

Matthew Williams – What role has the language of legislation played in changes to the constitutional role of senior judges in British politics since 1960?

Lord Atkin quoting *Alice Through the Looking Glass* in *Liversidge v Anderson* [1942]
AC 206 at 245,

‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘...it means just what I choose it to mean - neither more nor less.’

‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’

‘The question is,’ said Humpty Dumpty, ‘which is to be master - that’s all.’

Abstract

Some judges are born political, some seek out political power, and others have politics thrust upon them. This paper aims to show that the latter is the true description of developments in the constitutional role of senior British judges since 1960. The paper will outline the ‘unintended politicisation of the judiciary thesis’ which seeks to explain the increased political power of judges as a product of the increased enactment of ambiguous legislation by successive governments. This paper therefore adopts a historic institutionalist perspective, in order to move away from traditional accounts that explain changes in the institutional balance of British politics as being caused by the personal political ambitions of the judges themselves. The hypothesis tested for this paper is that legislation has become more ambiguous since 1960. A new methodology was required to test this hypothesis, with the result being a discourse analysis that has been used to objectively measure the ambiguity of legislative sections for a sample of 1,335 sections between 1960 and 2005. Results show with 95% confidence that legislation has become more ambiguous since 1960, with the 1980s and the 2000s showing the highest numbers of ambiguous legislative sections, at the time when strong Commons majorities allowed the government to pass a greater volume of legislation. However the 1990s showed the highest proportionate levels of ambiguity when government was hamstrung by a small Commons majority, and more had to be achieved from less legislation.

Introduction

The constitutional role of senior judges has changed a great deal since 1960, as their political power has increased relative to that of politicians and administrators. This paper is part of a larger doctoral project that aims to explain the increased political function played by the judiciary as primarily an unintended consequence of changes to the language of primary legislation over the last fifty years. The hypothesis to be tested is that the language of primary legislation has become increasingly ambiguous since 1960 and that this ambiguity means that the law cannot be objectively determined and therefore requires judicial clarification. Thus the political power of judges has emerged as an unintended consequence of changes to the nature and volume of primary legislation.

This theory relies on the theoretical assumptions of historic institutionalism that emphasises the importance of gradual change, context, and indeterminacy as the key causal forces behind institutional change. The causal direction proposed is also significant. Many existing theories suggest that changes in the political power of judges came from the judiciary itself, whereas this paper aims to show that political power was thrust onto the judiciary as a result of changes to the exogenous political context. The key elements of this theory are, firstly the importance of institutional history over deliberate agency, and secondly the importance of change coming from the political institutions rather than from the judicial institutions. This theory is thus called – the unintended politicisation of the judiciary thesis.

This choice of terminology is designed to mark the theory out from its rivals. The research problem of judicial power is commonly conceptualised in the comparative politics literature as the ‘judicialisation of politics’, defined as ‘the

expansion of the province of courts or the judges at the expense of the politicians and of the administrators’¹. This study will argue that senior British judges have, expanded their power to review the decisions of politicians and administrators, but they have done so in response to institutional rather than personal incentives. The primary institutional incentive of the judiciary is to maximise certainty in the rule of law, and such certainty has been threatened by ambiguous legislation. Politicians have enacted a greater volume of legislation which is constructed with decreasing specificity of language. This has had the unintended consequence of drawing judges into political decision-making as they must determine the interpretation and application of such ambiguous law. Thus the causal mechanism in the UK should not be conceptualised as the judicialisation of politics, as the judges have mostly been passively reacting to their political context.

This paper will deal with the first half of this causal argument by concentrating on the independent variable – ambiguous legislation. Specifically the following hypothesis will be tested alongside a rival null hypothesis:

H₁ – The language of legislation has become increasingly ambiguous since 1960.

H₀ – The language of legislation has not changed since 1960.

The hypothesis needs to be proved, and the null hypothesis rejected in order to make the case that the language of legislation has changed, and to go some way to explaining the changed constitutional role of senior judges in British politics. Evidence to prove the hypothesis has been taken from a discourse analysis that has been used to gather relevant information from sections of legislation over the last fifty

¹ Tate C.N. & Vallinder T. (1995) *The global expansion of judicial power* (New York: New York University Press) p.13.

years. This information will reveal patterns in the language of legislation over time, and enable conclusions to be drawn regarding changes in legislative language. It is necessary first of all to clarify the meaning of key concepts that will be used throughout the paper. There will then be three main sections; the first discussing the theory in detail, the second outlining the discourse analysis methodology used to measure ambiguity in legislation, and the third section considering the results.

Identifying the causation of changes to judicial power is very complicated, and there is a heavy reliance on theory as a result of the impossibility of directly observing the nexus of cause and effect. Furthermore, the field is located in an inter-disciplinary no-man's land between politics, law, sociology and philosophy, and so clarity of conceptual definition is vital. The most important concepts to clarify are 'ambiguous legislation', and 'political power of senior judges'.

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

What does 'ambiguous' mean in reference to the language of legislation? This term is ironically incapable of objective interpretation, so a careful elucidation is crucial if we are to have any hope of objectively measuring it. This paper therefore relies on a conceptualisation of 'ambiguous' developed by March and Olsen, which has been defined as being any one of, or any combination of, the following four

components². Firstly, ambiguous means *plurality*. In legislation this refers to semantic and syntactic forms that communicate more than one possible meaning. This is ‘ambiguous’ in its most commonly used form. Secondly, ambiguous means *volatility*. This is similar to plurality of meaning but refers more specifically to language that elicits a subjective response, in that its meaning depends totally on the individual interpreter. Plurality of meaning is unclear as to its meaning, whereas volatility is grammatically clear but its meaning depends on how an individual defines key terms. Thirdly, ambiguous means *decentralisation*. In terms of legislation, decentralisation means there is uncertainty about who is responsible for the implementation of the law, and how much power they have been delegated. Finally, ambiguous means *mobility*. In statute law this signifies a law whose meaning is unstable in that it depends too much on context. Thus a small change in the facts can cause a significant change in the law. March and Olsen were using these four measures to analyse institutional change. Given that legislation is a collection of rules intended to accomplish institutional change, the application of the four measures to this project is arguably ideal, especially as they are measures that have been successfully tested in previous research. The key advantage of the measures is that they bring a clear and objective means of identifying ambiguity of legislative language.

The other major concept, ‘political power of senior judges’, must also be clarified. Judicial decisions are political if they are discretionary, prospective, and consequentialist. The judges’ motivations for the resolution of a case would come from influences exogenous to the immediate concerns of the litigants to the case itself. Such motivations may be legal certainty, personal morality, socioeconomic necessity, or foreign jurisprudence. The most significant attribute of a political decision however

² March JG and Olsen JP (1989) *Rediscovering institutions: the organizational basis of politics* (Oxford: Maxwell Macmillan). pp.42-3.

is discretion. This refers to the ability to select between a number of equally satisfactory resolutions to a single case³.

