Indeterminate sovereignty and the rule of law: A descriptive analysis of changes to Parliament's use of language

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Original Article

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Abstract: Judges increasingly alter or veto government decisions. The aim is to explain this 'judicialization' of British politics. Existing theories focus on what the judges' want for themselves, or they focus on changes to social attitudes. But a key variable, often omitted in research, is the law itself. If the meaning of law is increasingly difficult to determine we should expect a greater role for adjudication in politics. A descriptive time series analysis of 8,278 sections of primary and secondary legislation between 1920 and 2010 demonstrates a significant increase in indeterminate language used by Parliament to communicate with government and the courts. This includes policy spaces with high judicialization: immigration, homelessness and anti-discrimination.

Keywords: judicialization; parliamentary sovereignty; courts; legislation; language.

Introduction

'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.'

Robert Stevens (2005, p. xv)

The aim of this article is to explain the 'new lease of life' of British courts since the 1960s.[1] Since the 1960s there has been an increased case load, and there are new powers for the courts to alter or veto government decisions. Some of these powers have been granted by Parliament, but others have been developed by judges in the Common Law. This 'judicialization' of politics is a crucial research area, because in some court cases power has been taken by judges at the expense of the government (Sunkin, 1994, p. 125; Tate and Vallinder, 1995, p. 13; Stone Sweet, 2000, p. 204). Existing explanations claim the judges wanted the power for themselves, and their 'activism' is self-serving. Other theories consider changes to social attitudes in the late twentieth century, which are increasingly in favour of rights protection and against excessive government power. Whilst these theories are important, the causal mechanism linking judges' attitudes or social attitudes to court rulings is imprecise. Specifically, it is not clear exactly when or how far judges will affect government decisions. Another possible explanation, presented here, is that judges have developed their powers because their job has become more difficult. Their job is to determine the rule of law in cases where the law is a matter of dispute. If the law has become indeterminate we would expect, given the role ascribed to the courts, that their case load will increase and the judges will develop new powers to manage the more complex disputes. My argument is, therefore, that judges have not taken power, but are reacting to indeterminacy in the rule of law. To substantiate this claim I will demonstrate that there has been a significant increase in the enactment of indeterminate language in legislation. The indeterminacy is most likely intended to enable government discretion, but the unintended consequence is increased calls from litigants to check if the government is acting legally.

The article will begin with a brief elaboration of the linguistic judicialization theory, and a discussion of how it contributes to the debate. This will be followed by an explanation of the method and analysis of the results. The conclusion underlines the importance of inter-institutional language in politics. By proposing language as an independent variable I am building on the work on 'discursive institutionalism' of Vivien Schmidt (Schmidt, 2008; Schmidt, 2010). Questions about quality of governance (Foster, 2005), and the new constitutionalism in British politics can all be enhanced by consideration of legislative language (Bogdanor, 2009). More broadly, language is the medium of principal-agent interactions, and change in the use of language by principals has significant implications for the behaviour of agents (Epstein & O'Halloran, 1999; Huber & Shipan, 2002).

The scale of judicialization in the UK can be observed from the growth in judicial review. In 1960 there were 49 applications for judicial review of executive action, of which 36 were heard. In 2010 the figure was 10,500 applications, of which 1,100 were heard. Over three-quarters of the cases in 2010 concerned immigration, so part of the explanation for increased cases is simply due to increased immigration.[2] But, there is more to the story than an increase in litigants, because the courts have more powers to resolve the cases. In recent years, British courts have blocked the provision of government aid for a dam in Malaysia,[3] they have prevented the indefinite imprisonment of terrorist suspects without trial,[4] they have blocked the attempted deportation of nine Afghan plane hijackers,[5] and they have challenged the safety of thousands of criminal convictions in Scotland.[6] Some of this new assertiveness can be traced to deliberate grants of power from Parliament with, for instance, the *Human Rights Act 1998* (HRA). However, the HRA is one of many tools used by judges to clarify the rule of law when it is indeterminate. They will not need, nor will they legitimately be able, to use

such tools if the rule of law is determinately set out by Parliament. Therefore, the language used by Parliament is a crucial variable often omitted in political science research. This omission is typically justified on the assumption that law as a structured technical language may be treated as a constant rather than a variable. On the contrary, legal scholars and practitioners have demonstrated that changes in the structure and content of legal language have tremendous implications for adjudication (Bingham, 2010, Ch 3).

Indeterminacy in law can be measured in the three main linguistic elements of semantics, syntactics and pragmatics. Indeterminate pragmatics is language whose meaning is incomplete and can only be resolved by reference to context. This can be seen in the increased reliance by Parliament on agents to flesh out the meaning of the law in administrative context, without specifying what the limits of the agent's power will be, or even clearly specifying who the agent will be. Parliament delegating powers is nothing new, but what is increasingly new is Parliament delegating power indeterminately. The courts must apply and adapt existing tools of statutory interpretation to deal with the increasing indeterminacy (Cross *et al*, 1995; Bennion, 2008; Bennion, 2009).

Using discourse analysis, I have coded 4,886 sections of primary legislation to produce a new time series dataset of changes to legislative language from 1920 to 2010. In addition I have coded all sections of legislation enacted since 1920 pertaining to immigration (913 sections), homelessness (825), and anti-discrimination and equality (822).[7] These areas of law are important sources of judicialization; both in terms of case load and impact. For anti-discrimination legislation I have also coded every piece of secondary legislation in order to observe the changes wrought by the government and by EU law (832 regulations from 116 statutory instruments). The coding frame measures semantic, syntactic and pragmatic changes

to legislative language and the results show a considerable increase in indeterminacy over time. In 1920, 4% of sections of primary legislation relied on an agent to complete their meaning. This proportion peaked at 36% in 1995 before declining to 19% in 2010. In real terms there were just 29 sections in 1920 that indeterminately enabled an agent to amend the law, and by 2010 this had increased by a factor of sixteen to 467 sections. Conclusions as to the effects of this on judicial decision-making must be tentative until causal analysis can be performed. But the descriptive analysis offered provides the first time series data on this significant variable, and combines political science and sociolinguistic methodologies with a research problem of interest to legal and political scholarship.

