

The London School of Economics and Political Science

Judicial Review and the Vanishing Trial

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Declaration

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Abstract

The thesis aims to contribute to the ‘vanishing trial’ debate. The first part updates and extends the existing body of research in this field on civil cases in courts of first instance in England and Wales, specifically the County Court, the Queen’s Bench Division and the Chancery Division, both individually and combined. Three different aspects of the vanishing trial are examined – the number of cases coming into the litigation system, the number of trials and the proportion of proceedings initiated that are disposed after trial. Current studies examined patterns between the late 1950s and 2011. This thesis provides an extended analysis, for the period 1949 to 2017, analysing whether the patterns identified in existing literature remain an accurate representation of trends in civil first instance cases.

The second part fills a gap in the existing literature by bringing public law into the vanishing trial debate. Judicial review cases were only briefly mentioned in a single study into the vanishing trial as showing a contrasting trend of growth between 2004 and 2011. There has however been no analysis within the vanishing trial debate as to why judicial review is bucking the trend, or the implications of this for the overall vanishing trial thesis. Separate to the vanishing trial debate, there has been a considerable body of empirical research into trends in judicial review. This literature has however only engaged to a very limited extent with trends in other areas of the litigation system. The aim of this section is to bring together the two bodies of literature by comparing and contrasting trends between civil law and judicial review cases between 1981 and 2017 for all three of the elements highlighted in the vanishing trial debate. It also aims to explore potential underlying reasons behind any convergences and divergences in patterns observed.

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Dedicated to the memory of my grandmother and brother.

Mary Green (1922-2017)

David John Teeder (1975-2019)

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List of Abbreviations

Acknowledgment of Service Form	AOS
Alternative Dispute Resolution	ADR
Civil Procedure Rules	CPR
Her Majesty's Courts and Tribunal System	HMCTS
Ministry of Justice	MoJ
Queen's Bench Division	QBD
Royal Court of Justice	RCJ
Upper Tier Immigration and Asylum Tribunal	UTIAC

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Introduction

In recent years there has been increasing interest in a phenomenon known as the vanishing trial. This debate focuses on concerns about the reduction in the number legal proceedings being started and disposed after trial, as well as the proportion of cases disposed after trial. Two seminal articles by Galanter on the topic have prompted a rich debate amongst socio-legal scholars about attitudes towards litigation across a number of jurisdictions. These include a limited number of studies into the vanishing trial in England and Wales. The vanishing trial debate is of particular importance in an England and Welsh context, given the importance of understanding the impact of fundamental policy reforms affecting the litigation system – most notably the Woolf reforms, increases in costs and the recent virtual abolition of civil legal aid.

What is particularly notable about the vanishing trial debate is the almost total absence of one area of law from existing studies – that of public law. When the subject has been alluded to it has been no more than a brief comment that the numbers of applications and trials in this area of law was increasing in contrast to the vanishing trial in other areas of law.¹ Although both public law scholars and vanishing trial scholars are both interested in trends in the litigation system discussions have tended to be in silos. This thesis argues that it is important to understand the interrelationship between the civil justice system generally and public law cases in particular. Moreover, it is important to examine whether trends in the two systems converge or not and whether similar factors can be determined to underlie trends in both.

This thesis aims to contribute to the vanishing trial debate as it relates to England and Wales in two ways. First by updating and extending the existing analysis of the County Court, Queen's Bench Division and Chancery Division to cover the date range 1949-2017 and determine whether trends observed in existing studies, and conclusions drawn from those trends remain accurate. Second, by bringing public law, in the form of judicial review cases, into the vanishing trial debate.

The first chapter explores the phenomenon of the vanishing trial, reviewing current scholarship in the field. The chapter then goes on to update the existing analysis as it relates to civil cases in England and Wales, challenging the accuracy of some of the conclusions

¹ H. Genn, 'Why the Privatisation of Civil Justice is a Rule of Law Issue' (36th F A Mann Lecture, Lecture at Lincoln's Inn, 19th November 2012), pp.1, 5.

reached in earlier studies. The focus of the analysis is on proceedings in the County Court, the Queen's Bench Division and the Chancery Division, both individually and combined. The chapter examines each of the three elements of the vanishing trial in turn – the number of cases coming into the litigation system, the number of cases disposed by trial and the proportion of cases disposed by trial. Whilst not attempting to definitively answer the question of the causes of the trends, the chapter will engage with explanations posited in existing literature, and consider their ongoing appropriateness.

The second chapter will detail the data sources and methods used in this study – the Judicial Statistics Reports published by the Ministry of Justice and its predecessors. The chapter will engage with both general issues relating to the analysis of secondary data and specific issues relating to Judicial Statistics. It will then go on to justify why the reports remain the only credible source of data for a longitudinal project of this nature. The remainder of the chapter will then focus on what and how specific data was collected for each of the courts and proceedings included in this study.

The third chapter highlights that, despite the importance of public law and the extent of debate about trends in litigation in the field, it has been virtually ignored in the vanishing trial literature to date. The chapter goes on to explore the meaning of the concept of public law, considering the various ways scholars have defined the concept, and how those approaches differ from that adopted by the courts in practice. It will then consider the implications of the lack of an agreed meaning of the concept are for defining what constitutes a public law case. Limitations of approaches to defining a public law case that have been used in existing studies are explored and an alternative approach is proposed, aimed at overcoming the issues identified.

The fourth chapter engages with the question of which proceedings should be analysed in this project in order to bring public law cases into the vanishing trial debate. Two main issues are dealt with in the chapter. First, whether any dispute resolution processes can be classified as public law proceedings, and if so, which. This involves mapping the typology of cases developed in the previous chapter onto the courts and tribunal system and, following this, identifying whether any types of public law cases have already been examined in existing vanishing trial literature based on the courts included in those studies. Second, which of the public law proceedings fall within the definition of a trial. Practical arguments will be presented justifying restricting this project solely to judicial review proceedings.

The final chapter will bring address the lack of attention paid to public law in the vanishing trial debate to date by comparing and contrasting trends in judicial review cases with civil law cases more generally between 1981 and 2017. Outside of the vanishing trial debate, there has been a significant body of research conducted into trends in judicial review. This chapter aims to unite the two bodies of research, and update the existing empirical analysis of judicial review cases to 2017. It examines whether trends in the civil justice system generally differ from those seen in judicial review. It concludes with an in-depth analysis of judicial review cases, investigating the potential causes for the trends seen and considering whether they explain any divergences with civil law cases more generally.

Chapter 1: The Vanishing Trial Phenomenon

Introduction

It has long been acknowledged that the majority of legal proceedings that are initiated do not end up in trials, but are instead abandoned or settled out of court. This has been of particular interest to socio-legal scholars interested in the ways in which people bargain in the shadow of the law.¹ Research by Galanter in 2004 altered the focus of such work by highlighting the fact that, in the US, the proportion of cases disposed by trial has been declining for over one hundred years and the number of trials has been dropping sharply for thirty years. This led him to coin the phrase the ‘vanishing trial’.² His findings have led to a burgeoning body of scholarship analysing the vanishing trial and its impact on civil justice systems in a number of countries including the UK.³ Writing in 2012, Genn argued that official statistics for England and Wales show a ‘decline, and now virtual extinction – of trials in the civil courts and with it public determination of the merits of civil disputes’ over the last fifteen years.⁴

This chapter will explore the phenomenon of the vanishing trial. It will first engage with the vanishing trial debate. The chapter will go on to review the existing literature in the field as it relates to civil trials in England and Wales. The remainder of the chapter will focus on each of the three central elements of the vanishing trial in turn – the number of cases coming into the litigation system, the number of cases disposed after trial and the proportion of cases disposed after trial. The aim of the chapter is to review and update existing research to cover, as far as possible, the period 1949-2017. This will enable me to query some of the conclusion made in current scholarship on the vanishing trial and determine whether Genn’s assessment of proceedings in English and Welsh first instance civil courts remains accurate.⁵

¹ See for example H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon 1987); R.H. Mnookin and L. Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1978-1979) 88 *Yale L.J.* 950.

² M. Galanter, ‘The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts’ (2004) 1 *JELS* 459; M. Galanter, ‘The Hundred-Year Decline of Trials and the Thirty Years War’ (2004-2005) 57 *Stan.L.Rev.* 1255; see also M. Galanter, ‘A World Without Trials?’ [2006] *J.Disp.Resol.* 7.

³ Two volumes of leading journals have been dedicated to the vanishing trial phenomenon. See the *Journal of Empirical Legal Studies* volume 1 (2004) and the *Journal of Dispute Resolution* [2006].

⁴ H. Genn, ‘Why the Privatisation of Civil Justice is a Rule of Law Issue’ (36th F A Mann Lecture, Lecture at Lincoln’s Inn, 19th November 2012), p.1.

⁵ Throughout the remainder of this chapter, ‘England’ will be used to refer to the legal system in England and Wales.

It is argued that it is important to get a more robust empirical picture than currently exists of trends to be able to address the question of what is causing changes in the volume of civil litigation. This chapter provides that analysis and, whilst it will not attempt to definitively answer the question of why certain trends are discernible, it will engage with potential explanations of the vanishing trial presented in existing literature and the impact that recent data has on the ongoing validity of claims in the existing literature.

The vanishing trial debate

Galanter established the vanishing trial as a field of study through empirical research into trials, both civil and criminal, in US Federal and State courts between 1962 and 2002.⁶ He argued that the increasing proliferation of law in terms of lawyers, legal literature, legislation and the prominence of law in the public domain could be contrasted with decline in one specific aspect of law – trials.⁷ However, he did not just analyse the absolute number of trials over that period. He also engaged with the proportion of cases that were disposed by trial and with the number of proceedings issued. In this way he was able to examine demand for law as expressed through the initiation of proceedings and changing trends in settlement once proceedings were commenced.

Although Galanter devoted more attention to the number and proportion of trials than he did to the number of cases commenced, his approach supports the argument that the vanishing trial phenomenon can be talked about as having three key components:

- 1) The number of cases coming into the litigation system
- 2) The number of cases disposed after trial
- 3) The proportion of cases disposed after trial

These data are not unrelated. Fluctuations in the number of cases entering the system can have a significant impact on both the number and proportion of trials.

His data showed a general pattern of decline between 1962 and 2002 across all courts in the number and the proportion of cases filed that resulted in trial. The number of trials decreased by 21 percent from 5,802 to 4,569 during that period.⁸ Much more dramatic was

⁶ Galanter, 'Vanishing Trial' (n.2 above); Galanter, 'Hundred-Year Decline' (n.2 above); Galanter, 'A World Without Trials?' (n.2 above).

⁷ Galanter, 'Vanishing Trial' (n.2 above), p.460; Galanter, 'Hundred-Year Decline' (n.2 above), p.1255.

⁸ Galanter highlighted that the figures overstated the number of completed trials. The source of his data, the annual reports of the Administrative Office of the US Courts, collated all cases terminated during or after trials. Table C-2 contains data on filings, table C-4 on dispositions, trials and percentages. Galanter, 'Vanishing Trial' (n.2 above), pp.462-463, 485-486. Whilst this would be true

the change in the proportion of cases disposed by trial from 11.5 percent to 1.8 percent – an 84 percent drop.⁹ In contrast, the number of cases entering the litigation system increased meaning that there were more cases coming into the system but progressively fewer reaching its apex. Acknowledging that the picture was not quite that straightforward,¹⁰ he went on to argue that the decline could be divided into two distinct types, which he distinguished as ‘a long-term gradual decline in the portion of cases that terminate in trial and a steep drop in the absolute number of trials’.¹¹ He referred to them respectively as the ‘hundred-year decline’ and the ‘thirty years war’.¹² Although his date range only started in 1962, he argued that the pattern he observed of a decline in the proportion of cases disposed by trial was a continuation of a much longer term trend, justifying his categorisation as a hundred-year decline.¹³ According to Galanter, during the period from the mid-1980s, both the hundred-year decline and the thirty years war were taking place, as shown in Figure 1.1 below.

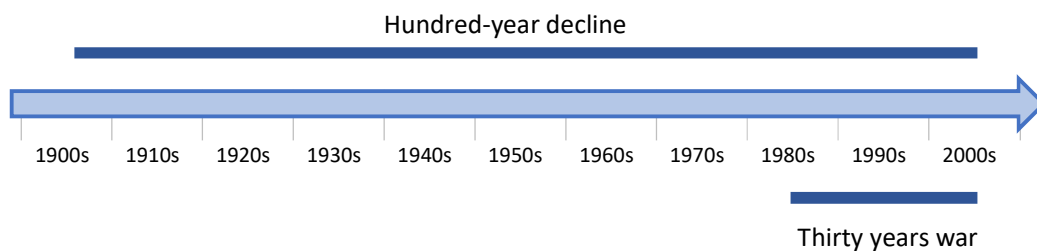


Figure 1.1: Representation of the time lines of the hundred-year decline and thirty years war.

It is possible to split Galanter’s data into two periods – a ‘slow’ period, covering the early part of the hundred-year decline up to the mid-1980s and a ‘fast’ period, representing the thirty years war and the last thirty years of the hundred-year decline, from the mid-1980s

for the figures in both 1962 and 2002, any increase in the rate of cases settling mid trial over the time period would mean that the decline in the number of trials would be even more significant than he presented.

⁹ *id.*







¹⁰ His own data shows that the picture is more complicated than the simplistic image of a consistent vanishing trial he presented. For example, his main findings related only to the Federal Courts, with data showing that the exact patterns of numbers and proportions of trials varied between Federal and State Courts.

¹¹ Galanter, ‘Hundred-Year Decline’ (n.2 above), p.1256.

¹² *id.*

¹³ See *id.*, pp.1256-1259. In which he discusses studies which showed a decline in the percentage of cases disposed by trial from the early part of the twentieth century in both Federal and State courts. The exact point at which the decrease started varied depending on the court and the time frame he highlights from the other studies calls into question is use of the phrase ‘100 years decline’ to some extent.

onwards. Figure 1.2 below summarises his findings on the trends in the three elements in these two periods.

Element of vanishing trial	Slow decline (1900s-mid-1980s)	Fast decline (mid-1980s-2004)
Number of cases coming into the litigation system		
Number of cases disposed after trial		
Proportion of cases disposed after trial		




 Fast increase
  Slow increase
  Fast decrease

Figure 1.2: Summary of distinctions in direction and relative rate of trends in Federal Courts in the three elements of the vanishing trial based on Galanter's findings in respect of the 'slow' and 'fast' periods.

The rate of decline in the proportion of cases disposed after trial remained relatively constant across both periods. However, whilst the number of claims being filed in Federal Courts increased across both periods,¹⁴ it is particularly interesting that contrasting patterns were observed in the number of cases disposed after trial in each of the two periods. They rose, albeit at a slower rate than the number of cases initiated in the 'slow' decline period, and fell in the 'fast' decline period.

Explanations for the vanishing trial phenomenon

Galanter identified twelve potential explanations for the vanishing trial phenomenon, which he grouped into six categories, as shown in Figure 1.3 below.¹⁵ The categories are not mutually exclusive. He argued that the relative contribution of each explanation differed between the two types of vanishing trial he identified and hence, it is likely that the relative contribution of each changed across the two periods.

¹⁴ In the 'fast' period', the number of cases filed in Federal courts continued to increase, growing fivefold over the date range. However, in the same period Galanter highlighted that filings in State courts decreased, albeit at a slower rate than the decline in the number of trials in State courts.

¹⁵ He stated that 'observers', who he did not name, proposed the list of explanations. Galanter, 'Hundred-Year Decline' (n.2 above), p.1262.

Category	Explanations
Changes in demand for trials	<ul style="list-style-type: none"> • The mix of cases being filed has changed, with relatively fewer in the most trial-prone categories • There is a longer wait to get to trial • Modern procedure facilitates settlement by providing information and cost incentives • Defendant corporations are more averse to the risk of trial due in large measure to exaggerated estimations of plaintiff success and of the likelihood of punitive damages awards • Corporate and governmental parties have embraced alternative dispute resolution (ADR) as preferable to courts and/or trials in many sorts of cases • In criminal cases, guidelines and determinative sentencing have raised the cost of trials for defendants
Changes in available resources	<ul style="list-style-type: none"> • Courts increasingly lack the resources to hold many trials • Cases are more complex and more costly to carry to trial (due to the elaboration of procedure and the higher costs of lawyers and experts)
Changes in the character of the process	<ul style="list-style-type: none"> • Cases are more complex and more costly to carry to trial (due to the elaboration of procedure and the higher costs of lawyers and experts) • There is a longer wait to get to trial • Modern procedure facilitates settlement by providing information and cost incentives • Courts have embraced judicial management, which supplies greater incentives and opportunities for judges to dissuade parties from going to trial
Changes in judicial ideology and practice	<ul style="list-style-type: none"> • Courts have embraced judicial management, which supplies greater incentives and opportunities for judges to dissuade parties from going to trial • Judges' conception of their role has shifted from one of presiding at trials to one of resolving disputes • Judges increasingly approve of and encourage ADR
Changes in the strategies and tactics of litigants	<ul style="list-style-type: none"> • Defendant corporations are more averse to the risk of trial due in large measure to exaggerated estimations of plaintiff success and of the likelihood of punitive damages awards • Corporate and governmental parties have embraced alternative dispute resolution (ADR) as preferable to courts and/or trials in many sorts of cases • In criminal cases, guidelines and determinative sentencing have raised the cost of trials for defendants
The appearance on the scene of ADR	<ul style="list-style-type: none"> • Corporate and governmental parties have embraced alternative dispute resolution (ADR) as preferable to courts and/or trials in many sorts of cases • Judges increasingly approve of and encourage ADR • ADR forums have developed and proliferated

Figure 1.3: Categories of explanations for the vanishing trial phenomenon.¹⁶

¹⁶ Adapted from id, pp.1262-1263.

Galanter attributed the decline in the proportion of cases disposed after trial primarily to changes in available resources, especially growing constraints on the judicial 'plant' or resources. Specifically, his argument was based on the fact that the number of courts was insufficient to keep up with the demand for trials over this period, due to a growing population, and increasingly wide array of legally enforceable rights for citizens and a broader range of people entitled to access the judicial system to enforce their rights.¹⁷ As a result, although the number of trials increased, it did so at a slower rate than that of the number of cases filed, resulting in a declining proportion of cases filed that reached trial. Galanter argued that these explanations for the decrease in the proportion of trials were unable to account for the more dramatic recent decline in the absolute number of trials and posited a number of alternative explanations.¹⁸ First, based on findings that the number of filings continued to rise in the 'fast' period, he discounted the possibility of it simply being a reflection of a decline in the use of the courts.¹⁹ He also argued that it was not simply due to an increase in the proportion of filings of types of cases that were less likely to get to trial.²⁰ Instead, he argued that one reason underlying the 'fast' period of decline was what the development of what he termed the 'jaundiced view' of law from the 1970s. During this period he argued that the language of and calls for 'access to justice' was replaced with warnings of a 'litigation explosion', characterised by:

[i]ndiscriminate suing by opportunistic claimants, egged on by greedy lawyers, and enabled by activist judges and biased juries that capriciously award immense sums against blameless businesses and governments.²¹

He claimed that this view was developed by elite players concerned with the growing ability of ordinary citizens to access courts and hold them to account.²² Galanter went on to argue that the jaundiced view was deliberately promoted by well-funded campaigns, as well as being supported and reinforced by media coverage and that, despite a lack of evidence to support it, it has become conventional wisdom that increasingly undermines confidence in the governments and public justice.²³

¹⁷ *id.*, pp.1263-1264.

¹⁸ Diamond and Bina challenge Galanter's claim that supply side explanations do not play a role in the decline in the number of trials, although they accept that the evidence is mixed. S.S. Diamond and J. Bina, 'Puzzles about Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals' (2004) 1 JELS 637.

¹⁹ Galanter, 'Vanishing Trial' (n.2 above), p.485.

²⁰ *id.*

²¹ Galanter, 'A World Without Trials?' (n.2 above), p.20.

²² *id.*

²³ *id.*

In addition to those explanations, Galanter also detailed five explanations for the vanishing trial, for each of which he made predictions of future trial trajectories. These were: convergence, displacement, assimilation, transformation and evolution.²⁴ The first of these, 'convergence', built on Sherman's argument that the American trial process was gradually aligning itself with that seen in continental Europe.²⁵ This is argued to account for vanishing trials because it helps explain the changing judicial role from a primarily adjudicative one to a more investigative and managerial one, as a result of which more cases are disposed of before they reach trial.²⁶ Although Galanter accepted that the convergence scenario had merit and that there was some evidence for it, he questioned how far it could go given how deeply imbedded lawyer-dominated adversarial trials, especially the concept of trial by jury was in the American system.²⁷

The second model he presented was 'displacement'. According to this theory, trials are not vanishing so much as relocating from trial courts to other locations.²⁸ He accepted that if trials were defined as proceedings 'in which parties present proofs and arguments according to a pre-set procedural template to an authoritative decision-maker who gives a binding decision', then many trial-like events occur outside the courtrooms.²⁹ In terms of his two vanishing trial types, Galanter argued that there was evidence for the displacement argument in the 'hundred-year decline', with growth in the number of courts far outstripped by that of administrative and private tribunals, resulting in a significant portion of adjudication, although not necessarily trials, taking place outside of courts.³⁰ Without a comparison of the subject matter of cases that vanished from courts with those heard in such alternate tribunals it is however difficult to determine whether growing numbers of the latter bodies was a factor in trials vanishing from courts, or whether it is instead evidence of an overall growth in trials in that period, contrary to Galanter's primary thesis. In the 'thirty years war', Galanter notes that there is similar evidence of decline in the volume of adjudication in the alternative bodies, contrary to the displacement thesis, under which the rapid decline in court-based trials should have correlated with an equally rapid growth in

²⁴ id, pp.23-33.

²⁵ id, p.23; E.F. Sherman, 'The Evolution of Americal Civil Trial Process Towards Greater Congruence with Continental Trial Practice' (1999) 7 *Tul.J.Int'l & Comp.L.* 125, p.138.

²⁶ Galanter, 'A World Without Trials?' (n.2 above), pp.23-25.

²⁷ id, pp.23-24.

²⁸ id, pp.24-25.

²⁹ id.

³⁰ id, p.25.

trials in alternative bodies.³¹ This suggests that even if the displacement theory is correct, it is not the primary driver behind the more recent reduction in trials.

Under the third scenario, 'assimilation', law is becoming less distinct, both in terms of various dispute resolution bodies becoming increasingly similar and with other institutions becoming legalised, for example by adopting legal standards and due process.³² Galanter argues that this model helps explain why trials are vanishing because it reflects the changing role of courts from adjudicative bodies to sites of bargaining and mediation, which has resulted in a vicious cycle of pressures to settle cases reducing the potential for trials, which in turn increases the pressure to settle because of a growing lack of trial experience on the part of lawyers and judges.³³

'Transformation' relates to an argument that the role of law in society is changing, with 'hard law', or adjudication being displaced by 'soft law' in the style of bargaining and negotiation.³⁴ This scenario appears to some extent to merely be a variation of the assimilation model, placing the changing role of the courts in the context of transformation of law's role more broadly. Whilst it does reflect the shrinking role of definitive adjudication in the complex of governance, Galanter argues that there is no direct evidence for transformation.³⁵

The final model that he presented was 'evolution', based on arguments by Menkel-Meadow that the demise of the adversarial trial was evidence of the continuing evolution of the American legal system.³⁶ Her argument was that law was evolving away from trials because parties were deliberately seeking better ways to resolve disputes.³⁷ Based on this, Galanter disputed the use of the term evolution to describe the process, arguing it is more akin to a 'prescriptive program of "intelligent design"'.³⁸

Galanter's research and findings were solely based on trials in the US. Following his seminal work, there has been considerable further scholarship on the vanishing trial.³⁹ Some

³¹ id, pp.25-26.

³² id, p.27.

³³ id, pp.27-30.

³⁴ id, pp.30-31.

³⁵ id, p.31.

³⁶ C. Menkel-Meadow, 'Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve' (2004) 57 *C.L.P.* 85, p.87.

³⁷ id, pp.112-114.

³⁸ Galanter, 'A World Without Trials?' (n.2 above), pp.32-33.

³⁹ See for example, *The Journal of Empirical Legal Studies* volume 1 (2004) and the *Journal of Dispute Resolution* [2006] both of which were dedicated to the vanishing trial debate. See also J. Lande, 'Shifting the Focus from the Myth of the "Vanishing Trial" to Complex Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter' (2004-

additional explanations for the vanishing trial have been proposed. These include the increased role of class actions, the advent of multi-district litigation, increased costs of litigation, an expansion in the use of summary judgment and a rise in litigant's fear of contemplating trial as factors affecting the decline in the number of cases disposed after trial.⁴⁰ The bulk of this further research has remained concentrated on the vanishing trial as it relates to the US. However, the question of whether the phenomenon is unique to that jurisdiction has also been addressed, with some investigation into trends in the number of trials in other countries. A distinction can be seen between civil law countries, in which a high proportion of civil disputes continue to be dealt with in the courts,⁴¹ and common law jurisdictions, in several of which evidence of a vanishing trial has been found.⁴² The chapter will now go on to examine analysis of the vanishing trial and its three component elements as it relates to England and Wales.

The vanishing trial debate in England

Empirical analysis of litigation patterns is especially relevant in the context of England, due to the high volume of procedural changes that have occurred in recent decades, notably the Woolf reforms and cuts to legal aid. Despite this, Genn has argued that the vanishing trial debate has 'passed largely unnoticed, unquestioned and little remarked upon in England & Wales'.⁴³ To date, there have only been four empirical studies that have explicitly focussed on the vanishing trial in relation to England,⁴⁴ although trends in the numbers of trials in various courts have been commented on by other scholars outside the context of the vanishing trial debate.⁴⁵ These projects provided important insights into trends in the

2005) 6 Cardozo J. Conflict Resol. 191; M. Galanter and A.M. Frozena, 'A Grin without a Cat: The Continuing Decline & Displacement of Trials in American Courts' (2014) 143 Daedalus 115.

⁴⁰ Diamond and Bina (n.18 above), p.638.

⁴¹ See for example F. Steffek and others (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart 2013). In which the high proportion of trials in Germany, Austria, France and Belgium is examined.

⁴² See for example H.M. Kritzer, 'Disappearing Trials? A Comparative Perspective' (2004) 1 *JELS* 735. , who examined trends in civil trials in the province of Ontario in Canada.

⁴³ Genn, 'Privatisation' (n.4 above), p.2.

⁴⁴ Kritzer (n.42 above); R. Dingwall and E. Cloatre, 'Vanishing Trials?: An English Perspective' [2006] *J.Disp.Resol.* 51; H. Genn, *Judging Civil Justice* (CUP 2009); Genn, 'Privatisation' (n.4 above).

⁴⁵ See for example C.W. Brooks, *Lawyers, Litigation and English Society Since 1450* (Hambledon Press 1998), pp.113-115. Who presented data on fluctuations in the number of civil actions commenced between 1900 and 1995, showing a period of growth from the mid-1940s to 1988, rapid growth to 1991, followed by year on year decreases until 1995, by which time it had fallen back to 1988 levels. See also J. Baldwin, *Small Claims in the County Courts in England and Wales: The Bargain Basement of Civil Justice?* (Clarendon 1997), p.ch2. , who considered trends in the number of small claims actions in the context of the overall number of actions in the County Courts.

numbers of proceedings commenced, set down for trial and tried in three first instance civil courts in England and Wales – the County Court, the Queen’s Bench Division of the High Court (QBD) and the Chancery Division of the High Court.⁴⁶ They focus on activity over the latter half of the twentieth century and the first decade of the twenty first. Detailed analysis and sources varied between the studies, as did their conclusions on the reasons behind the patterns that each identified. Figure 1.4 below summarises the civil courts included in existing research, and the relevant date ranges for the stages analysed in each study. As shown, although each of the studies primarily analysed only the same three courts, they differed in the stages and dates examined in each court. It can be seen from this that existing commentary described the position up to 2011.







Court	Stage	Kritzer	Dingwall and Cloatre	Genn (2009)	Genn (2012)
County Court	Claims issued	-	1998-2004	1938-2005	-
	Trials	1958-2002	1998-2004	1958-2005	1975-2011
	Proportion	-	1998, 2004	-	-
Queen’s Bench Division	Claims issued	1962-2002	1995-2004	1938-2006	1962-2011
	Set Down	1974-2002	1998-2004	-	-
	Trials	1958-1998	1998-2004	1958-1998	1974-2011
	Proportion	1962-1998	1998, 2004	1962-1998	-
Chancery Division	Claims issued	-	-	2008, 2011	-
	Trials	1977-2003	-	-	-
Administrative Court	Applications	-	-	-	2004-2011
	Determinations	-	-	-	2004-2011
Combined	Claims issued	-	1998-2004	-	-
	Trials	-	1998-2004	-	-

Figure 1.4: Summary of data by court and stage of proceedings in existing vanishing trial literature.

Overall, the findings of these studies were consistent with those for Galanter’s ‘fast’ period in the US in respect of two elements of the vanishing trial thesis, showing a decline in the number and proportion of trials occurring in courts of first instance dealing with civil cases

⁴⁶ In relation to the civil courts in England and Wales, Kritzer primarily concentrated on the QBD between 1958 and 1998, although he also analysed the County Courts (1958-2002) and the Chancery Division (cases disposed in London 1977-2002) to a lesser extent. He does not explain how or why the 1958 start date was chosen, or why data for the Chancery Division covered an entirely different period. Dingwall and Cloatre’s study was primarily aimed at extending Kritzer’s analysis of the QBD to 2004, although they also included data on the County Court. As with the other studies, Genn’s focus was also on extending Kritzer’s data and was again primarily focussed on the QBD, with only minimal analysis provided on the County Court and virtually nothing on the Chancery Division. Her data covered selected years between 1938 and 2011. The Probate, Divorce and Admiralty Division of the High Court (renamed the Family Division from 1972), has been excluded from all existing literature on the vanishing trial. Kritzer explicitly stated he was not analysing the Family Division, though provided no reason. Kritzer (n.42 above), p.738. Neither Dingwall and Cloatre nor Genn even mentioned the Family Division in their research.

since the mid-1990s. However, whilst both Kritzer and Genn claimed that data showed that the trend towards vanishing trials was continuing, Dingwall and Cloatre argued that the number of trials was at best flat lining, albeit at significantly lower levels than it had previously been at.⁴⁷

Element of vanishing trial	US	England and Wales
Number of cases coming into the litigation system		
Number of cases disposed after trial		
Proportion of cases disposed after trial		



 Fast increase  Fast decrease

Figure 1.5: Summary of overall trends observed in the three elements of the vanishing trial in the US and England and Wales.

Figure 1.5 above summarises the similarities and differences in the findings between the two jurisdictions. One significant difference can be seen between the US and English data. Whereas the number of cases coming into the US litigation system continued to increase throughout the date range Galanter analysed, the English studies found they were in decline.

Explanations for the vanishing trial in England

There are several differences between the American and English litigation systems that could affect the trends observed in the two jurisdictions with the result that the causes of the vanishing trial in the US do not necessarily underlie the decline in the trials witnessed in England, despite occurring over a similar period of time. As Genn has argued, whilst the factors highlighted by Galanter might have some resonance in the English context, there are specific local pressures which may account for the decline in this country.⁴⁸

Markesinis found pre-existing differences in the rates of claims being filed between the two jurisdictions. The overall number of cases filed was at one point broadly equivalent in the US and England, allowing for population differences.⁴⁹ However, when the subject matter of disputes was taken into account, there were significant differences in the numbers of claims per million of population.⁵⁰ Legislative reform has the potential to significantly impact the

⁴⁷ Dingwall and Cloatre (n.44 above), p.60.

⁴⁸ Genn, 'Privatisation' (n.4 above), p.8.

⁴⁹ B.S. Markesinis, 'Litigation-Mania in England, Germany and the USA: Are We So Very Different?' (1990) 49 *CLJ* 233, p.247.

⁵⁰ *id.*, pp.247-248. Tort actions are highlighted as being one third less numerous per one million of population in England versus the US.

number of claims issued in relation to the subject matter it concerns. Given the pre-existing differences in claim rates, even if similar legislative reforms on the same subject matter were enacted in each jurisdiction, the impact on the rate, and hence number, of claims being brought in each jurisdiction is unlikely to be the same.

Furthermore, variations also exist in the litigation process between the US and England. There are substantial pressures, inbuilt in the English system, on parties to settle or abandon the dispute before trial. Genn identified three main pressures unique to England that she argued were responsible for the vanishing trial – the rising cost of litigation, competition from private providers in the field of resolution of civil disputes, and the withdrawal by the State of the provision of public dispute resolution services as a cost saving measure.⁵¹ Kritzer proposed four additional factors specific to England to explain the vanishing trial in England, although he argued that it was not possible to accurately identify the respective contribution of each of them.⁵² He highlighted significant reforms of the civil justice system between 1971 and 1999,⁵³ the introduction of conditional fee arrangements,⁵⁴ and increasing interest in alternative dispute resolution, institutionalised by the Woolf reforms.⁵⁵ Finally, he attributed a significant portion of the decline to jurisdictional changes in the courts, although he acknowledged that the timing of changes in the numbers of cases entering the litigation or being tried did not always closely match the reforms he highlighted.⁵⁶ In the analysis of each of the three components of the vanishing trial in this chapter I will engage with each potential cause in more depth as it is relevant to that aspect.

Method

The Judicial Statistics Reports that were the source for this project contain data for the number of cases coming into the system and for the number of cases disposed after trial for

⁵¹ Genn, 'Privatisation' (n.4 above), pp.9-15. See also Dingwall and Cloatre (n.44 above), pp.65-67, who engage with the impact of the elimination of public subsidies for civil courts.

⁵² Kritzer (n.42 above), p.752.

⁵³ He identifies three rounds of reforms. First, the Courts Act 1971, which reformed the jurisdiction and location of courts that had been in place since the 1870s, reducing the locations in which civil trials could occur. Second, the Courts and Legal Services Act 1990 that more closely integrated the County Court and the High Court, as well making the County Court's jurisdiction in contract and tort unlimited. Third, the Woolf reforms. *id.*, pp.740-743. See also Dingwall and Cloatre (n.44 above), pp.52-54, who focus on the same three reforms.

⁵⁴ Kritzer (n.42 above), p.743. See also Dingwall and Cloatre (n.44 above), pp.65-67, who discuss the move from legal aid in civil disputes to a contingency fee system.

⁵⁵ Kritzer (n.42 above), p.747.

⁵⁶ *id.*, pp.745-746.

each of the three courts within this study. The proportion of cases disposed after trial has been calculated using the following equation:

$$\text{Proportion of cases disposed after trial} = \frac{\text{Number of cases disposed after trial}}{\text{Number of cases coming into the litigation system}}$$

It has not been possible to calculate proportion in exactly the same way as Galanter did in the US. This reduces the potential for an exact comparison of the vanishing trial in the US and England.⁵⁷ The approach adopted here is the same as that used in earlier English studies on the vanishing trial.

As shown in Figure 1.4 above, the current English scholarship has also engaged to a limited extent with an additional stage of the litigation process, that of cases set down for trial. Whilst this stage provides greater insight into the point *when* cases leave the system prior to trial and can therefore enhance our understanding of the vanishing trial phenomenon as it applies to England, it does not add anything to the question of *whether* trials are vanishing which is my focus. Due to this, and limitations in the available data, this stage will not be examined in this project.⁵⁸ Furthermore, trends in the Administrative Court and how they compare to those in the civil courts will be the subject of a later chapter.⁵⁹

Trends in the QBD have received the most detailed analysis in existing studies, despite the fact that the County Court deals with the vast bulk of civil litigation in England and Wales.⁶⁰ Trends in the County Court would presumably therefore provide the most representative picture of trends in civil litigation and the court consequently merits more attention than has so far been devoted to it. Additionally, As Kritzer highlighted, the County Court and High Court function somewhat like a unit.⁶¹ This makes it important not only to analyse the courts individually, but also to examine their combined totals to determine whether trials are actually vanishing, or merely moving from one court to another.⁶² Procedural changes over

⁵⁷ See further Appendix 1 US calculation of proportion.

⁵⁸ In Judicial Statistics, data for cases set down for trial is only available for the County Courts 1949-1973; the High Court – QBD 1949-2004 (aside from the Admiralty Court, for which figures are given for the entire date range); and the High Court – Chancery Division 1974-2017.

⁵⁹ Although the Administrative Court is part of the QBD, proceedings for this court, and for judicial review actions prior to its establishment in 2000 were reported separately in Judicial Statistics and are not included in the figures given in this chapter for the QBD.

⁶⁰ For example, from the data, between 1949 and 2017, over 68 times the number of claims were issued in the County Court compared to the Chancery Division and over 13 times those issued in the Queen’s Bench Division.

⁶¹ Kritzer (n.42 above), pp.738,740-743.

⁶² This was recognised by Dingwall and Cloatre, who analysed trends in the total number of cases commenced in the QBD and County Court. Dingwall and Cloatre (n.44 above), pp.60-62.

time have clearly shifted business from one court to the other with the general trend being to more and more cases being heard by the County Court.

Figure 1.6 below shows a number of key procedural reforms affecting the balance of jurisdiction between the courts that took place during the date range of this project. First, in 1970, the County Court was granted exclusive jurisdiction in mortgage actions, whereas before that point, jurisdiction was shared with the Chancery Division. Second, between 1955 and 1991, there were seven procedural reforms which raised the upper financial jurisdictional limit of the County Court in contract and tort from £200 to unlimited. The value of increase and the duration between increases was not consistent. Third, in 1999, a lower limit of £15,000 was imposed for actions to be commenced in the QBD. This was raised to £25,000 in 2009 and again to £100,000 in 2014. Although each procedural reform only specifically changed the jurisdiction of either the County Court or the QBD, they had the potential to impact the number of claims issued in both courts because they share jurisdiction in contract and tort cases, with the more complex cases in those areas taking place in the High Court and the County Court resolving the less complicated matters. The jurisdictional changes up to 1991 raised the limit of the value of claims that were able to proceed in the County Court. This means that, over time, an increasingly wide array of cases that could have previously only been issued in the QBD could be issued in the County Court, although they did not necessarily have to be issued in the lower court. The reforms post 1999 imposed a lower limit on claims to be issued in the QBD, unavoidably resulting in a transfer of business from the QBD to the County Court.

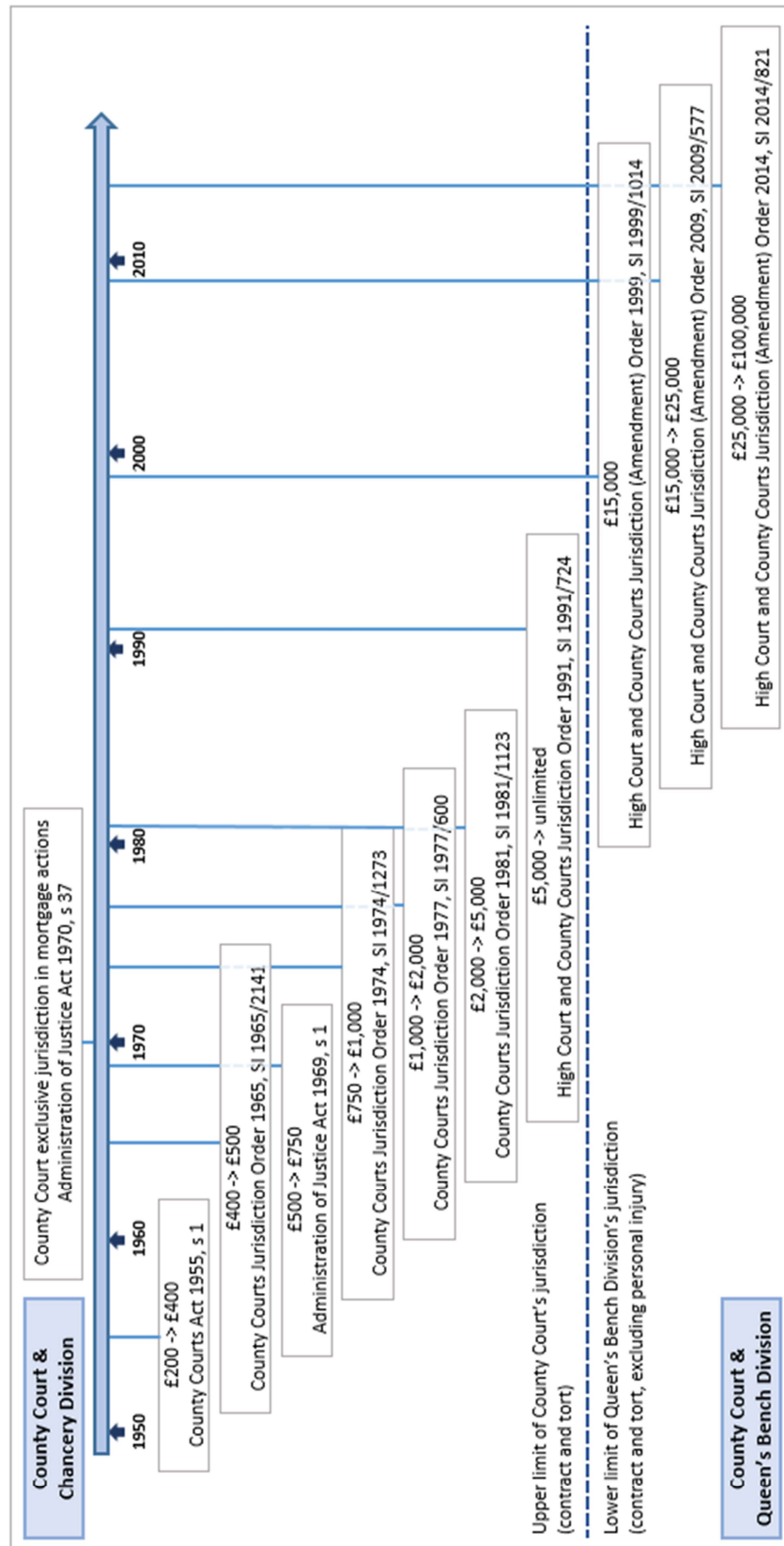


Figure 1.6: Jurisdictional changes between the County Court, Queen's Bench Division of the High Court and the Chancery Division of the High Court, 1949-2017.

By collating the data relating to the numbers of proceedings started and the number of cases disposed after trial from editions of the annual Judicial Statistics Reports, for the date range 1949-2017,⁶³ my aim is first to confirm the accuracy of the existing analysis, and second to determine whether trends that have been identified in the current literature and the explanations given for those patterns remain applicable in the light of more up to date data. In the sections that follow, I will, as far as is possible from the data available, analyse the three elements of the litigation process that Galanter identified as central to the vanishing trial debate – the number of cases coming into the litigation system, the number of cases reaching trial and the proportion of cases filed that reach trial for the civil courts – the County Court, the QBD and the Chancery Division, both individually and together.⁶⁴

The number of cases coming into the litigation system

The first of Galanter's elements of the vanishing trial, albeit the one he devoted the least attention to, is the number of cases coming into the litigation system. In the existing literature on the vanishing trial in England, considerably more attention has been paid to this aspect of the vanishing trial. Focussing on trends in the number of cases coming into the litigation system in the QBD between 1995 and 2004, Dingwall and Cloatre concluded that the vanishing trial might be more accurately described as a growing reluctance to file claims in England.⁶⁵ This provides a direct contrast to the position in the US. Figure 1.7 below illustrates that, across all three of the courts in this study, there was indeed a trend of vanishing litigants for just over twenty years, extending from the early 1990s to the early 2010s. A finding of vanishing litigants is significant. Galanter was able to discount the decline in the proportion of trials in the US as being caused by a drop in the number of cases coming into the system. Indeed, he highlighted the opposite trend in the federal Courts. This is not the case in England and marks a major distinction between the dynamics of the vanishing trial between the two jurisdictions. Any pattern of vanishing trials in this period in England might at least partially be due to a decline in demand for courts. Consequently, identification of the factors driving changes in the number of proceedings being initiated is of fundamental

⁶³ Genn's date range extends back to 1938, although prior to 1998, she does not include data for every year in her analysis (1938, 1958, 1968, 1978, 1988). My analysis will not replicate this starting point, instead beginning at 1949, to avoid as far as possible WWII artificially skewing trends. It will also include every year up to 2017, to ensure that patterns can be analysed as accurately as possible.

⁶⁴ For consistency purposes, data for other first instance courts whose jurisdiction was merged into either the County Court or the Chancery Division during the date range of this project was collected and added to figures for the relevant court into which they were assigned. Full details of which courts have been included can be found in Chapter 2.

⁶⁵ Dingwall and Cloatre (n.44 above), p.60.

importance in enabling us to understand the vanishing trial phenomenon as it applies to England. In terms of the explanations presented in existing literature for the vanishing trial, both increased costs and the impact of recent procedural reforms support findings of vanishing litigants. The pre-action protocols, introduced as part of the Woolf reforms, and designed to divert litigation away from the courts into alternative dispute resolution (ADR) forums appear especially relevant.

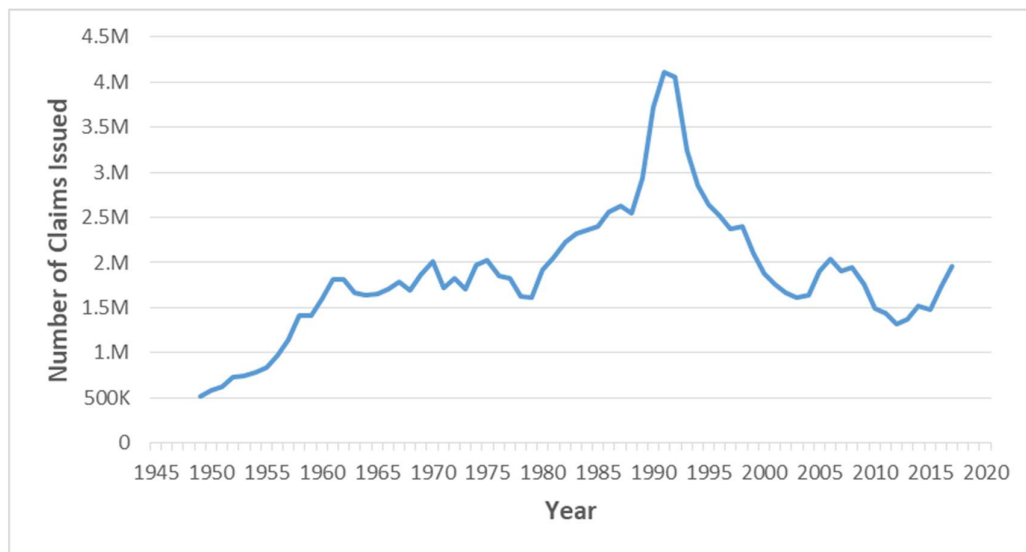


Figure 1.7: Total number of cases commenced in the County Court, QBD and Chancery Division, 1949-2017.

This pattern of decline in England is a reversal of that seen earlier in the twentieth century where the overall number of claims issued grew between 1949 and 1991. The growth rate was not constant, with periods of stability and slight dips. The rate of growth increased sharply from 1988 and peaked in 1991. Equally, the subsequent vanishing litigant period was not one of constant decline. First the numbers declined rapidly until 2004, then rose to a peak in 2006 that was similar to levels previously seen in 1999. The numbers of claims issued began to fall again, until they hit a low in 2012. At that point, the numbers had fallen back to the levels previously seen over half a century before in 1958.

It is significant that analysis trends in England contained in existing literature ended in 2011 because since 2012, there has been another reversal in direction. No longer is there a trend towards vanishing litigants, but instead an increase. The 2017 figures for claims issued have rebounded back up to the 2008 level. None of the explanations for the vanishing trial would seem to account for this recent change in pattern, because there has not been any reduction in costs or reversal of any other procedural reform. This calls into question whether the

explanations discussed above represent all the factors influencing fluctuations in the number of litigants coming into the system.

Detailed analysis

Looking more closely at the breakdown of claims issued, the trends vary between the different courts shown in Figure 1.7 above. Due to claims in the County Court accounting for an extremely high percentage of all claims, the pattern of proceedings started in that court virtually mirrors that of the overall number of claims issued. Figure 1.8 below just shows claims issued in the QBD and Chancery. As can be seen by comparing this with Figure 1.1 above, trends in the numbers of claims issued vary considerably between the three courts.

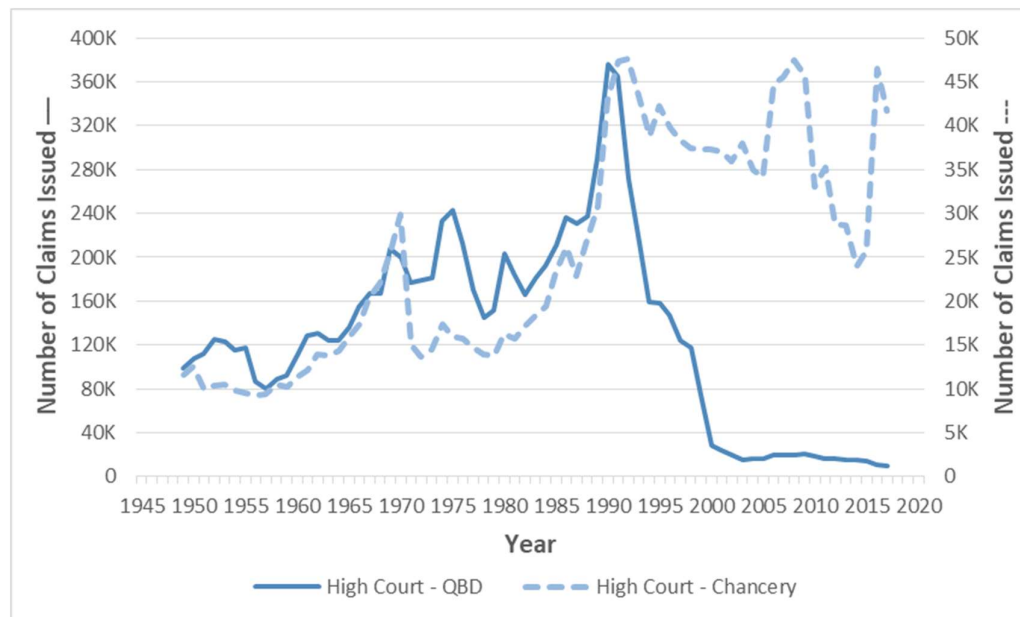


Figure 1.8: Cases commenced in the QBD and Chancery Division, 1949-2017.⁶⁶

The number of claims issued in the QBD followed a broadly similar pattern to that seen in the County Court, at least until the mid-2000s. There was a period of overall growth up to the early 1990s. As with the County Court, growth was not consistent in this period, although the annual variance in the numbers of claims issued in the QBD appeared more volatile. As with the County Court, the numbers increased to an all-time peak in 1991. They also showed the same increased rate of growth from 1988 as the County Court did. This was followed by

⁶⁶ The volume of business in the County Courts dwarfs that seen in either of the other courts, accounting for why the trends seen in claims issued in the County Courts are almost identical to that for all courts combined. As a result, the County Court is not included in this chart.

a sharp decline until 2001, to levels significantly below those at any previous year in the entire date range of this project. Since then the numbers have been relatively stable.

Whereas Dingwall and Cloatre were unable to ascertain whether the slight upward turn in the number of claims issued in 2004 was a random fluctuation because their date range only extended to that year,⁶⁷ the more recent data presented here can address that question. It can be seen from Figure 1.8 above that there 2004 was the start of a brief period that lasted until 2007, but that since then the number of claims in the QBD have been in continual, although relatively slow, decline. This recent trend can be contrasted with that seen in the County Court. As will be discussed below, this difference may reflect changes to the jurisdiction of the two courts and a consequent transfer of business from the High Court to the County Court.

The Chancery Division shows a somewhat different picture, especially from the early 1990s. There was the same overall growth in the number of claims issued up to that point, with a similar increase in the rate of growth from the mid-1980s. However, the other two courts had fairly erratic growth, characterised by several periods of increase and dips. In the Chancery Division in contrast, there were two almost constant periods of growth, the first up to 1970, followed by a sharp drop back to 1964 levels, then another period of growth until the early 1990s. The number of claims issued then declined, albeit not entirely consistently. Again, the pattern of decline differed from that seen in the other two courts. The numbers dropped fairly slowly at first, then spiked again in 2008 to just below the 1992 high point. It was only after then that they fell rapidly. What is striking about the Chancery Division is that, although the numbers of claims issued declined in the ‘vanishing litigant’ period, they did not fall to the same extent as in the other two courts, where the twenty year decline resulted in the volume of claims issued dropping below the numbers that were being initiated prior to the period of growth that started in the late 1970s.

There would appear to be a significant increase in the volume of claims issued in the Chancery Division in 2016 compared to 2015, completely against the general trend observed in the vanishing trial literature. However, notes accompanying the latest editions of Judicial Statistics highlight that, from 2016, all figures for the Chancery Division except ‘claims issued and other originating proceedings – outside London’ are sourced from a new cases management system – Pentaho. Although not mentioned on the summary of proceedings issued table in the Judicial Statistics Reports, on the breakdown of proceedings issued by

⁶⁷ Dingwall and Cloatre (n.44 above), p.61.

nature table, it is highlighted that figures from 2016 are not directly comparable with those for 2015 and earlier.⁶⁸ With only two years' data from the new system, it is not possible to determine whether the dip 2016-2017 is evidence of a continuing downward trend in claims issued or not.

Genn argued that '[w]e do not know much about the case mix, changes in the types of case being brought, who is bringing cases to court and how and when cases are terminating short of determination'.⁶⁹ Further research is needed into all these aspects of litigation to fully understand trends in the civil justice system and ascertain whether for example trends in one subject area mask contrasting trends in other areas. Unfortunately, aside from the number of proceedings in the different courts included within each of the three main courts analysed in this study, the Judicial Statistics Reports do not consistently contain data on the characteristics of cases commenced or disposed after trial so it is not possible here to provide an in-depth analysis of trends.

The volume of demand for the litigation system may fluctuate over time for numerous reasons. As highlighted in existing studies, there have been several reforms of the civil justice system over the date range this project covers that may have played a role in affecting the volume of litigation being commenced. Of specific relevance in this contest are the Woolf reforms. That appears to have had a significant impact on the number of claims issued, with a 22 percent drop in the total number of claims issued in the three courts between 1998 and 2000. The Woolf reforms were the most comprehensive alterations to the system in recent years. One of the primary aims of the reforms was to reduce the number of trials by diverting cases away from the litigation system before they reached trial into private resolution forums including negotiation, mediation and arbitration.

The pre-action protocols introduced by the Woolf reforms are central to achieving this goal, as can be seen by the aims stated in the pre-action protocol for debt claims:

- a) Encourage early engagement and communication between the parties, including early exchange of sufficient information about the matter to help clarify whether there are any issues in dispute;

⁶⁸ The quarterly editions of Judicial Statistics since 2009 can be found at: <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly>. Information relating to the Royal Courts of Justice is contained in each April-June edition, where a spreadsheet containing data is provided along with a pdf summary.

⁶⁹ Genn, 'Privatisation' (n.4 above), p.6.

- b) Enable the parties to resolve the matter without the need to start court proceedings, including agreeing a reasonable repayment plan or consider using an Alternative Dispute Resolution (ADR) procedure.⁷⁰

Judicial approaches towards the pre-action protocols have further incentivised the parties to attempt settlement. Following *Dunnett* and *Halsey*, parties may be penalised in costs if the court holds they unreasonably refused to even attempt ADR.⁷¹ Dingwall and Cloatre argue that the pre-action protocol initiative was likely to have contributed to a reduction in the number of claims issued, with parties unwilling to go to the expense of filing claims when they could just exchange documents gathered for the pre-action protocols and enter settlement negotiations.⁷²

However it is significant that, in all courts, the decreasing trend had started years before the Woolf reforms took effect, in some cases the earlier decreases were even greater than those following Woolf. In the QBD for example, the number of claims issued had fallen by 66% between 1991 and 1994. If anything, as shown in Figures 1.1 and 1.2 above, in the County Court and the QBD, the decline either slowed or stopped shortly after the Woolf reforms were implemented, with claims issued in Chancery even increasing within a few years.

