures, where the legislation allows the discretion to grant loans to refugees for housing purposes:

> "Regulations… shall specify matters which the Secretary of State shall, in addition to other matters appearing to him to be relevant, take into account in determining whether or not to make a loan (and those matters may, in particular, relate to — (i) a person's income or assets, (ii) a person's likely ability to repay a loan, or (iii) the length of time since a person was recorded as a refugee),"

Homelessness legislation has historically always established a relatively broad discretion for executive agents (most notably local authorities) to implement this complex social policy. However this discretion in the past was typically financial in nature, rather than legal, and the key innovation of pragmatic indeterminacy is that it enables executive agents (and others) to change the law itself. Such incredible discretion is arguably the critical causal factor in the politicisation of the British judiciary.

The following table (4.2) compares in real terms the number of sections in the 44 sections of the *Housing Act 1996 Pt VII* and the 21 sections of the *Homelessness Act 2002* that display indeterminacy. The difference in length of the two Acts is a significant difference between the laws, but their similarity in content, timing and their relative closeness in length made them the best candidates for a comparison according to the "Method of Difference":

Table 4.2: Real Terms Differences Between the 1996 Act and the 2002 Act

	Emb	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
1996 Act	17	0	35	24	14	34	36	10	12
2002 Act	10	2	14	9	4	13	17	17	4

As one can see from table 4.2 there is a significant difference in the levels of indeterminacy displayed by the 1996 Act and the 2002 Act. For instance in terms of the use of adjectives the difference is more than double with 35 sections in the 1996 Act against 14 in the 2002 Act. A similar gulf can be be observed in all of the

pragmatic measures considered of importance to political behaviour in judges – with the use of the vague modal verb "may" (24 sections against 9), the use of enabling language (14 sections against 4), the lack of a specified agent (34 sections against 13), and the use of conditional language (36 sections against 17). Finally, and arguably of greatest importance, one can see that the 1996 Act had an astonishing twelve Henry VIIIth Clauses, against the not insubstantial four for the 2002 Act. In other words a quarter of the 1996 Act was left incomplete by Parliament to be resolved by the executive or the courts. The impact of the differences in legislative language between the two Acts will now be discussed.

III: Results of the Comparison of the *Housing Act 1996* and the *Homelessness Act 2002*

A comparison was made of cases brought under 44 sections of the 1996 Act and the 21 sections of the 2002 Act. The 2002 Act largely amends the 1996 Act, and therefore as with the last chapter the two Acts are not totally independent of each other. This does create some confusion where the legal disputes occasionally emanate from both Acts working together. However the comparison is not just between the two Acts, but within them as well. The focus is on the impact of the specific language, and therefore it is not important if the content of the two Acts has some overlap; the key differences to observe are in the nature of the language and what impact this has on judicial behaviour.

The cases selected for analysis were once again taken from the LexisLibrary website, however for this chapter only appeal cases to the Court of Appeal for

England and Wales, the House of Lords and the Supreme Court were studied. This was because there were far too many cases at the High Court and lower courts and there is insufficient space here to give them full consideration. Another important reason to focus on the top of the judicial hierarchy is because of the confusion in jurisdiction over homelessness law. As mentioned there are 347 local authorities in England and Wales that are responsible for housing allocation, and the primary means of coordinating all of their behaviour is by decisions of the very highest courts.

This results section will firstly consider the four observable implications of the "Logic of Appropriateness", followed by the two observable implications of the "Logic of Consequences". In total there were 103 cases studied that were brought to the courts to dispute the 1996 and 2002 Acts. Of these cases, considerably more were brought under the 1996 Act, with 95, than the 2002 Act, with 8.

Appropriate Political Behaviour I: Empirical

The theory contends that the only source of political disputes for the courts is via concrete cases from individuals or groups that are victims of the law, and the more indeterminate the law is the more likely an aggrieved party will seek a judicial clarification of its meaning. However indeterminacy of language is not sufficient for litigation as it also depends on the law being used against the aggrieved party. Therefore legislation that is indeterminate but not implemented will have no effect on the politicisation of judges. The aim of this section of the chapter is to provide evidence that judges are the passive recipients of their case load, and this case load

will depend on there being mutually exclusive interpretations of what Parliament meant to achieve with a piece of legislation.

There is a clear difference between the two Acts both in their language and in the number of cases brought. Twelve of the sections in the 1996 Act displayed the decentralisation interaction, and there were 95 cases from the Court of Appeal upwards that sought clarification of its meaning (35 of these cases were lost by the public authority). In comparison, four sections of the 2002 Act display the decentralisation interaction, and only 8 cases contested it in the highest appeal courts (just 3 cases were lost by the public authority). Of course it is important to note that the 2002 Act has not been in force for as long as the 1996 Act, however further analysis of particular linguistic problems will help to embellish this basic correlation into a more robust causal explanation.

The following tables show the specific discourse analysis results for both Acts alongside the number of cases and number of years the section has remained in force without amendment.

Table 4.3: Discourse Analysis Results for the *Housing Act 1996*

Section	*Emb*	*Asp*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Total*	*Cases*	*In Force*
175	0	0	1	0	0	0	1	0	2	7	16
176	0	0	1	0	0	0	1	0	2	1	16
177	0	0	1	1	1	1	1	0	5	2	5
178	0	0	0	0	0	0	1	1	2	0	7
179	0	0	1	1	0	1	0	0	3	0	16
180	0	0	1	1	0	1	0	0	3	0	16
181	0	0	1	1	1	1	1	0	5	0	16
182	0	0	1	1	1	1	1	0	5	0	16

Section	*Emb*	*Asp*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Total*	*Cases*	*In Force*
183	0	0	1	0	0	1	1	0	3	2	3
184	0	0	1	1	0	1	1	0	4	10	12
185	0	0	1	1	1	1	1	1	6	7	3
186	1	0	1	0	1	1	1	1	6	0	3
187	0	0	1	0	1	1	1	0	4	0	3
188	0	0	1	1	0	1	1	0	4	7	5
189	0	0	1	1	1	1	1	0	5	14	16
190	0	0	1	1	0	1	1	0	4	2	5
191	1	0	1	0	0	1	1	0	4	14	5
192	1	0	1	0	0	1	1	0	4	1	5
193	1	0	1	1	0	1	1	0	5	25	5
194	1	0	1	1	0	1	1	0	5	0	6
195	1	0	1	0	0	1	1	0	4	0	5
196	1	0	1	0	0	0	1	0	3	0	5
197	1	0	1	0	0	1	1	0	4	0	5
198	1	0	1	1	1	1	1	0	6	4	6
199	0	0	1	1	1	1	1	1	6	5	11
200	1	0	1	1	0	1	1	0	5	0	5
201	1	0	0	0	0	0	0	1	2	0	16
202	0	0	0	1	1	1	1	0	4	19	6
203	0	0	1	1	1	1	1	0	5	1	16
204	0	0	1	1	0	1	1	0	4	21	6
205	0	0	0	0	0	0	0	0	0	0	5
206	0	0	1	1	0	1	1	0	4	0	3
207	1	0	1	1	1	1	1	1	7	0	6
208	0	0	1	0	0	1	1	0	3	0	3
209	1	0	0	0	0	0	1	1	3	0	6
210	0	0	1	1	1	1	1	1	6	1	3
211	1	0	1	1	0	1	1	0	5	0	16
212	1	0	1	1	0	1	1	0	5	0	16
213	1	0	1	0	0	1	1	0	4	0	4
214	1	0	1	0	0	1	1	0	4	0	16
215	0	0	0	1	1	1	0	0	3	0	16
216	0	0	0	0	0	0	0	1	1	0	16
217	0	0	0	0	0	0	0	1	1	0	6
218	0	0	0	0	0	0	0	0	0	0	6

One can see from this table that almost one-third of all sections of Part VII of the 1996 Act employ language that enables an agent of Parliament to change the law. This is an extraordinary delegation of power from Parliament. On top of this, over half of the sections use the indeterminate modal verb “may” and over three-quarters of sections do not explicitly name the agent responsible

for the law's execution. Therefore this is highly indeterminate legislation and one would expect a high number of applications from individuals seeking to clarify its meaning.

The results for the 2002 Act also show high levels of indeterminacy, but nevertheless lower than for the 1996 Act:

Table 4.4: Discourse Analysis Results for the *Homelessness Act 2002*

Section	*Emb*	*Asp*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Total*	*Cases*	*In Force*
1	0	0	1	1	0	1	1	0	4	0	10
2	0	1	1	0	0	1	1	0	4	0	10
3	0	1	1	1	1	1	1	0	6	1	1
4	0	0	0	0	0	0	0	1	1	0	10
5	1	0	1	1	0	1	1	1	6	0	10
6	0	0	0	0	0	0	1	1	2	4	10
7	1	0	1	0	0	1	1	1	5	6	10
8	0	0	0	0	0	0	1	1	2	0	10
9	1	0	1	0	0	1	1	1	5	0	10
10	1	0	1	0	0	0	1	1	4	2	10
11	1	0	1	1	0	0	1	1	5	0	10
12	1	0	1	1	0	1	1	1	6	0	10
13	1	0	0	0	0	0	1	1	3	0	10
14	1	0	1	1	1	1	1	1	7	1	10
15	1	0	1	0	0	1	1	1	5	0	10
16	1	0	1	1	1	1	1	1	7	0	10
17	0	0	0	0	0	1	0	1	2	0	10
18	0	0	0	0	0	0	0	0	0	0	10
19	0	0	0	0	0	0	0	1	1	0	10
20	0	0	1	1	0	1	1	1	5	0	10
21	0	0	1	1	1	1	1	1	6	0	10

Where the 1996 Act had almost a third of sections with "Enabling" language, in this Act it is under one-fifth. Similarly the use of "may" occurred in just over two-fifths of sections, and the lack of a clearly specified agent was the case in under two-thirds of the sections.

As mentioned in the previous chapter, a regression analysis of the correlation between indeterminacy and the number of cases is far too blunt a means of assessing the impact of legislative language on judicial behaviour. Far more useful as evidence is a more detailed qualitative analysis that can more closely inspect specific linguistic problems and see how they were resolved by the judiciary. A regression analysis would not fairly represent the impact of the language because many of the sections of the 2002 Act that were heavily litigated were making amendments to already indeterminate sections of the 1996 Act. For instance s 6 of the 2002 Act that saw four cases, made amendments to the indeterminate ss 193-4 of the 1996 Act. This lack of independence of sections suggests that a qualitative methodology is likely to yield better inferences. For instance a quantitative analysis could not elucidate the enormous complexity of the case of *R (on the application of M) v Hammersmith and Fulham London Borough Council*[78]. In this case the courts had to determine the legality of the local authority's decision not to house a child of 17, for which the court had to clarify the meaning of s 188 of the 1996 Act and how it interacts with s 22(1) of the *Children Act 1989*, and the *Homelessness (Priority Need for Accommodation) (England) Order 2002*[79]. On top of this, a section may have very high levels of indeterminacy, but if it is not implemented for whatever reason then it will not affect any individuals and will not lead to any cases. As mentioned, indeterminacy is not a sufficient condition for a high incidence of politicised cases, but it is necessary.

Despite misgivings about the utility of using the discourse analysis for regression analysis it should be noted that not a single case was brought against a section in either the 1996 Act nor the 2002 Act that displayed no indeterminacy of

[78] [2006] EWCA Civ 917 CA 188 at the Court of Appeal; [2008] UKHL 14 HL 188 at the House of Lords.
[79] SI 2002/2051.

any kind. Indeed no case was brought against a section that displayed no pragmatic indeterminacy, which is theorised to be the most significant measure. However this is the tip of the evidential ice-berg, and to more fully understand the reaction of judges to linguistic indeterminacy it is necessary to "soak and poke" the cases and see precisely how the indeterminacy was resolved (Fenno, 1986).

Appropriate Political Behaviour II: Definitional

This section of the chapter aims to look in detail at a key observable implication of the theory. As discussed previously, the definitional role of the judiciary is political in the sense of influencing the content of substantive law, but doing so in accordance with existing positive law or legal principles in order to maximise clarity in the Rule of Law. The expectation generated by the theory is that indeterminate language in the legislation will encourage judges to provide definitions of legal substance, and therefore because the 2002 Act has lower levels of indeterminacy it is expected to have led to fewer calls for definition from the judiciary. However the comparison sought is not just between the Acts, but also between different parts of the two Acts with different levels of indeterminacy.

To analyse the definitional role of the judges this section will focus on the core substantive content of homelessness law – the duty to house. Local authorities have a duty to provide interim accommodation to an individual if they have "reason to believe" that the individual is homeless and eligible for assistance[80]. More detailed

[80] s 184(1) 1996 Act.

enquiries will then be made by the local authority – where the burden of proof lies – and they will make a final determination as to their duties or powers to house. The authority is duty bound to provide two years accommodation if they conclude that the individual is homeless, eligible, in priority need, and unintentionally homeless[81]. If the individual is deemed to have failed on any of these points, the local authority has the power to provide accommodation, but is not duty-bound. Therefore this definitional section will focus on how the courts have decided on the extent of the duties of local authorities in housing. This entails a great deal of indeterminate legislation that must be applied and we shall consider sequentially the problems that have been adjudicated concerning eligibility, priority, intentionality, and the cessation of duty.

Firstly in terms of eligibility, the local authority is under no duty to house an individual that is ineligible for assistance, but determining eligibility depends on a highly indeterminate portion of the 1996 Act. Sections 185-187 of that Act provides the legal framework, and as one can see from Table 4.3 they all score highly for indeterminacy. The primary section is s 185:

> "(1) A person is not eligible for assistance under this Part if he is a person from abroad who is ineligible for housing assistance… (3) The Secretary of State may make provision by regulations as to… descriptions of persons who are to be treated for the purposes of this Part as persons from abroad who are ineligible for housing assistance."

Parliament has therefore delegated the power to decide eligibility to the Secretary of State, which forces the judges to intervene in the decision-making of the local authority and central government to resolve the meaning of the law when changes in eligibility are introduced.

[81] s 193 1996 Act. See May LJ in *Omar v Birmingham City Council* [2007] EWCA Civ 610 CA at para 6.

Of course, the government could use Regulations to narrow the indeterminacy themselves, and this they will occasionally seek to do. However they are typically not incentivised to provide narrow legal definitions as this will restrict their discretion and the flexibility in the law. For instance the Secretary of State had regulated that a "worker" not subject to immigration control was eligible for housing assistance[82], and the Court of Appeal had to decide whether a steward at the Wimbledon Tennis Championship was a "worker"[83]. The court decided that the Dutch national in question was an eligible worker by relying on the free movement principle underpinning the EU.

In a similar case concerning EU nationals[84], the Court of Appeal adopted a very strict definition of s 13(2) of the *Asylum and Immigration Act 1996* that individuals were subject to immigration control if they could not remain without leave. The Dutch family did not require leave to remain and were not subject to immigration control and therefore were eligible for housing assistance. The courts took whatever certainty they could from the immigration legislation and applied this to resolve indeterminacy in the homelessness legislation. The problem is that in order to decide eligibility for housing, the authorities and the courts must cut through a dense web of interconnecting legislation and regulations. The local authorities that lost these particular cases may have felt themselves to be the victims of political behaviour on the part of the judges, but that behaviour was arguably appropriate in order to define a small portion of clarity amidst the considerable indeterminacy in the law.

[82] *Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006*, SI 2006/1294
[83] *Barry v London Borough of Southwark* [2008] EWCA Civ 1440 CA
[84] *Barnet London Borough Council v Ismail and another* [2006] EWCA Civ 383

Perhaps the primary element to eligibility is the assessment as to whether the individual is *actually* homeless or threatened with homelessness. This is entwined with considerations of "priority need" where the authority must decide whether they have a duty to house an individual. This assessment turns on "whether it is reasonable" for an individual "to continue to occupy accommodation" that they already reside in[85]. In some circumstances it will be palpably inappropriate for an individual to continue to occupy accommodation, such as a bus shelter, but critical to this thesis are the penumbral circumstances that pose challenges to interpretation (Hart, 1961). What makes these penumbral cases more likely to occur is that the law on priority is founded on another Henry VIII[th] clause[86] that has led to uncertainty because the law is not fixed but fluid, and the government have added and changed the categories of "priority need". The 1996 Act established as priority categories i) pregnant women or any adult with dependent children, ii) those made homeless by an emergency situation such as a flood, and iii) the "vulnerable" defined as "vulnerable as a result of old age, mental illness or handicap or physical disability or *other special reason*". The emphasis has been added to show the considerable indeterminacy of this language that forces judges to define vulnerability. Further amendments were brought in by regulations under the 2002 Act which in England added to vulnerability: i) young people under the age of 21 without any family or foster family network, ii) discharged members of the military, iii) released prisoners, and iv) "A person who is vulnerable as a result of ceasing to occupy accommodation by reason of violence from another person or threats of violence from another person which are likely to be carried out." The government's categorisations of vulnerability have been led undoubtedly by an admirable desire to provide a safety net to institutionalised

[85] ss 175-177 1996 Act.
[86] s 189(2) 1996 Act

individuals and to the victims of domestic violence. The problem is that in implementing this law one should not be surprised by a politically interventionist bench. The judiciary must find some certainty amidst several indeterminate concepts, and to do so they typically enforce as strict a definition of the law as is possible, because assessing "need" in the context of scarce resources is a fundamentally political decision.

There were sixteen cases at the highest appeal courts that sought to find some definition for "priority need". Of these cases two core strands of judicial intervention emerge. Firstly there are cases that dealt with defining the substantive meaning of the different categories of priority need, and secondly there were cases where the applicant was not vulnerable but claimed to normally reside with a vulnerable person. Let us deal with these in turn in order to find evidence that the courts were motivated by the lack of determinacy in the legislation and sought a definition that was most conducive to certainty in the Rule of Law.

In terms of substantive definitions of the priority categories, a hugely important case was the 2011 case of *Yemshaw v Hounslow London Borough Council*[87]. In this case the Supreme Court decided that "domestic violence", "other violence" and "threats of violence" included verbal intimidation not associated with any physical act[88]. This is a very important decision for assessing the political influence of the judiciary. Were the majority on the court acting appropriately by interpreting the meaning of violence in this way? It could be argued that far from clarifying the definition of violence, the court extended it in accordance with their personal preferences and thereby admitted many more potential litigants to the

[87] [2011] UKSC 3 SC.
[88] s 177 1996 Act as amended by s 10 2002 Act.

security of the law. However, definition by interpretation involves the clarification of meaning, which depends in part on a reasonable assessment of popular usage, and it would not make sense for the law to employ terminology in an archaic fashion. A "literalist" interpretation tends to be used to signify that there is a single fixed and unchanging meaning to words, but language is not fixed, it is fluid. Therefore being a literalist can mean deciding that the literal meaning of the law has changed in response to popular usage, and popular usage can be more readily applied to elucidate law with indeterminate meaning. The domestic violence charity Refuge, for instance, employs the following definition: "The abuse can be physical, emotional, psychological, financial or sexual."[89] There is no evidence to support the contention that the judges were behaving purely in accordance with their personal policy-orientation, and there is plenty of evidence that domestic violence in modern Britain is generally accepted as including non-physical acts of emotional intimidation. The court was therefore arguably acting appropriately in its definition of the language that was added by amendments under the 2002 Act.

This brings us to the second major source of confusion with regard to priority, which is where the applicant claims to be residing with an individual that has priority need in order to strengthen their own case for a housing allocation. A very important case made a definition of priority that was subsequently overturned by the 2002 Act. The Court of Appeal in *Ekinci v Hackney London Borough Council*[90] decided that a seventeen year-old wife was not a "dependent child" within the meaning of s 189 of the 1996 Act, because she lacked the necessary parent-child relationship with her husband. This decision over-turned the county court judge who had invoked the right

[89] Refuge (2009) *About Domestic Violence* http://refuge.org.uk/your-questions/about-domestic-violence/#q33 Retrieved on 20/12/2011.
[90] [2001] All ER (D) 317 (May)

to a family life under Article 8 of the ECHR, and it went against the Code of Guidance issued by the Secretary of State – so was this definition inappropriate? Arguably it is not because an "inappropriate definition" would be one that was totally untethered to positive law or legal principle. Whereas "spouse" in law and in legal principle signifies equality of position between husband and wife, regardless of any difference in age, and the idea that a young woman of seventeen was dependent on her older husband would therefore bring into question the acceptability of allowing those under 18 to enter the contract of marriage in the first place. What is more, the woman in question was in full-time education and had permanent accommodation that it was reasonable for her to occupy. It was the husband that was claiming to be homeless, not his wife, and whilst it might be reasonable to expect them to live together, neither of them were technically homeless, and he could not use her age as a way around the rules on priority. Therefore despite the difficulty of this decision, it is perhaps fair to conclude that it was appropriate because it clarified the meaning of the law.

Another applicant for social housing in *Holmes-Moorhouse v Richmond-upon-Thames London Borough Council*[91] was deemed by the local authority to be homeless, but not in priority need because his children were not permanently resident with him but were shared with his former partner. The reviewing officer for the authority affirmed this decision and the county court denied jurisdiction over such family matters which were up to the local authority to determine. The Court of Appeal[92] rejected this denial of jurisdiction, and quashed the decision as being a misdirection in law. Finally the House of Lords reinstated the authority's original

[91] [2009] UKHL 7 HL
[92] [2007] EWCA Civ 970

decision that the applicant was not in priority need. Their reasoning was that "reasonably be expected to reside with" could not apply to children that only "stayed alternate weekends with their father". In other words the father was not entitled to rely on his children as a means of establishing a priority need. Once again this poses a difficulty of interpreting the behaviour of the judges. Given the variety of different definitions achieved by the Court of Appeal and the House of Lords, which one was appropriate? It could be argued that both the Court of Appeal and the House of Lords sought to resolve the indeterminacy in the legislation concerning "priority need", and hence the Logic of Appropriateness could be used to defend both decisions. This could render the Logic of Appropriateness as unfalsifiable, as any behaviour could ultimately be justified as appropriate and it would be impossible to distinguish inappropriate judgements.

The Logic of Appropriateness seeks certainty in the Rule of Law and achieves this by taking as much of the positive law or legal principle as provides meaning and mixing it with a careful interpretation of legal norms. Making assessments of judicial behaviour on this basis is difficult, but where the court rejects positive law and just applies a norm, that is inappropriate as being not conducive to certainty in the positive meaning of legislation. The starting point for an appropriate decision must always be the positive law, and resolving its indeterminacy by careful reference to existing principles. This is the essence of the post-positvism of MacCormick that underpins the theory of this project. Hence the Court of Appeal arguably were inappropriate by being anti-definitional as they sought to move beyond the positive meaning of "reside with" to become "occasionally resides with", and they could not justify this in reference to other positive law that could have rendered such an interpretation as appropriate. An appropriate judicial act is reactive to a lack of certainty in the positive

law and seeks to resolve this legal pathology by fleshing out the meaning according to other positive law or identifiable political norms. This role for the courts has arguably expanded as a result of the increase in legislative indeterminacy.

A further important source of indeterminacy in the substance of homelessness legislation concerns the distinction between intentionally and unintentionally being homeless, or becoming threatened with homelessness. This is a distinction that was first introduced by the 1977 Act and was incorporated into the 1996 Act by s 191. Ever since its introduction it has created confusion, as per Lord Lowry:

> "No one really becomes homeless or threatened with homelessness intentionally; the word is a convenient label to describe the result of acting or failing to act as described in [the Act]" (Luba & Davies, 2010, p. 502)

How can one be sure that someone deliberately acted in a manner that would lead to them losing their accommodation? A statutory defence to being labelled as intentionally homeless is to prove that the individual acted in "good faith" but nevertheless became threatened with homelessness[93]. A line of precedent has emerged to add meat to the bones of "good faith" in order to carefully analyse under what conditions the law does and does not apply. The first case to systematically set out the conditions for analysing the actions of the applicant in response to the 1996 Act was *O'Connor and another v Kensington & Chelsea Royal London Borough*[94] where the applicants left their home under the care of an individual they trusted to pay rent but turned out to be untrustworthy in that regard. The applicants for homelessness assistance had not deliberately caused their own homelessness and so had acted in good faith. As per Sedley LJ:

[93] s 191(2) 1996 Act
[94] [2004] EWCA Civ 394

> "[30] It is no doubt because of the harshness of s.191(1), which fixes people with all the unintended and unpredictable consequences of what may have been perfectly reasonable and prudent acts, that s.191(2) is there to mitigate it. It does so, however, not by breaking the chain of cause and effect where the effect was unintended and unpredictable, but by qualifying the deliberate act which has produced the effect... It subtracts from the category of deliberate acts and omissions those done in good faith and in ignorance of "any relevant fact". Importantly, it imposes no requirement that such ignorance must be reasonable."

This was not the first case to consider this problem, but it went on to be a precedent for all subsequent cases on the matter[95]. There was an even earlier case that on its face is similar, where the applicant went to prison and left his accommodation in the charge of his sister who failed to pay the rent[96]. The court decided the "deliberate act or omission" that led to the threatened homelessness was the crime that led to the accommodation coming under threat. Unlike the couple that left the house voluntarily and entrusted it to an associate, in this case the sale of class-A narcotics had forced the individual from his home and the inability to arrange for the payment of rent was bound up in that causative act. The cases suggest the importance of clarity in the interpretation of the indeterminate legislation, and do not suggest that judges act like legislators with substantive policy in mind. An attitudinalist or strategic analysis might argue that judges are more inclined to bend the law in favour of unlucky home-owners than they are for feckless drug-dealers, but there is absolutely no evidence for this contention. Both cases led to long and carefully justified dicta that unpicked the meaning of intentionality in terms of homelessness – therefore the legislative indeterminacy was the key independent variable, and not the political preferences of the judges.

[95] Most notably: *F v Birmingham City Council* [2006] EWCA Civ 1427; *Ugiagbe v The London Borough of Southwark* [2009] EWCA Civ 31 CA.
[96] *Stewart v Lambeth London Borough Council* [2002] All ER (D) 260 (Apr)

A similar conclusion can be drawn when one focuses on the cessation of duty. This is the difficult question of deciding when the local authority's duty to house ceases and its power to house, if it so wishes, begins. With this subject we can more clearly compare the impacts of the 1996 and 2002 Acts as the latter made several key amendments to the former that have made it more difficult for authorities to dispose of their duty to house the homeless. The cessation of duty to house depends on a confusing statutory framework that sets out what information must be communicated to the applicant, how it must be communicated (in writing or otherwise), and the "suitability" of the offer of accommodation. The original framework was set out in section 193 of the 1996 Act, and has minimal requirements on the local authority. The authority must communicate their decision to the applicant, but this need not be in writing, the applicant must be told of the consequences of refusal and their right to a review, and finally the authority must ensure that the offer of accommodation is "suitable" for the candidate. It is this last requirement that has created the greatest amount of litigation within the twenty-five cases that sought clarification of section 193.

The statutory framework became more onerous for the local authorities and more confusing for the applicants following amendments made by sections 6 and 7 of the 2002 Act. Lord Justice May identified eight separate means by which the local authority "shall cease" to have a duty to house under the new arrangements[97]. In the opening quote to this chapter from May, he acknowledged that the contemporary framework setting out the cessation of duty was "not happily drafted". Lord Justice Munby focussed on three of the eight major routes to cessation of duty in *Inparasa*

[97] *Griffiths v St Helen's Metropolitan Borough Council* [2006] EWCA Civ 160 at para 34.

Vilvarasa v London Borough of Harrow[98]. These he described as the "subsection (5) case", the "subsection (7) case" and the "subsection (7B) case". The subsection (5) case was described above in relation to the 1996 Act, and was until 2002 the only route to the cessation of duty, and this route continues to apply for homeless applicants seeking accommodation under Part VII of the 1996 Act. The other two routes were added by amendments under the 2002 Act, with the subsection (7) route applying where an applicant is provided with permanent social housing allocation under Part VI of the 1996 Act, and the subsection (7B) route applying to applicants to be housed by an assured short-hold tenancy with a private landlord. In both the (7) and (7B) routes the authority must communicate their decision in writing, and they must not only consider suitability, but whether it would be "reasonable" for the applicant to accept the accommodation[99]. The sections of the 2002 Act that made these amendments have clearly added further indeterminacy to the statutory framework. Indeed six of the eight cases brought under the 2002 Act have concerned the cessation of duty requirements. By adding new conditions and greater subjectivity to the law, Parliament has created a greater role for judicial intervention into this controversial policy space.

The aim of the 2002 Act was to increase the choice given to applicants for social housing and to improve the safety net for those that were considered to be in priority need. Under the 2002 Act, the authority cannot cease its enquiries if the applicant fails at the first hurdle as was previously the case. In other words if the authority find the applicant to be ineligible for housing assistance, they must nevertheless continue to enquire into their priority need, and whether they were

[98] [2010] EWCA Civ 1278 at para 4 onwards.
[99] s 193(7F) 1996 Act as added by s 7 2002 Act.

unintentionally homeless. This is so that the needs of the individual are fully ascertained and they are more likely to be found accommodation either in the authority area that they had applied to, or in another area with less housing demand. The content of the policy is irrelevant to this thesis, but what one can surmise is that the greater the complexity and ambition of the policy, the greater the role the courts will have in resolving any confusion created by the delegation of power from Parliament.

There is considerable evidence that deciding when the local authority ceases to have a duty is an important definitional function that the judiciary must perform. The major substantive considerations that have required clarification from the bench are in terms of "suitability" and "reasonableness". On the first point suitability implies a careful assessment of the needs of the applicant. Therefore it was not suitable to accommodate a disabled person in a house that had no facilities for their disability, despite the fact that the authority added much needed facilities *after* they had claimed that their duty to house had ceased[100]. Nor was it suitable for an authority to provide temporary accommodation in Great Yarmouth to a family that was working, going to school, and regularly attending hospital in East London[101]. These decisions are arguably uncontroversial assessments of suitability. Perhaps more controversial was the decision that it was suitable for a family of travellers to be housed in a bricks and mortar house in lieu of their desired caravan site[102]. The court decided that the accommodation was temporary, and to fulfil their duty to house the bed and breakfast accommodation was suitable before more permanent arrangements could be made for

[100] *Boreh v London Borough of Ealing* [2008] EWCA Civ 1176
[101] *R v Newham London Borough Council, ex parte Sacupima and others* [2000] All ER (D) 1947
[102] *Codona v Mid-Bedfordshire District Council* [2004] EWCA Civ 925

a site that was big enough for the entire group. Again, this decision by the court seeks to provide clarity to the meaning of "suitability".

On the second issue of whether "the accommodation is… reasonable for [the applicant] to accept the offer", this is a far more complex definitional task for the judges as they must decide when it is reasonable to accept an offer, given the variety of housing stock available around the country. The concept of "reasonable to accept" introduces a psychological dimension to the law, where some sense of identifiable and mutually acceptable reason needs to be identified by the courts. This language was added by the 2002 Act and goes some way to show that whilst that Act generally has lower levels of indeterminacy than the 1996 Act, it nevertheless has some important indeterminate sections that have created a need for judicial clarification.

The Court of Appeal in *Slater v Lewisham London Borough Council*[103] made it clear that "suitability" and "reasonable to accept" had to be considered separately. The applicant had asked to be housed near her family and away from her abusive partner, but the local authority offered her a place near her abusive partner and far from her family. The local authority's internal review ruled that this decision was correct because the accommodation was "suitable" but failed to take into account whether it was "reasonable to accept". The Court of Appeal ruled that it was not reasonable given the circumstances of the applicant, and that the authority and its reviewing officer should have considered reasonableness separately. This was based on a strict construction of "that" in the positive law of section 193(7F), which highlighted Parliament's intention to keep these considerations separate:

[103] [2006] EWCA Civ 394

> "The local housing authority shall not make a final offer of accommodation… unless they are satisfied that the accommodation is suitable for the applicant and *that* it is reasonable for him to accept the offer." [Emphasis added]

This careful analysis of the legislation forced the authority to engage with the complicated question of reasonableness that Parliament had delegated to them. The evidence taken from all of the cases that considered the cessation of duty is that the courts are not eager activists that are desperate to intervene in the political thicket. Rather their interventions in the substance of law are few in number, and limited in scope to precise legal definitions. This is entirely in keeping with the Logic of Appropriateness.

The consideration of the key definitional difficulties faced by the judges in response to the 1996 and 2002 Acts adds to the weight of evidence that the primary causal change in judicial behaviour is on the supply-side in terms of the law changing, and not on the demand-side in terms of the judges changing. This links us to the following section where we consider the systemic role of the courts in ensuring the procedural consistency of jurisprudence.

Appropriate Political Behaviour III: Systemic

The highest courts must also ensure that certain procedural standards are adhered to, and they must establish the meaning of existing procedural rules in the context of indeterminate legislation. In order to ensure coherence in the Rule of Law procedural safeguards are obligatory, and must be set out and sustained by the top courts. Such questions of procedural propriety are not only of importance in the

judicial system, but also amongst executive institutions that implement the law. For instance, local authorities are responsible for making housing allocations in accordance with public law rules of reasonableness and natural justice, and they are also responsible for conducting reviews of their own decision-making. In both the initial decision and the review, a quasi-judicial methodology is the optimal means of avoiding unwanted judicial review.

The need for a coherent procedural methodology that applies throughout the judicial and executive institutions is an important example of an appropriate response to increased indeterminacy. The greater the indeterminacy of legislation, the more frequent and significant will be the arbitration between litigants. To ensure an equal and just outcome to this process the senior judiciary must intervene in the methods employed by lower courts and quasi-judicial decision-makers. The primary mechanisms by which the courts enforce procedural propriety are by the appellate procedure and by judicial review of executive action. The former mechanism is the primary means of ensuring procedural propriety within the judiciary itself, as cases can be appealed for further consideration by a higher court. In practice, the right to appeal the decision of a lower court to the Court of Appeal or the Supreme Court are heavily restricted by the Civil Procedure Rules or, in cases pursuing a Convention right, the *Human Rights Act 1998* (Feldman, 2004, pp. 965-966). The cases that are granted leave to appeal are typically those displaying a critical issue of procedural or substantive legal principle. The two-tier appellate structure with Court of Appeal and Supreme Court allows for "review and supervision" of lower courts by higher courts (Blom-Cooper, Dickson, & Drewry, 2009, p. 51). Where review corrects decisions taken, supervision lays down precedent for future action. In addition the higher courts typically hear cases with three or more judges which encourages collegiality and

therefore discourages policy-orientation. Meanwhile procedural propriety is enforced in executive decision-making, statutory tribunals, first instance courts and all other public institutions by the judicial review mechanism. This is also carefully restricted to avoid hopeless claims and litigation from those not directly affected by the impugned action. Thus the procedural implementation of the law is carefully overseen by the courts, and especially the appellate courts, in order to ensure certainty in the Rule of Law.

Of course it is impossible to fully separate procedural and substantive elements of a case, but it is important to analyse them both for evidence that judges resolve indeterminacy not according to their personal preferences, but according to the requirements of the positive law, and legal norms. Therefore this section of the chapter will consider both procedural oversight of lower courts and quasi-judicial decisions in order to find evidence for the legislative politicisation of the judiciary theory.

