

Legislative language and judicial politics: The effects of changing parliamentary language on UK immigration disputes

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Why does the British government increasingly lose immigration cases in court? More broadly, what can explain the changing behaviour of appeal court judges? It is because government powers to manage immigration, delegated by Parliament, are increasingly couched in indeterminate language. Indeterminacy in legislation allows for executive discretion, but also encourages litigation. Parliament has therefore provided the cause of action, and judges are not being 'activist'. This argument revitalises, with nuance, the legal model of judicial behaviour. New evidence supports the claim, with discourse analysis of all 1,233 sections of immigration legislation enacted from 1905 to 2016 showing an increase in indeterminacy. Logit regression modelling of 252 immigration appeal cases between 1970 and 2012 shows that changes to language and the administration of the law can explain the outcome in 73% of cases.

Keywords: Judicial politics, language, law, UK Parliament, immigration.

Why does the British government increasingly lose immigration cases in court? More broadly, what can explain the changing behaviour of appeal court judges? In twenty-five years, from 1970 to the end of 1994, the government contested 78 immigration cases at a senior appeal court and took 25 defeats. These were cases brought to the Court of Appeal and the House of Lords (now the UK Supreme Court). In just the seventeen succeeding years, up to 2012, there were 174 appeal cases and 90 government defeats. The increased number and proportion of anti-government rulings is not simply a function of increased immigration, nor the result of new judicial powers in the *Human Rights Act 1998*. Increasingly indeterminate language used in immigration legislation is the key to understanding the changing behaviour of judges. Indeterminate legislation omits information on the content, scope and timing of government power. This makes policy adaptable, and less inhibited by tight 'policy windows' (Kingdon 1995). But, indeterminate legislation is also an 'incomplete contract' and open to contestation. Whilst all law considered on appeal will be to a degree indeterminate (Dyevre 2010, 311-314), it is law that omits and does not simply elide key information that creates the demand for and the supply of judicial intervention.

Studies of judicial politics gravitate around the concept of ‘judicialisation’. This describes ‘the expansion of the province of courts or the judges at the expense of the politicians and of the administrators’ (Tate and Vallinder 1995, 13). This paper aims to revitalise, with nuance, the unfashionable legal model (Levi, 1948; Dahl 1957; Merryman 1981; Edwards 1984). A legal model of judicialisation predicts that the expansion of the province of the courts will be led by changes to the law, rather than the changing preferences of the judges, as is predicted by alternative attitudinal (Schubert 1965; Gibson 1978; Sisk, Heise and Morriss 1998; Segal and Spaeth 2002) and strategic models (North and Weingast 1989; Eskridge and Ferejohn 1992; Epstein and Knight 1998; Garrett, Keleman and Schulz 1998; Carrubba, Gabel and Hankla, 2008). It is axiomatic to these attitudinal and strategic models that judges have policy preferences that will affect their decisions. It is an axiom I accept, but with the caveat that judges are tightly constrained by institutions, and specifically by the medium through which they and other institutions communicate. If the language of the law is merely ambiguous it will provide an opportunity for judicialisation, but not on any sustained basis. Given the power of precedent, an authoritative interpretation of an ambiguous concept at time t will delimit alternative interpretations at $t+1$. If, however, the language is not ambiguous but rather indeterminate, then it is incomplete. The language lacks a ‘logic of communication’. There are omissions of information needed to connect policy ideas to their practical implementation. My nuance to the legal theory is therefore to add the insights of Vivien Schmidt’s ‘discursive institutionalism’ (Schmidt 2008). Furthermore, I submit that contests over indeterminate law will typically be resolved in favour the weaker party – the immigrant in these cases. This may be partly in accordance with the judges’ personal preferences, but also relies on principles of natural justice: that the government should not be judge in their own cause by determining the extent of their own powers.

The reason for pursuing this adapted legal model is in part dissatisfaction with the predictive power of attitudinal models in the UK, as ably demonstrated by Chris Hanretty (Hanretty 2013). And, there are few opportunities for British judges to act strategically. Lacking higher constitutional law, judges in the UK are subservient to Parliament. More broadly, there is a need to develop approaches for observing inter-institutional discourses, and modelling their effects on judges' behaviour (Hönnige 2011). Attempts at a general theory of judicial politics are proving increasingly fruitful (Dyevre 2010), but it is necessary for political scientists to take seriously the claims made by judges and legal scholars that the law does, in fact, dominate the thinking and behaviour of judges.

The empirical focus on UK immigration law is justified on three counts. Firstly, suspicion that judges illegitimately interfere in immigration policy is widespread, but misplaced. Secondly, there is a large and diverse dataset of immigration cases to analyse. Thirdly, framing the debate on UK immigration law does not constrain the wider interest of the research. All UK legislation has become increasingly indeterminate, not just that pertaining to immigration (Williams 2016; Williams 2017). Furthermore, comparative politics and public debate will both benefit from consideration of legal language as an important variable.

Two methods have been used to test this new legal theory. Firstly, to demonstrate the increasing indeterminacy of immigration legislation, all 1,233 sections of immigration legislation enacted between 1905 and 2016 were coded using computer-assisted discourse analysis. Secondly, data on the language of legislation were combined in multivariate logit regressions. Other measures captured the age of legislation, the use of human rights instruments, salient case facts, and period dummies that track significant reforms to the administration of lower courts: the

immigration tribunals. Both fixed and random effects models were constructed. The latter tested for clustering of errors around different senior judges, and between the two courts in which appeals were heard. The dataset comprises all 252 appeal cases heard between 1970 and 2012 at the Court of Appeal and, before 2009, the House of Lords or, after 2009, the Supreme Court.¹ A model combining two linguistic variables with the period dummies yields the greatest statistical and substantive strengths. The model correctly predicts 73% of case outcomes. The inclusion in models of random intercepts for judges or courts made no significant difference to model fit. Legislative language and the administration of lower courts therefore best explains the changing behaviour of appellate judges.

