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Framing the concept of judicial power and facilitating further analysis

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Declaration

I, the author, confirm that the Thesis is my own work. I am aware of the University's Guidance on the Use of Unfair Means (www.sheffield.ac.uk/ssid/unfair-means). This work has not been previously been presented for an award at this, or any other, university.

Abstract

Judicial power in the United Kingdom has been a subject of contemporary debate within constitutional law scholarship. Such debates have tended to emphasise normative models of constitutional thought as a means of understanding that power and its use. Furthermore, there has been a tendency within these debates to adopt a “language of judicial power” which emphasises certain dominant characteristics: most notably that judicial power is on the rise. Adhering to this language risks limiting and reducing our understanding of the nature of judicial power. The claim of this thesis is that it is important that an account of judicial power can reflect the nuances and patterns of the complex, changeable and context-dependent nature of that power with sufficient detail and sophistication. To achieve this goal, this thesis’ original contribution is to incorporate the insights of political science within its own study of judicial power.

This thesis firstly situates existing accounts of judicial power within the UK’s changing constitution and explains what it sees as the “problem of judicial power”. The approach here relates this problem to the many complex politics of judicial power alongside the inherent challenges of the concept of power itself. Secondly, this thesis uses the approaches of political scientists to develop its own analytical framework through which to analyse different episodes of judicial power, and applies this framework to judicial power exercised under section 4 of the Human Rights Act 1998 and under the office of the Lord Chief Justice. These case studies are deployed to demonstrate the benefits of “thinking politically” about judicial power. This thesis concludes that it is more accurate to discuss judicial power in terms of changing patterns, as being multidimensional and located both inside *and* outside of the courtroom and that recognising the political qualities of judicial power supports such an endeavour.

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List of Abbreviations

CJEU	Court of Justice of the European Union
CRA	Constitutional Reform Act 2005
DOI	Declaration of incompatibility
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HMCTS	Her Majesty's Courts and Tribunals Service
HRA	Human Rights Act 1998
IHRAR	Independent Human Rights Act Review
IRAL	Independent Review of Administrative Law
JAC	Judicial Appointments Commission
JC	Judges' Council
JCHR	Joint Committee on Human Rights
JEB	Judicial Executive Board
LCJ	Lord Chief Justice
LC	Lord Chancellor
MOJ	Ministry of Justice
UKSC	United Kingdom Supreme Court

Introduction

This thesis is about judicial power. More specifically, it is a response to current debates and calls to ‘understand’ and ‘restate’ judicial power in the United Kingdom (UK).¹ Current debates are themselves a response to various changes in the UK’s recent past: changes to the courts system², changes to the role and power of judges³ and wider changes in the constitution.⁴ Contemporary debates, prompted in part by the Policy Exchange’s Judicial Power Project, have been an important and timely opportunity to discuss how the nature, scope and limits of judicial power in the UK are – and could be – understood.⁵ However, there are challenges to the task of understanding judicial power. These challenges can be explained briefly by recognising that judicial power is a complex, changeable and context-dependent phenomenon. Judicial power – and the phenomenon of power more generally – is complex for a variety of reasons not least because the meaning of ‘power’ is highly contestable; it means different things to different people and it can mean different things to different people at different times. Secondly, judicial power changes. The nature of the power can change but, more significantly, so can the ways in which it is exercised. Finally, much of our understanding of power of any kind draws upon the context of its use.

This thesis argues that, at times, public law scholarship fails to adequately recognise these complexities, subtleties and nuances in accounts of the nature and use of judicial power in the UK. It is the central claim of this thesis that contemporary debates about judicial power are underpinned by a discourse – or language – of judicial power which risks limiting our thinking about that power. The result of these observations is a two-fold set of challenges which will be addressed in the work of this thesis: conceptual challenges (how we think about and understand the power of judges as a species of power within the broader notion of power itself) and analytical challenges (how we manage the conceptual challenges in order to produce detailed, systematic analysis of that power). It is suggested that a different approach to conceptualising and analysing judicial power can help to overcome these challenges and ensure that debates are underpinned by accounts of judicial power which adequately align their language with the constitutional realities of that power.⁶ The reason this is important is that where understandings of judicial power are used, for example, to inform policy development it is imperative that they are as detailed and accurate as possible. Ultimately, the aim of achieving a better understanding of judicial power through a different approach is to subsequently help us think about other, equally contested and challenging, related questions around issues of accountability, legitimacy or democracy, for example.

¹ Policy Exchange, ‘About the Judicial Power Project’ <<https://judicialpowerproject.org.uk/about/>> accessed 5 July 2021.

² Such as the creation of the United Kingdom Supreme Court under the Constitutional Reform Act 2005

³ Such as – but certainly not limited to – via the enactment of the Human Rights Act 1998 or more specifically, changes to the senior judiciary under the Constitutional Reform Act 2005.

⁴ Such as the constitutional events brought about by the Brexit referendum in June 2016 or by wider changes affecting the power of Westminster through the establishment of devolved assemblies.

⁵ See the extensive list of publications available on the Judicial Power Project website: <https://judicialpowerproject.org.uk/publications/>

⁶ Aileen Kavanagh, ‘Recasting the Political Constitution: From Rivals to Relationships’ (2019) 30 KLJ 43

What is missing at present within debates about judicial power is a really strong understanding of the notion of power itself. By emphasising the ‘power’ in judicial power, we are able to strengthen and broaden our understanding of more specific features of this form of power and its use. This thesis will argue that it is possible, and beneficial, to understand judicial power with these requirements in mind in order to achieve a different emphasis within scholarship and it will provide the means for doing so. It will be argued that we can conceive judicial power in terms of *changing patterns* which more accurately reflects the ebbing and flowing and changes in judicial power and its use. It will be argued that we need to think about judicial power both inside *and* outside of the courtroom to adequately reflect – and analyse – the multi-dimensional nature and power of the changing judicial role in the constitution. Perhaps most importantly, this thesis will argue that in order to achieve this more comprehensive and sophisticated understanding of judicial power we can think about judicial power as a form of political power and adopt the tools of political science for achieving this different approach.

Identifying a problem

Speaking directly to what this thesis views as the ‘problem’ of some contributions to contemporary judicial power debates, it is necessary to interrogate and – in some instances – challenge claims made about the power of judges in the United Kingdom. Some parts of existing discourse make presumptions in understandings about judicial power yet this thesis would argue that there is not, in fact, that level of agreement about the nature of that power. There is a sense that scholars all agree on what judicial power *is* as well as what judicial power(s) *should be* and therein lies the risk that existing discourse may not, at times, adequately account for the vital facets in our understanding such as the nuances and subtleties of judicial power in different contexts. The result is then the risk of reaching conclusions about the nature, scope or limits of that power too readily. For example, focusing on a ‘rise’ in judicial power may not, if taken at face value, reflect moments or periods of retrenchment, deference or even strategic avoidance of the use of power by judges. The reason for this, it is argued here, is due to the omission of consistent analysis of features of *power*. Adding this to an analysis helps us to see more clearly what judicial power *is* and how it operates and provides an important additional dimension in our understanding.

In particular, this thesis questions the completeness of focusing too readily on single judicial decisions from litigation inside the courtroom as a means of assessing the realities of judicial power since such focus risks presenting an overly one-dimensional account of that power.⁷ Isolating decision-making is an important aspect of understanding power as this thesis will discuss but we must be mindful not to present a partial picture of how judges may use their power - which could occur if we do not explore the many other distinct features of power and its use. This risk exists largely due to the complexity of the phenomenon of power itself and the need to account for such complexities in accounts of power in any setting. To give an example: a single, high-profile decision of the UK Supreme Court may warrant extensive analysis and debate but to consider that decision (its merits, effects and suchlike) might indicate that judicial

⁷ This thesis will demonstrate that, according to political science, there are many potentially useful dimensions of power as decision-making to consider as well as many other features of power in terms of its nature, exercise or surrounding contexts.

power is only located within the courtroom or suggest that judicial power is located solely within overt decisions.

It might suggest that the decision we see *is* judicial power. Even in relation to that decision, there are a number of questions to ask about other ways we might understand the exercise of power. For example, has the court decided not to exercise their power in respect of certain issues and does this suggest a more strategic use of power? Are there other decisions related to the central judgment which we need to identify to look at the process of decision-making or the way in which judges have chosen to – or been required to – use their power in a certain way in that case? Decisions such as panel selection, use of precedent or even an awareness of the wider political climate of that case in how they present their judgment. Beyond the judgment or courtroom decision-making, this thesis will illustrate that there is a lot to be understood about judicial power *outside* the courtroom and within different dimensions of the judicial role – such as those relating to the leadership and governance of the judiciary. Emphasising single decisions as mentioned above would omit deliberate analysis of such aspects of judicial power. This thesis argues that an account of judicial power must consider, and incorporate if needs be, multiple sites of judicial power and any understanding of judicial power should be expected to be similarly multi-layered. By recognising judicial power as political power this thesis is asking us to turn our attention to facets of power outside of what may be traditionally conceived of as ‘judicial’ contexts.

The consequence of adopting overly-general understandings about judicial power without this ongoing examination is that they may fail to recognise the changing nature of that power. Changing nature in terms of its scope or changing patterns in terms of where, how or why it is used and by whom. For example, claims made about judicial power under the Human Rights Act 1998 might emphasise a ‘rise’ in judicial power where the Act has given judges *more* power. However, there is much more to be understood about the realities of that power from mapping within an account the number of times different aspects of HRA power is used, other strategies for exercising power around the HRA or even by contextualising a single use of HRA power by a court against the wider picture of human rights issues, social change and the many legal questions which surround an exercise of judicial power in this particular context.⁸ In addition, this thesis will show how it is possible to use the language of political science and the language from debates about ‘power’ to better describe and account for the multiple sites and exercises of judicial power. Identifying features of power such as the many sources of power – some more or less tangible than others – or the different ways in which power is exercised such as through nondecisions or unobservable influence might help to better capture more about the realities of judicial power in the UK (and, in due course, elsewhere).

There are many judicial behaviours which could be incorporated into our understanding: how judges explain and perceive their own power, for example, or the possibility that judges use their power strategically and how this might be reconciled with an acceptance of their independence or even questions of accountability. Not only this, but at times, debates may focus on the use of power by other public offices with less investigation of the judicial power in those relationships – such as the focus on the changing power of the Lord Chancellor rather than the dynamic and relative power of the LCJ in instances where those offices interact. It is argued that through a

⁸ Both Chapter 1 and the case study in Chapter 4 explore these in much more detail.

different approach it is possible to identify areas of enduring interest in judicial power beyond any single examples of judicial decision-making or high-profile cases or more familiar sites of judicial power within debates (such as the courts' role in the growth of administrative law). A single decision may be thought by some to be 'unconstitutional' but we can make more sense of the concept of judicial power if we, initially, set aside such normative beliefs and instead analyse the exercise of power in that context: placing analysis before critique.⁹ Looking beyond isolated examples can, as an important preliminary part of our thinking, help us to see more clearly the realities of judicial power and its use and to ensure that the understanding upon which we base normative arguments about its limits or desirability is sufficiently strong.

The politics and language of judicial power

The phrase judicial power - and our understanding of it - is surrounded by politics. This thesis makes the argument that judicial power is political. Yet, the notion of 'politics' and of understanding judicial power as 'political' is itself fraught with conceptual difficulties because those terms are themselves open to varying interpretations. 'Politics' is a loaded word and there are five senses of this word that are relevant to this thesis. The most obvious is the sense in which value judgements - that are normally reserved for the elected politician and their administrators - might, allegedly, be being made by the judiciary. However, this conception is unhelpful for a complete analysis of judicial power because it a) risks drawing debates into contentious arguments around the exact location of the divide between law and politics and b) it under-explains and obscures the multifaceted way in which the concept of politics is being used in this thesis. This thesis is, therefore, less interested in this first sense of the word 'politics' and more interested in the following four further senses of the word and what are termed here "the politics of judicial power". Firstly, when judicial power is a *focus of politics* and becomes *politicised*. Judicial power has been politicised because it has 'become the subject of deliberation, decision making and human agency where previously [it was] not'; it has moved from the realm of the non-political to the political.¹⁰ Secondly, where and how the meaning of judicial power is '*settled by politics*'.¹¹ This refers to debates about judicial power in which the meaning, content and limits of judicial power within the constitution are described, negotiated and determined.¹² Such politics draw together many, often conflicting, views and ideas about the desirable boundaries to the nature and scope of judicial power.

The current debates around judicial decision-making have shown instances where the power and work of judges is brought into the political arena, characterised by the high-profile 'Brexit cases'. These cases saw the work of the Supreme Court and other courts in the United Kingdom

⁹ John Finnis, 'The unconstitutionality of the Supreme Court's prorogation judgment' (Policy Exchange, 2019) <<https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf>>

¹⁰ Colin Hay, 'Politics, Participation and Politization' a chapter in Colin Hay, *Why We Hate Politics* (Polity Press 2007) 81

¹¹ Graham Gee, Robert Hazell, Kate Malleon and Patrick O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP 2015) 9

¹² This thesis will explore the contributions and approaches of political jurisprudence in this process of negotiating the tensions within public law - and the various politics which surround it - as discussed by, for example, Martin Loughlin, *Foundations of Public Law* (OUP 2010) and Marco Goldoni, 'The Materiality of Political Jurisprudence' (2016) 16 *Jus Politicum* 51

grapple with constitutional questions wrapped up in an intense political environment. This is an example of how judicial power became the focus of politics and was politicised, such as in resulting media coverage and interest. The second sense of the politics of judicial power – where the meaning of that power is settled by politics – has been evidenced in the continual negotiation and renegotiation of judicial power and its limits by key constitutional actors. Within these debates that have occurred regularly over time, we often see focus on the determination of these boundaries, either created through statute¹³ or determined through review and debate. This sense of the politics of judicial power is characterised by a push and pull between actors and often between different ideological positions as to the ‘correct’ scope and limits of such power. Such interactions are an important part of how we understand judicial power and together these first two senses of the politics of judicial power are important observations of the character of contemporary debates, however, to focus on these kinds of politics alone risks overshadowing the wider realities of judicial power since the nature of judicial power is ‘unlikely to be revealed by focusing on contemporary controversies’.¹⁴

Therefore, this thesis recognises two further senses of the politics of judicial power as a means of changing the focus of analysis. These additional senses emphasise particular features of political science and the tools for thinking politically about judicial power.¹⁵ The third example of the politics of judicial power relates to thinking about judicial power and politics in terms of *power relations and power relationships*. This incorporates notions of institutional design and activity alongside questions of how those institutions and their actors work together as part of ‘the machinery of the state’.¹⁶ This aspect of the politics of judicial power requires us to consider the existence, health and inner workings of formal and informal relationships between judges and ministers or between the courts and Parliament as a means of understanding the realities of judges’ power. Alongside this, we are thinking about the way in which actors exercise power and the different forms such power relations may take and how different forms of power interact with one another. Finally, we can use the term ‘politics’ as a means of thinking about the phenomenon of power itself – *politics as power*. It is these latter two senses of the idea of politics which this thesis considers a vital contribution to rebalancing the focus of contemporary debates. This levels the contributions made through normative models with increased descriptive and analytical contributions focusing on power itself. To understand judicial power as a form of political power requires us to firstly concern ourselves with questions of *power* and how that notion is understood: ‘power is politics, politics is power’, as Colin Hay notes.¹⁷ Or, to put it another way, this sense of politics reminds us to put the ‘power’ back into debates about judicial power.

A further observation to make here is how current debates about the role and power of judges have become characterised by a discourse – or language – of judicial power. Intrinsically linked

¹³ Such as the changes to and statements of power under, for example, the Constitutional Reform Act in respect of the Lord Chief Justice or the Supreme Court or via other mechanisms such as the powers conferred by ss3 and 4 of the Human Rights Act.

¹⁴ This is an amended version of the point put forward by Martin Loughlin regarding how best to understand the nature of public law more generally: Martin Loughlin, *Political Jurisprudence* (OUP 2017) 12

¹⁵ Graham Gee and Grégoire Webber in ‘A Grammar of Public Law’ (2013) 14 *German Law Journal* 2137, 2151 discuss the need to consider carefully the ‘language of public law’ and the ideas surrounding how to ‘think politically’ as a prerequisite to how we speak about public law.

¹⁶ JAG Griffith, ‘The Common Law and the Political Constitution’ (2001) 117 *Law Quarterly Review* 46

¹⁷ Colin Hay, ‘Divided by a Common Language: Political Theory and the Concept of Power’ (1997) 17 *Politics* 45

to the many politics of judicial power, it is important to consider how we assess current understanding as a means of examining its accuracy. Much can be understood through the study of language and in particular, how any existing discourse is shaping how we might speak about the power of judges. The implication of any emerging discourse is that it can inform how we might think about and understand that power. Yet, if we accept too readily these implications as part of our understanding then we may miss the opportunity to closely examine the realities of the power. While this discourse can tell us more about the politics mentioned above as it indicates sites of conflict and competing interests, it can also indicate the nature of the ‘language’ of judicial power within current debates. For example, current debates have come to utilise terms such as ‘judicial activism’ or ‘judicial overreach’ alongside questions relating to *boundaries* and *limits* and in doing so, begin to suggest certain characteristics of the power and its use.¹⁸

Features of a ‘language’ of judicial power can be observed when looking at the debates but there is also an overlap between questions of language and questions of understanding. At the outset, this thesis has described judicial power as a complex phenomenon. Given such complexities, any cognitive tools to support how we think about judicial power are appealing. At present, such tools exist in the form of emerging narratives. A series of narratives can be identified within current debates about judicial power and these narratives have the effect of characterising the nature and use of that power in particular ways. At times, those narratives may exaggerate certain features of judicial power or its use and at other times, the narratives turn our attention to certain sites of judicial power. However, narratives are beset with conceptual difficulties since they can oversimplify or limit our understanding of the realities of that power through, in part, omitting important aspects of that power and its use. Current discourse includes extensive reference to the growth or rise of judicial power.¹⁹ There is emphasis on judicial decision-making inside the courtroom as a site of that power²⁰ and a suggestion that judicial power is a relatively new phenomenon²¹. The language of judicial power leads to the emergence of narratives and those narratives lead to a particular understanding of the reality of that power.

Such language does not emerge from nowhere, however. There have been changes to the power of judges and in the last twenty or so years as a result of ongoing constitutional reform, such as changes in judicial leadership or the passing of new powers under the HRA. Alongside this, there have been high-profile judicial decisions which have seemingly engaged with questions of law and questions of politics but not only that, they have specifically involved questions relating to

¹⁸ See, for example, Kate Maleson, *The New Judiciary: the effects of expansion and activism* (Dartmouth Publishing 1999), Chapter 2; Rickard Ekins and Graham Gee, ‘Putting Judicial Power in its Place’ (2018) 36 *University of Queensland Law Journal* 375, 398; Steve Foster, ‘Human rights, judicial activism or deference and the case of assisted suicide’ (2019) 24 *Cov.LJ* 69; Derrick Wyatt QC and Richard Ekins, ‘Reforming the Supreme Court’ (Policy Exchange, 2020) <<https://policyexchange.org.uk/wp-content/uploads/Reforming-the-Supreme-Court.pdf>> accessed 28th October 2021

¹⁹ Paul Craig, ‘Judicial Power, the Judicial Power Project and the UK’ (2017) *University of Queensland Law Journal*, 355; Anthony King, *The British Constitution* (OUP 2009) 121; Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 275

²⁰ Mark Elliott, ‘Judicial Power and the United Kingdom’s Changing Constitution’ (2017) Paper No. 49/2017 *Legal Studies Research Paper Series* 1

²¹ Grégoire Webber, ‘Judicial Power and Judicial Responsibility’ (2018) 236 *University of Queensland Law Journal* 219; Andrew Le Sueur, ‘Judicial Power in the Changing Constitution’ located in Jeffery Jowell and Dawn Oliver (eds.), *The Changing Constitution* (5th edn OUP 2004) 342

the relationships between judges and ministers or between Parliament and the courts.²² In many cases, the multi-faceted politics of judicial power have been engaged. We have been required to think about questions of power and politics and reconcile this with existing constitutional understandings of judges, courts and law. In times of change, reform or even crisis, it is natural to reflect upon existing practice. During these moments, it is also somewhat natural to consider the actions of political actors – including their use of power – within this unsettled or changing picture. What is interesting is to consider the nature of the responses to such change. For example, to ask why changes in judicial power are often met with caution.²³ It is also important to consider where the balance may be tipped towards a particular kind of politics – or perspective – and how that can affect our resulting understandings of the power of judges.

‘Words are not just how we communicate; they are how we think’ and the language we use to debate and discuss judicial power informs our thinking about its nature.²⁴ It informs our thinking about that kind of power but it also affects how we interpret fundamental questions relating to the constitution. Consider, for example, how we might think about existing constitutional principles – the separation of power, the rule of law or the sovereignty of Parliament – in light of our specific understanding of judicial power. Is there sufficient consideration within these interpretations of power, of power relations or of the evolving politics surrounding judicial power?²⁵ How might our understanding of judicial power, gained through a different approach, incorporate the peculiar institutional position of judges and their independence?²⁶ Can we successfully navigate the many politics of judicial power alongside the conceptual complexities of power as well as developing our constitutional understanding in times of change? The different approach argued for by this thesis considers these questions and offers a means to incorporate existing thinking with novel questions about power to overcome the challenges of a changing constitutional picture of judicial power. Furthermore, the following chapters will each explore and examine the many complex and interlocking themes raised here in its own response to debates about judicial power.

Conceptualising and analysing judicial power

²² The cases relating to Brexit, *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 and *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41 but also other cases such as *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22, *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 or even those relating to the Freedom of Information Act such as *R (on the application of Evans) and another v Her Majesty's Attorney General* [2015] UKSC 21

²³ John Finnis, ‘Judicial Power: Past, Present and Future’ (Policy Exchange, 20 October 2015) <<http://judicialpowerproject.org.uk/wp-content/uploads/2015/10/John-Finnis-lecture-20102015.pdf>> accessed 27th August 2021; Richard Ekins, ‘Protecting the Constitution: How and why Parliament should limit judicial power’ (Policy Exchange 2019) <<https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf>> accessed 2 September 2021

²⁴ Joe Moran, ‘The scourge of managerial blah’, (THE, 19 August 2021) <<https://www.timeshighereducation.com/features/scourge-managerial-blah>> accessed 3 September 2021

²⁵ To say, for example, that the institutional position of courts which makes them ‘especially well-suited to assess the micro-political impact of macro-political choices’: Thomas Adams, ‘The Politics of ‘Judicial Power’’ (UKCLA, 11 November 2015) <<https://ukconstitutionallaw.org/2015/11/11/thomas-adams-the-politics-of-judicial-power/>> accessed 5th November 2021

²⁶ For example, the ‘conflict between the requirements of judicial independence and accountability’: Kate Malleson, *The New Judiciary: the effects of expansion and activism* (Dartmouth Publishing 1999)

Beyond the broader constitutional and political context of judicial power, judicial power is surrounded by a further category of politics which make thinking about judicial power even more challenging. These politics relate to public law scholarship and the scholarly debates and evolving schools of thought within that scholarship which offer their own insights on the nature of judicial power. The politics within public law are themselves complex: the differences of opinion about the role of judges, about the power they do or should have and about the constitution more generally enrich our understanding but can, at times, confuse the process of conceptualising judicial power. This is partly due to an emphasis on how we *should* think about the power of judges rather than asking what the power of judges at present *is*: the risk of mixing analysis with critique.²⁷ There is an overlap in accounts of judicial power between normative ideals, explanatory accounts and ‘real world’ observations. The reason for this is, this thesis will argue, due to an under-emphasis on analysing the concept of judicial power. More specifically, due to an under-emphasis on thinking politically about that power and understanding the nature of that power as political. In this sense, there is a need to remove the politics as described previously from debates about judicial power but at the same time, to reflect the political nature of that power by adopting political tools to think about judges’ power. These adjustments are needed due to the complexities of the phenomenon of power but also due to the difficulties those complexities present for studying that power. Therefore, we need a means to identify and navigate the varied politics of judicial power as well as a means to overcome the conceptual and analytical challenges of the phenomenon.

Not only is there a need to navigate the complex politics surrounding judicial power, there is a need to find an approach to enable both further conceptualisation of judicial power and to analyse the nature, scope and exercise of that power within the UK constitution. There are both conceptual and analytical challenges to overcome. This provides the rationale for why this thesis adopts the insights of political scientists in its development and design of its own approach. Political scientists think politically about power; they recognise power and power relations as a fundamental aspect of a governing system. Furthermore, they acknowledge the role of courts and law within that system as a form of political power and alongside this, they have debated extensively the different approaches to successfully analysing that power. Partly due to the increased debates about judicial power and partly due to wider constitutional events, increasingly we are required to think about the role of judges as part of a political system, whether that be in terms of power relationships, decision making or accountability. These are all political questions relating to judicial power. Therefore, this thesis argues that there is a need for public law scholarship to adopt a means of ‘thinking politically’ about judicial power. In a general sense, this means thinking specifically about judicial *power* and how we understand that power. At present, we are relying on narratives and characterisations of judicial power as cognitive tools to develop our understanding. What is needed is a clearer account of ‘power’, ‘judicial power’ and ‘politics’ within the context of the judiciary’s constitutional role.

If we do rely on the existing language of judicial power, we are potentially narrowing or limiting our understanding of the phenomenon of judicial power; we are conceptualising judicial power based on evolving discourse yet that discourse may not be sufficiently accurate, detailed or

²⁷ Colin Hay, ‘Divided by a Common Language: Political Theory and the Concept of Power’ (1997) 17(1) *Politics* 45. This is, broadly speaking, how we mix descriptive accounts of power with normative ideals as to the correct or desirable nature or scope of that power.

sophisticated to capture the realities of judicial power and its use. Political science demonstrates a wealth of different questions we might ask about power and about political power. This thesis will argue that these different questions can beneficially extend our understanding of judicial power and help us to think politically about its nature and exercise. Ultimately, this thesis begins to consider whether there is a way to use this better understanding of judicial power to better understand and explore questions relating to the management of judicial power, the accountability and independence of judges or the nature of the relationships between judicial power and other forms of public power.

Thesis approach, significance and contribution

An important feature of this thesis' approach is to ask whether debates about judicial power and the conclusions they draw still reflect the relativity of the phenomenon. Firstly, the approach must be able, through its contextual approach, to determine the extent of judicial power and also the extent of the problems of that power. For example, if we are correct to identify and talk in terms of a growth in judicial power, have we adequately reflected the starting point of that growth or the means through which it has been achieved? Have we considered that the growth may have followed a period of 'acquiescence'²⁸ or that many aspects of increased judicial power are facilitated by Parliament?²⁹ These are important facets to our understanding and as such, an analytical approach needs to be able to capture them. The further benefit of a different but systematic approach to analysis is that it can manage the evolving realities of judicial power. By adopting an analytical framework such as that offered by this thesis, we are able to reflect the changing nature of judicial power within an account and that, in turn, helps us to re-examine any existing understandings we hold about that power. In addition, by using the insight of political science as part of the design of that analytical framework, we can think 'politically' about judicial power: we can ask different questions of that power by recognising that it is political. Thinking differently in this way about the power of judges will offer a refreshing contribution to the debates relating to that power and its use within British constitutionalism.

The key research questions this thesis considers are:

1. How is the term 'judicial power' currently understood within the UK constitution?
2. How do the insights of political science support a different approach to conceptualising and analysing judicial power within public law scholarship?
3. Can a better understanding of the nature and scope of judicial power be gained through the application of an analytical framework?
4. What are the distinctive characteristics of judicial power in the UK and what is the best way to study this type of power?

²⁸ Sir Stephen Sedley, 'The Long Sleep' a chapter in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009)

²⁹ Under the Human Rights Act 1998 or the Constitutional Reform Act 2005 or via other statutes in specific areas of law such as within criminal law or the law relating to companies.

5. Does using an analytical framework lead to a better understanding of the judiciary's relationship with other institutions and judicial power more widely?
6. What are the benefits of gaining a better understanding of such power relationships on their future management e.g. in terms of pressing questions relating to the independence and accountability of the senior judiciary?

The significance of this thesis' own approach is the wider context of how judicial power – and the judiciary – are understood within the UK constitution. Questions relating to the role and power of judges remains a central focus of debates and scholarship relating to the UK's constitutional settlement. This is especially so where that constitutional settlement undergoes change or finds itself in crisis. It is without doubt necessary to be confident in the understanding we have of judicial power within the contemporary context. Determining the level of such confidence can be achieved by assessing the focus of contemporary debates about that power. As the earlier discussion suggested, there is a real risk that within contemporary debates we do not achieve a sufficiently nuanced and sophisticated understanding of the realities of that power and its use. There is a risk of distorting that understanding where elements of judicial power – such as that exercised outside of the courtroom – are not included in analysis and understanding. Similarly, an over-emphasis on the first two senses of the politics of judicial power may distort such debates towards a certain kind of understanding; one which is not itself adequately inclusive of the broader notion of power.

Therefore, this thesis makes its original contribution in a number of ways. Firstly, this thesis will offer a close analysis of the concept of power and use the insights and approaches of political scientists to enable this. In turn, this will allow for a closer examination of the nature of judicial power. Secondly, this thesis will provide a bridge between the insights and experiences of political science and the focus of public law scholarship. It will illustrate how public lawyers may adopt a different approach, incorporating a different approach to conceptualising and analysing judicial power, to broaden and rebalance contemporary understandings of this form of power. Thirdly, this thesis will provide its own original analytical framework which builds on the work of political scientists in their own analysis of power. The analytical framework incorporates the insights of political science and the requirements of public lawyers to provide a means of managing the complexities of the concept of power and the challenges of navigating the politics of judicial power. Fourthly, this thesis demonstrates the ability of this analytical framework – and a different approach – to re-examine existing debates about judicial power under the Human Rights Act (HRA) and to develop necessary debates about judicial power in the context of judicial leadership. It highlights the ability to add additional insight to existing knowledge as well as a means to identify areas for further analysis to be undertaken. Finally, this thesis draws out its own understanding of the nature of the politics of judicial power: what is understood by this term and why those politics present their own challenges of the task of better understanding judicial power.

This lack of normative focus may be perceived by some as one of the limitations of this thesis' approach. However, this omission is quite deliberate since this thesis is more interested in understanding the character of contemporary debates about judicial power with a view to identifying how and where we can understand more about the power itself. Arguably, providing

a framework through which to analyse judicial power without – if one so chooses – adopting any specific normative ideals may mean we are more flexible in how we develop our understandings. One notable limitation to this thesis is its own focus on examples which emphasise the role and power of the senior judiciary. Although the number of cases which reach the senior courts is extremely small by comparison to the lower courts, it is in response to such cases where sites of contention and debate most often arise.³⁰ Where the senior judiciary is drawn into litigating politics it brings broader questions about judicial power, which interest this thesis, into even sharper focus. Not only this, higher courts and their decisions often throw up constitutional questions and so they provide a great deal of information for an analysis. The risk is, of course, to neglect the wider realities of judicial power within the entire judiciary. The size and extensive work of the lower courts does, in reality, involve many more examples of the day-to-day workings of judicial power.³¹ While these limitations are recognised, the approach taken here allows for a more nuanced and detailed analysis of the chosen sites of judicial power and a consideration of the broader questions which would apply to all forms of that power.

Methodological considerations

The overarching methodology in this thesis is analytical. Having identified the problems associated with debating and understanding ‘judicial power’, the next implication is the need to, ‘[bring] out meanings, silences, and relationships... significant in understanding the legal norm’.³² While empirical research was initially considered, given the evident need for a stronger means through which to *conceptualise* judicial power, this thesis has focused on providing the preliminary stage to this process: the analysis of the concept of power and of judicial power. Such analysis may provide the prerequisite understanding of the notion of ‘judicial power’ – its associated norms, expectations or ideas within the constitution and within academic debates – from which to explore the ongoing, and similarly complex, normative arguments for the particular shape that power can and should take. Using an analytical methodology in this thesis has meant that there is a particular focus on the nature of language and understanding within debates and such analysis encourages us to take the view that, ‘words are to be understood by looking at the social context’.³³ The further reason for adopting this analytical methodology is that it provides a starting point from which to subsequently identify the potential for empirical research. This thesis does not rule out nor discard the benefits of such research however, the many empirical challenges of the phenomenon of power – the ability to evidence certain aspects of the phenomenon – are discussed in Chapter 2. While these challenges ought not to prevent empirical research, this thesis chose instead to focus on the question of how we *understand judicial power in the first instance*.

The focus on an analytical approach in this endeavour directly addresses the potential scale of any related empirical work and a decision to ensure the work of this thesis could be achieved

³⁰ As noted by the Lord Chief Justice in 2019, the modern judiciary – and the senior judiciary in particular - are ‘concerned with much more than the mere letter of the law. More generally, [they] make decisions which are heavily policy laden’ see, Lord Burnett of Maldon, ‘A Changing Judiciary in a Modern Age’ (Treasurer’s Lecture, 18 February 2019) 6

³¹ The approach set out and applied here can, in future, be used to analyse any form of judicial power wherever it is located however.

³² P. Ishwara Bhat, *Idea and Methods of Legal Research* (OUP 2019) 188

³³ *Ibid* 169

within the scope of the PhD thesis. To conduct the analysis, the thesis' task has been to design an analytical framework through which to explore the nature of judicial power. The specific aim in this sense is to be able to better understand the nature of that power through analysis of the phenomenon. The analytical framework offered in this thesis was inspired by the reading of the political science literature which will be explored in Chapter 2 and the many fascinating descriptions and debates offered about the nature of the phenomenon of power itself. Any subsequent empirical research would very much be viewed by this thesis as a secondary – and equally beneficial – stage in achieving a wider understanding of the phenomenon of judicial power. This thesis instead offers an approach which analyses the state of current understandings and knowledge and assesses some of the leading claims made about judicial power. The thesis begins to locate – through its five-fold analytical framework – features of power which may warrant further investigation (through empirical or other approaches) or aspects of different sites of judicial power which remain under-explored and therefore, under-represented in debates.³⁴ Therefore, the thesis' approach is the first stage in achieving what it calls a better understanding of judicial power in the UK.

In terms of the central aims of this thesis, and its research questions, the design of an analytical framework presented the opportunity to consider what the key ingredients of a framework should be. Decisions relating to the design are reflected in the intellectual journey of the resultant methodological approach. Initially, the analytical framework was a three-fold structure: firstly, *nature* (to focus on questions relating to the power itself), secondly *exercise* (to recognise the central feature of this in political science analysis) and finally, *context* (to require the contextualisation that was missing at times). Within political science literature, there is a central focus on the exercise of power as a focus for analysis largely due to the evidential considerations in being able to demonstrate the features of power discussed. This, therefore, seemed a vital ingredient in this thesis' own analytical approach. However, while this feature of understanding power – through its use – is clearly helpful, this thesis argues that there should be a specific space to analyse the power itself and where it comes from as a basis for then assessing its use. The *nature* element provided such a space. The *nature* element evolved into the *source* element seen in this thesis; a term used to emphasise the importance of sources in lawyers' understandings of the law and – it is suggested – in understanding power. As the two case studies will demonstrate, there is value in highlighting notable features of the power itself and where it comes from as one part of our wider understanding of judicial power in any setting.

In the final analytical design, the exercise element remained but in time, the earlier 'context' element was developed to better recognise and separate questions falling within this theme. Contextualising exercises of judicial power could be achieved by looking specifically at other aspects: the human aspects of the power relationships and the dynamics in those relationships and how they affect the power. This reflected the notions of agency and behaviour apparent in the political science literature. This will allow for considerations such as differences between institutional relationships and individual relationships and how they may affect our understanding of judicial power – or the power itself. Following this, the context element was

³⁴ As noted by Lee Epstein and Andrew D. Martin, there is an argument that 'well-executed research with a data component is likely to make more important, influential and, frankly, better contributions to law and policy' due to the ability to assess any conclusions against that data. See Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (OUP 2014) 4.

further separated to consider both temporal and spatial aspects of any relevant contexts. Within each of these elements are important but distinct questions which might shed more light on the nature of judicial power. For example, there is scope to consider a single exercise of judicial power against a timeframe or as part of its own history. There is scope to look at emerging trends or patterns or to make tentative predictions as to the future use or evolution of that power. Similarly, there are many different environments in which judicial power exists and in which it is exercised. We might understand a single exercise of judicial power differently if it relates to the endogenous environment of the judiciary vs one which sits outside of the judiciary in exogenous environments. This is, as the thesis will discuss, to encourage the focus away from the ‘close analysis of decisions’ as a basis for understanding the nature of judicial power but to look more broadly and consider judicial power ‘at work in society’; marrying, to an extent, the internal and external features of the law and judicial decision-making and offering a more holistic understanding.³⁵

This approach is designed to help us to consider our expectations of judicial power and this relates to the overall task of considering carefully how we a) understand the nature of judicial power in the UK and b) how those understandings may be reflected in wider discourse relating to judges and their power in the constitution. By including within the methodological design, the requirement to interrogate existing understandings or claims made about judicial power and analysing the realities of it in practice, we are encouraging interested stakeholders to consider the accuracy, clarity or completeness of the accounts of judicial power given in any situation. This does build on pre-existing information about that power but it is the opportunity to question whether, in light of the analytical framework’s assessment, current debates or discourse are providing a good quality understanding of that power. This is also to question whether, as this thesis claims, there is adequate reflection of the changing nature of judicial power and its use or the various dimensions of the judicial role and the circumstances in which judicial power may – or may not – be exercised. Therefore, this might be helpful not only to the academy and those with a specific interest in the judiciary but also to those involved in discussing and debating the work of public institutions. Journalists and other media outlets may benefit from such a toolkit for reviewing information about the judiciary and presenting it in outputs. Ministers and other public officials may be able to better understand the use of judicial power in this sense which could support policy development and base such policy proposals on more comprehensive accounts of judicial power.³⁶ It may also help develop working relationships between public powers and individual actors. In this sense, while the analytical framework is inspired by political scientists and designed with public lawyers in mind, it is hoped that its application will have much wider benefit beyond academic debates.

Thesis overview

This thesis will move from this short introduction into a much more comprehensive appraisal of judicial power within the context of the UK constitution. Chapter 1 will set this thesis’ claims

³⁵ Christopher McCrudden, ‘Legal research and the social sciences’ (2006) 122(Oct) LQR 632, 634. See, too, David Ibbetson, “Historical Research in Law”, in Peter Cane and Mark Tushnet (eds), *Oxford Handbook of Legal Studies* (OUP 2003) 864

³⁶ This is further explored in Chapter 6 within the scope of the ‘future’ of judicial power and possible strategies for its management within the UK constitution.

about judicial power within their constitutional and academic context. This first chapter will examine the changing constitution and the implications of those changes on the role and power of judges. In addition, such change is documented as a means of illustrating how judicial power – and our understanding of it – does not exist within static environments. Importantly, Chapter 1 will make the case for thinking about the role of judges in a multi-dimensional manner and it will make the case for thinking about the power of judges as a changing phenomenon. This includes the recognition of what this thesis terms the *traditional*, *regulatory* and *managerial* domains of that role and how wider reforms and constitutional change have led to the evolving – and changed – role of judges in the UK constitution. Complex questions of politics, power and their relationship to law, courts and judges will be discussed in order to pin down the problems and challenges of judicial power in the UK. In addition, Chapter 1 will map the contemporary debates about the power of judges, the character of those debates and the consequences they may have for our understanding.

Chapter 2 takes this thesis into the field of politics and power. The use of insights from political science is a crucial part of this thesis' original contribution since they offer rich descriptions and accounts of power and its many associated challenges. Part of this thesis' rationale is the use of political science accounts of power to help public lawyers to think politically about judicial power. Chapter 2 will further illustrate the problems of power: the conceptual difficulties of a changeable, complex and context-dependent phenomenon and the debates about how, given such difficulties, we may go about analysing the nature and use of power. Within this discussion, consideration will be made of the term 'politics' and the further conceptual challenges of that term and its relationship to how we understand power. This will provide an opportunity to explore further how we might think about and navigate the politics of judicial power in the UK. At its conclusion, Chapter 2 draws out key analytical themes from the political science literature that can be incorporated into the design of this thesis' own analytical framework. In particular, there is an assessment of what is termed the 'power-with-a-face' debates and the recognition of the notion of power as a multi-dimensional phenomenon.³⁷ Here, the accounts of power offered by Robert Dahl,³⁸ Peter Bachrach and Moreton S. Baratz³⁹ and Steven Lukes⁴⁰ will be analysed and the wider debates about their own contributions to the scholarship on power.

Chapter 3 presents this thesis' case for a different approach to analysing judicial power. It makes the case for building stronger conceptual foundations from which to *then* debate the socially desirable constitutional limits of judicial power. Chapter 3 returns to public law scholarship and reflects upon how public lawyers think about and approach questions of judicial power and how, by adopting the insights and approaches of political science, public lawyers may think differently about judicial power and its use. The purpose of this is to demonstrate how the analytical framework combines the insight and experience of *both* public law and political science to design an approach which capitalises on the strength of each. Chapter 3 presents the five-element analytical framework which incorporates this political thinking into the analysis of judicial power while responding to the particular demands of public lawyers in that design. This

³⁷ Clarissa Rile Heyward, 'De-Facing Power' (1998) 31(1) *Polity* 9

³⁸ Robert Dahl, 'The Concept of Power' (1957) 20 *Behavioural Science* 201

³⁹ Peter Bachrach and Moreton S. Baratz, 'Two Faces of Power' (1962) 56(4) *American Political Science Review* 947

⁴⁰ Steven Lukes, *Power: A Radical View* (Macmillan 1974)

framework comprises the following elements: *source* (asking what is the power in question), *exercise* (analysing the use of that power), *interactions* (drawing out important power relationships – individual and institutional – and other wider influential actors involved in the exercise of power), *time* (considering the context of the power and its use specifically in terms of changing timeframes) and *space* (considering the context of the power and its use in relation to the environments it exists within, such as inside or outside of the courtroom or taking account of the wider constitutional context).

Chapters 4 and 5 are two contrasting case studies which are chosen to demonstrate this different approach in practice. Each chapter applies this thesis' analytical framework in response to different conceptual and analytical demands. Chapter 4 analyses judicial power under the Human Rights Act and specifically, the use of Section 4(2) declarations of incompatibility. The particular challenge for the analytical framework here is whether it can pose different questions about judicial power under the HRA to add further insight to existing debates about the power of judges under the HRA. Chapter 4 determines how the nature of judicial power under the HRA is portrayed within contemporary debates – where there is reliance of certain narratives to form an understanding of that power. This chapter explores the use of section 4 HRA and considers it within the analytical framework; drawing out additional detail to add to existing conceptualisation of that form of judicial power. Not only this, it highlights where accounts of HRA power have been limited by the reliance on those narratives such as where they omit the influence of other actors in the exercise of that power. This continues to require any account to adequately describe the realities of that power – in relation to various episodes of its use - alongside existing normative beliefs about its use within the constitution. This chapter's aim is to show how the analytical framework can add more to even the more well-trodden areas of debate. The choice of the HRA is very deliberate as a means of highlighting how the analytical framework may provide a toolkit to re-investigate and interrogate why we might hold particular understandings of judicial power in certain contexts and the extent to which such understandings remain accurate. Notably, how we understand judicial power inside the courtroom and in relation to decision-making.

Chapter 5 analyses the power of the office of Lord Chief Justice; a less extensively debated site of judicial power but one which has undergone significant change in recent years. This case study is chosen to see whether the different approach can ask new questions about established details and to look at an example of judicial power which incorporates questions of judicial leadership and the use of judicial power *outside* of the courtroom. Of particular interest is the fact that 'LCJ power' has attracted far less interest within debates about judicial power and yet, as the analysis will show, the LCJ exercises considerable amounts of judicial power. The relative novelty of some aspects of the Lord Chief Justice's role and power since the Constitutional Reform Act 2005 merit greater analysis and this thesis claims that one reason contemporary debates may risk distorting our understanding of judicial power is because they over-emphasise judicial power in terms of power as decision-making inside the courtroom. Not only does this case study look beyond that domain of judicial decision-making, it also tests the application of the analytical framework on under-explored areas of activity. This chapter demonstrates the changing attitudes and reactions between these two forms of judicial power and draws out the differences in perception relating to individual or institutional judicial power. It differentiates between judicial power within the management and governance of the judiciary and judicial

power as a means of safeguarding rights. This chapter's aim is to show the flexibility of the analytical framework and the benefits of re-examining through systematic analysis even the most established aspects of any form of judicial power to evaluate current understandings.

Finally, in Chapter 6, this thesis reflects upon its work and asks whether the use of this different approach – of thinking politically about judicial power – can help us to better understand the phenomenon. It responds to contemporary debates and draws conclusions as to the accuracy and usefulness of narratives and, what will be termed, the 'old' language of judicial power. Chapter 6 considers whether an emerging 'new' language of judicial power may help us to more accurately understand the realities of judicial power and its use in light of ongoing change to the judicial role and to the constitution. The chapter asks whether the analytical framework can help us think differently about current debates, specifically those relating to the reform of judicial review, and it considers the future of judicial power in the UK and how, given this different understanding, we might think differently about how best to manage that power and its use. Chapter 6 offers a number of suggestions relating to the future management of judicial power within the collaborative constitution in light of the work of this thesis: the need for role recognition within power relationships, the need for respect and the maintenance of effective channels of communication between powers, and the review of relative power within relationships with the potential for remedying any perceived difficulties which may exist.

There is no escaping the fact that the UK's constitutional settlement has been placed under considerable strain in the last few years. This period of flux has presented many novel and complex constitutional questions and judges have not been immune from this. There have been some unusual instances - in both a legal and political context - where judges' decision-making power has been called upon and subsequently scrutinised. Yet there is a growing sense that the direction of travel in the UK may be towards future constitutional change: change both in the UK itself, with questions around the devolved nations in light of Brexit and the pandemic, and change in the nature and form of the constitution. It is inevitable that we will continue to think about and debate the role and power of judges and do so alongside equally complex and enduring questions about the UK's constitutional settlement. It is vital that we are equipped to carry out this task and to be able to think about and understand the nature and scope of judicial power in the most comprehensive and accurate way possible. This thesis will offer its reader one such means of undertaking this enterprise with the detail and sophistication needed. In addition, this thesis will work towards an explanatory frame within which to understand judicial power which permits longer-term considerations and understandings. In doing so, this thesis offers a mitigation for the rise and fall of contemporary debates about judicial power which can come to the fore at any point in time.

Chapter 1

Judicial Power in the Changing Constitution

This chapter will ground this thesis' analysis of judicial power within its constitutional and academic context. As this chapter will illustrate, this is by no means a straightforward task given the complex, changeable and at times ambiguous nature of the United Kingdom constitution and the evolving nature of the academic scholarship which explores that constitution. For this reason, this chapter begins with a description of constitutional change within the UK and the range of questions and debates about the nature of the constitutional settlement which such change has prompted. The purpose of this is to show that constitutional change is itself patterned and this dynamism requires constant reinterpretation of key constitutional principles and relationships, including those affecting the judiciary. In doing so, this leads us to consider evolving constitutionalism within public law scholarship and the established culture within public law to encourage different conceptions and understandings of potentially well-established phenomena.

The chapter then moves to consider the implications of the changing constitution and developing constitutional understanding on the judiciary: the courts, judges, their role and their power. The chapter will examine the evolution of the judicial role in today's constitution and set out this thesis' case for conceptualising that role as one which is *multi-dimensional*. By recognising the changing functions, demands and powers given to judges through events such as constitutional reform or wider societal changes affecting the administration of justice, it becomes clear that there is scope to think about that role as having a number of related – and at times, overlapping – parts. We may consider the work of judges within more traditional conceptions of their role or look at the role of judges in wider regulatory spaces. Alongside this, there is the important dimension of judicial leadership which may sometimes be omitted from accounts of judicial power but which is a central aspect of some judges' roles or powers.

The reason for documenting change to the judicial role and suggesting alternative ways of conceptualising that role is because how we conceive of judges' roles within the constitution is intrinsically linked to how we think about their power and its use. The chapter will consider the contemporary debates about judicial power which prompted this thesis' own analysis and identify the character and qualities of those debates. Primarily, this chapter will show how those debates are characterised by a series of narratives which have come to frame our understandings of judicial power. It will be argued that such narratives represent only a partial account of the realities of judicial power in the UK and that a reliance on this particular 'language' of judicial power may be limiting our potential for greater, more accurate understanding of the subtleties and complexities of the nature and use of judicial power in the UK.

Finally, this chapter will address the known challenges ahead. It will continue to explore the politics of judicial power as mentioned in the introduction to this thesis and consider what is needed to navigate the various themes within these politics. This final section will address concerns relating to the politicisation of questions of judicial power and begin making its case for a different approach to thinking about judicial power. This chapter will explain why there is a need to re-centre the debates about the power of judges and to focus our attention on questions of

power ahead of attending to debates about judges and the balance of power within the constitution.

1. The UK's changing constitution

This thesis is challenging its readers to reflect upon existing understandings of the power of judges in the UK. Potentially, such reflection may lead to a requirement to re-examine or develop those understandings through analysis to better reflect current realities. However, to understand the power of judges – and the difficulties associated with this endeavour – comes with a requirement to place those judges and their power within the relevant constitutional context. Changes to the UK's constitutional settlement often engage questions about the basic principles and foundations of our constitutional understanding and, at times, that engages questions of judicial power.⁴¹ What is required from public law against this backdrop of constitutional change is the ongoing examination of the 'complex and nuanced interrelationship between the foundations and futures' of both the field and the constitution more broadly.⁴² The effect of constitutional change has been to develop existing scholarship and interrogate the role and power of all aspects of the political system. However, it is the aim of this first section to describe the nature of the UK's changing constitution so that future sections may reflect upon the specific implications and questions such changes create for the judiciary and its power.

1.1 A picture of constitutional change

There are two main questions this thesis will consider in relation to constitutional change: firstly, how does constitutional change affect the power of judges and secondly, how does constitutional change affect our understanding of the power of judges? One is a question of realities - to determine an account of the nature of judicial power at any point in time - and one is a question of how we contextualise that power and its use and how such contextualisation affects our understandings of that power. This is challenging not least due to the ongoing change and development of the context in which that power exists: the constitution itself.⁴³ To understand these changes and their impact is to better understand the nature of the constitution however, while 'constitutions present themselves as devices of settlement but in reality are arrangements that thrive on evasion.'⁴⁴ The UK constitution is inherently ambiguous and these ambiguities – alongside a picture of change - present a need for constant interpretation and reinterpretation of

⁴¹ One such question was posed by Keith Ewing in 1994 when he asked, 'how can we reconcile with the first principles of democratic self-government the transfer of sovereign power from an elected legislature to an unelected judiciary?' see KD Ewing, 'The Bill of Rights Debate: Democracy or Juristocracy in Britain?' in Keith D Ewing, Conor A Gearty and Bob A Hepple (eds), *Human Rights and Labour Law. Essays for Paul O'Higgins* (Mansell 1994) 147, 148. These foundational questions require us to reconsider the existing principles and foundations of the constitution in light of wider constitutional change.

⁴² Elizabeth Fisher, Jeff King and Alison L Young (eds.), *The Foundations and Future of Public Law* (OUP 2020) 1

⁴³ For wider discussion of the UK constitution and questions of constitutional change, see: Elizabeth Fisher, Jeff King and Alison L Young (eds.), *The Foundations and Future of Public Law* (OUP 2020), Vernon Bogdanor in, *The New British Constitution* (Hart Publishing 2009), J.W.F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) or Rodney Brazier, *Constitutional Reform- Reshaping the British Political System* (3rd edn, OUP 2008)

⁴⁴ Martin Loughlin, 'The Silences of Constitutions' (2018) 16(3) IJCL 922, 927

known ‘facts’.⁴⁵ Rather than such ambiguity being problematic, Loughlin goes as far as to say that it might be necessary. It is this consistent need for interpretation which allows constitutions to develop and respond which may be beneficial to the long-term existence of the constitutional order. This aside, there remains a desire to locate certainties in our understandings of the constitution and the many phenomena it contains however, ‘The only thing that is certain is that the British constitution is not going to stop changing’.⁴⁶

The nature of this change has been – and is likely to continue to be – patterned. The scope and type of changes will continue to be incremental at times and more deliberate at others until such point that the constitution fails to adequately respond to problematic or unusual constitutional scenarios. To illustrate how the most recent set of changes have played out, the chapter refers to Robert Hazell’s (ed.) forecasting of four, future ‘constitutional scenarios’ for the UK from *Constitutional Futures Revisited: Britain’s Constitution to 2020* to reflect upon changes to date.⁴⁷ His matrix identifies: the Old Constitution, Centralised Constitutionalism, Westminster Devolved and Dispersed Constitutionalism.⁴⁸ The first of Hazell’s scenarios refers to the ‘old’ constitution; what might be known as the traditional or ‘classic’ Westminster model. The traditional Westminster model is a model of centralised government and centralised power. There exists very few checks and balances on the executive and Parliament’s sovereignty goes relatively unchallenged. This is due in part to the relatively quiet role of the courts in UK administrative law.⁴⁹ In terms of the relationships between the judicial branch and the executive and Parliament, the judiciary was not legislatively empowered to hold those branches to account and it was clear to see that the courts did not often opt to enforce notions of legality beyond those required by largely accepted notions of the rule of law.⁵⁰ This models to a large extent the account of the judicial-executive relationship given by Lord Nolan in *M v. Home Office*: the proper relationship is one of mutual respect for lawful decisions, whether those be executive or judicial decisions.⁵¹

This first of Hazell’s ‘constitutional scenarios’ is useful because it gives a strong benchmark against which to consider the nature and effect of recent constitutional changes on the balance of power, the power relationships and as Hazell himself did, consider the ‘direction of travel’ of the constitution in more recent years. When talking of constitutional change, the phase of identifiable constitutional reform pushed forward by the Blair government is the obvious example here.⁵² One might look initially to the handing over of power from Westminster to the devolved governments in Scotland, Wales and Northern Ireland⁵³ as well as the introduction of

⁴⁵ Loughlin explains that an ‘objective interpretation’ of any constitution cannot exist since there is this need for them to be understood different at different times and in different circumstances.

⁴⁶ Robert Hazell (ed.), *Constitutional Futures Revisited: Britain’s Constitution to 2020* (Palgrave 2008) 2

⁴⁷ Ibid 18

⁴⁸ Ibid 16

⁴⁹ The UK’s membership of the European Union and the growth of administrative law may present the obvious limits to this view but by and large, there is less substantial legislative provision for legal checks on the power of the political institutions.

⁵⁰ Eric C. Ip, ‘The judicial review of legislation in the United Kingdom: a public choice analysis’ (2014) 37 *European Journal of Law and Economics* 221, 222

⁵¹ [1992] 1 QB 220, at 314

⁵² Andrew Le Sueur, ‘New Labour’s next (surprisingly quick) steps in constitutional reform’ (2003) PL 368

⁵³ This was done under ‘machinery’ of the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 1998

the Human Rights Act for the UK.⁵⁴ Later, there were alterations such as the removal of the automatic rights of hereditary peers to sit in the House of Lords⁵⁵ or moves for increased freedom of information and transparency.⁵⁶ Under the Constitutional Reform Act 2005 (CRA 2005) there was another wave of substantial reform. The Act saw, amongst other things, the creation of a Judicial Appointments Commission (JAC), a new Supreme Court for the United Kingdom (UKSC) and a different role for the offices of Lord Chancellor and Lord Chief Justice.⁵⁷ There were further institutional changes which saw the formation of a Ministry of Justice (MoJ) taking responsibilities from both the existing Lord Chancellor's Department as well as from the Home Office.⁵⁸ As part of this constitutional reform there was also a period of change for the Courts Service, seeing changes to judicial pensions and salaries.⁵⁹

The results of these various reform events are captured by Hazell's three other 'constitutional scenarios'. For example, we might reflect upon how the UK constitution underwent a move towards the 'Westminster Devolved' scenario, following the raft of devolution legislation in 1998; a move which dispersed power and governance away from central government. The issue here is that during the same wave of constitutional reform, legislation was enacted which emphasised the importance of rights and of a stronger, more independent judiciary: an account which could sound more akin to either the 'Centralised' or 'Dispersed Constitutionalism' scenarios. The Human Rights Act and even the Freedom of Information Act, for example, have made for a stronger system of checks and balances. The arbiter of such checks – on questions of lawfulness or legality – is the judiciary. As suggested, many of the other deliberate changes within the constitution have affected the judiciary – the process of appointments is now more independent of government. The Supreme Court now sits separate from Parliament in its own building. The Lord Chief Justice – a judge without ministerial responsibilities – is now head of the judiciary. This has, without doubt, affected the relationships of power and the balance of power within those relationships. It has raised questions about the allocation, amounts and limits of power of all constitutional actors and, of more interest to this thesis, of judges. This thesis' analytical framework is designed to capture any shifts in judicial behaviour, however they may be described and whenever they may occur.

1.2 Evolving constitutionalism and the language of public law

The fact is, 'we are [still] living in constitutionally eventful times' and the desire for clarity and certainty in understanding ongoing constitutional change remains.⁶⁰ The Public Law Project has recently launched its UK Constitutional Reform Tracker in order to compile a clearer picture of

⁵⁴ Human Rights Act 1998

⁵⁵ House of Lords Act 1999

⁵⁶ Freedom of Information Act 2000

⁵⁷ Constitutional Reform Act 2005

⁵⁸ HC Constitutional Affairs Committee, *The Creation of the Ministry of Justice* (2006-07, HC 466)

⁵⁹ For a detailed discussion of this aspect of the reforms see Chapter 4 of Graham Gee, Robert Hazell, Kate Malleson and Patrick O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP 2015) or Chapter 3 of Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, CUP 2013)

⁶⁰ Lee Marsons, 'Constitutional change in an era of incrementalism: Launching Public Law Project's UK constitutional reform tracker' (UKCLA, October 19 2021) <<https://ukconstitutionalaw.org/2021/10/19/lee-marsons-constitutional-change-in-an-era-of-incrementalism-launching-public-law-projects-uk-constitutional-reform-tracker%ef%bf%bc/>> accessed 20th October 2021

the nature and scope of constitutional change.⁶¹ The tracker will address concerns about the fact that, ‘policies which have constitutional implications are being pursued at different times by different departments in different ways to achieve different objectives.’⁶² The nature of the UK’s uncodified constitution and the nature of recent events which have placed that constitution under strain have renewed calls to understand and, in some cases, formalise certain constitutional procedures and powers.⁶³ Identifying the relative certainty of future change is only one part of the task, the other is to continually draw ‘attention to developments that may have otherwise gone unnoticed and [highlight] patterns that may otherwise have been only semi-visible’.⁶⁴ This thesis will make its contribution to the development of our understanding of one facet of this constitutional order: the understanding of judicial power within this changing constitutional picture. Not only this, it highlights the importance of situating that understanding within constitutional pasts, the present and any predicted futures.

The purpose of Hazell’s forecasting and matrix is to offer predictions as to the future of the UK constitution. Hazell’s forecasting also highlights two axes which emphasise two central features of constitutional debate: matters of centralisation or decentralisation and questions of political versus legal constitutions.⁶⁵ Both axes concern questions of power and within this, there are specific questions to be addressed concerning the role and power of the courts in any future model. This presents the somewhat central questions for public law scholarship relating to the allocation, balance and limits of all forms of public power within the political system. It engages wider questions of how such power may be legitimised, held to account or reconciled with democratic ideals. The consequence of the ambiguities and evolutions of the UK’s constitutional order is to produce a rich and dynamic body of academic scholarship in which those ambiguities and developments are analysed, discussed and debated alongside these complex questions of power. It is part of this thesis’ claims that we must examine the language we use to discuss aspects of the constitution since ‘the language used when thinking, speaking, and writing about public law not only shapes understandings of political and legal practice, but is liable to distort those understandings as well.’⁶⁶ It follows that the manner in which we describe and debate the nature of any constitutional settlement – and the many features within it - will affect the nature of the knowledge and understandings we hold. This is an emerging feature of what we might identify as British constitutionalism; the schools of thought within which questions of constitutional fundamentals are considered.

The term ‘political constitution’ was popularised by JAG Griffith in his 1979 Chorley Lecture.⁶⁷ Since then, ‘it has become commonplace to describe the British constitution’ in this way and not only this, it has provided a focus upon which public lawyers, political scientists and those with an interest in the workings of the constitution have debated the exact nature of the constitutional settlement.⁶⁸ Describing the UK constitution as a political constitution indicates a certain

⁶¹ The tracker can be accessed here: <https://ukconsttracker.github.io/uk-constitutional-tracker/>

⁶² Marsons (n 52)

⁶³ Events such as Brexit but also those relating to constitutional reform such as the changing role of the Lord Chancellor or changes to the institutional framework relating to the judiciary.

⁶⁴ Marsons (n 52)

⁶⁵ Hazell (n 38) 18

⁶⁶ Graham Gee and Grégoire Webber, ‘A Grammar of Public Law’ (2013) 14(12) German Law Journal 2137, 2138

⁶⁷ JAG Griffith, ‘The Political Constitution’ (1979) 42 MLR 1

⁶⁸ Aileen Kavanagh, ‘Recasting the Political Constitution: From Rivals to Relationships’ (2019) 30(1) KLJ 43

understanding of its order. Parliamentary sovereignty is the ‘dominant principle’ and the role of Parliament is central in, for example, the protection of rights.⁶⁹ The executive has a wide amount of discretion but it is for Parliament to provide accountability of executive power. By contrast, the role of the courts is deferential to Parliament’s authority. The ‘logic’ of this arrangement is that political problems must be resolved through political means.⁷⁰ As Griffiths stated, ‘law is not and cannot be a substitute for politics.’⁷¹ Contrast this model with that of a legal constitution in which the supremacy of Parliament is constrained and ‘relocating the final authority to interpret and enforce fundamental law in the judiciary’.⁷² Law – and the courts – provide constitutional accountability through processes such as judicial review and provide rights protection through mechanisms such as the Human Rights Act 1998. The nature of the constitutional changes seen in the UK since as far back as the 1960s with the rise of ‘the modern system of judicial review’⁷³, have led some to argue that ‘the British constitution had in effect become transformed from one based on parliamentary sovereignty to one based on a separation of powers.’⁷⁴

What is clear is that the ‘overall character of the constitution’ is the subject of much debate and the catalyst for such debate is often constitutional changes.⁷⁵ The debate – and the accounts of the constitution which result from it – is itself characterised by how academics have come to talk about the constitution. The language used to describe its character ‘as predominantly political or predominantly legal’ has not only required us to think about the constitution itself but also how we understand those terms.⁷⁶ Recent debates within UK public law theory have been ‘dominated by the discourse and competing models of political and legal constitutionalism’.⁷⁷ This is what this thesis describes as the ongoing interrelationship between the *conceptualisation* of constitutional phenomena and their constitutional *realities*: the relationship between theory and practice. This was identified by Griffith in 1979 and furthered by Gee and Webber that, at times, public law theory ‘trades instead on misleading shorthand that oversimplifies the intricate workings of the constitution’ hence the need to reflect carefully on the language being used to describe and debate the nature of constitutional orders, practices and understandings.

Not only is this attention to language and discourse necessary, but there is also a need to address the emerging rivalry between these schools of thought and an emphasis on providing normative accounts of constitutional understanding. Aileen Kavanagh argues that, ‘rather than viewing the British constitution as *either* a political *or* a legal constitution, we should instead embrace the idea of a collaborative constitution which includes and combines both political and legal

⁶⁹ Hazell (n 38) 14

⁷⁰ Ibid

⁷¹ Griffith (n 59) 16

⁷² Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (OUP 2004) as cited by Robert Hazell (ed.), *Constitutional Futures Revisited: Britain’s Constitution to 2020* (Palgrave 2008) 14

⁷³ TT Arvind, Richard Kirkham, Daithí Mac Síthigh, Lindsay Stirton (eds), *Executive Decision-Making and the Courts: Revisiting the Origins of Modern Judicial Review* (Hart Publishing 2021) 3

⁷⁴ Vernon Bogdanor, ‘Reply to McHarg and Young’ (UKCLA, 14 September 2021)

<https://ukconstitutionallaw.org/2021/09/14/vernon-bogdanor-reply-to-mcharg-and-young/> accessed 14th September 2021

⁷⁵ Aileen McHarg, ‘Reforming the United Kingdom Constitution: Law, Convention, Soft Law’ (2008) 71 MLR 853, 855

⁷⁶ Ibid

⁷⁷ Kavanagh (n 60) 44

channels of accountability in a multi-dimensional constitutional order.’⁷⁸ Doing so presents the question for public lawyers of ‘how to understand the respective roles of all three branches of government within the constitutional system, examining how they act, interact and work together.’⁷⁹ These are questions this thesis will address as part of its own analysis of judicial power.