Other procedural reforms have had an equally unclear effect on the number of cases coming into the litigation system. Reforms introduced following the Jackson Report are relevant in this respect. Lawyers are now required to predict their costs at the start of the litigation process.⁷³ In contrast to the US, in England, the costs rule normally requires that the losing party to a dispute pays not only their costs, but also those of the winning party.⁷⁴ The requirement to predict costs, combined with the costs rule may incentivise some litigants to settle out of court instead of initiating litigation proceedings and risking losing at trial, especially where they have a relatively weak case. Given the nature of these reforms, it would appear logical that they might have contributed to a reduction in the number of cases

⁷⁰ Full details of this and all other pre-action protocols can be found at <https://www.justice.gov.uk/courts/procedure-rules/civil/protocol>.

⁷¹ *Dunnett v Railtrack Plc* [2002] EWCA Civ 303, [15]-[16]; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [16]-[29].

⁷² Dingwall and Cloatre (n.44 above), p.64.

⁷³ Jackson recommended that not only should costs budgeting and costs management be part of training for solicitors, barristers and judges, but that rules should set out a discretionary standard costs management procedure. Jackson LJ, *Review of Civil Litigation Costs: Final Report* (Ministry of Justice, 2009), p.419. Following this, CPR 3.13 requires that, unless the court orders otherwise, all parties except litigants in person must file and exchange budgets before the first case management conference.

⁷⁴ CPR 44.2 2(a) states that 'the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party'. However, the court does have discretion to 'make a different order' under 2(b).

being commenced. However, the reforms only came into effect from 2013, after the increase in the number of litigants had already started. The rate of did not slow after the reforms came into operation, making it unclear what effect, if any, they had on the number of cases being initiated.

Some of the changes observed in the total number of claims issued may be due to other procedural reforms, especially those included in Figure 1.6 above. These may however have been more likely to have affected trends in the individual courts affected by the changes than in the overall figure, with actions plausibly just transferring between courts as opposed to additional (or fewer) proceedings being initiated. Both Kritzer and Dingwall and Cloatre argued that changes in the civil justice system contributed to variations in the number of trials in the QBD and the County Court. They focussed on two main points. First, changes to the distribution of cases between the County Court and the QBD.⁷⁵ Second, changes to the types of proceedings available in the County Court.

It was not only between the County Court and QBD that jurisdictional changes took place. The Administration of Justice Act 1970 transferred exclusive jurisdiction in mortgage actions to the County Court, removing the Chancery Division's authority to hear disputes in this area. The total number of claims issued in the County Court fell between 1970 and 1971. However, as seen in Figure 1.9 below, when patterns in issuance recovery of land cases in the County Court are compared to trends in claims issued in the Chancery Division, a different story emerges. There is a sharp drop in the number of claims issued in the Chancery Division between 1970 and 1971, reflecting its loss of mortgage jurisdiction. Some of this business appears to have transferred to the County Court, because growth can be seen in the same period in recovery of land actions. However, the growth in the County Court does not fully compensate for the drop in the Chancery Division. The change in jurisdiction represents a drop in the number of mortgage claims issued, whereas there had previously been consistent year on year growth in the Chancery Division. As such, it does not seem possible to account for the decrease in terms of normal variance in the number of mortgage related actions that are issued in different years. The change in jurisdiction would therefore appear to be a relevant factor in the drop in the number of claims issued.

⁷⁵ Their discussion of the relationship between the jurisdiction of the County Courts and QBD focusses on increases to the jurisdictional limit of the County Courts in contract and tort, culminating in 1991 when it became unlimited. As shown in Figure 1.6 above however, after this date there have been three increases to the claim threshold for actions to begin in the QBD, which could have continued to affect the distribution of cases between the two courts.

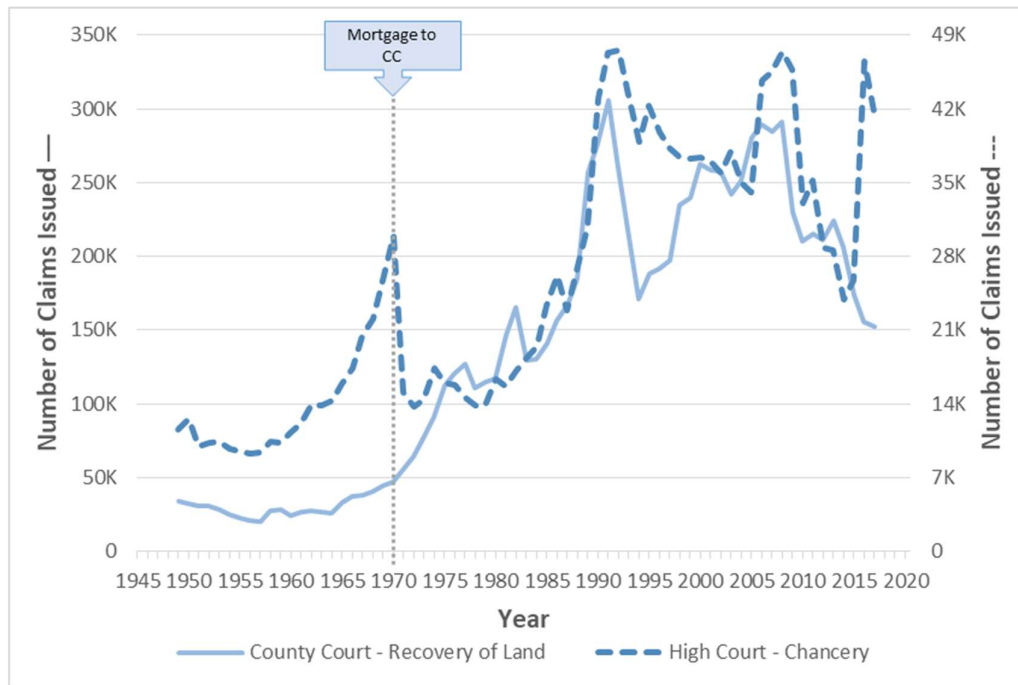


Figure 1.9: Comparison of recovery of land cases commenced in the County Court with cases commenced in the Chancery Division, highlighting the change affecting the breakdown of jurisdiction between the two courts, 1949-2017.

There is less of a clear association between changes in jurisdiction and trends in the number of claims issued in the County Court and QBD. As Figure 1.10 below shows, not all of the increases in the County Court's jurisdiction are associated with an appreciable rise in the number of claims issued in that court, or with a decline in the number of claims issued in the QBD such that would suggest a transfer of business from one court to another. In some instances, such as the change in 1974 from £750 to £1,000, both courts showed an increase in the number of claims the following year, significantly though at a slower rate than before it was implemented. After the doubling of the jurisdictional limit from £1,000 to £2,000, the numbers for both courts actually declined. When the County Court limit increased to £5,000, although the QBD numbers did subsequently decline and those of the County Court increase, this can be seen to be part of a trend that started before the reform came into effect. In several cases, any impact of the change can be seen to be relatively short lived, with the number of claims issued in the QBD rising again within a short period after following the 1969, 1974 and 1977 changes and the County Court numbers showing decreases soon after the same reforms. Analysing the QBD's claims issued alone, it would appear that the 1991 change was the most significant, because the number of claims dropped sharply following implementation of the reform. However, both the sharp drop and the preceding rapid increases in the number of claims issued are mirrored in claims issued in the County Courts,

calling into question whether the trends seen can be attributed to jurisdictional changes alone. Brooke highlighted that an editor of Judicial Statistics, McDonnell, analysing trends in litigation between 1858 and 1894, concluded that procedural changes did not explain changes in the rate of litigation, only in its distribution.⁷⁶ McDonnell instead focussed on social and economic explanations for trends.⁷⁷ The data suggests that the procedural changes considered here do have some role to play in influencing trends in the numbers of claims issued. However, given their inability to explain all the trends observed, it is also the case that McDonnell's argument about factors external to the litigation system influencing trends within it remains applicable.

The effect of the imposition of a lower financial limit in the QBD is somewhat unclear, because the number of claims issuing was already falling prior to its introduction in 1999. The two subsequent increases to the lower limit do not appear to have had a significant impact on the number of claims issued in the QBD, although they fell following each change, the rate of decrease is the slowest seen at any point in the date range of this project. Only the final increase appears to correlate with any increase in the number of claims issued in the County Court, although again the upwards trend had started between that and the earlier increase.

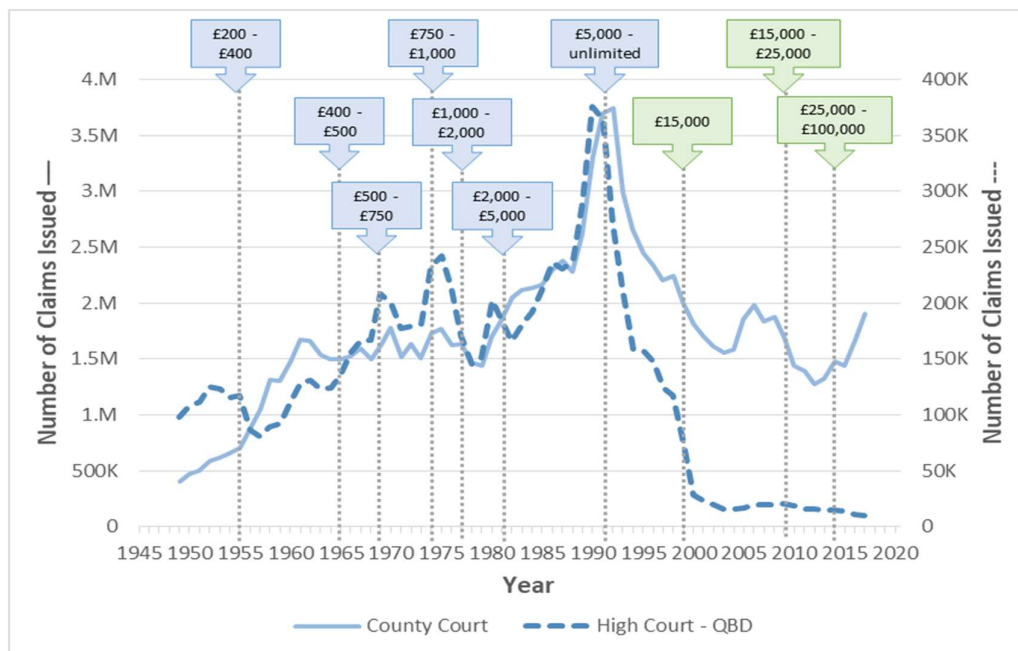


Figure 1.10: Comparison of cases commenced in the County Court with cases commenced in the QBD, highlighting changes affecting the breakdown of jurisdiction between the two courts, 1949-2017.

⁷⁶ Brooke (n.45 above), p.108.

⁷⁷ id, p.109.

In addition to the changes in jurisdiction between the County Court and the QBD, another series of procedural changes have also been occurring in the County Court since 1974, relating to the limit of the small claims procedure. This is unlikely to affect the number of claims issued in the QBD. However, it may have affected the number of claims issued in the County Court and hence any conclusions we can draw about a possible transfer of business from the High Court to the County Court. When the small claims procedure was introduced in 1973 the limit was established at £75, it now stands at £10,000.⁷⁸ The most increase in 2013 appears to be the most significant in terms of the trends seen in the number of claims issued in the County Court, because the trend of vanishing claimants reversed from 2012. This is however still in advance of the reform, so it remains unclear whether the reversal is due to this or other factors.

There are further non-jurisdictional factors that could also have played a role that have not been discussed in existing research into the vanishing trial in England. For example, the programme of closure of County Courts may have had an impact, restricting the ability of people to access a court to pursue a claim. A related factor might be court fees, which have increased significantly, creating another barrier to access to court.⁷⁹

The enactment of new legislation may also affect the number of cases coming into the litigation system. This could lead to a decrease in the volume of litigation, resolving issues that were previously the subject of lawsuits. Equally however, legislation can result in an increase in the number of proceedings as parties seek to clarify the meaning of statutory provisions or utilise new legally enforceable rights. The increases in the number of cases seen in all three courts from the late 1970s to the early 1990s support this latter argument. The period of growth corresponds to Thatcher's time as Prime Minister. As Goriely argues, the Tory party's neo-liberal agenda during this period led to the promotion of people as autonomous rights holders as opposed to welfare recipients, and led to the enactment of various legally enforceable rights in the early 1980s.⁸⁰ Brooks argues there is a connection between the expansion of the availability of legal aid, especially rapid during this period and the increase in the number of litigants, although he maintains that the connection is far from

⁷⁸ It was raised to £100 in 1974, £200 in 1978, £500 in 1981, £1,000 in 1991, £3,000 in 1996, £5,000 in 1998 and £10,000 in 2013.

⁷⁹ For a discussion of the policies underpinning and issues surrounding increases to fees see Thomas LJ, 'The Maintenance of Local Justice' (Sir Elwyn Jones Memorial Lecture, Lecture at Bangor University, 4th December 2004).

⁸⁰ T. Goriely, 'Rushcliffe Fifty Years On: The Changing Role of Civil Legal Aid Within the Welfare State' (1994) 21 *J.L. & Soc* 545, 555-556.

straightforward.⁸¹ He argued that short-term economic factors also played a role in affecting trends in the number of litigants, highlighting that the increase in the number of litigants in the 1980s coincided with an increase in credit and that the peak in the early 1990s represented a legal reflection of a boom-bust economic cycle.⁸² Another explanation for the growth in the number of litigants in this period has been proposed by Harlow and Rawlings who argue that pressure groups and non-governmental organisations were increasingly excluded from policy discussions, forcing them to resort to the courts to challenge legislation.⁸³

The increase in legal rights might paradoxically also account for the subsequent vanishing litigant period, in line with Galanter's argument about the turn against law in the US. It can be argued that, to some extent, repeated cuts to the availability of legal aid for civil actions and increases in court fees were a backlash to the increased use of courts. Genn makes this argument, suggesting that the crisis in civil justice that prompted the Woolf report was less to do with concerns regarding access to justice and more about the expanding civil justice budget.⁸⁴ She argues that policy makers replicated the 'jaundiced view', promoting the concept of a 'compensation culture' deliberately as a way to attempt to control legal aid expenditure, particularly the civil side.⁸⁵ There have been several significant cuts to civil legal aid from the 1990s.⁸⁶ There is very limited data available in Judicial Statistics on legal aid. However, statistics from the QBD between 1985 and 2004 relating to cases disposed shows that the number of claimants receiving legal aid peaked in 1988 at 5,620, after which they fell to a low of 330 in 2004.⁸⁷ The legal aid cuts coincide with the period of vanishing litigants. However, whilst cuts to legal aid might help to explain some of the twenty year period of decline, they are unable to explain the recent reversal in trend. The Legal Aid, Sentencing and Punishment of Prisoners Act 2012 virtually abolished civil legal aid. Despite this, the number of claims issued has risen since it came into force.

To summarise, even if the exact causes of the trends seen in the numbers of claims issued cannot be identified, what the data makes clear is that concerns regarding vanishing litigants may no longer be justified. Whilst there was a significant period of about twenty years where

⁸¹ Brooks (n.45 above), p.120.

⁸² *id.*, pp.120-121.

⁸³ C. Harlow and R. Rawlings, *Pressure Through Law* (Routledge 1992).

⁸⁴ Genn, *Judging* (n.44 above), p.43.

⁸⁵ *id.*

⁸⁶ See H. Brooke, 'The History of Legal Aid 1945-2010' appendix to Lord Bach, *The Right to Justice* (The Fabian Society 2017) for a history of legal aid.

⁸⁷ These are rounded figures, based on two month samples.

there was a pattern of vanishing litigants, more recently the number of claims has been increasing again. Although significantly fewer cases are being started in the County Court than at the 1991 peak, the numbers have been steadily rising year on year since 2012. The QBD still shows a pattern of decrease, but the rate of decline is the slowest it has been at any point in the date range of this project and, as such, is much more in line with Dingwall and Cloatre's assessment that we are witnessing a levelling off of trial activity in that court, as opposed to Genn's concerns over the extinction of civil claims.

The number of cases disposed after trial

This section will examine trends in the number of cases disposed as a result of a completed trial, the second of Galanter's indicators of the vanishing trial. Even in the face of vanishing litigants there would be evidence of a continuing vanishing trial in England if the number of cases disposed after trial is continuing to fall. Any decrease in the number of cases coming into the system does not automatically result in a drop in the number of cases disposed after trial, and vice versa, any increase in cases commencing does not necessarily correlate with an increase in the number of trials. It is possible that the number of cases disposed after trial could remain stable, decrease, or even increase in the event of either an increase or decline in the number of proceedings being started. Factors such as the judicial resources and judicial case management are relevant factors in this respect, as discussed by Galanter. The proportion of cases disposed after trial, discussed in the last section of this chapter, depends on the relationship between trends in cases coming into the system and being disposed after trial. If for example the rate of any decrease in the number of trials is of a greater magnitude than that of the increase in the number of claims issued, then there would be evidence of a vanishing proportion of cases disposed after trial.

Across all of the courts analysed in existing literature relating to England, a pattern of decline in the number of trials has been observed from the early 1990s. However, as shown in Figure 1.11 below, in the years since the most recent study was conducted, there has been somewhat of a reversal in the number of trials, similar to that seen in relation to the number of cases being issued.

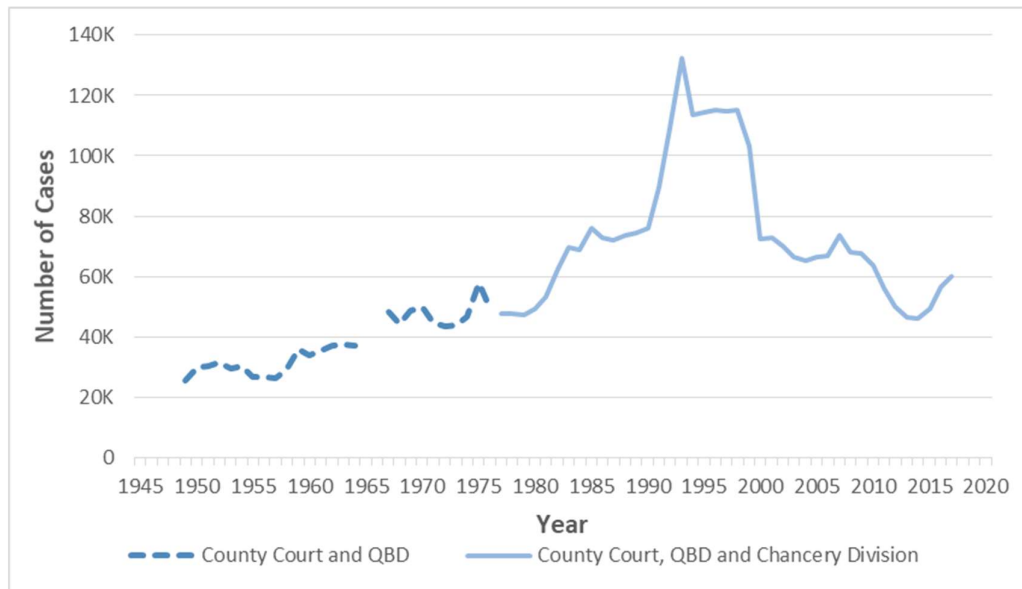


Figure 1.11: Total cases disposed after trial in the County Court and QBD, 1949-1976 and the County Court, QBD and Chancery Division, 1977-2017.⁸⁸

Between 1949 and 1976, there is overall, although not consistent growth in the number of trials in the County Court and QBD. From 1977, when data for all three courts is available, a broadly similar picture to that of claims issued as shown in Figure 1.7 above can be seen – initial growth, then decline for around twenty years, with recent, though somewhat limited, recovery. As shown in Figure 1.11 above, the number of trials increased between 1977 and 1993, with the rate of growth increasing from 1990. It then dipped slightly in 1994, remained stable until 1998, before falling rapidly until 2000. The number of trials levelled out again until 2010, at which point it dipped until 2014 before rising again, albeit not as yet to the previous level.

One difference between trends in the two stages of the litigation process is the timing of the shifts between growth and decline. In respect of the number of trials, major peaks and dips can be seen to be a couple of years behind those of claims issued, potentially accounted for by the time taken for claims to proceed through the system to trial. The primary distinction between patterns in the first two elements of the vanishing trial however concerns the period of decline in both from the early 1990s to the mid-2010s. Whereas the number of claims issued declined almost every year between 1991 and 2012 (aside from a brief recovery

⁸⁸ It is only possible to show the total number of trials across the three courts between 1977 and 2017. This is because, until this year, data for the number of trials in the Chancery Division was not included in Judicial Statistics. Consequently, the period 1949-1976 only includes data for the County Court and QBD. As highlighted by Kritzer, data on trials in the County Court for the years 1965-1966 is incompatible with other years' data and so it is not possible to accurately determine the number of trials that occurred in those two years. Kritzer (n.42 above), p.739.

between 2004 and 2006), the number of trials did not consistently fall, but instead followed a repeating pattern of periods of decline followed by years of relative stability.

Overall, having updated the data to show the most recent trends there is evidence to suggest that, not only have the number of trials stopped vanishing as both Kritzer and Genn claimed they were doing, but that Dingwall and Cloatre's argument that trials have bottomed out is no longer accurate either. The existing scholarship correctly identified that trials have declined in England since the early 1990s. However, the 'vanishing trial' is no longer an accurate description of the data in first instance civil courts. The recent resurgence calls into question predictions made by Genn about trials becoming extinct, at least in the English context. It does however remain the case that there are significantly fewer trials than there were before the period of decline, with the recent recovery still not to the levels seen in the first decade of the twentieth century and significantly below that seen at the end of last century.

Detailed analysis

The existing scholarship on the vanishing trial in England focusses on analysis of individual courts evidence. As with the number of claims issued, it is important to replicate this approach in order to determine whether much larger number of trials in the County Court masks a contrasting picture in either of the other two courts. Again, it can be seen that the exact trends in the number of trials varies across the three courts. In the case of the number of trials however, there is significantly more variance between them.

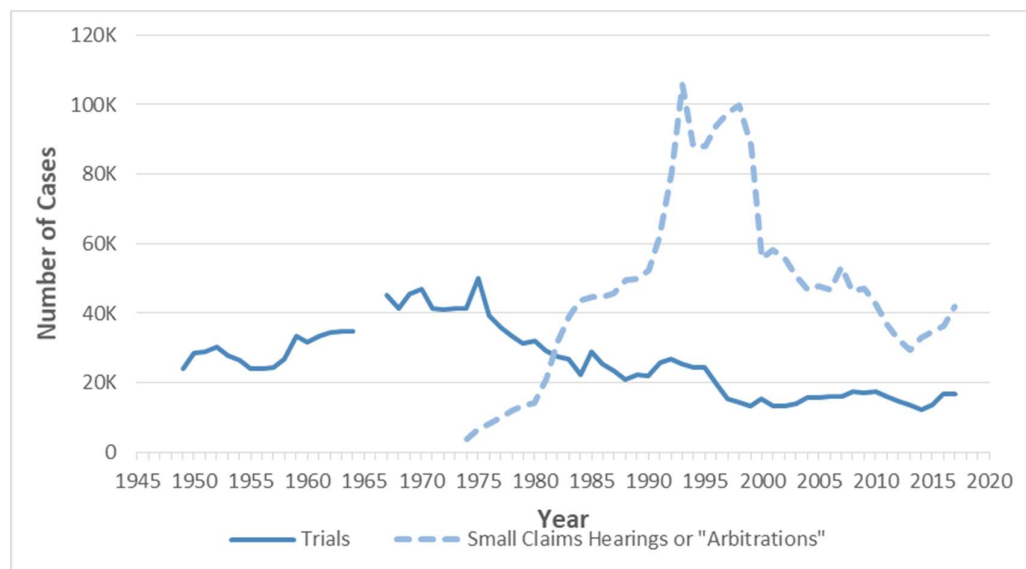


Figure 1.12: Breakdown of cases disposed by trial and by small claims hearing or arbitration in the County Court, 1949-2017.

As with claims issued, the magnitude of trials in the County Court is vastly greater than that in either of the other two courts. As a result, the total number of trials in the County Court virtually mirrors that of the overall number of trials. However, since 1974 there have been two distinct types of judicial determinations in the County Court – small claims hearings or arbitrations for lower value actions and trials for higher value cases.⁸⁹ Trends for these two proceedings vary significantly. Analysis of trends in each of these two proceedings enables us to gain some insight into whether the vanishing trial phenomenon has been affecting all values of claims equally.

From 1974, when the small claims procedure was introduced, the number of other trials started to decline. It briefly recovered in 1992, though started to fall again within a couple of years. Following a period of slow growth between 2002 and 2010, the number of trials fell again, back to the below the 2002 levels by 2014. They have since risen again. Kritzer argues that trials involving the higher value claims, represent the cases most likely transferred from the High Court following changes in jurisdiction.⁹⁰ This would explain the increase in the number of claims in 1992 and also those seen after 2014. However, it would not explain why the number of claims started to fall again so soon after the County Court's jurisdiction became unlimited, or why not all of the jurisdictional changes are reflected in increases in the number of trials.

In contrast, the number of small claims hearings rose sharply from its introduction in 1974 until 1993. There was a brief dip, then the numbers peaked again, at a slightly lower level, in 1998. From this year the number of hearings decreased until they hit a low in 2013. Since then, the number of small claims hearings has increased year on year. What is noticeable is that not only did the decrease precede the implementation of the Woolf reforms, but that the drop in the two years prior to Woolf was significantly greater than that in the two years following. The recent increase in the number of small claims hearings is likely to be a reflection of the doubling of the small claims limit in 2013 to £10,000 and this suggests that higher value claims are those more likely to stay in the litigation system and go to trial.

⁸⁹ Since the Woolf reforms, fast and multi-track cases are disposed by trials, while cases in the small claims track are disposed by hearings. Until 1998, what are now small claims hearings were referred to as 'arbitrations' in the Judicial Statistics Reports.

⁹⁰ Kritzer (n.42 above), p.745.

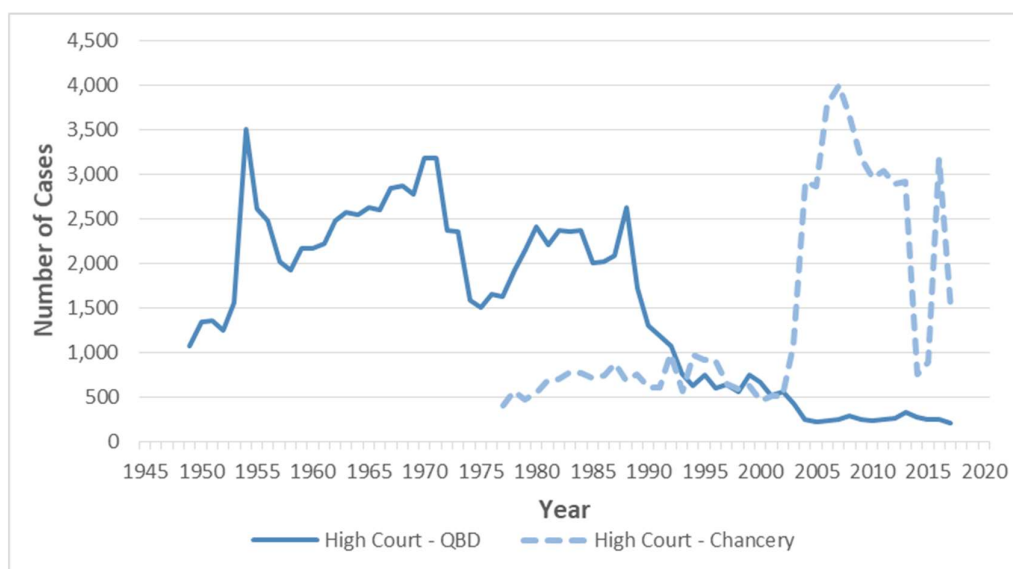


Figure 1.13: Cases disposed after trial in the QBD and Chancery Division, 1949-2017.⁹¹

Trials in the QBD present an interesting trend, showing overall decline between 1954 and 2004, since when they have levelled off.⁹² The decline was not consistent, periods of growth were followed by decline, peaking and dipping each time at successively lower levels than in the previous cycle. It was only from the peak in 1988 that the number of trials started to consistently fall.

Of the courts included in the existing vanishing trial studies, the Chancery Division has been the subject of the least amount of analysis. Kritzer devoted only two paragraphs to the Division out of his twenty-page article.⁹³ He argued that 'adjudication plays a more important role' in the Chancery Division as compared to the QBD. However, he only provided data on the number of trials, with nothing on the number of claims issued or cases set down for trial to explain or substantiate his claim.⁹⁴ His analysis was a primarily descriptive account of the trends seen in the chart, detailing the early increase in the number of trials, an erratic

⁹¹ As with claims issued, the County Court accounts for the vast majority of all trials and so the pattern for that court virtually replicates the overall trend and so is not included in this breakdown of individual courts.

⁹² Kritzer's analysis of trials in the QBD only extended up to 1998 because he was examining the number of trials that started and changes in the way the data was presented in Judicial Statistics meant it was no longer possible to distinguish trials started from those which were disposed during trial. Dingwall and Cloatre conversely based their analysis of trials in the QBD on cases disposed by trial, figures for which continued to be provided in Judicial Statistics after 1998. I have adopted the latter approach here, which corresponds to the data given for the other two courts.

⁹³ For comparison, his analysis of the Queen's Bench Division took five pages and the County Court one page.

⁹⁴ Kritzer (n.42 above), p.744.

period between 1987 and 1994 and then a steady decline from 1995.⁹⁵ Kritzer argued this latter period paralleled to some extent trends in the QBD and so supported the vanishing trial hypothesis, although the 'sketchy' nature of the data meant he was unable to posit explanations for the patterns.⁹⁶ Aside from a brief sentence by Genn,⁹⁷ the Chancery Division was otherwise not even mentioned in the other studies.

As indicated above, data on trials in the Chancery Division is only available from 1977. In contrast to Kritzer's representation of trends in this court, a very different picture emerges in respect of this Court to that seen in the others. The number of trials remained relatively consistent up to 2002, at which point, in direct contrast to the vanishing trial story of the other courts seen at that time, the number of trials began to rapidly increase, peaking in 2007. The number of trials then rapidly declined again, to a similar low point in 2014.⁹⁸ It can be seen from this that whilst trials did decline in the Chancery Division, they did so much later and for a much shorter period of time than in the other two courts. As discussed above, in the US context, Galanter rejected the argument that the decline in the number of trials witnessed during the 'thirty year war', or 'fast' period was simply a reflection of a change in the breakdown of the subject matter of cases being filed. However, underlying this argument is an acknowledgment that the likelihood to go to trial varies between different categories of cases. The Chancery Division deals with different subject areas of disputes to the County Court and the QBD. As such, the variations in the trends between the different courts may reflect a higher propensity to go to trial in the subject areas covered by the Chancery Division's jurisdiction and also a greater impact of the Woolf reforms on proceedings in the Chancery Division given the timing of the decline in that court.

As with the number of proceedings commenced, various factors may affect the number of cases disposed after trial. One incentive to settle in the English system that might affect trends in the number of cases disposed after trial is the Part 36 offer, included part of the CPR in the reforms introduced following the Woolf Report.⁹⁹ Under a Part 36 offer, either party can notify the court of an offer to settle. If the offer is refused and the party who

⁹⁵ *id.*

⁹⁶ *id.*

⁹⁷ Genn, 'Privatisation' (n.4 above), p.5.

⁹⁸ As with claims issued, the data on the number of trials in Chancery has been sourced from the new Pentaho system since 2015, the short date range makes it impossible to determine whether the drop between 2016 and 2017 is the start of a new downwards trend or just a temporary dip.

⁹⁹ CPR Part 36 – Offers to Settle. CPR 36.16 (1) states that a claimant is 'entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror'.

rejects the offer does not secure a better deal at trial then they are unable to claim any costs from the other side that were incurred after the Part 36 offer was made. This incentivises parties to make Part 36 offers as early as possible in the proceedings to minimise the costs that can be recovered by the other side if they subsequently lose at trial. It also encourages a party to seriously consider settling if the other side makes a Part 36 offer. In his review of costs, Jackson recommended that where a defendant rejected a claimant's Part 36 offer, but failed to do better at trial, the claimant's recovery should be enhanced by ten percent.¹⁰⁰ This recommendation was implemented in CPR 36.17,¹⁰¹ providing a further incentive for parties to accept Part 36 offers to settle during the litigation process and not risk proceeding to trial.

The Jackson reforms relating to the requirement to predict costs discussed above did not appear to have had any significant impact on the number of cases coming into the litigation system. However, they may have influenced the number and proportion of cases that are disposed by trial, implicitly pressurising parties even with strong cases to negotiate settlements during the litigation process as opposed to risking being liable for costs in the event of losing at trial. This is especially the case given parties now know in advance how much in advance how much they would be required to pay if they lost.

In summary, the data presented here shows that, in contrast to the number of claims being commenced, where not all of the courts in the study have shown a reversal of the trend towards vanishing litigants, all three courts have experienced an increase in the number of cases disposed after trial since the mid-2010s. Some of the trend in the number of cases disposed after trial may be a consequence of factors affecting the number of cases coming into the system. However, as seen, there are also various pressures to settle already in the litigation system that only impact the number of cases disposed after trial.

The proportion of cases disposed after trial

The final element of the vanishing trial is the proportion of cases that are disposed after trial. Analysing the proportion of trials as well as the absolute number enables us to examine more closely the relationship between the number of claims and the number of trials to determine

¹⁰⁰ Jackson LJ (n.73 above), p.427.

¹⁰¹ Under CPR 36.17 1(b) and 4, where judgment against a defendant is at least as advantageous to a claimant's proposals in a claimant's Part 36 offer then court must order that the claimant is entitled to interest on costs and on the money awarded, up to ten percent. Under 36.17 1(a) and 3, where a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer, the defendant must order that the defendant is entitled to costs with interest.

whether changes in the latter simply reflect changes in the former or whether there are likely other factors involved. Despite this, this aspect of the vanishing trial has received only limited attention in existing literature on the phenomenon as it relates to England.

Although there has been an overall decline across the date range of the project, akin to that observed in the US, there are significant differences between the two jurisdictions. Firstly, the one element of the vanishing trial that consistently declined in the US for the entirety of the period analysed by Galanter was the proportion of cases disposed by trial. As can be seen from Figure 1.14 below, the picture of the proportion of claims reaching trial in England is considerably more complicated than that observed in the US. From an early peak of 5 percent of claims issued in the County Court and QBD reaching trial in 1950, itself a remarkably low figure, the rate decreased sharply to 2 percent in 1958. The proportion fluctuated around this level until 1990, when it started to rapidly increase, reaching a high point of just under 5 percent in 1999. Since then it has dropped again, albeit not consistently and stood at 3 percent in 2017.

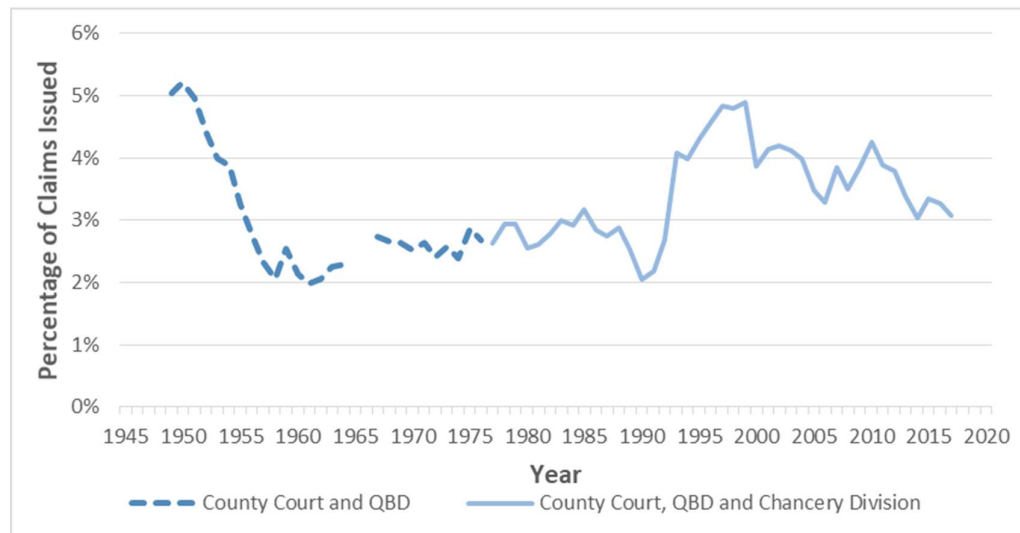


Figure 1.14: Proportion of total claims issued that were disposed after trial in the County Court and QBD, 1949-1976 and the County Court, QBD and Chancery Division, 1977-2017.¹⁰²

Secondly, the drop in the US is considerably more significant, falling from 11.5 percent in 1962 to 1.8 percent in 2002, a drop of 9.7 percent compared to the 2 percent decline seen in England. Finally, it can be seen that the starting point for the two jurisdictions is very

¹⁰² Due to the absence of data on the number of trials in the Chancery Division prior to 1977, the figures given for 1949 to 1976 are the proportion of claims issued in the County Court and QBD that reached trial, not the proportion of claims issued in all three courts.

different and that a considerably higher proportion of cases used to be disposed by trial in the US compared to England, and that conversely, the reverse is now true.

Detailed analysis

As shown in Figure 1.15 below, in the County Court, the percentage of cases issued that were disposed after trial fell sharply from 1950 to 1958, then rose again at a slow rate to a much lower level in 1975. The rate then fell again until 1990. From that time it has climbed very slightly to the current position of just under 1%. Following the introduction of the small claims procedure in the mid-1970s, the rate of hearing rose until 1985, levelled temporarily until 1988, before dipping slightly in 1990. Between 1991 and 1999 the rate of small claims hearings rose considerably, but since that then has fallen and was just over 2% in 2017. The overall low percentage of claims reaching trial or hearing in the County Court is likely to reflect the fact that many debt claims are issued in that court that are never expected to reach trial, but are uncontested and either disposed by judgment without trial or settled. This skews the proportion of cases reaching trial to some degree, but there is no way to strip these cases out of the figures for claims issued.

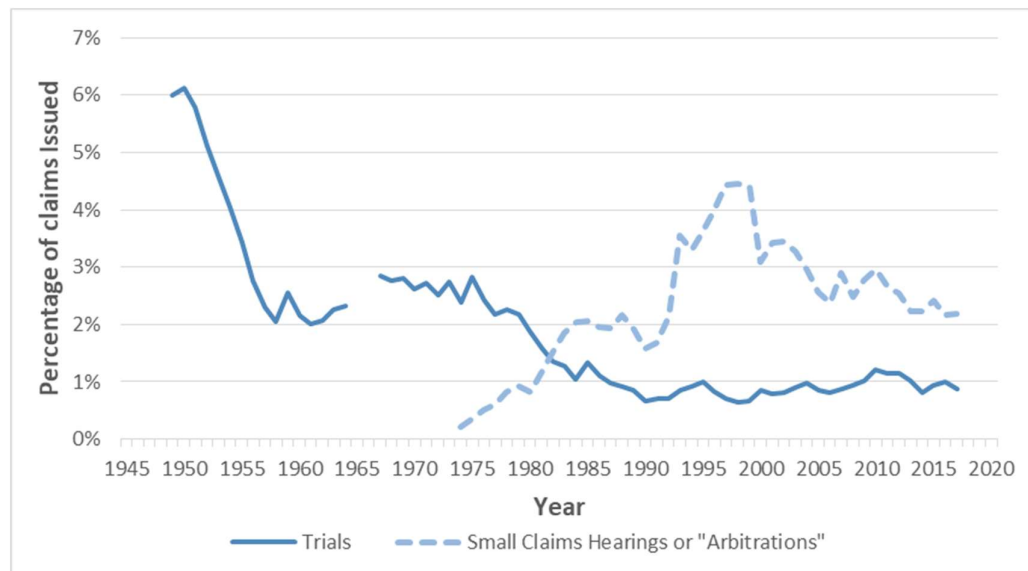


Figure 1.15: Breakdown of proportions of claims issued that were disposed after trial and small claims hearing or arbitration in the County Court, 1949-2017.

As with trends in claims issued and cases disposed after trial, individual courts show different patterns in the proportion of cases disposed after trial. Similarly to the County Court, the proportion of trials in the QBD fell overall from a high in the early 1950s to a low in 1974. What distinguishes the trends however is that rate in the QBD fell across the entire period, albeit not entirely consistently. In the County Court however, most of its decrease occurred

before that in the QBD even started and the rate in that court was actually increasing whilst the QBD showed decline.

The proportion of trials in the QBD recovered slightly by 1978, then declined to a new low in 1990, with the rate of decline increasing from the late 1980s. Following a period of relative stability up to 1999, there was then significant growth in the rate of cases disposed by trial until 2003, when it started to fall again just as rapidly. There are two possible explanations for the growth seen in early 2000s, both relating to the Woolf reforms. First, a stated aim of the reforms was to reduce the amount of cases that entered the litigation system only to settle just before trial. There was a significant reduction of claims issued immediately following the implementation of the Woolf reforms, the increase in the proportion of cases being disposed after trial in the same period suggests that the pre-action protocols had their intended effect and encouraged weaker claims to settle without proceedings being issued. As a result, only stronger cases that were more likely to proceed to trial entered the litigation system and these were encouraged to settle rather than proceed to trial by initiatives such as the Part 36 offer discussed above.

An alternative explanation, proposed by Dingwall and Cloatre, is based on analysis of decreasing waiting times, is that in order to maintain the same number of trials, cases that would otherwise have been tried at a later date were brought forwards.¹⁰³ This argument helps explain increases in the rate of trials occurring just prior to the Woolf report being published in 1996, with parties wanting their cases determined before the civil justice system was altered to an unknown extent and in unknown ways, and those just before the by then known reforms took effect in 1999. However, it would make sense that once the effect of the reforms was understood, that cases would no longer be brought forward. This should have been reflected in a dip in the number of trials in the QBD a few years after Woolf, especially given the reduced number of claims being filed, because trials that would ordinarily have been tried during that period would have already been disposed of. However, there is no dip, only a continuing slow reduction in the number of trials in the QBD. Whilst this does not rule out this argument, it does suggest that the initial rapid growth in the rate of trials following Woolf, and the overall growth up to 2017 is more due to the effect of the reforms reducing the number of weak claims being filed.

The impact of Woolf also seems apparent in the Chancery Division, albeit delayed by a few years in comparison to the QBD. As shown in Figure 1.16 below, after a period of overall

¹⁰³ Dingwall and Cloatre (n.44 above), pp.55-56.

decline in the rate of trials between 1977 and 2002, the proportion of claims disposed after trial rose rapidly until 2005, then overall more slowly until it peaked in 2013.

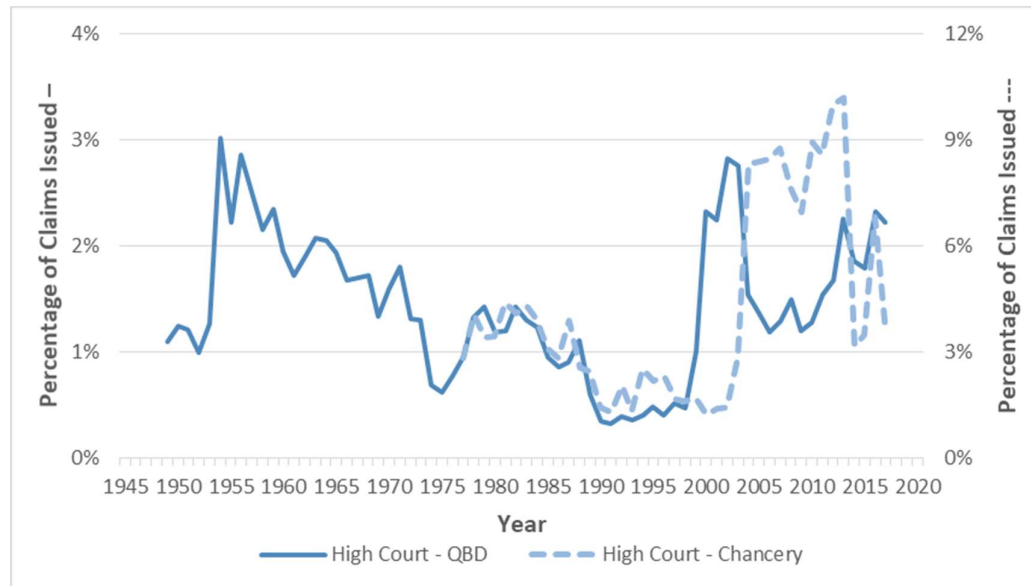


Figure 1.16: Proportion of claims issued that were disposed after trial in the County Court, QBD and Chancery Division, 1949-2017.

The overall picture of the vanishing trial phenomenon in England and Wales

The previous sections have analysed trends in each element of the vanishing trial individually. However, it is also relevant to consider the overall picture and examine how the relationship between the different aspects has shifted across the date range of this project. Galanter's analysis of the vanishing trial in the US can be divided into two distinct periods, during both of which there was evidence of a vanishing trial, at least in terms of proportion of claims issued that reached trial. It was however only during the second period that the actual number of trials declined, and the number of claims issued actually increased in both. In contrast, the data discussed here suggests it would be more appropriate in the English context to divide the date range of this project into five phases of unequal duration.




















Element of vanishing trial	Phase 1 ¹⁰⁴ 1949-late 1970s	Phase 2 Late 1970s-early 1990s	Phase 3 Early 1990s-early 2000s	Phase 4 Early 2000s - mid 2010s	Phase 5 Mid 2010s - 2017
Number of cases coming into the litigation system					
Number of cases disposed after trial					
Proportion of cases disposed after trial					
 Fast increase  Slow increase  Fast decrease  Slow decrease					

Figure 1.17: Breakdown of the three elements of the vanishing trial across the five different phases, indicating relative rates of overall increase or decrease in each phase.

As outlined in Figure 1.17 above, trends in the proportion of cases reaching trial differ significantly from those seen for both the number of claims issued and the number of cases disposed after trial in each of the five phases. Whereas the early period up to the late 1970s is characterised by growth in absolute numbers, the proportion of cases reaching trial in contrast declined over this period, although it did start to recover from the 1950s. During the Thatcher years, when both the number of claims and number of trials rose sharply, the proportion of trials declined, with this trend most evident from the late 1980s – the point from which there was the sharpest rise in absolute numbers. The story in the first two periods would appear to be a similar one to that seen in Galanter’s ‘100 years decline’. His arguments regarding judicial resource constraints may be relevant here in explaining the diverging trends between numbers and proportions.

Between the early 1990s and the early 2000s, the period when there was the most dramatic decline in the absolute number of claims and trials, the proportion of claims reaching trial conversely rose sharply. Although all five phases show evidence of one or more elements of the vanishing trial, it was only in the fourth phase that all three aspects decrease. The final period shows a similar picture to that seen in the second, with growth in both the number of claims issued and trials, but a drop in the proportion of cases being disposed by trial. Figure 1.18 below summarises the differing patterns in each of the three courts for each elements of the vanishing trial across the five phases, providing a more nuanced account of the vanishing trial in civil courts of first instance than presented in Figure 1.17 above.

¹⁰⁴ In phase 1, the trends attributed to the number and proportion of cases reaching trial are based on data for the County Court and QBD only because, as discussed in previous sections, no data for trials in the Chancery Division is included in Judicial Statistics before 1977.

Element of vanishing trial	Court	Phase 1 1949-late 1970s	Phase 2 Late 1970s- early 1990s	Phase 3 Early 1990s- early 2000s	Phase 4 Early 2000s -mid 2010s	Phase 5 Mid 2010s -2017
Number of cases coming into the litigation system	CC	↗	↗	↘	↗	↗
	QBD	↗	↗	↘	↗	↗
	Chancery	↗	↗	↘	↘	↗
Number of cases disposed after trial	CC - hearing	-	↗	↘	↗	↗
	CC - trial	↗	↘	↘	↗	↗
	QBD	↗	↗	↘	↘	↘
	Chancery	-	↗	↗	↗	↘
Proportion of cases disposed after trial	CC - hearing	-	↗	↗	↗	↘
	CC - trial	↘	↘	↗	↗	↗
	QBD	↘	↘	↗	↗	↗
	Chancery	-	↘	↗	↗	↘





 Fast increase
  Slow increase
  Fast decrease
  Slow decrease

Figure 1.18: Breakdown of the three elements of the vanishing trial across the five different phases in the County Court, QBD and Chancery Division, indicating relative rates of overall increase or decrease in each phase.

Conclusion

The existing literature on the vanishing trial relating to England argued that the number of claims issued showed a different trend to that highlighted by Galanter in the US. The continuing growth in proceedings issued in US Federal Courts contrasted with that of vanishing litigants in the UK. However, a similar pattern of a vanishing trial was observed in relation to both the number and proportion of cases disposed by trial. Whilst Dingwall and Cloatre argued that the trends towards vanishing trials were levelling out by 2004, Genn argued that the data pointed towards the elimination of civil trials.

The analysis conducted here updates the existing research and challenges these conclusions. Based on data from the 2012 to 2017, presented for the first time here, it is now argued that whilst there may have been a twenty year period of both vanishing numbers of litigants and trials, these trends have now reversed and both are now in a period of overall growth. The exact trends vary between the different courts examined, with recent growth in the County Court masking a continuing, albeit slow, decline in the QBD.

Procedural rules and reforms, the growing cost of litigation and virtual elimination of legal aid for civil disputes along with judicial case management have all been discussed as potentially underlying the trends analysed in this chapter. The complexity of the patterns observed, both overall and in individual courts makes it difficult to determine the respective

role played by different factors that have been proposed as explanations for the trends.¹⁰⁵ It is also the case that explanations proposed to date do not fully explain all of the trends. The various procedural reforms that have taken place, especially those affecting the jurisdiction between the County Court and the QBD did not correlate with significant changes in the numbers of proceedings issued in either court. It has not been possible to conclusively determine the underlying causes of all the trends observed. However, it is hoped the more up to date and accurate empirical picture of trends detailed here will be of assistance to future researchers in the field to explore this further.

This chapter has focussed on comparing trends in different courts that all resolve disputes covering various subject areas. From the comparative analysis of trends in the County Court and QBD with the Chancery Division it was shown that there is some variation in trends between different areas of law. Genn briefly commented that public law showed contrasting trends to those in the three courts analysed in this chapter.¹⁰⁶ I will explore this further in Chapters 3 to 5 of this thesis, aiming to bring public law into the vanishing trial debate.

¹⁰⁵ Kritzer (n.42 above), p.752.

¹⁰⁶ Genn, 'Privatisation' (n.4 above), pp.5-6.

Chapter 2: Sources of Data and Methods: The Strengths and Challenges of Judicial Statistics

Introduction

Researchers working on trends in the civil justice system are highly dependent on longitudinal datasets designed and maintained by the Ministry of Justice and its predecessors.¹ The Judicial Statistics Reports are however the only publicly available dataset on the litigation system covering a long period. As with any project which involves the analysis of secondary data, the researcher is limited by what others have done. This project involves quantitative analysis of secondary data. There are many challenges in using secondary data.² Bryman for example highlights the range of variables, the way they have been coded by the researcher, the complexity of the data, lack of control over the quality of the data and the absence of key variables as limitations of such data sources.³ There is however a significant advantage of secondary data – the ability to access data for a fraction of the resource cost involved in carrying-out the relevant data-collection, leaving more time for data analysis.⁴ This advantage is particularly relevant in the context of this study, where, given the high volume of cases involved, it would be beyond the scope of the project to gather the data from the case files.

The aim of this chapter is to detail the data sources and methods used in this research project. It provides a detailed and comprehensive account of the data which helps contextualise the findings discussed in the previous and subsequent chapters. In compiling such a detailed guide it is hoped that this chapter will be of use to future researchers working in the field. This chapter will first examine the data source used for this study, the Judicial Statistics Reports, considering general issues relating to the data contained in it, and justifying why despite the issues raised, it remains a credible data source. It will then detail the methods used when analysing available data, before going on to briefly explain why

¹ These were the Department of Constitutional Affairs, the Lord Chancellor's Department and the Lord Chancellor's Office.

² See A. Dale, J. Wathan and V. Higgins, 'Secondary Analysis of Quantitative Data Sources' in P. Alasuutari, L. Bickman and J. Brannen (eds), *The Sage Handbook of Social Research Methods* (SAGE 2008), pp.528-529 for a discussion of methodological issues associated with secondary analysis.

³ A. Bryman, *Social Research Methods* (5th edn, OUP 2016), pp.312-313.

⁴ *id.*, pp.310-311. See also Dale, Wathan and Higgins (n.2 above), p.520. They highlight secondary analysis enables researchers to 'analyse datasets that they would not dream of being able to collect themselves'.

certain courts of first instance were excluded from analysis in this project. The remainder of the chapter will focus on each of the courts and proceedings that have been included in this study in turn – the County Court, Queen’s Bench Division of the High Court (QBD), the Chancery Division of the High Court and judicial review proceedings. It will engage with what and how specific data was collected for each. Where details of statistics available interrupt the flow of the explanation given they have been included in a technical appendix.

Source of the data

In line with the approach taken in existing studies on the vanishing trial in England and Wales, the annual Judicial Statistics, currently published by the Ministry of Justice (MoJ), are the principal data source for this project.⁵ The reports contain statistical data on the number of cases commenced and reaching various stages of the litigation process. Each edition includes statistics for the relevant calendar year that the report refers to, and frequently also contains comparative data from previous years.⁶ The reports primarily covered first instance and appellate civil courts in England and Wales, although they also have data on Magistrates’ courts and the Crown Court.⁷ Prior to 2007, they also included data on a limited number of tribunals.⁸

The data collection required time consuming transcription of statistics from a number of tables in the Judicial Statistics Reports. I worked from scanned copies of the reports available at U.K. Parliamentary Papers,⁹ hard copies located in the LSE library and, for the reports from 2009 onwards, digital copies on the Ministry of Justice’s website.¹⁰ The reports contained a summary table for all first instance courts up until 1981 and this formed the starting point for the data collection. The summary table data related to the number of proceedings commenced in each of the courts and Divisions. Additionally, the County Court, each of the

⁵ For an explanation of what Judicial Statistics have been called over time see Appendix 1 Naming of Judicial Statistics.

⁶ The Judicial Statistics Reports also contain data on various other aspects of the legal system. This includes the number and workload of the judiciary and, lastly, a breakdown of legal aid and taxation of costs. The exact information provided varied considerably between different editions of the reports. This information was not required for the purposes of this study and so I did not collect it.

⁷ Additionally, the Privy Council is included within the appellate courts and data on the House of Lords/Supreme Court includes appeals from Northern Ireland and Scotland. Further, between 1979 and 1981, the report was divided into two sections, with the first concerning judicial activity in England and Wales and the second in Northern Ireland.

⁸ The tribunals included in Judicial Statistics have varied over time. Since 2007, statistics for all tribunals has been reported separately and reports can be found at

<https://www.gov.uk/government/collections/tribunals-statistics>.

⁹ <https://parlipapers.proquest.com/parlipapers/search/basic/hcppbasicsearch>.

¹⁰ <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly>.

divisions of the High Court and courts under the jurisdiction of each Division and a selection of tribunals have their own table, often several for each court, containing more in-depth statistics relating to various stages of the litigation process. Figures on both the number of cases commenced and disposed after trial in each court was sometimes varied between the different tables, even within the same edition of Judicial Statistics. It was not always possible to correlate precisely the data between the various tables over time and further, the data provided within Judicial Statistics varied between the different courts.

