Are litigants, trials and precedents vanishing after all?

Keywords: vanishing trial, precedent, strategic litigation, interveners

Abstract

In recent years scholars have become increasingly concerned with the impact of the 'vanishing trial' on common law civil justice systems that rely heavily on precedent. This article updates previous accounts of the vanishing trial in England and Wales, showing that the rapid decline which prompted earlier debate has levelled off. This provides an essential backdrop to the discussion of the production of precedent which the article goes on to discuss. The final section of the article contests the assumption that vanishing trials lead to a decline in precedent, drawing on a collation and analysis of seventy years of government data on civil litigation cases. It shows that, despite contra-predictions, the number of appellate court judgments has increased while cases coming into the system and proceeding to trial have decreased. Further, it considers what House of Lords and Supreme Court data reveal about demand for precedent and the sort of cases that are taking up a greater proportion of Supreme Court time in the twenty first century.

INTRODUCTION

Lawyers in common law jurisdictions rarely doubt the importance of judicial precedent. The radiating effect of appeals on the legal system and wider society takes a number of forms which include the transparent evolution of case law, the prompting of public debate, and the creation of predictable rules that allow prospective litigants to bargain in the shadow of the law. The significance of the latter allows us to see the private or problem-solving function of the courts and the public interest in adjudication as symbiotic;[1] creating a 'virtuous circle' in which litigation is needed to produce case law, and case law is necessary to help individuals avoid litigation.[2] However, while the value of precedent is widely acknowledged, it is striking that so little debate or quantitative analysis in the UK has focused on how precedent comes into being or indeed the ways in which precedent-setting is avoided.[3] Commentators rarely discuss whether we have too little or too much precedent.[4] Nor have they considered the possibility that certain types of legal problems are over-represented in the decisions of the appeal courts while others are under-represented. We regularly refer to precedent as 'judge-made' law without reference to the litigants who determine what issues are offered up to the appellate courts for determination. This article hopes to go some way to addressing some of these issues.

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1 On this point see further L. Mulcahy, 'The Collective Interest in Private Dispute Resolution' (2013) 33 OJLS 59.

2 W.M. Landes and R.A. Posner, 'Adjudication as a Private Good' (1979) 8 JLS 235. But see W.M.C. Weidemaier, 'Toward a Theory of Precedent in Arbitration' (2010) 51 Wm & Mary LRev 1894.

3 On this point see B.M. Atkins, 'Party Capability Theory as an Explanation for Intervention Behavior in the English Court of Appeal' (1991) 35 AJPS 881; B. Atkins, 'Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States' (1990) 24 L & Soc Rev 771; D. Robertson, 'Judicial Ideology in the House of Lords: a Jurimetric Analysis' (2009) 12 BJPolS 1.

4 But see D. Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83 Geo LJ 2619.

These matters are of particular importance when viewed in the context of contemporary concerns about the 'vanishing trial'. It has long been the case that only a small percentage of disputes that enter the civil litigation system are resolved by way of trial, but in recent years scholars have begun to draw attention to what is generally considered to be an alarming decline in the occurrence of court-based adjudication. Since the first account of this phenomenon was published in the US in 2004 [5] there has been a burgeoning of interest in the field,[6] and a number of researchers have now charted the extent to which North-American trends are being replicated elsewhere.[7] Various reasons for the reduction in trials have been given, including increasing costs, more proactive management of cases by judges, and the growth of arbitration and mediation. Most significantly for the purposes of this article, debate has given rise to widespread anxiety that fewer trials will result in less judicial precedent being produced.[8] In recent years the former Lord Chief Justice Lord Thomas has initiated a

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5 But see J. Lande, ''The Vanishing Trial' Report: An Alternative View of the Data' (2004) 10 Disp Resol Mag 19. 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' (2005) 6 Cardozo J Conflict Resol 191.

6 See further (2004) JELS 1(3, November) and [2006] J Disp Resol 1.

7 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. For a discussion of the Netherlands, see C.K. Haarhuis and B. Niemeijer, 'Vanishing or Increasing Trials in the Netherlands?' [2006] J Disp Resol 71.

8 H. Genn, 'Why the Privatisation of Civil Justice is a Rule of Law Issue' (36th F A Mann Lecture, Lincoln's Inn, 19 November 2012), at https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/36th_f_a_mann_lecture_19.11.12_professor_hazel_genn.pdf (last visited 2 March 2012); K.K. Kovach, 'The Vanishing Trial: Land Mine on the Mediation Landscape or Opportunity for Evolution:

controversial debate in which he expressed concerns about the English and Welsh courts' loss of business to arbitration and the resulting paucity of precedent in the field of commercial law.[9] His view that the development of the common law is being hindered has been supported by Sir Bernard Rix. who has argued that the senior judiciary are losing sight of the basic feedstock of English commercial law.[10]

Ruminations on the Future of Mediation Practice' (2005) 7 Cardozo J Conflict Resol 27; B.E. Meyerson, 'The Dispute Resolution Profession Should Not Celebrate The Vanishing Trial' (2005) 7 Cardozo J Conflict Resol 77; F.N. Smalkin and F.N.C. Smalkin, 'The Market for Justice, the "Litigation Explosion", and the "Verdict Bubble": A Closer Look at Vanishing Trials' (2006) 1 Fed Cts LRev 417. But see also T.J. Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"' (2004) 1 JELS 843.

[9] See, for instance, The Right Hon The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, 'Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration' (9 March 2016) The Bailii Lecture 2016 at http://www.bailii.org/bailii/lecture/04.pdf (last visited 2 March 2021); and The Right Hon The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, Launch of The CityUK's Legal Services Report 2016 (29 July 2016) at https://www.judiciary.uk/announcements/speech-by-the-lord-chief-justice-launch-of-thecityuks-legal-services-report-2016 (last visited 2 March 2021); P.E. Higginbotham, 'The Present Plight of the United States District Courts' (2010) 60 Duke LJ 745; Mulcahy n 1 above; L. Mulcahy, 'The Market for Precedent: Shifting Visions of the Role of Clinical Negligence Claims and Trials' (2014) 22 Med LRev 274.

[10] Sir Bernard Rix, 'Confidentiality in International Arbitration: Virtue or Vice?' Jones Day Professorship in Commercial Law Lecture, SMU, Singapore, 12 March 2015. But see: Lord Justice Gross, A View Across The System: London Common Law and Commercial Bar Association 22 November 2012 at https://www.judiciary.uk/announcements/lj-gross-speech-lclcba-21112012/ (last visited 2 March 2021). R. Abu-Manneh, M. Stefanini and J Holden, 'Is Arbitration Damaging the Common Law?' (2016) 19 Int ALR 65.

This suggests that the time is ripe to pay attention to the issue of the type of cases that do, and do not, reach the appellate courts. These are questions which have received much more attention in the US where political scientists have long demonstrated an interest in legal traffic in the lower and upper courts. Indeed, it has been argued that debate about the vanishing trial has passed largely unnoticed, unquestioned and little remarked upon in the English and Welsh setting.[11] It is certainly the case that in-depth commentary has been largely limited to one article by Herbert Kritzer in 2004, an essay by Robert Dingwall and Emily Cloatre in 2006 and two lectures given by Hazel Genn in 2008 and 2012.[12] Commentary by UK scholars has undoubtedly been stifled by the absence of good quality, consistent judicial statistics. Despite this, keeping this important debate alive requires a careful quantitative analysis of the court statistics that *are* available if we are to discern trends in the number of trials that take place and the impact of activity lower down the system on the courts that sit at its apex.

Drawing on a database we compiled, this article contributes to the existing literature in three ways. Firstly, having reviewed some of the problems involved in charting civil litigation trends, it updates existing accounts of the vanishing trial in England and Wales and the factors which allow us to distinguish what is happening from trends in the US. This demonstrates that some of the issues at the root of earlier debate have now subsided. Secondly, the article examines the precedent-setting activity of judges in the appellate

11 Genn, 'Privatisation' n 8 above.

12 H.M. Kritzer, 'Disappearing Trials? A Comparative Perspective' (2004) 1 JELS 735; R. Dingwall and E. Cloatre, 'Vanishing Trials?: An English Perspective' [2006] J Disp Resol 51.; the lectures by Genn were the Hamlyn Lectures, published as H. Genn, *Judging Civil Justice* (Cambridge: Cambridge University Press, 2010); and Genn, 'Privatisation' n 8 above.

courts in order to test the assumption that fewer cases coming into the system results in less precedent being produced. More specifically we explore the relationship between the rates of cases coming into the litigation system, the cases that get to trial and those that go on to appeal; and how the number and type of cases that reach the upper appellate courts has changed over time. Thirdly, the article considers how we can begin to explain the complex trends revealed. In doing so, the data presented on appeals serves to deepen and broaden some of the ground-breaking work of Louis Blom-Cooper, Gavin Drewry and others on the business of the appellate courts.[13] Rather than providing answers to all the questions posed, a key goal of this article is to provide baseline data about what we know and do not know about how the litigation system is used and by whom.

METHODS

Large-scale studies of litigation activity are heavily dependent on longitudinal datasets collected and published by the state. This has caused significant problems for social scientists across jurisdictions who have had to rely on categories and variables created by others that frequently vary over time. In England and Wales, datasets for some proceedings, such as the Family Division of the High Court, are largely unusable because of inconsistencies in the statistics reported and gaps in the time series produced. Data on the Chancery Division show such violent swings from year to year that their credibility is also in doubt.[14] Official statistics

[13] See, in particular, L. Blom-Cooper and G. Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Oxford: Clarendon Press, 1972) and the collection of essays by leading scholars in L. Blom-Cooper, B. Dickson and G. Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009).

[14] See Galanter, 'The Vanishing Trial' n 7 above. Genn has been particularly critical of statistics in the field – see Genn, 'Privatisation' n 8 above. See also Blom-Cooper and Drewry n 13 above; D.R.

are also reported in the form of aggregates, with the result that relationships between independent variables and the trajectory of individual cases can rarely be traced. In other instances, significant statistical information has simply not been collected, or its collection has been discontinued during vital periods. By way of example, data collected on the rate of out-of-court settlement and the stage of the litigation system at which settlement occurs was reduced in the immediate aftermath of the Woolf reforms. This is somewhat ironic given that the reforms actively sought to promote more out-of-court settlement.[15] The result of these various problems is that the research community has had to rely on partial accounts of activity. Her Majesty's Courts and Tribunal Service has expressed a commitment to improving data collection and reporting,[16] but it remains of ongoing concern to researchers that they are limited in their ability to chart historic patterns of behaviour and the impact of changes in policy or legal culture.[17] Problems with official statistics are such that Genn has

Songer, R.S. Sheehan and S.B. Haire, *Continuity and Change on the United States Courts of Appeal* (Ann Arbor: University of Michigan Press 2000); 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.

15 The Right Honourable the Lord Woolf, Master of the Rolls, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Lord Chancellor's Department, 1996).

16 See further https://www.gov.uk/government/news/hmcts-publishes-response-to-report-on-use-of-data (last visited 2 March 2021).

17 See further Ministry of Justice and National Statistics, *A Guide to Criminal Court Statistics* (London: Ministry of Justice, September 2018) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/894981/A_Guide_to_Criminal_Court_Statistics.pdf (last visited 2 March 2021). This matter was a prominent feature of discussion between policy-makers and socio-legal researchers at 'The Future of Justice: Harnessing the Power of Empirical Research' conference held at University College London

argued that important research questions cannot be answered because of the poverty of official data on court usage.[18]

In the sections which follow it will become clear that counting the number of trials that occur is not as easy as one might assume. Changes in data collection methods make it difficult to determine how many trials actually commence in the civil justice system, though it is possible to discern how many cases are 'set down' or ready for trial and the number that are 'completed'.[19] More generally, it has been argued that the term 'trial' is somewhat ambiguous.[20] It can be used to describe what has been called the 'classic' Anglo-American adversarial encounter before adjudicator(s) in which evidence is presented, opposing arguments made, and a decision pronounced in open court. However, in practice, definitions of trials may vary considerably across jurisdictions. In a US context Galanter has argued that comparative analysis within the US, and between it and other jurisdictions, is problematic as a result. In the course of working with the official data available for this study we found considerable variation as to how trial-like events were described across time and different court systems. Statistics for the Admiralty Court (1950–2017), Official Referees' Court (1950–98) and the Technology and Construction Court (1999–2017) refer

(UCL), in May 2018, hosted by UCL and funded by the Legal Education Foundation and Nuffield Foundation.

18 Genn, 'Privatisation' n 8 above, 19. See also J. Resnik, 'Migrating, Morphing, *and* Vanishing: The Empricial and Normative Puzzles of Declining Trial Rates in Courts' (2004) 1 JELS 783 on this point.

19 Dingwall and Cloatre n 12 above note that the first is a reasonable indicator of the willingness of the parties to go to trial and that the second gives some idea of the volume of trial business, but it remains unclear how many cases are settled or abandoned after being set down.