2. The judiciary in the changing constitution

The truth is, thinking carefully about how we understand any constitution is a means to also consider how we understand the many institutions, actors, functions and powers that exist within that constitutional framework. Much has been written about the role of courts in general terms and plenty has been written about the role of courts according to certain ideological or theoretical accounts of the constitution. The purpose of this section is to situate judges and their power within the aforementioned changing constitutional picture. More specifically, this section considers the implications of constitutional change on both the judiciary as an institution as well as the power that judges have and how that power is used. This section shows how the judicial role has changed in the longer and more recent past. We may consider, in light of those changes, how our understanding of judges and their constitutional role may be impacted. This section argues that we ought to expect to have to ask different questions about the role and power of judges given these changes and possibly use ‘new’ language to describe the judicial role and power. One way to achieve this is to understand the judicial role as being *multi-dimensional*. The other purpose of this discussion is, therefore, to explain this thesis’ understanding of the notion of a multi-dimensional judicial role - and, therefore, multi-dimensional power. It may be possible to understand the power of judges more completely if we acknowledge the many varied functions of judges. Importantly, this is to identify the functions and work of judges inside *and outside* of the courtroom. This not only allows us to broaden and challenge existing perceptions of judges and the work they do, it also requires us to capture more instances of when, how and why they use their power.

2.1 Implications of constitutional change for the judiciary

Within the picture of constitutional change discussed above, a number of constitutional reforms have affected the judiciary – some directly and some indirectly. Such reform, ‘helped to create a new, more formal, inclusive and dynamic regulatory space in which policy relating to the judicial system is made.’⁸⁰ Indeed, within that picture is a further distinction between those changes which have *affected* the judiciary and those which might arguably be viewed as being *effected by* the judiciary. Firstly, the UK’s membership of the European Economic Community in 1973 resulted in changes to the judicial role. Under the European Communities Act 1972, Parliament left the courts with ‘little choice’ but to acknowledge the supremacy of EU law over domestic

⁷⁸ Ibid 45

⁷⁹ Ibid

⁸⁰ Graham Gee, ‘Judicial Policy and New Labour’s Constitutional Project’ a chapter in Michael Gordon and Adam Tucker (eds.), *The New Labour Constitution: Twenty Years On* (Bloomsbury 2022) 85

law.⁸¹ Aside from the changes affecting the operation of the law itself, there was also the creation of a supranational relationship between the UK courts and the Court of Justice of the European Union (CJEU). In addition to European developments, there has been a change in the judiciary's role when it comes to holding the government to account. The 1980s saw a significant expansion of this procedure and its 'renaissance' as a feature of the UK's constitutional arrangements beginning in the 1960s. Through deliberate decisions, the courts enlarged the grounds by which they could review executive decision-making.⁸² This change to the judicial role is an interesting example of deliberate moves to widen their role.⁸³

Related to this second change to the role of the judiciary, 2000 saw the enactment of the Human Rights Act 1998 and increased powers of review. This Act included statutory changes to the judicial role, perhaps most significantly those under sections 3 and 4. Section 3 places a duty on the courts to interpret legislation so that it is compatible with the European Convention on Human Rights in so far as it is possible to do so. If unable to do this, they have the option to issue a declaration of incompatibility under section 4. This increased ability to challenge not only the application of the law but the content of the law itself is a further example of the changed – and expanded – judicial role.⁸⁴ Not only this, the HRA provided for 'judicially enforceable remedies for violations of the rights found in the European Convention on Human Rights for the first time in domestic law'.⁸⁵ Later statutory reform came under the Constitutional Reform Act 2005 which significantly altered the institutional arrangements of the judiciary and made clearer the separation of 'those who make the law, from those who administer it'.⁸⁶ The formation of a Supreme Court, the positioning of the LCJ as head of the judiciary (and the removal of the Lord Chancellor from this role) with changes to judicial appointments and, for the first time, statutory recognition of the principle of judicial independence.

2.2 A changing and multi-dimensional judicial role

Looking more closely at the judiciary within this picture of constitutional change shows that 'there is little doubt that the role, power and self-perception of the judiciary have changed.'⁸⁷ Some of this change is facilitated through statute, some is due to the judiciary 'modestly aggrandizing their positions and styles in the 1960s and 1970s' and some of this change was the result of exogenous changes in the political system such as the 'evaporation' of consensus

⁸¹ Mark Elliot discusses how the judges have had to expand their role due to statutory changes under the ECA, even if it is not an explicit requirement of the statute: Mark Elliott, 'Judicial Power and the United Kingdom's Changing Constitution' (2017) Paper No. 49/2017 Legal Studies Research Paper Series 1, 8

⁸² Kate Malleson, *The New Judiciary: the effects of expansion and activism* (Dartmouth Publishing 1999); Carol Harlow, 'Back to basics: reinventing administrative law' (1997) PL 245, 261; Sir Stephen Sedley, 'The Long Sleep' in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009)

⁸³ See also Dean R. Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (CUP, 2018)

⁸⁴ This is the focus of the first case study in Chapter 4 but for now, see Lady Arden, 'The Changing Judicial Role: Human Rights, Community Law, and the Intention of Parliament' Chapter 8 in Mary Arden, *Human Rights and European Law: Building a New Legal Order* (OUP 2015). Here she discusses the 'dynamic' nature of the interpretive duty and how this might naturally lead to questions about whether judges have too much power.

⁸⁵ Roger Masterman, *The Separation of Powers in the Contemporary Constitution* (CUP 2011) 3

⁸⁶ Lord Phillips as cited in Roger Masterman, *The Separation of Powers in the Contemporary Constitution* (CUP 2011) 1

⁸⁷ Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (Bloomsbury 2002) 147

politics after 1979 or ‘the collapse of serious opposition in the early 1980s’.⁸⁸ Changes to the nature and balance of power within the constitution has affected the nature and scope of judicial power. But this is not to say that all traces of the historic judicial role have disappeared, rather the role has evolved to respond to change. It is for this reason that this thesis suggests that an important aspect of better understanding the nature of judicial power is to acknowledge the changing nature of the judicial role. Before considering the dimensions of this changed role, let us consider the starting point – a prototype – of courts as provided by Martin Shapiro. Shapiro’s prototype or ‘an ideal type’ is a model of adjudication which reflected normative expectations of what courts *should* do within a system of government.⁸⁹ In reality, the judicial role extends beyond this model. In this section, three dimensions to the judicial role will be considered here: the *traditional*, *regulatory* and *managerial* dimensions.

In relation to the English judiciary, Shapiro’s notion of the prototype might be best evidenced if one considers the *traditional* dimension. There are fundamental aspects of the judicial role which have remained largely unchanged despite the constitutional environment altering. For example, the requirement that courts provide expertise in the adjudication of disputes or through litigation, courts look to offer remedies dependent upon the nature of the matter involved.⁹⁰ However, it is possible to identify further, ‘new’ demands and expectations placed upon the judiciary, and upon individual judges, which fall under the broad categories of regulation and management.⁹¹ This is to acknowledge the forms of judicial decision-making and activity which extend beyond the courtroom. Shapiro himself observes the limitations of resolutely adhering to the prototype suggesting, in fact, that it is nothing more than a prototype. The reality of courts, in various legal systems, is different. One factor he notes as limiting the use of the prototype is the growth of ‘political jurisprudence’; that courts are political agencies and that judges are as a result, political actors and acknowledging more readily that judges are deciding cases with an awareness of the context of the case and their decision.⁹² By recognising that judges are a part of the ‘political apparatus of the state’ it means that we are able to identify other aspects of their power and, as this thesis will suggest, begin to think about and understand the nature of that power differently.⁹³ Herein lies the case for recognising the *regulatory* and *managerial* dimensions of the judicial role.

Traditional dimension

⁸⁸ Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (Bloomsbury 2002) 147

⁸⁹ Shapiro outlines the prototype as the courts, “involving (1) an independent judge applying (2) pre-existing legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong.” Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1986) 1

⁹⁰ With reference here to the four features of Shapiro’s prototype in the footnote above.

⁹¹ For discussion of the ‘new’ judiciary see Rosemary Hunter, ‘Judicial Diversity and the ‘New’ Judge’ a chapter in Hilary Sommerlad, Sonia Harris-Short, Steven Vaughan, Richard Young (eds.), *The Futures of Legal Education and the Legal Profession* (Bloomsbury Professional 2014) and Kate Malleon, *The New Judiciary: the effects of expansion and activism* (Dartmouth Publishing 1999)

⁹² See Lord Steyn, ‘The weakest and least dangerous department of government’ (1997) (Spr) PL 84, 85

⁹³ Martin Shapiro, ‘Political Jurisprudence’ (1963) 52(2) *Kentucky Law Journal* 294. The issue is discussed further in Graham Gee, Robert Hazell, Kate Malleon and Patrick O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (CUP 2015) 22, 29

This first dimension of the judicial role is seen when thinking about the parameters of the judicial role as being adjudicating disputes, applying the law of Parliament through the interpretation of legislation and, perhaps more broadly, decision-making. These aspects of the role remain fundamental to the judiciary's constitutional functions today and an account of the role which highlights these functions would likely be supported by judges and one which may even be welcomed by those in government.⁹⁴ Accounts of the traditional dimensions of the judicial role emphasise deference; a sense of judicial acquiescence to executive power. Such acquiescence is documented in *The Long Sleep* where Sir Stephen Sedley argues that the judicial acquiescence of the 19th and early 20th centuries was because the judiciary were less confident to use their powers to challenge the government. Subsequently, Robert Stevens talks of a 'declining judicial role'⁹⁵ from 1900 until 1960 and Anthony King of how 'the judges were dogs that seldom barked or even growled'.⁹⁶ The *traditional* dimension of the judicial role has not disappeared. Judges still explain their role as seeking to uphold the rule of law, to abide by their judicial oath and to be independent and impartial.⁹⁷ But that account of their role, and therefore the traditional dimension, would no longer satisfactorily capture all aspects of the role of judges today.⁹⁸

Even the traditional dimension itself may have seen some evolution in how we might best characterise the work of judges within it today. As Hunter argues: '[t]he judge is no longer a distanced and interchangeable decision-maker' – the role now focuses, in part, much more closely on the person who embodies it. A further development from the traditional dimension is the need for a much more purposeful approach in areas such as courtroom management or in developing relationships with those parties involved in a case. This is the same, too, for the judiciary's own relationships with other institutions: it is no longer accepted that the courts can operate in an insular manner. But even acknowledging the evolving nature of any one dimension of the judicial role, those dimensions are limited in that they cannot adequately capture the varied nature of the work of judges. For example, we might consider the requirements of the judicial role within judicial review and within the increasing body of administrative law generated by the courts. This highlights the other limitation of only understanding the judicial role in more traditional terms: it overly emphasises the work of judges – and the use of their power – *inside* the courtroom and so anything which surpasses those boundaries might be perceived as overreaching. For the senior judiciary in particular, it is clearer to see the work of judges – and requirements placed upon them - to exercise their judicial functions *outside* of the courtroom. In particular, in the context of judicial leadership functions or relating to wider questions of judicial governance.

Regulatory dimension

⁹⁴ In 1997, Lord Steyn affirmed the view of Alexander Hamilton from some 200 years previously, that the judiciary are the 'weakest and least dangerous department of government': Lord Steyn, 'The weakest and least dangerous department of government' (1997) (Spr) PL 84

⁹⁵ Stevens (n 79) 14

⁹⁶ Anthony King, *The British Constitution* (OUP 2009) 115

⁹⁷ Lady Hale, 'Moral Courage in the Law' (The Worcester Lecture, Worcester, 21 February 2019); Lord Carnwarth, 'Do judges use gavels?' The modern judge in myth and reality' (Lecture at the Judicial College, 16 January 2013)

⁹⁸ Rosemary Hunter, 'Judicial Diversity and the 'New' Judge' a chapter in Hilary Sommerlad, Sonia Harris-Short, Steven Vaughan, Richard Young (eds.), *The Futures of Legal Education and the Legal Profession* (Bloomsbury Professional 2014), 80

The *regulatory* dimension moves away from *traditional* understandings of the judicial role by recognising, in broad terms, the increasing powers of review afforded to judges.⁹⁹ Predominantly, this dimension focuses on the work of the courts exercising regulatory functions such as the powers of the courts to judicially review executive decision-making in its many forms. Due to the increase in the scope of the courts' powers of review, '[s]uccessive areas of public life have been brought within the scrutiny of the courts to the point where no field of government activity is off-limits.'¹⁰⁰ As Malleon suggests, this change in judicial power has '[redefined] the role of judges' and we have witnessed a 'judicialisation whereby the courts have edged their way into the political arena.'¹⁰¹ The debates about judicial power indicate that this may not be a unique phenomenon but rather a picture which matches a trend taking place across the common law world. Courts 'no longer occupy the limited, secondary place envisaged under the common law tradition.'¹⁰² Rather than debate this development as many have done, this thesis argues instead for recognising this as a further dimension of the changing judicial role: the increasing role of courts to exercise a regulatory function within almost all aspects of public and private life. Doing so enables a broadened lens through which to analyse the power of judges. Not only might the development of judicial review be cited as an example of this increasing role but so too can wider constitutional changes. International obligations and the interactions between domestic and international courts have changed the role of domestic courts in overseeing the application of law within this context.

The 'UK's undertakings in European law, both ECHR and EU, have developed in tandem with a novel idea of the international rule of law' which 'takes conformity by states to international legal obligations — including to the rulings of international courts — to be as much a requirement of the rule of law as conformity by the executive to the rulings of domestic courts.'¹⁰³ Not only do such changes affect the nature of jurisprudence and the nature of the courts' traditional adjudicatory function *inside* the courtroom but they change the perception of the courts' role and function *outside* the courtroom as well. In particular, those changes affect the dynamics of the relationships between the judiciary and other actors within the political branches and public administration. Stepping aside from the important questions of the limits of the role and power of judges for a moment, there is clearly a need to carefully map 'intelligent contours to the judicial function' in light of wider constitutional changes as a starting point.¹⁰⁴ Recognising that the role is multidimensional and identifying any, or all, of those dimensions as part of an analysis of the judiciary is vital to recognising the nature and scope of their power. There is a case for understanding some judicial activity in a regulatory sense since it tells us more about the space such exercises of power are occupying; it is part of the process of contextualising judges' power by thinking about what kind of power is being exercised and for what purpose. Acknowledging that judges are part of the wider constitutional regulatory framework helps us to locate examples of that role and *then* debate the appropriateness or desirability of that aspect of their power.

⁹⁹ S.A De Smith, *Judicial Review of Administrative Action* (5th edn, Sweet & Maxwell 1998) as discussed in depth by Dean R. Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (CUP 2018)

¹⁰⁰ Kate Malleon, *The New Judiciary: the effects of expansion and activism* (Dartmouth Publishing 1999), 7

¹⁰¹ *Ibid*

¹⁰² Rickard Ekins and Graham Gee, 'Putting Judicial Power in its Place' (2018) 36(2) *University of Queensland Law Journal* 375, 378

¹⁰³ *Ibid* 381

¹⁰⁴ *Ibid* 384

Managerial dimension

This thesis recognises a third dimension which identifies a further important aspect of the judicial role and judicial power: the *managerial* dimension. This dimension of the judicial role reflects two elements of the work of judges: a ‘leadership’ element and a ‘policy-influencing’ element. Within the judiciary, there has been a move towards increased corporatisation, seeking to address the ‘long-standing perception of the judiciary as a collection of individuals rather than a collective entity’ and present the judiciary and its governance in a more organised way with ‘a sense of hierarchy [and] an oversight of the administration of justice.’¹⁰⁵ Wider constitutional changes, especially those under the CRA, have seen the clearer management of judicial business in areas such as leadership, appointments and the interactions between the judiciary and HMCTS.¹⁰⁶ As a result of reforms, ‘the making, implementing and monitoring of judicial policy is a much more formal, open and collaborative enterprise, with this largely a product of the regulatory space that was carved out by New Labour’s reforms.’¹⁰⁷ Again, there is no fixed space for the managerial functions of the judicial role to occupy. It may be that this third dimension covers the governance and management of interactions and relationships between the branches of government as well as the governance of the judiciary itself; it considers aspects of the judicial role *outside* of the courtroom. However, this may also arise in aspects of judicial function *inside* the courtroom. Examples of these added demands to the role can also be seen inside such as the need to manage cases and promote settlement or support litigants in person; a clearer departure from the *traditional* dimension and even the *regulatory* dimension.¹⁰⁸

The *managerial* emphasis can also be seen in the way the judiciary itself is now managed. The introduction of, for example, Key Performance Indicators to measure desired performance show, according to Hunter, the neo-liberal and more ‘bureaucratised’ judiciary. Something which shows a certain departure from the *traditional* dimension, even if that part of the judicial role still operates beneath this. Just two examples of how the judiciary has moved from a ‘club to a profession’ and where the role of those ‘professional’ judges within the constitution has subsequently changed.¹⁰⁹ The new, professional judiciary must now engage more actively with *managerial* matters such as training, appointments, discipline and other organisational challenges.¹¹⁰ In fact, the Judicial Appointments Commission criteria makes explicit reference to ‘leadership and management skills’ as part of its list of skills and qualities required of applicants. Reviewing this leadership more closely, Hunter and Rackley have identified further elements to

¹⁰⁵ Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, CUP 2013), 65

¹⁰⁶ Noting here that the interactions between the judiciary and HMCTS pre-date the CRA

¹⁰⁷ Gee (n 72) 96

¹⁰⁸ Hunter (n 90) 83. Hunter gives the examples – while discussing the ‘new’ judiciary – of a Family Court judge who has to not only decide the case but engage with the business of managing and monitoring other actors such as case workers.

¹⁰⁹ Maleson (n 92) 163

¹¹⁰ Such as those now faced by the Lord Chief Justice. See Chapter 6 of Graham Gee, Robert Hazell, Kate Maleson and Patrick O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (CUP 2015) for an in-depth discussion of these changes.

judicial leadership: the need for administrative, social and community leadership.¹¹¹ This demonstrates extra demands, in particular on senior judges, which expect them to engage in such management: running the judiciary as a whole and maintaining relationships with other branches or bodies.¹¹² This added responsibility arises as an extra to their jurisprudential obligations – the *traditional* and even the *regulatory* dimensions of their role. A further change which has impacted on the judicial role is the changes to the systems of internal governance within the judiciary, both in terms of individual judges and collective decision-making. The Judicial Executive Board and the Judges’ Council are the main points of collective governance within the judiciary.¹¹³ The JEB comprises eleven senior judges who advise on policy decisions. The JC, which includes the members of the JEB, is a larger body which acts as a voice for the wider judiciary and provides advice to the LCJ.¹¹⁴

Despite constitutional reforms citing increased judicial independence as part of their rationale,¹¹⁵ the practical consequences have been to see a more ‘collaborative enterprise’ when it comes to judicial policy matters and the administration of justice.¹¹⁶ This has meant that judges are now involved in aspects of governance and decision-making in a way that they may not traditionally have conceived they might be. Therefore, an analysis of judicial power needs to be able to consider this changing, multidimensional role within its design for two reasons. Firstly, to merely debate the desirability of these changing functions neglects to analyse carefully the exercise of such functions and their purpose. Secondly, separating our thinking in this multidimensional manner helps us to systematise and add clarity to our understanding of the role judges have in the UK constitution today. Prior to considering the normative models of constitutional settlements or the ideological arguments for any particular conception of the judicial role within constitutional arrangements, we must identify exactly what that role is. Describing the role as multidimensional helps us achieve this and helps us to see more clearly the kinds of judicial power we may wish to analyse and debate in the future.

¹¹¹ Rosemary Hunter and Erika Rackley, ‘Judicial Leadership on the UK Supreme Court’ (2018) 38 *Legal Studies* 191, 194. Social leadership is, they suggest, something that acknowledges the role of individual personalities in how judges may lead other judges. Community leadership is how, as part of their leadership, a judge engages with others outside of the judicial community such as the general public or academia.

¹¹² *Ibid* 192. See also the Ministry of Justice, *Modernising Judicial Terms and Conditions: Consultation on proposals to introduce a new tenure for fee paid office holders, provide for fixed term leadership positions, and modernise judicial terms and conditions* (Ministry of Justice, 15 September 2016) <https://consult.justice.gov.uk/digital-communications/modernising-judicial-terms-and-conditions/supporting_documents/consultationdocument.pdf> accessed 3 December 2021

¹¹³ Under the CRA 2005, all powers were vested in the LCJ as head of the judiciary. In addition to this, there is the Senior Presiding Judge acting as the LCJ’s ‘chief of staff’ and since the enactment of the Tribunals, Courts and Enforcement Act 2007, the Senior President of Tribunals. For detailed discussion of these roles, see Graham Gee, Robert Hazell, Kate Malleon and Patrick O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (CUP 2015) 138, 141

¹¹⁴ The membership of these bodies can be found on the judiciary’s website. The interaction between the LCJ and these bodies is considered in detail in Chapter 5.

¹¹⁵ The creation of the UK Supreme Court, the changes to the office of Lord Chancellor or the creation of the Judicial Appointments Commission as examples.

¹¹⁶ Graham Gee, ‘Judicial Policy in England and Wales: a new regulatory space’, Chapter 7 of Richard Devlin and Adam Dodek (eds.), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar 2016) 145, 162

3. Debating judicial power

This final section draws together the discussion of a changing constitution and a changing judicial role to consider the contemporary debates about judicial power in the UK. It is the claim of this thesis that the discourse within these debates risks being unduly limited by a lack of emphasis on how we understand the concept of power more broadly. The other aspect of these debates is the emphasis on normative beliefs as to the appropriate limits of judicial power. The reason why these features may present some risks, it is argued here, is due to an over-reliance on a ‘language of judicial power’ which has come to characterise the debates and in turn, characterise how we think about episodes of judicial power. It should be said, this thesis does not suggest that such debates should not take place. They undoubtedly provide valuable scholarship which addresses fundamental constitutional questions the transfer of power to an ‘unelected judiciary’ or whether, for example, we see the emergence of a ‘juristocracy’ where a democratic system ‘can be crushed by unelected judges under cover of ostensible principles like ‘the rule of law’ and ‘the protection of human rights’’.¹¹⁷ But care needs to be taken within these debates to ensure that while answering these questions and discussing the nature of judicial power, sufficient attention is given to the nuanced and complex realities of the phenomenon.

3.1 The ‘language of judicial power’

One only need consider the discussions surrounding the expansion of judicial review and the renaissance of administrative law in the UK to see the emergence of a language of judicial power. Through the middle part of the twentieth century, against a backdrop of concern over the growing powers of the state, there were moves towards increasing the legal controls on that power.¹¹⁸ Courts waking from their ‘long sleep’¹¹⁹ is often cited as evidence of the ‘changing constitutional role of the judiciary’.¹²⁰ This change was taking place with an agenda based on an increased demand to question the legality of government action.¹²¹ The increase in *regulatory* activity occurred within the ‘formative period of the 1960s’ through judicial decisions such as *Ridge v Baldwin*¹²², *Anisminic*¹²³ and *Padfield*¹²⁴ where the courts demonstrated how ‘judges could take on a broader role in policing executive decision-making’.¹²⁵ It is seen how these decisions were moving the scope of administrative law beyond its earlier position and in turn, it was moving the scope of the judicial role and its power further too. More recent increases in

¹¹⁷ KD Ewing, ‘The Bill of Rights Debate: Democracy or Juristocracy in Britain?’ in Keith D Ewing, Conor A Gearty and Bob A Hepple (eds), *Human Rights and Labour Law. Essays for Paul O’Higgins* (Mansell 1994) 147, 148 as cited in Conor Gearty, ‘Courting trouble. The role of the courts in contemporary democracy’ in Alan Bogg, Jacob Rowbottom and Alison L. Young, (eds.) *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Hart Publishing 2020), 1

¹¹⁸ David Judge, *The Politics of Parliamentary Reform* (Heinemann Educational 1983) or C.K. Allen, *Law and Orders* (3rd edn, Stevens 1965). See Carol Harlow, ‘Back to basics: reinventing administrative law’ (1997) PL 245, 261 where she discusses the development of administrative law in more detail.

¹¹⁹ Sir Stephen Sedley, ‘The Long Sleep’ a chapter in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009)

¹²⁰ Elliott (n 73) 4

¹²¹ A matter considered by the UKSC in *R (Unison) v Lord Chancellor* [2017] UKSC 51

¹²² [1964] AC 40

¹²³ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147

¹²⁴ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

¹²⁵ Arvind, Kirkham, Síthigh, Stirton (n 65) 5

judicial ‘activism’ in the UK mirror changes in the common law world more generally, where judiciaries have appeared more involved and proactive.¹²⁶ This is explained by the removal of judicial restraint which previously limited the role and power of judges. Alongside an aspect of self-restraint were the accepted principles of democratic government on which the courts operate: the rule of law, the sovereignty of Parliament and the separation of powers. Elliot describes these as part of the ‘traditional parameters’ of judicial power. These parameters are: the subservience to Parliament’s authority, the appeal-review distinction and the basis for action in that context and finally, questions of justiciability.¹²⁷

These wider changes are themselves of great importance to understanding judicial power but what is significant is considering the significance of how we describe that power and how such descriptions affect our understanding: the way we conceptualise judicial power. The further risk with such language and the ready adoption of it within debates is that it starts to frame our knowledge of the nature of that power and we may, as mentioned earlier in this chapter, miss the realities of that power and its use. Not only this, it may deter such debates from qualifying or ensuring the accuracy of such language. One account of a ‘growth’ in judicial power could also acknowledge how the judicial role and its perceived power has ebbed and flowed for a very long time; judges and Parliament once fought to settle the balance of power in favour of both the rule of law and the sovereignty of Parliament.¹²⁸ This required judges to show real ‘courage in standing up to the government’; what might now be termed ‘activism’.¹²⁹ But this is challenging due to the availability of different interpretations of such phenomena. What has resulted in contemporary debates, perhaps to manage this challenge, are a series of narratives. These cognitive tools have supported our understanding of the complexities of judicial power. It is the aim of this thesis to explore the accuracy of these narratives and their effect on how we understand the nature of UK judicial power; the question of how language and discourse has impacted – and at times, limited – our understanding. Within debates, we can see the emphasis on certain features of judicial power through the use of these narratives and as a result, the discourse has come to understand judicial power in this manner. The potential problem with this is that such narratives are drawing our attention to certain features of judicial power and presenting those features as a complete picture of judicial power.

Firstly, this thesis argues that a *dominant narrative* underpinning contemporary debates is that judicial power is on the rise. Recent literature supports the adherence to this characterisation: Mark Elliott documents ‘the many senses in which the exercise of judicial power has *grown*’¹³⁰; Richard Ekins and Graham Gee refer to ‘the *rise* of judicial power’¹³¹; Paul Craig admits how ‘judicial power has doubtless *increased*’. Less recently, Anthony King notes the increase in the judicial role describing how judges, ‘...had greatly *enlarged* the diameter of the sphere within

¹²⁶ See Kate Malleon, *The New Judiciary: the effects of expansion and activism* (Dartmouth Publishing, Aldershot 1999) Chapter 2 and Rickard Ekins and Graham Gee, ‘Putting Judicial Power in its Place’ (2018) 36(2) *University of Queensland Law Journal* 375, 398

¹²⁷ Mark Elliott, ‘Judicial Power and the United Kingdom’s Changing Constitution’ (2017) Paper No. 49/2017 *Legal Studies Research Paper Series* 1, 2

¹²⁸ Lady Hale, ‘Moral Courage in the Law’ (The Worcester Lecture, Worcester, 21 February 2019) 5

¹²⁹ *Ibid*

¹³⁰ Elliott (n 73)

¹³¹ Ekins and Gee (n 94) 398

which they worked'¹³²; Vernon Bogdanor previously stated how judges have, '...shown that they are prepared to adopt an *activist* stance', something which, '...implies a real discontinuity with the past.'¹³³ But we should not presuppose that such change is undesirable since there are some lawyers who are more comfortable with the idea of judges having even more power, making greater use of the law and the courts as a route through which to promote various positive rights. While this thesis does not query the fundamental basis for this narrative, it does argue that to only consider judicial power in this way would be to omit from our understanding the possibility that judicial power is patterned; it ebbs and flows.

The following chapters of this thesis make the case for this and test this idea, however the purpose of this observation is to initially challenge our thinking and ask: while there may be an over-arching growth in the role and power of judges in the UK, do all episodes of judicial power reinforce this idea? Is it the case that at times, courts or judges may appear more robust in their activity while at other times, one may observe increased levels of deference to the executive or Parliament? The argument is that the picture may well be more complex and nuanced.¹³⁴ A more recent example might be where we see the combination of focusing on single judicial decisions alongside this narrative, namely in relation to the so-called 'Brexit cases'. While these decisions are undoubtedly notable and undoubtedly high-profile there is a question to ask about the extent to which they represent changes in judicial power and to what extent those changes are unexpected or part of a wider trend of change in the role or power of judges. It is true that there are many questions of *power* to be drawn out of these decisions but if we are really wanting to understand the nature of that power then those decisions need greater contextualisation. A contextualisation which might offer more detailed answers to questions such as the role of judges within the political constitution or the role and powers of other constitutional actors in those circumstances. Such contextualisation is a means of emphasising what this thesis views as the need to undertake adequate reflection on the relativity of such decisions and alongside this, adequate reflection on the claims made about the nature of judicial power in their shadows.

Secondly, there are three further narratives this thesis considers significant to how contemporary debates may portray the realities of judicial power. The *novelty* narrative recognises the emphasis on the rise of judicial power and the changed role of judges being a relatively new constitutional phenomenon. This thesis utilises this idea of novelty to challenge instances where more recent constitutional history is cited within debates. For example, changes under the HRA or the CRA are of course crucial to the realities of judicial power today but in understanding the current nature and scope of judicial power it is important to look at its history. Not only does this enrich our understanding but it can also help us to more accurately observe changing patterns within the

¹³² Anthony King, *The British Constitution* (OUP 2009) 121

¹³³ Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009) 275

¹³⁴ A detailed consideration of one such example of this ebbing and flowing can be found in Sarah Nason, 'Plus ça Change? An Empirical Analysis of Judicial Review in Modern Administrative Law' a chapter in TT Arvind, Richard Kirkham, Daithí Mac Síthigh, Lindsay Stirton (eds) *Executive Decision-Making and the Courts: Revisiting the Origins of Modern Judicial Review* (Hart Publishing 2021). In this chapter, Nason explores the overarching narrative given about the 'rise in judicial review' but challenges our understanding – and use – of that notion. For example, she considers factors such as how it is difficult to quantify a 'growth' without a clear starting point for comparison in terms of statistics on applications, the comparison between the expansion of the grounds of review and the impact on case loads and individual remedies. There are challenges to a dominant narrative, Nason suggests, when the realities of practice are considered in detail.

power and its use over time. One aspect within contemporary debates has been to emphasise the temporaneous nature of judicial power. In this sense, the concern about changes to judicial power at specific moments in time or in response to specific events – such as constitutional reform. While these moments in time are important parts of our understanding, there is more to be understood about judicial power in some instances from adopting a different lens through which to contextualise those moments. For example, at the time surrounding the enactment of the HRA there was notable uncertainty about what the Act would mean for the constitution or the respective roles of constitutional actors, in particular the judiciary. Following the Act coming into force, there has been interest in judicial decision-making under the Act and how judges have used those ‘new’ powers. Yet, as this thesis will investigate, there may be a richer, more nuanced account of judicial power which is possible by looking back before the Act’s appearance at how judges exercised power in relation to human rights matters. It is important to ask how fundamental any change has been, how often judges have exercised this kind of power and in what forms (for example, using the HRA or using the common law) as well as investigating the ways in which judges themselves have interpreted and shaped their power in this context. These questions may be prompted, in part, by assessing claims made relating to the *novelty* of this site of judicial power.

The *decisional* narrative is a means to firstly highlight that many accounts of judicial power may emphasise judicial decision-making as a site of power and in particular, judicial decision-making inside the courtroom. This aligns with notions of the *traditional* dimension of the judicial role but proves problematic if considering other aspects of judicial decision-making especially those which occur within other dimensions of the role outside of the courtroom. As Finnis notes, this emphasis on courtroom decision-making is unsurprising given judges tend to describe their role as enforcing the rule of law as opposed to one of governance or wider politics.¹³⁵ Here then, the role of the decisional narrative is to challenge how we locate judicial power in terms of decision-making and encourage a much broader analysis of where and why such decision-making may exist. This narrative indicates a feature of the problem this thesis is investigating and that is to say that while there is a lot of power in a judicial decision taken inside the courtroom – from the longevity or effects of a particular interpretation of the law, argument or precedent – there are many other areas of judicial decision-making which are examples of judicial power. As this thesis has already mentioned, judges exercise power in lots of different ways.

Even within the courtroom, we might better understand and reflect the contexts in which such decisions are reached or the many reasons why decisions – exercises of judicial power – are needed. A decision which is isolated to a single criminal offence or test within the criminal law is powerful if offered, say, by the higher courts. That decision is different, however, from one which perhaps entails questions of the regulation of executive power or the incorporation of wider policy matters such as human rights within its nature. Further to this, there is an argument to make that judges exercise power in many other locations outside of the courtroom context. This might relate to questions of the management and governance of the judiciary as an institution and be identified as judicial leadership decision-making. These decisions may occur in other settings too, such as where judges give speeches and the decisions relating to the content

¹³⁵ John Finnis, ‘Judicial Power: Past, Present and Future’ (Policy Exchange, 2 February 2018) <<http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future-2/>> accessed 3rd September 2018

and tone of those speeches and their effects on matters such as public opinion, promoting interests or agendas in some way or by reinforcing existing, related decisions elsewhere. Not only are there many locations and types of decisions to consider, there is the ongoing question of whether those decisions are overly ‘singled-out’. Of course they may be used as a way of supporting a wider claim about the nature or changes to judicial power but we must also look at a single decision relative to their context and other, related decisions too.

The final narrative to consider is termed the *cautionary* narrative. This reflects the tone of some contributions to the judicial power debates and the unease as to the direction of travel of the changing judicial role. Concerns as to the nature of judicial power or its potential if left unchecked to ‘threaten democracy’ cannot be taken lightly.¹³⁶ For some, the rise of judicial power does not align with the common law constitutional tradition and should be discouraged.¹³⁷ Some of this concern arises out of the inherently political nature of power itself. Indeed, the suggestion of judges being involved with politics does not automatically sit well with perceptions of a more traditional judicial role.¹³⁸ But this thesis will make the case that we can find a way to incorporate and recognise the political features of power – and of judicial power – in a manner that does not exclude the traditional understandings of the limits of that power. One particular area of interest, therefore, is to try and better understand why it is that some exercises or forms of judicial power attract greater concern than others. Part of this may well be due to how the role of judges is perceived and against which ideological understanding of the UK constitution it is compared. This would indicate where there is a conflict in accounts of judicial power between what judges *should* be doing and what judges *are* doing.

Highlighting the concerns and caution surrounding the nature and scope of judicial power is not simply a means of pinpointing differences of opinion and differing levels of acceptance of the use of judicial power but rather to enquire further why those differences exist and how they are rationalised. Much can be learned from the reasons why a particular kind of judicial power (such as power exercised through judicial review) or a particular exercise of judicial power (such as the issuing of a declaration of incompatibility) creates unease. Those arguments may then provide a starting point to analyse the extent to which they are borne out through analysis i.e. whether the realities of how that power is used across a timeframe fit with a picture of that power painted by the single decision. Or, for example, whether that form of judicial power is concerning because it appears less accountable or justified and again, to what extent an analysis might support that understanding. A further aspect to this is that through the increased analysis facilitated by this thesis’ analytical approach, it is hoped that more can be known and understood about the realities of judicial power and as a result, provide increased clarity and certainty as to its use.

3.2 The challenges of debating power: politics

¹³⁶ Elliott (n 73)

¹³⁷ Ekins and Gee (n 94). See also John Finnis, ‘Judicial Power: Past, Present and Future’ (Policy Exchange, 2 February 2018) <<http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future-2/>> accessed 3rd September 2018

¹³⁸ See Grégoire Webber, ‘Judicial Power and Judicial Responsibility’ (2018) 236(2) University of Queensland Law Journal 205, 219 for a discussion of the judicial role and considerations relating to institutional design.

As the previous section alluded to, the focus and emphasis within contemporary debates on certain features of judicial power has the potential to provide an incomplete picture of the nature of judicial power. The dominant narratives outlined above suggest that judicial power is: a) on the rise, b) a relatively new phenomenon, c) found in judicial decision-making and, d) a phenomenon we ought to observe with caution but there are other questions we might ask about the phenomenon. We can ask questions as to the nature of the ‘rise’ – asking whether it is constant or might we see peaks and troughs in its use to suggest it is more accurate to think about changing patterns of judicial power. Alongside this, we might ask why such trends occur. We can query the extent to which we can and should focus on recent changes as part of how we think about judicial power – to ask which aspects of constitutional history remain important to understanding the nature of judicial power today. We must now locate judicial decision-making within the multi-dimensional judicial role and ask where else do judges engage in decision-making. This begs the question whether we adequately consider decision-making in the context of leadership or governance to offer a more complete picture of the realities of the power and its use. And finally, we might ask whether the caution and concern over the changing nature of judicial power is justified or borne out in practice. This thesis will explore such questions through its own analysis and through the adoption of a different approach to thinking about and analysing judicial power.

The other challenging aspect of debating judicial power – and power more generally – is the problem of politics and politicisation. This thesis is making the case to ‘think politically’ about judicial power and in the Introduction, the many potential senses in which we might use the term ‘politics’ were identified. To describe judicial power as political requires us to identify what kind of politics we mean and the reality is that judicial power and the debates about it are surrounded by several different kinds of politics. In one sense, judicial power is political because it has been the *focus of politics* and been *politicised*. This is seen perhaps most clearly in the public reaction and responses to the UK Supreme Court cases of *Miller*¹³⁹ and *Miller/Cherry*.¹⁴⁰ In another sense, judicial power is political because it has been *settled by politics* – the desirable meaning, content and limits of judicial power within the constitution are described, negotiated and determined within the judicial power debates. This aspect of constitutional scholarship may be best located within the ‘energetic’ claims and contributions made by political and legal constitutionalists.¹⁴¹ As Tomkins observes, the result of this aspect of the politics of judicial power has been ‘a considerable literature where political constitutionalists criticize courts and where legal constitutionalists criticize Parliament’.¹⁴² He suggested that what was missing was an offer by political constitutionalists of ‘what courts *should* do’ or by legal constitutionalists of what ‘courts should *not* do, constitutionally.’¹⁴³ It may be said that today, those debates have responded to Tomkins’ call to action. There is a wealth of normative accounts of judicial power provided in recent years which have given further energy to constitutional scholarship.

¹³⁹ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

¹⁴⁰ *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41. For wider discussion, see Joshua Rozenberg, *Enemies of the People: how judges shape society* (Bristol University Press 2020)

¹⁴¹ Adam Tomkins, ‘The Role of the Courts in the Political Constitution’ (2010) 60(1) *University of Toronto Law Journal* 1, 2

¹⁴² Adam Tomkins, ‘The Role of the Courts in the Political Constitution’ (2010) 60(1) *University of Toronto Law Journal* 1, 3

¹⁴³ Adam Tomkins, ‘The Role of the Courts in the Political Constitution’ (2010) 60(1) *University of Toronto Law Journal* 1, 3

However, this thesis suggests that to only consider judicial power as political in these senses of the word omits two further important ways of thinking politically about the power of judges which could extend and energise the debates still further. Firstly, to understand that judicial power is political because we can think about it in terms of *power relations and power relationships*. This conception of judicial power requires us to look more closely at that power in terms of interactions, actors and the different forms power relations may take – expanding our thinking. Secondly, to understand judicial power is political because we are considering questions of *power*. This last sense requires us, as mentioned before, to re-centre our focus on how we understand the power in judicial power. It moves the emphasis of the debates into a more descriptive and analytical approach and away, for a moment, from the normative ideals presented previously. It incorporates the ideas contained within political jurisprudence as a way of placing judges and their power within the wider political system. Something this thesis argues is vital to better understanding the realities of judicial power in today’s constitution. Not only does this approach extend the debates but it provides insight and experience from political scientists in how best to analyse power. Goldoni and McCorkindale reflect on what they term ‘the reflexive wave’ of political constitutionalism and how emerging scholarship is, ‘much less concerned by the rise of judicial power and juristocracy and instead is more focused on analysing the circumstances which make possible the emergence, the development and the preservation of a political constitution’.¹⁴⁴

This third wave is, ‘more prone to look beyond formal institutional arrangements and to inquire into political practices, governing arrangements and customs and constitute an exercise in understanding’.¹⁴⁵ The focus of this scholarship is on ‘contexts and conditions’ of the constitution and thinking carefully about what is ‘political’.¹⁴⁶ Martin Loughlin explores the ‘added value’ of political jurisprudence as being a better understanding of public law. By approaching traditional questions of public law from this perspective, ‘we become more skilled at extending the language’.¹⁴⁷ In this thesis, by extending our understanding of the politics surrounding judicial power we are able to open up an entirely different aspect of the debates and bring in a range of existing insight to ask different questions of what we currently understand. Analysing judicial power in this way permits the exploration of different understandings; it purposefully avoids making its own normative suggestions. The aim is that *following* an analysis generated through this approach, it would *then* be possible to reflect upon existing debates and claims as to the appropriate limits of judicial power in the constitution. We must look carefully at the conceptual foundations of judicial power as an initial stage in the debates. This thesis’ design deliberately recognises the contestability of the phenomenon of judicial power: to acknowledge that the phrase ‘judicial power’ is an evocative one whose beauty – or danger – is to a large extent in the eye of the beholder.’¹⁴⁸ This is not to shy away from debating judicial power but as

¹⁴⁴ Marco Goldoni and Chris McCorkindale, ‘Three Waves of Political Constitutionalism’ (2019) 30(1) KLJ 74, 82

¹⁴⁵ Ibid 83

¹⁴⁶ Ibid

¹⁴⁷ Martin Loughlin, *Foundations of Public Law* (OUP 2010), 179 as cited by and Marco Goldoni, ‘The Materiality of Political Jurisprudence’ (2016) 16 *Jus Politicum* 51, 59

¹⁴⁸ Elliot (n 73)

Paul Craig suggests, while all forms of power must be subjected to critical scrutiny, that scrutiny must be ‘objective, balanced and measured’.¹⁴⁹

4. A need to re-centre contemporary debates: putting the ‘power’ back into judicial power

This thesis will argue that it is possible, and beneficial, to understand judicial power differently and it will provide the means for doing so. It will be argued that we can conceive judicial power in terms of *changing patterns* which more accurately reflects the ebbing and flowing and changes in judicial power and its use. It will be argued that we need to think about judicial power both inside *and* outside of the courtroom to adequately reflect – and analyse – the multi-dimensional nature and power of the changing judicial role in the constitution. Perhaps most importantly, this thesis will argue that in order to achieve this more comprehensive and sophisticated understanding of judicial power we can think about judicial power as a form of political power and adopt the tools of political science for achieving this different approach. This chapter has shown the many dynamics to the UK’s changing constitution and considered the different forms such change may take. Of course, the extensive constitutional reform agenda of Tony Blair’s New Labour government is a site of great attention but there is a further need to reflect upon how such changes have been implemented subsequently. Not only this, we are at a stage where we can reflect upon their effect and their interpretation by ministers, judges, practitioners and scholars alike.

The main argument relating to this picture of constitutional change is that while it is well-documented by commentators and academics, it shows us that the nature of that change is patterned. It has required careful reflection and interrogation alongside its implications for how we might then understand the nature of the constitution as a result. The further consequence of this picture of constitutional change is how it has affected the judiciary. This chapter has begun to make its case for conceiving of a changed judicial role, one which is multi-dimensional in nature. It is hoped that recognising the different dimensions of the judicial role in today’s constitution we are able to see more clearly the many different functions judges carry out. Not only this, thinking about the judicial role in this manner highlights that any account of judicial power will similarly need to reflect such dimensions. If one were to summarise this aspect of the thesis, it would be the desire to extend current debates about judicial power to ensure they adequately consider the range and variety of aspects to judicial power. In particular, to recognise that (some) judges exercise their power both inside *and* outside of the courtroom. The senior judiciary in particular carry out functions and hold responsibilities far beyond their adjudicatory function. The giving of speeches, the chairing of public inquiries, the leadership of judges and responsibilities for training or discipline or the relationship between judges and ministers are all hugely significant aspects of judicial power which risk being omitted from debates or only referenced in passing.

¹⁴⁹ Paul Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) University of Queensland Law Journal, 355. Craig highlights the need to objectively assess the nature and extent of judicial power, perhaps before considering its expansion to amount to a legitimacy crisis.

Alongside the need to adequately reflect the effects of wider constitutional change on how we perceive the constitutional role of judges today, is the need to ensure that how we conceptualise judicial power is similarly interrogated. As this chapter has suggested, contemporary debates have offered a rich and energetic range of accounts of judicial power in the UK. There is now a strong sense of how, for example, political or legal constitutionalists may understand the role of judges in the constitution. However, it is suggested here that there has been less consideration within those debates about the ‘power’ within ‘judicial power’ and that this has led to an imbalance in how we might subsequently understand the role and power of judges. This thesis is making its case to remove the sense of ‘rivalry’ or ‘battle’ within constitutional scholarship when it comes to debating judicial power and instead to explore the benefits of adopting a more ‘political’ approach. Thinking politically about questions of judicial power can be enabled through ideas of political jurisprudence as well as political science more generally. This is not to place this thesis at odds with more traditional public law scholarship but rather to extend it. It is the aim of this thesis to ask different questions about judicial power, to assess the accuracy of existing understanding and to challenge to emphasise within contemporary debates as evidenced through the language of judicial power discussed in this chapter.

The next chapter will take us into the field of political science and continue to explore what it means to ‘think politically’ about power. The chapter will analyse the many contributions to the power debates and identify how such contributions may be useful in developing this thesis’ approach to the analysis of judicial power. Chapter 2 will make clear why ‘power’ is such a complex, contestable and context-dependent phenomenon and identify the particular conceptual and analytical challenges which lie ahead for this thesis’ own analysis. The main contribution of this thesis is to draw upon political science as a means to better understand judicial power; to understand more about power itself. Chapter 2 provides the academic basis for Chapter 3 to present its ‘different approach’ to the study of judicial power in the UK. Throughout the thesis, the question of how to more systematically analyse judicial power will be reflected upon. The achievement of a clearer, more systematic understanding of what we mean by ‘judicial power’ will provide us with a much stronger sense – and evidence through analysis of – the nature, scope and use of that power in the UK.

Chapter 2

The Concept of Power

This chapter takes this thesis into the realm of politics, power and political science. Part of the rationale for this is to further explore what this thesis understands by the notion of ‘thinking politically’ about judicial power. Political scientists have long debated the phenomenon of power and it is through those debates that we can learn more about the concept and its use: how we may understand it and how we might study it. Drawing on the political science literature, this chapter explains what it describes as the problematic nature of power. It considers the way others have approached the conceptual and analytical challenges power poses, elucidating more fully what those challenges are and why they exist. Chapter 1 has made its case for a different approach to thinking about and understanding judicial power in the UK and demonstrated the need for this different approach in light of changing constitutional contexts. Alongside this, Chapter 1 explored the potential of political jurisprudence to better recognise the complex interaction between law and politics within the field of public law.¹⁵⁰ This chapter builds on this idea by exploring how the insights and experience of political science may aid public lawyers in the development of a different approach to thinking about questions of judicial power.

Clarissa Heyward and Steven Lukes illustrate the character of the debates about power – of which debates about judicial power are one extension –, where they note:

“When we debate about power... we do so not only and not principally because we are concerned about how accurately to define a concept, but also, and importantly, because we are concerned to criticize particular relations of power and to identify and evaluate alternatives. The power debate, after all, is a debate driven by a commitment to human freedom and political equality: to the idea that people should have a hand, and that they should have a roughly equal hand, in helping shape the terms that govern their existence.”¹⁵¹

This indicates the importance of debates striving to develop accurate understandings of the nature of power out of the contestable nature of the phenomenon. This importance arises due to the subsequent negotiations in understanding and practice relating to that power and its use in context. It is within these debates that we are asked to think about how we understand the language we use to describe power relations, the meaning given to certain labels of power or the wider questions of how we think about power within the context of accommodating disagreement within a governing system. The many facets to the power debates will be examined in this chapter with the hope of illuminating both the fascinating and challenging nature of the phenomenon of power.

It is the aim of this chapter to firstly show why it is that this thesis has described judicial power as complex, changeable and context-dependent. It does so by exploring the complexities and

¹⁵⁰ Marco Goldoni, ‘The Materiality of Political Jurisprudence’ (2016) 16 *Jus Politicum* 51, 53

¹⁵¹ Clarissa Heyward and Steven Lukes, ‘Nobody to shoot? Power, structure, and agency: A dialogue’ (2008) 1 *Journal of Power* 5, 9

challenges of the phenomenon indicated by the extensive literature within the field of political science and other related schools of thought. Alongside this, this chapter considers the ‘essential contestability’ of questions of power and of related concepts such as legitimacy or the ‘normative implications of using the term power’.¹⁵² Secondly, this chapter considers the lessons which may be learned from the ‘power-with-a-face’ debates which began in the 1960s and 70s.¹⁵³

Describing power as containing faces offers a rich source of different questions to ask about power. These faces have helped us to frame power relations in terms of observable, concrete decision-making (first face), decisions accompanied by agenda-setting and the use of nondecisions (second face) and introducing power in the form of unobservable influence (third face). Each contribution to these debates is an opportunity to reflect upon how we think about – and how we study – power and this chapter’s final substantive section draws out the important commonalities within those debates to incorporate into this thesis’ own approach to the analysis of judicial power: the analytical themes.

This chapter provides the foundation for the discussion in Chapter 3 where the implications and benefits of bringing together political science and public law are presented. This chapter makes its contribution due to the fact that public law literature has largely ignored the political science literature on power. Where this literature does arise, political science insights tend to be referred to fleetingly and as a result, debates about judicial power have not sought to draw on the many rich and complex insights about the notion of power found within political science literature.¹⁵⁴ Therefore, this chapter remedies this perceived limitation by offering a sustained discussion of, and engagement with, the political science literature on power. Chapter 3 will introduce the design of the analytical framework which incorporates these combined insights and demands of political science and public law in its own approach to analysing judicial power; a specific response to the debates and analysis explored in this chapter.

1. Outlining the conceptual challenges of power

So much has been written on the topic of power it is difficult to know where to begin in offering a summary of the complexities and problems of the phenomenon. Arguably, the problem is one already set out by this thesis: the relationship between the understandings we have of phenomena and the words we use to describe them. It is true that, ‘[i]n constructing, representing and making sense of a concept like power we can never be free from the matter of words.’¹⁵⁵ Alongside this is the inescapable fact that there is ‘no such thing as a single all-embracing concept of power *per se*’ and as such, we are faced with a range of different accounts all with the potential to be accurate and informative in their own right, at least as a matter of degree.¹⁵⁶ This section seeks to demonstrate three important points. First, how and why power is an ambiguous (but not vague)

¹⁵² Keith Dowding, ‘Why should we care about the definition of power?’ (2012) 5(1) *Journal of Political Power* 119, 132

¹⁵³ Clarissa Rile Heyward, ‘De-Facing Power’ (1998) 31(1) *Polity* 1, 9

¹⁵⁴ For example, see Alan Paterson, ‘Power and Judicial Appointment: Squaring the Impossible Circle’ or Graham Gee, ‘Judging the JAC: How Much Judicial Influence Over Judicial Appointments Is Too Much?’ in Graham Gee and Erika Rackley (eds.), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2019)

¹⁵⁵ Stewart R. Clegg, *Frameworks of Power* (Sage 1989), 21

¹⁵⁶ *Ibid* xv

notion. Second, that these ambiguities lead to power becoming an essentially contested concept. Third, due to the ambiguous and contestable nature of power, it is important to be aware of how we talk about power.

1.1 Difficulties in definition

As mentioned above, political science demonstrates the ambiguous nature of power. One challenging aspect of power is that it can have many ‘similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.’¹⁵⁷ This is explained by Wittgenstein by describing power as ‘family resemblance concept’¹⁵⁸ or by Clegg as ‘a set of family relationships between some closely related but nevertheless different concepts.’¹⁵⁹ This means that while many episodes, actions or phenomena may be identified as ‘power’ – the family resemblance – they can, in reality, be quite different in nature. It is for this reason that a single, universal definition of power is unlikely to be achievable, certainly not one which reflects the complexities of power. It is also what makes power an ambiguous concept and so any concrete definition will either not be capable of responding to the variety of potential interpretations and meanings given to power or become so multi-layered in its own right such as to lose its potential benefit as an aid to understanding.

Dowding explains this problem by identifying how providing any that any, ‘definition (the intension of the concept) does not seem to describe every item in the extension.’¹⁶⁰ Dowding suggests that we can explain ‘power’ – it can be defined – but that any definition may not cover everything we could define as power. It is this which, Dowding argues, makes power ‘ambiguous, not vague’.¹⁶¹ A vague concept would be one without any clarity. However, power is capable of definition (and therefore, not vague) but any definition may not ‘precisely specify its extension’: hence, its ambiguity.¹⁶² By this reasoning, then, we may use the phrase ‘judicial power’ as a general term to refer to the power of judges, but we will likely need to consider a variety of ‘extensions’ of that power if we are to understand it. For example, the extension of judicial power inside the courtroom, judicial power in respect of judicial leadership, judicial power in Case A vs Case B and so on. Herein lies the complexity of power as a concept.

1.2 The essential contestability of power

Beyond the challenges of recognising and incorporating such ambiguities into our understanding of judicial power, there is a need to recognise and manage within an analysis the essential contestability of the concept. Political scientists remain divided as to the meaning of power but according to Hay, this is ‘perhaps testament to the centrality of the concept to political

¹⁵⁷ Ludwig Wittgenstein, *Philosophical Investigations* (2nd edn, Basil Blackwell 1958) 32

¹⁵⁸ *Ibid*

¹⁵⁹ Clegg (n 147) xv

¹⁶⁰ Keith Dowding, ‘Power: ambiguous not vague’ (2021) 14(1) *Journal of Political Power* 11, 12

¹⁶¹ *Ibid* 26

¹⁶² *Ibid* 15

analysis.¹⁶³ The relationship between power and politics leads to the ‘essential contestability’ of the concept – in particular the debates about the meaning of ‘power’ itself.¹⁶⁴ The *meaning* we give to a concept – such as the meaning we give to the phrase ‘judicial power’ - is subject to its own interpretation and understanding and it is expected that the phrase is used to refer to all manner of different things; different episodes of power and different contexts to its use. However, it is not always the case that notions and ideas have particular conceptual boundaries through which to secure that meaning. That is to say, there is no clear ‘assumption of agreement’ or ‘common sense’ view about the idea.¹⁶⁵ In terms of power, there may well be a broad understanding but this will likely relate to the ‘family resemblance’ degree of understanding. When it comes to understanding the detailed nuances and realities of any form of power, such meaning falls short of helping us to really understand the ‘more complicated and elusive character’ of the phenomenon.¹⁶⁶

The ongoing negotiation of power has resulted in extensive literature on ‘power’ because of the search for meaning, through definition or analysis, and the search for some sort of agreed understanding of what power is. Haugaard refers to the many accounts of power – the outcome of the many ‘language games’ - as a series of ‘ideal type classifications’.¹⁶⁷ He suggests that accounts of power can be classified as either: analytical political theory, nonanalytical political theory, modern social theory or postmodern social theory.¹⁶⁸ The analytical philosophy argues that the best way to understanding phenomena such as power is to clarify thoughts in a logical, precise and value-neutral way. In addition, this search for truth must be based upon evidence and proof.¹⁶⁹ Bertrand Russell noted that such an approach, ‘in regard to certain problems, achieve definite answers’ hence its appeal when approaching a study of power.¹⁷⁰

Nonanalytical philosophy argues that power is best studied with an emphasis on experience and observation. This subjective approach bases itself on intuitive thinking and the observation of how things work, or, for example, what power looks like in a particular space and time. It does not seek to provide rational explanations for this evidenced with science.¹⁷¹ Haugaard’s further distinction between modern and postmodern social theory show a difference in the view of what

¹⁶³ Colin Hay, ‘Divided by a Common Language: Political Theory and the Concept of Power’ (1997) 17 *Politics* 45

¹⁶⁴ See W.B. Gallie, ‘Essentially Contested Concepts’ (1956) 56 *Proceedings of the Aristotelian Society* 167 in which Gallie explores the idea that any ‘concept of commonsense’ is open to debate and dispute about its ‘true’ meaning.

¹⁶⁵ *Ibid*

¹⁶⁶ *Ibid*

¹⁶⁷ Mark Haugaard (ed.), *Power: A Reader* (MUP 2002) 2

¹⁶⁸ *Ibid*. Haugaard describes them as language games to show the applicability of Wittgenstein’s terminology in categorising or distinguishing between ideas but the ‘games’ or distinctions being described as not specific to Wittgenstein himself. It is worth noting that the terms adopted by Haugaard are also his own but again, reflect the basic distinctions of differences within the theories and ideas surrounding the concept.

¹⁶⁹ See Bertrand Russell, *Power: a New Social Analysis* (Routledge 2004), Robert A. Dahl, *Who Governs? Democracy and Power in an American City* (Yale University Press 1961) and Peter Morriss, *Power: A Philosophical Analysis* (MUP 1987)

¹⁷⁰ Bertrand Russell, *History of Western Philosophy* (Routledge 1946) 788. Robert Dahl subscribed to this view and as will be seen shortly.

¹⁷¹ See Hannah Arendt, *On Violence* (Penguin 1970)

knowledge is and how it can be obtained. Modern social thinkers see that “reason can deliver knowledge which is true until proven false” while postmodern social thinkers, ‘view all knowledge as strategic’.¹⁷² However, even within these ‘ideal types’ there is further disagreement. For example, some modern social theories see power as part of a structure such as government or education but they disagree as to the way in which that power is used. Some see it as a cause of conflict and inequality¹⁷³ – that is, power is used by the powerful to control others – while others see it as a necessary means of organising social groups or maintaining social order.¹⁷⁴

The many schools of thought about power show us that power can be seen as ‘a property of agents’; considering the power of an individual or the collective power of an institution, for example.¹⁷⁵ As seen here, some view power as a ‘property of systems or structures’; the power of the state as an entity, for example.¹⁷⁶ There is further disagreement about whether we can measure power: whether its nature means it is ‘ubiquitous and obscure’ or that we can, in fact, locate and observe concrete action.¹⁷⁷ Some view power as ‘necessarily conflictual’, emphasising interests or gains and losses, while others conceive of power as ‘consensual’ where ‘social power...[sees] people working together to accomplish aims’.¹⁷⁸ Furthermore, there are accounts of power which combine these ideas. In addition to the ‘conflict vs. consensus cleavage’ are further debates about whether power may be categorised as ‘power over’ - attached to understandings of domination – and ‘power to’ which implies power relates to the freedom and agency of the powerful to achieve certain aims.¹⁷⁹ Beyond these overlaps and intricacies in how power is conceptualised, there are, ‘related concepts that are used in a variety of contexts: authority, autonomy, domination, freedom, hegemony, influence, legitimation and manipulation, each of which might be as contestable as the concept of power itself.’¹⁸⁰

1.3 Power, ‘language games’ and the search for meaning

The ambiguities of the concept of power and its essential contestability mean that it becomes more challenging to talk about that power. In addition to the multi-faceted character of power and the existence of *clusters* of conceptions or *extensions* of the phenomenon, there is the further challenge of how power is described: the *language of power*. Each varying account – or theory –

¹⁷² Haugaard (n 159) 3

¹⁷³ See the works of Karl Marx, Nicos Poulantzas, *Political Power and Social Classes* (NLB 1973) and Pierre Bourdieu, *The Field of Cultural Production: Essays on Art and Literature* (Polity 1993)

¹⁷⁴ See Talcott Parsons, *Structure and Process in Modern Societies* (Free Press 1960), Anthony Giddens, *The Constitution of Society* (Polity 1984) and Barry Barnes, *The Nature of Power* (Polity 1988)

¹⁷⁵ The references in this section all relate to an extremely neat summary of the many facets of the power debates provided by Keith Dowding, ‘Why should we care about the definition of power?’ (2012) 5(1) *Journal of Political Power* 119, 120

¹⁷⁶ Keith Dowding, ‘Why should we care about the definition of power?’ (2012) 5(1) *Journal of Political Power* 119

¹⁷⁷ *Ibid*

¹⁷⁸ *Ibid*

¹⁷⁹ *Ibid* 120

¹⁸⁰ *Ibid*

about power is what Wittgenstein termed ‘a language game’.¹⁸¹ This language is important because it can a) convey our existing understandings of power or b) provide ‘conceptual tools’ for acquiring greater understanding.¹⁸² Drawing insight from the language of power evident in political science helps us to identify more clearly certain characteristics about the power and its use. The difficulty is that due to the ambiguities of the concept and its contestability, unfortunately, ‘political scientists remain divided by the common language of power’¹⁸³ Yet, as a result of these problems of definition, what we are left with is an extensive and rich source of insight into the potential meanings, definitions and conceptualisations we could adopt as part of our thinking about power (and, for that matter, about judicial power).

Rather than lament such challenges, the richness of insight and debate about power presents an opportunity to use, and build upon, those insights in our thinking about judicial power. It seems that ‘among the most important uses to which the concept of power is put are critical and evaluative uses.’¹⁸⁴ This responds to Dowding’s question: why should we care about the definition of power? This question elaborates the earlier point made by Hayward and Lukes: that we debate power not just to search for meaning and definition, but we debate power to critique existing power relations and ‘identify and evaluate alternatives’.¹⁸⁵ We care about a definition of power because how we understand and conceptualise power, affects how we are able to understand the realities of that power and its use. This thesis is arguing that debates about *judicial* power have tended to emphasise the critical and evaluative aspects of the notion but would benefit from an increased focus on the search for meaning and definition as a preliminary part of the assessment. If we can understand the intensions and extensions of a form of judicial power using the conceptual tools of political science, we can then consider the circumstances of its use – judicial power in the constitution. If we understand the circumstances of its use, we can then begin to think about some of the related questions around matters of accountability or legitimacy, for example.

At the same time, however, we are also able to separate out our thinking about those various elements of power. Doing so helps us to, ‘make our concepts as non-normative as possible so as not to conceal that normative disagreement within a conceptual one.’¹⁸⁶ This is the crux of this thesis’ own approach: to enable a non-normative description of judicial power so that we can conceptualise the phenomenon away from the normative, contested politics which surround that power and its use. Such an approach identifies with what Hathaway described as ‘a central question of interest group theory’; asking ‘‘what is power?’’ because an answer to this question would allow a determination of who governs and who is powerful

¹⁸¹ Wittgenstein (n 149) 32

¹⁸² Haugaard (n 147) 2

¹⁸³ Hay (n 155)

¹⁸⁴ Hayward and Lukes (n 143) 9

¹⁸⁵ Ibid

¹⁸⁶ Dowding (n 168) 133

in the political arena'.¹⁸⁷

Academics and commentators who debate judicial power are in many cases debating the wider questions of who governs and who is powerful within the constitution. If we adopt this line of thinking, it makes sense to adopt an approach which ultimately permits the enterprise of acquiring non-normative understandings of judicial power in order to better address questions of the allocation and use of that power as part of governing. In this respect, the overlaps between political science and public law in this thesis are not new: public lawyers have been concerned with questions of power for hundreds of years. What is novel, is adopting a different approach that focuses initially on the nature of judicial power itself. This is the current task for those interested in power: we must 'differentiate between the analytical questions concerning the identification of power, and the normative questions concerning the critique of the distribution and exercise of power thus identified.'¹⁸⁸ Building on the notion that, 'power is politics, politics is power', we understand the power within those politics to better understand and navigate the politics themselves.¹⁸⁹ We can understand judicial *power* as a step towards between understanding and navigating the complex politics in which that power is located. In this thesis' the idea of 'thinking politically' about judicial power is advanced and it is for this reason.

2. Learning from established accounts of power

This chapter has shown so far that there are many accounts of power, in part because power is an ambiguous, essentially contested concept which attracts what are sometimes referred to as language games. Each account can offer a definition or re-definition of the concept. The result is increased meaning and understanding of power albeit not located within a single, universal definition. But the challenges of power are numerous and one important problem to be addressed in considering the benefits of a different approach is thinking about what that approach should be. I now want to consider the debate in the political science literature about the so-called three 'faces' of power. This debate has been an important and influence source of insights into the notion of power and it therefore bears close scrutiny. The 'faces of power'¹⁹⁰ debates represent what JC Isaac termed the 'fulcrum of the debate'.¹⁹¹ Here, the first, second and third faces of power have illustrated the development in definition, debates, and approaches to the analysis of power. Within their accounts, it is also possible to see the different empirical choices to be made when studying the phenomenon. Ultimately, a reflection on the 'power-with-a-face' debates allows us to identify commonalities and recurring themes between their accounts of power.¹⁹²

¹⁸⁷ Terry Hathaway, 'Lukes Reloaded: An Actor-Centred Three-Dimensional Power Framework' (2016) 36(2) *Politics* 118, 119. This is not an endorsement of interest group theory but rather supporting the focus on asking more questions of the concept of 'power' separately from existing normative assumptions about the appropriate scope and limits of that power.