As an example of a ‘political’ decision one can take the pre-*Human Rights Act* case *R v Secretary of State for the Home Department ex p Simms*⁴ where the Lords decided that rules issued by the Home Secretary for a blanket ban against interviews between prisoners and journalists, potentially breached the latter’s basic right to investigating the soundness of their conviction. This decision was taken in a discretionary area of judgement and prospectively developed the right of all prisoners’ to access justice. The Prison Rules were arguably ‘ambiguous’ because their operation was authorised by a piece of legislation (the *Prison Act 1952*) that did not specifically authorise the denial of access to journalists, and the judges had to assume that without explicit authorisation, Parliament could not have intended this outcome. As per Lord Hoffmann at 412:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The *Human Rights Act 1998* will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty

³ See for example, Robertson D (1998) *Judicial Discretion in the House of Lords* (Oxford: Clarendon Press).

⁴ [1999] 3 All ER 400.

of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.’

This case shows the judges using discretion to overrule the government. Such increased political power of judges is a hugely important change in the British constitution with implications for Parliamentary Sovereignty. If judges can make politically sensitive decisions they can potentially subvert the democratic role of Parliament and the government. This project argues that the development of a discretionary area of judgement has been caused not by judicial artifice but by the ambiguity of primary legislation. These ideas will be considered further in the following section on theory.

I: Theory

The hypothesis is the product of the following theory. The ultimate political fact underpinning the British constitution is that Parliament has legislative supremacy⁵. This feature is the primary rule of recognition used by judges in order to interpret statutory language and determine the validity of actions taken under legislative authority⁶. H.L.A. Hart argued that legislation had, in his lifetime, become more prone to having ‘gaps’ which allowed a free judicial hand in deciding what to fill them with. This paper contends instead that legislation cannot have simple gaps – they are ambiguities. A ‘gap’ is *nothingness*, where an ‘ambiguity’ is *something* that creates confusion. Such confusion means that the supreme legal authority (Parliament) has issued a command that cannot be determined with certainty. This cannot be left

⁵ H.W.R Wade (1955) ‘The Basis of Legal Sovereignty’ *Cambridge Law Journal* p.188

⁶ Hart H L A (1994) *The Concept of Law 2nd ed* (Oxford: Clarendon Press)

unresolved by the judges otherwise the intentions of the supreme legislature will be mistaken, which is fundamentally against the point of having a supreme legislative power. Thus judges *must* respond to and resolve any ambiguity. Even in situations where the ambiguity is literally a gap – or a *casus omissus* to use its legal term – this is still a potential source of confusion in the rule of law. It still creates an actual problem, despite its being literally nothing, because supreme legal authority cannot be delegated into a vacuum. If there are gaps, they are like black holes – we perceive that it is nothing when in reality it is a dense mass of potential uncertainty.

What Lon Fuller described as natural law is, in the UK, an aspect of positive law. Namely you cannot have law that has no certain meaning and provides no unequivocal guidance as to acceptable behaviour⁷. In other countries, legislative ambiguities can be resolved by reference to a constitutional text or a Civil Code, but this is not possible in the UK. Parliament is the pinnacle of the constitution, so if its commands cannot be understood there is a real constitutional dilemma regarding the validity of the law. In these circumstances political and administrative actions taken under legislative authority must be reviewed by senior judges in order to verify their legality. If the judges ignore the uncertainty in the rule of law they are failing to defend it, which is a dereliction of their constitutional duty.

Ambiguous legislation thus negates the possibility of a ‘black-letter’ literal interpretation of statutory language, even for those judges personally determined to act restrictively. Ambiguous legislation has thrust political power on to the iconoclastic judges, such as Lords Denning and Reid, as much as it has empowered the more reluctant conservative judges, including Lord Templeman. Judges cannot escape the need to clarify the meaning of ambiguous legislation and their role in this

⁷ Fuller L.L. (1964) *The Morality of Law* (New Haven: Yale University Press)

respect is entirely reactive, and not 'activist'. Indeed if a judge refused to use discretion in order to resolve a legislative ambiguity that would be a political act motivated by personal preferences. A judge therefore faces a Catch-22 situation where to do nothing would be to shirk a constitutional responsibility, whereas to do something is liable to be misconstrued as activism and may encourage criticism from the government and the public.

Why then has Parliament enacted more ambiguous legislation over the last fifty years? There are many possible answers to this question and there is regrettably insufficient space here to give them a full consideration. Nevertheless the most probable cause has been increasing demand following the end of the Second World War for an expanded state focussed on service provision. The expanded size and responsibilities of the state have necessitated a new form of legislative authorisation of government action. Laws need to be flexible and enable government to respond to many eventualities. Thus there is a greater premium on legislation that enables government discretion in its implementation, and judicial discretion is an inevitable corollary of this development. Friedrich von Hayek and Harry Jones both anticipated that a state committed to its citizens' welfare, would create tensions with individual liberties that would enhance the role played by judges. Carol Harlow and Richard Rawlings have summarised these two scholars' positions as respectively the 'red light' and 'green light' positions⁸. Hayek's 'red light' position holds that collectivist welfare and individual liberty are mutually exclusive goods and you must either have one, or neither. Jones' 'green light' position was more willing to accept that an accommodation between individual and collective welfare was possible, albeit difficult.

⁸ Harlow C & Rawlings R (2006) *Law and Administration* (Cambridge: Cambridge University Press).

The point is that statute law has increased in volume and decreased in specificity as a result of the demands placed on the state. Clearly there were ambiguous laws before 1960 – the *Official Secrets Act 1911*, the *Public Order Act 1936*, and the *Emergency Powers (Defence) Act 1939* spring to mind – however such significant delegations of power from Parliament to the government were the exception and they have become the norm. This is key, legislation was in the past a means of resolving a specific problem identified in the Common Law, and occasionally the means to delegate some of Parliament’s sovereign power to government. Today legislation has become the government’s maid-of-all-work, passed quickly with limited Parliamentary scrutiny, to form the legal backing for an enormous governmental role in people’s lives. Old models of power delegation from Parliament in terms of principal-agent, delict-sanction, contract-property do not apply so clearly anymore. Power is increasingly contextual, malleable, personalised, and contingent. In a word power is increasingly ambiguous.

Judicial political power is therefore a product of history and political change. This is the unintended politicisation of the judiciary theory, and it is important to consider its strengths and weaknesses. A major strength of the theory is that it avoids certain dangerous assumptions. Firstly, it is an institutionalist rather than a behaviouralist theory, which avoids the difficulties of making assumptions regarding the personal preferences of the judges. It is incredibly difficult to observe and measure the preferences of judges, and it is safer to assume that they are acting appropriately according to the institutional norms of their office. It is particularly problematic to objectively measure judicial preferences if one is expecting to observe ‘activist’⁹ or

⁹ Dickson B ed (2007) *Judicial activism in common law supreme courts* pp. 366-70, and Evans M, McIntosh W, Lin J, & Cates C (Dec 2007) ‘Recounting the Courts? Applying Automated Content Analysis to Enhance Empirical Legal Research’ *Journal of Empirical Legal Studies* 4(4), pp.1007–1039.