One of the primary procedural questions which must be resolved by the higher courts is whether a litigant has the right to stand – locus standi. For judicial review, rules of standing are set out in the *Civil Procedure Rules*, and in particular rule CPR 52.13(b). This rule states that the judicial review application may only be accepted if an error of law is in issue. As will be seen in the section on prudential behaviour, the distinction between errors of law and errors of fact is blurred, and especially so where the factual questions depend on resolving indeterminate legislative language. Nevertheless, in the case of *Fletcher v Brent London Borough Council*[104], the Court of Appeal adopted a very narrow interpretation of "error of law"

[104] [2006] EWCA Civ 960.

in order to clarify the limited extent of standing in judicial review. Similarly in *Van Aken v Camden London Borough Council*[105], the Court of Appeal clarified the time limit within which an application for judicial review must be made in homelessness cases. According to CPR 2.3(1) all application documents must be filed within the allotted time limit, which for the *Housing Act 1996* is 21 days[106]. The procedural question to determine was whether the claimant had "filed" the documents by posting them in the out-of-hours' post box at the county court after closing time on the twenty-first day. According to the CPR "filing" was synonymous with "delivering" the documents, and the court therefore confirmed that documents could be delivered on the closing day to the court office, and they did not need to be processed by the court within the 21-day time limit as the act of delivery is "unilateral". How is this evidence for the Logic of Appropriateness? It is because it shows the careful elaboration of procedural rules from the higher courts to the lower courts, thereby ensuring coherent application of the rules throughout the judicial system. This is crucial for maintaining clarity in the Rule of Law amidst indeterminacy of legislative language.

Procedural oversight of quasi-judicial decisions has proven far more common in homelessness litigation than the procedural oversight of the courts system. The homelessness legislation, as with a great deal of modern legislation, sets up a large network of agencies and actors that perform quasi-judicial functions. For instance the local authority must set up their own internal review procedure to deal with complaints against the initial decision taken by the housing officer. As we will see, this review procedure was unsuccessfully challenged as being substantively illegal

[105] [2002] All ER (D) 170 (Oct)
[106] s 204(2) 1996 Act.

according to Article 6(1) ECHR. Nevertheless, procedural challenges have also been brought against the internal review process. To ensure a basic level of procedural fairness the higher courts have regularly intervened to maintain a coherent application of the Rule of Law amongst many quasi-judicial bodies. The Local Government Ombudsman also performs an important systemic oversight function to ensure the highest standards of delivery. Collectively the courts and the Ombudsman amount to a strong protection against arbitrary or unfair implementation of the homelessness legislation. Given the confusion created by the indeterminacy of this legislation, the systemic role of the courts is politically significant, but also entirely appropriate.

For instance in *Gibbons v Bury Metropolitan Borough Council*[107], the applicant was found by the local authority to have become homeless intentionally because his drinking problem had led to rent arrears. The decision was reviewed by the local authority reviewing officer, but the review was riddled with procedural flaws, such that the substantive decision could not be sustained. The reviewing officer had failed to advise the applicant as to his legal position, and had failed to hold an oral hearing to ascertain whether the applicant became homeless through a "deliberate act or omission"[108]. All that had occurred was that the applicant was sent a "minded to" letter stating the opinion of the reviewing officer, and this then formed the basis of the final decision. In order to ensure coherence in the Rule of Law, such procedural flaws need to be ironed out by the senior judiciary, even if it entails intervening in the decision-making of an executive body.

There is however a difficult balance to be struck. At what point are procedural flaws minor enough to be ignored by the senior courts? If the courts intervened in

[107] [2010] EWCA Civ 327
[108] s 191(2) 1996 Act.

every procedural infraction they would never do anything else. Therefore to avoid endless litigation that could spin out a homelessness application for many months the courts have to draw a line in the sand. A crucial case for setting out the basic procedural parameters was the case of *Goodger v Ealing London Borough Council*[109]. Here the courts prioritised the substantive finding of the case as legitimate despite the flawed procedural approach. The procedural flaws were that the claimant did not have access to his housing file until only a couple of days prior to the review panel's oral hearing. According to the county court judge this was procedurally unfair by preventing the claimant from having sufficient disclosure of the facts, and thereby having restricted his capacity to represent himself to the panel. However the Court of Appeal held that he knew the essentials of the case against him, and the finding of being intentionally homeless was the only possible conclusion to be reached. As a result there was ruled to be no unfairness and the decision of the local authority was upheld. This case shows the delicate interplay of different aspects of the Logic of Appropriateness. Whilst the systemic behaviour of the judges seeks to provide clear procedural guidance, this cannot be used to undermine the definitional role of maximising substantive clarity, nor the prudential desire not to arrogate the executive's role in reaching substantive conclusions. The balance is struck by rejecting local authority decisions where the procedural flaws are so egregious that the substantive conclusion is uncertain. This is not an easy balance to strike, but the different rulings in *Gibbons* and *Goodger* show the higher courts carefully weighing up their institutional responsibilities and defending them in such a way as to ensure their actions can be interpreted as entirely appropriate.

[109] [2002] All ER (D) 203 (Apr)

There are several other cases where the senior courts have had to assess the procedural mechanics of local authority decision-making in order to ascertain whether they invalidate the substantive conclusion. For instance in the conjoined appeal of *Feld v Barnet London Borough Council; Pour v Westminster City Council*[110] it was ruled that having the same reviewing officer consider the same case twice did not necessarily expose the process to unacceptable bias. The court made it clear that the finding of bias would need stronger foundations than the bare fact that the same person reheard the same case. Similarly in the only case of procedural technicality brought under the 2002 Act – *Omar v Birmingham City Council*[111] – the court ruled that the means of communicating the final decision by letter did not have to repeat verbatim the statutory wording, so long as the essential statutory meaning was communicated. In the majority of cases under both the 1996 and 2002 Acts the judges rejected arguments that were founded on a claim of procedural unfairness[112]. Nevertheless by discussing what does and does not amount to unfairness in the judicial dicta, the courts continued to provide procedural guidance to the many quasi-judicial bodies.

One of the more interesting cases brought under the 1996 Act raised one of the most persistent and intractable problems in administrative law – the fettering of discretion. A decision-making body must not inhibit its own discretion to make a full appraisal of each case by delegating its power to a third party (Oliver, 2000). In *Heald and others v Brent London Borough Council*[113] the Court of Appeal held that a

[110] [2004] EWCA Civ 1307
[111] [2007] EWCA Civ 610
[112] See *Rowley v Rugby Borough Council* [2007] All ER (D) 215 (Apr); *Tetteh v Kingston upon Thames Royal London Borough Council* [2004] All ER (D) 241 (Dec); and *Lomotey v Enfield London Borough Council* [2004] All ER (D) 90 (May).
[113] [2009] EWCA Civ 930

decision as to whether an individual was eligible for housing assistance could be delegated so long as there was no risk of bias. Determining eligibility is the primary decision to be reached by the local authority and can typically be done without contention. This therefore makes it a prime candidate to be sub-contracted out to a more efficient agent. Thus the courts seem unwilling to intervene in procedural matters unless the procedure leads to such uncertainty or unfairness as to utterly undermine the substance of the decision. Nevertheless the senior courts are able to provide clear guidance as to acceptable decision-making procedures, and they thereby ensure systemic coherence in the application of the Rule of Law. Such procedural coherence becomes increasingly difficult with greater levels of legislative indeterminacy, thereby leading to greater reliance on the courts to provide guidance to quasi-judicial political institutions. As one can see in comparisons between the 1996 and 2002 Acts – the more indeterminate statute (the 1996 Act) and the more indeterminate sections within that statute led to far more exploratory litigation where applicants sought clarification as to the correct procedural approach. The courts can be said to be acting politically when they make such interventions, but they are arguably led by Logic of Appropriateness in resolving the legislative indeterminacy.

Appropriate Political Behaviour IV: Prudential

One of the key difficulties for the judiciary in homelessness law is the distinction between errors of fact and errors of law. In assessing errors of fact, the higher courts typically defer to another agent on the grounds of lacking capacity and competence, whereas errors of law are within the expert competency of the judiciary.

The various elements of legislative language that were discussed in the definitional section raised difficult questions for the courts to determine, both in terms of potential errors of fact (for instance "priority need" and "suitability") and potential errors of law (for instance the cessation of duty to house). In either scenario the court must decide whether to substitute its judgement for that of the local authority, which is a significant political act. However it is important not to draw too clear a distinction between errors of fact and law because the two are closely linked. For instance the answer to the factual question whether accommodation is suitable will then lead to an answer to the legal question whether the duty of the authority has ceased. Judges at the senior appellate level do not make judgements of questions of fact, but can quash a decision on public law grounds if insufficient enquiries into the facts have taken place, or if the facts were applied irrationally to the case. Therefore when considering questions of fact, the courts leave the discretion to the local authority where the facts of the case have been considered in far greater detail than is possible from the bench. For instance in the famous 1986 homelessness case of *R v Hillingdon Borough Council ex Parte Pulhofer*[114] the applicant was denied accommodation because the authority considered her not to be homeless. The Lords' comsidered the statutory framework to depend on a reasonably determinate portion of legislation, and they therefore left the question of fact up to the local authority. As per Lord Brightman:

> "[7] In this situation, Parliament plainly, and wisely, placed no qualifying adjective before the word 'accommodation' in section 1 or section 4 of the [1977] Act, and none is to be implied. The word "appropriate" or "reasonable" is not to be imported… What is properly to be regarded as accommodation is a question of fact to be decided by the local authority… What the local authority have to consider, in reaching a decision whether a person is homeless for the purposes of the Act, is whether he has what can properly be described as accommodation within the ordinary meaning of that word in the English language."

[114] [1986] AC 484

Gradually the distinction between questions of fact and questions of law in homelessness legislation has been blurred by added indeterminacy to the factual questions. The 1996 Act added several qualifications to the statutory definition of "accommodation" which as Brightman points out had been absent in previous legislation. For instance "suitable" was added, and the 2002 Act further added "reasonable to accept". By this we can see the accumulation of indeterminacy in the factual considerations increases the role played by the judges in deciding the legal issues; such as when a duty to house has been fully discharged.

Nevertheless the courts still display a considerable sensitivity of the importance of executive discretion. In a similar vein to the famous US Supreme Court *Chevron* case[115], the British courts consistently display evidence of respecting a "margin of appreciation" within which executive discretion is not interfered with. Of all the cases brought under the 1996 and 2002 Acts, 63% were won by the local authority, and the cases brought represent the tip of the iceberg in terms of the number of individuals applying for housing and being accommodated by a local authority. Therefore despite the increased use of highly indeterminate language, the courts still act prudentially in not over-stepping their constitutional mark.

This section of the chapter will consider questions of fact and questions of law raised by the 1996 and 2002 Acts, and will provide evidence that the courts do often defer to executive discretion. Firstly, as regards questions of fact, the judicial approach to being in the state of homelessness shall be further analysed. This is the key fact that must be ascertained by the local authority in order to decide whether there is a duty to house. The law is set out in section 175(3) of the 1996 Act:

[115] *Chevron USA Inc. v Natural Resources Defense Council Inc.* 467 U.S. 837 (1984)

> "A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy."

The case law that sought clarification of this language has displayed a considerable level of prudential behaviour on the part of the judges. For instance in *Harouki v Royal Borough of Kensington and Chelsea*[116] the applicant wished to be allocated housing on account of living in over-crowded accommodation that was not "reasonable" to continue to occupy. The local authority's housing officer decided that over-crowding was not exceptional for families in the central London borough, and that whilst unreasonable to occupy, they could not be considered to be homeless in the context of an area of very high population density and low housing stock. The Court of Appeal fully endorsed this decision, and rejected the applicant's contention that the decision was illegal or irrational. The judges did not consider themselves to be qualified to make a factual judgement about housing conditions in West London that went against the local housing authority.

Beyond ascertaining the fact of an individual being homeless, the authority must also determine whether they became homeless intentionally, which involves the applicant leaving accommodation that it would have been reasonable to continue to occupy[117]. In making this factual assessment the Court of Appeal in *Watchman v Ipswich Borough Council*[118] ruled that it was reasonable for the authority to enquire into the mortgage payment history of the applicant in order to fully understand whether their rent arrears were caused by an unintentional loss of employment, or an intentional cycle of underpayment. In essence the court made it clear that important

[116] [2007] EWCA Civ 1000
[117] s 191 1996 Act.
[118] [2007] All ER (D) 109 (Feb)

factual enquiries were the prerogative of the local authority, and their conclusions would only be reversed by the courts in exceptional circumstances where a public law breach has occurred. As per Lady Justice Arden in *Denton v Southwark London Borough Council*[119]:

> "[28-29]…the omission to make further inquiries into the relationship between mother and son in my judgment did not have the effect of rendering Southwark's decision on intentional homelessness open to challenge on public law principles… Intentional homelessness is a concept which in its application is fact-sensitive and accordingly I do not consider that the court can give general guidance for the situation."

A case where a public law breach was identified was *Maloba v Waltham Forest London Borough Council*[120]. In this case the local authority had decided that it was reasonable for the applicant to occupy available accommodation in Uganda, rather than staying in London. The applicant was a British citizen and had a life in the UK with his wife and young daughter. The court ruled that considering "reasonable to occupy" solely in terms of the physical characteristics of the house was *Wednesbury* unreasonable when the location of the house was over 4,000 miles away from the centre of the applicant's daily life. Therefore it is only in extreme cases that the court will intervene in a factual enquiry. This was the only case of the 103 considered for this chapter where a *Wednesbury* test was successful. This suggests that whilst indeterminacy has increased the role of the courts in deciding the content of the law, they retain a strong sense of a margin of appreciation within which executive discretion must be respected unless an egregious breach of law takes place. This behaviour is anticipated by the Logic of Appropriateness.

[119] [2007] EWCA Civ 623
[120] [2007] EWCA Civ 1281

Considerations of reasonableness by the judiciary show the blurred distinction between errors of fact and errors of law, because an unreasonable or irrational enquiry into the facts is an error in law. Assessments of the decision taken can be very difficult for the courts because in English administrative law it is not always the case that public agents must defend their decisions by giving reasons to the affected party. Indeed this principle of judicial deference to executive discretion was reinforced in the homelessness case of *Bernard v Enfield London Borough Council*[121]. Furthermore, the evidence shows that judges are very reluctant to accept a submission of unreasonableness from counsel for the homeless as it is such a damning indictment of the local authority. An important example of this is in the case of *Deugi v Tower Hamlets London Borough Council*[122], where the Court of Appeal ruled that the county court judge had provided the correct remedy to the homeless applicant, but applied the wrong legal test. Specifically the finding of unreasonableness by the county court against the local authority was overturned. This very same reticence was displayed in another case – *Crossley v Westminster City Council*[123]. Here the Court of Appeal decided that the local authority's finding of fact was not unreasonable as the county court judge believed, but was wrong in law on account of a central question not being considered by the authority in its decision – namely whether the applicant had another "special reason" to be in priority need. The local authority in this case had to determine whether a 36 year-old man was in "priority need" in accordance with section 189(1)(c) of the 1996 Act:

> "The following have a priority need for accommodation… a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason."

[121] [2001] All ER (D) 27 (Dec)
[122] [2006] EWCA Civ 159
[123] [2006] EWCA Civ 140

The man claimed to have "other special" reasons for priority – namely addiction to heroin from the age of thirteen, sleeping rough since seventeen, spells in prison, asthma and hepatitis C. The authority did not consider these because they did not come under the concrete categories of old age, mental illness, or physical disability. However the authority should have enquired into the vulnerability of the applicant in other special ways in order to confirm or deny his claim to having another "special reason" for priority. Therefore once again the evidence suggests that indeterminacy in legislative language creates an important role for the judges to maximise certainty in the Rule of Law, but there is no evidence that the judges abuse this responsibility by over-extending their powers.

The final area where this prudential behaviour can be observed is in the judicial response to claims for Convention rights to be upheld in homelessness cases. This again can be brought under the umbrella of errors of law that the judiciary can in theory quash if detected in the decision-making of a local housing authority. Ever since the *Human Rights Act 1998* came into force in 2000, it has been common for litigants to make a claim of a breach of their Convention rights, but the courts have not been as accommodating to this as some in government and media circles may have us believe. In terms of homelessness law, the main claims for Convention rights have been in terms of the Article 6 right to a fair trial and the Article 8 right to a private and family life. In only one of the 95 cases under the 1996 Act, and the 8 cases under the 2002 Act was an ECHR claim successful, and this will be discussed below in the section of "Policy-orientated" behaviour. Let us focus on Article 6, where there were no successful litigations. For instance in the 2010 case of *Tomlinson and others*

v Birmingham City Council[124], the UK Supreme Court ruled that the allocation of social housing is a service and not a right. Therefore the fact-finding enquiries undertaken by the local authority did not have to achieve the high standards of procedural fairness that would be expected in a judicial trial that would be subject to Article 6. This decision was the culmination of a string of precedents[125] that was initiated by the 2001 case of *Adan v Newham London Borough Council and another*[126]. In this case, the Court of Appeal ruled that a local authority reviewing officer, as an individual employed by the authority to review its decisions, could not be considered to be an "an independent and impartial tribunal" in accordance with Article 6(1) ECHR. However this problem was remedied for all cases where there was no factual disagreement raised in the case. As we have seen, the courts are reluctant to question the factual conclusions of the local authority, and therefore there has as yet been no case where Article 6 has been claimed against any housing decision. The following dictum of Lord Justice Brooke in *Adan* displays the prudential approach of the courts:

> "[50] It is trite Convention law… that an appeal court can remedy defects in first instance decisions where the appeal is in the nature of a full rehearing or otherwise involves a careful review of the merits. In such cases it invalidates the first decision because of the blemishes in procedural fairness which it contains, so that the proceedings, viewed as a whole, do not violate Article 6. But it is a giant leap from there to hold that an appeal court has power to arrogate itself a jurisdiction which Parliament clearly did not give it, in order to ensure that the proceedings, taken as a whole, are Article 6 compliant… We must be very careful not to substitute decision-making by the judges for decision-making by the executive when we try to make the law ECHR compliant."

As one can see, there is significant evidence taken from the cases studied that the courts respect a "margin of appreciation" when ruling on disputes over errors of fact

[124] [2010] UKSC 8 SC
[125] *Sheffield City Council v Smart Central Sunderland Housing Company Ltd v Wilson* [2002] EWCA Civ 04; *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5.
[126] [2001] EWCA Civ 1916

and errors of law. This is evidence for the Logic of Appropriateness guiding the political behaviour of judges, in the sense that judges must resolve legislative indeterminacy, but do so with as minimal intrusion into executive power as is possible. Therefore the courts remain sensitive to and respectful of their position in the separation of powers.

Inappropriate Political Behaviour I: Policy-orientated

It is important to consider whether there is any evidence to support the alternative theory that judges do not resolve indeterminacy in accordance with the "Logic of Appropriateness" but rather display policy-orientated behaviour which consists of being anti-empirical or anti-definitional. This is where cases are selected not according to their legal importance, or where the judicial decision does not clarify the substantive meaning of the indeterminate legislation. Such behaviour does not seek to resolve indeterminacy but sustains or exacerbates it.

There is no evidence of anti-empirical behaviour, because as the tables above display, there were no cases brought against any section of legislation that did not have some form of pragmatic indeterminacy. The best place to find evidence for policy-orientated, or "anti-definitional", behaviour is in cases that have dissenting judgements. Dissenting opinions signal a particularly difficult case, where there are considered to be more than one means to resolve the issue. Of the 103 cases considered for this chapter, only five had dissents, and of these, four concerned the application of Article 8 ECHR (right to private and family life) to homelessness law.

Therefore, we shall examine how Article 8 was applied to homelessness law, and analyse the different solutions offered by the majority and the dissenters in order to find some evidence that one side were inappropriately proposing to undermine clarity in the definition of the law.

Whilst four of the five cases with a dissenting judgement concerned the application of Article 8 ECHR to homelessness law, there were a further seven cases without dissent that also considered this Article[127]. One would imagine that homelessness law would have had many more cases where Article 8 rights to a private and family life would be pursued by litigants that had been evicted, or denied a housing duty. However there were only eleven cases, and of these only one case successfully imposed Article 8 rights over domestic law. The rights to a private and family life contained in Article 8 are the bête noir of some politicians and sections of the British media for being a qualified right that it is believed is applied expansively by a liberal minded judiciary (Curtis, 2011). Patchy and misleading evidence is offered to support this contention, but it cannot be doubted that the right to a private and family life is an indeterminate legal concept, and it is therefore important to examine whether the judicial response is appropriate in terms of clarifying the definition, or inappropriate in terms of sustaining or exacerbating the indeterminacy. The analysis will concentrate on those cases where there was a dissent, as this signals a difficult case where the outcome has been contested. It is here where we are most

[127] *Ekinci v Hackney London Borough Council* [2001] All ER (D) 317 (May); *Sheffield City Council v Smart Central Sunderland Housing Company Ltd v Wilson* [2002] EWCA Civ 04; *Brent London Borough Council v Sharp* [2003] All ER (D) 238 (Apr); *Orejudos v Kensington and Chelsea Royal London Borough* [2003] All ER (D) 369 (Oct); *Tower Hamlets London Borough Council v Begum* [2005] EWCA Civ 116; *R (Couronne and others) v Crawley Borough Council and others R (Bontemps and others) v Secretary of State for Work and Pensions and others* [2007] EWCA Civ 1086 CA 185; *Manchester City Council v Mushin and others* [2010] EWCA Civ 336

likely to be able to observe inappropriate policy-orientated responses to the legislative indeterminacy.

Let us start with the case where Article 8 was successfully applied over domestic law, as it is also the first of the cases where there was a dissent. The case was a conjoined hearing at the Court of Appeal: *R (on the application of Morris) v Westminster City Council; R (on the application of Badhu) v Lambeth London Borough Council and another*[128]. We need to work out why there was a dissent, and whether the decision of the court was the most appropriate decision possible. The substance of the decision rested on the first case concerning Mrs Morris. She had come from Mauritius with her young daughter to settle in the UK. She is a British citizen by descent, but her daughter was temporarily placed under immigration control pending the conclusion of enquiries into her immigration status. Mrs Morris applied for homelessness assistance to Westminster Council, who found that she was homeless, eligible and had not become homeless intentionally. However they rejected her claim of being in priority need on account of her dependent daughter, because of s 185(4) of the 1996 Act, which reads as follows:

> "(4) A person from abroad who is not eligible for housing assistance shall be disregarded in determining for the purposes of this Part whether another person—(a) is homeless or threatened with homelessness, or (b) has a priority need for accommodation."

Morris claimed that this section was discriminatory (Art 14) by taking into account the national origins of her daughter, and that it was an attack on her right to a private and family life (Art 8) because it would force them to cut short the life they had made in the UK and they would either have to return to Mauritius or be separated. It is

[128] [2005] EWCA Civ 1184

important to note that Article 14 is parasitic, in that it can only be contested in conjunction with another Convention right; in this case Article 8.

A host of indeterminate aspects of the ECHR and the 1996 Act were called into question by this litigation. Firstly in terms of Article 8, the court had to establish whether s 185(4) came within the "ambit" of the right to private and family life, or whether it was unconnected with this right. Secondly, if the section was within the ambit of Article 8, it then had to be decided whether it engaged Article 14, and the court had to establish whether the section made a legitimate distinction between people of differing immigration statuses, or made an illegitimate discrimination between people of differing national origins. The court concluded (with Jonathan Parker LJ dissenting) that the section was within the ambit of Article 8, and the discrimination was unjustified in terms of national origin. The result was a declaration of incompatibility under s 4 of the *Human Rights Act 1998*, which was restricted in scope by the court to the details of this case. Were these decisions appropriate, in that they maximised certainty in the Rule of Law? Arguably they are, and in order to conclude this we need to analyse the reasoning behind the decisions.

Firstly as regards Article 8, is homelessness law within the "ambit" of Strasbourg jurisprudence and domestic law relating to the right to a private and family life? "Ambit" is a concept that was established by the Strasbourg court to outline the penumbral set of issues that can come within the purview of the ECHR. Lord Justice Sedley outlined why the section was within the ambit of Article 8, and in his first sentence he reveals the indeterminacy of the case, and the fact that in some cases it can be that more than one approach can be appropriate:

> "[23] There is a tenable sense in which each side of this argument is correct. The Housing Act [1996], as its name suggests, is concerned with a large range of housing issues. Part VII of it is

> concerned with a range of people, not necessarily forming part of a residential family, in need of housing. In this sense we are looking at social welfare legislation, and social welfare as such is not – or not necessarily -within the ambit of art.8. But when the focus is narrowed to the provisions in issue in this case, we find ourselves looking at measures which are designed specifically to keep families together. There can in my judgment be no question that this is, in the parlance of Strasbourg, a modality of the state's manifestation of respect for family life. If so, it is within the ambit of art.8."

This reasoning is sound when one recalls that "priority need" is a status that was established to ensure that families are afforded greater weight in homelessness allocation than those without dependent children, and it therefore unquestionably defends the family unit. This first step of assessing whether Article 8 was engaged shows the extraordinary difficulty faced by the judiciary in providing clear definition to the law given the considerable indeterminacy that they must surmount.

The next step was to consider whether the incursion into the right to a family life was discriminatory against those of a certain national origin and was therefore incompatible with Article 14 ECHR. Here it is instructive to see what Jonathan Parker LJ concluded in his dissent:

> "[77] I would accept the submission of Mr David Pannick QC (for the First Secretary of State [intervening]) that to treat the operation of section 185(4) as amounting to discrimination on grounds of nationality alone is to take too narrow a view; and that the better view is that (when read in the context of Part VII of the 1996 Act as a whole and the Homelessness (England) Regulations 2000 ("the 2000 Regulations")) it amounts to discrimination on grounds of immigration status, with particular reference to habitual residence in the UK. As Mr Pannick points out, the effect of regulation 4 of the 2000 Regulations is that British citizens are not eligible for assistance under Part VII if they are not habitually resident in the UK"

The problem with this judgement is that by the judge's own admission he is rejecting the "narrow view" in favour of an expansive interpretation based on the context of the Act taken as a whole, and in conjunction with the 2000 Regulations. This approach is understandable, but arguably is not the optimal means of maximising certainty in the

Rule of Law that would be achieved by narrowly construing the discrimination as being according to national origins. Section 185(4) distinguishes persons "from abroad" and it would therefore be stretching this definition to include UK citizens that are subject to immigration control on account of their not being habitually resident. Mrs Morris is a UK citizen and had a full right to residency despite not being habitually resident in the "Common Travel Area". The only reason that she was not able to secure housing assistance was because her daughter was born in Mauritius.

In order to justify the Declaration of Incompatibility under s 4 HRA, the court had to show that discriminating against Mrs Morris's daughter was not proportionate in pursuing a legitimate aim, or was not legitimate in the first place. The court concluded that in the immediate case the aim pursued was not legitimate, and could not be justified at all. This was because as Lord Justice Sedley stated at paragraph 45 "a policy objective of driving a British parent out of the country because of the immigration status of her child is not one which I am prepared to attribute to Parliament in its enactment of s.185(4)." The declaration of incompatibility was strictly limited to such cases where the applicant is a British citizen with a dependent child that is of a different national origin. This limited rendering of the interplay between Article 8 and the "priority need" categories in s 185 is arguably an entirely appropriate attempt at clarifying the indeterminacy in the law. What would have been inappropriate would be to read in policy aims that were not explicitly stated in the statutory scheme. This was the approach suggested by David Pannick QC for the First Secretary of State:

> "[s 185(4)] is a reasonable and proportionate means to the legitimate policy ends of encouraging persons illegally here to regularise their status and discouraging benefit tourism. Finally, Mr Pannick submits that there are other statutory powers which prevent what would otherwise be an incompatibility from arising, or alternatively which remedy any fault without the need of a declaration of incompatibility."

Lord Pannick is advocating that the court should encourage a policy of regularising the status of illegal immigrants and should discourage benefit tourism. If these were indeed the intention of Parliament they would have been clearly set out, and as they are not, such a suggestion is anti-definitional and inappropriate. Therefore with respect, one could suggest that Lord Justice Jonathan Parker's submission was inappropriate policy-orientation:

> "[80] I accept Mr Pannick's submission that the general policy aim underlying section 185(4) is that of ensuring that scarce public resources are focused on those with a settled link with the UK – an aim which no doubt embraces encouraging those who are in the UK legally to regularise their stay, and deterring benefit tourism."

There is absolutely no question that the *Morris* case was riddled with complicated legal and linguistic indeterminacy. The dissent threw into sharp relief what alternative resolutions to this indeterminacy were on offer, and although the court opted for applying the ECHR against the wishes of the UK government, it can be argued that this was appropriate, and that the alternative proposed was inappropriate anti-definitional behaviour. This was the only case out of 103 cases on homelessness where the ECHR was successfully applied, and its application can be strongly justified in terms of the Logic of Appropriateness. Therefore this surely supports the use of selection on the independent variable and a systematic qualitative methodology – as by these means there is strong evidence that despite the incredible opportunity to act in an expansively political manner this is not what the judges have done.

Of course not applying the ECHR can be just as policy-orientated if it sustains or exacerbates indeterminacy in the law. The very recent case of *Tomlinson and*

others v Birmingham City Council[129] was considered above where the Supreme Court ruled that the allocation of social housing was a service and not a right. In his dissent Lord Collins agreed with the majority that the appeals should be dismissed, but he also sought to clarify "economic rights" as Strasbourg had failed to do so:

> "[60] The Strasbourg Court has said that it is not necessary to give what it has called an 'abstract definition' of the concept of civil rights and obligations. It is understandable that the court has been reluctant to provide abstract definitions. What is not so comprehensible is its apparent reluctance to enunciate principles which will enable a line to be drawn between those rights in public law which are to be regarded as "civil rights" and those which are not to be so regarded."

Lord Collins was motivated by the desire to clarify the meaning of the law which is an appropriate motivation, but in this situation it could be accused of being anti-prudential by establishing legal connections proactively rather than reactively. Arguably this would be a per incuriam judgement, where there is no legislative or precedential cue for the judicial decision.

Another case that arguably shows an inappropriate dissent being blocked by the majority was the Court of Appeal case of *Desnousse v Newham London Borough Council and others*[130]. Here the court accepted the submission of the local authority that it had been legal to evict the homeless persons without the need for a court order. The court in this decision relied on precedent[131] to interpret the *Protection from Eviction Act 1977*. The precedent held that those in temporary accommodation with no further right to be housed by the authority could be evicted without the usual procedural safeguards afforded to those with a permanent tenancy. This did not mean that there was no procedural protection for the individuals, rather they had the

[129] [2010] UKSC 8
[130] [2006] EWCA Civ 547
[131] *Mohamed v Manek* (1995) 94 LGR 211

statutory rights to information, a review, and a 28-day notice of eviction. However Lord Justice Lloyd in his dissent submitted that there may be an Article 8 ground for ensuring the safeguard of a court order prior to eviction. He based this conclusion on the argument that individuals could create a home even in temporary accommodation. However this approach would place a heavy fact-finding jurisdiction on the courts and would arguably exacerbate indeterminacy in the law. As per Lord Justice Tuckey in the same case:

> "[146] At what stage in this process, if at all, can it be said that the accommodation made available becomes a person's home?"

Therefore again we can perhaps conclude that the decision taken by the majority in *Desnousse* was appropriate in so far as it sought to maximise certainty in the indeterminacy of the law, whereas the dissent contained an anti-definitional resolution to the case that could be described as inappropriate policy-orientation.

The final case involving Article 8 and a dissent was *Lambeth London Borough Council and another v Kay and others, Price and others v Leeds City Council*[132]. This is one of the two cases with dissents that involved both the 1996 Act and the 2002 Act. The case concerned orders for possession of property and land owned by the local authority. In the case against Lambeth it was held that the applicants had a right to a family home in the authority's property under Article 8(1), but that the domestic law meant that the local authority had a legitimate policy aim that could justify the interference with that right in the form of the possession order. In the case against Leeds the court held that there was no right to a home for a traveller family living

[132] [2006] UKHL 10

illegally on a recreation field, and so Article 8 was not even engaged. It was contended by counsel for the homeless applicants that contrary to section 3 of the 2002 Act the authorities had failed to take the needs of minority groups and their right to a home under Article 8 into account when drawing up their homelessness strategies. The majority and dissenters all agreed that neither appeal ought to be allowed, they only disagreed as to whether the personal circumstances of the applicants must automatically be taken into account when considering a possible threat to private and family life. The majority held that personal circumstances need only be considered in cases where the statutory scheme calls for such circumstances to be taken into account. The minority relied on the ECtHR judgement of *Connors v UK*[133] that set out that in some cases it was correct for the courts to take into account personal circumstances despite the lack of such procedural safeguards in domestic legislation. The problem with adopting this approach is that it could be said to sustain or exacerbate indeterminacy by giving the judiciary the responsibility to determine whether "personal circumstances" are or are not pertinent in every case, and arguably this is anti-definitional by failing to clarify s 3 of the 2002 Act. The majority were closely relying on domestic law and precedent and had taken Strasbourg jurisprudence into account but chose not to follow it explicitly, as is in their discretion under s 2 of the HRA 1998. Despite the differences between the two sides there was agreement that precedent of the domestic courts had to be carefully applied to ensure certainty. Indeed the following dictum of Lord Bingham shows that the disagreement between the judges was on just one aspect of the case, whereas on the importance of certainty the judges were all agreed:

[133] (2004) 40 EHRR 189

> "[43] As Lord Hailsham observed, "in legal matters, some degree of certainty is at least as valuable a part of justice as perfection." That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 [Human Rights] Act. But they should follow the binding precedent, as again the Court of Appeal did here."

This case, as with the others discussed for this section, shows evidence that the judges in difficult cases typically conclude with the decision that is most conducive to certainty in the Rule of Law, and is therefore most appropriate. The dissents are not entirely inappropriate, and indeed the scale of the dissent has in most of the cases been minor, and is indicative of the extraordinary difficulty involved in clarifying modern legislation in the context of international legal commitments.

It could be said that the concept of "policy-orientated" behaviour is at best disparaging, and at worst entirely unobservable. However it is arguably neither of these things. There will always be multiple ways of deciding a case, but some are more appropriate than others by being more conducive to certainty in the law. In not one of the 103 cases considered for this chapter was there any final judgement of the court that sustained or exacerbated indeterminacy in the definition of the legislation, and therefore there is no evidence to support the alternative theory that indeterminacy in legislative language encourages an inappropriate judicial response.

Inappropriate Political Behaviour II: Influence-seeking

As discussed previously, there is a risk that the categorisation of appropriateness is so broad that any judicial decision could be evaluated as being "appropriate". Take the *van Aken* case discussed above. The court decided that the delivery of the application documents was a unilateral endeavour and could be achieved by posting them in the out-of-hours' post box. It was concluded that this decision was appropriate as it clarified the procedural requirements that a local authority must adhere to. The danger is that any behaviour could be portrayed as being appropriate, and that therefore the concept is unfalsifiable. What would the analysis of the case have been had the judges said the opposite and pressed that "delivery" meant "delivery to an individual"? This would be reading words into the positive law which would not resolve the indeterminacy but in fact sustain or exacerbate it. An appropriate decision deals with indeterminacy in positive law by adding meaning, but this does not necessarily involve adding words. If "delivery" meant "delivery to an individual" one would then ask – to which individual? Would it have to be an officer of the court, or could it be to a cleaner working in the building? What time limit would apply? Could one hand the documents to an official after closing time as they walked out of the doors? Essentially the court in *van Aken* took the decision that maximised certainty in the law in response to the indeterminacy of the legislation.

This section on influence-seeking is important to show that the theory can be falsified, but also to show that there is very little evidence available to support the alternative argument that judges react to indeterminate legislation with inappropriate

behaviour. As mentioned, to find irrefutable evidence that a judge is maximising their preferences is impossible without a stark confession from the judge, and as such "inappropriate" behaviour simply identifies decisions that sustain or exacerbate indeterminacy in the positive law. Most notably the decision of the court displays influence–seeking if it is anti-systemic by creating new procedural requirements that conflict with existing requirements, or if it is anti-prudential by stretching the constitutional role of the judiciary beyond the limits of its capacity and competence.