20 For further discussion of this point see H.M. Kritzer, 'The Trials and Tribulations of Counting "Trials"' (2013) 632 DePaul LRev 415.

to cases 'tried', though there is no explanation of what this means. Data on the Queen's Bench Division (QBD) of the High Court refer to cases 'tried' before 1974, but after that the term 'disposed after trial' is used.[21] Elsewhere there is reference to 'judgments entered' in the London & Middlesex courts up to 1973. The data for County Courts have also changed over time to include: 'determined on hearing'; 'determined after trial'; 'judgments entered after trial'; sum of 'judgments given by registrars after trial'; 'judgments given by judges after trial'; 'judgments given by judges before judge with jury'; and 'proceedings disposed by trial'. To compound matters, judicial statistics rarely provide an explanation of what is counted under each heading. In addition to the 'classic' trial, an increasing amount of judicial time in both the US and the UK is spent in preliminary hearings and case management meetings which feature more prominently in common law systems than they did 50, or even 20, years ago. As the case management powers of judges are enhanced, it has been suggested[22] that the notion of the trial has transformed from a single plenary event to a series of trial-like events,[23] which may even involve judicial diversion of a case to other dispute resolution processes.[24] Whilst acknowledging the limitations of official statistics, it remains the case that this is the only source we can draw upon when attempting to understand civil litigation trends over time.

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21 We suspect that this includes cases which settle after trial but before formal judgment is given.

22 Galanter, 'The Vanishing Trial' n 7 above.

23 On this point see also G.K. Hadfield, 'Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases' (2004) 1 JELS 705.

24 Resnik n 18 above suggests that trials continue to be popular forms of dispute resolution in the private sphere e.g. through arbitration. While this is a form of authoritative adjudication, we consider it essential to the notion of trial that it is part of a public system of dispute resolution.

The research for this article used the government publication *Judicial Statistics* from 1950 to 2019 to plot litigation trends across a 70-year period.[25] This involved the creation of a database in which a variety of statistics from largely paper-based reports were input. Three key goals fuelled this activity. The first of these was to verify and update the work of other scholars who have discussed the notion of the vanishing trial in an English and Welsh context. The second was to extend existing analysis to appellate activity in order to test whether the vanishing trial has led to vanishing appeals, as commentators in the field frequently assume. Lastly, official statistics were supplemented by information about the basic characteristics of cases which allowed us to gauge whether certain legal topics are more likely to be given consideration by the appellate courts than others. In order to do this we developed a second database which recorded information on the name, citation, year, decade and subject matter of a total of 47,462 cases decided by the Court of Appeal (Civil Division), House of Lords and Supreme Court from 1950 to 2019.[26] This was done using information available on Westlaw. The subject matter of each case was determined by reference to the 2020 topic classification system used by Westlaw editors, which allowed for multiple subject classifications codes to be assigned to each case.[27]

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[25] The name of the report changed several times over the date range we analysed from: *Civil Judicial Statistics, England and Wales* (1950–74); *Judicial Statistics, England and Wales* (1975–78); *Judicial Statistics, England, Wales and Northern Ireland* (1978–81); *Judicial Statistics, England and Wales* (1982–2005); *Judicial and Court Statistics* (2006–08). From 2009, quarterly reports have also been available.

[26] This included: 43,838 Court of Appeal civil cases and 3,624 House of Lords and Supreme Court cases. The focus of this article is on civil litigation, but we do refer criminal when we discuss the workload of the House of Lords and Supreme Court.

[27] Ideally, we would have undertaken this coding ourselves, but the sheer volume of cases meant that we used the analysis conducted by Westlaw editors as a proxy. Westlaw categorises cases in three ways:

THE RELEVANCE OF THE VANISHING TRIAL DEBATE TO ENGLAND AND WALES: A CASE OF VANBISHING LITIGANTS

Before we can begin to understand trends in precedent setting, it is important to think about the pool of tried cases from which appeal cases are drawn. Two seminal articles by Marc Galanter on litigation trends in the US state and federal courts from 1962-2004 have prompted fresh debate about the state of civil justice across jurisdictions over the last 16 years and the ability of the lower courts to feed the higher courts.[28] His work showed that an increasing number of cases entering the court system was accompanied by a significant reduction in both the total number and proportion of cases reaching trial. Galanter noted a long-term reduction in the number of trials in federal courts, with a 60 per cent decline discernible since the mid-1980s. The fact that this occurred at the same time as the amount of litigation commenced increased fivefold means that a smaller proportion of cases entering the system ended in trial. According to his research, in 1938 about 18 per cent of civil cases that entered the federal courts were resolved by trial. That figure had fallen to around 12 per cent in 1962 and by 2002 it was just under 2 per cent.[29] Galanter's work has also shown that

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by topics, subject and keywords and for the purposes of this study we focused on topics. Cases were labelled with up to eight topics. It should be noted that until official transcripts with neutral citations were introduced in 2000 not all cases were reported. In addition, Westlaw does not have 100 per cent of cases decided for either court, pre or post the introduction of official transcripts. For a discussion of similar problems with data in the US see K. Carlson, M.A. Livermore and D.N. Rockmore, 'The Problem of Data Bias in the Pool of Published U.S. Appellate Court Opinions' (2020) 17 JELS 224.

[28] Galanter, 'The Vanishing Trial' n 7 above; M. Galanter, 'A World Without Trials?' [2006] J Disp Resol 7.

[29] Galanter, 'The Vanishing Trial' n 7 above.

federal trials are declining across all types of case.[30] Although data for the state courts, where the majority of trials are held, are neither as robust nor as extensive as that for Federal courts, he argued that the patterns that emerged bore an 'unmistakable resemblance' to trends in that system.[31] These data on vanishing trials raise important questions about the shrinking of the civic sphere, the transparency of justice, the ability of the courts to generate public debate or enhance respect for the law and the role of the courts in creating important signals for other litigants and disputants.

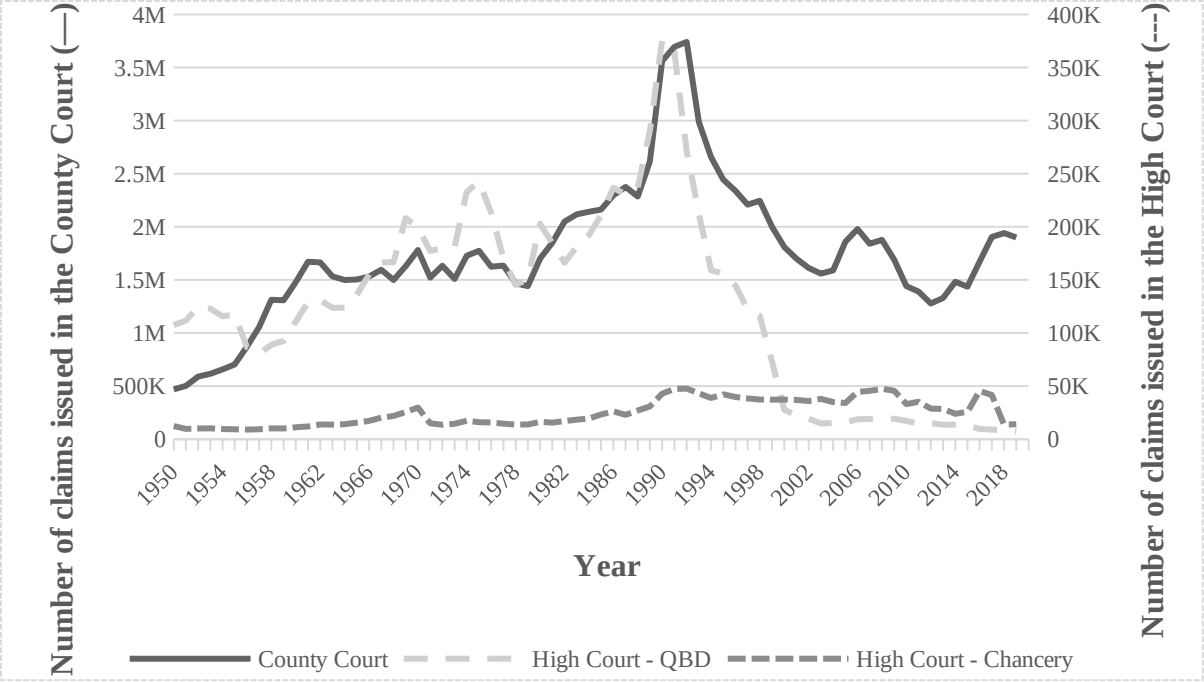
Commentators have noticed a series of similarities between the vanishing trial debate in the US and the UK, but there are also significant differences. While Galanter has demonstrated that the number of proceedings issued in the US has been on an upward trajectory over time, England and Wales have been experiencing a downward trajectory of cases coming into the system; what might be called the phenomenon of 'vanishing litigants'. This has occurred across all three types of court for which there are reliable statistics: the County Court, the Queens Bench Division (QBD) and the Chancery Division. The number of cases in the County Court, which has traditionally dealt with lower-value claims[32] and routine cases such

30 In 1962 most federal civil trials involved torts (55 per cent). This had reduced to 23 per cent of all trials by 2002. Trials involving contract reduced from 19 per cent to 15 per cent over the same period: ibid.

31 His analysis of civil trials in 21 states from 1976–2002 shows a decline in both the total number of cases going to trial and the proportion of all cases disposed of by trial. Galanter, 'The Vanishing Trial' n 7 above. On this point see also B.J. Ostrom, S.M. Strickland and P.L. Hannaford-Agor, 'Examining Trial Trends in State Courts: 1976-2002' (2004) 1 JELS 755.

32 The limit was initially set at £100 by the County Courts Act 1934, s 40; raised to £200 by the Administration of Justice (Miscellaneous Provisions) Act 1938, s 16; to £400 under the County Courts Act 1955, s 1; to £500 by the County Courts Jurisdiction Order 1965 SI 1965/2141; to £750 by the Administration of Justice Act 1969, s 1; to £1000 under the County Courts Jurisdiction Order 1974 SI

as undefended debt, far outstrips the number of cases in any other civil court. In recent decades it has consistently dealt with in excess of 90 per cent of all civil litigation.[33] During the largest peak in proceedings issued in 1992, the County Court was dealing with 3,741,804 cases in comparison with just 271,571 cases in the QBD in the same year. Trends in the County Court and QBD should, however, be seen as symbiotic. Increases in the financial limit of cases that could be lodged in the County Court, instituted in 1965, 1969, 1974, 1977, 1981 and 1991, will have automatically led to reductions in QBD business. Surprisingly, these increases did not necessarily produce a concomitant increase in the County Court.



1974/1273; to £2,000 by the County Courts Jurisdiction Order 1977 SI 1977/600; and to £5,000 under the County Courts Jurisdiction Order 1981 SI 1981/1123 Since the High Court and County Courts Jurisdiction Order 1991 SI 1991/724 the County Courts' jurisdiction has been unlimited.

[33] The proportion of claims issued has increased over time, by an average of 92 per cent between 1950 and 2018. In 1950 the County Court handled 80 per cent of business. This rose to 93 per cent in 1957, before falling slightly to 87 per cent in 1969. Since then it has risen (although not entirely consistently year on year) to 99 per cent in 2018.

Chart 1: Number of proceedings commenced in first instance courts for which there is reliable data on two separate axes (County Court on the left, QBD and Chancery on the right) 1950–2019.

Chart 1 shows data for the QBD and County Courts using different axes so that the detail of trends in the courts can be seen more clearly.[34] These data show that, while the QBD and County Court demonstrated comparable directions of travel up until 1991, the reduction in the number of cases entering the civil justice system has been particularly marked in the QBD since that time.[35] In the 1950s cases in QBD cases constituted 10 per cent of all proceedings commenced in the civil courts, compared with only 1 per cent by the 2000s. This suggests that the predictions made by other commentators about the demise of litigation or the end of the trial may now need to be revisited. The marked decline in the number of people commencing litigation since the 1990s, which Kritzer noted up to 2002 and Genn until 2011, has now reversed. Chart 1 demonstrates that in the last decade, between 2012 and 2019, there was an increase in the number of proceedings in the civil justice system from 1,322,239 to

[34] QBD figures include those for the Admiralty Court, Commercial Court and Official Referees Business/Technology and Construction Court. Chancery includes the Courts of Chancery of the County Palatine of Lancaster and Durham up to 1971, contentious probate, patents, Bankruptcy Court and Companies Court. The figures for the County Court include the Mayor and City of London Court up to 1971 and only show data for money and mortgage/landlord claims as those are the only figures which have been consistently included the entire *Judicial Statistics* series. Chancery writs for 2018-19 are only for London.

[35] The QBD usually handles larger and more complex cases worth over £100,000, personal injury and clinical negligence cases worth £50,000 or more, and defamation cases worth any amount. See further https://www.gov.uk/guidance/queens-bench-division-bring-a-case-to-the-court (last visited 2 March 2021).

1,921,665 cases. The increase in claims issued in the County Court, and the bulk of the growth in the number of first instance claims generally, can be attributed to a rise in undefended debt claims of up to £1,000.[36] This is despite concerted efforts on the part of the government to reduce incentives to litigate through reforms of costs and proactive management of certain types of claims, such as clinical negligence. The question of why demand for the litigation system changes over time is an extremely complex one which many authors have tended to gloss over. We argue that a more holistic explanation is possible by reference to three main factors which can be summarised as political, economic, and socio-cultural. A further analysis of these factors makes clear that establishing causal links between initiating proceedings, demand for trials and the quest for precedent are complex, multifaceted and tenuous.