‘supremacist’¹⁰ behaviour. Therefore this paper links into the dominant theoretical inclination of modern political science by concentrating on institutional factors, rather than behaviouralism. The ‘behaviouralist revolution’ in politics has been shown to yield limited insights and the most fruitful areas of study are the institutions within which actors behave. Secondly as regards the judicialisation-politicisation causal debate; it is arguably wrong to apply to the UK, comparative causal models from countries with strong histories of constitutionalism. The power of British judges has always been subordinate to that of the political establishment as a result of Parliamentary Sovereignty. This theory therefore emphasises the importance of historic context, specifically the constitutional fact that judicial power in Britain is relative rather than absolute. This means that power varies, depending on the power of the state, of litigants, and of politics in general. Judges do not have an independent source of power such as a constitution to draw strength from. For example it is hard to deny the importance of complex cultural phenomena such as the ‘rights revolution’. However, all such sociological change only affected the judiciary via the medium of legislation, as judges in Britain did not have direct access to the ‘rights revolution’, but were mediated by counsel, litigants, and ultimately the law.

The weaknesses of this paper are firstly the narrow focus on legislation when there are many important sources of law that influence judges’ behaviour. European law and the law of torts are important examples. For instance the courts have developed in the Common Law the politically significant torts of misfeasance in public office and contributory negligence, and these developments cannot be imputed to the language of legislation. However in terms of public law the misfeasance tort is used rarely by judges, and only if there is good reason why a public law remedy could

¹⁰ Rozenburg J (1997) *Trial of strength: The battle between ministers and judges over who makes the law* (London: Richard Cohen Books).

not be applied. The majority of politically significant decisions are taken in public law procedures, and in this field primary legislation remains the dominant source of legal guidance for the judges, as it forms the pinnacle of the legal hierarchy. A second difficulty with this theory is that it relies on history and has taken an arbitrary cut-off point at 1960. There were hugely significant political judgements made before this time – *Wednesbury*¹¹, *Magor and St. Mellons RDC*¹², and *Barnard v NDLB*¹³ for instance. Legislation can also have a considerable time-lag, for instance the *Prison Act 1952* was litigated in *Simms* forty-seven years after its enactment. Thus legislation passed prior to 1960 can still have a political impact on judicial decisions. However, a cut-off had to be chosen somewhere, firstly the 1960s saw a sudden increase in the volume of public law litigation, and secondly there was a renewed interest in the second appeal to the Lords following the 1966 *Practice Direction* which empowered the Lords to review their own decisions. These two historic developments make the decade a good place to start investigations. Extension of the study period to before the Second World War is intended for the doctorate.

II: Methodology

In order to test the hypothesis that legislation has become more ambiguous over the last fifty years (H₁), an entirely new methodology has been created with the results representing a unique data set. The method created is a discourse analysis, inspired by previously successful methods used in socio-legal research. Initially the aim of this project had been to perform a content analysis, but this is more appropriate

¹¹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* - (1948) 112 JP 55.

¹² *Magor and St Mellons RDC v Newport Corpn* [1952] AC 189, [1951] 2 All ER 839.

¹³ *Barnard v National Dock Labour Board* [1953] 2 QB 18, [1953] 1 All ER 1113.

for unstructured content such as newspaper articles¹⁴. Law on the other hand is a structured language and discourse analysis has, since the 1960s, been seen as the superior method to measure trends and developments in the legal register.

A discourse analysis uses a codebook of measures that seek to measure hypothetically important elements of language. Most such analyses have concentrated on the semantic and syntactical features of the language, for instance Brenda Danet performed a lexical study to show how different legal language is from everyday language¹⁵. Danet highlighted the use of common terms with uncommon meanings, archaisms, tautological doublets (null and void), unusual prepositional phrases, and a frequent use of ‘any’. Other studies have concentrated on the syntactics of legal language. Gustafsson for example revealed that in a sample of legal documents there were far more clauses per sentence than in other structured forms of language¹⁶. Similar syntactic studies include Butt and Castle, who have launched a campaign for ‘plain language’ drafting of legal documents. One particular problem they highlight is the use of vague modal verbs such as ‘may’, which does not provide a reliable basis for predicting the future¹⁷. Further concerns are with the use of complex conditionals¹⁸, a high incidence of prepositional phrases¹⁹, and ‘whiz’ deletion (where a sentence omits the wh-words, as in ‘agreement [*which is*] herein obtained or

¹⁴ Krippendorff K (1980) *Content Analysis: An Introduction to its Methodology* (London: Sage Publications)

¹⁵ Danet B (1985) ‘Legal Discourse’ in van Dijk T A ed. *Handbook of Discourse Analysis. Volume I*, (London: Academic) pp. 273-291.

¹⁶ Anna Trosborg (1997) *Rhetorical strategies in legal language: discourse analysis of statutes and contracts* (Gunter Narr Verlag Tübingen)

¹⁷ Butt P & Castle R ed. (2007) *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge: CUP)

¹⁸ Crystal D & Davy D (1969) *Investigating English style: English language series* (Harlow: Longmans)

¹⁹ Charrow R P & Charrow V R (1979). ‘Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions’ *Columbia Law Review*. 79(7), pp. 1306-1374.

applied’²⁰). All of these syntactical attributes confuse meaning and are therefore ambiguous.

This project is concerned with descriptive pragmatics, as well as with semantics and syntactics²¹. Pragmatics evaluates language in terms of its probable effects. Thus where semantic and syntactic studies measure the internal attributes of discourse, pragmatics studies the external impact of the language on those who use it. Dennis Kurzon has performed an excellent study of legal pragmatics, concentrating on the nature of ‘speech acts’ in legal discourse²².

The measures developed for this discourse analysis codebook (Table 1) all have roots in existing scholarship, except for the identification of subjunctive grammar and adjectives which I have developed independently. In such a complicated field of study it is important to ensure that the measures work, and that they have been successfully used before gives them credibility. The following coding frame lists all the indices and how they relate to the four elements of ‘ambiguity’. Examples can be found in the footnotes.