Linguistic judicialization theory

The meaning of legislation is contained in its three linguistic elements: semantics, syntactics and pragmatics (Morris, 1946). Pragmatics refers to the effects of the language on those receiving the communication. Pragmatic indeterminacy therefore occurs in language whose comprehension depends upon unexpressed information (Marmor and Soames, 2011, pp. 6-7). In speech we take advantage of pragmatic devices, such as omission and ellipsis, to have an effect on the listener that is predictable. For instance, the idiom 'When in Rome…' does not need to be followed by '…do as the Romans do' in order to mean something to most listeners (Crystal, 2004, pp. 302, 381). Nor of course does it need to be meant literally. Pragmatic indeterminacy when used in law has been described by the French politician Jean Foyer as a 'legislative neutron', as text 'with null juridical charge' (Foyer, 1982, p. 3667). It is law which does not explicitly state which acts, duties or powers are legal and which are illegal. There can be some value in the legislation being vague so policy can be applied

flexibly to a wide range of cases (Endicott, 2011). But pragmatic indeterminacy is legislation that is not just vague, but incomplete, and must be elaborated outside of Parliament by executive and judicial agents. Take, for instance, subsections 59(1-3) of the *Anti-social Behaviour, Crime and Policing Act 2014*:

> '59 (1) A local authority may make a public spaces protection order if satisfied on reasonable grounds that two conditions are met.
>
> (2) The first condition is that— (a)activities carried on in a public place within the authority's area have had a detrimental effect on the quality of life of those in the locality, or (b) it is likely that activities will be carried on in a public place within that area and that they will have such an effect.
>
> (3) The second condition is that the effect, or likely effect, of the activities— (a) is, or is likely to be, of a persistent or continuing nature, (b) is, or is likely to be, such as to make the activities unreasonable, and (c) justifies the restrictions imposed by the notice.'

This language contains significant indeterminacy. The local authority *may* create an order on condition of it being *satisfied* of the reasonableness of the order. The scope of the order may also be determined by the authority, and it is not clear which agent within the authority is legally responsible for implementing Parliament's wishes. If we remove the subordinate clauses from subsection (3) it allows a public spaces protection order if: 'the effect, or likely effect, of the activities… justifies the restrictions imposed by the notice'. An agent is required to determine the law, but the imprecise delegation of power to underspecified agency removes the clear accountability and oversight Parliament needs to ensure its will is implemented faithfully. This language will not only encourage litigation from those affected,

it will require the courts to creatively interpret the language, because a literal analysis will be inconclusive. Judges are being asked to determine whether restrictions are justified, not just whether they are legal. This form of analysis is more familiar to a political theorist than a judge (Robertson, 2010).

As well as the qualitative changes to legislation, there has been a more obvious quantitative change. Across the twentieth and twenty-first centuries, 1905 saw the lowest output of 82 pages of legislation. This is in comparison to the astonishing 5,388 pages that were enacted in 2006. The *HS2 Bill*, on its own, is 49,814 pages long. Alongside this increase in the volume of legislation, there has been a gradual yet haphazard decline in the number of statutes enacted each year, from a high of 120 in 1939 to a low of just 24 in 2005. The overall picture is that Parliament has increasingly enacted a smaller number of significantly longer statutes, with the average statute length at just three pages in 1900, but 131 pages in 2005.[8] The combination of increased quantity and decreased determinacy of legislation will predictably encourage litigation and judicialization if an individual is adversely affected by the law and asks the courts to set out the limits of government power. A judge's decision to engage in shaping anti-social behaviour policy would, for instance, be legitimate according to the established norm that judges construct meaning within the rule of law (March and Olsen, 1989).

Whilst changes in language are important microfoundations of judges' enhanced powers, they are not the whole story, and they interact with important social and institutional changes (Schelling, 1978). Critical junctures in the powers of the British judiciary can be identified in deliberate grants from Parliament to the courts (Collier and Collier, 2002). The *Crown Proceedings Act 1947* made all state employees liable for their public acts, whilst the *Legal*

Aid Act 1949 enhanced access to litigation. These developments came at a time of global establishment of legal protections for the weak in the aftermath of war. The most notable protections came with Britain's submissions to the Universal Declaration of Human Rights (UDHR) in 1948 and the European Convention on Human Rights (ECHR) in 1953. These legal powers were abetted by the 'rights revolution' in 1950s America (Klarman, 1996; Epp, 1998) and a heightened respect in continental Europe for human dignity, which was to be defended by militant democracy (Robertson, 2010). As well as enhanced respect for rights, economics affected judicialization. Most notably the *European Communities Act 1972* acknowledged subservience to EEC law as the price for access to the common market (Nicol, 2001). The specific powers of the courts to pursue judicial review were amended with the *Rules of the Supreme Court* of 1978 and the *Supreme Court Act 1981*, both of which were later consolidated by the *Civil Procedure Act 1997*. The New Labour government pursued further institutional reform of the judiciary by way of the *Human Rights Act 1998*, the *Constitutional Reform Act 2005,* and the *Tribunals, Courts and Enforcement Act 2007*.

Therefore, the perception that parliamentary sovereignty was the only institutional requirement for British liberty was re-evaluated in the post-war period. Whilst the reforms between 1947 and 2007 have provided new tools for the courts to use, a historical narrative of change to institutions and social attitudes cannot help us predict why, when and how judges will use the new tools available to them. For instance, the *European Communities Act 1972* obliges British courts to consider the jurisprudence of the Court of Justice of the European Union where appropriate. The CJEU is a court that applies a flexible 'purposive' method of interpreting legality. Whilst this method of statutory interpretation was not unknown to UK public law prior to accession, the CJEU has encouraged its development (Gearey *et al*, 2013,

pp. 164-187). However, considering the institutional powers alone is insufficient to predict with any accuracy when British courts will apply a purposive approach and when they will be more conservative.

A common tool for predicting judicial decisions in political science is by modelling the judges' preferences. There are essentially three decision theories: the attitudinalist, strategic and legal orthodox. These can be summarised as: judges do what they want, do what they can get away with, or do what they feel they ought to (Gibson, 2008). Attitudinalism suggests the primary factor in decision-making is the attitudes of the judges, rather than the content of the law or the facts of the case. The majority of attitudinalist scholarship concentrates on the US Supreme Court, with a focus on high-profile cases such as *Brown v Board*, *Roe v Wade* and *Bush v Gore* (Segal and Spaeth, 2002). This theory has roots in 'legal realism' and 'political jurisprudence', both of which begin with the reasonable predicate that judges are political actors and can be assumed to have personal policy goals (Shapiro, 1964; Robertson, 1998).