¹⁸⁸ Hay (n 155) 52

¹⁸⁹ Hay (n 155)

¹⁹⁰ *Ibid* 52

¹⁹¹ J.C. Isaac, 'Beyond the Three Faces of Power: A Realist Critique' (1987) 20(1) *Polity* 4

¹⁹² Heyward (n 145)

2.1 The first face of power – a one-dimensional approach

Like many before him, Robert Dahl wanted to offer a clearer understanding of what is meant by the term ‘power’. In his 1957 text *The Concept of Power*, he went some way to answer this stating: ‘Most people have an intuitive notion of what it means’ but it is the more detailed knowledge of the concept which might facilitate a ‘systematic study’ of power which is missing.¹⁹³ What he acknowledges here is that not only do we need a stronger understanding of the meaning of power but we also need to find a means by which to study it. Dahl recognises here the complex relationship between any ‘commonsense’ understandings of power and the need to identify with greater precision, specific power relations. Dahl’s one-dimensional account represents this more straightforward, intuitive account of power: if one actor (A) behaves in a certain way which affects the behaviour of another (B), causing B to behave in a way that they would not have naturally or ordinarily have done, then it can be concluded that A has power. In short, A has the power to affect the behaviour of another or to cause an outcome. Such an account reflects the behaviourist school of thought to which Dahl subscribes as he is explaining and emphasising, to some degree, human behaviour and interaction in the form of a relationship of power.

Viewing the exercise power as concrete decisions and overt or actual behaviour has been reinforced by later authors albeit it often as one aspect of their own accounts.¹⁹⁴ To offer an example of such a conception of power in practice, one might consider the action or behaviour of a police officer stopping traffic. The police officer walks onto a busy road, raises her hand and very shortly afterwards, the traffic begins to stop. Applying Dahl’s explanation of power: the police officer (A) has *caused* the drivers (B) to *do something they would not ordinarily have done* (stop their cars in the middle of the busy road). There is nothing particularly remarkable or controversial about this explanation but it does fit with what many people may understand as an exercise of power: the intuitive aspect. It is this basic notion of power that has since been termed the “one-dimensional view” and it is its simplicity which, at first, heralded a turning point in the literature on power.

As part of his studies of power, Dahl explored the exercise of power in the community of New Haven in his 1961 study *Who Governs?*. His focus on human behaviour is clear in this study: he wanted to better understand the relationships of power within the community. Dahl was interested in understanding power as ‘decision-making’, establishing which individuals (actors) initiated decisions in the community and which vetoed them. More specifically than this, he was interested in something he called ‘key issue areas’ such as political nominations, public education and urban renewal. Dahl wanted to show the causal link between a concrete decision (either to do something (initiate) or not (veto)) and an effect thus providing a more systematic way of measuring power. Indeed, it is accepted that this question is asked in order to establish

¹⁹³ Robert Dahl, ‘The Concept of Power’ (1957) 20 *Behavioural Science* 201

¹⁹⁴ Steven Lukes, *Power: A Radical View* (2nd edn. Palgrave Macmillan 2005) 153

who governs and as such, who is powerful.¹⁹⁵ Applying this methodology, Dahl was able to evidence that power was not concentrated in the hands of one elite but rather, it was dispersed within a plurality of elites. In more straightforward terms, Dahl was interested in locating the site of power and looked for observable decision-making as the indicator of this.

However, despite Dahl's account of power offering some clarity and simplicity to the complex concept, it is not without its critics. A common critique concerned the perceived narrowness of this account of power. The first face provides an *agency-centred* account of power: 'its concentration on the actions of individuals within the decision-making process (as distinct from the *context* within which such decision-making takes place).'¹⁹⁶ Lukes noted how Dahl's approach to analysing power relies upon the close examination of a series of concrete decisions. The one-dimensional view also frames power – using Dahl's description of power relations – as one based on 'an *observable* conflict of (subjective) *interests*'.¹⁹⁷ Lukes' criticisms aside, Dahl's study does itself challenge previous contributions to the 'community power' debate, namely those of Hunter and C. Wright Mills.¹⁹⁸ Dahl's insistence that power only involves actions, relations or influences which are "empirically evident" remains a matter of heated debate amongst theorists, particularly those who wish to explain power in terms other than human behaviour and agency.¹⁹⁹ Any failure of Dahl's account to consider power relations in a more critical or complex manner might be seen by some as naïve; however, its simplicity reflects our own understanding of power and provided a basis from which the two and three-dimensional accounts (discussed below) could evolve. There is an 'obvious appeal' of Dahl's first face in that it presents the exercise of power – and power itself – as 'visible and can be catalogued, classified and tabulated in terms of the realisation of preferences in the heat of the decision-making process.'²⁰⁰ It gives the sense that power and all its related complexities can be analysed and discussed with some degree of certainty.

What Dahl's choices show is that it is possible to both explain and study power regardless of how complex the concept may appear. This is both reassuring and thought-provoking. Dahl's critique of the 'ruling-elite' model – arguing that power is not a tool of the elite but rather can be viewed pluralistically - is one way of illustrating that power is not always a negative aspect of a political system. Such balance is certainly useful, if not required, especially if applying the theories of political scientists in other contexts to discuss how power can be identified, understood and managed. One of the most important contributions of Dahl's one-dimensional account was that it demonstrated how it is possible to facilitate – or operationalise - a study of

¹⁹⁵ Hathaway (n 179)

¹⁹⁶ Hay (n 155) 46

¹⁹⁷ Lukes (n 186) 19

¹⁹⁸ Floyd Hunter, *Community Power Structure: A Study of Decision-Makers* (North Carolina Press, 1953) and C. Wright Mills, *The Power Elite* (OUP 1956). Both these authors had argued that the structure of power in American democracy (at local and national level) was unequal; Mills described a pyramid of power with the few at the top having the most power.

¹⁹⁹ Isaac (n 183) 8. In this 1987 article, for example, Realist sociologist Isaac makes the case against the behaviourist commitment of the one (and two and three) dimensional accounts and instead argues for the need to recognise structural effects on power as well.

²⁰⁰ Hay (n 155) 46

what may appear to be an abstract concept. Having said that, Dahl did not appear to be satisfied with his broad definition since he offered many later revisions to try and clarify the intuitive notion he set out to explain.²⁰¹ What did remain, however, was his focus on behaviour and agency. He maintained his focus on the observable actions of individuals and the capacity of those individuals to act and to make choices. He addressed the difficulty of studying something abstract by instead identifying and studying the concrete aspects of it: instead of looking at power as a whole, he looked at power in terms of concrete, actual or overt decision-making. This was, Dahl argued, a way of observing power; of facilitating a study.

2.2. The second face of power – a two-dimensional approach

The second face of power and the work of Bachrach and Baratz was largely a critical development of Dahl's work. Power is 'janus-faced' and to narrow our own conceptual lens to facilitate a study would be to merely 'obscure' the complexities of its nature.²⁰² In addition, Bachrach and Baratz thought that to only consider the first face of power would be to omit an important aspect of power relations and relationships: the question of *why* an actor has exercised power. This additional element has since become known as the 'second face', or dimension, of power.²⁰³ It allowed Bachrach and Baratz to address one limitation of Dahl's work: that sometimes power operates in a more complicated way than simply A making a positive explicit and discrete decision that causes B to do something that B would not otherwise have done. They did so by identifying more than just the effects of concrete decision-making; they considered power as the ability to 'set the agenda'.²⁰⁴ This recognises an actor's power to promote certain interests, control the interests which are subject to wider policy debates or, as Bachrach and Baratz consider, the power to leave certain items off an agenda to avoid them becoming central to political discussions. This last point relates to the other aspect of the second face: power in the form of *nondecisions*.

So, how does one begin to answer the question of *why* an actor has exercised power? Bachrach and Baratz argued that while A may exercise power over B in this way (the first dimension), A may equally well exercise power over B through a process of avoiding action. In a political context, this was identified as limiting the scope of the political agenda to issues that have little or no impact on A therefore likely benefiting A in some manner. This might be more clearly described as 'agenda-setting'. Within this, if A leaves an item off an agenda which is of importance to B then A can be said to have power. Bachrach and Baratz describes this, in effect, as 'nondecision-making': the decision not to make a decision.²⁰⁵ The notion of having an agenda

²⁰¹ These developments are considered by Lukes in Steven Lukes, 'Robert Dahl on Power' (2015) 8 Journal of Political Power 261, 271

²⁰² Hay (n 155) 46

²⁰³ Peter Bachrach and Moreton S. Baratz, 'Two Faces of Power' (1962) 56(4) American Political Science Review 947, 952

²⁰⁴ Clare Heyward, 'Revisiting the Radical View: Power, Real Interests and the Difficulty of Separating Analysis from Critique' (2007) 27(1) Politics 48

²⁰⁵ Hugaard discussing the contribution of Bachrach and Baratz in Mark Hugaard (ed.), Power: A Reader (MUP 2002) 26

or purpose behind the exercise of power is not unusual nor should it be automatically contentious but it does offer an additional aspect of power relationships to consider. Let us return to the example of the police officer stopping traffic. We saw earlier how the one-dimensional account would explain this. What is offered by the two-dimensional account is considering *why* the police officer exercised this power (a broad application of the notion of agenda). For example, the agenda behind the police officer's decision to stop or redirect traffic may be because there is an accident further down the road and she wants to avoid further accidents. It could be that she is doing so to make mischief. By questioning the agenda under the second face, it is possible to see both the power the police officer has but also assess the purpose of agenda behind its exercise before finally judging whether the use of such power is reasonable in the circumstances.

Similarly to Dahl, Bachrach and Baratz were faced not only with a conceptual question but also an empirical one. Their account of power raised a new challenge of how to study a 'nondecision'. To address this, they chose to focus on political organisations and the occurrence of agenda-setting and nondecision-making. This allowed them to consider when and why items may be left off an agenda or why power is not exercised in some situations. If one were to make the link between an agenda and an actor having some sort of bias, it is possible to see how affecting an agenda may be a powerful tool. Schattschneider's work on this topic, cited by Bachrach and Baratz, suggests that some bias in political organisations is inevitable. He described organisational structures, for example political parties or a judiciary, as being able to 'mobilise bias' through agenda-setting.²⁰⁶ An institution with an agenda can 'mobilise' or promote their intentions and interests. This 'intentionality' is an area of continued debate and the question of 'whether power when actualized involves the enacting of the intentions of the powerful'.²⁰⁷ Importantly, this notion of 'bias' and the recognition of how agendas are used within power relations is not inherently negative yet, often this is how they can be viewed. The idea of agenda-setting and the mobilisation of bias is used here as part of the process of identifying the nature of power relations rather than as a need to determine whether power must be seen in terms of conscious intention or whether the effects of power could be understood as unintentional byproducts of power relations.²⁰⁸

Bachrach and Baratz's interest in structural or institutional influences is not dissimilar to Dahl but it is their focus on agenda that had to be evidenced. In their study *Power and Poverty*, they demonstrated how issues which were important to the poor black community in Baltimore were left off the political agenda. To deliberately avoid certain issues, knowing that those they affect will have little or no influence to change the agenda is a clear exercise of power. One group has more power than the other. This study was a means of showing the second face of power by showing how 'nondecisions' can be just as powerful.²⁰⁹ Another study at this time was carried

²⁰⁶ E. E. Schattschneider, *The Semi-Sovereign People* (Holt, Rinehart and Winston 1960) 71

²⁰⁷ Steven Lukes, 'Power and rational choice' (2021) 14(2) *Journal of Political Power* 281, 282

²⁰⁸ Ibid. See also Keith Dowding, 'Three-Dimensional Power: A Discussion of Steven Lukes' Power: A Radical View' (2006) 4(2) *Political Studies Review* 136

²⁰⁹ Peter Bachrach and Moreton S. Baratz, *Power and Poverty: Theory and Practice* (OUP 1970): see the abstract for a clear summary of their aims and objectives.

out by Matthew Crenson. He specifically studied the issue of air pollution in *The Un-Politics of Air Pollution*. In his study, he was able to show how large companies had exercised power by ensuring that pollution was never on the political agenda. A good example of the practice of nondecision-making when an item does not make it to a point requiring a decision.²¹⁰ This could be seen as unremarkable by some and it would be necessary to find evidence of why such actions occur however, it does provide a means by which to study less overt aspects of power relationships. Haugaard identified what he called ‘modern examples’ of this second face of power - matters such as: the use of red tape to exclude matters from an agenda; the creation of committees who never reach a decision or outcome; the loss of important files; using experts with known bias to reach decisions; running out of time; or, labelling such issues as ‘inappropriate’.²¹¹

In spite of the critical development of the second face of power to the debates, Bachrach and Baratz’s account still attracted criticism for some of its assertions. They ‘retain a residual behaviouralism which they inherit from the pluralist problematic’; the second face still places an emphasis on those actions which can be observed, even when considering nondecision-making.²¹² Even their emphasis on agenda-setting – an ‘observable phenomenon’ – gives little consideration to the ‘less visible (and arguably more significant) processes by which preferences... are shaped’.²¹³ This assumption - that there are only observable power relations - neglects an aspect of power relations which is fundamental to understanding the concept itself: unobservable exercises of power.²¹⁴ From an empirical point of view, to discuss power within the confines of observable, human behaviour is logical. It shows that the choices made are, partly, related to being able to support those ideas with proof. To move away from this, presents empirical challenges that Dahl and Bachrach and Baratz perhaps, were not prepared or able to overcome.²¹⁵ There may also be a question of how to gather unbiased information about the reasons behind decisions or nondecisions. How likely is it that individual actors would want to be open and honest about the nature of their agenda? The second face’s ‘bold attempt’ to overcome the limitations of the first face has, itself, its own limiting factors.²¹⁶

2.3 The third face of power – a three-dimensional approach

As Hay notes, by the 1970s, ‘where once there was only one face of power, there would now be three’.²¹⁷ Continuing the pattern of developing analytical approaches through critique, Lukes presented a third account of power in which he sought to address what he saw as the limitations

²¹⁰ Matthew Crenson, *The Un-Politics of Air Pollution* (John Hopkins Press 1971)

²¹¹ Haugaard (n 139) 28. It does seem that Bachrach and Baratz were aware of the potentially negative connotations which may attach themselves to the agenda-setting label. They were careful to note that while considering items left off an agenda as a means of studying power, it may also simply be a case of the issue being irrelevant or unrealistic.

²¹² Hay (n 155) 47

²¹³ Ibid

²¹⁴ Steven Lukes, *Power: A Radical View* (Macmillian 1974)

²¹⁵ See Nelson W. Polsby, *Community Power and Political Theory* (Yale University Press 1980)

²¹⁶ Hay (n 155) 47

²¹⁷ Ibid

of the one and two-dimensional accounts. His self-termed ‘radical’ account moved the focus away from power relations which are observable, even if observable by not doing something, to the question of those power relations which take place in ways which cannot be seen. This is not the same as Bachrach and Baratz’s notions of backroom negotiations and agenda setting but rather is intended to capture the potential for power to be used in ways that are unobservable. The third face of power would address the fact that, according to Lukes, the ‘behaviouralism-influenced pluralist and elitist models of power were incomplete.’²¹⁸ Lukes’ third dimension of power comprised two elements. Firstly, his critique of the one and two-dimensional accounts of agency, arguing instead that power is non-agent specific; it is not dependent on the actions of individuals. And secondly, that power is exercised through the creation of a false consciousness and the creation of false interests which the majority deem to be ‘real’.²¹⁹

Lukes argues that A has the power to affect B’s behaviour (the first dimension) and they do so with an agenda (the second dimension), however A affects B in a manner which is contrary to B’s interests (the third dimension). A has used their power to promote interests which are of benefit to themselves.²²⁰ This might have been something which one might infer from Bachrach and Baratz’s account but they themselves did not state so bluntly. The meaning of ‘interests’, false and real, is potentially challenging. Isaac describes ‘real’ interests as, ‘those norms, values, and purposes implicit in the practice of social life and associated with social roles as principles of action.’²²¹ This could be described as those matters which are fundamental to a social group. Lukes is raising the question of how those become viewed as ‘real’ and whether those interests which appear ‘real’ are, in fact, created by those in power. This is one reason why the three-dimensional account is considered challenging is because it suggests there could be a level of manipulation beyond just agenda setting; an exercise of power that has an intended effect with direct manipulation that those who are subjected to it are not aware of.

However, the fact that Lukes does ask questions about this aspect of human interaction is exactly why his contribution is so important. It suggests that an understanding of the use or outcome of an exercise of power may not be as informed as it appears and this may raise questions as to the extent of accountability of the actors involved. To continue the example of the police officer stopping traffic, it is possible to apply the third face of power but it must be acknowledged that this is only a very simple example. The police officer has stopped the traffic by raising her hand (first dimension) and it is then established that she has done so to prevent an accident further down the road where there is an obstruction (second dimension). How could an action with seemingly noble intentions be then understood in terms of unobservable effects and the creation of ‘interests’. It may be possible to suggest that by doing as the police officer asks, it suggests to

²¹⁸ Clare Heyward, ‘Revisiting the Radical View: Power, Real Interests and the Difficulty of Separating Analysis from Critique’ (2007) 27(1) Politics 48

²¹⁹ Lukes (n 206) 38

²²⁰ His ideas were framed against the backdrop of Marxism and the ideas of Poulantzas and Miliband in terms of structural conflict and the creation of false ideology in a majority. It was this third dimension which, Lukes, argued was the “most insidious and most important form of power in domination” see Keith Dowding, ‘Three-Dimensional Power: A Discussion of Steven Lukes’ Power: A Radical View’ (2006) 4(2) Political Studies Review 136, 137

²²¹ Isaac (n 186) 26

the driver that the police are 'in charge'. By reinforcing such beliefs and as an agent of the powerful state, the police officer is promoting the interests of those in power through a form of social control. Social control may be viewed by some as contrary to B's interests but the power is hidden because B does not understand this.

For Lukes, 'the most insidious and important form of power is domination'.²²² He was interested not only in how the powerful dominate but the reception of this by the dominated. These degrees of domination may range from active belief in the values being used to oppress them or mere resignation to them (i.e., acquiescence). It is due to the treatment and interpretation of the questions raised by this notion of values that Lukes describes power as 'essentially contested' because 'it requires a notion of objective interests'.²²³ In responding to this view, one of the primary difficulties of Lukes' account is brought to the fore: how does one study, or observe, something which is considered unobservable? The earlier criticism of Bachrach and Baratz's account is realised again since it is arguably unlikely that the degree of manipulation suggested by Lukes would be openly acknowledged (since to do so would reduce the potential to manipulate). Lukes' argument surrounding real interests is potentially problematic, not eased by the lack of a strong empirical response. Hathaway asks how one can determine what exactly constitute 'real' interests. If something is perceived by many as 'real', how is it possible to show that it is not, other than by suggesting that those in power have created it. This presents the question of how to evidence it.

This is linked to the second area of critique: that Lukes in fact 'conflated analysis with critique'.²²⁴ Colin Hay suggests that rather than offering an analysis of power he, in fact, offered a critique of power relations and structures. By doing so, Clare Heyward argues that Lukes' account is, 'beyond scientific, objective analysis'.²²⁵ This may suggest that Lukes' account is unable to *prove* anything further about power given the difficulties of evidencing the third face. However, the very question itself of these unobservable aspects is an incredibly important contribution to our thinking. Haugaard notes that the reason Lukes' account may not answer his critics as effectively is that he moves between 'language games'.²²⁶ That is, he moves between different theories of power in how he describes its nature which may not offer the additional clarity of understanding Lukes was striving for. The third face of power offers important critique of the limitations of the first and second faces and requires us to think carefully about the contributions of each. However, the empirical limitations of evidencing 'real interests' may be best overcome by using the third face to identify their potential existence before requiring that 'power relations [are] rendered visible prior to critique.'²²⁷

²²² Keith Dowding, 'Three-Dimensional Power: A Discussion of Steven Lukes' Power: A Radical View' (2006) 4(2) Political Studies Review 136, 137

²²³ Ibid 138

²²⁴ Colin Hay, *Political Analysis: A Critical Introduction* (Palgrave Macmillan 2002) 183

²²⁵ Heyward (n 210)

²²⁶ Haugaard (n 159) 3

²²⁷ Heyward (n 210) 49

In the later edition, Lukes seeks to address the limitations of his radical view and in the process, offers three methodological suggestions for approaching something which is arguably 'empirically falsifiable'.²²⁸ These suggestions are: '1) search for observable mechanisms of the third dimension 2) find ways of falsifying it or 3) identify relations, characteristics and phenomena of power for which the first and second dimensions cannot account.'²²⁹ Part of Hay's critique was to question why Lukes made his conception dependent on an aspect of interaction which is so difficult to prove since it reduced the potential for others to use his approach but this should not be cause to dismiss his ideas.²³⁰ In Lukes' 2005 'reformulation', he chooses to recognise that power 'involves an interplay between agent power and structure', moving beyond his 1974 account of power which was critical of agency-focused accounts but was itself 'agent-focused'.²³¹ Lukes' reformulated account suggests that power can be: 1. exercised with respect to one or many issue(s); 2. 'context-bound' or 'context-transcending' i.e. the extent to which an agent's power can affect their context or is bound by it or the extent to which power is separate from the context in which it exists; 3. exercised intentionally or unintentionally; or 4. manifested in active exercise or inactive enjoyment.²³²

3. Framing an analysis and thinking politically

This final section will explore how this thesis will think politically about judicial power. This chapter has demonstrated the vast amount of potential when thinking about power politically. There are many dimensions to the notion of thinking politically but here, it means emphasising and analysing power as part of the wider analysis of judges' work. Not only this, in light of the insights from the political science literature, it is possible to develop a strategy for such analysis which responds to the challenges of the phenomenon. This section will firstly summarise the main themes extracted from the power-with-a-face debates and their resulting critique. Next it will further elaborate the aims of this thesis' different approach in light of this chapter's work and finally, it will explore how to think politically and ask what kind of analysis can support its aims.

3.1 Themes, approaches and commonalities between the faces of power

Despite certain criticisms, the three accounts of power discussed above do offer a rich picture of the concept of power. The table below shows the main themes present in each account:

²²⁸ Lukes argues that just because there is a lack of methodological tools for studying this third dimension, it does not mean it does not exist. See Lukes (n 186) 64

²²⁹ Ibid

²³⁰ Hay (n 155) 52

²³¹ Heyward (n 210) 51

²³² Lukes (n 186) 79 (Figure 1)

Main themes within these three accounts of power		
One dimensional account	Two-dimensional account	Three-dimensional account
<ul style="list-style-type: none"> • Power as a causal relationship (between A and B) • Focus given to the behaviour of agents/actors within the relationship • Power can be understood in terms of concrete decision-making by A and the effects of those decisions on B • This systematic approach focuses on observable actions 	<ul style="list-style-type: none"> • There is a second face of power – agenda setting • Identifying the agenda behind an exercise of power is important to better understand the power itself • Focus on the mobilisation of an agenda • Agendas can be mobilised by decisions or ‘nondecisions’ • Maintains the empirical emphasis on observable actions (or inaction) 	<ul style="list-style-type: none"> • Recognises the first and second face of power but argues there is a third – power is exercised by A contrary to B’s interests • A has the power to create and promote false interests • This shows a manipulation of the consciousness of B which shows power • Importantly, there are unobservable aspects of power relationships which lead to this degree of manipulation

The resulting lessons from the power-with-a-face debates has been the need to formulate some sort of conceptual and analytical framework which is ‘capable of reconciling within a single account a sensitivity to: (i) the strategies, struggles and practices that characterize the decision-making process; (ii) the actions and inactions involved in the shaping of the agenda for the decision-making process; and (iii) the actions and inactions similarly implicated in the shaping of perceived interests and political preferences.’²³³ It can be argued that any such framework has to go further than this. This thesis argues for a different approach to analysing judicial power and alongside these many complex insights about the nature of power and its exercise, there are other demands to be considered. There is the need to incorporate the approach of thinking politically about judicial power. Thinking politically about judicial power means, put simply, thinking about the notion of power itself as an initial matter before then thinking about how that notion might apply in the specific context of the judiciary. Already, this chapter has shown the intricacies and challenges in the concept of power and how that concept may be framed through analysis.

There are practical concerns to consider in light of these reflections: any specific demands or considerations needed for the study of power in question. To give an example of this, let us consider two very different institutions: a local community theatre group and the Ministry of Justice. A study of power within these institutions will likely make different demands on the analysis. There will be a need to look at the role of each group and the expectations of their power. There will need to be recognition of the actors within each institution, levels of

²³³ Hay (n 155) 47

accountability and even from where they derive their legitimacy in the exercise of power. There will be a need to consider the availability of evidence to describe the workings of those institutions – of the powers they have or how that power is constituted. There may be a need to think about wider relationships and influences on the operation of their functions; external power relationships and interactions. There is clearly an extensive range of questions and thinking surrounding the power of any actor, institution or within any system but it remains challenging to facilitate an analysis due to the open-ended nature of those questions. Therefore, this thesis makes the case for an analytical framework as a means of determining the core ingredients within an analysis which can be used in a variety of contexts, be applied to a variety of episodes and manage the overarching challenges of power.

3.2 Differentiating between the analysis and critique of judicial power

Peter Morriss in *Power: A Philosophical Analysis* asks: ‘why do we need a concept of power?’.²³⁴ Morriss asked this question to consider ‘what is our purpose in studying power?’.²³⁵ Morriss suggests we analyse power for practical, moral and evaluative reasons and because we are ‘interested in theorizing *about* power.’²³⁶ This returns to the point made by Lukes and Heyward at the opening to this chapter, and the point raised from Terry Hathaway’s article,²³⁷ of studying power because we want to understand more about who governs, who has power and who does not, and how power is allocated within a system. The overall contribution of this thesis is to offer a response to the ‘internal dialogues, controversies and disputes’ about judicial power.²³⁸ This response has two qualities: firstly, it demonstrates how to think politically about judicial power by asking ‘analytical questions concerning the identification of power’ and exploring answers to the question ‘what is judicial power?’.²³⁹ Secondly, it does this to provide a prior step to existing and future analyses which focus separately on ‘the normative questions concerning the critique of the distribution and exercise of power thus identified.’²⁴⁰ This thesis further responds to the first part of the assignment set by Hay: to begin the process of differentiating between analysis and critique more explicitly within public law scholarship on the topic of judicial power.²⁴¹

Morriss’ reasons for analysis are useful to identify existing – and missing – aspects of debates about judicial power. Firstly, we ‘want to know, in practical contexts, what our capacities and the capacities of others are, in order to achieve desired outcomes.’²⁴² We analyse judicial power to understand more about the role and power of judges and, in turn, the respective roles and powers of others within power relations and power relationships. Secondly, ‘we want to know, in moral

²³⁴ Peter Morriss, *Power: A philosophical analysis* (2nd edn, MUP 2002) 36

²³⁵ As discussed by Steven Lukes in Heyward and Lukes (n 143) 6

²³⁶ Morriss (n 226) 42

²³⁷ Heyward and Lukes (n 143) 9 and Hathaway (n 179)

²³⁹ Hay (n 155) 52

²⁴⁰ *Ibid*

²⁴¹ *Ibid*

²⁴² Heyward and Lukes (n 143) 6

contexts, whom to hold responsible (whom to blame, and I would add, whom to praise) for outcomes that affect the interests of others.’²⁴³ We analyse judicial power to consider questions of accountability and responsibility; perhaps a stronger feature of existing debates. Thirdly, ‘we want to know, in evaluative contexts, when we are judging social systems, to what extent they give their citizens freedom from the power of others, and to what extent citizens have the power to meet their own needs or wants’.²⁴⁴ We prompt debate about judicial power so we can develop a stronger understanding of the implications of that power and its use within the political system and the constitution more broadly. In turn, this leads us to evaluate and debate the desirability of what exists and how potential alternatives may prove more effective. This appears as though it is a clearly defined task – with this thesis emphasising the practical reasons for the study of judicial power in the first instance. However, as this chapter has shown, the conceptualisation of (judicial) power is not straight forward partly due to the ‘diversity of analytical strategies’ available.²⁴⁵

3.3 The analytical strategy and its composite elements

One important consideration for this thesis has been how it makes its own analytical choices and which analytical strategies it employs to analyse judicial power. There is a clear need in the design of any approach to address the relationship between critique and analysis as raised within the power debates. The practice of critique is ‘inherently normative, ethical, evaluative and value-laden’.²⁴⁶ This thesis argues for an approach to thinking about judicial power which precedes the normative debates about the scope and use of that power; an approach that is more ‘neutral, dispassionate, empirical and scientific’ in its style.²⁴⁷ It is what Hay describes as a ‘definition of power that is not in itself a value-judgement’ but which can still reflect the spirit of the three-dimensional nature of power.²⁴⁸ This requires us to think about two things: the practical analytical strategy to be employed (the *how*) and the composite thematic elements within that analysis (the *what*). This is to develop an approach which can incorporate sites of consensus within the power debates about the nature of power, which can overcome the many conceptual complexities of the phenomenon of power and which can similarly address the wider demands of public law scholarship in its overall design. The final aspect of this will be very much the focus of Chapter 3 but the first two aspects will be addressed here.

There are, it seems, many central lessons taken from the debates surrounding the meaning and study of power. The three faces of power show the evolution of analytical approaches to examine ways in which power can be exercised: the power relations to be studied. This exercise might be located within decision-making or it might be understood in terms of agenda-setting or the ability not to make a decision. The debates similarly ask us to consider questions of agency and of the

²⁴³ Ibid

²⁴⁴ Ibid

²⁴⁵ Hay (n 216) 1

²⁴⁶ Hay (n 155) 49

²⁴⁷ Ibid

²⁴⁸ Ibid 50

interactions between actors in power relationships. Beyond this, there are structural questions to consider both in terms of the actors – such as institutional considerations – or in the wider development of beliefs and values. There is, the third face suggests, the need to consider how such interests develop and how they might be exploited by the powerful. There is, too, a wider appreciation of the influence of context on our understanding of power. Thinking politically may incorporate questions of politics and the impact those politics may have on power. For example, there will be a need to contextualise an episode of judicial power within the wider political environment. One such example might be to situate changes to the nature and use of judicial power against the wider political effects of, say, the effects of populist governments. Ackerman notes that such political questions can affect how we understand central concepts such as leadership (more charismatic than rational), norms of practice (with the rejection of traditional norms by populist leaders). Therefore, an analysis must place power within that wider, changeable environment.²⁴⁹ The broad analytical themes which this thesis acknowledges are: decision-making, agenda-setting and nondecisions, influence and shaping of preferences, behaviour and interaction, structure and context. Around these sites of consensus can occur the necessary and ongoing reexamination of our broader contextual understanding of power and its use.

The second aspect is to ask how to address the perpetual conceptual challenges of the phenomenon of power. This is really to ask: what will this thesis' different analytical approach look like? There is a need for an approach which can respond to the controversies of the power debates, the difficulties of judicial power and an approach which can result in detailed analysis: an approach which is 'capable of responding without capitulation.'²⁵⁰ The fact is it is possible to incorporate the breadth of insight, the areas of essential contestation and the wider demands of any field of study into an analysis of power. Hay makes the case for what he terms 'critical political analysis' – a strategy for thinking politically about power while taking account of its challenges. For example, finding an approach which is able to describe power and its qualities and characteristics while also recognising the ambiguities and contestability of the concept. He argues that this kind of analysis should be: 'empirical but without being empiricist'.²⁵¹ Any analysis of power can include a sense of 'science' in how it measures or frames power but in adopting an air of the empirical, it must remain cautious of the fact that any scientific approach will have its limitations. While 'empirical evidence alone is never enough it is an important and necessary starting point.'²⁵²

Secondly, Hay suggests that analysis should be 'balanced in its conception of the relationship between structure and agency.'²⁵³ Here he means that any approach must appreciate the

²⁴⁹ National Constitution Center, 'Bruce Ackerman: Revolutionary Constitutions' (YouTube, 3 June 2019) <<https://www.youtube.com/watch?v=UZzn0fv0IiY&t=666s>> accessed 19 September 2021. Here, Ackerman discusses his new book: Bruce Ackerman, *Revolutionary Constitutions and the Rule of Law* (Harvard University Press 2019).

²⁵⁰ Hay (n 216) 251

²⁵¹ Ibid

²⁵² Ibid 252

²⁵³ Ibid 251

contribution of actors (agency) but that while actors are vitally important, ‘the parameters of their capacity to act [(their power)] is ultimately set by the structured context in which they find themselves’.²⁵⁴ This does not necessarily require a whole-hearted acceptance of a structure *or* agency perspective but rather a recognition of the influence of both on how we understand power. Thirdly, Hay states that analysis should be ‘inclusive in its conception of the political, inclusive in its incorporation of extra-political factors and attentive to the interaction of the domestic and the international’.²⁵⁵ This can be viewed as advice for potential analysts and an appeal for the lack of capitulation he refers to. Hay warns against any rigidity in approach and the limitations of ‘disciplinary parochialism’ since we now live in an ‘interconnected world which does not respect such conventional divisions’.²⁵⁶ Fourthly Hay suggests that analysis should be ‘sensitive to the potential causal and constitutive role of ideas in social, political and economic dynamics’.²⁵⁷ Here Hay is concerned with the potential influence of normative ideas within discourse and ‘the discursive construction of the imperatives’ such discourse is ‘seen to conjure’.²⁵⁸ This relates directly to this thesis’ position that judicial power debates require a descriptive foundation to underpin the normative dimensions of those debates.

Finally, Hay requires an analysis to appreciate its context. He says analysis should be ‘attentive to the contingency, open-endedness and inherent unpredictability of social, political and economic systems’.²⁵⁹ This is really an appreciation of the impossibility of any real sense of certainty about power and politics due to the many systems which surround their existence. This is to say that any settled and established norms or understandings are inevitably going to be challenged by the changing nature of their circumstances. This is, Hay states, ‘a wonderfully liberating thought’ that ‘Things, in the end, can be different’.²⁶⁰ It is upon this idea that this thesis sees a different approach to the analysis of judicial power as being able to recognise these inherently unpredictable, changeable and dynamic influences on both our understanding and our study of any form of power. Judicial power is described in this thesis as being complex, changeable and context-dependent and this is very much to be incorporated in the analytical design of this thesis’ framework. It is, admittedly, only one approach to this but it begins to make the case for how public law scholarship may benefit from adding this means of thinking politically about the work of judges by explicitly addressing the conceptual and analytical challenges of the phenomenon.

²⁵⁴ Ibid 254

²⁵⁵ Ibid 251

²⁵⁶ Ibid 257

²⁵⁷ Ibid 251

²⁵⁸ Ibid 258

²⁵⁹ Ibid 251

²⁶⁰ Ibid

Conclusions

The challenges posed by power may be summarised by recognising that the debates which have surrounded it ‘have been truly inter-disciplinary’.²⁶¹ The roots of those debates engage questions of political theory and political philosophy while its more recent locus has been as a ‘mainstay of political science’.²⁶² There are wider links made with political sociology and in more recent times, much wider engagement with questions of power in literature, social history, feminism or organisational theory to name just a few. The fact is that power ‘has become one of the central concepts of the social and human sciences’.²⁶³ In spite of how power features across the academy, it remains a highly complex phenomenon. This chapter has set out to give an overview of these complexities by firstly identifying the definitional challenges it poses. It is clear that power can legitimately be conceptualised in different ways. This conceptualisation can be presented in more specific accounts, such as those which offer a specific view of power (such as power and agency *or* power and structure) or in more general accounts which look at power as a force within social systems (such as power over or notions of domination).

Debates about the accuracy of describing power as ‘essentially contested’ are themselves an illustration of these inherent complexities; the idea that there may not be one ‘right’ way to talk about power and its use. Instead, Wittgenstein and Haugaard urge us to consider power as a ‘family resemblance’ concept used to refer to a collection or group of related ideas. We should also be wary of the ‘language games’ evident within debates – where the labels or terminology used to describe power may, in fact, be referring to similar ideas. It may also be that we are talking about power in terms of competing ideas: the contrast between, for example, soft and hard power or political and legal power. It could be that some conceptions of power are ‘contextualized to a specific purpose’.²⁶⁴ Therefore, the language we use – the discourse surrounding power – can affect how we understand it but we may find that within that discourse there are common themes or groupings of ideas.

The further contribution of these power debates has been their ability to engage in the task of defining and redefining the meaning of power. The faces of power debate raised fundamentally important questions about what we view as power and, importantly, how we might approach the study of that power. Dahl’s one-dimensional, pluralist model of elite power located power within decision-making. This meant that the question of study was facilitated by the observation of concrete behaviour alongside notions of causality. While the subject of criticism, the first face of power prompted important inquiry and analysis in response. It gave a frame of reference from which to evaluate the concept of power further. Bachrach and Baratz took up the baton when they ‘proceeded to demolish the edifice of classic pluralism’ and required greater account to be given of alternative – equally complex – aspects in the exercise of power.²⁶⁵ Remaining content

²⁶¹ Clegg (n 147) xviii

²⁶² Ibid

²⁶³ Ibid

²⁶⁴ Dowding (n 168) 120

²⁶⁵ Hay (n 155) 46

with the observable features of power relations, the second face develops our thinking by asking questions of agenda setting and nondecisions.

The final face of power was provided by Steven Lukes within his ‘radical’ view of power. *Power: A Radical View* ‘addressed problems involved in the analysis of power as well as offering an elegant model for their solution.’²⁶⁶ Despite this ringing endorsement, Lukes’ account of power was not exempt from extensive scrutiny. One important, resulting discussion has been about the nature of analysis. Should accounts of power adopt critical or analytical approaches? Hay suggests that the support for Lukes’ third face comes from ‘his ability to present an essentially value-laden critical conception of power as a neutral analytical category.’²⁶⁷ This forces us to think carefully not only about what we require from an analysis but how we design and facilitate that analysis with an awareness of the risks of inadequately separating critique from analysis. The reason why this is important is because of the need for both and the difficulties of doing one without the other. It is difficult to separate the normative, ideological understandings of power – such as an argument that a particular kind of power must be located within a particular kind of institution - from those which describe and analyse its nature and use. Both are offered against the backdrop of a desire for clarity and certainty and both are valuable but they are more valuable as two distinct entities.

The further contribution from the power debates discussed in this chapter has been to examine how political scientists have approached the analysis of power. Beyond questions of normative or descriptive approaches, there are more fundamental challenges debated within political science as to how to manage the study of power. Not only are there lots of different ways in which we might conceptualise power – how we might think about it – there are many ways in which we might study it. Any approach must be able to frame our thinking so that we are able to see more clearly the composite elements of an analysis: the power itself, the way it is used, who it involves and its context. That same approach must also be able to frame our thinking in such a way that it manages the complexities of that analysis. Any framework of power has, to some extent, to make choices about what it contains and what it omits and the wider aims of its endeavours. The final section of this chapter has seen how within political science there are many similar debates about approaching analysis in light of the social, political and economic change and development in the global world. The challenge is set to incorporate existing thinking alongside changing environments and these challenges are no different for public law scholarship and the questions of judicial power. It is, however, possible to design such a framework. Hay’s suggestions of the contents of critical political analysis provide important themes to incorporate in this thesis’ design of its own analytical framework and approach.

This thesis’ different approach will be presented in the following chapter but it is clear that the extensive debates and insights of political science offer important experience to be built upon. There will be varied demands in the analysis of judicial power and there will be specific considerations to be acknowledged relating to the nature of the judiciary’s institutional position

²⁶⁶ Clegg (n 147) xv

²⁶⁷ Hay (n 155) 49

within the constitution. Recognising judges as political actors and placing exercises of their power within a political context, we are more ready to think politically about that power and its use. Thinking politically about judicial power can ready us to think more widely about the political nature of, and political influences on, the exercise of that power. This chapter has shown that within the power debates there exists a rich source of ideas as to how to develop a more dispassionate, neutral and less value-laden account of judicial power which will be extremely helpful in developing our understanding of that power within British constitutional thought. It is possible not only to think politically but also to navigate the politics which surround power.

Chapter 3

The case for a different approach to analysis

This chapter will present this thesis' approach to the analysis of judicial power in the UK. The analytical approach proposed here builds on the intellectual and empirical foundations of political scientists discussed in the previous chapter. Chapter 2 highlighted the difficulties of the concept of power: of how to think about and how to study power. In Chapter 1 this thesis has suggested that it may be necessary to think about judicial power differently from the account offered by the narratives and to challenge existing assumptions about judicial power sometimes evident within public law scholarship. Within debates about judicial power, the nature and use of judicial power is often characterised as being 'on the rise', being located in judicial decision-making, being a relatively recent constitutional development and one that we ought to be cautious of. While there is evidence of why these narratives have emerged, it may be useful to conceptualise judicial power differently. This thesis suggested in Chapter 1 that judicial power may be more accurately understood in terms of *changing patterns*, of being part of a *multi-dimensional judicial role* whose exercise occurs both *inside and outside of the courtroom* in different capacities. Finally, this thesis suggests that understanding *judicial power as a form of political power* needs to be incorporated into modern analysis of the role of judges. This chapter will present both the rationale and design of its proposed different approach.

There is a need to bring together existing debates and existing understandings of judicial power within public law scholarship to better understand the nature of judicial power in the UK. Just as the phenomenon of power more generally has many faces so too does judicial power and, '[l]ike blind men grasping at different parts of an elephant, scholars have offered sharply discontinuous accounts of the nature' of that power'.²⁶⁸ Therefore, the rationale for the analytical framework presented in this chapter is that it will allow us to systematise an analysis. Secondly, that systematic analysis is better placed to examine whether a more accurate account of that power is available than that which is offered by the narratives. In short, the analytical framework – and the use of ideas from political science – help us to think *differently* about judicial power. The design of this thesis' analytical framework provides an approach which can overcome both the broader conceptual and analytical challenges of the phenomenon of power. It does this by firstly facilitating an analysis of sites of judicial power and using the resulting account of that power to frame the concept. This conceptual framing occurs through the comparison between narratives or discourse which exist relating to that power and the understanding of the realities of its nature and use gained through systematic analysis.

The aim of this chapter is to document the understandings – conceptualisations – of judicial power offered within public law literature: to give a sense of how public lawyers think about and approach questions of judicial power. The chapter will then consider the insights of political science and consider what else those insights can add to existing public law thinking about judicial power. The purpose of this is to justify the chosen design of the analytical framework by demonstrating how it incorporates the experience and insights of *both* public law and political

²⁶⁸ David S. Law, 'A Theory of Judicial Power and Judicial Review' (2009) 97 *Georgetown Law Journal* 723, 754

science in order to produce the best possible analytical approach in light of current thinking and practice. As a reference point to illustrate the arguments in favour of this different approach, the chapter will make use of the case of *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* as an example throughout.²⁶⁹ This is not intended as a detailed analytical case study; it is intended as an illustration of the potential for increased analysis through a different approach. *Miller* has attracted plenty of its own analysis since the Supreme Court heard the case in December 2017 and it is chosen here partly for that reason.

1. Public law and power

This section re-engages with existing public law scholarship on questions of judicial power. It does so to demonstrate the strengths and limitations of existing approaches to analysing the phenomenon within public law and existing insight into how we understand the phenomenon.

1.1 Questions of power and questions of politics

Public law scholarship has considered questions of power extensively and considered, too, questions relating to the changing role of judges and their power. As Chapter 1 explained, the contestable nature of many aspects of the UK constitution – and constitutional orders more generally – has resulted in lively debate and much of that debate has included questions of judicial power. The result of these lively debates has been, at times, to show the complex interaction, and differences, between ‘idealized and stylized’ models of understanding, explanatory models and the ‘real world constitution’.²⁷⁰ The benefits of these debates, including those aspects which raise questions of judicial power, are that we engage in the process of determining the desirable (and undesirable) features of judicial power within the constitution. We debate and demonstrate the limits or tolerances of the existence and use of judicial powers considering our conceptualisation of that power.

One observation to be made of the development of thinking within public law has been the increased emphasis – and understanding of – the term ‘political’ through these debates. The UK constitution is often described as a political constitution. It is suggested here that this is an important conceptual reference point when thinking about judicial power within our constitutional understandings, both implicitly and explicitly. In his scholarship, Griffith popularised the term political constitution but he also recognised that courts are ‘political players’.²⁷¹ This development in conceptualising the judicial role aligns with notions underpinning political jurisprudence where courts and law are viewed as part of the system of governance – a political power.²⁷² The result of this change in conceptualisation has been to ask which decisions, which functions, ought to be carried out by judges within this system; questions of the allocation of power. The lack of concrete answers to such questions and the contestability

²⁶⁹ [2017] UKSC 5. Hereafter referred to as ‘*Miller*’.

²⁷⁰ Graham Gee and Grégoire Webber, ‘What is a political constitution?’ (2010) 30(2) *Oxford Journal of Legal Studies* 273

²⁷¹ Aileen Kavanagh, ‘Recasting the Political Constitution: From Rivals to Relationships’ (2019) 30 *KLJ* 43, 52. Here, Kavanagh sets out multiple conceptions of the term ‘political constitution’ within Griffith’s own scholarship.

²⁷² Martin Shapiro, ‘Political Jurisprudence’ (1963) 52(2) *Kentucky Law Journal* 294, 345

of the idea – of linking judges with politics - prompted further debates about the constitutional limits of judicial power compared to legislative and executive powers.²⁷³ Debates which might be further complicated by pre-existing understandings of whether the UK is a political or legal constitution.

The outcome of these debates is that while there may not always be agreement about the nature and scope of judicial power, there may be a growing acceptance of the existence and notion of judicial power itself: ‘judges exercise power’.²⁷⁴ As a result, we have seen increased discussion and debate about questions of judicial power. The challenges of those debates have been, in part, to work out how to understand – think about – judicial power within the constitution and how to reconcile that understanding with more traditional conceptions of the judicial role. One of this thesis’ claims is that the judicial role may be more helpfully understood as being multi-dimensional; there are different dimensions of the role and of, therefore, the power and how we understand it. A further claim of this thesis is the need to normalise the notion that judicial power is a form of political power and how to reconcile this with, for example, the consensus that a democratic system requires an independent judiciary. This is the recognition that ‘judges can and do make political decisions’.²⁷⁵ There are varying approaches to portraying this recognition: some commentators emphasise, even exaggerate, claims of judicial activism indicating less acceptance of this idea while others may understate the scope of judges’ political decision making’ potentially suggesting greater acceptance.²⁷⁶

As Malleon notes, ‘the strength of [a] wider perspective on [judicial] politics is that it emphasises the distinction between politics and partisanship.’²⁷⁷ This is perhaps a key issue within debates about judicial power today: the need to separate our thinking of judicial power as political from judicial power *within* ‘politics’. The term ‘politics’ is a heavily-laden word which can be employed in a number of ways to mean different things or used to over-simplify the realities we are referring to.²⁷⁸ Ideally, we would prefer to discuss questions of politics and judicial power away from ‘the swings and roundabouts of competitive electoral politics.’²⁷⁹ Given the conceptual challenges of the term ‘politics’, it makes a challenging task to consider judicial power – an inherently complex concept in its own right – in relation to politics. Malleon notes that the consequence of widening our understanding of judicial power to *judicial power as political power* is that it requires extensive further reconceptualization of wider questions

²⁷³ Adam Tomkins, *Public Law* (OUP 2003), Graham Gee and Grégoire CN Webber, ‘What Is a Political Constitution?’ (2010) 30 *Oxford Journal of Legal Studies* 273, 281, Marco Goldoni, ‘Two Internal Critiques of Political Constitutionalism’ (2012) 10 *International Journal of Constitutional Law* 926, K Ewing, ‘The Resilience of the Political Constitution’ (2013) 14 *German Law Journal* 2111, JAG Griffith, ‘The Common Law and the Political Constitution’ (2001) 117 *Law Quarterly Review* 42, Martin Loughlin, *The Idea of Public Law* (OUP 2003), Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007), Jeff King, ‘Rights and the Rule of Law in Third Way Constitutionalism’ (2015) 30 *Constitutional Commentary* 101

²⁷⁴ Lord Steyn, ‘The weakest and least dangerous department of government’ (1997) (Spr) PL 84

²⁷⁵ Kate Malleon, *The New Judiciary: the effects of expansion and activism* (Dartmouth Publishing Company 1999) 4

²⁷⁶ *Ibid.* As Malleon notes, Griffith’s own analysis of judicial politics emphasised the political decision making of senior judges which, in fact, is a relatively rare occurrence.

²⁷⁷ *Ibid.*

²⁷⁸ Graham Gee discusses this ‘narrow’ approach often taken by political constitutionalists in Graham Gee, ‘The political constitution and the political right’ (2019) 30(1) *KLJ* 148, 155

²⁷⁹ *Ibid.* 156

relating to the judiciary²⁸⁰: such a ‘redefinition of judicial politics [would] draw the judiciary out of its specialist legal niche’ and require us not only to think differently about judicial power but think differently about how that power is managed as part of the constitutional infrastructure.²⁸¹ It is in recognition of this that this thesis has offered its own description of the many politics of judicial power as part of our understanding.

1.2 Implications for the analysis of judicial power

Such redefinition has implications for how we understand and how we manage judicial power. If we accept judicial power is political power then it challenges us to rethink our expectations of judges and their role and, importantly, their accountability within the political system.²⁸² What is important, then, is being able to think about judicial power today in light of – but not limited by – pre-existing assumptions and conceptualisation of both judges, their role and the constitution. We risk thinking about judicial power in potentially pre-determined ways and the difficulty with this is the impact of change on our understanding: changes to judges’ power, institutional changes to the judiciary and changes to the constitution. The risks may be to reduce our understanding of judicial power. We might narrow our understanding if we think of judicial power in light of existing dichotomies (such as between political *or* legal constitutionalism). We might limit our understanding if an account of judicial power reflects the polarisation between such dichotomies (political *versus* legal constitutionalism or judges *versus* Parliament). We might over-simplify our understanding of judicial power if we fit our understanding of judicial power within certain existing models of thought where the realities of that power traverse the boundaries of those models.²⁸³

It is potentially limiting to think about judicial power in light of existing assumptions since it affects how we can explain the exercise of judicial power. It is possible to see this happening, using the *Miller* case - an example of a recent site of debate within public law. Following both the High Court and UKSC decisions, we saw the polarization occur – most infamously characterised in the ‘Enemies of the People’ newspaper headline.²⁸⁴ We saw, too, analysis offered from different perspectives such as those accepting of the courts’ role in determining the judicial review questions or in the reasoning given for the decisions compared to those more concerned by the use of judicial power to resolve what could easily be viewed as a political decision. The dichotomies could be seen, such as judges versus executive or between law and politics or between political constitutionalism and legal constitutionalism. Finally, it could be said that the outcome of these debates risked over-simplifying our understanding by emphasising the power of judges as a court ruling or by the action of the UKSC judges. This thesis’ claim for a *better understanding* of judicial power is by no means suggesting that existing scholarship is limited in its consideration of judicial power. This thesis is suggesting that there is an

²⁸⁰ For example, questions relating to appointments, training, discipline.

²⁸¹ Maleson (n 267) 5

²⁸² Ibid

²⁸³ Kavanagh (n 263) 45

²⁸⁴ James Slack, ‘Enemies of the People: Fury over “out of touch” Judges who defy 17.4 million Brexit voters and could trigger constitutional crisis’ *The Daily Mail* (London, 4 November 2016) <<https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>> accessed 23 May 2019; Peter Dominiczak, Christopher Hope and Kate McCann, ‘The Judges versus the People’ *The Telegraph* (London, 4 November 2016)

opportunity to think about judicial power *differently*, largely to sufficiently recognise the political aspects of that power.

There appears to be an appetite for thinking differently and asking different questions of established practice and established thought, perhaps prompted by the forces of constitutional change in the last twenty or thirty years. Goldoni and McCorkindale describe the recent development in constitutional scholarship as ‘the reflexive stage’.²⁸⁵ Constitutional scholarship – in their case relating to political constitutionalism – ‘is an exercise in *understanding*: understanding not only the grammar of public law but in so doing understanding precisely what it is that is political about the political constitution.’²⁸⁶ It is the aim of this thesis to engage in a similar enterprise regarding the concept of judicial power and how such an understanding may be achieved via a different approach to analysis. This ‘reflexive’ stage in the scholarship presents further opportunities for the analysis of judicial power. Opportunities to recognise the collaborative and multi-dimensional nature of the constitutional order and in doing, recognise the collaborative and multi-dimensional nature of the changing judicial role. Opportunities to incorporate institutionalism into our view of judicial power; to consider the institutional design and institutional relationships surrounding judicial power and its use. Opportunities to manage the challenges of the politics of judicial power by developing new tools to analyse different questions relating to that power.

A further challenge – which may possibly be overcome simply through the recognition of the need for ongoing analysis – is the fact that when analysing and *understanding* judicial power today we have to manage a number of moving parts. There is a need to incorporate an ever-changing constitution and ever-evolving constitutional understanding as part of an analysis of judicial power. There is also a need to manage the contestable features of constitutional orders and the debates such contestability can attract. Therefore, while all these swirling questions are helpful for debate, what is needed is a means to navigate and organise them as part of an analysis. There is a need for an approach which facilitates the conceptualisation of judicial power *without*, initially at least, being based upon pre-existing ideologies or limited by the complexities it faces by virtue of the phenomenon. Finally there is a need for an approach which retains a ‘political’ approach to questions of judicial power so that we may extend our thinking beyond traditional parameters by asking different questions of judicial power; different questions of existing understandings of that power and asking different questions to explore new understandings.²⁸⁷ The modest contribution of this thesis’ approach is to incrementally extend our thinking of judicial power by thinking about that power differently. The main contribution of this chapter – and of the thesis more generally – is through providing the *means* to analyse judicial power differently. The result of which, in the future, may be that we adopt a different way of thinking and speaking about judicial power as part of a better understanding.

2. Judicial power through the eyes of political science: making more of the ‘political’

²⁸⁵ Marco Goldoni and Chris McCorkindale, ‘Three Waves of Political Constitutionalism’ (2019) 30(1) K LJ 74

²⁸⁶ *Ibid*

²⁸⁷ This incorporates the need to ‘think politically’ as discussed by Graham Gee and Grégoire Webber in their article, ‘A Grammar of Public Law’ (2013) 14(12) German Law Journal 2137, 2139.

The previous section highlighted potential limitations in existing conceptualisations of judicial power by public lawyers and suggested that the insight and experience of political science may enable a different approach to analysis. This does pose an important methodological question: what is the *best* approach to analysing judicial power as a form of political power? This section draws upon the insight from Chapter 2, and in particular the three established accounts of Dahl, Bachrach and Baratz and Lukes, to explore the different questions political science may ask of judicial power. In part, this will demonstrate some of the benefits of thinking politically about judicial power and how this thinking can be incorporated within an analytical approach. It will use reference to the *Miller* case to demonstrate its contribution.

Questions of analytical approach are intrinsically linked to questions of conceptualisation. Indeed, this chapter is itself suggesting the benefits of thinking politically about judicial power as part of its case for adopting the insight and approaches of political theorists in subsequent analysis and design. In spite of this link, it is important to view the process of conceptualisation as distinct from the process of analysis in order to reflect upon the necessary qualities of each for the design of this thesis' approach. At the end of Chapter 2, three broad analytical themes were identified within existing political science research on the question of analysing and conceptualising power; key aspects of how political science thinks about power. Those themes were: the nature of power, the exercise of power and the context of power. These themes require us to consider certain ingredients necessary for a more complete analysis of any form of power; to ask what the power is, how the power is used and any wider influences upon the exercise of that power or our understanding of it. This section will consider these broad themes – and the analytical approaches of the one, two and three-dimensional accounts – as a means of exploring the benefits of adopting this style of thinking and analysis.

2.1 Power as decision making

One feature of existing judicial power debates has been the emphasis on decision making – what this thesis has termed the *decisional* narrative. Dahl's first face of judicial power attends most readily to questions of concrete and observable decision-making. Identifying the decision-making within a power relationship between the decision-maker (A) and the individual affected by the decision (B). Importantly, Dahl suggests, the decision of A must cause B to do something they would not already have done. It is the affecting of behaviour which is viewed as an indicator of power in this account. In principle, this is a reasonable account of judicial power and evident in a number of legal scenarios. The law itself – its rules, in their many forms – is a powerful entity: '[a]ll mandatory rules of law interfere with the personal autonomy of individuals'.²⁸⁸ It follows from this that a judge as a decision-maker operationalising those rules can appear similarly powerful. Viewing judicial power in this way will also lead to two related assumptions: one, that a power relationship is one-directional – that A has the power over B - and two, that judicial power is understood as conduct-shaping power – that A affects the conduct of B. A one-dimensional account of the *exercise* of judicial power in *Miller* is viewing power in terms of its exercise in the form of 'concrete decision-making' will likely focus on the UKSC decision itself:

²⁸⁸ Jonathan Sumption, 'The Reith Lectures 2019: Law and the Decline of Politics - Lecture 4: Rights and the Ideal Constitution' (The Reith Lectures 2019 11 June 2019) <http://downloads.bbc.co.uk/radio4/reith2019/Reith_2019_Sumption_lecture_4.pdf> accessed 10 May 2020

the judgment.²⁸⁹ The UKSC's decision (power) had the effect of changing how Article 50 TEU was triggered. It limited the power and actions of the government (who wished to exercise prerogative power) and at the same time, handed power to Parliament to trigger Article 50 via legislation.

Dahl's emphasis on the causal relationship between A's power and the effect its exercise has on B is helpful to locate the power relations and the actors and to view the potential power and effects of the decision. However, within judicial power debates we have seen an emphasis on understanding judicial power as the power of court decisions. The limitation of this is that it focuses us on decision making inside the courtroom and it may not account for a *range of decision making* that can occur during litigation. Consider utilising Dahl's focus on decision making and cause as a means of asking what kind of *different decisions* related to the core decision (the ruling itself) might we consider as part of a wider analysis. Here we might consider as well, decisions relating to panel selection and the extraordinary panel of eleven UKSC Justices (broader decisions relating to the exercise of power).²⁹⁰ We might consider the decision to leapfrog the Court of Appeal and the granting of permission (decisions relating to access for claims).²⁹¹ We might consider further, specific decisions such as those relating to interjections, timings and responses to the arguments put forward by lawyers during the appeal (decisions relating to process).

2.2 Power as agenda setting and nondecisions

Bachrach and Baratz's account of the second face of power asks us to consider additional features of the exercise of power to develop our understanding of its nature and use.²⁹² There are two prominent and appealing features of Bachrach and Baratz's second face of power: the questions posed about the existence and effect of agendas attached to decision-making and the possibility of a 'nondecision'.²⁹³ The second face of power requires us to identify any agenda surrounding an exercise of power and the result is to prompt questions about those agendas: what are they, why do they exist or are they being used as a means of covert control or as a way of mobilising a particular bias or interest.²⁹⁴ It is here that the sense of 'political' power is drawn out and it is for this reason that it can helpfully challenge existing thinking about judicial power. If judges are acting politically, we must think politically about how they act. Importantly, to ask questions of agendas or the use of nondecisions is not to automatically assume that such an exercise of power is negative. Rather, it is a tool for adding detail and clarity to a picture of

²⁸⁹ Robert Dahl, 'The Concept of Power' (1957) 20 *Behavioural Science* 201, 214

²⁹⁰ Dr Daniel Clarry and Christopher Sargeant, 'Judicial Panel Selection in the UK Supreme Court: Bigger Bench, More Authority?' a chapter in Daniel Clarry (ed.), *UK Supreme Court Yearbook Volume 7: 2015-2016 Legal Year* (Wildly & Sons Ltd 2018) 2. See also: Penny Darbyshire, *Sitting in Judgment: the working lives of judges* (OUP 2011) and Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013)

²⁹¹ Sir Phillip Sales, 'Legalism in constitutional law: judging in a democracy' (2018) Oct PL 687

²⁹² Peter Bachrach and Moreton S. Baratz, 'Two Faces of Power' (1962) 56(4) *American Political Science Review* 947, 952.

²⁹³ Bachrach and Baratz describe a nondecision as: "a decision that results in suppression or thwarting of a latent or manifest challenge to the values or interests of the decision maker" Peter Bachrach and Moreton S. Baratz, *Power and Poverty* (OUP 1970) 22

²⁹⁴ That is, being about to promote a certain idea or agenda by virtue of being in a 'powerful' position.

power in any example or episode: it helps us gain a better understanding. As Chapter 2 explained, the second face of power asks us to consider *why* power is exercised.

It was suggested that analysing agendas within the exercise of judicial power may be facilitated by judges' propensity to give reasons for their decisions. This explanation of the reason for the decision – whether that be inside the courtroom or elsewhere – does aid the understanding of *why* power is exercised in a particular way. For example, in *Miller*, when delivering the judgment Lord Neuberger was careful to set the scope of the judgment and the Court's role. He took time to explain that the *Miller* judgment was 'nothing to do with' the issues relating to withdrawal from the EU, the referendum result or even potential future relationships.²⁹⁵ These are not 'appropriate for resolution by judges'.²⁹⁶ Similarly, it is possible to analyse the judgment itself for particular reasoning. A challenge is when agendas are not explained through reasoning of this kind. For example, the panel decisions in the *Miller* litigation. The 'unusually strong'²⁹⁷ Divisional Court bench was explained by Lord Sales as a decision taken to 'make it equivalent in practical terms to the Court of Appeal' due to the expectation the Court of Appeal would be leapfrogged.²⁹⁸ The eleven-strong UKSC bench was explained later as being used 'so that no-one could say that the result would have been different if the panel had been different'.²⁹⁹

The second feature of the second face of power is the nondecision. This is quite interesting to look at in the *Miller* judgment. By the time the matter reached the Supreme Court, the 'constitutional lens being applied had broadened considerably' and one question for the Court related to the impact of any primary legislation securing withdrawal on the devolved legislatures.³⁰⁰ The question – was it necessary to secure the consent of the devolved legislatures to such legislation? – provoked much interest due to the *lack of response* given by the Court. The Court refused to answer the question about the status of the Sewel Convention. It said that judges, 'are neither the parents nor the guardians of political conventions; they are merely observers'.³⁰¹ This looks in many respects like a judicial nondecision: a decision not to act. Coupled with the agenda for this, the reason which appears to be given relates to the distinctions between political and legal matters: the former being the concern of politicians and not judges. The Court went further to say that even the legislative recognition of the Sewel Convention in s2 of the Scotland Act 2016 was insufficient to turn it into a 'legal rule justiciable by the courts'.³⁰² A different means of understanding judicial power in this situation: a lack of decision whose power is in its deference.

2.3 Power as influence

²⁹⁵ *Miller* at [3]

²⁹⁶ *Ibid*

²⁹⁷ Lady Hale, 'Moral Courage in the Law' (The Worcester Lecture, Worcester, 21 February 2019) 4

²⁹⁸ Sir Phillip Sales (n 283) 688

²⁹⁹ Lady Hale, 'Judges, Power and Accountability: Constitutional Implications of Judicial Selection' (A speech at the Constitutional Summer School, Belfast, 11 August 2017) 16

³⁰⁰ Mark Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76(2) CLJ 17

³⁰¹ *Miller* at [146]

³⁰² *Ibid* at [148]

The third face of power challenges us to consider the unobservable aspects of power and its use. Not so concerned with decisions but a broader notion of influence, Lukes' account of power requires us to look beyond what we can observe and consider any further aspects of the exercise of power such as how norms and beliefs may be created as a result of power being used.³⁰³ David S. Law explains how the US Supreme Court exercises power through communicating opinions about disputes which then coordinate the behaviour of others.³⁰⁴ Law acknowledges courts' power to shape a society's belief systems through statements about what is, simply put, right and wrong and he refers to this as the power of persuasion as opposed to coercion since the ability of the court to make people want to comply is through 'appealing to their sense of what is good, appropriate, or desirable.'³⁰⁵ Those beliefs, Law argues, may take different forms: *normative*, *factual* and *predictive*. *Normative* beliefs are formed through persuasion: the ability to make people want to comply with the outcome. The compliance and action then indicates what is 'lawful'.³⁰⁶ In determining a case, *factual* beliefs are formed.³⁰⁷ A court or judge may exercise a whistleblowing or monitoring power here to determine what has happened, identify responsibility or highlight, for example, where an administrative decision has been reached in the wrong way. It is also possible for judges to exercise power that then creates *predictive* beliefs i.e. expectations about how others will behave or how one ought to behave.³⁰⁸

Including this notion of influence within an analysis helps us to broaden our thinking – and understanding – of judicial power. Lukes' third face encourages greater notice to be taken of the wider context by asking questions about beliefs or values and moves our focus away from courtroom decision-making. It considers the extent to which judicial power not only shapes conduct but *context* as well. *Miller* was considered in this regard and the decision tended to be discussed in terms of its consequences. This engaged the complicated questions of how law was interacting with politics and how judges were interacting with 'political' questions. The constitutional significance of the questions raised in *Miller* meant they were 'inescapably political' and so the UKSC decision would always have the potential to be influential.³⁰⁹ Not only this, the judgment 'invoked some of the most authentic and fundamental 'old' rules.'³¹⁰ Here Law's model of beliefs can be used as a means of evidencing the influence and the third face of judicial power in *Miller*.