Of course these categories of inappropriate behaviour entail a qualitative interpretation of the data, and inappropriateness is not an objective fact that can be identified. Nor is "appropriate behaviour" identifiable with necessary and sufficient conditions, but rather it depends on a family-resemblance approach to concept identification. Therefore it is controversial and capable of alternative conclusions, but these same problems underpin all studies of judicial politics, and the approach offered here has aimed to alleviate some of the limitations of the subject by using a systematic approach to case selection and analysis that helps to ensure the validity of the evidence presented.

To consider whether the courts have been inappropriately influence-seeking evidence was sought from all 95 cases brought under the 1996 Act and all eight cases brought under the 2002 Act, and only two cases show any of the elements that could potentially be described as inappropriate influence-seeking. The first case where influence-seeking could be observed concerns a potentially anti-prudential and anti-systemic decision. In the case of *R (on the application of Lin) v Barnet London Borough Council*[134] the Court of Appeal ruled that procedural aspects of the local

[134] [2007] EWCA Civ 132

authority's housing scheme were invalid and therefore unlawful. This was the only case where the courts directly invalidated a local authority's housing scheme, and this was therefore a significant incursion into the decision-making discretion of the authority, and could be considered as judicial influence-seeking.

However this would be a very weak and superficial analysis of the *Lin* case. The applicant had pressed the court in the judicial review to quash several aspects of the authority's housing scheme; including i) the policy that no "reasonable preference" was given to homeless applicants for social housing, ii) the "unreasonable" policy that prevented those in temporary homeless accommodation from competing with other preferred groups for permanent housing, and iii) the policy that no explanation was given for the distribution of points by which allocation decisions were made by the local authority. Despite this broad ranging attack against both the powers and procedures of the local authority, the court only quashed the effects of the third aspect – the lack of sufficient information on the points system. All other elements of the housing scheme were left intact by the court. Thus the interference was minimal and carefully targeted at rectifying that aspect of the housing scheme that was so uncertain as to undermine the implementation of the law. Therefore *Lin* led to the court directly altering the authority's entire housing scheme, which is significant in terms of scale compared to all other cases that only affected individual decisions. However the alteration made to the scheme was minimal, and can be justified as improving clarity in the Rule of Law, and was hence appropriate judicial behaviour.

To be anti-prudential the courts must substitute their judgement for that of the authority that was intended by Parliament, despite the lack of capability to make such

a judgement. Alternatively the courts can be anti-prudential in the opposite direction by not recognising their own responsibility to act and thereby deferring too much to other branches of government. In one important case the judges assessed the extent of the separation of powers and negated an aspect of the judicial power. In other words they were arguably providing such a capacious margin of appreciation as to unduly fetter their own legitimate powers. The case was *Tower Hamlets London Borough Council v Begum*[135], where the Court of Appeal held that it was reasonable for the claimant to continue to occupy her father-in-law's house in Bangladesh that was available to her. This case was disapproved by the case of *Maloba*[136] discussed above, where the claimant had been told by the local authority that it was reasonable for him to occupy his home in Uganda. Far from being anti-prudential in terms of being an "activist" incursion into the decision-making process of the local authority, *Begum* was excessively restrained and arguably undermined the public law power to review unreasonable exercises of executive power. Inappropriate political behaviour in judges is often taken to be synonymous with activist judgements, but it actually refers to behaviour that sustains indeterminacy in the law either through expansion or contraction. Conversely either direction of change can be justified as "appropriate" so long as the change improves the clarity in the Rule of Law that has been assailed by legislative indeterminacy. Therefore the *Begum* case created greater confusion because it was not clear how the rationality requirements of English public law would apply to the provision of social housing. The Rule of Law requires rationality to be imposed by the judiciary or else there is a risk of arbitrary and unjustifiable decision-making that will undermine the principles of certainty and equality in the law. Despite the confusion created, it was alleviated in less than a decade by the *Maloba* case, and

[135] [1999] All ER (D) 1189
[136] [2007] EWCA Civ 1281

hence there have only been two such cases concerning homeless individuals with foreign homes that were brought before the senior courts in the last fifteen years. Therefore on balance one can conclude that inappropriate decision-making is very rare.

There is clearly a real lack of evidence of inappropriate political behaviour in judges. That is not because it would be impossible to find such evidence as the observations required to falsify the theory have been clearly set out. Clear and irrefutable evidence that the judges behave inappropriately in terms of influence-seeking just does not exist in this field, and where evidence such as the *Begum* case arises, it does not last long before being disapproved on appeal due to the indeterminacy it has sustained and exacerbated in the Rule of Law.

Conclusion

The aim of this chapter, and of this thesis, is not to conclude that senior British judges on an individual level are infallible and always reach decisions according to the Logic of Appropriateness. Rather the aim is to show that despite very rare instances where inappropriate judgements are reached, the system works to correct them with reasonably efficiency, and thereby the system maximises the long-term efficacy of Parliamentary legislation. This is because uncertainty in the Rule of Law is jarring and encourages litigants to challenge its validity, and the optimal judicial behaviour trope is a decision that maximises certainty, or conversely that minimises indeterminacy. Judges increasingly have had to make decisions that amend the law in such a way because of the vast increase in the enactment of indeterminate legislation.

This process can be seen in the comparison of the 95 cases brought against the indeterminate 1996 Act and the 8 cases brought against the more determinate 2002 Act. There is therefore strong evidence in support of the theory that political behaviour in judges is an appropriate reaction to legislative indeterminacy.

Chapter Five: Indeterminacy in Anti-Discrimination and Equality Legislation

> "Equality… requires government not to treat people unequally without justification. The notion of equal worth is thus a fundamental precept of our constitution. It gains its ultimate justification from a notion of the way individuals should be treated in a democracy. It is constitutive of democracy"
>
> (Jowell, 1994, p. 7)

Introduction

As Jeffrey Jowell has argued, equality is a fundamental principle of democracy and hence the Rule of Law that underpins the operation and efficacy of the state in all policy spaces. As the state has expanded further into the lives of its citizens under the authority of indeterminate legislative instruments, there has been an expansion in the role of the judiciary in applying the principles of the Rule of Law in various cases of importance to public and private law. Of particular interest therefore are attempts to codify the anti-discrimination and equality principles of the Rule of Law via legislation. This has the potential to diminish the political role of the judiciary, but only if the legislation is reasonably determinable.

This chapter seeks to test the Legislative Politicisation of the Judiciary Theory by looking at developments in anti-discrimination and equality legislation in the UK from 1920 to 2010, in order to see the impact on the political behaviour of senior judges. This chapter uses the same comparative methodology of tracing the impact of linguistic variations within two pieces of legislation. However rather than analysing

primary legislation, this chapter will focus on two pieces of secondary legislation. The reasons for this are that firstly it is important when considering the impact of legislative language not to ignore secondary legislation as it is such an enormous potential source of linguistic indeterminacy. Secondly it is necessary to assess the impact of European Union Law on the indeterminacy of modern British legislation. All EU Law has direct effect[137] and supremacy[138] over UK Law and therefore does not need to be enacted by the British Parliament to have legal force, however a great deal of EU Law is incorporated into UK Law via secondary legislation passed under the authority of s 2(2) of the *European Communities Act 1972*. There has been an enormous amount of legal change relating to anti-discrimination and equality in the EU in the past decade, and its impact on the political behaviour of judges needs to be examined.

Thirdly, the most important reason for considering secondary legislation is to see how pragmatic indeterminacy in primary legislation can be used by politicians to change the law. In previous chapters, the discourse analysis was used to code sections of primary legislation, and the key set of variables that established the indeterminacy of legislation were those that created pragmatic indeterminacy via decentralisation. That is those elements of language that enabled an agent of Parliament to change the law outside of Parliament in accordance with contextual or normative considerations. In this chapter we are able to observe how this decentralised power has been used to create secondary legislation and whether this further exacerbates the indeterminacy in the law or not.

[137] *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratis der Belastingen* Case 26/62 [1963] ECR 1
[138] *Flaminio Costa v ENEL* Case 6/64 [1964] ECR 585

This chapter will first of all consider the development of anti-discrimination and equality law in the UK and the EU (I). This will be followed by a discussion of the results of the discourse analyses for all primary and secondary legislation pertaining to anti-discrimination and equality (II). Finally the *Race Relations Act 1976 (Amendment) Regulations 2003*[139] and the *Employment Equality (Religion or Belief) Regulations 2003*[140] will be compared (III). These two secondary regulations differ sufficiently in their linguistic properties to enable an assessment as to whether the political behaviour of the judges has been a reaction to the supply of indeterminate legislation, and whether the resolution of the indeterminacy has been in accordance with the "Logic of Appropriateness".

I: Developments in Anti-Discrimination and Equality Law in the United Kingdom and the European Union

This section will start with a discussion of the Legislative Politicisation Theory in the context of anti-discrimination and equality legislation. It will then consider in detail the legal developments in these areas in both the UK and the EU.

Anti-discrimination and equality legislation are very important examples of how the linguistic nature of legislation has developed since 1920. Before examining this claim it is worth understanding the distinction between the two. In simple terms one might characterise anti-discrimination law as a negative right, and equality law as a positive right. In the sense that anti-discrimination is freedom *from* discriminating

[139] SI 2003/1626
[140] SI 2003/1660

treatment, and equality is the right *to* equal treatment. However the conceptual utility of this dichotomy is limited due to its simplicity, and due to the fact that the categories are not mutually exclusive (Koch, 2005). Nevertheless for the purposes of this chapter the distinction will suffice. Anti-discrimination and equality legislation are of considerable interest to this thesis for several reasons. Firstly, such legislation is often implemented via indeterminate legislation and needs careful clarification in order to be assimilated into the Rule of Law. This is because the ambition to achieve "equal concern and respect" (Dworkin, 1977) between citizens as private individuals, and in their relations with the state, requires legislation to be elastic so as to accommodate unforeseeable changes in circumstance. Such legislation does not just establish the means of resolving simple "boundary disputes" that require third-party resolution, it also establishes the means to resolve "rights disputes" where the fight is not over resources, but over something far less tangible. Secondly, anti-discrimination and equality legislation also creates tension with other areas of law and policy that intentionally discriminate between individuals. Thirdly, there will inevitably be issues where different rights to equal treatment will be mutually exclusive leading to a resolution that may be pejoratively summarised as "all people are equal, but some are more equal than others". Take for instance the case decided in January 2011 that Christian bed and breakfast owners in Bristol had breached equality regulations by not allowing a gay couple to use one of their double rooms. In this case the rights of the Christian couple came into direct conflict with the rights of the gay couple and the latter prevailed[141].

Finally anti-discrimination and equality legislation can be used by litigants to augment a public or private law case. For instance, two asylum seekers in July 2010

[141] *Hall & Or v Bull & Or* [2011] EW Misc 2 (CC)

successfully appealed against a deportation order at the Supreme Court as they would not be treated equally as homosexuals in their home countries of Iran and Cameroon, and should not have been expected to hide their sexuality[142]. In private law, an employee can rely on anti-discrimination grounds to support a claim for unfair dismissal. Therefore one can see that anti-discrimination and equality legislation increasingly underpin a considerable amount of British law and raise considerable complications that must be clarified in order to maximise certainty in the Rule of Law. However the principles of anti-discrimination and equality have long underpinned the Rule of Law and the operation of British democracy, and the legislation arguably makes explicit what was hitherto implicit. By extension, the judicial role in reconciling Parliamentary legislation with the Rule of Law is especially important when it comes to anti-discrimination and equality as it is such a crucial pillar of modern democracy, and the continued efficacy of Parliamentary sovereignty depends on a sustainable clarification of the law. Indeed David Robertson (2010) has argued that dignity and discrimination are key "symbolic markers" of late 20th and early 21st century political theory.

In the UK the principles of equality inherent in the Common Law were recognised by A.V. Dicey's description of the Rule of Law as applying equally to all regardless of rank. This is formal equality, but arguably there are also substantive principles of equity and procedural fairness that have long existed in English Law. However the Common Law has also been concerned with discriminating between individuals in the apportionment of their rights in terms of property, trusts and contract. Therefore it was via statute law that the most significant developments in anti-discrimination and equality were achieved.

[142] *HJ (Iran) v Secretary of State for the Home Department (Rev 1)* [2010] UKSC 31

These developments began in the inter-war period, when there were significant reforms to the rights of women secured in the wake of their receiving the vote with the *Representation of the People Act 1918*. For instance, the *Sex Disqualification (Removal) Act 1919* removed any legal impediments from women seeking to serve in public office, and during the 1920s there was legislation to guarantee equal rights to property, equality in voting and equality in divorce. There was also legislation to promote the equality of the Catholic community and those with disabilities before the end of the Second World War. It was not until the 1960s when the issue of race discrimination was first tackled with the *Race Relations Acts* of 1965 and 1968. This was followed in the 1970s by the *Equal Pay Act*, the *Sex Discrimination Act* and another *Race Relations Act*. The latter established the Commission for Racial Equality (CRE) as a non-departmental public body to oversee the implementation of anti-discrimination measures. There was little legal development in the 1980s, but the 1990s saw further protection for the disabled with the *Disability Discrimination Act 1995* and the *Disability Rights Commission Act 1999*. The outcome of this late 20th Century legislation was a series of statutory duties placed upon employers, contractors, service providers and public authorities not to directly discriminate.

The anti-discrimination legislation that had been passed in the latter half of the 20th Century did a great deal to improve the recognition of minority groups, however there was a fundamental problem: the lack of intersectionality. The problem of intersectionality means that there is no consistency in the law on discrimination, and little communication between the different anti-discrimination regimes. For instance those individuals that held more than one protected status would risk falling between two stools. The concept of intersectionality was developed by Kimberlé Crenshaw

(1989) who criticised the "single-axis" frameworks for analysing discrimination where women are white, black people are men, and black women are forgotten by both camps. A related problem arose where different anti-discrimination legislation lacked a consistent legal approach and therefore increased the confusion in the law. For instance, Lord Justice Mummery opened his reasoning in the 2010 Court of Appeal case of *Aylott v Stockton-On-Tees Borough Council*[143] with an assessment of the problems with disability discrimination legislation:

> "[1] This appeal is about how the *Disability Discrimination Act 1995*… should be interpreted in law and applied in practice. The course of the proceedings demonstrates that problems persist, even after 15 years' experience of the legislation. The problems are not solved by attempting to work from other discrimination legislation and the authorities on how that should be construed. Many of the problems are different in practice. Important features of the 1995 Act have no equivalent in sex discrimination and race discrimination law."

British judges have had to assimilate a vast body of anti-discrimination legislation into the Rule of Law, whilst bearing in mind European Union Law and the *European Convention on Human Rights*. Due to the lack of certainty in this area of the law there has been considerable need for the technocratic interventions of the judiciary into public policy disputes.

In the 21st Century the law on discrimination was augmented in the EU and the UK under the auspices of Articles 13 and 29 of the European Union Treaty that had been ratified by the Treaty of Amsterdam in 1997. Article 13 was implemented by the *Race Directive*[144] and the *Framework Directive*[145], which in turn were incorporated into UK law via a series of Statutory Instruments, two of which form the basis of this case study chapter. The law on discrimination was considerably enhanced by these

[143] [2010] EWCA Civ 910
[144] 2000/43/EC.
[145] 2000/78/EC.

laws as it added to direct discrimination the offences of indirect discrimination, harassment and victimisation. In the UK, anti-discrimination law was further enhanced by the move to equality law with the *Equality Acts* of 2006 and 2010. The main difference between the anti-discrimination and equality legislation is that anti-discrimination law relies on complaints from individuals, where equality law creates a positive requirement that public and private bodies create equality within "social reality" (Schiek & Chege, 2009). Thus public and private bodies have to fulfil certain procedural requirements to show that they are not risking discrimination, and that they are encouraging equality. These requirements are strictly enforced as one can see with the Secretary of State for Education, Michael Gove, losing a judicial review case in February 2011[146]. The review had been launched against his decision to stop planned capital expenditure on school buildings. Gove was not accused of discriminating in his decision, but of not considering the possible implications of his decision on gender, race and disability discrimination. He was thus found to have acted illegally by not adhering to the procedural requirement to consider the risks to discrimination and inequality.

The move to equality legislation has made the UK amongst the most progressive in terms of such rights in the EU. Indeed the EU has not gone as far as the UK in achieving equality law that has been termed the "fourth generation" of anti-discrimination legislation. It was NGOs from the UK and the Netherlands that largely pursued the anti-discrimination agenda through the EU's political institutions that had led to Articles 13 and 29 (Schiek & Chege, 2009, pp. 3-6). The enactment of equality legislation in the UK was designed to resolve the issue of intersectionality, as well as

[146] *Luton Borough Council & Nottingham City Council & Ors, R (on the application of) v Secretary of State for Education* [2011] EWHC 217

to include protected characteristics such as age discrimination that had been neglected by previous anti-discrimination law[147], and ultimately it was designed to quicken the pace of social change in the UK that had been shown to be sluggish in some institutions such as the Metropolitan Police[148]. Such legal ambition can arguably be achieved only with indeterminate legislation that enables the greatest flexibility in resolving unforeseeable circumstances. For example the issue of intersectionality was dealt with in section 14 of the *Equality Act 2010* that legislates for "combined discrimination" and "dual characteristics". Also the pace of change was tackled by Part 11 Chapter 2 ss 158-159 that enabled "positive action" to be taken, and here one can clearly see the indeterminacy of the legislation required to achieve such ambitious social change:

> "159 (1) This section applies if a person (P) *reasonably thinks* that – (a) persons who share a protected characteristic *suffer a disadvantage* connected to the characteristic, or (b) participation in an activity by persons who share a protected characteristic is *disproportionately low*.
>
> Part 5 (work) does not prohibit P from taking action within subsection (3) with the *aim of enabling or encouraging* persons who share the protected characteristic to— overcome or minimise that disadvantage, or participate in that activity.
>
> That action is treating a person (A) *more favourably* in connection with recruitment or promotion than another person (B) because A has the protected characteristic but B does not." [Emphasis added]

Such legislative language is highly indeterminate and thus more likely to require resolution by the judiciary making politically significant choices, such as where participation in an activity is "disproportionately low" amongst those of a protected characteristic. The indeterminacy of anti-discrimination and equality legislation is of considerable importance, and taken on top of the requirement of the

[147] s 5 *Equality Act 2010*
[148] This was the conclusion of the Stephen Lawrence Inquiry that reported in February 1999 that parts of the Metropolitan Police remained "institutionally racist".

UK courts to apply European Court of Justice (ECJ) decisions, and take into consideration European Court of Human Rights (ECtHR) jurisprudence it should not surprise us when the judges are called upon to make significant political decisions.

In terms of EU law, the key anti-discrimination law development in the Treaty of Amsterdam was the amendment of EU Treaty Article 234 which provided for vertical and horizontal protection against discrimination on the grounds of nationality. The new Articles 13 and 29 added protection in education, employment, healthcare, housing, and immigration (Bell M. , 2009). Mark Bell has argued that this change in anti-discrimination law amounted to an ideological shift in the EU constitution from a trade-based market integration model, towards a social citizenship model (Bell M. , 2002). A series of Directives were subsequently passed to implement Articles 13 and 29, and the key issue for this chapter is how these Directives as translated into secondary legislation by Parliament have affected the political behaviour of the judiciary. All EU law, including the Treaty, Regulations and Directives have direct effect in the UK, and Danny Nicol has stressed that the significance of this change to Parliamentary Sovereignty was not foreseen with sufficient clarity by the MPs that enacted the *European Communities Act 1972* (Nicol, 2001). However despite the direct effect of EU law, the vast majority of new European law is enacted by Parliament via secondary legislation. and two Directives that were incorporated in this manner into UK law form the basis for the comparative analysis.

II: Discourse Analysis Results and Selection of Cases for Comparison

As with the previous chapters on immigration and homelessness legislation the choice of which two particular pieces of legislation to compare has been led by

selection on the independent variable. The legislation selected needed to have as much in common as possible in terms of subject matter and length, but differ in the levels of indeterminacy. This chapter is different to the earlier ones as it compares the judicial interpretation of secondary legislation, rather than primary legislation. This is significant because secondary legislation is a hugely important source of law and its impact on the political behaviour of judges must be assessed.

The data set for the discourse analysis therefore included not only all primary legislation relating to anti-discrimination and equality, but all secondary legislation as well. This means a total data set of 1,654 sections and regulations of legislation. This total includes 822 sections of primary legislation beginning with s 1 of the *Jurors (Enrolment of Women) (Sc) Act 1920* and ending with s 218 of the *Equality Act 2010*. The total also includes 832 regulations from secondary legislation taken from 116 statutory instruments, starting with reg 1 of the *Race Relations (Offshore Employment) Order 1987* and ending with reg 2 of the *Equality Act 2010 (Amendment) Order 2010*. The data set is not a sample as every single section and regulation in British legislation relevant to anti-discrimination and equality was coded. The only qualification to this is that secondary regulations that were simply initiating the implementation of the legislation were not coded, nor were those that only applied to one of the UK's four nations alone. This includes all commencement and revocation orders as they are typically just two regulations long and initiate the implementation of the primary legislation. However any commencement order that made supplementary amendments was coded. This selective approach may seem to introduce distortive bias that will not yield a clear picture of the nature of secondary legislation in this field. However the secondary legislation should be considered in two distinct categories. Firstly there are those regulations that simply mark the start or

finish of the operation of primary legislation, and secondly there are regulations that implement the legislation in response to contextual variation. It is this latter category that is theoretically important and makes up the vast majority of the total volume of secondary legislation.

What follows are a summary of the results from the discourse analysis, and more comprehensive tabulations are provided in the appendix. The first table (5.1) displays changes in the proportion of sections of primary legislation that displayed indeterminacy between 1920 and 2010.

Table 5.1: Indeterminacy in Primary Legislation relating to Anti-Discrimination and Equality

	Emb	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
Increase %	-0.12	0.18	0.65	0.3	0.34	0.45	0.46	0.11	0.35
R^2	0.03	0.27	0.35	0.13	0.43	0.32	0.24	0.01	0.48
Real Terms	0.36	0.07	0.55	0.29	0.19	0.28	0.57	0.3	0.18
R^2	0.19	0.3	0.24	0.29	0.32	0.32	0.24	0.35	0.33

Emb = Embedding – The legislation utilises subordinate clauses. **Sub = Subjunctive** – The use of subjunctive language. **Adj = Adjectives** – The use of adjectives, adverbs or qualifying nouns. **Mod = Modal** – The use of vague model verbs (may). **Enb = Enabling** – An agent of Parliament is enabled to amend the law. **Age = Agency** – The agent intended to implement the law is not clearly specified. **Con = Conditional** – The use of conditional language. **Ref = Referential** – The use of a reference to another piece of legislation. **Decent = Decentralisation** – The decentralisation interaction, which displays the combined measure of vague modal verbs, enabling power and unclear agency.

The table shows an extraordinary increase in all of the significant forms of indeterminacy over the ninety year period. For instance the annual percentage increase in the use of adjectives of 0.65% translates to an almost 60% rise between 1920 and 2010. This shows that the level of semantic indeterminacy has increased enormously. The proportionate incidence of Embedding has declined (-0.12% pa), as it did for all previous chapters. Thereby showing a slight improvement in syntactic clarity, although in real terms there was an increase, and the very low R^2 suggests that there was considerable variance in the results. There was also a small increase in the

use of references to other legislation of 10% (0.11% pa), again with very high variance over the period (R^2 = 0.01). This measure can be of significance, but it depends entirely on the legislation that is being referred to, such that taken on its own the referential measure does not tell us much about the legislation except the extent to which it connects to other pieces of legislation.

The most significant change in the language has been the increase in pragmatic indeterminacy, which on the core measures of decentralisation has seen a considerable rise. The use of the vague modal verb "may" increased by 27% over the period (0.3% pa), the use of language that enables an agent of Parliament increased by 31% (0.34% pa), and the extent to which that agent was not clearly specified by the language increase by 41% (0.45% pa). The decentralisation interaction of these three together as a "Henry VIIIth Clause" is theorised to be the most important form of indeterminacy in causing politicisation, and this increased by 32% (0.35% pa). In addition the R^2 values for all of the observations are relatively high, which signifies a reasonably low level of variance away from the average rate of increase. Thus one can see that the language of legislation in this field has become significantly more indeterminate.

When one considers the real terms increase in legislation over the period the proportions translate into a truly astonishing increase in the quantity of indeterminate legislation. For instance the *Disability Discrimination Act 1995* had thirty Henry VIIIth clauses on its own, which is greater in sum than all of the anti-discrimination legislation that preceded it. From 1968 onwards all legislation had sections that were decentralising apart from the relatively short *Race Relations (Remedies) Act 1994* which had only three sections in total.

Measuring secondary legislation with the discourse analysis required a change in approach. The key differences were that it was not necessary to measure for decentralisation of power as it is legally impossible to further delegate from a delegated statutory instrument. Secondly there were some other measures that were worth including that were not used in the measures for primary legislation. These were a measure of the number of offences created and a measure of whether the regulation amended the primary legislation.

In terms of indeterminacy in secondary legislation the most important measures are arguably regulations that amend the primary legislation and that add adjectives and conditional language. This is because the secondary legislation applies the primary legislation in a specific context, but by adding further semantic subjectivity and pragmatic conditions the regulations will create greater uncertainty that will need to be resolved by the judiciary. Conditionality increased rapidly in the primary legislation by 41% (0.46% pa) as one can see from Table 5.1, therefore adding to this pragmatic confusion with secondary legislation will arguably make certainty in the Rule of Law considerably more elusive.

The converse of these indeterminate regulations are those that amend the primary legislation but without using adjectives or conditional language. This implies that the regulations clarify the meaning of the primary legislation without adding further confusion. Such regulations will help the judiciary avoid political behaviour as they will be able to resolve legislative indeterminacy by reference to the amending secondary legislation. However it must always be remembered that these measures represent a probabilistic theory of causation. Clearly in some cases secondary legislation may amend primary legislation without the use of adjectives or conditions

and nevertheless create indeterminacy or lead to political behaviour. In some cases two or more secondary regulations may create a mutually exclusive legal framework even if the language of the clashing instruments is reasonably determinable. It is impossible to account for all causation, but the Legislative Politicisation Theory does significantly help to explain a considerable amount of variation on the dependent variable of political behaviour in judges.

The following table (5.2) shows the summary of results for all of the 116 statutory instruments between 1987 and 2010 (for the full table please refer to the appendix).

Table 5.2: Indeterminacy in Secondary Legislation relating to Anti-Discrimination and Equality

	Embedding	*Aspiration*	*Adjective*	*Condition*	*Amendment*
Average %	23	5	30	51	57
Increase %	-0.51	-0.26	0.2	0.25	-0.23
R^2	0.02	0.01	0.002	0.003	0.003

This table displays results for the twenty-three years between 1987 and 2010 for which there has been secondary legislation on the subject of anti-discrimination and equality. Prior to 1987 there were no such regulations passed. The change in the twenty-three years has been small in proportion, and highly variable as can be seen from the extremely small R^2 values. Despite the variation in the language, it is important to note the sudden explosion of secondary legislation in the late 1980s when there was nothing prior to this. Also the averages in table 5.2 show that in the majority of the 832 regulations significant amendments were made to primary law (57%), and there was also a high utilisation of adjectives (30%) and conditional

language (51%). Essentially this all means that over 400 regulations amended primary law between 1987 and 2010, and most of these amendments added new conditions to the law, thereby exacerbating the pragmatic indeterminacy. On top of this an astonishing 110 new criminal offences were introduced by secondary legislation. Clearly this evidence is hugely significant in the attempt to understand the difficulties faced by the judiciary in interpreting legislation.

An aspect of pragmatic indeterminacy that was raised in relation to primary legislation was the failure to specify the agent responsible for the law's implementation. This was measured in primary legislation by testing whether or not a section clearly specified an agent or empowered an indistinct group of individuals by using terms such as "Her Majesty may…" or "The Secretary of State may…". It is only by looking at secondary legislation that one is able to discover who actually implemented these indeterminate sections, and with the anti-discrimination and equality legislation it has almost always been implemented by junior ministers or civil servants acting in the capacity of the Monarch or one of her Secretaries. For example SIs 2004/3125 and 2004/3127 were passed under the authority of the Secretary of State and yet were written and signed by Fiona Mactaggart the Parliamentary Under-Secretary of State at the Home Office. It could be argued that it is unlikely that the Home Secretary was unaware of the activities of the Parliamentary Under-Secretary, and as Mactaggart was in charge of Criminal Justice, Race Equality and Communities at the Home Office she was probably better able to draft such regulations. However the issue is one of accountability. The primary legislation placed the legal responsibility with the Secretary of State (without specifying that the Home Secretary was the intended recipient) and there have been occasions in the past where junior ministers and civil servants have acted beyond their bailiwick without the knowledge

of the responsible Minister, as was most clearly highlighted by the Scott Report[149]. With such a high volume of secondary legislation being enacted it is significant that responsibility for it has been so widely dispersed throughout the government. The risks of "moral hazard" are considerable where the identification of those that are responsible and accountable is left indeterminate (Strom, Mueller, & Bergman, 2003).

In terms of the politicisation of the judiciary one could argue that the individual that makes a decision is irrelevant if the legislation is clear as to who is responsible. However the legislation is not clear as to who is responsible if it says "The Secretary of State" as there are currently eighteen Secretaries of State in the Cabinet. In many cases the responsible Secretary will be abundantly clear from the department that has been implementing the legislation, but nevertheless the primary legislation has increasingly been written to enable various government representatives to implement the legislation, and that is the crucial point. Whereas in the past it was far more common to explicitly name the responsible minister in the legislation, it is increasingly the case that the responsibility is given to government *tout court*, which shows the importance of legislative indeterminacy in modern governance. It is perhaps therefore more symptomatic than causative in terms of indeterminacy that no single agent is authorised to implement the legislation, but it leads us to the same conclusion – that the language of legislation has changed over time with implications for the political behaviour of judges.

[149] "Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions"

The Regulations used for Comparison

Of the 116 statutory instruments, two were selected for comparison. These are the *Race Relations Act 1976 (Amendment) Regulations 2003* SI 2003/1626 (from here referred to as the Race Regulations) and the *Employment Equality (Religion or Belief) Regulations 2003* SI 2003/1660 (from here referred to as the Religion or Belief Regulations). As mentioned these pieces of secondary legislation were selected according to their variance on the independent variable – the indeterminacy of language. As noted the most theoretically significant source of indeterminacy in secondary legislation is via adjectives and conditional language that excerbates indeterminacy rather than resolving it. Table 5.3 displays the differences between these two instruments in real terms:

Table 5.3: Comparison of Race Regulations and the Religion or Belief Regulations

	Embedding	*Subjunctive*	*Adjective*	*Conditional*	*Amendment*	*Offences*
Race	12	0	8	28	51	16
Religion	25	2	31	33	0	14

There are 52 regulations that make up the Race Regulations, and 39 that make up the Religion or Belief Regulations (the full results can be found in the appendix). As one can see from Table 5.3, the Race Regulations made many amendments to primary legislation (98%), without adding many new adjectives (15%), but with a significant increase in conditionality (54%). The Race Regulations implemented the *Racial Equality Directive* (2000/43/EC), but did so by amending existing legislation on racial discrimination. However the Religion or Belief Regulations made no amendments to primary law because the subject-matter was entirely new to British law and was

implementing part of the EU *Framework Directive* (2000/78/EC). This new law was communicated in regulations where 79% utilised adjectives and 85% added conditions to the law. Therefore on the two crucial parameters of indeterminacy the two statutory instruments vary significantly; both in terms of the adjectival-conditional interaction and in terms of the amendments to primary legislation. Thus the expectation generated by the theory is that the Race Regulations have encouraged less political intervention from the judiciary because of the greater level of determinable language, whilst the more indeterminate Religion or Belief Regulations are expected to have required significant judicial intervention to maximise clarity in the Rule of Law.

There are similarities between the two statutory instruments. Firstly they were both enacted under the authority of s 2(2) of the *European Communities Act 1972* as they were both implementing EU Directives in UK law. First of all the Race Regulations were extending the anti-discrimination protection already enshrined in the *Race Relations Act 1976* by adding the offences of indirect discrimination and harassment, and adding the defence of discrimination as a "genuine and determining occupational requirement". The explanatory notes for the regulations describe the range of situations that will be covered by the law:

> "The Directive is concerned with the principle of equal treatment between persons, irrespective of racial or ethnic origin, in the areas of employment (and related matters), social protection, social advantage, education and access to and supply of, goods and services which are available to the public, including housing."

The Religion or Belief Regulations on the other hand were creating an entirely new area of legal protection in British law that included new offences against direct discrimination, indirect discrimination, harassment, and victimisation; and also by

creating the defence of a "genuine and determining occupational requirement". These two statutory instruments have been compared to assess the impact of their language on the political behaviour of judges, with the results showing further evidence of the theorised causal link.

III: Results

This chapter has used evidence taken from the LexisLibrary website of the eleven cases that litigated the Race Regulations and the nineteen cases that litigated the Religion or Belief Regulations. There were relatively few cases to consider for this chapter, but they are of considerable jurisprudential significance, and quantity should not be seen as trumping quality. The cases considered include private law cases as well as public law, on the basis that the anti-discrimination regulations are a matter of public policy and involve the imposition of the state in private relations. In a further departure from previous chapters, this chapter has considered cases heard by statutory tribunals, most notably the Employment Appeal Tribunal. This is because it allows an evaluation of how the lower courts interact with those higher up the hierarchy, which in turn allows conclusions to be drawn as to whether the judiciary operates in concert or in dissonance when seeking to resolve indeterminacy in the Rule of Law.

Appropriate Political Behaviour I: Empirical

The legislative politicisation theory predicts that the political behaviour of judges will be in response to indeterminacy in legislation, and the first sign for evidence of this is that cases brought to the courts focus on sections with considerable

indeterminacy. The following tables compare the regulations that were litigated to see if there is a connection between indeterminacy and litigation. Unlike in previous chapters, only those regulations that were litigated are included in the tables, and the full set of results is available in the appendix:

Table 5.4: Litigation brought against the Race Regulations

Regulation	*Emb*	*Asp*	*Adj*	*Mod*	*Cond*	*Ref*	*Off*	*Amt*	*Cases*	*In Force*
2	0	0	0	0	0	1	0	1	2	8
3	1	0	1	0	1	1	0	1	5	8
4	0	0	0	0	0	1	0	1	5	8
35	0	0	0	0	1	1	0	1	1	8
41	1	0	0	0	1	1	0	1	5	8

Emb = Embedding – The regulation utilises subordinate clauses. **Sub = Subjunctive** – The use of subjunctive language. **Adj = Adjectives** – The use of adjectives, adverbs or qualifying nouns. **Mod = Modal** – The use of vague model verbs (may). **Amt = Amendment** – The regulation amends primary legislation. **Off = Offence** – The regulation creates a new offence. **Con = Conditional** – The use of conditional language. **Ref = Referential** – The use of a reference to another piece of legislation. **Cases** – Total number of cases litigating the section. **In force** – Number of years in which the legislation went in force without amendment or repeal.