Political reforms impact on litigation rates in the most obvious and direct way by conferring new causes of action. In both the US and the UK for instance the rapid increase in the number of people using the legal system from the 1950s onwards can be explained by the acquisition of numerous social and economic rights in the post-war era in such areas as landlord and tenant, personal injury, employment law, welfare benefits, discrimination and human rights.[37] In the UK the adjudication of some of these new types of litigation were hived off to the

[36] 'Specified money claims' i.e., debt cases make up the vast bulk of claims issued in the County Court. These increased both in volume and as a proportion of the total claims issued between 2012 and 2019 from 894,822 (70 per cent) to 1,637,854 (86 per cent). This has been driven by a rise in the number of lower value claims of up to £1,000, which have more than doubled from 507,465 in 2012 to 1,068,300 in 2019. The proportion of specified money claims which are undefended has also increased in the same period, though to a lesser degree, from 87 per cent in 2012 to 90 per cent in 2019. A higher proportion of lower value claims have been undefended in the same period. 94 per cent of claims up to £1,000 were undefended between 2012 and 2019, compared to 83 per cent of claims over £1,000.

emerging tribunals sector but other reforms, such as the liberalisation of divorce laws in the Matrimonial Causes Act 1937 and the Divorce Reform Act 1969, heralded a significant increase in the number of people using the courts. Legal change can also suppress litigation. By way of example, the Woolf reforms, brought in during the closing years of the twentieth century, introduced a number of measures such as pre-action protocols,[38] and encouragement of referrals to mediation and arbitration that have helped to maintain or, arguably, been a major factor in the downturn in litigation statistics shown in Chart 1 by encouraging settlement or early abandonment of claims without merit. [39] Judith Resnik has argued that the reduction in the number and proportion of litigated cases ending in trials does not mean that adjudication is diminishing but that some business is migrating from public courts and morphing into private forms of dispute resolution.[40] A number of commentators have raised concerns that the widespread practice of referring commercial disputes to arbitration seems likely to cause a stagnation of the common law because it fails to alert the legal system to new types of problem.[41] The former Chief Justice, Lord Thomas, sees this as a particular

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37 H. Brooke, *The History of Legal Aid 1945–2010* (Bach Report) (London: Haldane Society, 2017) Appendix 6; B. Hale, 'Non-Discrimination and Equality' in L. Blom-Cooper, B. Dickson and G. Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009).

38 For information about the various pre-action protocols now in place see further https://www.justice.gov.uk/courts/procedure-rules/civil/protocol (last visited 2 March 2021).

39 J.H. Langbein, 'The Disappearance of Civil Trial in the United States' (2012) 122 Yale LJ 522.

40 Resnik n 18 above. See also J. Resnik, 'Lawyers' Ethics beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes' (2017) 85 Fordham LRev 1899.

41 For the classic article on this issue see O.M. Fiss, 'Against Settlement' (1984) 93 Yale LJ 1073. Luban n 4 above presents a much more sophisticated version of this argument.

problem in relation to standard-form contracts and commercial practices in industries such as construction, engineering, shipping, insurance and commodities.[42]

Other political initiatives have served to reduce the use of the legal system. The severe reduction in the amount of legal aid available in the UK in recent years is an obvious example.[43] Also relevant are a range of measures introduced to reduce the number and cost of claims that involved a shifting of risk away from the taxpayer towards lawyers, clients and insurers.[44] The Access to Justice Act 1999 introduced the use of both conditional fee agreements and 'after-the-event' insurance.[45] The fixed recoverable costs regime introduced

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[42] Thomas n 9 above (Bailee lecture); and F. Reynolds, 'Commercial Law' in L. Blom-Cooper, B. Dickson and G. Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford University Press, 2009). 700–710.

[43] T. Goriely, 'Rushcliffe Fifty Years On: The Changing Role of Civil Legal Aid Within the Welfare State' (1994) 21 *J.L.& Soc* 545. Most recently, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 virtually abolished legal aid in all but a few areas of law.

[44] R. Moorhead, 'Legal Aid and the Decline of Private Practice: Blue Murder or Toxic Job?' (2004) 11 *International Journal of the Legal Profession* 159; R.M. Jackson, *Review of Civil Litigation Costs* (Norwich: The Stationery Office; 2010); National Audit Office, 'Managing the Costs of Clinical Negligence in Trusts' HC 305 (2017–2019); C. Hodges, S. Vogenauer and M. Tulibacka, 'Part I: The Oxford Study on Costs and Funding of Civil Litigation' in C. Hodges, S. Vogenauer and M. Tulibacka (eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Oxford: Hart Publishing, 2010); E. Blinderman, 'The Role of Litigation Finance in the Next Recession' (Law 360 UK, 19 December 2019) at https://www.law360.co.uk/legalindustry/articles/1229365/the-role-of-litigation-finance-in-the-next-recession?copied=1 (last visited 2 March 2021).

[45] We are grateful to our anonymous referee for drawing our attention to the fact that the importance of after the event insurance is that it made both the conditional fee uplift and the after the event insurance premium recoverable.

in the UK in recent years following the Jackson reforms has also reduced the number of low-value claims being pursued because of the reduction of income it generates for lawyers. More particularly, the Chartered Institute of Legal Executives has argued that the introduction of fixed recoverable costs for low-value personal injury cases has restricted smaller law firms from offering their services to the public,[46] though some of the larger personal injury firms may have developed strategies to handle fixed cost cases on an efficient basis.[47] These various measures provide an explanation for the dramatic drop in the number of proceedings issued from the 1990s.

Changes in the economy can also impact on the number of claims that enter the litigation system. High tax rates in the post-war period, dividend-stripping activities in the 1960s and the introduction of capital gains tax in 1965 generated a tranche of litigation involving Her Majesty's Revenue and Customs.[48] Economic recessions can prompt litigation involving insolvencies, bankruptcies, recovery of defaulting commercial loans, realisation of security,

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[46] See Chartered Institute of Legal Executives, 'Fixed Recoverable Costs Are Restricting Smaller Firms' Ability to Offer Services, Says CILEx' at https://www.cilex.org.uk/media/media_releases/fixed_recoverable_costs_are_restricting_smaller_firms_ability_to_offer_services_says_cilex (last visited 2 March 2021). See further N. Rickman, P. Fenn and A. Gray 'The Reform of Legal Aid in England and Wales' (1999) 20 *Fiscal Studies* 261; P. Fenn, A. Gray and N. Rickman, 'Standard Fees for Legal Aid: An Empirical Analysis of Incentives and Contracts (2007) 59 *Oxford Economic Papers* 662; E.-A. Lambert and N. Chappe, 'Litigation with Legal Aid versus Litigation with Contingent/Conditional Fees' (2014) 10 Rev L & Econ 95.

[47] We are grateful to our anonymous referee for drawing our attention to this argument.

[48] Capital gains tax taxed gains made on the disposal of assets by individuals, personal representatives and trustees.

property repossessions, consumer investment claims for mis-selling, insurance policy coverage disputes and tax disputes.[49] Businesses are often keen to put underutilised legal departments to work during recessions monetising legal claims; activity that would be considered a distraction in buoyant economic times when in-house lawyers are focused on transactional work. It is noticeable that in the wake of the global economic crisis in 2007, the number of cases entering the Commercial Court increased from 839 in 2007 to 1,331 in 2011. Business in the Technology and Construction Court also rose from 409 in 2007 to 528 over the same period. We have yet to see the impact of the COVID-19 pandemic and the economic crisis it seems likely to precipitate on litigation rates, but it seems highly likely that the number of insurance claims, *force majeure* disputes and employment cases will increase rapidly as a result of it.

Cultural and societal attitudes can also be seen to have an impact on the propensity to use the courts. Commenting on the rise in litigation from 1978 to 1991, which coincided with the premiership of Margaret Thatcher, Goriely has suggested that this reflects policies that encouraged people to see themselves as active and autonomous rights-bearers rather than passive recipients of services. In a US context, commentators have interpreted rises in civil litigation as reflecting increasingly complex relations in a globalised world, the loss of local networks and common norms, a failing respect for authority and a rise in adversarialism.[50]

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[49] J. Haydn-Williams, 'UK: Litigation & Dispute Resolution in and after the Recession: How to Avoid or Deal with Disputes' (Monday 9 August 2009) at https://www.mondaq.com/uk/x/83180/Arbitration+Dispute+Resolution (last visited 2 March 2021).

[50] See, for example, M. Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about our Allegedly Contentious and Litigious Society' (1983) 31 UCLA LRev

Together these various drivers and inhibitors of litigation indicate a multifaceted web of factors that explain litigation rates. The picture does not become any simpler as we go on to consider which cases reach trial or progress to the appellate courts.

CASES REACHING TRIAL

Cases that enter the litigation system form an important pool from which the appeal courts may be able to draw, but this pool is commonly reduced when cases are abandoned, settled or diverted elsewhere before getting to trial. Claims commonly disappear as the parties run out of money or evidence unfolds during disclosure and litigants learn more about the credibility of their case. There are many structural pressures to settle built into the English and Welsh litigation process, such as the costs rule,[51] payment-in rule,[52] strict application of taxation of costs rules, the introduction of fixed costs, the requirement that lawyers provide advance predictions of costs, and case law that penalises the parties for failing to consider or attempt settlement, have added to these incentives. The combined effect of these practices has been to make the pursuit of a case to trial an extremely risky business. Chart 2 shows the stage at which cases in the QBD of the High Court have left the litigation system on their way to trial.

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[51] Unlike other jurisdictions, such as the US, the general convention in the UK is that costs follow the cause. This means that a disputant who loses their case can expect to pay their own costs and those of their opponent.

[52] Since the Civil Procedure Rules were substantially revised in 1999 this has been known as a Part 36 offer, though it has a much longer history.

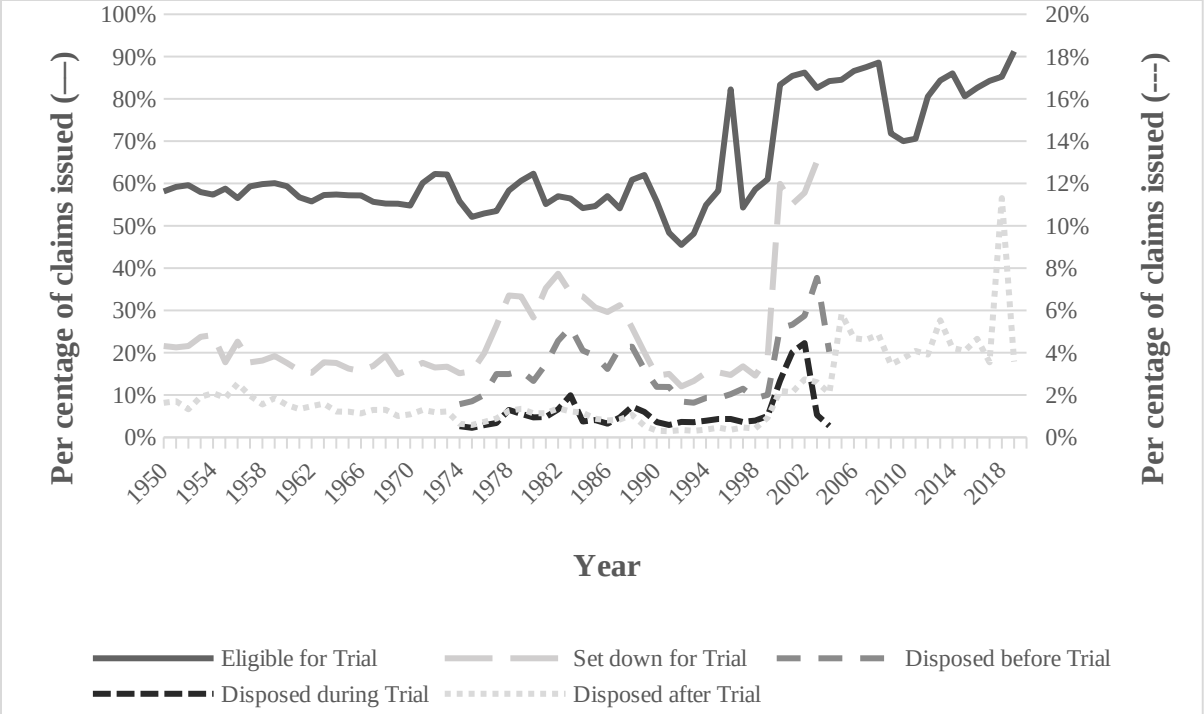

Chart 2: High Court (QBD) cases reaching each of the five key stages of the litigation process as a proportion of claims issued 1950-2019.[53]

[53] 'Eligible for trial' is based on the difference between the number of claims issued and the number disposed by either default or Order 14 judgments. Between 1950 and 1973, *Judicial Statistics* only contained data on claims issued, judgments by default and by Order 14 and cases set down for trial for the RCJ only. For this period, the proportions have been calculated based on the number of claims issued in the RCJ. Between 1974 and 2004, *Judicial Statistics* provided a more detailed breakdown of methods of disposal, which we categorised as 'cases disposed before trial', 'cases disposed during trial' and 'cases disposed after trial'. The headings used varied over time, but it was possible for us to assign each heading to one of our three categories to show trends in each category over time. From 1994, figures for judgments by default and Order 14 were only provided for the RCJ, from this point, the proportion for cases eligible for trial were calculated based on claims issued in the RCJ only. From 2005, *Judicial Statistics* no longer contained a breakdown of methods of disposal and from that year figures for cases disposed after trial were only provided for the RCJ, Consequently, from 2005, the proportion was calculated based on claims issued there. In some years, the figures in *Judicial Statistics* were based on weighted two month samples as opposed to actual numbers of cases at the relevant stage. As a result, the proportions shown may not be completely accurate. This applied to the following

An analysis of the number of cases reaching trial demonstrates that England and Wales have been experiencing very similar trends to those identified in the US.[54] However, a further updating of data undertaken for this project, shown in chart 3, indicates a stabilisation of the number of cases disposed of after trial in QBD since 2005.[55] There was a sharp increase in the number of trials in 2018, however numbers returned to previous levels in 2019, suggesting the increase was not the start of a new upwards trend. Though it remains the case that the number of disputes determined by trial remains much lower than in 1950,[56] this finding calls into question earlier predictions that what we are witnessing is the virtual extinction of the trial and a reduction in the sample from which precedent emerges..

data in the listed years: cases disposed by default or Order 14 between 1981 and 1993; cases disposed before and during trial between 1982 and 2004; cases disposed after trial between 1993 and 2004.