Firstly, the *normative* beliefs shaped through powers of persuasion. In a legal context, persuasion may imply a focus on argument or reasoning.³¹¹ However, persuasion may be exercised through other action. For example, a 'strong' bench in the High Court which mimics a Court of Appeal bench or an unusually large Supreme Court panel can affect the way the *Miller* judgment is

³⁰³ Steven Lukes, *Power: A Radical View* (2nd edn. Palgrave Macmillan 2005)

³⁰⁴ Law (n 260)

³⁰⁵ *Ibid* 755

³⁰⁶ *Ibid* 756

³⁰⁷ *Ibid* 757

³⁰⁸ *Ibid*

³⁰⁹ Thomas Poole, 'Losing our religion: public law and Brexit' (UKCLA, 2 December 2016)

<<https://ukconstitutionallaw.org/2016/12/02/thomas-poole-losing-our-religion-public-law-and-brexite/>> accessed 28 July 2021

³¹⁰ Albeit the case itself being a matter of procedure relating to the notification of Article 50 TEU, as said, to answer that matter it required consideration of constitutional law. See Poole (n 301)

³¹¹ Law notes how 'courts may employ any combination of legal, moral, and practical arguments in its efforts to shape our normative beliefs': Law (n 260) 756

interpreted: it persuades us as to the extent of the power or authority of the decision. The normative effect may be to influence our understanding of the decision and the extent to which compliance with it is expected. *Miller* has shaped *factual* beliefs.³¹² The Supreme Court's judgment contains descriptions of judicial independence³¹³, Parliament's sovereignty³¹⁴, the Crown's administrative powers and the use of the prerogative by the executive³¹⁵ and is a modern source of judicial clarification of fundamental constitutional principles.³¹⁶ The extent of the influence of the decision will mean that such descriptions have the potential to then shape beliefs about what is factually correct. This is challenging given the contestability of many of these beliefs – or the concepts to which they relate – and, for some, the creation and reinforcement of such factual beliefs can result in a 'stubborn stain' on the perceptions of roles and powers of key institutions.³¹⁷ It may be that such an account, despite its apparent authority, inaccurately perpetuates understandings of the points it makes.³¹⁸

Courts can create expectations about how others will behave through the shaping of *predictive* beliefs. In some respects, this is linked to the creation of normative or factual beliefs relating to roles and powers of institutions by causing others to perceive a situation in a certain way. In *Miller*, one might say that judicial statements about the correct use of prerogative powers will likely affect normative, factual and predictive beliefs. It can shape *predictive* beliefs since the outcome of the Supreme Court's judgment offers an account of the legally 'correct' process for the use of those powers. There are further *predictive* beliefs given in terms of what should happen following the *Miller* decision: that legislation was required to trigger Article 50 TEU. The influence in terms of predictive beliefs of the decision may look notable however, the reality was that the passing of this Act – with only one substantive section – was a 'mere administrative formality made inevitable by the referendum, rather than a policy-laden decision that should be accompanied by sustained parliamentary debate'.³¹⁹

2.4 Power and behaviour – interactions, relationships, actors and institutions

A significant appeal of political science is the emphasis on interactions, relationships and power. This is what has been termed the 'behavioural' aspects of the analysis of the concept of power. For judicial power, this theme allows us to look at the judges and other actors involved in the existence and exercise of power. However, political science's interest in power relations is, as

³¹² Through what Law described as 'credibly describing the behavior of others': Law (n 260) 757

³¹³ *Miller* at [42]

³¹⁴ *Ibid* at [43]

³¹⁵ See, for example *Miller* at [44, 46]

³¹⁶ Timothy Endicott refers to it as 'an instant classic of constitutional law': Timothy Endicott, 'The Stubborn Stain Theory of Executive Power: from Magna Carta to *Miller*' (Policy Exchange, 7 September 2017)

<<https://policyexchange.org.uk/wp-content/uploads/2017/09/The-Stubborn-Stain-Theory-of-Executive-Power.pdf>>

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³¹⁷ *Ibid*. For example, Endicott argues how *Miller* seeks to further reinforce the legitimacy of the courts in controlling executive power and does little to address the legitimacy gap for the executive.

³¹⁸ One might look to the many academic responses to the *Miller* judgment to see such disagreements as to the interpretation and outcomes. Some of these are mapped out by Poole (n 301) and here: Judicial Power Project, 'Miller: Expert Reactions' (Policy Exchange, 4 November 2016) <<http://judicialpowerproject.org.uk/wp-content/uploads/2016/11/Miller-Expert-Reactions-pdf.pdf>> accessed 30th August 2021

³¹⁹ Paul Daly, 'Miller: legal and political fault lines' (2017) Special Issue PL 73, 91

Dahl noted, ‘ancient’.³²⁰ Political theorists have long since understood power in these terms and analysed power in light of how that power is shared between groups, considerations for its allocation and even how those groups may shape the power itself.³²¹ This question of power relations is interesting since it asks us to consider the relative power of individual actors and of institutions within power relationships as well as the effects of that power on the behaviour of others (such as stopping a minister from exercising their own power as seen in *Miller*). For Martin Shapiro, it is from this behavioural perspective adopted by scholars such as Dahl that his political jurisprudence evolved. The significance of this is that political jurisprudence is concerned with how to understand – in part – behaviours within a political system which involve the courts. Therefore, institutions such as the judiciary or individual actors such as judges behave in ways that can be understood as power relations and, more specifically, political power relations.

In Shapiro’s essay in *Political Science: State of the Discipline II*, he identified the fact that American public law scholars had not adopted the ability to ‘speak’ politically about constitutional questions.³²² He regretted this since it was, he suggested, through the combination of public law and political science perspectives that the best understanding of courts and law *within* politics may be achieved. Part of this understanding is to appreciate the workings of institutional and individual relationships and interactions between power. One benefit of considering interactions and power relations was to take an ‘external perspective’ that showed ‘how politics invaded law’ and how ‘law and courts were institutions of politics.’³²³ This is a step towards contextualizing the behaviour and actions of judges surrounding the exercise of their power. In the process, it has the effect of helping us to extend our thinking about that power and its use. Interestingly, in the *Miller* example, there was plenty of focus on interactions, behaviour and relationships. There was focus on the actors and institutions involved – the coverage and analysis of the decision talking at length about judges themselves³²⁴ or of the judiciary in institutional terms – and there was similar coverage of the decision in terms of relationships.³²⁵ There was also a significant amount of analysis on the question of balancing power within those relationships. There was analysis of the behavioural aspects of judicial power.

This could be explained through the portrayal of *Miller* as a ‘political’ case and, therefore, analysis concerned itself with – deliberately or otherwise – questions of political science. However, it is

³²⁰ Robert Dahl, ‘Power’ as printed in Mark Haugaard (ed.), *Power: A Reader* (MUP 2002) 8

³²¹ *Ibid* 9,10

³²² Something Shapiro argued had resulted in a loss of potentially beneficial dialogue between political science and public law. See, Martin Shapiro in Ada W. Finifter, *Political Science: State of the Discipline II* (American Political Science Association 1993)

³²³ Martin Shapiro as documented in Howard Gillman, ‘Martin Shapiro and the Movement from “Old” to “New” Institutional Studies in Public Law Scholarship’ (2004) 7 *Annual Review of Political Science* 363, 375

³²⁴ For example, the profiles of the judges sitting on the Divisional Court bench or the fascination with Lady Hale’s spider brooch or Lord Sumption’s ties. Less about their power but plenty about judges as people. For example: Joshua Rozenberg, *Enemies of the People: How Judges Shape Society* (British University Press 2020), Katie King, ‘What is going on with Lord Sumption’s ties?’ (Legal Cheek, 8 December 2016)

<<https://www.legalcheek.com/2016/12/what-is-going-on-with-lord-sumptions-ties/>> accessed 3 May 2021, Joshua Rozenberg, ‘Hale: I regret that brooch’ (23 August 2021) <<https://rozenberg.substack.com/p/hale-i-regret-that-brooch>> accessed 24th August 2021

³²⁵ Peter Dominiczak, Christopher Hope and Kate McCann, ‘The Judges versus the People’ *The Telegraph* (London, 4 November 2016)

possible to use this emphasis on behaviour to focus more helpfully on analysing the interactions which surround the power and its use. This may allow us to look for other influential *actors* and give details, for example, of the role of Listing Officers, Registrars, the Deputy President and President in decisions relating to Supreme Court panel selection. It may help us analyse the significance of a Court of Appeal Justice sitting in the High Court. Identifying *power relations* emphasises individual and institutional links in the exercise of power as well as highlighting tensions or conflict which may exist. It may ask us to look at *wider influences* on the power relationship. Characterised perhaps as judges vs government, *Miller* might also be understood by considering the influence of the CJEU or of Parliament in how the judicial power was exercised. There is benefit in adopting behavioural features when thinking politically about judicial power but they will need to be framed as part of a wider aim to achieve a clearer understanding.

2.5 Power and context

The final aspect of political science and of social thinking more generally is the need to contextualise the detailed accounts of power and its use. Loosely speaking, contextualizing power within an analysis can encourage us to think about a specific episode of power in terms of wider environments in which it is found. This builds on the notion that power can shape the context around it but suggests instead that how we understand power can be informed by analysing the context in which it is located. There are features to the context of judicial power which will be useful to incorporate into our analysis and subsequent understanding: ‘by examining the question of judicial power within a particular temporal and jurisdictional context.’³²⁶ Not only questions of environments but also questions of timeframes. It no longer seems as appropriate to understand judicial power based on any fixed understanding. Doing so will be unable to adequately identify any *changing patterns* in the exercise of that power. Thinking about the timing of a decision or the climate of a decision can affect how we understand the power. The decision in *Miller* is understood more clearly relative to its context: the highly charged political environment following the Brexit referendum. Therefore, by engaging in ongoing analysis and reflection of our understanding, we are able to account for changes to that power or influential changes to the context of that power which may develop our understanding. We can understand judicial power *in light of* its changing context and use.

To view *Miller* only in this context we see explanation for some aspects of the power: such as the aforementioned panel decisions or the clarity with which the judgment was explained. But by becoming too focused on that context, we are not viewing that exercise of power – the decision – as part of a wider pattern of decision-making. Therefore, conclusions drawn about the relative power of that decision are overly simplified if they are not drawn relative to the wider context and wider timeframes of that type of power. Therefore, *Miller* is better understood as a single judicial review decision and may be analysed by comparing it within a broader perspective. We could ask instead, was the exercise of judicial power in *Miller* fundamentally different to other judicial review decisions or was the context different? Contextual analysis of this kind might help us extend our thinking of, for example, power relationships. *Miller* highlighted the relationship between judges and ministers and between the courts and Parliament. Since the

³²⁶ Mark Elliott, ‘Judicial Power and the United Kingdom’s Changing Constitution’ (2017) Paper No. 49/2017 Legal Studies Research Paper Series 1

decision, we have seen increased analysis of the environment of that decision documenting changes in the health of the relationship between the judiciary and the government.³²⁷

The other benefit to thinking of power and context is that we are encouraged to move our thinking about judicial power away from courtroom decision-making. Looking at the wider political system, and judges within it, we can include here analysis of judicial leadership power and think about judicial power *outside* of the courtroom. In doing so we recognise another important dimension of the judicial role and another site of judicial power. Consider the interactions and responses between the senior judiciary and the Lord Chancellor following the ‘Enemies of the People’ headline during the *Miller* litigation. The delayed response from the Lord Chancellor, Liz Truss, was perceived by the judiciary as an inadequate response to hostile media coverage and increased public debate about the Divisional Court’s decision.³²⁸ We can contextualise – and better understand – *Miller* if we include in our understanding the political environment, the uncertainty following the Brexit referendum, the need for novel constitutional questions to be resolved. Contextualising judicial power draws in the realities of that power, its use and how it is received which is an important part of our understanding. We might also consider how the decision making space may have changed. For example, we might consider any differences in approach between the UKSC and the House of Lords before 2009 and ask whether the institutional autonomy of the UKSC had a bearing on the decision making, for example?

3. The analytical framework: rationale and design

This final section presents this thesis’ own approach to analysing judicial power which combines the insight and experience of both public law and political science. The rationale for the use of this analytical framework will be made clear but in short, it incorporates and develops the analytical themes highlighted at the end of Chapter 2 into a framework comprising five discreet elements. This section will firstly consider specific considerations for the design of the analytical framework in light of this thesis’ appraisal of both public law and political science scholarship. The section will make clear the aims of the analytical framework as it is designed and finally, present the five element framework to be applied as part of the two case studies in Chapters 4 and 5.

3.1 Considerations for the design of an analytical framework

It is hoped at this point the benefits of using political thinking to conceptualise judicial power are evident, not least in the ability for that thinking to pose different questions of judicial power and how we understand it. However, it is not only the *exercise* of judicial power which concerns this

³²⁷ The current government’s decision to undertake an Independent Review of Administrative Law is seen by some as a breakdown of this relationship and of the government ‘clamping down and striking back’ against judicial power: see, Carol Harlow and Richard Rawlings, ‘“Striking Back” and “Clamping Down”: An Alternative Perspective on Judicial Review’ a chapter in John Bell, Mark Elliott, Jason NE Varuhas and Philip Murray, *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016)

³²⁸ Patrick O'Brien, "'Enemies of the People": judges, the media and the mythic Lord Chancellor' (2017) Nov Brexit Special Extra Issue PL 135 and BBC News, ‘Brexit ruling: Lord Chancellor backs judiciary amid row’ (5 November 2016) <<http://www.bbc.co.uk/news/uk-politics-37883576>> accessed 4 June 2021

thesis. As said previously, it is also a question of conceptualisation. To conceptualise judicial power, we can incorporate wider themes from political science: we may think about power relationships and actors and the allocation of power within those relationships; we can think about individual and institutional power and the structures within which they operate; we might think about pervading cultures, norms or values which surround the use of judicial power and incorporate that into our contextual understandings of the power; and, we can recognise that the exercise of power is multi-dimensional – there are many forms it can take and we must consider many possibilities if we are striving for a detailed understanding of the nature of that power. It is not to say that public lawyers have neglected any of these considerations within existing analysis but there is a need to bring together this thinking as part of an analysis.

Not only this, by drawing on the experience of political theorists we can develop further tools for thinking politically about judicial power and acknowledge the political dimensions of that power within analysis. It helps us to determine the ‘right’ kind of questions to ask about that power. There are some limits of the three established accounts’ portrayal of power that can be addressed in the design of the analytical framework. For example, the first face’s emphasis on decision making is useful but there needs to be analysis of a range of possible decision making to extend the analysis to reflect the multi-dimensional nature of judicial role. There may need to be clarification of the purpose of determining agendas or nondecision making to remove the negative connotations with this idea for our understanding of power. The ideas of political science can be included but the analytical framework can be tailored to the specific interests and concerns of public lawyers so that an analysis is as relevant as possible to its own demands. The analytical framework will need to incorporate legal questions alongside political questions. It needs tailoring to the context of courts and to law so that it speaks to lawyers. The analytical framework will need to manage the changing nature of judicial power and of the environments in which it exists and the analytical framework will need to be designed so as to overcome the conceptual complexities of power and facilitate an analysis.

The rationale for adopting an analytical framework in the study of judicial power is that it can provide a means to achieve a better understanding. It does this in a number of ways. Firstly, it ‘frames’ the concept of judicial power by incorporating the elements of the concept of power identified within political science scholarship. Not only does it contain key ingredients of an analysis of judicial power but it also enables discreet, separate thinking to be undertaken on each one. For example, it is possible to analyse the source of a power without having to negotiate the separate questions about that power’s exercise or its context. It makes the process of understanding composite elements of judicial power easier by separating them from one another. Secondly, it frames judicial power in terms of separate but related elements. Once each element is analysed and considered on its own, the information can be compiled to produce a clear and systematic account of a potentially complex episode or type of judicial power. Therefore, it is capable of producing a clearer understanding of that power and its use and operationalise the analysis in spite of the conceptual complexities of the phenomenon.

3.2. Aims of the analytical framework

The analytical framework is designed to be adaptable and flexible to the demands of a particular analysis. In some instances, it may be that there already exists a body of literature which has considered at length a certain aspect of the power analysis such as analysing the power contained in a new statute. By reviewing the analytical framework, the current analysis can then incorporate that understanding into the account or develop it if required but then *add to* that aspects by analysing the remaining elements. The framework can be adapted, therefore, to expand existing analysis or to undertake brand new analysis depending on the judicial power in question. Alongside this, adopting a systematic and ‘framed’ approach to understanding the concept it can overcome some of the broader challenges of the concept (such as the fact that it changes and is inherently complex).

The analytical framework is designed to ‘cut through’ the existing debates about judicial power by avoiding any reliance on pre-existing ideologies or beliefs. It is not designed to facilitate normative theories about judicial power in the first instance. It is designed to facilitate a descriptive analysis of judicial power. The benefit of this is that the user of the framework can navigate the politics of judicial power; the range and diversity of thinking about what judicial power *should* look like. This framework encourages an account of the current reality of that power and its use *from which* to debate its constitutional ideals. Therefore, the use of the analytical framework concentrates our attention on the conceptual foundations of judicial power *before* embarking on further empirical research and any resulting normative theories or accounts. It is not presupposing a certain understanding. Instead, through its incorporation of political thinking in its design it is helping us to consider how judicial power is understood alongside other forms of public power.

The wider aim of using this analytical framework in this thesis is to explore any disparities between existing discourse within the judicial power debates and the realities of judicial power in practice. The thesis introduction and Chapter 1 have identified the emergence of narratives surrounding judicial power in the UK: that it is increasing, it is a relatively new phenomenon, it is located in judicial decision making (largely inside the courtroom) and it is a phenomenon to be cautious of. This thesis is concerned to assess the accuracy of this account of judicial power and to see whether we are speaking about judicial power in sufficiently accurate and sophisticated ways. By summarising the discourse and determining the themes within it, it is possible to then compare that with the results of the analytical framework’s analysis. It will be possible to examine any disparities but also evaluate the accuracy of our understanding of that power. It is hoped that in its approach, this thesis can approach the ‘familiar dilemma of rigour versus relevance’ with some success.³²⁹

3.3 Design and structure of the analytical framework

The analytical framework contains five composite elements. As described above, each is intended to draw out specific questions as part of an analysis of judicial power. Each may be applied on its own but are most usefully applied with the view to developing a multi-dimensional account of judicial power. In summary, the elements are: source, exercise, interactions, time and space.

³²⁹ Robert Dahl, ‘Power’ as printed in Mark Haugaard (ed.), *Power: A Reader* (MUP 2002) 15

Element 1: SOURCE

The first element of the framework asks questions of the power itself asking: what is the power(s) that the judge is exercising here? The location of judicial power – where it comes from – and what the power is are fundamental aspects of our understanding. More specifically, we can better understand and talk about the exercise of judicial power if we have a detailed understanding of its source. This element is included for two reasons: to incorporate the approach of lawyers and their interest in the basis for action but also to guard against a tendency to over-emphasise the exercise of power within an analysis. It is hoped that in doing so, a more detailed understanding of the power itself will inform the understanding of how and why that power is used. In *Miller*, there are a number of interesting features to the source of the Court's power of review which might be explored. The Court explained its power within its judgment stating that, '...the role of the judiciary is *to uphold and further the rule of law*; more particularly, judges impartially identify and apply the law in every case brought before the courts. That is why and how these proceedings are being decided.'³³⁰ Similarly, the question of justiciability arose and this too gives further detail as to the nature and source of judicial review power – within the common law. Each merits further analysis and could be attended to by this element.

Element 2: EXERCISE

This second element is directly informed by the work of political scientists and requires us to consider the exercise of judicial power in multi-dimensional terms. This recognises that judicial power can be exercised in lots of different ways and extends our thinking beyond traditional conceptions of the judicial role, such as judicial power is exercised through decisions in court. It suggests that there is a range of decision making which can occur in any environment. It recognises the influence of judicial decision making outside the courtroom, such as in relation to judicial leadership roles. Wherever the location of the decision making, the three faces of power have helped us to consider whether there is more to the exercise of power than we might see. It asks us to consider agenda setting attached to the decision as well as the potential for a nondecision – a decision not to act. The third face asks us to analyse the possibility of wider influences from the exercise of power such as the creation of a set of beliefs. Part 2 of this chapter has considered the usefulness of considering different 'faces' of judicial power within the *Miller* judgment so as to better understand the use of that power.

Element 3: INTERACTIONS

This element incorporates the important questions relating to actors and power relationships in our understanding of judicial power. It draws on the insights of behavioural analysis and will allow for analysis of a range of specific contextual features of judicial power which can help us to understand its use. By considering the current state of collaboration between actors, we might identify the quality of relationships or highlight other channels of communication between individuals or institutions. Thinking about institutional relationships surrounding a particular site

³³⁰ [2017] UKSC 5 at [42]

or change in judicial power can help us understand more about current and future practice.³³¹ Considering questions of interaction helps us to think carefully about who has the power and who exercises that power or, how power is dispersed between actors. This highlights the relative considerations about individual or institutional judicial power. Furthermore, this aspect of the analysis specifically requires an account of the current dynamics within power relations which can often shed important light on how and why power is being used. For example, the *Miller* decision was looked at in relational terms and helped us to consider judicial power alongside Parliamentary and executive power. The changing dynamics which can occur between those powers often feature in changing narratives about the power and its use.

Element 4: TIME

This fourth element specifically addresses the need to consider changes in judicial power and enables the identification of changing patterns in the use of that power. It is a further contextual element of the analytical framework and uses notions of ‘time’ as a way of looking beyond the current exercise of power. It is useful to identify timelines including the episode of judicial power in question. We can situate *Miller* as part of a timeline.³³² For example, we can note how it follows the referendum in June 2016, the passing of the European Union (Notification of Withdrawal) Act 2017. We can now situate the 2018 UKSC decision in light of future events too, such as the changes in government and passing of the European Union (Withdrawal) Act and the UK’s ultimate withdrawal from the EU. Using the ‘time’ element, we could take a different approach and place *Miller* in a timeline of UKSC judicial review decisions to look at any specific patterns about the extent and frequency of the use of that power. We might, too, adopt an historical approach within this element and look at the legal history to the *Miller* decision. This fourth element manages the changing nature of judicial power and incorporates recognition of changing patterns of judicial power as part of our understanding.

Element 5: SPACE

In terms ‘space’, this final element is asking for consideration of ‘where’ the power is located and used and analysing the power in light of its environments. This directly addresses the concern of this thesis that analysis of judicial power may omit important dimensions of the judicial role, some of which can occur outside of courtroom decision making. Therefore, within this element we can ask questions of the internal and external environments of judicial power: namely, the judicial environment and the wider constitutional environment.³³³ Within the judiciary, there have been many reforms to its institutional structure and processes which may affect the exercise of judicial power. For example, an analysis of the use of power by a Lord Chief Justice before 2006 will likely differ from an analysis of LCJ power after 2006 following the CRA reforms to judicial leadership and governance. Equally, there may be changes in the wider constitutional environment which can inform how we understand the use of judicial

³³¹ See, for example, analysis of the JAC’s impact on institutional relationships by Graham Gee and Erika Rackley, ‘Diversity and the JAC’s first 10 years’ in Graham Gee and Erika Rackley (eds.), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2019)

³³² A timeline which is too long to summarise here in any significant detail but this would be an important feature of an analytical account of *Miller* or of the exercises of judicial power relating to Brexit, perhaps.

³³³ The term ‘constitutional’ is used here as an all-encompassing term to recognise the influences of environments beyond the judiciary such as political, social or economic environments.

power.³³⁴ For example, the decision in *Miller* can sit against the backdrop of constitutional uncertainties brought about by the Brexit referendum. Doing so may add further insight to changing patterns in the exercise of judicial power such as highlighting ‘one-off’ episodes or the start of wider ‘trends’ in the exercise of judicial power and the influences of other factors.

Conclusions and case studies

This chapter has set out this thesis’ case for a different approach to analysing judicial power. This chapter built upon the discussions from Chapter 2 which highlighted the political nature of power and the extensive insights of political science when seeking to analyse and conceptualise power in general. This chapter presents this thesis’ own analytical framework which is designed to incorporate this political thinking into analysis of judicial power while responding to the particular demands of public lawyers in that design. It is suggested that the five elements chosen here are able to encapsulate the key analytical themes in an analysis of power while managing the complexities of judicial power: of the phenomenon, of its multi-dimensional nature and of its own politics. By using the example of *Miller* it is hoped that the range of different questions we might ask of judicial power are beginning to emerge and the benefits of adopting a systematic approach to analysis shows how we can draw together a complex mix of thinking and argument about the nature and exercise of judicial power in the UK.

Of perhaps greatest challenge to this thesis’ claims is that judicial power is a form of political power. This chapter has sought to explain further what is intended by the use of this notion and how its adoption enables public lawyers – or anyone concerned with understanding judicial power – to use the tools of political theorists to think about judicial power beyond more traditional parameters. The further argument in favour of this is that if we understand the changing judicial role as multi-dimensional, with functions including regulation and leadership/management, it becomes more difficult to argue in favour of judicial power being insulated from politics. One only need consider, for example, the changed role and power of the Lord Chief Justice or the evolving role of the President of the Supreme Court in the wider picture of judicial leadership. One only need consider, for example, discussions relating to the Human Rights Act 1998 to see that judicial power exists within a structure that includes executive and legislative power as well.

This thesis is not suggesting there is a need to rid ourselves of any ideological beliefs about the constitution or about the power of judges within that constitution but rather this thesis is making the case for factoring an extra stage in the process of understanding that power. Prior to embarking on debates with the aim of reaching a consensus of expectations relating to the scope and limits of judicial power in the UK, we can afford time to better understanding the very concept of judicial power. We can spend time thinking about what we mean by that term and, through the application of this thesis’ analytical framework, we can construct a detailed and systematic analytical account of the realities of that power to inform ongoing debates about what

³³⁴ See, for example, an analysis offered by Richard Ekins and Graham Gee of the *Miller* decision in its wider constitutional and political context: ‘*Miller*, Constitutional Realism and the Politics of Brexit’ a chapter in Mark Elliott, Jack Williams, and Alison Young, (eds.) *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018)

the constitutionally desirable limits to that power may be. The analytical framework helps us think differently so as to challenge and examine our understanding. Thinking differently creates the potential for understanding differently which, in turn, may see the language of judicial power – how we talk about that power within scholarship – evolve too.

The chapter has set out its analytical approach to be applied in the following two chapters of this thesis: the case studies. In Chapter 4, the analytical framework is applied to analyse judicial power under the Human Rights Act 1998. A site of extensive existing debate on specific aspects of judicial power however, one where there is still room for further conceptualisation of ‘HRA power’. The case study will consider HRA power and the use of s4 declarations of incompatibility. The aim here is to test the use of the analytical framework and whether it can offer new insight into judicial power by asking different questions of existing debates. In Chapter 5, the analytical framework is applied to analyse the power of the office of the Lord Chief Justice. Here, it is argued, is an area of under-explored judicial power and the analysis aims to ask different – and potentially new – questions of ‘LCJ’ power. Within these case studies, consideration will be made of the narratives and debates and the expectations that language of judicial power creates. Following the use of the framework, it will be possible to analyse the ‘realities’ of HRA and LCJ power and assess the accuracy of the narratives and how we are currently understanding judicial power.

Chapter 4

Analysing Judicial Power – The Human Rights Act 1998 and Declarations of Incompatibility

The Human Rights Act prompts many questions relating to the role and power of judges and the Act remains a feature of contemporary judicial power debates. The issues these debates explore, which will be summarised in this chapter, are not, however, purely academic. The current government is committed to reviewing the HRA alongside other matters such as the nature and scope of administrative law.³³⁵ As a result, understandings about the power of judges under the HRA are forming the basis of policy arguments as well as featuring within constitutional scholarship. This suggests that this is a good opportunity to ask whether it is possible, by thinking politically about ‘HRA power’, to assess the accuracy and breadth of our existing understandings about the nature and scope of this form of judicial power.

The chapter will begin by explaining the rationale for focusing on section 4 HRA and declarations of incompatibility within this analysis. Summarised briefly, the reason for this focus is that section 4 can be used as a clear example of how contemporary debates – and the narratives this thesis has identified – risk oversimplifying our understanding of the nature of judicial power. It can demonstrate some of the possible limits to existing approaches. Declarations of incompatibility are a tangible exercise of judicial power under the HRA and as such, there is plenty of data available about its use since 2000. This means that there is clear potential for assessing claims made about the nature of HRA power against ‘evidence of how it has actually been operating in practice’.³³⁶ While these are decisions which occur *inside* the courtroom, there is still scope to broaden our understanding of them by considering them in the context of the changing judicial role (such as where those decisions relate to the *regulatory* dimension and what this might mean for our understanding) and by placing them in the context of the other features of power this thesis has thus far identified as being important elements in our conceptualisation

³³⁵ Ministry of Justice, *Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998* (CP 588, 2021), Foreword by The Rt Hon Dominic Raab MP. See further discussion of these aims in: Conservative and Unionist Party, ‘Manifesto 2019: Get Brexit Done, Unleash Britain’s Potential’ (2019) <https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf>; Richard Ekins, ‘Protecting the Constitution: How and why Parliament should limit judicial power’ (Policy Exchange 2019) <<https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf>> accessed 2 September 2021

³³⁶ Murray Hunt in his submission to the Independent Human Rights Act Review’s Call for Evidence noted the Review was a ‘welcome opportunity for a genuinely independent, dispassionate and forensic assessment of claims which are frequently made about the effect of the Act, on the basis of rigorous evaluation of the evidence of how it has actually been operating in practice.’ See Hunt M, ‘The Independent Human Rights Act Review: Response to Call for Evidence’ (2021) <<https://www.gov.uk/guidance/independent-human-rights-act-review#call-for-evidence-responses>> accessed 16 November 2021. Available via download under ‘Call for Evidence: Individual Responses M-Z’, 3.

of that power in practice (such as highlighting the changing dynamics of agency/actors and of changing behaviours on the exercise of power).

Secondly, the chapter will demonstrate an application of the analytical framework. This further highlights the benefits of taking a step back from understanding judicial power in light of normative models and instead thinking politically about that power.³³⁷ One of this thesis' claims is that contemporary debates may be enriched by requiring us to spend time thinking about what is being debated and why. In particular, considering what we understand about judicial *power* and exploring why certain disagreements or sites of consensus exist within debates about the nature and scope of that power. It should be said that this chapter will not resolve any debates about HRA power but rather provide a clearer starting point to subsequently understand how the power is being used, continuing to use section 4 HRA as a focal point. The rationale in this choice of case study has been to ask what else we can understand about judicial power *inside* the courtroom. While the narratives identified in Chapter 1 show the importance of this site of judicial power in terms of the interest and debate it provokes, it is suggested that our understanding may not be as holistic and broad as it might be in respect of this kind of judicial power. The decisions in question identify a need to discuss that exercise of judicial power but this thesis' approach wishes to ask, 'what else can we know?'

This chapter aims to show how it is possible to widen the analysis within any particular site of judicial power – such as judicial power under the HRA – beyond single, one-off decisions: part of the problem this thesis identifies within contemporary debates. Most notably, it aims to show how placing decisions (in this case a decision under s4(2) HRA) in context can enrich our understanding and better reflect the nature of judicial power. It does so by requiring an analysis to move beyond one-off decisions but rather to ask questions around them and any related decisions. Using the language of political science and the five elements of the analytical framework, this chapter highlights the aspects of 'HRA power' which are less often incorporated into debates or which may be under-explored features of this power. The chapter therefore asks us to reflect on questions relating to how we might describe fully the source of HRA power beyond merely identifying its location in statute. There is detailed analysis of the many dimensions of the use of HRA power, including nondecision-making and unobservable influence. The chapter also demonstrates how the many politics of judicial power may be navigated and how the systematisation of an analysis can add both clarity and depth to our existing understandings.

Finally, the chapter reflects upon what this analytical approach might offer in terms of increased insight and contextualisation of HRA power and declarations of incompatibility. The chapter will highlight how the HRA is a good example of where the lines between law and politics and, therefore, legal and political questions about judicial power can be particularly blurred. This thesis' approach aims to 'cut through' the many politics of HRA power which surround this particular challenge and, along with its assessment of the narratives, offers a clearer sense of how we might understand the exercise of this form of judicial power. One suggestion this thesis offers is to conceptualise the judicial role as multi-dimensional and to situate forms of judicial power

³³⁷ This approach aims to separate analysis from critique in the search for greater understanding of judges' power under s4 HRA, a challenge set by Colin Hay, 'Divided by a Common Language: Political Theory and the Concept of Power' (1997) 17 *Politics* 45, 52

within those dimensions as part of our increased comprehension and contextualisation. In this regard, this case study brings to the fore the *traditional* and *regulatory* dimensions of the judicial role engaged by the HRA and by the use of s4 DOIs to offer a more holistic and rounded account of judicial power in this context.

1. The Human Rights Act and contemporary debates about judicial power

1.1. Judicial power under the Human Rights Act 1998

Questions of judicial power are propelled to the fore by the HRA and recognised as a ‘turning point in judicial activism’.³³⁸ The reason being is that the changes made by the Act had a ‘significant impact on the function of the judiciary’ by requiring judges to fulfil certain responsibilities such as interpreting domestic legislation so far as is possible in line with ECHR rights, by requiring judges to take account of Strasbourg jurisprudence in dealing with human rights questions and by offering judges a means to highlight any resulting incompatibilities to Parliament. The HRA’s regime prescribes certain responsibilities for the courts that would see judges taking an active role in the safeguarding of human rights and this raised important questions about how the Act would affect the balance of power within the constitution.³³⁹ As a result, it is fair to say that under the HRA’s regime, the ‘judiciary have been propelled deep into the contestable world of governance’ and the Act has brought some of their activities closer to the lines between law and politics.³⁴⁰ For many, the Act saw a ‘strengthening of the courts’ authority³⁴¹ and not only this, but the Act ‘allows judges to be somewhat creative in their interpretation of laws’, all of which can change how we may view judicial power in light of the HRA.³⁴²

As mentioned, a further complexity in understanding judicial power in this context is, as suggested, the fact that questions of human rights traverse the boundaries between law and politics. Episodes of HRA power often give rise to concerns as to the limits of judicial power and the comparative functions and powers of political institutions in matters of human rights.³⁴³ Within existing scholarship, academics and practitioners have contested issues relating to the nature and scope of the judicial role³⁴⁴ and the balance of power within relationships between the

³³⁸ Kate Malleon, *The New Judiciary: the effects of expansion and activism* (Dartmouth Publishing 1999) 24

³³⁹ Ibid

³⁴⁰ Danny Nicol, ‘Law and Politics after the Human Rights Act’ (2006) 4 PL 722, 742

³⁴¹ Mark Elliott, ‘Judicial Power and the United Kingdom’s Changing Constitution’ (2017) Paper No. 49/2017 Legal Studies Research Paper Series 1, 6

³⁴² Conor Gearty, ‘The Human Rights Act Should Not Be Repealed’ (UKCLA, 17 September 2016)

<<https://ukconstitutionallaw.org/2016/09/17/conor-gearty-the-human-rights-act-should-not-be-repealed/>> accessed 17 November 2021. It should be noted that Gearty here goes on to say that while this creativity is permitted, judges have acted within the limits of the Act and the Act, overall, does not disrespect Parliament’s sovereignty.

³⁴³ As Kavanagh notes, legislators were tasked with finding ‘a way of allowing judges to enforce human rights standards while preserving the notion of parliamentary sovereignty’. Aileen Kavanagh, ‘What’s so weak about “weak form review”? The case of the UK Human Rights Act 1998’ (2015) 13(4) *International Journal of Constitutional Law* 1008, 1014

³⁴⁴ Dame Mary Arden, ‘The Changing Judicial Role: Human Rights, Community Law and the Intention of Parliament’ (2008) 67(3) *CLJ* 487

judiciary, ministers and Parliament.³⁴⁵ Other dynamics within those relationships are debated such as instances of deference³⁴⁶, the effectiveness of dialogue between branches and, of course, questions of the judiciary's willingness to enforce human rights obligations in ways that may appear to some as being creative.³⁴⁷ This is not to omit wider, international dynamics in these relationships such as the involvement of the ECtHR in domestic HRA decision-making. In this sense, this case study allows us to reflect upon where and how the boundaries between law and politics are drawn in these debates and between institutions and, in light of the analysis, provide a clearer picture of where they have been drawn in practice.

1.2 Debating judicial power under the Human Rights Act

This thesis argues that the narratives which emerge from contemporary debates are only part of how we might think about judicial power under the HRA. The argument is that a more comprehensive understanding is possible if we can extend the ways in which we describe the nature of that power. Existing debates have risked losing some perspective of HRA power in the sense that claims made about judicial power have been, at times, informed by the narratives. In this context, the dominant narrative suggests that HRA power has increased judicial power and the 'unprecedented transfer of political power from the executive and legislature to the judiciary' is exactly why, for many, it illustrates such a rise.³⁴⁸ For others, it is the wider mechanisms and influence created by the Convention – and the Act – that has seen it become 'an engine for political litigation and an instrument by which domestic courts can and have expanded their power'.³⁴⁹ Others have suggested that that HRA has also given judicial behaviour a stronger political quality or, at least, one 'more involved in policy-making'.³⁵⁰

Prior to, and at the time of, its enactment it was increasingly clear that the HRA would represent a significant change in the constitutional landscape and this change would inevitably affect the judiciary. It was clear that the HRA would give judges 'the tools' to engage more robustly with the protection of citizens' rights.³⁵¹ Due to the novelty of clearer statutory provision for the mechanisms through which the Convention would be adhered to and rights considered, there was plenty of debate about how judges might use the Act in practice. For example, relating to

³⁴⁵ HL Constitution Committee, *Relations between the executive, the judiciary and Parliament: Report with Evidence* (HL 151, 2007)

³⁴⁶ See, for example, Francesca Klug, 'Judicial Deference under the Human Rights Act 1998' (2003) 2 EHRLR 125; Aileen Kavanagh, 'Deference in particular contexts' in *Constitutional Review under the Human Rights Act* (CUP 2009) 211; TRS Allan, 'Human rights and judicial review: a critique of "due deference"' (2006) 65(3) CLJ 671, 695 or Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs to the Concept of "Due Deference"' in Nicholas Bamforth and Peter Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Oxford 2003)

³⁴⁷ On the matter of dialogue, this chapter considers this later. For now, see: Alison Young, 'Is dialogue working under the Human Rights Act 1998?' (2011) Oct PL 773; Richard Clayton Q.C., 'Judicial deference and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act 1998' (2004) Spr PL 33, 47 and Tom Hickman, 'Constitutional dialogue, constitutional theories and the Human Rights Act 1998' (2005) Sum PL 306, 335

³⁴⁸ Keith Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62(1) MLR 79

³⁴⁹ Richard Ekins and Graham Gee, 'Submission to the Joint Committee on Human Rights, 20 years of the Human Rights Act' (Policy Exchange, 18 September 2018) <<https://policyexchange.org.uk/wp-content/uploads/2018/10/JPP-submission-to-the-JCHR-inquiry-18-September-2018.pdf>> accessed 20 April 2020

³⁵⁰ David Neuberger and Peter Riddell, *The Power of Judges* (Haus Publishing 2018) 32

³⁵¹ Keith Ewing, 'The futility of the Human Rights Act' (2004) Win PL 840

questions of interpretation – both of Convention articles and of the courts’ own role in the fulfilment of their duty under the Act.³⁵² Finally, the narratives imply that the ways in which judges have used their power under the Act, or the uncertainty about how they might, has led to wider concerns about issues such as the ‘judicialisation of politics’.³⁵³ There is a wider debate about where those boundaries between law and politics *should* be in this area; between what functions are judicial and which are political.

However, part of the problem is that such boundaries have been contested based upon existing normative models of the judicial role and those norms are themselves contestable. To address this – albeit not to suggest what such norms should be – the analysis here asks instead: how has the judicial role evolved within the HRA framework and what does that suggest about how the boundaries between law and politics are managed through the exercise of judicial power. In light of statutory intervention in this aspect of judicial power, we may now look at how judges have subsequently negotiated and shaped their power in practice. To illustrate this challenge, consider the example of a judicial decision under s4 HRA which highlights the incompatibility of a law preventing prisoners from having the right to vote. It includes both questions of law (such as the legal issue of compatibility of domestic legislation with the Convention or the issue of the courts’ role under s4 to declare such incompatibility) and questions of politics (such as the arguments for and against disenfranchising certain citizens). The design of the HRA – including the s4 provision – has required judges to engage with these questions through legal processes yet there is an overlap between exactly which questions may be for legal resolution and which may be for political resolution. There is also, save for the s4 provision itself, little prescription of how that might materialise in practice.

It is here that the complex politics of judicial power can be considered once more. Issues relating to human rights feature centrally in electoral politics, such as within a political party’s manifesto pledges to address internet-related privacy concerns or within public debates about questions of the scope of an individual’s right to protest. It is also true that when judges are called upon to resolve legal questions in court relating to these rights, their decision-making can become the *focus of politics* and *politicised* in the sense that the courts’ involvement is brought to the fore. It may subsequently be the case that through increased awareness of their involvement, the nature of their role or the ways in which they exercise their decision-making may be debated: should the courts be involved, for example? The resulting debate – with a variety of perspectives as to what may be right - suggests the issue may too be *settled by politics*. We might further see this sense of politics evidenced in contemporary debates. The often-competing views of political and legal constitutionalism may debate the appropriateness or desirability of particular judicial interventions in such matters.³⁵⁴

³⁵² See Shona Wilson Stark, ‘Facing facts: judicial approaches to section 4 of the Human Rights Act 1998’ (2017) 133(Oct) LQR 631; Gavin Phillipson, ‘(Mis)-reading section 3 of the Human Rights Act’ (2003) LQR 183; Richard Buxton, ‘The Future of Declarations of Incompatibility’ (2010) PL 213, 215

³⁵³ Murray Hunt, ‘The impact of the Human Rights Act on the legislature: a diminution of democracy or a new voice for Parliament?’ (2010) 6 EHRLR 601, 608

³⁵⁴ An analysis of the conflicting approaches of political and legal constitutionalism – and the potential for consensus - is offered by Richard Bellamy: Richard Bellamy, ‘Political constitutionalism and the Human Rights Act’ (2011) 9(1) International Journal of Constitutional Law 86

However, this thesis argues that thinking about two further senses of the politics of judicial power helps us to navigate the existing complexities of debating judicial power under the HRA and to understand better how judges have used this form of power. These senses of politics help us do so by focusing our attention on determining the realities of the power and its use. Firstly, to understand judicial involvement in human rights matters in terms of *power relations and power relationships*. This helps to re-focus our attention on describing the nature of HRA power itself: to look at the form the power takes and the various ways in which it may be (and has been) exercised. Not only this, it allows us to reflect upon the dynamics of important power relationships and interactions around exercises of HRA power; relating to the use of s4 HRA in particular. This begins to better contextualise any uses of the power. Secondly, the thesis considers the politics of judicial power in terms of *power*. This aims to re-centre debates by looking at the power in these episodes separately from wider, ongoing questions relating to what role judges should play and what powers judges should have in respect of human rights. Using the insight of political science to equip us with the tools for this task, we are able to better reflect the nature and scope of this site of judicial power.

1.3 Section 4 HRA and questions of judicial power

This case study uses section 4 HRA and declarations of incompatibility as its focus. It does so for a number of reasons. As previously mentioned, there is now a substantial body of data available about the use of DOIs since 2000. That kind of data provides a rich source of information on judicial decision-making inside the courtroom within the *traditional* dimension of the judicial role. A DOI forms part of judges' adjudicatory function. In addition, DOIs represent a good example of judicial decision-making within the *regulatory* dimension of the judicial role. Part of the wider purpose of s4 (along with s3) is to review the content and applicability of legislation in line with the UK's obligations under the European Convention on Human Rights. In issuing a DOI, a court is playing a regulatory role within the wider human rights framework under the HRA. By analysing judicial power in these two dimensions, we can understand more clearly the working practices of judges and the changing circumstances in which their power may be used and why. For example, understanding it in an adjudicatory sense within traditional conceptions of the role or understanding it in a regulatory sense, engaging in the wider system of governance for that reason.

Section 4 has less often been a focus in debates about the HRA and judicial power, compared to an established body of literature on the use and interpretation of section 3. However, the use of section 4 provides an important example of the multi-dimensional nature of judicial power and permits a consideration of different dimensions of the judicial role. The design of the analytical framework draws out discrete features of judicial power relating to s4 and will describe with greater clarity the nature of power relations, relationships and power in this context. It will offer a nuanced and detailed account of judicial power under s4, reflecting its changeable, complex and context-dependent nature and use the growing body of evidence and discussion available.³⁵⁵ In light of this analysis and the insight it provides, it will be possible to reflect further upon contemporary debates. It will be useful to reflect on how we understand s3 based upon our knowledge of a corresponding provision, albeit this is not a primary aim of this case study. Since

³⁵⁵ Such as the annual reports from the Ministry of Justice which respond to human rights judgments and their impact.

s4 is an example of the overlap between law and politics, it is a prime site to compare the claims made about the nature of judicial power by the narratives with evidence of the ways in which it is exercised in reality - gained via the analysis.

2. Framing an analysis of HRA power: the analytical framework in action

As Chapter 3 mentioned, the analytical approach in this thesis is designed to ‘cut through’ existing debates about judicial power and to look afresh at how we understand the nature of judicial power. This analysis is, therefore, more concerned with the identification and conceptualisation of judicial power under the HRA – and under s4 as a particular focal point – as a prior step to existing and ongoing debates about what that power *ought to* look like and how it *ought to* be used. This case study will demonstrate how this thesis uses the analytical framework to develop an account of HRA/s4 power and how the five elements contribute discrete aspects to our understanding of its nature and use.

2.1 Source

This first element shows how we might draw out certain characteristics of the power itself and separate these from questions of its use. In this section, five characteristics are identified to help describe the nature of DOIs. They are: statutory, discretionary, conditional, remedial and declaratory. Of course, any description may be open to qualification or contestation – these are by no means absolute categorisations. Describing the features of s4 is intended to provide a clearer basis from which to reflect upon the ways in which it is used.

Statutory

Identifying HRA power – and DOIs in particular – as *statutory*, points us to the source of the power: where the power comes from. This immediately provides important (if unremarkable) information about its nature. Under the HRA, s4(2) reads: ‘If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.’³⁵⁶ DOIs are ‘a potent device’³⁵⁷ which can still be perceived as ‘the most innovative design-feature of the UK HRA’.³⁵⁸ A further consequence is that s4’s origin in statute points to its source as being ‘from Parliament’. Parliament legislated to provide judges with this power and a natural feature of this statutory character is that in the same way that Parliament can create and give the power to the courts, it may also take it away.³⁵⁹ Contrast this to some judicial power which is understood instead as being judge-made.³⁶⁰ In addition, noting the statutory

³⁵⁶ Human Rights Act 1998

³⁵⁷ Elliott (n 333) 6

³⁵⁸ Kavanagh (n 335) 1014

³⁵⁹ This chapter began by acknowledging the current Government’s calls for HRA reform. Colm O’Cinneide discusses the issues with the HRA and the changed role of judges but notes how there are many political and legislative challenges associated with the task of reform – highlighting the significance of the source of DOI power (and HRA power more generally) being statutory in nature: see Colm O’Cinneide, ‘Human Rights and the UK Constitution’ a chapter in Jeffrey Jowell and Colm O’Cinneide (eds.), *The Changing Constitution* (9th edn, OUP 2019) 89, 92

³⁶⁰ For example, common law development of the grounds of judicial review.

intervention in creating this kind of judicial power, we are interested then in how judges have received this and utilised it since.

Discretionary

The second characteristic observed when looking closely at the source is the *discretionary* nature of s4(2). The provision states that a court *may* make a DOI where there is an incompatibility within a piece of domestic legislation. The meaning of ‘may’ suggests that this does afford the courts some degree of decision-making space when it comes to deciding whether or not to issue a DOI. The HRA does not prescribe the nature and extent of this discretion and as such, ‘it is up to the courts to articulate the grounds on which they would decide that a rights-consistent interpretation is not possible.’³⁶¹ Further illustrating such discretion it is possible to locate cases where a court has decided *not* to issue a DOI.³⁶² This discretion is one site of caution which is evident in some aspects of those debates. Prior to debating the desirability of such discretion, the framework identifies it as a feature of the power itself. The discretion afforded by the drafting of s4 should be contrasted to the drafting under s3 where the courts are under a ‘duty’ to interpret legislation in a way that is Convention compatible. Looking at the two sections, it would appear from the statutory provisions that s4 has the potential to leave the courts more room when deciding how to act. However, as the next subsection suggests, the s4 discretion can only be exercised once s3 has been fully considered.³⁶³

Conditional

The issuing of a s4 DOI is *conditional* upon the interpretation of a court’s duty under s3. Therefore, the exercise of the discretion afforded by s4(2) is similarly conditional on other, preceding circumstances. Section 3(1) states that courts *must* read legislative provisions and give effect to them in a way which is compatible with Convention rights. The qualification of this is that the interpretation must happen ‘so far as it is possible to do so’. It provides for a ‘strong presumption of statutory interpretation, which is difficult to rebut even by express words.’³⁶⁴ It is clear that S3(1) creates an obligation, or duty, on the courts to exercise interpretive powers. This means that a s4 DOI is conditional upon a court being unable to interpret the legislative provision(s) in question in a manner that is Convention compatible. As Lord Bingham put it in *Sheldrake v Director of Prosecutions*, ‘a Convention-compliant interpretation under section 3 is the primary remedial measure and a declaration of incompatibility under section 4 an exceptional course’.³⁶⁵ Lord Steyn emphasised the fact that s3(1) is the ‘prime remedial measure’³⁶⁶ while s4(2) is ‘a measure of last resort’.³⁶⁷ This ‘interplay’ between ss3 and 4 is a significant

³⁶¹ Kavanagh (n 335) 1020

³⁶² *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27 or *R. (on the application of Conway) v Secretary of State for Justice* [2017] EWCA Civ 275. These cases are considered later as part of an analysis of the use of s4 and as such, develops this notion of discretion beyond the nature of the power to discretion in how that power is subsequently exercised.

³⁶³ Here it is worth noting that since s4 is a discretion, it is not a power in the strictest sense of the word. However, that discretion and the influences of its use can be understood as ‘powerful’ in many cases.

³⁶⁴ Aileen Kavanagh, *Constitutional Review under the Human Rights Act* (CUP 2009) 118

³⁶⁵ [2005] 1 AC 264 at [28]

³⁶⁶ *Ghaidan v Godin-Mendoza* [2004] 3 W.L.R. 113 at [46] and [50]

³⁶⁷ *Ibid* at [46]

observation to make when conceptualising DOIs as an example of HRA power; the dynamics and conditions of that relationship upon the operation of s4 is fundamental to understanding when and how it may be used.³⁶⁸

Remedial

Conceptualising DOIs as *remedial* requires careful clarification. However, using this idea in how we think about what a DOI is can be useful in better understanding the nature of that power and later, why the discretion it provides is exercised in certain ways. Arguably, both ss3 and 4 operate to provide a remedial measure following the review of legislation. This returns once more to the interplay *between* s3 and s4. Kavanagh discusses the ‘judicial incentive’ which may underpin an exercise of s3/s4 and this can be linked back to a court’s desire to offer a remedy.³⁶⁹ Parliament utilises courts’ expertise in interpretation within the HRA design, of which DOIs are one part. The choice between s3 or s4 can be understood better by acknowledging the remedial nature and purpose of those provisions. Where s3(1) would not provide a remedy, a DOI is issued. Likewise, where a DOI would be insufficient remedially – because it provides no remedy to the litigant or would be unlikely to result in law reform – the courts will likely adopt a s3 approach.³⁷⁰ Such a distinction can be illustrated by two cases: *Ghaidan*³⁷¹ and *Bellinger*.³⁷² In *Ghaidan*, a DOI was not issued but in *Bellinger*, as seen, a DOI was made and the ‘remedial implications’ governed the varied use of ss3 and 4 in these cases.

The question in *Ghaidan* related to the limits of the possibility to read and give effect to the meaning of the word ‘spouse’ under the Rent Act 1977 which explicitly referred to ‘wife or husband’. The issue was whether the courts could read the provision in such a way as not to discriminate against same sex couples and therefore, not identify an incompatibility between that Act and the Convention. The House of Lords explained here that the power under s3 would allow them to modify the wording of the Act in such a way as to avoid the injustice and read in words which changed the meaning.³⁷³ This approach mirrored the view of Lord Nicholls in *R v A (No 2)* explaining that the s3 interpretive obligation, ‘is of an unusual and far-reaching character’.³⁷⁴ Given the circumstances of *Ghaidan*, a s4 DOI would not have provided a litigant remedy and allowed the claimant to retain the tenancy. The desire to find an appropriate remedy *for the litigant* governed the court’s use of s3(1) contrasted to a desire or requirement to identify the need for a *legislative* remedy if using s4.

³⁶⁸ Kavanagh (n 335) 1021

³⁶⁹ Kavanagh (n 356) 119

³⁷⁰ The reason a DOI may not have any use from a remedial point of view in respect of the legislation in question or the parties concerned may be explained by looking at s4(6) HRA. This section outlines the effect of a DOI, explaining that a DOI ‘(a)does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b)is not binding on the parties to the proceedings in which it is made’.

³⁷¹ [2004] UKHL 30

³⁷² [2003] UKHL 21

³⁷³ [2004] 3 W.L.R. 113 at [32]. See further analysis in ‘Section 3(1) after *Ghaidan v. Mendoza*’ in Aileen Kavanagh, *Constitutional Review under the Human Rights Act* (CUP 2009) 49, 90

³⁷⁴ [2001] UKHL 25. Referred to in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, at [30]. The decision in *R v A* is one of the most often cited as a source of judicial declaration as to the scope of the power under ss3 and 4.

This second approach is seen in the case of *Bellinger v Bellinger*.³⁷⁵ In *Bellinger*, the legislative provision at issue was s.11(c) of the Matrimonial Causes Act 1973. The provision provided that parties to a marriage must be ‘respectively male and female’. Mrs Bellinger was a post-operative male to female transsexual and wished for her marriage to Mr Bellinger to be legally recognised. The Court found that this provision – and its inability to recognise transsexuals within the institution of marriage – was contrary to Article 8 ECHR and the right to private and family life as well as Article 14 ECHR and the protection from discrimination it affords. The decision to issue the DOI in this case was made in view of the assurances given by the Secretary of State that new legislation – the soon to be implemented Gender Recognition Act 2004 – would allow Mrs Bellinger to be married and her rights to be protected via that means.³⁷⁶ Therefore, the issuing of the DOI served part of a wider remedial process in relation to the marriage rights of transsexuals. The court did not provide a remedy for the litigant directly, knowing that the s4 DOI would give further weight to the case for a stronger legislative remedy within the law as a whole. Two distinct approaches but driven, in part, by the sort of remedy available under s4 (and s3) and the context of each case.

Declaratory

The final characteristic identified here is how s4 DOIs represent an example of judicial power which is *declaratory* in nature. A *declaration* of incompatibility is located within a court’s judgment. It is a statement or declaration by the court about the nature of the legislation concerned. It is described by the Ministry of Justice as a ‘notification’ to Parliament by the higher courts that a piece of legislation – or a specific provision within it – is incompatible with the Convention.³⁷⁷ Section 4 creates for the courts a ‘declaratory jurisdiction. It does not provide the courts with an outright power to quash legislation in question’.³⁷⁸ Therefore, it is clear from this that the courts were not given the position of ‘veto player’ which would have aligned their power with that of Parliament.³⁷⁹ In many respects this feature of the DOI is important when assessing the power of the courts under the Act. Giving the courts the ability to declare legislation incompatible with the Convention does two things: firstly, it purports to respect the judges’ role in seeking to remedy rights violations while, secondly, maintaining Parliament’s ultimate authority. It is, as Campbell puts it, ‘a characteristically British compromise’.³⁸⁰ More will be discussed in terms of responses to such declarations in the following section.

2.2 Exercise

³⁷⁵ [2003] UKHL 21

³⁷⁶ Kavanagh (n 356) 120

³⁷⁷ Ministry of Justice, *Responding to Human Rights judgments: Report to the Joint Committee on Human Rights on the Government’s response to Human Rights judgments 2017–18* (Cm 9728, 2018) 5

³⁷⁸ Ekins and Gee (n 341)

³⁷⁹ Part of the justification for this being the need to maintain the position of Parliament as ultimate authority. For further discussion see: Eric C. Ip, ‘The judicial review of legislation in the United Kingdom: a public choice analysis’ (2014) 37 *European Journal of Law and Economics* 221, 223

³⁸⁰ Tom Campbell, ‘Incorporation through Interpretation’ a chapter in Tom Campbell, Keith Ewing and Adam Tomkins (eds.), *Sceptical Essays on Human Rights* (OUP 2001) 79

It is possible to understand more about the exercise of DOIs simply by looking at how many have been issued. Since the first DOI was issued in 2001¹, 44 DOIs have been issued to date.³⁸¹ The purpose of the DOI, along with the interpretive duty under Section 3 HRA, was not only to ‘bolster judicial supervision’ of human rights but also to promote a ‘wider culture of human rights’ amongst the public and it is interesting to reflect upon these aims within an analysis of how the power is exercised.³⁸² This section of the analysis demonstrates the multi-dimensional nature of the exercise of s4: it has many faces. Analysing these dimensions allows us to see more clearly the different forms the use of s4 can take, the reasons behind its use – or lack of use – and the extent of the influence any exercise of the power may have on shaping wider beliefs.³⁸³

The first face: HRA power as decision-making

The first face of power as offered by Dahl sits most comfortably with traditional conceptions of judicial power: judicial power as concrete and observable decision-making. The exercise of judicial decision-making power inside the courtroom - under the HRA as one example – clearly has the capability to affect the personal autonomy of others, whether that be litigants or even institutions affected by the result of that decision. This face of power offers a one-directional and conduct-shaping account of judicial power. A s4 DOI decision is issued by the court and, if it results in a change in the law, we might say it causes an effect on another actor (Parliament). In doing so, it has shaped the conduct – or affected the behaviour – of that other actor to indicate the power relation. It would be reasonable to say that we already have a strong account of the first face of power under the HRA; decision-making inside the courtroom – within judges’ adjudicatory role – is a key feature of discussions about HRA power. It is questionable what the first face of power might add to existing debates but it can support the further identification of information relevant to our understanding.

For example, we might give here a sense of the *nature of DOI decisions*: the sorts of matters and issues they address. In *H*, the issue related to the detention of mental health patients and incompatibility between the process for attaining discharge from hospital under ss.72 and 73 of the Mental Health Act 1983 and Article 5 of the Convention: the right to liberty and security of person.³⁸⁴ In *Blood v Tarbuck*, the issue related to the law not permitting deceased fathers’ names being entered on the birth certificate of a child.³⁸⁵ As such, the court considered Section 28(6)(b) of the Human Fertilisation and Embryology Act 1990 to be incompatible with Article 8, and/or Article 14 taken together with Article 8.³⁸⁶ In *H*, the incompatibility was amended by the Mental

³⁸¹ Ministry of Justice, *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2020–2021* (CP 562, 2021)

³⁸² Tom Hickman, *Public Law After the Human Rights Act* (Hart 2010) 23

³⁸³ This is to consider the differing notions of conduct versus context-shaping power identified in Chapter 2, something which an assessment of the three dimensions (or faces) of power permits.

³⁸⁴ *R (on the application of H) v Mental Health Review Tribunal for North East London Region* [2001] EWCA Civ 415

³⁸⁵ *Blood and Tarbuck v Secretary of State for Health* unreported, 28 February 2003

³⁸⁶ Ministry of Justice, *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2010-11* (Cm 8162, 2011) 36

Health Act 1983 (Remedial) Order 2001 (SI 2001 No.3712) and in *Blood*, the legislative remedy came in the form of the Human Fertilisation and Embryology (Deceased Fathers) Act 2003. In describing the legislative focus of the DOIs here, we are able to understand a little more about the context of the decision in terms of the issue to which it related and understand the power relation in light of this.³⁸⁷

Another important aspect in our thinking about decision-making power is to consider the *effects* of those decisions. That is to ask, what happens as a result of the use of s4. The ‘notification’ nature of a DOI engages relations between the courts and Parliament as well as between existing legislation and Convention rights.³⁸⁸ While there is no requirement under the HRA for Parliament to respond to a DOI, it has been said that there is a ‘constitutional expectation’ of compliance in order to remedy the violation of rights identified.³⁸⁹ As Kavanagh notes, this has ‘generally been borne out in practice’ although the picture here is similarly patterned and requires qualification.³⁹⁰ For example, of the 44 DOIs recorded to date, 10 have been *overturned* on appeal, 5 related to provisions that had *already been amended* at the time the DOI was issued, 8 were addressed by Remedial Order with 15 addressed through various primary or secondary legislation.³⁹¹ These snapshots of responses show a patterned picture in terms of the end result – or effects – of the decision, and that the effects (or the power of) each DOI is subject to important qualification. We might need to qualify our understanding how much power any single DOI may have based upon differing effects to their use. Arguably, the first face of power offers a limited, one-dimensional account of the exercise of DOIs and leaves lots of room to extend our thinking under the second and third faces.

The second face: HRA power as non-decisions and agenda-setting

The limits of the first face of power mean that it does not, on its own, consider the breadth of potential power relations, or the features of those power relations under s4. Decision making is clearly a crucial part of our understanding of judicial power but the second face of power asks us

³⁸⁷ One might also inquire whether there are any other related decisions of interest around the decision to issue (or not) a DOI. One example might be where a judge makes comments extra-judicially about wider issues relating to decision-making such as a speech given by Lord Neuberger as President of the Supreme Court in which he reiterated the position that human rights are not a ‘judicial power-grab’, see Lord Neuberger, ‘Reflections on significant moments in the role of the Judiciary’ (Personal Support Unit Fundraising Breakfast, 16 March 2017). In making these extra-judicial comments, Lord Neuberger was also able to reinforce comments made in earlier judgments – and in earlier judicial speeches – about the status of the HRA and Convention rights alongside common law rights. Not only did Lord Neuberger refer to cases such as *Osborn v The Parole Board* [2014] AC 1115 and *Kennedy v The Charity Commission* [2015] 1 AC 455 and the comments made by Lords Reed and Mance regarding the relationship between statutory and common law rights, he also took time to show where common law rights have been more effectively used to secure certain judgments than those rights prescribed in the ECHR.

³⁸⁸ Ministry of Justice (n 369) 5

³⁸⁹ Jeffrey Jowell and Jonathan Cooper as cited in Aileen Kavanagh, ‘What’s so weak about “weak form review”? The case of the UK Human Rights Act 1998’ (2015) 13(4) *International Journal of Constitutional Law* 1008, 1025

³⁹⁰ Kavanagh (n 335) 1025

³⁹¹ For a full breakdown of responses, see Annex A of Ministry of Justice, *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2020–2021* (CP 562, 2021)

to consider questions of agenda setting and non decisions; Bachrach and Baratz's second face better recognises that (judicial) power is 'janus-faced'.³⁹² It is possible to understand more about the use of DOIs by looking at this second face and develops our account of judicial power from a one, to a two, dimensional picture. This gives a further richness to our understanding of the decision making identified (the first face) and draws in additional insights about the realities of that power's use. It asks us to incorporate more elements within our thinking.

Considering firstly the question of *nondecisions*: the decision not to act as a manifestation of power relations. In the context of DOIs, this phenomenon can be identified in a number of case examples. Firstly, in *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* (hereafter 'the NIHRC case'), the Supreme Court was asked to consider the extent to which Northern Irish abortion law is incompatible with Articles 3, 8 and 14 ECHR.³⁹³ The court, by a majority of 4:3 agreed that the legislation was incompatible with article 8 where it prohibits abortion in cases of rape, incest and foetal abnormality yet it did not issue a s4 DOI (a nondecision).³⁹⁴ The reason the court gave for not using this power was due to the Court's answer to the procedural question raised by the Attorney-General for Northern Ireland: did the NIHRC have the necessary standing to bring the judicial review? On this matter, the court was split in a less complex way and a majority of 4:3 found that there was no standing and as such, the court had no jurisdiction to make a DOI.³⁹⁵ In the case of *Conway*, all three courts which heard the matter, or an application to hear the matter, chose not to exercise their power under s4 culminating in the refusal to grant permission to hear the appeal.³⁹⁶ Here, a nondecision to prevent the issue from reaching the court and as a result, requiring a decision to be made.