Table 5.5: Litigation brought against the Religion or Belief Regulations

Regulation	*Emb*	*Asp*	*Adj*	*Mod*	*Cond*	*Ref*	*Off*	*Amt*	*Cases*	*In Force*
2	1	0	1	0	1	0	0	0	7	0
3	0	0	1	0	1	0	0	0	10	3
4	1	0	1	0	1	0	0	0	2	8
5	1	0	1	0	1	0	0	0	2	8
6	1	0	1	0	1	0	1	0	5	8
7	1	0	1	0	1	0	0	0	2	8
26	1	0	1	0	1	1	0	0	1	8
29	1	0	1	0	1	0	0	0	1	8

By comparing these two statutory instruments it is clear that the Race Regulations utilise adjectives and conditional language to a lesser extent, but nevertheless amends existing primary legislation, notably the *Race Relations Act 1976.* One can speculate that those amendments that do not add adjectives or conditions are therefore not adding to indeterminacy in the primary legislation. On the

other hand the Religion or Belief Regulations do contain high levels of adjectives and conditional phrases, but the Regulations do not amend existing law, so the source of litigation is expected to be the uncertainty created by the regulations themselves. As with all previous chapters there is no evidence of any case being brought to the courts without some form of indeterminacy in the legislation being present. Thus we have some superficial evidence in support of the theory, but clearly greater detail is required.

Appropriate Political Behaviour II: Definitional

It is important to assess how substantive indeterminacy in the two statutory instruments was resolved by the courts, to see whether interventions into public policy can be justified according to the "Logic of Appropriateness". In response to indeterminacy in the Race Regulations and Religion or Belief Regulations there is evidence that substantive tests were developed by the courts with the aim of maximising certainty in the Rule of Law. Such tests have formed precedent that has assimilated legislation, principle and international law in order to maximise substantive certainty in the Rule of Law. This section of the chapter will look at the new substantive legal concepts that were introduced by the two statutory instruments and what effect they have had on the political behaviour of judges. First to be considered are the categories of individual that are protected by the two statutory instruments. Secondly the key legal innovations achieved by both of the statutory instruments will be analysed with a focus on the substantive distinction between direct and indirect discrimination.

First of all, how do the two statutory instruments define the protected categories of "race" and "religion or belief" and what impact does it have on the political behaviour of the judges? The definition of protected characteristics for the Race Regulations are taken from s 3 of the *Race Relations Act 1976*:

> "(1) In this Act, *unless the context otherwise requires*— "racial grounds" means any of the following grounds, namely colour, race, nationality or ethnic or national origins; "racial group" means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls." [Emphasis added]

This legislative definition contains significant indeterminacy by admitting context as a relevant consideration. For instance "racial grounds" refers to an array of semantically and pragmatically indeterminate legal material. Do the "grounds" for discrimination refer to the thought process of the discriminator, or a more objective factual grounding? In addition it is not clear from where one should infer an individual's origins. Resolution to this indeterminacy depends on perception, most important of which is the self-perception of the discriminated individual.

Similarly for the Religion or Belief Regulations the definition of protected characteristics is indeterminate. As it states in reg 2:

> "(1) In these Regulations, "religion or belief" means any religion, religious belief, *or similar philosophical belief*." [Emphasis added]

This very sparse and indeterminate regulation was amended just three years later by s 77(1) of the *Equality Act 2006* in order to remove "or similar", and to include the lack of religious belief as a belief system that should not be discriminated against. Replacing "or similar" from the original regulation shows how such incomplete and meaningless legislation as this can create significant problems in terms of the efficacy

of Parliamentary law. In addition to the uncertainty created by "or similar", the Religion or Belief Regulations left the meaning of "philosophical belief" open to expansive interpretation by litigants and the judiciary by allowing them to determine the grounds for evaluating "similarity" between religion and philosophy. Two cases directly confronted the meaning of religious or philosophical belief and neither show evidence that the judiciary made the final substantive definition of the law according to personal preferences. Instead the evidence shows that the judges were trying to clarify the meaning of the legislation in accordance with existing legal principles in order to maximise certainty in the Rule of Law. Therefore their political behaviour was entirely appropriate.

The first case to consider relied on several precedents in order to establish a test for evaluating which belief systems came under the protection of the Religion or Belief Regulations. In the case of *Nicholson v Grainger PLC & Ors*[150], Tim Nicholson was an aggrieved former employee who had been made redundant in July 2008. He claimed his dismissal was unfair and discriminatory as he held that it was on account of his "philosophical belief" in an impending climate catastrophe that he had been dismissed. The employer rejected this claim and appealed against an Employment Tribunal (ET) ruling that the employee's belief was protected by the Religion or Belief Regulations. The Employment Appeal Tribunal (EAT) that heard this case dismissed the employers' appeal contending that on a strict construction of "belief" Mr. Nicholson's views were protected. The judge, Mr Justice Burton,

[150] [2009] All ER (D) 59 (Nov).

developed a formula from several important precedents[151] that is worth quoting at length:

> "[24] there must be some limit placed upon the definition of "philosophical belief" for the purpose of the Regulations… I shall endeavour to set out the limitations, or criteria, which are to be implied or introduced by reference to the jurisprudence set out above. (i) The belief must be genuinely held. (ii) It must be a belief and not, as in *McClintock v Dept of Constitutional Affairs*, an opinion or viewpoint based on the present state of information available. (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour. (iv) It must attain a certain level of cogency, seriousness, cohesion and importance. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others… As it was put in argument, such philosophical belief does not need to amount to an '-ism'."

Burton J created a five-point test to determine in a reasonably objective manner what is protected by the Religion or Belief Regulations. He had to clarify the meaning of the indeterminate legislation in order to ensure certainty in the Rule of Law. In doing so he relied on precedent and the jurisprudence of the European Court of Human Rights that he had to take into account in accordance with s 2 of the *Human Rights Act 1998*. The litigants in the case both demanded this clarification as the result determined the scope of the entire legislative framework. Burton J therefore made a decision of considerable political importance, not in order to maximise his personal preferences, but because that was the most appropriate response to the legislative indeterminacy.

In a later case heard before the Employment Tribunal, Mr Power, an employee of Greater Manchester Police, was made redundant and applied for a full hearing of his case as he claimed the reason for his dismissal was due to his belief in Spiritualism and life after death. The ET allowed the application and the EAT dismissed an appeal from the Police claiming that according to Burton J's five-point test Mr. Power's

[151] *Eweida v British Airways plc* [2009] IRLR 78; *Campbell v UK* (1982) 4 EHRR 293; and *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] 2 All ER 1

Spiritualism was sufficiently cogent and worthy of respect[152]. Thus one can see that the judiciary have sought to clarify the meaning of the indeterminate regulations in situations where an individual is dismissed from their job on the grounds of their beliefs rather than on the grounds of their conduct.

Beyond the categorisation of belief systems there were several new grounds created upon which a discrimination claim could be made as a result of the Race Regulations and Religion or Belief Regulations. These include indirect discrimination, harassment and victimisation. It is worth noting that the Race Regulations do not explicitly create a rule against victimisation, although it is a part of the wider law against racial discrimination. Also in defence of a discrimination claim a new concept of "genuine and determining occupational requirement" (shortened to GOR) was established. These new legal concepts were created in secondary legislation by junior ministers and with no more oversight from Parliament than the positive resolution procedure for statutory instruments. This shows the incredible influence of EU directives on British law, but the concern of this chapter is how such EU law has affected the political behaviour of the judiciary. The focus will be on indirect discrimination and the evidence again shows that the judges clarified the meaning of the regulations by establishing a test that could be used to evaluate such claims. By establishing a test that is based on existing legal principles the judges are preventing the determination of indirect discrimination claims on the basis of purely subjective preferences.

The key test that was developed to determine whether indirect discrimination could be defended by a respondent was whether it was a "proportionate means of

[152] *Power v Greater Manchester Police Authority* [2010] All ER (D) 173 (Oct)

achieving a legitimate aim". Where direct discrimination against an individual on the basis of their race or religion could never be justified, in some circumstances indirect discrimination was possible if it was proportionate to a legitimate end. Exactly the same formula for indirect discrimination was used for both the Race Regulations and the Religion or Belief Regulations, and the formula draws on the proportionality jurisprudence of the ECJ and the ECtHR. What needs to be shown is how the judges used the proportionality test to reach a definitive judgement.

The use of proportionality involves balancing the rights of the complainant against the aims of the respondent. It draws the judges into a non-textual adjudication of the relative weights of the two competing interests. This is an extraordinary power with considerable political influence, as it allows the judges to define for a society the weight that ought to be accorded to certain aims and values. The regulations introduced by the government explicitly called on the judges to use a proportionality test. In other words the government by implementing the Directives gave the judiciary the power to determine a proportionate act of discrimination and perhaps more importantly to define legitimacy in terms of policy aims. The language of the regulations is therefore indeterminate and has been left to judges to resolve. Even though the resolution of the case will require non-textual reasoning, the instigation of this power was from the legislative text, and thus the indeterminacy of the legislation is the key causal variable. By taking on the task of definition and applying a strict evaluative test the judges can be said to be acting appropriately given the institutional requirements laid upon them.

There are two halves of the proportionality test that can be considered separately: the legitimate aim and the proportionate means. Firstly a legitimate aim

will typically be more difficult for the judges to determine than the proportionate means. This is because such policy decisions in either a private organisation or a public authority are typically best taken by those familiar with their institutional environment and better placed to decide on the ends to which policy is directed. Quite aside from this practical issue is the far more onerous political issue of judges potentially delegitimising a policy. Therefore one would expect judges to prudentially avoid delegitimising an aim, especially where it is authoritatively mandated public policy.

The evidence taken from the cases of both the Race and the Religion or Belief Regulations is precisely that; indeed in no case of the thirty studied for this chapter did the courts overrule a policy aim as illegitimate. There is however evidence of counsel for complainants attempting to establish the illegitimacy of aims in difficult cases where different rights have collided. Such challenges only came under the Religion or Belief Regulations where the religious views of the complainant were in direct competition with the aims of public policy to promote homosexual rights. One important case in particular was heard in two courts by the EAT and the Court of Appeal. The case of *Ladele v Islington London Borough Council*[153] concerned whether the marriage registrar of the respondent council could opt-out of officiating civil partnerships on account of her Christian views on marriage. The Employment Tribunal held that she had been indirectly discriminated against by the council. The EAT and the Court of Appeal overruled this judgement on the grounds that the aim of promoting civil partnerships was a policy aim that is enshrined in primary legislation, and the unwillingness of the complainant to implement this policy could not be considered as indirect discrimination as it was self-evidently a legitimate aim that

[153] At the EAT: [2009] IRLR 154. At the Court of Appeal: [2010] LGR 690.

primary legislation be implemented. The dispute centred on what precisely the aim was as per Lord Neuberger MR in the Court of Appeal case:

> "[20] The ET decided that there had been indirect discrimination against Ms Ladele, because the blanket policy of requiring all registrars to perform civil partnership duties put individuals who held the orthodox Christian belief, that marriage was a union between one man and one woman for life, at a disadvantage when compared with others who did not hold that belief. While it accepted that the promotion of the LGBT community was a legitimate aim, the ET concluded that Islington's treatment of Ms Ladele was not a proportionate means of achieving that aim.
>
> [45] The problem with the ET's analysis is, as the EAT pointed out, that it wrongly identifies Islington's aim, as it overlooks the point that the service which Islington stated that they aimed to provide was not merely one which was effective in terms of practicality and efficiency, but was also one which complied with their overarching policy of being "an employer and a public authority wholly committed to the promotion of equal opportunities…"
>
> [46] I find it very hard to see how this could be challenged, either as being Islington's actual aim, in the light of the evidence, or as being a legitimate aim, in the light of Islington's Dignity for All policy, current legislation and mainstream thinking."

It is very important to note that in no case was a policy aim deemed to be illegitimate, and the definitional role the judges adopted gave a wide margin of appreciation to the concerns of public and private organisations to determine the legitimacy of their aims. Even in the above stated case the ET regarded the aim as legitimate, but by misinterpreting the aim the ET misdirected its analysis of what means there were to achieve the aim.

Therefore what is often more complicated for judges to define is the second half of the proportionality equation: whether an aim is implemented by proportionate means. Another case where religious and gay rights clashed is illustrative. Once again the question arose as to whether individuals could opt-out of performing certain functions within their job description in order to take into account their religious beliefs. The case was that of *McClintock v Department of Constitutional Affairs*[154]

[154] [2008] IRLR 29

where Mr. McClintock was a Justice of the Peace and member of the Family Panel. He claimed that as a Christian he could not place a child in the adoptive care of a same-sex couple and sought an exception to allow him not to administer such arrangements. He was told that s.79 of the *Civil Partnership Act 2004* would not allow any such exceptions to be made and he therefore resigned. He put in a claim for indirect discrimination on the grounds that the means were not proportionate to achieving the aim. Mr Elias J at the Employment Appeal Tribunal resolved the case by pointing out that a JP could not refuse to apply the law even if it was against his personal beliefs. Such a situation could result in a lack of judges left to apply great swathes of the law:

> "[53] Mr Diamond [Counsel for Mr McClintock] made the perfectly cogent point that it seems to be something of a paradox if a magistrate can properly recuse himself from a particular case on the grounds that his public actions or words have created the appearance of bias and yet will not be permitted to do so where the objection to the law may be for entirely the same reasons but have been only privately expressed. We recognise the force of that. However, the apparent paradox dissolves once the purpose of the rules is appreciated. Recusal for apparent bias occurs where the parties have a reasonable suspicion arising from some particular factor, such as the fact that the judge has a financial interest, or exceptionally because he or she has expressed strong views on an issue, that the judge may not be able to conduct the trial fairly and impartially. This is different from a situation where the judge is refusing to apply the law because he has moral objections to it, or thinks that it has been introduced prematurely or has been insufficiently considered. He is then expected to put his personal views to one side – which judges frequently have to do – and there is no reason why the parties should not trust him to be able to do that."

There is no evidence in Elias J's ratio that he sought to apply any personal interest for gay rights over religious rights. Instead he makes a legally prudent definition of proportionality of means that averts a situation where magistrates and judges are allowed to opt-out of applying law that they disapprove of. This is strong evidence that judges are acting in an institutionally appropriate manner that ensures the efficacy of Parliamentary legislation and government regulation.

In only one case of the thirty reviewed was the means adopted deemed by the courts to be disproportionate to achieve a legitimate aim. This was *R (Elias) v Secretary of State for Defence*[155] at the Court of Appeal. In this case the claimant had applied for compensation from the Japanese government for her internment in a Japanese Prisoner of War camp during the Second World War. She and her family were British citizens but had not been born in the UK and were therefore denied the compensation. The court ruled that discriminating between British citizens and non-British citizens was a legitimate policy aim, but doing so on the basis of the place of birth was not proportionate and was therefore unlawful. Specifically the court decided that the means could not be objectively justified, as place of birth (as discussed in the immigration chapter) is not determinative of citizenship under UK law. By relying on objective criteria one can see that the judges' means of resolving this case did not depend on personal political preferences, but on the appropriate means of resolving the substantive confusion in the law. Another crucial case that involved a proportionality test was the *Jewish Free School* case heard at the Court of Appeal and the Supreme Court[156]. This case is very controversial and will be examined in the "Influence-seeking" section below, as it was a case where the courts have been accused of inappropriately not using proportionality review and in the process seeking to settle the ancient question of what it is to be Jewish. Nevertheless the general assessment of the definitional role of the judiciary in anti-discrimination and equality law is that the judges have responded appropriately to the enormous complication

[155] [2006] EWCA Civ 1293 CA (Civ)

[156] *R (on the application of E) v Governing Body of JFS and others (Secretary of State for Children, School and Families and others, interested parties) (United Synagogue intervening); R (on the application of E) v Office of the Schools Adjudicator (Governing Body of JFS and others, interested parties) (British Humanist Association and another intervening).* At the Court of Appeal: [2009] EWCA Civ 626. At the Supreme Court: [2009] UKSC 15.

caused by the new regulations as detailed substantive tests have been developed to resolve the indeterminacy.

Appropriate Political Behaviour III: Systemic

As the decisions of the judges have repercussions throughout all areas of the political system, a holistic approach to decision-making is the most politically appropriate behaviour trope. Attitudinal and strategic theories of judicial behaviour assume that judges are independently motivated and will only cooperate with colleagues if it is in their own self-interest to do so. This thesis alternatively argues that coordination and cooperation are crucial features of judicial behaviour and are required to effectively deal with the difficult task of clarifying indeterminate legislation. The observable manifestation of such a coordinated activity is the development and application of procedural rules that provide basic guarantees of systemic coherence.

A crucial procedural problem that had to be resolved by the courts concerned the burden of proof provisions set out in both the Race and the Religion or Belief Regulations. The rules were set out in indeterminate language that encouraged litigants to demand a clarification from the courts. Exactly the same legislative formula was used in both the Regulations, as laid out in r 41 of the Race Regulations and r 29 of the Religion or Belief Regulations:

> "Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this regulation, conclude in the absence of an adequate explanation that the respondent… has committed against the complainant an act to which regulation[s] appl[y]; or is… to be treated as having committed against the complainant such an act, the tribunal shall

> uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act."

From this legislation it was left to the judges to decide at what point the burden of proof shifts from claimant to respondent. This is clearly not a simple decision to make as the court must establish whether the claimant has satisfactorily "proved facts" that the tribunal "could" conclude were in contravention of the regulations or can be "treated" as having been in contravention. This indeterminacy allows the judges extraordinary discretion to determine what burden to place on the disputants. The key question to address is whether this discretion encouraged the judges to clarify the legislation and in turn limit their own discretion in future cases as this thesis suggests they would.

There is good evidence for this conclusion, as the courts in a 2005 case drew on sex discrimination case law to clarify the procedural confusion by reference to what became known as the "Barton Guidance"[157]. The case in question, *Wong v Igen Ltd and other appeals*[158], was a combined appeal at the Court of Appeal involving separate claims of sexual, racial and disability discrimination, where the common feature was the focus on resolving the burden of proof confusion. The application of a similar approach to all forms of discrimination, despite some differences in the respective legislation, was given the approval of the House of Lords in order to maximise procedural consistency[159]. The Barton Guidance stressed that the burden of proof was on the claimant to prove that discrimination *could* be inferred from the

[157] *Barton v Investec Securities Ltd* [2003] ICR 1205, [2003] IRLR 332 para 25.
[158] *Wong v Igen Ltd and others (Equal Opportunities Commission and others intervening); Emokpae v Chamberlin Solicitors and another (Equal Opportunities Commission and others intervening); Webster v Brunel University (Equal Opportunities Commission and others intervening)* [2005] EWCA Civ 142
[159] *Rhys-Harper v Relaxion Group plc* [2003] UKHL 33, [2003] ICR 867

facts. The "could" is important as direct and irrefutable proof of discrimination is unlikely as few employers would openly admit to direct discrimination. The burden of proof threshold on the claimant is fairly low therefore, and having established that one could infer discrimination from the facts, it shifts to the respondent who must be able to show that discrimination cannot be inferred from the facts. There is still room for the discretion of the court, but it gives useful guidelines to decide whether a claimant has successfully made their case. The Barton Guidance has been used many times subsequently in the ET and EAT, and indeed the *Wong* ruling was later used to resolve other cases studied for this chapter[160].

It seems clear that the courts were clarifying the indeterminacy in the regulations by establishing a strong line of precedent to resolve the procedural confusion. This is politically significant, but also institutionally appropriate behaviour. The inferential means of integrating a new legal problem with existing legal principle is the essential basis of the Common Law. As discussed in the introduction, Ronald Dworkin (1986) has likened the methodology to multiple authorship of a novel; where one individual starts the novel and others add succeeding chapters. The task of starting the novel (to continue the metaphor) has been made more difficult due to the nature of modern legislation, and the courts have been forced to create "A Common Law for the Age of Statutes" (Calabresi, 1982). The key point is that it is a collective endeavour targeted at maximising clarity in the Rule of Law. Further evidence is required that the courts used precedent from domestic and international courts, and overruled or distinguished lower court decisions in an institutionally appropriate manner. This is because it could be claimed by attitudinalists, strategic scholars, or legal realists that any precedent can be found to

[160] *Mohmed v West Coast Trains Ltd* [2006] All ER (D) 224 (Nov)

support any conclusion one may wish to draw from a case, and therefore the precedents and procedural rules are a smoke-screen that hide the personalised behaviour of the judges.

On the first issue of the utilisation of precedent, this thesis contends that we should observe the courts carefully using precedent to resolve indeterminacy in legislation, rather than using personal interests to make a resolution. Where precedent is lacking, the thesis would expect the judges to rely on very strict non-personal criteria to construct the legislative language. Of the thirty cases that contested the Race and Religion or Belief Regulations none of them made a referral to the European Court of Justice (ECJ) for a preliminary determination. However many of the cases referred to ECJ jurisprudence, as well as case law from the European Court of Human Rights (ECtHR) in order to make a judgement. In three cases there was no existing domestic or European precedent available to provide guidance and it is here where judicial decision-making has the greatest potential of being in accordance with the personal interests of the judges. However in all of the cases the judges either fell back on a strict construction of the legislation or inferred by analogy from related cases. This collegial approach to problem-solving underpins the systemic norms of the judiciary and is not in keeping with assumptions that the bench behaves like a third legislative chamber (Stone, 1992).

For example in *R (Couronne and others) v Crawley Borough Council and others; R (Bontemps and others) v Secretary of State for Work and Pensions*[161], two sets of claimants from Mauritius were denied Job Seekers' Allowance or homelessness assistance because they were not "habitually resident" in the Common

[161] [2006] EWHC 1514 (Admin)

Travel Area (United Kingdom, Ireland, Isle of Man or Channel Islands). The claimants alleged that this was racial discrimination and they initiated a judicial review. The High Court had little direct precedent to rely on, so they fell back on the "ordinary meaning of the words" of the relevant legislation, including the Race Regulations. Thus where the systemic coordination is impossible because the case has never been considered before, the courts rely on the most appropriate means of resolving the indeterminacy.

In the case of *Hashwani v Jivraj*[162] brought under the Religion or Belief Regulations, the High Court decided to infer by analogy what the relevant EU law was. As per Moore-Bick LJ:

> "[15] Our attention was not drawn to any case in which the meaning of art 3 has been considered by the Court of Justice of the European Union and accordingly we think it is to be interpreted in the light of the recitals and given its natural meaning consistent with the EC Treaty and the existing case law of the court."

Similarly in the case *Abbey National Plc and another v. Chagger*[163] brought under the Race Regulations, the EAT sought to resolve a drafting anomaly that had omitted "colour discrimination" from the wording of the regulations. As per Underhill J:

> "[35] The starting point is that the purpose of s.54A is to give effect to Article 8 of the Directive [The Race Directive]. In our view it is inconceivable that the Directive is not intended to apply to discrimination which is expressed as being on the ground of colour: for the reasons already given, such discrimination is in practice necessarily an aspect or manifestation of discrimination based on "racial or ethnic origin". We have no doubt that the European Court of Justice would not give even the time of day to a submission that a claim of "colour discrimination" did not attract the operation of the Directive."

[162] [2010] 1 All ER 302. Later heard by the Supreme Court.
[163] [2009] IRLR 86

This reasoning is compelling, and relies on principles of law rather than Underhill J's personal interests. Thus one can see significant evidence that the courts sought to resolve indeterminacy via coordinated means, primarily by using precedent. Where this was not possible, the courts relied on robustly defended inferences from other legal sources.

The second issue of concern is where lower court decisions were overruled or distinguished by higher courts. There are seven cases of the thirty studied where the judgement is a full or partial reversal of a lower court decision. What is interesting is that in all seven of the cases bar one, the higher court was dismissing a claimant's case for discrimination and thereby restricting the legal grounds for bringing a discrimination claim. As per Mummery LJ in *British Medical Association v Chaudhary*:

> "[198] …despite what the majority [on the Tribunals] said about agreeing with one another, it was not possible to extract a single principle from the three opinions of the majority… the reasoning of the majority was inconsistent with binding authorities of the House of Lords and the Court of Justice of the European Communities… and was wrong in law."

The higher courts were therefore restricting the political power of the judiciary by overruling the lower courts. The whole system works because of coordination and cooperation within the judiciary and prudential leadership from the top.

The only case where a lower court was overturned and the claimant's discrimination complaint was thereby upheld was *Saini v All Saints Haque Centre and others*[164], brought under the Religion or Belief Regulations. This was a difficult case concerning harassment heard by the EAT. The claimant, Mr Saini, had resigned from

[164] [2009] IRLR 74

the respondent Centre and claimed harassment on the grounds that he was being heavily pressurised to provide material to justify the dismissal of his colleague, Mr Chandel. The latter had been dismissed because he was a Hindu by the board of directors that was controlled by two men of the Ravidassi faith. The case turned on whether Mr Saini could allege harassment on the grounds of religion even when it was not his religion that was directly at issue but the religion of the colleague that he was being pressured to implicate. This case was especially complicated as "harassment" is an indeterminate offence that was not known to the Common Law until it was introduced via statute in s 40 of the *Administration of Justice Act 1970*, leaving its meaning to be clarified by judges over the years. Therefore by adding new dimensions to the statutory meaning of harassment in the anti-discrimination Regulations it is clear that the judiciary had to intervene in public policy disputes to secure an efficacious resolution.

In this case the ET was held to have legally misdirected itself by limiting the reach of the regulations to harassment against one's own religion. This is clearly a difficult case, but it does not seem unreasonable for the court to infer that harassment on the grounds of religion can be suffered by a third party asked to undermine a colleague on the grounds of his religion. There is no evidence from this case to support the view that the judges were acting in accordance with their personal interests, but rather they were coordinating their reasoning with existing legal principles. Thus the crucial element to the systemic approach to resolving indeterminacy is that the courts act collectively and not individually, via procedural rules and the careful development of precedent. Thus there is good evidence that the courts appropriately implemented the indeterminate anti-discrimination Regulations.

Appropriate Political Behaviour IV: Prudential

Underpinning the "Logic of Appropriateness" is the ability of the courts to ascertain when an intervention is justified as being within the capacity of the courts and when it is best to defer to another agent of Parliament that has greater capacity, competence or collective legitimacy. For instance when considering the definitional role of the judges there was no evidence that they imprudently utilised substantive tests to advance their political power. Nor was there any evidence in the systemic section that the courts undermined procedural coherence in the application of the law. This section will consider the appropriateness of non-intervention as opposed to intervention by considering in turn the denial of jurisdiction by the courts, and the use of reasonableness review to intervene in the decision-making of other agents of Parliament.

As mentioned, "prudential" does not mean that denying jurisdiction is the ideal resolution to indeterminacy. Instead prudence involves the careful calculation of the requirements of the law, where intervention by the courts will be required where the judiciary are sufficiently capable and competent to implement a resolution. Indeed the denial of jurisdiction can be just as personally motivated as can more commonly scrutinised examples of judicial "activism". This is an important issue, the judges perform an important gate-keeping role, and by denying litigants it will lead to a development in the law that could be a strategic victory for the individual judge. On the other extreme, a judge that oversees an extraordinary change in the law may be "activist" but is doing so for entirely appropriate reasons. There is no reasoning behind the conclusion that restrained judicial behaviour is more appropriate, as all that matters is that the behaviour is motivated by the requirement of certainty in the law.

There are two cases of the thirty studied for this chapter where the courts dismissed a claim for discrimination on the grounds that there were insufficient grounds to bring the claim, and therefore the courts lacked the jurisdiction to resolve such a dispute. The first case to be considered was *British Medical Association v Chaudhary*[165], which sought a clarification of the Race Regulations. In this case, a doctor of Asian origin applied to the British Medical Association (BMA) to support his claim of racial discrimination against the regulatory bodies that he accused of sabotaging his career progression towards becoming a urologist. The BMA refused to represent Mr Chaudhary as they believed he did not have a strong claim for racial discrimination. His solicitors then instructed the BMA that they would be taken to court for direct discrimination, indirect discrimination, and victimisation on the grounds that their refusal to support Mr Chaudhary was on account of a closed minded attitude to his claims. The Tribunal dismissed the claims for direct discrimination and victimisation but held that the BMA had indirectly discriminated by not sufficiently considering the racial discrimination suffered by Mr Chaudhary. The BMA was ordered to pay £814,877 in damages.

The BMA contested this decision, but their appeal was dismissed by the EAT. This brought them to an appeal at the Court of Appeal which reversed the judgements of the lower courts and stopped the damages payment. Their reasoning was that the Tribunals had "perversely" analysed the facts and had formed the erroneous inference that Mr Chaudhary's claim to the BMA was dismissed due to a discriminatory policy. One key issue was that Mr Chaudhary impugned the decisions taken by the BMA *after* he had served them notice of litigation against them. The indirect discrimination and victimisation claims were based on the refusal of the BMA to change their

[165] [2007] EWCA Civ 788.

position on Mr Chaudhary after he had accused them of discrimination. This is not dissimilar to blackmail, and the Court of Appeal's restrained approach to the definition of discrimination and victimisation doubtless decreased the potential scope of the Race Regulations, and thereby reduced the potential power of the courts. Such prudential behaviour is arguably the appropriate response to such a case where the courts lacked the capacity to greatly extend the offence of discrimination.

The second case to consider is a more straight-forward denial of jurisdiction that came under the Religion or Belief Regulations. In the case of *Padgett v Board and Trustees of the Tate Gallery*[166] the EAT followed the reasoning of the ET in denying that it could resolve the case at hand. The case concerned an art installation that was proposed by Mr Padgett to the Tate Gallery. He is a Unitarian and had developed a conceptual "performance around the themes of contemporary art and religious fundamentalism" that entailed a sugar cube memorial to the founder of the Unitarian Church. The Tate Gallery thanked Mr Padgett for his application but rejected it on the grounds that it was not appropriate for their forthcoming exhibition. Mr Padgett claimed that this decision discriminated against his religion and denied his attempt at seeking employment. The Regulations were intended for those who are already in employment or who are applying for employment, and the Tribunals held that Mr Padgett's case could not be considered under either of these headings. If the judges were seeking to maximise their personal preferences, then the refusal to even hear the case would be an ineffective means of achieving that end. If however the motivation of the judges was to clarify the extent of the legislation then the denial of jurisdiction where the courts lack capacity does achieve this end.

[166] [2007] All ER (D) 239 (Dec)

On the other end of the prudential scale is the reasonableness test, where decisions taken by an agent of Parliament (usually a member of the government) are reviewed by the courts on account of their reasonableness. It is important to assess whether such interventions can be defended as appropriate and within the capacity of the courts. Such interventions by the courts into the policy process are highly controversial as they involve the courts analysing the decisions taken by a democratically accountable agent, and potentially replacing the decision with the court's determination. Illustrative of the controversy created by reasonableness review are these comments from the former Home Secretary Michael Howard on Radio 4's *Today Programme* on 25th January 2011:

> "One of the things the judges can take into account in deciding whether an action is lawful is whether it's unreasonable, and when judicial review first got going in the early days the judges were very reluctant to set aside decisions of ministers on the grounds that they were unreasonable. They have become steadily more prone to set aside decisions on that ground since and what has happened is that more decisions are made by unelected, unaccountable judges, instead of accountable, elected members of Parliament who have to answer to the electorate for what's happened."

Howard assumes that the key variable is the behaviour of judges, but he does not address whether i) the decisions taken by ministers are increasingly unreasonable, and ii) whether assessment by the courts of the legality of executive action is increasingly difficult due to the indeterminacy of legislation. Whilst five of the thirty cases turned on a reasonableness test, it would be wrong to conclude as Howard does that this implies an inappropriate form of behaviour from the judges. The reasonableness test is a necessary tool for judges to resolve indeterminacy in the law if they have the capacity and competence to make such an intervention. The reasonableness test has been developed over the years as a measure of behaviour. It is not perfect and has faced criticisms from critical legal scholars, amongst others, who suggest that the

standard is neither objective nor egalitarian. However recent scholarship has called for the test to be refined rather than discarded (Mayo, 2003), as the test has an important jurisprudential role to play in tort law, criminal law and administrative law. The utilisation of the reasonableness test may not amount to true objectivity, which is impossible in the law, but it is inter-subjective and aspiring to a shared standard measure that negates the criticisms of Howard, and accepts the position of Mayo and others that further refinement is needed. Such refinement is made more complicated by the increasing indeterminacy in the law, where the courts have to assume the intention of Parliament from its uncertain commands. One core assumption that the courts make is that Parliament would expect its commands to be implemented in a reasonable manner – such that the decision does not defy logic or accepted moral standards[167]. Essentially Michael Howard is confusing symptom with cause. Where he suggests that the reasonableness test is the cause of political behaviour in judges, acting as a mask for their true intentions, arguably it is the symptom of increasingly indeterminate legislation that has forced judges to develop means of resolving the uncertainty in the Rule of Law.

From the five cases where the reasonableness test formed a part of the ratio decidendi, none of them show evidence that the reasonableness criteria were applied in a purely subjective fashion. Instead the reasonableness test used was applied with rigorous and publicly verifiable criteria. Indeed of the five cases, four of them denied that the reasonableness test could be used, and dismissed appeals by counsel to use it to resolve the case. The use of shared standards and the concern with approaching objectivity in the reasonableness test can be seen clearly from the following dicta of

[167] As per Lord Diplock in the *GCHQ* case.

Slade J in the only case to use such a test – *Pricewaterhouse Coopers LLP v Popa*[168] that contested the Race Regulations:

> "[60] In accordance with the guidance given by Lord Neuberger in *Derbyshire*, whilst considering the question primarily from the perspective of the alleged victim, the view that the victim has suffered a detriment must be objectively reasonable in all the circumstances. The ET should focus on the word "detriment"."

From this statement we can see that Slade J was seeking a definition of "detriment" that applied a reasonableness standard. The court would not need to perform such as definitional role if detriment had been more clearly defined by the legislation as per Reg 29(2):

> "Where a relevant relationship has come to an end it is unlawful for the relevant party— (a) to discriminate against another party, on grounds of race or ethnic or national origins, by subjecting him to a detriment."

This is the only mention of detriment in the regulations apart from reg 52 that confirms that a detriment is not the same as harassment for the purposes of the *Race Relations Act 1976*. The 1976 Act itself has no further mention of what a detriment is, even in its interpretation section (s. 78). Thus the judges were faced with establishing a standard measure for detriment and opted for a test that imports aspects of the reasonableness criteria. In this case therefore the use of reasonableness was not a means for the judges to extend their personal preferences within the law, but did quite the reverse by applying a well-established rule of adjudication to an extremely indeterminate legislative provision.

[168] UKEAT/0030/10/DA

In another case brought under the Race Regulations, *Abbey National Plc and another v. Chagger*[169], the Employment Appeal Tribunal refused to apply a reasonableness test and overruled the ET for so doing. As per Underhill J:

> "[56] …what the tribunal was doing was dismissing the appellant's explanation simply because it involved unfair conduct: it had accordingly fallen into the well-known error, exposed in *Glasgow City Council v Zafar* and *Bahl v Law Society*, of confusing the question whether the employer had acted reasonably with the question whether his explanation, however unreasonably it showed him acting, was true."

What this dicta suggests is that the argument that judges readily employ a reasonableness test in order to further their own interests is difficult to sustain. Where the task of defining a legal concept turns on a finding of fact then adjudicative criteria such as reasonableness become irrelevant. The judges do not show evidence of the self-aggrandising use of the reasonableness test, but instead a prudent application of its criteria. The reference made to the *Zafar*[170] and *Bahl*[171] cases also shows the reliance on precedent, which suggests that the judges are behaving appropriately and not according to self-interest. A very similar judgement to the above was reached in a case concerning the Religion or Belief Regulations[172] that also turned on the *Zafar* precedent. As per Elias J:

> "[40(4)] The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the Claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the Claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne Wilkinson pointed out in *Zafar v Glasgow City Council*"

[169] [2009] IRLR 86
[170] [1998] 2 All ER 953
[171] [2003] IRLR 641
[172] *Ladele v London Borough of Islington* [2009] All ER (D) 100

The other two cases that utilised the reasonableness test[173][174] also overruled the attempted use of the reasonableness criteria that is often pushed by counsel and rejected by the judiciary. When it is used, as in *Popa*, one can see that the judges intention is to maximise certainty in the Rule of Law, and not to maximise their personal preferences. The irony therefore for Michael Howard is that it is his brethren at the bar who are more concerned with an expansive use of the reasonableness test, and evidence that the bench use it to further their personal ends is not forthcoming.