²⁰ Danet (1985) ‘Legal Discourse’

²¹ Charles Morris developed the trinity of ‘semiotics’ as semantics, syntactics and pragmatics. ‘Descriptive pragmatics’ was first identified by Rudolf Carnap. D Carzo and B S Jackson (1985) *Semiotics, Law and Social Science* (Liverpool: Liverpool Law Review)

²² Kurzon D (1986) *Pragmatics and Beyond VII: 6. It is hereby performed...Explorations in Legal Speech Acts* (Amsterdam: John Benjamins Publishing Co)

Table 1: Discourse analysis codebook

| Variable | Linguistic problem | Observable Implications |
|------------------|---------------------------|--|
| Pluralism | Syntactic ambiguity | Use of the passive form ²³ Use of embeddings ²⁴ |
| Volatility | Semantic ambiguity | Use of subjunctive language ²⁵ Use of adjectives ²⁶ |
| Decentralisation | Pragmatic ambiguity | Use of vague modal verbs ²⁷ Use of enabling powers ²⁸ Lack of clear agency ²⁹ |
| Mobility | Pragmatic ambiguity | Use of conditional language ³⁰ Refers to other legal provisions ³¹ |

²³ For instance s 25(5) *Youth Justice and Criminal Evidence Act 1999*, ‘Any proceedings from which persons are excluded...’ this does not clarify which agent it is that will perform the exclusion.

²⁴ For example s 3(7)(a) *Terrorism Act 2006*, ‘...something that is likely to be understood, by any one or more of the persons to whom it has or may become available, as a direct or indirect encouragement or other inducement...’

²⁵ Subjunctive language is where the language projects a desired state of affairs, and is contrasted with indicative language which states how the world actually is. Such aspirational language does not lay out what the law is, but rather what it ought to be. For instance s 1(1) *Overseas Development and Co-Operation Act 1980*, ‘The Secretary of State shall have power, for the purpose of promoting the development or maintaining the economy of a country or territory outside the United Kingdom, or the welfare of its people, to furnish any person or body with assistance, whether financial, technical or of any other nature.’ This ambiguous section was litigated in the *Pergau Dam* case: *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement Ltd (1995)*.

²⁶ Adjectives are far more open to contestation than are nouns and verbs. For instance s (1) *Transport (London) Act 1969* called for the provision of ‘economic, efficient and integrated’ transport. This ambiguity led to the famous ‘Fare’s Fair’ case: *Bromley v Greater London Council (1983)*.

²⁷ A vague modal verb often used in statute law is ‘may’ which does not say whether or not an action ‘will’ or ‘shall’ be performed. It is therefore vague and leaves discretion to the agent. For instance s 16B(1)(b) *Disability Discrimination Act 1995*, ‘...an application [for employment as a disabled person] will or may be determined to any extent...’.

²⁸ Enabling powers are those that allow an agent to amend the law outside the usual procedure for primary legislation. This includes the power to make delegated legislation, which in its most extreme form is called a ‘Henry VIIIth Clause’. It also includes the discretion to change the particulars of the law. For instance s 71(2) *Race Relations Act 1976*, ‘The Secretary of State may by order impose...such duties as he considers appropriate for the purpose of ensuring the better performance by those persons of their duties...’

²⁹ In this case Parliament has failed to specify exactly which agent is responsible for the delegated power. For instance when ‘the Secretary of State’, or ‘Her Majesty’ appears in statutes it can represent any member of the government. In some cases these legal entities can empower the civil service upon application of the *Carltona* principle.

³⁰ For instance s 3(3) *Public Order Act 1936*, ‘Any person...with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.’ This section demands considerable foresight on the part of the Chief Officer of Police. One can see two very different interpretations of the *Public Order Act* emerging as a result of its contextual confusion. In *Jordan v Burgoyne* a fascist march in Trafalgar Square was deemed illegal, whereas in *Brutus v Cozens*, an anti-apartheid protest at Wimbledon, was not.

³¹ This is referential law. It means that to truly understand the law one must refer to other legal provisions, be they other Acts of Parliament, delegated legislation, or the legislation of a sub or supra-national Parliament.

This codebook has nine measures which employ a simple binary system (0/1) to make a composite measure of ‘ambiguity’ for the four different categories. Due to the vast quantity of legislation a sample was used to make predictions about the overall nature of legislative language. Sections of legislation were sampled using a systematic sample. That is for every 19th page the first section starting after that point was measured against the nine indicators. A random sample was rejected as it did not as effectively represent the chronological range of different legislation passed in a year. However if a sampled page had no sections as it was a schedule, then a random sample of the parent Act was taken. By this means, some of the years sampled with a great deal of scheduled material had higher sample sizes, even if they had fewer sections overall than other years. The figure 19 was chosen because in an initial pilot study it was shown that a sample of just over 5% of all pages of legislation would be the optimal sample from which to predict with 95% statistical confidence what the true levels of ambiguity are.

All the primary legislation from every five years was sampled. Thus 1960, 1965, and so on up to and including 2005, were all sampled creating a total of ten years. For each year a sample of just over 5% of the pages was tested using the codebook, which produced a total sample size (n) of 1,335 sections. Each section produced a series of nine binary scores that formed the four categories of ‘ambiguity’, giving each section a measure of how ambiguous it is in each of these parameters. An average was then taken for each year on each measure of ambiguity, and this sample average was used to calculate confidence intervals using the formula $\bar{Y} \pm z \hat{\sigma}_{\bar{Y}}$,

where $\hat{\sigma}_{\bar{Y}} = \frac{s}{\sqrt{n}}$ (³²). This formula calculates the range of values above and below the sample mean within which the real value lies with a 95% probability. The hypothesis that the language of legislation has changed since 1960 (H_1) will be proved and the null (H_0) disproved if the sample mean and the confidence intervals of the years after 1960, all increase beyond the upper range of the 1960 confidence interval.

III: Results

The first four diagrams (Figs 1-4) show the results of the change in proportion of ambiguity in legislation between 1960 and 2005 for each of the four measures of ambiguity. Each graph has six lines. The three thin and straight lines represent the null hypothesis, which is the baseline level of legislative ambiguity in 1960. These lines represent the sample mean in the middle, flanked above and below by the confidence interval range. The three thicker, moving lines, show the same information for each of the ten years. In order to disprove the null hypothesis, these thicker lines all need to move above the upper range of the 1960 baseline. If the thicker lines do not leave the confidence range of the 1960 baseline then we cannot with 95% confidence discount the null hypothesis.

³² \bar{Y} = The sample average. z = The test statistic. Assuming a normal distribution, where $z = 1.96$ this calculates confidence to the 95% level.

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

Fig 1: Change in the proportion of sections displaying pluralistic ambiguity.