The paper begins with an elaboration of the theory and hypotheses. This is followed by a description of the data and methodology, after which the results are presented and analysed. The final section concludes.

THEORY AND HYPOTHESES

First, an example is needed. In 2012, the UK Supreme Court controversially delayed the deportation of seven men.² The Algerian nationals were considered a threat to national security, but there was a risk of their being tortured on repatriation. Proof for this risk could only be presented if a witness could remain anonymous. A permanent injunction against reporting witness testimony was unprecedented in such cases. Nevertheless, the court ordered the evidence be admitted, imposed an injunction and ordered the cases be reheard. The cases turned on indeterminate language in section 5 of the *Special Immigration Appeals Commission Act 1997*. In this section, Parliament omitted key information:

‘(1) The Lord Chancellor may make rules...

(b) for prescribing the practice and procedure to be followed on or in connection with appeals... including the mode and burden of proof and admissibility of evidence on such appeals, and

(c) for other matters preliminary or incidental to or arising out of such appeals’

The question for the court was whether rules describing the admissibility of evidence could include a provision admitting anonymous testimony. Parliament’s intent was indeterminate. Specific parts of speech created this indeterminacy, including the modal verb ‘may’, and the enabling verb ‘make’. Legislators had also used conditional conjunctions with ‘on or in connection with’ and introduced ambiguity with adjectives in ‘matters preliminary or incidental’. This legislation enabled the government to manage the procedure of sensitive cases, but it was not clear whether Parliament had intended for this power to be consistent with the UK’s commitments to other rules of law, specifically the *European Convention on Human Rights* (ECHR). The ECHR did not provide the cause of action in this case, it merely resolved the indeterminacy in domestic law.

Before further elaborating the theory, some concepts must be clarified. The dependent variable for this paper is binary: pro/anti-government ruling. Whilst this is simple, its simplicity is defensible for an innovative, large-N analysis (Staton and Vanberg 2008, 505). It is tempting to widen the conceptualisation by describing judicial behaviour as ideologically liberal. But a liberal/conservative spectrum of behaviours cannot be observed. Data on the motivations of British judges are practically non-existent. This is because of the depoliticised appointments process and the judges’ unwillingness to express political opinions in public. Furthermore, judicial ‘activism’ is difficult to assess and measure objectively (Roosevelt 2006). A safer

conceptual hook is the ‘judicialisation of politics’. In that, an anti-government ruling at a senior court marks the ‘reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies’ (Hirschl 2008, 94). As Christoph Hönnige has argued, one major problem with this judicialisation hypothesis is the insufficient consideration of inter-institutional relationships (Hönnige 2011, 351). Judicialisation research typically builds off individualism, derivative of economics (Dyevre 2010, 301). Judges are taken as players, fighting from within social and institutional constraints. This has under-valued the importance of communication and interaction between players (Clayton and Gillman 1999, 5).

My argument therefore concentrates on the meso-level of a complex causal mechanism. I will outline in turn the notable forces operating at macro, meso and micro levels. At the macro-level is an historic phenomenon: the post-war increase in global migration. In the UK, the rate of immigration has, with only sporadic deviation, risen sharply. The result has been demand for policies to manage immigration. But policies have been discordant. On the one hand, public opinion generally demands constraints on immigration, whilst, on the other hand, labour-market shortages and humanitarian concerns have encouraged a more open-door approach. Hence, the increased rate of anti-government court rulings observed since 1995 correlates with increased immigration and laws designed to protect rights. In particular, the *Human Rights Act 1998* (HRA) provides protection against, *inter alia*, deportation of an individual to a state where death, torture or unlawful incarceration are likely. But mystery remains. Firstly, human rights protection for non-citizens is nothing new. Instruments such as the *Refugees Convention* and the ECHR have protected immigrants since the 1950s. Secondly, it would be unconstitutional for judges to quash a lawful use of government power simply because human rights were potentially under threat. Thirdly, there are many intervening steps between an individual

seeking to enter the country and an anti-government ruling by a senior appeal court. Modelling from macro-level historical variables would have limited explanatory leverage.

Anti-government court rulings depend on a specific cause of action. This is provided by indeterminate legislation. Legislative language operates at the meso-level (Stone Sweet 2000), in that it is nested within macro-level historical forces that created the language, and it in turn nests the micro-level decisions taken to act on it (Dyevre 2010). Immigration law is increasingly indeterminate because of policy complexity and reliance on executive discretion. The incentive to ‘muddle through’ with loose and adaptable policy tools is overwhelming (Lindblom 1959). In immigration policy, in particular, the law must enable discretion for governments to tackle unanticipated shocks from globalisation, humanitarian emergencies, terrorism, and economic crises. Hence, the specific linguistic features that enable anti-government rulings will be those that create uncertainty as to what exactly the power is. These are the parts of speech that are meaningless until reified in context (Morris 1946). In other words, the power is not truly known until it is used. Ambiguous words in legislation, unlike indeterminate words, at least offer a central tendency of meaning. Ambiguity can cause confusion, but as Ronald Dworkin argued, the ‘semantic sting’ can be avoided if we buy our judges better dictionaries (Dworkin 1986). More impactful is language that omits key information on the extent of power. This analysis contributes to research on the length and subject-matter of legislation, and the indeterminacy of the judges’ own language (Huber and Shipan 2002; Staton and Vanberg 2008).