Two different uses of nondecisions can be seen in the following cases from which the political nature of judicial power can be highlighted. In *R (on the application of Chester) v Secretary of State for Justice; Supreme Court*, the Supreme Court applied the principles from existing litigation on the question of prisoner voting rights in *Hirst (no. 2)* and *Scoppola v Italy (no. 3)*

³⁹² Colin Hay, 'Divided by a Common Language: Political Theory and the Concept of Power' (1997) 17 *Politics* 45, 46

³⁹³ *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27. The legislative provisions considered were ss.58 and 59 of the Offences Against the Person Act 1861 and s.25(1) of the Criminal Justice Act (NI) 1945 and the potential infringements related to the rights to prohibition of torture and inhuman and degrading treatment, to respect of everyone's private and family life and the prohibition of discrimination.

³⁹⁴ *Ibid* at [2]. The majority becomes 5:2 on the issue of foetal abnormality but not the other two cases. Two justices find that the law is also incompatible with article 3. Two justices find that the law is not incompatible with either articles 3 or 8.

³⁹⁵ *Ibid* at [3]

³⁹⁶ *R (on the application of Conway) v Secretary of State for Justice* [2017] EWCA Civ 275. Conway wished to challenge a High Court decision against issuing a DOI and was granted permission to appeal to the Court of Appeal (Civ). The argument made by Conway was that by resolving the incompatibility – changing the law on assisted dying – would mean he could make the decision, while he still had capacity, to have a peaceful yet assisted death at home. The Court of Appeal refused to make a DOI and upheld the decision. Conway later applied for permission to appeal to the Supreme Court. On 27 November 2018, the Court refused permission and as a result, there was no further domestic scope to seek a declaration of incompatibility under s4 HRA.

and declined to issue a further DOI.³⁹⁷ The Court explained that since the matter had already been subject to a DOI, there was little benefit from issuing a further DOI – on the same matter – in this later case.³⁹⁸ The Court chose not to issue a DOI and as such, determined a limit in their intervention in that way. Contrast this form of nondecision with that seen in *R (on the application of DN (Rwanda)) v Secretary of State for the Home Department* where the Supreme Court gave its reasoning almost entirely on common law principles instead of using the HRA as a basis for its power.³⁹⁹ In this case, a decision to circumvent the jurisdiction of the HRA in favour of the common law. A decision not to use statute but instead find a different basis for their decision-making. In this aspect of the analysis, the second face of power helps us to pull together a range of different HRA decisions within this notion to better see how and why judges have used their power in certain ways.

The second face of power makes a further contribution to the analysis through its ability to locate the existence of *agendas* accompanying these different forms of decision-making. So far, this study has considered a range of different decisions and identifying agendas is useful to pinpoint reasons behind decision-making and potentially understand why a decision was reached. For example, in terms of the ss3 and 4 relationship, in *H* the court explained that to interpret the provision using s3 would be a step too far in linguistic terms. However, in *Bellinger*, the court explained that while it could remedy the issue in the present case using s3, in doing so it would neglect a much wider issue: that the UK legislation was inadequate in recognising gender change and so there were issues with ECHR compliance. It was also recognising that the matter required ‘extensive enquiry and the widest public consultation and discussion’ and it was not for the courts to facilitate ‘a major change in the law’ which would have ‘far reaching ramifications’.⁴⁰⁰ In respect of the nondecisions above, in giving reasons for its refusal to grant permission to appeal in *Conway*, the Supreme Court noted that under the UK’s constitutional arrangements, it is only for Parliament to change the law.⁴⁰¹ The courts suggesting here that to change the law on assisted dying through any other means would be unconstitutional.⁴⁰²

In the *NIHRC* case, the reasons related to the standing issue and the general application of the law. However, those reasons can be scrutinised in terms of asking what other agendas there may be. In *NIHRC*, we might consider whether part of the agenda demonstrated the political nature of judicial power and a recognition by the Court to again defer to alternative, political authority to resolve a sensitive issue relating to the law on abortion. In *Chester*, the decision not to issue a further DOI could relate to an agenda in which the Court is wishing to make clear its unwillingness to abuse the s4 mechanism and think carefully about what the best approach will

³⁹⁷ *R (on the application of Chester) v Secretary of State for Justice; Supreme Court* [2014] UKSC 25

³⁹⁸ Ministry of Justice (n 373) 32

³⁹⁹ [2020] UKSC 7

⁴⁰⁰ *Bellinger v Bellinger* [2003] UKHL 21, at [37]

⁴⁰¹ See David Dyzenhaus, ‘Are legislatures good at morality? Or better at it than the courts?’ (2009) 7 IJCL 46, 51 where he discusses, in part, the fact that any decision-makers will approach an issue and give reasoning about it from different perspectives. He compares the difference of views of the Joint Committee on Human Rights with the Law Lords when considering human rights implications of government actions and proposed legislation.

⁴⁰² The court could, as it noted, make a DOI and leave the matter to Parliament to consider. The court reached its decision – as it right and proper in applications – on the basis of how likely it was that Mr Conway would succeed in his claim. The court said that it was ‘[n]ot without some reluctance’ that it was decided ‘those prospects are not sufficient’ to justify giving permission.

be in each case. It may be part of an agenda to recognise the scope of judicial power in terms of resolving the wider political questions beyond the legal question at the heart of the DOI. In *Chester*, the debate relating to prisoners' voting rights is identified as a political one (relating to electoral politics and one which may be settled by politics) despite having legal ramifications and ultimately, it is likely most appropriately resolved through political means. The legal question of ECHR compatibility or, indeed incompatibility, is – and has been – best resolved by the Court and beyond that, there is no further need for judicial intervention on the same question.

The third face: HRA power as unobservable influence

As with the first face of power, the limitations of the second face of power led to the development of Lukes' third face. While the second face is already adding clarity and detail to our understanding of the exercise of DOIs, it remains focused on conceptualising power as conduct-shaping; the power is used to cause certain effects on others. The third face of power extends our thinking once more by considering the potential of an exercise of power to have context-shaping effects. Here, this is to reflect on the wider effects of a DOI decision in terms of shaping the environments which surround it. In other words, to ask whether there are unobservable outcomes from the issuing (or not issuing) of a DOI such as influencing the development of certain norms or beliefs. This is a useful aspect of the analysis, partly because it differentiates between DOIs which are more self-contained in terms of wider effects and those which have longer-term consequences. It has the potential to highlight exercises of power which are more consequential than others.

Let us consider first the idea that DOIs do not necessarily demonstrate a third face of power. For example, the DOI in *H* was issued with knowledge of its relatively minor influence due to it being 'in line with government policy intentions'.⁴⁰³ As such, it was outwardly supported by the then Secretary of State for Health Jacqui Smith MP. There may be some subtle suggestion that, through issuing the DOI, the court was reinforcing the legal necessity Government's policy intentions. Similarly, in *Bellinger*, the court knew that the DOI issued would form part of the Government's existing plans to reform the law relating to gender recognition and gender reassignment in particular. Again, the wider influence of the DOI was relatively small but it could still be considered as having a supportive role in buttressing the authority of executive power. By contrast to this, one might consider the nondecisions in cases relating to assisted dying or the law relating to abortion rights. In cases such as *Conway*, *Nicklinson* or the *NIHRC* case, the courts had an opportunity to signal to Parliament the need to change the law through the DOI mechanism. However, in all three cases, the courts decided *not to* use that power.

By looking at this third face, one can see one example of where the courts 'recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person.'⁴⁰⁴ Beyond this, the 'most difficult question' for the courts is the 'extent to which they should defer to Parliament and other institutions of

⁴⁰³ Letter from Jacqui Smith, Minister of State Department of Health to the Chairman of the JCHR, 15 October 2001

⁴⁰⁴ Lord Hope in *R v DPP ex p. Kebeline* [2002] 2 AC 3236 at [381]

government on matters relating to the public interest.⁴⁰⁵ Returning to the Supreme Court decision in *Chester* and the decision not to issue a further DOI, the third face might help frame our thinking about the wider effects of this. While there was a clear legal issue of incompatibility, as reinforced by the ECtHR, the Supreme Court stepped aside from a potentially powerful exercise of power through *re-issuing* a DOI. Not only could this be described in terms of agenda (with explicit reasons given) or in terms of recognising the balance of constitutional authority in resolving the political questions it raises, it could be that the third face encourages us to consider whether the court was sending a further message to litigants. Had it issued a DOI, it would suggest that other litigants could pursue unresolved legislative matters through the courts to create further political pressure. By drawing a line as it did in *Chester*, the Court has implied set boundaries in the exercise of DOI power and its own institutional capability or intervention.

Admittedly, the judiciary retains a degree of discretion in the determination of such limits – one court may adopt what is seen as a deferential or restrained approach while another may not. There is much already written about judicial deference and the way in which it may be achieved,⁴⁰⁶ the extent to which it should be governed by rules⁴⁰⁷ or even whether it is correct to try and allocate roles in a quantifiable manner.⁴⁰⁸ Each relate to an underpinning question: if the courts are given such discretion to defer to Parliament, how do they know when to do so and do they do so appropriately? It gets to the heart of the judicial power debate regarding whether or not the courts are able to exercise the restraint required by the limits of their democratic role. David S. Law's normative, factual or predictive beliefs notion – discussed in the previous chapter - is helpful here.⁴⁰⁹ In circumstances of deference to Parliamentary authority, courts' patterned uses of DOIs creates factual beliefs as to the functions of the respective institutions and factual understanding of the circumstances when courts do defer. The increasing body of evidence about the use, and non-use, of DOIs and common themes in the reasoning given for this might support the creation of predictive beliefs about when and how judges will use this kind of judicial power in future.

2.3 Interactions

This section moves the analysis beyond looking at power relations (the s4 power and the ways in which it is exercised) to examine questions relating to *power relationships*. This involves identifying the contribution of certain actors within the DOI power relation(s), the dynamics between actors and as a result, considering how these differing interactions may affect the issuing – or not issuing – of a DOI. Looking at these interactions also determines when we are

⁴⁰⁵ Jeffery Jowell, 'Judicial deference: Servility, Civility or Institutional Capacity?' (2003) Win PL 592, 592

⁴⁰⁶ Laws LJ in *International Transport Roth GmbH* [2002] EWCA Civ 158, at [81] – [87] gave four principles which may govern judicial deference.

⁴⁰⁷ TRS Allan, 'Human rights and judicial review: a critique of "due deference"' (2006) 65(3) CLJ 671. TRS Allan argues that we ought to trust judges to exercise this restraint on a case-by-case basis, determining when it is needed and when it is not.

⁴⁰⁸ Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs to the Concept of "Due Deference"' in Nicholas Bamforth and Peter Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Oxford 2003). Hunt discusses the 'spatial approach' of 'hiving off' areas of decision-making.

⁴⁰⁹ David S. Law, 'A Theory of Judicial Power and Judicial Review' (2009) 97 *Georgetown Law Journal* 723

talking about judicial power in individual and/or institutional terms. The individual power of a judge or a single court or the institutional power of the judiciary compared to the individual power of a litigant or the institutional power of Parliament.

Actors involved directly in the exercise of s4

The HRA includes a number of interactions within the design of a s4 DOI. Firstly, the initial interaction between **victims** of suspected human rights' breaches and **public authorities** with the matter sought to be resolved by suitably qualified **senior courts**. Section 4(5) tells us that only senior courts may issue a declaration of incompatibility⁴¹⁰, although the meaning of 'court' within this provision has been updated to include other courts in more recent years.⁴¹¹ In order to bring such a case, a person must have standing and earlier case examples in this analysis have shown where this is used as a means to circumvent the exercise of a DOI.⁴¹² The HRA itself requires that a person bringing a claim is (or would be) a 'victim' of the unlawful act.⁴¹³ Secondly, in terms of recipients of DOIs, the design is such that **Parliament** may respond but the realities can vary here. In practice, the involvement of Parliament means a question of whether the DOI – if responded to in the form of a remedial action – is remedied via primary legislation or alternative means. King notes the 'modest impact' of DOIs on Parliament given that Parliament has 'only engaged rarely with the jurisprudence of the courts'.⁴¹⁴ Instead, the most common route for responding to DOIs more recently has engaged the **Government** – through the issuing of s10 HRA remedial orders.⁴¹⁵

Actors and wider relationships relating to the exercise of s4

The potential influence of other actors and wider relationships has already been touched upon above, mostly notably the question of how the HRA has affected the balance of power between the courts and Parliament: an institutional power relationship. Before considering this broader question, let us stay focused on the question of other actors whose own power and influence may affect the interactions relating to a DOI. To illustrate the significance of such actors, the roles of the European Court of Human Rights (ECtHR) and the Joint Committee on Human Rights (JCHR) are of interest. The relationship between the UK and Strasbourg is provided for under Article 46 of the Convention which requires contacting states' compliance with judgments. It is largely through these decisions that the Court has exercised 'considerable influence' over the

⁴¹⁰ Under this section, 'court' is taken to include: the Supreme Court, the Judicial Committee of the Privy Council, the Court Martial Appeal Court, in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session, in England and Wales or Northern Ireland, the High Court or the Court of Appeal, the Court of Protection, in any matter being dealt with by the President of the Family Division, the Chancellor of the High Court or a puisne judge of the High Court.

⁴¹¹ Such as changes brought in under the Armed Forces Act 2006, Mental Capacity Act 2005 and latterly, the Crime and Courts Act 2013

⁴¹² See the discussion in the 'Exercise' section relating to *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27

⁴¹³ S7(1) Human Rights Act 1998

⁴¹⁴ Jeff King, 'Submission to the Independent Human Rights Act Review' (3 March 2021)

<<https://www.gov.uk/guidance/independent-human-rights-act-review#call-for-evidence-responses>> accessed 16 November 2021. Available via download under 'Call for Evidence: Individual Responses A-L', 12.

⁴¹⁵ These remedial orders engage other actors too, such as the Joint Committee on Human Rights but their role and influence will be considered in the section below.

rights discourse in Europe and the Court and the Convention together means that countries as ‘subject to strong diplomatic pressures’ to respect its authority and supervision.⁴¹⁶ However, via s2(1)(a) HRA, domestic courts are now required to *take account of* any, ‘judgment, decision, declaration or advisory opinion’ of the Strasbourg court where it is relevant to the current proceedings. Initially, UK courts ‘mirrored’ Strasbourg jurisprudence to assess compatibility and guide interpretation of rights but after much academic and judicial criticism of how this reflected the notion of ‘taking account’, the position has since been clarified.⁴¹⁷ It is now the case that a ‘clear and consistent line of settled Strasbourg jurisprudence will generally be followed, but even this rule of thumb is not absolute’.⁴¹⁸

Here we are examining the extent of the influence of the Strasbourg court on a UK court’s DOI decision-making. Two earlier case examples can be looked at through this lens: *Bellinger* and *Smith v Scott*. When the DOI was issued in *Bellinger*, the ECtHR had considered the issue of gender recognition on several occasions in the preceding twenty years and its recent decision in *Goodwin v. United Kingdom* (2002) which identified the specific ECHR breach was explicitly referred to in the House of Lords’ judgment.⁴¹⁹ The domestic court’s DOI supplemented the existing influence of the Strasbourg court in notifying Parliament of the incompatibility and in this process, the link between the activities of the ECtHR and the UK court were made explicitly clear. A further example of this interaction is found in relating to prisoner voting rights. Following the ECtHR’s 2005 decision in *Hirst v UK (No. 2)*⁴²⁰, a ‘major fracture opened up’ between Strasbourg and the UK.⁴²¹ With the ECtHR holding that the UK’s current law which created a blanket ban disenfranchising all prisoners was not compatible with the Convention, it was not clear what the UK government would do.

Using Parliamentary opposition to law reform as the perpetuating reason, the UK refused to make the changes required. A 2007 Scottish case, *Smith v Scott*, saw the issuing of a DOI which echoed the position taken by Strasbourg but it was not until 2018 that administrative measures were taken by the Government to give two categories of prisoners the vote and as such, bring the UK legal position more in line with the ECtHR decision in *Hirst*. Even so, this particular DOI remains one of the most notable examples where there was no political response.⁴²² The difference in how we may perceive the influence of the ECtHR in these two examples is interesting. In *Bellinger*, the matter was already on the domestic political agenda and the involvement of the ECtHR was incorporated into the House of Lords’ decision. In terms of prisoners’ voting rights, an area where there may be less political drive for change, the response was much delayed. This can be interpreted in many different ways but from a behavioural point

⁴¹⁶ Colm O’Cinneide, ‘Human Rights and the UK Constitution’ a chapter in Jeffrey Jowell and Colm O’Cinneide (eds.), *The Changing Constitution* (9th edn, OUP 2019) 71

⁴¹⁷ Most recently in *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2

⁴¹⁸ Colm O’Cinneide, ‘Written Evidence to the Independent Human Rights Act Review (IHRAR)’ (2021) <<https://www.gov.uk/guidance/independent-human-rights-act-review#call-for-evidence-responses>> accessed 16 November 2021. Available via download under ‘Call for Evidence: Individual Responses A-L’), 3.

⁴¹⁹ 35 EHRR 18

⁴²⁰ (2006) 42 EHRR 41

⁴²¹ Colm O’Cinneide (n 408) 72

⁴²² [2007] CSIH 9. For further outline see Ministry of Justice, *Responding to Human Rights judgments: Report to the Joint Committee on Human Rights on the Government’s response to Human Rights judgments 2018–19* (CP 182, 2019) or Kent Roach and Jacqueline S. Hodgson, ‘Disenfranchising as punishment: European Court of Human Rights, UK and Canadian responses to prisoner voting’ (2017) Jul PL 450

of view, it is interesting to observe the dynamics between the actors in question: between the UK courts and Strasbourg and the receipt of those decisions by the UK government.

In contrast to the ECtHR, the JCHR is a domestic, Parliamentary body whose role includes the scrutiny of every Government Bill proposed to check its compatibility with the Convention. It considers the government responses to court judgments in human rights cases as well as conducting wider inquiries into human rights practice in the UK.⁴²³ The JCHR was the first permanent Joint Committee of both Houses and has operated under ‘broad terms of reference’ when it comes to its role of Bill scrutiny.⁴²⁴ Under s19 HRA, governments are required to produce a statement of compatibility relating to proposed legislation. Such proposals are made ‘in the shadow of the ECHR’ but also in the shadow of the JCHR, knowing that any possible incompatibilities will need to be justified and reported to Parliament.⁴²⁵ This ‘systematic’ scrutiny has the capability of exposing serious human rights issues within legislation and in effect is holding the executive to account, such as in cases of a delay in responding to a DOI.⁴²⁶ One of the concerns surrounding the HRA was that it may create an imbalance of power when it came to judicial scrutiny of human rights. The role and activity of the JCHR may be one example of the need to carefully qualify any claims that the HRA has led to the ‘judicialisation of politics, or to Parliament being bypassed on the most important issues of the day’ by situating responsibility for matters including those relating to compatibility issues in a Parliamentary body.⁴²⁷

The differing dynamics of communication

An important feature to acknowledge within these power relationships is the different dynamics between those actors. This can be illustrated by a number of factors: the manner in which the DOI is communicated, the nature of the response to the DOI and the character of ongoing dialogue between actors. Since there is no prescribed formula for a DOI, individual judges have approached the formation of this communication in different ways, each of which indicates the nuances of how the incompatibility may be shared with Parliament. For example, in *R (on the application of Baijai) v Secretary of State for the Home Department*, Buxton LJ set out his

⁴²³ Indeed, current analysis of the use of DOIs within the Ministry of Justice is a reporting exercise which involves the JCHR.

⁴²⁴ Francesca Klug and Helen Wildbore, ‘Breaking new ground: the Joint Committee on Human Rights and the role of Parliament in human rights compliance’ (2007) 3 EHRLR 231, 236

⁴²⁵ Dawn Oliver, ‘Improving the scrutiny of bills: the case of standards and checklists’ (2006) Sum PL 219, 223

⁴²⁶ For example, in *R (on the application of Sylviane Pierrette Morris) v Westminster City Council & First Secretary of State (No. 3)* [2005] EWCA Civ 1184 and later in relation to *R (on the application of Gabaj) v First Secretary of State* (Administrative Court 28 March 2006, unreported), the Joint Committee scrutinised the judgments, the DOIs and the nature of the governmental responses. Despite there being no legislative response for quite some time, there was a great deal of political dialogue between the government and the Committee. There is clear evidence of ‘sustained pressure’ on the government between 2006 and 2008 via letters and reports. For wider discussion of the JCHR’s role, see Robert Hazell, ‘Who is the guardian of legal values in the legislative process: Parliament or the Executive?’ (2004) Aut PL 495, 497

⁴²⁷ Hunt (n 345) 608. One further aspect of the JCHR’s activity which may bear on analysis is how it has used law within its own work. The JCHR has demonstrated ‘consistent’ use of international treaties as well as case law and legal opinion as a source of insight and in doing so, it has developed a robust but legalistic approach to its critique of legislation. In this regard, the JCHR adopts both political and legal qualities to its own work. For more discussion of this, see: Simon Evans and Carolyn Evans, ‘Legislative scrutiny committees and parliamentary conceptions of human rights’ (2006) Win PL 785, 798

recommendations stating that a new scheme ‘must’ or ‘at least’ contain certain elements.⁴²⁸ By comparison, in *H*, Lord Phillips presented certain considerations which the Secretary of State might ‘wish to bear in mind’.⁴²⁹ In *R (Wright) v Secretary of State for Health*, Baroness Hale abstained entirely from making any recommendations for remedial action.⁴³⁰ By identifying these, it is possible to reflect on the extent to which it is accurate to describe a DOI as being ‘more akin to judicial advice’ about the status of legislation and the infringement of rights as opposed to an instruction about what the political branches must do in response.⁴³¹

In addition to consider the form of a DOI – the nature of the communication – more can be understood about the interaction (and the power of the DOI) from the responses. Positive responses with explicit support or those which result in a legislative change, can indicate a willingness to resolve the incompatibility and an acceptance of the DOI. As previously noted, in most cases there has been some kind of legislative response even though such responses to a DOI are not required by the HRA. However, the example of prisoners’ voting rights highlights different responses and how the delaying power of ministers may indicate a different dynamic.⁴³² It may seem innocuous to consider delaying power but the power of the DOI is balanced against the power of the actors involved in that power relation. This dynamic is understood in political terms and can perhaps be illustrated by considering the sorts of DOIs where delays have occurred. The rights of prisoners is one example but ‘the reality is that they are often persons who are politically marginalised’ rather than ‘well-heeled litigants re-fighting battles previously lost in the legislature’.⁴³³

The applicants in these cases fall into minority groups⁴³⁴ and it is suggested that such groups are affected by legislative ‘blind spots’ and ‘burdens of inertia’ from government to resolve incompatibilities in legislation.⁴³⁵ Although the courts have a role in safeguarding rights, they are not equipped to engage in the wider political debates about the value or importance of certain issues being resolved by Parliament. In *Morris*, the government responded to the DOI by saying that it was ‘difficult and complex’ to strike a balance between their policy objectives and the court’s decision.⁴³⁶ Not explicitly disagreeing with the court but being clear about the fact that

⁴²⁸ [2007] EWCA Civ 478; [2008] Q.B. 143

⁴²⁹ *R (on the application of H) v Mental Health Review Tribunal for the North and East London Region & the Secretary of State for Health* [2001] EWCA Civ 415

⁴³⁰ [2009] UKHL 3; [2009] 1 AC 739

⁴³¹ Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP 2013) 81

⁴³² As it stands, there is no provision for any time limits in terms of responding to a DOI as discussed by Jeff King, ‘Submission to the Independent Human Rights Act Review’ (3 March 2021)

<<https://www.gov.uk/guidance/independent-human-rights-act-review#call-for-evidence-responses>> accessed 16 November 2021. Available via download under ‘Call for Evidence: Individual Responses A-L’), 15, 18.

⁴³³ *Ibid* 19. See, too, Appendix 1 of King’s submission which gives a brief overview of the of claimants who have obtained s4 remedies via DOIs.

⁴³⁴ For example, in *R (on the application of Baiai and others) v Secretary of State for the Home Department and another* [2006] EWHC 823 (Admin), the issue related to sham marriages and immigration control requirements, *R (on the application of Sylviane Pierrette Morris) v Westminster City Council & First Secretary of State (No. 3)* [2005] EWCA Civ 1184 and *R (on the application of Gabaj) v First Secretary of State* (Administrative Court 28 March 2006, unreported) involved cases relating to local authority accommodation and discrimination occurring within the processes for gaining such accommodation.

⁴³⁵ Sathanapally (n 423) 133, 134

⁴³⁶ Letter from Yvette Cooper MP to the JCHR, 27 February 2006 as seen in Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP 2013) 149, 150

there was no current intention to respond and change the law. For some, this delay is best described as ‘ambivalence’ to the DOI and the issue of potential discrimination in the allocation of social housing.⁴³⁷ In *Baiai*, there was an interesting dynamic between the House of Lords and the government as throughout the appeals, the DOI was challenged by the government. After the House of Lords narrowed the scope of the DOI, albeit not that quickly, The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2011 was made on 25 April 2011 and came into force on 9 May 2011. The dynamics in these interactions, the profiles of the litigants, the nature of the responses all indicate something beyond the DOI about the nature of the respective powers within those relationships. They add a potentially important dimension to our understanding as does the recognition in our thinking of wider actors – such as the ECtHR or JCHR – whose own power affects the dynamics and changing balance within any single exercise of judicial power.

The interactions can be observed by accounting for the behaviour and decision-making of relevant actors, whether they be individuals or institutions, but it can be further supplemented by considering the ‘inter-institutional dialogue’ created by the HRA’s design.⁴³⁸ It is thought that ss 3 and 4 HRA ‘facilitate democratic dialogue’ between the courts and Parliament and this analysis has already highlighted many situations where such dialogue may occur, and the forms it may take.⁴³⁹ The nature of this dialogue has itself been debated but to use one conception, it can shine a brighter light on how actors may communicate with one another around a DOI. The dialogue may be ‘conversational’ – an exchange of ideas – or ‘deliberative’ – with the aim of reaching a collective decision - or ‘dialectic’ – exchanging competing views with the hope of reaching consensus.⁴⁴⁰ The idea of this dialogue is to recognise it as a potential strategy to manage the fact that questions relating to ss3 and 4 are likely those where ‘there is no settled human rights answer’.⁴⁴¹ Yet the important question here is whether this matches the realities? This ‘metaphor of dialogue’ has been criticised.⁴⁴² Kavanagh, for example, observes that the ‘empirical realities do not match this metaphorical picture’ and that the communication dynamics under s4, ‘is less like an open conversation and more like a complex division of labor where each branch of government performs different (though complementary) roles in protecting rights.’⁴⁴³

2.4 Time

This part of the analysis contextualises the DOI decision and uses notions of ‘time’ to look beyond a single exercise of HRA power. This is designed to mitigate any particular emphasis on a single decision as a basis for understanding judicial power more widely. For HRA power and DOIs, there have been notable ‘moments in time’ and change for judicial power. Perhaps most

⁴³⁷ Sathanapally (n 423) 149

⁴³⁸ Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2009) 11

⁴³⁹ Ibid 10. See also: Alison Young, ‘Is dialogue working under the Human Rights Act 1998?’ (2011) Oct PL 773; Richard Clayton Q.C., ‘Judicial deference and “democratic dialogue”: the legitimacy of judicial intervention under the Human Rights Act 1998’ (2004) Spr PL 33 and Tom Hickman, ‘Constitutional dialogue, constitutional theories and the Human Rights Act 1998’ (2005) Sum PL 306

⁴⁴⁰ For a thorough discussion of these three models see Gregoire Webber, ‘The unfulfilled Potential of the Court and Legislature Dialogue’ (2009) 42(2) Canadian Journal of Political Science 443

⁴⁴¹ Francesca Klug, ‘Judicial Deference under the Human Rights Act 1998’ (2003) 2 EHRLR 125, 132

⁴⁴² Kavanagh (n 335) 1027

⁴⁴³ Ibid

significantly is the enactment of the HRA in 2000. In this sense, the time since 2000 until now is one important timeframe to reflect upon. The additional insight offered comes from placing any timeframe within its wider history. Therefore, this discussion reflects upon the relationship between judicial power and the history of rights protections in the UK. Doing so allows us to assess the extent to which the HRA *did* change judicial power in this context and, indeed, offer suggestions about how it may do so in future.

History of HRA power

An analysis of HRA power and DOIs today can benefit from some historical contextualisation. If, as TRS Allan notes, ‘the Human Rights Act has truly changed the British constitution, it is largely because it was planted in fertile soil.’⁴⁴⁴ Considering the history of the HRA and, more broadly, the history of judges’ power in respect of rights and civil liberties one is able to contextualise, and possibly broaden, the understanding of any single example. David Dyzenhaus refers to this broader perspective as the ‘continuum of legal orders in which human rights are considered among the fundamental or constitutional legal commitments of a society’.⁴⁴⁵ Dependent upon where one looks on this continuum, there will exist different attitudes towards human rights and civil liberties, different perceptions as to whose role it is to enforce, create or protect those rights or, even, whether there exist any particular powers under which to fulfil such roles.⁴⁴⁶ Allan identifies ‘fertile soil’ to emphasise how the HRA should not be treated as a self-contained code but rather part of an existing body of common law, or fundamental rights, recognised and protected by the courts prior to the HRA’s enactment. The Act ought not to be considered a ‘discrete legal regime for the enforcement of Convention rights’ but rather, a regime which operates in a way ‘interwoven’ with the common law.⁴⁴⁷

Common law rights do not enjoy the prescription offered by the Convention or other rights declarations. They are rights ‘inherent and fundamental to democratic civilised society’.⁴⁴⁸ This raises the suggestion that rights such as those contained within the Convention are ‘respond[ing] by recognising rather than creating’ these rights and freedoms.⁴⁴⁹ In terms of the history of the HRA, this question of the relationship between common law rights and rights contained in the Convention is something judges have sought to clarify. For example, Lord Mance described Convention rights as representing ‘a threshold protection’ and that in some areas, the common law ‘may go further’.⁴⁵⁰ So in this sense, the HRA has *added to* the toolkit of judges in respect of rights’ protection with the addition of s4 DOIs just one example of such an extension. In terms of judicial power, this suggests that while s4 DOIs have their own power, that power exists alongside existing power located within the common law, less subjected to statutory intervention. Judges have the option to use s4 DOIs to resolve an incompatibility or, potentially, they have the

⁴⁴⁴ TRS Allan, ‘Parliament’s Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective’ (2006) 59(1) *Current Legal Problems* 27, 31

⁴⁴⁵ Dyzenhaus (n 393) 49

⁴⁴⁶ Richard Bellamy, ‘Constitutive citizenship versus constitutional rights: Republican reflections on the EU Charter and Human Rights Act’ a chapter in Tom Campbell, Keith Ewing & Adam Tomkins (eds.), *Sceptical Essays on Human Rights* (OUP 2001) 15

⁴⁴⁷ Hickman (n 374) 12. See also Lord Reed in *Osborn v Parole Board* [2013] UKSC 61 at [57]

⁴⁴⁸ Lord Reed in *R (Daly) v Secretary of State for the Home Department* [2010] UKHL 16 at [30]

⁴⁴⁹ *Ibid*

⁴⁵⁰ *Kennedy v The Charity Commission* [2014] UKSC 20 at [46]

option to use common law reasoning as a basis for human rights decision making as seen in *R (on the application of DN (Rwanda)) v Secretary of State for the Home Department*.⁴⁵¹

There is a further, different, aspect to this notion of history which is to ask what is the background to the DOI. Take, for example, the evidence that five DOIs issued, ‘related to provisions that had already been amended by primary legislation at the time of the declaration’.⁴⁵² It is important to understand the amount of power or influence a DOI has in relation to this context. This issue has been touched upon earlier in asking questions of exercise and effects and interactions and responses but it is worth including here. For example, the notoriety – or consequence – of a DOI may be measured by its response such as the suggestion that DOIs are powerful tools because Parliament will change the law. This idea has already been qualified in this case study but it can be qualified again: the DOI’s influence is lessened if the legislation was already going to be changed. This was seen in *Bellinger* and *H* as the court acting in line with government intentions. It is likely the power is viewed differently to, say, a DOI where the government does *not* intend to change the law – such as in *Smith v Scott* (albeit here we see evidence of the government’s own power to choose not to respond). Therefore, the timing of a DOI may be a significant part of our understanding; the context can tell us more about when and why it was exercised but also how it was received.

Patterns of DOIs

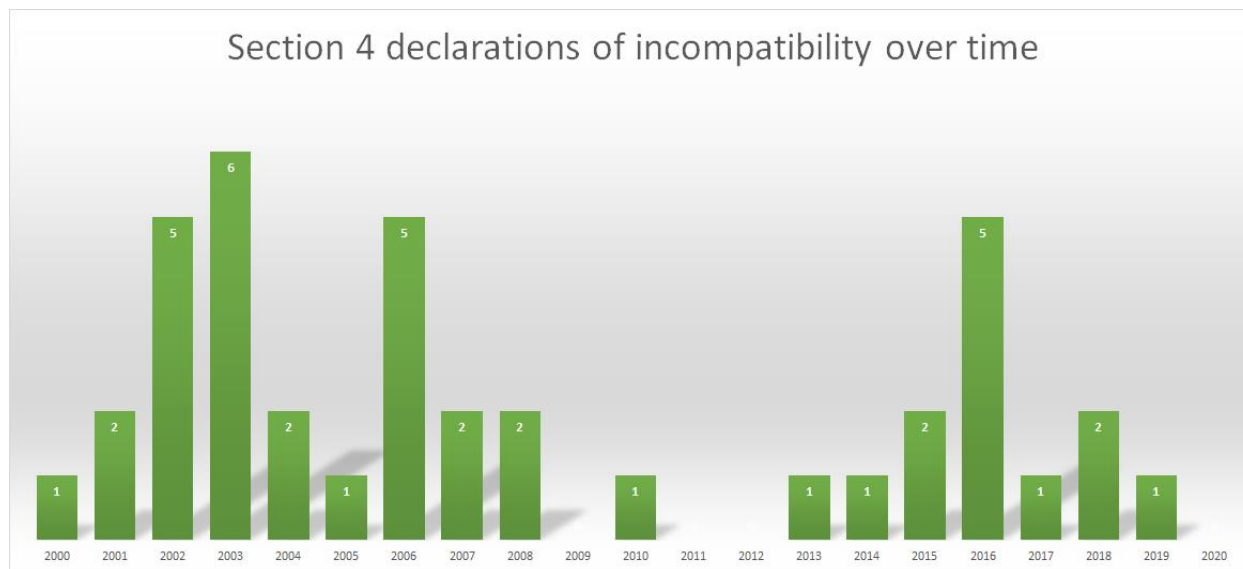
A further contribution of this element to our analysis of HRA power is to ask whether there is evidence of changing patterns in the use of judicial power over time. Using the timeframe from 2000 until the present and the data available on the number of DOIs issued, it is possible to see patterns emerging in the use of DOIs. Greene shared this chart which maps the number of DOIs per year between 2000 and 2019:

Figure 1.⁴⁵³

⁴⁵¹ [2020] UKSC 7. For further discussion of the ‘renaissance’ of common law rights, see: Paul Bowen QC, ‘Does the renaissance of common law rights mean that the Human Rights Act 1998 is now unnecessary?’ (2016) 4 EHRLR 361, 374

⁴⁵² Ministry of Justice, *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2019–2020* (CP 347, 2020)

⁴⁵³ Greene A, ‘A chart of declarations of incompatibility over time’ (*Twitter*, 4 February 2021) <<https://twitter.com/DrAlanGreene/status/1357351583193980929>> accessed 6 February 2021

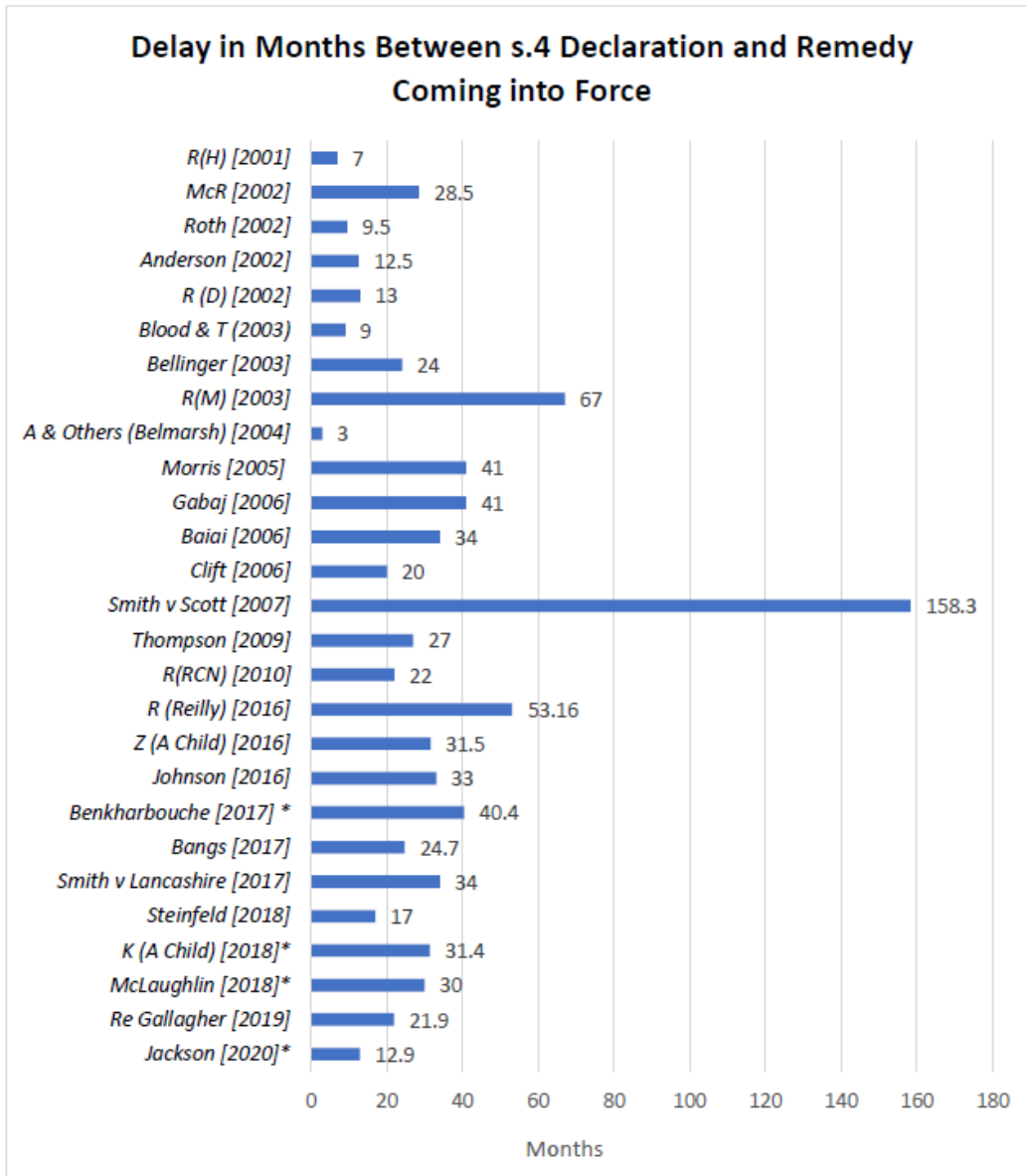


Depending upon where one was looking at this ‘continuum’, the assumptions we might make about the use of judicial power could vary. For example, an analysis of judicial power in 2004 might well review the exercise of s4 by the courts in terms of *increased use* from 2000 until 2004 whereas an analysis in 2019 might suggest that the picture is more ‘patterned’. A declining use of DOIs could be explained by an increased compliance with Convention requirements or, perhaps, it could be compared to a similar chart in which the use of s3 is considered as an alternative. Either way, the pattern may be analysed in broader terms regarding how human rights are being safeguarded. Further analysis is possible if one focuses on changing times or time periods. One example of such analysis is provided by Jeff King who used this idea in an assessment of patterns relating to delays between the issuing of a DOI and the remedy entering into force.⁴⁵⁴ In doing so, he is able to illustrate where the longest delays have occurred, the matters those delays relate to and draw conclusions as to their impact.

Figure 2.⁴⁵⁵

⁴⁵⁴ Jeff King, ‘Parliament’s Role Following Declarations of Incompatibility under the Human Rights Act’ a chapter in Hayley Hooper, Murray Hunt and Paul Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015)

⁴⁵⁵ King (n 424) 16.



Source: Ministry of Justice's *Responding to Human Rights Judgments (2020, CP 347) Annex A: Declarations of Incompatibility; further analysis of responses.*

Looking ahead to the future

Not only may it be possible to use this feature of the analytical framework to locate and show changing patterns in the s4 power and its use, it might also be a means of reflecting on its future direction of travel. To take the example mentioned above in relation to common law rights, it might be said that by reasserting the value of the common law as a ‘source of legal inspiration’, the courts are creating a body of common law judgments in which rules regarding human rights

are created.⁴⁵⁶ This means that a decision by a court to reason a human rights case by way of the common law, reinforces the system of rights and precedents which co-exist with any precedents set by virtue of HRA reasoning. It is possible, therefore, that the protection mechanisms afforded by the HRA can be similarly interwoven into common law rules although it would be notable to see a court ‘issue’ something akin to a DOI without basing its power to do so on s4 HRA. However, it may well develop a body of reasoning in which the need to demonstrate legislative incompatibilities exists should – at a different point in time – the HRA be repealed and such a statutory mechanism disappear.⁴⁵⁷

2.5 Space

This thesis certainly agrees with Lord Steyn’s suggestion that ‘[i]n law context is everything’; in understanding power, context is everything too.⁴⁵⁸ The final element of this analysis adds further contextualisation of a DOI by looking at the environments – or spaces – in which they exist. Just as certain actors may influence the decision to issue, or not issue, a DOI so too may the environment. This section considers the internal and external environments to a DOI as well as the significance of any change in those spaces and how that may affect the use of power.

Internal environments

DOIs tend, on the face of it, to occupy internal environments. That is, they are exercised by judges inside the courtroom as part of their adjudicatory role. However, we may think once more about the realities of this activity within this space. While it is clear that DOI decision-making takes place within the traditional dimension of the judicial role, the HRA has ‘empowered courts to review legislation’ albeit in what is termed by many a ‘weak’ form of review.⁴⁵⁹ Aside from debates about the nature of this review - weakened by the courts’ lack of strike-down power under the Act – the use of DOIs illustrates a more formalised approach to courts’ ability to review legislation for compatibility. This is one example of how the judicial role takes on a further dimension via s4: the regulatory dimension. The wider ‘pluralisation of the institutional landscape’ and ‘formalisation of roles and responsibilities’ brought about by the HRA is one

⁴⁵⁶ Lady Hale, ‘UK Constitutionalism on the March?’ (A keynote address to the Constitutional and Administrative Law Bar Association Conference, 12 July 2014) 2

⁴⁵⁷ While such discussion is by its nature speculative, it remains valuable. One might consider some of the submissions of evidence to the Government’s Independent Human Rights Act Review as examples of academics considering what might happen if certain changes are made: Colm O’Cinneide, ‘Written Evidence to the Independent Human Rights Act Review (IHRAR)’ (2021) <<https://www.gov.uk/guidance/independent-human-rights-act-review#call-for-evidence-responses>> accessed 16 November 2021. Available via download under ‘Call for Evidence: Individual Responses A-L’), 13 or Jeff King, ‘Submission to the Independent Human Rights Act Review’ (3 March 2021) <<https://www.gov.uk/guidance/independent-human-rights-act-review#call-for-evidence-responses>> accessed 16 November 2021. Available via download under ‘Call for Evidence: Individual Responses A-L’), 8.

⁴⁵⁸ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532

⁴⁵⁹ Richard Bellamy, ‘Political constitutionalism and the Human Rights Act’ (2011) 9(1) *International Journal of Constitutional Law* 86, 87. See further discussion of the weak/strong form review argument in, for example, Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346, Mark Tushnet, ‘Alternative Forms of Judicial Review’ (2003) 101(8) *Michigan Law Review* 2781 or Aileen Kavanagh, ‘What’s so weak about “weak form review”?’ The case of the UK Human Rights Act 1998’ (2015) 13(4) *International Journal of Constitutional Law* 1008, 1039

reason why it is necessary to reflect on how we perceive even the ‘internal’ activities of judges inside the courtroom as part of our broader understanding of the institutional infrastructure of the changing constitution.⁴⁶⁰

External environments

Micro-level changes – such as the changing role of judges and their work inside the courtroom – can be influenced by macro-level changes outside of changes in the statutory regime. Arguably, this is where this element makes a greater contribution but placing activities within internal spaces in their wider, external contexts. One example where this interaction between spaces and their influences on the use of judicial power is seen in relation to national security matters. It has already been shown how, in some matters, the courts are willing to defer to the authority of political institutions. There are, however, some instances where they are not and national security has been one such example.⁴⁶¹ In terms of this regulatory role, and the use of the HRA as part of it, judges may not be willing to leave decision-making to the discretion of an executive and use their s4 power to emphasise this. For example, the DOI issued in *A and Others*.⁴⁶² At that time, the DOI was used as a mechanism for questioning provisions of the Terrorism Act 2000 and their compatibility with the continued aim of protecting the human rights of those detained - a challenging task. The DOI here was considered as a ‘bold exercise of judicial power’ since the courts were standing up to an executive ‘bent on waging the ‘war on terror’’.⁴⁶³ The regulation of executive power in this sense came by way of a DOI and placing that DOI – and the reactions to it - within the wider space of heightened concerns about terrorism and security, we might understand more clearly some features of that decision-making.

In terms of the *external* space, the HRA, ‘catapult[ed] the courts into choppy political waters’ and in doing so, there are two broad but interlinked sites of interest here: the political environment and the constitutional environment.⁴⁶⁴ Firstly, the HRA has created the environment for judicial activities to expand into ‘those areas traditionally delineated for the executive and Parliament’ when questions of safeguarding rights and complying with Convention obligations arises.⁴⁶⁵ But questions of human rights have a political quality – they arise and may be resolved in ‘circumstances of politics’⁴⁶⁶ and the system in which those rights-questions arise ‘has to be politically negotiated’.⁴⁶⁷ This adds a further layer of complexity and potential for change in how we conceptualise an exercise of judicial power here. Returning to the example of national security, ‘we live in a more dangerous world today than we did in 1998: balancing public safety and individual liberty has become a harder task’.⁴⁶⁸ The question is, would a DOI issued by the

⁴⁶⁰ Graham Gee, ‘Judicial Policy and New Labour’s Constitutional Project’ a chapter in Michael Gordon and Adam Tucker (eds.), *The New Labour Constitution: Twenty Years On* (Bloomsbury 2022) 99

⁴⁶¹ See Aileen Kavanagh, ‘Deference in particular contexts’ in *Constitutional Review under the Human Rights Act* (CUP 2009) 211

⁴⁶² *A and Others v Secretary of State for the Home Department* [2004] UKHL 56

⁴⁶³ Kavanagh (n 356) 230

⁴⁶⁴ Gee (n 452) 102

⁴⁶⁵ Maleson (n 330) 30

⁴⁶⁶ Jeremy Waldron as cited by Richard Bellamy, ‘Political constitutionalism and the Human Rights Act’ (2011) 9(1) *International Journal of Constitutional Law* 86, 90

⁴⁶⁷ *Ibid*

⁴⁶⁸ Rodney Brazier, *Constitutional Reform: Reshaping the British Political System* (3rd edn OUP 2008) 124

Supreme Court today be welcomed as a safeguard of human rights or would it be interpreted as a judiciary standing in the way of an executive seeking to protect people from threats to their own peace and security? It is quite possible it might. This illustrates the ongoing negotiations of boundaries between law and politics in these matters where, in reality, such boundaries are moveable, contestable and complex in their own right.

In the external space, we must also reflect on the constitutional context of a DOI to understand judicial power. One might recognise that the HRA has provided a means for the courts to review legislation as a positive addition to a system of accountability where ‘the powers of MPs to check executive actions exists more in theory than in practice’.⁴⁶⁹ The reality is that the HRA has brought to the fore questions of how we may find an ‘effective balance between democracy and rights’.⁴⁷⁰ The use of DOIs is part of a clearer, more formalised regulatory role for judges under the HRA scheme which has affected the constitutional order. There are constitutional questions to ask of how we understand the need and scope of principles such as judicial independence in light of these episodes of judicial power. In one respect, the involvement of judges under the HRA in these matters emphasises the need for their independence from politics to offer a different kind of decision-making and expertise. On the other hand, that independence may give rise to concern as to the extent to which judges’ own decision making is accountable. This once more requires us to consider the allocation of authority in human rights matters. The HRA involves both legal and political actors in its design but in a challenging context such as national security, their constitutional roles indicate different contributions to resolve complex questions via legal and political means.

3. A developing picture of judicial power under the HRA

3.1 Insights from the analytical framework

The analysis produced a range of characteristics which could be used to describe the nature of s4. Such *descriptive characteristics* provide a clearer picture of what the power is and what it looks like. They support the process of defining judicial power under s4. In the longer term, this supports the emerging discourse relating to judicial power under this provision: we are able to talk about the nature of s4 power with increased clarity. Through the analysis, it is seen that there are many different ways to understand the use of DOIs. An exercise of s4 has the potential to result in both *conduct-shaping* and *context-shaping* power. A DOI – or a series of DOIs – can have quite localised effects in terms of being issued and leading to a legislative change. However, attached to this decision can be further conduct-shaping attributes. There is evidence of judges deciding not to issue DOIs; perhaps leaving the issue to be resolved via political means instead. We also saw how it is possible to understand more clearly when a DOI is – or is not – issued by looking at any attached agendas. Where these agendas are more obvious within judicial reasoning, there is increased certainty about why the power is used in a particular way or how judges have used their discretion. A DOI has context-shaping attributes in that its use, its reasoning or the nature of a pattern of use can influence wider norms or beliefs about matters

⁴⁶⁹ Maleson (n 330) 30

⁴⁷⁰ Young (n 430) 121

such as the role of judges in regulating legislative compliance or by indicating a better or worse level of compliance by the state with its human rights obligations.

The *individual and institutional dynamics* which surround the use of power are highlighted by the analysis. By locating actors in the power relationship, we are more specifically reflecting on the role of that actor. We are considering what our expectations are of their involvement or of their use of power as well as showing that judicial power may not be exercised in isolation and others' influence can be a factor in our understanding. Further to this, the case study highlighted the role of communication in understanding power under s4. The HRA creates particular communication dynamics, under ss3 and 4 as an example, but we also see less formalised interactions which can communicate actors' own perceptions of their role. For example, the nature and form of the DOIs themselves or even the decision not to use that power. The analysis has shown how further contextualisation of the power and its use can be given by looking at its history. Here we see that the HRA is not the only source of judicial safeguarding of rights and identify the importance of including the development and use of common law rights in our understanding. Looking at DOIs over time, we see clearly patterns in their use and an *ebbing and flowing* in terms of the extent of that use in different timeframes. In reality, this presents a more complicated picture than a mere growth.

These patterns might permit some speculative analysis of what the future holds for the use and influence of DOIs. For example, a pattern of decreasing use indicating improving compliance with the HRA's requirements or a decreasing use indicating a judiciary less willing to use s4 as a regulatory device, opting instead to use common law rights as a basis. Lastly, the analysis shows the impact of changing spaces on how we understand s4 and its use. The HRA, including s4, has been a factor in changing the judicial role. DOIs are an example of a more structured mechanism for regulating the protection of human rights within domestic legislation. The analysis highlighted how our understanding of the power – and the use of the power – can change in light of *changing external environments*. Such environments can affect, for example, the extent to which the power is needed; whether judges are called upon to use that power. It may be that a changing external environment places different demands on actors to use specific powers, or to use their power in specific ways. A more over-zealous executive, wishing to restrict human rights in a more overt and deliberate fashion, may find those decisions subject to increased regulation and response – perhaps in the form of a DOI if they raise an issue of compatibility with the Convention.

3.2 The emerging picture of HRA power

These insights tell us quite a lot about how judges have used their power under s4 and what we can learn from analysing different episodes of its use. That analysis suggests differing approaches taken by the courts to navigating the complex relationship between legal and political matters within the context of human rights. Looking at the nature of s4, we see an example of 'political leaders accept[ing] the fundamental need for legal standards' in the design of the HRA.⁴⁷¹ The formal involvement of judges under ss3 and 4 and that development in their regulatory role was a choice of Parliament under New Labour. Yet this has not meant it is easy

⁴⁷¹ Gearty CA, 'In the Shallow End: Conor Gearty on the Supreme Court' (London Review of Books, 27 January 2022) <<https://www.lrb.co.uk/the-paper/v44/n02/conor-gearty/in-the-shallow-end>> accessed 28 January 2022

for judges to hold politicians to account in this manner and there are many ways in which the DOI has – and has not – been used which indicate a nuanced and changeable approach taken by the courts to their use (and by others in response). Examples of nondecisions, where legal challenges arise in relation to certain policy areas, are a powerful example of judges recognising the limits of their interventions; adopting a nuance to their own decision making. A court chooses not to act, even where they have the legal jurisdiction to do so, on the basis that the matter may be better settled through political means. Contrast this to a situation where a court perceives a need to act to more robustly hold an executive to account, such as was described in the Belmarsh case.

Notions of agenda-setting may create a more overtly-political description of judicial action in the sense of using the language and ideas of political science. However, it has provided increased understanding of how judges exercise that power in the context of governance – as a political actor. There are benefits to situating judicial power in politics in this manner; most simply because it better recognises the qualities of that power in its context. To frame the work that judges do as conduct-shaping is not controversial or particularly novel but it adds clarity to how we might think about the effects (and extent) of that power and the influence of its use. This applies both to individuals and individual cases inside the courtroom and external effects on other actors and institutions outside of the courtroom in this study. While the notion of context-shaping does suggest a significant amount of wider influence, this is not an unusual perception of the role of courts within a constitutional structure; they, and their decisions, are known to be influential.

By identifying interactions between actors – and the actors themselves – we are being required to reflect upon our expectations of their roles. To ask whether the actor (judge, victim or government minister) is fulfilling the role we expect of them or whether their respective power relations are overstepping those limits. There can be evidence, as described above, of judges regulating their own use of s4 and through that evidence – and our own perceptions of actors’ roles in certain circumstances – we make an assessment as to whether or not those interventions are good, desirable, effective, problematic or otherwise. This case study has shown the process through which to gather the evidence upon which to base those assessments. It has asked whether we know enough about the involvement and influence of respective actors. Has the assessment included a sufficiently detailed consideration of the influence of bodies such as the Strasbourg Court in how we understand any specific use of s4? It is possible that analysis of different communications between actors in power relationships is a rich source to help us understand more clearly how those actors choose to engage with one another. This is not to, at that stage, determine how actors *should* engage with one another and use their power but rather to see more clearly how they *do*.

The analysis has shown that there are instances where judges are choosing to exercise their power differently. Namely, at times since the HRA’s enactment, not using its mechanisms to address human rights matters but instead, opting for common law tools. There is perhaps something more overtly ‘legal’ or judicial in this form of power and by reasoning via the common law, the courts are themselves drawing clearer lines between the power of the common law and the power of statute in achieving particular aims. In some respects, this mode of reasoning sits more clearly in the *traditional* dimension of the judicial role. While it may achieve

a similar outcome in terms of remedying the situation for litigants, it removes the *regulatory* dimension and interaction between judicial institutions and political institutions such as Parliament. It might, more clearly, separate the legal from the political aspects of this form of judicial decision-making. This highlights a further complexity which is the changing patterns to how judges are using power under the HRA – both in terms of s4 and more broadly. The picture of ‘growth’ is complicated by the changeable nature of the use of the power. The notion of trends or predictability is complicated, not least because the extent of the ebbing and flowing or the changing approach is not prescribed.

What is evident within those changes, are the changing dynamics in both individual and institutional power relations and power relationships as well as the changing dynamics of the spaces in which they occur. The HRA is part of wider changes to the balance of roles and power in the institutional framework of the constitution; judges and judicial power are clearly part of these changes. While there is potential to understand a lot about the nature of that power and its use as it evolves, it remains important to contextualise any episode. To ask more about the power itself *in addition to* debating how that power should work: separating the task of analysis from that of critique. Contextualising exercises of HRA power within their internal and external environments helps us to better understand the changes. Asking whether the particular exercise – while, perhaps unpopular – represents a fundamental alteration in the power and its scope or whether it represents one decision within a wider regulatory process. It can often be that a s4 DOI is a question asked by judges of whether Parliament needs to amend legislation; that decision is ultimately still political and may still be debated in Parliament should such a change be proposed.

4. Conclusions

The nature and use of s4 and of HRA power is complicated and it is changeable. It is important to contextualise the emerging picture of that power. It is without doubt that public law scholarship has considered the HRA’s impact extensively, including the effects of the Act on judicial power. However, while these various accounts offer – collectively – a rich body of scholarship and debate, it is argued here that there is room for a more systematic, analytical account of episodes and forms of HRA power. This chapter began the process of separating analysis from critique within contemporary debates by bringing together various examples of DOI decision-making and using these to assess several important features of this site of judicial power. First, to consider how contemporary debates have approached questions of judicial power under the HRA. Second, to highlight the limitations of existing narratives on how we understand this form of power and in particular, the nature of s4 DOIs. Third, this chapter has shown that by thinking politically via this thesis’ own approach, it is possible to understand more clearly discrete aspects of this power and recognise the political qualities it contains.

Doing so helps us to ask whether the existing language of judicial power reflects with sufficient nuance and sophistication these many elements, changes and influences on our understanding. This thesis suggests that there is real merit in thinking about s4 and judicial power in terms of changing patterns, as illustrated in this case study. There is merit in recognising the multi-dimensional nature of the judicial role and situating exercises of this power within those

dimensions to understand the use of power more clearly. In this case study, using the notions of traditional and regulatory work to frame – and differentiate - the actions of judges under s4 and show the analytical value in re-examining these features of HRA decision-making. Finally, there is clearly merit in thinking politically about judicial power under s4. The language used adds clarity to our understanding: thinking about matters such as conduct or context-shaping power helps us to describe the effects of that power. To consider judges as political actors in some respects helps us to see more clearly when judges highlight the legal/judicial nature of their power more clearly. It is also helping us to speak more clearly about the way we can, in our own understanding, navigate the often-blurred lines between the legal and the political in questions of human rights.

It overcomes the challenges of analysing judicial power by deliberately locating its work away from normative arguments about the desirability of s4 or DOIs instead seeking to better describe the realities of that power and its use. The politics of judicial power described in this thesis' Introduction are evident within the HRA context but they can be navigated and managed to secure an analysis and increased conceptualisation of any elements of the HRA. Better understanding s4 DOIs within this approach is just one step toward a much larger endeavour but it is certainly one worth pursuing. This case study should not be viewed on its own but rather as part of a wider ambition to give more analytical detail about many aspects of judicial power within the UK constitution.

Chapter 5

Analysing Judicial Power – the Office of Lord Chief Justice

The changeable and complex nature of judicial power requires ongoing contextual analysis. Chapter 4 has shown the benefits of analysing judicial power under s4 HRA by ‘thinking politically’ about that power. As a result, it was possible to illustrate different features of that power and to show how the political qualities of its use may be framed and described more clearly. Chapter 4 was the first of two case studies designed to clarify questions of ‘power’ within contemporary debates and show how we might overcome the potential reductivism of those debates. Through the analysis in Chapter 4, it is evident that more comprehensive accounts of judicial power are available where the analysis recognises and describes more of the subtleties, nuances and changing patterns of judicial power. This chapter aims to illustrate further how thinking politically can shine a brighter light on discrete aspects of judicial power and how this thesis’ approach can account for the many complexities which surround the power of the office of Lord Chief Justice (LCJ).

The office of LCJ has been chosen for a number of reasons. Firstly, to continue the demonstration of the adaptability and application of the analytical framework to judicial power in different contexts. Secondly, the LCJ uses their power in many different ways. The power of an LCJ sitting as a judge may be contrasted with an LCJ using their power to speak out against executive responses to a court decision or in an appearance before a Parliamentary committee. Therefore, the work of an LCJ epitomises what this thesis identifies as the leadership dimension of the judicial role and provides the opportunity to specifically analyse this aspect of judicial power. Whereas the HRA case study considered judicial power largely inside the courtroom, this chapter explores an example of judicial power located *outside* of the courtroom. Thirdly, an analysis of the office of LCJ requires the analytical framework to address the changes to that office and how they may affect the way we understand this site of power, particularly within what we might think of as political contexts.⁴⁷² Finally, the role of LCJ is chosen in part to address a gap in the wider debates around judicial power and the previous attention given to the role and power of the Lord Chancellor (LC). The rationale for this case study is to directly confront the argument made by this thesis that there remain under-investigated, yet vitally important, sites of judicial power. Not only is it possible to see how the analytical framework can support our thinking about those different sites of judicial power, it is also possible to learn more about the nature and use of judicial power more generally by looking at it in this context – and comparing those insights to what is understood about judicial power in other locations, other dimensions of the judicial role or at different moments in time.

The chapter begins by describing the extent of the LCJ’s roles and responsibilities and considering specifically why questions of ‘power’ arise in respect of the office. The chapter explores contemporary debates and their limitations in terms of considering the work of the LCJ

⁴⁷² Details of these changes will be provided as part of the analysis shortly. Following the Constitutional Reform Act 2005, the role of Lord Chief Justice has undergone change in respect of its responsibilities, remit and place within the UK’s constitutional – and judicial – framework. Specifically, the Lord Chief Justice has taken over many of the judiciary-related functions previously held by the Lord Chancellor.

as one site of judicial power and one further example of a crossover between law and politics. The notable difference here is how the narratives this thesis identifies are not often used to describe LCJ power. Claims of overreach, a growth of power or the sense of caution afforded to HRA power is omitted from discussions about the work of the LCJ. There appears to be less controversy attached to the power of the LCJ. This chapter is interested in why this is the case in light of what we can subsequently understand about its nature and scope. The chapter considers further what LCJ power is – and the ways in which it is used. One of the important themes in this thesis is to understand how the complex boundaries between judicial power and other forms of public power are understood. In particular, how they are understood by actors involved in those power relations and to what extent the distinction between individual and collective power affects our understanding. Therefore, it is hoped that not only can we learn more about the *power* itself through an application of the analytical framework, we can also learn more about the nature and direction of contemporary debates as well.

This case study turns our attention to the work and power of judges *outside* the courtroom and where that relates to matters of leadership and management. This addresses one of the limitations of current debates where they have tended to emphasise judicial power in terms of the decision-making power of judges within the courtroom instead. It is worth restating that the aim of this is not to provoke debates in light of normative ideals as to an additional site of judicial power but rather to show that when we refer to ‘judicial power’ there are many things we might be talking about and many ways in which we can more clearly understand that power. The LCJ is an important political actor whose role, although judicial in nature, requires engagement with other political actors and institutions more readily than is seen with some judges and some episodes of judicial power. This varied role means that while Chapter 4’s analysis benefited from a richness of case law and academic literature relating to the HRA and judicial power, evidence of LCJ power is much more disparate.⁴⁷³ This will test the ability of the analytical framework to draw together this evidence into a systematic account of LCJ power. Ultimately, the work of both case studies will highlight the differences between two varied sites of judicial power and prompt further discussion via the analysis of how we might understand the complexities of the relationship between law and politics – and different forms of power – within the constitution.

1. The office of Lord Chief Justice and contemporary debates about judicial power

1.1 Judicial power and the office of Lord Chief Justice

The LCJ is an office upon which great responsibility falls; not just in relation to the responsibilities of a sitting judge but responsibilities relating to the leadership and management of the judiciary of England and Wales.⁴⁷⁴ Since 3 April 2006, the LCJ has been both Head of the

⁴⁷³ Potential sources of such evidence indicate the breadth of the role by locating LCJ activity within case law, select committee appearances, judicial speeches, press releases alongside the less available evidence of interactions such as those between the LCJ and the Judges’ Council (JC), Judicial Executive Board (JEB) or via meetings with government ministers such as the LC.

⁴⁷⁴ The current Lord Chief Justice, Sir Ian Burnett, took the role in 2017.