The attitudes of judges are undoubtedly important, but they are arguably not determinative of the outcome of a case (Gearey *et al,* 2013, p. 196). If judges predominantly acted as politicians in robes they would lose their legitimacy which derives from their perceived (and real) expertise and independence (Gibson, Caldeira and Baird, 1998). Attitudinalism can be very useful in explaining ground-breaking cases, where there is no clear precedent and the preferences of the judges are known. But, from a methodological perspective, attitudes are unobservable until they are expressed. This can lead to circular reasoning. Also, there is no consensus on what judges want. The assumption that judges seek to expand their powers, and therefore the powers of the state, is contested by notable authors such as Griffith (1977) who see judges as perniciously small 'c' and large 'C' conservative. Overall, whilst there are

certainly individual jurists who have left their fingerprints on British politics, it is neither theoretically nor methodologically easy to conclude that this is because of their attitudes.

Strategic theory links attitudes to the constraints faced by judges. Judges must take advantage of opportunities and acknowledge costs when making their decisions. Rather than clumsily marching towards their preferred policy position in every case, strategic theory models judges as more sophisticated and capable of calculating the likely reactions of their 'opponents' in the policy game. For instance, Garrett, Keleman and Schulz (1998) proposed three hypotheses derived from game theory to explain the increased application of 'EU unconstitutional' rulings by the CJEU. Firstly, the existence of a strong precedent will shelter the court from needing to tailor a country-specific ruling. Secondly, the greater the costs of a ruling to a member state the less likely such an adverse ruling will be complied with. Finally, the more adverse rulings there are, the more likely it is that member states will coordinate to reform the EU treaties or the powers of the court. The expanded powers of the CJEU relative to the member states has therefore progressed via strategic calculations of when opportunities may most profitably be seized.

An alternative strategic theory looks to politicians rather than judges as the key players. In this model, politicians cede power to the courts and thereby place sensitive issues beyond the reach of their opponents (Gillman, 2002; Hirschl, 2004). Strategic theories such as these successfully reconcile the importance of individual judges with an assessment of their limitations, however, as with attitudinalism, the most significant empirical problem with strategic theories is identifying the aims of the judges. Most strategic theories assume judges want to expand their powers, but such an assumption is very difficult to verify in any given case. Whilst judges may issue a self-denying judgement in one case, a strategic analysis may

explain this away as short-term sacrifice for long-term gain. The assumption of strategic rationality is therefore unfalsifiable, as it is difficult to conceive of a judicial decision that could not be explained as part of a long-term strategy to enhance power.

Another problem with the focus on preferences is that it under-theorises the role of legitimacy and accountability in judges' decision-making. British judges are unelected and can only be impeached in extreme circumstances, but this does not mean they are unaccountable and insensitive to public opinion (Le Sueur, 2004). The legal orthodox approach, which I am contributing to, predicts judicial behaviour from the content of the law and the norms of the judiciary (Levi, 1948; Dahl, 1957; Merryman, 1981; Edwards, 1984). Judges cannot rely on the powers of purse or sword, and only have the power of rhetoric (MacCormick, 2005). Rhetoric needs to be persuasive and any perception that a legal decision is self-serving or corrupted will undermine the decision. Radical decisions are possible, but only if they survive the double appeal, are not repealed by Parliament, and ultimately are considered sound by the tight fraternity of professional judges, lawyers and academics. For instance, the notable iconoclast Lord Denning saw his decisions overruled when they advanced the rule of law beyond the extent acceptable to the legal profession and Parliament (Heward, 1990). The legitimate institutional role of judges is to construct the meaning of law where it is in doubt. Given that the raw material of adjudication is language, significant changes to legislative linguistics will stimulate a response from judges. Whilst the courts may thereby develop new powers to constrain government, these new powers vindicate an established mode of judicial oversight. The seeming paradox that new judicial powers are in fact the consequence of old institutional norms can only be resolved by considering changes exogenous to the judiciary. The solution to the paradox is that old powers have new expression because of the expanded

role of the state. As the extent of state responsibilities has increased, the language of parliamentary legislation has become increasingly indeterminate in order to maximise the discretion of government agents pursuing broad policy goals (King, 1975). Essentially, the rising tide of government power has raised all boats, and it is not the nature of judicial power that has changed but rather its objects and extent.

Methodology

The expectation of the theory is that legislative indeterminacy will have increased over time. Measuring indeterminacies in language is difficult using computer-assisted coding, because programs such as Wordfish and Wordscores focus on the presence of content rather than its absence. Nevertheless, there are objective implications of increased indeterminacy that can be observed using discourse analysis applied without computer assistance. Using this method of close textual analysis, I hand-coded 8,278 sections of primary and secondary legislation, and re-coded five percent of sections to test for measurement consistency. Political science research is more familiar with content analysis where language is coded independent of its context, whereas discourse analysis considers how language is likely to affect its recipients (Krippendorff, 1980). With regard to judicialization, some very important works of content analysis have been conducted, mostly with regard to the political contents of US Supreme Court decisions (Laver *et al*, 2003; Evans *et al*, 2007). Discourse analysis has been utilised in legal scholarship since the 1960s to trace patterns through various forms of communication and to consider the likely effects on legal practitioners (Trosborg, 1997). I have used existing methodologies and adapted them for this research. The resulting coding

frame includes six separate measures; two consider semantics, one syntactics and three pragmatics.

All sections of legislation were coded with a simple binary (0/1) to show which sections did or did not display the relevant linguistic features. For semantics, I recorded the use of subjective noun-modifiers such as adjectives and adverbs, as well as the use of conditional conjunctions such as ‘if’, ‘when’ and ‘or’. Measuring complex conditional language in law was performed using the method designed by Crystal and Davy (1969). For syntactics, I recorded the incidence of embedded subordinate clauses within sentences. This measure was adapted from Marita Gustafsson (1975), who showed that in a sample of legal documents there were far more clauses per sentence than in other structured forms of language. For pragmatics, I recorded, firstly, the use of the indeterminate modal verb ‘may’, instead of the more precise ‘will’ or ‘shall’. This form of indeterminacy was highlighted by Butt and Castle (2007) in their campaign for ‘plain language’ drafting of legal documents. Secondly, I recorded any grant of power which was assigned to a collective agency, such as ‘Her Majesty’, ‘Secretary of State’ or ‘local authority’. As the legal powers and duties delegated by Parliament *may* be performed by several agents, the courts will need to determine who in particular is responsible for the power and how far they can utilise it. In some policy spaces, such as immigration and homelessness, there can be many ministers, civil servants and executive agencies severally and collectively responsible for the law. It will be for the courts to determine the correct use of the powers.