Overall therefore there is good evidence from both the Race Regulations and the Religion or Belief Regulations that the courts have resolved the indeterminacy created by these instruments according to the Logic of Appropriateness. The Religion or Belief Regulations have created slightly greater indeterminacy, largely because the law is entirely new to the UK and was introduced by very unclear language. However the Race Regulations have also created significant difficulties for the judiciary. Both of the statutory instruments show the extent of the problem created by pragmatic indeterminacy in primary legislation that had enabled such expansive legal instruments to be introduced as secondary law. Nevertheless the resolution of the uncertainty in the Rule of Law achieved by the judiciary shows how important this institutional role is for the continued efficacy of Parliamentary legislation.

Inappropriate Political Behaviour I: Policy-orientated

It is very important that counter-arguments and counter-evidence are carefully considered before they can be dismissed. A critic of this thesis could argue that judges give the appearance of acting appropriately when in reality they are maximising their

[173] *Wong v Igen Ltd and others (Equal Opportunities Commission and others intervening); Emokpae v Chamberlin Solicitors and another (Equal Opportunities Commission and others intervening); Webster v Brunel University (Equal Opportunities Commission and others intervening)* [2005] EWCA Civ 142
[174] *Eweida v British Airways Plc* [2008] All ER (D) 13 (Dec)

personal preferences. Firstly it is important to reiterate that such an argument is unfalsifiable as there are no conceivable situations where a judge could not be accused by someone of acting in bad faith. Nevertheless, evidence that the judges act in a purely policy-orientated fashion needs to be explored.

Policy-orientated behaviour is defined as being anti-empirical or anti-definitional. There is no evidence that the courts were anti-empirical because as the discourse analysis showed, not a single case was heard against a regulation that did not display some form of indeterminacy of language. Therefore one cannot accuse the judges of selecting cases according to criteria other than the legal importance of the case. However this on its own would not be sufficient to remove the potential for policy-orientated behaviour, as the judges could be strategically taking advantage of the indeterminacy to further their own interests. Therefore we need to assess whether the courts have been anti-definitional by seeking substantive interpretation of the law without tethering their resolution to existing principles of law. As in previous chapters the key observable implication of this will be a high level of dissenting judgements, where alternative substantive resolutions were considered.

There is however very little evidence for such anti-definitional behaviour. In only one of the thirty cases was a dissenting opinion registered. This was the controversial *Jewish Free School*[175] case when it was heard at the Supreme Court. The case is so significant that it will be considered in greater detail in the following section of "Influence-seeking" as the case potentially brings to light anti-definitional, anti-systemic and anti-prudential behaviour as the Supreme Court used human rights law to determine the ancient question of what it is to be Jewish.

[175] *R (E) v Office of the Schools Adjudicator (Governing Body of JFS and others, interested parties) (British Humanist Association and another intervening)* [2009] UKSC 15

It is worth stressing that there were few dissents partly because few of the cases were litigated by more than one judge. Only eleven of the thirty cases were heard at either the Court of Appeal or the Supreme Court where more than one judge may preside. Nevertheless the very low incidence of dissent, coupled with the evidence discussed above that the overruling of lower court decisions was not led by personal motivations, shows that there is scant evidence to support the argument that the courts inappropriately took advantage of indeterminacy and sought a resolution that sustained or exacerbated the indeterminacy through an anti-definitional resolution.

Inappropriate Political Behaviour II: Influence-seeking

The final form of inappropriate behaviour to consider in detail is influence-seeking. This is where the courts act anti-systemically by not applying or elaborating existing procedural rules, or anti-prudentially where the courts intervene in policy-making despite lacking the capacity or competence to resolve the dispute. We have already encountered several cases where rights have clashed, notably the right not to be discriminated on the grounds of one's religion or belief, and the right to respect for one's sexual orientation. These cases have raised the concern that in choosing what balance to strike between these competing rights the judges are making personal policy decisions, rather than making decisions that maximise certainty in the Rule of Law. A similar case of extraordinary complexity is to be considered in this section, where the right of a school to select pupils on religious grounds came into conflict with the desire of an individual to obtain admission to the school. It is important to

assess whether this case shows evidence of the judiciary influence-seeking by expanding the role and responsibilities of the bench to intervene in policy disputes without the justification of institutional appropriateness.

The case to be considered here is the *Jewish Free School* (JFS) case that was heard by the Court of Appeal[176] and the Supreme Court[177], and concerned the meaning of the *Race Relations Act 1976* as amended by the Race Regulations. The specific question was whether the school's use of a matrilineal test to determine Jewishness, and thereby admittance to the school, was discriminatory against the ethnic origins of the applicant. This discussion will focus on the reasoning of the Supreme Court that heard the case with a rare nine-judge constitution.

The case concerned JFS, a comprehensive school that is funded by the local authority but is a voluntary aided faith school that is administered in accordance with Orthodox Judaism. The school is over-subscribed and therefore gave preference in admittance to those pupils recognised as Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth (OCR). Recognition was accorded to those whose mother was Jewish, or whose mother had converted to Orthodox Judaism before their birth. A boy referred to as M had applied to the school but was refused admittance because although his father was Jewish and his mother had converted prior to his birth, she had converted to Masorti Judaism rather than Orthodox Judaism. According to the OCR guidelines M did not pass the matrilineal test, and was therefore not a Jew according to Orthodox standards.

[176] [2009] EWCA Civ 626
[177] [2009] UKSC 15

M's father – referred to as E – applied for judicial review at the High Court, claiming that the JFS decision was racially discriminatory on the grounds of ethnicity. The High Court rejected this claim, but the Court of Appeal allowed it on the basis that whilst the JFS intended to discriminate on religious grounds, it was actually discriminating on ethnic grounds. The JFS appealed to the Supreme Court where a great many interveners joined the case, including The United Synagogue, The Board of Deputies of British Jews, and the Secretary of State for Children, Schools and Families in support of the JFS; whilst The Equality and Human Rights Commission, and the British Humanist Association intervened in support of E.

Three different conclusions were reached by the judges. The Court's majority ruling was determined by five justices (Lord Phillips, Lady Hale, Lord Mance, Lord Kerr and Lord Clarke) who held that M had been directly discriminated against on the grounds of his ethnicity. Two justices (Lords Hope and Walker) held instead that indirect discrimination had taken place, and that whilst the school had a legitimate aim its means of achieving it was not proportionate as the school did not use less discriminatory means of determining whether a child was Jewish. Finally Lords Rodger and Brown in a dissenting judgement held that the school's admissions policy was not ethnically discriminatory because the ethnic background of the mother was irrelevant and all that mattered was that she had not converted to Orthodox Judaism.

The decision of the majority was seen as highly controversial as they were seen to be determining the criteria for recognition of an individual as Jewish. What is more, according to some observers the justices were using recognition criteria that are considered to be essentially Christian, rather than Jewish; in the sense that conversion and self-recognition are the only relevant factors in determining one's religion

(Mancini, 2010). Three very different solutions to the problem were put forward by the Supreme Court, and as mentioned this was the only case of the thirty studied for this chapter where any dissenting opinions were offered. This could encourage the conclusion that the majority decision was inappropriately anti-prudential, in the sense that the case was so difficult to resolve according to the law that the justices should have deferred to the OCR and the JFS.

However the three different resolutions to the case are a reflection of how difficult the case was to decide using the indeterminate language of the *Race Relations Act 1976* and the Race Regulations. Indeed the majority decision that direct discrimination had been suffered was arguably the most appropriate construction of the legislative framework. The key question to resolve is: Were the judges motivated by a desire to clarify the meaning of the legislation? Arguably they were, and even if the court's decision was highly contentious, and one might even say wrong in the interests of social justice, it was not wrong in terms of the legislation. The legislation was written in such an indeterminate manner that it covered several ill-defined categories of protected characteristics. The logical conclusion was that an ethnic test of religious status was racially discriminatory, despite the revered and ancient lineage of the matrilineal test in Judaism. One should blame the legislation for this outcome, not the judges.

In order to conclude that the judges were inappropriately acting according to their own preferences one would have to make heroic assumptions about the judges' preferences that would be impossible to empirically observe. It is far safer to assume that judges were seeking to behave appropriately according to the norms of their institutional role. This is also an assumption of course, but it is the simplest

assumption to make regarding the motives of the judges. When one accepts this simple assumption, the difficulties faced by the judges come into clearer focus. The reason for three different results was not because of differences in the personal opinions of the judges but because of the considerable indeterminacy in the legislation and the difficulty faced in securing a resolution that clarified the meaning. The *Race Relations Act 1976* s 1 as amended by regs 3-4 of the Race Regulations illegalises discrimination on the "grounds" of "colour, race, nationality or ethnic or national origins of the person to whom it is applied". Not only are the "grounds" not defined, but neither is "ethnicity".

In terms of "grounds" the court had to decide whether grounds referred to the motives for the discriminator to act, or the facts upon which he relied. The court opted for the safer latter option, but appreciated the serious complication that the "facts" relied upon in discrimination will often be subjective as the discriminator will interpret the factual situation differently to the discriminated. Nevertheless, assessing facts will always be more objective than assessing motives. The JFS had based its admission decisions on the fact of the matrilineal test and its conformity with the OCR religious guidance, and in the case of M that entailed an assessment of the origins of M's ethnicity via his mother. Therefore the grounds of the decision were based on facts relating to the ethnic origins of M and not only on his religion as is the professed policy of the school.

Similarly in terms of "ethnicity", there was considerable indeterminacy in the legislation that had to be resolved. Counsel for the JFS defined ethnicity according to the precedent set out in *Mandla v Dowell Lee*[178]. This defined ethnicity according to

[178][1983] 1 All ER 1062

seven tests of membership of a distinct group. However the Supreme Court majority suggested that this defined ethnic *group* rather than ethnic *origins* which was arguably more relevant to the case. According to the *Mandla* ruling M was not a member of the Jewish ethnic group, but according to the majority of the Supreme Court in *JFS* his ethnic origins were Jewish on account of his mother's conversion. It is important to note that ethnicity is indeterminate in UK legislation and in all international law[179], and the legal content of this loaded category was a crucial political decision that was not taken by Parliament and was left to be determined by the judiciary. By distinguishing the *Mandla* ruling the Court cannot be accused of anti-systemic or anti-prudential behaviour because the judges had to resolve not just what constituted membership of an ethnic group, but also the admittance to that group by new members. In other words the court had to define the legal status of the origins of ethnicity, which implicates an anthropological question of considerable complexity.

A further complication is that UK law is unusual in affording no proportionality defence whatsoever to a charge of direct discrimination. Had the court determined as per Lords Hope and Walker that the JFS had indirectly discriminated then a proportionality test could have been engaged. The majority of the Court decided that the school's admissions policy was directly discriminatory as its aim was to distinguish between those of different religions, but that entailed an ethnic distinction. The Court was therefore unable to use proportionality review, and as such the court had opted for a very narrow definition of discrimination according to ethnicity as being based on an individual's descent or lineage. The judges were adopting a construction of the legislation that was appropriate in terms of the

[179] See the European Court of Human Rights case of *Gorzelik and Ors v Poland* Application No. 44158/98

language of the legislation, even if the substantive result was questionable. This substantive result was that the judges came to resolve the meaning of what it is to be Jewish in UK law. This decision is of course highly controversial given the delicately inter-linking religious and ethnic markers of being Jewish, and it has implications for all Jewish schools and perhaps all faith schools.

By establishing such a general anti-discrimination framework Parliament had not catered for situations that required a delicate balance of considerations. This conclusion is not meant as a criticism, but aims to highlight the difficulties of establishing a universal anti-discrimination law for a modern and complex society. The legislation applied to all without exception and one could argue that the conclusion reached by the judges was the most appropriate that was available. It is important to stress that the judges were fully aware of the difficulties they faced in resolving the indeterminacy in the legislation and it is not a responsibility that was relished. As per Lord Phillips

> "[8] While the court has appreciated the high standard of the advocacy addressed to it, it has not welcomed being required to resolve this dispute. [9] …*there may well be a defect in our law of discrimination.* In contrast to the law in many countries, where English law forbids direct discrimination it provides no defence of justification. It is not easy to envisage justification for discriminating against a minority racial group. Such discrimination is almost inevitably the result of irrational prejudice or ill-will. But it is possible to envisage circumstances where giving preference to a minority racial group will be justified. Giving preference to cater for the special needs of a minority will not normally involve any prejudice or ill-will towards the majority... Nothing that I say in this judgment should be read as giving rise to criticism on moral grounds of the admissions policy of JFS in particular or the policies of Jewish faith schools in general, let alone as suggesting that these policies are "racist" as that word is generally understood." [Emphasis added]

This statement shows how unwilling Lord Phillips was to find the admissions policy as being discriminatory, and it could have been resolved by allowing a proportionality test.

One could argue that the *JFS* case is evidence against this thesis because it is a case where the law was too determinate, and what was required was greater indeterminacy with the courts utilising a proportionality test. However such a conclusion would make two mistakes, firstly by linking a proportionality test with indeterminacy, and secondly by suggesting that the dispute in *JFS* was created by the law being too determinate, whereas it was in fact too arbitrary. On the first point, a proportionality test is founded on a careful and justified balance of rights that can be defended through careful reasoning. It is therefore the opposite of indeterminate as it seeks the best possible resolution to a clash of rights. On the second point the issue in *JFS* was that the law of direct discrimination was arbitrary, but this does not make it determinate. Arbitrariness means that the law applies even where it is clearly inappropriate, and will thereby create considerable uncertainty in the law (Endicott, 2011). On top of this source of indeterminacy, the law of direct discrimination was based on categories of race and ethnicity that had not been defined by Parliament or the government, and the task had therefore been delegated to the courts. Therefore even if one concludes that the result in *JFS* was wrong, the focus of criticism should be the legislation and not the judges.

Conclusion

This chapter has considered the impact of supranational law on the legislative indeterminacy encountered by the British judiciary. Evidence has been shown that since 1987 a huge increase in the volume of indeterminate secondary legislation has been enacted to extend anti-discrimination and equality law. Most of this legislation

was of domestic origin, but a significant amount was enacted to implement EU Directives in the UK. The aim of this chapter was to see whether the incorporation of this EU law was a further source of legislative indeterminacy that had to be resolved by appropriate political behaviour on the part of the judges. By comparing two different statutory instruments that incorporated EU Directives it was possible to see that a great deal of legislative indeterminacy was imported as well as that which was home-grown. Having considered the judicial interpretations of the Race and Religion or Belief Regulations it may be tempting to conclude that EU Directives need to be more carefully incorporated into British law in order to avoid judges having to fulfil a significant political function. However such a conclusion cannot be drawn from the current chapter. The Directives were very carefully incorporated into UK law by assimilating the language of the EU Directives with existing anti-discrimination and equality law already existing in the UK. It may be the case that some EU Directives are poorly incorporated into the UK, but that is not the subject for this thesis and to assert it here would be speculative. As in the other chapters, the aim was not to assert any criticism that law ought to be better drafted, rather the aim is to demonstrate that law has become increasingly indeterminate – for better or worse – and that is why judges behave more politically now than they did half a century ago. There is no sense in which this is a critical statement, but it does challenge those who do pass criticism on the courts for behaving "anti-democratically". As yet no systematic evidence has been found to support that conclusion.

Chapter Six: The Impact of the *Human Rights Act 1998* on the Legislative Politicisation Thesis and Conclusions for the Thesis

> "The rule of construction which s 3 [*Human Rights Act 1998*] lays down is quite unlike any previous rule of statutory interpretation. There is no need to identify an ambiguity or absurdity. Compatibility with convention rights is the sole guiding principle. That is the paramount object which the rule seeks to achieve. But the rule is only a rule of interpretation. It does not entitle the judges to act as legislators."
>
> Lord Hope of Craighead in *R v A (No 2)* 2001 UKHL 25 at 108.

> "[The *Human Rights Act 1998*]…represents an unprecedented transfer of political power from the executive and legislature to the judiciary, and a fundamental re-structuring of our 'political constitution'" p.79
>
> (Ewing, 1999, p. 79)

Introduction

The *Human Rights Act 1998* (HRA) incorporated the vast majority of the rights contained in the *European Convention on Human Rights* (ECHR) into UK law. Since it came into force in October 2000 it has been possible for British litigants to have their Convention rights enforced in the domestic courts. Prior to the HRA litigants could make a claim for breach of Convention rights to the European Court of Human Rights (ECtHR) in Strasbourg, but the time-consuming and costly process discouraged many regardless of the strength of their claim. The aim of this chapter is to assess whether the HRA has broken the causal mechanism of the Legislative Politicisation Theory. It has been argued that the HRA allows the courts to increasingly intervene in political disputes regardless of the language of the law they are interpreting, and that it has provided cover for the courts to make law in a consequentialist fashion more commonly associated with legislators. However this

chapter will attempt to demonstrate that the HRA has not affected the causal mechanism of the Legislative Politicisation Theory, and one could even argue that it has simply made explicit what was hitherto implicit in the Common Law – that the courts interpret statute law in the context of human rights principles. The reason for considering the HRA alongside conclusions for the thesis is that the HRA provides the greatest single challenge to the thesis and thus is a highly significant issue to be discussed and it will help to sharpen the argument and implications of the thesis.

This chapter will seek to falsify the argument that the HRA has created a wholly new constitutional paradigm and has led to inappropriate political behaviour from the judiciary. Demonstrating the lack of reasoning and evidence behind this argument will not establish the validity of the Legislative Politicisation Theory, but it should undermine a hugely important challenge to it.

The most notable of the new rules of interpretation are contained in sections 2-4 of the HRA. Section 2 states that the judiciary "must take into account" the jurisprudence of the ECtHR and the ancillary human rights institutions of the Council of Europe. Section 3 is arguably the most significant change in the rules of statutory interpretation:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

This has been taken to mean that the courts may "read down" or "read in" legislative language to avoid an infringement of an individual's Convention rights. Finally section 4 sets out the ultimate means of resolving an incompatibility between positive law and Convention rights:

> "If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."

A declaration under section 4 initiates a mechanism under section 10 whereby the government *may* amend the incompatibility, or acknowledge the incompatibility and order the courts to apply it anyway.

These new rules were intended as a third way between the maximalist and minimalist models of rights protection in a Parliamentary democracy. The maximalist model is associated with the Canadian *Charter of Rights and Freedoms* where the courts can strike down legislation that is incompatible with rights. The minimalist model is associated with the New Zealand *Bill of Rights Act* where the courts can only highlight rights breaches, and have no remedial powers (Feldman, 2004, p. 397). Whilst there are new rules of statutory interpretation as a result of the HRA, the judiciary are fundamentally still reactive to change on the supply-side, and indeterminate legislation explains judicial behaviour better than any alternative explanation. The HRA has not stimulated a demand-side response where judges proactively change the law without first encountering an indeterminacy that needs to be resolved. Whilst it may be the case that "ambiguity" and "absurdity" are not required in the law for judicial intervention under the HRA, it needs to be stressed that indeterminacy includes more than semantic "ambiguity" or logical "absurdity". Legislative indeterminacy fundamentally involves the interpretation by the courts of incomplete legislation, which can be stated in clear semantic and syntactic form, but yet lacks clear linguistic pragmatics. Thus the HRA has not changed the supply-side source of political behaviour in judges, nor has it enabled judges to act inappropriately by untethering their decisions to the institutional requirement of certainty in the Rule of Law. As per Lord Hope in the quote above, the new rules of statutory interpretation

fit with the existing model of judicial behaviour, and do not fundamentally change it. Therefore it will be argued that there has not been a "fundamental re-structuring of our 'political constitution'".

The two central tasks for this chapter are to demonstrate that despite the HRA legislative indeterminacy remains the main source of political behaviour in judges, and that the means of resolving indeterminacy continues to be the Logic of Appropriateness. Thus the counter-argument that must be rebutted is that the HRA has allowed the courts to engage politically according to their own personal beliefs in accordance with the Logic of Consequences. As mentioned in previous chapters, the distinction between the Logic of Appropriateness and the Logic of Consequences comes down to the aim being pursued and the means by which it is pursued. An appropriate judgement seeks to maximise certainty in the Rule of Law by integrating past legal principle to resolve the indeterminacy encountered in the case. An inappropriate judgement seeks to maximise any interest other than certainty in the law, and in doing so exacerbates or sustains indeterminacy in the law. Judges in the Common Law tradition reconcile new cases with past principles, and the HRA simply provides new principles in domestic law to inform future cases. Thus the judicial role under the HRA continues to be a normative institutionalist role of reconciling new law with existing principle in order to maximise the efficacy of Parliamentary legislation.

The Logic of Appropriateness is more complex than the declarative theory of law as set out by Blackstone, as it is not a question of stating what the law has always been, rather it is a complex process of integrating elements of existing positive law and elaborating them according to the normative principle underpinning certainty in

the Rule of Law. This is the crux of MacCormick's post-positivism, and as Ronald Dworkin has argued, the task of the judiciary is to establish what the law ought to mean in situations where the sovereign power has left some indeterminacy:

> "… the law may be silent because the pertinent institutional decision stipulated only vague guidelines by declaring, for example, that a landlord must give a widow a 'reasonable' time to pay her rent… Then the judge has no option but to exercise a discretion to make new law by filling gaps where the law is silent and making it more precise where it is vague." (Dworkin, 1986, pp. 8-9)

The counter-argument that the HRA enables the judges to make decisions inappropriately according to the Logic of Consequences (policy-orientation or influence-seeking) essentially suggests that the HRA marks a "critical juncture" in English public law jurisprudence (Collier & Collier, 2002). The argument is that since October 2000 judges have changed their behaviour and become noticeably more politically activist, inspired by the expansionist jurisprudence of the ECtHR. This perspective can be seen in the following quote from Jonathan Sumption QC, who is the latest appointment to the UK Supreme Court:

> "The tendency of the courts to intervene in the making of 'macro-policy' has become more pronounced…The Strasbourg court has treated the Convention not just as a safeguard against arbitrary and despotic exercises of state power, but as a template for most aspects of human life. These include many matters which are governed by no compelling moral considerations one way or the other."[180]

By enabling the courts to resolve disputes according to undemocratic principles, it has been argued that the HRA has initiated an inappropriate level of judicial intervention into the "political constitution" (Ewing, 1999). The argument for the constitutional novelty of the HRA and the argument that inappropriate judicial power has been

[180] F.A Mann lecture in Lincoln's Inn, November 2011.

enabled by the HRA are to be rebutted in this chapter. The first section of this chapter will discuss the development of constitutional jurisprudence in English public law in order to demonstrate that the HRA is symptomatic of a long process of change, rather than causative of that change. The second section will go through the four criteria of the Logic of Appropriateness set out in previous chapters and will seek to demonstrate that judicial power under the HRA remains tethered to the institutional requirement of certainty in the Rule of Law.

The Constitutional Impact of the HRA

Fundamentally the question to be addressed is when and how the "political constitution" of the UK developed a constitutionalism that enabled judicial intervention into political decision-making on the basis of legal principles. This thesis has been working on the case that constitutionalism is a necessary aspect of Parliamentary sovereignty – such that the application of legal principles to politics has long existed and the notion of a separate political and legal constitutionalism is a false dichotomy.

As discussed in the introduction to this thesis, Parliamentary Sovereignty does not exist in a vacuum, but rather it depends on certainty in the Rule of Law. The norm that certainty in the Rule of Law must be maximised has an ancient lineage as Parliament's orders must be understood by all that are to be affected by them, and must be applied equally to all. In a state where there is a single source of public law without any other source such as a codified constitution or civil code, the precise implications of that law must be clearly understood or else the intentions of the

sovereign will be mistaken or ignored. To illustrate this point there is an apocryphal story of an architect seeking approval from Lenin for a new hotel in Moscow shortly before the leader's death. The architect offered two totally distinct architectural styles to the ageing and stroke-impaired dictator who gave an indeterminate indication of his preference. The architect was so petrified of upsetting Lenin that he built one half of the hotel in one style and the other half in the totally different alternative. The result was an utterly absurd split design. The point being that where an absolute ruler cannot be understood, then he does not in fact rule at all. Clear instructions are requisite or else the wishes of the sovereign are bound to be misinterpreted. Therefore the idea that there can be a political constitution that in no way relies on strength in the law is a logical impossibility. The two are far from mutually exclusive, they are mutually supporting (Phillipson, 2011).

Maximising certainty in the law has two core elements – substantive equality and procedural justice. The norm of certainty as equality and justice tacitly underpins the British Constitution because Parliament is the public forum for private interactions, and since the *Representation of the People Act 1928* it has been legally mandated that interactions in this public forum are to be transacted with equal access to all citizens. Parliament is the intersection between the principals (voters) and their agents (Parliament), and by logical extension therefore Parliament must be assumed to be acting in a manner that ensures the equal protection of the law to all citizens, unless it explicitly states otherwise (Jowell, 1994). This normative requirement of certainty in the law has been elaborated into a range of rights that protect individuals from state action unless specific derogations from the right have been set out in plain legislative language. Arguably the mistake of the political constitutionalists is to separate Parliament from its source of legitimate power – the citizenry. It is argued

that Parliament has unlimited sovereign power, which may be legally true, but Parliament is just a body of representatives of the citizenry. It is a conduit of collective power, not the origin of that power. So in fact the unlimited sovereign power rests in civil society, not in the Palace of Westminster. This basic principle has been recognised and asserted in English public law for hundreds of years. In *Dr Bonham's Case* in 1610, Sir Edward Coke issued this famous dictum:

> "…in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void."

The Glorious Revolution of 1688 and the subsequent *Bill of Rights 1689* made it clear that the Common Law could not be used to adjudge an Act of Parliament as "void", but the principle remains that Parliament is expected to act in a way that conforms with the underlying principles of equality and justice unless it has explicitly stated otherwise. This has not changed with the *Human Rights Act*, instead the HRA has merely made explicit certain principles of law that had for many years been implicit.

The key change in British politics that propelled the development of constitutionalism came much earlier than the HRA. The key change was the increased delegation of power from Parliament to executive agents via indeterminate legal instruments. This institutional change developed in the post-war period and particularly accelerated after the 1960s. Whilst there was indeterminate legislation before the 1960s it rapidly increased in volume thereafter, and was coincident with institutional reforms such as legal aid that facilitated the courts in pursuing their appropriate constitutional role. The unwillingness or inability on the part of judges to tackle indeterminacy prior to this stage was hence constitutionally inappropriate as it

sustained or exacerbated uncertainty in the Rule of Law. As per Lord Mustill in his obiter dictum in the *FBU* case[181]:

> "[567] To avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen 30 years ago."

This dictum predates the HRA and the case was one of a number of hugely significant assertions of the Rule of Law during the 1980s and 1990s against executive power (Feldman, 2004; Loveland, 2006). Perhaps the most notable case was *Simms*[182], where the House of Lords made it clear that human rights existed in the Common Law, and the HRA was merely enhancing the clarity with which the judiciary may assert such rights, as per Lord Hoffmann:

> "[412] The *Human Rights Act 1998* will make… changes to this scheme of things. First, the principles of fundamental human rights which exist at common law will be supplemented by a specific text, namely the European Convention. But much of the Convention reflects the common law… That is why the United Kingdom government felt able in 1950 to accede to the Convention without domestic legislative change. So the adoption of the text as part of domestic law is unlikely to involve radical change in our notions of fundamental human rights."

Contrary to this analysis is Vernon Bogdanor who argues that the HRA and devolution mark the creation of a "New British Constitution" based on fundamental laws that limit Parliamentary Sovereignty (Bogdanor, 2009). The problem with this argument is the assumption that Parliamentary Sovereignty was ever unlimited. Such an assumption has to face something akin to a cosmological argument – if Parliament is omnipotent, where did its power come from? The answer is the citizens, who use

[181] *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513
[182] *R v Secretary of State for the Home Department ex p Simms* [1999] 3 All ER 400.

Parliament as a means of agreeing to mutually beneficial laws which must then be enforced with vigour by the subordinate judiciary.

The second problem with this argument is that it overestimates the impact that the HRA has on the power of the judiciary. The HRA is not higher law and the judiciary are not able to strike down Parliamentary legislation. On top of this, Parliament may either assert that a Bill is considered to be compatible with the Convention under s 19 HRA, or not make such an assertion but mandate the courts to implement the law anyway. For instance the *Communications Act 2003* did not include a 'declaration of compatibility' (Fenwick, 2011). Similarly the *Prevention of Terrorism Act 2005* allows the creation of "derogating control orders" that explicitly infringe the Convention rights of those subject to them. Although no derogating control orders have ever been issued it is clear that Parliament may still legislate against the Convention. On top of this, Parliament may ignore the rulings of the ECtHR if it feels that they are mistaken, or not in accordance with British interests. For instance the ruling from Strasbourg against the blanket ban on prisoners' voting has not led to any remedial action by the courts or Parliament[183]. This flexibility is a clear demonstration of the third way position between the maximalist rights protection in Canada and the minimalist position in New Zealand. Ultimately Parliament remains the heart of the British constitution, and it continues to rely on strong enforcement of the Rule of Law.

The HRA may not have changed the nature of the constitution, but there have been "problems with incorporation" experienced by the judiciary in implementing the new rules of interpretation (Clayton & Tomlinson, 2003). Some cases have been

[183] *Hirst v the United Kingdom (No 2)* [2005] ECHR 681

heavily criticised, and there have been accusations that the judges are applying the HRA without any clear principles underpinning its application (Edwards, 2002). Most notably there has been dispute concerning the point at which the duty set out in the "compatible construction rule" in section 3 must give way to the power to issue a declaration of incompatibility under section 4 (Bennion, 2009). These teething problems will be discussed in greater detail in the following section assessing the appropriateness of judicial behaviour under the HRA. It will be demonstrated that despite early difficulties, the HRA has largely been assimilated into the existing principles of the Rule of Law. The cause of the problems with incorporation is the slightly ironic fact that the HRA is itself highly indeterminate in its language. It delegates significant powers to both judges and the government to ensure that the British state conforms to the ECHR. The judiciary have had to incorporate these new powers into the institutional requirement of certainty in the Rule of Law, which has been a complicated and controversial task.

The following table compares the discourse analysis results as percentages for the HRA with the other major pieces of indeterminate legislation that were studied in previous chapters:

Table 6.1: Cross-Tabulation of the HRA 1998 with the *Asylum and Immigration Act 1996* (AIA), the *Housing Act 1996 Part VII* (HA), and the average levels of indeterminacy for 1995 and 2000:

	Emb	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
HRA	59	14	68	50	50	50	55	86	36
AIA	85	0	77	38	62	77	85	92	31
HA	39	0	80	55	32	77	82	23	27
Average '95	72	16	68	54	36	39	78	52	25
Average '00	52	11	70	50	24	39	73	56	22

Emb = Embedding – The legislation utilises subordinate clauses. **Sub = Subjunctive** – The use of subjunctive language. **Adj = Adjectives** – The use of adjectives, adverbs or qualifying nouns. **Mod = Modal** – The use of vague model verbs (may). **Enb = Enabling** – An agent of Parliament is enabled to amend the law. **Age = Agency** – The agent intended to implement the law is not clearly specified. **Con = Conditional** – The use of conditional language. **Ref = Referential** – The use of a reference to another piece of legislation. **Dec = Decentralisation** – The decentralisation interaction, which displays the combined measure of vague modal verbs, enabling power and unclear agency.

Table 6.1 presents the percentage of sections that display each of the eight independent measures of indeterminacy, and the decentralisation interaction. An astonishing 36% (eight sections) of the HRA display the decentralisation interaction, thereby delegating a significant amount of power to be used with discretion by an unspecified agent. This is a higher proportion than the two major pieces of indeterminate legislation used in the chapters on immigration (31%), and homelessness (27%); it is also significantly higher than the sampled averages for 1995 and 2000 (25% and 22% respectively). In other words, over a third of the legal material contained in the HRA is pragmatically indeterminate, such that its meaning is incomplete and must be fleshed out through implementation by an agent of Parliament.

For instance the following section allows an unspecified member of the government to amend primary legislation in order to address a declaration of incompatibility issued by the judiciary:

> "10(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility."

This is a truly astonishing grant of power from Parliament with a Henry VIIIth Clause. The courts will make a declaration of incompatibility (under s 4 HRA) where it is believed that they are unable to interpret the legislation in such a way as to remove the incompatibility with the ECHR without doing violence to the intent of the original enactment. Under such circumstances the government, rather than Parliament, is tasked with amending primary law to achieve compatibility.

On the other measures of indeterminacy the HRA is closer to the other acts, with the exception of the subjunctive measure where 14% (or three sections) display subjunctive language. For instance the following section sets out the criteria for granting damages by the court which uses subjunctive rather than indicative language:

> "8(3) No award of damages is to be made unless…the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made."

There are two important points to be taken from the indeterminacy of the HRA. On the one hand the indeterminacy provides flexible principles that enable judges with discretion to repair and develop the Rule of Law in response to human rights violations. However, on the other hand, as with any act of delegation that is couched in indeterminate language the HRA creates uncertainty which is the cause of problems with incorporation experienced since October 2000.

More specifically there has been a need to resolve four categories of indeterminacy which accord with the four markers of appropriate political behaviour

in judges: jurisdictional, substantive, procedural and constitutional. Firstly there is jurisdictional indeterminacy (empirical), in terms of who is protected by the HRA and how it is used. The key jurisdictional debate has concerned whether the HRA has horizontal effect on litigation between private individuals, or just vertical effect between the state and citizens. Secondly there is substantive indeterminacy (definitional), in terms of the clash between mutually exclusive rights, the clash between individual rights and private policies (such as the wearing of a uniform in a company), and the demarcation of the courts' duties and powers under the Act. Thirdly there is procedural indeterminacy (systemic), in terms of the extent to which the HRA is applied consistently with the procedural principles of higher courts, most notably the ECtHR. Finally, there is constitutional indeterminacy (prudential), in terms of what balance of power there is between executive, legislature and judiciary. The most important debate here has concerned the extent to which a "margin of appreciation" should be granted to government actions where the legitimate aims of a democratic state are recognised as taking precedence over the rights of individuals.

One can see with the HRA that legislative indeterminacy has not only led to the judiciary having to oversee the delegation of power to executive agents, but also to oversee delegations of power to the judiciary itself. This raises the spectre of the judiciary acting in judgement of their own cause by deciding how much power Parliament has granted them. This encourages the argument that judges, in acts of self-reflection, will scrutinise the behaviour of judicial agents of Parliament with less rigour than they might do when overseeing non-judicial agents of Parliament. The institutional question raised is therefore – *Quis custodiet ipsos custodies,* or "Who guards the guardians"? However this chapter will aim to show that there is no evidence for the contention that judges have interpreted the indeterminacy of the HRA

that empowers the judiciary with any less rigour than they have interpreted other Acts that enable non-judicial agents. As well as a lack of evidence, the reasoning underpinning the fears of judicial power are based on strategic or attitudinal assumptions that cannot be falsified and do not explain with precision the political behaviour of judges.

This chapter will consider the four observable manifestations of "appropriate" political behaviour in judges, in order to make the case that the HRA has not fundamentally changed the constitutional role of judges, and has not encouraged inappropriate political decision-making.