The Judicial Statistics Reports series started in 1857. The decision was however made to start the analysis of trends in this project from 1949 in order to avoid any artificial suppression in the numbers of cases commenced and disposed after trial during World War II and its immediate aftermath.¹¹ From the data in the annual Judicial Statistics Reports between 1949 and 2017, I primarily collected data on three civil courts which resolve disputes at first instance – the County Court, the Queen’s Bench Division of the High Court (QBD) and the Chancery Division of the High Court. To ensure the data was as accurate as possible, I also gathered statistics for a number of other courts whose jurisdiction was merged into either of the High Court Divisions or the County Court during the date range of this project. Data for these courts has been collated with figures for the relevant court into which they were subsumed into. Figure 2.1 below shows all the courts and tribunals for which data has been collected, and which one of the three main courts their data has been attributed to. Whilst the data is therefore not perfectly aligned with that reported in Judicial Statistics for each individual court, this approach enabled me to track more accurately trends in types of cases over time and avoided issues of an artificial increase in cases in caused by the changes in jurisdiction. From this, it was possible to produce a more up to date and accurate picture of the vanishing trial at first instance than in current literature.

¹¹ For analysis of the number of civil proceedings commenced during this period see C.W. Brooks, *Lawyers, Litigation and English Society Since 1450* (Hambledon Press 1998), ch4 who provides data from 1830 to 1995.

Main court	Courts and proceedings data gathered for	Years
County Court	County Court	1949-2017
	Mayor's and City of London Court	1949-1971
Queen's Bench Division	Queen's Bench Division	1949-2017
	Admiralty proceedings	1949-2017
	Official Referees Court/Technology and Construction Court	1949-2017
	Commercial Court	1995-2017
Chancery Division	Chancery	1949-2017
	Companies Court	1949-2017
	Bankruptcy Court	1949-2017
	Patents Appeal Tribunal and the Registered Designs Appeal Tribunal	1949-1978
	Patents Court	1979-2013
	Courts of Chancery of the Counties Palatine of Lancaster and Durham	1949-1971
	Contentious probate	1949-1974

Figure 2.1: Summary of courts that have been included within figures for the County Court, QBD and Chancery Division.¹²

I also gathered data on judicial review proceedings, both in the High Court and in the Upper Tier Immigration and Appeal Tribunal (UTIA).¹³ Until the UTIA was granted power to determine immigration and asylum judicial reviews in 2013, judicial review actions were exclusively resolved in the Queen's Bench Division. Despite this, these proceedings have been excluded from analysis of the vanishing trial in the QBD in existing literature. One reason for this could be the inconsistency in how judicial review actions are classified in Judicial Statistics. Up until 1973, prerogative writs were included within the summary table of first instance courts, with the figure provided being the sum of the total 'applications for leave to apply by notice of motion' and 'summons issued in other special matters'.

From 1974, the style of the Judicial Statistics Reports was significantly altered following proposals made by a Working Party in light of the recommendations made by the 1968 Adams Committee and the changes introduced by the Courts Act 1971.¹⁴ From that point, the reports were divided into a number of sections, the relevant ones for the purposes of this study being 'appeals'; 'business of courts at first instance' and 'business of tribunals'.¹⁵

¹² For further details see Appendix 1 Summary of courts.

¹³ Statistics for the latter were obtained from tribunal reports as opposed to Judicial Statistics.

¹⁴ Lord Chancellor's Department, *Judicial Statistics, England and Wales, 1974: Civil Judicial Statistics* (Cmd. 6361, 1975), p.1.

¹⁵ Other sections included 'taxation of costs' and 'the work of the judges'. Initially, the final section in the revised Judicial Statistics format included comparative tables, replacing the original summary tables. In 1982, the comparative tables were relocated to within the relevant sections of Judicial Statistics and presented in a different format.

Classificatory systems used are not always consistent or logical. Under the revised Judicial Statistics layout, first prerogative writs and, from 1981, judicial review cases were included within the appeals section. The explanatory notes for the QBD in that section stated that the court exercised appellate and supervisory jurisdiction over inferior courts and tribunals. The supervisory jurisdiction refers solely to judicial review cases. However, between 1977 and 1981, prerogative proceedings also appeared on the summary table of first instance proceedings commenced in the High Court. The unique character of judicial review actions most likely accounts for the degree of confusion within Judicial Statistics as to how to report judicial review cases because the procedure does not fall precisely within either first instance or appellate jurisdictions.

Proceedings	Court data gathered from	Years
Judicial Review	Queen's Bench Division	1981-1999
	Administrative Court	2000-2017
	Upper Tier Immigration and Asylum Tribunal	2013-2017

Figure 2.2: Summary of proceedings for which data has been gathered relating to judicial review actions.

Method

Data was collected from every edition of the Judicial Statistics Reports for the date range 1949-2017 and input into Excel databases designed for the purpose. Data for civil law proceedings in each of the courts of first instance included in this study (the County Court, Queen's Bench Division of the High Court and the Chancery Division of the High Court), and for judicial review proceedings were input. Statistics on two key variables were collected for each court – the number of proceedings commenced and the number of cases disposed after trial each year. From the statistics on the number of proceedings commenced and disposed after trial, a third variable, the proportion of cases disposed after trial was calculated by dividing the number of cases disposed after trial by the number of proceedings commenced each year. For each court individually, and for all courts combined, bivariate analysis of trends over time for each of the three variables was conducted and line graphs produced to summarise the results.

In addition to these main variables, all other available data relating to the number of proceedings commenced and disposed after trial was also collected though what was available varied considerably over time. Where the Judicial Statistics Reports contained not only the total number of cases reaching a particular stage of the litigation process, but also provided a breakdown by case characteristics such as subject matter or claim value, this

information was also recorded.¹⁶ Due to the fact that the data contained in the reports changed repeatedly over time, it was then necessary to reconcile, as far as possible, the different types of subjects and values contained in the reports. The limited amount of subject matter data in the reports significantly restricted the degree of in-depth analysis it was possible to conduct on trends in the type of cases commenced or disposed after trial by subject. Further, even where subject matter data was included for both proceedings commenced and disposed after trial, discrepancies between the breakdowns used at the different stages meant it was not possible to analyse trends in the proportion of cases at subject matter level in a reliable manner.

For judicial review proceedings, data was collected about four main variables – the number of applications for judicial review, the number of permission decisions, the number of permission granted and the number of final hearings. In addition to calculating the proportion of cases disposed after hearing each year by dividing the number of final hearings by the number of applications, two further proportions were examined in respect of judicial review actions. First, the proportion of permission decisions in which permission was granted.¹⁷ Second, the proportion of permissions granted that reached a final hearing.¹⁸ As well as collecting data on the total number of proceedings, where a breakdown by subject matter was included in the reports, those statistics were also gathered. Again the inclusion of subject matter data, and the breakdown used in Judicial Statistics was not consistent across the date range of the study. However, the same breakdown was used for each stage of the judicial review process that it was provided for in any given edition. As with the analysis of civil law proceedings, bivariate analysis was conducted for each variable, including the calculated proportions, over time and line graphs produced to summarise the trends.

Limitations of the Judicial Statistics Reports

Whilst providing a considerable amount of information, the dataset is by no means perfect and there are clear limitations about what we can learn about the civil litigation system from Judicial Statistics. As with any longitudinal study analysing large volumes of cases, reliance on government datasets causes problems for the researcher.¹⁹ The variables that can be

¹⁶ This level of detail was not consistently included in Judicial Statistics for all courts, or all stages of the litigation process.

¹⁷ Calculated by dividing the number of permissions granted by the number of permission decisions.

¹⁸ Calculated by dividing the number of final hearings by the number of permissions granted.

¹⁹ See Bryman (n.3 above), pp.319-323. For a discussion of issues relating to official statistics, especially in regard to reliability and validity, as well as a synopsis of the academic debate concerning

analysed are restricted to what others have chosen to collect. In the case of Judicial Statistics, these have varied over time. Further, the data is almost entirely provided in aggregate format, which limits the potential for in-depth analysis by making it impossible to explore the relationship between different variables. It was not for instance possible to conduct more in-depth statistical tests or perform any regression analysis using the data.

Genn has been especially critical of data provided by Her Majesty's Courts and Tribunal System (HMCTS), which includes Judicial Statistics, describing it as 'weak statistical data'.²⁰ She went on to highlight the what she termed the 'poverty' of the data provided, in terms of limited information on case mix, types of cases being brought, types of litigants and timing of determination prior to trial.²¹ Both Brooke and Jackson in their respective reports on civil courts and litigation costs have also voiced strong concerns about the reliability of the data in Judicial Statistics. Brooke was particularly scathing in his assessment, stating that some statistics were 'not worth the paper they are written on'.²² His argument that 'the quality of the data ... depends on the quality of the staff who make the entries, and of those who train and supervise them', suggests fundamental concerns about the accuracy of Judicial Statistics data generally.²³ Jackson was equally dismissive, indicating that his 'own experience confirm[ed] the unreliability of the published statistics'.²⁴

There are other issues relating to the data contained in the reports. In some cases, relevant data series have gaps, either where the information was not gathered at all for a period of time, or was collected for a number of years only in a format that was non-compatible with data from other years. Our ability to analyse and understand the impact of reforms on trends in the number and proportion of cases is also further hampered by some key reports being discontinued entirely, either just before or immediately following the reform in question. Related to this, not all courts and tribunals are included every year between 1949 and 2017.

the appropriateness of their use as a data source for social researchers. Not all of his concerns are relevant in the context of the Judicial Statistics Reports, as they primarily concern crime statistics.

²⁰ H. Genn, 'Why the Privatisation of Civil Justice is a Rule of Law Issue' (36th F A Mann Lecture, Lecture at Lincoln's Inn, 19th November 2012), p.3.

²¹ *id*, p.6.

²² This criticism was specifically in respect of District Registry statistics. Brooke went on to claim that only data on personal injury cases was likely to be accurate for cases outside London in the Queen's Bench Division. His comment that 'Chancery statistics present fewer problems' suggests that although Brooke felt inaccuracies were prevalent in the reports, he accepted that the degree of error varied between courts. H. Brooke, *Should the Civil Courts be Unified?* (Judicial Office, 2008), p.197 Annex J.

²³ *id*, p.192 Annex J.

²⁴ Referring specifically to the Technology and Construction Court, Jackson highlighted that the published statistics in the 2007 Judicial Statistics were wrong by several hundred percent. Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report Volume One* (Ministry of Justice, 2009), p.45.

This is due to two factors. First, some courts were abolished during the date range, whilst others were only established during it. Second, in some years, information for some courts was either not included or included in a modified/reduced format.²⁵ Additionally, the jurisdiction of various courts changed during that period, causing some proceedings to be reported under different courts in different years. The overall style of the reports, the presentation of information and the data provided was frequently revised and has in some circumstance proved also difficult to reconcile. The information provided also varies to a certain extent between different courts and tribunals, reducing the potential for in-depth comparisons.²⁶

Another issue relates to the actual numbers given in the Judicial Statistics Reports. Many of the tables included statistics not just for the relevant year, but also included historical data on one or more preceding years. In several instances, the figures provided for a given year for comparative purposes differed from those originally contained in the relevant edition of Judicial Statistics. This anomaly was not restricted to a single court or tribunal, or particular stage of the litigation process, but observed across the majority to differing degrees. In some cases this can be accounted for, either because the figures given in the later reports corrected errors, or the numbers were revised to reflect changes made to the proceedings included in the relevant statistic in later reports. However, it has not been possible to determine why all of the numbers differ and which entry should be considered correct. Where this happened, the figure from the most recent edition of Judicial Statistics was used.

However, these concerns do not mean that the entirety of the data contained within Judicial Statistics should be regarded as completely inaccurate and rejected as an unsuitable data source for analysis of trends in civil litigation. Jackson himself accepted that the degree of inaccuracy in areas not investigated by either himself or Brooke was a matter of speculation.²⁷ Moreover, Judicial Statistics are the only government produced and accessible source for statistics on the number of cases in the legal system available. Whilst there are doubts about the accuracy of the fine line detail of the data, the reports remain the only credible source for consideration of big picture trends.²⁸ Further, given the volume of cases

²⁵ For example, there is no data relating to the Court of Appeal (Civil Division) in the 1981 report because the statistics were said to be unavailable at the time of publication.

²⁶ For example, there is no data on the number of trials in the Chancery Division prior to 1977, whereas the other courts and proceedings analysed here contain this data from 1949.

²⁷ Jackson however accepted that the degree of accuracy in areas not investigated by either himself or Brooke was a matter of speculation. Jackson LJ (n.24 above).

²⁸ The MoJ's own assessment of the quality of the reports supports this argument. Jackson highlighted that he had been advised by the MoJ that 'the published figures can be relied upon as giving a

that pass through the civil courts on a yearly basis and the sixty eight year date range of this project, alternative approaches such as analysis of case files are beyond the scope of this study. Consequently, the figures contained in Judicial Statistics are used for the purposes of this study, but have been treated with caution. In the description of data contained in other chapters, any inconsistencies are noted when relevant.

Sources of data for individual courts

Within each edition of the Judicial Statistics Reports there are a number of different tables. Some contain information for a number of courts, in other instances, a single court will have several tables with data on it relating to different stages of the litigation process. The following sections of this chapter will provide further detail on the tables within Judicial Statistics that were used to obtain the data for this project. It will first detail which courts of first instance were excluded from the study, and why. The chapter will then move on to consider the County Court, the QBD, the Chancery Division and judicial review proceedings in turn.

Not all the courts of first instance included in Judicial Statistics have been included in this study. In previous studies into the vanishing trial in England and Wales, the Family Division of the High Court has been excluded. One reason for this is likely the inconsistencies in the reporting of data.²⁹ Whilst data for the Family Division has been collected, it has so far proved impossible to reconcile the various data contained in the Judicial Statistics Reports over the entire date range. As with existing literature therefore, statistics for divorce from the Probate, Divorce and Admiralty Division prior to 1971 as well as all data relating to the Family Division post 1971 have been excluded from analysis of trends at first instance in this project. Some editions of Judicial Statistics contain statistics for a number of other first instance courts that no longer exist.³⁰ These have all been excluded from analysis of trends at first instance to avoid skewing the data for the years in which there is data for them.

reasonable order of magnitude'. They suggested that overall totals were likely to be broadly accurate, though admitted some fine line detail may have been 'muddled up'. *id.*

²⁹ For example, up to 1973 family statistics in the Probate, Divorce and Admiralty and Family Divisions only related to divorce and from 1974 statistics for the Family Division also included 'originating summonses' under a range of different Acts; 'wardship'; 'adoptions'; 'guardianship of minors'; 'legitimacy proceedings' and 'probate grants issued'.

³⁰ See further Appendix 1 Excluded courts of first Instance.

In the sections that follow, I will detail the various sources that I used for each court that has been included within this project and how the data contained within them was reconciled across the date range of this project.

County Courts

There have been an extremely large number of different tables in Judicial Statistics relating to proceedings issued and disposed after trial in the County Courts across the date range of this project (see Appendix 2). In some instances, the only difference between tables is the name, with the data contained, and the format it is presented in otherwise remaining the same. A further layer of complexity, not shown in the table is that, data contained within a table was not necessarily consistent, even when the name of the table it was included in remained constant. However, although the exact nature of the statistics contained in the tables has varied considerably over time, it has been possible to collate data on the number of proceedings commenced and disposed after trial in the County Court for the entire period 1949-2017.

Proceedings issued

The primary issue in analysing trends in the number of claims issued in the County Court is ascertaining which proceedings should be counted. The Judicial Statistics Reports do not provide much clarity on this subject. From the table in Appendix 2, four main groups of tables can be identified that contain data on proceedings commenced in the County Court:

- 1) General summary tables of courts of first instance
- 2) County Court summary tables
- 3) Main plaints entered in the County Court table
- 4) County Court proceedings commenced tables.³¹

In most years, tables from more than one of these groups was included in Judicial Statistics and, frequently, different figures for the number of proceedings commenced were given in the various tables within the same edition of the report. What was reported in these tables also changed every few editions of the reports. This presented a number of challenges in

³¹ There was a fifth type of table in Judicial Statistics, containing details of specific proceedings, primarily although not exclusively those brought under specific Acts, what I've termed 'detail tables'. However, it has not been possible to reconcile the data contained in these tables with that in any of the summary tables detailed above. For further details see Appendix 1 County Court: proceedings issued. See Appendix 3 for the full list of the detail tables included in Judicial Statistics for the County Court and Mayor's and City of London Court.

deciding how to reconcile the data to produce an accurate picture of the number of claims issued.

Due to the different types of proceedings included in each of the sets of tables, it has proved difficult to reconcile the various data sources. The only type of proceedings that I have consistently been able to identify and collect data on across the different categories of tables and for the entire date range are money claims, including recovery of land actions. Consequently, trends in proceedings issued in the County Court will be based on an analysis of money claims alone. This is a rational response to the problems outlined in this section given that, aside from divorce proceedings, the magnitude of all other types of actions is so small in comparison to money claims that their exclusion will not appreciably affect observed trends.³²

This approach matches that in both Genn's and Dingwall and Cloatre's studies,³³ although they do not address the issue of the conflicting information in Judicial Statistics or specifically identify what types of proceedings they are looking at. It also goes some way to explain why Genn only provided data for selected years up to 1998,³⁴ because the ones she used were the same as those provided in the revised format of the County Court summary table from 1983. However, that table also included data for 1963 and 1973, which she did not. Further, figures for money and recovery of land actions are provided in every edition of the Judicial Statistics Reports, meaning it was not necessary to restrict data to the years contained in the summary table.

Cases disposed after trial

Statistics on the number of cases disposed after trial presented less of a problem to collect and collate from Judicial Statistics. For the vast majority of the date range, the data available was compatible and, aside from 1965-1966, it was possible to map trends in the number of trials in the County Court from 1949-2017. Between 1949 and 1973, the 'Actions for Trial and Disposed of Table' in the County Court section of Judicial Statistics contained data on

³² For example, in the 1971 edition of Judicial Statistics, there were a total of 1,497,523 money proceedings commenced, including those relating to recovery of land. Whereas there were only 4,225 bankruptcy proceedings commenced and 363 proceedings under the Companies Act. Lord Chancellor's Department, *Judicial Statistics, England and Wales, 1971: Civil Judicial Statistics* (Cmd. 4982, 1972), p.86.

³³ R. Dingwall and E. Cloatre, 'Vanishing Trials?: An English Perspective' [2006] *J.Disp.Resol.* 51; H. Genn, *Judging Civil Justice* (CUP 2009); Genn, 'Privatisation' (n.20 above).

³⁴ Genn, *Judging* (n.33 above), p.35.

the number of cases both set down for trial and disposed after trial.³⁵ For cases disposed after trial, the numbers were broken down into the manner of disposal – whether by judge,³⁶ or registrar.³⁷ Unlike with the various tables on proceedings issued, it was not an issue to correlate the numbers given in that table with others that also included data on trials in the County Court.³⁸

After 1974, following the establishment of the small claims procedure, Judicial Statistics provided a more in-depth breakdown of cases disposed. Numbers were given not only for cases disposed after trial, but also for small claims hearings, which were recorded as ‘arbitrations’ until the 1993 Judicial Statistics. From 1974, I collected data on both types of proceedings, as well as combining for an overall total. Between 1974 and 1990, the figures were provided as a breakdown of the number of trials and arbitrations by each of judges and registrars. From 1990 to 1994, the only breakdown provided was by circuit. Between 1995 and 2010, the tables relating to the County Court were revised and additional tables on disposals were included, that provided data not only on the number of trials and arbitrations/small claims, but also on the subject matter of the claim.³⁹ Since then, the only breakdown has been by small claims hearings and fast and multi-track trials combined. Due to the fact that the only data consistently provided was overall number of trials and, since 1974, as breakdown by small claims hearings and trials, this is as in-depth as it has been able to analyse trials in the County Court.

Queen’s Bench Division

As with the County Court, Judicial Statistics contained data on proceedings commenced and disposed after trial in the QBD in a number of different tables, as shown in Appendix 4. Although there are fewer tables on proceedings in the QBD itself than for the County Court, there were data for the various courts that fall under the jurisdiction of the QBD – Admiralty Court, the Official Referees’ Court or Technology and Construction Court, the Commercial Court and ‘other’ proceedings.

³⁵ An equivalent table was provided for the Mayor’s and City of London Court between 1949 and 1971, I combined the numbers in the County Court and Mayor’s and City of London Court tables for these years.

³⁶ This was broken down into cases disposed by ‘judge alone, by ‘judge after reference under s 93’ and ‘before judge with jury’.

³⁷ From the 1972 edition, the figures for trials before registrars was further broken down in cases below £75 and those exceeding it.

³⁸ See further Appendix 1 County Court: cases disposed after trial.

³⁹ See further Appendix 1 County Court: Small Claims statistics.

Proceedings issued

The QBD figures within the Judicial Statistics Reports' summary and individual court tables were difficult to reconcile. Up to 1981, the summary table provided an overall total for the QBD and a breakdown by 'prerogative proceedings' and 'general proceedings'.⁴⁰ Between 1949 and 1971, admiralty proceedings were on the summary table under the Probate, Divorce and Admiralty Division, but were under the QBD from 1972. The admiralty figures on the summary table were the sum of the writs issued for actions *in rem* and *in personam* and admiralty writs issued in District Registries.⁴¹ Neither the Official Referees' Business nor the Commercial Court were included in any of the summary tables and so the only tables I used to obtain data for proceedings in these courts were the ones specifically relating to them. From 1982, I gathered all data from the tables within the QBD section of the Judicial Statistics Reports. From this year, there were no longer any issues reconciling data from different reports. However, problems were caused by the fact that the numbers given in one report differed from those given in later editions for comparative purposes. As a result, I calculated the number of claims commenced in the QBD each year by totalling the number of:

- Writs issued
- Admiralty proceedings issued
- Official Referees' Court or Technology Court proceedings issued
- Commercial Court proceedings issued
- 'Other' proceedings issued

In respect of writs issued, the Judicial Statistics Reports contain details on writs issued in both the Royal Courts of Justice and District Registries.⁴² Although a breakdown by subject matter of writs issued was included in the Judicial Statistics Reports from 1974 I have been unable to do detailed analysis on trends in the QBD by subject matter for a number of reasons. First, the number and nature of the categories has changed several times since 1974. Second, although a breakdown of cases disposed after trial was also provided by subject area between 1974 and 1998, the categories were not the same, meaning it was not possible to analyse trends in the proportion of cases issued that were disposed after trial as it was with the overall number of cases issued. Third, the source of the statistics was revised several

⁴⁰ See further Appendix 1 Queen's Bench Division: Prerogative and General Proceedings.

⁴¹ See further Appendix 1 Queen's Bench Division: Admiralty Writs.

⁴² See further Appendix 1 Queen's Bench Division: Royal Courts of Justice and District Registries.

times. Initially, the breakdown was for all QBD writs issued, later the numbers were based on a sample of cases issued in both the RCJ and District Registries. Currently, it is based on a sample of cases issued in the RCJ only. It is not possible to determine how representative of the entirety of cases issued the sample is.

Cases disposed after trial

Judicial Statistics contains a full series of cases disposed after trial in the QBD between 1949 and 2017. From 1974 to 1998, considerably more detail was contained within the reports. Not only was there data on the number of cases disposed after trial, but it also contained statistics on numbers of cases settled during trial or settled at the door of court, all by subject matter. From 1999, revisions to the format of the report reduced the number of categories of outcomes and, since 2005, the reports have only contained data on the number of trials concluded.

Kritzer based his analysis on the number of cases disposed after or during trial, to show trends in the number of trials that commenced. As he highlighted though, amendments to the Judicial Statistics Reports from 1999 meant that several categories of outcome were collapsed into one and it was no longer possible to distinguish cases settled or withdrawn before trial from those settled during trial.⁴³ This led Dingwall and Cloatre to instead use only statistics on the number of cases disposed after trial in their study.⁴⁴ Both can be seen as relevant as indicators of the number of trials that occur and the number that are concluded. However, I have followed Dingwall and Cloatre's approach here because this is the only trial variable that is consistently recorded in the reports. It also matches the type of data provided for the other courts in this study, which enables me to analyse trends in the combined number of trials.

Chancery Division

It has been possible from the data contained in Judicial Statistics to provide an analysis of trends in the Chancery Division, for both proceedings issued and cases disposed after trial, although inconsistencies in Judicial Statistics' data have impacted my ability to analyse trends. As with the County Court and QBD, data for the Chancery Division has been sourced from several different tables that have been included within the Judicial Statistics Reports across the date range of this project. The full list of tables relating to proceedings in the

⁴³ H.M. Kritzer, 'Disappearing Trials? A Comparative Perspective' (2004) 1 *JELS* 735, p.738.

⁴⁴ Dingwall and Cloatre (n.33 above), p.54.

Chancery Division that I collected data from are shown in Appendix 5. The data I gathered relates to the Chancery Division itself and proceedings that fall under its jurisdiction in order to provide greater insight into the trends in the types of proceedings in the Division.

Proceedings issued

The numbers of claims issued in the Chancery Division are not identical to those given in the Judicial Statistics Reports for the period 1949-1977, but have been adjusted to take account of three changes in jurisdiction of the court. First, under the Administration of Justice Act 1970, the Probate, Divorce and Admiralty Division of the High Court was renamed the Family Division and one of the consequent changes was to relocate contentious probate into the Chancery Division.⁴⁵ Second, the Courts of Chancery of the Counties Palatine of Lancaster and Durham were merged with the High Court under the Courts Act 1971.⁴⁶ Third, the Patents Court was established within the Chancery Division under the Patents Act 1977, incorporating the Patents Appeal Tribunal and Registered Designs Appeal Tribunal.⁴⁷ For consistency purposes, all data relating to contentious probate, the Palatine Courts, the Patents Appeal Tribunal and the Registered Designs Appeal Tribunal in Judicial Statistics before the dates they merged into the High Court have been included within the Chancery Division figures shown in this study.

The number of claims issued in the Chancery Division each year was calculated by totalling the figures given in the Judicial Statistics Reports for the following:

- Writs issued in the Chancery Division
- Originating proceedings issued in Companies Court
- Originating petitions issued in Bankruptcy Court
- Contentious probate proceedings issued
- Proceedings issued in the Patents Appeal Tribunal and Patents Court

Summary data on proceedings issued in the Chancery Division was contained in Judicial Statistics up to 1981 as part of the tables on proceedings issued in courts of first instance.⁴⁸ From 1974, the Chancery section of the Judicial Statistics Reports has contained a summary table on proceedings issued, with a breakdown by 'writs and other processes commenced', 'bankruptcy proceedings', 'Companies Court proceedings', for 1974 and 1975, 'Probate

⁴⁵ Administration of Justice Act 1970, s 1(4).

⁴⁶ Courts Act 1971, s 41.

⁴⁷ Patents Act 1977, s 132(7) and Schedule 6.

⁴⁸ See further Appendix 1 Chancery Division: proceedings at first instance.

proceedings' and, from 1979, 'patents court'.⁴⁹ In addition to the summary tables, the Chancery section of Judicial Statistics also included individual tables relating to specific proceedings.

Up to 1973, there was no individual total provided in the Court of First Instance summary table for proceedings issued in the Chancery Division itself. However, the difference between the overall total and the sum of the other proceedings was equivalent to figures given for Chancery writs and other proceedings commenced in the Royal Courts of Justice (RCJ) and District Registries that were contained in other tables within the reports.⁵⁰ Since 1974, further details on writs and originating summonses by subject matter have also been included in Judicial Statistics.⁵¹ Initially, the relevant table included details of proceedings issued both in and outside London, under separate headings. Since 1981 however, the Judicial Statistics Reports have only included a subject matter breakdown for Chancery writs issued in London, with the total corresponding to that given for writs issued in London in the Chancery Division summary table. Due to this, and the fact that there is no equivalent breakdown of trials in the Chancery Division by subject matter that would enable me to analyse trends in the number and proportion of each subject area being disposed after trial over time, this data has not been analysed in depth.

The Judicial Statistics Reports do however provide additional data on other types of proceedings within the Chancery Division. They contain separate tables on bankruptcy proceedings. Similarly, there are tables for proceedings in Companies Court.⁵² Although there were some discrepancies between the figures given in the summary tables and those in the tables relating specifically to those proceedings, overall the numbers were fairly consistent.

Up to 1971, tables on contentious probate proceedings were included under the section of Judicial Statistics concerning the Probate, Divorce and Admiralty Division.⁵³ Between 1972 and 1975, these proceedings were included under the Chancery Division. Since 1976, there have not been any specific tables on contentious probate within Judicial Statistics. In all

⁴⁹ For further details see Appendix 1 Chancery Division: Judicial Statistics summary tables.

⁵⁰ See further Appendix 1 Chancery Division: proceedings issued in the Royal Courts of Justice.

⁵¹ See further Appendix 1 Chancery Division: Writs and Originating Summonses by subject matter.

⁵² For further details see Appendix 1 Chancery Division: Originating Proceedings in Bankruptcy and the Companies Court.

⁵³ See further Appendix 1 Chancery Division: Contentious Probate.

instances, the number of contentious probate proceedings issued in the general summary or Chancery Division summary tables matched those given in specific tables.⁵⁴

Cases disposed after trial

Prior to 1974, it has not been possible to determine the number of cases that were disposed after trial in the Chancery Division. Although there was a table on 'Actions and Matters Disposed of in Court' within the section of Judicial Statistics relating to the Chancery Division, it has not been possible to reconcile the information given in that table with that provided from 1974 in the 'Cases Set Down for Hearing in Main Lists in London' table. From 1974 onwards, I was able to collect data on the number of cases disposed after trial in London. For selected years, there was also data on cases disposed outside of London. However, this data was not included for a significant number of years and I have not included it in my figures for the number of trials because it would artificially skew the data.

Judicial Review

The full list of tables in Judicial Statistics which contain data on public law actions, either under the prerogative writs or by judicial review is shown in Appendix 6. Although there is data in the Judicial Statistics Reports relating to prerogative writs from 1949 to 1981, I have not included this in my analysis of trends in judicial review, as will be discussed in depth in Chapter 5. From 1982, Judicial Statistics has included statistics on the number of applications for judicial review, the number of applications granted and the number of final determinations. It has also contained progressively more data on subject matter of judicial review actions. Unlike with the courts considered above, however, the subject breakdown used for judicial review is consistent across all stages of proceedings, meaning it has been possible to analyse trends judicial review actions in greater depth.

As will be detailed further in Chapter 5, data on judicial review cases in Judicial Statistics have been the subject of two main criticisms. First, that the reports contained no information about the subject matter or the types of parties bringing and defending judicial review applications.⁵⁵ Second, that there was no way to track case progression from the reports,

⁵⁴ See further Appendix 1 Courts of First Instance: proceedings table.

⁵⁵ See for example Sunkin, who argued that the data was insufficiently detailed to enable researchers to obtain more than a general impression of trends. M. Sunkin, 'What is Happening to Applications for Judicial Review?' (1987) 50 MLR 432, p.432.

because it only contained aggregate statistics on the number of cases at specific stages of the litigation system, regardless of the year in which applications may have been lodged.⁵⁶

Conclusion

Judicial Statistics Reports provide the basis for the analysis conducted in this study though it is clear there are a number of problems with their use. The account of those problems contained in this chapter constitutes the most detailed analysis of anomalies and inconsistencies provided to date and it is hoped that this will be of value to other researchers undertaking work in this field. Despite many issues associated with secondary data and Judicial Statistics in particular, these reports remain the only credible source of data for a longitudinal project of this nature. With adjustments it was also possible to produce a credible analysis of trends. Whilst no table was consistently included in the reports in the same format for the entire date range (1949-2017), it was possible to reconcile the data for each of the courts included in the study so as to produce a dataset of proceedings commenced and disposed in each court. In addition, for select periods of time within the study, it was possible to collect more in-depth data on the subject matter or value of claims. The preceding chapter and chapters which follow present these data and place them in the broader context of academic debate about use of the civil litigation system.

⁵⁶ See for example Bridges, Mészáros and Sunkin, who argued that it was not possible for example to calculate accurate grant or refusal rates of permission from the data in Judicial Statistics because the 'snapshot' format meant there was no direct relationship between the number of applications and the number of permission decisions. L. Bridges, G. Mészáros and M. Sunkin, *Judicial Review in Perspective* (2nd edn, Cavendish 1995), p.4-5.

Chapter 3: What is Public Law?

Introduction – the complexity of public law

Research on the vanishing trial to date has provided a rich insight into the contemporary dynamics of litigation systems in the US and UK. Despite this, one of the most notable gaps is the lack of attention paid to public law. The importance of the area of law and the extent of debate about litigation trends in the field makes this surprising. Contrary to the claims of proponents of the vanishing trial thesis, there has actually been an increase in public law cases, especially judicial review actions in the field of immigration.¹ Focussing on public law is not without its problems. Disagreement about the contemporary scope of public law throws up numerous issues for the researcher trying to collate and analyse data on the topic. This chapter outlines some of the history of these issues and possible approaches to this problem. Identification of the best approach to the topic will then be used to frame the data collection process for this study. Once a workable concept of public law has been reached, Chapter 5 will go on to discuss litigation trends in the field.

In the sections that follow, I consider the emergence of public law as a concept in England and Wales and then go on to consider the various ways that scholars have defined what constitutes public law. As will soon become clear, not only have there been intense debates about the notion of public law and its appropriate ambit, but there are differences between theoretical approaches towards the term and how it has been interpreted by the courts in practice. The chapter considers what the implications of the absence of an agreed meaning of the concept of ‘public law’ are for the production of a definition capable of identifying a public law case. More specifically, this involves examining the ways in which existing studies have attempted to categorise public law cases by reference to a number of characteristics of litigation. The characteristics include the subject matter of the dispute, the type of litigants involved and the court in which cases are heard. The distinctions that exist and the logical coherence of existing categories has numerous ramifications for the research design of the empirical project described in subsequent chapters. Engaging with literature on the meaning of public law, I will examine the limitations of identifying cases by reference to those characteristics, either individually or together. To overcome these issues, I propose an

¹ See for example V. Bondy and M. Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges before Final Hearing* (The Public Law Project 2009). for a detailed analysis of trends in judicial review.

alternative approach to categorising cases that incorporates an additional characteristic of the type of dispute.

The emergence of public law as a concept in England and Wales

The question of what constitutes a public law case in the English and Welsh legal system is far from straightforward.² Until relatively recently, the terms ‘public law’ or related concepts such as ‘administrative law’ was considered to have little relevance to English law.³ Dicey for example in 1902 claimed that ‘in England we know nothing of administrative law; and we wish to know nothing’.⁴ His view was highly influential and remained the prevalent orthodoxy for much of the twentieth century.

However, the existence of public law was not universally denied and, over the course of the century, views opposing that of Dicey have become increasingly widespread. Harlow and Rawlings argue that the work of scholars at the London School of Economics in the pre and inter-war periods, notably Laski, Robson and Jennings, was instrumental in enabling public law to develop in England.⁵ These scholars challenged the Diceyan orthodoxy, publishing some of the first books concerning administrative law from the late 1920s.⁶ Robson ran the first ever course at a British university on administrative law from 1929 at the London School of Economics under the title ‘Principles of Administrative Law’.⁷ Dicey’s ongoing influence can be seen in the fact that the then Chairman of the Law Department, Professor Jenks, refused to allow Robson to teach it there until 1933, stating that ‘there is no such subject in England’.⁸

² Throughout the remainder of this chapter, ‘England’ will be used to refer to the legal system in England and Wales.

³ This can be contrasted with Scotland, where the Regius Chair of Public Law and the Law of Nature and Nations was established at Edinburgh University in 1707. M. Loughlin, ‘The Nature of Public Law’ in C. Mac Amhlaigh, C. Michelon and N. Walker (eds), *After Public Law* (OUP 2013), p.14.

⁴ W.A. Robson, ‘The Report of the Committee of Ministers’ Powers’ (1932) 3 *Pol.Q.* 346, pp.346-347. In reference to a discussion between M Barthélemy, the Dean of the Faculty of Law in the University of Paris and Dicey thirty years previously.

⁵ C. Harlow and R. Rawlings, ‘Administrative Law in Context: Restoring a Lost Connection’ [2014] *PL* 28, p.32.

⁶ See for example W.A. Robson, *Justice and Administrative Law: A Study of the British Constitution* (Macmillan and Co. 1928); Chapter VI ‘Administrative Law’ in W.I. Jennings, *The Law and the Constitution* (1st edn, University of London Press 1933); and, for an example of such work from outside the LSE, see F.J. Port, *Administrative Law* (Longmans, Green and Co. 1929).

⁷ W.A. Robson, ‘The Study of Public Administration Then and Now’ (1975) 23 *Political Studies* 193, p.195.

⁸ *id.* Laski invited Robson to teach the course in the Department of Public Policy. By 1933, the situation had changed drastically with Robson being appointed Reader in Administrative Law. From that year, he was able to teach the course in the Law Department. Harlow and Rawlings (n.5 above), p.32.

Acceptance of the existence of public law began to flourish after World War II, due in large part to the work of another LSE law professor, Griffiths.⁹ In 1956, the first issue of the journal *Public Law* was published, of which he was the editor.¹⁰ Reflecting the increasingly broad acceptance of public law, Griffiths was appointed professor of public law at LSE in 1970.¹¹ Scholars from the LSE have continued to be influential in developing public law. The contribution to the growth of the subject by Harlow and Rawlings should not be understated, with the first edition of their textbook *Law and Administration* revolutionising the approach towards administrative law away from the traditional court-centric approach to one that considered an entire array of dispute resolution mechanisms.¹² Research in the field has since spread far beyond the LSE. A search of university library catalogues or those of retailers such as Amazon brings up a plethora of texts containing the word ‘public law’, ‘administrative law’, ‘constitutional law’ or ‘judicial review’ in their titles. Similarly, from the starting point of a single course, public law is now taught as a core subject in all law degrees, with additional courses widely available in more specialised areas such as administrative law.

The increasing academic acceptance of public law can be attributed at least in part to changes relating to the organisation of the State and the structure and operation of the machinery of justice.¹³ The first change of importance to note is the development of the administrative (or welfare) State in the early part of the twentieth century, especially its rapid expansion post-WWII. This led to a considerable rise in delegated administrative powers, a fundamental shift in the exercise of State power. These changes led Jennings to claim in 1933 that ‘public law...is gradually eating up private law’.¹⁴ Since the 1980s, the welfare State has undergone a significant contraction,¹⁵ marked by the concern for public law’s potential

⁹ Harlow and Rawlings also note the impact of the work of professor Street of Manchester University, both individually and in conjunction with Griffiths. Harlow and Rawlings (n.5 above), p.33.

¹⁰ In 1958, *Public Law* was amalgamated with *The British Journal of Administrative Law*, which had been established in 1954. In the editorial comment explaining the decision, it was stated that the scope of the two journals was much the same – constitutional and administrative law and that it was hoped the merger would enable all relevant issues arising to be dealt with adequately in a single journal. –, ‘Comment’ *PL* [1958], p.1.

¹¹ M. Loughlin, ‘John Griffith Obituary’ *The Guardian* (London, 25th May 2010), <<https://www.theguardian.com/education/2010/may/25/john-griffith-obituary>> accessed 4th May 2018.

¹² C. Harlow and R. Rawlings, *Law and Administration* (1st edn, Weidenfeld and Nicolson 1984).

¹³ Bamforth and Leyland for example argue the emergence of a distinctive notion of administrative law in UK is a direct response to the growth of government power over the last century. N. Bamforth and P. Leyland, ‘Public Law in a Multi-Layered Constitution’ in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003), p.8.

¹⁴ W.I. Jennings, ‘The Institutional Theory’ in W.I. Jennings (ed), *Modern Theories of Law* (OUP 1933), p.72.

¹⁵ Bamforth and Leyland highlight a number of key initiatives that have taken place since 1979 affecting the organisation of the State and interactions between public and private bodies, several of

erosion by private law as result of successive governments privatising and contracting out increasingly large swathes of services previously provided by public bodies.¹⁶ The organisation and powers of the State have been further affected by membership of the European Union and, since 1997, devolution.¹⁷ More recent changes affecting the perception and operation of public law in the UK include the growing impact of human rights, seen especially in the incorporation of the European Convention of Human Rights 1957 into domestic law through the Human Rights Act 1998.

The structure of the justice system, has undergone profound shifts since the concept of public law first emerged in England in order to accommodate the new types of action entailed. Tribunals, originally few in number and seen as an alternative to the court process for resolving disputes relating to administrative State action multiplied almost exponentially from the late 1950s until they were reformed by the Tribunals, Courts and Enforcement Act 2007 into the current two tiered format and brought inside the court system. The Law Commission published its *Report on Remedies in Administrative Law* in 1976, the title alone indicating an acceptance of administrative law's existence.¹⁸ The report led to the introduction of the application for judicial review procedure the following year. However, the procedure was not introduced to fill a lacuna in the system in respect of the ability to challenge actions of the State. The Law Commission's report was merely the impetus for the introduction a special new procedure, amending the existing process of different proceedings relating to each of the prerogative writs. Lord Woolf has argued that public law was intertwined with prerogative writs (mandamus, prohibition and certiorari) long before the judicial review procedure was established in 1977.¹⁹ As has been noted by various authors, prerogative writs can be traced back to at least the 17th and 18th centuries in England and Wales.²⁰ More recently, the Administrative Court was established in 2000 within the

which can be said to have contributed to the contraction of the welfare state. Their list includes privatisation, regulation, new public management, next steps agencies, public private partnerships and contracting out. Bamforth and Leyland (n.13 above), p.9.

¹⁶ Harlow and Rawlings argue that by the second edition of *Law and Administration*, published in 1997, regulation threatened to occupy the whole of field of administrative law. C. Harlow and R. Rawlings, *Law and Administration* (3rd edn, CUP 2009), p.xvii. This view was not universally accepted however, with Taggart arguing that the reinvented government in its various guises would not cause administrative law 'go the way of the dinosaur'. M. Taggart, 'Reinvented Government, Traffic Lights and the Convergence of Public and Private Law' [1999](Spr) *PL* 124, p.137.

¹⁷ The question of the potential impact of the UK leaving the EU, or of any future vote for Scottish independence on the nature and scope of public law will not be considered here.

¹⁸ Law Commission, *Report on Remedies in Administrative Law* (Law Com No.73, 1974).

¹⁹ Lord Woolf, 'Droit Public – English Style' [1995] *PL* 57, p.60.

²⁰ See generally E.G. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (HUP 1963); Lord Woolf, 'Droit Public' (n.19 above), pp.59-60; P. Cane,

Queen's Bench Division of the High Court, providing concrete recognition of the existence of administrative law in the legal system.

As the welfare State expanded, judges became more willing to permit review of administrative action. From the late 1960s, the scope of judicial review expanded considerably and judges became more willing to review the exercise of administrative powers. Despite these changes, Dicey's denial of the existence of public law remained influential on the judiciary until near the end of the twentieth century. Lord Reid for example rejected the existence of a developed system of administrative law in 1964.²¹ As late as 1984, Lord Wilberforce regarded expressions public and private law as foreign imports to be treated with caution or suspicion.²² Judicial refusal to acknowledge the existence of public law is one reason behind repeated criticism that Dicey stultified the growth of a coherent system of administrative, or more broadly, public law.²³ Eventually however, judges accepted the existence of public law. Symbolising the final rejection of Dicey's view, Lord Woolf asserted in 1995 that 'we now have a developed system of administrative law'.²⁴

If the question of the existence of public law has largely been settled, that of its scope and meaning remains an open and contested issue. In the first issue of *Public Law* for, it was explicitly noted that the definition of public law could not be 'dogmatically answered'.²⁵ Authors such as Harlow have even questioned the relevance of attempting to define public law in relation to English law.

When in England we talk about "public law," we all know roughly what we are talking about and this is normally enough for us. We do not need to define the term more precisely because, although we may sense in the common law a latent distinction between the "public" and the "private," we do not use these terms as classificatory terms of art ... Nor do legal consequences usually flow from the distinction.²⁶

'Understanding Administrative Adjudication' in L. Pearson, C. Harlow and M. Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart 2008), pp.275-278. who began his historical analysis of English public law in 1066.

²¹ *Ridge v Baldwin* [1964] AC 40 (HL), 72.

²² *Davy v Spelthorne Borough Council* [1984] AC 262 (HL), 276.

²³ See for example W.A. Robson, *Justice and Administrative Law: A Study of the British Constitution* (3rd edn, Stevens 1951), p.423. who described Dicey's influence as a 'dead hand'; S. Sedley, 'Foreword' in M. Taggart (ed), *The Province of Administrative Law* (Hart 1997), p.viii. talking about the 'ghost' and 'clammy spectre' of Dicey; A. Tomkins, *Public Law* (OUP 2003), p.24. arguing that Dicey cast a 'shadow' on public law; M.D. Walters, 'Public Law and Ordinary Legal Method: Revisiting Dicey's Approach to *Droit Administratif*' (2016) 66 *U.T.L.J.* 53, p.54. who argued that administrative law needed to escape from Dicey to develop.

²⁴ H. Woolf, 'Public Law – Private Law: why the Divide? – a Personal View' [1986] *PL* 220, p.221.

²⁵ *Public Law* 1956 p.2

²⁶ C. Harlow, "'Public" and "Private" Law: Definition without Distinction' (1980) 43 *MLR* 241, p.241.

Despite this, it is important to engage with the meaning of public law. Genn contrasted the trend of vanishing trials in the civil justice system with that of public law cases,²⁷ but did not examine the latter in depth. This was because her focus was what she argued were the concerning consequences of the shift of civil disputes out of the public realm into private adjudication.²⁸ To bring public law inside the vanishing trial debate and determine whether her analysis was, or remains accurate, it is first necessary to define what is meant by the term in order to identify which cases or proceedings should be analysed.

Defining a public law case

Although the meaning and scope of public law is often assumed to be self-evident amongst specialists or too complex to warrant discussion, the term is not self-explanatory.²⁹ Leading textbooks on the subject do not contain any definition of the concept. Instead, they launch straight into specific topics, for example constitutional law.³⁰ There is no prior consideration of the nature of 'public law' itself, or of the relationship of any of the topics covered either to each other or to the overarching subject. Hickman, in his book *Public Law after the Human Rights Act* similarly failed to provide a definition, on the contrary he explicitly stated that he was not using the term 'public law' consistently throughout his book.³¹ This he attributed to both the ambiguity of the term itself and how it was used by the courts.³²

This uncertainty surrounding the scope of public law has implications for our understanding of what constitutes a public law case. Judicial review is the procedure most often associated with public law. However, it is not immediately clear that the ambit of public law cases should be so simply delineated. Lord Woolf for example argued it is wrong to assimilate public law and judicial review.³³ His argument was that the pre-existing prerogative writs

²⁷ H. Genn, 'Why the Privatisation of Civil Justice is a Rule of Law Issue' (36th F A Mann Lecture, Lecture at Lincoln's Inn, 19th November 2012), pp.1, 5.

²⁸ *id.*, p.1.

²⁹ An indication of the extent of the lack of consensus concerning the meaning can be seen clearly by Farber and Frickey's attempt to determine whether their work fell within the ambit of public law. They asked various law professors for their opinions and 'received almost an equally great variety of answers'. D.A. Farber and P.P. Frickey, 'In the Shadow of the Legislature: The Common Law in the Age of the New Public Law' (1990-1991) 89 *Mich.L.Rev.* 875, p.885.

³⁰ See for example A. Le Sueur, M. Sunkin and J.E.K. Murkens, *Public Law: Text, Cases, and Materials* (3rd edn, OUP 2016). Their first chapter was 'The Constitutional Rulebook'; see also M. Elliott and R. Thomas, *Public Law* (3rd edn, OUP 2017). Despite Part 1 being titled 'Introduction to Public Law', their first chapter was 'Constitutions and Constitutional Law', with no general introduction to the concept of public law itself.

³¹ T. Hickman, *Public Law after the Human Rights Act* (Hart 2010), p.1.

³² *id.*

³³ Lord Woolf, '*Droit Public*' (n.19 above), p.60.

should also classify as public law cases and that the field did not come into existence with the development of the special judicial review procedure. Lord Woolf did not address the question of whether a public law case should be defined more broadly than judicial review. However, as will be seen, there are a number of theoretical approaches towards the concept of public law which would suggest that the ambit of a public law cases should extend beyond just judicial review actions.

The binary divide between public and private law

Feldman argues that the term public law implies two distinctions – between ‘public law’ and ‘non-public law’ and between ‘public law’ and ‘public non-law’.³⁴ In terms of his first distinction, this represents a common approach towards defining public law in contradistinction to private law – the notion of a public/private divide. Many scholars have chosen to understand public law in the context of its relationship to private law. Under this approach, at its most basic, public law can be seen as being all things that private law is not. Highlighting that more attention is paid to defining public law than private law, Oliver argues one assumption made is that public law is a special area carved out, with the rest of the law being private.³⁵ What it is that distinguishes public law from private law is not however certain.

Further, whether the distinction is an appropriate one in the first place is highly disputed. Cane notes there is somewhat of a ‘paradox’ in relation to the public/private divide and summarises the current ‘schizophrenic’ state of the debate as follows: ‘public/private is dead, long live public/private’.³⁶ On the one hand, he comments on the wide array of scholarly arguments to the effect that use of the divide to understand and analyse social life is outmoded because the two spheres have become inextricably interwoven.³⁷ Kelsen for example argued it was ‘useless as a common foundation for a general systematization of law’.³⁸ More recently, Verkuil held it to ‘fail as an organizing principle’.³⁹ Allison’s critique of

³⁴ D. Feldman, ‘The Distinctiveness of Public Law’ in M. Elliott and D. Feldman (eds), *The Cambridge Companion to Public Law* (CUP 2015), p.17.

³⁵ Although she goes on to challenge this assumption, arguing that ‘much of what is generally regarded as ‘private law’ has heavy layers of what is regarded as ‘public law’ in it’. D. Oliver, *Common Values and the Public-Private Divide* (CUP 1999), p.16.

³⁶ P. Cane, ‘Accountability and the Public/Private Distinction’ in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003), pp.247-248.

³⁷ *id.*, p.248.

³⁸ H. Kelsen, *General Theory of Law and State* (A. Wedberg tr, HUP 1961), p.207.

³⁹ P.R. Verkuil, *Why the Privatisation of Government Functions Threatens Democracy and What We Can Do About It* (CUP 2007), p.78.

the divide is based on what he considers the inappropriateness of importing the French approach towards the divide into English law.⁴⁰

On other hand, Cane argues it seems 'alive and well', highlighting the judicial review procedure, the implementation of an Administrative Court, distinctions between public and private bodies and functions in relation to EC law and distinctions included in legislation such as the Human Rights Act 1998 and the Freedom of Information Act 2000.⁴¹ Other scholars similarly argue that the existence of the public/private divide should not be disputed, given the distinctive features of the State when compared to ordinary citizens and the philosophical presumption that sound normative justification is required for State action to be legitimate.⁴² Instead, for those scholars, the focus should be on when, where and how the divide should operate. As Bamforth notes, Allison is not arguing against the public/private divide *per se*, but instead how it has been applied by the courts in the UK.⁴³ Samuel is similarly critical of the judiciary's approach towards the divide, despite arguing from the position of accepting the existence of the public/private divide.⁴⁴

My intention here is not to resolve the debate, but to determine whether a public law/private law distinction provides a useable means by which to identify public law cases. Here the concept of a distinction between public and private law appears to be somewhat less controversial. For example, Harlow has been generally critical of the concept of a public/private divide and argued that 'a jurisdictional division between "public" and "private" law cases is old-fashioned and undesirable in practice'.⁴⁵ Despite that however, she seemed to accept without issue a distinction between public and private law cases, noting that the distinction between public and private traditionally operated at the remedial level in English law.⁴⁶ She highlighted that the prerogative remedies were usually known as 'public law remedies' whereas damages, injunctions and declaratory judgments were traditionally associated with private law actions, although, given the absence of separate systems of public and private law they were not necessarily so restricted.⁴⁷

⁴⁰ J.W.F. Allison, *A Continental Distinction in the Common Law: a Historical and Comparative Perspective on English Public Law* (OUP 1996).

⁴¹ Cane, 'Public/Private Distinction' (n.36 above), p.247.

⁴² See for example N. Bamforth, 'The Public Law – Private Law Distinction: A Comparative and Philosophical Approach' in P. Leyland and T. Woods (eds), *Administrative Law Facing the Future: Old Constraints & New Horizons* (Blackstone 1997).

⁴³ *id.*, p.157.

⁴⁴ G. Samuel, 'Public and Private Law: A Private Lawyer's Response' (1983) 46 *MLR* 558, p.561.

⁴⁵ Harlow (n.26 above), p.242.

⁴⁶ *id.*, p.258.

⁴⁷ *id.*, pp.258-259.

Characteristics of public law cases

In principle, identifying characteristics specific to public law *litigation* provides the simplest and most effective method for identifying public law cases. There has however been limited discussion of what elements are most important within existing literature. The public law/private law approach has manifested in studies which have attempted to define and analyse public law cases. Some scholars have highlighted procedural differences between public and private law litigation, but have also noted that exceptions can frequently be found on both sides.⁴⁸ In the context of US litigation, Chayes argued that public and private law litigation could be distinguished by reference to the following eight characteristics:⁴⁹

Characteristic	Private Law	Public Law
Scope of lawsuit	Determined by factors external to court or parties	Shaped primarily by court and parties
Party structure	Rigidly bilateral	Sprawling and amorphous
Fact inquiry	Historical and adjudicative	Predictive and legislative
Relief	Conceived as compensation for past wrong In form logically derived from substantive liability Confined in impact to immediate parties	Forward looking Fashioned <i>ad hoc</i> on flexible and broadly remedial lines Often has important consequences for many persons
Remedy	Imposed	Negotiated
Decree	Terminates judicial involvement	Administration requires continuing participation of court
Judge	Passive Function limited to analysis and statement of governing legal rules	Active Responsible for credible fact evaluation and organising and shaping litigation to ensuring just and viable outcome
Subject Matter	Dispute between private individuals about private rights	Grievance about operation of public policy

Figure 3.1: Characteristics of private law and public law litigation.⁵⁰

The appropriateness of Chayes' approach in identifying UK public law cases has been questioned, given the distinctions in public law litigation between the US and the UK.

⁴⁸ Farber and Frickey (n.29 above), p.885. Although they referenced Chayes, they only highlighted some of his terms. Public law litigation was identified as often, but not always, involving more parties, more flexible remedies and more judicial initiative than private law disputes; See also Eisenberg and Yeazell, who, in contrast to Chayes', argued that characteristics apparently confined to public law litigation could actually be found in all litigation, albeit in different forms. T. Eisenberg and S.C. Yeazell, 'The Ordinary and the Extraordinary in Institutional Litigation' (1979-1980) 93 *Harv.L.Rev.* 465, p. 466.

⁴⁹ A. Chayes, 'The Role of the Judge in Public Law Litigation' (1975-1976) 89 *Harv.L.Rev.* 1281.

⁵⁰ id, pp.1282-1283, 1302.

Whereas Chayes defines private law as historical in terms of relief, this definition could traditionally be applied more generally to litigation generally in the UK.⁵¹ He also equates relief in public law litigation to legislative acts, highlighting the power of courts to set up regimes with binding force to govern the activities in dispute for an indefinite period.⁵² Further, in the US, courts perform constitutional review, with the power to strike down statutes if found to be incompatible with the Constitution. In the UK in contrast, the courts lack any authority to invalidate statutes. They are restricted to examining the legality of the procedure used by public officials to reach decisions, with powers to quash decisions and remit them to decision makers – historical as opposed to predictive and therefore more on the private law litigation side of Chayes’ classification. Whilst not identical to Chayes’ description of private law, public law litigation in the UK does bear some resemblance to it.

Sunkin and Richardson have argued that UK judicial review is located somewhere between public and private litigation.⁵³ To take party structure as an example, research has shown that whilst third party interveners are more common in UK cases classified as ‘public law’, not all cases so defined include interveners and interveners appear in non-public law cases.⁵⁴ The distinctions between public law litigation in the UK and US highlight what Harlow and Rawlings describe as the ‘slippery’ nature of the concept of judicial review.⁵⁵ Viewed in this way, Chayes’ classification does not work in the UK context because the number of parties to a dispute is not determinative of whether a case is a public law one or not.

These problems appear to explain why studies that have explicitly examined UK public law cases have not adopted Chayes’ classification. Very few academic commentaries focus on categories of cases rather than analysis of individual litigation. Where the characteristics approach has been used to distinguish public law cases, considerably fewer types of classification have been held to be necessary. Those that have been used differ somewhat from those identified by Chayes.