Judiciary of England and Wales and the President of the Courts of England and Wales.⁴⁷⁵ The LCJ now runs the judiciary and exercises his ‘executive and leadership responsibilities’, with the support of Heads of Division through a body known as the Judicial Executive Board.⁴⁷⁶ Much of the LCJ’s current power is provided for by statute and under the Constitutional Reform Act 2005 the Lord Chief Justice has ‘some 400’ statutory duties alongside responsibilities derived from the office itself.⁴⁷⁷ These include: sitting as a judge in important cases across criminal, civil and family justice, including appeals; representing the views of the judiciary to Parliament and Government; welfare, training and guidance of judges in England and Wales; the management of judges’ work and their deployment across Her Majesty’s Courts and Tribunals Service (HMCTS); leadership roles in key judicial bodies such as being President of the Courts in England and Wales, the Sentencing Council and Magistrates’ Association, chairing the Judicial Executive Board and Judges’ Council⁴⁷⁸ as well as working within – and being supported by – the Judicial Office and Judicial Communications Office.⁴⁷⁹

Beginning to consider the scope of the LCJ’s role and its associated responsibilities indicates why it should be a site of interest in relation to questions of power. However, the current office holder does not have unfettered discretion when it comes to matters of justice. It is necessary to understand LCJ power as part of a larger picture of political power. For example, post-CRA, an important feature of understanding LCJ power is understanding the role and power of the Lord Chancellor (LC); a role which has itself undergone notable constitutional surgery under the CRA.⁴⁸⁰ The LCJ has several responsibilities which exist in conjunction with the ‘new’ LC. For example, alongside the LC, the LCJ is involved in resource allocation and the investigation of complaints made against judges. With the LCJ taking the reins of many of the LC’s previous judiciary-related functions and the LC focusing on their ministerial role as Secretary of State for Justice, there is now a clearer separation of judicial power from executive and legislative power. This said, the LCJ will work closely with the LC – in some instances reaching decisions jointly,

⁴⁷⁵ Courts and Tribunals Judiciary, ‘Lord Chief Justice’ (2020) <<https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/lord-chief-justice/#:~:text=The%20current%20Lord%20Chief%20Justice,Courts%20of%20England%20and%20Wales.>> accessed 2 September 2020

⁴⁷⁶ Courts and Tribunals Judiciary, ‘Judicial Executive Board’ (2020) <<https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/how-the-judiciary-is-governed/judicial-executive-board/>> accessed 30 October 2020; Penny Darbyshire, *Darbyshire on the English Legal System* (13th edn Sweet & Maxwell 2020) 335

⁴⁷⁷ Courts and Tribunals Judiciary (n 467)

⁴⁷⁸ The Judges’ Council is a body with a long history being originally established by the Judicature Act 1873. In recent years, the Council has undergone its own change and been formalised by a constitution and membership by senior judges. There is now provision for this body within the Constitutional Reform Act 2005. Its primary function is as a body can inform and advise the LCJ on matters relating to the judiciary, such as the development of judicial policy or the gathering of views from the wider judicial family on certain matters as requested by the LCJ. For further detail, see: Courts and Tribunals Judiciary, ‘Judges’ Council’ (2020) <<https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/how-the-judiciary-is-governed/judges-council/#:~:text=Background%20Role.%20The%20primary%20function%20of%20the%20judiciary%20and%20an%20annual%20report.%20More%20items...%20>> accessed 20 September 2020

⁴⁷⁹ After 2005, a large team of civil servants were relocated to the Royal Courts of Justice to run these bodies and support the changed office of Lord Chief Justice. Information from Courts and Tribunals Judiciary (n 467)

⁴⁸⁰ Constitutional Reform Act 2005, Part 2. This change in power and its implications for judicial independence are considered at length in Graham Gee, Robert Hazell, Kate Malleson and Patrick O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (CUP 2015)

or in others working in consultation.⁴⁸¹ Therefore, LCJ power has changed as a result of changes to the office of LC and, in spite of more obvious separation between judicial and executive functions, the relationship between the offices is still very much an important feature of LCJ power today. It is an important and changing dynamic to be included within this analysis because understanding judicial power is enhanced by thinking too about other forms of power within those relationships.

1.2 Debating judicial power and the role and power of the Lord Chief Justice

This last point about the relationship between the LCJ and the LC is perhaps illustrative of one of the main features of debates about judicial power and the LCJ. While there are many political characteristics to the work of the LCJ by virtue of their leadership role, so far there has been much less controversy and debate about the nature – and importantly, the limits – to the power of the office. As part of their day-to-day activities, an LCJ may well participate in the wider politics of governance. Yet even when the politics in question are more electric and unsettled – and even more closely linked to electoral politics - it has been unlikely that the contribution of the LCJ prompts significant debate about their power. Take, for example, the now infamous events surrounding the High Court decision in the first judicial review of the Brexit process brought by Gina Miller.⁴⁸² The ‘Enemies of the People’ front page headline run by the Daily Mail on 4th November 2016 included a photograph of the then LCJ, Lord Thomas.⁴⁸³ While subsequent academic debates did raise important questions of judicial power – such as the appropriateness of the role of the courts in determining issues relating to the referendum and the process of withdrawal – they did not, on the whole, single out the LCJ as a specific site of interest. Much more was debated about the nature of the response by the LC than the LCJ.⁴⁸⁴ And yet, the LCJ had just as much, if not different, direct involvement with the case.

Consider a more recent example of the LCJ appearing before the Justice Committee on 10 November 2020. Here, the LCJ was responding to comments about the legal profession made by the Home Secretary in a speech about changes to the asylum system at the Conservative Party conference. In this speech, the Home Secretary derided what she termed, ‘lefty lawyers’ and ‘do-gooders’ and a few days’ later, the Prime Minister ‘attack[ed] lefty human rights lawyers’ who had ‘hamstrung’ the whole criminal justice system.⁴⁸⁵ The LCJ condemned what he called a ‘general attack on the integrity’ of the legal profession which he said, in his view, ‘undermines

⁴⁸¹ There will be much greater discussion of this relationship and its significance in the section on ‘Interactions’. For now, see Graham Gee, Robert Hazell, Kate Maleson and Patrick O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (CUP 2015) 130, 138 on the ‘multiple leadership roles of the Lord Chief Justice’ or Sir Ernest Ryder and Stephen Hardy, *Judicial Leadership: A New Strategic Approach* (OUP 2019) 22

⁴⁸² *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin)

⁴⁸³ James Slack, ‘Enemies of the People: Fury over “out of touch” Judges who defy 17.4 million Brexit voters and could trigger constitutional crisis’ *The Daily Mail* (London, 4 November 2016) <<https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>> accessed 23 May 2019

⁴⁸⁴ Patrick O’Brien, ‘“Enemies of the People”: judges, the media and the mythic Lord Chancellor’ (2017) Nov Brexit Special Extra Issue PL 135

⁴⁸⁵ John Hyde, ‘Lord chief justice condemns ministers’ attacks on lawyers’ *Law Gazette* (11 November 2020) <https://www.lawgazette.co.uk/news/lord-chief-justice-condemns-ministers-attacks-on-lawyers/5106357.article?fbclid=IwAR0ergid6Oguqza5OuCjzPCgKDcG96OOVMFyjiRyh_fmNQ1v77iSRu85mM> accessed 4 December 2021

the rule of law'.⁴⁸⁶ While these comments unsurprisingly attracted attention, with headlines in the Law Gazette and the Independent newspaper highlighting the LCJ's comments, there were no subsequent questions asked about the LCJ's *power* to do this.⁴⁸⁷ Contrast the reaction and the subsequent contributions to debate about, for example, a Supreme Court decision which rules that a prorogation of Parliament is unlawful and the differences in the kinds of judicial powers being debated become clear to see.⁴⁸⁸

This difference in reaction is further illustrated if we consider the picture of LCJ power as presented by the judicial power narratives. If we used this understanding, we expect to accounts demonstrating how LCJ power is on the rise (dominant narrative); LCJ power is new (novelty narrative); LCJ power is located within decision-making (decisional narrative); and, LCJ power is something to be cautious about (cautionary narrative). At this stage, three observations might be offered. Firstly, the reality is that LCJ power does not tend to be cited as a reason for the rise in judicial power nor is the role of the LCJ debated extensively, even where the LCJ is a central actor involved.⁴⁸⁹ Secondly, where the LCJ's power *is* considered, it is often with reference – direct or otherwise – to the role and power of other actors, most recently the office of LC. Thirdly, there appears to be much less, if any, concern about the amount or use of LCJ power as a central feature of the concept of judicial power. There is very little evidence of the LCJ featuring in wider scholarship relating to questions of, for example, whether this form of judicial power pushes acceptable boundaries between legal and political constitutional activity. And yet, as this chapter has begun to make clear, the LCJ is an office which holds significant amounts of power both inside and outside of the courtroom.

1.3 A case for further reflection on LCJ power

This presents one key question this chapter wishes to reflect upon: why has LCJ power not been a central feature of debates about judicial power to date in the way that, say, the HRA has? Such a question highlights a difference between this chapter and the last. Chapter 4 aimed to develop existing understandings of HRA power within contemporary debates by asking discrete questions about the traditional and regulatory dimensions of the judicial role within the analytical framework. In this case study, the aim is to consider judicial power within the leadership dimension and contrastingly, the lack of apparent contemporary debate about this aspect of judicial power. It is not the aim to provoke debates about LCJ power, to make LCJ power a focus of politics or to politicise questions of LCJ power. Instead, it is the aim to highlight a site of under-explored judicial power and to firstly, provide insight into the nature of LCJ power through analysis. Secondly, the chapter can reflect upon why this has not been required

⁴⁸⁶ HC Justice Committee, *Oral evidence: The work of the Lord Chief Justice* (2019-2021, HC 226)

⁴⁸⁷ Lizzie Deaden, 'Government attacks on lawyers 'undermine rule of law', says Lord Chief Justice' *The Independent* (London, 11 November 2020) <<https://www.msn.com/en-gb/news/uknews/government-attacks-on-lawyers-e2-80-98undermine-rule-of-law-e2-80-99-says-lord-chief-justice/ar-BB1aSkLm>> accessed 4 December 2021

⁴⁸⁸ For example, John Finnis, 'The unconstitutionality of the Supreme Court's prorogation judgment' (Policy Exchange, 2019) <<https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf>>

⁴⁸⁹ The often-cited reasons are, as mentioned previously, the introduction and effects of the HRA, as a result of EU membership, through the expansion of the grounds of judicial review and as a result of constitutional reforms which sought to enhance and protect the independence of the judiciary.

previously. This contributes to the question of why some forms of judicial power are more contestable than others. In particular, it considers whether the reasons for this may be because some LCJ activities are happening away from the public eye or whether it is due to differing perceptions of legitimacy between forms of judicial power. In drawing conclusions about this, it may prove interesting to reflect on the different amounts of power between an LCJ and between a s4 DOI and align these with the subsequent amounts – if quantifiable in some way – of reaction to their use.⁴⁹⁰

The chapter will reflect upon the portrayal of LCJ power which may be acquired through the narratives; to reflect upon whether, for example, LCJ powers are ‘new’ or whether the picture is more nuanced. The analysis will compile evidence to show how LCJ power can be understood as multidimensional and in doing so, make clearer the nature and scope of the power located within the leadership dimension of the judicial role. The LCJ’s power will be considered at source, not just those powers found increasingly in statute but rather the power which arises from the office – and the office-holder – itself. Within this will be a consideration of the interactions involving the LCJ and the extent to which the character and personality of the individual officeholder affects the power and its use can be explored. Alongside such analysis, the relative influence of other judicial leadership roles can be considered. Not only this, but in this analysis, it will be shown how there are many ways in which an LCJ may use their power and what this suggests to us about its nature, such as in strategies of self-governance (the LCJ’s approach to managing their own power, for example). Finally, this chapter will contextualise LCJ power and consider questions of changing patterns in its nature and its use as well as situating exercises of LCJ power within different environments. All of this will help us to better understand the realities of LCJ power and consider its place within our wider conceptualisation of judicial power and its use in the UK constitution.

2. Framing an analysis of LCJ power: the analytical framework in action

This section applies the analytical framework to LCJ power. The application will entail, as suggested above, the compilation of a range of examples and evidence to explore the five component parts of the analysis: the main ingredients in our conceptualisation of LCJ power. In doing so, the specific findings provide insight into discrete aspects of LCJ power while giving a clear and more systematic account of its nature and use. Following this, it will be possible to consider the insights from analysing the leadership dimension of the judicial role, especially the way in which judicial power and other forms of public power interact within it.

2.1 Source

Exploring the source of LCJ power highlights a number of important features of its nature. Firstly, the distinction between statutory and non-statutory bases for this power but perhaps most significantly, the identification of a substantial body of ‘social power’. This less tangible form of LCJ power accounts for a large part of an LCJ’s potential influence. Beyond this, we must

⁴⁹⁰ One such means to quantifying this may be the differing government policies relating to reform: reform of the HRA happening presently compared to the nature and focus of debates about constitutional reform prior to the Constitutional Reform Act 2005.

consider how one site of LCJ power may take many forms and where we must account for this in our understanding. Since the office of LCJ has been the subject of quite substantial reform, this first element of the analytical framework provides a concise account of LCJ power post-CRA alongside further details about its nature.⁴⁹¹

The location of LCJ power: statutory

Many aspects of the LCJ's power are located in statute. Increased codification of LCJ power in this way is achieved via statutes relating to constitutional reform and the courts. Firstly, provisions of the CRA 2005 provide for the LCJ's 'new' powers and those provisions transfer extensive duties to the LCJ from the office of Lord Chancellor. Section 7(1), 'President of the Courts of England and Wales' confirms the LCJ as head of the judiciary while s7(2) sets out the main responsibilities of the office relating to matters such as representation of the views of the judiciary, responsibilities for welfare and training and matters relating to judicial deployment. Within the Act, further provision exists for the LCJ's leadership roles relating to criminal law⁴⁹² and family justice⁴⁹³ as well as details relating to the interaction between the LCJ and LC on judicial appointments.⁴⁹⁴ Not only does the CRA detail the transfer of power between the LC and the LCJ, it creates new powers as well. For example, Section 5(1) CRA permits an LCJ to, 'lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice'.⁴⁹⁵ A provision inserted by the then LCJ, Lord Woolf, as an 'attempt to square the circle' and preserve the ability of the post-CRA LCJ to continue to appear before the House of Lords and convey important matters relating to the judiciary.⁴⁹⁶

Beyond the CRA, more recent statutes clarify the scope of the LCJ's statutory responsibilities. Under the Crime and Courts Act 2013, the four parts to Schedule 13 provide further clarification of LCJ power in respect of appointments. Not only does this relate to the transfer of power to the LCJ but includes the incorporation of requirements under the Equality Act 2010 in respects of recognising diversity within those appointments.⁴⁹⁷ These provisions place a duty on the LCJ – and the wider judiciary - to improve the 'prospects of increasing diversity within the judiciary.'⁴⁹⁸ Documenting these statutory sources of LCJ power here provides an account of changes to the power but it also highlights, within the sources of LCJ power, how much of that

⁴⁹¹ For example, Gee notes how many of the functions previously carried out by the Lord Chancellor have been 'hived off' to the LCJ or other arms-length bodies under the CRA 2005: Graham Gee, 'Legal Elites, Lord Chancellors and Judicial Independence' a chapter in DJ Galligan (ed.), *The Courts and the People: Friend or Foe? The Putney Debates 2019* (Bloomsbury 2021) Section II

⁴⁹² Section 8(2) Constitutional Reform Act 2005

⁴⁹³ Section 9(2) Constitutional Reform Act 2005

⁴⁹⁴ Such as s87(2) within Part 4 of the Act 'Judicial Appointments and Discipline' which requires the LC to consult the LCJ when requesting the JAC make a certain selection.

⁴⁹⁵ Section 5(1) Constitutional Reform Act 2005 'Representations to Parliament'

⁴⁹⁶ HL Deb 20 December 2004, vol 667, Column 1541 (Lord Woolf). S5(1) was further considered by later LCJs, Lord Phillips and Lord Judge, who at the time suggested this 'nuclear option' would be used rarely in only the most exceptional of circumstances. This said, the way in which LCJs have used s5(1) will be considered in the next section on 'exercise', in particular the changing trends and attitudes relating to annual reports by successive LCJs.

⁴⁹⁷ Schedule 13, Part 2, ss9 - 15 of Crime and Courts Act 2013 updated both Constitutional Reform Act 2005 and Senior Courts Act 1981 to include this.

⁴⁹⁸ Lord Neuberger, 'Rainbow Lecture 2014 on Diversity' (House of Commons, 12 March 2014) 21

power relates to external dimensions to the LCJ's role. LCJ power which does not relate to judicial decision-making inside the courtroom highlights too the increased responsibilities relating to the leadership and management of judges. This includes statutory provisions governing external relationships between the LCJ and other bodies such as with the UK Government, the UK Parliament, HM Courts and Tribunals Service, the devolved administrations, other senior judges in the UK and beyond. Therefore, we can see clearly how the source of LCJ power has both internal and external features, working across all dimensions of the judicial role.

The location of LCJ power: non-statutory

In spite of the sense of clarity offered by locating statutory LCJ powers and duties, they do not provide a complete account of this type of judicial power. There are many episodes of LCJ power which contain other features, not based in statute. These other features may be explored within the broad notion of *non-statutory power*. Consider a situation where, for example, a government minister is asked why they have listened to what the LCJ said in a speech in the development of government policy and the minister answers along the lines of “well, when the LCJ suggests something like that the government would be foolish to ignore it.” The basis for such influence is much less obvious than a statutory provision or even written guidance yet it has the potential to affect the behaviour of others. Instances where an LCJ may exert this type of influence can be explained by identifying their ‘social power’. Social power is an accepted – if sometimes underacknowledged - feature of organisational behaviour and a way in which we understand the power of those in management. Within an organisation there are structured social arrangements formed by the recognition of hierarchies of authority. Certain positions exist near to, or at, the apex of this hierarchy and have the ability to exercise considerable social power. For example, the CEO of a large multi-national corporation or the position of the office of the LCJ at the apex of the judicial hierarchy.⁴⁹⁹

Fortunately, there exist many well-established classifications of social power to draw upon here. French and Raven's ‘seminal five-fold typology’⁵⁰⁰ provides five types, or ‘bases’, of social power: *reward* power, *coercive* power, *legitimate* power, *referent* power and *expert* power.⁵⁰¹ One may, too, be familiar with Max Weber's authority types – *rational legal*, *traditional* and *charismatic*; another means of classifying authority and locating the source of power.⁵⁰² Each of these forms of authority or influence may help to explain where the LCJ's power comes from if not from some explicit source such as statute. The government minister's response above might be more clearly explained by considering French and Raven's notion of *expert* power – deciding to comply by virtue of the LCJ's expertise in the matter. It might also be considered *legitimate* authority if, presumably, it relates to matters of justice and the minister believes the LCJ's contribution to be legitimate in light of their expertise. Weber's *traditional* authority could apply in the sense that the office of LCJ presents a settled and well-established site of legal authority

⁴⁹⁹ For discussion of ‘leadership’ and ‘judicial leadership’ see Sir Ernest Ryder and Stephen Hardy, *Judicial Leadership: A New Strategic Approach* (OUP 2019) 9, 15

⁵⁰⁰ Steven Elias, ‘Fifty years of influence in the workplace: the evolution of the French and Raven power taxonomy’ (2008) 14(3) *Journal of Management History* 267, 268

⁵⁰¹ John R.P. French Jr and Bertram Raven, ‘The basis of social power’, in Cartwright, D (ed.), *Studies in Social Power* (University of Michigan Press 1959) 529, 69

⁵⁰² Max Weber, *The Theory of Social and Economic Organization* (OUP 1947) 276

within the workings of government and on that basis, exerts sufficient influence for the minister to comply. While based on a hypothetical example, these observations illustrate the potential for plausible analysis of certain episodes of LCJ power where less tangible evidence of power is available.

Forms of LCJ power

The ability to classify sources of LCJ power is extremely helpful when seeking clarity in our understanding. Yet, we must look even more closely at any one form of LCJ power to ensure all its nuances and layers may be accounted for as fully as possible; one aspect of LCJ power may take many forms or manifestations. Let us use the somewhat broad example relating to one feature of the LCJ's judicial leadership and governance functions: the duty, or power, of representation. We can locate the power in section 5(1) CRA which states:

“(1) The chief justice of any part of the United Kingdom may lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in that part of the United Kingdom.”⁵⁰³

The categories explored thus far would describe this as a *statutory* power which permits the LCJ to formally lay written representations before Parliament however, this site of LCJ power may take many forms.

While this does overlap with how we understand the use of this power, we can describe the power with more accuracy by looking at the ways in which an LCJ fulfils this aspect of their role. In more recent years, the s5(1) power has taken the form of an LCJ presenting their annual report to both Houses of Parliament. But this is quite a narrow description of an LCJ's power – or duty – of representation. The LCJ has a ‘suite of tools available’ for communicating matters of concern or importance to the judiciary with others not caught by statutory provision.⁵⁰⁴ For example, between 2005 and 2015, the LCJ met regularly with the LC and twice a year with the Prime Minister. Not only this, the LCJ may convey views and concerns through other means such as in appearances before select committee or via press conferences. The LCJ, and other members of the judiciary, are able to provide evidence to Parliamentary committees regarding proposed legislation and there is provision for wider engagement with committees too.⁵⁰⁵ There is now extensive evidence of consecutive LCJs delivering speeches, many of which are cited as a barometer for the judicial mood.

⁵⁰³ S5(1) Constitutional Reform Act 2005

⁵⁰⁴ Graham Gee, ‘The Lord Chief Justice and Section 5 of the Constitutional Reform Act’ (UKCLA, 14 April 2014) <<https://ukconstitutionallaw.org/2014/04/14/graham-gee-the-lord-chief-justice-and-section-5-of-the-constitutional-reform-act/>> accessed 15 November 2021

⁵⁰⁵ Each of these forms of LCJ power can be considered in their own right or as part of an episode of power interactions. The reason it is important to recognise these separate forms of the ‘same’ kind of power is that when analysing the impact of any episode of LCJ power, this analytical framework strives for detail. To omit a speech relating to an annual report may omit important information which can be used in the later analysis. The other consequence of this aspect of the analysis is to be able to show more clearly the source of the power.

Speeches – as a form of LCJ power – can be, collectively, a site of notable power and influence. If within those speeches, by the same or consecutive LCJs, there are continuing themes or messages this adds weight to those ideas. For example, there are a suite of examples of speeches given by senior judges, including consecutive LCJs, on the topic of ‘moral courage’; a notion which permits discussion of the rationales underpinning judicial decision-making – and judicial power. In 2008, Lord Judge, as LCJ, spoke about the need for judges to show moral courage as an important judicial attribute.⁵⁰⁶ This related to the message that judges should have the courage to make unpopular decisions even in the face of push back from ‘politicians or the media, or indeed the public’.⁵⁰⁷ In 2009, Lord Clarke, former Master of the Rolls and Supreme Court Justice, reiterated the notion of moral courage within judges’ character.⁵⁰⁸ In 2018, Lord Burnett as LCJ mentioned again the need for moral courage as a means of highlighting how institutions (such as the judiciary) will only be effective where actors within them have the moral courage to make difficult decisions.⁵⁰⁹ In 2019, Baroness Hale gave a lecture titled, ‘Moral Courage in the Law’ which explored the notion at length.⁵¹⁰ Here speeches are a different form of (LCJ) power through which the statutory power of representation may manifest. While one might be careful to overstate the significance of this, it is clear how attention must be paid to the different forms any single power may take in practice.

What is interesting to reflect upon beyond these different locations and forms of LCJ power is how LCJs themselves understand their own power since this gives further indication of the nature and scope of the power itself. There is clear evidence of LCJs being aware of the need for their interventions to be appropriate to their role. In one select committee appearance, Lord Thomas was questioned about ongoing issues relating to judicial salaries and when a government appeal was mentioned, the LCJ stated, ‘but that is a matter on which I cannot comment’ for reasons relating to the potential situation where the LCJ might sit as a judge on that case.⁵¹¹ In response to a question about the recent Article 50 case, the LCJ again took a firm position: ‘I am extremely reluctant to get into an argument that in any way compromises the position that the judiciary has taken on Brexit, which is to get on with the legal problems and leave the politics to the politicians. I do not want to be drawn into the politics at all.’⁵¹² These limits to LCJ power, as set by the LCJ themselves in those instances, suggests that how an LCJ understands their own power will likely have a direct effect on how they use that power.⁵¹³ How the LCJ perceives the

⁵⁰⁶ Lord Judge (Diversity Conference, London, 11 March 2009)

<<https://webarchive.nationalarchives.gov.uk/ukgwa/20131203072734/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-speech-diversity-conf.pdf>> 2

⁵⁰⁷ Ibid

⁵⁰⁸ Lord Clarke, ‘Selecting Judges: Merit, Moral Courage, Judgment and Diversity’ (2009) 5(2) The High Court Quarterly Review 49

⁵⁰⁹ Lord Burnett, ‘Becoming Stronger Together’ (Commonwealth Judges and Magistrates’ Association Annual Conference 2018, 10 September 2018) 11

⁵¹⁰ Lady Hale, ‘Moral Courage in the Law’ (The Worcester Lecture, Worcester, 21 February 2019)

⁵¹¹ HL Constitution Committee, *Corrected oral evidence: Oral evidence session with the Lord Chief Justice, Select Committee on the Constitution - Wednesday 22 March 2017* (2017) 12

⁵¹² Ibid 6

⁵¹³ For further discussion of judicial appearances before select committees, see: Robert Hazell and Patrick O’Brien, ‘Meaningful Dialogue: Judicial Engagement with Parliamentary Committees at Westminster’ (2016) Jan PL 54 and Patrick O’Brien, ‘Judges and Select Committees: A Developing Accountability Culture’ (UKCLA, 7 September 2015) <<https://ukconstitutionallaw.org/2015/09/07/patrick-obrien-judges-and-select-committees-a-developing-accountability-culture/>> accessed 23 November 2021

appropriate scope of their power of representation affects the form those representations may take. It follows then that how others understand the basis of LCJ power – how it is described and accounted for – will have an effect on how we may understand its subsequent use.

2.2 Exercise

This second part of the analysis of LCJ power examines the multi-dimensional exercise of LCJ power. This section will show firstly the kinds of decision-making power an LCJ may have and the effects of those decisions (the first face of power). It will show how adding notions of nondecisions and agenda setting (the second face of power) to this understanding can enhance our conceptualisation of the political nature of LCJ power. Finally, it will reflect upon the idea of the LCJ exercising their power ‘obliquely’ and the potential to locate wider influence created by the exercise of that power (the third face of power).⁵¹⁴

The first face: LCJ power as decision making

Dahl’s first face of power draws out two aspects of LCJ power: different kinds of decisions and the effects of those decisions. Given the scope of the role and its responsibilities, there is a vast number of potential power relations to recognise. The different kinds of decisions an LCJ takes will depend upon which aspect(s) of their role they are fulfilling. An LCJ sitting as a judge will likely exercise decision-making power in ways that echo some of those qualities seen in Chapter 4’s analysis. The important factor in analysing LCJ power is of course the fact that the role extends much beyond the traditional dimension of the judicial role and requires different forms of decision-making. Any single site of LCJ decision-making within the leadership dimension – such as the duty of the LCJ to represent the views and concern of the judiciary – is worthy of specific and ongoing analysis, largely due to the ways in which this power may be exercised either by one or more LCJs or within different situations. Using the example of Section 5(1) CRA - which empowers the LCJ to lay representations before Parliament on matters of importance to the judiciary or the administration of justice – it is possible to illustrate the ways in which LCJs negotiate the use of their power.

During the CRA’s drafting, the then LCJ, Lord Woolf, justified the inclusion of the s5(1) provision within the reforms by explaining it would provide a statutory basis for an existing ‘privilege’ of LCJs: to contribute views within legislative proceedings of the House of Lords by virtue of their membership of the upper legislative chamber.⁵¹⁵ At that time, Lord Woolf explained that he did not, ‘consider that [section 5] will be a power that any of the judges will use frequently. It is an additional safeguard.’⁵¹⁶ This sentiment was echoed by later occupants of the LCJ role, Lord Phillips and Lord Judge.⁵¹⁷ However, both LCJs then acted in ways which indicated different views of the nature of the s5(1) power. It was hoped that by describing s5(1)

⁵¹⁴ Graham Gee, Robert Hazell, Kate Malleson and Patrick O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (CUP 2015) 132

⁵¹⁵ HL Deb 20 December 2004, vol 667, Column 1541

⁵¹⁶ HL Deb 20 December 2004, vol 667, Column 1541

⁵¹⁷ Making reference to the infamous “nuclear option” description of s5(1) CRA.

as a ‘nuclear option’, it would avoid ‘reduc[ing] the effect of the power’⁵¹⁸. Therefore, when a decision *was* made under this provision, it would indicate serious judicial concern relating to ‘matters of importance relating to the judiciary or the administration of justice’.⁵¹⁹ In practice, different decisions have been taken by LCJs in relation to this option: in 2010, Lord Judge issued his annual report without invoking s5(1) to do so whereas Lord Phillips had made a decision to use it for this purpose in the year before.⁵²⁰ This shows how one specific site of LCJ decision-making can take many forms and it is this potential for change and evolution in different contexts which must be included in an analysis. In relation to this example, the context of these events will be developed further in the later section on ‘Interactions’ to show how further understanding may be gained from their context.

Identifying specific decisions illustrates the variety of forms that LCJ decision-making may take and we can use this evidence to make a further distinction in how we perceive the use of LCJ power. This is the question of whether we are identifying collective or individual decision-making. It is possible to learn more about this not just from observation and perception but from how LCJs themselves convey this. Looking at examples from public appearances, we can see a difference between what we might call ‘collective language’ and ‘individual language’ in LCJs’ representations. For example, in a meeting of the House of Commons Justice Committee in May 2020 which considered the impact of Covid-19 on prison, probation and the court systems, Lord Burnett CJ responded to a question about changes as such: “*We* started making adjustments even before the lockdown”(emphasis added).⁵²¹ In a more recent appearance before the same committee, this time on the subject of the work of the LCJ, he was invited to offer any observations about recent tensions between some government ministers and the legal profession. This time, Lord Burnett CJ said this: “A general attack on the legal profession, *in my view*, undermines the rule of law”(emphasis added).⁵²² Where this variation in language occurs, it makes an apparently identical exercise of power subtly different.⁵²³ What may be seen is how the LCJ decides to make clear the capacity in which they are acting. “*We*” indicates that the LCJ is speaking here *on behalf of* the judiciary and other judges. The “*I*”, on the other hand, makes clear that the LCJ is speaking *in their individual capacity*.

Identifying LCJ power as decisions – and exploring the nature of those decisions - is only part of the contribution made by Dahl’s first face. The other is to consider the *effect* of those decisions as a means of beginning to identify the influence or outcome of the exercise of power in question. One observation about the effects of LCJ decisions is that they are often more subtle

⁵¹⁸ A comment made by the then Lord Chancellor, Lord Falconer – reported in HL Constitution Committee, *Constitution – Sixth Report* (HL 151, 2006-07), Chapter 3 para 115

⁵¹⁹ HL Deb 20 December 2004, vol 667, Column 1541

⁵²⁰ Gee (n 496)

⁵²¹ HC Justice Committee, *Oral evidence: Coronavirus (COVID-19): The impact on prison, probation and court systems* (2020-21, HC 299). Lord Burnett gave evidence on 22 May 2020 which may be viewed here: <<https://parliamentlive.tv/Event/Index/a80ba910-dfa5-4330-b9e7-ea0164b79543>> 14:36.22

⁵²² *Ibid* at 14:34.30.

⁵²³ A contrasting example might be when an LCJ gives a speech. By its nature, this decision – to give a speech – may be seen as much more individual. Although present in their capacity still as head of the judiciary, the LCJ may appear to be speaking more for themselves. In a speech given by Lord Thomas in 2015, he stated: “The judiciary has, *I think* it is fair to say, traditionally been wary of accountability. This is entirely understandable and constitutionally appropriate.” (emphasis added). See Lord Thomas CJ, ‘Judicial leadership’ (Conference on the Paradox of Judicial Independence, Constitution Unit, 22 June 2015) 39

and less tangible than, say, linking the issuing of a DOI by a court to a change in legislation as seen in Chapter 4. A particular episode prior to the enactment of the CRA is interesting to consider here since it demonstrates both a range of LCJ decisions and some varying effects. It is now well known that in 2003, the then prime minister, Tony Blair, had decided to sack his current Lord Chancellor Lord Irvine and intended to remove the office of Lord Chancellor at that point. The implications of this were not fully understood by Blair. But of note, was how the Lord Chief Justice at that time, Lord Woolf, had ‘no inkling’ of the impending change.⁵²⁴ Nor did the incoming Lord Chancellor, Lord Falconer, who was tasked with implementing the proposals. When it quickly became clear that the Prime Minister’s plan to abolish the office of LC was going to be impossible due to the constitutional consequences of such a decision, it fell to the Lord Chief Justice and incoming LC to negotiate the future relationship between the judiciary and government. What resulted was the Concordat.⁵²⁵

In amongst this background, Lord Woolf CJ took a number of decisions – partly relating to the nature and scope of the Concordat but also about his own role and its future position within the proposed landscape. He had been ‘minded to retire’ at that time but delayed the decision to ensure that judicial independence and the interests of the judiciary were protected during the impending process of constitutional reform. This decision itself gave a message that he was so concerned by current events that he did not deem it appropriate to retire. While this is a less tangible or less obvious effect of his decision not to retire, it was important since it spoke to those involved of how one of the most senior judges was not prepared to step back from what was currently afoot.⁵²⁶ Alongside this, there were certain decisions taken by Lord Woolf about what the Concordat should contain. Here, he negotiated, for example, the inclusion of a stronger, and more representative role for the Judges’ Council to ensure greater support of judicial colleagues. Not only this, it was also clear that he was committed to ensuring that the negotiations would result in changes which were ‘satisfactory to the government of the day and satisfactory to the judiciary.’⁵²⁷ This indicates lots of potential effects and influence from a range of LCJ decisions and what is also interesting is how an exercise of LCJ decision-making at any point in time can have long-lasting effects.⁵²⁸ This may suggest that quite often, the individual

⁵²⁴ Joshua Rozenberg, Interview with Lord Woolf, former Lord Chief Justice of England and Wales. Interview available: LSE Law School, ‘Judicial Interviews: Legal Biography Project’ (2014) <<https://www.lse.ac.uk/law/legal-biography-project/judicial-interviews>> accessed 3 March 2020

⁵²⁵ HL Constitution Committee, *Constitutional Reform Bill – First Report* (HL 142, 2004), Appendix 6: The Lord Chancellor's Judiciary-Related Functions: Proposals (the "concordat"). For wider discussion of these events, see: Andrew Le Sueur, ‘From Appellate Committee to Supreme Court: A Narrative’ a chapter in Louis Blom-Cooper QC, Brice Dickson, and Gavin Drewry (eds.), *The Judicial House of Lords: 1876-2009* (OUP 2011) or Lord Windlesham, ‘The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change: Part 1 (2005) Win PL 806 and Lord Windlesham, ‘The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change: Part 2 [2006] Spr PL 35

⁵²⁶ Applying this element alone does not allow us to incorporate a consideration of whether this had a long-term effect or whether this was one of those decisions which was specific to its moment in time. Arguably, less controversial if so hence the need to contextual any analysis of the ‘exercise’ of power in the later elements of the framework.

⁵²⁷ Joshua Rozenberg, Interview with Lord Woolf, former Lord Chief Justice of England and Wales. Interview available: LSE Law School, ‘Judicial Interviews: Legal Biography Project’ (2014) <<https://www.lse.ac.uk/law/legal-biography-project/judicial-interviews>> accessed 3 March 2020

⁵²⁸ Hence the value of the ‘Time’ element of the analytical framework in requiring us to consider the longer-term consequences of an exercise of power alongside any relevant preceding history to its use. For LCJs, they are often

power of the LCJ sits within the collective power of the judiciary which might be why, sometimes, the LCJ's power is not a source of attention in the way that, for example, a single decision of the UKSC which is dealing with matters of high policy may. It does not always stand out as a distinct site of judicial power.

The second face: LCJ power as nondecisions and agenda-setting

Bachrach and Baratz's second face of power adds a second dimension to LCJ decision-making by considering nondecisions and agenda-setting. If looking for evidence of an LCJ nondecision, we are considering circumstances where an LCJ has decided not to act or exerted influence to keep matters away from the political agenda. This manifests itself, as one example, in circumstances where an LCJ is careful *not to be drawn on* particular issues or answer specific questions. In doing so, the LCJ is once more indicating boundaries to the role and using the nondecision to reaffirm the limits of judicial intervention – most often where the matter is one of public policy or thought of as party political.⁵²⁹ This is seen, for example, in how LCJs have contributed to select committee hearings as discussed in the first element of this analysis. Such decisions not to act by an LCJ may also arise in situations where they choose to delegate their responsibilities to other senior judges.⁵³⁰ The decision to delegate could be reframed as a nondecision; a decision not to act themselves. This nondecision might simply be explained on a practical level – due to the vast number of LCJ responsibilities, the office needs support. Yet, it could indicate further that such willingness to delegate, the LCJ does not consider the decision to be one which requires involvement by the head of the judiciary. To further illustrate the second face of LCJ power, let us consider a different example: the involvement of the LCJ in matters of resource allocation and events surrounding the cuts made to state-funded legal aid.

In June 2011, the Ministry of Justice issued its response to an earlier consultation on matters relating to the funding – and cost - of legal aid in England and Wales.⁵³¹ The then Lord Chancellor, Ken Clarke MP, explained that the proposals constituted 'a substantial set of very bold reforms, the overall effect of which should be to achieve significant savings whilst protecting fundamental rights of access to justice'.⁵³² The legislative result of this consultation was the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which sought to provide a 'saving of £350 million to the public purse in 2014/15 annually over the longer term' and address concerns over rising costs of legal aid in England and Wales.⁵³³ These proposals were met with much criticism from many quarters, not least from the judiciary. Even a number

considered as some of the most eminent judges in English legal history – such as Lord Bingham or Lord Woolf – whose contributions through the office are remembered long after their retirement.

⁵²⁹ For example, in a speech given to JUSTICE, Lord Thomas stated: "Some of what is put forward will be for political decision; *on that it would be inappropriate for judges to express a view* [emphasis added]. Some of it will be for decision by the Judiciary working with the Executive. Some of it will be for the Judiciary alone to consider." Lord Thomas, 'Reshaping Justice' (A speech delivered to the organisation JUSTICE, 3 March 2014)

⁵³⁰ Lord Chief Justice, *Delegation of Statutory Functions – Issue No. 1 of 2020* (2020)

⁵³¹ The plans to reform the legal aid system were set out initially in HM Government, 'The Coalition: our programme for government' (20 May 2010)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/83820/coalition_programme_for_government.pdf accessed 4 October 2020. Documented in Section 22: Justice, the coalition government committed to 'carry out a fundamental review of Legal Aid to make it work more efficiently' 23

⁵³² Ministry of Justice, *Reform of Legal Aid in England and Wales: the Government Response* (CM 8072, 2011) 5

⁵³³ Ibid 7

of years later, judges are speaking of the impact of these cuts on the access to justice and the administration of justice more widely.⁵³⁴ Throughout its short history, this issue of legal aid funding engaged the LCJ and required various exercises of their power of leadership. Two instances can be highlighted to explore the nature of their interventions: a speech given by Lord Thomas in March 2014 and a submission by the Judicial Executive Board, of which the LCJ is head, to a consultation reviewing the first year of LASPO in May 2014.

In his speech, Lord Thomas recognised the period of ‘significant retrenchment’ affecting the State and agreements within government of the need to reduce the budget deficit by reducing expenditure.⁵³⁵ Alongside this, Lord Thomas made a number of proposals which might allow for the ‘radical’ examination of the system when implementing the wider changes. It was reported following the speech that Thomas’ proposals would be ‘more politically palatable’ and allow the government to gain more support for the changes they wished to make to the justice system as a whole.⁵³⁶ Following the LCJ’s intervention in the March, in May 2014 the Judicial Executive Board reported back to a government consultation on the impact of LAPSPO. The JEB raised a number of concerns relating to LAPSPO, not least the notable impact of a reduction in legal aid funding and ‘an unprecedented increase’ in litigants in person.⁵³⁷ This evidence represented continued pressure from the senior judiciary, including the LCJ, to the changes which had been implemented in 2013. These events firstly show how an LCJ may intervene to support the government in their own political aims – of reform – while seeking to preserve aspects of the system considered important to the judiciary and the legal profession. They also can be framed in terms of nondecisions.

The proposals and their impact were clearly an opportunity, had he wished, for the LCJ to make a much stronger intervention, criticising the government and raising the issue much more publicly to gain more support in opposing the changes. Instead, he chose not to – a nondecision. There appears not to be published communication – and therefore, public communication – between the LCJ and the LC on this issue. While there were likely private interactions between the LCJ and officials in the Ministry of Justice, the LCJ did not act publicly in criticising the government at this stage. Using the power of the nondecision, the LCJ’s actions were perhaps an attempt to maintain relationships between judges and ministers at a time when tensions were high. While short-term gains for the judiciary’s standpoint may have been possible with increased criticism, it could well have damaged important relationships in the long term.

⁵³⁴ Considering matters not only of legal aid but the wider impacts of increased numbers of litigants in person. See, too, Baroness Hale speaking about this when she guest edited the Today Programme on Radio 4: BBC News, ‘Legal aid: UK’s top judge says cuts caused ‘serious difficulty’’ (27 December 2019) <<https://www.bbc.co.uk/news/uk-50923289>> accessed 20 March 2020

⁵³⁵ Lord Thomas, ‘Reshaping Justice’ (A speech delivered to the organisation JUSTICE, 3 March 2014)

⁵³⁶ Joshua Rozenberg, ‘Lord chief justice helps politicians grasp courts’ ‘hot potato’ *The Guardian* (4 March 2014) <<https://www.theguardian.com/law/2014/mar/04/lord-thomas-chief-justice-jury-trials-reform>>. These suggestions included taking account of the consequences of legal aid cuts and the rise of litigants in person which inevitably impact the efficient running of the system.

⁵³⁷ HC Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012: Eighth Report of Session 2014–15 - Written evidence from the Judicial Executive Board (MSC 84)* (HC 311, 2015). Evidence submitted 12 March 2015 <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/9472.html>>

Contrast this with an example from 2010, still on the matter of resource allocation, when the LCJ wrote informally to the LC about court closures and funding. The LCJ stated the letter was not ‘intended to be an all encompassing “judicial” response’ but was a stronger, more deliberate contribution to the policy debate to highlight concerns.⁵³⁸ While there is action here – rather than inaction – there was still a sense of avoiding overt political strategies within this intervention. It still appeared to reconcile the need to convey concerns as a judicial representative with respect for the roles of other actors and the political context in which they occurred.

The second feature of the second face of power relates to agenda-setting and its influence. It is expected that a judicial leader – the head of the judiciary in England and Wales – will have some sort of agenda. It is certainly the case in more recent years, post CRA, that through procedures such as annual reporting or appearances before Parliament, an LCJ is able to make clear their wishes in terms of policy direction or changes affecting the judiciary and the administration of the justice. In some respects, it would be unusual if an LCJ did not use such vehicles to reaffirm the interests of the institution they represent. What is interesting is to explore the relationship between judicial – LCJ – agendas and wider, public or political agendas; situations where an LCJ has taken an opportunity to highlight specific issues – to place certain matters relating to the judiciary onto the wider agenda or publicise them in the public domain. For example, the issues affecting the judiciary and the administration of justice which arose from changes to funding were placed into the public domain by, in part, decisions of the LCJ to intervene regarding the review of LAPSO. It is possible to see that the aim (or agenda) to improve the operation of justice, to address concerns about access to justice and wider issues relating to resources were factors in what the LCJ said and did.⁵³⁹ Analysing agendas is complex because they are not always clear. In courtroom decision-making, we identified agendas through the reasons given for the decision. In external capacities, such reasoning is not always evident hence the challenges of this case study requiring the analysis to read between the lines a bit more.

That said, there are plenty examples of judicial agenda-setting to reflect upon. For example, specific policy intentions relating to increased equality and diversity within the judiciary⁵⁴⁰ or the move to promoting and developing the public image of judges.⁵⁴¹ More recently, one might consider the issue of morale and evidence of agenda-setting by the senior judiciary. There appears to be an agenda to promote more effectively the achievements and work of *all* judges,

⁵³⁸ Letter from The Rt Hon The Lord Judge, Lord Chief Justice of England and Wales to the Lord Chancellor and Secretary of State for Justice’, 21 October 2010

⁵³⁹ It is possible to see this approach taken often by an LCJ: to highlight a specific matter alongside a more general issue. In one appearance before the House of Lords Select Committee on the Constitution, Lord Thomas took such opportunities at several points. When asked about the major challenges his successor would face he rightly observed the impact of the UK’s decision to leave the EU. However, in doing so, he was clear to state the UK’s credentials as a ‘a pre-eminent centre for international dispute resolution, both court and arbitration’. This is something seen in other senior judges’ contributions and may well indicate a wider agenda for the judiciary – and the legal profession – to maintain the position of the UK’s legal system post-Brexit. See HL Constitution Committee, *Corrected oral evidence: Oral evidence session with the Lord Chief Justice, Select Committee on the Constitution - Wednesday 22 March 2017* (2017) 1

⁵⁴⁰ Rosemary Hunter, ‘Judicial Diversity and the ‘New’ Judge’ a chapter in Hilary Sommerlad, Sonia Harris-Short, Steven Vaughan, Richard Young (eds.), *The Futures of Legal Education and the Legal Profession* (Bloomsbury Professional 2014)

⁵⁴¹ See, for example, Chapter 2 of Penny Darbyshire, *Sitting in Judgment: the working lives of judges* (Hart Publishing, 2011)

moving the attention away from senior judges and courts and emphasising how the judiciary and the courts system is a sizeable organisation. Before his retirement, Lord Thomas used a select committee appearance to speak of the modernisation programme and its achievement but took time to say that, ‘none of this is feasible without the goodwill and hard work of every judge at every level, whether you be a first instance judge in the tribunals, a district judge, or a High Court or Court of Appeal judge; it is absolutely central.’⁵⁴² In the 2020 Annual Report, the current LCJ opens by praising the ‘hard work’ of the ‘judiciary, HMCTS, the Ministry of Justice, professions and all those who work in the court system’.⁵⁴³ In this representation, the LCJ highlights once more the issue of funding and how modernisation and reform was possible but ‘with appropriate funding made available to complete the job’.⁵⁴⁴ Although just two examples, what can be seen in this merging of messages, are intended internal effects of addressing the morale agenda – boosting the cohesion and morale of judges internally within the judiciary – and external effects such as using coordinated agendas on a single issue over a prolonged period of time to maintain pressure on the government in respect of concerns relating to resource allocation. An interesting contribution of the second face is to highlight the complexities of LCJ power within the leadership dimension – and the richness of information about that power and its use which is available.

The third face: LCJ power as unobservable influence

Lukes’ third dimension of power suggests that in analysing LCJ power, we ought to consider the relevance of unobservable influence. It has been noted how the LCJ must ‘exercise power obliquely so as to avoid any suggestion of command and control’ but to what extent does this obliqueness translate into the sort of wider influence Lukes was identifying?⁵⁴⁵ In this sense, we can ask where an exercise of LCJ power could be linked to the development of cultural norms and beliefs beyond the specific use of power. These single decisions and their impact – and the scope of the power as a whole – can be thought about again in individual and collective terms. In Chapter 4 this was discussed in terms of how judicial review rules and outcomes can deliver messages about, for example, whether a government’s actions are ‘right’ or whether they go against constitutional norms. Further to this, patterns of judicial decision-making can structure beliefs about future action and social behaviour and alike, creating intangible influence over a potentially large number of people. In this sense, a court – or judge – can exercise influence through what Rozenberg termed ‘a *judicial path*’.⁵⁴⁶ A court, through a continued approach to a certain type of case, may develop a series of beliefs about what may be ‘right’ or ‘wrong’ in those circumstances.

The question is here whether or not the LCJ has this kind of power and influence. If one considers the LCJ by taking a ‘wider perspective on politics’, the work of the LCJ – and their possible influence – may be ‘understood in more general terms as the exercise of power by those

⁵⁴² HL Constitution Committee (n 503) 1

⁵⁴³ Judiciary of England and Wales, ‘The Lord Chief Justice’s Report 2020’ (2020) Introduction by the Lord Chief Justice

⁵⁴⁴ Ibid

⁵⁴⁵ Gee, Hazell, Malleson and O’Brien (n 506)132

⁵⁴⁶ Gerald N. Rozenberg, *The Hollow Hope: can courts bring about social change?* (2nd edn, University of Chicago Press 2008) 7

in authority'.⁵⁴⁷ Lord Woolf's involvement in the CRA's application to the judiciary or the intervention of LCJs in matters of court funding and resource allocation are two examples of an exercise of power which have potentially far-reaching effects. In light of these examples, it is possible to see where the development of wider cultural norms within both the judiciary as an institution and within the constitution more generally may be influenced by the activities of an LCJ. A recurring message about the need for more state support and funding for litigants, for example, or a culture of valuing all judges' contributions can convey certain values and expectations. The creation of beliefs may not only be about public perceptions of the judiciary but about adapting the views of judges themselves. This might include the need to promote the views of the senior judiciary – whose aims were to 'maintain and enhance standards of performance' – throughout all levels of the judicial hierarchy.⁵⁴⁸ The subsequent culture was one which included a 'greater sense of collective identity' and at 'the centre of this change is the office of the Lord Chief Justice'.⁵⁴⁹

In terms of influencing the wider constitutional culture, we see many examples of the LCJ reinforcing norms and expectations relating to the judiciary. For example, speaking about the reasons why we need an independent judiciary or highlighting that government actions may be negatively affecting the rule of law.⁵⁵⁰ In 2015 Lord Thomas spoke about the changing constitutional relationships between the judiciary and other branches of the state. He said that by senior judges talking openly about their interactions with other actors means, 'the wiring is no longer hidden' but that, 'Our Constitution, its practices and its evolution are very much out in the open; and it is all the better for that.'⁵⁵¹ More recently, in 2018, Lord Burnett spoke about public engagement and its importance: 'The judiciary invites misunderstanding or incomprehension if it stands completely apart and aloof from society. Engagement within proper constitutional bounds will benefit society and the judiciary.'⁵⁵² By explicitly referring to 'proper constitutional bounds' there is a clear sense that what the LCJ is describing specifically addresses this concern. Through concurrent action and deliberation of these questions – such as normalising judicial interactions of this kind – it can lead to changing attitudes both inside the judiciary and have wider influences on how the public perceive judges too.

These examples might indicate that unobservable influence is easier to evidence than has been suggested. However, some influences are much harder to quantify. One key example would be the work of the Judicial Executive Board of which the Lord Chief Justice is the head. Prior to 2005 there was an existing practice of the LCJ maintaining close contacts with Presiding Judges of the circuit so as to remain informed of 'matters relating to divisions of the High Court'.⁵⁵³

⁵⁴⁷ Kate Malleon, *The New Judiciary: the effects of expansion and activism* (Dartmouth Publishing 1999) 4

⁵⁴⁸ Gee, Hazell, Malleon and O'Brien (n 506) 129

⁵⁴⁹ Ibid 130

⁵⁵⁰ HC Justice Committee, *Oral evidence: The work of the Lord Chief Justice* (2019-2021, HC 226). Lord Burnett's submissions made on 10 November 2020 can be viewed here: < <https://parliamentlive.tv/event/index/084108cc-9302-44a5-a73d-4a7bb7292373>> 14:34.30

⁵⁵¹ Lord Thomas CJ, 'Judicial leadership' (Conference on the Paradox of Judicial Independence, Constitution Unit, 22 June 2015). The unobservable aspects of this may be to reinforce the belief that transparency in constitutional interaction is positive, perhaps for reasons of accountability. It is likely that further confirmation or insight might only be possible either through interview or on reflection after a period of time has passed.

⁵⁵² Lord Burnett (n 501) 11

⁵⁵³ Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn CUP 2013) 68

Increased formalisation of these existing relationships came in 2005 with the creation of the JEB. Sometimes described as a judicial cabinet, through its monthly meetings between ten senior judicial roles, the JEB ‘enables’ the LCJ to make policy and executive decisions. It ‘makes’ policy on issues such as judicial deployment and appointments and ‘manages’ the relationship with the executive, HMCTS and with Parliament and ‘approves’ – working with the MOJ – the Judicial Office’s budget.⁵⁵⁴ While this gives a sense that the JEB’s role is reasonably proactive, there is no way of knowing for sure how the LCJ interacts with the other nine judicial office holders to pursue such actions. In this sense, it is quite difficult to locate LCJ power where it manifests in the form of a collective output from the JEB due to little published documentation from this body, such as meeting minutes. It may be that this indicates a good example of unobservable influence via the third face of LCJ power which can be thought about within our understanding, even in the event of a lack of tangible evidence.

2.3 Interactions

The analysis of interactions comprises three aspects. Firstly, an analysis of the officeholder themselves and their own influence. Secondly, other influential actors involved in potential exercises of LCJ power – such as those to whom the LCJ delegates certain responsibilities. Finally, the dynamics of wider power relationships are considered specifically with a view of examining the relative influence of those relationships on how we understand the nature and use of LCJ power. By exploring these aspects of LCJ power we are able to offer increased contextualisation of episodes of its use and recognition of changing behavioural dynamics related to that use.

The Lord Chief Justice

The personalities of judicial office-holders remain an important feature of how the judiciary is evolving as an institution.⁵⁵⁵ Not only this, there is increasing coverage of the individuals behind the judicial office – some in an attempt to publicise the work of judges⁵⁵⁶ and occasionally as a basis for criticism, such as the personalised attack on the judges in the High Court decision in *Miller*.⁵⁵⁷ While there may have been a move towards increased formalisation of the judiciary as an institution, the significance of judicial personalities remains important in how we understand the use of judicial power. This emphasis on the personal qualities of those who inhabit judicial offices, including the office of LCJ, is reflected in the selection criteria for judicial appointments. It is not unsurprising that the personal qualities and character of an applicant to the office of LCJ plays a part in selection; a practice familiar in recruitment to other organisations. The changes occurring with changes in judicial selection are highlighted by what Hunter terms ‘new’ judges: judges are, ‘no longer a distanced and interchangeable decision-maker. The identity of who sits

⁵⁵⁴ Ibid

⁵⁵⁵ For a wider discussion of this idea, see, for example, Alan Paterson, ‘Presidency and the Supreme Court: Lord Neuberger’s Legacy’ (Judicial Institute Lecture, University College London, 2 December 2019) <https://pure.strath.ac.uk/ws/portalfiles/portal/102772206/Paterson_UCLJI_2020_Presidency_and_the_supreme_court_lord_neuberger's_legacy.pdf> accessed 21 June 2021

⁵⁵⁶ For example, the 2011 BBC Four documentary which followed the lives of several UKSC Justices, ‘Highest Court in the Land: Justice Makers’

⁵⁵⁷ The ‘Enemies of the People’ headline including short biographies of the High Court bench as if suggesting that these details influenced the decision reached in the first *Miller* case: Slack (n 475)

under the wig and gown thus becomes more important.⁵⁵⁸ Applying this observation to a judicial leader such as the LCJ, it is arguably the case that such skills and qualities – the ability to connect with and manage others – is somewhat vital to an individual’s success within that role. This links with the discussion about the source of LCJ power and the recognition of the social power and authority of an LCJ.

Considering the LCJ as an actor separately from the source of their power, we might reflect on how a particular officeholder secures their power and its potential success. It may be that a successful LCJ, who leads effectively, does so due to *charismatic* authority; their personality enables them to ‘take people along’ because of how they interact with others.⁵⁵⁹ Connected to this idea is how we understand the leadership styles of the LCJ and how these have – or might – vary between different officeholders. A more *authoritative* style, one of command and rule, may prove less effective than one which is *collaborative*: leading as a peer to inspire those they lead to work together ‘on an equal footing’.⁵⁶⁰ Alongside these styles of leadership, we may see other leadership behaviour indicative of an LCJ’s approach such as an officeholder whose work with judges indicates an emphasis on team-orientated practice to develop a culture of collaboration and unity within the judicial organisation.⁵⁶¹ Some officeholders will consciously adopt particular styles while others may pursue certain courses of action informed by their own personalities or prior experiences. What is most significant is where these approaches can be observed, their impact on the use of LCJ power(s) can be observed.

Other influential actors

There are numerous actors with whom an LCJ will interact within the course of their duties. One feature of LCJ power is particularly interesting here and that is the LCJ’s power to delegate. The LCJ delegates significant decision-making power to ‘a senior management team comprising the Senior Presiding Judge, the Senior President of Tribunals and Heads of Division.’⁵⁶² There can also be a secondary layer of delegation from these judges to ‘presiding judges, resident judges and chamber judges’.⁵⁶³ Two observations may be made about this: firstly, that there are clearly a number of different actors involved in the use of some sites of LCJ power and these actors may independently influence the matters to which those delegated powers relate. For example, the provision under the County Courts Act 1984, section 61 permits the LC, in concurrence with the LCJ, the ability to extend rights of audience in the County Court in specific circumstances. If delegated, the nominee then works with the LC to fulfil this and this presents a different dynamic to consider. Secondly, with the scope of delegation it can be said that LCJ power is dispersed through layers of judicial leadership and governance and is sometimes not initially identifiable as LCJ power at all.⁵⁶⁴

⁵⁵⁸ Hunter (n 532) 80. See also further discussion in Rosemary Hunter and Erika Rackley, ‘Judicial Leadership on the UK Supreme Court’ (2018) 38 *Legal Studies* 192

⁵⁵⁹ Gee, Hazell, Malleon and O’Brien (n 506) 137

⁵⁶⁰ Ryder and Hardy (n 491) 43

⁵⁶¹ *Ibid* 67

⁵⁶² Gee, Hazell, Malleon and O’Brien (n 506) 132

⁵⁶³ *Ibid*

⁵⁶⁴ Lord Chief Justice, *Delegation of Statutory Functions – Issue No. 1 of 2020* (2020)

Different approaches to delegation by different LCJs sheds further light on this aspect of LCJ power. While ‘the delegate’ could themselves be the subject of an analysis, we see other features of LCJ power arise once more. Notably, how some LCJs have decided *not to* delegate but instead exercise certain powers or roles themselves.⁵⁶⁵ As part of the wider culture of their leadership, this seems to have been key in engaging judges across the system with changing practices and policy within the judiciary. For example, since 2005 the LCJ has had the role of swearing in all new Circuit and High Court judges – a power which can be delegated if desired. While LCJ, Lord Judge made a decision not to delegate this responsibility but rather to do this work himself. Along with this, Lord Judge took time to travel to meet in person judges across the system in an effort to bring together the ‘judicial family’.⁵⁶⁶ Combining an understanding of the office holder, their own personalities and approaches to leadership with examples of their power does paint a clearer picture of how we might understand LCJ power at that time. Comparing changing patterns in this aspect of LCJ power may help to evaluate where there have been particular successes in the leadership and governance of the judiciary.

In his own response to the 2005 reforms to the office of LCJ, Lord Thomas recognised the ‘new way of working’ required by the reforms and new methods of engagement with other actors. In carrying out their leadership function, the LCJ will interact with many actors in many settings. Within the judiciary, actors such as the JEB and the Judges’ Council are significant alongside more localised interactions with other judges, at all levels of the judiciary. In terms of the judicial organisation, actors such as the Judicial College or the Judicial Conduct Investigations Office and Her Majesty’s Courts and Tribunal Service may be significant to how an LCJ exercises their power. Beyond this, the Judicial Appointments Commission or the Ministry of Justice and the ministerial office of Lord Chancellor are important connections to consider. The potential for other actors to be involved with the LCJ’s work is vast but must be noted in any episode. There are other connections, too, such as with advisory bodies, such as the Civil and Family Justice Councils; independent advisory bodies; citizens advice bureau; consumer bodies; and professional bodies; and above all the Executive and Parliament.⁵⁶⁷ Looking at this wider ‘machinery of justice’ and how that has ‘changed over time’ is part of acknowledging the many evolving dynamics of LCJ power.⁵⁶⁸

Key relationships

Part of an LCJ’s potential for success – and power – in the role will be their ability to forge strong working relationships with other key stakeholders and maintain the confidence of others within those relationships. We are reminded of the potential significance in how an LCJ is able to ‘take people along’, whether they be judges, judicial bodies or other, external actors and institutions.⁵⁶⁹ What remains key to understanding the power here is to be able to identify the

⁵⁶⁵ This is considered here in this manner but may equally be a feature of an analysis of a nondecision; deciding not to delegate in order to make clear, for example, the importance of ensuring effective leadership through positive working relations between the LCJ and all judges working in the courts system.

⁵⁶⁶ Gee, Hazell, Malleon and O’Brien (n 506) 137

⁵⁶⁷ Lord Thomas CJ, ‘Judicial leadership’ (Conference on the Paradox of Judicial Independence, Constitution Unit, 22 June 2015) 45

⁵⁶⁸ Ibid 8

⁵⁶⁹ Gee, Hazell, Malleon and O’Brien (n 506) 137

dynamics in those relationships.⁵⁷⁰ There are plenty of examples of positive relations between LCJ power and other actors such as through effective delegation. However, there are also plenty of examples of tensions within those relationships sometimes arising where an LCJ and the other actor(s) are trying to promote competing agendas or managing different obligations. Perhaps one of the most significant external relationships the LCJ has is with the LC but this has, as already stated, undergone substantial change. Since 2005, this relationship has required the LCJ to navigate evolving, complex politics with the ‘new style’ LC.

Under statute, the LC and LCJ are required to work in partnership on some matters relating to the administration of justice; they ‘speak often’.⁵⁷¹ Even prior to 2005, this relationship was a site of frequent interaction, requiring the relationship to achieve a range of objectives relating to the administration of justice. This was then reflected in the reforms, firstly within the 2004 Concordat – a product of the working relationship between the LCJ, Lord Woolf, and the LC, Lord Falconer and in conjunction with Sir Hayden Phillips.⁵⁷² Four years later, the 2008 Framework Document formally recognised this partnership alongside the Courts Service.⁵⁷³ However, provision for the relationship does not necessarily mean a harmonious relationship is guaranteed since each actor may well have their own interests in matters. For example, the Concordat has been described as being ‘drawn up in ‘an atmosphere of intense suspicion’.⁵⁷⁴ Prior to 2005, many instances of disagreement arose between judges and government and between the LCJ and LCD. In the early 1990s, Lord Lane CJ publicly complained about the shortage of judges and the role of the Lord Chancellor’s Department⁵⁷⁵, no doubt furthering the tensions which had arisen in response to the 1989 dispute ‘between Lord Mackay and the judiciary over powers to grant rights of audience to lawyers’.⁵⁷⁶ Lord Woolf was proactive in leading an ‘attack’ on sentencing plans with a heated debate over proposals in the Crime (Sentences) Bill 1997⁵⁷⁷ and later use a speech to attack provisions within the Asylum and Immigration Bill which sought to oust courts’ jurisdiction to review.⁵⁷⁸

Observing such dynamics can extract moments of particular tension in this relationship and simply give greater explanation to an exercise of LCJ power by way of one part of its context. This chapter has already mentioned the ‘Enemies of the People’ episode but it can be returned to here to illustrate how, since the existence of the ‘new style’ LC, it has not lessened the potential for such tensions. Indeed, there was much judicial scepticism about the ability of non-lawyer

⁵⁷⁰ A task made slightly easier by virtue of much of the ‘hidden wiring’ of some interactions being made more public by the reforms and by changing practices. For more extensive discussion of this wiring, see Peter Hennessey, *The Hidden Wiring: Unearthing the British Constitution* (W&N 1995)

⁵⁷¹ HC Justice Committee, *Oral evidence: The work of the Lord Chief Justice* (2019-2021, HC 226)

⁵⁷² Sir Hayden Phillips was the then Permanent Secretary of the Department for Constitutional Affairs and remain the Permanent Secretary to the Lord Chancellor.

⁵⁷³ HMCTS, *Her Majesty’s Courts Service Framework Document* (CM 7350, 2008)

⁵⁷⁴ Gee, Hazell, Malleon and O’Brien (n 506) 43

⁵⁷⁵ Penny Darbyshire, *Sitting in Judgment: the working lives of judges* (Hart Publishing 2011) 32 in which Darbyshire refers to the reporting in 1991 of a Mansion House speech made by Lord Lane CJ.