The third measure for pragmatics recorded the use of enabling language, where the content of the legislation is left to be completed by an agent of Parliament. This includes sections enabling the creation of statutory instruments, and more broadly includes any devolution of

power to determine the content of law without the need for primary legislation. Whilst the legal limits of enabling power can be clarified by the government with secondary legislation, there is an additional constitutional problem: this form of indeterminacy leaves unresolved the question of what the correct or normal distribution of power is, or ought to be, between Parliament and the government. Both the meaning of the language and the unresolved question of power distribution will be resolved by the courts if a case is brought to them. Lord Hewart vehemently denounced such 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 but where it was once reserved for emergencies it is now a common device in all areas of public policy.

In order to measure change in the language of parliamentary legislation, every single section of legislation in 1920 and 2010 was analysed to bookend the period with results that were not taken from samples. A sample was taken for the years between 1925 and 2005 with five percent of pages of legislation sampled for the years 1925, 1930 and so on up to 2005. The reason for sampling pages rather than sections is because there are many more sections per page in more modern legislation, and the sample sizes would have been disproportionately skewed towards later years. A systematic sample was preferred to a random sample so as to measure all types of legislation enacted within a year. This approach meant very short Acts were more likely to be included in the data set. For the years where a sample was taken, the mean, standard deviation and 95% confidence intervals were calculated. These confidence calculations depend on the assumption of a normal distribution from the mean. This assumption is reasonable given the systematic sampling technique, and the proximity of the mean and median levels of indeterminacy for each year sampled. The

results for all types of legislation are presented below, along with results taken from the coding of every section of immigration, homelessness and anti-discrimination legislation between 1920 and 2010.

Results

Table 1 presents the proportion of sections displaying indeterminacy for each of the six measures with standard deviations in parentheses. Figures 1-6 display the change in real terms as a bar chart linked to the primary y-axis, along with the proportional change displayed as a line with markers linked to the secondary y-axis. The measure of proportions has error bars displaying the 95% confidence interval for every sampled year between 1925 and 2005.

Table 1: Proportion (and standard deviation) of legislation displaying indeterminacy, 1920-2010

Year	*Adjective*	*Conditional*	*Embedding*	*Modal*	*Agency*	*Enabling*	*N*
1920	0.3	0.31	0.8	0.37	0.26	0.04	720
	(0.46)	(0.46)	(0.4)	(0.48)	(0.44)	(0.19)	
1925	0.33	0.52	0.9	0.43	0.21	0.04	96
	(0.47)	(0.5)	(0.3)	(0.5)	(0.41)	(0.21)	
1930	0.43	0.57	0.86	0.57	0.26	0.05	45
	(0.5)	(0.5)	(0.35)	(0.5)	(0.45)	(0.23)	
1935	0.3	0.55	0.85	0.48	0.21	0.03	33
	(0.47)	(0.51)	(0.36)	(0.51)	(0.42)	(0.17)	
1940	0.35	0.54	0.81	0.42	0.19	0.08	26
	(0.49)	(0.51)	(0.4)	(0.5)	(0.4)	(0.27)	
1945	0.43	0.5	0.8	0.37	0.2	0.02	46
	(0.5)	(0.51)	(0.4)	(0.49)	(0.4)	(0.15)	
1950	0.44	0.54	0.85	0.54	0.25	0.04	52
	(0.5)	(0.5)	(0.36)	(0.5)	(0.44)	(0.19)	
1955	0.38	0.49	0.82	0.54	0.31	0.08	39
	(0.49)	(0.51)	(0.39)	(0.51)	(0.47)	(0.27)	
1960	0.4	0.58	0.8	0.47	0.27	0.1	60
	(0.49)	(0.5)	(0.4)	(0.5)	(0.45)	(0.3)	
1965	0.43	0.33	0.83	0.37	0.33	0.07	95
	(0.5)	(0.47)	(0.37)	(0.48)	(0.47)	(0.26)	
1970	0.49	0.61	0.81	0.38	0.23	0.09	79
	(0.5)	(0.49)	(0.39)	(0.49)	(0.42)	(0.29)	
1975	0.52	0.45	0.77	0.46	0.35	0.09	147
	(0.5)	(0.5)	(0.42)	(0.5)	(0.48)	(0.28)	
1980	0.46	0.71	0.76	0.55	0.3	0.17	150
	(0.5)	(0.46)	(0.43)	(0.5)	(0.5)	(0.37)	
1985	0.54	0.66	0.76	0.55	0.26	0.16	170
	(0.5)	(0.48)	(0.43)	(0.5)	(0.44)	(0.37)	
1990	0.74	0.84	0.74	0.59	0.51	0.26	125
	(0.44)	(0.37)	(0.44)	(0.49)	(0.5)	(0.44)	
1995	0.68	0.78	0.72	0.54	0.39	0.36	157
	(0.47)	(0.41)	(0.45)	(0.5)	(0.49)	(0.48)	

2000	0.7	0.73	0.52	0.5	0.39	0.24	202
	(0.46)	(0.45)	(0.5)	(0.5)	(0.49)	(0.43)	
2005	0.67	0.78	0.51	0.43	0.45	0.23	150
	(0.47)	(0.42)	(0.5)	(0.5)	(0.5)	(0.42)	
2010	0.65	0.82	0.41	0.29	0.57	0.19	2494
	(0.48)	(0.39)	(0.49)	(0.45)	(0.49)	(0.39)	
R^2	0.82	0.58	0.65	0.003	0.64	0.7	
Mean	0.49	0.6	0.75	0.47	0.31	0.12	
SD	0.14	0.15	0.13	0.08	0.11	0.1	
Min	0.3	0.31	0.41	0.29	0.19	0.02	
Max	0.74	0.84	0.9	0.59	0.57	0.36	
N	4886	4886	4886	4886	4886	4886	