Also operating at the meso-level are reforms to tribunals. These courts of first instance filter the thousands of immigration appeals brought annually, and thereby affect the behaviour of higher appeal courts. They mediate between the macro-level changes in migration and micro-

level case resolutions on appeal. There have been three major reforms to tribunals in the period under study, motivated by the rising backlog of cases, the expense incurred in processing claims and the disruption caused by cases going against the government. First came the Immigration Appellate Authority (IAA), established by the *Immigration Act 1971* to replace a system of adjudicators created just two years previously. This two-tier IAA was ill-suited to managing a rapidly growing case load and was replaced in 2005 by the Asylum and Immigration Tribunal (AIT). This single-tier body was itself replaced in 2010 in an overhaul of the tribunals system with the Asylum and Immigration Chamber of the First-tier Tribunal.

Reform of the IAA setup after 2005 not only improved the efficiency of case management, it also emboldened the lower courts to reject submissions from immigrants. This can be seen from the data. The government appealed to the higher courts from tribunal decisions in sixteen of the 252 cases analysed between 1970-2012. Fourteen of these appeals from government fell during the IAA period (1971-2004). Taking an appeal to the Court of Appeal or Supreme Court depends on permission being granted by the tribunal or the higher court. This permission will only be granted when an arguable error of law is identified. By processing more cases, tribunal reform has affected the raw number of cases reaching a higher appeal. Also, the more deferential stance of the tribunals towards the government can be expected to have affected the rate of government loss at the higher courts. The higher courts enjoy more extensive powers to develop rules of law by common law adjudication and can be less deferential. Thus, tribunal reform can be expected to have increased the throughput of cases and increased the rate of anti-government rulings.

At the micro-level are the rulings themselves. Indeterminacy in law encourages anti-government rulings by three steps — the actions of the government, the reaction of the

immigrants, and the mediation of the courts. Firstly, government action will typically constrain an immigrant's autonomy – including rights of entry, residence, and access to public services. The government is incentivised to retain the indeterminate scope of their powers. Secondary legislation and immigration rules may provide details, but these do not determine how far power can extend. Secondly, for litigants, indeterminacy enables their barristers to submit that a power used by the government was not delegated by Parliament. This is not a straightforward claim of *ultra vires*, because the extent of the *vires* is indeterminate. Thirdly, for the judges, they must reach a determinative conclusion. So why might indeterminate language lead to senior judges ruling against the government? Ruling against the government will often be the more defensible thesis on just power. It is restrained, norm-bound and institutionally appropriate to rule against the government, if such a ruling restrains an indeterminate power (March and Olsen 1989). A restrictive thesis on power is more likely to maintain the integrity of existing laws, and will defend natural justice in supporting the weaker party against a self-determination of power from the stronger party.

This is, as discussed, an adapted legal theory of judicialisation. I predict the judges' rulings primarily from the state of the law and the administration of courts. Nevertheless, other forces could operate at the micro-level. The importance of judges' personal attitudes is confirmed anecdotally by lawyers, who complain that cases turn on who presides (Robertson 1998). Furthermore, strategic models add the intuitions of game theory. Judges will pursue their preferences, but only when the chances of being overruled are low (Ferejohn and Weingast 1991). Certain types of dispute may offer more or fewer opportunities for judges to rule against the government. Cases where justice or security hang in the balance may encourage judges to downplay the rule of law. As such, in testing the theory that indeterminate law best predicts anti-government rulings, it is necessary also to test whether the presence of particular judges

or the substance of the dispute systematically affects outcomes.

There is also the possibility of reverse causation: where anti-government rulings on appeal encourage the enactment of indeterminate legislation. Specifically, losing on appeal may encourage the government to seek even greater discretionary power from Parliament. Indeed, ministers have made public statements to the effect that legislation is needed to manage not only immigration, but also the administration of immigration appeals (Mitchell 2009). But such efforts were aimed at curtailing the thousands of cases heard at tribunal level, not the small number of higher appeals. If the government wanted to curtail these higher appeals it would be more effective to ‘oust’ the jurisdiction of the higher courts by refusing the right to appeal tribunal decisions. Such a proposal was included in clause 14(6) of the *Asylum and Immigration Bill 2004*:

‘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 is not indeterminate language and would have succeeded but for the fact that the clause caused an outcry from judges and the government withdrew it. Creating more indeterminate legislation would not help the government constrain the higher courts. These courts have powers to develop the common law and enjoy general jurisdiction. Statutory powers will have greater purchase on tribunals that are themselves the creation of statute law.

Hypotheses

Hypotheses test macro, meso and micro-level variables. The observable implications of the

legal model are that legislative indeterminacy at the meso-level will provide the best predictors of government wins and losses. It is also expected that the reorganisation of immigration tribunals will have increased the throughput of meritorious cases to appeal. For all other variables, it is expected that there will be insufficient evidence to improve on the null. All hypotheses are described in Table 1.

TABLE 1

There are other macro-level variables, such as the rate of immigration, that could have been considered. This variable is omitted because it correlates with time and would create an endogeneity problem. Also, even if a time-independent measure of immigration was included in the analysis, there is no reason why the raw number of immigrants ought to be relevant to the ratio of pro to anti-government rulings on appeal. A variable that is included, is the age of legislation disputed (H1). In response to increased immigration, Parliament has enacted a greater volume of legislation at a faster pace. The consequent volatility in law could enable litigants and their counsel to dispute government actions. Conversely, older law might be expected to have more stable meaning, achieved through repeated interpretations. However, indeterminate parts of speech always rely on context to be meaningful, and interpretation at time t cannot fully determine the meaning at $t+1$. As a result, the age of legislation is not expected to be significant as compared to its linguistic qualities. The other macro-level variable included is the use of human rights law (H2). The expectation of critics of human rights law is that barristers use it to overrule government actions, even when those actions are otherwise lawful. My counter submission is that the use of human rights law will not significantly correlate with government losses. Judges will not allow counsel to use human rights law to trump a lawful use of government power.