Jennings defined administrative law in two different ways. First, from an institutional viewpoint, as that which ‘determines the organisation, powers and duties of administrative

⁵¹ It has frequently been argued that English law traditionally focuses on remedies not principles. See for example Lord Wilberforce in *Spelthorne* (n.22 above), 276.

⁵² Chayes (n.49 above), p.1297.

⁵³ M. Sunkin and G. Richardson, ‘Judicial Review: Questions of Impact’ [1996] *PL* 79, p.87.

⁵⁴ S. Shah, T. Poole and M. Blackwell, ‘Rights, Interveners and the Law Lords’ (2014) 34 *OJLS* 295.

⁵⁵ Harlow and Rawlings, *Law and Administration* (3rd edn) (n.16 above), p.669. They also note other models are possible, providing the examples of dual jurisdiction in France and systematised administrative appeals in Australia.

authorities'.⁵⁶ Second, from a functionalist perspective as the law relating to powers of administrative authorities.⁵⁷ Cane and Harlow both used similar terminology to develop models of the public/private divide.⁵⁸ Under the 'institutional' or 'organic' model, the status of the body performing the task as either public or private determines how it should be classified. In contrast, under the 'functional' model, the classification is determined by reference to the public or private nature of the task in question.

Existing studies have identified public law cases using methods that broadly reflect Jennings' theoretical models, either individually or by a combination of the two. Cases have primarily been identified either by the characteristics of the parties (institutional model) or by reference to the subject matter of the dispute (functional model). In the sections which follow, these two approaches towards defining public law cases and the problems they pose will be considered in turn. As will be shown, each of these approaches have issues of both under and over inclusivity. The issues of these approaches to defining public law have had in practice will then be considered in the context of litigation on the subject of what constitutes a public law matter for the purposes of judicial review. To counter the various problems with existing methods, I propose an alternative approach, based on more generic claims about the nature of the legal challenge posed and the forum of the dispute.

Characteristics of litigants in cases approach

Blom-Cooper and Drewry adopted a method similar to that of the institutional model to identify public law cases. Their criteria was that a public authority or its representative be a party to the litigation.⁵⁹ The litigant approach is based on the notion of a public/private divide. It has been proposed that it can be traced back to the Roman jurisprudence model, which distinguishes private law actions *in personam* (person v person) and actions *in rem* (person v property) from public law (person v State).⁶⁰ A distinction along the lines of the Roman model has been taken up by various authors, although its influence is not always

⁵⁶ I. Jennings, *The Law and The Constitution* (5th edn, University of London Press 1967), p.217.

⁵⁷ *id.*

⁵⁸ Cane, 'Public/Private Distinction' (n.36 above), pp.249-261; Harlow (n.26 above), pp.253-256, used the term 'organic' as opposed to 'institutional'.

⁵⁹ L. Blom-Cooper and G. Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Macmillan 1972), pp.256-257. They also included a second criterion, that the case involved some recognisable administrative or constitutional principle. This will not be considered further here because that approach would require examining each case individually to categorise it, which is beyond the available resources of this project given the number of cases involved.

⁶⁰ Samuel (n.44 above), p.559.

acknowledged and, in modern discussions of the divide, the category of *in rem* is usually omitted. This can be seen for example with Rosenfeld’s recent articulation of the distinction:

[L]aw that regulates the vertical relationship between the state and private parties shall be deemed public whereas law that applies to horizontal dealings among private parties shall be labelled private.⁶¹

Rosenfeld’s formula does not include State v State actions, where different levels or branches of the State bring claims against each other.⁶² However, these could also be seen as public law cases under the litigant approach – the requirement for a case to be defined as public is that *at least* one party be the State, not that *only* one party is the State.

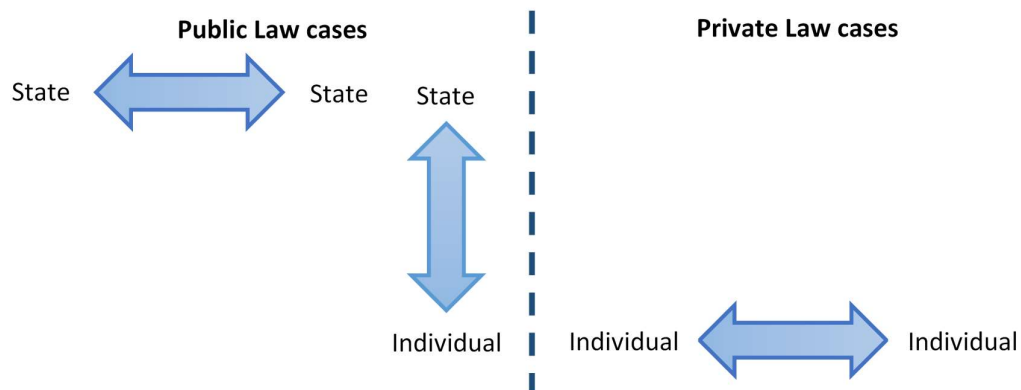


Figure 3.2: The distinction between public and private law cases based on characteristics of litigants.

Some authors, such as Hickman have advocated a wide definition of public law that included actions in tort and contract against the State.⁶³ Scholars such as Poole have similarly questioned whether contractual disputes by public employees should be able to be brought through judicial review actions.⁶⁴ Under the litigant approach, this would be the cases because any case with the State as one or more of the parties should be identified as a public law case, regardless of their subject matter. On the face of it, a litigant approach to case identification is both simplistic and workable in practice. However, the inclusion of this type of dispute within the ambit of public law is controversial and raises problems. It runs contrary to the breakdown of public law and private law subject areas identified in literature,

⁶¹ M. Rosenfeld, 'Rethinking the Boundaries Between Public Law and Private Law for the Twenty First Century: An Introduction' (2013) 11 *ICON* 125, p.126.

⁶² Lord Woolf highlighted that such actions were rare when he was appointed a judge. However, he claimed that by the mid-1980s, it was 'commonplace to have central government attacking local government decisions, local government attacking central government decisions and one local authority challenging the decisions of another'. Woolf, 'Why the Divide' (n.24 above), p.220.

⁶³ Hickman (n.31 above), p.1.

⁶⁴ T. Poole, 'Judicial Review and Public Employment: Decision-Making on the Public-Private Divide' (2000) 29 *ILJ* 61.

as will be seen under the subject matter approach, and would involve classifying cases typically seen as private as public. The litigant approach can therefore be argued to be over inclusive.

Harlow provided persuasive reasons against distinguishing between public and private law cases based simply on the characteristics of the body carrying out the action in question. She argued that the problem with an 'organic' jurisdictional divide based on the status of bodies is that it fails to take account of the nature of the tasks carried out by the body and hence causes considerable difficulties in practice.⁶⁵ Her argument can equally be applied in the context of attempts to distinguish public law cases by reference to party characteristics. The definition of public law in *The Dictionary of Law* provides evidence to suggest that public law cases can extend beyond simply those involving the State. There, public law is defined as:

The part of the law that deals with the constitution and functions of the organs of central and local government, the relationship between individuals and the state, and relationship between individuals that are of direct concern to the state.⁶⁶

Whilst the State can be seen to be central to the concept of public law, the dictionary definition would not require the State to be a party to the dispute. Public law would include all cases where the State was a party, but could also include other cases where it is not. It might be possible to broaden the concept of what constituted a public body or the State for the purposes of identifying public law cases. The Freedom of Information Act 2000 provides an illustration of this approach, through its inclusion of a list of bodies to be considered public authorities for its purposes.⁶⁷ This in itself creates problems, with every newly established body requiring classification and the list updating.⁶⁸ More importantly, it would stretch the meaning of a 'public' body into absurdity to include private bodies within its scope. Based on these reasons, the litigant approach can also be seen as under inclusive.

The subject matter of the dispute approach

Given the various problems associated with a litigant approach, it is unsurprising that an alternative, based on a typology of subject areas, has been utilised in other studies. The subject matter approach can be broadly approximated to the 'functional' model. Given its aim is to enable the identification of public law cases, its focus is not on the nature of the

⁶⁵ Harlow (n.26 above), pp.253-256.

⁶⁶ J. Law (ed), *A Dictionary of Law* (8th edn, UOP 2015), p.496.

⁶⁷ Feldman (n.34 above), p.32.

⁶⁸ An issue Harlow notes in relation to similar lists included in the Parliamentary Commissioner Act 1967, the Tribunals and Inquiries Act 1958 and the Crown Proceedings Act 1947, s 17(1). Harlow (n.26 above), p.254.

task as public or private, but on the nature of the dispute. The dispute is defined by reference to detailed macro level subject areas that have been classified as together constituting public or private law. In effect, the subject matter approach represents a more complex categorisation of the nature of tasks, or rather disputes arising from them, than the simplistic public/private approach used in the functional model. At first glance, a subject-matter approach appears tautological – using subject-area to define subject-area. However, given the disputed meaning of the term ‘public law’, an approach of fleshing out its meaning and scope by reference to accepted and long-standing terms – specific subject areas, is somewhat understandable.

Two studies are worthy of note because of their attempt to define the boundaries of the field in this way. In their analysis of interveners in the House of Lords, Shah, Poole and Blackwell adopted a simplified approach and arrived at a definition of public law cases by reference solely to subject matter. They found the highest incidence in cases they had classified as ‘human rights’ and ‘rights-related’ cases. From this, they concluded that intervention was a ‘phenomenon most common to what might be called “public law” cases’.⁶⁹ In contrast to the earlier studies however, they were not specifically focussed on distinguishing public law cases but rather ones involving human rights. As such, the lack of consideration of whether the scope extended beyond those involving human rights issues is understandable. Whilst an example of a subject-matter approach towards identifying cases, their definition should not be taken as authoritative as a result.

Studies that have specifically aimed to distinguish public law cases from other types have adopted a similar subject-matter approach but problems have arisen around the issue of whether judicial review cases are rightly categorised as a form of civil law. Genn for example defined public law cases as ‘relations between the citizen and state – essentially criminal and administrative law issues’.⁷⁰ In contrast, civil law cases were said to be ‘final determinations on the merits of private law claims by citizens and business’, essentially equating civil law with private law.⁷¹ However, she conceded that it is by no means obvious that public law cases should either be defined as simply, or entirely excluded from the ambit of civil law.⁷² On the one hand, statistics on judicial review are included in the Judicial Statistics Reports,

⁶⁹ Shah, Poole and Blackwell (n.54 above), p.308.

⁷⁰ Genn (n.27 above), p.1.

⁷¹ *id.*

⁷² Genn highlighted that the inclusion of judicial review within the civil justice ‘tent’ might be a disadvantage in relation to attempts to secure greater resources for civil justice. H. Genn, *Judging Civil Justice* (CUP 2009), p.43.

government produced reports on civil justice. On the other hand, others have advocated breakdowns of different types of law that are far more complex.⁷³

The 'functional' model more appropriately reflects the privatisation of the State than the 'institutional' model, with many previously State run services now either privatised or contracted out to private bodies.⁷⁴ The subject matter approach would have the benefit of enabling disputes arising out of actions taken in the performance of such services by private bodies to remain within the ambit of public law cases, whereas they would be excluded under the litigant approach. Harlow's criticism of the functional approach was that the vagueness of the functional test for jurisdiction made it difficult to use in practice.⁷⁵ A recent example of this problem can be seen in relation to the Human Rights Act 1998, s.6 which designates 'any person certain of whose functions are functions of a public nature' as a public authority other than in respect of their 'acts of a private nature'.⁷⁶ A large amount of litigation ensued in relation to the concept of public functions, to determine when private bodies came within the ambit of the Act.⁷⁷ Harlow's concerns regarding vagueness mirror issues associated with attempting to define public law cases by reference to subject matter.

⁷³ For example, Adler attributes a three-way division of civil, criminal and administrative justice systems to Lord Irvine, former Lord Chancellor. M. Adler, 'Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice' (2006) 69 *MLR* 958, p.960. An even more complex typology is that of Lord Thomas, the former Lord Chief Justice, who distinguished civil, family, criminal, public law and private law disputes. Lord Thomas, 'The Centrality of Justice: Its Contribution to Society, and its Delivery' (The Lord Williams of Mostyn Memorial Lecture, Lecture at Gray's Inn, 10th November 2015), p.3.

⁷⁴ See for example Davies for a discussion of privatisation, contracting out and the extent to which private bodies performing public functions may be subject to public law. A.C.L. Davies, 'Public Law and Privatisation' in M. Elliott and D. Feldman (eds), *The Cambridge Companion to Public Law* (CUP 2015).

⁷⁵ Harlow (n.26 above), p.256.

⁷⁶ Human Rights Act 1998, ss 6(3)(b) and 6(5).

⁷⁷ For a small sample of the mass of literature concerning the interpretation of s.6(3) see P. Craig, 'Contracting Out, The Human Rights Act and the Scope of Judicial Review' (2002) 118 *LQR* 551; Cane, 'Public/Private Distinction' (n.36 above), pp.249-253; C. Gearty, *Principles of Human Rights Adjudication* (OUP 2004), pp.185-191; Harlow and Rawlings, *Law and Administration* (3rd edn) (n.16 above), pp.376-383; Davies (n.74 above), pp.184-187.

Author(s)	Subject area												
	Administrative Law	Civil Liberties/Human Rights	Community Care Law	Constitutional Law	Criminal Law	Environmental Law	European Union	Family Law	Housing Law	Immigration Law	Local Government Law	Planning Law	Prison Law
Blom-Cooper and Drewry ⁷⁸	✓			✓	✓								
<i>Dictionary of Law</i> ⁷⁹	✓			✓	✓			✗					
Cane ⁸⁰	✓			✓									
Farber and Frickey ⁸¹	✓			✓									
Genn ⁸²	✓				✓								
Harel ⁸³	✓			✓	✓								✓
Hickman ⁸⁴	✓												
Jackson and Leopold ⁸⁵	✓			✓									
Jennings ⁸⁶	✓												
Le Sueur, Sunkin and Murkens ⁸⁷	✓	✓	✓	✓		✓	✓			✓	✓	✓	✓
Loughlin ⁸⁸	✓	✓		✓	✓		✓						✓
Rosenfeld ⁸⁹	✓			✓	✓								
Syrett ⁹⁰	✓			✓	✓	✓		✓	✓				
Walters ⁹¹	✓			✓									

Figure 3.3: Summary of subject areas of public law found in literature.

⁷⁸ Blom-Cooper and Drewry (n.59 above), p.255.

⁷⁹ Law (n.66 above), pp.480, 496. Family law is defined in the Dictionary as part of private law.

⁸⁰ P. Cane, *Administrative Law* (4th edn, OUP 2004), p.1.

⁸¹ Farber and Frickey (n.29 above), p.885.

⁸² Genn, 'Privatisation' (n.27 above), p.1.

⁸³ A. Harel, 'Public and Private Law' in M.D. Dubber and T. Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2014), p.1042.

⁸⁴ Hickman (n.31 above), p.1.

⁸⁵ P. Jackson and P. Leopold, *O. Hood Phillips and Jackson Constitutional and Administrative Law* (8th edn, Sweet & Maxwell 2001), p.10.

⁸⁶ According to Griffiths, Jennings held that 'public lawyers were essentially concerned with administrative law and dealt with institutions through which the State (no longer a single entity) acted'. J. Griffiths, 'A Pilgrim's Progress' (1995) 22 *J.L. & Soc* 410, p.413.

⁸⁷ A. Le Sueur, M. Sunkin and J.E.K. Murkens, *Public Law: Text, Cases, and Materials* (1st edn, OUP 2010), p.4. Their list was broken into three sections. 'Textbook writers and academics' included constitutional, administrative and human rights law. 'Practitioners', included immigration, planning, environmental, prison, local government and community care law, specified to be a non-exhaustive list. 'Policymaking, legislating, governing and judging' and included parts of European Union and public international law.

⁸⁸ M. Loughlin, *The Idea of Public Law* (OUP 2003), p.11.

⁸⁹ Rosenfeld (n.61 above), p.125.

⁹⁰ K. Syrett, *The Foundations of Public Law: Principles and Problems of Power in the British Constitution* (2nd edn, Palgrave 2014), pp.2-3. He describes 'public law' and 'constitutional and administrative law' as interchangeable terms. Criminal, family, housing and taxation law are only included in Syrett's definition in the sense that they concern the relationship between the individual and the State.

⁹¹ Walters (n.23 above), p.54.

The lack of consensus between the studies as to what subject areas constitute public law cases is extensive and reflects a long-standing debate.⁹² This point becomes obvious from Figure 3.3 above, drawn from a small sample of the considerable literature engaging with the question. As it demonstrates, there is no accepted and exhaustive list of what public law subject areas are. Of all numerous potential areas, only administrative law is consistently defined as public law, suggesting that this might represent the subject's core. Even if it was possible to produce a definitive list of public law subject-areas, the problem remains of defining the scope of each of the relevant public law subject-areas. This point was highlighted by Blom-Cooper and Drewry, who examined a range of subject areas in-depth in their study of the House of Lords. They addressed the question of how to identify public law cases by producing a general definition of public law and then identifying features of cases falling within their definition. They argued that lawyers used the term public law as shorthand for substantive and procedural jurisprudence governing the relationship between governors and governed.⁹³ From that starting point, public law was defined as an amalgamation of 'nebulous areas of civil law termed "administrative law" and "constitutional law"', which were themselves held to be impossible to define precisely.⁹⁴ Loughlin highlights the extent of issue, arguing that 'administrative lawyers are unlikely to agree on the boundaries of the subject, the methods for examining it, and the values that inform it'.⁹⁵

It is unclear the extent to which the subject areas listed in Figure 3.3 above are conceptually distinct from one another.⁹⁶ Some authors, whilst defining administrative law as a branch of public law have then proposed sub-branches of administrative law that include many of those listed above based on the concept of administrative law being the law relating to government powers.⁹⁷ This approach has been criticised by others as turning administrative

⁹² Loughlin for example, has explicitly rejected the concept of a public/private divide approach to defining public law and instead adopted a more philosophical approach. See M. Loughlin, *Foundations of Public Law* (OUP 2010); Loughlin, *Idea* (n.88 above). His approach will not be examined further here, because it does not provide assistance in defining public law cases.

⁹³ Blom-Cooper and Drewry (n.59 above), p.255.

⁹⁴ *id.*, pp.255-256.

⁹⁵ M. Loughlin, 'Why the History of Administrative Law is not Written' in D. Dyzenhaus, M. Hunt and G. Hurscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart 2009), p.171.

⁹⁶ De Smith and Brazier for example describe administrative law as a branch of constitutional law. S. De Smith and R. Brazier, *Constitutional and Administrative Law* (8th edn, Penguin 1998), p.503.

⁹⁷ See for example De Smith and Brazier who list local government, tax law, social security and immigration as topics within administrative law. *id.* Similarly, P. Leyland and G. Anthony, *Textbook on Administrative Law* (6th edn, OUP 2008), p.2. list social security, health, housing, planning, education, immigration, the exercise of powers by central and local government and the police, and tribunals and inquests under the heading of administrative law.

law into a 'subject of inordinately vast proportions' that swallows up other recognised areas, themselves large.⁹⁸

Defining public law in the negative as all areas other than those classified as private law is not a workable solution to this problem. There is a considerably higher degree of consensus regarding private law subject areas amongst those authors in the sample. However, not only do far fewer authors provide details of private law topics, amongst those that do there is not uniform agreement.⁹⁹ Contract and tort are accepted by all authors to be private law subject areas, property by five out of the seven and trusts by only two.¹⁰⁰ One area in particular creates problems with defining public law cases in this way – family law. It is defined as both an aspect of public and private law and is therefore unclear where it should actually fall.¹⁰¹

The way in which organisations that maintain online databases of decided cases classify cases, although also by subject matter, does not correspond precisely with any of the approaches seen in Figure 3.3 above. Under the classification system used on Westlaw for example, public and constitutional law is a distinct topic from several areas that are included in list, including: criminal; equality and human rights; family; health and social welfare; international; local government; and tax.¹⁰² Cases may however be assigned to multiple topics under the Westlaw classification system. This differs considerably from the theoretical approach, which is principally aimed at delineating areas of law for study and research. This highlights a further problem with using a subject matter approach to classify cases as public law cases – cases can involve issues relating to many different aspects of law and this that might plausibly require some cases to be classified as both public law *and* private law.

⁹⁸ See B. Jones and K. Thompson, *Garner's Administrative Law* (8th edn, Butterworths 1996), p.5. The subject areas they identify as being distinct from administrative law despite relating to public administration are as follows: town and country planning law, social security law, immigration law, housing law and revenue law.

⁹⁹ Five authors from the above sample also define private law subject areas: Law (n.66 above), p.329; Farber and Frickey (n.29 above), p.885; Harel (n.83 above), p.1042; Rosenfeld (n.61 above), p.125; Syrett (n.90 above), p.2. Additionally, two works were examined in which a breakdown of private law but not public law subject areas was provided: M. Elliott, *Beatson, Matthews and Elliotts Administrative Law* (3rd edn, OUP 2005), p.1; Verkuil (n.39 above), p.80.

¹⁰⁰ Property was included by Harel, Rosenfeld, Syrett, Verkuil and in the *Dictionary of Law*. Trusts was included by Syrett and in the *Dictionary of Law*.

¹⁰¹ Syrett (n.90 above), p.3; Law (n.66 above), p.329.

¹⁰² The topic of public and constitutional law itself is comprised of a number of sub-topics, not all of which correspond to those included in Figure 3.3: administrative law; armed forces; Brexit; constitutional law (general, Northern Ireland, Scotland and Wales); crown and government; ecclesiastical law; elections and referendums; immigration; judicial review; legislation; nationality; national security; Parliament; political parties; public finance; public order; public procurement.

Combined approach – characteristics of litigants and the subject-matter of the dispute

Although each approach has its benefits, there are various issues associated with both the litigant and the subject matter approach, as summarised in Figure 3.4 below:

Approach	Litigant	Subject Matter
Model	Institutional/organic	Functional
Pros	Most straightforward approach	Reflects modern organisation of State
Cons	Does not account for privatisation or contracting out Excludes cases not involving State, despite the subject-area being public law	Question of how to define subject-areas Excludes cases against the State in private law subject areas

Figure 3.4: Summary of pros and cons of existing approaches to defining public law cases.

A further problem is that, despite both the subject matter and litigant approaches being derived from the concept of a public/private divide, they produce different outcomes in some cases. The same result is produced under both approaches when *both* conditions, i.e. that the subject area be public law and that the State is a party, are either met or not met. However, different outcomes occur when only one criteria is satisfied – if *either* the State is one or more parties or the subject matter falls within the ambit of public law.

	Parties: State one or more	Parties: State not involved
Subject matter: Public law	Public law case – both approaches	Public law case – subject matter approach only
Subject matter: Private law	Public law case – litigant approach only	Private law case – both approaches

Figure 3.5: Different outcomes between litigant and subject area case classification approaches.

This point is made clear when the arguments concerning the over and under inclusivity of the litigant approach are reversed and applied to the subject matter approach. The subject matter approach could be seen to be under inclusive because it excludes cases between individuals and the State in private law subject areas from the ambit of public law cases. Equally, if the notion of ‘relationship between individuals and the State’ from the Dictionary definition was used to restrict the scope of public law cases to those involving the State as a

party, then the subject matter method is in danger of being over inclusive. Under that approach, regardless of whether the State was a party to the litigation, if the subject matter were public law, the case would be classified as public law.

It can plausibly be suggested therefore that individually either approach is *under* inclusive and excludes some cases that should come within the definition of public law cases. On the other hand, it is possible to argue that each approach is to some extent *over* inclusive when viewed from the perspective of the limitations of the alternative approach. The conflicting outcomes highlight three more subtle criticisms of the public/private divide. First, those that focus on the element of 'the' and instead argue that there are many ways to distinguish public from private.¹⁰³ Second, those arguing that some distinctions are overlapping or even in opposition to each other.¹⁰⁴ Third, arguments that which side of the divide something falls is frequently context dependent, controversial and contested.¹⁰⁵ There is the possibility of creating a third, intermediate group of public/private to resolve this problem. Kennedy has argued that such an approach was a sign of the decline of the divide.¹⁰⁶ A further problem with this option is that it is of no help in identifying public law cases as it just creates a further category to define.

The various problems associated with each approach individually might account for the fact that, in practice, Blom-Cooper and Drewry combined the two models when defining public law cases – first defining public law by subject-area and then identifying cases in those subject-areas by party type. Whilst drawing on all features that have been considered relevant to defining public law, that approach however arguably heightened the problem because an even greater range of cases was excluded. The combined approach is under inclusive by arguments in favour of a wider interpretation in terms of either type of litigant *or* subject matter.

¹⁰³ See for example C. Mac Amhlaigh, 'Defending the Domain of Public Law' in C. Mac Amhlaigh, C. Michelon and N. Walker (eds), *After Public Law* (OUP 2013), pp.103-104; R.E. Barnett, 'Foreword: Four Senses of the Public Law-Private Law Distinction' (1986) 9 *Harv.J.L.& Pub.Pol'y* 267, pp.267-272. Barnett argued there were four ways to distinguish public and private law. First, the substantive standards used to assess types of conduct that may be subject to legal regulation. Second, the status of persons that are entitled to complain about violations of legal regulation. Third, the status of persons subject to legal regulation and fourth, the kinds of institutions capable of adjudicating and enforcing legal regulations.

¹⁰⁴ W. Lucy, 'Private and Public: Some Banalities About a Platitude' in C. Mac Amhlaigh, C. Michelon and N. Walker (eds), *After Public Law* (OUP 2013), p.56.

¹⁰⁵ *id.*

¹⁰⁶ D. Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1981-1982) 130 *U.Pa.L.Rev.* 1349, p.1351.

With reference to the Public Authorities Protection Act 1893, Harlow argued that a combined approach would cause even more difficulties. The Act defined a public authority as a body with statutory duties to perform for the benefit of the public not the private.¹⁰⁷ She noted that ‘ominously, but not surprisingly...there is no general definition’ of a public authority and argued that the approach resulted in a substantial increase in litigation seeking clarification as to which bodies were included.¹⁰⁸ Feldman points to equality law as providing a more modern example of problems of the combined approach. He describes it as ‘the worst of both worlds’ because the public authorities it imposes a duty on to promote equality are defined by a combination of a list and the functional test replicated from the Human Rights Act 1998, s.6 discussed above.¹⁰⁹

Judicial approaches to public law matters

In practice, the debate around what constitutes public law has primarily centred on judicial review actions, specifically in relation to what bodies are and are not amenable to judicial review. Relatively soon after the judicial review procedure was implemented, the House of Lords established what has been termed as the ‘exclusivity rule’ – that all cases involving public law matters must be brought via judicial review actions to avoid an abuse of process.¹¹⁰ This was a deceptively simplistic requirement that led to substantial further litigation attempting to resolve the question of what constituted a ‘public law matter’. In many ways, the complexity of the litigation on this issue mirrors the issues seen in the theoretical debate above.

Just as with the theoretical debate around the meaning of public law, the subject was further complicated in practice by developments such as contracting out, which, as already discussed, resulted in private bodies carrying out functions previously the responsibility of the State.¹¹¹ The exclusivity rule has been heavily criticised, Feldman for example highlighted the lack of clarity regarding the meaning of ‘public law matters’. In this respect, he listed criteria developed by the courts to attempt to distinguish public law and private law matters: the governmental nature of the body whose act was challenged; the governmental character of the function that the body was exercising; the statutory underpinnings of the function

¹⁰⁷ Harlow (n.26 above), pp.253-254.

¹⁰⁸ *id.*, p.254.

¹⁰⁹ Feldman (n.34 above), p.32.

¹¹⁰ *O'Reilly v Mackman* [1983] 2 AC 237 (HL).

¹¹¹ For a fuller discussion of developments in judicial approaches to the issue of amenability to judicial review and arguments both in favour of and against the courts adopting a broad approach see for example Harlow and Rawlings, *Law and Administration* (3rd edn) (n.16 above).

being exercised; the source of the funding for the activity in question; the absence of a 'private law' nexus between the parties; the monopolistic control which the challenged decision-maker exercised over access to a market.¹¹² As he emphasised, no individual criterion was determinative and the various criteria frequently led to opposing conclusions about whether a body should be considered amenable to judicial review or not.¹¹³

Revised approach – nature of the legal challenge and dispute forum

This discussion above makes clear that the approaches used in existing studies to identify public law cases are problematic. As such, neither the litigant, subject matter nor combined approaches will be replicated precisely in this project. When an additional characteristic, that of the type of the dispute, is added in however, it becomes possible to build on the above approaches to differentiate types of public law cases in such a way that largely avoid the issues of considered above.

Existing literature, which, whilst elaborating various subject areas as public or private, includes only limited attempts to categorise further. That provided by Le Sueuer, Sunkin and Murkins is one exception. They however exclude one specific area identified by others as public – criminal law. Blom-Cooper and Drewry articulate a more simplistic categorisation, separating public law into 'civil' and 'criminal' aspects. They described criminal as *sui generis*.¹¹⁴ Whilst this in itself does not explain what is different about criminal law, it does reflect the idea that there are different types of public law and hence, of public law cases.

Syrett justified separating criminal law into a distinct subject for teaching in law schools based on the volume of material required to be covered in it.¹¹⁵ However, the number of cases does not provide any justification for treating criminal law as a distinct type of public law case. Similar issues relate to Blom-Cooper and Drewry's decision to exclude tax cases from their analysis of public law cases. They argued that, although such cases involved both a public authority as a party and public issues, they were argued to involve an area of jurisprudence entirely distinct from administrative law and therefore did not fit their previously derived definition.¹¹⁶ This is somewhat circular reasoning though and calls into question the robustness of their initial definition of public law. The result was that they were

¹¹² Feldman (n.34 above), pp.30-31.

¹¹³ *id*, p.31.

¹¹⁴ Blom-Cooper and Drewry (n.59 above), p.255.

¹¹⁵ He argued the same applied to other subject areas involving the relationship between the individual and the state such as family or housing law.

¹¹⁶ Blom-Cooper and Drewry (n.59 above), p.256.

not so much analysing public law cases as merely one aspect of them – administrative law cases.

The notion of categorising public law cases based on nature of the dispute builds on the idea of separating of public law into different types. As shown in Figure 3.6 below, two primary conceptually distinct types have been identified, along with an additional third, more controversial category. The first represents challenges to the legality of the exercise of State power. The second, the exercise of coercive power by the State. The third, disputes relating to private law matters that involve the State. Whilst the State is required to be a party to the second and third categories, it is not necessarily required for the first. Together these capture all cases that would be defined as public law under the subject matter and litigant approaches. There can be seen to be some overlap between the first and second categories in terms of macro level subject matter. The first category might plausibly contain cases that involve challenges to the exercise of coercive power by the State. Whilst these could plausibly be placed in either category, this approach towards identifying cases is based primarily on the nature of the action as opposed to macro subject matter so they should fall under the first category.

Figure 3.6 below represents the full taxonomy of types of cases based on identifying cases by a range of characteristics. It is broken down by general subject matter of the case, the type of dispute, who the parties to the dispute, and shows relevant macro subject areas.

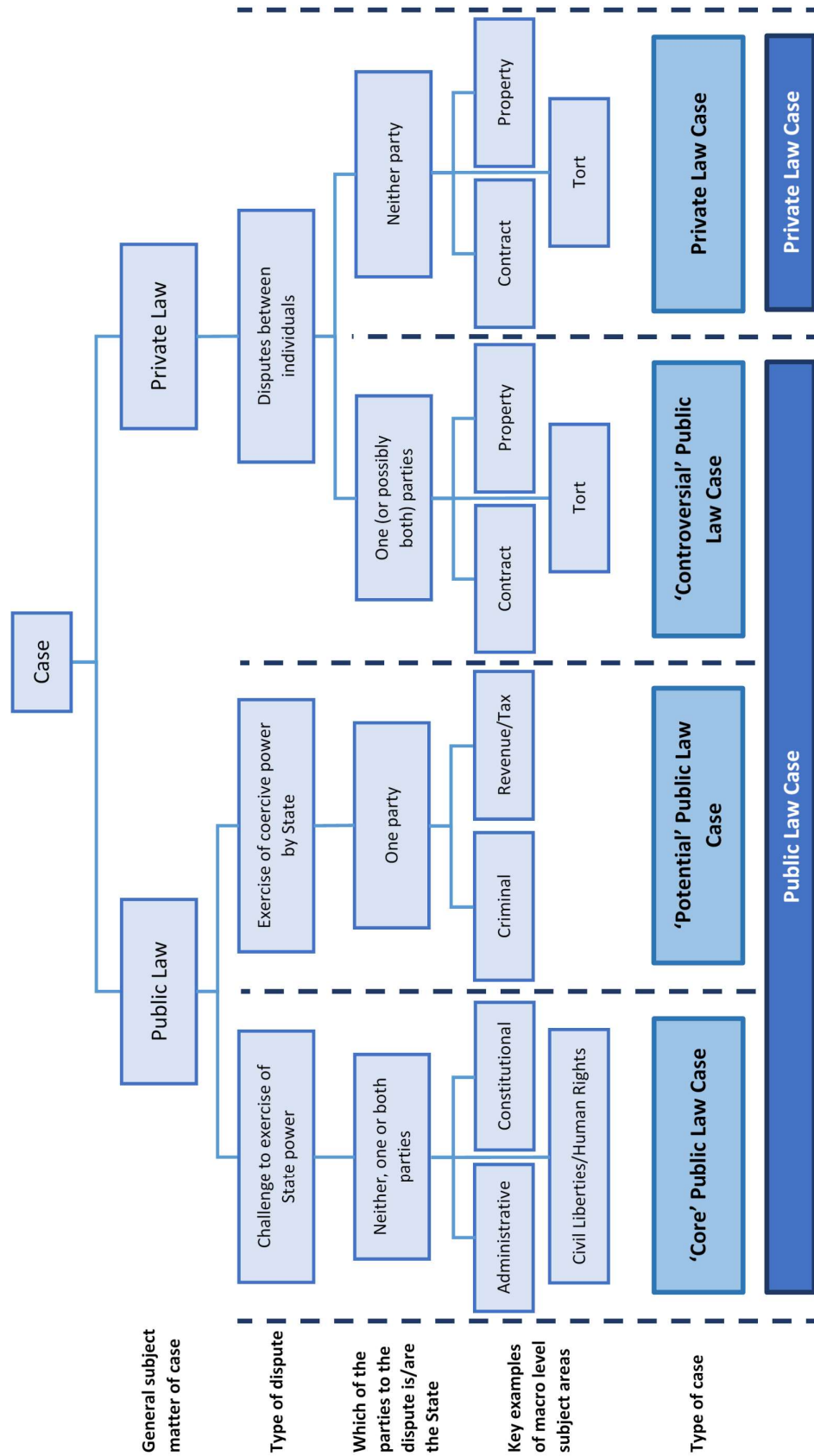


Figure 3.6: Full taxonomy of types of cases.

Conclusion

The concept of 'public law' has proved difficult to define with certainty. There is no single unified meaning or scope in literature, practice or existing studies that have analysed public law cases. To bring public law into the vanishing trial debate however, it has been necessary to attempt to reconcile the various approaches towards the concept. The revised approach presented here defines public law cases based on a number of characteristics and identifies three different types of public law cases – 'core', 'potential' and 'controversial'.

Whilst the typology developed addresses the issue of what public law cases is, it does not answer the question of what proceedings should be analysed in this study to compare trends in the civil justice system with those in public law. This question involves two further steps – an examination of whether it is possible to map specific proceedings onto the typology of public law cases and consideration of which of the proceedings identified classify as 'trial'. These two issues will be addressed in the following chapter.

Chapter 4: What Constitutes a Public Law Trial?

Introduction

The vanishing trial as a field of study is delimited by a key concept, that of a 'trial'. Having engaged with the definition of a public law case in the previous chapter, this chapter will examine two key questions to determine what proceedings should be analysed as part of this project in order to bring public law within the scope of the vanishing trial debate. The first is whether any dispute resolution processes can be classified as public law proceedings, and if so, which ones. The second is what constitutes a trial.

This chapter starts with a discussion of the courts and tribunal system in England and Wales. The typology of cases developed in the previous chapter is then mapped onto this system. The aim is to determine whether particular court or proceedings can be identified that resolve public law cases as defined by identifying which courts and tribunals within it can be said to resolve each of the four types of cases ('core' public law, 'potential' public law, 'controversial' public law and private law). Existing vanishing trial literature has examined proceedings in specific courts and this section will also engage with the question of whether, and if so what, types of public law cases can be said to have already been examined in existing vanishing trial literature. From this, I will justify delimiting the scope of this study to an analysis of 'core' public law cases only.

After engaging both with how the concept of 'trial' has been used in the existing vanishing trial literature, and how the term should be defined; the chapter will then examine which of the public law proceedings could be said to come within the ambit of the vanishing trial debate. Two practical arguments will be presented to justify restricting this project solely to judicial review proceedings. I will examine the limitations of publicly available data on first instance public law cases in proceedings other than judicial review actions. Secondly, I will revisit the lack of any research into public law trends in the existing vanishing trial literature, arguing that even if limited to judicial review, the project will make a significant contribution to the debate.

Public law proceedings

The existing vanishing trial literature relating to England has focussed on trends in specific courts – primarily the Crown Court, County Court, and both the Queen’s Bench (QBD) and Chancery Divisions of the High Court. No specific justification was provided for the choice of courts in any accounts published to date. This is surprising given the fact that the courts analysed to date only represent a small sample of the bodies that form the courts and tribunals system, as shown in Figure 4.1 below. This section aims to map the typology of public law cases developed in the previous chapter onto the parts of the system in which disputes are managed. In doing so, it will address two questions to justify the decision to restrict this project to ‘core’ public law cases, specifically those relating to administrative law. First, whether it is possible to classify any of the courts in Figure 4.1 as resolving public law disputes and second, whether, based on that classification, it is the case that some public proceedings have already been analysed as part of the vanishing trial debate.

The absence of a jurisdictional divide akin to that seen in civil law systems whereby separate systems of courts exist for resolving public and private law disputes means that it is not immediately clear that individual courts can or should be defined as public law courts, or specific proceedings as public law proceedings. However, Feldman has argued that being able to distinguish public law proceedings is important where there are special rules of public law and special procedures for implementing such rules.¹ Further, in those circumstances, a clear distinction is of practical importance to a lawyer who needs to advise clients which procedure is most appropriate to have their particular issue resolved in.² He goes on to argue that it is possible to distinguish public and private law by reference to ‘distinct *procedures and tribunals*’ that deal with public law matters.³ In respect of England and Wales, he focussed on judicial review, in which remedies can be obtained in respect of ‘public law matters’, as an example of a public law procedure.⁴ My intention here is not to engage in or resolve the question of whether there should be a jurisdictional divide between public and private law cases in England.⁵ At a practical level this does however make it harder to

¹ D. Feldman, ‘The Distinctiveness of Public Law’ in M. Elliott and D. Feldman (eds), *The Cambridge Companion to Public Law* (CUP 2015), p.17.

² *id.*

³ *id.*, p.27.

⁴ *id.*, pp.30-31.

⁵ For a further discussion against the appropriateness of importing the French model of separate systems of public and private law courts into the English legal system see for example C. Harlow, ‘“Public” and “Private” Law: Definition without Distinction’ (1980) 43 *MLR* 241; J.W.F. Allison, A

identify what cases to include under the rubric of public law. Instead, I will examine whether it is possible to public law proceedings through examination of the types of cases that different courts in Figure 4.1 resolve.

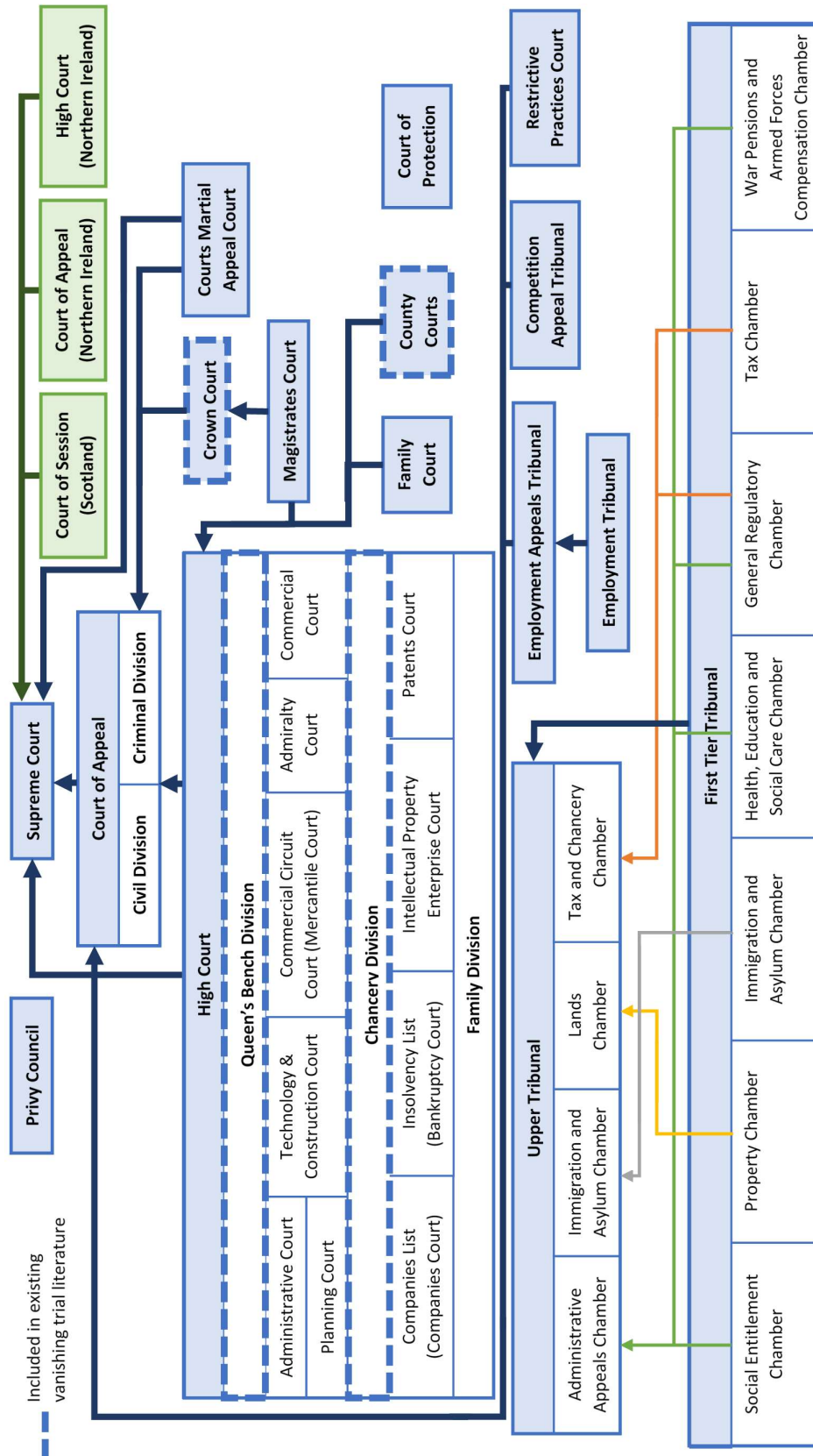


Figure 4.1: Overview of court and tribunal structure in England and Wales. Arrows show direction of appeal, including appeal routes to Supreme Court from Scotland and Northern Ireland.

Mapping the typology of public law cases onto the court structure

In the typology developed in the previous chapter, I identified three different types of public law case – ‘core’, ‘potential’ and ‘controversial’. Taking these in reverse order, it does not appear to be possible to identify specific proceedings or courts that resolve ‘controversial’ public law cases. Given their subject matter and the jurisdiction of the courts, this type of public law case will have almost certainly been resolved in the ordinary civil courts – the county court, and either the QBD or Chancery Division of the High Court. These courts have already been included within existing analysis of the vanishing trial. Therefore, it is likely that most, if not all ‘controversial’ public law cases have already been analysed as part of the existing vanishing trial debate.

Blom-Cooper and Drewry analysed only a small number of House of Lords cases within a short period in their study.⁶ It was therefore easy for them to examine and classify cases individually. This is not the case in relation to cases at first instance. Whilst it could be possible to distinguish which of these cases should be classified as ‘controversial’ public law cases and which as private law cases in those courts, this would require access to the court files. Given the date range of the project and the courts involved, the volume of cases requiring classification is enormous.⁷ As such, this approach is beyond the scope of this project. Consequently, ‘controversial’ public law cases will be excluded from the ambit of public law cases analysed in this study.

The second category of public law case identified above is ‘potential’ public law cases. Criminal cases are a prime example of the category of ‘potential’ public law cases and, for this type of case, it is possible to identify specific proceedings and courts. Both the Magistrates Court and the Crown Court deal with criminal cases at first instance. Of these, trends in the Crown Court have already been analysed as part of the vanishing trial. On the face of it, the Magistrates Court, which deals with the vast bulk of criminal cases might have been a more logical choice for analysis of trends. However, to the extent that some criminal cases have been analysed, this category of public law has already been included to a limited extent within the existing literature. This by itself does not justify excluding this category of public law cases from the scope of this project, because analysis of trends in the Magistrates Court would make a significant contribution to the vanishing trial debate. However, this

⁶ L. Blom-Cooper and G. Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Macmillan 1972).

⁷ Between 1949 and 2017, 118,889,407 proceedings were issued in the county court, 8,944,965 in the QBD and 1,741,797 in the Chancery Division.

category is not solely comprised of criminal cases. Another subject area that comes within this category of public law cases is tax law. In respect of this type of case, as with 'controversial' public law cases, it is not possible to identify specific proceedings or courts which resolve all such cases. As a result, this category of public law case will also be excluded from this project.

This leaves the final category of public law case, that of 'core'. Exemplifying this category is the macro subject area of administrative law. Here it is possible to identify a specific procedure – the judicial review procedure. Cane suggests that theorists define judicial review as private, whereas courts see it as public law.⁸ This is based on the facts that it is available to be used by individuals and that courts purport to determine judicial review cases on the basis of rules as opposed to political considerations.⁹ According to Oliver, for such commentators, only 'political' modes and standards of control of public bodies classify as 'public'.¹⁰

It is argued here that judicial review should be seen as a public law procedure. Under the Civil Procedure Rules (CPR), a judicial review claim is defined as a 'claim to review the lawfulness of...the exercise of a public function'.¹¹ In *O'Reilly v Mackman*,¹² the House of Lords held that public law matters should only be litigated via judicial review proceedings. The judicial stance on this matter has largely been watered down since then.¹³ In fact, as Harlow and Rawlings note, cases on procedural exclusivity are now notable only by their absence,¹⁴ although the debate over what constitutes public and private functions continues in the context of the Human Rights Act 1998 (HRA).¹⁵

However, whilst the courts are no longer as prescriptive about cases involving public law issues being required to be brought via judicial review, under the CPR it remains the case that judicial review actions concern public law matters. This indicates that judicial review

⁸ P. Cane, 'Public Law and Private Law: A Study of the Analysis and Uses of a Legal Concept' in J. Eekelaar and J. Bell (eds), *Oxford Essays in Jurisprudence*, vol Third Series (Clarendon 1987), p.74.

⁹ D. Oliver, *Common Values and the Public-Private Divide* (Butterworths 1999), p.10.

¹⁰ *id.*

¹¹ Civil Procedure Rules Part 54 Rule 54.1 (2)(a).

¹² *O'Reilly v Mackman* [1983] 2 AC 237 (HL).

¹³ For a discussion of changes in approach see C. Harlow and R. Rawlings, *Law and Administration* (3rd edn, CUP 2009), pp.683-685.

¹⁴ *id.*, p.684.

¹⁵ Human Rights Act (HRA), s 6(3) states that a 'public authority' includes a) a court or tribunal, and b) any person certain of whose functions are functions of a public nature. HRA, s 6(5) states that in relation to a particular act, a person is not a public authority by virtue only of section (3)(b) if the nature of the act is private. For a discussion of the case-law surrounding interpretation of these sections see for example *id.*, pp.376-383.

should be defined as a public law proceeding. In fact, the association is so strong that judicial review is frequently equated with public law though there have been criticisms of this approach.¹⁶ The type of dispute can be characterised as a challenge to the exercise of State power, whether a direct action of the State, its representatives or a body contracted to exercise State power in specific circumstances, as established in case-law discussed above. This therefore meets the essential criteria required to come within the definition of a 'core' public law case.

Under the existing court structure, judicial review cases are dealt with in the Administrative Court, which is part of the QBD. The Administrative Court is therefore the most obvious contender for inclusion in this project as a court dealing solely with 'core' public law cases. However, there are problems with solely analysing the Administrative Court. First, it was only established in 2000, which means there is a comparatively short data period in contrast to other, longer established courts dealing with other types of cases. Second, as Feldman highlights, the Administrative Court, despite its name, no longer purely deals with administrative law actions. A large number of tort claims, particularly in relation to military action abroad are also heard there.¹⁷

As discussed in the last chapter, the judicial review procedure existed prior to the creation of the Administrative Court, having been established in 1979. Furthermore, the procedure itself amalgamated the pre-existing system of prerogative writs into a revised procedure. Whilst trends in the QBD have been analysed as part of the vanishing trial debate, figures for prerogative writ actions and judicial review actions, both those in the QBD and those in Administrative Court, have all been explicitly excluded from this analysis.¹⁸ This highlights a clear gap in the existing vanishing trial scholarship.

It is not clear that there is a specific procedure for resolving constitutional law or human rights cases although some may have been brought as judicial review actions. Whilst it is likely that it would be possible to identify human rights cases brought since the introduction of the Human Rights Act 1998 (HRA) by reference to section(s) of the Act or to Articles of the European Convention on Human Rights and Fundamental Freedoms 1950, though this would not necessarily be exhaustive and further content analysis of judgments and/or case files

¹⁶ Lord Woolf noted the tendency to assimilate public law with judicial review, but argued it was a mistake to do so. Lord Woolf, '*Droit Public – English Style*' [1995] *PL* 57, p.60.

¹⁷ Feldman (n.1 above), p.31.

¹⁸ Genn for example briefly noted that the Administrative Court showed a different trend to that observed in the QBD and the County Court, but excluded that court from the ambit of her research on the basis of that its jurisdiction was public law cases.

would be required.¹⁹ As noted above in respect of ‘controversial’ public law cases, such an approach is not feasible given the volume of case files that would have to be examined. It is therefore a subset of ‘core’ public law cases, administrative law cases in the form of judicial review proceedings, on which I will concentrate in this project. Restricting my analysis to ‘core’ public law cases will necessarily involve a similar restriction of my analysis to administrative law cases and will also artificially inflate the numbers of private law actions which will have to be taken into account in relation to drawing conclusions about trends in public versus private law cases.

Non-court administrative law proceedings

So far, I have considered which court-based proceedings classify as public law proceedings, because it is exclusively courts which have featured in the vanishing trial literature relating to England to date. Figure 4.1 shows that the legal system also includes tribunals, and a wide range of mechanisms for resolving administrative law disputes beyond this system that also merit consideration for inclusion within this study. Surveying a wide range of literature, Adler identified three different approaches to the research on interactions between the individual and the State in relation to administrative decisions: ‘administrative law’, ‘justice in administration’ and ‘administrative justice’.²⁰ ‘Administrative law’ was identified as a top down approach, focusing on judicial review as the forum for resolution of disputes between the individual and the State.²¹ ‘Justice in administration’ was described as the direct opposite, a bottom up approach – focusing instead on internal systems of review.²² The final approach, ‘administrative justice’ combined both of the other two and recognised the importance of both internal and external mechanisms of redress.²³

Adler’s ‘administrative law’ approach can be associated with traditional approaches to administrative law by legal academics. Ground-breaking work by Harlow and Rawlings however challenged this approach. They developed a bottom up approach that treated a considerably wider variety of interactions between individuals and the State as falling within the ambit of administrative law. In their book, *Law and Administration*, not only do they expand on the range of external redress mechanisms beyond judicial review, they also

¹⁹ It is even less clear how cases predating the HRA coming into force would be identified.

²⁰ M. Adler, ‘Understanding and Analysing Administrative Justice’ in M. Adler (ed), *Administrative Justice in Context* (Hart 2010), p.154.

²¹ *id.*

²² *id.*

²³ *id.*

incorporate internal review mechanisms and first instance decisions.²⁴ Summarising developments in the field of administrative law, Harlow and Rawlings highlight challenges to the view of courts as the only appropriate mechanism for resolving administrative disputes from early in the twentieth century. First, by the introduction of alternative dispute resolution mechanisms such as inquiries and tribunals. Latterly, by proportionate dispute resolution procedures such as internal complaints procedures and ombudsmen.²⁵ The work by Harlow and Rawlings is most closely aligned with Adler's 'administrative justice' model. The proceedings that Harlow and Rawlings identified are shown below in Figure 4.2:

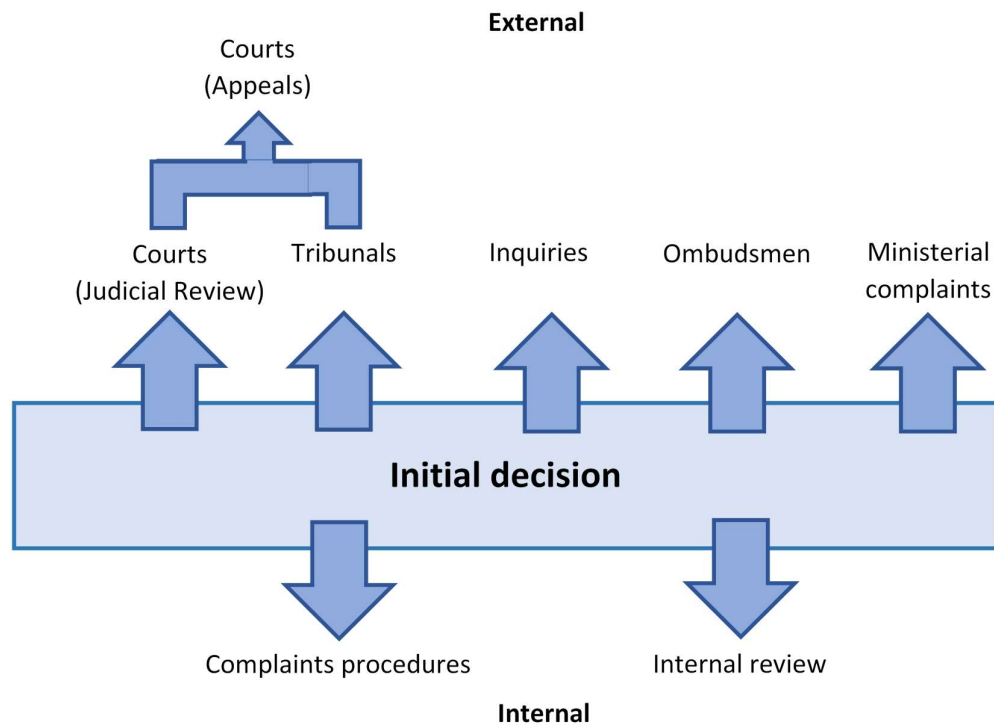


Figure 4.2: Administrative law dispute resolution processes.²⁶

²⁴ C. Harlow and R. Rawlings, *Law and Administration* (1st edn, Weidenfeld and Nicolson 1984), chs.6-9; Now in its third edition Harlow and Rawlings, *Law and Administration* (3rd edn) (n.13 above), chs.10-13.

²⁵ Harlow and Rawlings, *Law and Administration* (3rd edn) (n.13 above), ch.10.

²⁶ Derived from Harlow and Rawlings' discussion of various types of public law proceedings. d, chs.10-13.