Fig 1: Adjective

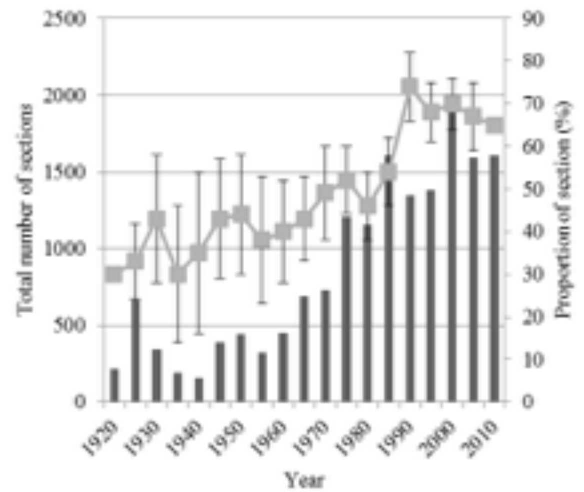


Fig 2: Conditional

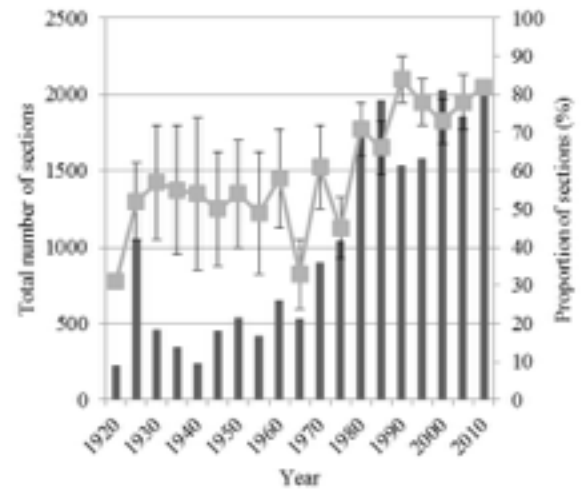


Fig 3: Embedding

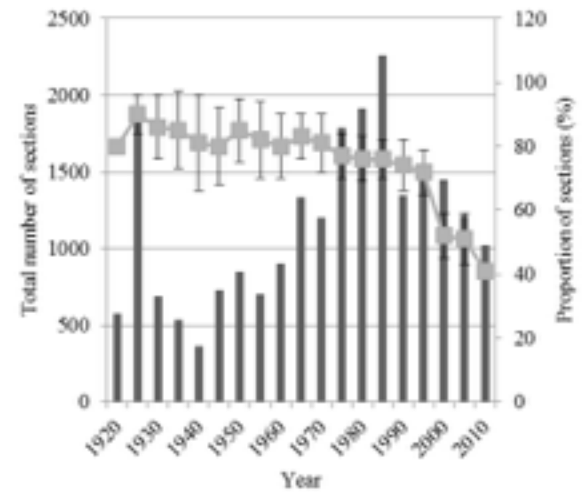


Fig 4: Modal

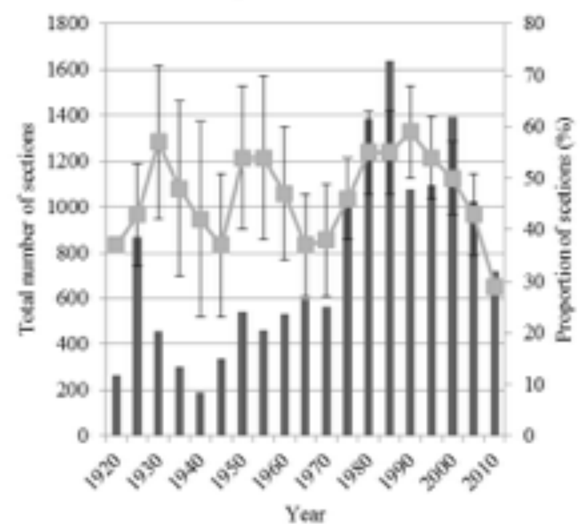


Fig 5: Agency

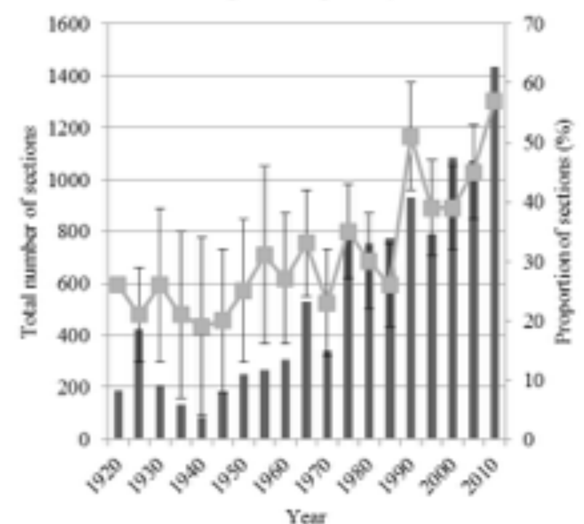
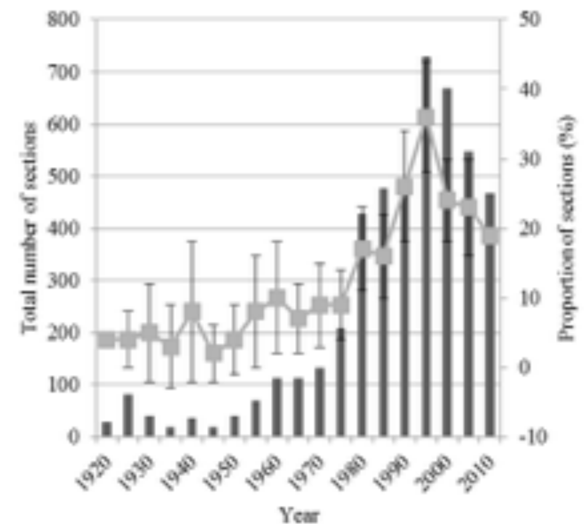


Fig 6: Enabling



The results show there has been a substantively and statistically significant change to the determinacy of legislative language over the course of the twentieth and twenty-first centuries. Only in the incidence of embedded subordinate clauses do we observe a proportionate decrease over the period. Whilst the data shows that indeterminacy has always been a feature of legislative language, the significant increase does suggest a qualitative change over the ninety-year period. On top of this, the results show modest change until 1960-70, followed by more rapid change that coincides with the renaissance of judicial power identified by Stevens in the opening quotation.