54 On this point see the data from 1960-2002 in Kritzer, 'Disappearing Trials?' n 12 above and Genn, Privatisation' n 8 above, who extended the analysis by nine years to 2011.

55 This was predicted by Dingwall and Cloatre n 12 above.

56 Genn, 'Privatisation' n 8 above.

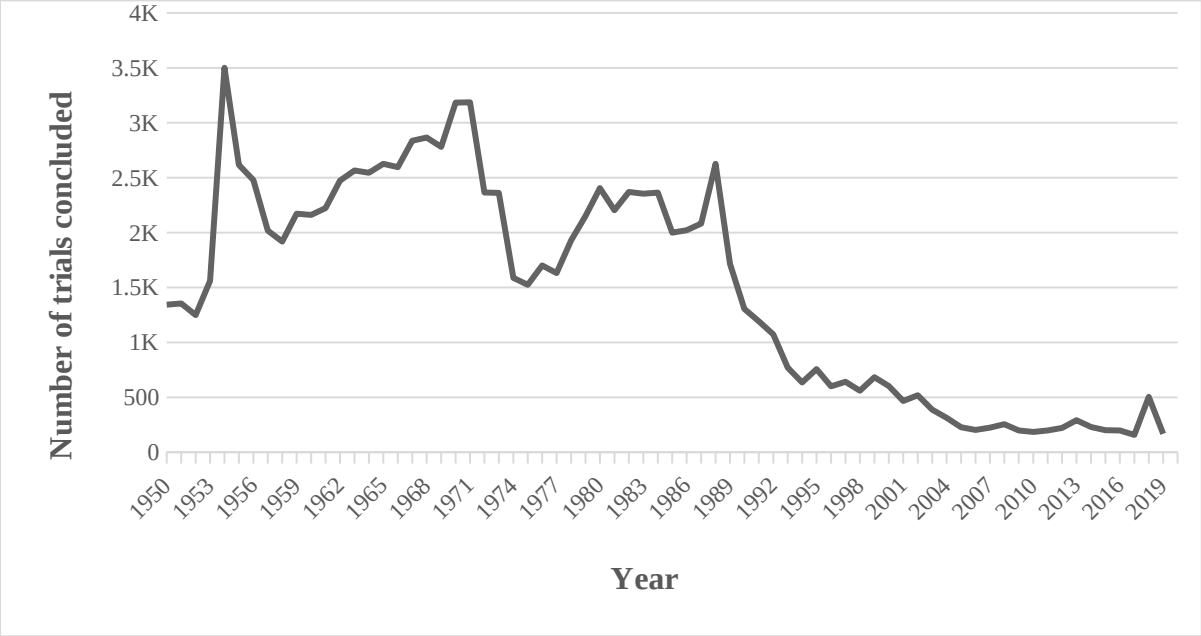

Chart 3: Number of cases disposed of after trial in the QBD (other than the Administrative Court) 1950–2019.[57]

It is clearly important not to focus too much on data from the High Court as the bulk of trials take place in the County Courts. A review of data in both systems from 1950–2019 shows that the largest number of trials to be heard in the QBD stood at 3,501 in 1954, compared to a peak of 50,036 in the County Court in 1975. Statistics on the much larger number of cases that end in County Court trials shown in Chart 4 demonstrate a similar but less dramatic downward trend than the one in the QBD. There has been an overall steady decline in County Court trials other than small claims since 1975, though as with QBD

[57] This includes cases disposed after trial in the QBD itself (including cases disposed by trial at Assizes 1954-1973), the Admiralty Court, the Official Referee's Court and the Technology and Construction Court. Between 1993 and 2004, the number of cases determined after trial was calculated from a two month weighted sample, as opposed to the actual number. From 2005, the figures in *Judicial Statistics* for cases determined after trial in the QBD itself only cover cases disposed at the RCJ. Admiralty figures in *Judicial Statistics* only cover trials at the RCJ.

cases, the trend has flattened out since 2005 and even increased from 15,700 in 2005 to 17,707 in 2019. By way of contrast, trials involving small claims rose dramatically from when the procedure was introduced in the Administration of Justice Act in 1973 until 1993. It would seem that the introduction of the small claims procedure merely pushed cases elsewhere in the system for 20 years; indicating that trials were being demoted in the judicial hierarchy rather than vanishing. After 1993, the number of small claims trials fluctuated and then fell just as dramatically as other County Court trials until 2003[58] since when they have increased significantly from 29,577 in 2013 to 47,047 in 2019. This suggests that, rather than vanishing, trials of smaller matters are now experiencing something of a renaissance.

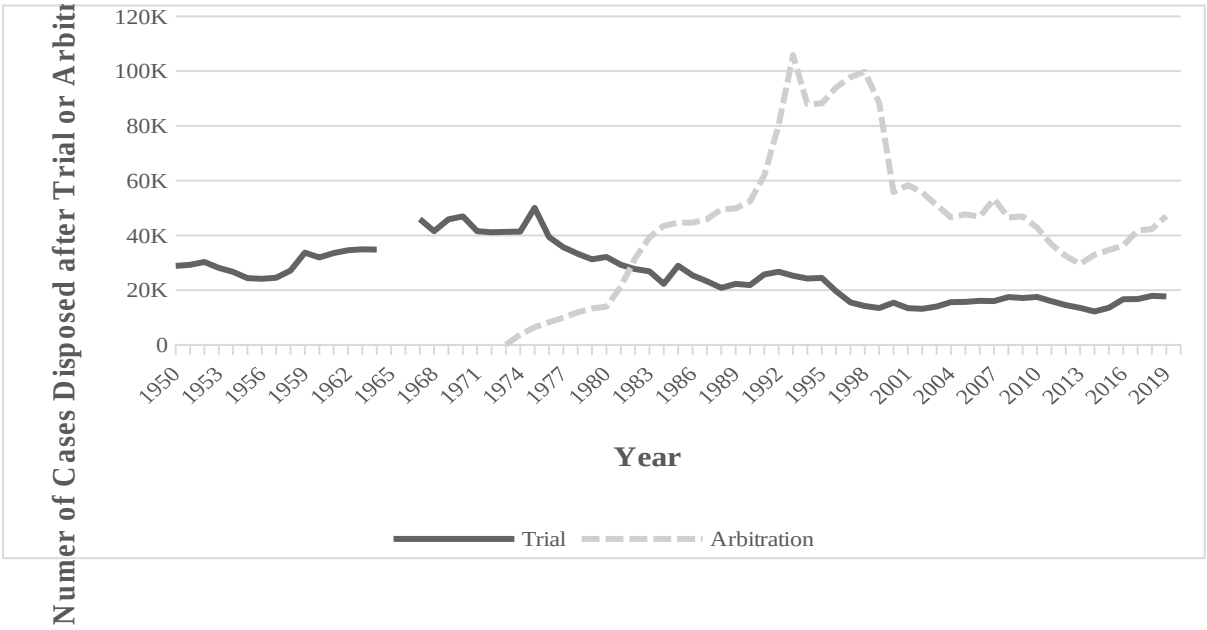

Chart 4: Number of cases disposed of after trial in the County Court and small claims hearings or arbitrations 1950–2019.[59]

[58] Kritzer, 'Disappearing Trials?' n 12 above.

[59] The two missing years are accounted for by the fact that the data in *Judicial Statistics* are not comparable with that presented for most other years.

While existing accounts of the vanishing trial have relied on statistics from the QBD and County Court, the picture is more complex when one looks at statistics from other courts. Cases in the QBD Administrative Court contradict more general trends on trials, largely because of the number of immigration and asylum cases following the European migration crises.[60] However, when these cases are excluded it can be seen that the number of other hearings has been declining since 2013. A more varied picture also emerges from the Chancery Division, which deals with some of the most complex business disputes around issues such as banking, financial services, fraud, asset-tracing and complex property cases.[61] Reliable data on the Chancery Division is unavailable,[62] although Kritzer has noted that the

[60] When these cases are excluded the number of other hearings has been reducing since 2013. Although the judicial review procedure came into effect in 1978, replacing the previous prerogative writs, the data presented here are from 1981 because of concerns about earlier data. See further C. Harlow and R. Rawlings, *Law and Administration* (1st edn, Weidenfeld and Nicolson 1984); 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*, 10 January 2013), at https://ukconstitutionallaw.org/2013/01/10/varda-bondy-and-maurice-sunkin-judicial-review-reform-who-is-afraid-of-judicial-review-debunking-the-myths-of-growth-and-abuse/ (last visited 2 March 2021). There is no explanation provided in the *Judicial Statistics* for the drop in 2000–02.

[61] Kritzer, 'Disappearing Trials' n 12 above presents some data from the Chancery Division but relies predominantly on the QBD in his discussion of High Court data. He does not explain the reasons for this.

[62] There were no data included in the *Judicial Statistics* prior to 1974 on the number of cases disposed after trial. Data from 2016 have been sourced from the new cases management system PENTAHO, whereas older data drew on 'OPT' data from an Her Majesty's Court Service performance database and manual Royal Courts of Justice reports. In the *Judicial Statistics*, data from the new system are stated not to be compatible with earlier data.

number of cases disposed of after trial or hearing in Chancery was actually higher in 2003 than in 1977. Lord Briggs' review of the Chancery Division in 2013 noted the substantial but irregular increases in Chancery trials over the last 30 years and the exponential increase in the value of cases considered, which now regularly involve millions if not billions of pounds.[63] The increasing popularity of the Chancery Division has been explained in part by the attraction of specialist judges, the speed with which it hears cases and the importance of its work to the UK financial sector.[64]

The proportion of litigated cases that end in trial

Debate on the vanishing trial has not only focused on the *number* of cases that are adjudicated but has also examined the *proportion* of cases entering the legal system that end in trial. Extending analysis beyond bare totals allows us to ask additional questions about the extent to which trials are being rationed by judicial case managers or whether incentives for the parties to settle *after* proceedings have been issued are working. Charts 5 and 6 show data from the QBD and the County Court which indicate that the pattern is more complicated in England and Wales than the picture that Galanter painted for the US.

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[63] Lord Justice Briggs, *Chancery Modernisation Review: Final Report* (London: Judiciary of England and Wales, 2013). The picture since 2013 has been highly erratic with a number of peaks and troughs in succession.

[64] D. Wood, 'Land Law' in L. Blom-Cooper, B. Dickson and G. Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009).

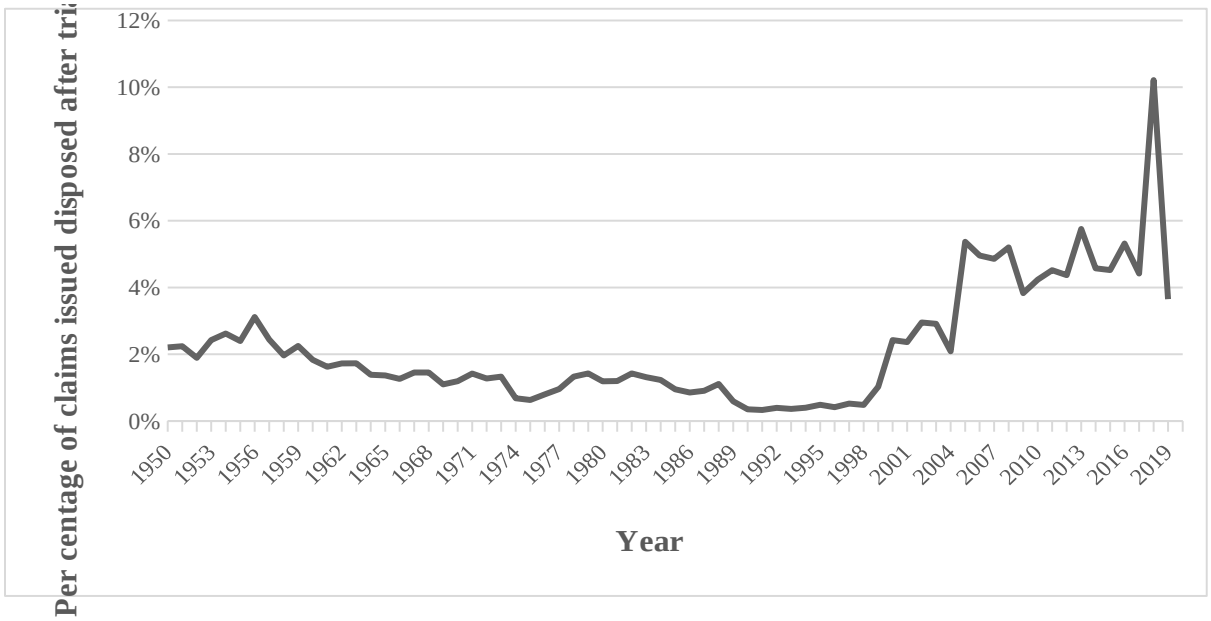

Chart 5: Percentage of cases issued that were disposed after trial in the QBD 1950–2019.[65]

Data from the QBD show that a decline in the percentage of cases that are issued and end in trial from the mid-1950s to the 1990s has been followed by an overall increase in the proportion of cases reaching trial, though trends from 2018 have been dramatic and gone in opposite directions in successive years.[66] The general upward trend from 1999 may well have been caused by the introduction in that year of new Civil Procedure Rules and pre-action protocols. These had the effect of requiring earlier disclosure and exchange of detailed information prior to the lodging of a claim. Logically, this should have resulted in more cases that are suitable for settlement (very strong and very weak cases) being

[65] Data in these charts include the QBD itself, Admiralty, Official Referees and Technology and Construction Court trials as a per centage of same issued. For the QBD, between 1950 and 1973 and from 2005, data in *Judicial Statistics* for cases disposed after trial only refers to cases disposed in the RCJ. For those periods, the per centage was calculated based on claims issued in the RCJ as opposed to all QBD claims issued.