The concept of a trial

As one of five theories presented to explain the vanishing trial phenomenon, and predict what would happen if the observed trends continued,²⁷ Galanter proposed that trials may not be vanishing, but instead relocating away from courts to other locations.²⁸ However, he went on to argue that trial-like events in ‘peripheral institutions’ such as administrative tribunals and forums in the US also showed evidence of recent decline, suggesting that the displacement theory was incorrect in the American context.²⁹ In principle, regardless of the focus on *trials* in the vanishing trial debate, I would examine trends in all mechanisms of dispute resolution included in Figure 4.2 above to determine whether there have been any shifts in the proportions of cases being resolved in each forum. This would enable a comprehensive examination of trends in public law cases and an analysis of whether, regardless of the direction of change in the actual number of public law trials, Galanter’s hypothesis of the ‘displacement’ of trials holds true in the context of public law in England.³⁰ Trends in public law cases in the appellate courts would also be analysed and, as such the structure of courts and variables would be as follows:

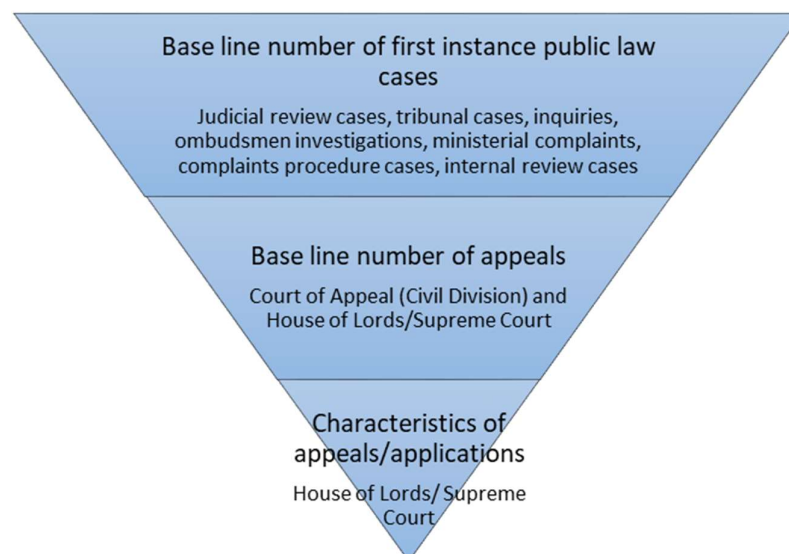


Figure 4.3: Diagram of the ideal structure of courts and variable to be analysed.

²⁷ Galanter’s five theories were convergence, displacement, assimilation, transformation and evolution. M. Galanter, ‘A World Without Trials?’ [2006] *J.Disp.Resol.* 7, pp.23-33. See Chapter 1 for a fuller examination of these hypotheses.

²⁸ *id.*, p.24. See also J. Resnik, ‘Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts’ (2004) 1 *JELS* 783.

²⁹ Galanter (n.27 above), pp.25-26.

³⁰ *id.*, pp.24-27.

However, the primary objective of this study is to bring public law into the vanishing trial debate through a comparison of trends in public law cases with those in civil law more generally. The existing vanishing trial literature relating to the UK has only examined trends in the numbers of cases entering the *litigation* system at first instance and the number and proportion proceeding through to final judicial determination, without consideration of trends in other proceedings. Future work could usefully examine trends in the number of inquiries, ombudsmen and complaints procedures but the decision has been made to restrict this project to proceedings which classify as 'core' public law *trials* so that direct comparisons can be made with the work of others interested in the vanishing trial.

Given this restriction, it is necessary to determine whether all of the proceedings in Figure 4.2 above can be defined as trials and hence ought in principle to be analysed as part of the vanishing trial debate. The question of the definition of a trial is therefore an essential one to address. As will be seen however, this is not clear from the vanishing trial literature, with individual scholars using the term in different ways. This it is argued may at least in part explain the absence of analysis of public law in the scholarship, specifically that relating to the US, to date. Instead of attempting to reconcile the various approaches to the concept, I will instead elaborate a definition of a trial from literature in the field of dispute resolution. Finally, I will justify why, of the public law proceedings that can be defined as trials, I will restrict my analysis to judicial review actions.

The absence of administrative law and meanings attributed to 'trial' in the US vanishing trial literature

Whilst civil rights were included as one of the subject areas that Galanter examined trends in, there was no mention of trends in other aspects of public law such as constitutional or administrative law.³¹ Beyond the narrow parameters of court-based adjudication however, he did examine administrative adjudication more generally. Significantly, Galanter recognised the importance of administrative law in the broader landscape of disputes, noting that a 'significant portion of all adjudication takes place in various administrative tribunals and forums'.³² However, despite implying that he considered such adjudication to come within the ambit of a trial by arguing that further analysis should be undertaken to assess

³¹ id. Specific subject areas featured were torts, contracts, prisoner, civil rights, labour, intellectual property and 'other'.

³² id, pp.499-500., also mentioning that the number of administrative law judges in 2001 was double that of district court judgeships.

whether trends paralleled those seen in courts and if so whether they were connected,³³ his treatment of administrative law was minimal. Administrative adjudication merited only a single paragraph in his 112 page seminal article. He restricted his analysis to a brief mention of research by Schooner documenting a drop in cases at the General Accounting Office in the 1990s.³⁴ Schooner examined the number of proceedings filed with this body between 1990 and 1999, showing growth until 1993, followed by consistent decrease.³⁵ He contrasted this with trends in civil cases filed in District Courts, which showed growth between 1993 and 1997.³⁶

In Galanter's seminal thesis establishing the vanishing trial as a field of study, the nature of the central concept 'trial' received surprisingly limited attention. He only dealt with its meaning in a footnote, stating that the Administrative Office defined it as 'a contested proceeding before a jury or court at which evidence is introduced' and that the definition of a trial varied between State courts.³⁷ Galanter did not engage with any theoretical literature on the concept or provide a definitive definition of what constituted a trial, instead going straight into an analysis of the number of trials in various courts, overall and by subject matter.

Galanter's inclusion of administrative adjudication in his article establishing the field of study calls into question whether 'trial' should be defined narrowly in the broader context of socio-legal approaches to the topic. His lack of in-depth analysis of trends in administrative agencies could be argued to demonstrate an intention to exclude dispute resolution processes that occur external to courts from the ambit of a trial. Alternatively, the extremely limited treatment of administrative adjudication in his initial vanishing trial study was potentially more a reflection on the conclusions of his research to date than a deliberate attempt to delimit the scope what should be classified as a trial in future research.³⁸

³³ *id.*, p.500.

³⁴ *id.* Commenting on S.L. Schooner, 'Fear of Oversight: The Fundamental Failure of Businesslike Government' (2000-2001) 50 *Am.U.L.Rev.* 627, pp.644-647.

³⁵ Schooner (n.34 above), p.645.

³⁶ *id.*, p.644.

³⁷ Table A-25, in the appendix to his article, provided a definition of bench (criminal) and jury (civil) trials in twenty nine States. However, this was only to the extent that relevant stages in those particular proceedings that cases had to reach to be classified at trials for reporting purposes were identified for each of the listed States. M. Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 *JELS* 459, pp.460, 564-565.

³⁸ This is supported to a certain extent by Resnik's reference to an earlier, presumably draft, version of his seminal paper, which included sections on 'administrative adjudication' and 'number of ADR proceedings' that were both unwritten aside from notes referring to 'other figures' and that he was looking for data. Resnik (n.28 above), p.790.

However, it is possible that he anticipated adopting a broader definition of a trial including proceedings beyond court-based adjudication.

In a subsequent article, Galanter engaged with the concept of a trial in slightly more depth, defining it as a 'proceeding in which parties present proofs and arguments according to a pre-set procedural template to an authoritative decision-maker who gives a binding decision'.³⁹ To some extent, his position regarding the appropriateness of the inclusion of administrative adjudication within the concept of a trial, and hence the vanishing trial debate, appears to have altered by that point. He highlighted that many trials took place outside the federal and district courts in other courts such as bankruptcy court and acknowledged that more trials took place outside courts than within.⁴⁰ However, despite repeating verbatim his comment regarding adjudication in administrative tribunals and forums, he questioned how many such proceedings should be defined as trials.⁴¹ In contrast to his initial seemingly broad approach to the concept of a trial that included administrative adjudication, those proceedings were now classified instead as 'trial-like events'.⁴² Administrative adjudication was included in his analysis only to the extent it was considered as a potential explanation for the vanishing trial – proceedings displacing out of courts into alternative locations.⁴³

Public law is notable for its almost complete absence in the subsequent substantial vanishing trial literature relating to the US. As with Galanter, in the limited instances it was mentioned, its inclusion was restricted to administrative agency adjudication. Further, this body of scholarship fails to provide a clear answer on the ambit of a trial and the question of whether the concept should, or does, encompass administrative adjudication. Honeyman defined trial for the purposes of his study as an 'administrative law hearing', a broad definition that encompassed administrative agency adjudication.⁴⁴ In an attempt to test whether Galanter's five theories regarding the explanation for the vanishing trial applied in the context of administrative agencies, he analysed trends in a single agency – The Wisconsin Employment Relations Commission.⁴⁵ He found that trial rates were 'remarkably larger' to federal courts for the corresponding time and that, although they showed a sharp drop from 1985, there

³⁹ Galanter, 'A World Without Trials?' (n.27 above).

⁴⁰ *id.*, p.25.

⁴¹ *id.*

⁴² *id.* Other proceedings defined as trial-like events included judicial auxiliaries, arbitration proceedings and a range of disciplinary hearings.

⁴³ *id.*

⁴⁴ C. Honeyman, 'Worlds in a Small Room' [2006] *J.Disp.Resol.* 107, p.109.

⁴⁵ *id.*

was also somewhat of a rebound from 1995.⁴⁶ Although noting that trends from a single agency were insufficient to be able to generalise, he nonetheless concluded that his findings suggested that where all five theses were either inapplicable or present at the beginning, the absolute number of trials both starts and remains higher.⁴⁷

Others have also found the absence of data on administrative adjudication worthy of note. Lande described the 'vanishing trial' concept as a misleading and counterproductive myth, partly because of the exclusion of administrative proceedings from analysis of the overall number of trials.⁴⁸ He criticised the absence of data on administrative agency adjudication from earlier vanishing trial literature, and can therefore be seen as a proponent for a wide definition of a trial. However, he similarly only examined data from a single agency across a very limited date range. Lande's figures showed that the number of hearings dealt with by the Social Security Administration department rose 2001-2003, in direct contrast to the trend identified by Galanter in federal and state courts.⁴⁹ His use of administrative cases can be seen to be part of his critique of the term 'vanishing', designed to demonstrate that a large number of trials still occurred than an attempt to provide an in-depth analysis of trends in administrative adjudication.

Resnik proposed a narrow definition of a trial as 'fact finding by government-employed judges and government-deployed juries in courtrooms situated in buildings called courthouses provided by the state'.⁵⁰ Proceedings such as administrative agency adjudication fall outside her definition and, as such, should logically be omitted from research into the vanishing trial. This definition could in fact justify the general exclusion of non-court based adjudication from the vanishing trial debate. However, questioning whether all of the criteria in her initial definition should actually be treated as authoritative, she provided an alternative broad definition of a trial in the same article.⁵¹ Resnik suggested that proceedings occurring anywhere before a neutral third party empowered to impose

⁴⁶ id, p.111.

⁴⁷ id, pp.116-118.

⁴⁸ J. Lande, 'Shifting the Focus from the Myth of the "Vanishing Trial" to Complex Management Systems, or I Learned *Almost* Everything I Need to Know About Conflict Resolution from Marc Galanter' (2004-2005) 6 *Cardozo J. Conflict Resol.* 191, pp.191-197. This was not the sole critique Lande leveled at the vanishing trial phenomena. He criticised both the use of the singular 'trial' as opposed to 'trials' given the variety of types of trial and the accuracy of the term 'vanishing' to describe trends in trial numbers.

⁴⁹ id, p.197.

⁵⁰ Resnik (n.38 above), p.790.

⁵¹ id.

judgment that would be enforced by the state could be considered trials.⁵² This is a significantly wider definition that brings any form of state-sanctioned adjudication inside the ambit of 'trial', regardless of whether it is court-based or not.

Despite explicitly questioning whether administrative adjudication should come within the scope of the vanishing trial,⁵³ Resnik's treatment of such proceedings provides conflicting answers, and her approach towards the appropriate breadth of the definition of a trial appears somewhat confused. She only examined administrative adjudication as part of consideration of a proliferation, or migration thesis to explain the vanishing trial data.⁵⁴ There was no attempt to analyse trends in the volume of proceedings to determine whether they similarly demonstrated evidence of vanishing adjudications. In fact, Resnik only compared administrative cases in four government agencies in a single year to federal court based cases, demonstrating that the former had over eight times as many adjudicatory proceedings (720,000 versus 85,000).⁵⁵ Previous work by Fiss and Resnik, outside the vanishing trial field, had demonstrated that filings in the Social Security Administration alone in the late 1990s were almost double those in federal courts.⁵⁶

Although arguing that 'trials may well vanish – in courts, agencies, and beyond', she failed conclusively to state under which definition administrative adjudication should fall.⁵⁷ Despite implying that her narrow definition would exclude administrative agency adjudication, she also described administrative agencies as courts,⁵⁸ which would plausibly suggest that she considered them as falling within the narrower definition. Causing further confusion, she left it unclear as to whether she definitively classed administrative adjudication as trials. Instead, she merely noted that, based on its specific characteristics, some scholars would wish to dispute it being considered a trial, whereas others would criticise it for being too trial like.⁵⁹

⁵² id.

⁵³ Honeyman (n.44 above), p.107.

⁵⁴ Resnik (n.38 above), pp.790-804.

⁵⁵ id, pp.799-800. In relation to administrative agencies, she included proceeding in the Social Security Administration, the Immigration and Naturalization Services, the Board of Veterans' Appeals and the Equal Opportunity Commission. The federal court proceedings included were those by Bankruptcy Judges, District Judges and Magistrate Judges.

⁵⁶ O.M. Fiss and J. Resnik, *Adjudication and its Alternatives: An Introduction to Procedure* (Foundation Press 2003), p.40.

⁵⁷ Resnik (n.38 above), p.789.

⁵⁸ id, p.787. After providing the two definitions of a trial, her language changed slightly, referring to agencies as 'functionally courts', p.791.

⁵⁹ id, p.798.

Outside the context of the vanishing trial debate, Verkuil and Lubbers referred to administrative adjudication as ‘trial-type’,⁶⁰ a term that suggests that, whilst there are similarities between the two types of proceedings, such adjudication should be distinguished from trials. Edles goes further, arguing against turning informal agency adjudication into ‘trial-type’ proceedings as a means of improving procedures under the Administrative Procedure Act and, as such, suggests there is a clear distinction between trials and administrative adjudication.⁶¹ The inclusion of administrative adjudication in some discussions of the vanishing trial suggests that not all scholars perceive a distinction between administrative and other forms of civil adjudication such that would justify excluding the entire subject area of public law from consideration of data on the vanishing trial. However, the extent to which administrative adjudication in the US should be considered a trial remains questionable.

One justification that has been given by researchers in the field for their limited treatment of public law is that of the paucity of data against which to plot trends. Honeyman for example notes that statistics relating to State agencies are highly fragmented and often poorly documented.⁶² Resnik especially highlighted this issue, attributing the absence of further analysis of administrative adjudication to what she described as a ‘data-gap’.⁶³ She stated that, in contrast to federal courts, there were considerable difficulties in obtaining data about proceedings in the wide range of administrative agencies and explained this by reference to historical developments.⁶⁴ The work by legal reformers in the 20th century that resulted in considerable data being available in relation to the federal courts was contrasted to the perceived lack of importance of administrative agency adjudication that meant no equivalent resources had been developed to gather data on those proceedings.⁶⁵ The data-gap argument appears to have primarily been used by Resnik to explain why she was unable to either substantiate or disprove her proliferation thesis. It remains unclear whether, if data on administrative adjudication was available, that would affect researchers’ views on whether such proceedings should come within the ambit of a trial.

⁶⁰ P.R. Verkuil and J.S. Lubbers, ‘Alternative Approaches to Judicial Review of Social Security Disability Cases’ (2003) 55 *Ad.L.Rev.* 731, p.759.

⁶¹ G.J. Edles, ‘An APA-Default Presumption for Administrative Hearings: Some Thoughts on Ossifying the Adjudication Process’ (2003) 55 *Ad.L.Rev.* 787, pp.808-809.

⁶² Honeyman (n.44 above).

⁶³ Resnik (n.38 above), pp.795-798.

⁶⁴ *id.*, pp.791-793.

⁶⁵ *id.*, pp.796-798, 800-801.

The definition of a trial

There are two issues with the how public law is dealt with in the vanishing trial literature. First, the reason for its virtual absence is unclear. Whilst the appropriate meaning of a 'trial' and the issue of significant data-gaps largely justifies the exclusion of administrative agency adjudication from US literature on the vanishing trial, it does not explain the absence of data on or analysis of public law trials taking place within the courts. The question of why trends in public law cases in courts have been ignored in the US context remains to be addressed. Second, even when public law is mentioned, there is confusion regarding how such proceedings should be regarded within the context of the vanishing trial debate. The scholarship lacks clarity regarding which types of adjudicative processes should be considered 'trials' and therefore within the scope of the vanishing trial and which should be considered relevant only in relation to explaining the observed decrease in the number of court-based trials. The problems of both the lack of justification for exclusion and the appropriate use of public law proceedings largely stem from failure to engage with the meaning of the concept of 'trial' in sufficient depth. The fact this issue arises is in many ways surprising. The vanishing *trial* as a concept suggests an implicit limitation on the scope of the field of study based on the definition of a trial. The scholarship discussed above, despite its apparent clear focus on 'trials', tends to conflate 'trials' and 'adjudication'. The two terms are not interchangeable – whilst all trials are adjudications, not all adjudication occurs in trials.

Richardson and Genn have argued that adjudication has no universally agreed meaning.⁶⁶ Although stating it was customary to think of adjudication as a means of settling disputes, Fuller argued that adjudication could be viewed more fundamentally as a form of social ordering.⁶⁷ Considering specifically the dispute settlement aspect of adjudication, he proposed a sliding scale covering a wide variety of mechanisms, from informal to formal, of settlement by a third party as a definition.⁶⁸ Genn and Richardson suggest that the concept of adjudication can be seen to cover a wide array of dispute resolution mechanisms. They suggested that 'in its broadest sense it can be applied to all administrative decisions which require judgment in applying standards to facts'.⁶⁹ Galligan proposed a narrower approach to adjudication, under which the ambit of concept is limited to court processes, although

⁶⁶ G. Richardson and H. Genn, 'Tribunals in Transition: Resolution or Adjudication?' [2007] *PL* 116, p.119.

⁶⁷ L.L. Fuller, 'The Forms and Limits of Adjudication' (1978-1979) 92 *Harv.L.Rev.* 353, p.357.

⁶⁸ *id.*, p.353.

⁶⁹ Richardson and Genn (n.66 above), p.119.

these can be divided into adversarial and inquisitorial.⁷⁰ His narrow sense does not therefore imply a more restricted meaning, but instead refers only to a specific location. However, he gave no justification as to why court processes should be considered a distinct sense of adjudication.

Other scholars, whilst also arguing that court processes, or trials, should be seen as a sub-set of the broader concept of adjudication, analyse more closely the characteristics of trials that make them special. Roberts and Palmer for example first identify adjudication, or umpiring, as one of three basic models of dispute resolution in which a third party is empowered to determine the outcome of a dispute.⁷¹ They further divide adjudication into different types, although their division is not inherently linked to location. Instead, they distinguish state-sponsored adjudication by judges from adjudication by arbitrators privately selected by the parties themselves, in a location of their choice.⁷² Two of the key elements they highlight in relation to state-sponsored adjudication are the publicity of court processes (central to the concept of the rule of law), and the hierarchical appellate structure of the judicial system.⁷³ Landes and Posner, considering whether adjudication could be entirely privatised, emphasised publicity in the form of precedent setting as an aspect of trials that set them apart from private forms of adjudication such as arbitration.⁷⁴ From this, it can be seen that it is the concept of publicity, both in terms of hearings and precedential output that justifies categorising trials as a distinct subset of adjudication.

Administrative law trials in England

Discussions about whether proceedings resolving administrative law disputes should come within the concept of a trial in the US need to be contextualised within an English setting because of variations in the nature of the bodies resolving such disputes between the two countries. From the definition of a trial adopted above, judicial review actions clearly come within its ambit. They take place within the public forum of a court, decisions can be appealed and judgments have precedential value. However, not all of the other

⁷⁰ D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon 1996), p.241.

⁷¹ S. Roberts and M. Palmer, *Dispute Processes: ADR and the Primary Forms of Decision Making* (2nd edn, CUP 2005). The other two models being 'negotiation', which involves the parties to the dispute reaching a mutually agreed decision, and 'mediation' in which a neutral third party intervener facilitates the parties reaching agreement.

⁷² *id.*, pp.88, 264.

⁷³ *id.*, p.228.

⁷⁴ W.M. Landes and R.A. Posner, 'Adjudication as a Private Good' (1979) 8 *JLS* 235, p.236.

administrative law dispute resolution mechanisms in England identified by Harlow and Rawlings should be classified as trials.

Internal dispute resolution mechanisms lack the publicity and precedential value necessary to amount to trials. Of the external procedures, neither ministerial complaints, ombudsmen's investigations nor inquiries procedures can be classified as trials. Similarly to the internal grievance procedures, ministerial complaints lack publicity. An ombudsman investigation is largely documentary, although they do have the power to hold hearings.⁷⁵ Significantly, their procedures lack the publicity necessary to amount to trials, investigations by the Parliamentary Commissioner for example are conducted in private. Ombudsmen give recommendations and, whilst commonly obeyed, they do not amount to judgments and as such they lack precedential value.⁷⁶ Courts have become increasingly willing to submit ombudsmen's decisions to judicial review,⁷⁷ but this does not amount to the decisions being capable of being appealed. In their discussion of inquiries Harlow and Rawlings focussed on coroner's inquiries, stating that they contained many features of modern public inquiries.⁷⁸ They argue that some of its features give it the appearance of a criminal trial, namely the inclusion of juries, that interested parties can be legally represented, the power to summon witnesses who must answer and give evidence under oath.⁷⁹ However, although coroner's inquiries are held in public, not every type of inquiry is public.⁸⁰ Furthermore, their recommendations are not enforceable,⁸¹ as a consequence, inquiries also do not amount to trials.

There are significant differences between administrative adjudication in agencies in the US and in tribunal proceedings in England, meaning the two should not be considered equivalent and, unlike administrative adjudication in the US, tribunal hearings in England should be classified as trials. Cane defines administrative adjudication as the resolution of disputes arising out of administrative decision-making.⁸² He argues that such adjudication can be either non-judicial or judicial and the latter can be further divided into internal and

⁷⁵ Harlow and Rawlings, *Law and Administration* (3rd edn) (n.13 above), p.480.

⁷⁶ *id.*

⁷⁷ *id.*, p.482.

⁷⁸ *id.*, pp.575-579.

⁷⁹ *id.*, pp.578-579.

⁸⁰ *id.*, p.581.

⁸¹ *id.*, pp.576-577.

⁸² P. Cane, 'Judicial Review in the Age of Tribunals' in C. Forsyth and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010), p.120; For a detailed analysis of the history of tribunal development see for example Harlow and Rawlings, *Law and Administration* (3rd edn) (n.13 above), ch.11.

external review.⁸³ Judicial administrative adjudication is not limited to judicial review in the courts but can take a number of forms. In this context, Cane identifies fundamental differences between judicial administrative adjudication in agencies in the US and in tribunals in the UK. In the US, the multitude of different administrative agencies perform internal review.⁸⁴ The Administrative Procedures Act (APA) 1946 established 'trial-type' procedures within administrative agencies, presided over by special quasi-independent adjudicators.⁸⁵ The adjudicators, now called administrative law judges (ALJ), are employed by the agencies they review and embedded within them, although there are a variety of legal protections to ensure they are functionally separate.⁸⁶ According to Mashaw, specifically in relation to the Social Security Administration (SSA), there are competing views on the roles and independence of the ALJs. Historically the ALJs believed that they should be independent of the SSA and that the administrative adjudication process should be aligned as closely as possible with methods of providing justice in traditional court trials.⁸⁷ The SSA management initially disputed that ALJs were intended to have independence under the APA and subsequently attempted to structure ALJs discretion in such a way as to ensure that the outcome of hearings was implementation of the goals of the disability program.⁸⁸ ALJ decisions are technically decisions of the relevant agency, which can be appealed within the agency and are subject to judicial review in the courts.⁸⁹ In the US, administrative adjudication within agencies does not come within the scope of a trial and should be excluded from the vanishing trial debate.

In contrast, in the UK Cane argues that, whereas tribunals were initially an integral component of the machinery of the regulatory and welfare state, they have since been transformed into external adjudication of disputes between citizens and the state.⁹⁰ It has been argued that, in the UK, the view of tribunals as lying within the judicial arm is firmly entrenched.⁹¹ While tribunals are now considered adjudicatory bodies, this is however only

⁸³ Cane, 'Age of Tribunals' (n.82 above), p.120.

⁸⁴ For a detailed, albeit somewhat dated, description of the operation of one Administrative Agency, the Social Security Administration (SSA), including a review of criticisms surrounding its adjudicatory function see J.L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale UP 1983), ch.1-2.

⁸⁵ J.S. Lubbers, 'Should the Primary Locus of Government Adjudication be in the Agencies, the Courts, or in a Special Tribunal? Comparisons Between the US and UK/Australia Models' in C. Forsyth and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010), p.164.

⁸⁶ Cane, 'Age of Tribunals' (n.82 above), p.121.

⁸⁷ Mashaw (n.84 above), p.41.

⁸⁸ *id.*

⁸⁹ Cane, 'Age of Tribunals' (n.82 above), pp.135-139.

⁹⁰ *id.*, p.123.

⁹¹ Richardson and Genn (n.66 above), p.116.

a recent development. The Franks Reports concluded in 1957 that tribunals were part of the 'machinery of adjudication rather than part of the machinery of administration'.⁹² This marked a turning point in thinking about the role of tribunals, away from viewing them as a stage in the administrative process.⁹³ Whereas prior to Franks the meaning of 'trial' might have excluded tribunals from the ambit of the vanishing trial, subsequent reforms mean this is no longer the case. Harlow and Rawlings describe them as frequently being perceived as court substitutes, although they did highlight qualities that continued to differentiate tribunals from court hearings.⁹⁴

However, despite the judicialisation of tribunals as a consequence of the Franks Report, until relatively recently they were usually viewed as falling under the general umbrella of 'alternative dispute resolution'. That is no longer the case following the most recent reforms to the tribunal system. The Leggatt Report,⁹⁵ published in 2001 contained far reaching proposals for reform to the then existing 'system' of tribunals – which had grown to nearly 100 since the Franks Report, with little consistency in terms of operation. Leggatt highlighted that over 60 tribunals existed which enabled citizens to challenge decisions of the State. Amongst other criticisms, he concluded that such tribunals were insufficiently independent of the departments sponsoring them. His proposal was for the establishment of a single Tribunals Service, analogous in position to the Court Service in relation to the Lord Chancellor's Department. The Government's response was more far reaching than Leggatt's proposals, considering the role of tribunals in providing administrative justice by placing them in context with a wide range of dispute resolution mechanisms.⁹⁶ The most recent reform, the Tribunal, Courts and Enforcement Act 2007, made tribunals part of the judiciary.⁹⁷ From court substitutes, tribunals are now more akin to quasi-courts.⁹⁸ Carnwath, subsequently first senior president of tribunals system, highlighted the fact that the Upper Tribunal was to be a superior court of record.⁹⁹ He emphasised that although the intention was not to replace the Administrative Court, on matters within jurisdiction powers would be at least as

⁹² Lord Chancellor's Department, *Report of the Committee on Tribunals and Inquiries* (Cmnd. 218, 1957), [40].

⁹³ Harlow and Rawlings, *Law and Administration* (3rd edn) (n.13 above), p.488.

⁹⁴ These characteristics included cheapness; speed; the participatory nature of tribunal hearings; the inclusion of lay members. *id.* pp.490-491.

⁹⁵ A. Leggatt, *Tribunals for Users: One System, One Service* (HMSO 2001).

⁹⁶ Tribunals were considered along with complaints procedures, ombudsmen and judicial review in courts.

⁹⁷ Lubbers (n.85 above), p.165.

⁹⁸ Harlow and Rawlings, *Law and Administration* (3rd edn) (n.13 above), p.522.

⁹⁹ R. Carnwath, 'Tribunal Justice – A New Start' [2009] *PL* 48, p.56.

extensive, and that tribunals would have the advantage of providing supervision by specialist judges.¹⁰⁰ More recently still, the Court Service was renamed the Court and Tribunal Service, further aligning the two types of bodies. Of especial importance in the context of the assimilation of courts and tribunals, the newly established Upper Tribunal was granted judicial review powers in cases transferred from the High Court – either by categories or on a case-by-case basis.¹⁰¹ As a result of these reforms, it is clear that tribunal procedures can, now at least, be classified within the definition of a trial.

Figure 4.4 below highlights that, of the various proceedings in Figure 4.2 above, only judicial review and tribunal cases should be considered trials:

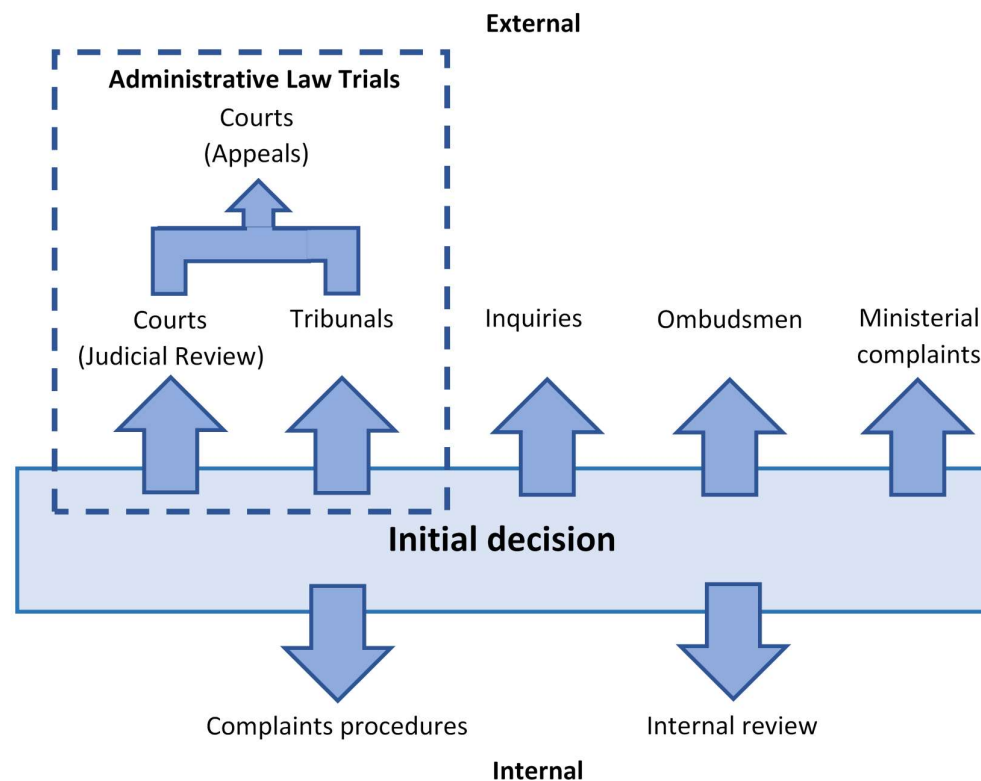


Figure 4.4: Administrative law dispute resolution processes, highlighting which should be defined as trials.

Limiting the dataset to judicial review proceedings only

Ideally, this project would examine trends in both judicial review and tribunal trials. This would allow for a comprehensive analysis of trends in administrative law in England, especially because, as Richardson and Genn note, tribunal cases vastly outnumber cases in

¹⁰⁰ id, p.57.

¹⁰¹ Lubbers (n.85 above), p.166.

the High Court and Court of Appeal combined.¹⁰² It would also counter their criticism regarding the lack of engagement by ‘mainstream’ public law scholars with administrative justice in general or tribunals in particular.¹⁰³ However, this is not possible within the scope of this study.

Whilst statistics for a limited number of tribunals were included in the Judicial Statistics Reports until 2005, it was noted in the Adams Committee *Report on Civil Judicial Statistics* 1968 that details of activity on the large volume of other tribunals could be found in the annual reports of the Council on Tribunals, and in reports from government departments.¹⁰⁴ The Committee recommended retaining just the three tribunals that had previously been contained in the report (Land, Transport and Patents) until when (or if) a general report on tribunals was inaugurated.¹⁰⁵ Later editions of the Judicial Statistics Reports included data on a wider range of tribunals, those included varied between years. In any given year, the tribunals included were stated to be those for which the Lord Chancellor had administrative responsibility in the relevant year and, additionally, the Employment Appeal Tribunal, for which the Secretary of State for Employment had administrative responsibility. Reference continued to be made to the Council on Tribunals Annual Reports for information relating to a wider range of tribunals.¹⁰⁶

In principle therefore, it would be possible to analyse trends in tribunal trials, either just those included within Judicial Statistics, or also gathering data from the Council on Tribunals Annual Reports relating to tribunals which heard administrative law disputes. One preliminary issue with attempting to analyse the full range of tribunals is that the Council on Tribunals Annual Reports were dated period 1st August – 31st July as opposed to calendar years in the Judicial Statistics reports. However, the data contained is said to be for calendar years, except where otherwise stated, so that would not pose a significant barrier to combining the data in the two reports. The Council on Tribunals Annual Reports only contained data for tribunals which fell under its jurisdiction, leaving the question of whether there were additional administrative law tribunals that fell outside its jurisdiction, and, if so, where data could be obtained for them. The most significant problem in relation to including

¹⁰² Richardson and Genn (n.66 above), pp.118-119.

¹⁰³ *id.*, p.118.

¹⁰⁴ Committee on Civil Justice Statistics, *Report of the Committee on Civil Judicial Statistics* (Cmnd 3684, 1968), p.11.

¹⁰⁵ *id.*

¹⁰⁶ See for example Lord Chancellor’s Department, *Judicial Statistics, England and Wales for the year 1999* (Cm. 4786, 2000), p.80.

tribunals within the scope of this project however relates to the reforms in the Tribunals, Courts and Enforcement Act 2007, which completely revised the existing tribunal structure into the current two tier format. There are considerable difficulties with conclusively reconciling the massive number of tribunals under the previous system with the current model. As a result, any analysis of trends in tribunals would have to split into two parts – up to 2007 and post 2007, ruling out any possibility of analysing long term trends in a manner comparable to civil trials generally.

Given these factors, this project will be restricted to judicial review proceedings, including those in the QBD, the Administrative Court and the Upper Tier of the Immigration and Asylum Tribunal (UTIAC). From 2013, jurisdiction to hear judicial review actions relating to immigration and asylum was transferred from the Administrative Court to the UTIAC. To exclude this body from analysis of trends in administrative law trials would either necessitate stripping out all immigration and asylum judicial review actions prior to 2013 to ensure consistency, or show an artificial drop in the number of judicial review actions post 2013. Therefore, the decision has been taken to include data from this one tribunal.

Conclusion

There is a clear absence of administrative law in the context of the English vanishing trial debate. It is noticeable that only Genn even mentioned public law cases in the UK vanishing trial literature.¹⁰⁷ She explicitly contrasted private and public law cases, considering only the former as civil disputes within the ambit of the vanishing trial.¹⁰⁸ Her focus was clearly on what she identified as the problem of reducing private law adjudication in court. However, to exclude an entire area of trials from the vanishing trial literature presents an artificial picture of trends in the overall number of trials.¹⁰⁹ This is clear from figures Genn presented on the Administrative Court demonstrating the overall increase in its workload in terms of both applications and determinations 2004-2011.¹¹⁰ In her defence, she argued that there was too much emphasis on the constraint on the abuse of state power aspect of the Rule of Law as opposed to the role of the state in preventing the abuse of private power aspect.¹¹¹

¹⁰⁷ H. Genn, 'Why the Privatisation of Civil Justice is a Rule of Law Issue' (36th F A Mann Lecture, Lecture at Lincoln's Inn, 19th November 2012).

¹⁰⁸ *id.*, p.1.

¹⁰⁹ Lande essentially makes this point, arguing that trials occurring outside the courts in various administrative agencies show no evidence of vanishing and using this to challenge what he sees as the 'myth' of the vanishing trial. Lande (n.48 above), pp.196-197.

¹¹⁰ Genn (n.107 above), pp.5-6.

¹¹¹ *id.*, p.20.

This, according to Genn, resulted in ‘private law becoming invisible, while administrative law grows’.¹¹² Using this as her justification, she only examined trends in private law cases in any depth. This lack of engagement with administrative law in existing vanishing trial scholarship leaves a significant gap in the analysis of trends in trials, enabling me to make a significant contribution to the field in this study, even by restricting it to judicial review alone. Further research would be able to build on this project by analysing trends in other public law dispute resolution forums.¹¹³ The following chapter brings judicial review into the vanishing trial debate through a comparative analysis between trends in judicial review and civil law proceedings more generally.

¹¹² *id.*

¹¹³ See further Appendix 1 Location of data.

Chapter 5: Bringing Judicial Review into the Vanishing Trial Debate

Introduction

It has been argued in earlier chapters that hardly any attention has been paid to judicial review in the vanishing trial debate. This chapter addresses this gap. One reason why this is important is that Genn mentioned public law as an outlier in her accounts of the phenomena. She presented graphs of the Administrative Court showing increasing numbers of applications and determinations between 2004 and 2011,¹ and briefly concluded that an entirely different story was occurring in public law to civil law. However, she did not investigate possible reasons for differing trends. Other scholars discussed in Chapter 1 who have examined the vanishing trial debate in the UK context have not considered judicial review within their analysis, despite the fact that data seemingly bucks the trends. This suggests the story deserves to be told.

The lack of attention to public law in the vanishing trial debate constitutes a serious limitation. It is all the more surprising given that there has been a significant amount of empirical research conducted into the use and operation of the judicial review procedure outside of this debate. Several studies have been carried out, primarily by Sunkin, either alone or in collaboration with a variety of other scholars, since 1987.² This chapter aims to unite these two bodies of data. It examines what is known about trends in the use of the judicial review procedure and investigates why trends in the field are running counter to

¹ H. Genn, 'Why the Privatisation of Civil Justice is a Rule of Law Issue' (36th F A Mann Lecture, Lecture at Lincoln's Inn, 19th November 2012), pp.5-6.

² See for example M. Sunkin, 'What is Happening to Applications for Judicial Review?' (1987) 50 *MLR* 432; M. Sunkin, 'The Judicial Review Case-Load 1987-1989' [1991] *PL* 490; A.P. Le Sueur and M. Sunkin, 'Applications for Judicial Review: the Requirement of Leave' [1992] *PL* 102; L. Bridges, G. Mészáros and M. Sunkin, *Judicial Review in Perspective* (2nd edn, Cavendish 1995); M. Sunkin and G. Richardson, 'Judicial Review: Questions of Impact' [1996] *PL* 79; M. Sunkin, 'Withdrawing: A Problem in Judicial Review?' in P. Leyland and T. Woods (eds), *Administrative Law Facing the Future: Old Constraints & New Horizons* (Blackstone 1997); L. Bridges, G. Mészáros and M. Sunkin, 'Regulating the Judicial Review Caseload' [2000] *PL* 651; M. Sunkin and T. Cornford, 'The Bowman Report, Access and the Recent Reforms of the Judicial Review Procedure' [2001] *PL* 11; M. Sunkin and others, 'Mapping the Use of Judicial Review to Challenge Local Authorities in England and Wales' [2007] *PL* 545; V. Bondy and M. Sunkin, 'Accessing Judicial Review' [2008] *PL* 647; V. Bondy and M. Sunkin, 'Settlement in Judicial Review Proceedings' [2009] *PL* 237; V. Bondy and M. Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges before Final Hearing* (The Public Law Project 2009); V. Bondy, L. Platt and M. Sunkin, *The Value and Effect of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (The Public Law Project 2015).

other types of civil litigation. The chapter starts with a consideration of the historical context to judicial review decisions before considering existing research on the topic. Drawing on a database of activity from 1981 to 2017 compiled by the author, it goes on to compare judicial review data with trends elsewhere in the civil justice system and concludes with an in-depth look at the subject matter of judicial review cases and the causes of the increase in applications. The data presented extends the research conducted by Sunkin and others up to the end of 2017.

Method

A specific procedure for managing judicial review cases is a relatively modern addition to the civil justice system. The Law Commission's 1976 report *Remedies in Administrative Law* was the impetus for the introduction of this specialised procedure, which amended the existing process of different proceedings relating to each of the prerogative writs (mandamus, prohibition and certiorari).³ However, the ability to bring an action against a public body has a much longer heritage. As Cane notes, the courts developed the prerogative writs in the seventeenth century.⁴ The judicial review procedure introduced in 1978 subsumed the prerogative writs into a single procedure. However, the Judicial Statistics Reports continued to report cases as prerogative writs until 1980 edition.⁵

On the face of it, it is possible to compare trends over time in judicial review proceedings with those of civil actions more generally before 1981 by equating prerogative writs data with judicial review data. In its recent proposals for reforming judicial review, the government in effect adopted this approach. They argued that there had been a recent 'huge surge' in the number of judicial review applications, with the procedure being increasingly used for public relations purposes, many of the applications were argued to be 'weak or ill-founded ... taking up large amounts of judicial time, costing the court system money and ... hugely frustrating for the bodies involved'.⁶ A comparison of the number of judicial review

³ Law Commission, *Report on Remedies in Administrative Law* (Law Com No.73, 1974).

⁴ P. Cane, 'Judicial Review in the Age of Tribunals' in C. Forsyth and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010), p.122. For a detailed examination of the origins of the prerogative writs see E.G. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (HUP 1963).

⁵ There was a reference in the 1977 report that as of 11th January 1978, the three categories of prerogative writ were subsumed under a general heading of 'judicial review'.

⁶ Ministry of Justice, 'Judicial Review Consultation' (13th December 2012), <<https://www.gov.uk/government/news/judicial-review-consultation>> accessed 9th July 2019.

applications in 1974 (160) with those in 2011 (11,200) was made to support these claims.⁷ However, it is argued here that it is not appropriate to include data from the Judicial Statistics Reports relating to judicial review actions between 1949 and 1980 in a longitudinal analysis of trends in the use of the procedure for a number of reasons. First, prerogative writ tables in the reports recorded the number of each individual writ sought and obtained but multiple writs could be sought in a single case.⁸ This means that there is a danger of double counting. Secondly, data on the prerogative writs in the Judicial Statistics Reports can also be said to undercount the number of judicial review actions prior to 1981. Prior to the House of Lords decision in *O'Reilly v Mackman* in 1983 which established procedural exclusivity,⁹ challenges to the actions of public bodies could be brought in the ordinary civil courts.¹⁰ Following that decision however, all such claims have had to be brought using the judicial review procedure. For consistency purposes, and to enable the pre and post 1981 data to be comparable, it would be necessary to identify how many of what could be termed quasi-judicial review actions took place outside the judicial review procedure and adjust the pre 1981 figures to account for them. Sunkin and Bondy highlight that it is impossible to know how many such actions were brought prior to 1981 and argue that comparisons with the use of judicial review back to 1974 are 'almost totally meaningless' as a result.¹¹ Consequently, in line with

⁷ id. See also Ministry of Justice, *Judicial Review: Proposals for Reform* (Cm. 8515, 2012), p.9. In its response to the proposals, the Public Law Project was highly critical, arguing that there was a lack of evidence to support some of the government's claims, such as those relating to judicial review acting as an economic impediment. Further, they highlighted that that overall, such evidence as was included in the proposals was predominantly anecdotal or impressionistic. The Public Law Project, *Public Law Project response to the Judicial Review consultation* (2013), pp.2-3, 8 <<https://publiclawproject.org.uk/resources/response-to-moj-consultation-judicial-review-proposals-for-reform/>> accessed 7th July 2019. For the government's reply to responses to the consultation regarding the proposals see Ministry of Justice, *Reforms of Judicial Review Proposals for the Provision and Use of Financial Information* (Cm. 9303, 2016).

⁸ C. Harlow and R. Rawlings, *Law and Administration* (1st edn, Weidenfeld and Nicolson 1984), p.261.

⁹ *O'Reilly v Mackman* [1983] 2 AC 237 (HL); See also *Cocks v Thanet District Council* [1982] 2 AC 286 (HL).

¹⁰ Gordon criticised the government's use of 1974 figures as a comparator for the number of applications in 2011, arguing that the government failed to recognise changes in how cases had to be brought since the 1980s, and that any comparison with the prevailing position in 1974 was otiose. R. Gordon, 'Judicial Review – Storm Clouds Ahead?' (2013) 18 *JR* 1, pp.2-3.

¹¹ V. Bondy and M. Sunkin, 'Judicial Review Reform: Who is Afraid of Judicial Review? Debunking the Myths of Growth and Abuse' (*UK Constitutional Law Association*, 10th January 2013), <<https://ukconstitutionallaw.org/2013/01/10/var-da-bondy-and-maurice-sunkin-judicial-review-reform-who-is-afraid-of-judicial-review-debunking-the-myths-of-growth-and-abuse/>> accessed 2nd December 2018. See also The Public Law Project (n.7 above), p.6. Bowman, in his report into the Crown Office List, made the same point. He argued that the information required to determine the number of challenges to governmental actions before the early 1980s was 'not readily available and was going to be difficult to obtain'. Sir J. Bowman, *Review of the Crown Office List: A Report to the Lord Chancellor* (Lord Chancellor's Department, 2000), p.10.

existing empirical studies on judicial review, the comparison between trends in civil law cases with judicial review actions in this chapter will be restricted to the period from 1981.

In order to compare the two systems it is necessary to first identify relevant stages in each which can be classified as equivalent and then, which of those are relevant to the vanishing trial debate. Figures 5.1 and 5.2 below illustrate the different stages in the two procedures. Although the diagrams in the Guide to Court and Administrative Justice Statistics on which these are based are stated to be simplified versions of the two procedures, they remain complex and make identification of equivalent stages difficult.

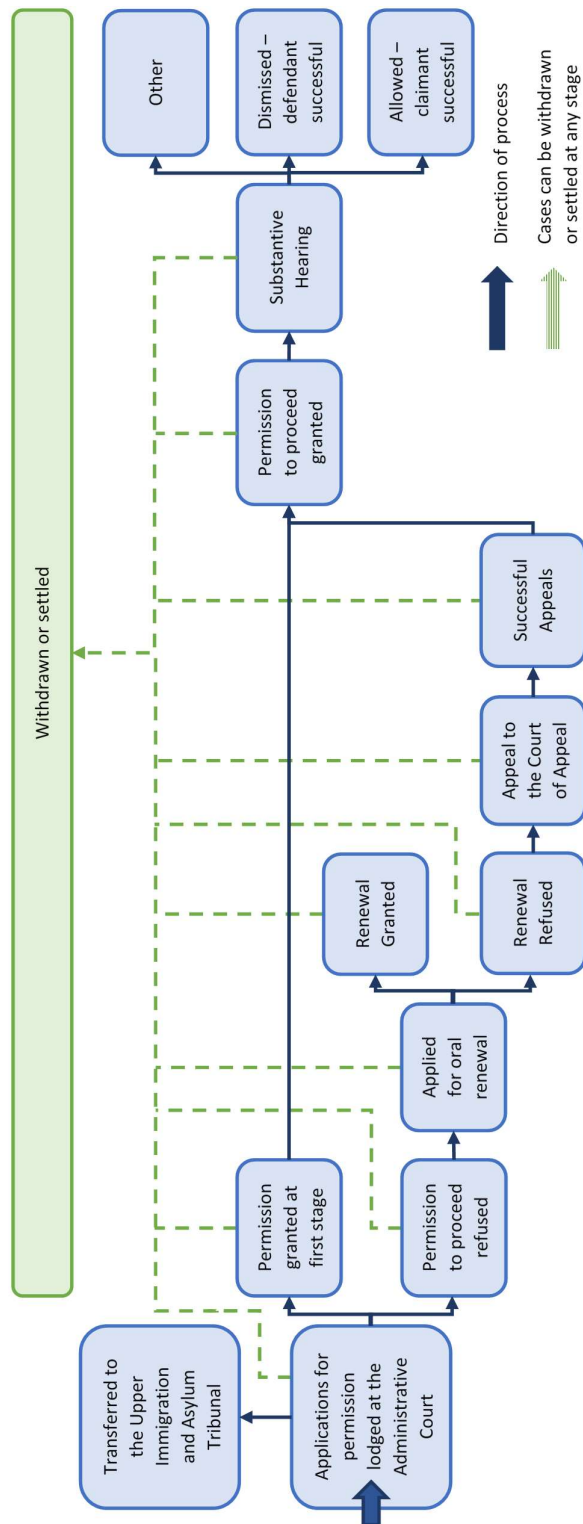


Figure 5.1: Flowchart showing simplified current judicial review process. Source: Adapted from diagram contained in Guide to Court and Administrative Justice Statistics.¹²

¹² Ministry of Justice, *A Guide to Civil and Administrative Justice Statistics* (Ministry of Justice 2016), p.15 <<https://www.gov.uk/government/statistics/guide-to-civil-and-administrative-justice-statistics>> accessed 3rd November 2017.

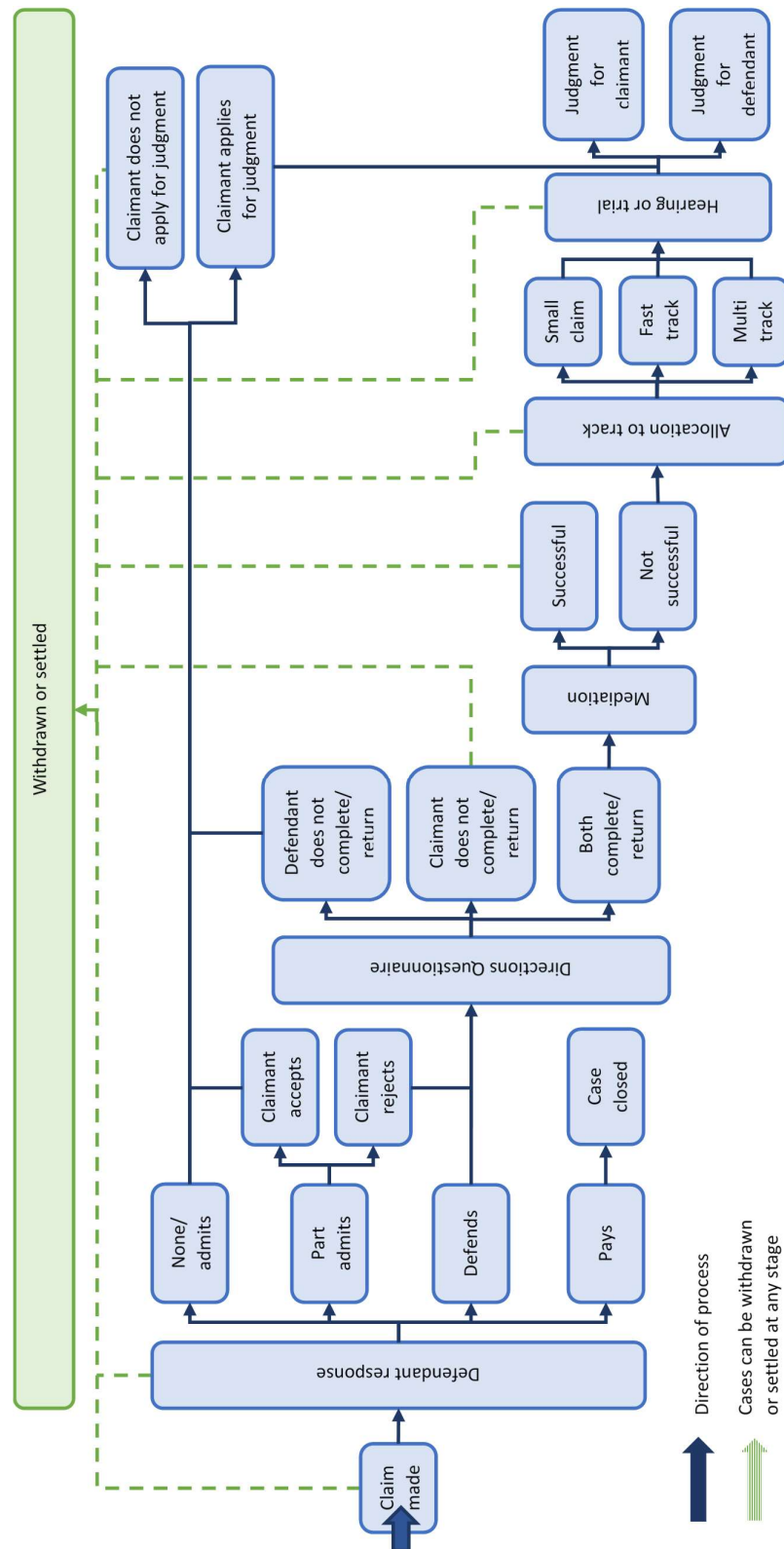


Figure 5.2: Flowchart showing simplified current judicial review process. Source: Adapted from diagram contained in Guide to Court and Administrative Justice Statistics.¹³

¹³ Id, p.6.

As can be seen, there are broad similarities between the two systems, in that cases are issued and may proceed to determination by trial. Further, cases can be withdrawn or settled at any point during either type of proceedings, meaning the numbers of cases decrease at each stage between issuance and trial. However, what is potentially more relevant in the context of the vanishing trial debate and for comparing between trends in civil law and judicial review actions are the differences between the two procedures. The distinctions mean that there are likely to be reasons specific to each that affect when, why and how many cases drop out of the system before trial. Of fundamental importance in this respect is the permission filter in the judicial review procedure.¹⁴

As opposed to ordinary civil actions, where the issuance of a claim is sufficient to initiate legal proceedings that may lead to a trial, all applications for judicial review are subject to judicial consideration to determine whether they can proceed or not. The step has considerable practical significance, empowering the court to summarily dispose of applications for judicial review without any evidence being tested.¹⁵ This means that judges control the number of judicial review cases that may reach trial, in contrast to the parties to the dispute in civil actions.

The requirement for an applicant wishing to seek judicial review to first obtain permission of the High Court to proceed with the action was established in 1933.¹⁶ Le Sueur and Sunkin highlight three aims of the permission filter – to prevent the court from being overwhelmed by applications; to protect respondent bodies from ill-founded challenges; and to provide a cheap, quick and easy way for applicant's to obtain the view of a High Court judge as to whether their application has any merits.¹⁷ It is a highly unusual process, not seen in judicial review procedures of other jurisdictions around the world, or indeed other legal systems within the UK.¹⁸ No equivalent requirement exists to bring ordinary civil actions, even if they involve public bodies. The requirement to obtain permission for judicial review actions is controversial and it has been argued that makes it potentially more difficult to obtain justice against bodies exercising public functions than against other bodies.¹⁹

¹⁴ Until the reforms enacted following the Bowman Report in 2000, the permission filter was called 'leave'. For consistency, it will be referred to as permission throughout this chapter.

¹⁵ Le Sueur and Sunkin (n.2 above), p.102.

¹⁶ For a history of the permission stage before 1992 see *id.*, pp.102, 104-111.

¹⁷ *id.*, pp.104, 107.

¹⁸ For example, neither Canada, New Zealand nor Australia require applicants to seek permission. Although Scotland does have a two stage process for applications, neither involves seeking the court's permission to proceed. *id.*, p.103.

¹⁹ *id.*, p.102.

Originally, applicants had the right to seek permission either at an oral hearing, or on the papers with a right to renew the application orally if it was rejected. Further, the stage was *ex parte* and as such, did not include any legal submissions from the defendant body unless requested by the court. Following the Bowman Report into the Crown Office List,²⁰ various changes were made to the process. Initial applications for permission can now only be made on the papers, although the right to renew orally remains.²¹ The introduction of the requirement for respondent bodies to file an acknowledgment of service form in response to the application has significantly altered the character of the permission filter. Sunkin and Cornford argue that, as a result, the permission stage was ‘re-crafted from an essentially summary *ex parte* filter of arguability to a procedure which is both a filter of access and an *inter partes* procedure of the sort familiar in civil litigation’.²² Research into the effects of these changes and into changing judicial attitudes to the permission filter will be discussed further in later sections.