⁵⁷⁶ *Ibid*

⁵⁷⁷ Frances Gibb and G Hurst, *The Times* 17 June 2003 as cited in Penny Darbyshire, *Sitting in Judgment: the working lives of judges* (Hart Publishing 2011) 33

⁵⁷⁸ Lord Woolf, ‘The Rule of Law and a Change in the Constitution’ (Squire Centenary Lecture, University of Cambridge, 3 March 2004) as cited in Penny Darbyshire, *Sitting in Judgment: the working lives of judges* (Hart Publishing, 2011) 33

LCs to adequately work with the judiciary. When the Daily Mail headline was published in November 2016, there was a strong suggestion that the Secretary of State for Justice, Liz Truss, had not met the expectations others had of her role. The LCJ's response spoke volumes about the judiciary's view of how events played out, with security being considered for judges and concerns raised about threats to judicial independence. The legal profession felt the LC's response was inadequate and the delay in publicly responding to the headline unacceptable.⁵⁷⁹ The LCJ subsequently told Parliament how judges on the circuit were being referred to as enemies of the people by litigants and this was linked to a perceived lack of adequate response by the LC.⁵⁸⁰

However, the dynamics of this relationship – and each of the offices of LC and LCJ – had changed considerably and it has since been suggested that the judiciary may be applying pre-2005 expectations to a LC who was now a very different actor in quite a different role.⁵⁸¹ The dynamics of this relationship – and the skills and expertise of the new LC – have changed and our understanding of that relationship must change too. Post-2005 LCs are 'first and foremost politicians, ensconced in the wider political culture and appointed to help the government to secure its policy objectives.'⁵⁸² While it is the focus here to understand LCJ power, we might reflect on the LCJ's response to this event *in light of* changes to the role, responsibilities and changing characteristics of the LC. For example, noting how the office of LC has most recently been occupied by non-lawyers and moving a step further away from the judiciary as a result. In the context of this event, and these interactions, it is also important to analyse how the LCJ has adapted to being the actor responsible for 'protecting entrenched interests in the judicial system' compared to the LC who is now more concerned with 'implementing government policy in the public interest'.⁵⁸³ It is clear that changes to the LCJ's power have been driven in part by changes to the power of the LC and the altered relationship between those actors. As such, we can see how the changing dynamics of localised interactions between actors can affect the evolution of LCJ power more generally and, importantly, how we understand it.

2.4 Time

This part of the analysis broadens our field of vision beyond any particular examples or officeholders to consider the history of the office. This highlights how, even given recent constitutional reform, there are some settled areas of practice and behaviour. The analysis here looks ahead and considers the existence of any patterns or trends in the nature or use of this power.

A history of LCJ power

⁵⁷⁹ O'Brien (n 476)

⁵⁸⁰ HL Constitution Committee (n 503) 7

⁵⁸¹ See, for example, Graham Gee, 'Legal Elites, Lord Chancellors and Judicial Independence' a chapter in DJ Galligan (ed.), *The Courts and the People: Friend or Foe? The Putney Debates 2019* (Bloomsbury 2021) or Paul Daly, 'Judicial Independence and Accountability in the British Constitution' a chapter in Ernst Hirsch Ballin, Gerhard van der Schyff and Maarten Stremmer (eds.), *European Yearbook of Constitutional Law 2019* (T.M.C. Asser Press 2020) 156

⁵⁸² Graham Gee, 'Legal Elites, Lord Chancellors and Judicial Independence' a chapter in DJ Galligan (ed.), *The Courts and the People: Friend or Foe? The Putney Debates 2019* (Bloomsbury 2021) Section III

⁵⁸³ Ibid

The current role and power of the LCJ sits within a ‘long evolution’ of the machinery of justice. Lengthy legal history documenting the way in which the courts and the legal profession evolved is relevant here since, the role of the LCJ has developed from what Sir John Baker termed the ‘emergence of an expert judiciary’ traced back to Medieval times.⁵⁸⁴ The notion of an LCJ as a judicial leader may have grown over time but the role of earlier LCJs in leading the development of fundamental ideas or policy relating to the administration of justice can be seen. For example, the developing recognition of the principle of judicial independence. It is now believed that the ‘independent stance of particular chief justices may have helped to establish’ this as a general principle of the UK constitution.⁵⁸⁵ Although the position of the judiciary as ‘an independent force’ might often be traced back only as far as the Stuarts, if one considers the part played by Chief Justices prior to this, it may be that we understand the role and influence of this office more clearly.⁵⁸⁶ Furthermore, by reflecting on the history of the office of LCJ we are reminded of former LCJs whose influence is still felt - Sir Edward Coke, for example. Such reflection emphasises the fact that LCJ power is itself not a new phenomenon, even if we are looking at new or updated exercises of that power. It also reminds us of the need to compare LCJ power ‘now’ to LCJ power ‘then’ – whenever ‘then’ may be in that history. Such comparisons allow us to do two things: firstly, better understand the current exercise of power *in light of* the comparison and secondly, assess the extent of any change to the power and its use.

Using the notion of LCJ legacies here – their enduring influence – adds an important aspect to our thinking. This recognises how LCJ power does not cease immediately after its exercise or immediately at the end of the career of one LCJ. One recent example might be the actions of Lord Woolf as LCJ around the time of the CRA having significant, long-term influence. At a time of swift, constitutional change – contrasting to periods of slow evolution of traditions – the judiciary were anxious about the consequences. One result of the ‘white heat of judicial anxiety’ was the 2004 Concordat to provide much groundwork for the reforms and regime in place today.⁵⁸⁷ The CRA and its provisions have since been criticised for being ‘far too prescriptive’ but it is possible to make links between LCJ action (power) and certain, constitutionally significant developments.⁵⁸⁸ Similarly, we might also consider LCJs who have left office and retired but who retain a position of constitutional influence. For example, via their seat in the House of Lords. When matters arise which relate to law, justice or the judiciary itself, former LCJs may contribute. Contributions to parliamentary debates are a known site of – albeit varied - influence within the legislative process or within wider policy debates. In September 2021, Lord Woolf (and Lord Mackay as a former LC) participated in the Lords debate on the Public Service Pensions and Judicial Offices Bill speaking openly about matters such as judicial pensions and

⁵⁸⁴ Sir John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) 176. For further history of early Lord Chief Justices, see: Lord John Campbell, *Lives of the Chief Justices of England, from the Norman Conquest till the Death of Lord Mansfield* (2nd American edn, Blanchard & Lea 1853)

⁵⁸⁵ For more detailed discussion of specific examples involving the actions of Gascoigne CJ and Huse CJ, see Sir John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) 176

⁵⁸⁶ Robert Stevens, *The English Judges: their role in the ever-changing constitution* (Hart Publishing 2005) 1

⁵⁸⁷ Gee, Hazell, Malleeson and O’Brien (n 506) 42

⁵⁸⁸ *Ibid* 41

judicial retirement ages.⁵⁸⁹ An example perhaps of the enduring social power of the position of LCJ and another site of influence to consider beyond looking at the present office holder.⁵⁹⁰

Changing timeframes and looking ahead to the future of LCJ power

The other feature of this element is being able to capture pivotal moments in the wider history and evolution of the office of LCJ and its power. The aim here is to look at any significant moments and then use the notion of timeframes to look for developing trends or patterns of behaviour. For example, we might identify the Constitutional Reform Act 2005 as a key point in time relating to LCJ power and the increased codification of LCJ power. This analysis has already included much detail about the CRA and how those reforms affected the nature and scope of LCJ power. But what we can add here is to ask whether there are any emerging patterns in the use of LCJ power. The many reforms to the scope of LCJ power show a ‘conscious Parliamentary enlargement’ or alteration of the LCJ role.⁵⁹¹ We can, however, talk about those changes as examples of emerging patterns. Such an example here might be the changing patterns of LCJ action in respect of the use of s5(1) CRA and annual reporting. We have noted the changing approaches to this between recent LCJs and considering this in terms of changing timeframes, encourages us to look at patterns: linking exercises of one form of LCJ power to others to understand its nature.

One further benefit of talking about LCJ power in terms of ‘time’ is the ability to look ahead and consider the future. This is asking us to consider any expected directions of travel when it comes to current trends or patterns of LCJ power and assess the *predictability* of LCJ power. Arguably, this may be merely a forecasting exercise. Current trends affecting the power of the LCJ appear to link with the evolution of the management trend within the judiciary; the formalisation of the judiciary and the way in which it is governed. The LCJ has been – and will continue to be – a central actor in this. Over the last fifteen or so years since the changes under the CRA were enacted, we have seen LCJs promote change relating to judicial performance and appraisal, changes to judicial training and support changes to appointments and discipline. We have also traced ongoing agendas supported by numerous LCJs relating to matters such as judicial morale, judicial salaries and pensions or the public image of the judiciary. LCJ power in many respects is predictable, especially where now located in statute. However, there remains a flexibility within the role for future LCJs to approach their leadership according to their own personalities and experiences and the potential for the emergence in new trends relating to the use of LCJ power.

2.5 Space

Finally, vital context is given in an analysis of judicial power by accounting for the space in which it exists and is exercised. LCJ power was chosen specifically because much of the role extends beyond the courtroom. The LCJ is an actor who engages with both internal environments – the judiciary itself – and external environments – the politics of governance. This analysis

⁵⁸⁹ HL Deb 7 September 2021, vol 814, col 783 (Lord Woolf)

⁵⁹⁰ It would, of course, be important to consider the extent of this influence and locate any tangible effects from such interventions as a measure of this site of power.

⁵⁹¹ Sir Stephen Sedley, *Foreward* in Kate Malleson, *The New Judiciary: the effects of expansion and activism* (Dartmouth Publishing 1999) viii

shows the significance of changing environmental influences on the use of that power and how it may be perceived.

Internal environments

The Lord Chief Justice's role today requires much greater engagement with what Shetreet & Turenne described as the 'management trend' within the judiciary; a growing feature of wider changes to the courts system.⁵⁹² Some of the LCJ's actions can be contextualised within, for example, the context of the modernisation programme underway in the judiciary. In the Judicial Ways of Working scheme, developing the leadership and management of the judiciary is an 'essential feature' of this agreement and the LCJ is a key player.⁵⁹³ In 2011, in a 'unique constitutional development', a partnership was formed between the executive (through the Ministry of Justice) and the judiciary with the merging together of the tribunals service with the existing court system to establish HMCTS. As a result, this required the LCJ to work alongside the Senior President of the Tribunals and government in the leadership of the judiciary. It is now the case the LCJ, alongside the LC, agree the aims, priorities and funding for HMCTS.⁵⁹⁴ These changes themselves form part of a much larger picture of cultural change within the judiciary. Earlier, the role and influence of the JEB was considered. The increased prominence of this judicial cabinet-style body is a further example of the formalisation of the judicial hierarchy, of which the LCJ now heads. There have been clear moves towards developing the collective, corporate judicial culture and a move away from the more individualistic ways of working seen historically. Along with increased emphasis on professionalism amongst the judiciary and consistency across the administration of justice, this move may lead to the appearance of much more organised, robust institution of which LCJ power is very much a feature.

One example of these institutional changes and trends may be illustrated through how and when an LCJ may speak out publicly. Prior to the CRA, the LCJ would be made a member of the House of Lords (HLs) and able to speak publicly in the House on matters relating to the judiciary. With changes also the role of LC, it is clear that the role of the LCJ has changed to fill some of the gaps left by the reforms. One aspect of this is for the LCJ to find ways to effectively respond 'to unwarranted criticism'.⁵⁹⁵ There has been guidance provided to judges on how to speak while in office and there have been consequences where such guidance has not been adhered to. The LCJ in recent years has used several vehicles for speaking out such as: select committee appearances, annual reporting and speeches. For example, since March 2020 there are thirty-four appearances and communications from the LCJ published on the judiciary's website.⁵⁹⁶ The content of some communications has been seen in this analysis – with mention of specific internal judicial policies addressed such as judicial salaries or there is reference to and management of external events, such as the pandemic, the consequences of Brexit or reactions to high profile coverage of court decisions. It is clear, however, that the ways in which LCJs have opted to speak varies between LCJs and the reasons for these interventions changes based upon changing environments. Some may take the form of more robust and prompt interventions via a

⁵⁹² Shetreet and Turenne (n 545) 48

⁵⁹³ Ryder and Hardy (n 491) 5

⁵⁹⁴ Shetreet and Turenne (n 545) 75

⁵⁹⁵ Ibid 379

⁵⁹⁶ Courts and Tribunals Judiciary (n 467)

press release (to immediately counter government criticisms of lawyers) while others may arise within a speech and be a more subtle form of response (such as to a longer-term political initiative to manage case backlogs).

External environments

Outside of the judiciary, the office of LCJ has also had to respond to changing external environments. Constitutional, political, social or economic changes may directly affect the work of the LCJ in ways which may help us to understand their power. These changes occur at a micro level of governance such as pressures from ministers to address certain issues in judicial-executive relations or which require the LCJ to deal with in their managerial capacity. For example, the recent example of Lord Burnett speaking out directly to address government attacks on the legal profession.⁵⁹⁷ Some changes occur at a macro level, external institutional changes to the system of governance will affect the nature, scope and use of LCJ power. Many of the interactions and episodes of LCJ power discussed in this chapter so far can be linked to these broader contexts. An LCJ decision might be discussed *in the context of* the at-times-tense relationship between judges and ministers or one might point to the disagreements in the 1980s and 1990s relating to civil rights and the development of increased review of public action as a factor to be considered. One might highlight the swathe of constitutional reforms in the 2000s or the more recent challenges of the Brexit process as external factors in which judges – and judicial leaders such as the LCJ - have been inextricably linked.

Now moving into a new decade, it is hard to know how LCJ power relations and relationships may be defined by their environments but the decade began with a global pandemic requiring the LCJ to manage unprecedented situations relating to courts and the administration of justice. Further impending reviews – and any subsequent proposals for reform - of administrative justice and the HRA will be a future source of interaction between the judiciary and the government. In recent years, we have seen increased public attention given to high-profile cases which reminds us of the connection between judicial activity and publicity. Here the LCJ will be instrumental in acting as a role model in instances of publicity but also as a connection between law and politics in times of change, upheaval or tension. LCJ power is affected by external factors and part of the LCJ's role is to manage those influences while carrying out their own functions.

3. A developing picture of LCJ power

⁵⁹⁷ Discussed in the first section of this chapter. See also: John Hyde, 'Lord chief justice condemns ministers' attacks on lawyers' *Law Gazette* (11 November 2020) <https://www.lawgazette.co.uk/news/lord-chief-justice-condemns-ministers-attacks-on-lawyers/5106357.article?fbclid=IwAR0ergid6Oguqza5OuCjzPCgKDcG96OOVMFyjfiRyh_fmNQ1v77iSRu85mM> accessed 4 December 2021; Lizzie Deaden, 'Government attacks on lawyers 'undermine rule of law', says Lord Chief Justice' *The Independent* (London, 11 November 2020) <<https://www.msn.com/en-gb/news/uknews/government-attacks-on-lawyers-e2-80-98undermine-rule-of-law-e2-80-99-says-lord-chief-justice/ar-BB1aSkLm>> accessed 4 December 2021

3.1 Insights from the analytical framework

The analysis has shown with greater clarity where LCJ power comes from. Two observations are made: firstly, the *increased codification* of LCJ power within statutes (largely as a result of constitutional reform) and secondly, the analysis has accounted for another substantial body of LCJ power in the form of *social power*. Locating LCJ power has added detail but so too has identifying the different forms LCJ power may take. This means that while the broad location of LCJ power may be made clearer, some of that clarity is lost initially because more analysis is needed to identify exactly which form that power may take in particular circumstances.

Understanding the different forms of LCJ power relates also to the ways in which it is used. The analysis shows how the exercise of LCJ power is multi-dimensional. It has been possible to understand more about it by looking at its three faces: the first face in terms of decision-making and effects; the second to describe more clearly political strategies in the forms of nondecisions and agenda-setting; and the third face, in the sense that we were able to explore more explicitly notions of ‘influence’ and the wider, less tangible effects of LCJ power.

When looking at different exercises of LCJ power, we start to see distinctions being made between individual and collective language used by the officeholder. This language then indicates whether we might best think of the exercise of that power as individual or collective: as the LCJ acting in a personal capacity or as the LCJ acting as the head of the judiciary. There is a strong sense of the nature of political power in this analysis, particularly when considering the second face. The LCJ may employ more strategic uses of power such as a decision not to act in a certain way or to use different means through which to promote certain agendas. The other apparent feature of LCJ power and its use is a sense of transparency. The obliqueness of the third face is less obvious and suggests that the significant authority of the office comes with a requirement of more explicit action. There is much clearer explanatory action surrounding uses of LCJ power and less obvious examples of instances where an LCJ acts in unseen ways. This is not to omit circumstances of informal or less public interaction but it is rather to highlight that there appears to be a deliberate strategy to be clear in what is being said and why and in which capacity.

This links to the findings relating to how we understand a use of LCJ power within the context of the interactions surrounding it. The analysis drew out the importance of the LCJ themselves in determining how we understand their power. Similarly, there was clear insight to be gained from thinking about the influence of certain leadership styles or behaviour as an aspect of our understanding of their power. The analysis reminds us of the importance of including the wider influence of power relationships and other actors. The example of delegation suggested the site of power is more complex in practice; such a dispersal of authority may be less obvious but the reasons for it are practical. However, it is important in how we conceptualise the work of the LCJ to include these other individuals. The analysis also highlighted the importance of relationship building in the context of LCJ power, with other judges or with ministers for example. This looks beyond the LCJ-LC relationship and recognises the wealth of other interactions involving an LCJ which may help us to better understand the power they have and how it is used.

As with HRA power, the analysis reminded us of the need to contextualise episodes of LCJ power and one means of doing this is to look at those episodes as part of a larger, longer history. Here the historical position of the LCJ was included to place the role of the LCJ today within its constitutional background and to consider again the roles of judges more widely. This demonstrated how the influence of the office, albeit subject to changes, is a well-established feature of the UK's constitutional architecture. The question of using changing timeframes to consider emerging patterns of LCJ power is a more complicated exercise than for HRA power, largely due to the lack of as much readily-available tangible evidence of a specific form of decision-making. The notions of trends remained relevant to track development and change in the role and responsibilities of the LCJ, but required greater synthesis to achieve the same clarity. Not only did the analysis reflect on how the power changed over time but also the effects of changing internal and external environments on how we understand LCJ power. Changes within the judiciary such as increased professionalism and managerialism are important cultural shifts which affect the role of the LCJ and how successive LCJ's may perceive their own role and power. Similarly events within external spaces can determine the nature of LCJ interventions. Tense relationships between legal and political actors, constitutional reforms such as the CRA or Brexit or even other events such as a global pandemic affect the way in which an LCJ may need – or choose – to use their power.

3.2 The emerging picture of LCJ power

One aim of this analysis has been to offer a clearer description of LCJ power. This chapter has analysed a site of judicial power which has not been a prominent feature in contemporary debates about the phenomenon. LCJ power has not been cited as a reason for the overarching growth in judicial power across the common law world but, as this chapter has shown, it is a site of significant influence and authority. The analysis suggests the picture of LCJ power presented is a more personalised account of judicial power; power located in a single officeholder compared to the collective, or institutional, power of courts. However, it is arguably – in some aspects at least – a less tangible form of judicial power if one considers the potential breadth of the LCJ's social power. There is a large amount of discretion afforded to the LCJ and the many exercises of this power analysed here show how such discretion is used and its boundaries negotiated. Therefore, while there is increased clarity offered through the fairly extensive codification of this site of power, there remains significant freedom for the officeholder in how they choose to exert their authority.

The language of political science has been particularly effective in capturing the many ways an LCJ may use their power. There is clear evidence here of recent LCJs carefully and deliberately navigating their role and the nature of their interventions in a range of settings. They choose carefully how to speak, who to speak for and when to speak at all. In this sense, highlighted well by the framework's design, there is evidence of careful use by LCJs using their power strategically in politically controversial matters, such as in the LAPSO example. They use such strategies to aim to achieve certain outcomes or to promote certain agendas. A question might be asked about the extent of this influence or the effectiveness of those strategies in terms of outcomes. There is evidence of both conduct and context-shaping power but one might ask whether the extent of their influence in both instances is relatively contained. To what extent might one officeholder affect the balance of power within an entire constitutional system? Not all

LCJ power nor its effects can be accounted for. Longer-term effects of interventions or the specific degree of influence an LCJ may have within wider judicial activities may be debated.

What can be said is that the picture of LCJ power is one of change. In the development of the judiciary as an institution in recent years, the officeholder's own personal skills and qualities have become significant in how we understand their position as a judicial leader. In turn, this can determine how we perceive their power, for example leading to increased legitimacy in the role. This again refers to the individual and personal nature of LCJ power – something quite different in many respects from a wider, albeit more specific power, afforded to a larger number of judges under the HRA. There is a clear sense that the potential success of an LCJ, and of their power, comes from the health of power relationships. During times of tension between actors or times of apparent harmony or quiet, it is helpful to understand the dynamics and behaviour of all relevant actors not just the LCJ themselves. Doing so may offer strategies for managing less harmonious times of tension or conflict. One prime example is how we adapt our understanding of the role and power of the LCJ in light of changes to the role and power of the LC; and, importantly, how that understanding has to change when substantial changes have occurred to the dynamics within that relationship.

Regardless of specific changes in these power relationships, there is evidence of an LCJ having enduring influence. Their power then may have similar longevity and it is not immediately limited upon retirement from office. The position of an LCJ, in office or retired, is one which holds influence even where the exact nature or extent of their power does change. Separately from this notion, there is the question of how we might account for emerging trends or patterns in LCJ power – a particularly useful conceptual tool. One way is to locate sources and form of LCJ power and account for their use over time. There are softer trends which are not data-driven which may better reflect the nature of LCJ power. For example, emerging cultural trends and trends in behaviour of LCJs. This was seen in this analysis in terms of the changes to the office of LCJ moving to one with increased leadership and management responsibilities. It may be that such trends are not driven by the LCJ – or attributed to LCJ power itself – but rather are the result of changing environmental factors. A changing political context in which there are increased criticisms of legal professionals, or an increased tendency to politicise courtroom decision-making or a clearer political agenda driven by a desire to reform the scope of judicial activity in certain areas may determine how an LCJ exercises their power. There are many complex dynamics swirling around LCJ power, some of which the LCJ may influence by exercising their power and some of which may influence the way an LCJ chooses to fulfil their role.

Conclusions

The challenges of this case study were different in that LCJ power has not been a site of contention within contemporary debates about judicial power. Normative claims made about the office are not at the forefront of those debates and cannot, therefore, provide a springboard for assessment. The aim here was not to assess the accuracy of the narratives identified in Chapter 1 in how they describe LCJ power but rather to ask how *might* we describe this power as part of our wider understanding of judicial power as a phenomenon. LCJ power is a good example of

where judicial power sits firmly within the political landscape and firmly within the leadership dimension of the judicial role. LCJ power appears to be a site of judicial power which is subject to careful self-governance by the officeholder. There is deliberate action taken by LCJs to use their power in ways that attempt to keep judicial matters away from electoral politics and policy matters. While a lot of LCJ power is situated outside of the courtroom and in that sense, much closer to the political world, the actor maintains a transparency and clarity in their role and their interventions.

It may be that due to this – and the lack of instances where this understanding is challenged – there is a stronger sense of trust by those actors involved in government of the LCJ. LCJ power is, although less often described and debated, more of a known quantity. This is in spite of the breadth of LCJ power and the amount of discretion the officeholder is afforded. There may be a clearer sense of accountability of LCJ power simply because it is often exercised in the public domain, away from the courtroom. Notions of political accountability – such as explaining the reasons behind certain decision-making or interventions – would be an uncomfortable feature inside the courtroom. Ideas of judicial independence would be particularly challenged. The combination of this form of judicial power existing outside of the courtroom, being located in a single officeholder and, in the way they exercise their power, offers greater transparency in those actions perhaps begins to explain the differences in reaction to this form of judicial power and HRA power.

The language of judicial power may not best describe the nature of LCJ power. It is again an example of how judicial power may be understood in terms of changing patterns. There is clear evidence here of the importance of recognising judicial power outside of the courtroom as well as within and there is evidence shown across both case studies of the multi-dimensional nature of the judicial role (and power). This chapter is a clear example of how understanding judicial power as political can be helpful to locate certain features of judicial power. The analytical framework has provided a clear and systematic account of LCJ power and highlighted a different set of qualities of judicial power. The following chapter will reflect upon the insights gained from both case studies – their commonalities and important differences. Importantly, Chapter 6 will return to the question of how we might understand judicial power more generally in light of this thesis' analysis.

Chapter 6

Judicial Power: constitutional pasts, the present and uncertain futures

This thesis has sought to demonstrate that judicial power – like the concept of power more generally – is an inherently complex and problematic phenomenon and one which requires careful and ongoing analysis. Chapter 2 gave reasons why power can be described as being complex and problematic. Firstly, it can be difficult to arrive at a clear and concise definition of power due to its ambiguous (but not vague) nature. Both case studies have shown that it is possible to describe power but it is virtually impossible to provide a single, universal definition which captures every possible example of power. This suggests that continued analysis of different examples and sites of judicial power is necessary and valuable to provide detailed and specific accounts of that power. This potentially avoids the reliance on more general, catch-all accounts of its nature. Secondly, ambiguities surrounding the concept of power contribute to its contestable nature; that is to say, the meaning we give to power may be subject to debate. Debate where there is, at one level, broad agreement on the concept but at another level also widespread disagreement on the best way for that concept to be interpreted and realised. Recognising difficulties in definition reminds us of the need to look for further detail and understanding of the nuances and subtleties in judicial power and convey its ‘more complicated and elusive character’.⁵⁹⁸ Again, this supports this thesis’s analytical venture to complement existing critical accounts of judicial power by striving to add more nuance and precision to existing debates within public law scholarship in the UK.

Thirdly, as an ambiguous and contestable concept, it can be difficult to convey adequately sophisticated understandings of power; to know what language to use to talk about the power and its use. Herein lies an explanation for the ‘language games’ which are sometimes evident within contemporary debates which have over-emphasised certain features of judicial power to date in ways which have perhaps reduced our overall understanding of how, where, why and with what effect, judges exercise power in the UK.⁵⁹⁹ This thesis suggests that language games evident in recent debates about judicial power – such as the narratives identified in Chapter 1 - might lead to an impoverished understanding of the nature of judicial power and its use. Instead, the thesis argues that through its analytical approach it is possible to achieve a better understanding of the changeable, complex and context-dependent nature of that power within the UK constitution and better recognise those language games and their influence on our understanding. The Policy Exchange’s Judicial Power Project highlights the need, ‘to *understand* and correct the undue rise in judicial power by *restating*, for modern times and *in relation to modern problems*, the nature and limits of the judicial power within our tradition and the related scope of sound legislative and executive authority.’⁶⁰⁰ The Project has encouraged academics, lawyers, judges, ministers and other stakeholders to reflect upon our understanding of judicial power and, in particular, debate the normative ideals of where the limits of that power should be located.

⁵⁹⁸ W.B. Gallie, ‘Essentially Contested Concepts’ (1956) 56 Proceedings of the Aristotelian Society 167.

⁵⁹⁹ Mark Haugaard (ed.), *Power: A Reader* (MUP 2002) 2. Haugaard uses this term to acknowledge the many different accounts of power within political science and beyond and the fact that any accounts of power may be influenced by the ways in which authors grapple with the concept and the search for meaning and definition.

⁶⁰⁰ Policy Exchange, ‘About the Judicial Power Project’ <<https://judicialpowerproject.org.uk/about/>> accessed 5th July 2021.

This thesis has offered its own response to this task. It has made the case that in order to consider the appropriate limits of that power, we must first better understand the nature and exercise of the power itself. The thesis has shown how we can analyse judicial power differently to acquire this more sophisticated and detailed understanding of its use in different contexts. This chapter will consider the implications of this analysis for our wider constitutional understanding with the aim being to more clearly separate analysis of the nature and use of power in practice from critique and evaluation of the desirability of certain limits to this power within recent debates. This chapter summarises this thesis' findings and reflections on the conceptualisation of judicial power within existing debates and shows the potential effects of emerging discourse on our understanding. The chapter demonstrates how using this thesis' analytical framework to think politically about judicial power is beneficial and can result in a more detailed, more complete account of that power. Doing so better reflects the complexities and nuances of judicial power – and of the judicial role – in the modern constitution. As we look ahead and consider the future of judicial power within the UK constitution, it is undeniable that this requires 'critical engagement with [the] foundations' of that power, just as wider debates around the future of the constitution do too.⁶⁰¹

In Part 1, this chapter will return to the past and re-engage with some of the dominant claims made within judicial power debates *in light of* the analysis undertaken in earlier chapters. In Part 2, this chapter will consider the present challenges of judicial power which are, it argues, both conceptual and practical in terms of the management of that power. In reflecting upon these challenges, Part 2 uses one example of recent political intervention in questions of judicial power and the Independent Review of Administrative Law (IRAL) to consider the differences between language and realities and to reflect upon proposed strategies for the management of judicial power in this context. Finally, in Part 3, the chapter will consider possible future directions for judicial power in the UK. This relates to questions of clarification, the scope and focus of future analysis and wider consideration of the legitimisation, justification and the management of judicial power in the UK. By considering these three 'fields of vision', this chapter can reflect upon the constitutional pasts of judicial power debates, present attitudes and understandings of the role and power of judges and then consider the impact of uncertain constitutional futures on the nature and use of that power.

1. Reflecting on the past – using theories of power to inform debates about judicial power

This first section considers what it terms the 'past': the evolving judicial power debates in the last twenty-five or so years which have inspired this thesis' research. Within this lens, this section considers the implications of relying upon any set of narratives as a basis for developing a conceptual understanding of judicial power. At its outset, this thesis' central claim was that current understandings about judicial power in the UK are often informed by a number of

⁶⁰¹ Elizabeth Fisher, Jeff King and Alison L Young (eds.), *The Foundations and Future of Public Law* (OUP 2020)

common themes: the judicial power narratives.⁶⁰² The existence and reliance upon these narratives is, it has been suggested, informing how judicial power is both understood and debated. Reliance on such narratives might manifest as Government confidence in particular claims made about judicial power within the development of policy, as the promotion of the use of the courts to resolve an increasing number of issues or, perhaps, as debates within the academy which may be influenced by other normative ideals such as political or legal constitutionalism. Emerging narratives and evidence of their use are examples of ‘the language of public law’ and this thesis has been interested in their presence and the degrees of acceptance of their claims within more recent debates.⁶⁰³

Such language, as it emerges and evolves, ‘shapes, and at times perhaps even transforms’ how we understand judicial power in the UK.⁶⁰⁴ The evolving nature of this language and its potential to impact the nature and tone of debates means it is vital that no ‘gap...exists between the simplicity of the language’ and ‘the complexity of the practices to which that language relates’.⁶⁰⁵ To illustrate the limitations of the current language of judicial power, this thesis has analysed the nature and use of judicial power under the Human Rights Act (HRA) and under the office of the Lord Chief Justice (LCJ): considering what any language might suggest about the nature of those sites of judicial power compared to the analytical information gained about that power’s use. Having appreciated the complexities, nuances and subtleties of practice in these two different sites of judicial power, the concern that gaps exist between knowledge and practice appear to be true. In both case studies, the narratives portrayed certain accounts of HRA and LCJ power but the findings from the analysis suggested that those accounts need clarification. This section will map the disparities between the judicial power narratives and the findings of the HRA and LCJ case studies with a view to considering how such limitations may be addressed.

1.1 Debating judicial power: reassessing the narratives

The problem with relying on narrative assumptions about judicial power is that they portray a certain picture of judicial power and yet, many will contest whether that picture accurately conveys the colours, shapes and varying tones within that picture. The narratives identified in Chapter 1 as being evident within recent debates about judicial power may only reflect some characteristics of the realities of different examples of judicial power. Not only this, many would challenge the stance taken in some or all of those portrayals. To use these narratives to understand HRA and LCJ power, we would expect to see evidence in the analysis both kinds of judicial power are ‘new’. We would expect to see that the exercise of each kind of power is located within judicial decision-making and finally, we would expect to see concrete evidence of excessive judicial power (or its use) in order to justify the caution apparent in wider

⁶⁰² The narratives this thesis identified were: the *dominant* narrative which indicates that judicial power is on the rise; the *novelty* narrative which may suggest that the rise of judicial power and its current nature and scope are relatively new phenomena; the *decisional* narrative which has identified that we might often conceptualise judicial power within judicial decision-making (where, in fact, its use can materialise in other ways); and, the *cautionary* narrative which reflects the apparent concern about the growth in judicial power within some aspects of contemporary debates about judicial power.

⁶⁰³ Graham Gee and Grégoire Webber, ‘A Grammar of Public Law’ (2013) 14(12) *German Law Journal* 2137, 2139

⁶⁰⁴ *Ibid*

⁶⁰⁵ This is a tailoring of the wider view offered by Graham Gee and Grégoire Webber regarding Public law more generally.

contemporary debates, if indeed excessive use is the main basis of such caution. The analysis has shown that neither HRA nor LCJ power match this account completely; that this language provides only a partial understanding of these sites of judicial power. Each requires more accurate and detailed qualification and it is clear that there is more we can say about judicial power than the account those narratives are capable of offering. How we talk about judicial power – where such discussions rely on some or all of these narrative – may be broadly accurate but require further careful and regular interrogation. We must seek to better capture the varying colours, shapes and tones of judicial power.

The thesis began by identifying within contemporary debates the existence of what it termed the ‘dominant’ narrative. This is the overarching narrative within existing discourse that judicial power in the UK is on the rise. Evidence of the narrative and, more importantly, its use was found within a range of existing literature. It is safe to say that this broad account of judicial power has gained increasing weight and momentum in recent years. The first question was why this was – why judicial power was being seen and talked about in this way. One reason was that recent constitutional reform has restated – and changed – the role of judges. In both case studies, it is clear to see that HRA and LCJ power have increased and that they are two examples of where judges have been afforded more power, in part through statutory intervention. However, the case studies have shown that while there may be an overall increase in these sites of judicial power, the nature and use of those powers, in reality, ebbs and flows. There are subtle changes in the power and its use over time.⁶⁰⁶ For example, within the HRA analysis, the existence of s4 HRA gives judges more power in the sense that they did not have that power before but on closer analysis of the actual use of s4, we see a relatively restrained picture and, importantly, one which is patterned. This is a similar picture when looking at LCJ power. There is an increase in responsibilities, functions and along with them, power. However, in practice, the way in which those increased powers are used is patterned. These nuances in understanding and variations in practice indicate that the dominant narrative may need qualification.

The range of supporting narratives surrounding the dominant narrative must be subject to the same understanding in light of the analysis. Firstly, the ‘novelty’ narrative which suggests that judicial power and its use may be in some way a relatively new phenomenon. The case studies confirm that both HRA and LCJ power have novel features although the extent of this novelty varies between the two examples. The novelty of these two sites of judicial power is emphasised perhaps due to Parliament’s intervention in providing for – and changing – the power in each case. Prior to the HRA’s enactment, there was no explicit provision for a judicial power to review legislation for compatibility with the ECHR. In this sense, s4 is clearly new. However, while the specific source of HRA power is itself reasonably new the underpinning culture of rights’ protection by the courts is less novel. For the LCJ, again the statutory provisions under the CRA created a ‘new’ role as head of the judiciary and afforded the LCJ additional (new) functions and responsibilities. Yet, as Chapter 5 highlighted there is much about the work of the LCJ which is borne out of long-standing tradition and the constitutional presence of the office holder long before 2005. Therefore, the nature and extent of any ‘novelty’ of judicial power – as suggested by the two case studies here – appears to require careful qualification for any site of

⁶⁰⁶ Recent research shows that across the lifetime of s4 HRA, there was a sharp increase in its use between 2000 and 2003 but that since 2003, the exercise of this power annually has actually *decreased*.

judicial power analysed. This may help in reducing the apparent unease or uncertainty surrounding the potential use of judicial power in some cases.

Secondly, the ‘decisional’ narrative turns our attention to questions of judicial power and decision-making. This thesis has shown that decision-making is a crucial feature of power relations and within the analytical framework, this aspect of judicial power is considered. However, it is questioned whether existing debates have taken a sufficiently broad look at the range of decision-making judges engage in as well as the different spaces where those power relations may occur. The aim here is to highlight where existing debates have overly-emphasised a one dimensional account of decision making in the courtroom when describing judicial power. This thesis has shown that even in the traditional dimension of the judicial role (occupying the decision-making space inside the courtroom), there are a wide variety of potentially significant decisions to consider within an analysis. Beyond this, there is the question of decision-making occurring within both the regulatory and managerial dimensions (decision-making within the wider regulatory space between the courts and other actors and within the dimensions of judicial leadership and governance). Chapters 4 and 5 sought to show how we might extend our thinking beyond the parameters of existing notions of power and decision-making. Extending our notion of decision-making beyond that which occurs inside the courtroom means we can move discussions of judicial power into broader discussions of political power; the notion supported within political jurisprudence of conceptualising courts as political decision-makers within a government system. This approach helps us to understand more about the nature and scope of judicial *power* because it recognises the many ways in which judicial power can be exercised and the many different contexts in which judicial decision-making is found. In identifying judicial power within those dimensions, we are able to incorporate more features of judicial decision-making within our understanding.

The final narrative theme to consider is the ‘cautionary’ narrative; one which arguably makes for interesting analysis in terms of this notion of courts as political decision-makers. Underpinning many contributions to contemporary debates is a wariness surrounding the existence and extent of judicial power, in particular where it appears as though courts are involved in taking ‘political’ decisions. Political decisions in this sense may not be decisions relating to electoral politics per se but those decisions which sit very close to the complex boundaries between what we may perceive as matters which are legal or political. Not only this but concern, too, where there are suggestions that judges are becoming too powerful or using their power in ways that are constitutionally unfamiliar or undesirable. Such concerns – evidenced within some of the critique in existing debates - are useful as a prompt for further analysis but it becomes vital that the subsequent analysis is able to separate itself from the critique. That is, the analysis must be able to assess whether current practices support the level of caution felt. At this point in the chapter, three observations are made about this narrative in light of the case studies. Firstly, the distinction between the amounts of HRA and LCJ power analysed. LCJ power affords a broad range of powers, some codified and some less tangible, to a single judge as part of a judicial office. HRA power, by contrast, is a reasonably specific, codified power afforded to all senior courts. There is more caution evident about the latter yet in both cases, there exists degrees of judicial freedom to shape the power and its use.

Secondly, there are differences in the dynamics of the power relationships involved which may provide some partial explanation for differing levels of caution and concern. HRA power is afforded to more judges; to judges sitting within courts. Courts are institutions and collectively may appear more powerful. Attach to this evidence of an agenda and the exercise of even something as specific as a s4 DOI might appear like a very ‘powerful’, institutional exercise of judicial power. Contrast this to the dynamics of LCJ power relations which tend to be much more localised, confined and often hidden. The exercises of judicial power here are individual and more personal suggesting that greater concern arises in debates relating to matters of institutional judicial power. Lastly, the existence of caution relating to judicial power can be examined in light of the many politics of judicial power. Both sites of power studied raise political questions, in particular the question of how law is separated from politics and the ways in which judges have – and should – negotiate this separation through their own use of power. Too much emphasis on caution can dismiss the delicate balances within these different kinds of politics and how we perceive judicial power as a result. The notion that judges make political decisions if under-defined can indicate the undesirable crossing of boundaries between law and politics and indicate judges exercising influence in areas beyond their perceived capabilities. The two case studies have sought to illustrate how recognising and using different senses of the term ‘politics’ can better recognise other features of judicial power. This may then, in fact, help us understand the nature of that power and be useful in assessing any degree of caution required.⁶⁰⁷

1.2 Key lessons from this thesis’ analysis: HRA and LCJ power

From the case studies, it is clear that there is much more we might understand about HRA and LCJ power (and, in turn, other sites of judicial power as well). To summarise the substantive differences in our understanding following the application of the analytical framework – and therefore, the benefits or potential appeal of this different approach – we might identify three points. Firstly, the analytical framework overcomes the risk of presupposing that judges exercise power and moving straight onto debating the desirability of that power. It requires us to look closely at the power itself and account for the subtleties, nuances and changes in that power first. This is evident in both case studies. Firstly, the HRA debates were – and may still be – fraught with claims as to whether judges *should* have the kind of power they have under the Act. Yet, the analytical framework requires us to pause and ask firstly: what kind of power *do* judges have under the Act and, perhaps more importantly, how have they used it over the last twenty or so years. There is a changeable picture presented of the use of power under s4(2) HRA and so it is expected that a similarly nuanced, changeable picture might be seen in other areas of HRA decision making too. In terms of the LCJ, this question of presupposing power might be one explanation for the differing levels of caution and concern between the two forms of judicial power analysed in this thesis. LCJ power has changed, it is evolving but it has existed in some form for a long time. However, Chapter 5 shows that there is still clearly more we can understand about its nature and scope when thinking differently about it.

Secondly, the findings from the case studies – and the use of political science in the approach – show us that judges have at their disposal a number of different strategies or choices about how they use their power. Even where the power in question is quite clearly located, such as in s4(2)

⁶⁰⁷ Section 3 of this chapter will explore ‘The emerging politics of judicial power’ in much more detail to consider how this may be achieved in practice.

HRA, there is in fact examples of that power being used in different ways. Judges may, for example, issue a declaration of incompatibility but not provide any definitive suggestion about what the reform or legislative change should look like. The exercise of power is reasonably confined. In another instance, a court may issue a DOI and offer more express details about what the change should be to ensure Convention compliance. To say more about this strategic notion of power, there is clear evidence of judges using nondecisions as a means of circumventing a more overt or potentially confrontational use of power: such as that seen in the *NIHRC* case in respect of issuing a DOI at all or in *Chester* as a means of avoiding a reiteration of a pre-existing DOI. These are prime examples of judges exercising political power and it is important to identify these so that, subsequently, we can invite discussion both about why such strategies were used and their effects as well as to consider the best way to manage such power. In Chapter 5, we saw instances of the LCJ using different approaches to managing certain issues from more subtle interventions in relation to legal aid changes or via stronger, more public interventions in relation to current claims or criticisms of the legal profession by the executive.

Thirdly, the analytical framework allows us either: to look at a one-off decision in a more complete context or to recognise any episodes of judicial decision-making power as having the potential to be understood much more broadly as part of a wider picture of power. Highlighting a one-off decision really does not allow us to understand the nature of judicial power more broadly. The analytical framework can help us to contextualise that decision and set it within its moment in time. From here, it is vital to explore related decisions, the roles and influences of particular actors in the use of power or the influence of changing environments on how judges may choose to use that power. For example, we saw in Chapter 4 how a single DOI decision can be explored in terms of the significance of its source such as the relationship between s3 and s4 in how and when s4 is used. We also saw how we might ask whether a DOI decision can be framed in terms of agenda-setting or as a nondecision and how powerful those additional features are. We might also ask whether, within an area of judicial power such as under the HRA or within the office of LCJ, we are accounting for the many forms that power and its use can take or the potential impact of certain relationships on its use. This is related to this thesis' approach in highlighting the existence of multiple sites of judicial power – of which these two case studies are just two examples. The phrase 'judicial power' encapsulates a multi-layered and varied picture of decision-making, taking place in different and changing environments some of which remain under-investigated or, at least, under-represented in accounts of judicial power.

The first lesson from this thesis' analysis is that while any emerging narratives surrounding judicial power may offer a good guide for our thinking, we must be wary of their ability to offer a complete and holistic picture of the power and its use in any context. Too much reliance on such tools risks influencing debates in a manner which may result in an incomplete conceptual picture of judicial power. The apparent simplicity of any identified narratives, and that simplicity's potential to remove ambiguities, is appealing when taking account of the complexities of power. However, given what this thesis has shown in its own analysis, any narrative is unlikely to adequately reflect the details of any examples of judicial power which may be captured by careful descriptive analysis. There needs to be richer and more nuanced ways of talking about judicial power – new, more subtle 'languages' – which recognise the diverse ways in which that power takes shape, is exercised and impacts over time on the relationships with other institutions. This is opposed to the reliance on too few, overly simplistic

notions which may indicate a more complete understanding of the nature of judicial power than they are capable of providing. The accumulation of descriptive analytical accounts can provide a stronger starting point from which we might then debate what is constitutionally desirable in terms of the nature and limits of that power. To recognise more languages of judicial power can help us to be clearer in how we describe and define the many complex, overlapping, ambiguous and contestable features of judicial power. A further difference if adopting this thesis' approach is that we can better debate judicial power by making more explicit use of the language of 'power' and use that language to identify more features and sites of judicial power as a result.

The next lesson is to demonstrate that this thesis' approach is able to overcome the many conceptual and analytical challenges of concept of (judicial) power. This thesis' approach manages both sets of challenges within the design of its analytical framework by conceptualising judicial power through increased and systematic analysis; increased clarity in our understanding through increased clarity in how we go about gaining that understanding. The analytical framework is designed to encourage public lawyers to think about judicial power in some of the ways political scientists think about power. The explicit use of political science has provided additional means to quantify features of judicial power, examine the different ways in which it can be used and capture some of the aspects of the power and its use which might not immediately fall within the domain of public law: the political features of power. For example, in Chapter 4 we were able to see more clearly the ways in which the courts have exercised discretion in respect of s4 DOIs. While there are lots of different cases and examples to consider, the framework has been able to bring them together and think about them in these terms. Between Chapter 4 and Chapter 5, we were able to see more clearly the differences in the political nature of judicial power. LCJ power is political in the sense that it is firmly situated within the wider system of governance, certainly post-CRA. This can be contrasted to the political or governing nature of judicial power under s4 HRA where judges are involved in regulatory governance but in a manner which is firmly attached to the more traditional conceptions of their judicial role.

A further lesson is that it remains clear that any search for a universal, fixed definition of 'judicial power' is unwise – largely due to the changeable nature and use of that power. However, a lack of definition need not equate to a lesser understanding. We can *describe* judicial power, albeit with the caveat that we need to continually assess the accuracy of those descriptions. What this means is that we can conceptualise – and theorise - judicial power with greater clarity through more detailed descriptions of the power, its use and its other composite elements.⁶⁰⁸ It is through this descriptive process that we can gain strength and clarity in our understandings. Judicial power is a phrase often used but less often considered from a conceptual standpoint. This thesis has shown increased clarification of our understanding of HRA and LCJ power to show that we can provide a stronger conceptual foundation ahead of further research and debate.⁶⁰⁹ We have the tools to describe the source of HRA and LCJ power, to capture the multi-dimensional exercises of those powers, to incorporate behavioural considerations of power relationships and wider actors and to contextualise those descriptions by looking at time and space. What this means is that we have a greater body of information through which to assess the

⁶⁰⁸ Those elements provided for by the analytical framework or other elements determined through future research and ongoing clarification of the concept.

⁶⁰⁹ These descriptions are not re-summarised here but can be located in Chapters 4 and 5.

many ways in which judges use their power, particularly in complex situations that require judges (and other political actors) to navigate the boundaries between law and politics and their respective constitutional roles.

Finally, both case studies have offered further clarification of the nature and use of judicial power in each instance: a lesson in increased understanding via analysis. The HRA case study benefitted from the availability of increasing data and evidence about the use of s4 DOIs but what it demonstrated was the value in this thesis' approach to reviewing that data and existing understandings in light of changing timeframes and contexts. This allows us to update, extend and re-examine any existing assumptions and understandings we have as to the nature of that power and its use. While the outcome may be only incremental development in knowledge, it is also the recognition of accurate and detailed knowledge as being key to our contemporaneous understanding of the power. For the analysis of LCJ power, the challenges were different. This is a less-researched area of judicial power so there was less existing literature to assess and reflect upon with less tangible data available for analysis. LCJ power was also more analytically challenging because of the dispersed and wide-ranging nature of the LCJ's power. The analytical framework captured the power in a comprehensive manner, managed the many locations and exercises of LCJ power (including where it is exercised by another judge), captured the more hidden elements of LCJ power (such as the interactions with the Judicial Executive Board, for example) and navigated and incorporated the changes to LCJ power into our understanding.

Therefore, the analytical framework can help us to systematically analyse 'new' questions, episodes or sites relating to judicial power or to revisit and re-examine, in a systematic fashion, areas of existing understanding. The aim has been to use the framework to highlight how it can be used to 'illuminate [the] salient features' of power through more detailed analysis.⁶¹⁰ Neither of these case studies is presented here as a complete picture of judicial power in the UK. Rather, they are presented as two examples of the different challenges of analysing judicial power and how this thesis' analytical framework can manage these.

2. Judicial power: evolving discourse and ongoing debates

This section reflects upon the implications of increased analysis on our current understanding of judicial power. It suggests that we can improve and add precision and sophistication to the discourse surrounding judicial power and we can achieve this by recognising the need to develop the 'language of judicial power'. The aim here being to enhance existing discourse and encourage that discourse to be 'firmly rooted' in the realities of any form of judicial power under scrutiny.⁶¹¹ To illustrate the possible contribution of an evolving language of judicial power, this section will firstly suggest four possible components to a 'new' language of judicial power. It will then use current debates surrounding administrative law as a means of demonstrating the potential benefits of a different style of thinking. The reason for this selection is two-fold. It is an area of current debate and scrutiny. As such, there is an increasing amount of information

⁶¹⁰ Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30 KLJ 43, 73

⁶¹¹ Joe Tomlinson discusses this in relation to debates about judicial review and how great care is needed to ensure discussion of judicial review is itself firmly rooted in 'empirical reality': Joe Tomlinson, 'Review: Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning' (2020) Apr PL 388, 390

available to use to examine claims made about the nature of judicial power in that context, the various proposals for the reform or management of judicial power, and the wider analysis of its use in practice. The wider aim of this discussion is to subsequently reflect upon questions of the legitimisation, justification and management of judicial power in the future.

2.1 An evolving language of judicial power

While this thesis is itself not seeking to offer a ‘concept of judicial power’, it does recognise that the search for meaning surrounding the notion of judicial power will culminate in a greater sense of understanding which could, in time, lead to such a concept. This is fraught with the many difficulties presented by the concept of power more generally which have already been explored by this thesis. One suggestion this thesis has to manage these difficulties, based on its own analysis, is to promote the idea that there is clearly scope to recognise that the language of judicial power – the way we talk about and debate the power of judges – is evolving; that any claims about that power are flexible and subject to change. Working on the basis of any such language emerging gradually and as a result of various analytical endeavours, it is hoped that it may be possible to ensure that any conceptualisation of judicial power is sufficiently precise, nuanced and sophisticated. In addition, by recognising that language changes we can recognise that power changes. This language will be the product of ongoing debates and negotiations in our understanding of the phenomenon however, it is intended that such debates will more clearly elicit the analytical *and* critical elements within those debates. What this means is that we may develop this language from a sufficiently clear foundation of scrutiny and understanding of both the nature of power in the abstract and the practical realities of its use.

This thesis’ primary aim has been to find a way to scrutinise judicial power through its own analytical approach.⁶¹² This approach used political science insights to draw out the qualities and characteristics of the ‘power’ itself and the many ways in which we can understand its use. By following this approach, we have understood more about the ways in which judges have exercised power using the HRA and LCJ examples as just two snapshots of this. These forms of judicial power have been clearly situated within the evolving dimensions of the judicial role, recognising the constitutional development of the work of judges and how we have come to think about that role in recent years. The purpose of this is not just to be able to say with greater clarity what judicial power *is* – although that has been the priority of this thesis – but in the longer term, we are using that scrutiny and the information we gather to think about broader questions relating to judicial power. We are thinking in turn about questions of the legitimacy and the justifications for judicial power and also to interrogate the ways in which that power is, and could be, managed and controlled. While this thesis does not set out to address these in significant detail, this chapter provides the opportunity to think a little more about those questions and ideas in light of the findings of this thesis.⁶¹³

Initially, this thesis suggests three possible components to this emerging new ‘language of judicial power’. These components, which can inform how we talk about judicial power, are:

⁶¹² This supports Paul Craig’s view that ‘academics should critically assess all exercise of power, including judicial power’: Paul Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) *University of Queensland Law Journal*, 355, 356

⁶¹³ This is an area of future, ongoing research which this thesis’ own work will provide a foundation for.

judicial power is patterned, the judicial role is multi-dimensional and judicial decision-making extends beyond the courtroom and judicial power is political power.

Judicial power is patterned

This thesis has argued that it is better to understand and speak about judicial power in the UK as *patterned*. This follows specific analysis of the so-called ‘dominant narrative’ and its claim that judicial power is on the rise. To consider judicial power as patterned, we are acknowledging the possibility of change to the nature, scope and use of the power in question alongside its complex dynamics. We are more accurately representing the complicated nature of any ‘growth’ in judicial power and recognising the ability for the use of power to ebb and flow. The case studies illustrated that judicial power can be exercised in different ways, at different times and by different actors. Similarly, a single ‘power’ can be patterned in its use (such as can be seen in the use of s4 DOIs, for example). Not only this, by adopting an institutional perspective the analysis has shown the further influences of power relationships and contexts – such as the push and pull between judicial and executive power - on how we describe judicial power and its scope. Such variables question the accuracy of any notion which may appear too fixed or not subject to some qualification. In both case studies, overall, we tend to see an ebbing and flowing of judicial power.

To adopt this idea of patterns as part of our thinking is also to recognise the fluidity of the balance of power between institutions and actors. For example, the potential for a period of robust judicial decision-making followed by a period of possible deference towards executive or legislative decision-making. Given the ongoing and uncertain scope of constitutional change, it makes sense to recognise that judicial power – as one feature of that – is likely itself to be changeable. The importance of recognising this feature of judicial power is to recognise the risks of trying to impose fixed boundary lines around judicial power since it is evident that the power and its use alters. The difficulties with any fixed notions of lines between powers is evident in areas where power is codified.⁶¹⁴ For example, while such codification can appear to add clarity and certainty to the scope of power on the one hand (such as defining judicial action under ss3 or 4 HRA), it is clear that in reality, the way in which that power is used is open to ongoing negotiation and interpretation – even if it is largely within those prescribed parameters. The use of judicial power analysed in this thesis has shown to be affected by other factors such as the dynamics of interactions within key power relationships or changes to external environments. This makes the understanding of judicial power as patterned useful in recognising that it may always be difficult to determine any fixed notions of boundaries to its scope.

The judicial role is multi-dimensional and judicial decision-making extends beyond the courtroom

⁶¹⁴ Cora Hoexter discusses this within the context of debates about codification within administrative law. Here she looks at the appeal of codification – of legislating judge-made law – and the pitfalls in terms of complexity, unintended consequences and other outcomes. Cora Hoexter, ‘Administrative Justice and Codification’ in Marc Hertogh, Richard Kirkham, Robert Thomas, and Joe Tomlinson (eds), *Oxford Handbook of Administrative Justice* (OUP 2022)

Chapter 1 introduced the suggestion that the judicial role has changed, partly as a result of constitutional reform. This is intended to recognise the changing ‘institutional parameters’ of judges’ work and power.⁶¹⁵ This thesis suggests that to acknowledge these evolving institutional parameters we can describe the judicial role as *multi-dimensional*. Adopting a one-dimensional view of the work of judges will omit many important features of their decision-making power and activity. Instead, we can conceptualise the judicial role as having three dimensions as a means of reflecting upon the judicial role and function within the constitution more broadly: the *traditional*, *regulatory* and *managerial* dimensions. Using these dimensions within our thinking (and how we talk about judicial power) will give a clearer sense of which aspects of that role – and therefore of judicial power – we are speaking about. In addition, it will help clarify the expectations we may have of judges within each aspect of the role in light of what is actually happening. For example, we may ask whether we are interpreting an exercise of judicial adjudicatory power in light of our expectations of judicial leadership power or vice versa? Doing so will inevitably give rise to the debates about the legitimacy and justification of judicial power being used within those dimensions but by beginning here, we are able to locate exactly which aspect of judicial power is being debated reducing the risk of ‘misunderstanding and talking past each other’.⁶¹⁶ The further benefit of this aspect of language is to help us separate our thinking within an analysis. We might more easily distinguish between exercises of judicial power within judicial adjudicatory functions (inside the courtroom) and within judicial leadership functions (outside the courtroom) and those where the divide may be less clear (regulatory actions) – and, in turn, offer a more complete analytical account.

Judicial power is political power

The inclusion of this element of language is not intended to provoke debate but rather to aid public lawyers in ‘thinking politically’ about judicial power.⁶¹⁷ This thesis has provided a means of ‘thinking politically’ about judicial power using the analytical framework and the tools of political scientists. Using the framework, we can see benefits of emphasising different power relations and we can identify actors and institutions within power relationships. Doing so provides the opportunity to include the insights of those actors in how they understand the power, its use and its boundaries. Using the framework, we are able to compare existing beliefs and understandings about judicial power against the constitutional – and political – realities of that power. And perhaps, most importantly, the framework provides a tool through which to recognise and manage the impact of changing contexts – temporal and jurisdictional - on our conceptualisation of judicial power, both generally and in relation to specific episodes of its use. The further aspect to talking about judicial power as political power is the ability to think about judges and courts as one part of the political system in which they operate. This helps us, in part, identify the similarities and differences between courts and other institutions and our relative expectations of their power and authority. However, at this stage, the notion that ‘judicial power

⁶¹⁵ Mark Elliott, ‘Judicial Power and the United Kingdom’s Changing Constitution’ (2017) Paper No. 49/2017 Legal Studies Research Paper Series 1, 2

⁶¹⁶ Kavanagh (n 602) 45. See, too, Graham Gee and Grégoire Webber, ‘A Grammar of Public Law’ (2013) 14(12) German Law Journal 2137

⁶¹⁷ Gee and Webber (n 595) 2151

is political power’ promotes the use of political-style thinking about judicial power by those debating its nature and use, based on this thesis’ evidence of the benefits of doing so.⁶¹⁸

2.2 Reflecting on current debates – judicial power and the Independent Review of Administrative Law

Having made a case for the emerging and evolving language of judicial power – to extend and improve the quality of contemporary debate - this section now considers how such language may begin to explore wider questions about judicial power. In particular, recent political responses to questions of judicial power which appear to argue in favour of further codification of judicial power and its use. The Independent Review of Administrative Law is one recent area of debate about judicial power which contains a ‘political dimension’, where claims about judicial power are ‘informing governmental views’ and policy proposals.⁶¹⁹ That is to say, it is an area where political decisions by political actors are being made to attempt to shape the role of the judiciary and specifically, to address concerns about judicial overreach.⁶²⁰ It has already been seen in this thesis how judges may respond to such legislative interventions and how, even where they are made, the subsequent use of judicial power has to be negotiated within any changing legislative boundaries. These complexities make this a good example to briefly explore the potential benefits of a transition towards this new language and thinking politically about judicial power.

Language vs. realities

The Independent Review of Administrative Law (IRAL) was launched in July 2020 to consider options for reform to the process of judicial review.⁶²¹ At its launch, the Government described the aims of IRAL as being, in part, ‘to ensure the right balance is struck between citizen’s rights and effective governance.’⁶²² Specifically, the Review would determine whether ‘the terms of judicial review’ ought to be codified, whether ‘certain executive decisions should be decided on by judges’, the nature of grounds and remedies available where a claim is brought against the government and whether further procedural reform to matters such as time limits or standing was necessary.⁶²³ Administrative law is one area this thesis has already discussed as being a basis for growing concerns about the rise in judicial power and in amongst the many questions it raises for that power, questions of ‘constitutional propriety’ and ‘institutional practice’ are at the fore: questions of who has the power of review and to what extent is that considered legitimate and necessary.⁶²⁴ At the launch event for IRAL, the Lord Chancellor, Robert Buckland QC made reference to the need for IRAL to ‘ensure this precious check on government power is maintained, while making sure the process is not abused or used to conduct politics by another

⁶¹⁸ The final section of this chapter will engage more extensively with questions of political jurisprudence, the political constitution and the role of courts.

⁶¹⁹ Craig (n 604)

⁶²⁰ Paul Craig, ‘Judicial Review, Methodology and Reform’ (2022) PL (forthcoming)

⁶²¹ Gov.uk, ‘Independent Review of Administrative Law’ <<https://www.gov.uk/government/groups/independent-review-of-administrative-law>> accessed 20 July 2021

⁶²² Gov.uk, ‘Press release: Government launches independent panel to look at judicial review’ (31 July 2020) <<https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review>> accessed 3 August 2021

⁶²³ Ibid

⁶²⁴ Elliott (n 607) 2

means.⁶²⁵ It is evident that underpinning the Government's commitment to review administrative law is an account of judicial power as potentially over-reaching into politics. There is a suggestion of a need to 'curtail the courts' review powers more generally'.⁶²⁶ This fits in with the language of judicial power portrayed by some of the narratives: that judicial review powers (and the grounds of judicial review) have increased, largely through common law decision-making. This increase, the Government's position suggests, ought to be met with caution.

This discourse underpinning the IRAL's rationale fits with the existing debates and the narratives' portrayal of judicial power. This thesis would anticipate that the discussions relating to the IRAL would follow some of the trends of the 'old' language of judicial power. In doing so, there was an expected disparity between the language used to describe the nature and scope of judicial power within administrative law and the constitutional realities of its use. The risk – as this thesis has noted throughout – is that such disparity between language and realities would distort our understanding of judicial power in this context. By reflecting on the findings of IRAL and wider submissions to the Panel's call for evidence, we learn more about the 'constitutional realities'⁶²⁷ of judicial power within administrative law.⁶²⁸ IRAL's findings stated, 'Our view is that the government and parliament can be confident that the courts will respect institutional boundaries in exercising their inherent powers to review the legality of government action. Politicians should, in turn, afford the judiciary the respect which it is undoubtedly due when it exercises these powers.'⁶²⁹ A seemingly contrasting statement to these findings was offered shortly afterwards by the Lord Chancellor, 'The panel found courts were increasingly considering the merits of government decisions themselves, instead of how those decisions were made – moving beyond the remit of judicial review.'⁶³⁰ Paul Craig responded to this saying that the, 'principal target is, in reality, alleged judicial over-reach in relation to review of discretionary power.'⁶³¹ This disparity highlights the importance of ensuring that where judicial power is the subject of political debate and even reform, any claims made about the use of that power are grounded in analysis and not solely based upon critique. In this case, there is some question of whether that is the case.

The submission to the Panel from Lord Reed as President of the Supreme Court may be used as one example of the ability to locate information about those realities. The statistics of judicial review hearings he provides give an illustration of the reality of judicial review in the recent past: "During 2020 the court is expected to hear fifty-two appeals, of which eight concern judicial

⁶²⁵ Gov.uk (n 614)

⁶²⁶ Mark Elliott, 'Constitutional Adjudication and Constitutional Politics in the United Kingdom: The Miller II Case in Legal and Political Context' (2020) 16(4) ECLR 625, 645

⁶²⁷ Kavanagh (n 602) 46

⁶²⁸ A collation of public responses to the IRAL Panel's Call for Evidence is available here: Lee Marsons, 'Collection of responses to the Independent Review of Administrative Law (IRAL)', (UKAJI, 4 November 2020) <<https://ukaji.org/2020/11/04/collection-of-responses-to-the-independent-review-of-administrative-law-iral/>> 3 August 2021

⁶²⁹ Lord Edward Faulks (chair), *The Independent Review of Administrative Law* (CP407, 2021) 131

⁶³⁰ Ministry of Justice, 'Press release: judicial review consultation launched' (18 March 2021) <<https://www.gov.uk/government/news/judicial-review-consultation-launched>> accessed 14 October 2021

⁶³¹ Paul Craig, 'IRAL: The Panel Report and the Government's Response' (UKCLA, 22 March 2021) <<https://ukconstitutionallaw.org/2021/03/22/paul-craig-iral-the-panel-report-and-the-governments-response/>> accessed 23 March 2021

review proceedings. Three out of those eight involve central government... In the year to the end of October 2020 the court is expected to hand down fifty-two judgments, of which eleven concern judicial review proceedings. Six out of those eleven involve central government”⁶³² However, even snapshots such as this from those directly involved in the exercise of judicial power in this context need more careful elaboration and analysis. There is a growing academic drive to analyse the realities of judicial power and administrative law decision-making given the difficulties with relying on snapshots of the use of power in this area.⁶³³ This recognises the need outlined by Craig which is that in using data and analysis of judicial power in this context, we must be mindful of the nuances between successful actions, rejected claims and to ‘distinguish successful claims that are controversial from those that are not’.⁶³⁴

The recommendations of the IRAL Panel are similarly contained which would support the idea that the realities of judicial power here – or, more specifically, any required need to manage or add certainty to the scope of that power – is similarly contained. That is to say, it suggests that the Panel’s own review of the data available through the consultation has concluded that the need for wholesale reform is limited. Broadly speaking, the Panel did not support change regarding codification of judicial review and ‘it opposed any move further to restrict the rules on standing or further tightening time limits for doing so’.⁶³⁵ The recommendations for change related to legislative reversal of the decision in *Cart*,⁶³⁶ legislative recognition of suspended quashing orders⁶³⁷ and an amendment to the wording of the Civil Procedure Rules regarding the ‘prompt’ bringing of a claim within the three-month time limit.⁶³⁸ This is one example of how the acquisition of a range of information from a wide range of stakeholders on the realities of judicial power has added clarity to our understanding of the realities of its use. This has meant that claims made about that power and its extent may require qualification in much the same way as this thesis has seen in its two case studies.