[66] *Judicial Statistics* does not provide any explanation for the increased number of trials in 2018, or even mention it.

abandoned or settled early, and a higher proportion of cases that were not suitable for immediate settlement entering the system and progressing to trial. The data shown suggest that the pre-action protocols have been successful in ensuring that cases are only being pursued to trial where the incentives for settlement are less obvious. This means that while the number of cases in the pool for precedent may have reduced, a greater proportion of cases that are appropriate for adjudication are populating the pool.

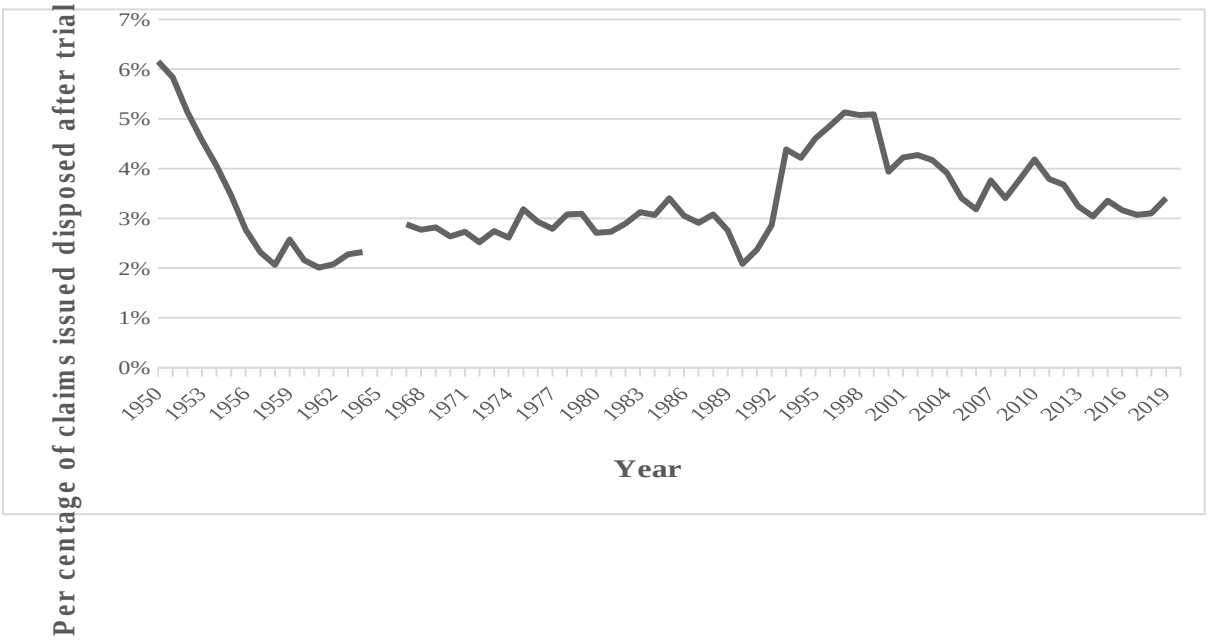

Chart 6: Percentage of cases issued disposed after trial or arbitration in the County Court 1950–2019.[67]

However, data from the County Court shown in Chart 6 present a very different picture of overall decline in the proportion of cases getting to trial since the mid-1990s. This may well be explained by the type of cases that dominate the County Court. Actions for debt lodged in the County Court are often undefended, involving a creditor getting a court order to require

[67] The chart shows the sum of trials and small claims hearings or arbitrations as a proportion of the number of claims issued in any given year. The two missing years are accounted for by the fact that the data in *Judicial Statistics* are not comparable with those presented for most other years.

the other party to make regular payments to them or a charging order which secures the debt against a home or other property. They are not expected to end in contested adjudication.[68] Individuals using the County Courts are also more likely to be unrepresented and less able to gauge the chances of success at trial.

Trends in administrative law cases also differ from other QBD cases. When one looks at the number of final judicial review hearings as a per centage of applications received in the Administrative Court and the Upper Tribunal (Immigration and Asylum Chamber) from 1981 to 2019, it can be seen that there has been a decline in the proportion of cases coming into the system that end in trial, from 44 per cent in 1981 to 3 per cent in 2019. The number of hearings as a per centage of applications granted has also been in decline from 64 per cent in 1981 to 17 per cent in 2019.[69] It seems likely that, despite the massive upturn in the number of claims made, the judiciary have been highly effective in rationing access to their time and managing the influx of immigration and asylum cases.

IS PRECEDENT VANISHING?

[68] Undefended cases in the County Court were reported separately in *Judicial Statistics* from those which were disposed by trial or arbitration and are not included in the proportions shown in Chart 7. Data on various different mechanisms of disposal other than trial or arbitration is available but what is reported has been inconsistent. Consistently, over half of the cases issued have been disposed by methods other than trial or arbitration across the date range shown.

[69] The per centage of hearings in the Administrative Court alone has been decreasing since 2015 following a 2014 spike. From 2000, figures for the number of hearings in the Administrative Court have been taken from the quarterly Civil Justice and Judicial Review data, which provides case progression data as opposed to aggregate data on the number of cases reaching specific stages in a given year.

After an extensive discussion of context and the pools from which cases with precedent setting potential are drawn, we move on in this section to discussion of the issues that first motivated this research. As we argued in the introduction to this article, data on the vanishing trial has prompted serious concern about the development of the common law.[70] More particularly, it has been argued that vanishing trials cause problems further up the legal system because they render it inevitable that fewer precedents will be produced. Diminishing precedent in the field of private and commercial law seems to be a particular cause for concern, with Genn suggesting that the development of law in these areas is in danger of withering away.[71] Despite these concerns about the future of precedent, and assumptions that vanishing trials will create vanishing precedents, there has actually been very little data collected on the relationship between the two phenomena. In a US context, Galanter has noted that the proportion of appeals that come from classic trials rather than summary judgments is falling, as is the total number of appellate decisions in tried cases. He draws attention to the fact that in the early years of the twenty-first century the US Supreme Court was deciding less than half as many cases as it did 20 years previously. However, this explanation amounts to just three paragraphs of discussion in a 112-page article.[72] In England and Wales there has been little debate about the amount of precedent being produced by the

[70] See for instance Genn, 'Privatisation' n 8 above and G.J. Wendt and J.C. Sims, 'The "Vanishing Trial": A Hayekian Perspective' (2011) 2 Faulkner LRev 287; L.K. Doré, 'Public Courts Versus Private Justice: It's Time to Let some Sun Shine in on Alternative Dispute Resolution' (2006) 81 Chicago-Kent LRev 463; J.M. Glover, 'Disappearing Claims and the Erosion of Substantive Law' (2015) 124 Yale LJ 3052.

[71] Genn, 'Privatisation' n 8 above.

[72] Galanter, 'The Vanishing Trial' n 7 above. Somewhat ironically he draws attention to the fact that, while the number of appeals being heard in the US has been in decline, the number of reported cases has increased from 5,782 pages in 1962 to 13,490 pages in 2002.

appellate courts and where the issue has been raised it has tended to be considered in the context of specific specialisms.[73] What can we deduce about the precedent-setting activity of the courts by reference to information on the public record? Has the vanishing trial led to vanishing precedent? What are the implications of the vanishing trial for the sort of cases and litigants that progress to the upper appellate courts?

Official data shown in Chart 7 reveal that, contrary to some predictions, there has been a sharp *increase* in the number of civil appeals from the 1950s to the present day. Moreover, this has happened at the same time as the number of trials has been diminishing.[74] It is also clear that the distribution of appellate work between courts has shifted over this period with the main burden of dealing with this case load shifting to the High Court from the 1980s.[75] This reflects a desire on the part of policy-makers to divert business away from a busy Court

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[73] Excellent accounts of particular areas include the essays in L. Blom-Cooper, B. Dickson and G. Drewry n 13 above.

[74] There are three main courts that hear appeals in the UK: the Supreme Court (previously the Judicial Committee of the House of Lords); the Court of Appeal (Criminal and Civil Divisions); and the High Court. In addition, the Judicial Committee of the Privy Council acts as the court of final appeal for the UK overseas territories and Crown dependencies and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of republics, to the Judicial Committee.

[75] In the High Court, the Chancery Division has jurisdiction over appeals in revenue matters from Commissioners of Taxes and bankruptcy appeals from the County Court and High Court Registrars. The Queen's Bench Division, more specifically the Administrative Court, has jurisdiction over judicial review; appeals by way of case stated from the Crown Court and Magistrates' court; and applications and appeals other than by way of judicial review or case stated which include statutory appeals, habeas corpus, committals for contempt and appeals and appeals in disciplinary matters concerning healthcare professionals and others.

of Appeal, a trend reflected in the Bowman reforms of the late 1990s.[76] This appears to diminish precedent setting opportunities. While some important precedents are set in the High Court[77] they are by their nature of lower standing that those cases decided by the Court of Appeal or Supreme Court.

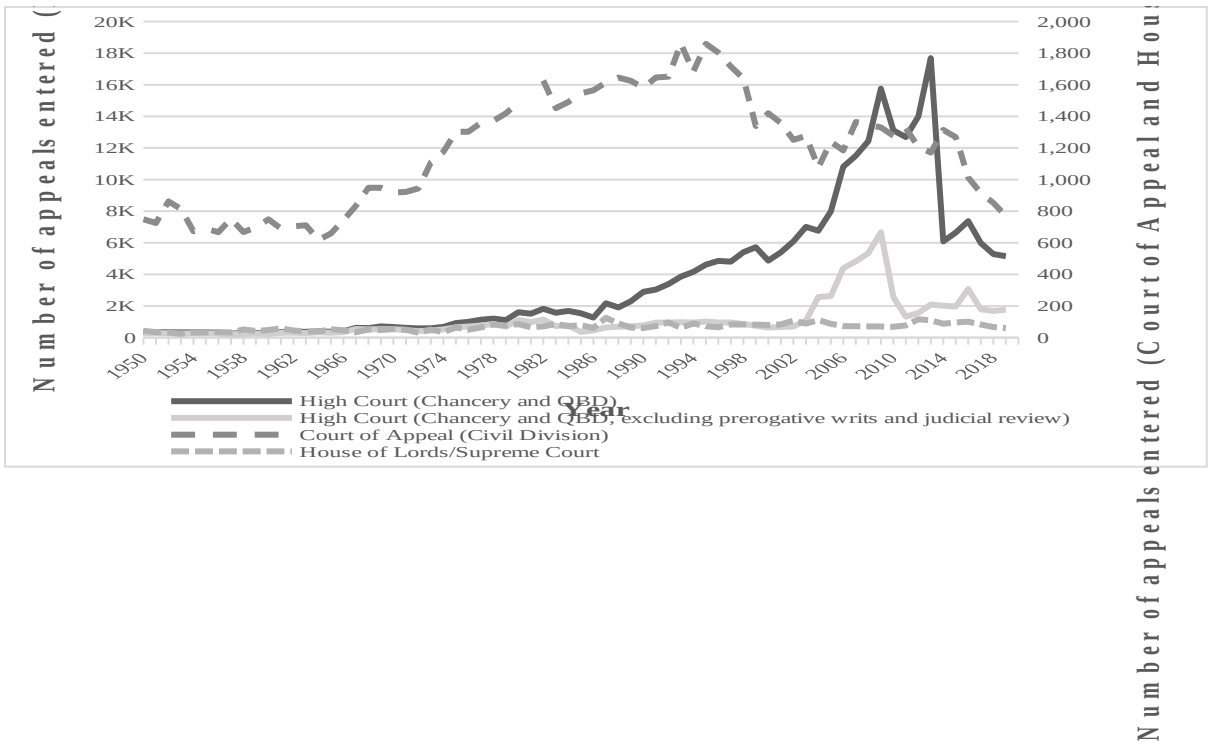

Chart 7: Number of appeals entered by court 1950-2019.[78]

[76] J.M. Jacob, 'The Bowman Review of the Court of Appeeal' (1998) 61 MLR 390.

[77] R. Stevens, 'Torts' in L. Blom-Cooper, B. Dickson and G. Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009).