At the meso-level, the indeterminate parts of speech that omit information on the law's scope (conditional conjunctions H4), timing (modal verbs H5) and policy content (enabling verbs H6) are expected to have the greatest impact. Adjectives and adverbs (H3), being ambiguous rather than indeterminate, are not expected to have a significant effect. Of the linguistic variables, it is conditional conjunctions and indeterminate modal verbs that are expected to have the greatest predictive power across the whole period (H4-5). This is because enabling language (H6), whilst creating policy indeterminacy, is more time-dependent than conditions and modal verbs. It can be expected that more cases contesting enabling powers came before the higher appeal courts after the reform to tribunals in 2005. The reform meant that these lower courts adopted a more deferential stance to government discretion and pushed more cases through to appeal. Conditions and modal verbs muddy the intersection of law and case facts, where enabling verbs also implicate government discretion to adapt the law. The reform of tribunals is therefore expected to have greater explanatory power than the incidence of enabling language. Put grammatically, indeterminacy in the object (conditional conjunctions) and the verb of legislative language is less controversially challenged in a tribunal than that which enables the subject. And hence, as well as measuring language at the meso-level, I have included dummy variables to capture reforms to the administration of lower courts. These reforms have affected the behaviour of judges on higher courts by increasing the number of meritorious cases they hear (H7).

At the micro-level, hypotheses probe the strategic and attitudinal models. For the strategic model, hypotheses consider the case facts, so as to assess whether anti-government rulings are more or less likely given the chances of the ruling being reversed by Parliament or disdained by public opinion. Analysed for this are existential disputes — threats to national security (H8),

and threats to the life of the immigrant if deported (H9). If judges were moved by the substance of the dispute, we would expect them to defer to the government in national security cases and constrain the government if the immigrant's life was at stake. However, the expectation of the legal theory is that the gravity of the case is of lesser importance than the letter of the law. It would have been possible to include other case facts, such as whether the immigrant was a convicted criminal or claimed to have an established family life. However, I have chosen to focus on the most diverting case facts, being those posing existential threats to either the government or the immigrant. If even these momentous matters do not correlate with case results, it is unlikely that matters of lesser implication will.

Finally, the presiding judges' effect on the rulings was analysed (H10) so as to consider the importance of who hears the cases. As discussed, there are difficulties in operationalising judicial attitudes, but it is possible to observe what effect the presence of senior presiding judges has on patterns in case outcomes. In the Court of Appeal there are typically three Lord Justices, including a senior judge, whilst the Supreme Court typically hears cases with five Justices, including a senior judge. The senior judge has no institutional power to compel others to rule a certain way. But there are possibilities for leadership created by experience and intellectual authority. As such, some senior judges have led their courts in new jurisprudential directions. Most notable in this regard have been administrative and civil law developments under Lords Reid, Wilberforce, Denning and Bingham in the post-war era (Blom-Cooper, Dickson and Drewry 2009). By assessing whether the presence of senior judges is associated with patterns in wins or losses for the government, we can go some way to test if the judges themselves matter for determining the result. What is being observed, specifically, are patterns in judicial leadership, rather than judges' attitudes. In a notable contribution, Chris Hanretty analysed individual judge's rulings using a hierarchical item-response model. The aim was to

model judicial preferences within a unidimensional policy space. Evidence could not be found to reject the null, reinforcing the argument that attitudinal theories have limited purchase in the UK (Hanretty 2013).

Thus, it is a legal model that is expected to have the greatest explanatory leverage. The specific model with the greatest power is the following fixed effects logit model (Model 3 below):

$$\text{Logit}(Pr_{AG}) = \alpha + \beta_1 CON + \beta_2 MOD + \beta_3 PD2 + \beta_4 PD3 + \varepsilon$$

Pr_{AG} describes the probability of an anti-government ruling. The four beta coefficients describe two language variables (conditional and modal) as well as two period dummy coefficients to capture reforms to the administration of immigration tribunals ($PD2 = 2005-2009$, $PD3 = 2010-$).

DATA AND METHODOLOGY

This paper relies on two methodologies — discourse analysis and logit regression analysis. The discourse analysis tests the descriptive claim that legislative language has become more indeterminate. The logit analysis considers the implications of this for judicial behaviour. Firstly, for the discourse analysis, every section of immigration legislation enacted from the first statute on the matter up to 2016 was coded using computer-assisted natural language processing (NLP). That is 1,233 sections, from section 1 of the *Aliens Act 1905* to section 96 of the *Immigration Act 2016*. The NLP used measures parts of speech, rather than content. Therefore, unlike Wordscores, the aim is not to analyse the ideological or policy content of the laws, but simply to code parts of speech that affect meaning (Laver et al 2003; Evans et al

2007). This is simpler than content analysis as it avoids the potential for subjectivity in assigning values to a reference document that is used to score a virgin text (Martin and Vanberg 2008).