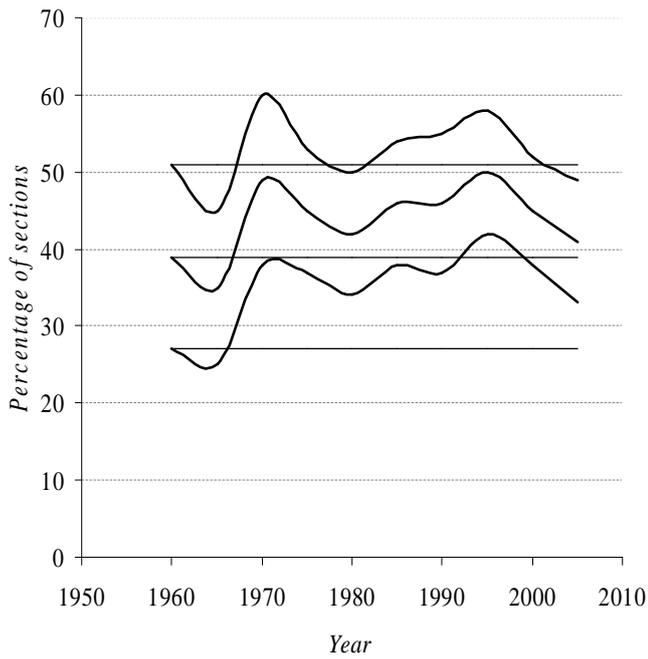


Fig 2: Change in the proportion of sections displaying volatile ambiguity.

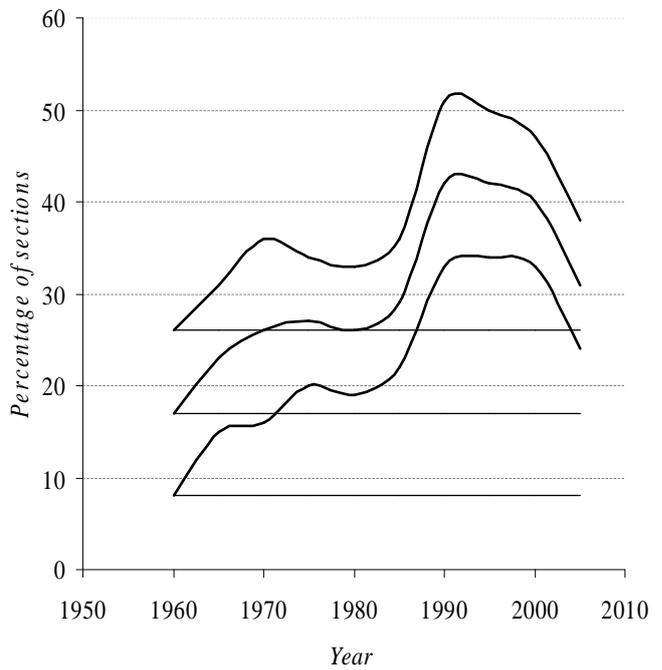


Fig 3: Change in the proportion of sections displaying decentralised ambiguity.

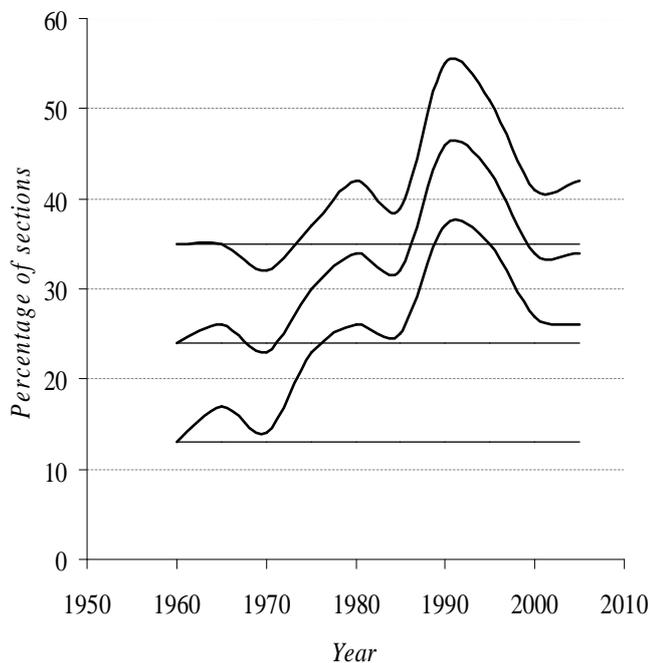
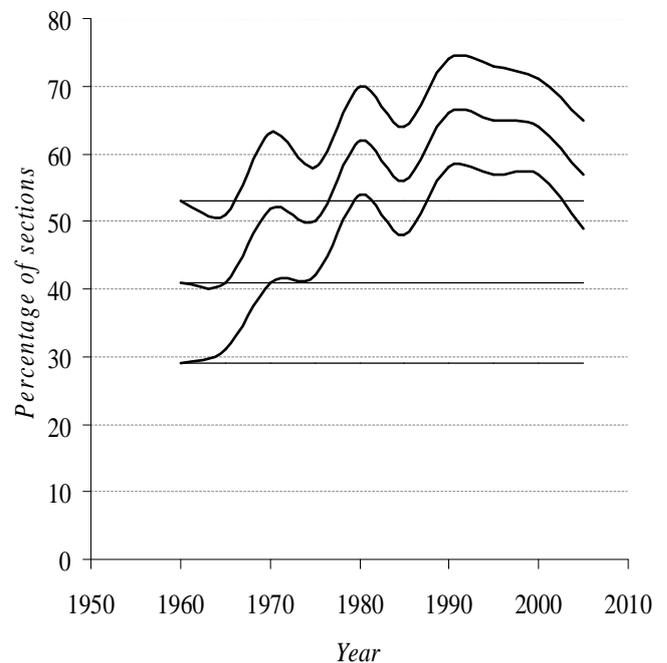


Fig 4: Change in the proportion of sections displaying mobile ambiguity.



Figures 1-4: Display changes over time to the proportion of sections of legislation that present ambiguous characteristics, stated as a percentage. The four graphs represent the four parameters of ambiguous legislative language: plurality, volatility, decentralisation and mobility. Each graph has three thin straight lines representing the null hypothesis, which is the level of ambiguity in 1960. The lines represent the sample mean in the middle, with the upper and lower confidence interval above and below this. The three thicker lines represent the sample averages and confidence intervals for every five years up to 2005.

Figures 1-4 show that the proportion of ambiguous sections in legislation has changed since 1960. The thicker moving lines show an upward trend for volatility, decentralisation and mobility. Only in plurality was there a less decisive move away from the 1960 baseline (Fig 1). One possible explanation is that plurality started from a higher level in 1960 than all of the other measures bar mobility. Of the sampled sections in 1960 39% displayed aspects of pluralism of language: that is either the use of passive grammar that obscures agency, or the use of embedded clauses. This average did increase to a peak of 50% in 1995, but this is still just less than the upper limit of the 1960 confidence interval (51%). There is little chance that the true figure for 1960 is as high as 51%, however we cannot with 95% confidence reject the null hypothesis for plurality of language.