Figure 5.3 below maps selected stages of civil law and judicial review actions that have been reported in Judicial Statistics onto the relevant flowcharts to create considerably more simplified models under which each process is broken down into only three main stages – ‘proceedings initiated’, ‘eligible for trial’ and ‘disposed after trial’. In order to achieve this, the breakdown utilised does not precisely correspond to terms used in Judicial Statistics or those in Figures 5.1 and 5.2 above. The choice of terminology and stages adopted reflects an attempt to standardise the different elements of each system as far as possible, highlighting overarching similarities between the dynamics of case progression in each.

As can be seen however, even simplified in this way, the models are not identical, with important distinctions in respect of the ‘proceedings initiated’ and ‘eligible for trial’ stages clearly shown. Further, although the term ‘eligible for trial’ is used in both models, it has different meanings for civil law and judicial review cases. With the former, it is used to represent the number of cases which are not determined without judgment, either because the claim was not defended or because the judge determined there was no case for the defendant to answer. In judicial review cases, it represents the number of permission decisions in which the application was granted, either on the papers or when the application was renewed at an oral hearing.

²⁰ Bowman (n.11 above).

²¹ Sunkin and Cornford (n.2 above), p.14.

²² *id.*, p.15.

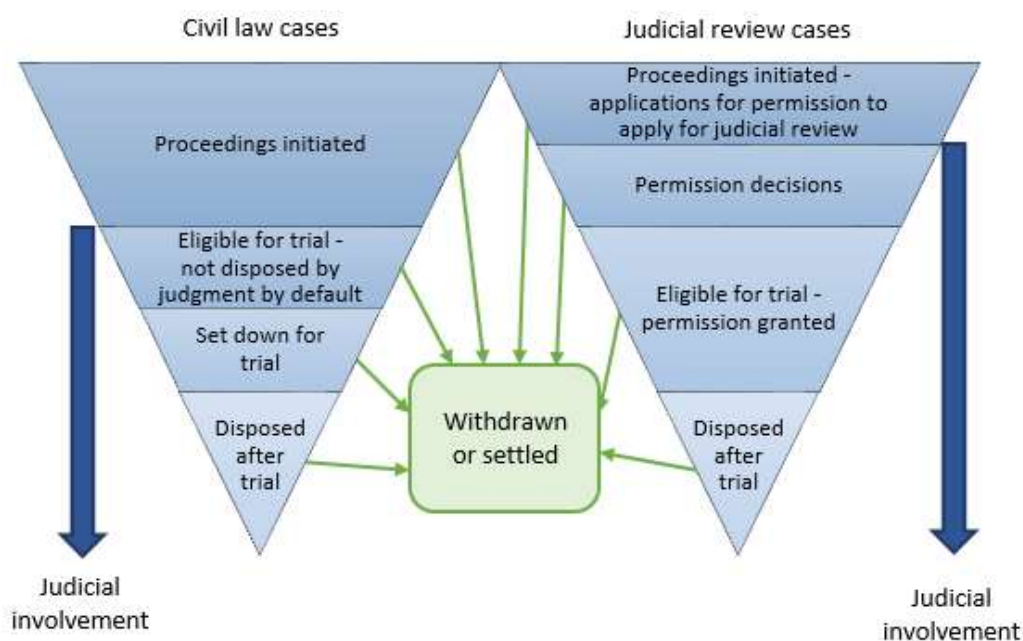


Figure 5.3: Comparison of the stages in civil law and judicial review cases which are included in the Judicial Statistics Reports, representing the decreasing number of cases at each stage in the processes and indicating the stage at which judicial involvement commences.

This more simplified representation of the two systems enables me to easily identify comparable stages for analysis. The vanishing trial debate has focused on three elements of the civil trial process – the number of proceedings initiated, the number of cases disposed by trial and the proportion of claims issued that are disposed after trial. As can be seen in

Figure 5.3 above, data for the first two of these elements is also available for judicial review actions. The proportion of judicial review cases disposed after trial can, as with civil law actions, be calculated from data on the number of claims issued and the number of cases disposed after trial. Consequently, it is possible to compare patterns in all three elements of the vanishing trial between civil law and judicial review actions. Given the added complexity of the permission stage in judicial review actions and its potential to regulate the number of cases progressing to trial, further in-depth examination of this stage is also required to help understand trends in numbers and proportions of cases reaching trial in judicial review cases.

What do we know already about judicial review trends?

In 1984, Harlow and Rawlings highlighted what they saw as the limitations of then existing studies concerning judicial review, specifically, the lack of research into the questions of *who* litigates, how *often* and in respect of *which* government activities.²³ Sunstein published his

²³ Harlow and Rawlings (n.8 above), p.257.

first empirical study on judicial review in 1987, explicitly seeking to fill in some of the gaps Harlow and Rawlings had identified. Since then, a considerable amount of further research has been conducted by Sunkin and an increasingly large number of other researchers, analysing these and other aspects of the judicial review process. Figure 5.4 below summaries the major studies to date in this field, showing both what was investigated and the date range analysed.

Whilst none of the studies have engaged with the vanishing trial debate, there is a considerable degree of overlap between researches in the two fields. Researchers conducting empirical studies into judicial review have similarly utilised data contained within Judicial Statistics to examine trends over time in the number of applications for judicial review, the number of final determinations and the proportion of applications that reach final determination. As highlighted by Genn's use of trends in the number of applications for judicial review and the number of final judicial review determinations in the Administrative Court between 2004 and 2011 to demonstrate a contrasting trend in judicial review to civil litigation,²⁴ these areas of analysis can be mapped onto two of the central features of the vanishing trial debate (the number of litigants coming into the system and the number of cases reaching trial). Although Genn did not provide any analysis on the proportion of judicial review applications reaching final determination as part of her work, analysis on trends into this aspect of judicial review can be seen to have parallels with the third major element of the vanishing trial debate – the proportion of cases which result in trial. The analysis of these trends in the judicial review research covers a considerably longer time period than that included by Genn, from 1981 to 2007. Given the longitudinal nature of the trends analysed in the vanishing trial debate, covering a period of over forty years, this extended judicial review analysis enables a more accurate comparison of trends in the two systems over time.

Sunkin and others' research on general trends in judicial review drew from data contained within the Judicial Statistics Reports, examining the numbers of applications, numbers and outcomes of leave decisions and numbers and outcomes of substantive hearings. In addition to this, several researchers gained access to paper files held by the Crown Office and Administrative Court and provided a more comprehensive account of the judicial review procedure than was possible from data contained in the Judicial Statistics Reports alone. An approach was adopted whereby all applications submitted within specific date ranges were tracked through the judicial review procedure. The high volume of records that required

²⁴ Genn (n.1 above), pp.5-6.

examining and coding meant that the data collected often only covered short periods. Studies which have utilised data obtained by this method can be seen in Figure 5.4 below. As can be seen, many aspects of the judicial review process have been the subject of detailed investigation.

Year of study	Variables								Date range		Sample		
	Claimants/applicants	Defendants/respondents	Location	Outcome/effect	Permission/leave filter	Representation/funding	Subject categories	Timings	General trends	Detailed analysis	Applications	Interviews/questionnaires	Judgments
									Source: Judicial Statistics Reports	Source: Crown Office/ Administrative Court case files			
1987 ²⁵	✓	✓			✓	✓	✓		1981-1985	Q1, Q3 1983; Q1-Q2 1984; Q1-Q2 1985	1,138	-	-
1991 ²⁶	✓	✓			✓		✓			1987-1989	3,353	-	-
1992 ²⁷					✓			✓		November-December 1988; June-July 1989	306	61	*
1995 ²⁸	✓	✓			✓	✓	✓		1981-1994	1987-1989; Q1 1991	4,740	-	-
2000 ²⁹				✓	✓	✓	✓			November 1994-March 1995; 1994-1999	198	281	
2007 ³⁰		✓	✓				✓			2000-2005	5,112		
2008 ³¹					✓		✓		1996-2006		1,449	123	
2009 (1) ³²	✓	✓		✓	✓	✓	✓			April 2005 – December 2005	1,449	123	
2009 (2) ³³			✓		✓	✓	✓		1993-2007	September 2005 – November 2005	884		
2009 (3) ³⁴				✓									
2010 ³⁵		✓		✓	✓					2000-2005	5,112	42	2
2013 ³⁶			✓		✓	✓	✓			May 2007 – December 2011		200	
2015 ³⁷				✓						2000-2005			All

Figure 5.4: Summary of major judicial review studies, showing variables analysed, the date range covered and the number of applications tracked.

²⁵ Sunkin, 'What is Happening?' (n.2 above).

²⁶ Sunkin, 'Case-Load' (n.2 above).

²⁷ Le Sueur and Sunkin (n.2 above).

²⁸ Bridges, Mészáros and Sunkin, *Perspective* (n.2 above).

²⁹ Bridges, Mészáros and Sunkin, 'Regulating' (n.2 above). Statistics for detailed analysis from *Crown Office Review*.

³⁰ Sunkin and others (n.2 above).

³¹ Bondy and Sunkin, 'Accessing' (n.2 above).

³² Bondy and Sunkin, *Dynamics* (n.2 above).

³³ V. Bondy and M. Sunkin, 'The Use of Statistics in Proposing Reforms to the Public Funding of Judicial Review Litigation: A Critical View' (2009) 14 *JR* 372.

³⁴ V. Bondy and L. Mulcahy, *Mediation and Judicial Review: An Empirical Research Study* (The Public Law Project 2009).

³⁵ L. Platt, M. Sunkin and K. Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales' (2010) 20 *JPART* 243.

³⁶ S. Nason and M. Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) 76 *MLR* 223.

³⁷ Bondy, Platt and Sunkin (n.2 above).

Not only has this more in-depth research helped to provide a greater understanding of *what* is happening in judicial review, but it has also given some insights into *why* the observed trends have occurred.³⁸ There are four aspect of the research that are of particular relevance in the context of the vanishing trial debate. Other studies have focussed on the consequences of judicial review claims and not on trends in the number of cases progressing through the system, but on court judgments and as such, are not relevant to this project.³⁹

1) Subject categories

Sunkin and colleagues have argued that there was no way to identify from the Judicial Statistics Reports statistics whether the generally perceived increase in judicial review from the early 1980s was applicable across all subject areas or being skewed by a disproportionately high volume of cases in one category.⁴⁰ This has significant implications in terms of any conclusions that could be drawn about the use of judicial review and, especially for this study, any comparisons that might be made with trends in the civil justice system. The case files were able to provide details of the subject matter of cases and the data and conclusions from this analysis are of assistance in helping me provide a more nuanced account of variations in the trends between cases in the civil justice system and judicial review actions.

In all of the studies which examined subject matter, a broad range of subject categories were found.⁴¹ Within each sample of cases analysed, the cases were centred on a small number

³⁸ As Sunkin and Bondy argue, the purpose of the data in the annual Judicial Statistics Reports is to provide an indication of the overall scale of the Administrative Court's workload and, as such, it is unsurprising that it gives only very limited insights into the way judicial review is used and its broader effects. M. Sunkin and V. Bondy, 'The Use and Effects of Judicial Review: Assumptions and the Empirical Evidence' in J. Bell and others (eds), *Public Law Adjudication in Common Law Systems Process and Substance* (Hart 2016), p.329.

³⁹ See of example Bondy, Platt and Sunkin (n.2 above).

⁴⁰ This particular criticism of the restricted nature of Judicial Statistics data is no longer justified. Since 1982, Judicial Statistics contained a breakdown of judicial review actions by broad categories (civil, criminal and immigration). The current format of the Judicial Statistics Reports provides, for all judicial review actions since 2000, a further level of subject classification, presenting data on cases by sub-categories. The current subject classification system used will be discussed further later in the chapter.

⁴¹ In the 1987 study, eighteen different subject areas were identified (benefits, education, employment, family, health, housing, homeless persons, immigration, licensing, planning, prisoners, environment, public health, rates and budgets, tax, legal proceedings, coroners, media, solicitors and transport). Sunkin, 'What is Happening?' (n.2 above), p.441. This had dropped to fifteen categories in the 1991 study (benefits, commercial, discipline, education, family, employment, health, housing, immigration licensing, local government or rates, planning, environment, public health, prisoners and tax). He was unable to identify a category for 163 applications. Sunkin, 'Case-Load' (n.2 above), p.492. Twenty three categories were found to account for over 90 percent of all applications in the case files they analysed. Bridges, Mészáros and Sunkin, *Perspective* (n.2 above), p.14.

of core subject areas, with very few applications being brought in respect of each of the other categories identified.⁴² Over time, however the proportion of applications brought in 'non-core' subject areas increased.⁴³ The exact categories included and the proportions of each were not consistent over time. Contrary to the generally received impression of growth in all areas of judicial review, only a few categories showed consistent growth, either in the years analysed in individual studies, or between studies.⁴⁴

There is one major exception to the inconsistent nature of the subject matter of judicial review cases – in every study immigration and asylum cases were found to dominate the case load.⁴⁵ Researchers identified a consistent pattern of growth in the number of applications for judicial review until the mid-1990s, at which point although the number continued to increase, the rate of growth was seen to slow for the first time.⁴⁶ Significantly however, when immigration applications were excluded, judicial review caseload trends altered dramatically. For example, although there was still overall growth in the number of applications between 1981 and 1986, the increase was far less substantial and there was even a dip in 1985.⁴⁷ The findings from these studies demonstrate the importance of looking

⁴² Four categories constituted 66 percent of all applications in the 1987 study. 487 applications related to immigration (37 percent), 140 to prisoners (11 percent), 124 to health (9 percent) and 118 to housing (9 percent). Of the housing applications, 87 concerned homeless persons. Sunkin, 'What is Happening?' (n.2 above), p.441. In the 1991 study, over 60 percent of applications were from only two subject areas – immigration and housing. Sunkin identified 1,475 immigration applications (44 percent) and 505 housing applications (15 percent), of which 349 related to homeless persons. Sunkin, 'Case-Load' (n.2 above), p.492. By the 1995 study, the position had changed slightly, with the three main categories of crime, housing and immigration only accounting for between 57 percent and 68 percent of all applications in the years analysed. Bridges, Mészáros and Sunkin, *Perspective* (n.2 above), p.14.

⁴³ Between 1987 and 1989 the share increased from 32 percent to 44 percent. Bridges, Mészáros and Sunkin, *Perspective* (n.2 above), p.17. Subsequently, it was found that the proportion of applications from non-core areas continued to increase between the mid-1980s and mid-1990s, at which point they stabilised. Bridges, Mészáros and Sunkin, 'Regulating' (n.2 above), p.654.

⁴⁴ For example, between 1983 and 1985, Sunkin found that, contrary to the generally received impression of growth in all areas of judicial review, only three areas showed consistent growth in the number of applications, with the number of applications in six other areas decreasing. The categories with consistent growth were immigration, prisoner and rate or budget. Applications in the fields of education, employment, family, health, housing and licensing all decreased year on year 1983-1985. Additionally, the number of applications relating to benefits decreased 1984-1985. Sunkin, 'What is Happening?' (n.2 above), p.441.

⁴⁵ See n.42 for the proportions of immigration applications found in various studies.

⁴⁶ Although data was examined from 1981 only, Sunkin highlighted that this pattern of growth was a continuation of that seen in the 1970s. Sunkin, 'What is Happening?' (n.2 above), pp.435-436. Between 1991 and 1994-1995, the number of applications rose by 78 percent. Between 1994 and 1999, the increase was only 40 percent. Bridges, Mészáros and Sunkin, 'Regulating' (n.2 above), p.654.

⁴⁷ Sunkin, 'What is Happening?' (n.2 above), pp.443-444.

beyond total numbers when analysing trends, which can be skewed by the dominance of individual categories and mask contrary trends in other areas.⁴⁸

Researchers have identified that the number of applications of judicial review is susceptible to external influences and their findings provide valuable insights into trends in the number of applications for judicial review. For example, the creation of rights of appeal has been found in some instances to decrease the number of applications for judicial review in a particular subject area because it creates an alternative way to challenge decisions. Appeal rights have however also been found to result in an increase in applications due to its perceived inadequacy and applicants seeking to challenge its operation.⁴⁹ In the field of immigration, not only have changes in immigration policy been seen to influence the number of applications for judicial review, but also surges in litigation can occur following the outbreak of wars or other crises which result in large number of people seeking asylum.⁵⁰ Whereas the vanishing trial literature has focussed primarily on procedural changes to the civil justice system itself to explain changes in the numbers of cases, research in the field of judicial review can therefore be seen to have considered a broader range of explanations.

Research into the defendants in judicial review actions can also help enhance our understanding of trends. To some extent it merely confirms findings from subject matter analysis, as the Home Office was consistently found to be the most frequent defending authority.⁵¹ Additionally, research into the effect of the changing roles of local and central government on the nature of defendants in judicial review actions also can potentially provide assistance in understanding changes in the number of applications brought.⁵² A considerable body of literature has been written around the growth of contracting out of

⁴⁸ *id.*, pp.438, 442.

⁴⁹ The number of homelessness applications was found to decrease from 1994. The creation of appeal rights under the Housing Act 1996 was highlighted as a factor contributing to this decline, though potentially also a source of new challenges. Bridges, Mészáros and Sunkin, 'Regulating' (n.2 above), pp.654-656.

⁵⁰ For example, Sunkin highlighted a peak in immigration application figures in 1987 that coincided with Tamils seeking political asylum. Sunkin, 'Case-Load' (n.2 above), p.493.

⁵¹ In the 1987 study for example, Sunkin highlighted that the vast majority were against the Secretary of State for Home Affairs and concerned immigration. In 1983 such applications accounted for 80 percent of those against central government, this had risen to 94 percent in 1985. He also noted that almost half of the applications against courts and tribunals concerned immigration. Sunkin, 'What is Happening?' (n.2 above), pp.438, 440.

⁵² Bridges, Mészáros and Sunkin, 'Regulating' (n.2 above), p.655. Excluding immigration cases, local government remained the most cited defendant in 1994. Although they were unable to ascertain whether that trend continued, the authors speculated that there would have been a shift to central government by 1999 as the role of local government became more limited.

public services to private bodies and the lack of amenability to judicial review of such private bodies.

2) Access to judicial review

A second aspect of the existing research which is relevant to the ‘vanishing litigant’ phenomenon relates to analysis of applicants’ ability to access judicial review. There are two areas of research that are relevant in this respect. First, studies examining the implications of changes to the provision of legal aid funding and the distribution of legal representation for judicial review actions.⁵³ Second, research into the decentralisation of the Administrative Court.⁵⁴ These two areas of research both help provide greater clarity for the reasons behind changes in the number of applications for judicial review.

What is of especial interest in the context of the vanishing trial debate is analysis of changes to legal aid provision in judicial review that came into effect under the Access to Justice Act 1999. The changes include the requirement for solicitors’ firms to be awarded a public law contract to be able to handle legally-aided judicial review cases.⁵⁵ The second change introduced was to make legal aid subject to a funding code, under which judicial review actions which either involve a significant public interest, are of overwhelming importance to the applicant, or raise significant human rights issues are prioritised for funding.⁵⁶ As argued by Bridges, Mészáros and Sunkin, this raised the question of whether judicial review actions falling outside those categories would no longer be funded to the same extent as under the previous regime.⁵⁷ Restrictions to the availability of legal aid are by no means limited to judicial review actions, on the contrary, cuts have occurred across the civil justice system. The impact of legal aid cuts is therefore particularly relevant in the context of the vanishing trial to the issue of ‘vanishing litigants’ in both the civil justice system and judicial review cases. The question that needs to be addressed is whether it is possible, from the data available, to attribute any changes in the number of cases coming into each system to legal aid reform in such a way as to determine whether the reforms have had a similar impact in both systems.

⁵³ See *id.*, pp.658-664.

⁵⁴ See S. Nason, ‘Regionalisation of the Administrative Court and the Tribunalisation of Judicial Review’ [2009] *PL* 440; S. Nason, D. Hardy and M. Sunkin, ‘Regionalisation of the Administrative Court and Access to Justice’ (2010) 15 *JR* 220; S. Nason, ‘Justice Outside London? Five Years of “Regional” Administrative Courts’ (2014) 19 *JR* 188.

⁵⁵ Bridges, Mészáros and Sunkin, ‘Regulating’ (n.2 above), p.658.

⁵⁶ *id.*, p.659.

⁵⁷ *id.*, p.664.

It is striking among the findings relating to the availability of legal representation, that between 2000 and 2005, 60 percent of challenges to local authorities were in respect of London Boroughs, whilst the vast majority of local authorities around the country were not challenged at all within that period.⁵⁸ The same study highlighted that access to legal services varied geographically, which had a considerable impact on the ability of litigants to bring challenges.⁵⁹ An association was found between the incidence of challenge and availability of legal services in London Boroughs, although it was accepted that the relationship between the scale of judicial review litigation and provision of legal services was unlikely to be straightforward.⁶⁰ Whilst this research may demonstrate influences on the number of applications for judicial review, it is not however necessarily of assistance in understanding trends in applications without further investigation into the location and speciality of legal services over time.

The finding of a high concentration of claims in London in the early 2000s is however potentially of relevance to the vanishing trial debate. In the civil justice system, the county courts are spread around the country, enabling applicant's to bring cases with relative ease, in terms of location at least. However, until 2009, the Administrative Court was solely based in the Royal Courts of Justice in London, which could have plausibly affected the ability of applicants living elsewhere in the country to bring applications for judicial review. In 2009, regional administrative courts were established, a development which is of relevance in terms of helping to explain any significant increases in the numbers of applications after 2009.

This issue has been the subject of recent analysis. Nason and Sunkin conducted an analysis of applications for judicial review in the two years prior to and following the establishment of regional administrative courts outside of London in 2009,⁶¹ to investigate whether regionalisation had achieved one of its goals of opening up access to judicial review.⁶² They

⁵⁸ Sunkin and others (n.2 above), p.549.

⁵⁹ *id.*, p.666.

⁶⁰ *id.*, pp.561-562.

⁶¹ Regional courts were established in Birmingham, Cardiff, Leeds and Manchester in 2009. A fifth regional court opened in Bristol in 2012.

⁶² Nason and Sunkin (n.36 above), p.224. This was done through examination of applications filed between the 1st May 2007 and 30th April 2011. In addition to analysing applications, they also surveyed solicitors and barristers, obtaining responses from forty five regional solicitors, twenty five London based solicitors, thirty two regional barristers and forty eight London barristers. Further, interviews were conducted with twenty five solicitors and twenty five barristers for various firms and chambers. For further research into regionalisation, see for example Nason, 'Tribunalisation' (n.54 above). on the predicted impact of regionalisation; Nason, Hardy and Sunkin (n.54 above); Nason, 'Regional' (n.54 above).

found, following regionalisation, that about one third of cases were handled outside London. In respect of the volume of applications, because they found no significant change in the volume of non-immigration civil claims and concluded that regionalisation had led to relocation of claims as opposed to the creation of new claims.⁶³ However, when they went on to look into the subject matter of claims by region, they found variations that suggested that it had enabled some claims to be brought that otherwise could not have been.⁶⁴ They also found evidence to support the argument that regional solicitors tended to specialise, meaning that although whilst in theory regionalisation opened up access to judicial review, a continuing absence of local legal expertise meant it remained restricted in practice in many subject areas.⁶⁵ As with the vanishing trial debate, this analysis demonstrates the importance of analysing trends in the context of procedural changes affecting the system in question.

3) The permission stage

The third element of judicial review research which is relevant to the vanishing trial debate concerns the permission stage. This aspect of the judicial review procedure has been analysed in depth in various studies, especially its impact on the flow of cases. As detailed earlier in this chapter, this stage is unique to judicial review actions, with no comparable step in cases in the civil justice system. It plays an important role as a filtering mechanism as judges determine which applications for judicial review are entitled to proceed to trial (though may not in practice if they are settled or withdrawn). Whilst it has implications for our understanding of the number of final judicial determinations, it is especially relevant when examining the third element of the vanishing trial debate – the proportion of cases coming into the system which result in trial.

Various studies have examined the changes in the overall grant rate at the permission stage, observing a significant drop over time.⁶⁶ Despite this, research to date has not found any correlation between the growth in the number of applications for judicial review and the decrease in the percentage of permissions granted. In fact, in some years a contrary trend

⁶³ Nason and Sunkin (n.36 above), pp.234-235. Immigration claims on the other hand increased dramatically in every year of the study.

⁶⁴ Specifically, the high number of homelessness cases in Cardiff. *id.* p.241.

⁶⁵ *id.*

⁶⁶ For example, a drop in the proportion of applications granted from 61 percent in 1981 to 37 percent in 1994 was observed, which was argued to be an important factor in the widening of the gap between the number of applications and substantive determinations. Bridges, Mészáros and Sunkin, *Perspective* (n.2 above), pp.8-9.

was found, where a year on year increase in the number of applications was accompanied by an increase in the percentage of applications granted.⁶⁷ As argued by Bondy and Sunkin, the long term decrease in the grant rate is somewhat perplexing for a number of reasons:

- i) The growing constitutional importance of public law over this period
- ii) The trend to greater liberality of access in relation to other aspects of judicial review, including standing and third-party interventions
- iii) That we might expect lawyers to have become more experienced in using the process
- iv) A very high proportion of claims are prepared and submitted by expert counsel
- v) That most claims will have been supported by public funds on the basis that they have merit.⁶⁸

The operation of the stage has been examined in more depth to attempt to understand and explain this downwards trend. Attention has been paid to a number of factors. First, the difference between the success rate of oral and paper applications, especially given the procedural reforms introduced following the Bowman Report that required all applications to be made on paper unless the court directed otherwise.⁶⁹ Applicants retained the right to renew paper applications orally in open court if they were initially refused, however this option may not always be utilised.⁷⁰ Of interest here is the finding that oral applications have consistently been more successful.⁷¹ This discrepancy has significant implications for our understanding of trends in the number of permissions given, and hence the proportion of applications reaching final determination.

A further explanation that Bondy and Sunkin put forward to help explain the decline in grant rate was the change in judicial attitudes towards the permission stage throughout the 1980s, as illustrated by statements given by Lords Diplock and Donaldson.⁷² They highlighted that Lord Diplock initially advocated a relaxed approach towards the permission stage, arguing its

⁶⁷ See for example 2002-2003. In 2002, 5,377 claims were filed and the grant rate was 21 percent. In 2003, 5,949 applications were filed, an increase of 572. At the same time, the grant rate rose to 28 percent. Bondy and Sunkin, *Dynamics* (n.2 above), pp.49-59. They drew on the same data to question the use of statistics in policy making, questioning the government's assertion that the long term decrease in permission grants should be equated with a drop in the quality of claims. Bondy and Sunkin, 'Statistics' (n.2 above), p.374.

⁶⁸ Bondy and Sunkin, *Dynamics* (n.2 above), p.52.

⁶⁹ *id.*, p.49.

⁷⁰ *id.*

⁷¹ Le Sueur and Sunkin (n.2 above), p.112, where the authors examined the outcomes of both oral and paper applications. Overall, they found 37 percent of applications were refused and that oral applications fared better than paper ones at the initial decision. Failed paper applications which were renewed were found to be granted permission in a significant proportion of cases, which they argued showed a high error rate on initial paper applications.

⁷² Bondy and Sunkin, *Dynamics* (n.2 above), pp.52-55.

primary purpose was to prevent the court's time being wasted by 'misguided or trivial complaints'.⁷³ According to Lord Diplock

If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.⁷⁴

They contrasted this attitude towards the permission requirement with that promoted by Lord Donaldson just over a decade later where he argued that permission should 'only be granted if prima facie there is already an arguable case for granting the relief claimed'.⁷⁵ Lord Donaldson explicitly distinguished his approach from Lord Diplock's position, saying that things had moved on since then and that a 'prima facie arguable' cases was not established merely by the disclosure of "what *might on further consideration* turn out to be an arguable case".⁷⁶ In another case Bondy and Sunkin highlight, Lord Donaldson gave a somewhat controversial justification for the move to a more restrictive approach, based primarily around judicial workload concerns. There he argued that, given the public interest required judicial review to be exercised speedily, limited judicial resources necessarily meant that the number of cases had to be rationed.⁷⁷ Whether or not Lord Donaldson's latter justification reflects the true reason for the change in judicial attitudes, findings from the studies show that the more restrictive approach that he advocated has continued to dominate and have, if anything, become progressively more restrictive since then.⁷⁸

Judicial attitudes towards judicial review can be seen to influence trends in the numbers and proportions of cases in other ways. Sunkin for example has argued that judges' criticisms of what they perceived to be over use of judicial review in certain areas, even if not supported empirically, can have a significant, albeit only short-lived impact on the caseload in terms of both applications and grant rates.⁷⁹ Analysis of judicial approaches provides insights into the

⁷³ *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617, 643.

⁷⁴ *id.*, 644.

⁷⁵ *R v The Legal Aid Board, ex parte Hughes* (1992) 24 HLR 698, 702.

⁷⁶ *id.*

⁷⁷ *R v Panel on Takeovers and Mergers, ex parte Guinness Plc.* [1990] 1 QB 146, 177-178.

⁷⁸ See Bondy and Sunkin, *Dynamics* (n.2 above), p.50, who highlighted a decrease in the grant rate between 1996 and 2006 from 58 percent to 22 percent.

⁷⁹ Sunkin argued the Court of Appeal's decision in *R v Secretary of State, ex parte Swati* [1986] 1 All ER 717 (CA), where it was held that leave should only be granted in 'genuine visitor' judicial review applications in 'exceptional circumstances' was the reason for the steep decline in such applications from 1986. Sunkin, 'Case-Load' (n.2 above), p.493. Similarly, he highlighted the impact of Lord Brightman's dictum in *Pulhofer v London Borough of Hillingdon* [1986] 1 All ER 467 (CA), criticising the 'prolific' use of judicial review to challenge local housing authorities and calling for leave to only be

reasons behind changes in the permission rate that go beyond the primarily procedural reforms presented as part of the vanishing trial debate to explain trends in the civil justice system.

4) When and why cases drop out of the process

The final area of existing research that I will draw on is the issue of withdrawal and settlement in judicial review proceedings. These have been the subject of several studies to date. Particular focus has been paid to the questions of at what stage in the process cases leave the system. In the major study which focused on this issue, the proportion of cases withdrawn pre and post a grant of permission in 1991 was compared with those in 1994-1995. The rates of both were found to have increased. Pre permission withdrawals increased from 13 percent in 1991 to 20 percent in 1994-1995, whereas withdrawals following a grant of permission were up from 24 percent to 30 percent.⁸⁰ Drawing from data in the Bowman Report, researchers also found that, in 1999, of civil judicial review cases granted permission, 60 percent were either withdrawn or settled by consent before a substantive hearing, although argued that this figure could in reality underestimate the true level of settlement because of the lack of data in the report concerning cases that settled prior to permission being granted.⁸¹ This aspect of the research is important because it provides assistance in understanding three different trends – the number of permission decisions, the number of final determinations and the proportion of applications reaching final determination.

Limitations of existing research

The data gathered in these studies is invaluable, but does have its limitations in the context of debate about the vanishing trial. Whilst the approach used provides an effective means of relating different stages of the process to each other and allows delay to be calculated, it can also be described as a 'snapshot', the criticism various of the researchers applied to the Judicial Statistics Reports data. The various studies provide analysis of applications filed at specific times, but not comprehensive longer-term analysis of trends given the limited

granted exceptionally. Between 1985 and 1986, the applications more than halved from 66 to 32 and the leave refusal rate more than doubled from 6 to 13. Sunkin, 'Case-Load' (n.2 above), pp.495-496.

⁸⁰ Bridges, Mészáros and Sunkin, 'Regulating' (n.2 above), p.667.

⁸¹ This figure was skewed somewhat by immigration claims, where the rate was 85 percent in asylum cases and 60 percent in non-asylum cases. The rate in other civil cases was 52 percent. Whilst this figure was up to 54 percent in 1991, it had dropped back slightly from 63 percent in 1994-1995. id, pp.652, 667.

nature of the periods covered in each study. This is ameliorated to some extent by the existence of a range of studies covering different periods, but not entirely.

A more significant limitation from the perspective of the vanishing trial debate is that the focus of the studies discussed above was very narrow, solely restricted to analysis of judicial review with almost no consideration of wider trends. Just as the vanishing trial literature did not significantly engage with judicial review, so the judicial review literature has not engaged with trends in civil litigation in any meaningful manner. In this way, studies into the vanishing trial and judicial review are very similar – in almost none of the literature relating to trends in either civil justice or judicial review are trends in the other system mentioned. One partial exception is Fisher, who, in his review of The Public Law Project’s 2009 judicial review studies, situated their findings in the context of Genn’s criticisms of the increasingly dominant role of private dispute resolution in the civil justice system.⁸² He made no direct reference to the vanishing trial debate, or to observed trends in civil litigation. However, he did posit that Genn’s argument that the Woolf reforms were diverting civil cases out of the courts into private dispute resolution was undeniable and went on to suggest that judicial review was not immune from the drive to resolve disputes outside the courtroom.⁸³ He highlighted similarities between the Woolf reforms of the civil justice system and reforms to the judicial review procedure following the Bowman report, both of which were aimed at encouraging early settlement, seen especially through the introduction of pre-action protocols.⁸⁴

Limitations of official data

Judicial review data in the Judicial Statistics Reports has been the subject of two main criticisms.⁸⁵ The first related to its limited content – the reports contained no information about for example the subject matters of judicial reviews or the types of applicants and defendants. The second criticism concerned the ‘snapshot’ nature of Judicial Statistics data. Numbers of cases at stages in the process at a specific time were reported, but there was no

⁸² T. Fisher, ‘Resolution of Judicial Review Claims Without a Hearing: A Review of Two Papers from the Public Law Project’ (2009) 14 *JR* 380. He was referencing Genn’s argument in H. Genn, *Judging Civil Justice* (CUP 2009), pp.52-60., while reviewing Bondy and Sunkin, *Dynamics* (n.2 above); and Bondy and Mulcahy (n.34 above).

⁸³ Fisher (n.82 above), p.380.

⁸⁴ *id.*, pp.380-381.

⁸⁵ For example, Sunkin, ‘What is Happening?’ (n.2 above), p.432. argued that whilst the Judicial Statistics Reports data could indicate overall caseload, it was insufficiently detailed to give more than a general, often misleading impression of what was happening. Bridges, Mészáros and Sunkin highlighted that Judicial Statistics gave a snapshot of all decisions taken in a given calendar year, regardless of whether the relevant application had been lodged that year or previously. Bridges, Mészáros and Sunkin, *Perspective* (n.2 above), p.4.

way to track case progression, either to determine which of the cases started reached which stage or to examine the relative length of time each stage took.⁸⁶ Despite these criticisms, Judicial Statistics data still provides a credible picture of overall trends over time across a variety of different courts and proceedings. Further, it is the only publicly available government produced source of longitudinal data on the numbers of cases in a variety of courts and types of actions. Whilst analysis of case papers, the approach adopted in the research discussed above, would provide considerably more detail on cases than the Judicial Statistics Reports, this approach is beyond the scope of this study. Given the volume of cases in the civil courts, the time and resources required to examine the papers across the full date range of this project is not feasible.

Data on judicial review cases in the Judicial Statistics Reports has become progressively more detailed over time, overcoming to some extent the above criticisms. Since 1982, Judicial Statistics have contained data on subject matter. Following the change to quarterly editions of the Judicial Statistics Reports in 2011, the available data has been revised and, in many cases, extended. In addition to written summaries of court statistics, the MoJ website on civil justice statistics now contains various spreadsheets with more in-depth information, especially the County Court and judicial review cases.⁸⁷ In respect of judicial review cases, data is available in this format for all cases dating back to 2000.⁸⁸ Significantly, the data is now provided on a case by case basis, as opposed to aggregate data, allowing considerably more in-depth analysis than previously. The variables included are: year of application, location of application, subject matter, whether case reached the permission stage, whether permission was granted (on papers or renewed orally), whether a case reached a final hearing.⁸⁹

Researchers in existing studies also looked at other characteristics of cases from the case files, including the nature of the applicant and whether they had legal funding. It remains impossible to examine all these characteristics from the Judicial Statistics Reports. However, since 2007, a data file has been provided by the MoJ, giving a yearly breakdown of

⁸⁶ See further Appendix 1 Judicial Review: statistics and consistency.

⁸⁷ The most recent editions can be found at <https://www.gov.uk/government/statistics/civil-justice-statistics-october-to-december-2018>.

⁸⁸ See further Appendix 1 Judicial Review: data 2000-2010.

⁸⁹ Data is also provided on timings of different stages, but this data is not relevant to this project and has not been examined.

applications, permissions granted and final hearings in favour of claimants by defendant body.⁹⁰

Comparison with civil law trends

The sections that follow will compare trends between the civil litigation systems and judicial review, analysing the three key elements of the vanishing trial debate – numbers of cases coming into the litigation system, numbers of cases getting to trial and the proportion of cases coming in that get to trial. As with the existing vanishing trial research on trends in civil litigation generally, the data on judicial review is updated here to 2017 to determine the extent to which more recent trends in each system continue to diverge or converge in recent years.

⁹⁰ See further Appendix 1 Judicial Review: claimants by defendant body.

Cases coming into the litigation system

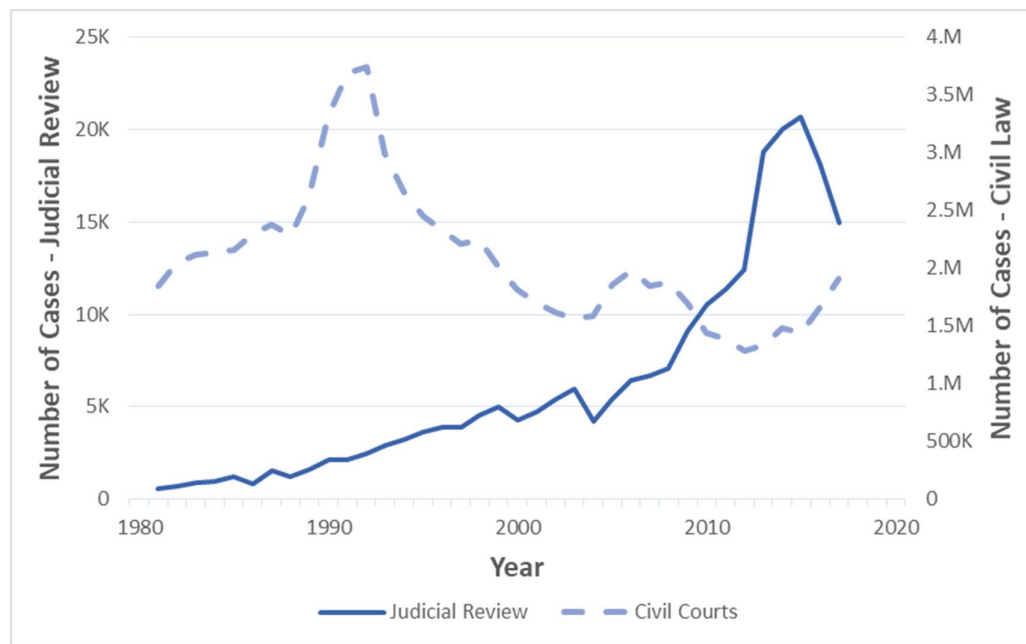


Figure 5.5: Comparison of trends in judicial review applications issued with proceedings issued in first instance civil law courts, 1981-2017. Source: Judicial Statistics Reports.⁹¹

As seen in Figure 5.5, there is a very different picture between the trends in the numbers of applications for judicial review and the numbers of proceedings started in the civil courts. In many ways, the trends in the numbers of applications for judicial review and the numbers of civil proceedings follow a similar upwards trend until 1990, but diverge after this point as judicial review increased and other civil actions plummet. As discussed in Chapter 1, the significant increase in the number of cases commenced in the civil justice system coincides with the period Thatcher was Prime Minister, when a neo-liberal agenda was in place that led to people being granted an array of legally enforceable rights.⁹² This agenda does not appear to have had the same degree of impact in relation to judicial review. Whilst the number of judicial review actions grew in the same period, the rate of increase was nowhere near as significant as that seen in the civil justice system.

In the early 2010s the pattern changes, with both sets of proceedings showing growth, though to differing degrees. From the mid-2010s, there has been a return to inverse trends, with the numbers of judicial review applications in sharp decline, whilst the number of civil law proceedings started has been rising. What is immediately apparent from Figure 5.5 is

⁹¹ See further Appendix 1 Judicial Review: data for applications.

⁹² See T. Goriely, 'Rushcliffe Fifty Years On: The Changing Role of Civil Legal Aid Within the Welfare State' (1994) 21 *J.L. & Soc* 545.

that there is a radically different story to tell about litigation trends in judicial review. Most notable of these is the fact that between the early 1990s and 2010s, when there was a trend of vanishing litigants in the civil law courts, is no evidence of an equivalent pattern in judicial review applications. In fact, the only vanishing litigant phase in judicial review applications has occurred since 2015, during a period in which the number of claims commenced in the civil justice system has been increasing again.

As with the civil justice system, there have been procedural changes affecting judicial review applications during the date range of this project. The impact of reforms following the Bowman Report has been examined in existing literature discussed above. The rate of growth in the number of applications for judicial review increased from 2004, a few years after the establishment of the Administrative Court, making it questionable as to whether the growth can be attributed to this reform. The regionalisation of the Administrative Court in 2009 had a similarly unclear effect because, although the rate of growth climbed dramatically, it only did so from 2012, several years after the new court system was in operation. There was a significant slowing in the rate of growth in the number of applications for judicial review in 2013, corresponding to the transfer of immigration and asylum applications for judicial review from the Administrative Court to the Upper Tier Immigration and Asylum Tribunal in 2013, although this only happened in November of 2013. No specific procedural reform affecting judicial review actions would appear to account for the recent decline in the number of applications. Trends in different subject areas will be examined later in this chapter to determine whether that is able to provide greater insight.

To a certain extent, the reforms in the two systems have followed the same strategy. In this respect, one similar reform implemented in both the civil justice system and in judicial review is the pre-action protocol. A wide range of pre-action protocols exist, each relating to a different subject area or type of proceeding. It is however unlikely that the pre-action protocol initiative had the same impact in terms of the number of cases commenced in both the civil justice system and judicial review. As discussed in Chapter 1, a primary aim of the pre-action protocol in civil courts was to divert cases away from the litigation system into alternative dispute resolution forums. A logical consequence of this was a reduction in the number of cases commenced. As discussed in research by the Public Law Project, references to alternative dispute resolution were initially excluded from the main body of the pre-action protocol for judicial review due to concerns about the appropriateness of ADR in public law

disputes.⁹³ However, this was changed in 2005 when clauses on ADR were introduced into all pre-action protocols.⁹⁴ The relevant paragraph in the judicial review pre-action protocol states that:

The courts take the view that litigation should be a last resort. The parties should consider whether some form of alternative dispute resolution ('ADR') or complaints procedure would be more suitable than litigation, and if so, endeavour to agree which to adopt. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. Parties are warned that if the protocol is not followed (including this paragraph) then the court must have regard to such conduct when determining costs. However, parties should also note that a claim for judicial review should comply with the time limits set out in the Introduction above. Exploring ADR may not excuse failure to comply with the time limits. If it is appropriate to issue a claim to ensure compliance with a time limit, but the parties agree there should be a stay of proceedings to explore settlement or narrowing the issues in dispute, a joint application for appropriate directions can be made to the court.⁹⁵

Although there is now explicit reference to explore ADR in judicial review actions, the findings of the Public Law Project study were that less than six percent of public law practitioners had either considered using mediation or actually participated in mediation.⁹⁶ They found that whilst extensive negotiation and settlement took place in judicial review actions, it did so during the litigation process.⁹⁷ In contrast to the civil justice system therefore, where the pre-action protocols effectively diverted litigants away from the litigation system, in judicial review actions this has not proved to be the case.

Cases disposed after trial

Distinctions between judicial review activity and civil litigation more generally do however fall away when it comes to looking at the cases that are disposed after trial.

⁹³ Bondy and Mulcahy (n.34 above), p.4. A reference to ADR was however contained in the introduction to the pre-action protocol.

⁹⁴ *id.*

⁹⁵ The full text of all pre-action protocols in effect can be found at <https://www.justice.gov.uk/courts/procedure-rules/civil/protocol>.

⁹⁶ Bondy and Mulcahy (n.34 above), p.85.

⁹⁷ *id.*

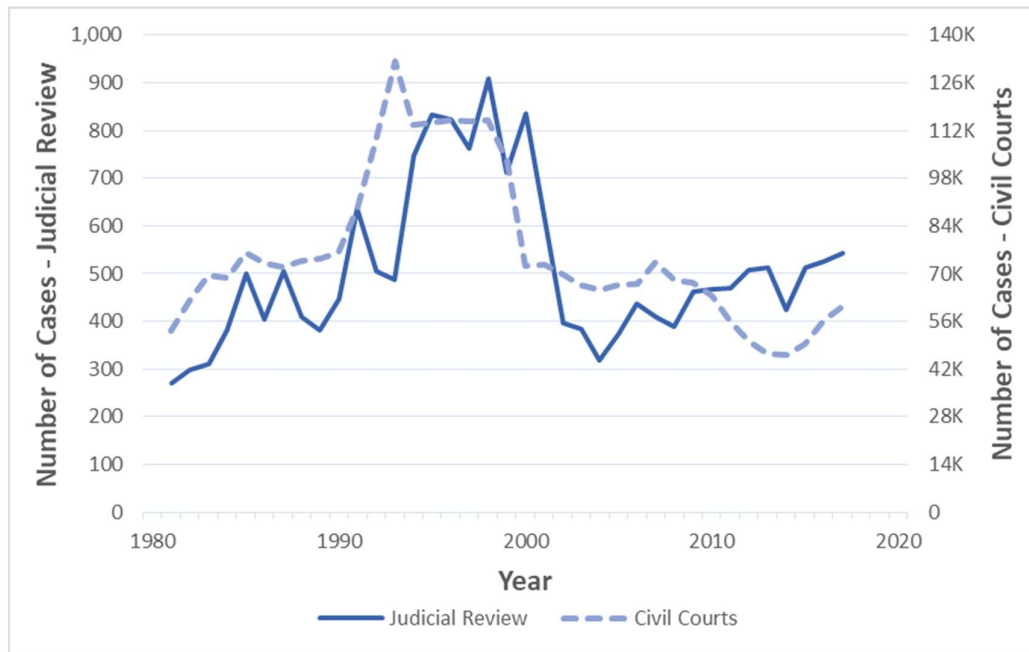


Figure 5.6: Comparison of trends in judicial review final determinations with cases disposed after trial in first instance civil courts, 1981-2017. Source - Judicial Statistics Reports.

Figure 5.6 shows a markedly different story to the one alluded to by Genn. Until 2000, the main point of difference that can be seen is that the major increases and decreases in the number of judicial review determinations occur a couple of years after equivalent ones in civil law trials. Since 2000, the trends between the types of trial have become slightly more divergent, with there being an overall steady increase in the number of judicial review determinations, whereas the numbers of civil law trials continued to decline until the early 2010s, although they have since started to increase.

Research on the vanishing trial does not only examine the *number* of cases that are disposed after trial. It also looks at the *proportion* of cases that are disposed by trial. As was made clear in Chapter 1, Galanter found that not only was there a decreasing number of cases ending in trial in the US, but the proportion of cases ending in trial was also decreasing.⁹⁸

⁹⁸ M. Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 *JELS* 459, p.459.

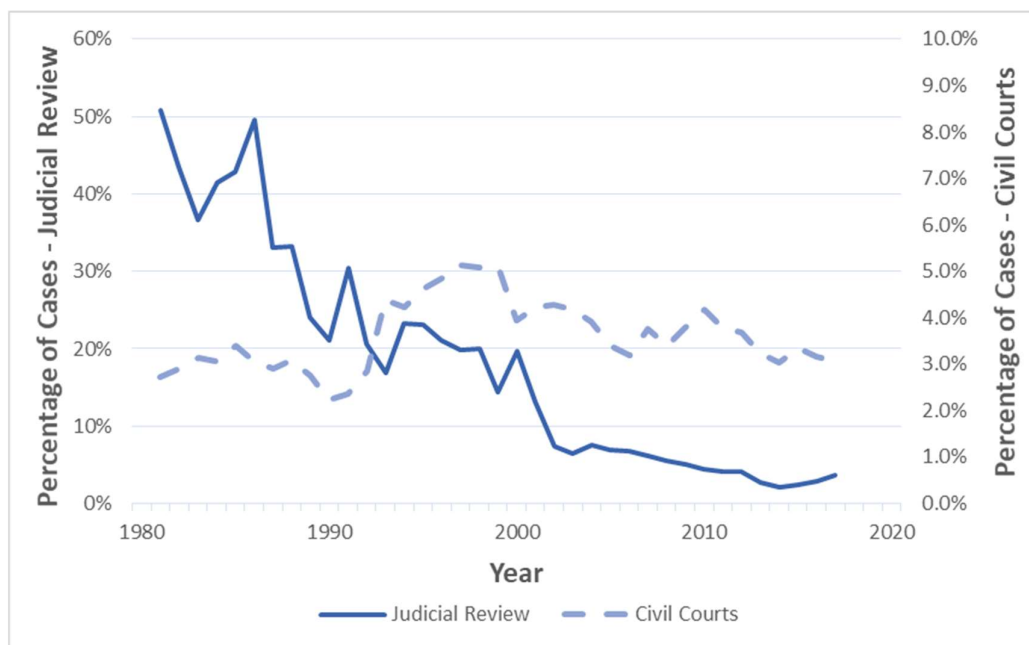


Figure 5.7: Comparison of trends in percentage of judicial review applications reaching final determination with the percentage of proceedings issued being disposed after trial in the civil courts, 1981-2017. Source: Judicial Statistics Reports.

As can be seen in Figure 5.7, a significant point of difference between the two types of proceedings in England is in trends relating to the percentage of actions started that end in a trial. The percentage for judicial review actions has steadily declined since 1981 from 51 percent to 4 percent. In the same period, there is no clear trend in respect of the percentage of civil law actions started that were disposed after trial. For civil actions, the percentage has fluctuated between a low of 2 percent and a high of 5 percent. Although a greater percentage of judicial review applications end in trial than civil law actions, the difference is negligible now compared to the position in 1981 what these data show is that it is judicial review actions that are in line with Galanter's characterisation of the vanishing trial, not civil law cases.

Charts 6-6 and the judicial review research discussed above show different conclusions to those argued for by Genn in her Mann Lecture. She showed the Administrative Court's workload as showing steady growth, based on a brief analysis of the number of applications and final determinations made between 2004 and 2011.⁹⁹ This was presented as directly contrasting to the position of private law litigation in the Queen's Bench Division, which showed a continuing decrease in both the number of applicants and trials since the late 1980s.¹⁰⁰ However, despite Genn's assertion of contrasts between civil litigation generally

⁹⁹ Genn, 'Privatisation' (n.1 above), pp.5-6.

¹⁰⁰ id, p.4.

and judicial review, the longer term trends observed in existing judicial review research show some similarities with the wider vanishing trial story. In Galanter's analysis of the vanishing trial phenomenon in the US, two of his three elements showed evidence of a trend towards vanishing – the actual number of cases reaching trial and in the proportion of proceedings that were disposed by trial.¹⁰¹ It is the second of these that can be seen to be mirrored in judicial review. Genn did not take account of the permission stage in her analysis of the Administrative Court. As the above charts and research show, the proportion of applications which are granted permission has decreased over time. When trends in percentages as opposed to actual numbers are examined, a different picture emerges. Whilst both the number of applications for judicial review and the number of final determinations have increased over time, the rate of increase of final determinations is much less than for applications. This means that, in line with Galanter's findings in respect of civil litigation, final determinations as a proportion of judicial review applications has decreased significantly over time.

Judicial Review – a more in-depth analysis

The remainder of the chapter will consider each of the stages for which data is provided in Judicial Statistics for judicial review actions (applications for permission to apply for judicial review, permission decisions, permissions granted and final determinations) in more depth, comparing and contrasting trends in different subject categories to provide a more nuanced account of trends in the judicial review.

The Judicial Statistics Reports have provided a progressively more detailed breakdown of cases, not by relief sought, as was the case in the prerogative writ format, but in terms of the subject matter of the judicial review cases. In 1981, there was a single heading of 'judicial review'; this was divided into 'criminal' and 'civil' in the 1982 report.¹⁰² From 1988-2010, three main headings were used: 'immigration', 'criminal' and 'other'. Whilst it was not specified that 'other' represented civil cases, this was presumably the case. An additional category of 'homeless' was included 1993-2003.

¹⁰¹ Galanter (n.99 above), p.459. He also discussed the number of cases coming into the litigation system, although this aspect of his analysis showed growth as opposed to decline.

¹⁰² In 1987, in contrast to the trend towards more detail, only a single figure was provided for 'judicial review'.

Subject	Years included
Criminal	1982-1986, 1988-2010
Civil	1982-1986
Immigration	1988-2010
Other	1988-2010
Homelessness	1993-2003

Figure 5.8: Subject areas included in Judicial Statistics 1982-2010.

Since the move to quarterly publications of the Judicial Statistics Reports, judicial review actions have been divided into four headings: ‘criminal’, ‘civil (other)’, ‘civil (immigration and asylum)’ and ‘unknown’. Although tables continue to be provided showing the number of applications for permission to apply by judicial review by category, in its current format, the Judicial Statistics Reports do not contain a breakdown by subject for permissions granted or final determinations, only the overall number of cases for each of those stages. However, in addition to Judicial Statistics, the Ministry of Justice (MoJ) now provides a case progression spreadsheet, updated quarterly, of all judicial review actions which contains details of subject and whether the case was granted permission at oral or renewal stage and, where applicable, the outcome of any final determination. Along with the four overarching categories, the MoJ has provided a detailed breakdown of what topics they consider come within each of them¹⁰³

The topics and classification system used do not appear entirely convincing. There is no unifying concept behind the topics assigned to each of the categories. For example, in the criminal list, the topics include amongst others an Act of Parliament, types of police actions and types of crimes. Similarly, the civil list appears to be a mixture of official’s actions, specific laws and areas of law. The somewhat confused approach to the topic breakdown can be contrasted with that seen in Westlaw for example, where all cases are assigned to one or more topics, each of which is further broken down into sub-topics and sub-sub-topics, all relating to areas of law that come within the overarching heading.¹⁰⁴ The rationale underlying the assignment of individual topics to categories appears somewhat unclear in the MoJ list, with Criminal Cases Review Commission appearing under the civil list. As a result, even though the category breakdown provides invaluable insight into judicial review cases, analysing cases by category still does not necessarily enable us to fully understand

¹⁰³ Ministry of Justice, *Guide* (n.12 above), pp.15-16. See Appendix 7 for the full breakdown by category.

¹⁰⁴ See further Appendix 1 Westlaw topics.

what is happening and it is therefore necessary to draw on data relating to individual topics to help explain category trends.