Legislative language is measured with four indicators. Firstly, the presence of noun-qualifying adjectives or adverbs in a section of legislation was coded. Secondly, the presence of conditional language was coded when describing a power or right with the conjunctions ‘if’, ‘or’ and ‘and’. These affect the potential scope of powers and rights. The broader significance of conjunctions on discourse has long been a focus of research (Crystal and Davy 1969). Thirdly, the presence of the indeterminate modal verb ‘may’ was coded, providing it transformed the modality of a government agent. This grants agents flexibility as to when and how far to use power. The other modal verbs ‘will’ and ‘shall’ are more determinate in this regard. And, finally, the presence of enabling verbs such as ‘make’ and ‘amend’ were coded, where the subject of the verb was the government. These verbs allow the government to alter the content of the law. To assess the density of indeterminacy in law, frequencies were divided by the number of sections of legislation. A potential problem with the observations taken is that sections capable of clarifying indeterminacy are not measured. Some legislation makes use of sections or schedules to place fetters on powers enumerated. However, the clarifying potential of these provisions will be stunted by any mismatch between the power, the fetter and the government action. If the power is indeterminate but fettered, there will still be a spur to litigation created by the uncertainty as to how far the power is or ought to have been fettered in the context of a case.

An example of indeterminate power displaying all four types of indeterminacy comes from the *Immigration and Asylum Act 1999*, section 31, as disputed in *R v Asfaw*³:

‘(2) *If*, in coming from the country where his life *or* freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only *if* he shows that he could not *reasonably* have expected to be given protection under the Refugee Convention in that other country...

(10) The Secretary of State *may* by order *amend*—

(a) subsection[s] by adding offences to those for the time being listed there.’

Besides the four measures of indeterminacy used, it would have been possible to include other indicators, such as the use of passive verbs (Tanner quoted in Butt and Castle 2007, 156) and the excessive use of prepositions (Charrow and Charrow 1979). These parts of speech affect the determinacy of discourse, but they are less important to the transference of powers and rights than the features outlined above. Also, the reason for not aggregating the four language variables into a single indeterminacy factor is because they operate independently. The Cronbach’s α (0.56) and McDonald’s ω (0.41) coefficients for the language variables are too low to establish an aggregate factor.

For the logit analyses, there were two approaches: fixed and random effects modelling. The data source was appeal case reports. Specifically, all appeals pertaining to immigration reported by the authoritative Incorporated Council of Law Reporting and the All England Law Reports were analysed (252 cases across 42 years). To analyse the legislation disputed in each case, the specific sections that were central to the dispute were identified from the law reports and were, as with the discourse analysis, coded using computer-assisted NLP. In each case report the summary of the case provided by the case reporters identifies the precise sections and words of legislation that were litigated. Typically, a case centres on just one or two sections of

domestic legislation, or a clause from an international treaty. Although counsel for the immigrant will often claim breaches of many different laws, the case reports make clear the specific points of law that were pertinent to the cause of action. The per section densities of each of the four parts of speech were recorded and then normalised to be between 0 and 1 to make for comparable regression coefficients. The density measures may be a proxy for various phenomena, such as changes in legislative style over time or differences between domestic law and international treaties. Nonetheless, a section of law is the basic unit of empowerment for the state or individuals. A section, like a sentence, encapsulates dominant and subordinate subjects, objects and verbs. The density of indeterminacy within this basic unit, whether in domestic or international law, is a legitimate basis for assessing the relative meaningfulness of language.

Data on all other variables for the regression analyses were also taken from the case reports. The age of legislation was measured by subtracting the enactment year of the disputed legislation from the year of the dispute. As a non-binary variable, it too was scaled to between 0 and 1 to ensure comparable coefficients. The submission by counsel of human rights law was coded as a binary where a human rights instrument was identified by the case reporters as being central to the dispute. Three period dummies were used to capture reforms to tribunals. And, to establish whether the case implicated national security or a threat to the life of the immigrant, a binary coding was used if either of these claims was made in submissions by counsel and confirmed in the factual summary provided by the case reporters.

All the variables were first tested in bivariate logit regressions. There are, in addition, three multivariate models that were run. Two are of primarily statistical interest, where the third model offers the principal substantive evidence for this paper. Model 1 is a fixed effects model

including just the indeterminate linguistic variables, excluding adjectives as being more a measure of ambiguity than indeterminacy. Model 2 is a random effects model including the same linguistic fixed effects as Model 1 with random intercepts for each senior presiding judge. This is to assess whether individual judges have had any notable effect on case outcomes. Model 3 is a fixed effects model that includes the conditional and modal variables with the period dummies to capture changes in the administration of tribunals. This is the model described by the equation above. It is expected to have the greatest statistical significance and captures the substance of the argument: that government losses on appeal will be greatest when cases concern indeterminate legislative objects and verbs, and when lower courts increase the throughput of meritorious cases. These factors all measure changes to the law, and hence support the legal model of judicialisation. Other random effects versions of Model 3 were run to assess for clustering by judge or by court. These results are described in the results section but are not presented in the regression table (Table 4). Descriptive statistics are provided in Table 2.

TABLE 2

With regard to data diagnostics, the dependent variable must be stationary, rather than subject to time-series autoregression. A Priestly-Subba Rao test for stationarity offers a p-value of 0.83 for the null. This is insufficient evidence of autoregression and suggests the assumptions of the logit analyses are valid. With regard to the independent variables, Table 3 displays the variance inflation factors of all variables. None present a factor greater than two, so there is insufficient evidence to reject the null in favour of multicollinearity. If present, multicollinearity would have voided the independence assumptions of the logit method.

TABLE 3

RESULTS

Firstly, what evidence is there of changes to the language of legislation? A longitudinal trend is essential to the argument. Figure 1 demonstrates changes on each of the four language measures. The number of sections containing indeterminate language are summed into totals for every five years from 1905-1909 up to 2015-.

FIGURE 1

Figure 1 presents the universe of data, without any sampling or confidence intervals needed. It is clear that indeterminate legislation has always existed, but there has been a substantial increase in its enactment. Notably, the use of conditional conjunctions to qualify the scope of government powers has more than doubled in per section density over the past century (1915-2016), and has increased by nearly fifteen times in real terms. This omits the outlying pre-First World War legislation that sought drastic controls on enemy ‘aliens’. And, across that same time scale, the use of the modal verb ‘may’ also doubled in its per section use, and increased by nearly eleven times in real terms. These are strong preliminary findings.