Incorporating a new language and thinking politically

⁶³² United Kingdom Supreme Court, ‘The Rt. Hon. Lord Reed President of the Supreme Court of the United Kingdom, Response to a call for evidence produced by the Independent Review of Administrative Law Panel’ (26 October 2020) <<https://www.supremecourt.uk/docs/iral-response-26-october-2020.pdf>> accessed 17 August 2021, 18.

⁶³³ See, for example, Joanna Bell and Elizabeth Fisher, ‘Exploring a year of administrative law adjudication in the Administrative Court’ (2021) Jul PL 505

⁶³⁴ Craig (n 612)

⁶³⁵ House of Commons Library, ‘Insight: Judicial Review Reform’ (1 April 2021) <<https://commonslibrary.parliament.uk/judicial-review-reform/>> accessed 25 August 2021

⁶³⁶ For discussion of this specific proposal, see: Mikołaj Barczentewicz, ‘Should Cart Judicial Reviews be Abolished? Empirically Based Response’ (UKCLA, 5 May 2021) <<https://ukconstitutionallaw.org/2021/05/05/mikolaj-barzentewicz-should-cart-judicial-reviews-be-abolished-empirically-based-response/>> accessed 5 July 2021

⁶³⁷ For further discussion of quashing orders and legislative proposals see: Tom Hickman QC, ‘Quashing Orders and the Judicial Review and Courts Act’ (UKCLA, 26 July 2021) <<https://ukconstitutionallaw.org/2021/07/26/tom-hickman-qc-quashing-orders-and-the-judicial-review-and-courts-act/>> accessed 26 July 2021, Lewis Graham, ‘Suspended and prospective quashing orders: the current picture’ (UKCLA, 7 June 2021) <<https://ukconstitutionallaw.org/2021/06/07/lewis-graham-suspended-and-prospective-quashing-orders-the-current-picture/>> accessed 26 July 2021

⁶³⁸ Lord Edward Faulks (n 621) 130

IRAL, its responses and the reactive analysis of judicial power it has prompted beg the question of how else we might think about judicial review power in this context. More specifically, how might the ‘new’ language of judicial power and the analytical framework be incorporated when reflecting on the power of judges in the context of administrative law. It is argued that we can broaden our thinking and understanding by using the analytical framework and its findings to better understand the realities of judicial review and judicial power. The ‘political’ elements of the framework, its focus on institutions, power relationships and the multi-dimensional nature of judicial power’s exercise could further enrich and clarify the existing discourse which surrounds judicial review and the IRAL. It is able to evaluate that surrounding discourse in light of a more complete analytical account of how that power is used. This is entirely necessary given proposed reforms to administrative law which are founded on certain conceptual understandings of judicial power in this context. Since this is not a further case study of this thesis, this short discussion will use the example of IRAL to consider what sort of different questions we might ask and include in future research.⁶³⁹

It is the case that, in light of the Panel’s findings, the Government’s own consultation and the Judicial Review and Courts Bill which is currently making its way through Parliament, we are prompted to ask whether the understandings informing the development of any legislative response are sufficiently mindful of the fact that exercises of judicial power in this context are patterned. We might ask whether accounts of judicial power within administrative law have themselves sought to explore the nature and use of that power within the multidimensional judicial role; to look beyond a mere adjudicatory function of the courts as the parameters within which we consider what is, or is not, constitutionally appropriate. Given the case made in this thesis for recognising the changeable nature of judicial power, Parliamentary debates must also consider the temporal and environmental factors on the use of this form of judicial power, such as changes to the judiciary’s own management structure or constitutional events or uncertainties such as Brexit.⁶⁴⁰ There is a question to be asked of the ability of any legislative response to manage the many complex tensions surrounding the task, not least in a time of perceived tensions between ministers and judges. There is a concern that where such response is informed by existing discourse – the language of judicial power as identified within the narratives this thesis has used – that means that the nature and degree of response it itself may be disproportionate. Not least because it may not be addressing the realities and nuances of the way in which any judicial power is actually used in practice. This is a risk with any codification, as discussed by Hoexter, but it remains important to therefore ensure that those proposals are based upon accounts of the realities of the power and its use.⁶⁴¹

Managing judicial power

While there is much to be gained from analysing the realities of the nature and use of any form of judicial power, the broader question we are being asked to think about relates to how that

⁶³⁹ This is not to suggest that extensive research into judicial review and its impact has not been undertaken but rather to say that it has not been approached using this thesis’ own approach.

⁶⁴⁰ For example, looking further back from the present debates we are able to see a previous period of disharmony between the executive and judges on the matter of judicial review in the early 1990s.

⁶⁴¹ Cora Hoexter, ‘Administrative Justice and Codification’ in Marc Hertogh, Richard Kirkham, Robert Thomas, and Joe Tomlinson (eds), *Oxford Handbook of Administrative Justice* (OUP 2022)

power should be managed. Although not explicitly stated, the IRAL is about the management of judicial power. Existing debates about judicial power are concerned with questions of how best to negotiate the limits of judicial power: the control of its exercise, the determination of its boundaries and the wider constitutional role of judges within the political system. Some contributions to debates are explicitly concerned with addressing instances of judicial overreach. IRAL is asking questions about the governance, or management, of power relationships – most notably between the executive and the courts. It is in this regard that thinking politically about judicial power offers many benefits since it considers judges and their power alongside the respective power of other political institutions. The reason this is beneficial is because it moves our thinking away from judicial decision-making and instead asks questions about expectations and understandings of institutional relationships within government. Two elements of the Government’s aims prompt some thought here. Firstly ‘ensure the right balance’ and secondly ‘effective governance’. Questions of ‘balance’ must engage thought about power relationships: relationships between judicial power and executive power, between citizens’ rights (power) and executive power, between judicial power and Parliamentary power. There are many, equally complex relationships to consider when determining what the ideal balance may be and how that balance might be achieved. Alongside this is the recognition that any notion of balance itself suggests a fluidity in what that balance may look like or how it may be achieved. The second aspect – concerns of ‘effective governance’ – relate to the broader institutional and constitutional workings of *all* state actors: how they might achieve individual and collective aims within this system through their use of power.

One means of achieving such aims can be through the effective management of all forms of public power. It can arise through the recognition and respect for roles, the effective balancing of functions or via more deliberate intervention. The IRAL itself can be viewed as one strategy of managing judicial power through more deliberate intervention. It may be that this is an example of the management of judicial power through what Harlow and Rawlings termed ‘striking back’ and ‘clamping down’.⁶⁴² A public consultation and legislative response against the possibility of judicial over-reach via administrative law. It is a strong, public response to the management of judicial power compared to the softer forms of managing power such as through finding the natural balance of power within relationships and localised communications between actors. The ‘political dimension’ of this aspect of the judicial power debates has been to provoke reactive analysis, debate and reflection about the nature of judicial power within administrative law and the ways in which judges have – and should – exercise this aspect of their power. It has brought questions of judicial power into the public awareness through its transparency. Suggestions of the need to control judicial power in this area via legislative reform indicates a strong-hold approach of management through codification. The responses to questions such as codification of the grounds of judicial review (an aspect of discretion in judicial decision making) are implicitly asking whether judicial power to determine the basis of a judicial review claim need managing in the form of statutory clarification.⁶⁴³

⁶⁴² Carol Harlow and Richard Rawlings, ‘‘Striking Back’ and ‘Clamping Down’. An Alternative Perspective on Judicial Review’ a chapter in John Bell, Mark Elliott, Jason NE Varuhas and Philip Murray, *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016)

⁶⁴³ As the authors of De Smith’s *Judicial Review* explain ‘the current common law ‘principles of judicial review must be stated at a high level of generality to ensure that their application can be matched appropriately to the particular context in which they arise in a given challenge.’: Michael Zander, ‘Judicial review does not need

However, evidence of research submitted to IRAL on the arguments for and against codification note that even where codification has occurred, judges are still required to interpret statutory grounds in order to apply them to individual claims.⁶⁴⁴ In terms of strategies for the management of judicial review power, incremental codification is suggested by the Panel as one potential strategy: giving Parliament the opportunity to legislate on certain aspects of the process. Changes to Procedure Rules suggests another, softer strategy to control the exercise of power (i.e. the nature and parameters of its use). This is a weakening of a potentially stronger model of ‘clamping down’ than some of the Government’s proposals may suggest is necessary. In both case studies in this thesis, we have seen instances of judicial power being codified under the HRA and CRA but that there remains scope for judges to maintain some freedom to shape the subsequent use of that power.

The Ministry of Justice’s subsequent consultation included the proposal of ‘factors to guide the court’s discretion’ as a means of providing greater certainty.⁶⁴⁵ Their report suggests that, ‘any discretionary power of the courts should be guided by certain factors set out in legislation that are to be considered by the court.’⁶⁴⁶ The responses were cautious of such prescription and the Government responded with a suggestion of a ‘non-exhaustive list... to ensure a well-reasoned conclusion for any remedy that is granted’.⁶⁴⁷ This may be one, slightly softer means to regulate and manage the use of judicial power in this area. The various and different outcomes to IRAL raise important, wider questions of how to reconcile the management of judicial power – in any form – with existing constitutional principles and evolving constitutional understanding. For example, how does a statutory list to guide discretionary judicial power in relation to the granting of judicial review remedies align with our understanding of judicial independence? The following, final section of this chapter will endeavour to explore these questions more fully in light of this thesis’ approach to analysing and understanding judicial power. In any event, it is argued that ‘striking back’ and ‘clamping down’ offers only one possible remedy to any perceived changes in the patterns of judicial power within any context.

3. Looking ahead to the future of judicial power within the constitution

The last section will reflect upon questions relating to the legitimisation, justification and management of judicial power within the UK’s constitution and relate those questions to existing fundamental constitutional principles and parameters. Craig notes that it is, ‘axiomatic that all power requires justification, and that is equally true for judicial power’.⁶⁴⁸ One question to ask

legislative reform’ (New Law Journal, 6 November 2020) <https://www.newlawjournal.co.uk/docs/default-source/article_files/nlj_2020_vol170_issue7909_november_comment_zander.pdf?sfvrsn=9cc0e357_1> accessed 20 September 2021

⁶⁴⁴ Kate O’Regan and Cheryl Saunders, ‘Codification of Administrative Law in Common-Law Systems: Insights from Australia and South Africa - A Submission to the United Kingdom Independent Review of Administrative Law Panel’ (Bonavero Report Series, Bonavero Report No. 6/2020, October 2020)

<https://www.law.ox.ac.uk/sites/files/oxlaw/bonavero_report_6_2020_1.pdf> accessed 10 November 2021, 28.

⁶⁴⁵ Ministry of Justice, *Judicial Review Reform Consultation: The Government Response* (CP477, 2021) 22

⁶⁴⁶ Ibid

⁶⁴⁷ Ibid 23

⁶⁴⁸ Craig (n 604)

here is how what those justifications may be and how they are capable of legitimising judicial power. Therefore, one aspect of this section's discussion is not to argue that judges should have more or less power but rather ask how judges might increase the perceived legitimacy in their use of power at any one time or in any one context with a particular focus on increased understanding of their role and power to achieve this. To reflect upon these questions, this section addresses three points. Firstly, this section considers the developing approaches to understanding judicial power within public law scholarship and how those approaches explore possible justifications for, or the legitimate use of, judicial power.⁶⁴⁹ Secondly, this section considers potential understandings of judicial power within the evolving UK constitution and how this evolving context requires ongoing reflection of the nature and use of judicial power in certain contexts. Finally, this section considers strategies for the management of judicial power and the practical contributions of this thesis' own approach to that future direction.

3.1 Developing public law scholarship surrounding questions of judicial power

The merit of documenting the history and development of public law scholarship is to trace developments in how our understandings of the constitutional order have evolved. Within this, it is possible to identify where such evolutions in wider constitutional understanding have informed perceptions and understandings about the judicial role and about judicial power. One notable point in this development comes from the point at which scholars began identifying the constitution as 'political'.⁶⁵⁰ Subsequently, scholarship has shown moves from understanding the constitution as 'political' towards normative models of constitutional understanding offered by political constitutionalism and subsequently to the development of opposing models of thought and rivalries between this type of constitutional thought and so-called 'legal constitutionalism'.⁶⁵¹ These 'waves' of public law scholarship have contributed much to our constitutional understanding through the debates they have prompted and those waves 'feed into and... lap back upon one another'.⁶⁵² The potential of this is to locate the lessons we can take from each wave and, ultimately, achieve a scholarship which is 'even better than the new'.⁶⁵³ It is hoped that this thesis' own work may contribute to this new wave of scholarship through its desire to re-centre contemporary debates about one aspect of the constitution: judicial power. This thesis has done this by arguing that one is better placed to understand the complex, changeable and context-dependent nature of judicial power by stepping away from the most contestable aspects of that power (and the desire to understand that power through critique) and adopting a more holistic, analytically driven approach to understanding power through the lens of political science.

⁶⁴⁹ To achieve this, it will draw on some of the work of public lawyers who have recently reflected on and reconsidered the impact of JAG Griffith's 1979 Chorley Lecture, 'The Political Constitution' on public law scholarship. This is largely from the King's Law Journal's special 2019 edition entitled 'The Political Constitution at 40': <https://www.tandfonline.com/toc/rklj20/30/1?nav=tocList>

⁶⁵⁰ Most notably, of course, following JAG Griffith's 1979 lecture: JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1

⁶⁵¹ Kavanagh (n 602) 43

⁶⁵² Marco Goldoni and Chris McCorkindale, 'Three Waves of Political Constitutionalism' (2019) 30(1) KLJ 74, 75

⁶⁵³ Howard Gillman, 'Martin Shapiro and the Movement from "Old" to "New" Institutional Studies in Public Law Scholarship' (2004) 7 Annual Review of Political Science 363, 380

Let us return here to the politics of judicial power as identified by this thesis at its outset. Within public law scholarship, further senses of politics can be observed – not as a criticism but as a means to understand the existence and focus of those debates in more depth. Firstly, the debates between political and legal constitutionalists may be understood as a further politics of judicial power within scholarship between competing normative views of the constitutional order. But there is also a sense of the politics of judicial power arising in the very existence of the debates themselves since judicial power in the UK has been politicised in recent years; it has been the focus of politics and debate. This politicization has occurred within public law scholarship in the sense that it has ‘become the subject of deliberation, decision making and human agency where previously [it was] not.’⁶⁵⁴ The effect of the process of politicisation has been to see ‘an increase in issue salience, the expansion of the range of actors expressing a stake in the issue [of judicial power] and an associated polarisation of the positions actors adopt with respect to the issue.’⁶⁵⁵ The difficulty with politicisation is that it may have the effect of ‘potentially jeopardising the authority’ of those concerned and it may affect levels of trust in the exercise of judicial power more generally and in the judiciary as an institution.⁶⁵⁶ Debates within public law scholarship have created their own politics surrounding judicial power and there may be an argument that while the aim of scrutiny of judicial power is fundamentally important, we must be wary of these politics as we look to develop and further those debates.

It is not the case that public lawyers have debated judicial power simply to criticise certain examples of its use. The purpose is, really, to consider at length how we understand – and *want* to understand – the role and power of judges in the constitution. Such debates may achieve most where they avoid taking ‘an unduly polarised, dichotomized and reductivist approach’ to questions of the nature, exercise and management of judicial power.⁶⁵⁷ But this task can be complicated where the term ‘judicial power’ is used and understood not in value-neutral terms. This aspect of politics is not classified as ‘formal and institutional’⁶⁵⁸ politics, those associated with ‘democratic polities’, but rather a sense of politics which is ‘synonymous with the pursuit of self-interest’.⁶⁵⁹ These politics have shown their ability to generate rivalries in the manner Kavanagh noted as evolving within public law scholarship.⁶⁶⁰ The debates, where they become political in this sense, risk narrowing our understanding of judicial power. It may be that we started to view judicial power as an issue of ‘judges vs. executive’ or ‘law vs. politics’ or ‘left vs. right’ and of competing interests. Where these politics and any associated agendas feed into the discourse surrounding judicial power, we risk distorting, polarizing and reducing the concept of judicial power in unconstructive ways because it is shown to be possible to think about the politics of these relationships differently.

⁶⁵⁴ Colin Hay, ‘Politics, Participation and Politization’ a chapter in Colin Hay, *Why We Hate Politics* (Polity Press 2007) 81

⁶⁵⁵ Benedetta Voltolini, Michal Naturski and Colin Hay, ‘Introduction: the politicisation of permanent crisis in Europe’ (2020) 42(5) *Journal of European Integration* 609, 612

⁶⁵⁶ Christina Boswell, ‘How has the UK’s research community been affected by COVID-19 – and what does this mean for social sciences?’ (The International Public Policy Observatory, 22 August 2021)

<https://covidandsociety.com/how-has-the-uks-research-community-been-affected-by-covid-19-and-what-does-this-mean-for-social-sciences/> accessed 22 August 2021

⁶⁵⁷ Kavanagh (n 602) 45

⁶⁵⁸ Hay (n 646) 62

⁶⁵⁹ *Ibid* 63

⁶⁶⁰ Kavanagh (n 602) 45

How, then, might we avoid the risks associated with the politics and politicisation of judicial power as described above? It is this thesis' belief that judicial power can be understood in value-neutral terms and by doing so, we can 'free up' our thinking by shedding the burden of, for example, understanding judicial power *as* a political constitutionalist or *as* a judge or *as* a government minister and so on. The analytical framework and this thesis' aim to recognise the emerging language of judicial power can help us 'examine a broader and a more deep set of constitutional questions, from the very foundations of public law itself' in relation to judges and their power.⁶⁶¹ It moves us beyond the 'sometimes spontaneous and unpredictable' areas of political debate and activity that exist beyond those ideological and theoretical parameters.⁶⁶² The analytical framework and approach here similarly provides a strategy for managing the politics of judicial power within public law scholarship at least. It promotes new and different thinking while demonstrating that we can think politically in order to better understand the changing nature and use of judicial power. What this may allow for is a more value-neutral debate about the justifications or legitimacy of judicial power away from those pre-existing ideological standpoints.

3.2 Legitimising judicial power within understandings of the constitutional order

By reflecting on the constitutional order, we can situate our own expectations for judicial power in a wider context. This section explores a little further the idea of how judicial power may be legitimised within the UK constitution, both in light of existing constitutional principle and through the explicit recognition of strategies for managing that power and its use. We might ask questions about what role and power judges *have*, what role and powers judges *should* have and, importantly, *why*. In terms of the role of judges within the constitution, it is perhaps accepted that judges will always be required – as adjudicators – to make sometimes unpopular decisions. By virtue of their role as independent arbiters of disputes, they are required to weigh up the competing interests of others and reach a decision. That is one central feature of their role. This aspect of their power can, as this thesis has shown, be exercised in different ways and in different environments both inside and outside the courtroom. The idea of disputes, if judges are conceived as political actors, can take many forms: a dispute between parties to a contractual agreement, a dispute about the nature and protection of a right to get married or even a dispute about whether an executive body has exercised their own powers within their legal limits. Some of the legitimisation and justification for this role comes from an understanding of the bases for those decision-making powers: the source of judicial power. For example, power contained in statute (such as s4 HRA), established common law precedent (such as the grounds for making judicial review claims) or by virtue of the judicial role and its constitutional jurisdiction (such as the power of an LCJ to promote and protect the interests of their judiciary). It may be that further legitimisation comes via notions of legality and the use of that notion to link the issue with the role of courts in its resolution.

⁶⁶¹ Goldoni and McCorkindale (n 644). It will also be suggested in this thesis' overall conclusions that some of the strategies of this thesis may be employed in order to engage in similar thinking and analysis of other forms of political power – of exercises of executive or legislative power as well.

⁶⁶² Ibid 75

This perhaps highlights the contestability of judicial power coming not just from its use but from its source. The legitimacy of judicial power is often questioned where it is ‘unrooted in transparently articulated and defensibly deployed fundamental principles’.⁶⁶³ This might suggest, then, that there is real merit in debating and – more specifically – *describing* judicial power and its use to better articulate and possibly, defend, its use. This approach is seen in recent high profile decisions of the Supreme Court where the Justices have taken care to situate their decision-making in alignment long-established constitutional principle.⁶⁶⁴ It is recognised here that notions of legitimacy are themselves inherently contested, just as has been shown in the case of the concept of power. Stepping aside from this complexity for a moment, this thesis suggests that constitutional principle can provide one basis for legitimising judicial power but there may be others. It may be that judicial power is legitimised via traditional parameters in constitutional understanding. Judicial power is legitimate where there is a clear separation of judicial and political authority, with ‘an independent judiciary, exercising legal and constitutional authority to adjudicate disputes, including disputes between citizens and officials, fairly and in accordance with settled positive law.’⁶⁶⁵ It may be that we can consider judicial power legitimate by thinking about that power in light of the multidimensional judicial role; by looking at other parameters. This thesis has suggested one possible means and that is to situate judicial power within one, or more, of the dimensions to that role as a clearer way of describing and debating the scope of its use.

Discussing the (potentially changing) ways in which judicial power may be legitimised has implications for how we understand other aspects of the constitution. This is largely in terms of consequences: does adopting a different conception of the judicial role and a more holistic understanding of judicial power impact more established notions of the constitution? The challenge of the UK’s constitutional parameters of judicial power is that the form and substance of those principles is itself often contested. Consider, for example, the principle of judicial independence. Despite its form now being located in s3 CRA, it is accepted that the ‘meaning, content and limits’ of judicial independence and accountability in the UK have been negotiated extensively by interested stakeholders and ‘settled by politics’.⁶⁶⁶ Judicial independence has itself been the subject of extensive debate. While there is an underpinning ‘social logic’⁶⁶⁷ of the role of courts and the justification for their impartiality within any social order, this independence is, however, ‘contextual and contestable’.⁶⁶⁸

The idea of a clearer separation between judicial and political authority as one strategy for legitimising judicial power is itself subject to debate. It has been suggested that the ‘good sense of this separation of powers is now increasingly doubted’ in the UK although recent constitutional reforms to enhance the separation of the judiciary from the political branches

⁶⁶³ Elliott (n 607) 17

⁶⁶⁴ The decision in *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41 being a prime example of such reasoning.

⁶⁶⁵ Policy Exchange, ‘About the Judicial Power Project’ <<https://judicialpowerproject.org.uk/about/>> accessed 5 July 2021

⁶⁶⁶ Graham Gee, Robert Hazell, Kate Malleon and Patrick O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (CUP, Cambridge 2015) 9

⁶⁶⁷ Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1986) 1

⁶⁶⁸ Gee, Hazell, Malleon and O’Brien (n 658) 16

complicates how we might understand the nature and extent of this separation.⁶⁶⁹ Therefore, there are questions of how we can – and do – base our understanding of judicial power upon both descriptive and normative notions of the separation of public power. Basing understandings of the legitimacy of judicial power using the rule of law may be similarly problematic given the contestable nature of the details and dimensions of that concept. For example, the understanding of the judicial role as one means of effectively securing the rule of law or highlighting judicial overreach as a threat to that idea.⁶⁷⁰ It suggests that while constitutional principles can guide our thinking about the nature, scope and limits of judicial power they may themselves have limitations. This thesis does not provide a case for how to legitimise judicial power through alternative means but it can make some observations based on the analysis it has undertaken and the arguments it makes about conceptualising judicial power.

3.3 Considering alternative strategies for the management of judicial power

Where questions of judicial power are raised in line with questions of the legitimacy and justification of courts’ ‘constitutional propriety’, we are required to think about the conventionally accepted expectations of judicial power and its use.⁶⁷¹ This thesis makes the case for thinking differently about that power or, at least, not automatically relying on normative assumptions to understand or determine its desirable scope and limits. Instead, the case has been made for looking carefully at institutional practice and the realities of judicial power as a preliminary step in understanding the modern parameters of that power. The argument here is that to achieve that understanding – given the subject is ‘power’ – we are better equipped to do so by adopting the tools of political scientists. This final part of the discussion takes the opportunity to consider how power may be managed and controlled. It does this by taking account of notions of legitimacy and justification alongside the information gathered by its own analysis of judicial power. In particular, this reflects on ideas relating to the accountability of judicial power and how, through a stronger understanding of the nature of judicial power, that power may be more effectively or, at least, more transparently managed within the constitution.

What does thinking politically – about the constitution and about judicial power – mean for the practical management of judicial power? It means understanding the subtleties of judicial power and its use (facilitated through the analytical framework), evaluating our understanding and our expectations of the use of that power (evaluating the discourse, politics and realities of judicial power) and then seeking consensus between stakeholders as to how the judiciary may collaborate with other institutions as part of a constructive, constitutional power ‘matrix’.⁶⁷² The endeavour is as much about understanding the nature of judicial power as it is about prompting further inquiry into the nature of other forms of public power. Doing so will not only add greater clarity to our understanding of the power of each but will consider, too, how and why those institutions may be able to work together as part of the ‘the machinery of the state’.⁶⁷³ All political institutions need to demonstrate their political legitimacy as a means of securing their power.

⁶⁶⁹ Policy Exchange (n 657)

⁶⁷⁰ Craig (n 604) 356 where Craig discusses at length the arguments set out by the Judicial Power Project.

⁶⁷¹ Elliott (n 607) 2

⁶⁷² Martin Shapiro used this term to recognise the placing of courts as part of the governmental system in the US. It may similarly be used here to acknowledge how judicial power is a form of political power in the UK constitution. Martin Shapiro, ‘Political Jurisprudence’ (1963) 52(2) *Kentucky Law Journal* 294, 345

⁶⁷³ JAG Griffith, ‘The Common Law and the Political Constitution’ (2001) 117 *Law Quarterly Review* 46

Part of this legitimacy is achieved where that power is deemed to be sufficiently accountable. There are debates about whether judges may be the subject of a legitimacy crisis and this thesis has no intention of engaging with these here.⁶⁷⁴ However, in recognising the potential existence of such debates, this chapter looks at ways to manage judicial power which may have positive implications for wider questions of legitimacy and accountability.

Fundamentally, the effective management of judicial power – just as it is with any other form of power – may depend on institutional and individual relationships and the dynamics and relative ‘health’ of those relationships. This takes account of notions of agency and power; the fact that how we understand power is often linked with those who have power, who use power or are affected by any power and its use (for example, accounting for the many actors involved in any single power relation). It also takes account of notion of structure and how institutional structures may establish certain power relations or could be used in their management (for example, the use of legislative intervention). The management of judicial power is also about developing the shared aim of effective and responsible government through effective accountability mechanisms - a broad strategy of moving towards a system based on relationships, *not* rivals. This thesis makes three recommendations to consider as part of a wider, overarching – and ongoing - assessment of how judicial power may be managed in the future. These recommendations are as follows:

A - Role recognition within relationships

This work seeks to enhance the clarity with which we understand the legal and political elements of institutional relationships and the respective functions of each institution within those relationships. Its aim is to offer a clearer sense of the jurisdiction of judicial power, including the recognition that the edges of that jurisdiction may be evolving or – at least – our understandings of where those edges exist needs careful analysis. This requires continued analysis and debate as to the institutional and constitutional limits of different aspects of the judicial role, enabled by adopting a model such as that suggested in this thesis of the different work judges do within the constitution. Not only this, there is a recognition of the need to delineate the changing nature and sources of judicial power against the realities of their use. The emphasis on role recognition here promotes the strategy of self-restraint in the management of judicial power but uses the interactions within those to relationships to determine when and how such self-restraint should occur. It is thought that the evidence of self-restraint and self-governance seen in this thesis’ analysis indicates judges are capable of – and aware of the need for – imposing their own controls on their power.

This particular suggestion reconciles notions of accountability and control with the requirement of judges’ independence. The further aim of promoting more explicit role recognition is to use power relationships and actors’ interactions to locate the norms, expectations or sites of consensus between actors within those relationships about what the other does and should be

⁶⁷⁴ See, for example, Jason Varuhas, ‘Judicial Capture of Political Accountability’ (Policy Exchange, 2016) <<http://judicialpowerproject.org.uk/wp-content/uploads/2016/06/Judicial-Capture-of-Political-Accountability-.pdf>> accessed 13 January 2022 and Richard Kirkham, ‘A Reply to Judicial Capture of Political Accountability’ (Policy Exchange, 2016) <<http://judicialpowerproject.org.uk/richard-kirkham-a-reply-to-judicial-capture-of-political-accountability/>> accessed 13 January 2022

doing. For example, recognising the importance of courts as independent adjudicators or of Parliament as the primary legislative power and aligning this with the evidence of institutional practice. It is possible to identify this role recognition where it may be less explicit (or assessing the claims made where it is) by analysing where there are different degrees of tolerance for certain exercises of power. It may be identified in responses to exercises of power, such as where consensus in the use of power indicates acceptance or notable pushback indicates a possible overreach. It is expected that this emphasis may support the building and maintenance of healthy working relationships and utilise tensions and conflicts to assess where, perhaps, there is a lack of consensus or clarity as to the nature and scope of the respective roles in particular contexts.

B - Respect and the maintenance of effective channels of communication

This recommendation builds on from the last as it promotes the development of a culture within the institutional relationships which may prove effective in managing and controlling the exercise of judicial power. Focusing on effective communication between institutions and their actors, through recognised and agreed channels, can foster further adherence to institutional boundaries and promote ‘good’ quality institutional interaction. It may be that the adherence to institutional boundaries is made easier, especially where those boundaries are less clear, if actors are able to articulate their own understandings of the limits of their respective power to one another. This is informed by the caution apparent in existing debates about the scope of judicial power. By understanding more about the legal and political forms of judicial decision making – and judicial power within and outside of the courtroom – the increased clarity can be used to build and secure mutual trust, respect and understanding between the branches. This includes recognition and respect for appropriate forms of accountability as a facet of ‘good constitutional governance’; that is, recognition of the need for *both* ‘meaningful accountability in the courts, as well as serious political accountability in Parliament’.⁶⁷⁵

Recognition that judicial power is exercised as a feature of institutional relationships is to understand how it is exercised as a feature of good governance. A culture of constructive communication may help manage situations where accountability mechanisms are used and promote the maintenance of a degree of respect and understanding of why. It may be possible to maintain relationships through these channels even in times of inevitable tension and conflict between the institutions. Part of this will be enabled by the identification of any particularly exaggerated or down-played claims as to the appropriate nature and extent of judicial in a certain context and the opportunity for actors to clarify their respective agendas and intentions if required. This may be a means for judges to communicate ‘sensitivity on epistemic, institutional and constitutional grounds in the exercise of their authority’ even in instances where such authority has been provided for by Parliament.⁶⁷⁶ It is also important to note that this requires not only an investment in such a strategy by judicial actors but by others too, such as ministers.

C – Review of relative power within relationships with the potential for remedy

⁶⁷⁵ Kavanagh (n 602) 65. See also Jeff King, ‘The Instrumental Value of Legal Accountability’ in N Bamforth and P Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013) 149

⁶⁷⁶ Craig (n 604) 374

This final recommendation is informed by the current government's strategy to manage judicial power, through the use of appropriate and legitimate enhanced consultation and review. It seems that this may represent a stronger form of judicial power management via public review and recommendations for reform: the 'striking back' to which Harlow and Rawlings referred.⁶⁷⁷ Building on the previous two recommendations, it may be possible to use such reviews at any stage as a means of clarifying our understanding of the nature and exercise of judicial power in various sites (as has been done with administrative law and the HRA). Where such review is undertaken against the background of constructive and respectful institutional relationships, it has the potential to manage and control the exercise of judicial power through focused debate and the development of more explicit strategies where they are deemed essential. The consultation, analysis and subsequent discussion offers a remedy to legitimate concerns about the exercise of judicial power through clarification. It may be the case that engaging in such reviews is, in fact, an effective means of re-negotiating the limits of respective powers without the need for wholesale reform.

If, however, there is not the potential of managing the balance of power within these institutional relationships through the interactive relationships themselves then it may be that a review is an opportunity to seek more substantial remedies. These may include using codification by Parliament as a means of changing the nature of that power more explicitly. This could include the reduction of discretion, the reduction of judicial oversight and responsibilities for certain matters of public governance. It could, of course, be the opportunity to expand judicial power such as was seen under the HRA or under the CRA. It may, too, be the case that a review of judicial power necessitates the similar or equivalent review of executive and legislative functions with the aim of better understanding all actors' power in the institutional relationships upon which the constitution operates. The debates about judicial power, suggestions for reform and any changes in behaviour or practice they may result in indicate the pendulum effect of understanding many complexities in a social order. Change may be prompted by undesirable events and debates may occur in which radical views and suggestions are offered on all sides. The likelihood is that we will only know when real change has occurred when we do not have to think so carefully about the socially desirable outcomes of those debates and changes. Judicial power will be – and should be – debated until such time that an understanding of it becomes part of the myriad of constitutional norms.

Conclusions

This chapter has drawn together the many themes and ideas raised by this thesis' own analysis of judicial power and situated these within their wider scholarly and constitutional context. This chapter has strengthened this thesis' case for using its different analytical approach by firstly examining the accuracy of existing narratives within contemporary judicial power debates. The limitations of those – or any - narratives and their use in understanding HRA and LCJ power were explored and while there is some accuracy in their account, if used alone they risk limiting and reducing our understanding of those sites of judicial power. To mitigate this risk, the chapter

⁶⁷⁷ Carol Harlow and Richard Rawlings, 'Striking Back' and 'Clamping Down'. An Alternative Perspective on Judicial Review' a chapter in John Bell, Mark Elliott, Jason NE Varuhas and Philip Murray, *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016)

moved on to consider the need to recognise an *evolving language* of judicial power. For the same reasons that our understanding of power may change and evolve as the power itself changes and evolves, so too must the discourse which surrounds its use.

The chapter has reflected upon the evolution of public law scholarship and where this different approach to conceptualising judicial power may make its own contribution. In the design and application of the analytical framework, the thesis provides a toolkit for public lawyers to think politically about judicial power in any context. It is able to take account of changing temporal or jurisdictional considerations, the many bases for judicial power and decision-making and the variety of ways in which that power may be used. By using this analytical framework, scholarship may make more explicit reference to and assessment of, the nature and use of judicial *power* through the lens of political science. The benefits of this will be to more clearly separate analysis from critique and manage the potentially value-laden nature of debates about power. It enables scholars to, if they wish, reflect on questions of constitutional roles in light of analytical information about institutional practices. Alongside this, scholars may find the task of reflecting upon any language of judicial power central to their endeavours. As a result, resulting accounts of judicial power in its many forms and in many contexts may make their own contribution to the evolving discourse surrounding judicial power.

Finally, the chapter has begun to consider what this thesis' own approach may mean in wider debates about the legitimacy, justification and management of judicial power. There are many valid concerns raised about the rise of judicial power across the common law world and instances of judicial decision-making have been – and are likely to continue to be – a source of scrutiny and criticism. The task of reconciling our understanding of another contestable concept such as judicial power with equally contestable notions of legitimate power or justified authority is no simple task. This thesis has chosen to approach this in light of its analysis by considering some of the ways in which judicial power may be managed and controlled within the constitution – in a manner which is not designed to unduly rely on any particular constitutional understanding. The suggestions of role recognition, increased communication and potential consultation and review are (rightly or not) deliberately practical and grounded in ideas of human interaction, behaviour and power more than they are in constitutional principle. It is evident that the analysis of judicial power is itself complex, the accounts such analysis produces may too be contested but what is sure is that it remains necessary to study the nature and use of judicial power in light of its changing contexts. Understandings of judicial power and the language we use to convey our understanding will require ongoing and regular reflection.

Conclusions

The power of judges continues to prompt debate both within the United Kingdom and beyond. Such debates include questions relating to the constitutional role and function of judges, the desirable amounts of judicial power, and the necessary - or desirable - limits to or controls on that power. As well as occupying an increasingly prominent place within the public sphere in the UK and beyond, debates about judicial power are now a firmly established element of constitutional scholarship. This thesis has offered its own contribution to this scholarship in part by examining the nature and scope of those debates and, in turn, examining the ways in which constitutional scholars have investigated questions about the nature and scope of judicial power. The central argument of this thesis has been that while judicial power is a feature of extensive debate, within those debates there can be an insufficient focus on the complexity of the concept of power itself. This final part of the thesis will firstly reflect once more on what it has described as the problem of judicial power. Secondly, it will review the efficacy of – and findings from - its own approach to analysis before finally, summarising this thesis' own contribution to ongoing debates about judicial power.

A problem of power

This thesis has explored the nature of judicial power in the United Kingdom through its own analytical approach which was developed in response to what this thesis describes as the problem of judicial power. The problem of judicial power is, it is suggested, a problem of *power* as much as it is a problem of judicial power and it is multi-layered. The problem of *power* contains two distinct elements: how best to think about power (conceptualisation) and how best to study power (analysis). Although judicial power is a focus of many contemporary debates about the nature of the UK constitution and the role and functions of the judiciary within the constitutional order, it is currently understood in relatively broad and, at times, unsophisticated terms. That is to say, contemporary debates about judicial power have come to be characterised by a certain discourse – or as it was phrased in the Introduction, the “language of judicial power” – which indicates particular qualities of that power.

As this thesis sees it, those qualities can be identified from emerging narratives underpinning those debates. As discussed in Chapter 1, the dominant narratives in contemporary debates in the UK may characterise judicial power as being ‘on the rise’, a relatively novel constitutional phenomenon, a power that is located in judicial decision-making inside the courtroom and a phenomenon which ought to be met with a certain degree of caution. From assessing these contemporary debates, and the claims they make about judicial power, it becomes clear that ‘judicial power’ is a phrase which invokes a range of responses and reactions but is most often discussed – as this thesis has argued – in somewhat normative terms or in line with specific ideological beliefs about the nature of the UK constitution. For example, the phrase judicial power is used to focus those debates on questions of the judicial role often in relative terms to the role and power of other institutions such as Parliament or the executive or within the boundaries of political or legal constitutionalism. Focusing on these questions is important for sure, not least in illuminating the rival and opposing views on the respective roles of and limits on political and

judicial institutions. However, these debates can also be reductive, missing many of the subtleties, nuances and changing patterns of judicial power.

Part of the reason such a problem exists within the context of judicial power is because although academics have debated judicial power quite extensively, the phrase judicial power is often wrapped up in other equally challenging and weakly defined concepts; concepts such as legitimacy, accountability, legality, activism, self-government, the rule of law, parliamentary sovereignty, and so on. We tend to think about these aspects – and perhaps seek to resolve the questions they raise - together with questions of judicial power rather than necessarily separating out our thinking. As a result, the risk is that we debate important, yet contestable, notions relating to judicial power without a suitably strong understanding of the nature of judicial power itself. One way of thinking about this is that in debating judicial power there has been a tendency to emphasise the ‘judicial’ rather than the ‘power’ in how we understand the term. This creates missed opportunities to consider how we understand the concept of power and the result can be a missing ‘first step’ in our thinking.

The politics of judicial power: a more complicated picture

The problem of judicial *power* is further complicated by the so-called *politics* of judicial power which, if not carefully identified and explored, this thesis argues can risk limiting how we understand the nature of judicial power. The contemporary debates mentioned above have tended to emphasise two senses of the politics of judicial power. Firstly, that the phrase has been made a focus of politics and one which can be politicised. Judicial power has been brought to the fore as an issue of salience and one we have been encouraged to think more carefully about. The second sense of politics relates to the ways in which the meaning of the phrase judicial power is being settled by politics; using particular normative models or ideological beliefs to negotiate the meaning and limits of that power within UK constitutional understandings. This is problematic in one sense because the resulting accounts of judicial power have been used to inform subsequent political responses to the management of that power.

The politicisation of judicial power may be problematic in another sense since, in addition to insufficient emphasis on the concept of power itself, it means that contemporary debates are not as complete as they might otherwise be. In the Introduction, this thesis identified two further senses of the politics of judicial power. These two additional senses, so the Introduction argued, have the potential to enhance our understanding of the phenomenon of judicial power. The third sense of the politics in question relates to thinking about power relations and power relationships. Political science insights have shown that in order to better understand the concept of power more generally, there are a number of features that need to be considered, as discussed in Chapter 2. The question of power relations considers questions to do with the various ways in which power is exercised: such as through decision-making, through nondecisions, via the influence of agenda-setting or in terms of unobservable influence over interests and beliefs. It is also necessary to consider questions of power relationships highlight the influences and dynamics of actors – individuals and institutions – in these power relations.

The fourth sense of politics is really to emphasise the importance of understanding the concept of power within our understanding of the phrase judicial power. It is a response to the central

argument of this thesis that at present, many accounts of judicial power offer insight and undertake analysis without a clearer and more systematic understanding of the nature of power itself. This is the aim of this thesis to put the ‘power’ back into the judicial power debates by acknowledging both additional senses of politics and using them to inform the analysis. Here, the continued importance of political science was clear but alongside this, the ideas from political jurisprudence and new institutionalism which already exist within public law scholarship provided further support and a link between these schools of thought, as outlined in Chapter 2.

Overcoming the problem(s) of judicial power

In order to confront the problematic nature of power, this thesis has posed the question, ‘what is judicial power?’. By doing so, this thesis has not only sought to explore how the term ‘judicial power’ is currently understood within the UK constitution but also to explore how that term *could* be understood in such a way as to best reflect the constitutional realities of that power. This requires us to think more specifically about the concept of power and provides the opportunity to review and reflect upon existing conceptions of the role and power of judges and to recognise the many dimensions they contain. Not only this, this thesis’ approach takes the challenge – or opportunity – to manage the politics of judicial power by identifying them and expanding the senses in which we understand that notion. Doing so helps us to think politically about judicial power which, it is argued, helps us to achieve a stronger conceptualisation of the phenomenon.

In Chapter 3, this thesis developed an original framework for thinking about and making sense of judicial power. This framework is designed to offer the tools for thinking politically about judicial power and recognise and manage the various politics identified above. The design of the framework incorporates both political science insights into the study and conceptualisation of the concept of power as well as recognising the demands of public lawyers in their own study of judicial power. There are five main elements to the framework introduced in Chapter 3, namely: source, exercise, interactions, time and space. Through its five elements, the analytical framework has ‘framed’ examples and forms of judicial power. It has provided a series of lenses through which to analyse discrete – albeit related – aspects of power. It has justified the inclusion of these elements as the basic ingredients identified through its review of the concept of power – and the work of political scientists. While these five elements can provide a comprehensive account of judicial power, some of the devil is in the detail. The other contribution of this framework is that each element asks distinct questions of certain aspects of judicial power and in doing so, allows us to think carefully about different features of judicial power *before* considering the meaning of the phenomenon as a whole. This is one strategy to manage the complexities of power alongside compiling a more thorough and multi-layered account of that power and its use. The expectation is that this framework will allow us to put the ‘power’ back into debates about judicial power in ways that lead to more nuanced assessments of the patterns of judicial power than is possible under the narratives that currently dominate and (to some extent) distort modern public law scholarship.

In order to test this different approach and determine whether the analytical framework could produce the clearer, more detailed and systematic accounts of judicial power suggested, two case studies were undertaken. The choice of focus for these case studies was designed to test the

application of the analytical framework in two different contexts and in relation to two different forms of judicial power: the Human Rights Act and section 4 declarations of incompatibility and the office of the Lord Chief Justice. The analysis of s4 DOIs and the HRA would revisit an area of much established debate and analysis. As such, it presented a prime opportunity to ask whether the analytical framework be able to contribute additional insight in an area where there was already lots of focus on judicial power by asking ‘new’ or ‘different’ questions driven by its own approach. In particular, this thesis was interested to see whether there was additional information to be gained from exploring the latter two senses of ‘politics’ which may surround HRA power.

The second case study similarly wished to consider the extent of our understanding but in relation to the power of the office of the Lord Chief Justice. By contrast to HRA power, there exists much less debate and analysis of the office of the LCJ within the context of contemporary debates about judicial power and it is partly for this reason that it was chosen. While the HRA analysis would ask whether it was possible to ask new questions of established debates, this case study shows where the analytical framework can extend existing understanding and conceptualisation of LCJ power. The power of the LCJ does not feature in the list of often-cited reasons for the ‘rise’ in judicial power but it is without doubt an office which holds a significant amount of power. One of the aims of this case study was to consider why this difference exists. These two sites of judicial power were purposefully chosen for the case studies since they speak to two different sites of judicial power. The HRA case study emphasised questions of judicial power *inside* the courtroom and allowed for an analysis of the traditional and regulatory dimensions of the multi-dimensional judicial role. The LCJ case study by contrast located questions of judicial power *outside* of the courtroom by focusing the analysis on questions of judicial leadership.

To directly confront one of the main issues in contemporary debates – a possible tendency to conflate an understanding or analysis of one-off decisions with a wider understanding of the concept of judicial power – this thesis offers an approach which overcomes this. It does so by requiring any episode of judicial power to be contextualised. This process of contextualisation, in addition to the use of ‘thinking politically’ about the power in that instance, means that the application of the analytical framework offers a clearer and more holistic account of our understanding of the notion of ‘judicial power’ in any instance. It draws out key features of that power, recognises distinct and more complex ways in which judicial power is used and identifies the significance of agency, behaviour and relationship dynamics on the exercise of power. Furthermore, the analytical account developed contextualises judicial power temporally – with the aim of showing enduring interest in the phenomenon of any site or form of judicial power – and recognises the differences between the environments or spaces in which it is located. Even in an area such as the HRA where there exists much analysis of questions of judicial power, it is possible to move our focus away from one-off decisions to provide a more systematic and multi-layered account of that power by incorporating understandings of power from political science. This directly addresses some of the concerns raised in this thesis (and beyond) of instances where judicial power may become politicised, particularly where single decisions are cited as the basis for broader claims about the changing nature of judicial power in the UK.

Key findings

The multi-layered problem of judicial power and its many politics has driven this thesis' own analytical response. The contribution of this thesis is to, as a result of the application of that approach, offer three further aspects to the conceptualisation of judicial power. These themes are: to recognise changing patterns in the power and its use; to recognise that judicial power is located inside *and* outside of the courtroom, which reflects the multi-dimensional nature of the judicial role; and, to recognise that judicial power is political and in doing so, think politically about that power and its use. The important contribution of this thesis has been to recognise these characteristics – the so-called ‘new language of judicial power’ – as a way of describing judicial power and better reflecting the realities of that power, in particular its changing, complex and context-dependent nature. Not only does the recognition of these features of an emerging language of judicial power develop the existing discourse, but they also specifically reflect the findings of this thesis in explicitly recognising the key features of judicial power. By doing so, they highlight where existing debates may have neglected or under-investigated some of these features and where, it is argued, greater analysis is needed. For example, the intriguing question of judges exercising power through nondecisions and how this sits with our understandings of the power of other state actors and, importantly, the independence of judges. The idea that judges have at their disposal a number of strategies for using their power in different ways presents a more ‘political’ understanding of judicial power.

This thesis has highlighted instances where a clearer understanding of judicial *power* is achievable and how this understanding, coupled with an approach of ‘thinking politically’ about judges’ power, helps us to see more features of its nature and use. The benefits of this are that we can understand more about the nature, scope and use of judicial power in the UK. We can also better frame our understanding of changes to that power – actual or proposed. We must aim to understand as much about judicial power as possible if we are to really feel able to state where its limits should be, reflect the desirability of those limits against current understandings of the role of judges within the constitution and, importantly, talk with sufficient accuracy about judicial power while navigating the many politics which surround the phenomenon. To expand upon this: it is argued that it may be more accurate to characterise judicial power in terms of changing patterns in its nature and use. Doing so recognises the ebbing and flowing in the nature of the power – such as what power judges have – or in the varied ways in which it is used (or not used, for that matter). It is clear that for the often-cited reasons for a rise in judicial power such as the expansion of the grounds of judicial review or the reforms brought about by the CRA 2005, judges have acquired more power and responsibility. Both the HRA and LCJ case studies demonstrated the acquisition of new or additional responsibilities: a ‘growth’. However, separate from the acquisition of that power is the question of the ebbing and flowing in its use. The use of s4 DOIs has been shown to be patterned with times of increased activity versus those years in which very few, or no, DOIs were issued. In terms of LCJ power, there was evidence that while the number of responsibilities was notable, questions of exercise included the recognition of different LCJs using their powers differently (such as under s5 CRA) or taking the option to delegate power to other judicial leaders.

A feature of this thesis' own claims is that within contemporary debates, existing accounts of judicial power have tended to emphasise the work of judges *inside* the courtroom. Yet this omits important aspects of the work of judges which occurs *outside* of the courtroom. In terms of judicial power, this means that such a focus risks missing significant aspects of the realities of that power and its use. This can relate to extra-judicial activities such as judicial speeches, appearances before select committees or even judicial memoirs. It also relates to a more sizeable dimension of judicial power: that of judicial leadership. In omitting this from our thinking, we may miss questions of judicial power which specifically relate to this. The LCJ case study has highlighted, by comparison to the HRA case study, how there remain under-explored and under-analysed questions of judicial power to consider. By recognising that judicial power is located inside and outside of the courtroom, we can immediately widen the scope of any analysis and subsequent understanding. There is a further observation to make about these two sites of judicial power and that is that sites of judicial power can be related; combining dimensions of the judicial role or locating one exercise of judicial power in overlapping contexts. For example, a senior judge could make a speech about human rights litigation or about the HRA in an appearance before a select committee.

Further to this point about where judicial power is located is the question of how else we might conceptualise that power. This thesis suggests one means is to recognise the judicial role – and therefore its power – as being multi-dimensional. By doing this, we are able to more clearly delineate the types of functions judges are undertaking, both inside and outside of the courtroom, and whether those functions are predominantly internally-facing (such as a court judgment or decisions relating to judicial training policies) or which may adopt some externally-facing qualities (such as an influential HRA judicial review decision or an appearance by the LCJ which criticises current government policy relating to the administration of justice). The three dimensions this thesis identifies, it is hoped, reflect these many complex layers: the *traditional* dimension to locate judicial activity inside the courtroom; the *regulatory* dimension to consider the work of judges in terms of reviewing the actions of others, through such mechanisms as judicial review; and, the *managerial* dimension, to encourage us to include in our thinking about judicial power the influence of judicial leadership and governance.

The final characteristic this thesis suggests is a vital aspect in our understanding of judicial power is to recognise many politics of judicial power and in doing so, to recognise that judicial power is political. This helps us to extend our understanding of the notion of 'politics' – perhaps that which refers to the political power endorsed by an electorate – to include matters of power. Thinking politically about judicial power in this manner helps us achieve two things: it helps us to ask different questions of the power and its use. It also helps us to re-assess established debates and established understandings and to ask whether we are considering the meaning of the phrase 'judicial power' in sufficiently nuanced and sophisticated terms so as to reflect the complexities of the concept of power. In this sense, acknowledging and managing the complexities of *judicial* power allows us to gain a more detailed understanding of the changing nature of that power and, in time, we may be able see more clearly the many aspects to the phrase 'judicial power' we are debating.

This thesis has shown that its own approach of applying the analytical framework has provided a more detailed and more systematic understanding of the nature and scope of judicial power in the

UK at present. There are both specific details which can be drawn out within the analysis about a particular type of judicial power – as was seen in the HRA or LCJ case studies – but there is clearly room for this approach to offer increased clarity when it comes to the task of describing the nature of that power. There is no single definition of what judicial power is and the ‘correct’ or desirable amount of judicial power may always be contested however, by focusing on the ‘power’ and its many elements we are able to contribute more detailed information and analytical insights to wider debates. Not only that, this thesis has shown that it is possible to analyse and re-analyse different forms of judicial power – or different examples of its use – within a clear and multi-layered framework.

Originality and contributions

The originality of this thesis’ contribution has been to show how a different approach can put the ‘power’ back into debates about judicial power. In particular, how using political science theories about power enable a stronger analysis of power within public law scholarship on judicial power. This thesis makes five main and related contributions. First, it offers a critique in Chapter 1 of current dominant debates about judicial power, arguing that those debates lack a sufficiently nuanced understanding of the notion of power itself. Second, it draws in Chapter 2 on the political science literature to help public lawyers to think about how they can enrich the language of judicial power, explaining how political scientists have sought to conceptualise power and overcome the challenges of the complex nature of the phenomenon. Third, building on the political science literature, the thesis articulates in Chapter 3 its own framework for analysing judicial power. This is built around five elements, namely source, exercise, interactions, time and space. Fourth, those elements and the framework as a whole are used to analyse two case studies in Chapter 4 (judicial power under the HRA) and Chapter 5 (judicial power under the office of LCJ). The common themes identified here are: that judicial power is patterned, it ebbs and flows in nature and use; the judicial role is multidimensional and as such, an analysis must consider judicial power both inside and outside of the courtroom. Fifth, the thesis in Chapter 6 has argued for the recognition of an emerging language of judicial power and reflected upon questions of the legitimisation, justification and management of judicial power in light of this thesis’ findings.

The findings of this thesis suggest that in the absence of a single definition of ‘judicial power’, it is nevertheless possible to respond to the question: ‘what is judicial power?’. This thesis’ response is to contribute the following characteristics to the conceptualisation of the phenomenon: to describe judicial power as changeable, multi-dimensional and located both inside and outside of the courtroom and as being political. The identification of these additional characteristics of judicial power are intended to contribute to what this thesis has termed the “emerging ‘new’ language of judicial power”. While the limitations of any narratives are recognised, it is nonetheless that we consider carefully how we talk about judicial power within contemporary debates. The further contribution of focusing on the language of judicial power is that we seek to locate with greater clarity and certainty certain qualities of that power. This is intended to show that, through systematic analysis, it is possible to extend and enhance our understanding of the nature of judicial *power*; to say more about its nature. The justification for this overarching motivation behind this thesis’ own approach is to accommodate the changing, fluctuating nature of judicial power. By recognising the changes in the power, its use and its

wider contexts, we know that we must continue to reflect on the realities of the power and its use against our existing understandings. In this sense, this thesis challenges the narratives on the basis that they may become too fixed or suggest that our understanding is too complete.

Important questions for reflection

As this thesis has suggested previously, it is not the case that we debate judicial power or analyse judicial power simply to highlight gaps in the existing discourse or to describe the nature and tone of that discourse. The purpose is, really, to consider at length how we understand – and *want* to understand – the role and power of judges in the constitution. An important question raised by the study of judicial power here is how else can we understand and give meaning to the phrase ‘judicial power’? This thesis recognises just one means of approaching this task and it is hoped that this approach – and its conclusions – may be qualified, clarified or updated in light of future research and analysis. By offering an updated account of the nature of judicial power using this approach is not to suggest that this is the *only* account possible. It is hoped, instead, that it will prompt further investigation of this kind and that alongside the growing body of normative debates there can be a complementing body of descriptive analysis to offer detail and information about the realities of judicial power at any one time or in any one context.

The further question this raises is once we have the kinds of analytical accounts of different forms or episodes of judicial power, what do we do with them? That next stage is one of synthesis. The synthesis of the updated analytical information about the realities of judicial power – with the emphasis on conceptualising the power in that instance – with existing normative models of the judicial role. This will allow us to comparatively assess, for example, how the account of LCJ power initiated by this thesis begins to reconcile with our understandings of judicial leadership power or the managerial dimension of the judicial role. Does this additional information and multi-dimensional account of LCJ power fit with existing perceptions of the current function of an LCJ in the constitution and how does it match up to what we believe an LCJ should do in the changing UK constitution? In this way, it would be possible to use this thesis’s framework of judicial power to enrich the emerging debates on judicial leadership in the UK and elsewhere.⁶⁷⁸

Two questions posed by this thesis were to ask whether using the analytical framework and thinking politically about judicial power leads to a better understanding of the judiciary’s relationship with other institutions and what the implications of that understanding may be for how we understand the power of judges. This is something of an ongoing question. This thesis has shown that it is possible within the analysis to learn more about matters such as the actors involved in certain power relations or the dynamics of particular interactions – between institutions such as the judiciary and the government in response to a DOI or between individual actors such as in communications between the LCJ and the LC. The wider implications of this will likely relate to the management of judicial power and those involved in its use.

⁶⁷⁸ For example, Rosemary Hunter and Erika Rackley, ‘Judicial Leadership on the UK Supreme Court’ (2018) 38 *Legal Studies* 191, Richard Cornes, ‘Gains (and dangers of losses) in translation – the leadership function in the United Kingdom’s Supreme Court, parameters and prospects’ (2011) *Jul PL* 509, Brenda Hale, ‘A Supreme Judicial Leader’ a chapter in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009)

Chapter 6 offered some initial suggestions as to how power relationships and judicial power may be managed but this is also a discussion to be continued. The findings of this thesis give rise to a number of other important questions. Firstly, the question of whether existing scholarship recognises the need for ongoing re-examination of our understandings and assumptions about the power of judges. This is not to suggest that long-held beliefs about the nature of the constitution, such as whether it is best understood as a political or legal constitution, or the role of judges within that constitution are redundant. Rather, it is asking whether we interrogate our understandings regularly enough given the picture of change this thesis has recognised: change in the power and its use and changes in the contexts in which it is located. Are we able to say with confidence that accounts of judges which include questions of judicial power sufficiently assess the evolving realities of that power against our understandings?

The implication of this for contemporary debates about the power of judges is to ask whether the claims made within those debates about judicial power include sufficient conceptualisation of the power being debated. Are such claims acknowledging the multi-dimensional nature of the judicial role or the multi-dimensional nature of the power and its use? It must be questioned whether contributions to debates and claims made about the power of judges have, too readily, moved onto questions of the limits or management of that power without sufficient attention given to ascertaining a systematic understanding of the power itself. This thesis suggests there can be benefits from acknowledging within our discussions of the role and work of judges, the many dimensions of that role. For example, in recognising that an episode engages the managerial dimension of the judicial role may help us to understand the nature and use of power in that instance.

There is a question of why of institutional judicial power and individual judicial power are received differently, even where the power of an individual judge (such as the LCJ) is shown to be extensive. Which qualities of each form of judicial power are more palatable than others and what are the reasons for such differences? A suggestion may be that such perceptions are drawn from concern rather than analysis of realities. The concern conveyed prior to the enactment of the HRA about the new power afforded to the judiciary to declare legislation incompatible was clear yet the analysis shows that the realities of the use of that power – and the responses to it – are much more muted. Compare that to the significant responsibility of an LCJ to drive forward judicial policy and represent the judiciary and the relative quiet in response. It would be interesting to consider, through future analysis, whether this trend bears out in other areas of judicial power and if so, why.

This thesis has also prompted the question of what the ongoing priorities are for judicial power in the UK. Firstly we might ask whether we are moving towards a new concept of judicial power. With recognition of the need to embark on further analysis as described by this thesis, coupled with existing scholarship and debate, it is possible to foresee further clarification of this term ‘judicial power’. By highlighting the gaps in constitutionalism in this regard, it is hoped that future research may add more to this understanding. Moving away from questions of scholarship or theory and into questions of practice, the primary question relates to how this new understanding of judicial power affects strategies for the governance of the judiciary more widely. However, this is not just an academic exercise but one of transparency and clarity.

We may continue to look at how judges themselves perceive their power, how other constitutional actors perceive judicial power in relation to their own and how the lines drawn between constitutional powers can continue to be negotiated. The difference is that by asking for more information about the power itself as part of this process, there may be a greater collective understanding – consensus, even – about where those lines will be. The important thing here is that in better understanding the realities of judicial power, we can ensure that strategies to do with its governance or suggestions for reform of its nature and scope are based on sufficient evidence. These are political questions and they are questions about power; judicial power and the judiciary as an institution are not immune from these considerations. Yet, conceptualising their power and its management as this thesis suggests may mitigate the warranted concerns of judges remaining separate from (some senses of) politics.

Opportunities for future research

As this thesis has taken an analytical methodology, it is clear that there is scope for subsequent empirical work to complement the approach and to consider other ways to evidence the tentative conclusions drawn here. It would be interesting now to develop the preliminary stage in the process of better understanding judicial power with the design of further research to collect real-world data. For example, while this thesis did not undertake interviews or observational studies, this is clearly an area of opportunity for finding out more about the realities of judicial power. Not only this, it may be possible to understand more about how judges perceive their own power: its nature, its limits or the different ways in which they use it and for what reasons. There is a sense of this within the thesis' analysis but this 'sense' could be strengthened through more directed, empirical work. In this regard, there is scope – through further analysis and through empirical data collection – to not only seek meanings, identify silences or to explore relationships in order to understand the 'norms' of judicial power as an external observer but also to ask those who have the power(s) in question and who are affected by its use in different ways how they understand its nature.

At its outset, this thesis recognised its limitations in terms of primarily focusing on the work of the senior judiciary and recognising that this leaves a significant part of the judiciary and its power un-explored. Therefore, it would be a necessary and important piece of future research to consider the power of judges at all levels of the judicial hierarchy. This is to recognise the power of *all* judges and to better understand the power of the judiciary as an institution and thus produce an even more complete picture of judicial power as a result. Alongside this, there remain under-investigated 'internal' aspects of judicial governance such as the power relations which exist within bodies such as the Judicial Executive Board or Judges' Council. In the spirit of increasing our understanding of judicial power, there are numerous features of the power of such bodies which would merit further investigation. For example, we might understand more about the kinds of power they have, the ways in which they use that power and for what purposes. We might think about the internal and external constraints and influences on the exercise of power by the JEB or JC and perhaps the varying roles and dynamics of actors within those bodies on the power relations we observe. This would inevitably lead to the wider questions – as seen in this thesis – about the justification, legitimisation and management of that power as a feature of wider constitutional governance. Not only this but it would permit us to assess the nature and

scope of the power of those bodies, the location of power within the judicial hierarchy and understanding more about the realities of judicial power within the judiciary.

Moving away from questions of judicial power, one may undertake the analytical exercise and consider the power of other constitutional actors. For example, to analyse and compare the power of the ‘new’ LC vs the ‘old’ LC in this approach or to compare the power of the LC and LCJ in their own relationship. This interest in the ‘power’ of the Lord Chancellor and other law officers is reflected in recent developments such as the HL Constitution Committee’s new inquiry: ‘Role of the Lord Chancellor and the Law Officers’.⁶⁷⁹ Here, the interest in these roles and their own powers provides an opportunity to apply this thesis’ analytical framework to wider political roles. For example, there are an increasing number of questions to consider about roles such as the Attorney-General and how legal and political responsibilities are reconciled within them.⁶⁸⁰ These are further examples of sites of power where the complex dynamics between law and politics arise and where, perhaps, an increased analytical understanding of the nature and scope of power may be useful in determining future steps for reform. In addition to considering wider domestic roles and their power within the UK constitution, there is the potential to use this approach as a comparative tool to analyse judicial power – and other forms of public power – in other jurisdictions. This would make for useful and illuminating analysis of commonalities or differences in the nature and use of that power and to highlight significant variations in different constitutional contexts.

It the above discussion begins to suggest, this thesis’ approach is not only applicable to judicial power. While it was developed with an analysis of judicial power in mind, it is informed by the scholarship on power as a concept and is not, therefore, specific to any form of power. It could be used and tailored to undertake analysis into the realities of, for example, executive power and its use. The many layers of institutional governance within the executive would make for important discussion such as the role and influence of the civil service and its interaction with the Government. One might also consider specific executive actors, such as the Prime Minister or other important roles whose influence may be known but not fully understood, such as the role of Permanent secretaries. The general applicability of the five elements within the analytical framework suggest it will easily transfer to other contexts and other forms of power. The context here is one of constitutional law however, it is feasible that this approach to analysing power may be used to think about other forms of power such as organisational power or to look at organisational power in specific contexts such as education or healthcare. One must acknowledge the potential difficulties of investigating questions of power: question of access to the inner sanctum of the judiciary and bodies such as the JEB may prove difficult. It may also be that in some cases, mapping power relations proves challenging since it may be difficult to capture the degree of influence of an actor’s personality or leadership style upon the wider ‘picture’ of power.

⁶⁷⁹ UK Parliament, ‘Constitution Committee: Role of the Lord Chancellor and the Law Officers’ <<https://committees.parliament.uk/work/6540/role-of-the-lord-chancellor-and-the-law-officers/>> accessed 8 March 2022

⁶⁸⁰ Joshua Rozenberg, ‘You can’t ride two horses: It’s time to make the office of attorney general a non-political public appointment’ (The Critic, March 2022) <<https://thecritic.co.uk/issues/march-2022/you-cant-ride-two-horses/>> accessed 8 March 2022

A continued analysis of judicial power in the UK must inform the continued debates about the nature and extent of that power. Analysis should encourage, even require, a continual assessment – and re-assessment – of how we understand the role and power of judges in a variety of different contexts. This is vital to ensuring that we understand the nature of judicial power with sufficient accuracy alongside debating the necessary scope of that power. Such negotiations in meaning and understanding are an ongoing task due to the changes in the nature and use of that power but it remains fundamentally important. It is especially important given that the power of judges will continue as a feature of wider political and constitutional debate, whatever the emphasis of such debates may be.

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