Applications for permission to apply for judicial review

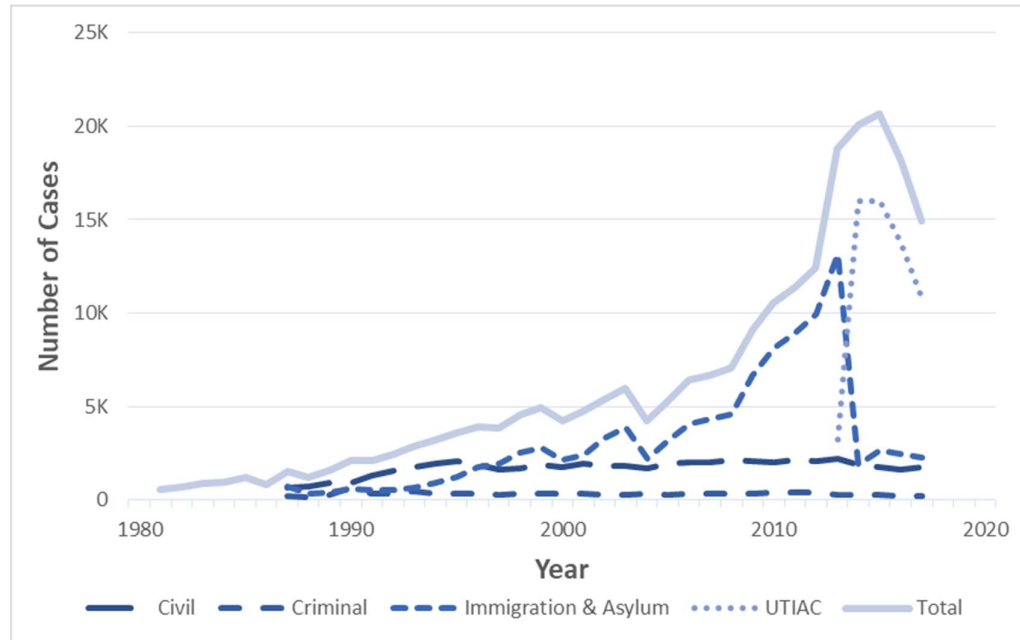


Figure 5.9: Applications for permission to apply for judicial review by subject, 1949-2017. Source: Judicial Statistics Reports¹⁰⁵

In contrast to scholars that have commented on the rise in the number of judicial review applications,¹⁰⁶ Bondy and Sunkin have questioned whether judicial review should actually be seen as a growth area. They argue that if immigration and asylum and criminal applications were stripped out of the statistics there has not been any significant growth.¹⁰⁷ As can be seen from Figure 5.9, the vast bulk of applications for judicial review, especially since the early-2000s, have been in immigration and asylum.¹⁰⁸ Applications for judicial review in the civil category have shown slight growth since 1981, but nowhere near the

¹⁰⁵ See further Appendix 1 Judicial Review: applications for permission to apply.

¹⁰⁶ In the context of the vanishing trial debate, see especially Genn, 'Privatisation' (n.1 above), p.5.

¹⁰⁷ Bondy and Sunkin, 'Debunking' (n.2 above); see also Sunkin and Bondy (n.2 above), pp.328, 330-350., who highlighted that government reforms between 2013 and 2015 drew on this assumption. They identified two other assumptions underlying the reforms. First, that judicial review hinders government and exerts overwhelming negative impact public administration by causing delay and diverting costs. The third assumption was that judicial review often concerns technical matters of process rather than substance and that, even when parties win in court they rarely if ever obtain tangible benefits. Sunkin and Bondy argued that all three assumptions were misleading.

¹⁰⁸ The UTIAC has had responsibility for assessing applications for the majority of immigration and asylum claims since November 2013, this is reflected in the drop in the number of immigration applications in the Administrative Court. There was a massive drop from 13,129 in 2013 to 1,892 in 2014, of which 3,764 and 118 were transferred to the UTIAC respectively.

magnitude of that seen in immigration and asylum. Similarly, the bulk of the decrease in applications since 2015 has been in immigration and asylum applications, which dropped from a high point of 18,676 in the Administrative Court and UTIAC combined in 2015 to 13,007 in 2017.

In Sunkin's early research into judicial review, he highlighted that the increase in the number of immigration and asylum judicial review applications in the mid-1980s coincided with unrest in Sri Lanka leading to a large number of Tamils seeking refuge in the UK.¹⁰⁹ Without further information on the identity of applicants for judicial review it is impossible to be certain, but it would appear likely that the rapid growth in immigration and asylum applications throughout the 2000s relates to the immigration crisis in Europe.

My focus here is on a comparison between trends in civil law actions generally and judicial review. In this context, it is appropriate to focus on the 'civil' category of judicial review actions as opposed to criminal or immigration cases because these do not have any direct comparators with civil cases. In line with existing research, although there is a broad spread of topics, actions appear concentrated in a much smaller number of topics, with most of the topics on the MoJ list showing only a small number of cases that does not change significantly over time. Within the civil category, there are several topics of interest. Cases relating to education have fallen from 11 percent of this the civil category in 2000 to 5 percent in 2017. Identified as a core category in existing research, cases relating to housing and homelessness have more recently decreased as a percentage of civil cases (homelessness falling from 9 percent to 4 percent, housing from 13 percent to 3 percent and housing benefit from 7 percent to 0 percent in the period 2000-2017). Similarly, applications relating to prisons have fallen from 12 percent to 8 percent in the same period. Cases concerning town and country planning on the other hand have grown from 7 percent to 15 percent of civil applications.

¹⁰⁹ Sunkin, 'Case-Load' (n.2 above), pp.493-494.

Permission decisions

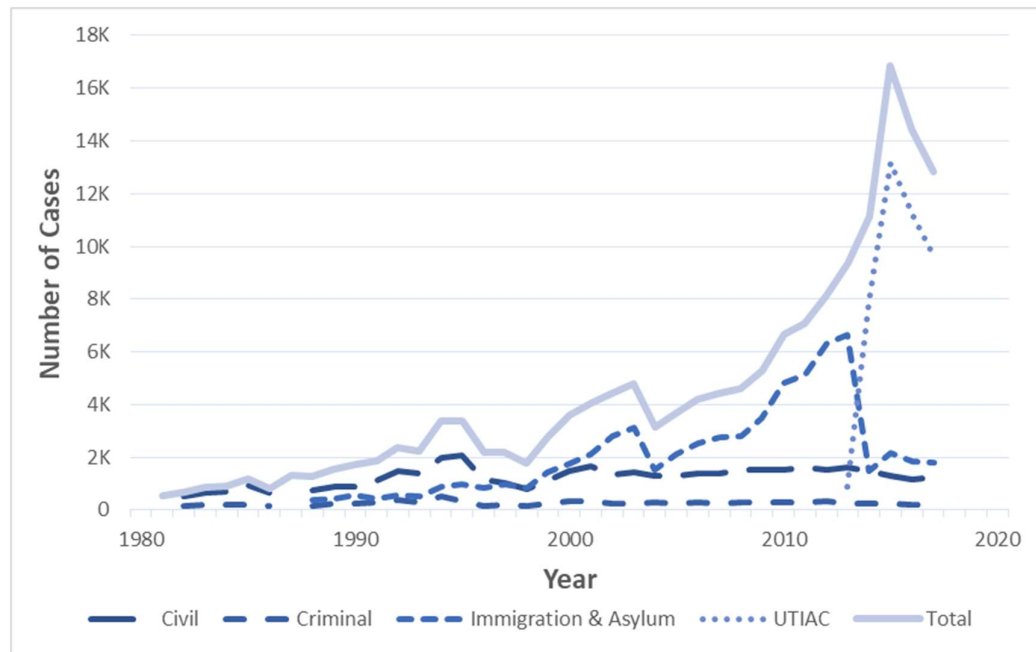


Figure 5.10: Permission decisions by category, 1981-2017. Source: Judicial Statistics Reports.

Similarly to in the civil justice system, judicial review cases can fall out of the system at any point, either being settled or withdrawn. As a result, the number of permission decisions that are made are fewer than the number of applications for judicial review. As Figure 5.10 above shows however, the breakdown of permission decisions by category is very similar to that in Figure 5.9 for applications. This suggests that no particular category of cases is more or less likely to drop out of the system before a permission decision is made than any other. Within individual topics of the civil category, the patterns seen since 2000 largely mirror those seen for the number of applications, again suggesting there is no specific area which is more or less likely to settle before a permission decision.

Permissions granted

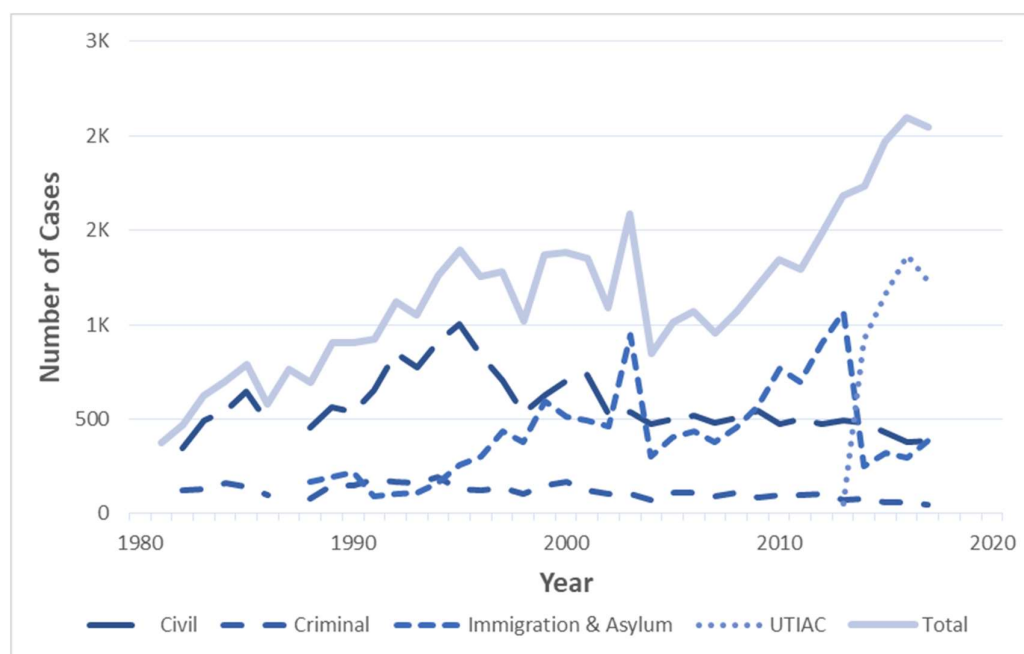


Figure 5.11: Applications for permission to apply for judicial review granted by subject, 1981-2017. Source: Judicial Statistics Reports.¹¹⁰

However, as shown in Figure 5.11, significant differences can be seen between trends in applications by category and those for permissions granted by category, suggesting that there is variation in the rates of permissions granted between the categories.

¹¹⁰ Between 1981 and 1999, the subject data is drawn from the tables provided in Judicial Statistics. From 2000, the data is drawn from the spreadsheets on the MoJ website which provide data. Figures from 2000 are the sum of applications for permission granted at first permission stage and those at oral renewal stage

Judicial management of demand

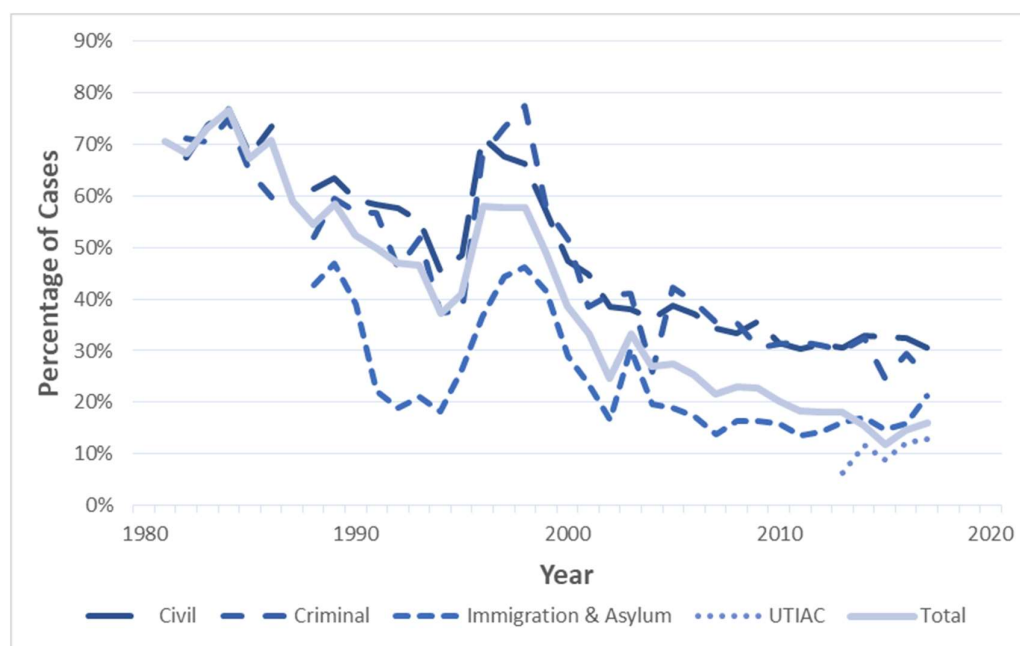


Figure 5.12: Percentage of permission decisions where permission was granted by subject, 1981-2017. Source: Judicial Statistics Reports.

Figure 5.12 above shows the number of permission decisions in which permission was granted.¹¹¹ What is remarkable is that very similar trends can be seen in across all categories – a long term decrease in the proportion of permissions granted, with a spike between 1995 and 1999.

The existing research discussed above highlighted a consistent decrease over time in grants of permission as a proportion of permission decisions. This trend can be seen to have continued until 2015 from which point, an overall upwards trend can be observed. From Figure 5.12, this increase can be attributed solely to a change in approach in relation to immigration cases, with civil and criminal proportions continuing to fall. The increase in immigration is not restricted to UTIAC cases, implying that the change is driven by something other than UTIAC judges adopting a different approach to granting permission than High Court judges. Although the overall number of permission grants has risen, the long term decrease in proportions challenges Genn’s argument that the courts are more open to hearing judicial review actions than civil cases.

¹¹¹ This chart is provided instead of one showing the proportion of applications which were granted permission in order to account for applications which were withdrawn or settled prior to the permission decision. Including these would skew the data and not present an accurate picture of judicial management of cases.

One possible explanation is that the increase in the number of applications is a result of large numbers of weak applications being submitted and the consequent decrease in the proportion of applications being granted is a reflection of this.¹¹² However, this argument has been challenged. As discussed above, Sunkin and other researchers have highlighted that the long term decrease can, at least in part, be attributed to changing judicial attitudes towards the permission stage, with an increasingly restrictive approach being adopted from the mid-1980s. Additionally, research has highlighted the impact, albeit short term, that judicial criticism of perceived high rates of judicial review actions has on both the number of applications and the proportion of permissions granted in specific subject areas.

Other explanations concern procedural changes that have affected the judicial review process, particularly the permission stage. The vanishing trial literature has similarly highlighted procedural changes as having a significant influence on trends in the civil justice system. Although the exact nature of the changes is distinct to each system, procedural changes can be seen as a common factor in both systems. The most significant procedural reforms in respect of judicial review are those following the Bowman Report in 2000.¹¹³ These reforms were influenced by the Woolf reforms and had the similar aim of encouraging early settlement in judicial review actions that the Woolf reforms had had in civil law cases. To achieve this aim, the permission stage was made *inter partes* as opposed to *ex parte*, with the defendant required to submit an acknowledgment of service form (AOS). Research by Bondy and Sunkin highlight the significance of this change. They found that the AOS was specifically mentioned as influencing their decision by a large number of judges as part of their observations on why cases were refused permission.¹¹⁴

A further element of the Bowman reforms that is relevant to the issue of the decline in proportions of permissions granted is changes to how the permission decisions are taken. Prior to the reforms, applicants had the right to either have an oral hearing, or for the permission decision to be made on the papers, with a right to renew orally if the initial paper application was refused. Following the Bowman reforms, the right to opt for an oral hearing was removed, although the right to renew the application in an oral hearing was retained. The research discussed above highlighted the lower rate of success for paper applications for permission. Bondy and Sunkin argue that the fact the majority of applications for permission

¹¹² Bondy and Sunkin highlight that the government used this argument in their 2012 consultation paper on reforming judicial review. Bondy and Sunkin, 'Debunking' (n.2 above).

¹¹³ For a discussion of the Bowman Report and subsequent reforms see Sunkin and Cornford (n.2 above).

¹¹⁴ Bondy and Sunkin, *Dynamics* (n.2 above), p.57.

are now decided on papers is a significant contributing factor to the continuing decline in the proportion of permissions granted since 2000.¹¹⁵ The fact that all categories of judicial review actions show similar trends in the rate of permissions granted points towards the impact of procedural changes being an important influence on the long term decrease, because the procedural changes discussed affect all judicial review actions equally.

Final Determinations

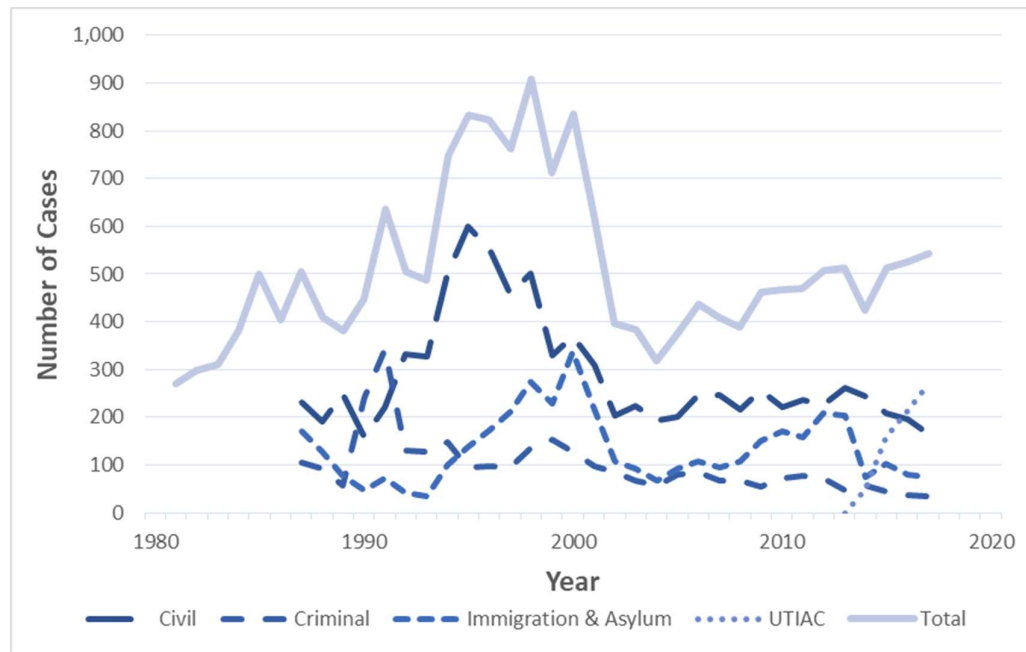


Figure 5.13: Number of final judicial review determinations by subject, 1981-2017. Source: Judicial Statistics Reports.¹¹⁶

The total number of final hearings grew the late 1990s, then delinked sharply from 1998 until 2004, since when it has been slowly increasing again. The different categories show slightly different patterns. First, in contrast to the number of applications, it is civil judicial review cases that constitute the majority of final hearings, averaging at 53 percent of all final hearings between 1987 and 2017.¹¹⁷ Civil actions peaked much earlier than overall judicial review actions, showing a decline from 1995. They became relatively stable from 2002, only increasing very slightly to 2013, from which point they have dropped again every year. Criminal cases in contrast peaked in 1991 and, after a sharp drop in 1992 have steadily,

¹¹⁵ *id.*, p.56.

¹¹⁶ The figures are the sum of determinations that were allowed or dismissed, or where there was no order. They exclude cases recorded as withdrawn after permission was granted but before a final hearing.

¹¹⁷ With a high point of 72 percent in 1995, since when it has steadily declined to only 30 percent in 2017.

though not consistently, decreased since then. Immigration cases declined between 1987 and 1993, then rose sharply until 2000. After another drop they rose steadily again from 2004 until 2013. At which point, immigration judicial review hearings in the Administrative Court declined sharply due to the transfer of immigration actions to the UTIAC. Final hearings in the latter have increased sharply every year since 2013. When all immigration actions are considered together, aside from a dip in 2014, the number of final hearings continues to show growth until 2017.

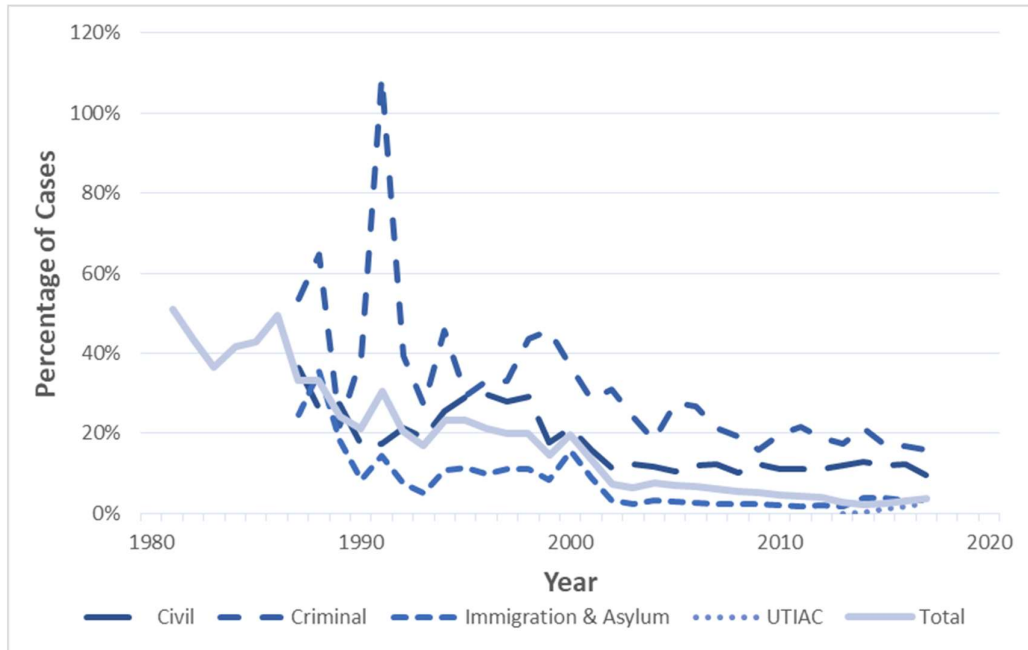


Figure 5.14: Percentage of applications for permission to apply for judicial review reaching final determination by subject, 1981-2017. Source: Judicial Statistics Reports.

As with the proportion of permission decisions which were granted, trends in the proportion of applications which reached a final hearing are relatively similar for each category, especially since the mid-1990s. In contrast to trends in both the numbers of applications and final hearings, it is criminal judicial review actions with the highest proportion of applications reaching a final hearing. Since the late 1990s, all categories have followed the pattern identified by Galanter as part of the vanishing trial debate – a fall in the proportion of applications reaching final hearing.

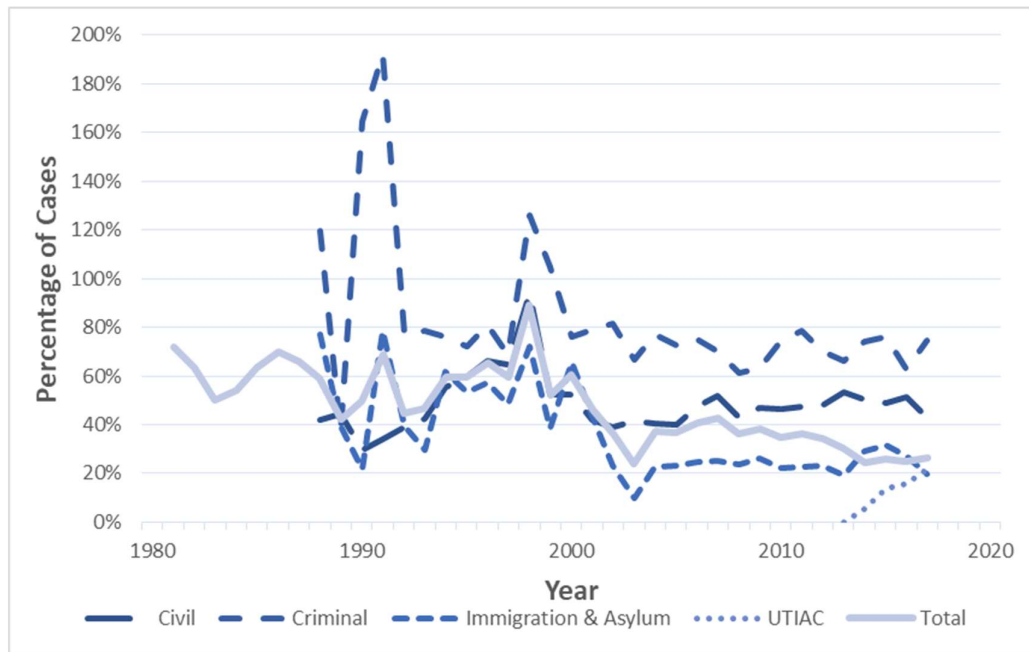


Figure 5.15: Percentage of permissions granted reaching final hearing by subject, 1981-2017. Source: Judicial Statistics Reports.

The number of final hearings is smaller than the number of permissions granted in every category due to cases falling out of the system between permission and final hearing. As shown in Chart 10, the proportions of permissions granted reaching final hearing rose between 1989 and 1998, before falling sharply in 1999. On the whole however, the percentage of permissions granted that reach final hearing has remained relatively stable in each category since 2000, although the rates in each category differ.¹¹⁸ This suggests that the procedural changes discussed above had only limited impact on settlements post permission.

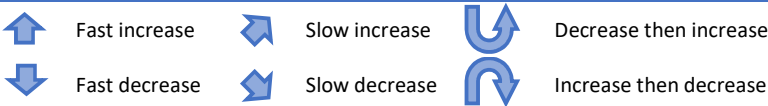
Overall comparison of trends between judicial review cases and civil law cases

It is not possible to represent the trends in each element since 1981 without breaking down the date range into multiple stages because of the level of variation in trends over time and the differing patterns observed between each element. When comparing trends in civil cases

¹¹⁸ Civil cases have averaged at 46% of permissions granted reaching final hearing. Criminal cases average at 72 percent of permissions granted. Immigration cases have shown the most fluctuations since 2000, they were at 66 percent in 2000, then fell to 23 percent in 2002. Following a dip to 10 percent in 2003, they have since remained relatively constant, averaging at 24 percent.

with those in judicial review, the picture becomes even more complex. Figure 5.16 below simplifies the comparison to some extent to show the main trends in each system by decade:

Element of vanishing trial	System	Phase 1 1981-1989	Phase 2 1990-1999	Phase 3 2000-2009	Phase 4 2010-2017
Number of cases coming into the litigation system	Civil Justice	↑	↓	↘	↑
	Judicial Review	↗	↗	↗	↻
Number of cases disposed after trial	Civil Justice	↗	↻	↗	↻
	Judicial Review	↗	↑	↓	↗
Proportion of cases disposed after trial	Civil Justice	→	↗	→	↘
	Judicial Review	↓	↓	↘	→



↑ Fast increase ↗ Slow increase U Decrease then increase
 ↓ Fast decrease ↘ Slow decrease ∩ Increase then decrease

Figure 5.16: Comparison of trends in the three elements of the vanishing trial between civil law cases and judicial review between 1981 and 2017.

Further, when trends in judicial review were examined in more detail, it is apparent that the inclusion of immigration and asylum figures especially, and, to a much more limited extent, criminal figures, in the total judicial review statistics in the Judicial Statistics Reports calls into question the accuracy of using the total numbers for a comparison between civil law cases and judicial review actions. Figures 5.17 and 5.18 below show the difference between trends in all judicial review actions, and those for just civil judicial review cases. The two charts reinforce the importance of looking beyond overall numbers to understand trends more fully.

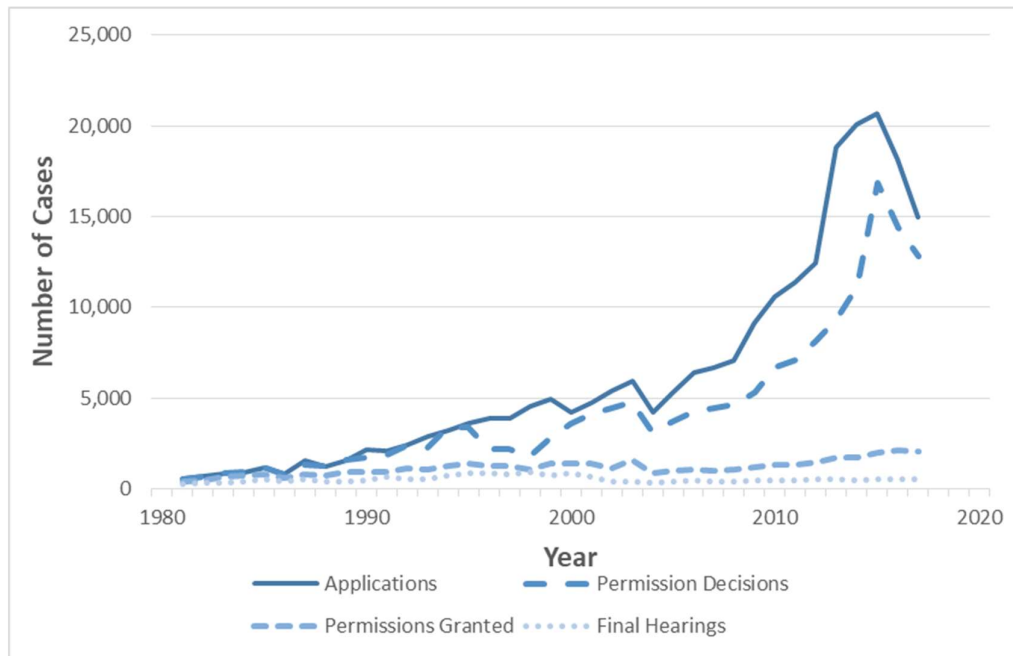


Figure 5.17: Total number of judicial review cases by stage, 1981-2017.

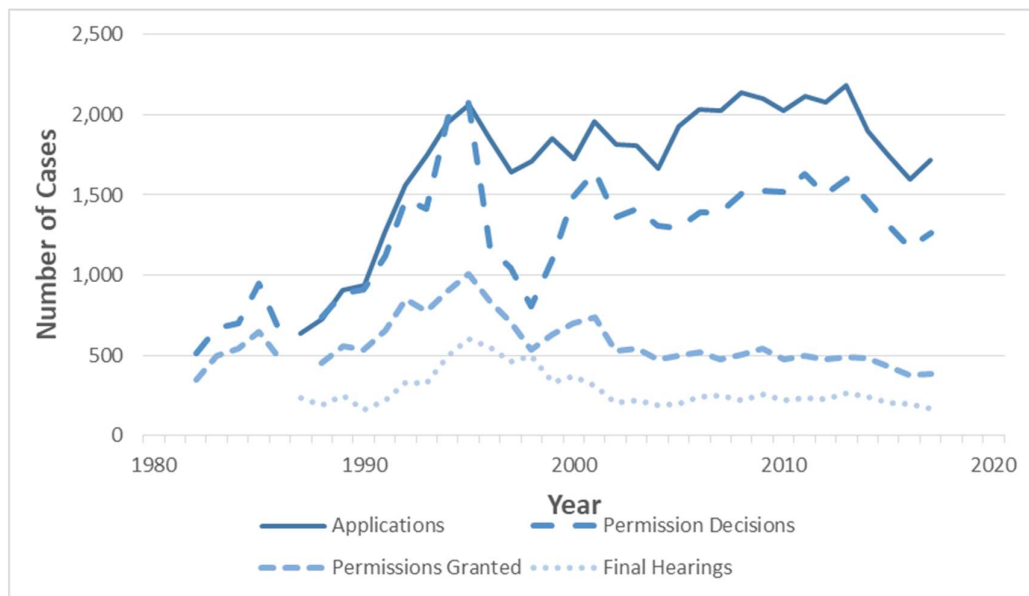





Figure 5.18: Civil judicial review cases by stage, 1981-2017.


Given that this project aims to update the vanishing trial debate regarding civil law, it is more appropriate to compare trends in civil law cases with civil judicial review cases, as opposed to all judicial review cases. Figure 5.19 below adjusts Figure 5.16 to reflect this:


Element of vanishing trial	System	Phase 1 1981-1989 ¹¹⁹	Phase 2 1990-1999	Phase 3 2000-2009	Phase 4 2010-2017
Number of cases coming into the litigation system	Civil Justice	↑	↓	↗	↑
	Judicial Review	↗	↑	↗	↘
Number of cases disposed after trial	Civil Justice	↗	↻	↗	↻
	Judicial Review	↘	↻	↘	↘
Proportion of cases disposed after trial	Civil Justice	→	↗	→	↘
	Judicial Review	↘	↻	↘	→

 Fast increase

 Slow increase

 Decrease then increase

 Fast decrease

 Slow decrease


 Increase then decrease

Figure 5.19: Comparison of trends in the three elements of the vanishing trial between civil law cases and civil judicial review between 1981 and 2017.

As Figure 5.19 makes clear, there are still differences in the trends between civil judicial review actions and cases in the civil justice system more generally. Based on this comparison, it is the case that it is judicial review actions that currently show clearer evidence of a vanishing trial, particularly in respect of the number of cases coming into the litigation system and the number disposed after trial.

Conclusion

To the limited extent that judicial review has been included in the vanishing trial, it has been claimed that, as opposed to a vanishing trial, judicial review is a growth area. This chapter has examined this claim in more depth, by comparing trends in the total judicial review actions with those in civil law cases for each of the elements of the vanishing trial. What the analysis presented here shows is that there is not a straightforward contrast between trends in the two systems. What is also clear is that, as with trends in civil cases for each of the three aspects of the vanishing examined in Chapter 1, the picture for judicial review cases is more complex than that presented by Galanter in respect of the vanishing trial in the US.

When statistics for criminal and immigration and asylum judicial review cases are stripped out, to leave only civil judicial review actions, there remain differences between the patterns observed in the three elements of the vanishing trial between civil law cases and civil judicial review actions. However, the differences still do not support Genn's assertions that trends

¹¹⁹ For judicial review actions, the trends for the number of cases disposed after trial and the proportion of cases disposed after trial is for 1987-1989 only.

in the two systems contrast entirely, or that there is only evidence of a vanishing trial in the civil justice system. On the contrary, there is clearer evidence of a vanishing trial in both the number and proportion of cases disposed after trial in civil judicial review actions than in civil law cases.

As with civil law proceedings discussed in Chapter 1, it has not been possible from the data available to conclusively determine the causes of the trends observed in judicial review actions. There have similarly been procedural reforms affecting the judicial review process that are likely to have contributed to some of the trends. The unique feature of the judicial review process, the permission filter, does however point towards an additional cause for trends in both the number and proportion of cases disposed after trial that may not be as applicable in the civil law context – judges. It was shown that judicial attitudes towards this stage of the litigation process have become more restrictive over the date range of this project. Although judicial case management was introduced in civil law cases as part of the Woolf reforms, this still does not amount to a judicial filter of cases and highlights that the differences between the processes in the two systems contribute to the differing trends observed between them.

Conclusion

This project sought to contribute to the vanishing trial debate as it relates to England and Wales in two ways. First, by updating and extending the date range of trends in civil cases at first instance analysed to 1949-2017 in order to test whether trends observed in existing literature and the conclusions drawn in those studies remain accurate. Second, to incorporate an area of law noticeable to its virtual absence in current vanishing trial scholarship – public law and compare and contrast trends in the two areas of law.

The existing vanishing trial literature concerning England and Wales covered the period from the late 1950s to 2011. It highlighted that, in respect of the three elements of the vanishing trial identified by Galanter (the number of cases coming into the litigation system, the number of cases disposed after trial and the proportion of cases disposed after trial), there was evidence of a decline in all three in England and Wales from the early 1990s, although there was some disagreement amongst scholars as to whether the vanishing trend had slowed or was still in effect by the early 2000s. Analysis of the period 2012-2017 presented here for the first time reveals that a different picture has been emerging more recently. Whilst the data analysed supports the argument that there was a twenty year decline in both the number of litigants entering the system and the number of cases disposed after trial from the early 1990s, more recently there has been a period of growth in both aspects of the vanishing trial. Trends in the proportion of cases disposed after trial differ somewhat, growing in the 1990s when the other two elements were in decline and overall decreasing slightly since 2000. This allows us to question claims that trials are in danger of becoming extinct and may even call into question some of the explanations for the vanishing trial that have been given in the English literature on the debate. Future researchers could usefully explore this area further.

It is clear from the review of literature in Chapter 3 that bringing debate about public law trends into broader discussions of the vanishing trial is far from being a straightforward task. Resource limitations have meant that this thesis has focussed only on judicial review. However, Chapter 3 clearly demonstrates the potential for others to pursue the debate about the explosion or disappearance of grievances in public and administrative law systems more generally. This reflects a claim that Harlow and Rawlings made many years ago that these various grievance systems should be taken more seriously in policy debate. This is clearly a limitation of the vanishing trial debate which focusses on a particular form of

adjudication. The need for a broader approach to the topic is reiterated in Chapter 4 on what constitutes a public law trial. As Galanter and Resnik have argued, the notion of a trial is far from being a stable concept. This is a factor which clearly needs to be given serious consideration in future research in the field.

The lack of attention to public law within the vanishing trial debate has enabled me to make a significant contribution to this field of research by analysing trends in one type of public law – judicial review cases. Trends in these proceedings were compared to civil law cases more generally between 1981 and 2017 for each of the three aspects of the vanishing trial identified by Galanter. The findings demonstrate that, to some extent, there is evidence of a vanishing trial in judicial review cases. In terms of cases coming into the litigation system, whereas civil law cases have recently come out of a twenty year period of decline and are now showing growth, the opposite is the case in applications for judicial review, which since 2015 have started to significantly and consistently decline for the first time in the date range analysed in this project. Both the previous growth and the recent decline in judicial review applications however are primarily due to immigration and asylum cases. Once these and criminal judicial review actions are stripped out so that civil judicial review actions are compared to civil law cases, a slightly different picture emerges. Although there was still growth in the number of applications for judicial review until 2013, followed by a more recent decline, the changes were on a much smaller scale.

Whereas there was evidence of a vanishing trial in all judicial review cases in respect of the number of cases disposed after final hearing in the first couple of years of the twenty first century, this was both preceded and followed by periods of growth. In respect of civil judicial review actions alone, there is clearer evidence of a vanishing trial. Final determinations peaked in 1995 and have since then fallen, albeit not consistently. The fastest period of decline was between the mid-1990s and early 2000s, similar to the trends seen in civil law actions at that time. Where civil judicial review actions diverge from civil law actions is that there is continuing evidence of a vanishing trial in judicial review cases in recent years, at a time civil law actions are on the rise.

When compared to civil law cases more generally, then Judicial review actions showed clearer evidence of a vanishing trial in the proportion of cases disposed after trial. The proportion of applications disposed after final determination fell significantly across the date range of this project. The proportion both started considerably higher than that in civil law actions, and ended far lower. In respect of civil judicial review actions only, the same trend

applied, although neither the starting proportion nor the degree of decline was as great, again demonstrating that most of the changes in judicial review over the date range concern immigration and asylum judicial review claims.

Causes for the trends in civil law action posited in existing research have been reconsidered here, in particular, procedural reforms and the virtual elimination of civil legal aid. Over the course of the date range of this project there have been a number of procedural reforms affecting the two systems, most notably the Woolf reforms in relation to civil law actions and reforms following the Bowman Report in respect of judicial review actions. Whilst it was possible to attribute some of the trends observed in civil law actions to the procedural reforms, it was clear from the data that another factor was also affecting the trends in judicial review cases – the permission filter. An increasingly restrictive judicial approach to this stage of the litigation process, across all subject areas necessarily had a knock on effect on both the number and proportion of judicial review applications being disposed after final hearing.

The complexity of the trends observed in both systems however has made it difficult to determine the respective role of each factor influencing trends. Further, more recent reversals of trends in civil law actions especially raise the question of whether existing explanations are capable of fully explaining what is happening, given the reversal in trends but no equivalent reversal in procedure or increase in the availability of legal aid. This project has not addressed in-depth the question of what causes the trends observed in either system. It has however provided a more up to date and accurate empirical picture of the trends that can help form the basis for further research examining the underlying reasons.

Appendix 1: Technical Appendix

US calculation of proportion

Galanter obtained data for the number and proportion of cases disposed after trial in the US from Table C-4 of the annual reports of the Administrative Office of the US Courts.⁵¹² The table provides figures for the total number of dispositions and the number of trials, as well for trials as a proportion of total dispositions. This contrasts to the approach used in this project of dividing the number of trials by the number of proceedings commenced to obtain the proportion of cases disposed after trial. Based on the data provided by Galanter on the numbers of filings and civil dispositions per year between 1962 and 2002,⁵¹³ there appears to be some slight difference between the two figures. This may reflect the fact that some cases that were filed in one year may not have been disposed of until the next year. The exact extent of any discrepancy is unclear from Galanter's analysis. Whereas his analysis included figures for the number of civil filings at ten year intervals between 1962 and 2002, he only provided a bar chart of annual filings that did not include the exact numbers.

Judicial Statistics contain data on the number of proceedings commenced and the number of trials. However, the reports do not contain consistent data on other forms of disposition across the entire date range, or for trials as a proportion of dispositions. Some alternative forms of dispositions were included, but only for a limited number of years. For example, between 1974 and 2004, data for the Queen's Bench did include figures for some other forms of disposition including 'settled at the door of court' or 'withdrawn before or during trial'.

The figures in Judicial Statistics, based on the number of cases reaching specific stages of the English and Welsh litigation process in any given year, do not take account of any delay between claims being issued and cases being disposed. As a result, the analysis of the proportion element of the vanishing trial is based on two slightly different measures in US and English analysis of the vanishing trial.

⁵¹² M. Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 JELS 459, p.461.

⁵¹³ Data on filings was contained in Table C-2 of the annual reports of the Administrative Office of the US Courts. *id.*, pp.485-486.

Naming of Judicial Statistics Reports

Prior to 2002, Judicial Statistics were produced by the Lord Chancellor's department. Between 1949 and 1974, they were called 'Judicial Statistics, England and Wales, [year]: Civil Judicial Statistics'. In 1975, they were renamed 'Judicial Statistics, England and Wales, 1975: Judicial Statistics'. From 1976 to 1978, and again 1982-1985 the title was 'Judicial Statistics, England and Wales'. For the three years 1979-1981, data for Northern Ireland was also included in the Report, which was renamed 'Judicial Statistics, England, Wales and Northern Ireland'. From 1987 to 2001, the reports were renamed again to 'Judicial Statistics, England and Wales for the year [year]'. Between 2002 and 2005, the reports were produced by the Department of Constitutional Affairs, under the same title. Since 2006, the Ministry of Justice has had responsibility for the Judicial Statistics Reports, and renamed them 'Judicial and Court Statistics'. In 2012, the MoJ changed the format from annual reports to quarterly, covering only first instance courts under the new title 'Court Statistics Quarterly, [quarter] to [quarter] [year]', revised to 'Civil Justice Statistics Quarterly, England and Wales [Quarter] to [Quarter] [year]' in the July to September edition in 2014. In the quarterly format, the January-March editions contain annual appellate statistics for the preceding year and additional statistical data is provided in spreadsheets accompanying the each edition. For ease of reference, I have referred to the reports collectively as 'Judicial Statistics Reports', or 'Judicial Statistics' throughout this study.

Summary of courts

Courts included in County Court figures: The Mayor's and City of London Court was reconstituted as a County Court under the Courts Act 1971, s 42. Data for this court has been incorporated into the County Court figures for the years 1949-1971.

Courts included in QBD figures: The Probate, Divorce and Admiralty division was renamed the Family Division on 2nd August 1971 by the Administration of Justice Act 1970, s 1(1). Under s 1(3) of same Act, admiralty proceedings were transferred to the QBD. For consistency purposes, admiralty proceedings between 1949 and 1971 have been recorded in their current location despite the fact that they came under the jurisdiction of the Probate, Divorce and Admiralty Division during that period. The Official Referees' Court was renamed the Technology and Construction Court on 9th October 1998. In the Judicial Statistics, figures were under the heading 'Official Referees' business' between 1949 and 1998. Since 1999, actions have been recorded under the Technology and Construction Court. Although it

stated in Judicial Statistics that the court includes cases in the Chancery Division or QBD which involve 'issues or questions which are technically complex or for which trial by such judges is in any reason desirable', since the 1982 edition, the Court has been included within the chapter concerning first instance actions in the QBD. For the entire date range of this project, data for this court has been included as part of the QBD figures.

Courts included in Chancery Division figures: Figures for Companies Court actions commenced in London were included between 1949 and 2017, for actions commenced outside of London, the Judicial Statistics only contains data for the years 1985-2017. Figures for Bankruptcy petitions were included between 1949 and 2017, for other originating proceedings, the Judicial Statistics only contains data for the years 1985-2017. The Patents Appeal Tribunal and Registered Designs Appeal Tribunal were incorporated into the Patents Court under the Patents Act 1977, s 132(7) and Schedule 6. Figures for these tribunals up to 1978 have been included within the Chancery Division data. The Patents Court was constituted by the Patents Act 1977, s 96 and came into effect 1st June 1978. Judicial Statistics included figures for the Patents Court from 1979. In that year, comparative data was given for 1978, within the table for the Patents Court. In the 1978 edition however, the same figures were reported in the tribunals section of the Judicial Statistics. The Palatine Chancery Courts were merged with the High Court under the Courts Act 1970, s 41. Data relating to them has been included as part of the Chancery Division figures for the years 1949-1971. Contentious probate was transferred to the Chancery Division under the Administration of Justice Act 1970, s 1(4). Figures for contentious probate has been included within the figures of its current Division of the entire date range of this project for consistency purposes.

Excluded courts of first instance

The Borough Courts of Record and other Inferior Civil Courts were included in the Judicial Statistics until 1971. 95,322 cases were commenced in them from 1949 to this point. 58,078 were disposed, of which the majority, 38,288 (65.93%), were determined without a hearing. They were abolished by the Courts Act 1971, s 43. Despite this, the Borough Courts appeared in the summary table until 1981 after which the format of the report was altered to move the summary tables into the relevant section in the Judicial Statistics. No detailed tables appeared relating to them after 1971. The Borough Courts were specified in the Judicial Statistics as the Bristol Tolzey Court, the Liverpool Court of Passage, the Norwich Guildhall Court, the Oxford Chancellor's Court, the Salford Hundred Court of Record and 'Other'.

Data was also provided for Ecclesiastical Courts until 1973. In total, 48 cases were commenced 1949-1973. The Railway and Canal Commission was abolished in 1949, although it continued to be reported in the summary table until 1973. No proceedings were commenced during the period of our study. From the summary table in the Judicial Statistics, between 1938 and 1948, 95 cases commenced in that court.

The National Industrial Relations Court was included in the Judicial Statistics 1972-1974. 328 proceedings in total were commenced in the court, of which 437 were disposed, just over half (245, 56.06%) of those without a hearing. The final time it was included in the reports, the entry noted that the table was only included 'as a matter of passing interest'.⁵¹⁴ Although I collected data for each of these courts data was only available for a limited time. Further, there is no indication as to whether their jurisdictions were transferred to any other courts when they were abolished.

County Court: proceedings issued

1. General Summary Tables of Courts of First Instance

This category includes the 'Court of First Instance – Proceedings' table (1949-1973) and the Courts of First Instance – Summary of Proceedings Commenced' table between 1974 and 1981. Both the County Court and the Mayor's and City of London Court were included on these tables. Although the Mayor's and City of London Court was reconstituted as a County Court in 1971 under the Courts Act 1971, s 42, it remained on the summary table because that included historical data covering the period when it was in effect. Between 1949 and 1971, figures from the summary table for the County Court and the Mayor's and City of London Court were added together.

2. County Court Summary Tables

Five different tables fall within this category. Similar data was included between 1949 and 1973 in the 'County Court: Summary' table; 1974-1981 in the 'County Courts – Number of Plaints Entered, Judgments Made, etc.' table; 1982-1989 in the 'County Courts: Trends in Number of Plaints Entered, Judgments Made, etc.' table; between 1990 and 1992 in the 'County Courts: Trends in Number of Plaints Entered, Judgments Summonses and Warrants of Execution' table; 1993-1998 in 'Plaints Entered and Warrants of Execution Issued' and between 1999 and 2005 in 'Claims Issued and Warrants of Execution Issued'.

⁵¹⁴ Lord Chancellor's Department, Judicial Statistics, England and Wales, 1974: Civil Judicial Statistics (Cmnd. 6361, 1975), p.20.

The first category was summary tables of proceedings issued in courts of first instance. Between 1949 and 1973, the number given was stated to include bankruptcy and companies court proceedings, but excluded certain proceedings commenced in the High Court. In the 1974 edition, it was noted that the figure included divorce and ancillary matters.⁵¹⁵ The table was revised in 1974 and moved from the front of the Judicial Statistics, to the front of the 'courts of first instance' section and no longer gave any indication of what types of proceedings were included in the figures given. From 1982, each court was given its own section and the general summary table for first instance courts was discontinued.

The second category of tables concerning the number of claims issued in the County Court are tables included in the reports between 1949 and 2005 that contained summary data on the number of proceedings commenced and disposed of in the County Courts. They included data on various actions over time,⁵¹⁶ with each edition of the Judicial Statistics up until 1982 providing data the relevant year and the previous twenty-five years. In 1983, the table was revised. From that year until 2004, it only included selected years data from 1938. The 2005 edition only included the last five years data and the table was discontinued entirely after that year. More importantly from the perspective of the data it contained on proceedings issued, a new breakdown format was used – 'money claims' and 'claims for the recovery of land'. The historical figures given for money claims match the total of those for up to and above £100 in the previous format. However, the historical figures for 'recovery of land' were lower than the figures given for 'other claims' in the old format. It has been possible to determine which proceedings the difference relates to for some years, but not all. In no year did the figure given in this table match that contained in the summary of proceedings commenced in courts of first instance table, in all years it was a smaller figure. This shows that the first instance summary tables included more than just claims in the total of proceedings commenced.

⁵¹⁵ The proceedings included in the total for 1974 can be seen to be different from those in earlier editions because, in that edition, the 1973 figure was based on the new format and was given as 1,891,026, whereas in the 1973 edition, under the previous format it had been given as 1,555,835.

⁵¹⁶ Data on various actions over time up until 1982. In addition to 'claims entered', which, in addition to a total, were broken into 'not exceeding £100', 'above £100' and 'other claims (recovery of land etc.)', data was also given for the following: 'Judgments' (broken into 'on hearing' (judge, registrar and total) and 'without hearing'); 'judgment summonses' (broken into issued and heard); 'orders of commitment' (broken into issued and debtors imprisoned); 'executions against goods' (broken into issued and sales made); 'number of days of sitting'; 'number of proceedings under the equitable jurisdiction of the courts'; and 'number of proceedings under the County Courts Admiralty Acts'. Over time, the types of actions included in the table decreased, with entries for proceedings under equitable jurisdiction and Admiralty Acts for example both being discontinued from 1977.

The third category is the table on 'number of main complaints entered', which further complicated the question of how many proceedings were commenced in the County Courts. Each edition of the Judicial Statistics in which it was included contained figures for the relevant year and ten years historical data. Money complaints were broken down into several bands, enabling me to obtain a greater amount of detail about trends in claims issued than from the summary table. Additionally, 'actions for possession of land' and 'actions for possession of goods' were included as well as an overall total. Until 1976 however, the overall total was not equivalent to the sum of the different monetary and possession categories. It did however match the total given for complaints entered in the County Court summary table. Confusingly, from 1977, the total provided was the sum of the different categories and yet continued to match that given in the County Court summary table. The Judicial Statistics contains no explanation for what type of actions accounted for the discrepancy in the total of the categories included and the total figure actually given between 1968 and 1976, or why it reconciled from 1977. From 1977, it has been possible to attribute the difference between 'other' and 'recovery of land' proceedings in the two versions of the County Court summary table to 'recovery of goods' actions. Between 1974 and 1976 however, these figure given for recovery of goods actions does not amount to the difference.

Tables on proceedings commenced in the County Court were the fourth category. They provided a more detailed breakdown of proceedings than in either of tables considered above. Within the tables provided in the Judicial Statistics for the County Courts specifically, additional statistics provided a breakdown of the types and value of proceedings commenced, the number of trials entered during the year and the number of actions disposed by default, before a judge or jury or struck out/withdrawn that enabled further analysis of trends within the County Courts. Up to 1973, the data included was broken into proceedings commenced 'by complaint, petition, or originating application' and those commenced 'otherwise than by complaint, petition or other originating application'. Each type of proceeding was further broken down, complaints by value bands of claims, actions for recovery of land and 'other proceedings commenced by complaint'.⁵¹⁷ Other proceedings by interpleader actions, bankruptcy petitions, Companies Act petitions and Workmen's Compensation Acts claims. In addition, a figure for actions remitted from the High Court, the Liverpool Court of Passage or the Mayor's and City of London Court was provided. In relation to the County Court, the data on the summary table referred to the total number of proceedings

⁵¹⁷ The value bands included varied as the jurisdictional limit of the County Court increased over time.

commenced. Until 1961, the total excluded this figure, whereas from 1962, it was included, creating a degree of inconsistency in the numbers reported.⁵¹⁸ The figure given for the total proceedings commenced in this table matched that included on the summary of courts of first instance table. From this table, it was possible to determine that the difference between 'other' and 'recovery of land' proceedings in the two versions of the County Court summary table was those defined as 'other proceedings commenced by plaintiff'.

As with the other tables, the format of and data included in the proceedings commenced table was not consistent throughout all the editions of the Judicial Statistics examined. From 1974,⁵¹⁹ there was no longer any distinction made between proceedings commenced by plaintiff or otherwise and, aside from money claims, bankruptcy petitions and Companies Act petitions, the breakdown of proceedings contained within the total commenced on the table differed considerably from previous editions.⁵²⁰ However, the total figure given still matched that contained in the summary table of courts of first instance. However, it has not been possible to determine what proceedings the difference between 'other plaintiffs' and 'recovery of land' actions refers to in the two versions of the County Court summary table because the difference is not equal to any one or combination of proceedings included in the revised format.

Money claims were no longer broken down by bands from 1974 in the proceedings commenced table, although additional data on such actions was provided in the form of a new table.⁵²¹ This not only provided a breakdown of claims by value bands, but also by the subject matter of the action.⁵²² This table contained the most detailed breakdown of claims

⁵¹⁸ In the 1962 edition, the comparative total provided for 1961 still excluded the figure. Lord Chancellor's Department, *Judicial Statistics, England and Wales, 1962: Civil Judicial Statistics* (Cmnd. 2055, 1963).

⁵¹⁹ There were widespread changes to the format of the entire Judicial Statistics in 1974. This followed recommendations made by the Adams Committee regarding what data should be provided in the reports in the Committee on Civil Justice Statistics, *Report of the Committee on Civil Judicial Statistics* (Cmnd 3684, 1968).

⁵²⁰ The other proceedings included were 'other'; 'admiralty actions'; 'divorce petitions'; 'other family matters'; probate; and 'Mental Health Act 1959' proceedings. An additional new table provided further details on 'other' proceedings. They were specified to be claims not in respect of money that were brought under specific Acts. Recovery of land actions were initially included in the 'other' table, but were reclassified as money claims in 1981.

⁵²¹ Between 1974 and 1981, this data was included in the 'Actions Entered for the Recovery of Sums of Money or Value' table; in 1982 in the 'Proceedings Commenced – Money Claims' table and '1983-1989 in the 'County Courts: Plaints Entered' table.

⁵²² In 1974, the list of subjects was 'goods sold and delivered, work done and materials supplied'; 'money lent, paid or received including bills of exchange, promissory notes, etc.'; 'professional fees, services rendered (advertising contracts of service, etc.)'; 'damages'; 'rent arrears (excluding claims for possession)'; 'hire purchase and conditional sale agreements'; 'recovery of tax'; 'other claims for money'. This was revised in 1975 to 'goods sold and delivered, work done and materials supplied,

issued in the County Court and, as such, had the potential to provide the basis for an in-depth analysis of trends. However, it was discontinued from the 1990 Judicial Statistics, meaning it was only included for fifteen years. The continuing absence of this level of detail has important implications for the ability of researchers to obtain meaningful insights into claims issued in the County Courts. Given the short period that this data was included out of the total sixty-eight year date range of this project, I have not analysed this data further.