Appropriateness under the HRA:

As Lord Hope stated in his dictum quoted at the start of the chapter, the HRA has not entitled the judges to act inappropriately as legislators. Instead judges continue to act as interpreters of the law, rather than its creators. Parliament and the government voluntarily bound itself with the HRA, and the courts in their interpretations are simply reviewing actions and enforcing rules that have been committed to by the democratic branches of the state. Parliament has acted rather like Odysseus, who hears the Siren calls and demands his sailors (the judges in this analogy) to block their ears with beeswax and tie him to the mast. Odysseus makes a positive decision, and the sailors enforce that decision. However much Odysseus may desperately want to answer the Sirens' call he knows the dangers, and with the assistance of the sailors he stops himself. There is no question that Odysseus is controlling the sailors, they are simply following his orders and agree to ignore any

protests. The power of the judges is therefore entirely bounded by the institutional requirements of providing certainty to Parliamentary law. If anything, the power of the courts under the HRA is more predictable and democratically justifiable than the erstwhile situation under the Common Law. With the HRA the courts police an area of individual freedom that was marked out by Parliament in conjunction with the Convention, and not by the courts themselves.

Unlike in previous chapters, for this chapter case selection has proceeded on the dependent variable, where cases have been selected according to their significance in displaying political behaviour in judges. This selection method can be justified as the aim is to falsify the case against this thesis, rather than seeking to provide substantial proof for it. Also unlike in previous chapters inappropriate and appropriate behaviour tropes will be assessed side-by-side rather than separately.

Empirical

First of all it is necessary to consider and rebut the case that the empirical changes brought about by the HRA have fundamentally changed the constitution and encouraged inappropriate behaviour. The empirical measure considers the source of case law and the extent of legal jurisdiction. In terms of the HRA the most important question to be solved by the judges has concerned whether the HRA has only vertical application between state and citizen, or whether there can be horizontal application between private citizens. The source of this indeterminacy is section 6 HRA which deals with the jurisdictional reach of the Act:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right… (3) In this section "public authority" includes— (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature"

Parliament is explicitly excluded from the definition of a public authority in order to ensure its privilege is maintained. Nevertheless Parliament has given scant guidance to the judiciary as to whether and to what extent the HRA applies not only vertically, but also horizontally. The courts have been left to consider what "functions of a public nature" are, which thrusts them into a highly complex theoretical debate on the intersection between the public and private spheres. Forcing the judiciary to act as political theorists in this way can explain the problems experienced with the incorporation of the HRA (Robertson, 2010).

The most prominent problems have concerned the development of privacy law. Whilst there is no question that this is the domain of private law, the courts as a public authority have to act in a way that is compatible with Convention rights, which means not frustrating the enforcement of rights even in private law cases. This problem is aggravated by the supposed clash between Article 8 ECHR that sets out a right to a "private and family life", and Article 10 that establishes "freedom of expression". In a number of complex cases privacy law has been developed rapidly with the utilisation of the HRA. For instance in *Mosley v News Group Newspapers*[184], Mr Justice Eady relied on the HRA to award damages to Max Mosley, the former head of the Formula One governing body, after he was accused of sadomasochism with prostitutes by the *News of the World*. The reaction from Paul Dacre, the editor of *The Daily Mail*, was to accuse Eady J of fundamentally altering the law "with a stroke

[184] [2008] EWHC 1777

of his pen" (Holmwood & Fitzsimmons, 2008). In other words Eady was accused of inappropriately taking advantage of the HRA to make new law.

Arguably even more controversial was the development of super-injunctions in privacy law. This is an injunction on press reporting where even the existence of the injunction cannot be reported. The supposed inappropriateness of this legal instrument can most clearly be explained in terms of the consequences of breaching a super-injunction. The malefactor would be held in contempt and put on trial, but the circumstances of the case could not be reported because of the super-injunction. Thus the malefactor would face punishment for contempt without being able to defend that behaviour in open court.

It may appear that the HRA has therefore allowed a wholly new approach to privacy law where the judges are able to inappropriately create new law without tethering their decisions to the requirement of certainty in the Rule of Law. There are two problems with this argument – first of all the reach of public law rights into private lives is nothing new, and secondly the problems associated with the early incorporation of the HRA in private disputes has been more a matter of press disapproval than actual inappropriateness. Indeed principles of law that can be defended have emerged, such that the judges can be said to be behaving entirely appropriately in enforcing the HRA in private law cases.

In cases under the pre-HRA public law, the extent to which private interactions could be the subject of public law intervention had developed a strong jurisprudence. Cases such as *R v Panel on Take-overs and mergers ex p Datafin*[185] established the principle that where a private body takes on a role that would have to

[185] [1987] QB 815

be performed by the government in its absence, that role can be considered essentially as a public function. Also the courts have long recognised that for consistency's sake, they cannot totally compartmentalise public and private law rights, as it creates an arbitrary division in the Rule of Law that is not in the constitutional tradition of the Common Law. Therefore the HRA does not mark a critical turning point in the development of the public law, it merely makes explicit what had been implicit – that there needs to be guiding principles to explain the interaction between private lives and public rights. Indeed the extreme indeterminacy of the HRA has simply forced the judiciary into creating new legal ligatures to link the HRA with the pre-existing Rule of Law. As per Gavin Phillipson:

> "… given the paradox set up by section 6(1) and (3)'s inclusion of judges within those public authorities bound to act compatibly with the Convention rights taken together with the Act's presumably deliberate silence on private law and common law, we must turn to existing constitutional principles governing the role of the judiciary, which provide the 'constitutional constraint' of incrementalism; this supplies the necessary definition of and limitation upon the judicial role in developing common law compatibly with the Convention rights." (Phillipson, 2011)

Despite complaints from the media that judges have inappropriately applied the Convention to privacy law by failing to link it to existing principles in the Rule of Law, there is simply no evidence for this. All the judicial dicta on the subject display a careful attempt to reconcile the indeterminate HRA with the existing Rule of Law in order to achieve the greatest degree of certainty. Even with the hugely controversial super-injunctions, it has been recognised that they cannot be untethered from existing principles of law. As one can see from Eady J in a case concerning a celebrity chef[186]:

> "[5]…it is clear that an applicant who seeks to restrain publication of personal information will need to approach the matter in two stages. First, it is necessary to demonstrate that he has a reasonable expectation of privacy in respect of the subject-matter in question, having regard

[186] *KGM v News Group Newspapers Ltd and others* [2010] EWHC 3145 (QB)

> to Article 8 of the *European Convention on Human Rights*. If that hurdle is overcome, it next has to be shown that there is no countervailing public interest sufficient to outweigh his right to protect that information. At the second stage, the court will apply what has been termed 'an intense focus' to the particular circumstances of the case, in order to arrive at a determination of where the balance lies between the competing rights concerned…"

In this particular case, Gordon Ramsay, did not establish a strong enough case on Convention grounds and the super-injunction was declined. Balancing rights in this manner is complex and can be controversial, but it is the essence of the judicial role, and it has only been made more complex and controversial as a result of indeterminate legislation. Added to this, the awesome power of the super-injunction starkly reflects the iniquitous trial-by-media that can rapidly ensue on the flimsiest of evidence without the rights of the subject being considered at all. Therefore, by linking their decisions to existing principles of law, the courts can be said to be acting appropriately according to their constitutional role. Parliament has committed the courts to enforcing Convention rights but gave no guidance on what impact those rights should have on private interactions. What Parliament did make clear in s 6(3) is that courts are a public authority and must not act incompatibly with the ECHR. They have therefore had to gradually develop a jurisprudence that has increased the certainty with which individuals understand the relationship between public and private rights in English law. This role of the judiciary has not changed, and arguably they have not behaved "inappropriately" since the introduction of the HRA.

Definitional

As well as jurisdictional indeterminacy, the HRA has also raised significant substantive indeterminacies that have had to be ameliorated by the judiciary. Despite

the lack of certainty in the language of the HRA, it will be argued that its implementation has been consistent with the norms of the British constitution, and hence the behaviour of the judiciary has generally been appropriate.

The most significant substantive indeterminacies have taken three forms: firstly the mutual exclusivity of certain rights, secondly the balancing of individual rights against the policies of private organisations, and thirdly the distinction between duties and powers of the courts under the HRA to enforce the rights. As with the above section, the discussion will concentrate on the case that the courts have been behaving in an inappropriately political manner as a result of the HRA, and by exposing the lack of reasoning and evidence for this position it will undermine a potential caveat of the Legislative Politicisation Thesis.

In terms of the mutual exclusivity of certain rights and the balance between individual rights and private policy, the argument is that where the rights of separate individuals clash the judges are free to choose the balance most preferred by themselves. Such behaviour would be anti-definitional, in so far as it does not interpret existing legal substance and integrate it with the case. In previous chapters, this behaviour was referred to as policy-orientated; and it is necessary to demonstrate that the HRA has not led to judges acting in this inappropriate fashion.

The challenge to this thesis is that intuitively there must be a point at which indeterminacy in the law becomes so great that judges are forced to untether their reasoning from existing legal substance, whether they would wish to or not. In other words, at some point new enactments may create so much discretion that providing the ligatures with the Rule of Law becomes practically impossible, and judges have legislative decision-making thrust upon them. This thesis has been working on the

argument that indeterminacy of legislation is a problem for the judiciary that must be resolved, but the resolution is never fully untethered from existing legal principle, and therefore it simply encourages an enhanced interpretative power that can be justified according to the norms of the constitution. The problem with this argument is where two or more rights are simply irreconcilable or where individual rights and private policy come into conflict, a resolution may not be possible through interpretation alone. In the last chapter we discussed the clash between religious discrimination and sexuality discrimination under EU law. Similar clashes have emerged under the Convention, such as the clash between Articles 8 and 10 considered above; where privacy and press freedom came into dispute. In terms of the clash between individual rights and private policy there have been a number of cases where the courts have had to define the content of individual Convention rights against private policy. In the case of *Sakira*[187], a girl who practiced Sikhism was allowed by the courts to wear a religiously significant bracelet to school (the Kara). However, in the case of *Denbigh*[188], a girl of Islamic faith could not use the HRA to defend her choice to wear a long loose-fitting coat to school (the Jilbab). Also in *Eweida*[189], a lady working for British Airways lost her case to be allowed to openly wear a crucifix at work. It could be suggested that the decisions made were purely arbitrary and cannot be defended according to the "Logic of Appropriateness". However these cases do not provide sufficient evidence that the judiciary have been inappropriately policy-orientated in their judgements for the reason that *Sakira* was a fundamentally different case, and cannot be compared to the others. *Sakira* relied mainly on anti-discrimination law in the *Race Relations Act 1976* (as amended), rather than being primarily based on the

[187] *Sakira Singh* [2008] EWHC 1865 (Admin)
[188] *R(SD) v The Governors of Denbigh High School* [2007] 1 AC 100
[189] *Eweida v British Airways* [2010] EWCA Civ 80

HRA because of a string of failed attempts to use that Act to defend individual clothing choices against private clothing policies[190]. Therefore where rights have clashed, both in privacy law and religious freedom, there is no evidence that the judiciary have been acting inappropriately under the HRA. Indeed counsel have realised that the HRA leads to a dead end in such cases and have opted to pursue claims under anti-discrimination law.

Whilst the judiciary faced difficulties in interpreting indeterminate Convention rights in various cases, it would be wrong to say that their decisions have not been interpretations. The reasoning that extreme indeterminacy encourages acts of untethered legislation from the bench fundamentally mistakes the Common Law legal tradition. The greater the indeterminacy, the more carefully the judges must justify their decisions according to available principles of law. The mere fact that different legal claims clash is not enough to contend that judges merely make law according to their own interests. The Common Law system is founded on the adversarial principle, and the entire system would rapidly fall into illegitimacy if judges could not openly defend their judgements according to reasoning based on existing principles. Therefore it cannot be defended that the HRA has initiated a new constitutional paradigm, rather it has brought into clearer focus some of the clashes that have been the mainstay of the Common Law tradition for centuries.

The second element of definitional difficulty under the HRA is arguably the most significant aspect of indeterminacy that the judiciary has had to resolve – namely the demarcation of the courts' own duties and powers that have been delegated by Parliament with the HRA. In particular the *duty* to apply the "compatible

[190] See also *R (on the application of Playfoot) v Governing Body of Millais School* [2007] ELR 484; and *R (on the application of X v Head Teacher and Governors of Y School* [2008] 2 All ER 249

construction rule" under section 3, and the *power* to make "declarations of incompatibility" under section 4. The HRA states in section 3 that the judiciary "must", "so far as it is possible to do so… read and given effect" to Convention rights when interpreting primary and secondary legislation. Section 4 states that "If the court is satisfied that [a] provision is incompatible with a Convention right, it *may* make a declaration of incompatibility" [Emphasis added]. The point at which the duty under section 3 disappears and is replaced by the power under section 4 is not clearly elaborated in the HRA. This indeterminacy has led to significant controversy and disagreement. However the rules of construction under the HRA may be new, but they do not fundamentally change the constitutional position of the judiciary as interpreters of existing law; and sections 3 and 4 HRA have generally not led to inappropriate political behaviour from the judiciary.

The key controversy concerning the demarcation of duties and powers under the HRA is the suggestion that there has been no principled elaboration from the courts of when the duty under section 3 disappears and the power under section 4 emerges. If this case is true then it could be claimed that judges have been inappropriately policy-orientated by deciding cases without being tethered to any limitations founded on principle. However, despite some early disagreements amongst judges and commentators, there is emerging a strong set of guidelines that inform the demarcation of duties and powers. As per Lord Nicholls in *Re S*[191]:

> "[40] The area of real difficulty lies in identifying the limits of interpretation in a particular case. This is not a novel problem. If anything, the problem is more acute today than in past times. Nowadays courts are more 'liberal' in the interpretation of all manner of documents. The greater the latitude with which courts construe documents, the less readily defined is the boundary. What one person regards as sensible, if robust, interpretation, another regards as impermissibly creative. For present purposes it is sufficient to say that a meaning which

[191] *Re W (children: care plan) Re S (children: care plan)* [2002] UKHL 10 All ER (D) 212 (Mar)

> departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment."

Lord Nicholls's argument that statutory interpretation by the judiciary has become more "liberal" chimes with this thesis, but it has done so because the identification of the "fundamental feature" of an indeterminate Act of Parliament is increasingly difficult.

Two of the earliest cases to tackle the duty/power problem were *R v A (No 2)*[192] and *R v Lambert*[193] that were handed down by the House of Lords within two months of each other in 2001. Both cases concerned the criminal law, with the former involving the admissibility of past consensual sexual experience in a rape trial, and the latter involving the legal burden of proof on an individual caught in possession of drugs. In *R v A* the court ruled that s 41(3) of the *Youth Justice and Criminal Evidence Act 1999* if construed according to traditional methods of statutory interpretation challenged a defendant's right to a fair trial under Article 6 of the Convention, but in the immediate case the appeal was dismissed pending a reconsideration of the facts in a lower court. The case led to a difficult obiter debate concerning the demarcation of sections 3 and 4. The key protagonists were Lords Steyn and Hope, with the former proposing that section 3 should be used not only to "read down" statutory language to ensure compatibility, but also potentially to "read in" language:

> "[44] In accordance with the will of Parliament as reflected in s 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a clear limitation on convention rights is stated in terms, such an impossibility will arise."

[192] [2001] UKHL 25
[193] [2001] UKHL 37

This conclusion was rejected by Lord Hope who pointed to the fact that Parliament had made a declaration of compatibility under s 19 whilst the Bill passed through Parliament, and therefore if a compatible construction is impossible under section 3, a section 4 declaration should be made to allow Parliament to resolve the problem:

> "[58] As I said in *R v DPP, ex p Kebeline*, it is *appropriate* in some circumstances for the judiciary to defer, on democratic grounds, to the considered opinion of the elected body as to where the balance is to be struck between the rights of the individual and the needs of society" [Emphasis added]

Therefore Lord Hope in *R v A* opposed the idea of "reading in" language as he argued that it tipped over from interpretation to amendment, which was inappropriate by not being in accordance with constitutional norms. However when it came to *R v Lambert* his position was that "reading in" was possible but had to be done according to strict rules and principle in order to avoid the charge of being legislation and not interpretation:

> "[80] So far as possible judges should seek to achieve the same attention to detail in their use of language to express the effect of applying section 3(1) as the parliamentary draftsman would have done if he had been amending the statute. It ought to be possible for any words that need to be substituted to be fitted in to the statute as if they had been inserted there by amendment. If this cannot be done without doing such violence to the statute as to make it unintelligible or unworkable, the use of this technique will not be possible. It will then be necessary to leave it to Parliament to amend the statute and to resort instead to the making of a declaration of incompatibility."

One can see the conceptual distinction between interpretation and amendment risks becoming dangerously blurred, which can be considered as an important change in the constitutional role of the courts. However it is not the case that prior to the HRA the judiciary would not effectively "read in" words in order to interpret statutory language

in accordance with the Rule of Law. Interpretation involves the reconstruction of language in order to clarify meaning, and this involves reading words in or out, in order to effect the best fit between principle and case. Again the HRA has merely made more explicit what was hitherto implicit. Take for instance the case of *Fitzpatrick*[194] decided before the HRA came into force. The House of Lords decided by a majority that Schedules to the *Rent Act 1977* should be read as if "living with the original tenant as his or her wife or husband" in paragraph 2(2) included homosexual couples. In a very similar case under the HRA the same interpretative "reading in" was made under the guidance of section 3 HRA in *Ghaidan v Godin-Mendoza*[195]. The Common Law method of statutory interpretation has new rules of construction, but the underlying principles are unchanged, and by extension the judicial role in the constitution as interpreters of Parliamentary law is unchanged.

The *Ghaidan* case is a further source of controversy when compared with the cases of *Bellinger*[196] and *Wilkinson*[197]. In *Bellinger* a transsexual sought the right to have her marriage to her husband recognised under s 11(c) of the *Matrimonial Causes Act 1973.* In this case the House of Lords issued a declaration of incompatibility on the grounds that they could not use the "compatible construction rule" to change the test of gender performed at birth that provided the basis for recognised marriages between a "male" and a "female". In *Wilkinson* a bereaved husband was unable to have the term "widower" read into s 262 of the *Income and Corporation Taxes Act 1988* which provided tax relief to widows. Therefore the use of section 3 to resolve *Ghaidan,* section 4 to resolve *Bellinger,* and neither to resolve *Wilkinson* is a potential

[194] *Fitzpatrick v Sterling Housing Association Ltd* [1999] All ER (D) 1171
[195] [2004] 2 AC 557
[196] *Bellinger v Bellinger* [2003] UKHL 21
[197] *R (on the application of Wilkinson) v Inland Revenue Commissioners* - [2005] All ER (D) 68 (May) [2005] UKHL 30

basis for a case that the HRA has encouraged inconsistent judgements that are untethered to existing principles.

However this is not evidence of anti-definitional policy-orientation from the courts. Distinguishing gender is the only point that these three cases have in common, and to draw any closer connections to the facts or the law of the three cases would be a grievous over-simplification. Firstly in *Ghaidan* the use of section three was "possible" because a very similar interpretation had previously been achieved in *Fitzpatrick,* and the disputed legislation was indeterminate by stressing "*as* his or her wife or husband". To live "as" a wife or husband implies fulfilling the role commonly associated with those labels, rather than literally being the wife or husband[198]. Parliament could have adopted the more determinable "*being* his or her wife or husband" to prevent the courts from reading in language. However in *Bellinger* the language to be interpreted was: "A marriage celebrated… shall be void on the following grounds… that the parties are not respectively male and female". There is no indeterminacy here and the intention of Parliament is as clear as day. It would have been utterly inappropriate for the courts to have read in language here. Indeed it was unnecessary to reconstruct the *Matrimonial Causes Act* for the satisfaction of the claimant as the government was working on replacing it whilst the case was proceeding[199]. Similarly *Wilkinson* concerned the "Widows' bereavement allowance", and if the courts had read in "widower" it would have had dramatic repercussions for the entire tax code and many other social policies where discrimination between the genders was pursued to address specific gender-based inequalities. The reason for denying a declaration of incompatibility was justified by the court on the grounds that

[198] See Lord Hoffmann in *Wilkinson* at 16-18.
[199] *Civil Partnerships Act 2004*

the infringement of the right to enjoy property under Article 1 of the First Protocol ECHR was justified in this case as pursuing a legitimate democratic aim.

Therefore despite early problems with incorporation in resolving the demarcation issue in *R v A*, *Lambert*, *Ghaidan*, *Bellinger*, and *Wilkinson*, there are now clear principles of statutory interpretation that accord with the traditional constitutional role of the judiciary – of maximising certainty in the Rule of Law through interpretation rather than legislation. As Aileen Kavanagh argues:

> "…the power given to the courts under sections 3 and 4 is a constitutional power, because it enables the courts to shape the content of the human rights guarantees. Not only is it a power to enforce those rights and comply with them in common law adjudication, it is also a power to enforce those rights against the elected branches of government if required. The performance of this constitutional role is one which has traditionally been exercised by the courts, but has been enhanced by the HRA in various subtle ways, most notably in giving the courts a greater sense of legitimacy in opposing and limiting the law-making powers of Parliament. So the courts did not acquire a novel kind of power by the enactment of the HRA – rather, their existing constitutional role was strengthened and enhanced." (Kavanagh, 2009, p. 280).

Systemic

The third aspect of judicial behaviour to be analysed is the extent to which the courts develop a consistent procedural jurisprudence throughout the legal hierarchy. The judiciary would be acting in an anti-systemic – or influence-seeking – manner if there was incoherence in the pursuit of rights claims in various branches of the judicial hierarchy. The new rules of statutory interpretation include section 2 HRA where the courts "must take into account" judgements or advice given by the ECtHR, the Commission (ECmHR), or the Committee of Ministers. Here the imperative modal verb "must" is connected with the deeply indeterminate psychological state of "taking into account" relevant material. In other words the Strasbourg jurisprudence is

not binding on the UK unlike EU jurisprudence from the European Court of Justice (ECJ), nevertheless it *must* be considered to some extent. This indeterminate section of the HRA alarms those that suggest that the judiciary have been given an open invitation by Parliament to pick and choose from ECtHR jurisprudence to whatever extent they feel best supports their strategic objectives.

The most controversial and important area of jurisprudence that has been imported to English law from the ECJ and the ECtHR is the principle of proportionality. This is a substantive balancing act where a law or executive action that infringes a right is evaluated in terms of being a "legitimate aim" that is "in accordance with law", "necessary in a democratic society" and therefore "proportionate". Clearly these concepts are highly indeterminate and require a considerable amount of judicial clarification of their meaning; although, as discussed above, the balancing of rights and powers is an ancient feature of judicial power in the Common Law. However, proportionality review on the continental European model was unknown to the Common Law tradition, where substantive evaluation of executive decisions was limited to a reasonableness test. Since the *Wednesbury* case[200], it has been recognised that the action of an executive agent need not be simply evaluated as being legal or illegal, but can be technically legal but:

> "So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."[201]

Thus it has been recognised since 1947 that certainty in the Rule of Law means that legal principles can be broken when implemented in an irrational and unjustifiable

[200] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 1 KB 223
[201] Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service [1983] UKHL 6* at 410.

manner. This jurisprudential development of substantive review in *Wednesbury* was arguably a logical extension of the meaning of the Rule of Law – where law must be applied in an openly justifiable manner that can be understood by those subject to it, because irrationality and arbitrariness are abhorrent to the Rule of Law.

The proportionality principle is difficult to define, as the nature of the balancing act depends on the facts of the case. On top of this, it is difficult to determine the extent to which the British courts actually apply the proportionality principle in cases under the HRA (Loveland, 2006, pp. 759-761). This raises the possibility of the courts being anti-systemic by strategically adapting the jurisprudence of other courts to achieve different outcomes, and this could be taken as evidence of the courts being inappropriately influence-seeking. However systemic considerations cannot be divorced from definitional and prudential concerns. The proportionality principle needed to be assimilated with domestic principles of the Rule of Law or else it would risk sustaining or exacerbating the indeterminacy. Case law from the ECJ and ECtHR applies a more rigorous substantive assessment of the proportionality of an infringement of rights than the limited *Wednesbury* formula, or even the augmented "heightened *Wednesbury*" test set out in *R v Ministry of Defence ex p Smith*[202]. Where in pre-HRA English law a substantive review of an action would need to be assessed in terms of its reasonableness, at the ECJ and ECtHR the assessment turns on the legitimacy of the aim being pursued and whether it could justify an infringement of rights. Such a substantive assessment of the balance of policy against rights would be difficult to incorporate into the English tradition where

[202] [1996] QB 517

there is no higher law than Parliamentary law[203]. Therefore the most appropriate judicial mode of action was not to fully adopt proportionality on the same lines as the ECtHR, but to "take it into account" and assimilate it as an extension of *Wednesbury* that adds rights to the calculus on top of reason. As per Lord Steyn in *R v. Secretary of State For The Home Department, Ex Parte Daly*[204]:

> "[26-27] There is a material difference between the *Wednesbury* and *Smith* grounds of review and the approach of proportionality applicable in respect of review where convention rights are at stake… The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach… the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions."

Thus it is arguably not the case that proportionality review is an entirely new constitutional innovation brought in by the HRA, rather it has been adapted and assimilated into domestic principles of the Rule of Law. Whilst this may go against the strictest sense of a systemic consistency of jurisprudence within the Council of Europe, it is important in terms of definitional and prudential considerations within UK and English law and thus its limitations suggest that it has not encouraged the courts to act inappropriately under the auspices of the HRA.

Prudential

The demarcation of interpretative duty and declarative powers under sections 3 and 4 of the HRA raises a related problem of when the courts should defer to a

[203] See Lords Roskill and Ackner in *R v Secretary of State for the Home Department, ex p. Brind* [1991] UKHL 4
[204] [2001] UKHL 26

democratically accountable agent or institution, and when it should make a decision that goes against the majority will. At the ECtHR this deference is referred to as the "margin of appreciation" that is afforded to national governments which are able to infringe Convention rights in pursuit of a "legitimate aim". As discussed in previous chapters, the judiciary acts appropriately where it prudentially defers to greater capacity, competence or legitimate collective action on the part of a democratically accountable agent or institution. Therefore the point at which the courts cede the interpretation of the law to another agent of Parliament depends on a calculus of their own capabilities and the capabilities of the democratic alternative. Where the courts make a decision despite lacking the capability, such a decision is inappropriate anti-prudential behaviour that can be classified as influence-seeking. Again it needs to be demonstrated that there is no case to be made that the HRA has changed the constitutional position of the judiciary by enabling or encouraging more influence-seeking behaviour. The most controversial area of public policy where judicial intervention has increased as a result of the HRA is in national security, and it is important to provide evidence that despite the profile and controversy it remains the case that the judiciary are appropriately providing definitional guidance where they have the capability, and prudentially deferring where they do not.

National security, rather like immigration as discussed in Chapter Three, is one of the core competencies of executive government. Defending the territorial integrity and overseas interests of the state is a policy space that relies on secrecy and tactical flexibility, and hence the certainties of the law are not always conducive to good policy. However, as with any other policy pursued within the borders of the UK, national security must not breach the Rule of Law. This principle is by no means new

to English law as a result of the HRA. As Lord Atkin stated in his dissentient speech in *Liversidge v Anderson*[205]:

> "[244] In this country, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

Despite this being the minority opinion, it is now recognised to have been the correct assertion of the principles of the Rule of Law (Loveland, 2006, pp. 76-79).

A severe test for the judiciary came with the attacks of September 11th and the subsequent "War on Terror" in the UK. Parliament passed the *Anti-terrorism, Crime and Security Act 2001* in order to delegate significant executive discretion to the government so that they could respond robustly to the threat. However, the power under section 23 to detain foreign terrorist suspects without charge or trial pending their deportation was declared to be incompatible with the Convention in the "*Belmarsh case*"[206]. The incompatibility arose because the detention power irrationally discriminated against foreign terrorist suspects when home-grown terrorists were by far the greater threat. The reasoning was that the government may derogate from the Convention if it is faced with a "threat to the life of the nation", but it cannot respond to such a threat with a policy that derogates from the Convention but will not achieve its intended purpose and makes an irrational distinction between foreign and domestic terrorist suspects. The incompatibility was with Article 14 ECHR that guards against unjustifiable discrimination.

[205] [1942] AC 206
[206] *A and others v Secretary of State for the Home Department* [2004] UKHL 56

This decision could be seen as anti-prudential influence-seeking on two separate grounds – one from the executive perspective and the other from the judicial perspective. The executive perspective would be that the courts did not have the same policy competence as the executive and could not truly know the threat posed by foreign terrorist suspects. This argument fails because the court did have access to sufficient evidence to show that the threat posed by foreign-born terrorist suspects was in numerical terms insignificant next to the home-grown threat. Parliament had rushed the 2001 Act onto the statute book and had not sufficiently considered the implications of a policy that would derogate from the Convention and yet not achieve the legitimate aim of fighting terrorism.

Alternatively from the judicial perspective, using discrimination as the means of defeating the government gave a confusing anti-prudential approach to the Rule of Law in emergency situations. For instance Lord Hoffmann in his dissent argued that Article 14 was not the key point of incompatibility with the Convention, and that it was surely Articles 5 and 6 (restriction of liberty, and right to a fair trial) that were threatened. The majority decision could be viewed as an inappropriate set of legal somersaults where the court accepted that there was a threat to the nation, but having conceded as much it could not then claim that detention or right to a trial were at issue and it instead had to resort to discrimination to achieve its intended objectives. This could be seen as not only anti-prudential but also anti-definitional as it exacerbated uncertainty in the substantive content of the Rule of Law.

However both the executive and judicial perspectives are arguably not sustainable given the available evidence. The first point to undermine the executive perspective is that the court accepted by a majority of eight-to-one that there was a

threat to the nation, and that it was not in the court's power to question this policy conclusion. The court was acting prudentially by not undermining the government's assessment of the threat, and arguably Lord Hoffmann's alternative approach of denying the threat would have been anti-prudential by being based on a lack of competence. Having accepted that the executive were free to make the conclusion that there was a threat to the nation, it was then incumbent on the courts to ensure that the response to that threat accorded with the principles of the Rule of Law. The government had legal cover to detain terrorist suspects without trial, but if that patently was not going to achieve the professed aim of the government then it was not a rational policy response, and as argued above there is surely nothing more abhorrent to a state governed under law than irrationality or arbitrariness.

The courts showed considerable balance in this case, by deferring to the government where they lacked competence, but also fleshing out the principles of the Rule of Law where they did have competence. Due to the fact that the courts cannot strike down law under the HRA, the declaration of incompatibility gave the government sufficient time to come up with the alternative solution of control orders for all terrorist suspects (foreign and domestic) under the *Prevention of Terrorism Act 2005* (PTA). These control orders also faced challenges under the HRA, and again the courts displayed sufficient prudential balance by accepting a "margin of appreciation" for government competence, but intervening where the courts had the greater competence. So for instance in *Secretary of State for the Home Department v. JJ and others*[207] the House of Lords dismissed an appeal from the Home Secretary against rulings from the High Court and Court of Appeal that six control orders were a nullity because the government did not have power to make them. The Home Secretary could

[207] [2007] UKHL 45

not impose restrictions on an individual that were incompatible with his rights against restriction of liberty under Article 5 ECHR. The case could be seen as being anti-prudential by restricting the government's "margin of appreciation", or it could also be anti-definitional because the court concluded that where 18 hours of house arrest was a deprivation of liberty, something less than this could be seen as compatible with the Convention. Lords Hoffmann and Carswell dissented in this case by denying that the court could compare 18 hours of house arrest per day with being in an open prison as the majority conceived it. They also rejected the comparator of being detained on a remote Italian island, which formed the basis of a ECtHR decision[208]. However the rulings of the High Court, Court of Appeal and House of Lords all very carefully balanced the competence of the executive branch with concrete means of evaluating the extent of the deprivation of liberty, according to "nature, duration, effects and manner of execution or implementation of the penalty or measure in question". Such an evaluation is not evidence of the courts acting in an executive policy-making mode of behaviour, rather it is the traditional constitutional role of the judiciary of balancing public power against clear principles of law.

Also in *Secretary of State for the Home Department v AF and another*[209] the House of Lords ruled that those suspected of terrorist activities had to be given enough information to enable a special advocate to effectively defend them in the closed trials used to impose control orders. The court used section 3 HRA to read down the restrictions in the PTA 2005. By doing this the court allowed the control order policy to continue but enforced some basic legal standards to ensure compatibility with the Convention. Again this balancing act can be construed as the

[208] *Guzzardi v Italy* (1980) 3 EHRR 333
[209] [2009] UKHL 28

judiciary taking advantage of indeterminacy in order to manipulate the law in accordance with personal preferences. However, this is based on an unverifiable assumption that all judges seek to maximise their personal interests in every case, and there is no evidence to suggest that the balance struck by the courts was based on judges acting outside of their competence in an anti-prudential fashion.

The government is bound to feel aggrieved by the national security decisions of the courts, but it is quite wrong to argue that such decisions are unconstitutional and inappropriate. To make such an argument would be to suggest that the government may act above the law, which is clearly unconstitutional, and abhorrent. The courts have not excessively intervened in national security decisions, and it is not constitutionally new for the courts to intervene where a breach of the law has been claimed. Whilst there have been some controversies under the HRA, the general picture is that the judiciary acts appropriately in the face of legislative indeterminacy. According to Lord Falconer, the former Lord Chancellor, in a government review of the HRA:

> "The *Human Rights Act* has had an impact upon the Government's counter-terrorism legislation… [but] The Act has not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary." (Falconer, 2006)

Once again it can be concluded that the HRA has made explicit what was hitherto implicit – that national security policy must accord with the Rule of Law.

Conclusion

There are clearly some important new tools of statutory interpretation that have been introduced by the HRA, but they have not changed the fundamental nature of the "political constitution", because a political sovereignty has always depended on a strong Rule of Law. The more political power that is exercised by the agents of Parliament the more the Rule of Law needs to be enforced to ensure the continued efficacy of parliamentary sovereignty. Therefore the most important development in constitutionalism in English law has occurred gradually since around the 1960s in response to the significant increase in indeterminate legislation. In terms of the constitutional role of judges, the HRA makes it clear that Parliament retains its supremacy and the role of the judiciary is to ensure that domestic legislation is compatible with Convention law. Thus the constitutional power of the judges has not qualitatively changed, because the ECHR has not been incorporated, rather Parliament has domesticated it (Ewing, 1999, p. 84).

Research does show a substantial increase in human rights litigation under the HRA, such that 37.5% of cases brought to the House of Lords between 2002 and 2008 were related to the HRA in some way (Blom-Cooper, Dickson, & Drewry, 2009, p. 546). However we cannot accurately measure what the comparative figure for human rights related cases was before October 2000. Whilst there was no HRA, it would be wrong to say that there were no human rights related cases (Clayton & Tomlinson, 2003). The HRA has served to extend and make explicit the human rights component of judicial review cases, but has not created this component. Also, as the HRA is increasingly assimilated with existing principles of the Rule of Law litigation is likely to consolidate into more regularised patterns. Many of the early litigations under the

HRA were speculative in an attempt to test the boundaries of the new legislation, and such a profusion of "hard cases" was bound to lead to problems with incorporation. Nevertheless the impact of the HRA on English and UK law has been to increase the profile of human rights, to facilitate its application in the courts, and to enable greater "jurisprudential cosmopolitanism" where ideas are shared between domestic and foreign jurisdictions (Posner, 2003). Therefore what the HRA has not done is to change the fundamental nature of the judicial role in the constitution, as the judiciary must still make law through interpretation where cases are resolved in accordance with discernible principles with the aim of maximising certainty in the Rule of Law.