Table 4 displays results from bivariate regressions and three multivariate models.

TABLE 4

The coefficients in Table 4 represent the log odds of anti-government rulings for each variable. In the bivariate analyses, it is impossible to improve on the null with regard to the age of legislation (H1), the use of adjectives (H3), national security (H8) or a threat to the immigrant's life (H9). Firstly, the age of legislation result suggests that an anti-government ruling is no less likely with well-known legislation. Further, that adjectives and adverbs make no significant difference to case outcomes supports the argument that ambiguity has less of an impact on judicial behaviour than indeterminacy. And, there is no significant evidence that case facts have any systematic effect on outcomes. Human rights (H2) has a relatively low p-value in the bivariate regression, <0.1 , but it does not present sufficient statistical significance to provide evidence to reject the null. Human rights instruments have been available to immigrants for the entire period under study, and since the *Human Rights Act 1998* came into force in 2000 there has been criticism that rights trump other considerations in litigation. Counsel cited the *Human Rights Act* in nearly half of all cases analysed since 2000, but there is little evidence that this submission strategy made a systematic difference. Clearly human rights law is important, but the argument that such laws are sufficient to improve the chances of a win for the immigrant is not sustainable (H2). Furthermore, when included in multivariate analysis, this variable loses even its single starred p-value.

It is linguistic indeterminacy in legislation (H4-6) and the reorganisation of lower courts (H7) that present statistical significances in the bivariate analyses, with the exception of the second period dummy (2005-2009). Model 1 follows up with a fixed effects multivariate model that contains just the indeterminate linguistic variables. This model is designed to assess whether the language variables continue to be statistically significant in multivariate analysis. Modal verbs (H5) lose their statistical significance in this model with a p-value <0.1 . But the model nonetheless offers good predictive power (70%). Model 2 is the same as Model 1, but with

random intercepts for each senior presiding judge. There were seventy different judges that presided in a position of seniority over the 252 cases. Twenty of these judges led their courts in five or more cases, and include the likes of Lords Denning and Bingham. Despite the small sample sizes for each judge, Model 2 is needed to assess the importance of judicial leadership in affecting case outcomes (H10). The fixed effects coefficients in Model 2 retain much the same statistical significances of Model 1, albeit with marginally inflated standard errors and with enabling losing its statistical significance. But, crucially, the difference in explanatory power (measured by error variance, or s^2) between Model 1 and Model 2 is 0.05, suggesting that including random intercepts only very slightly changes model fit. Furthermore, a likelihood ratio test of the differences between Models 1 and 2 yields a χ^2 of 0.05 ($p = 0.82$) with one degree of freedom. This is not statistically significant. There is therefore little evidence to reject the null for H10.

Model 3 provides the most substantively and statistically important results. It includes the two most theoretically important linguistic variables along with the period dummies that capture reforms to the lower immigration tribunals. All coefficients and the constant are statistically significant. This is strong support for rejecting the nulls in H4-5 and H7. Model 3 also returns the lowest AIC (297.52) of any model and correctly predicted the outcome in 73% of cases. As expected, cases contesting enabling language were more frequently brought to appeal after the 2005 tribunal reforms. Specifically, 37 of 48 cases contesting enabling language came after 2005, and these cases contained higher than average enabling parts of speech per section (0.57). Hence, if enabling is included in a multivariate model with the period dummies it loses its statistical significance. Modal verbs in model 3 gain three-starred significance without the presence of enabling verbs, suggesting a minor suppression effect, albeit with insufficient intercollinearity to justify a composite factor. The key component of my argument is that

indeterminate law will lead to rulings favouring the weaker party because that would be the more defensible thesis on just power. Statutory tribunals will have found it increasingly difficult to question the rectitude of government enabling powers, even where indeterminacy is created between Parliament's law and the government's actions. Less difficult for both tribunals and the appeal courts are cases where the nexus of law and case facts has been rendered indeterminate by conditions on the object and unclear modality in the verb.

A variant of Model 3 run with random intercepts for senior judges (not recorded in Table 4) provides no difference in model fit. This is because the period dummies capture the variances that would otherwise be partially explained by different judges and courts. And the period dummies are far more theoretically and statistically significant. A model containing just the conditional and modal variables with random effects for judges and courts provides no significant improvement in model fit either: for judges $s^2 = 0.2$, $\chi^2 = 1.12$, $p = 0.29$, and for courts $s^2 = 0.05$, $\chi^2 = 0.82$, $p = 0.36$. With explanatory differences between fixed and random effects models so close to zero, there is little evidence of intra-class variation by judges (H10) or courts.

The model with the greatest leverage over the data is the fixed effects model, Model 3.⁴ The log odds in Table 4 tell us the direction and relative strength of coefficients, but odds ratios are more intuitive and important:

TABLE 5

Table 5 demonstrates that conditional language increased the likelihood of an anti-government ruling by a maximum of fourteen times. Indeterminate modal verbs increased the likelihood of

an anti-government ruling by a maximum of ten times. The maximum density of conditional language was five parts per section, where modal verbs reached a maximum of two parts per section. These odds ratios provide evidence for rejecting the null in favour of the adapted legal model presented in this paper. Although, it must be noted that there are a vast number of variables involved in adjudication and reductive conclusions should be avoided.