The first measure recorded the use of adjectives and other subjective noun-modifiers in legislative language. The results show a considerable increase over the period, from being observed in under a third of sections in 1920 (216 sections in real terms), to a peak incidence in just under three-quarters of sections in 1990 (1,351 sections in real terms). The trend also displays a high degree of consistent growth, with a linear trend line R^2 of 0.82. The near eight-fold real terms increase in the use of subjective noun-modifiers between 1920 and 2010 is likely to be a significant cause of increased litigation.

The next semantic feature to consider is the use of conditional language. This has increased steadily over the period with a linear trend line R^2 of 0.58. In 1920, 31% of sections displayed conditional language (223 sections). This increased to a peak of 84% in 1990 and declined marginally to 82% in 2010 (2,039 sections). In eight out of ten sections in 2010 there was conditional language that allowed for multiple scenarios to be included or excluded from the law. It is important to note that complex conditionals are a semantic rather than

pragmatic problem, because the conditions are enumerated. By ‘semantic’, I mean the interpretation of words used, rather than words not used, whereas I take ‘pragmatics’ to mean that priority between alternatives was unexpressed.

With regard to syntactics, embedded subordinate clauses in legislation show a sharp and statistically significant drop from 1995 onwards; well below the 80% starting point in 1920. The lowest result was recorded in 2010 with 41% of sections displaying embedded subordinate clauses. In real terms there was an increase from 572 sections in 1920, to 1,025 in 2010. Nevertheless, the proportionate decrease is an important sign for the ‘plain language’ campaign that had highlighted the loss of comprehension caused by extremely long sentences with too many subordinate clauses (Butt and Castle, 2007). There were other important changes by the turn of the century that have also improved the quality of legislation, such as improved page lay-outs, pre-legislative scrutiny and more comprehensive explanatory notes. However, on its own, simplified sentence structure will not deflect judicialization.

With regard to pragmatic indeterminacy, the change in the use of the modal verb ‘may’ has been haphazard over the period with a very low linear trend line R^2 of 0.003. Indeed the proportion in 1920 (37%) was higher than in 2010 (29%). Nevertheless, in real terms the change was from 266 sections in 1920 to 720 in 2010. 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. Therefore the use of ‘may’ rather than ‘will’ or ‘shall’ will more likely encourage judicialization in conjunction with indeterminate agency and enabling.

Legislation indeterminately specifying the agent responsible for it has seen an increase from 26% in 1920 (187 sections) to 57% in 2010 (1,434 sections). By 2010 not only did the majority of legislation require an agent for its implementation, but that agent was not

individually named. Rather, a branch of government as a whole was named as beneficiary. Similarly, language that enables an agent to determine the content of law has increased rapidly and consistently, with a high R^2 of 0.7. Starting from a modest baseline of 4% in 1920, the incidence 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. After 1960 we are able to say with 95% confidence that the sample mean is different to the 1920 baseline. After 1980 the levels of enabling are so high that one can conclude with 99% confidence that the sample results are higher than the 1920 baseline.

More specific patterns in the data can be discerned. Notably, the period from 1990-2000 saw a peak in indeterminacy. Perhaps this was due to Conservative governments from 1990-1997 seeking to maximise their administrative discretion during a period of difficult relations with Parliament. Indeterminate legislation is likely to have lower transaction costs in the legislative process, as debate will be limited to broad policy themes rather than detailed specifics (Epstein & O'Halloran, 1999). Given the government's powers to expedite the legislative process with guillotine motions it could be that indeterminate legislation is correlated with limited parliamentary consensus. However, the post-1997 New Labour governments also enacted indeterminate legislation, and it may be that the high use of pragmatic indeterminacy is correlated with an activist approach to government, supported by a willing and quiescent legislative majority. Clearly further research is needed as to why Parliament enacts indeterminate legislation, but evidence from the US suggests 'vague' legislation is enacted by Congress during periods of unified government, when bureaucrats can be trusted by politicians (Huber & Shipan, 2002).

Delving further into the data reveals other notable patterns. All legislation in 2010 was coded, so we may compare different types of legislation from that year. If we combine all the measures of indeterminacy into a composite measure, the three Finance Acts were all below the mean for the year of 49% indeterminacy, with 30%, 14% and 41% respectively. This suggests that Finance Acts retain the traditional model of legislation as a precise command from parliament to her agents. The clarity of finance law is in stark contrast to the *Digital Economy Act 2010,* with 82% of its sections displaying indeterminacy. Interestingly, there is little difference in indeterminacy before and after the 2010 election; with 49% indeterminacy before and 46% after the formation of the coalition.

It is important to consider in further detail the interaction between the separate measures. The Cronbach's Alpha Coefficient for all measures of indeterminacy is 0.71, which is just above the 0.7 benchmark beyond which one can conclude there is internal consistency in a set of different measures. If we remove the measure for embedding, the internal consistency of the semantic and pragmatic measures has a coefficient of 0.74. This verifies the intuition that all forms of indeterminacy have been rising together and are therefore likely to draw from the same cause. The measures may therefore be aggregated into a composite metric of indeterminacy which is arguably most appropriate as an additive rather than a multiplicative aggregation. This is because the absence of one form of indeterminacy does not negate the presence of others.

Considering an additive measure of indeterminacy, we may now turn to the results for immigration, homelessness and anti-discrimination legislation displayed in figures 7-9.