[78] Figures for the High Court are the sum of appeals entered in Chancery and the QBD Divisions. Statistics for the Family Division are unreliable. Since 2017, figures for the Supreme Court have been excluded from *Judicial Statistics*. The Supreme Court's Annual Reports do not include this information. For 2017-19, the number of appeals heard per year in the Supreme Court has been used instead.

The increase in the number of appeals entered in the High Court from the late 1980s can be attributed to the rise in applications for judicial review, in particular those regarding immigration and asylum decisions. This is evident in the rise in the proportion of High Court appeals that consist of applications for permission to apply for judicial review from 54 per cent in 1984 to 88 per cent in 2001. Similarly, the steep drop from 2013 corresponds to the point at which responsibility for immigration and asylum judicial review was transferred to the Upper Tier Immigration and Asylum Tribunal. But when applications for permission to apply for prerogative writs and judicial review numbers are stripped out of the High Court figures it becomes apparent that not all the growth in the High Court was due to judicial review. Between 2003 and 2011 data for applications and appeals, other than by way of case stated or judicial review in the QBD, included statutory reviews and reconsiderations under the Nationality, Immigration and Asylum Act 2002. These rose from 378 in 2003 to a peak of 5,563 in 2009, before falling sharply to 1,313 in 2010 and only 19 in 2011. This accounts for the spike seen in the High Court excluding judicial review. During the period of growth in appeals other than judicial review, the proportion of High Court appeals entered which were judicial review dropped to a low of 57 per cent in 2008, before climbing again to peak at 90 per cent in 2011 as appeals under the NIAA 2002 dropped off sharply, and then declining again after immigration and asylum applications for judicial review were moved to the Upper Tier Tribunal. Applications for permission to apply for judicial review currently stand at 66 per cent of High Court appeals.

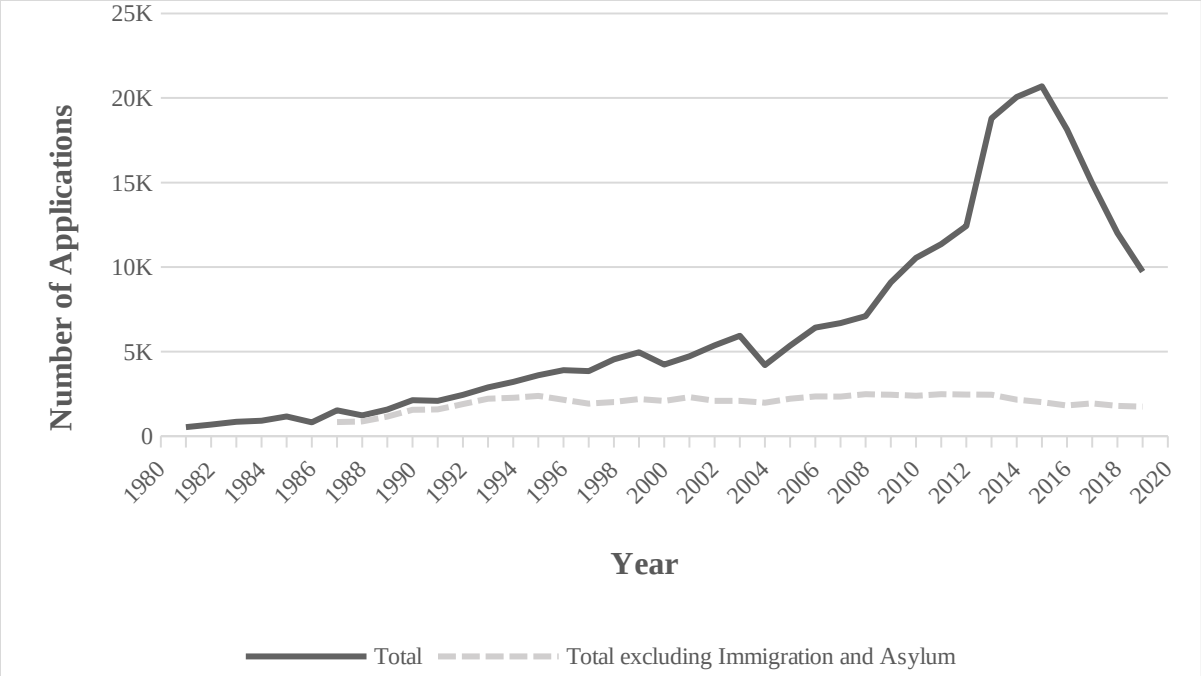

Chart 8: Number of total applications for judicial review 1981–2019 and the number of non-immigration and asylum applications for judicial review 1987–2019.[79]

Global politics can also have a knock-on effect on domestic litigation rates. The closure of the Suez Canal 1956-7 as a result of the war in the Middle East resulted in a number of US and English frustration cases being lodged in the courts. The impact of the European migration crisis is also discernible in data relating to administrative law cases in the UK, often alluded to in the vanishing trial debate but not discussed in detail. Chart 8 shows that the growth in the number of judicial review actions caused by the rapid increase in challenges to immigration and asylum decisions as a result of the Kosovan crisis, Afghan war, Iraqi conflict and Syrian civil war has resulted in a bucking of the trends shown in chart 1.[80] These

[79] The subject matter of applications was only provided in *Judicial Statistics* from 1987.

[80] Judicial review cases involving immigration were transferred to a new Upper Tier Immigration and Asylum Tribunal (UTIAC) in 2013, but Chart 3 shows all judicial review cases coming into the system regardless of where they were determined.

judicial review cases peaked in 2015, before falling off sharply. If immigration and asylum cases are stripped out of the statistics then a much flatter trend in the number of applications for judicial review is revealed in Chart 8.[81]

The decline in the number of appeals entered in the Court of Appeal (Civil Division) since 1995 shown in Chart 7 can be attributed to a decrease in the number of interlocutory appeals. These peaked at 826 in 1995, but fell consistently over time to 13 in 2015, after which data on interlocutory appeals was not included in *Judicial Statistics*. In contrast, the number of final appeals increased, albeit inconsistently, from 1,033 in 1995 to 1,314 in 2014. This is obscured by just looking at overall trends. Since 2015 however, the number of final appeals has fallen year on year to 769 in 2019.

We cannot equate the number of appeals being decided with the amount of precedent being produced by focusing on the Court of Appeal. Many appeals at the intermediate level may simply apply existing precedent without creating new case law. They may also be concerned with claims that the decision of a lower court was incorrect, or suffered from a serious procedural error or irregularity. This makes it impossible to draw a direct link between the number of appeals and the volume of precedent production across the appellate

[81] The procedure for judicial review cases is different from other types of civil litigation in that the parties have to apply for permission for the case to be heard. Statistics on the number of applications for judicial review granted 1981–2019 collated for this project demonstrate that, in addition to the increase in the number of cases coming into the litigation system, there has been an overall increase in the number of applications granted, from an average of 655 in the 1980s to 1,881 in 2019. However, there is also evidence of judicial rationing of the use of this procedure. If one looks at the proportion of applications where leave has been granted, there has been a decline from 63 per cent in the 1980s to just 19 per cent in 2019 (Administrative Court and UTIAC).

courts. However, the link between appeals and precedent is much more compelling when we examine the Supreme Court, which only hears 'hard' cases of the greatest public or constitutional importance.[82] The bar for permission to appeal is deliberately high and gives considerable scope for the judges to select what they consider to be the most important issues in need of determination.[83] Against this backdrop, the remaining sections of this article focus on the extent to which vanishing litigants and the vanishing trial discussed in earlier sections has had an impact on the precedent-setting activity of the Supreme Court.

The precedent-setting activity of the Supreme Court

The Judicial Committee of the House of Lords and Supreme Court have always received many more applications than it was possible for them to determine. It is was only from the 1990s that the Judicial Committee began to control its own docket and data on how the Court of Appeal has historically managed permissions to appeal to the House of Lords re not available.[84] Chart 9 demonstrates that direct applications and petitions to the court have been on a sharp upward curve since the 1950s. Demand for appeals from litigants has been

[82] There is no right to appeal. The Supreme Court or the Court of Appeal must give permission to appeal. On this issue see further G. Drewry, L. Blom-Cooper and C. Blake, *The Court of Appeal* (Oxford: Hart Publishing, 2007).

[83] Permission to appeal is granted for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. An application which in the opinion of the Appeal Panel does not raise such a point of law is refused on that ground. The Appeal Panel gives brief reasons for refusing permission to appeal. The reasons given for refusing permission to appeal should not be regarded as having any value as a precedent: The Supreme Court of the United Kingdom, Practice Direction 3 at https://www.supremecourt.uk/docs/practice-direction-03.pdf (last visited 2 March 2021).

matched by the judiciary giving its permission to appeal. The number of cases allowed to proceed to appeal has increased from 56 in the 1950s to 101 (1960s), 207 (1970s), 339 (1980s), 475 (1990s), 673 (2000s) reaching 695 in the 2010s. Although the figures fluctuate, there has also been an overall rise in the proportion of applications where permission to appeal is given, from 22 per cent in the 1950s to 34 per cent in the 2010s.[85]

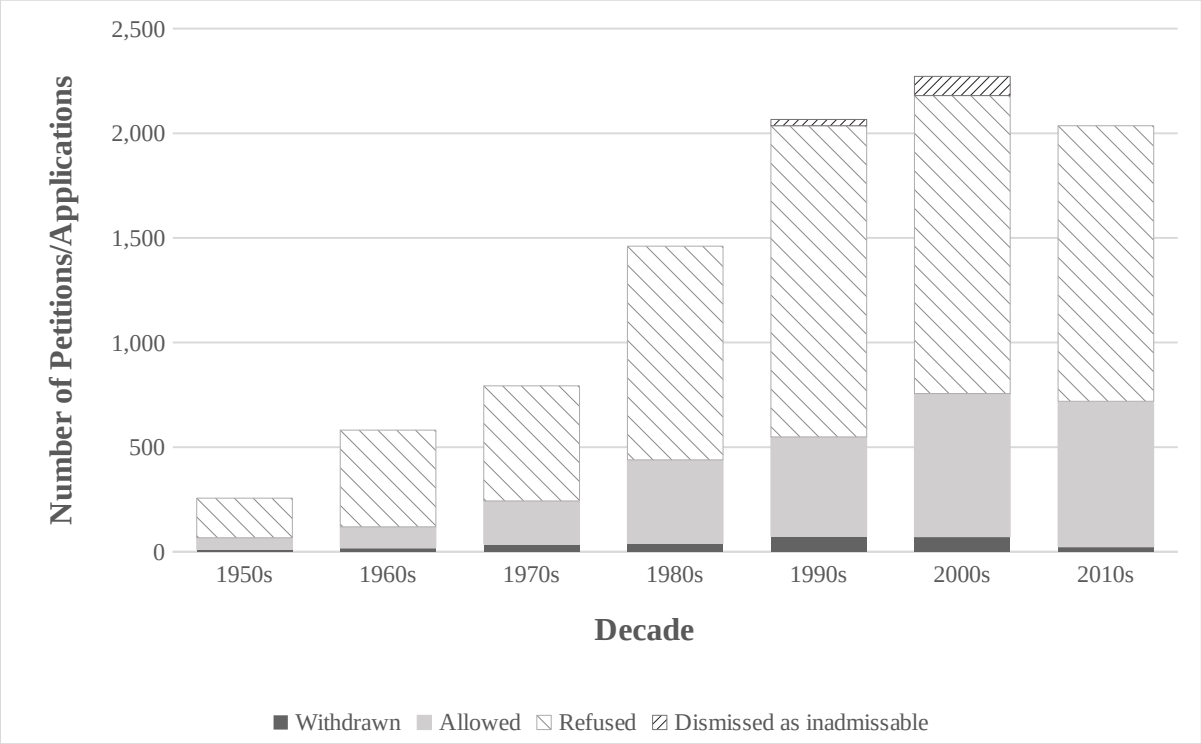

Chart 9: The number of criminal and civil petitions and applications to the House of Lords/ Supreme Court that those courts determined by result and decade 1950-2019.[86]

[84] See further Drewry, Blom-Cooper and Blake n 82 above, 146 who note that between 1952 and 1968, of the 366 civil appeals heard by HL, 286 (78.1 per cent) had received permission to appeal from Court below.

[85] The House of Lords/Supreme Court only managed a small percentage of applications to the Court in the earlier decades. The figures shown relate to the period in which applications were handled internally.

It soon becomes clear that while there is a certain logic in assuming a link between vanishing trials and vanishing precedent, the reduction in the possible pool of cases lower down the system does not necessarily have any impact on the number of cases decided in the upper appellate court. However, this raises interesting questions about the sort of cases that are progressing to the apex.

What sorts of cases are being heard in the Supreme Court?

Evidence of an increasing number of decisions being made by the Supreme Court has the potential to quell the fears of those commentators who have been worried about the impact of the vanishing trial on the production of precedent.[87] However, the fact that there is now a smaller pool of cases to be appealed against raises questions about the *type* of cases that are progressing to the apex of the system. There is, for instance, a danger that the diversion of cases lower down the hierarchy may be having a disproportionate impact on certain types of case. By way of example, Hazel Genn has echoed the anxiety expressed by Lord Thomas that

[86] Data for 2017–19 have been taken from the applications for permission to appeal files on the Supreme Court website. *Judicial Statistics* does not provide any explanation of the terms used for outcomes of applications to the House of Lords/Supreme Court and we have assumed that 'Allowed' (including allowed on terms) means the Court gave permission for the appeal to proceed; 'Dismissed' means the Court refused the applicant permission to appeal to the House of Lords/Supreme Court; 'Withdrawn' means the application to appeal was submitted to the Court, but withdrawn before a decision was made and that 'Dismissed as inadmissible' (changed to 'dismissed' in 2008) refers to applications dismissed as outside the Court's jurisdiction.