CONCLUSION

An adapted legal model of judicialisation is supported by the evidence presented. The result in most cases can be predicted from the language of the law and the administration of courts. Rapid increases in government losses on appeal after 1995 coincide with similarly rapid increases in the enactment of indeterminate legislation. This updating of the legal model is not incompatible with attitudinal or strategic theories. Individual judges may pursue their own preferences and will be conscious of their strategic constraints, but, either way, opportunities to rule against the government come when Parliament uses indeterminate language.

As Arthur Dyevre puts it (Dyevre 2010, 311):

‘many strategic accounts of judicial decision-making implicitly assume that “legal” variables do have some impact on judicial outcomes. Indeed, if constitutional rigidity or the threat of legislative override has an effect on judicial conduct, the reason must be that changes in constitutional language and clear expressions of legislative will have an impact on the courts.’

Previous research on judicial politics has not considered changes in legislative language with sufficient breadth. The aim was to fill this gap in the literature. The longitudinal measurement of four linguistic features and the analysis of their impact sheds light on the spurs to judicialisation. More data and research are needed on the preferences of British judges, but nuances to the individualism of attitudinal and strategic models are also to be encouraged. As argued by Hönnige, the judicialisation hypotheses need to consider inter-institutional coordination (Hönnige 2011), and the theoretical framework provided by Schmidt's 'discursive institutionalism' is ideally placed for this endeavour (Schmidt 2008).

Indeterminacy raises wider questions on how legislation should be understood. The concept of law has been described as an accessible guide to legitimate action (Hart 1961). But, indeterminate legislation presents a new concept: a scaffolding, without clear guidance for what or when action will be valid. This new concept of law suggests a surrender to changeable circumstances, and an unwillingness to draw sharp red lines in policymaking. This further implies that *ex ante* mandates for action are being replaced with *ex post* justifications for action. The risks to moral hazard will grow in agents untethered by a clear mandate (Strøm, Müller and Bergman 2003). The practical implication for legislators is to consider the opportunity costs. By promulgating legislation that omits key information, time can be spared in legislating and flexibility can be gained in policy execution. However, it is likely that judges will impose clarity on indeterminate law through litigation. This can impair policy effectiveness and diminish authority. If the calculation is made that indeterminate legislation is nevertheless the most efficient and effective legal instrument, then this decision should come with the expectation of an increased role for the courts.

Furthermore, the sticks with which judges allegedly beat the government — such as human

rights law, or concern for the life of an immigrant — show no significant correlation with case results. By reacting to change in the rule of law, judges are acting appropriately. The primary normative implication is that castigating judges or threatening to clip their wings is therefore inappropriate. Should the legislature be encouraged to set more determinable limits on power? Or, is the concept of law in need of revision to manage immigration? Either way, the government should expect and welcome scrutiny. It will either come *ex ante* from the legislature, or *ex post* in court.

Notes

1. All replication data and computer programs are available on request.
2. *W(Algeria) and another v Secretary of State for the Home Department; PP(Algeria) v Same; Z(Algeria) and others v Same* [2012] UKSC 8.
3. [2008] UKHL 31.
4. Interaction terms have not been reported for any model. This is because the most powerful models contain variables for language and period dummies. The latter cannot be combined and, as discussed above, there are no grounds for aggregating the linguistic variables into an aggregate factor.

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DIAGRAMS

Table 1: Hypotheses

<i>Level</i>	<i>Description</i>	<i>Hypotheses</i>	<i>Expectation</i>
Macro	Socio-legal	H1 — Disputes over old legislation have a lower rate of government loss.	Null
		H2 — Disputes over human rights law have a higher rate of government loss.	Null
Meso	Legislative language	H3 — Disputes over legislation containing adjectives or adverbs have a higher rate of government loss.	Null
		H4 — Disputes over legislation containing conditions, signified by the conjunctions ‘If’/‘or’/‘and’, have a higher rate of government loss.	Evidence to reject the null
		H5 — Disputes over legislation containing the modal verb ‘may’ have a higher rate of government loss.	Evidence to reject the null
	Institutional reform	H6 — Disputes over legislation containing the enabling verbs ‘make’/‘amend’ have a higher rate of government loss.	Evidence to reject the null
		H7 — Tribunal reform increases throughput of meritorious cases to appeal which leads to increased government loss.	Evidence to reject the null
Micro	Case facts	H8 — Disputes over national security have a lower rate of government loss.	Null
		H9 — Disputes over a threat to the life of the immigrant have a higher rate of government loss.	Null
	Judicial	H10 — Senior judges lead courts to rule against the government.	Null

Table 2: Descriptive Statistics for Fixed Effects

<i>Variables</i>	Min	Mean	Median	Max	SD
<i>Dependent variable</i>					
Anti-government ruling	0	0.46	0	1	0.5
<i>Independent variables</i>					
Age of legislation	1	20.84	13.5	61	18.03
Human rights claim	0	0.41	0	1	0.49
Adjectives or adverbs	0	1.19	1	4.5	1.14
'If'/'or'/'and' conditionals	0	1.58	1	5	1.63
Modal verb 'may'	0	0.35	0	2	0.48
Enabling verbs 'make'/'amend'	0	0.15	0	1.5	0.29
National security implications	0	0.3	0	1	0.3
Threats to the immigrant's life	0	0.46	0	1	0.46

N=252

Notes on clusters and period dummies: For clusters, there were 70 different senior presiding judges. 134 cases were heard at the Court of Appeal, and 118 cases were heard at the House of Lords/Supreme Court. For period dummies, just under 52% of cases were heard in the first period (PD1=1971-2004), 24% were heard in the second period (PD2=2005-2009) and another 24% were heard in the final period (PD3=2010-).