Volatility on the other hand displays a much more positive rise (Fig 2), and by 1990 the change is significant enough that even the lowest possible value for 1990 (33%) is higher than the highest possible for 1960 (26%), thereby allowing us to reject the null with 95% confidence. This shows that legislative language displays a higher proportion of subjunctive grammar, and a greater use of adjectives. This trend tapers off in 2005, which could be explained by the fact that 2005 was an election year and there was far less legislation than for other years under New Labour. This change in the proportion of volatile language over the fifty year period is a very significant result. Where plurality measures a general lack of clarity, volatility implies that the language is open to dispute depending on an individual's subjective standpoint. An example of such a section that was sampled is s.65(1) *Environmental Protection Act 1990*,

‘(1) No information shall be included in a register maintained under section 64 above if and so long as, in the opinion of the Secretary of State, the inclusion in

the register of that information, or information of that description, would be contrary to the interests of national security.’

This is a fine example of volatility of language as opposed to plurality. The sentences are short and easily comprehensible in terms of their grammar, but the true meaning is still unclear because it relies on what the Secretary of State believes ‘national security’ means in any given case. Volatility is arguably far more problematic to the judiciary than plurality of language. It is usually possible to resolve grammatical confusion through application of the ‘golden rule’ of statutory interpretation³³. However when the confusion lies in a contested concept such as ‘national security’ the confusion is far more serious and a prospective elucidation of the concept would be a rational judicial strategy. Thus we can see that if a case came to the courts under s. 65(1) *Environmental Protection Act*, it would be necessary for the courts to define what ‘national security’ meant, and this would be a political decision in that it would be discretionary and have prospective importance.

Results are also supportive for the theory in terms of decentralisation where an upward trend is observed which escapes the 1960 baseline for 1990 and 1995 (Fig 3). This also allows us to reject the null hypothesis. Decentralisation is arguably the most important measure, as it asks whether a section creates discretion for an unnamed agent to change the basic elements of the law itself. This is where one can see law that enables the government to act with discretion in administration, and even to change law without going through the rigours of the Parliamentary process.

Figure 3 also shows a decline in the proportion of decentralising sections under New Labour which was unexpected. The sampled averages for 2000 and 2005 were both 34% of legislative sections, which is considerably lower than 1990 at 46%.

³³ Bennion F.A.R. (2002) *Statutory Interpretation: A Code 4th ed* (London: Butterworths)

New Labour enjoyed strong Commons majorities and a centralising executive, so one would expect higher levels of decentralisation of language. What one can say, is that the proportions are still worryingly high, and that the use of decentralising sections for New Labour included some of the most draconian legislation of recent times, such as the *Serious Organised Crime and Police Act 2005* (where 52% of the sampled sections displayed decentralising ambiguity).

Finally as regards mobility, there is also an upward shift which from 1990 to 2000 goes beyond the 1960 baseline, again allowing us to reject the null hypothesis (Fig 4). Mobility, like pluralism, has shown high levels throughout the period, as it never dropped below 41% in the sampled average. This measure looks at language whose meaning depends on the facts of the case, or on another piece of law. Such high levels of mobility show how important it is for Parliament to build flexibility into its legislation by allowing it to cope with eventualities, and it also shows how legislation is a sedimentary process that changes rapidly when new eventualities emerge. This again makes it difficult for a judge to identify the vires within which a delegate of Parliament ought to be operating and it encourages the courts to outline their own solution.

The results for each of the measures have displayed the hypothesised trend with the exception of pluralism. Overall these results show that there has been deterioration in the clarity of legislative language. The results however only display a proportion of the legislative sections, so what happens if we look at *real terms* changes in the levels of ambiguous legislation? First of all it is important to consider how the volume of legislation has changed, shown in Figures 5-8. Figure 5 shows the total number of pages of legislation for every year between 1900 and 2006, which indicates an enormous increase from the lowest level of 82 pages in 1905 to an

astonishing 5,388 pages in 2006. The linear trend line shows a steady increase for the whole of the 20th Century. The subsequent three graphs illustrate legislative matters central to an expanding and welfare orientated state; namely criminal justice (Fig 6), the annual Finance Act (Fig 7), and social security (Fig 8). For these graphs the average page length for all statutes in every year between 1960 and 2006 was calculated and is represented by the thin line. The thicker line shows the number of pages of legislation on each of the three topics.

It can be seen from Figure 6 that the average statute length is considerably lower than the length of criminal law legislation for the majority of years. There is a significant increase after 1993 where the average statute was a considerable 69 pages, but the volume of criminal law was 215 pages. By far the most voluminous year was 2003 with an enormous 949 pages of criminal and counter-terrorism law, well above the 99 page average for all other subjects. This shows that huge set-piece criminal justice laws have become increasingly important to successive governments in the fight against crime. A similar trend can be seen with the annual Finance Act (Fig 7) which peaked at 782 pages in 2000 (the average statute was 98 pages). Also in social security an ongoing rise can be observed (Fig 8), which peaked at an incredible 1,345 pages in 1992.

All of the graphs show sharp rises and falls which reveals that every few years a new piece of legislation is passed on each policy area. This regular legislative innovation could represent a change of minister, or a change in government policy; either way it is disturbing evidence that continuity and clarity in the law is lacking as law is constantly changed through vast legislative instruments. It is little wonder that judges are forced to establish clarity.

Fig 5: Total number of pages of primary legislation per year, 1900-2006.

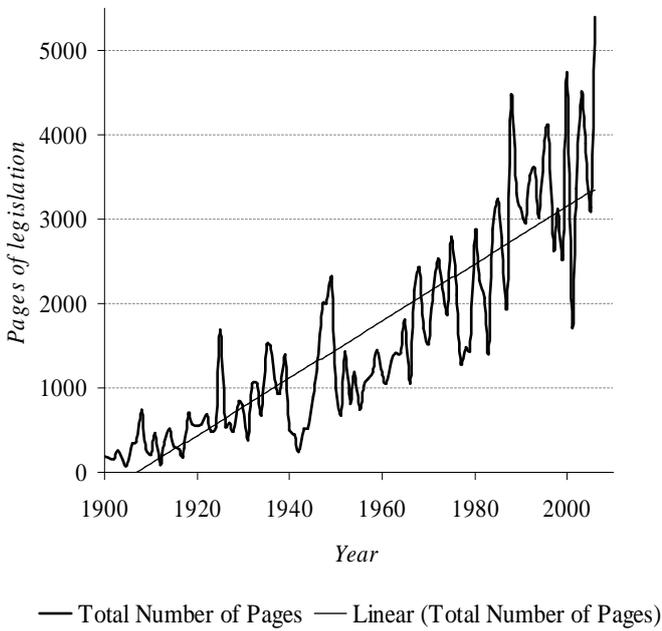


Fig 6: Total page length of criminal justice and counter-terrorism legislation.