[87] The resources available to the court will also be relevant here with Gee suggesting that the practice of constituting smaller benches and generating fees from users has increased the courts' capacity to hear cases. G. Gee, 'The Financial and Administrative Independence of the UK Supreme Court: Five Years On' (2015) 21 *European Journal of Current Legal Issues*.

too many commercial disputes are going to alternative dispute resolution, and suggested that private law is now receiving much less attention than public law.[88] In the interests of ensuring that the Supreme Court is serving the interests of all, it is also pertinent to ask whether it is only those with deep pockets that can afford to take a case there. This is a particular issue in the context of debate about repeat players and one-shotters in the aftermath of sweeping legal aid reforms.

In an attempt to see whether certain types of cases are 'going underground' we charted the subject matter of cases heard by the House of Lords/Supreme Court over time using the 27 topic classification codes used by Westlaw from 1950–2019 (see further Appendix A).[89] Our analysis shows that the number of cases in all topic categories has increased over this period including private law cases. This made it more instructive to look at the topic categories as a proportion of all cases as this is likely to be of more use in revealing the priorities of the court or litigants over time. To illustrate this we found that appeals involving issues about employment and work have increased from 51 in the 1950s to 79 in the 2010s, suggesting growing importance. However, the proportion of all appeals concerned with these issues has decreased over the same period suggesting a relative

88 Genn, 'Privatisation' n 8 above.

89 This is not the same as all cases heard because not all cases are reported, however, it is important to note that the gap between the two is decreasing as an increasing number of cases are reported on the web. The allocation of neutral citation numbers to all cases seems to have coincided with this practice. We initially started using Appeal Cases as our source of information about appeals, but it soon became apparent that there was a large discrepancy between the number of cases that the Court of Appeal and House of Lords/Supreme Court were adjudicating every year and those that appeared in Appeal Cases. As a result, we broadened our database to cover all House of Lords/Supreme Court cases in the Westlaw database, regardless of where they were reported.

decline in importance. Chart 10 shows the topic areas of those cases that have formed an increasing proportion of the House of Lords/Supreme Court workload since the 1950s.

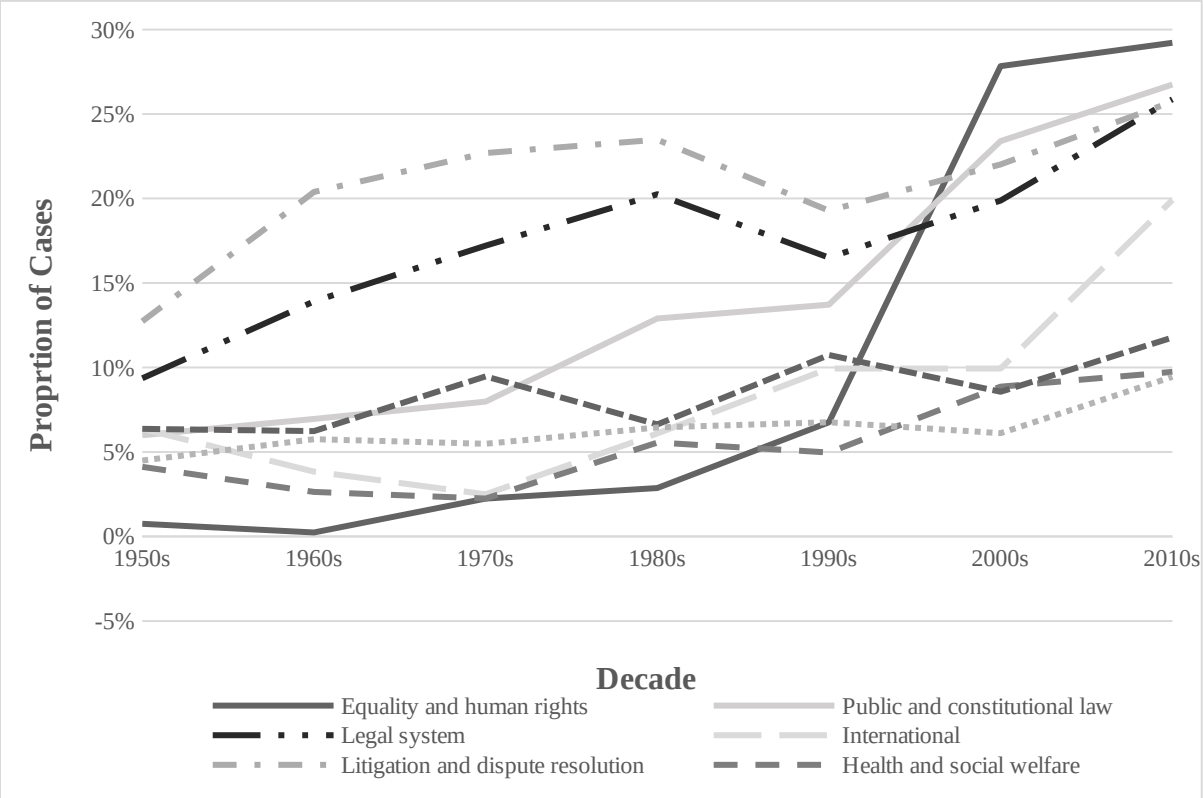

Chart 10: The subject matter of the eight types of civil cases (multi-code) which are taking up an increasing proportion of the House of Lords' and Supreme Court's workload 1950–2019.[90]

Looking at the sub-topics beneath each of the categories shown in Chart 10 allows us to see the particular issues that are fuelling appeals. We can discern that cases involving family

[90] All topics have been included where the proportion of court's workload increased by four per cent or more between 1950s and 2010s. Other topics increased to a lesser degree. 'Environment', 'insolvency' or 'local government' topic areas each increased two per cent. 'Personal injury' and 'social regulation' each increased one per cent. The focus of this paper is primarily on civil cases, in addition to these, the topic of 'crime' increased by 18 per cent in the same period.

law are dominated by issues pertaining to children; cases involving health and social welfare by social security benefits and mental health; cases about the legal system by sanctions; public and constitutional cases by immigration; equality and human rights cases by the right to respect for private and family life; finance appeals by insurance issues; and international law by issues surrounding EU law. At one level the cases reaching the House of Lords/Supreme Court are subject to the same political, economic, and socio-cultural factors outlined earlier in this article. However, the reasons for growth in a field are not always straightforward. Increases in public and constitutional law cases in the 2000s have been explained by reference to legislation that raises new constitutional issues around devolved government following the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 1998,[91] though a closer look at the sub-codes behind this category shows that public and constitutional cases are actually dominated by issues relating to immigration.

Although finance and international disputes have been making up a greater proportion of the cases considered by the House of Lords/Supreme Court since the 1950s, what is most notable about the data in chart 10 is the presence of cases relating to family, health and social welfare, public and constitutional law, and equality and human rights. These findings mirror work undertaken on State Supreme Courts in the US by Kagan and others which has charted the growth and increasing importance of appellate decisions involving non-market transactions with the state rather than those arising out of private voluntary business relationships.[92] Despite the considerable cost of taking a case to appeal, these topics tend to

[91] See further the essays on specific areas in L. Blom-Cooper, B. Dickson and G. Drewry n 13 above.

[92] R.A. Kagan et al, 'The Business of State Supreme Courts, 1870-1970' (1977) 30 Stan LRev 121. See H.M. Kritzer and others, 'The Business of State Supreme Courts, Revisisted' (2007) 4 JELS 427. which updates Kagan et al's analysis to the 1990s. This also seems consistent with the decline of

touch on the troubles of people further down the socio-economic scale. For example, the changing political and legal landscape of the post-war period with its new forms of jurisprudence concerned with social and economic rights is well reflected in our dataset by an erratic but gradual rise in the proportion of cases relating to landlord and tenant from 1950 to 2019 and a gradual decline in the proportion of cases relating to sale of land.

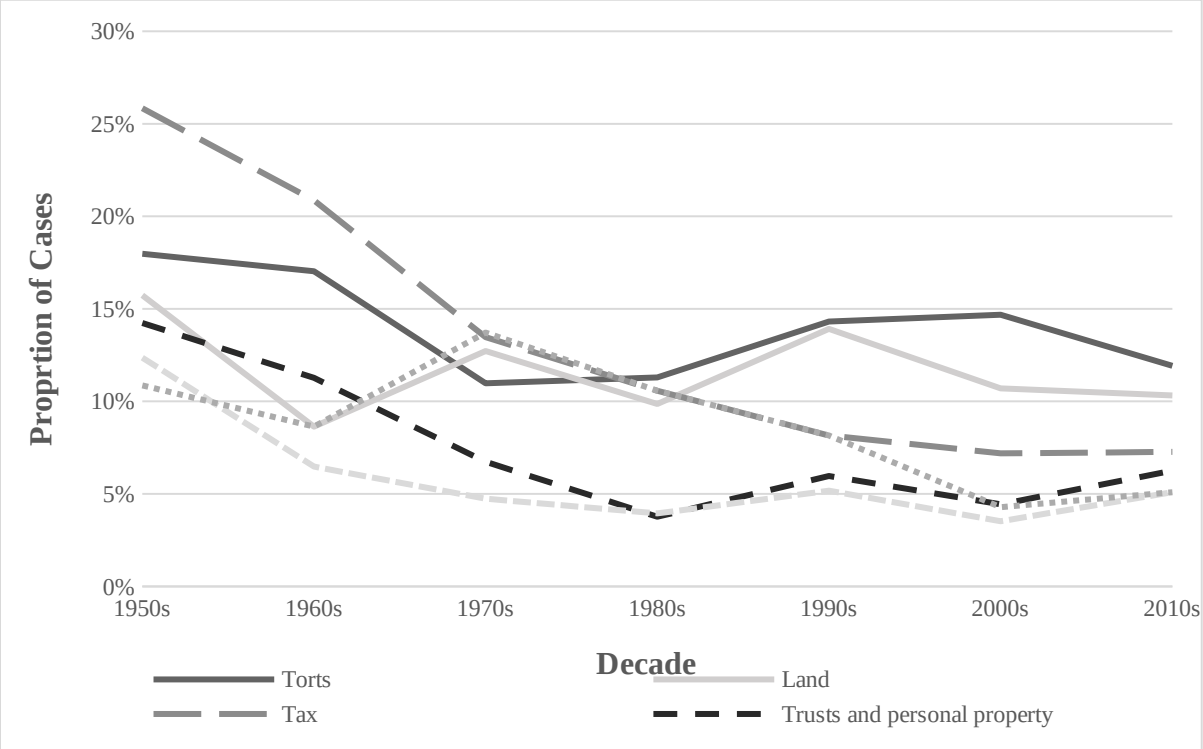

Chart 11: The subject matter of the six types of case (multi-code) which are taking up a decreasing proportion of those going to the House of Lords and Supreme Court workload 1950–2019.[93]

economics cases in the US Supreme Court. See also H.M. Kritzer, 'Polarized Justice? Changing Patterns of Decision-Making in the Federal Courts' (2019) 28 *Kansas Journal of Law & Public Policy* 309. See also Genn, 'Privatisation' n 8 above.

[93] As with Chart 10, topics are shown where the proportion of the court's time decreased by four per cent or more. Additionally, 'commercial', 'planning & construction', 'employment & work', and 'intellectual property' each decreased by two per cent.

Chart 11 provides additional insight into the subject matter of the types of cases that have been taking up a smaller proportion of the House of Lords/Supreme Court workload since the 1950s. Commenting on the diminishing importance of commercial disputes arising out of market transactions in US State Supreme Courts in the 1970s, Kagan has argued that this seems counter-intuitive in an industrial age in which we have witnessed the domination of the economy by large corporations.[94] We suggest that such claims require close scrutiny for a number of reasons, not least because similar concerns have been raised in a UK context. When Kagan's study of US State Supreme Courts was updated to the 1990s by others, it became clear that contract disputes were playing an increasingly important role in the business of the courts, a finding that may well reflect the increasing complexity of business enterprises and the decline of local and personal relationships which previously tended to facilitate informal resolution of disputes.[95]

[94] Kagan et al n 92 above.

[95] S. Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55.