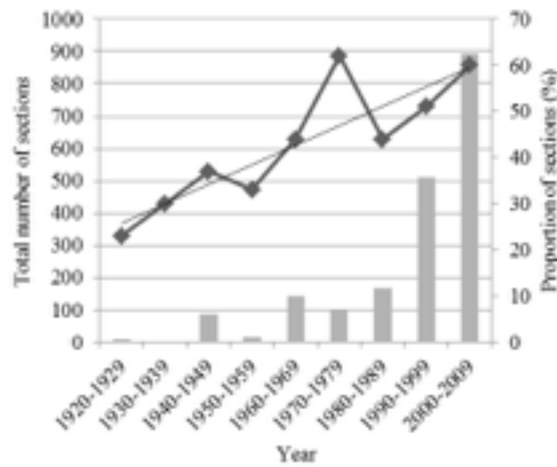


Fig 7: Immigration
Total number of sections
Proportion of sections (%)
1000
900
800
700
600
500
400
300
200
100
0
70
60
50
40
30
20
10
0
1920-1929
1930-1939
1940-1949
1950-1959
1960-1969
1970-1979
1980-1989
1990-1999
2000-2009
Year

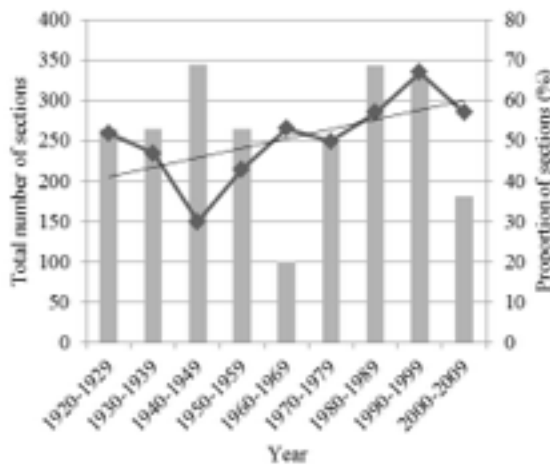


Fig 8: Homelessness
Total number of sections
Proportion of sections (%)
400
350
300
250
200
150
100
50
0
80
70
60
50
40
30
20
10
0
1920-1929
1930-1939
1940-1949
1950-1959
1960-1969
1970-1979
1980-1989
1990-1999
2000-2009
Year

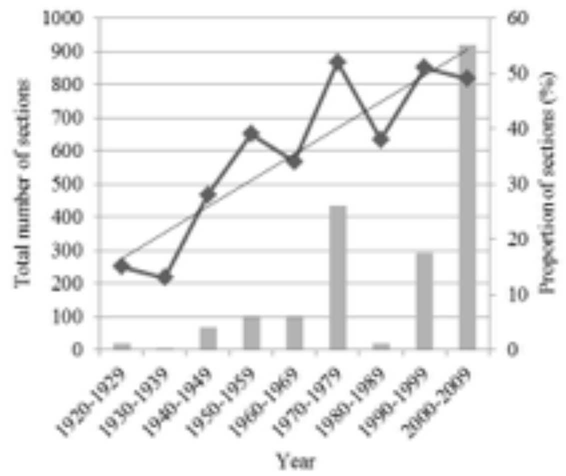


Fig 9: Anti-discrimination and equality
Total number of sections
Proportion of sections (%)
1000
900
800
700
600
500
400
300
200
100
0
60
50
40
30
20
10
0
1920-1929
1930-1939
1940-1949
1950-1959
1960-1969
1970-1979
1980-1989
1990-1999
2000-2009
Year

The data, displaying results for the entire population rather than samples, shows significant increases in indeterminacy in proportions and real terms, with the exception of homelessness legislation where there has been an increase in proportions but a marginal decrease in real terms. There has been a decreasing volume of legislation pertaining to homelessness since the 1920s and 1940s, where there was post-war demand for such legislation to replace the dated Poor Laws. More recent legislation on homelessness is more indeterminate as a proportion, implying Parliament is seeking to achieve more with less. For instance, 1945-1949 saw 289 indeterminate sections pertaining to homelessness, but that was only 37% of the total. From 1985-89 the figures were 343 sections amounting to 57% of the total. This highlights the importance of considering qualitative as well as quantitative changes to legislation.

In contrast to homelessness legislation, immigration and anti-discrimination legislation have both seen very substantial increases in real terms and proportions. This is because, unlike homelessness, these are both new policy priorities for the late twentieth and early twenty-first centuries. This goes some way to supporting the argument that it is the expansion of government responsibility in the post-war era that has stimulated the increase in indeterminate legislation. The other advantage of considering these different policy spaces comes from the fact that they pertain to different levels of government and governance. They therefore allow us to see the effect of indeterminacy throughout British politics. Specifically, immigration, homelessness and anti-discrimination legislation primarily devolve power and duties to central government, local government and the private sector respectively. Anti-discrimination legislation is an especially interesting area of law as it bridges the public-

private law divide and considers the vertical effect of law between state and citizen as well as the horizontal application between different citizens. Another important finding from anti-discrimination legislation is the considerable number of pieces of secondary legislation passed by governments since 1987. In the majority of the 832 regulations, significant amendments were made to primary law (57%), but rather than remove the indeterminacy, the regulations contained a high proportion of new adjectives (30%) and conditional language (51%). Over 400 regulations amended the primary law, and most of these amendments added new conditions to the law. On top of this, 110 new criminal offences were introduced by secondary legislation.

Examples taken from the three areas of law studied can demonstrate the effect of indeterminate language on judicialization. Section 9 of the *Asylum and Immigration Act 1996*, for instance, limited entitlement to housing assistance for those under immigration control:

> '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. The courts were asked to determine whether this section repealed by implication the *National*

Assistance Act 1948. The courts determined the meaning of section 9 in a manner that frustrated the government's aim of denying housing benefits to asylum seekers, but the decision was defended as vindicating the rule of law. As per Mr Justice Collins:[9]

> 'I do not regard this conclusion as in any way frustrating the will of Parliament in enacting the 1996 Act... Clearly Parliament intended that, unless they applied on entry, asylum seekers should find it very difficult to exist in this country… 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 law (the 1948 Act) and the underpinning substance of the rule of law that individuals should be treated equally unless Parliament has expressly stated otherwise. This creative interpretation was necessary given the indeterminacy of the 1996 Act.