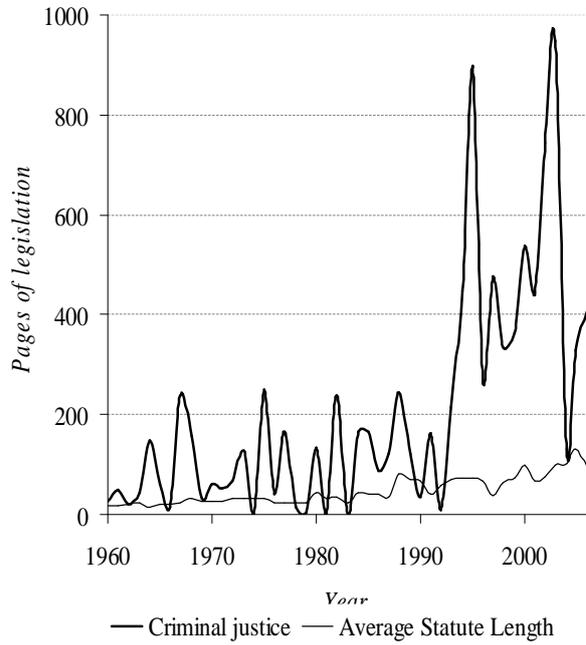


Fig 7: Page length of the annual Finance Act.

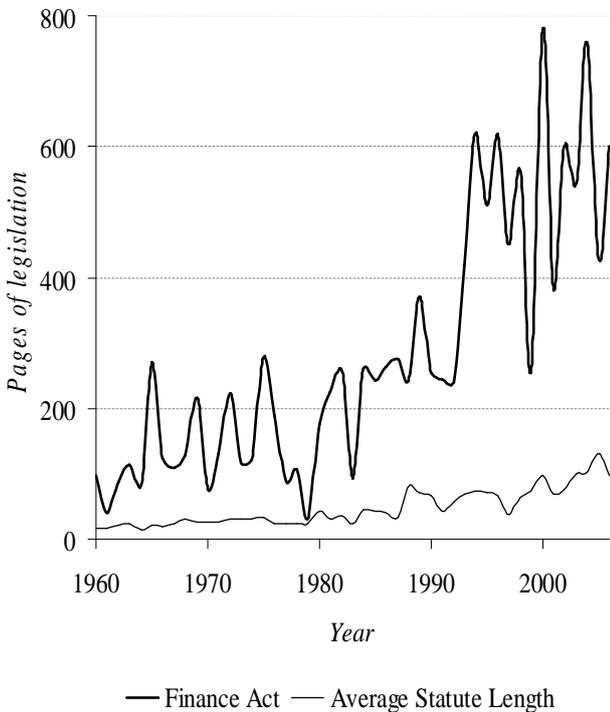
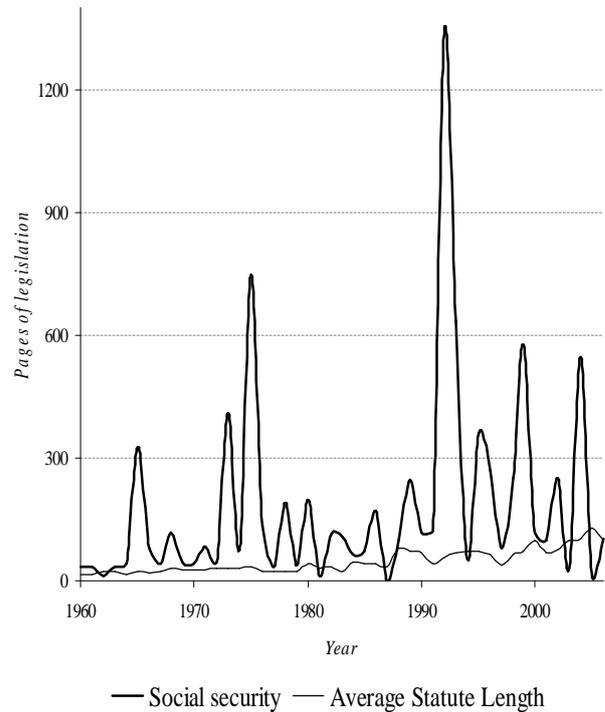


Fig 8: Total page length of social security legislation.



Figures 5-8: Display changes in the volume of legislation over time. Figure 5 looks at the total volume of legislation between 1900 and 2006, measured by total page length. Figs 6-8 display changes in the page length of legislation between 1960 and 2006 in three important policy areas for a service orientated state. The thin line represents the average page length of all legislation for each year. The thick line displays the length of legislation enacted in each year on the policy area of interest.

Clearly one can see that the volume of legislation has increased considerably, and on subjects that are liable to attract high numbers of aggrieved citizens seeking satisfaction in the courts. Following on from these results it is necessary to factor in the change in the volume of legislation as well as the change in its quality. Table 2 shows the total number of legislative sections for each of the years and the sample size. If we take the proportions calculated for Figs 1-4 above and translate them into predicted real terms values the results are startling (Figs 9-12). Some of the years have more sections overall but had a lower sample size, which is because if a year had more schedules and thereby more pages, more of its sections were sampled.

Table 2: Total number of sections enacted for each year, and sample size for each year.

| <i>Year</i> | <i>Total Sections</i> | <i>Sections Sampled</i> |
|-------------|-----------------------|-------------------------|
| 1960 | 1129 | 52 |
| 1965 | 1608 | 39 |
| 1970 | 1481 | 60 |
| 1975 | 2318 | 95 |
| 1980 | 2516 | 79 |
| 1985 | 2976 | 147 |
| 1990 | 1825 | 150 |
| 1995 | 2029 | 170 |
| 2000 | 2784 | 125 |
| 2005 | 2380 | 157 |

Fig 9: Change in the number of sections that contain pluralistic ambiguity.

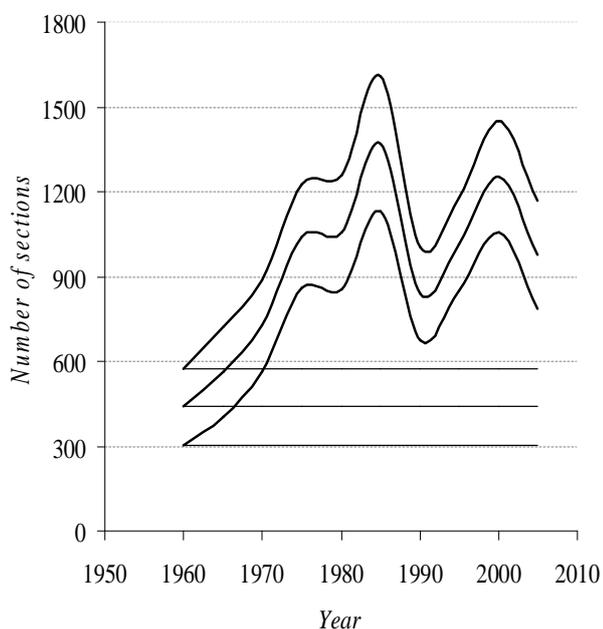


Fig 10: Change in the number of sections that contain volatile ambiguity.