In terms of the thesis, the HRA is one of the most prominent examples of indeterminate legislation and the impact it can have on judicial behaviour. Not only did the HRA delegate power to the democratic agents of the state, but it also empowered the judiciary as well, leading to fears that there was no institution capable of guarding the guardians. Such a significant supply-side change in the raw material of judicial interpretation was bound to affect judicial behaviour, but the evidence suggests that despite the interpretative difficulties faced by the courts, they were able to resolve the indeterminacy according to the Logic of Appropriateness. Indeed in all of the chapters of this project the same conclusion has been reached – that to fully understand changes in judicial behaviour one must understand change on the supply-side before speculating as to changes on the demand-side in terms of the attitudes or strategies of the individual judges. Over the latter half of the 20th Century and at the start of the 21st Century there was a significant increase in the level of indeterminate legislation which created great uncertainty in the Rule of Law and forced the judiciary to act politically by intervening in public policy. However such interventions were the

only appropriate response to an institutional problem that had been thrust upon the judges.

It is important to clarify the contribution this thesis has aimed to make to comparative debates in the field of judicial politics. The primary contribution of the thesis is theory and evidence that supports the conclusion that the law is an important variable in judicial decision-making. In other words the content and the method of communication of the law can have a significant effect on the role judges play in resolving political disputes. This legal orthodox approach stresses that judges generally behave as they believe they ought to given the content of the law, and they do not simply behave how they want to, or can do given restrictions on their decision-making power (Gibson, 2008). The legal orthodox approach was rejected by the Political Jurisprudence scholarship, led by Martin Shapiro, which criticised studies focussed on the law as "doctrinal analysis" that ignore the importance of judges as politically motivated agents (Shapiro, 1964). Whilst Political Jurisprudence is a crucial contribution to the debate, in the spirit of new institutionalism which has sought to understand the institutional limits to agents' behaviour by, for instance, "bringing the state back in" (Evans, Rueschemeyer, & Skocpol, 1985), this thesis has sought "to bring the law back in" by recognising it as the key raw material of judges' behaviour. Thus one can explain the politicisation of judges as a predominantly supply-side phenomenon, where judges have reacted to change in the law and sought to clarify its meaning for the sake of certainty in the Rule of Law. The judicial reaction has been led by a Logic of Appropriateness where the uncertainty in the legislation is resolved by the most normatively persuasive clarification of the substance and procedural implementation of the legislation. This theoretical approach is in keeping with the developing Normative Jurisprudence school (Smith, 1988), and

the recent trend towards exploration of the "cultures of legality" that it is increasingly believed are crucial to understanding the origins and development of the Rule of Law (Sieder, Schjolden, & Angell, 2005; Bell J. , 2006; Couso, Huneeus, & Sieder, 2010).

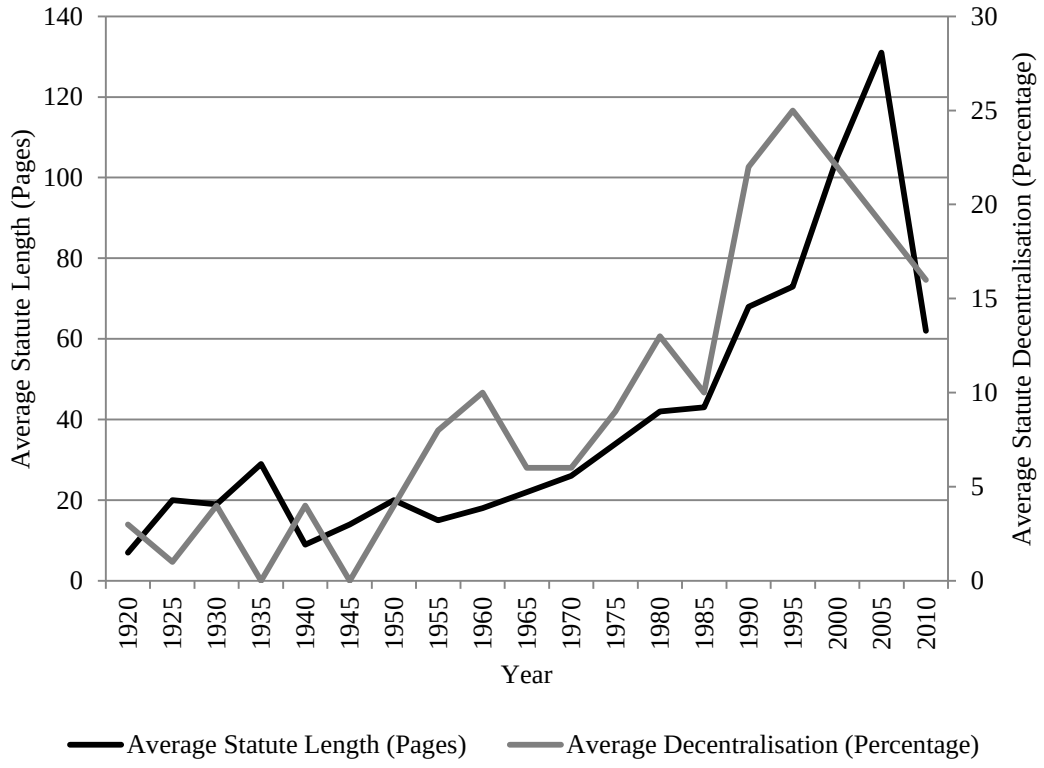
In addition to generating theoretical and empirical support for the assumption that the law matters, this thesis has also sought to be precise as to the causal mechanisms that link change in the indeterminacy of legislation with change in the behaviour of judges. This approach has sought to focus on the microfoundations of the macro-phenomenon of change in judicial behaviour, by focussing on individual sources of uncertainty in the law that, when taken together, have led to a general politicisation of judges (Schelling, 1978). The impact of this theoretical precision has been a narrow empirical approach that has focussed on the UK; and more specifically there has been a predominant focus on the English judiciary. Such a modest empirical range for a comparative field of research could be said to be against the comparative ideal of maximising the leverage of the model, and thereby maximising the number of observable implications of the theory (King, Keohane, & Verba, 1994). However the trend in comparative politics towards more carefully elaborated mid-range theory has been promoted as a solution to insubstantial paradigms that shift like sandcastles with every new theoretical and empirical development (Geddes, 2003). Rather the intention of much modern comparative research has been to focus on precisely explaining causation, rather than observing under-theorised correlations (Gerring, 2007). These precise models serve to stimulate further research, or to falsify existing models that fail to explain specific cases. Such theoretical and empirical precision has been referred to as the "historical turn" in comparative politics (Capoccia & Ziblatt, 2010). The impact of this approach to research in judicial politics can be observed in attitudinalist and strategic scholarship, as well as in legal orthodox work, where there

has been increasing empirical concentration on individual courts and legal systems rather than cross-case models. For instance there has been significant research focussed on the European Court of Justice (Garrett, Keleman, & Schulz, 1998; Carrubba, Gabel, & Hankla, 2008), the European Court of Human Rights (Voeten, 2008), Argentina (Helmke, 2002), Germany (Vanberg, 2001), Israel (Dotan & Menachem, 2005), and the Post-Communist Eastern European countries (Smithey & Ishiyama, 2002; Herron & Randazzo, 2003).

Therefore the precision of the causal theory and the narrow empirical focus of this thesis are important contributions to the existing comparative debates on judicial politics. The thesis also contributes to research that specifically focusses on British politics. Indeed the unique data set generated by the discourse analysis could be used to support existing research, and also encourages further research to understand the implications of the results achieved. Primarily it is important to explain why legislation has increased in volume and become more indeterminate in its language over the course of the 20th and 21st Centuries, and it is important to explain whether these two variables are connected.

In order to visualise the change in volume and indeterminacy the following graph presents the increases between 1920 and 2010 (Graph 6.1). The measure for volume is the number of pages (in black), whilst indeterminacy is measured with the decentralisation interaction that is theorised to be the key element of linguistic indeterminacy (in grey):

Graph 6.1: Increase in the Volume and Indeterminacy of Legislation, 1920-2010[210]



As one can observe from Graph 6.1 there was a remarkably similar increase in both volume and indeterminacy over the course of the 20th and 21st Centuries. Specifically, there was a significant increase in the average length of individual statutes from a low of 7 pages in 1920 to a high of 131 pages in 2005. There was a simultaneous rise in the average percentage of decentralisation displayed from a low of zero in 1935 and 1945, to a high of a quarter of all sections in 1995. The increase in both volume and indeterminacy can most clearly be observed after 1960, from which point an indeterminate trend changes to a determinable increase. This correlation of increases in volume and indeterminacy of legislation, it will be argued, can be

[210] The sources for this graph were the discourse analysis for the measure of decentralisation, and for page length the source was, as with Graph 1.1: i) 1900-1925, *The Public General Acts of the United Kingdom of Great Britain and Ireland* (London: George Edward Eyre and William Spottiswoode), ii) 1926-1972, *The Public General Acts and the Church Assembly Measures* (London: Council of Law Reporting), and iii) 1973-2010, *The Public General Acts and Church Assembly Measures* (London: Parliamentary Law Reports).

explained as causally linked and a consequence of what Sir Christopher Foster has described as a crisis in British government in the post-war period (Foster, 2005).

In the introductory chapter it was suggested that the increase in volume and indeterminacy of legislation was as a result of the expanded size and responsibilities of the state that had necessitated a new form of legislative authorisation of government action[211]. The expansion of the state, it will be argued, is the underpinning cause of the crisis in government, which in turn has incentivised successive governments to increase the range and flexibility of powers available in law to attempt to manage the crisis. The expansion of the state was stimulated by an increase in demand from voters for state management of key economic and social policies in post-war Britain. These demands have, in some policy spaces, not effectively been met by state intervention which has stimulated discontent and further demands for reform. The sum result is a high degree of policy instability, and in such a context successive governments have been incentivised to increase the range of their enumerated powers, and the flexibility with which those powers may be applied. Range is provided by increasing the volume of legislation, and flexibility is provided by increasing indeterminacy. Policy stability, on the other hand, could be observed by a consolidation of legal powers and hence an annual decline in the requisite volume and indeterminacy of legislation.

Perhaps the most prominent evidence of policy instability leading to high volume and high indeterminacy of legislation is in the field of criminal justice legislation. Here we can see the government seeking greater range and flexibility in the law in order to manage expectations of what can be achieved by the state in

[211] Page 14.

tackling crime. The result has been, between 1997 and 2010, 3,605 new offences created across a vast volume of primary legislation (1,238 offences) and secondary legislation (2,367 offences) (Morris N. , 2008). Nearly two-thirds of the new criminal offences were created in secondary legislation under the authority of decentralised powers in primary legislation. Therefore in criminal justice one can see the desire on the part of the government to enact a comprehensive range of legal instruments, with flexibility in the enumerated powers, so as to manage criminal justice policy despite public perceptions that the state management of the policy space is consistently failing (Dean, 2012). When considering the sum total of modern criminal law with the considerable overlap of legislation and the increase of secondary legislation the picture emerges of a vast increase in volume and indeterminacy of the law, with judges having to work out how the Rule of Law is to be adapted to this weight of new statutory material (Calabresi, 1982).

It is therefore necessary to assess: i) whether and to what extent the state has in fact expanded in post-war Britain, ii) how this expansion has translated into changes in the quantity and quality of legislation enacted by Parliament, and iii) whether and to what extent legislative volume and indeterminacy are connected by the same causal mechanism. These questions shall be addressed in turn after the clarification of some key terms. First of all, what is meant by an increase in the "size and responsibility" of the state? Size is an objective measure, whilst responsibility is a subjective measure. They represent therefore the "is" and "ought" of the modern British state. Size can be roughly measured as the share of GDP that is spent by the state, which has increased significantly in post-war Britain (Foster & Plowden, 1996, pp. 3-4). The state *is* significantly more interventionist in terms of its involvement in economic and social policy, and this has had to be underpinned by enumerated law to

legitimise this advance. The responsibility of the state concerns expectations of what it *ought* to be achieving. This has also expanded with individuals increasingly considering the state as the primary solution to economic and social problems. The problem for successive governments is that how the state is has not kept pace with expectations of what the state ought to be. This has led to disillusionment and policy instability as the state seeks to manage expectations as far as possible, and rival parties trade in unrealistic expectations. The result has been increases in the volume and indeterminacy of legislation to furnish the government with the legal instruments to attempt to manage the policy instability. As well as desiring a full repertoire of legal powers, it may be that in some cases the enactment of new legislation is intrinsically valued by governments as it can provide the appearance of managing the crisis.

This is not to say that state expansion has been inexorable and will continue to rise, rather the state has expanded significantly in comparison with pre-war Britain, and despite peaks and troughs there has been an upward trend. It would also be simplistic to assume that governments have been always incapable of satisfying voter demands, and that the result has been policy instability and therefore more legislation. Whilst the causal explanation is simple it can help us to understand why in comparison to pre-war Britain there has been such an increase in the volume and indeterminacy of legislation.

Another key issue to consider is how we measure the volume of legislation. Much of the thesis has considered what indeterminacy in legislation means, but how should one understand the meaning of a high volume of legislation? In other words is there a specific length that legislation may reach, in terms of the number of pages or

sections that is, with reasonable objectivity, considered to be "long". The answer is of course, no. Length is a relative measure and the point at which legislation tips from short to long cannot be defined with absolute precision. So an increase in volume can only be assessed in relation to an arbitrary temporal yardstick, in this case the length of the average statute in 1920. The reason that Parliament increasingly enacts longer statutes may tentatively be assumed to be for the sake of comprehensiveness, in the sense that the longer the law is, the more of a policy space it will be applicable to. This is of course a simple assumption, as shorter laws may more effectively encompass a policy problem than needlessly verbose legislation. Nevertheless the assumption is the safest that can be made without further detailed research.

Another issue in terms of volume is the focus on individual pieces of primary legislation as the measure of volume. This is a not an accurate measure of volume across a policy space, but is the most simple and commonly used metric (Seaward & Silk, 2003). For instance it was observed in Chapter Four that homelessness was the only policy space studied for this project where the volume of primary legislation declined over the period. However when one includes secondary legislation the volume of homelessness law has increased overall, in terms of the number of pages and sections (Luba & Davies, 2010). Individual acts may be shorter than the average length, but may also be individual parts of an on-going scheme of primary and secondary legislation that collectively creates a vast web of interconnected law. Despite the decline in the length of the average homelessness statute, the legislation does display the ambition by successive governments to maximise the range and flexibility of the law in response to policy instability. The policy instability in homelessness was modest in comparison with other policy spaces as there has been an overarching consensus on homelessness law favouring those considered to be most

deserving. However within this broad consensus there has been considerable instability concerning, for example, those considered to be in "priority need". In contrast, immigration law has seen more holistic shifts in policy from restriction to liberalism, and back to restriction again. Within these waves of policy change there have been supplementary shifts in policy linked to welfare, criminal justice, and counter-terrorism. This perhaps explains why immigration and homelessness have seen such different volumes of legislation, as they have been directed at different levels of policy instability. Nevertheless it would be simplistic to conclude from a falling average statute length that homelessness has seen declining policy instability.

Having considered the terminology it is now possible to consider the proposed causal mechanism in greater detail, alongside a discussion of relevant literature. First to be considered is whether and to what extent the state has expanded in size and responsibility. The driver of change has been increased demand for government management of the economy and social welfare in a context of relative global decline, where there have also been demands for a strong foreign policy beyond the ability of the country to pay without relying on foreign loans. The cumulative effect of increased state liabilities has been an extraordinary increase in the extent of government expenditure as a share of GDP, and despite increased application of resources there has not been a perceptible improvement in policy effectiveness. This therefore leads to a vicious cycle where an increasing lack of capacity and competence to manage economic and social demands is exacerbated by an inability to effectively manage the expectations of those with the demands.

The result has been a high level of policy instability, where regular changes in policy coupled with expansive executive discretion were pursued by successive

governments in order to provide the perception of effective control of policy. Whilst absolute policy stability, or stasis, can threaten the stability of a regime, the alternative of high policy instability can undermine the effectiveness of government to solve economic and social problems over the long-term (Tsebelis, 2002). The result is a high degree of policy taken from the "garbage can" where new problems are matched with existing solutions, rather than bespoke solutions being matched to new problems (Cohen, March, & Olsen, 1972). A related problem of high instability is the lack of a policy consensus in the electorate, which can be exacerbated by an ineffective consultation exercise by government policy-makers. The high levels of policy instability in post-war Britain can be observed by increasing government overload (King A. , 1975), a lack of coherent policy strategy (Flinders, 2008), a fragmentation of policy-making and delivery in a hollowed-out state (Rhodes, 1996), a hostile media reaction to policy ineffectiveness (Dean, 2012), and ultimately the breakdown of effective relations between politicians on the one hand, and interest groups, policy networks, and civil servants on the other (Foster, 2005). Hence as Foster argues a "crisis" has developed in British government and a possible symptom of the crisis is increased volume and indeterminacy of legislation. It is not clear how best to resolve this situation without breaking the vicious cycle by empowering Parliament to restrain the executive, and encouraging careful and comprehensive policy-making with intricate consultation leading to a broad consensus on how to proceed (Foster, 2005, p. 288). It is of course not true to say that this never happens in modern British politics, but the argument of Foster is that such policy-making is increasingly the exception rather than the norm.

In a situation of high policy instability and limited capacity to resolve the instability, the government seeks solutions where it retains capacity for dynamic

change which is primarily in the enactment of new legal instruments with the range and flexibility to attempt to manage the crisis. However the drafting of more law is not necessarily the optimum solution and it may simply reinforce the policy instability. A long-term resolution to policy demands could be observed by a single comprehensive piece of legislation with limited decentralisation of power that was not repealed despite a change in government. This stability in the law would ensure the policy would endure with consistent delivery over the long-term. A comprehensive piece of legislation that seeks to resolve the increasing complexity of demand is likely to be longer than the average statute whilst displaying lower than average decentralisation. In this situation volume and indeterminacy in legislation are disconnected variables. However it is too simplistic to dichotomise long comprehensive statutes from short flexible statutes and this brings us to the question of whether and to what extent legislative volume and indeterminacy are linked.

Volume and indeterminacy are two means of achieving the same goal. They are thus consequences of the same causal mechanism but are not directly related in the sense that volume by necessity implies indeterminacy, or vice versa. Both range and flexibility are useful to a government seeking to maximise its capacity to respond to demands for state management of policy. One would imagine that flexibility is always more desirable for the government than range, as flexibility may allow for the expansion of the range via secondary legislation. However Epstein and O'Halloran have applied a transaction-cost analysis that suggests that providing "delegation" by legislative language has costs and benefits that will be weighed up by the law-makers (Epstein & O'Halloran, 1999). Their work focusses on the US Congress, and thus the Presidency and the bureaucracy are the key recipients of delegated power. Congress will allow for discretion where they entrust the execution of the law to like-minded

partisans in the executive branch. Or alternatively delegation can be a way of avoiding close association with unpopular policy decisions, such as closing military bases. A similar theory has been tested on Presidential and Parliamentary systems by Huber and Shipan, seeking to understand whether "discretion" in law is deliberate or unintended. The key variables for them are: firstly the level of policy conflict, where law-makers will want to tightly control the language of the law if they fear it will be wilfully misinterpreted by those responsible for its implementation. Secondly the capacity of the law-makers, in terms of available information and resources, can affect the language of the law. Where a paucity of information is likely to encourage discretionary legislative language, and a great deal of available information and considerable foresight may encourage less discretionary language. Thirdly the bargaining environment in the law-making process can affect the discretion in the law. Many veto players could distort legal language from the intent of the original drafter, making it more or less discretionary depending on the benefits to those wielding the veto power. Finally discretion can be encouraged by non-statutory factors such as the likely role that judges and local government can play in providing concrete meaning to the law (Huber & Shipan, 2002, p. 11).

Thus both Epstein and O'Halloran, and Huber and Shipan have provided compelling reasoning why flexibility in the law will not automatically be favoured by law-makers, and instead comprehensive range in the law may be preferable without flexibility, or vice versa. Nevertheless the general trend across all policy spaces is not increases in range or flexibility, but rather increases in both as one can observe from Graph 6.1. As a specific example, the *Corporation Tax Act 2010* is 1,185 sections long, and has 64 Henry VIIIth Clauses. This amounts to 5% of sections in that Act that display decentralising language which is well below the average for that year of 16%.

Nevertheless this Act on its own has three times as many Henry VIIIth Clauses as all of the primary law enacted in 1920 combined. It is also has 465 more sections than all of the legislation of 1920. Whilst this Act is unusually long, it underlines the dramatic extent to which the volume and indeterminacy of law has changed. Where the average statute in 1920 was 11 sections long and there was one decentralising Henry VIIIth Clause for every 40 sections, by 2010 the average statute was 61 sections long, and there was one Henry VIIIth Clause for every 6 sections. Ultimately the increase in both the range and flexibility in the law are symptoms of the same problem: policy instability and government crisis. Huber and Shipan have suggested that there is little understanding of what consequences there are of state expansion (Huber & Shipan, 2002, p. 20), but the aim of this thesis has been to demonstrate that the politicisation of judges is a crucially important consequence. Therefore increased volume and indeterminacy in the law have manifested in increased uncertainty in the Rule of Law and as a result there has been the politicisation of British judges.

Appendix

Chapter Three: Discourse Analysis Results for all Immigration Legislation – Proportions

	Emb	Sub	Adj	Mod	Enb	Age	Con	Ref	Dec
1922	100	0	33	0	33	33	33	67	0
1925	100	0	0	50	0	50	0	100	0
1933	100	0	0	50	0	50	50	100	0
1943	100	0	18	27	9	55	64	82	9
1948	79	3	21	41	21	56	56	24	18
1955	67	0	33	33	0	33	33	67	0
1958	100	0	20	40	40	60	40	100	20
1962	86	0	48	57	19	43	62	43	19
1964a	67	0	33	67	0	67	67	67	0
1964b	50	0	0	17	17	67	67	100	0
1965	100	20	20	40	0	60	60	100	17
1968	71	14	29	43	29	29	71	100	29
1969	79	8	42	67	33	75	75	63	33
1971	92	14	46	76	38	65	86	30	35
1981	87	6	53	57	26	58	85	47	26
1983	100	0	20	20	0	20	40	100	0
1987	100	0	50	50	50	50	100	50	50
1988	75	0	8	42	33	42	83	83	25
1990	67	0	17	67	50	50	67	17	33
1993	73	0	40	60	27	87	73	73	27
1996	85	0	77	38	62	77	85	92	31
1997a	67	0	0	0	0	33	33	67	0
1997b	33	33	56	56	33	56	78	56	22
1999	59	5	69	64	20	66	86	52	16
2002	31	6	61	56	24	60	77	68	23
2004	48	6	58	60	32	54	68	88	32
2006	34	8	42	56	45	59	78	80	42
2007	26	10	67	59	31	66	82	70	28
2008	38	0	75	63	38	75	88	88	38
2009	44	3	58	59	44	81	90	81	44
Increase	-0.68	0.06	0.56	0.28	0.33	0.22	0.58	-0.11	0.38
R^2	0.5	0.05	0.38	0.14	0.23	0.12	0.47	0.01	0.4

Chapter Three: Discourse Analysis Results for all Immigration Legislation – Real Terms

	Emb	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
1922	3	0	1	0	1	1	1	2	0

	Emb	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
1925	2	0	0	1	0	1	0	2	0
1933	2	0	0	1	0	1	1	2	0
1943	11	0	2	3	1	6	7	9	1
1948	27	1	7	14	7	19	19	8	6
1955	2	0	1	1	0	1	1	2	0
1958	5	0	1	2	2	3	2	5	1
1962	18	0	10	12	4	9	13	9	4
1964a	2	0	1	2	0	2	2	2	0
1964b	3	0	0	1	1	4	4	6	0
1965	5	1	1	2	0	3	3	5	1
1968	5	1	2	3	2	2	5	7	2
1969	19	2	10	16	8	18	18	15	8
1971	34	5	17	28	14	24	32	11	13
1981	46	3	28	30	14	31	45	25	14
1983	5	0	1	1	0	1	2	5	0
1987	2	0	1	1	1	1	2	1	1
1988	9	0	1	5	4	5	10	10	3
1990	4	0	1	4	3	3	4	1	2
1993	11	0	6	9	4	13	11	11	4
1996	11	0	10	5	8	10	11	12	4
1997a	2	0	0	0	0	1	1	2	0
1997b	3	3	5	5	3	5	7	5	2
1999	100	9	117	109	34	112	146	88	27
2002	51	10	100	92	39	98	126	112	38
2004	24	3	29	30	16	27	34	44	16
2006	22	5	27	36	29	38	50	51	27
2007	16	6	41	36	19	40	50	43	17
2008	3	0	6	5	3	6	7	7	3
2009	26	2	34	35	26	48	53	42	26
Increase	0.26	0.05	0.49	0.45	0.24	0.49	0.63	0.52	0.22
R^2	0.1	0.21	0.2	0.2	0.3	0.2	0.2	0.25	0.3

Chapter Four: Discourse Analysis Results for all Homelessness Legislation – Proportions

	Emb	*Asp*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
1920	100	0	33	56	0	67	67	100	0
1921	100	0	67	67	0	33	100	100	0
1923	92	8	40	60	4	56	68	80	0
1924	50	0	50	50	0	50	50	50	0
1924	82	0	53	41	0	53	65	71	0
1925	88	13	71	88	8	92	83	33	8
1925	87	4	65	78	0	91	70	17	0

	Emb	*Asp*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
1925	50	0	50	0	0	50	50	50	0
1926	100	11	56	67	0	56	89	44	0
1927	60	0	40	20	0	20	60	40	0
1930	100	2	71	68	2	49	76	63	0
1930	100	4	73	69	0	92	81	42	0
1931	50	0	0	0	0	50	0	100	0
1931	67	0	33	50	0	67	33	67	0
1933	67	0	67	67	0	67	67	100	0
1933	75	0	25	75	0	75	75	100	0
1934	94	6	28	28	0	50	39	56	0
1934	100	0	0	50	0	0	0	100	0
1936	97	15	74	91	6	97	65	44	6
1938	92	0	42	33	0	50	67	100	0
1938	33	0	0	0	0	33	0	67	0
1938	100	8	25	25	0	42	42	100	0
1938	95	0	50	50	5	50	55	82	5
1942	100	0	0	0	0	0	0	100	0
1943	50	0	0	0	0	0	0	100	0
1944	67	0	0	33	0	0	33	100	0
1944	89	0	67	89	0	89	89	100	0
1944	75	13	25	50	0	63	50	88	0
1945	67	0	33	33	0	0	33	67	0
1946	85	0	50	38	8	38	69	65	4
1946	95	0	55	50	5	70	60	80	5
1947	50	0	0	50	0	50	0	50	0
1948	62	10	72	75	12	46	78	37	3
1951	50	50	50	50	0	50	50	100	0
1951	50	50	50	50	0	50	50	100	0
1952	71	0	29	14	0	29	57	100	0
1952	82	0	27	9	0	55	55	100	0
1957	82	4	76	87	7	82	87	56	7
1958	100	7	62	66	0	59	90	59	0
1961	100	9	73	73	0	18	100	91	0
1969	93	4	70	56	7	52	78	15	0
1971	60	0	0	40	20	60	60	80	0
1973	67	0	67	0	0	67	0	100	0
1974	84	12	82	76	20	94	90	43	20
1977	57	0	76	57	24	76	81	38	24
1985	70	2	68	41	14	68	73	20	14
1986	55	27	36	36	0	36	64	100	0
1987	55	0	85	65	20	85	85	10	20
1988	86	0	86	86	0	0	100	29	0
1988	70	12	70	85	42	88	82	64	42
1990	100	0	100	100	0	100	100	100	0
1994	20	0	40	40	40	40	100	60	40
1996	30	2	80	57	33	77	80	20	30
1999	68	6	79	68	21	82	94	44	15

	Emb	*Asp*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
2000	100	0	100	25	0	25	100	100	0
2002	48	10	67	43	19	62	81	81	19
2004	10	10	80	70	20	100	100	10	20
2004	50	0	83	100	83	100	100	100	83
2004	7	36	71	71	50	64	93	36	50
2008	0	0	0	0	0	0	0	100	0
Increase	-0.46	0.05	0.4	0.13	0.34	0.15	0.39	-0.19	0.33
R^2	0.24	0.02	0.15	0.02	0.38	0.02	0.12	0.03	0.36

Chapter Four: Discourse Analysis Results for all Homelessness Legislation – Real Terms

	Emb	*Asp*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
1920	9	0	3	5	0	6	6	9	0
1921	3	0	2	2	0	1	3	3	0
1923	23	2	10	15	1	14	17	20	0
1924	1	0	1	1	0	1	1	1	0
1924	14	0	9	7	0	9	11	12	0
1925	21	3	17	21	2	22	20	8	2
1925	20	1	15	18	0	21	16	4	0
1925	1	0	1	0	0	1	1	1	0
1926	9	1	5	6	0	5	8	4	0
1927	3	0	2	1	0	1	3	2	0
1930	41	1	29	28	1	20	31	26	0
1930	26	1	19	18	0	24	21	11	0
1931	1	0	0	0	0	1	0	2	0
1931	4	0	2	3	0	4	2	4	0
1933	2	0	2	2	0	2	2	3	0
1933	3	0	1	3	0	3	3	4	0
1934	17	1	5	5	0	9	7	10	0
1934	2	0	0	1	0	0	0	2	0
1936	33	5	25	31	2	33	22	15	2
1938	11	0	5	4	0	6	8	12	0
1938	1	0	0	0	0	1	0	2	0
1938	12	1	3	3	0	5	5	12	0
1938	21	0	11	11	1	11	12	18	1
1942	2	0	0	0	0	0	0	2	0
1943	1	0	0	0	0	0	0	2	0
1944	2	0	0	1	0	0	1	3	0
1944	8	0	6	8	0	8	8	9	0
1944	6	1	2	4	0	5	4	7	0
1945	2	0	1	1	0	0	1	2	0
1946	22	0	13	10	2	10	18	17	1
1946	19	0	11	10	1	14	12	16	1
1947	1	0	0	1	0	1	0	1	0

	Emb	*Asp*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
1948	42	7	49	51	8	31	53	25	2
1951	1	1	1	1	0	1	1	2	0
1951	1	1	1	1	0	1	1	2	0
1952	5	0	2	1	0	2	4	7	0
1952	9	0	3	1	0	6	6	11	0
1957	37	2	34	39	3	37	39	25	3
1958	29	2	18	19	0	17	26	17	0
1961	11	1	8	8	0	2	11	10	0
1969	25	1	19	15	2	14	21	4	0
1971	3	0	0	2	1	3	3	4	0
1973	2	0	2	0	0	2	0	3	0
1974	41	6	40	37	10	46	44	21	10
1977	12	0	16	12	5	16	17	8	5
1985	31	1	30	18	6	30	32	9	6
1986	6	3	4	4	0	4	7	11	0
1987	11	0	17	13	4	17	17	2	4
1988	6	0	6	6	0	0	7	2	0
1988	23	4	23	28	14	29	27	21	14
1990	1	0	1	1	0	1	1	1	0
1994	1	0	2	2	2	2	5	3	2
1996	18	1	48	34	20	46	48	12	18
1999	23	2	27	23	7	28	32	15	5
2000	4	0	4	1	0	1	4	4	0
2002	10	2	14	9	4	13	17	17	4
2004	1	1	8	7	2	10	10	1	2
2004	3	0	5	6	5	6	6	6	5
2004	1	5	10	10	7	9	13	5	7
2008	0	0	0	0	0	0	0	2	0
Increase	-0.03	0.01	0.1	0.05	0.07	0.08	0.1	-0.004	0.06
R^2	0.004	0.03	0.05	0.01	0.24	0.03	0.05	0.0002	0.26

Chapter Five: Discourse Analysis Results for all Anti-Discrimination and Equality Legislation – Proportions

	Emb	Sub	Adj	Mod	Enb	Age	Con	Ref	Dec
1920a	50	0	0	25	0	25	0	25	0
1920b	50	0	0	50	0	50	50	100	0
1920c	88	0	25	0	0	0	0	25	0
1923	33	0	0	33	0	0	33	67	0
1926	50	0	0	0	0	0	50	50	0
1928	75	0	13	13	0	13	63	88	0
1935	63	0	13	13	0	0	38	38	0
1944	91	9	65	83	26	17	65	22	0

	Emb	Sub	Adj	Mod	Enb	Age	Con	Ref	Dec
1949a	50	0	50	0	0	0	0	50	0
1949b	71	0	43	29	0	0	43	100	0
1950	89	0	83	69	0	3	83	31	0
1958	89	0	44	44	0	0	67	78	0
1962	67	0	67	67	0	0	67	33	0
1964	50	0	0	0	0	0	0	0	0
1965	88	0	75	38	0	13	88	75	0
1968	90	7	86	48	24	24	76	21	10
1970	91	0	82	64	9	64	73	55	9
1975	71	10	87	33	11	29	74	34	11
1976	83	9	88	31	13	35	83	25	9
1986	90	0	60	20	10	20	80	100	10
1994	67	0	33	33	0	33	33	67	0
1995	81	4	81	66	44	69	83	33	43
1999	44	19	75	69	19	63	69	69	19
2000	70	20	90	50	20	60	80	90	20
2001	37	9	60	40	23	30	58	95	21
2002	0	50	0	25	25	25	25	50	25
2005	60	5	75	80	65	75	90	95	65
2006	52	15	76	53	23	28	77	39	21
2010	46	5	67	27	19	27	77	31	17
Increase	-0.12	0.18	0.65	0.3	0.34	0.45	0.46	0.11	0.35
R^2	0.03	0.27	0.35	0.13	0.43	0.32	0.24	0.01	0.48

Chapter Five: Discourse Analysis Results for all Anti-Discrimination and Equality Legislation – Real Terms

	Emb	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
1920	2	0	0	1	0	1	0	1	0
1920	1	0	0	1	0	1	1	2	0
1920	7	0	2	0	0	0	0	2	0
1923	1	0	0	1	0	0	1	2	0
1926	2	0	0	0	0	0	2	2	0
1928	6	0	1	1	0	1	5	7	0
1935	5	0	1	1	0	0	3	3	0
1944	21	2	15	19	6	4	15	5	0
1949	1	0	1	0	0	0	0	1	0
1949	5	0	3	2	0	0	3	7	0
1950	31	0	29	24	0	1	29	11	0
1958	8	0	4	4	0	0	6	7	0
1962	2	0	2	2	0	0	2	1	0
1964	1	0	0	0	0	0	0	0	0
1965	7	0	6	3	0	1	7	6	0

	Emb	*Sub*	*Adj*	*Mod*	*Enb*	*Age*	*Con*	*Ref*	*Dec*
1968	26	2	25	14	7	7	22	6	3
1970	10	0	9	7	1	7	8	6	1
1975	62	9	76	29	10	25	64	30	10
1976	66	7	70	25	10	28	66	20	7
1986	9	0	6	2	1	2	8	10	1
1994	2	0	1	1	0	1	1	2	0
1995	57	3	57	46	31	48	58	23	30
1999	7	3	12	11	3	10	11	11	3
2000	7	2	9	5	2	6	8	9	2
2001	16	4	26	17	10	13	25	41	9
2002	0	2	0	1	1	1	1	2	1
2005	12	1	15	16	13	15	18	19	13
2006	49	14	72	50	22	27	73	37	20
2010	100	11	146	59	41	59	168	68	37
Increase	0.36	0.07	0.55	0.29	0.19	0.28	0.57	0.3	0.18
R^2	0.19	0.3	0.24	0.29	0.32	0.32	0.24	0.35	0.33

Chapter Five: Discourse Analysis Results for Anti-Discrimination and Equality Statutory Instruments – Proportions