With regard to homelessness, local authorities must determine 'priority need' in order to determine the duties and powers they have to house an individual. The law on 'priority need' is founded on indeterminate pragmatic language,[10] and the government have added and changed the concept without clarifying its meaning. The *Housing Act 1996* 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*' [emphasis added]. Further amendments were brought in by regulations under the *Homelessness Act 2002,* which in England added to the categories of 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.'[11] In the 2011 case of *Yemshaw v Hounslow London Borough Council*[12] the Supreme Court decided that 'domestic violence', 'other violence' and 'threats of violence' included verbal intimidation. The court's interpretation of the indeterminate language led to an expansion of the legal duties of local authorities, but it is not an illegitimate clarification of indeterminate law. There is no evidence to support the contention that the judges were behaving purely in accordance with their personal attitudes in resolving this case, and there is plenty of evidence that domestic violence in modern Britain is generally accepted as including non-physical means of exercising power. [13]

Finally, with regard to anti-discrimination, a notable judicial response to legislative indeterminacy came with the momentous *Jewish Free School* (JFS) case heard by the Court of Appeal and the Supreme Court.[14] The dispute was whether the school's use of a matrilineal test to determine Jewishness, and thereby admittance to the school, discriminated against the ethnic origins of the applicant as his mother had converted to Masorti Judaism rather than Orthodox Judaism. The Court's majority ruling held the applicant had been directly discriminated against on the grounds of his ethnicity. Although, three very different solutions to the problem were put forward by the court, which demonstrates how difficult the case was to resolve. Specifically, the *Race Relations Act 1976* s 1 as amended by regs 3-4 of the *Race Regulations* prohibits discrimination on the 'grounds' of 'colour, race, nationality or ethnic or national origins of the person to whom it is applied'. Not only is 'grounds' not defined, but

neither is ‘ethnicity’. In terms of ‘grounds’ the court had to decide whether this referred to the motives for the discrimination, or the facts upon which it relied. The court opted for the latter, assuming facts will be more objective than assessing motives. The JFS had based its admission decisions, according to the court, on the ethnic origins of the applicant via his mother. With regard to ‘ethnicity’, there was considerable indeterminacy in the legislation that had to be resolved. It is important to note that ethnicity is indeterminate in UK legislation and international law,[15] and the meaning of this loaded category was left to be determined by the judiciary.

Overall, the results for all legislation, and for the three specific areas of legislation, provide important preliminary verification of the linguistic judicialization theory. Further research is required to establish a causal relationship between legislative language and judicialization. The most plausible model is a linear relationship between indeterminacy and judicialization. One could propose another possible model of judicialization as a quadratic function of indeterminacy, where at extremely low levels of indeterminacy there is no chance of litigation, and at extremely high levels where absolute discretion has been delegated there will also be little scope for litigation. For instance, clause 14(6) of the *Asylum and Immigration Bill 2004* proposed the following ouster clause:

> ‘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 clause is precisely worded but would have removed the courts’ oversight of very indeterminate immigration powers. Hence, a moderate level of indeterminacy may be most propitious for judicial power. However, the linear model is more intuitively accurate, because at extremely high levels of indeterminacy the government approaches the point of true

dictatorship. Given the hostile reaction to the proposed clause 14 and its ultimate omission from the Act, we can, perhaps, consider this position as a theoretical possibility than a practical probability.

Conclusion

The lease of life for the courts observed since the 1960s is a crucial research problem. It concerns issues of legitimate and accountable governance, and raises conceptual questions as to the constraints on democracy in the twenty-first century. Whilst there have been significant institutional reforms and changes to social attitudes that have affected the powers of the judiciary, these alone cannot explain when, how and why judges will decide to alter or veto government decisions. Existing decision theories focus on the judges' attitudes as the primary factor in judicialization. Whilst it is reasonable to assume judges' attitudes will inform their decisions, it is theoretically and empirically less convincing that these attitudes are, on their own, determinative. From a theoretical perspective, the focus on attitudes and strategies downplays the importance of legitimacy and accountability. From an empirical perspective, it is difficult to accurately measure attitudes and strategies, which can encourage broad and unfalsifiable assumptions.

My alternative linguistic judicialization theory considers the language of law as a key variable; a variable often overlooked in political science research. The discourse analysis results demonstrate a very significant increase in indeterminate semantics and pragmatics in legislative language between 1920 and 2010. The change in inter-institutional discourse could help us rethink the power of judges, not as 'activism' (Dickson, 2007), but rather legitimate

institutional conservatism. Applying the rule of law to clarify the indeterminate commands of the sovereign Parliament is an appropriate and predictable institutional effect. Essentially, the concept of law is changing, from a clear instruction delivered from principal to agent, to a policy framework capable of administering multiple contingencies (Hart, 1961). The implications of this conceptual shift are, to an extent, dehumanising, as law aims to achieve policy goals such as economic growth, immigration control or poverty reduction, but increasingly fails to explain how the goals will relate to individuals. This in turn has implications for the extensive use of human rights law to clarify what the law means for individuals. Therefore, before concluding that the powers of the judiciary are excessive because of the judges' self-aggrandisement, it is important to consider the possibility that judicialization is unintentionally being propelled by politicians. This conclusion should not be considered a criticism of modern politics or legislative drafting, as the vast complexity of governance in an increasingly hollowed-out and globalized state is the most likely cause of indeterminacy in legislation. Nevertheless, the empirical evidence suggests a very significant change to the language used by the sovereign parliament, and this should inform debate on the institutional balance of power between parliament, the courts and the government.

Word Count – 7,509

Date – 15/08/2014

Notes

[1] The adjective 'British' will be used unless one of the three legal systems in the UK is specifically referred to.

[2] All data was taken from the annual judicial statistics issued in print and online by the Ministry of Justice and its predecessor departments.

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

[4] *A and others v Secretary of State for the Home Department* [2004] UKHL 56

[5] *R (on the application of GG and others) v Secretary of State for the Home Department* [2006] All ER (D) 143.

[6] *Cadder v HM Advocate* [2010] UKSC 43.

[7] The complete data set is available from the author on request. From here, 'anti-discrimination' will be used to refer to both anti-discrimination and equality legislation.

[8] The sources for this data were 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).

[9] *R v London Borough of Hammersmith and Fulham, ex parte M and ors,* The Times 18 October 1996.

[10] Notably s 189(2) of the *Housing Act 1996*.

[11] s 177 of the *Housing Act 1996*, as amended by s 10 of the *Homelessness Act 2002*.

[12] [2011] UKSC 3 SC.

[13] See, for instance, Refuge (2009) *About Domestic Violence* http://refuge.org.uk/your-questions/about-domestic-violence/#q33, accessed on 20/12/2011.

[14] [2009] EWCA Civ 626; [2009] UKSC 15.

[15] See the European Court of Human Rights case of *Gorzelik and Ors v Poland,* Application No. 44158/98.

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