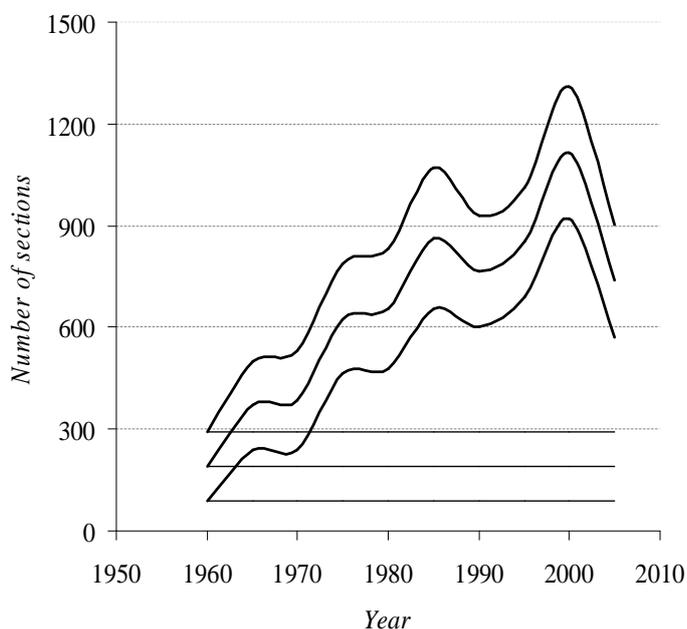


Fig 11: Change in the number of sections that contain decentralised ambiguity.

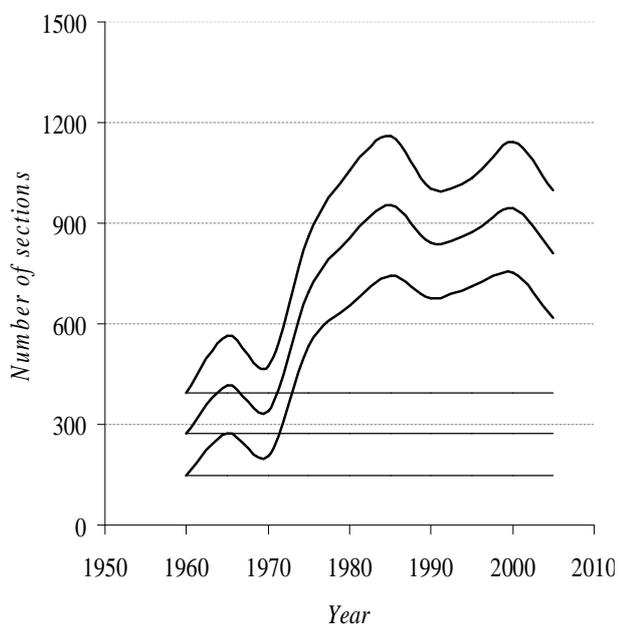
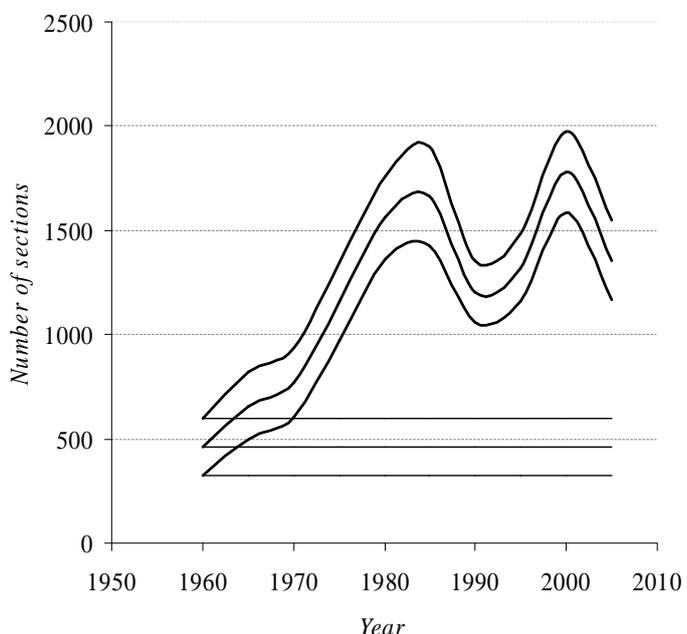


Fig 12: Change in the number of sections that contain mobile ambiguity.



Figures 9-12: Display changes over time to the total number of sections of legislation that present ambiguous characteristics. Each graph has three thin straight lines representing the null hypothesis, which is the level of ambiguity in 1960. The lines represent the sample mean in the middle, with the upper and lower confidence interval above and below this. The three thicker lines represent the sample averages and confidence intervals for every five years up to 2005.

The real terms increase in the number of ambiguous sections is strong evidence in favour of the hypothesis that legislation is more ambiguous now than it was in 1960. For all of the measures of ambiguity the upper limit of the 1960 baseline is quickly superseded by even the lowest possible limit of every year thereafter, allowing us to reject the null hypothesis that legislation has not changed since 1960 with 95% confidence. What is really interesting is that in real terms the worst periods for ambiguity were the 1980s and 2000s, whereas when we considered proportions the worst period was the 1990s. This holds to reason. In the 1990s John Major had a small Commons majority and thus the volume of legislation he could pass was limited, however the legislation that was enacted was proportionately more ambiguous than for any other period. This suggests that Major was incentivised to limit the total amount of legislation, and to make that legislation which was passed of maximal benefit to the government. One can expect at times when the government has a comfortable Commons majority that it does not feel pressure to squeeze as much out of Parliament with every Act, as it can pass more legislation with relative ease. This poses an interesting prediction for forthcoming legislation under the current governing coalition. Parliamentary business will be considerably harder for the Conservative-Liberal Democrat government than it was for its New Labour predecessors. Thus one can expect less legislation, but perhaps of a more ambiguous nature as the government seeks to govern with Parliament at arms-length.

These results are preliminary, and for the doctoral thesis I intend to lengthen the range of the study back to before the Second World War, and I will also increase the sample sizes in order to tighten the confidence intervals. Then it will be necessary to establish the links between this deterioration in linguistic clarity and the political power of the judges through interviews and case studies.

Conclusion

Considerable evidence has been brought to bear on the hypothesis: that legislation has become more ambiguous since 1960 (H₁). It is clear from this paper that the institutional environment within which judges act has changed radically, and their role in determining the rule of law in every case brought to them is highly likely to have been made more difficult as a result of the increased ambiguity of legislation. There is thus good evidence that the unintended politicisation of the judiciary does help explain the changing constitutional role of judges since 1960. Clearly a great deal more work is needed, but this is an important first step in showing that what judges have anecdotally complained of regarding ambiguous legislation, is in fact a real pathology in British politics that has considerably worsened since 1960.

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