The proceedings commenced table was revised again in the 1983 Judicial Statistics. In the new format, claims issued were presented as 'default', 'fixed date' and 'possession of land' complaints. Although not specified as 'money' actions in the revised format, the 1982 total given for such actions matched that for money complaints in the 1982 Judicial Statistics. Additionally, 'miscellaneous' proceedings were included (but only until 1989), broken down by actions under specific Acts. These actions are equivalent to 'other' in the previous format. Other types of proceedings included were admiralty, bankruptcy petitions, Companies Act proceedings and major areas of family work. In a significant change from the previous format, an overall total was no longer provided, with complaints separated from other types of proceedings commenced. In 2006, the format was significantly revised again. From that year, data on the County Court was specifically stated to relate only to non-family proceedings, the proceedings commenced table has since then included an overall total, claims broken down into money, non-money and insolvency proceedings issued.⁵²³ Figures for the years 2000 onwards were included to show recent trends. However, the numbers given were not consistent with that given in earlier editions of the Judicial Statistics.⁵²⁴ It has not been possible to identify and strip out all family claims issued from the figures given in

professional fees'; 'moneylenders' claims (except under a mortgage); 'bank loans, by bank of finance house'; 'other claims for debts, e.g. income tax, dishonoured cheques, arrears of rent (excluding hire purchase)'; 'hire purchase, credit sale, conditional sale agreements. Money claims and/or return of goods'; 'return of goods other than under hire purchase'; 'breach of contract'; 'negligence – personal injuries'; and 'other torts'. 'Other torts' was discontinued after 1980, 'Nuisance, trespass, fraud, malicious proc., assault, conspiracy'; 'recovery of land' and 'miscellaneous' were added in 1981. In 1988, the categories relating to moneylenders, bank loans, other claims for debt, hire purchase and return of goods were changed to 'money claims under the Consumer Credit Act 1974'; 'other claims for debt, e.g. income tax, dishonoured cheques, arrears of rent (not consumer credit)'; 'return of goods claims under the Consumer Credit Act 1974 (incl HP)'; and 'return of goods other than under Consumer Credit Act 1974'. The value bands used were similarly altered several times as the jurisdictional limit of the County Court increased. However, the reports did not simply add in an extra band to reflect the new limit, but instead revised the existing breakdown, making it difficult to track trends in values of claims.

⁵²³ Money claims were further divided into specified and unspecified, with a third category of personal injury added in 2009. Non-money claims were broken down into mortgage and landlord possession, return of goods and other.

⁵²⁴ Additionally, figures were frequently revised in subsequent editions.

the Judicial Statistics prior to 2005 to make the earlier data correlate with the figures given in the current format.

3. Main Plaints entered in the County Court table

Unlike the other categories, this only contains one table, the 'Main Plaints Issued in County Courts', which was included in the Judicial Statistics between 1968 and 1981.

4. County Court proceedings commenced tables

This category is comprised of the 'County Courts: Proceedings Commenced' table between 1949 and 1974; the 'County Courts: Summary of All Proceedings Commenced' table 1974-1982; the 'Summary of Proceedings Commenced' table 1983-1993; the 'Summary of Proceedings Started' table 1994-2005; between 2006 and 2010 the data is from the 'Summary Statistics on Claims Issued' table and since 2011 the 'Claims Issued in the County and Magistrates' Courts' table. Until 1971, the same tables were provided for the Mayor's and City of London Court. The figures from the County Court and Mayor's and City of London Court proceedings commenced tables have been combined for the years 1949-1971.

5. Detail tables

The nature and number of the tables varied between different editions of the Judicial Statistics, depending on the legislation in force at the time. Individual tables were annotated to show that the figures on that particular proceeding were contained within those given on the County Courts proceedings commenced tables. The sum of the various proceedings issued in the detail tables does not equal any one or combination of types of proceedings contained in the proceedings issued table. Further, it is not clear to what extent Judicial Statistics accurately annotated the detailed tables in the main proceedings commenced table. By way of example, despite the heading of 'bankruptcy petitions' in the proceedings issued table, bankruptcy proceedings were not annotated. Finally, there was a lack of consistency as to which proceedings were said to be included in the proceedings commenced table. Proceedings were stated as not being included one year, yet included in the next years Judicial Statistics without any change in the comparative figure for the previous years' proceedings commenced. In the introduction to the County Court section of 1990 edition of the Judicial Statistics, it was noted that following a review of County Court statistics, less detailed information on County Court proceedings would be collected from that year and the detail tables were discontinued from that point onwards.⁵²⁵ Although this data could in

⁵²⁵ Lord Chancellor's Department, *Judicial Statistics, England and Wales for the year 1990* (Cm. 1573, 1991), p.38.

principle provide some further insight into the types of proceedings commenced in the County Court, the difficulties with reconciling it with the summary data on proceedings commenced meant it has not been possible to utilise it further.

County Court: cases disposed after trial

For example, in the 1972 Judicial Statistics, the 'Summary of Progress of Actions for Trial in County Courts' table gave a breakdown of actions disposed after trial by judge and registrar. The figures for cases disposed by judges and registrars were the same as the sum of the various types of cases disposed by judge and registrar respectively in the 'Actions for Trial and Disposed of' table. In the same edition, the total figure of proceedings disposed after hearing in the 'Business of the County Courts by Circuit' table was identical to the sum of all the different types of trial disposals given in the 'Actions for Trial and Disposed of' table. However, the figures given in the 'County Courts: Summaries' table for 'judgments on hearing' did not correspond with the numbers given in the 'Actions for Trial and Disposed of' table for cases disposed after trial. In the latter, additional statistics were provided for actions determined 'by consent' and 'in default of appearance'. When the numbers for these actions were added to those for cases disposed after trial by judge and registrar, the numbers in the two tables matched. This larger total also corresponded to the figure given in the 'Business of the County Courts by Circuit' table for the total number of cases heard. This implies that there is a distinction between hearings and disposals after trial. Because the focus of this project is the vanishing trial, the figures I used for the County Court were drawn from those in the 'Actions for Trial and Disposed of' table which specifically related to disposals after trial.

County Court: Small Claims statistics

In the 'Number of Judgments Entered showing by whom Tried and Type of Trial' table, included in the Judicial Statistics between 1974 and 1982, the distinction between cases disposed by judges and registrars was maintained, each with a breakdown by value bands and for 'non-money' cases. Figures were also provided from cases disposed by arbitration, showing whether by judge, registrar or 'other person'. From 1983, the 'County Courts: Judgments: Judgments Entered' table only provided the total number of trials and arbitrations by judges and registrars. From 1978, additional tables were included for judges and registrars, showing the breakdown of trials and arbitrations by value for each. Both the judgments entered and the specific judges/registrar tables were discontinued from 1990.

Between 1983 and 1992, the 'County Courts: Proceedings Disposed of by Trial or Arbitration by Circuit' provided totals for trials and arbitrations, as well as a breakdown by circuit. This was replaced by the 'Proceedings Disposed of by Trial or Arbitration by Circuit' in 1993, which was included in the Judicial Statistics until 1998 and, other than the name, was identical to the previous version.

The breakdown by circuit continued to be included until 2005. Additionally, tables on the numbers of parties to trials who were funded by legal aid, the number of trials by award value bands and the number of cases settling before or during trial were included between 1995 and 2005, all by subject matter.

Queen's Bench Division: Prerogative and General Proceedings

Between 1949 and 1973, this data was obtained from the 'Courts of First Instance – Proceedings' table and between 1974 and 1981, from the 'Courts of First Instance – Summary of Proceedings Commenced' and 'High Court – Number of Proceedings Commenced' tables. Prerogative proceedings were not included on the 'High Court – Number of Proceedings Commenced' summary table between 1974 and 1976. They will be discussed later as part of 'judicial review', I did not include them within the figures for proceedings issued or disposed of in the QBD generally.

Queen's Bench Division: Admiralty Writs

The number of Admiralty Writs issued in District Registries was only specified in the Judicial Statistics from 1962. In the same year, a figure for 'proceedings transferred from District Registries' was introduced into the main table that was identical. It seemingly represented the same cases based on the figure provided in the summary. Prior to this year, we calculated the number by subtracting the number of divorce proceedings issued in District Registries from the figure provided for Admiralty General Proceedings commenced in District Registries. There is an issue that in both 1969 and 1971 the figures for the writs issued in the District Registries were excluded from the summary total. For consistency, I included them in our data for those years.

Queen's Bench Division: Royal Courts of Justice and District Registries

Prior to 1974, data on writs issued in London was contained in the 'High Court of Justice – King's Bench Division – General Proceedings' and 'High Court of Justice – Queen's Bench Division – General Proceedings' tables, which also had an entry for 'proceedings transferred from District Registries and proceedings removed to the High Court from inferior courts'. From 1953, this latter entry was broken down into 'proceedings transferred from District Registries' and 'proceedings removed to Supreme Court from inferior courts'. However, in the comparative table provided in the 1953 Judicial Statistics, numbers for each of these proceedings do not match the single figure provided in the 1952 Judicial Statistics either combined or individually. Statistics on general proceedings in District Registries were provided in the 'High Court of Justice – District Registries – General Proceedings' and 'High Court of Justice – District Registries – General Proceedings' tables, which gave a breakdown of proceedings by Division of the High Court. Whilst it is not specified, the proceedings transferred to the District Registries were presumably included within the figure relating to the District Registries and I did not count them as additional proceedings issued. From 1974 to 1981, writs issued in both London and District Registries were contained as separate entries on a single table within the QBD section of the Judicial Statistics. From 1982, the only entries were for writs issued in London and District Registries.

Chancery Division: proceedings at first instance

Between 1949 and 1973, the 'Courts of First Instance – Proceedings' table contained a total for the Chancery Division, as well as sub-totals for Companies Court and bankruptcy proceedings. Until 1971, contentious probate was included in that table, as part of the Probate, Divorce and Admiralty Division. Between 1972 and 1973, it was moved into the figures for the Chancery Division. The same table contained separate entries for the Patents Appeal Tribunal and the Palatine Chancery Courts of Lancaster and Durham. From 1974 to 1981, the 'High Court – Number of Proceedings Commenced' table included a total for the Chancery Division, with a breakdown for Companies Court and Bankruptcy. Probate was included in this table under the Chancery Division only between 1974 and 1975. Between 1979 and 1981, the Patents Court was included as part of the Chancery Division. The Palatine Chancery Courts were also included in this table, although not under the Chancery Division.

Also between 1974 and 1981, the 'Other Courts and Tribunals – Number of Proceedings Commenced' table included proceedings commenced in the Patents Appeal Tribunal.

Chancery Division: Judicial Statistics summary tables

In the 1981 Judicial Statistics, there was a separate table showing the breakdown of writs and originating summonses in and outside London, the 'Writs and Originating Summonses – Number Commenced' table, renamed as the 'High Court – Chancery Division: Writs and Originating Summonses' table in 1982. From the 1983 Judicial Statistics, this breakdown was instead included in the general Chancery Division summary table.

From 1986, Companies Court proceedings issued in this table have been divided into those issued inside and outside London.

From the 2007 Judicial Statistics, there have been two entries on this table concerning bankruptcy – 'petitions' and 'other originating applications'.

Between 1974 and 1981, this data was contained in the 'Number of Proceedings Commenced' table. In 1982, the table was renamed the 'High Court – Chancery Division: Number of Proceedings Commenced'. That changed to the 'High Court – Chancery Division: Summary of Certain Proceedings Commenced' table in 1983 and the 'High Court – Chancery Division: Summary of Proceedings Commenced' table between 1986 and 1992. During the same years, the 'High Court – Chancery Division: Summary of Proceedings Commenced in Selected Years' table was also included which provided data on proceedings issued for selected years from 1938. In 1993, the summary data was included in the 'Chancery Division: Summary of Proceedings Commenced' table. Since 1994, the table has been called the 'Chancery Division: Summary of Proceedings Started' table.

Chancery Division: proceedings issued in the Royal Courts of Justice

For proceedings issued in The RCJ, I collected data from the 'High Court of Justice – Chancery Division – Writs Issued and Other Proceedings Commenced' table for 1949-1967 and the 'Supreme Court of Judicature – Chancery Division – Writs Issued and Other Proceedings Commenced' table 1968-1973. For Chancery writs issued in District Registries, the data was obtained from 'High Court of Justice – District Registries – General Proceedings' between 1949 and 1967 and the 'Supreme Court of Judicature – District Registries – General Proceedings' between 1968 and 1973. In a couple of editions of the Judicial Statistics there

was a slight discrepancy between the sum of writs in the RCJ and District Registries and the figure in the 'Courts of First Instance – Proceedings' table, excluding Companies Court and bankruptcy proceedings, but the difference was very small (the figures from the two writs tables were 8 greater in the 1967 edition and 21 fewer in the 1973 edition).

Chancery Division: Writs and Originating Summonses by subject matter

Since 1975, the proceedings have been divided into categories. Initially, these were: 'land and property'; 'trusts and trustees'; 'wills and probates'; 'business, trade and industry' and 'miscellaneous'. 'Other applications' was added in 1982 and the 'miscellaneous' category removed in 1984. In 1992, the main categories were revised to: 'land'; 'business and industry'; 'intellectual property'; 'professional negligence'; 'trusts, wills and probate'; 'other'. 'Contract' was added in 2010, since when the categories have remained constant.

Chancery Division: Originating Proceedings in Bankruptcy and the Companies Court

Statistics for originating proceedings in bankruptcy were contained in the Judicial Statistics in the 'High Court of Justice – Chancery Division – Bankruptcy – Originating Proceedings' table 1949-1967; the 'Supreme Court of Judicature – Chancery Division – Bankruptcy – Originating Proceedings' table between 1968 and 1973; the 'Number of Originating Proceedings' table from 1974-1981; the 'High Court – Chancery – Bankruptcy: Number of Originating Proceedings' 1982-1986; 'High Court – Chancery – Insolvency (Bankruptcy): Number of Originating Petitions Issued' between 1987 and 1992; 'Chancery Division – Bankruptcy: Originating Petitions Issued' between 1993 and 2005; the 'Chancery Division: Bankruptcy Petitions Issued' table 2006-2007 and the 'Chancery Division: Originating Proceedings in Bankruptcy Court' from 2008. Figures for bankruptcy notices were contained in the tables between 1949 and 1986. However, the Chancery Division only included bankruptcy petitions, so notices have not been included in the figures I collected for proceedings issued. Between 1949 and 1982, petitions were broken down into by 'creditors', 'debtors' and 'legal representatives'. From 1983, the latter two headings have been collapsed into a single category of 'debtors and legal representatives of deceased debtors'.

Data on originating proceedings issued in the Companies Court was contained in the 'High Court of Justice – Chancery Division – Companies Court – Originating Proceedings' table up

to 1967, with proceedings broken into two main categories, 'Companies Act 1948' and 'chancery proceedings', the former changed to 'liquidation proceedings' in 1958. Between 1968 and 1973, the report was named the 'Supreme Court of Judicature – Chancery Division – Companies Court – Originating Proceedings'. It was changed in 1974 to the 'Companies Court – Number of Originating Proceedings' table, in 1976 to 'Companies Court – Number of Originating Proceedings in London', again in 1982 to 'High Court – Chancery – Companies Court: Number of Originating Proceedings in London', in 1993 to 'Chancery Division – Companies Court: Summary of Proceedings' and in 2006 to 'Chancery Division: Summary of Companies Court Proceedings, London'. In 1987, the categories of proceedings were amended to 'Insolvency Act 1986'; 'Companies Act 1985'; 'Companies Directors Disqualification Act 1986' and 'Insurance Companies Act 1982'. Since 1992, the only breakdown of proceedings issued has been 'winding up petitions' and 'other petitions'. From 1975, data was also provided on the number of petitions for winding up outside London, although no for other types of Companies Court proceedings. This data was contained in the 'Companies Court – Number of Petitions for Winding Up by the Court Presented at Centres outside London' table between 1975 and 1981. From 1982 the table was renamed to 'High Court – Chancery – Companies Court: Number of Petitions for Winding Up by the Court Presented at Centres outside London', and again in 1993 to 'Chancery: Trends in Company Winding-Up and Bankruptcy Petitions Filed in the High Court and County Courts'. Since 2006, this latter table has no longer appeared in the Judicial Statistics.

Chancery Division: Contentious Probate

Between 1949 and 1968, data on contentious probate was included in the 'High Court of Justice – Probate, Divorce and Admiralty Division – Probate – Contentious Probate' table. From 1969 to 1971, in the 'Supreme Court of Judicature – Probate, Divorce and Admiralty Division – Probate – Contentious Probate' table and between 1972 and 1973, in the 'Supreme Court of Judicature – Chancery Division – Probate – Contentious Probate' table.

Courts of First Instance: proceedings table

The 'Courts of First Instance – Proceedings' table also included entries for the Palatine Chancery Courts of Lancaster and Durham and the Parents Appeal Tribunal separate to the Chancery Division, with the figures provided matching those given in specific tables relating to those courts and tribunals. Although the Palatine Chancery Courts continued to be included in the Courts of First Instance summary table until 1973 because it also included

historical comparative data covering years in which those courts were in operation, the 'Courts of Chancery of the County Palatine of Lancaster and Durham', which contained more in-depth information on the number of proceedings commenced and disposed of in those courts, was discontinued in the Judicial Statistics from the 1972 edition following their abolition. Data on patents proceedings commenced was consistently reported in the Courts of First Instance table under the 'Patents Appeal Tribunal' up to 1973. However, the table specifically on the tribunal was amended to the 'Patents Appeal and Registered Designs Appeal Tribunal' in the 1954 Judicial Statistics.

Location of data

Data on other types of proceedings can be found in a wide range of places, depending on the proceeding in question. For ombudsmen actions, there are the ombudsmen reports. Tribunal data can be found in the Judicial Statistic Reports, the Reports of the Council on Tribunals and, more recently, on the Ministry of Justice website. Reports are available relating to individual inquiries. There is a wide variety of complaints procedures; consequently, in-depth analysis of these would require examination of procedures from each government department.

Judicial Review: statistics and consistency

A further problem regarding judicial review is that what data is provided is not consistent over time. Until 1980, it was in the form of applications for each of the three prerogative writs granted and refused by single judges and the divisional court, with sub totals for each, same for orders. In 1981, data was provided for judicial review applications granted and refused and then orders granted and refused by single judge/divisional court. Solely in 2000, data on lapsed applications was specifically identified. Data on withdrawals was included from 1981, although the first time any occurred was not until 1988. From 2011, the figures were only for total number of applications by subject, no breakdown by granted/refused and nothing on disposal or withdrawals, although this has been possible to obtain from the MoJ spreadsheets.

Judicial Review: data 2000-2010

The data on cases between 2000 and 2010 differs in the current spreadsheet format to that given in editions of the annual Judicial Statistics Reports relating to those years. For each of those years, the data presented here has been taken from the spreadsheet versions. Further,

the most recent editions of the spreadsheet only contain data back to 2007. Data from the 2017 q3 edition has been used for all cases between 2000 and 2006, with the 2018 q3 spreadsheet data used for all cases from 2007 to 2017 to ensure the most up to date information was included for the more recent cases.

Judicial Review: claimants by defendant body

This file is separate from the one containing case progression data by subject. Although it is possible in some circumstances to identify the defendant body from the subject matter, such as the Home Office as the defendant in immigration cases, this is not always the case. It is not therefore possible to correlate subject matter data with defendant body from the available data completely accurately and so this has not been attempted.

Judicial Review: data for applications

Data for applications for judicial review is for those in the Queen's Bench Division 1981-1999; the Administrative Court 2000-2017 and the Upper Tier of the Immigration and Asylum Chamber tribunal 2013-2017. The figures for the civil courts are the sum of proceedings initiated in the Queen's Bench Division; the Chancery Division and the County Court. As highlighted in Chapter 2, the figures presented for each of these courts include not only proceedings in those courts themselves, but also for courts falling under their jurisdiction and courts whose jurisdiction was transferred into any of them within the date range of this project. In this respect, the County Court include Mayor's and City of London Court. The Queen's Bench Division includes data on admiralty proceedings, the Commercial Court, the Official Referees Court and the Technology and Construction Court. The Chancery Division includes statistics for Companies Court, Bankruptcy Court, Patents Court and its predecessors the Patents Appeal Tribunal and Registered Designs Appeal Tribunal, the Courts of Chancery of the Counties Palatine of Lancaster and Durham and contentious probate proceedings.

Westlaw topics

The twenty six topics in Westlaw are: commercial, companies and partnerships, contract, crime, data and communications, employment and work, environment, equality and human rights, family, finance, health and social welfare, insolvency, intellectual property, international, land, litigation and dispute resolution, local government, planning and construction, public and constitutional law, social regulation, tax, torts, transport and

shipping, trusts and personal property, unclassified. As an example, public and constitutional law is constituted of the following sub-topics: administrative law, armed forces, BREXIT, constitutional law, constitutional law Northern Ireland, constitutional law Wales, crown and government, ecclesiastical law, elections and referendums, immigration, judicial review, legislation, nationality, national security, parliament, political parties, public finance, public order, public procurement. In Westlaw, judicial review is broken into costs, grounds for review, parties, procedure and remedies.

Judicial Review: applications for permission to apply

Prior to 1981, this is the sum of the applications for prerogative writs (certiorari, mandamus and prohibition). From 1981 to 1999, this is the number of judicial review applications received by the Queen's Bench Division of the High Court. From 2000 to 2012, this is the number of applications for judicial review received by the Administrative Court. Since 2017, this is the total of the applications for judicial review received by the Administrative Court and the Upper Tier Immigration and Appeals Tribunal (UTIAC), excluding those transferred from the Administrative Court to the UTIAC to avoid double counting.

Appendix 2

Table in Judicial Statistics	Data on		Years in Judicial Statistics
	Claims Issued	Disposed after Trial	
County Court			
Courts of First Instance – Proceedings	✓		1949-1973
County Courts: Proceedings Commenced	✓		1949-1973
County Courts: Actions for Trial and Disposed of		✓	1949-1973
County Courts: Detail Tables	✓	✓	1949-1989
County Courts: Summaries	✓	✓	1949-1973
Summary of Progress in Proceedings in County Courts	✓	✓	1968
County Court Proceedings Related to Size of Population	✓		1968
Main Plaints Issued in County Courts	✓		1968-1981
Summary of Progress of Proceedings in County Courts		✓	1969
Volume of Civil Proceedings Commenced			1969-1978
Summary of Progress of Actions for Trial in County Courts		✓	1970-1973
The Business of the County Courts by Circuit	✓	✓	1972-1973
County Courts: Cases in the Judge’s List		✓	1974-1977
County Courts: Number of Judgments Entered		✓	1974-1981
Courts of First Instance – Summary of Proceedings Commenced	✓		1974-1981
County Courts – Number of Plaints Entered, Judgments Made, etc.	✓	✓	1974-1981
County Courts: Actions or Matters Entered where the Claims were not in Respect of Sums of Money	✓		1974-1981
County Courts: Actions Entered for the Recovery of Sums of Money or Value	✓		1974-1981
County Courts: Summary of All Proceedings Commenced	✓		1974-1982
County Courts: The Number of Actions Commenced by Plaintiff and Disposed of by Trial According to Circuit	✓	✓	1974-1989
County Courts: Number of Judgments Entered showing by whom Tried and Type of Trial		✓	1974-1982
County Courts: Number of Judgments given by Judges		✓	1978
County Courts: Number of Judgments given by Registrars		✓	1978
County Courts: Miscellaneous Proceedings		✓	1978-1981
County Courts: Trials: Number of Judgments given by Judges		✓	1979-1981
County Courts: Trials: Number of Judgments given by Registrars		✓	1979-1981
County Courts: Proceedings Commenced – Other than Money Plaints	✓		1982
County Courts: Proceedings Commenced – Money Claims	✓		1982
County Courts: Judgments: Number of Judgments Entered		✓	1982
County Courts: References and Appointments		✓	1982
County Courts: Judgments: Trials and Arbitrations: Number of Judgments given by Judges		✓	1982-1989
County Courts: Judgments: Trials and Arbitrations: Number of Judgments given by Registrars		✓	1982-1989
County Courts: Trends in Number of Plaints Entered, Judgments Made, etc.	✓	✓	1982-1989
County Courts: Proceedings Disposed of by Trial or Arbitration by Circuit		✓	1983-1992
County Courts: Plaints Entered	✓		1983-1989
County Courts: Judgments: Judgments Entered		✓	1983-1989
County Courts: Arbitrations and Assessments		✓	1983-1989
County Courts: Summary of Proceedings Commenced	✓		1983-1992
County Courts: Main Proceedings Commenced by Circuit	✓		1983-1992
County Courts: Trends in Number of Plaints Entered, Judgments Summonses and Warrants of Execution	✓	✓	1990-1992

Table in Judicial Statistics	Data on		Years in Judicial Statistics
	Claims Issued	Disposed after Trial	
County Court (continued)			
Summary of Proceedings Commenced	✓		1993
Plaints Entered and Warrants of Execution Issued	✓		1993-1998
Proceedings Disposed of by Trial or Arbitration by Circuit		✓	1993-1998
Main Proceedings Commenced by Circuit	✓		1993-2004
Proceedings Disposed of by Arbitration, by Nature of Claim and by Circuit		✓	1994
Default Actions: Summonses Issued by the Summons Production Centre	✓		1994-1998
Summary of Proceedings Started	✓		1994-2005
Trials Disposed of by Type of Judge and Nature of Claim		✓	1995-1997
Trials Disposed of by Nature of Claim and Amount of Award		✓	1995-1997
Trials by Nature of Claim and whether Legal Aid Granted		✓	1995-2002
Actions Set Down for Trial, Disposed of and Results by Nature of Claim		✓	1995-2005
Arbitrations Heard by Nature of Claim, Type of Plaintiff and Defendant		✓	1998
Arbitrations Heard by Nature of Claim and Award		✓	1998
Trials Disposed of by Amount of Award and Nature of Claim		✓	1998-2005
Trials Disposed of by Type of Judge and Average Length of Hearing, by Nature of Claim		✓	1998-2005
Proceedings Disposed of by Trial or Small Claim by Circuit		✓	1999-2003
Proceedings Disposed of by Small Claim, by Nature of Claim and by Circuit		✓	1999-2004
Default Actions: Claims Issued by the Claim Production Centre	✓		1999-2005
Claims Issued and Warrants of Execution Issued	✓		1999-2005
Small Claims Heard by Nature of Claim, Type of Claimant and Defendant		✓	1999-2005
Small Claims Heard by Nature of Claim and Award		✓	1999-2005
Trials by Nature of Claim and whether Civil Funding Granted		✓	2003-2005
Proceedings Disposed of by Trial or Claim Hearing by Circuit		✓	2004
Proceedings Disposed of by Trial or Claim Hearing by Region		✓	2005
Main Proceedings Started by Region	✓		2005
Proceedings Disposed of by Small Claim, by Nature of Claim and by Region		✓	2005
Summary Statistics on Claims Issued	✓		2006-2010
Summary Statistics on Claims Issued by HMCS Area	✓		2006-2010
Summary Statistics for Other Non-“Money” Claims Issued	✓		2006-2010
Summary Statistics on Other Non-“Money” Claims Issued by HMCS Area	✓		2006-2010
“Money” Claims Issued for a Specified Amount	✓		2006-2010
“Money” Claims Issued for an Unspecified Amount	✓		2006-2010
Number of Trial and Small Claims Hearings		✓	2006-2010
Small Claims Hearings, by Claim Type		✓	2006-2010
Fast and Multi-Track Trials, by Claim Type		✓	2006-2010
County Court Activity	✓	✓	2011-2017
Claims Issued in the County and Magistrates’ Courts	✓		2011-2017
Judgments and Outcomes in the County Courts		✓	2011-2017
Number of Trials and the Average Time to Reach Trial		✓	2011-2017

Table in Judicial Statistics	Data on		Years in Judicial Statistics
	Claims Issued	Disposed after Trial	
Mayor’s and City of London Court ⁵²⁶			
Courts of First Instance – Proceedings	✓		1949-1973
Other Courts and Tribunals – Number of Proceedings Commenced	✓		1974-1981
Mayor’s and City of London Court: Proceedings Commenced	✓		1949-1971
Mayor’s and City of London Court: Actions for Trial and Disposed of		✓	1949-1971
Mayor’s and City of London Court: Detail Tables	✓	✓	1949-1971

Figure A2.1: Sources of data for the County Court, showing years each table was included in the Judicial Statistics and whether it contained statistics on proceedings commenced, disposed of after trial, or both.

⁵²⁶ This is a County Court, but with special jurisdiction.

Appendix 3

Detail Table	County Court	M&CoLC
Actions in Tort between husband and wife	1962-1967	
Admiralty	1949-1973, 1982-1987	1949-1971
Adoption	1950-1973	1950-1971
Adoption of Children Act 1926	1949	1949
Bankruptcy	1949-1973, 1982-1987	
Caravan Sites Act 1968	1968-1982	
Coal Mining (Subsidence) Act 1950	1951-1956	1951-1956
Coal Mining (Subsidence) Act 1957	1957-1962	1957-1971
Companies Act	1949-1973, 1982	
County Court Rules, Order 24, Part I	1982-1989	
County Court Rules, Order 24, Part II	1982-1989	
County Court Rules, Order 26, Part I	1974-1981	
County Court Rules, Order 26, Part II	1974-1981	
Courts (Emergency Powers) Act 1943	1949-1950	1949-1950
Criminal Justice Act 1967, s 45	1968-1973	
Employers' Liability Act	1949	1949
Equity	1949-1982	1949-1971
Guardianship of Infants	1950-1971	1950-1971
Guardianship of Infants Acts 1886 and 1925	1949	1949
Guardianship of Minors	1972-1973	
Hire Purchase Act 1938	1949-1958	1949-1958
Hire Purchase Acts 1938-1954	1959-1964	1959-1971
Hire Purchase Acts 1938-1965	1965-1976	
Housing Acts		1959-1971
Housing Act 1936	1949	1949
Housing Act 1957, the Housing (Financial Provisions) Act 1958 and the House Purchase and Housing Act 1959	1959-1962	
Housing Acts 1936 to 1949 and 1957 and the Housing Repairs and Rents Act 1954, Part I	1957	
Housing Acts 1936 to 1949 and the Housing Repairs and Rents Act 1954, Part I	1954-1956	
Housing Acts 1936 to 1949	1950-1953	1950-1956
Housing Acts 1936 to 1957		1957-1958
Housing Acts 1949 and 1957 and the Housing (Financial Provisions) Act 1958	1958	
Housing Acts 1957 to 1961, the Housing (Financial Provisions) Act 1958 and the House Purchase and Housing Act 1959	1963-1964	
Housing Acts 1957-1964	1965-1969	
Housing Acts 1957-1969	1970-1976	
Housing Acts 1957-1975	1977-1982	
Housing Finance Act 1972	1974-1976	
Housing Repairs and Rents Act 1954, Part II	1954-1956	
Income Tax Management Act 1964	1968-1973	1968-1971
Increase of Rent and Mortgage Interest (Restrictions) Acts	1949-1956	
Inheritance (Family Provision Act 1938, s 1)	1968-1973	
Insolvency (Companies)	1987	
Insolvency Act 1976	1982-1986	
Insolvency Act 1986	1987	
Landlord and Tenant (Temporary Provisions) Act 1958	1958-1961	
Landlord and Tenant (War Damages) Acts 1939 and 1941	1949-1960	1949-1961
Landlord and Tenant Act 1927	1949-1954	1949-1954

Detail Table	County Court	M&CoLC
Landlord and Tenant Act 1954	1975-1989	
Landlord and Tenant Acts 1927 and 1954	1954-1974	1955-1971
Law Reform (Miscellaneous Provisions) Act, s 2(2)	1972-1973	
Leasehold Property (Repairs) Act 1938	1954-1974	
Leasehold Property (Temporary Provisions) Act 1951	1951-1962	1951-1971
Leasehold Reform Act 1967	1968-1982	
Legal Aid and Advice Act 1949	1969	
Legitimacy	1950-1973	1950-1971
Legitimacy Act 1926	1949	1949
Liabilities (War-Time Adjustment) Acts 1941 and 1944	1949-1950	1949-1950
Lunacy Act 1890	1949-1958	1949-1958
Maintenance Orders Act 1958	1967-1971	
Married Women's Property Act 1882, s 17	1959-1969, 1971-1973	
Matrimonial Causes Act 1965, s 26	1968-1973	
Matrimonial Homes Act 1967	1968-1973	
Matrimonial Proceedings and Property Act 1970, s 39	1972-1973	
Mental Health Act 1959	1960-1973	
Mobile Homes Act 1975	1976-1982	
Probate (County Courts Act 1934, ss 60 and 61)	1949-1958	
Probate (County Courts Act 1959, ss 62 and 63)	1959-1973	
Protection from Eviction Act 1964 and Rent Act 1965	1965	
Race Relations Act 1968	1969-1977	
Race Relations Act 1976	1977-1982	
Recovery of Land	1949-1989	1950-1971
Recovery of Land: Mortgage Possessions	1988-1989	
Recovery of Residential Premises	1978-1982	
Rent and Mortgage Interest (Restrictions) Acts		1949-1956
Rent Act 1965	1966-1967	
Rent Act 1977	1977-1989	
Rent Act 1977 and the Rent (Agricultural) Act 1976	1977	
Rent Act 1977, Part VIII	1977-1979	
Rent Acts 1965 and 1968	1968-1973	
Rent Acts 1965 to 1974	1974-1976	
Rent, etc. Restrictions Acts 1920 to 1939 and the Rent Act 1957	1957-1967	
Rent, etc., Restrictions Acts 1920 to 1939 and the Rent Act 1957 (or the Rent Act 1968)	1968-1973	
Rent, etc., Restrictions Acts 1920 to 1939, the Rent Act 1957, the Rent Act 1965 and the Rent Acts 1968 and 1974 (Proceedings under Rent (County Court Proceedings) Rules 1970)	1974	
Rent etc., Restrictions Acts 1920 to 1939, the Rent Act 1957, the Rent Acts 1965, 1968 and 1974	1975-1976	
Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951	1951-1962	1951-1971
Sex Discrimination Act 1975	1977-1982	
Tithe Acts 1891, s 2 and 1936, s 16	1949-1974	1949-1971
Workmen's Compensation Acts	1949-1974	1949-1971

Figure A3.1: Detail tables for the County Court and Mayor's and City of London Court showing the years included in the Judicial Statistics.

Appendix 4

Table in Judicial Statistics	Data on		Years in Judicial Statistics
	Claims Issued	Disposed after Trial	
King's Bench Division			
Courts of First Instance – Proceedings	✓		1949-1951
High Court of Justice – King's Bench Division – General Proceedings	✓		1949-1951
High Court of Justice – District Registries – General Proceedings	✓		1949-1951
Queen's Bench Division			
High Court of Justice – Queen's Bench Division – General Proceedings	✓		1952-1967
High Court of Justice – District Registries – General Proceedings	✓		1952-1967
Courts of First Instance – Proceedings	✓		1952-1973
Volume of High Court Business Related to Size of Population	✓		1968-1971
Supreme Court of Judicature – Queen's Bench Division – Proceedings Commenced	✓		1968-1973
Supreme Court of Judicature – Queen's Bench Division – Actions for Trial			1968-1973
Supreme Court of Judicature – District Registries – General Proceedings	✓		1968-1973
Volume of Civil Proceedings Commenced	✓		1969-1978
Courts of First Instance – Summary of Proceedings Commenced	✓		1974-1981
High Court – Number of Proceedings Commenced	✓		1974-1981
Number of Proceedings Commenced	✓		1974-1981
Number of Writs Issued	✓		1974-1981
Actions for Trial by Circuit		✓	1975
Actions Set Down for Trial		✓	1974-1981
Number of Judgments after Trial		✓	1974-1975
Number of Judgments Showing Nature of Claim and Amount of Judgment		✓	1976, 1978-1981
Judgment after Trial: Number of Judgments Showing Nature of Claim and Amount of Judgment		✓	1977
High Court – Queen's Bench Division: Number of Proceedings Commenced	✓		1982-1992
High Court – Queen's Bench Division: Number of Writs Issued	✓		1982-1992
High Court – Queen's Bench Division: Actions Set Down for Trial: Number Set Down, Disposed of, and Results of Trial, by Nature of Claim		✓	1982-1992
High Court – Queen's Bench Division: Number of Judgments Made		✓	1982-1983
High Court – Queen's Bench Division: Proceedings Commenced	✓		1982-1992
High Court – Queen's Bench Division: Number of Court Judgments		✓	1984-1992
High Court – Queen's Bench Division: Actions Set Down for Trial: Cases Disposed of by Type of Plaintiff and Defendant, whether Legal Aid Granted and Nature of Claim		✓	1985-1992
Queen's Bench Division: Proceedings Commenced	✓		1993
Queen's Bench Division: Writs Issued	✓		1993-1998
Queen's Bench Division: Actions Set Down for Trial, Disposed of, and Results of Trial by Nature of Claim		✓	1993-2004
Queen's Bench Division: Actions Set Down for Trial and Disposed of by Type of Plaintiff and Defendant, whether Legal Aid Granted, and Nature of Claim		✓	1993-1998
Queen's Bench Division: Court Judgments Showing Nature of Claim and Amount of Judgment		✓	1993-2004
Queen's Bench Division: Proceedings Started	✓		1994-2005
Queen's Bench Division: Trial Hearings by Type of Judge and Nature of Claim		✓	1995-2004

Table in Judicial Statistics	Data on		Years in Judicial Statistics
	Claims Issued	Disposed after Trial	
Queen’s Bench Division (continued)			
Queen’s Bench Division: Claims Issued	✓		1999-2004
Queen’s Bench Division: Actions Set Down for Trial and Disposed of by Type of Claimant and Defendant, whether Legal Aid Granted, and Nature of Claim		✓	1999-2001
Queen’s Bench Division: Actions Set Down for Trial and Disposed of by Type of Claimant and Defendant, whether Civil Funding Granted, and Nature of Claim		✓	2002-2004
Queen’s Bench Division: Proceedings Started by Nature of Claim	✓		2005
Queen’s Bench Division: Summary Statistics on Proceedings Started	✓		2006-2017
Queen’s Bench Division: Proceedings Started by Nature and Value of Claim	✓		2006-2017
Queen’s Bench Division: Originating Receipts and Trials Concluded	✓	✓	2008-2017
Probate, Divorce and Admiralty Division (Admiralty Proceedings)			
High Court of Justice – District Registries – General Proceedings	✓		1949-1967
Courts of First Instance – Proceedings	✓		1949-1971
High Court of Justice – Probate, Divorce and Admiralty Division – Admiralty – Proceedings	✓	✓	1949-1971
High Court of Justice – District Registries – Admiralty Proceedings	✓	✓	1962-1968
Supreme Court of Judicature – District Registries – General Proceedings	✓		1968-1971
Volume of High Court Business Related to Size of Population	✓		1968-1971
Supreme Court of Judicature – District Registries – Admiralty Proceedings	✓	✓	1969-1971
Business in Admiralty Proceedings	✓	✓	1969-1971
High Court – Number of Proceedings Commenced	✓		1974-1975
Probate, Divorce and Admiralty Division: Admiralty Proceedings	✓	✓	1970-1971
Admiralty Court			
Courts of First Instance – Proceedings	✓		1972-1973
Division: Admiralty Proceedings	✓	✓	1972-1973
Supreme Court of Judicature – Queen’s Bench Division – Admiralty Court	✓	✓	1972-1973
Supreme Court of Judicature – District Registries – Proceedings Commenced	✓		1972-1973
Supreme Court of Judicature – District Registries – Admiralty Proceedings	✓	✓	1972-1973
Number of Proceedings Commenced	✓		1974-1975
Number of Actions Commenced	✓		1974-1981
Actions for Trial in the High Court		✓	1974-1981
High Court – Number of Proceedings Commenced	✓		1974-1981
Number of Proceedings	✓		1976-1981
High Court – Queen’s Bench Division – Admiralty: Number of Proceedings	✓		1982-1992
High Court – Queen’s Bench Division – Admiralty: Number of Actions Commenced		✓	1982-1986
High Court – Queen’s Bench Division – Admiralty: Number of Actions for Trial in the High Court Set Down, Tried or Otherwise Disposed of		✓	1982-1992
High Court – Queen’s Bench Division: Proceedings Commenced	✓		1982-1992
High Court – Queen’s Bench Division – Admiralty: Number of Writs Issued	✓		1987-1992
Queen’s Bench Division: Admiralty Proceedings	✓		1993-2005
Queen’s Bench Division: Admiralty Writs Issued	✓		1993-2005
Queen’s Bench Division: Admiralty Actions for Trial in the High Court Set Down, Tried or Otherwise Disposed of		✓	1993-2005

Table in Judicial Statistics	Data on		Years in Judicial Statistics
	Claims Issued	Disposed after Trial	
Admiralty Court (continued)			
Admiralty Court: Summary Statistics on Admiralty Proceedings	✓		2006-2017
Admiralty Court: Admiralty Claims Issued	✓		2006-2017
Admiralty Court: Admiralty Actions for Trial in the High Court Set Down, Tried or Otherwise Disposed of		✓	2006-2017
Official Referees Court			
High Court of Justice – Official Referees	✓	✓	1949-1973
Official Referees' Business	✓	✓	1974-1981
High Court – Official Referees' Business	✓	✓	1982-1992
Official Referees	✓	✓	1993
Official Referee's Business	✓	✓	1994-1997
Official Referees' Business	✓	✓	1998
Technology and Construction Court			
Technology and Construction Court Business	✓	✓	1999-2005
Technology and Construction Court: Summary Caseload Statistics	✓	✓	2006-2017
Commercial Court			
Disposal of Actions Set Down and Judgments		✓	1974-1975
Number of Judgments Made		✓	1974-1979
Number of Proceedings	✓		1976
Disposal of Actions Set Down for Trial		✓	1976
Commercial Court	✓	✓	1995-2002
Commercial Court: Claims Issued	✓		2003-2017
Others			
High Court – Number of Proceedings Commenced	✓		1976-1981
High Court – Queen's Bench Division: Proceedings Commenced	✓		1982

Figure A4.1: Sources of data for the Queen's Bench Division, showing years each table was included in the Judicial Statistics and whether it contained statistics on proceedings commenced, disposed of after trial, or both.

Appendix 5

Table in Judicial Statistics	Data on		Years in Judicial Statistics
	Claims Issued	Disposed after Trial	
Chancery Division			
High Court of Justice – Chancery Division – Writs Issued and Other Proceedings Commenced	✓		1949-1967
High Court of Justice – District Registries – General Proceedings	✓		1949-1967
Courts of First Instance – Proceedings	✓		1949-1973
Volume of High Court Business Related to Size of Population	✓		1968-1971
Supreme Court of Judicature – Chancery Division – Writs Issued and Other Proceedings Commenced	✓		1968-1973
Supreme Court of Judicature – District Registries – General Proceedings	✓		1968-1973
Volume of Civil Proceedings Commenced	✓		1969-1978
Volume of Business in the Chancery Division	✓		1972-1973
Chancery Proceedings Outside London – Originating Proceedings Commenced	✓		1972
Court of First Instance – Summary of Proceedings Commenced	✓		1974-1981
High Court – Number of Proceedings Commenced	✓		1974-1981
Number of Proceedings Commenced	✓		1974-1981
Writs and Originating Summonses	✓		1974-1980
Cases Set Down for Hearing in Main Lists in London		✓	1974-1981
Actions for Trial at Centres Outside London		✓	1974-1975
Cases Set Down for Trial in Centres Outside London		✓	1977
Writs and Originating Summonses – Number Commenced	✓		1981
Writs and Originating Summonses Showing Nature of Proceedings and Origin in London	✓		1981
High Court – Chancery Division: Number of Proceedings Commended	✓		1982
High Court – Chancery Division: Writs and Originating Summonses	✓		1982
High Court – Chancery Division: Writs and Originating Summonses Issued in London	✓		1982-1992
High Court – Chancery Division: Cases Listed in London, Set Down and Disposed of		✓	1982-1992
High Court – Chancery: Proceedings Commenced	✓		1982
High Court – Chancery Division: Summary of Certain Proceedings Commenced	✓		1983-1985
High Court – Chancery Division: Summary of Certain Proceedings Commenced in Selected Years	✓		1983-1985
High Court – Chancery Division: Cases Listed Outside of London, Set Down and Disposed of		✓	1985-1992
High Court – Chancery Division: Summary of Proceedings Commenced	✓		1986-1992
High Court – Chancery Division: Summary of Proceedings Commenced in Selected Years	✓		1986-1992
Chancery Division: Summary of Proceedings Commenced	✓		1993
Chancery Division: Writs and Originating Summonses Issued in London	✓		1993-2006
Chancery Division: Cases Listed in London, Set Down and Disposed of	✓		1993-2017
Chancery Division: Cases Listed Outside London, Set Down and Disposed of	✓		1993-2006
Chancery Division: Summary of Proceedings Started	✓		1994-2017
Chancery Division: Claims and Originating Proceedings Issued in London	✓		2006-2017

Table in Judicial Statistics	Data on		Years in Judicial Statistics
	Claims Issued	Disposed after Trial	
Companies Court			
High Court of Justice – Chancery Division – Companies Court – Originating Proceedings	✓		1949-1967
Courts of First Instance – Proceedings	✓		1949-1973
Supreme Court of Judicature – Chancery Division – Companies Court – Originating Proceedings	✓		1968-1973
High Court – Number of Proceedings Commenced	✓		1974-1981
High Court – Chancery Division – Number of Proceedings Commenced	✓		1974-1981
Companies Court – Number of Originating Proceedings	✓		1974-1975
Companies Court – Number of Originating Proceedings in London	✓		1976-1981
Companies Court – Number of Petitions for Winding Up by the Court Presented at Centres outside London	✓		1975-1981
High Court – Chancery – Companies Court: Number of Originating Proceedings in London	✓		1982-1992
High Court – Chancery – Companies Court: Number of Petitions for Winding Up by the Court Presented at Centres outside London	✓		1982-1992
High Court – Chancery: Proceedings Commenced	✓		1982
High Court – Chancery Division: Summary of Certain Proceedings Commenced	✓		1983-1992
Chancery Division: Summary of Proceedings Commenced	✓		1993
Chancery Division – Companies Court: Summary of Proceedings	✓		1993-2005
Chancery Division – Companies Court: Petitions for Winding-Up by the Court Presented at Centres outside London	✓		1993-2005
Chancery: Trends in Company Winding-Up and Bankruptcy Petitions Filed in the High Court and County Courts	✓		1993-1995
Chancery Division: Summary of Proceedings Started	✓		1994-2017
Chancery Division: Summary of Companies Court Proceedings, London	✓		2006-2017
Bankruptcy Court			
High Court of Justice – Chancery Division – Bankruptcy – Originating Proceedings	✓		1949-1967
Courts of First Instance – Proceedings	✓		1974-1973
Supreme Court of Judicature – Chancery Division – Bankruptcy – Originating Proceedings	✓		1968-1973
High Court – Number of Proceedings Commenced	✓		1974-1981
High Court – Chancery Division – Number of Proceedings Commenced	✓		1974-1981
Number of Originating Proceedings	✓		1974-1981
High Court – Chancery – Bankruptcy: Number of Originating Proceedings	✓		1982-1986
High Court – Chancery: Proceedings Commenced	✓		1982
High Court – Chancery Division: Summary of Certain Proceedings Commenced	✓		1983-1992
High Court – Chancery – Insolvency (Bankruptcy): Number of Originating Petitions Issued	✓		1987-1992
Chancery Division: Summary of Proceedings Commenced	✓		1993
Chancery Division – Bankruptcy: Originating Petitions Issued	✓		1993-2005
Chancery: Trends in Company Winding-Up and Bankruptcy Petitions Filed in the High Court and County Courts	✓		1993-1995
Chancery Division: Summary of Proceedings Started	✓		1994-2017
Chancery Division: Bankruptcy Petitions Issued	✓		2006-2007
Chancery Division: Originating Proceedings in Bankruptcy Court	✓		2008-2017

Table in Judicial Statistics	Data on		Years in Judicial Statistics
	Claims Issued	Disposed after Trial	
Probate, Divorce and Admiralty Division (Contentious Probate)			
High Court of Justice – Probate, Divorce and Admiralty Division – Probate – Contentious Probate	✓	✓	1949-1968
Courts of First Instance – Proceedings	✓		1949-1971
Volume of High Court Business Related to Size of Population	✓		1968-1971
Business in the Probate Division – Contentious Probate	✓	✓	1969
Supreme Court of Judicature – Probate, Divorce and Admiralty Division – Probate – Contentious Probate	✓	✓	1969-1971
Probate, Divorce and Admiralty Division – Contentious Probate Proceedings	✓	✓	1970-1971
High Court – Number of Proceedings Commenced	✓		1974-1975
Contentious Probate			
Supreme Court of Judicature – Chancery Division – Probate – Contentious Probate	✓	✓	1972-1973
Volume of Business in the Chancery Division	✓	✓	1972-1973
Courts of First Instance – Proceedings	✓		1972-1973
High Court – Number of Proceedings Commenced	✓		1974-1975
High Court – Chancery Division – Number of Proceedings Commenced	✓		1974
Court of Chancery of the County Palatine of Lancaster and Durham			
Courts of First Instance – Proceedings	✓		1949-1973
Courts of Chancery of the County Palatine of Lancaster and Durham	✓		1949-1971
High Court – Number of Proceedings Commenced	✓		1974-1975
Patents Appeal Tribunal			
Patents Appeal Tribunal	✓	✓	1949-1953
Courts of First Instance – Proceedings	✓		1949-1973
High Court – Number of Proceedings Commenced	✓		1974-1981
High Court – Chancery: Proceedings Commenced	✓		1982
High Court – Chancery Division: Summary of Certain Proceedings Commenced	✓		1983-1992
Patents Appeal and Registered Designs Appeal Tribunal			
Patents Appeal Tribunal and the Registered Designs Appeal Tribunal	✓	✓	1954-1978
Business of Tribunals – Summary	✓		1974-1978
Patents Court			
Number of Proceedings Commenced	✓		1979-1981
Patents Court (Incorporating Patents Appeal Tribunal and Registered Designs Appeal Tribunal) – Number of Proceedings	✓	✓	1979, 1981
High Court – Number of Proceedings Commenced	✓		1979-1981
Patents Court and Registered Designs Appeal Tribunal – Number of Proceedings	✓	✓	1980-1981
High Court – Chancery – Patents Court: Number of Proceedings	✓	✓	1982
High Court – Chancery: Proceedings Commenced	✓		1982
High Court – Chancery – Patents Court: Number of Appeals to the Court	✓	✓	1983-1992
High Court – Chancery Division: Summary of Certain Proceedings Commenced	✓		1983-1992
Chancery Division: Summary of Proceedings Commenced	✓		1993
Chancery – Patents Court: Appeals to the Court	✓	✓	1993-1994
Chancery Division: Summary of Proceedings Started	✓		1994-2017
Patents Court		✓	1995-2005

Figure A5.1: Sources of data for the Chancery Division, showing years each table was included in the Judicial Statistics and whether it contained statistics on proceedings commenced, disposed of after trial, or both.

Appendix 6

Table in Judicial Statistics	Data on		Years in Judicial Statistics
	Applications	Final Hearing	
Prerogative Writs			
High Court of Justice – King’s Bench Division – Prerogative Proceedings	✓	✓	1949-1951
Courts of First Instance – Proceedings	✓		1949-1973
High Court of Justice – Queen’s Bench Division – Prerogative Proceedings	✓	✓	1952-1967
Supreme Court of Judicature – Queen’s Bench Division – Prerogative Proceedings	✓	✓	1968-1973
Prerogative Orders	✓	✓	1968
High Court – Queen’s Bench Division – Prerogative Proceedings	✓	✓	1974-1981
High Court – Number of Proceedings Commenced	✓		1977-1981
High Court – Queen’s Bench Division: Order 53 Proceedings	✓	✓	1981
Judicial Review			
High Court – Queen’s Bench Division – Crown Office Matters: Applications for Leave to Apply for Judicial Review and Applications for Judicial Review Disposed of, and Results	✓	✓	1982-2000
High Court – Queen’s Bench Division – Administrative Court Matters: Applications for Permission to Apply for Judicial Review and Applications for Judicial Review Disposed of and Results	✓	✓	2001-2005
High Court – Queen’s Bench Division (Administrative Court Matters): Summary Statistics on Judicial Review Applications	✓	✓	2006-2010
Number of Case Applications for Permission to Apply for Judicial Review by Topic	✓		2011-2017
Case Progression	✓	✓	2011-2017
Number of Judicial Review Applications Lodged, Granted Permission to Proceed to Final Hearing and Found in Favour of the Claimant at Final Hearing, by Defendant Department or Public Body	✓	✓	2011-2017
Number of Case Applications for Permission to Apply for Judicial Reviews Lodged in the Administrative Court	✓		2013-2017

Figure A6.1: Sources of data for judicial, showing years each table was included in the Judicial Statistics and whether it contained statistics on applications for judicial review, final hearings, or both.

Appendix 7

Civil (Other)		
Other	Crown Court	Police (Civil)
Age Assessment	Disciplinary Bodies	Pollution
Agriculture & Fisheries	E.C.	Prisons
Animals	Education	Prisons (not parole)
Anti-Social Behaviour Order	Elections	Proceeds of Crime Act
Armed Forces	Employment	Public Contract Regulations 2006
Bail	Firearms	Public Funding and Grants
Bind Over	Food and Drugs	Public Health (Not Disciplinary matters)
Broadcasting	Family	Public Utilities (OFTEL etc.)
Bye-Laws	Children and Young Persons	Rates/Community Charge/ Council Tax
Caravans and Gypsies	Freedom of Information	Registered Homes
Care Standards	Health and Safety	Road Traffic
Care Proceedings	Highways	Social Security
Cart – Other	Homelessness	Solicitors Disciplinary Appeal Tribunal
Child Support	Housing	Solicitors Regulation Authority
Community Care	Housing Benefit	Statutory Nuisance
Companies	Inquiries	Tax
Consumer Protection	Jurisdiction (Crown Office)	Town and Country Planning
Contempt	Land	Trade and Industry
Coroners	Licensing	Transport – Not Road Traffic Accidents
Costs and Legal Aid (Civil)	Local Government	VAT
County Court	Magistrates Courts Procedure	Valuation Tribunal Appeals
Criminal Cases Review Commission	Mental Health	Vexatious Litigants
Criminal Injuries Compensation Authority	Parole	Welsh Devolution Issues

Figure A7.1: Topics within the Civil (Other) judicial review category.⁵²⁷

⁵²⁷ Ministry of Justice, A Guide to Civil and Administrative Justice Statistics (Ministry of Justice 2016), p.15 <<https://www.gov.uk/government/statistics/guide-to-civil-and-administrative-justice-statistics>> accessed 3rd November 2017, p.16. It was noted that 'Age Assessment' is categorised as Civil (Other) by default. Some cases might be Civil (Immigration and Asylum), but it is impossible to distinguish based on the information in the database. If an Age Assessment case is transferred to the UTIAC, it is reassigned to Civil (Immigration and Asylum).

Civil (Immigration and Asylum)		
Asylum Support	Immigration Asylum only	Citizenship
Asylum Fresh Claim	Immigration asylum fresh claim	Immigration Sponsor Licensing
Cart – Immigration	Immigration Detention	Immigration Declaration of Incompatibility
Fresh claim not mandatory transfer	Immigration legislation validity	Extradition Part 1
Human rights fresh claim	Immigration Not Asylum and Naturalisation	Extradition Part 2

Figure A7.2: Topics within the Civil (Immigration and Asylum) judicial review category.⁵²⁸

Criminal		
Cautions	Custody Time Limits	PACE
Committal for Trial and Sentence	Decision as to Prosecution	Public Order Act
Costs and Legal Aid (Criminal)	Drug Trafficking	Sentencing
Criminal Fine Enforcement	Evidence	Terrorism
Criminal Law (General)	Financial Penalties – Enforcement	Trade Descriptions

Figure A7.3: Topics within the Criminal judicial review category.⁵²⁹

⁵²⁸ id, pp.15-16. A note was included that discussions were underway as to whether Extradition Parts 1 and 2 would be better classified in a different, albeit unidentified, category.

⁵²⁹ id, p.16.

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