Figure 1: Indeterminate Legislation, 1905-2016

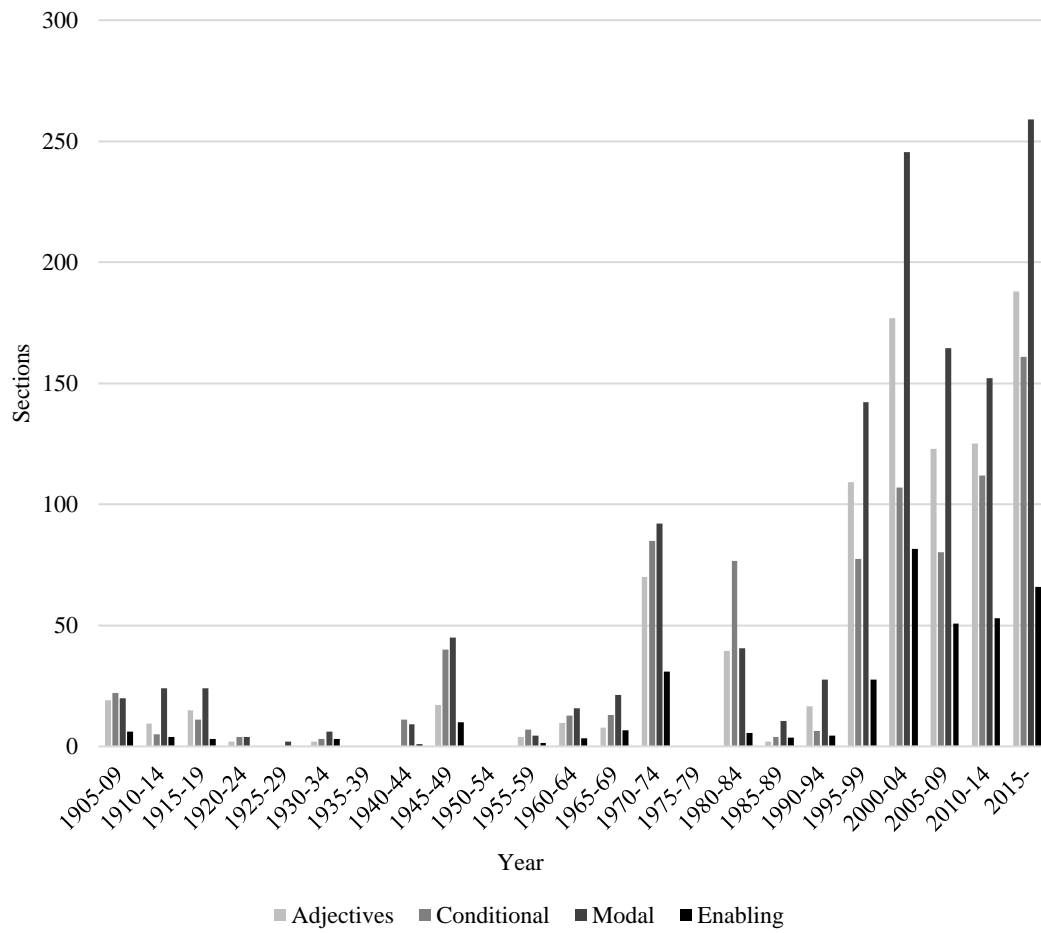


Table 3: Variance Inflation Factors for Independent Variables

<i>Variable</i>	<i>VIF</i>
Age	1.35
Human Rights	1.33
Adjectives	1.52
Conditional	1.54
Modal	1.30
Enabling	1.38
National Security	1.15
Threat to Life	1.31
Period Dummy 2 (2005-2009)	1.09
Period Dummy 3 (2010-)	1.30

Note: Only two of the three period dummies can be included in any single model. The two dummies included represent periods of reform for the immigration tribunals. These time periods might be expected to present correlations with other predictors as they are associated with higher rates of government defeat on appeal. But, as the table suggests, there are no grounds to reject the null hypothesis and there is no significant interaction between variables.

Table 4: Log Odds of Anti-government Rulings in Fixed Effects (FE) and Random Effects (RE) Models

Variable	Bivariate	Model 1 (FE)	Model 2 (RE)	Model 3 (FE)
Age	0.43 (0.43)			
Human Rights	0.43* (0.26)			
Adjectives	0.62 (0.50)			
Conditional	2.42*** (0.46)	2.71*** (0.48)	2.70*** (0.48)	2.63*** (0.48)
Modal	1.56*** (0.56)	1.35* (0.77)	1.42* (0.85)	2.31*** (0.69)
Enabling	2.19*** (0.73)	1.84** (0.92)	1.75* (1.01)	
Period dummy 1 (1971-2004)	-1.07*** (0.26)			
Period dummy 2 (2005-2009)	0.41 (0.30)			0.84** (0.35)
Period dummy 3 (2010-)	0.99*** (0.31)			1.16*** (0.35)
National Security	-0.07 (0.42)			
Threats to life	0.29 (0.27)			
Constant	—	-1.44*** (0.25)	-1.47*** (0.28)	-1.89*** (0.30)
N	252	252	252	252
Predicted	—	70%	73%	73%
-2 log Likelihood	—	296.56	296.51	287.52
AIC	—	304.56	306.50	297.52

Note: Standard errors in parentheses. ***p<0.01, **p<0.05, *p<0.1. -2 log Likelihood for RE models is a quasi-log-likelihood derived from Laplace approximation using R's *glmer* function (Bates 2010).

Table 5: Odds Ratios for Model 3

<i>Variable</i>	<i>Odds ratio</i>	<i>2.5%</i>	<i>97.5%</i>
Conditional	13.92	5.57	37.45
Modal	10.06	2.75	40.76
PD2 (2005-2009)	2.32	1.17	4.66
PD3 (2010-)	3.19	1.61	6.45