	Embedding	Subjunctive	Adjective	Conditional	Amendment	Offences
1987/929	100	0	50	50	50	0
1987/930	100	0	0	100	100	0
1988/249	67	67	67	67	67	0
1989/2140	0	0	33	67	67	0
1989/2420	0	0	0	67	67	0
1991/227	0	0	0	0	0	0
1991/2813	0	0	33	33	67	0
1992/619	0	0	0	0	0	0
1993/2798	30	0	10	40	100	0
1994/109	0	0	0	100	67	0
1994/1748	22	11	22	67	67	0
1994/1986	0	0	0	0	67	0
1994/3276	0	50	50	50	50	0
1995/901	80	0	20	80	80	0
1996/438	67	0	67	67	67	0
1996/1333	0	0	25	50	50	0
1996/1455	17	0	50	67	67	0
1996/1456	60	0	60	73	87	0
1996/1474	33	0	33	33	33	0

	Embedding	Subjunctive	Adjective	Conditional	Amendment	Offences
1996/1745	50	50	50	50	50	0
1996/1836	78	11	78	100	89	0
1996/2793	0	0	20	20	80	0
1996/2803	50	0	13	88	88	0
1996/2987	0	0	0	0	0	0
1997/536	25	0	25	50	75	0
1997/2161	0	0	0	50	50	0
1997/2163	0	0	0	50	50	0
1998/565	0	0	0	0	50	0
1998/2618	0	0	0	0	50	0
1999/1102	57	14	57	86	86	0
1999/1191	0	0	50	50	50	0
1999/1992	0	0	0	0	0	0
1999/2638	0	0	0	0	0	0
2001/909	33	0	67	33	33	0
2001/2660	33	0	56	67	78	0
2001/3253	33	0	56	78	56	0
2001/3457	0	0	0	50	50	0
2001/3458	25	0	75	100	0	1
2002/721	0	0	0	0	50	0
2002/1458	29	0	71	86	86	0
2002/1459	50	0	50	50	50	0
2002/1980	0	0	0	0	25	0
2003/712	0	0	0	25	75	0
2003/1626	**23**	**0**	**15**	**54**	**98**	**16**
2003/1651	0	0	0	50	50	0
2003/1657	25	0	75	75	75	2
2003/1660	**64**	**5**	**79**	**85**	**0**	**14**
2003/1661	59	3	72	79	0	14
2003/1673	45	3	42	45	97	7
2003/2770	25	0	25	25	50	1
2003/2827	33	0	33	33	33	1
2003/2828	33	0	33	33	33	1
2003/3006	0	20	60	80	100	0
2003/3007	0	0	0	0	50	0
2004/193	22	0	56	67	78	0
2004/437	0	33	33	33	33	0
2004/1168	0	0	20	60	80	0
2004/1429	0	0	0	0	50	0
2004/2519	0	0	0	50	50	0
2004/2520	0	0	0	50	50	0

	Embedding	Subjunctive	Adjective	Conditional	Amendment	Offences
2004/3125	25	25	50	75	100	0
2004/3127	50	0	0	0	50	0
2005/1070	25	0	63	75	63	0
2005/1121	0	0	50	50	50	0
2005/2703	60	0	80	80	80	0
2005/2901	36	0	57	79	79	0
2005/2966	0	80	80	80	80	0
2005/3190	13	0	13	88	88	0
2005/2468	25	6	42	58	92	14
2005/3258	50	0	71	86	86	4
2006/887	40	0	50	70	70	0
2006/1031	65	4	69	76	0	20
2006/1721	30	4	48	91	83	5
2006/2408	50	0	0	50	50	0
2006/2470	0	0	0	0	50	0
2006/2471	0	25	50	50	75	0
2006/2930	0	50	50	50	83	0
2006/2931	37	11	41	67	93	0
2006/2951	33	0	50	67	50	0
2007/618	0	0	0	0	75	0
2007/825	33	0	11	78	89	0
2007/1263	38	12	76	91	6	10
2007/1764	20	20	40	80	60	0
2007/1849	0	0	50	0	50	0
2007/2269	50	0	50	50	50	0
2007/2405	50	0	64	71	71	0
2007/2602	20	0	0	20	40	0
2007/2603	33	0	33	33	33	0
2007/2604	0	0	0	0	0	0
2007/2914	38	0	25	63	63	0
2007/3555	0	0	0	0	50	0
2008/573	0	0	0	60	60	0
2008/641	25	0	0	75	75	0
2008/656	20	0	40	100	100	0
2008/963	0	0	0	80	80	0
2008/1336	0	0	0	33	67	0
2008/2159	50	0	50	50	50	0
2008/3008	0	0	0	50	50	0
2010/1835	0	0	0	75	50	0
2010/1839	29	0	29	57	43	0
2010/1915	0	0	50	50	50	0

	Embedding	Subjunctive	Adjective	Conditional	Amendment	Offences
2010/2128	27	0	60	73	80	0
2010/2132	50	0	0	50	75	0
2010/2133	40	0	0	80	40	0
2010/2192	0	0	0	50	0	0
2010/2194	17	17	67	83	33	0
2010/2245	0	0	50	0	75	0
2010/2279	13	0	13	38	88	0
2010/2285	50	0	50	50	50	0
2010/2317	36	0	4	60	4	0
2010/2337	50	0	0	50	0	0
2010/2622	0	0	50	50	50	0
Increase	-0.51	-0.26	0.2	0.25	-0.23	
R^2	0.02	0.01	0.002	0.003	0.003	

Chapter Five: Discourse Analysis Results for the Race Relations Act 1976 (Amendment) Regulations 2003 SI 2003/ 1626

	Emb	*Sub*	*Adj*	*Mod*	*Amt*	*Off*	*Con*	*Ref*
1	0	0	0	0	0	0	0	0
2	1	0	1	0	0	0	1	0
3	0	0	1	0	0	0	1	0
4	1	0	1	0	0	0	1	0
5	1	0	1	0	0	0	1	0
6	1	0	1	0	0	1	1	0
7	1	0	1	0	0	0	1	0
8	1	0	1	0	0	1	1	0
9	1	0	1	0	0	0	1	1
10	1	0	1	0	0	1	1	1
11	1	0	1	1	0	0	1	1
12	0	0	1	0	0	1	1	0
13	0	0	1	0	0	1	1	0
14	0	0	1	0	0	1	1	1
15	0	0	1	0	0	1	1	0
16	0	0	1	0	0	1	1	0
17	1	0	1	0	0	1	1	0
18	1	0	1	0	0	1	1	0
19	1	0	1	0	0	1	1	1
20	0	0	1	0	0	1	1	1

	Emb	*Sub*	*Adj*	*Mod*	*Amt*	*Off*	*Con*	*Ref*
21	1	0	1	0	0	1	1	0
22	1	0	1	0	0	0	1	0
23	0	0	1	0	0	1	1	0
24	0	1	1	0	0	0	1	0
25	1	1	1	0	0	0	1	0
26	1	0	1	0	0	0	1	1
27	0	0	0	0	0	0	0	1
28	1	0	1	0	0	0	1	0
29	1	0	1	0	0	0	1	0
30	1	0	1	1	0	0	1	0
31	1	0	0	0	0	0	1	0
32	1	0	0	0	0	0	1	0
33	1	0	1	1	0	0	1	1
34	1	0	1	1	0	0	1	0
35	0	0	0	0	0	0	0	0
36	1	0	1	1	0	0	1	1
37	1	0	0	0	0	0	0	1
38	0	0	0	0	0	0	0	1
39	0	0	0	0	0	0	0	1

Chapter Five: Discourse Analysis Results for the *Employment Equality (Religion or Belief) Regulations 2003* SI 2003/1660

	Emb	*Sub*	*Adj*	*Mod*	*Amt*	*Off*	*Con*	*Ref*
1	0	0	0	0	0	0	0	0
2	1	0	1	0	0	0	1	0
3	0	0	1	0	0	0	1	0
4	1	0	1	0	0	0	1	0
5	1	0	1	0	0	0	1	0
6	1	0	1	0	0	1	1	0
7	1	0	1	0	0	0	1	0
8	1	0	1	0	0	1	1	0
9	1	0	1	0	0	0	1	1
10	1	0	1	0	0	1	1	1
11	1	0	1	1	0	0	1	1
12	0	0	1	0	0	1	1	0
13	0	0	1	0	0	1	1	0
14	0	0	1	0	0	1	1	1
15	0	0	1	0	0	1	1	0
16	0	0	1	0	0	1	1	0

	Emb	*Sub*	*Adj*	*Mod*	*Amt*	*Off*	*Con*	*Ref*
17	1	0	1	0	0	1	1	0
18	1	0	1	0	0	1	1	0
19	1	0	1	0	0	1	1	1
20	0	0	1	0	0	1	1	1
21	1	0	1	0	0	1	1	0
22	1	0	1	0	0	0	1	0
23	0	0	1	0	0	1	1	0
24	0	1	1	0	0	0	1	0
25	1	1	1	0	0	0	1	0
26	1	0	1	0	0	0	1	1
27	0	0	0	0	0	0	0	1
28	1	0	1	0	0	0	1	0
29	1	0	1	0	0	0	1	0
30	1	0	1	1	0	0	1	0
31	1	0	0	0	0	0	1	0
32	1	0	0	0	0	0	1	0
33	1	0	1	1	0	0	1	1
34	1	0	1	1	0	0	1	0
35	0	0	0	0	0	0	0	0
36	1	0	1	1	0	0	1	1
37	1	0	0	0	0	0	0	1
38	0	0	0	0	0	0	0	1
39	0	0	0	0	0	0	0	1

Bibliography

Abel, R. L., & Lewis, P. C. (1988). *Lawyers in Society: The Common Law World.* Berkley CA: University of California Press.

Ackerman, B. (1989). Constitutional Politics/ Constitutional Law. *Yale Law Journal*, 453-548.

Auchie, D. (2003). The Undignified Death of the Casus Omissus Rule. *Statute Law Review*, 40-67.

Banakar, R., & Travers, M. (2005). *Theory and Method in Socio-Legal Research.* Oxford: Hart Publishing.

Barak, A. (2006). *The Judge in a Democracy.* Princeton NJ: Princeton University Press.

Bates, R. H., & etal. (1998). *Analytic Narratives.* Princeton NJ: Princeton University Press.

Bell, J. (2006). *Judiciaries Within Europe: A Comparative Review* . Cambridge: Cambridge University Press.

Bell, M. (2002). *Anti-Discrimination Law and the EU.* Oxford: Oxford University Press.

Bell, M. (2009). *Racism and Equality in the European Union.* Oxford: Oxford University Press.

Bennion, F. A. (2008). *On Statutory Interpretation: A Code, 5th Ed.* London: LexisNexis.

Bennion, F. A. (2009). *Understanding Common Law Legislation: Drafting and Interpretation.* Oxford: Oxford University Press.

Bevan, V. (1986). *The Development of British Immigration Law* . London: Croom Helm.

Blom-Cooper, L., Dickson, B., & Drewry, G. (2009). *The Judicial House of Lords.* Oxford: Oxford University Press.

Blyth, M. (2003). Structures Do Not Come With Instruction Sheets: Interests, Ideas and Progress in Political Science. *Perspectives on Politics*, 695-706.

Bogdanor, V. (2009). *The New British constitution.* Oxford: Hart.

Bogdanor, V. (2011, May 31). *Daily View: Are judges battling MPs?* Retrieved July 19, 2011, from BBC News: http://www.bbc.co.uk/blogs/seealso/2011/05/daily_view_are_judges_battling.html

Brady, H. E., & Collier, D. (2004). *Rethinking Social Inquiry: Diverse Tools, Shared Standards.* Oxford: Rowman and Littlefield.

Braman, E. (2006). Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision-Making. *Journal of Politics*, 308-321.

Brooke, H. (2007). Interventions in the Court of Appeal. *Public Law*, 401-409.

Bury, R. (2011, September 27). *Labour Would Overhaul Social Housing Allocations*. Retrieved December 20, 2011, from Inside Housing:

http://www.insidehousing.co.uk/tenancies/labour-would-overhaul-social-housing-allocations/6517995.article

Butt, P., & Castle, R. (2007). *Modern Legal Drafting: A Guide to Using Clearer Language.* Cambridge: Cambridge University Press.

Calabresi, G. (1982). *A Common Law for the Age of Statutes.* Cambridge MA: Harvard University Press.

Capoccia, G., & Ziblatt, D. (2010). The Historical Turn in Democratization Studies: A New Research Agenda for Europe and Beyond. *Comparative Political Studies*, 931-968.

Carr, C. T. (1940). Referential Legislation. *Journal of Comparative Legislation and International Law*, 191-194.

Carrubba, C. J., Gabel, M., & Hankla, C. (2008). Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice. *American Political Science Review*, 435-452.

Charrow, R. P., & Charrow, V. R. (1979). Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions. *Columbia Law Review*, 1306-1374.

Clayton, C. W. (2002). The Supply and Demand Sides of Judicial Policy-Making (or, Why Be so Positive about the Judicialization of Politics). *Law and Contemporary Problems*, 69-88.

Clayton, R., & Tomlinson, H. (2003). *The Law of Human Rights.* Oxford: Oxford University Press.

Cohen, M. D., March, J. G., & Olsen, J. P. (1972). A Garbage Can Model of Organizational Choice. *Administrative Science Quarterly*, 1-25.

Cohn, M. (2001). Fuzzy Legality in Regulation: The Legislative Mandate Revisited. *Law and Policy*, 469-487.

Collier, R. B., & Collier, D. (2002). *Shaping the Political Arena: Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America.* Princeton NJ: Princeton University Press.

Couso, J. A., Huneeus, A., & Sieder, R. (2010). *Cultures of Legality: Judicialization and Political Activism in Latin America* . Cambridge: Cambridge University Press.

Cox, G. W. (1987). *The Efficient Secret: The Cabinet and the Development of Political Parties in Victorian England* . Cambridge: Cambridge University Press.

Craig, P. (1998). Ultra Vires and the Foundations of Judicial Review. *The Cambridge Law Journal*, 63-90.

Craig, P. (2008). *Administrative Law.* London: Sweet and Maxwell.

Crenshaw, K. W. (1989). Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine , Feminist Theory and Anti-Racist Politics. *University of Chicago Legal Forum*, 139-168.

Cross, R., Bell, J., & Engle, G. (1995). *Cross: Statutory Interpretation.* London: LexisNexis Butterworths.

Crystal, D., & Davy, D. (1969). *Investigating English Style: English Language Series.* Harlow: Longmans.

Curtis, P. (2011, October 4). *Reality check: can owning a cat be grounds for appeal against deportation?* Retrieved October 7, 2011, from The Guardian: http://www.guardian.co.uk/politics/reality-check-with-polly-curtis/2011/oct/04/reality-check-cat-theresa-may?newsfeed=true

Dahl, R. A. (1957). Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker. *Journal of Public Law*, 279-295.

Dahl, R. A. (1970). *After the Revolution?* New Haven: Yale University Press.

Danet, B. (1980). Language in the Legal Process. *Law and Society Review*, 445-564.

Danet, B. (1985). Legal Discourse. In T. A. van Dijk, *Handbook of Discourse Analysis: Volume One* (pp. 273-291). London: Academic.

Dean, M. (2012). *Democracy Under Attack: How the Media Distort Policy and Politics.* Bristol: The Policy Press.

Derrida, J. (1997). *Of Grammatology.* Baltimore: John Hopkins University Press.

Dicey, A. V. (1915). *The Law of the Constitution, 8th ed.* London: Macmillan.

Dickson, B. (2007). *Judicial Activism in Common Law Supreme Courts.* Oxford: Oxford University Press.

Dotan, Y., & Menachem, H. (2005). Legal Defeats—Political Wins: Why Do Elected Representatives Go to Court? *Comparative Political Studies*, 75-103.

Dworkin, R. (1977). *Taking Rights Seriously.* Cambridge MA: Harvard Universuty Press.

Dworkin, R. (1986). *Law's Empire.* London: Fontana.

Dyer, C. (2004, March 5). *The Guardian Profile: Lord Woolf*. Retrieved October 30, 2010, from The Guardian: http://www.guardian.co.uk/politics/2004/mar/05/ukcrime.immigrationandpublicservices

Dyevre, A. (2005). The Constitutionalisation of the European Union: Discourse, Present, Future and Facts. *European Law Review*, 165-189.

Edelman, L. B. (1992). Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law. *The American Journal of Sociology*, 1531-1576.

Edwards, H. T. (1984). Public Misperceptions Concerning the Politics of Judging: Dispelling Some Myths About the DC Circuit. *University of Colorado Law Review*, 619-646.

Edwards, R. A. (2002). Judicial Deference under the Human Rights Act . *The Modern Law Review*, 859-882.

Elliott, M. (2000). The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law. In c. Forsyth, *Judicial Review and the Constitution.* London: Hart Publishing.

Elman, C., & Elman, M. F. (2001). *Bridges and Boundaries: Historians, Political Scientists and the Study of International Relations.* Cambridge MA: MIT University Press.

Elton, G. R. (1953). An Early Tudor Poor Law. *The Economic History Review*, 55-67.

Empson, W. (1953). *Seven Types of Ambiguity.* London: Chatto and Windus.

Endicott, T. (2011). The Value of Vagueness. In A. Marmor, & S. Soames, *Philosophical Foundations of Language in the Law* (pp. 14-30). Oxford: Oxford University Press.

Epp, C. (1998). *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective.* Chicago: University of Chicago Press.

Epstein, & Knight. (1998). *The Choices Justices Make.* Washington DC: CQ Press.

Epstein, D., & O'Halloran, S. (1999). *Delegating Powers: A transaction Cost Politics Approach To Policy-Making Under Separate Powers.* Cambridge: Cambridge University Press.

Eskridge Jr, W. N., & Ferejohn, J. (1992). Making the Deal Stick: Enforcing the Original Constitutional Structure of Law-Making in the Modern Regulatory State . *Journal of Law, Economics and Development*, 165-189.

Evans, M., McIntosh, W., Lin, J., & Cates, C. (2007). Recounting the Courts? Applying Automated Content Analysis to Enhance Empirical Legal Research. *Journal of Empirical Legal Studies*, 1007-1039.

Evans, P. B., Rueschemeyer, D., & Skocpol, T. (1985). *Bringing The State Back In.* Cambridge: Cambridge University Press .

Ewing, K. D. (1999). The Human Rights Act and Parliamentary Democracy. *Modern Law Review*, 79-100.

Ewing, K. D. (2010). *Bonfire of the Liberties.* Oxford: Oxford University Press.

Fahey, T., & Norris, M. (2010). Housing. In Castles et al, *The Oxford Handbook of the Welfare State.* Oxford: Oxford University Press.

Falconer, C. (2006, July). *Review of the Implementation of the Human Rights Act*. Retrieved November 20, 2011, from Department for Constitutional Affairs: www.dca.gov.uk/peoples-rights/human-rights/pdf/exec_summ_intro.pdf

Fallon Jr, R. H. (1997). The Rule of Law as a Concept in Constitutional Discourse. *Columbia Law Review*, 1-56.

Feldman, D. (2004). *English Public Law.* Oxford: Oxford University Press.

Fenno, W. (1986). Observation, Context and Sequence in the Study of Politics. *American Political Science Review*, 3-15.

Fenwick, H. (2011, November 1). *The Conservative anti-ECHR stance and a British Bill of Rights: Rhetoric and Reality*. Retrieved November 20, 2011, from UK Constitutional Law Group Blog: http://ukconstitutionallaw.org/blog/page/2/

Fitzpatrick, S., & Jones, A. (2005). Pursuing Social Justice or Social Cohesion? Coercion in Street Homelessness Policies in England. *Journal of Social Policy*, 389-406.

Fitzpatrick, S., & Stephens, M. (1999). Homelessness, Need and Desert in the Allocation of Council Housing. *Housing Studies,* 413-431.

Flanagan, B. (2010). Revisiting the Contribution of Literal Meaning to Legal Meaning. *Oxford Journal of Legal Studies*, 255-271.

Flinders, M. V. (2008). *Delegated Governance and the British State: Walking without Order*. Oxford: Oxford University Press.

Forsyth, C. (1996). Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review. *The Cambridge Law Journal*, 122-140.

Forsyth, C. (2000). *Judicial Review and the Constitution.* London: Hart Publishing.

Foster, C. D. (2000). The Encroachment of the Law on Politics. *Parliamentary Affairs,* 328-346.

Foster, C. D. (2005). *British Government in Crisis, Or, The Third English Revolution.* Oxford: Hart Publishing.

Foster, C. D., & Plowden, F. J. (1996). *The State Under Stress.* Buckingham: Open University Press.

Freeman, G. P. (1995). Modes of Immigration Politics in Liberal Democratic States. *International Migration Review*, 881-902.

Freund, E. (1920). Use of Indefinite Terms in Statutes. *Yale Law Review*, 437-455.

Fuller, L. L. (1964). *The Morality of Law.* New Haven: Yale University Press.

Garrett, G., Keleman, R. D., & Schulz, H. (1998). The European Court of Justice, National Governments, and Legal Integration in the European Union. *International Organization*, 149-176.

Geddes, B. (2003). *Paradigms and Sand Castles: Theory Building and Research Design in Comparative Politics.* Ann Arbor, Michigan: University of Michigan Press.

Gee, J. P. (2005). *An Introduction to Discourse Analysis: Theory and Method, 2nd ed.* London: Routledge.

Gerring, J. (2001). *Social Science Methodology: A Criterial Framework.* Cambridge: Cambridge University Press.

Gerring, J. (2007). The Case Study: What it Is and What it Does. In C. Boix, & S. Stokes, *The Oxford Handbook of Comparative Politics* (pp. 90-122). Oxford: Oxford University Press.

Gibson, J. L. (1983). "Judges" Role Orientations, Attitudes and Decisions: An Interactive Model. *American Political Science Review*, 911-924.

Gibson, J. L. (2008). Judicial Institutions. In B. A. Rockman, S. A. Binder, & R. A. Rhodes, *The Oxford Handbook of Political Institutions* (pp. 514-534). Oxford: Oxford University Press.

Gillman, H. (2001). What's Law Got To Do With It? Judicial Behavioralists Test The "Legal Model" Of Judicial Decision-Making . *Law and Social Inquiry*, 465-504.

Goertz, G. (2006). *Social Science Concepts: A User's Guide.* Oxford: Princeton University Press.

Goldsworthy, J. (2004). *The Sovereignty of Parliament.* Oxford: Oxford University Press.

Green, D. P., & Shapiro, I. (1994). *Pathologies of Rational Choice Theory.* New Haven: Yale University Press.

Griffith, J. A. (1977). *The Politics of the Judiciary*. Manchester: Manchester University Press.

Gustafsson, M. (1975). *Some Syntactic Properties of English Law Language*. Turku, Finland: University of Turku.

Hall, P. A., & Taylor, R. C. (1996). Political Science and the Three New Institutionalisms. *Political Studies*, 936-957.

Hansen, R. (2009). Immigration and Citizenship. In M. Flinders, *The Oxford Handbook of British Politics.* Oxford: Oxford University Press.

Harlow, C., & Rawlings, R. (2006). *Law and Administration.* Cambridge: Cambridge University Press.

Hart, H. L. (1958). Positivism and the Separation of Law and Morals. *Harvard Law Review*, 593-629.

Hart, H. L. (1961). *The Concept of the Law*. Oxford: Clarendon.

Hay, C. (2008). Constructivist Institutionalism. In B. A. Rockman, S. A. Binder, & R. A. Rhodes, *The Oxford Handbook of Political Institutions* (pp. 56-74). Oxford: Oxford University Press.

Helmke, G. (2002). The Logic of Strategic Defection: Judicial Decision-Making in Argentina under Dictatorship and Democracy. *The American Political Science Review*, 291-303.

Herron, E., & Randazzo, K. (2003). The Relationship Between Independence and Judicial Review in Post-Communist Courts. *Journal of Politics*, 422-438.

Hewart, G. (1929). *The New Despotism.* London: Ernest Benn.

Hirschl, R. (2004). *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism.* Cambridge MA: Harvard University Press.

Hirschl, R. (2006). The New Constitutionalism and the Judicialization of Pure Politics Worldwide. *Fordham Law Review*, 721-753.

Hirschman, A. O. (1970). *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* . Cambridge MA: Harvard University Press.

Hodder-Williams, R. (1997). Six Notions of "Political" and the United States Supreme Court. *British Journal of Political Science*, 1-20.

Holmwood, L., & Fitzsimmons, C. (2008, July 24). *Max Mosley wins £60,000 in privacy case*. Retrieved October 31, 2011, from The Guardian: http://www.guardian.co.uk/uk/2008/jul/24/mosley.privacy

Huber, J. D., & Shipan, C. R. (2002). *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy.* Cambridge: Cambridge University Press.

Jowell, J. (1994). Is Equality a Constitutional Principle? *Current Legal Problems*, 1-18.

Kavanagh, A. (2009). *Constitutional Review Under the UK Human Rights Act* . Cambridge: Cambridge University Press.

Keynes, J. M. ([1961]). *The General Theory of Employment, Interest and Money.* London: Macmillan.

King, A. (1975). Overload: Problems of Governing in the 1970s. *Political Studies*, 284-296.

King, G., Keohane, R., & Verba, S. (1994). *Designing Social Inquiry: Scientific Inference in Qualitative Research.* Princeton NJ: Princeton University Press.

Klarman, M. J. (1996). Rethinking the Civil Rights and Civil Liberties Revolutions. *Virginia Law Review*, 1-67.

Koch, I. E. (2005). Dichotomies, Trichotomies, or Waves of Duties. *Human Rights Law Review*, 81-103.

Kreuzer, M. (2010). Historical Knowledge and Quantitative Analysis: The Case of the Origins of Proportional Representation. *American Political Science Review*, 369-392.

Krippendorff, K. (1980). *Content Analysis: An Introduction to its Methodology.* London: Sage Publications.

Kurzon, D. (1986). *Pragmatics and Beyond VII.* Amsterdam: John Benjamins Publishing Co.

Laitin, D. D. (2002). Comparative Politics: The State of the Subdiscipline. In I. Katznelson, & H. V. Milner, *Political Science: The State of the Discipline.* New York: New York University Press.

Laurie, E. (2004). The Homelessness Act 2002 and Housing Allocations: All Change or Business as Usual? *The Modern Law Review*, 48-68.

Laver, M., Benoit, K., & Garry, J. (2003). Extracting Policy Positions from Political Texts Using Words as Data. *American Political Science Review*, 311-331.

Lee, S. (1994). Law and the Constitution. In A. Seldon, & D. Kavanagh, *The Major Effect.* London: Macmillan.

Levi, E. H. (1948). An Introduction to Legal Reasoning. *The University of Chicago Law Review*, 501-574.

Lichbach, M. I., & Zuckerman, A. (2009). *Comparative Politics: Rationality, Culture and Structure.* Cambridge: Cambridge University Press.

Lijphart, A. (1971). Comparative Politics and the Comparative Method. *American Political Science Review*, 682-693.

Lloyd, T. O. (1985). *Empire to Welfare State: English History 1906-1985.* Oxford: Oxford University Press.

Loveland, I. (2006). *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction, 4th ed.* Oxford: Oxford University Press.

Luba, J., & Davies, L. (2010). *Housing Allocation and Homelessness: Law and Practice.* Bristol: Jordans.

Lukes, S. (1974). *Power: A Radical View.* London: Macmillan Press.

MacCormick, N. (2005). *Rhetoric and the Rule of Law: A Theory of Legal Reasoning.* Oxford: Oxford University Press.

Mancini, S. (2010). Supreme Court of the United Kingdom - To Be or Not To Be Jewish: The Supreme Court Answers the Question. *European Constitutional Law Review*, 481-502.

March, J. G., & Olsen, J. P. (1989). *Rediscovering Institutions: The Organisational Basis of Politics.* New York: The Free Press.

Marmor, A., & Soames, S. (2011). *Philosophical Foundations of Language in the Law.* Oxford: Oxford University Press.

Mayo, M. (2003). *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard.* Oxford: Oxford University Press.

McGuire, K. T., & Stimson, J. A. (2004). The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences. *Journal of Politics*, 1018-1035.

McGuire, K. T., & Vanberg, G. (2005). Mapping the Policies of the US Supreme Court: Data, Opinions and Constitutional Law. *American Political Science Association Annual Meeting.*

Merryman, J. H. (1981). On the Convergence (and Divergence) of the Civil Law and the Common Law. *Stanford Journal of International Law*, 357-388.

Morris, C. W. (1946). *Signs, Language, and Behaviour.* New York: G Braziller.

Morris, N. (2008, September 8). *More than 3,600 new offences under Labour* . Retrieved April 28, 2012, from The Independent: http://www.independent.co.uk/news/uk/home-news/more-than-3600-new-offences-under-labour-918053.html

Munck, G. (2007). The Past and Present of Comparative Politics. In G. Munck, & R. Synder, *Passion, Craft and Method in Comparative Politics* (pp. 32-59). Baltimore: John Hopkins University Press.

Nicol, D. (2001). *EC Membership and the Judicialization of British Politics.* Oxford: Oxford University Press.

North, D., & Weingast, B. (1989). Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England. *Journal of Economic History*, 803-832.

Oliver, D. (2000). Is the Ultra Vires Rule the Basis of Judicial Review? In C. Forsyth, *Judicial Review and the Constitution.* London: Hart Publishing.

Oliver, D. (2000). Is the Ultra Vires Rule the Basis of Judicial Review? In C. Forsyth, *Judicial Review and the Constitution.* London: Hart.

Pelling, H. (1979). *Popular Politics and Society in Late Victorian Britain.* London: Macmillan.

Phillipson, G. (2011, September 23). *Constitutional Principles and the Human Rights Act: Moving Beyond One-Way Street Approaches*. Retrieved October 30, 2011, from UK Constitutional Law Group Blog: http://ukconstitutionallaw.org/blog/page/4/

Pierson, P., & Skocpol, T. (2002). Historical Institutionalism in Contemporary Political Science. In I. Katznelson, & H. V. Milner, *Political Science: State of the Discipline* (pp. 693-721). New York: W W Norton.

Poguntke, T., & Webb, P. (2005). *The Presidentialization of Politics: A Comparative Study of Modern Democracies.* Oxford: Oxford University Press.

Posner, R. A. (2003). *How Judges Think.* London: Harvard University Press.

Post, R. C. (1994). Reconceptualizing Vagueness: Legal Rules and Social Orders. *California Law Review*, 491-508.

Ragin, C. (2000). *Fuzzy-Set Social Science.* Chicago: Chicago University Press.

Rhodes, R. A. (1996). The New Governance: Governing Without Government. *Political Studies*, 652-667.

Rhodes, R. A. (1997). *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountabiility.* Buckingham: Open University Press.

Robertson, D. (1982). Judicial Ideology in the House of Lords: A Jurimetric Analysis. *British Journal of Political Science*, 1-25.

Robertson, D. (1998). *Judicial Discretion in the House of Lords.* Oxford: Clarendon Press.

Robertson, D. (2010). *The Judge as Political Theorist: Contemporary Constitutional Review*. Oxford UK: Princeton University Press.

Roche, M. (2004). Complicated Problems, Complicated Solutions? Homelessness and Joined-Up Policy Responses. *Social Policy and Administration*, 758-774.

Rogers, J. R. (2006). The Majoritarian Basis for Judicial Counter-Majoritarianism. *Midwest Political Science Association.*

Rogowski, R. (2004). How Inference in the Social (but not the Physical) Sciences Neglects Theoretical Anomaly. In H. E. Brady, & D. Collier, *Rethinking Social Inquiry: Diverse Tools, Shared Standards.* Oxford: Rowman and Littlefield.

Rozenburg, J. (1997). *Trial of Strength: The Battle Between Ministers and Judges Over Who Makes the Law*. London: Richard Cohen Books.

Sarat, A. (1983). The Maturation of Political Jurisprudence. *Political Research Quaterly*, 551-558.

Sartori, G. (1970). Concept Misformation in Comparative Politics. *American Political Science Review*, 1033-1053.

Schelling, T. C. (1978). *Micromotives and Macrobehaviour.* London: W W Norton & Co.

Schiek, D., & Chege, V. (2009). *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law.* London: Routledge.

Schmidt, V. A. (2008). Discursive Institutionalism: The Explanatory Power of Ideas and Discourse. *The Annual Review of Political Science*, 303-326.

Schubert, G. (1965). *The Judicial Mind.* Evanston IL: Northwestern University Press.

Seaward, P., & Silk, P. (2003). The House of Commons. In V. Bogdanor, *The British Constitution in the Twentieth-Century.* Oxford: British Academy.

Segal, J. A., & Spaeth, H. J. (2002). *The Supreme Court and the Attitudinal Model Revisited.* Cambridge: Cambridge University Press.

Shapiro, M. (1964). *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence.* New York: Free Press of Glencoe.

Shapiro, M. (1981). *Courts: A Comparative and Political Analysis.* Chicago: University of Chicago Press.

Shapiro, M. (1983). Recent Developments in Political Jurisprudence. *Political Research Quarterly*, 541-548.

Shapiro, M., & Stone Sweet, A. (2002). *On Law, Politics and Judicialization.* Oxford: Oxford University Press.

Sieder, R., Schjolden, L., & Angell, A. (2005). *The Judicialization of Politics in Latin America.* Basingstoke: Palgrave Macmillan.

Sisk, G. C., Heise, M., & Morriss, A. P. (1998). Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning. *New York University Law Review*, 1377-1500.

Smith, R. M. (1988). Political Jurisprudence, The "New Institutionalism," and the Future of Public Law. *The American Political Science Review*, 89-108.

Smithey, S. I., & Ishiyama, J. (2002). Judicial Activism in Post-Communist Politics. *Law & Society Review*, 719-741.

Stevens, R. (2005). *The English Judges: Their Role in the Changing Constitution.* Oxford: Hart Publishing.

Stolcke, V. (1995). New Rhetorics of Exclusion in Europe. *Current Anthropology*, 1-24.

Stone Sweet, A. (2000). *Governing With Judges: Constitutional Politics in Europe.* Oxford: Oxford University Press.

Stone, S. (1992). *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective.* Oxford: Oxford University Press.

Strom, K., Mueller, W. C., & Bergman, T. (2003). *Delegation and accountability in parliamentary democracies.* Oxford: Oxford University Press.

Sunkin, M. (1994). Judialization of Politics in the United Kingdom. *International Political Science Review*, 125-133.

Tanner, E. (2006). Clear, Simple and Precise Legislative Drafting: How Does a European Community Directive Fare? *Statute Law Review*, 150-175.

Tate, C. N., & Vallinder, T. (1995). *The Global Expansion of Judicial Power.* New York: New York University Press.

Taylor, G. D. (1976). Judicial Review of Improper Purposes and Irrelevant Considerations. *The Cambridge Law Journal*, 272-291.

Thring, H. (1902). *Practical Legislation: The Composition of Acts of Parliament and Business Documents.* London: John Murray.

Trosborg, A. (1997). *Rhetorical Strategies in Legal Language: Discourse Analysis of Statutes and Contracts.* Tubingen: Gunter Narr Verlag.

Tsebelis, G. (2002). *Veto Players: How Political Institutions Work.* Princeton, NJ: Princeton University Press.

Tushnet, M. V. (2000). *Taking The Constitution Away From The Courts.* Princeton NJ: Princeton University Press.

Vanberg, G. (2001). Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review. *American Journal of Political Science*, 346-361.

Voeten, E. (2008). The Impartiality of International Judges: Evidence from the European Court of Human Rights. *The American Political Science Review*, 417-433.

Wade, H. W. (1955). The Basis of Legal Sovereignty. *The Cambridge Law Journal*, 172-197.

Waldron, J. (2005). The Core of the Case Against Judicial Review. *Yale Law Journal*, 1346-1407.

Wendall Holmes Jr, O. (1920). *Collected Legal Papers.* London: Constable.

Woolf, H. (1995). Droit Public - English Style. *Public Law*, 56-71.