Topic	1950s	1960s	1970s	1980s	1990s	2000s	2010s	Change 1950s-2010s
Equality and Human Rights	**1%**	**0%**	**2%**	**3%**	**7%**	**28%**	**29%**	**29%**
Equality and Discrimination	1%	0%	2%	2%	4%	6%	9%	8%
Discrimination	1%	0%	1%	0%	1%	2%	6%	5%
Human Rights	0%	0%	0%	1%	3%	24%	25%	25%
Right to Fair Trial	0%	0%	0%	0%	1%	7%	5%	5%
Right to Respect for Private and Family Life	0%	0%	0%	0%	0%	5%	9%	9%
Public and Constitutional Law	**6%**	**7%**	**8%**	**13%**	**14%**	**23%**	**27%**	**21%**
Administrative Law	0%	1%	1%	3%	6%	3%	7%	6%
Immigration	0%	0%	1%	3%	3%	7%	10%	10%
Crime	**7%**	**16%**	**22%**	**22%**	**24%**	**32%**	**26%**	**18%**
Criminal Procedure	3%	6%	6%	7%	10%	12%	8%	6%
Sentencing	0%	1%	1%	3%	3%	9%	6%	6%
Legal System	**9%**	**14%**	**17%**	**20%**	**17%**	**20%**	**26%**	**17%**
Legal system - Sanctions	6%	9%	13%	13%	10%	9%	15%	9%
Litigation and Dispute Resolution	**13%**	**20%**	**23%**	**23%**	**19%**	**22%**	**26%**	**13%**
Civil - Claims	6%	10%	13%	13%	11%	11%	17%	10%
Judgments and Orders (Civil)	2%	3%	5%	8%	4%	6%	10%	8%
International	**6%**	**4%**	**2%**	**6%**	**10%**	**10%**	**20%**	**14%**
EU Law	0%	0%	0%	2%	5%	6%	14%	14%
Health and Social Welfare	**4%**	**3%**	**2%**	**6%**	**5%**	**9%**	**10%**	**6%**
Finance	**6%**	**6%**	**9%**	**7%**	**11%**	**9%**	**12%**	**5%**
Family	**4%**	**6%**	**5%**	**6%**	**7%**	**6%**	**9%**	**5%**
Land	**16%**	**9%**	**13%**	**10%**	**14%**	**11%**	**10%**	**-5%**
Transport and Shipping	**11%**	**9%**	**14%**	**11%**	**8%**	**4%**	**5%**	**-6%**
Torts	**18%**	**17%**	**11%**	**11%**	**14%**	**15%**	**12%**	**-6%**
Negligence	15%	11%	6%	8%	8%	7%	6%	-9%
Companies and Partnerships	**12%**	**6%**	**5%**	**4%**	**5%**	**4%**	**5%**	**-7%**
Corporate Finance	6%	2%	1%	1%	1%	1%	1%	-5%
Trusts and Personal Property	**14%**	**11%**	**7%**	**4%**	**6%**	**4%**	**6%**	**-8%**
Succession	5%	4%	1%	1%	1%	1%	1%	-5%
Tax	**26%**	**21%**	**13%**	**11%**	**8%**	**7%**	**7%**	**-19%**
Income Tax	10%	4%	4%	2%	3%	1%	2%	-8%

Table A: Changes in the proportion of the House of Lords/Supreme Court time by topic, sub-topic and sub-sub-topic 1950-2019 where the change in either direction was 5 per cent or greater.

Table A shows that between 1950 and 2019 a smaller proportion of contract cases that reached the House of Lords or Supreme Court were about breach and a much larger

proportion about terms which may well reflect the increasing regulation of contractual provisions. Moreover, while the *proportion* of commercial law cases decided in the House of Lords/Supreme Court has declined, the *number* that deal with general commercial matters has increased from 18 to 35 since the 1950s, those relating to contract from 18 to 45, finance 17 to 81, and transport and shipping from 29 to 35. The diminishing priority given to commercial law cases could be explained by reference to ways in which demand for and supply of authoritative adjudication works very differently in final appellate courts. Once precedent becomes settled there may continue to be multiple cases on the subject coming into the system without a corresponding need for precedent to be re-visited. In his discussion of the impact that the House of Lords has had in the field of commercial law, Francis Reynolds has drawn attention to the large number of the decisions that set out the architecture of contract and commercial law decided in the nineteenth and early twentieth century.[96] Other cases that feature more prominently lower down the system might be those requiring adjudication on matters of fact rather than principle.

Demand for speedy resolution of issues may also be an important factor in understanding why certain commercial cases do not feature more prominently in data relating to the House of Lords and Supreme Court. Disputes such as those in the construction industry, rarely find their way to the appellate courts at all because of the delay involved. The London courts have witnessed a significant increase in large-scale commercial disputes with an international dimension in recent decades with the Chancery Division, Commercial Court and Technology and Construction Court, becoming the largest centre for financial, business and property litigation in the world.[97] These specialist commercial courts are highly conscious of the need for speed in the settlement of commercial disputes and lower status

[96] Reynolds n 42 above. See also Stevens n 77 above.

[97] Briggs report on Chancery n 63 above.

precedents set at this level may well be sufficient for the smooth operation of the market.[98] Reflecting on the fact that some areas of law manage perfectly well without constant revisiting of precedent, Derek Wood has remarked: 'Property lawyers, echoing the question raised by the Judaean Liberation Front in Life of Brian might ask: What did the House of Lords ever do for us?'[99]

There is also a danger that some developments get lost in the data in Charts 10 and 11. Treating human rights as a discrete subject category suggests that it is distinct from the other categories listed, whereas in reality human rights jurisprudence touches on the obligations of corporations and the commercial arena in a number of ways. However, the fact that the coding scheme we have been working with allows for multi-codes facilitates further investigation of the relationship.

[98] 'A Unique Gathering of Commercial Courts' (Courts and Tribunals Judiciary, 15 May 2017) at https://www.judiciary.uk/announcements/a-unique-gathering-of-commercial-courts (last visited 2 March 2021).

[99] Wood n 64 above.

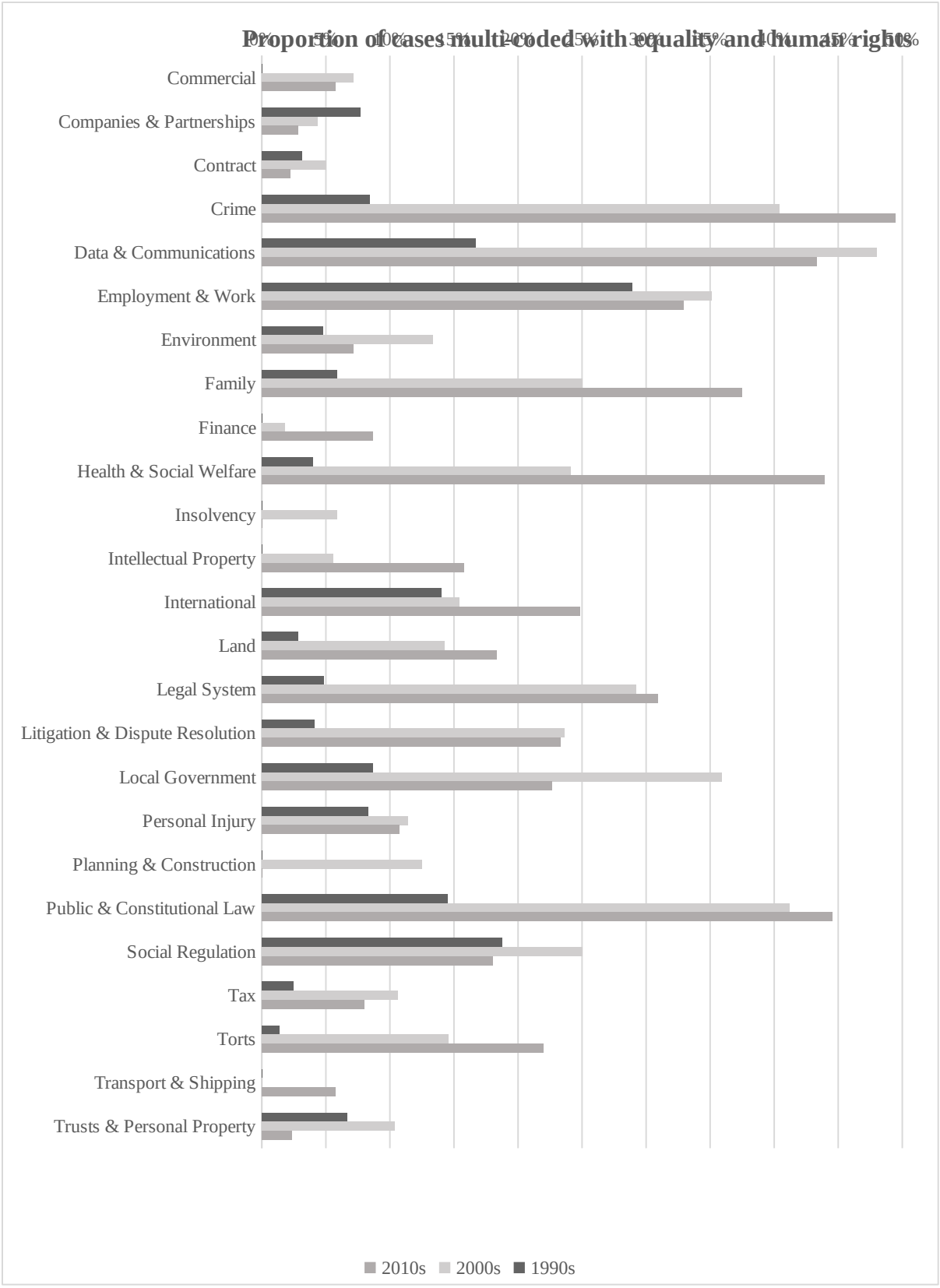
Proportion of cases multi-coded with equality and human rights
0%
5%
10%
15%
20%
25%
30%
35%
40%
45%
50%
Commercial
Companies & Partnerships
Contract
Crime
Data & Communications
Employment & Work
Environment
Family
Finance
Health & Social Welfare
Insolvency
Intellectual Property
International
Land
Legal System
Litigation & Dispute Resolution
Local Government
Personal Injury
Planning & Construction
Public & Constitutional Law
Social Regulation
Tax
Torts
Transport & Shipping
Trusts & Personal Property
2010s
2000s
1990s

Chart 12: Changes in the proportion of cases by topic that also had equality and human rights as one of the topics assigned, 1990-2019.

Whilst cases in most areas of law have seen an increase in the proportion involving an equality and human rights dimension since the enactment of the Human Rights Act 1998 (HRA), there is considerable variation in the degree of growth as shown in Chart 12. Crime, health and social welfare, family, public and constitutional law, data and communications, legal system and torts have all seen growth of more than 20 per cent in the proportion of cases that are also coded as equality and human rights between the 1990s and 2010s. Other topics have seen far less significant growth, with the proportion of employment and work, personal injury and environment that have an equality and human rights aspect each increasing by less than 5 per cent since the HRA came into effect. For both insolvency and planning and construction, the impact of human rights does not appear to be long term. Both areas of law had cases which were also coded as equality and human rights in the decade following the enactment of the HRA, but neither did in the 2010s. Notably, a small number of topics (social regulation, contract, trusts and personal property and companies and partnerships) have actually shown a decrease in the proportion of cases that are multi-coded with equality and human rights since the 1990s.

Looking in more detail at sub-categories involving equality and human rights makes it possible to analyse these changes in more depth. It would seem that across legal specialisms, an increasing proportion of cases are multi-coded with the right to respect for private and family life. In the 2010s, over 5 per cent of crime, health and social welfare, family, public and constitutional law, data and communications, legal system and litigation and dispute resolution were all concerned this aspect of human rights, reflecting its growing importance.

Discrimination is another area that has increasingly been a factor in cases in many different topics with 20 per cent of health and social welfare cases involved disability discrimination in the 2010s and 12 per cent involved the prohibition of discrimination in that decade.[100] Family, public and constitutional law, international and social regulation each had 5 per cent or more cases concerned with various aspects of discrimination in 2010s. One notable area bucking the trend to some extent was employment and work cases, in which the proportion of cases relating to discrimination rose to 19 per cent in the 2010s, while cases concerning sex discrimination fell to only 3 per cent in the same decade from 14 per cent in the 2000s. A small number of topics have increasingly concerned the right to a fair trial. Unsurprisingly, this is particularly evident in criminal cases, with 12 per cent of cases multi-coded with the right to a fair trial in 2010s but legal system, employment and work, intellectual property and litigation and dispute resolution also each had 5 per cent of more cases relating to this. Other equality and human rights sub-topics have shown increases in the proportion of cases, but only in one or two topics. For example, 27 per cent of data and communications concerned freedom of expression in the 2010s, down from 40 per cent in the 2000s. Freedom of expression was also an element of 5 per cent of tort cases in the 2010s.

Who is bringing cases?

[100] We only analysed the proportion of cases in each topic that were multi-coded with each sub topic in equality and human rights individually. As with topic coding, cases could be coded to multiple sub-topics, or to none at all. Given the number of sub-topics within the equality and human rights primary topic (three sub topics and 32 sub-sub topics), we did not calculate the proportion of cases which were coded to multiple sub topics as this would have resulted in too much complexity and the numbers of cases in each permutation would have been too small to allow meaningful analysis.

The type of precedent produced is not only determined by the judges; litigants and their lawyers also have to decide to pursue cases to appeal. Bursts of strategic litigation activity are often discernible. Reynolds has drawn attention to the cult of fighting charterparty cases to the highest level in the 1970s and Mulcahy has highlighted the NHS Litigation Authority's (now NHS Resolution) role in pursuing cases about interest rates to appeal because of its duty to protect NHS resources.[101] But while the need for a new precedent may be widely acknowledged, it takes considerable resources to pursue a case, and there may be limited incentives for an individual disputant to fund an action on behalf of a wider group. Despite this, issues around who brings cases to the attention of the Supreme Court is of particular importance because of the speculation that well-resourced disputants are more likely to be able to 'game' the litigation system by 'playing for rules' and influence the sort of precedent that is created.[102]

Somewhat surprisingly, there is currently no official published data relating to the types of parties involved in House of Lords and Supreme Court litigation.[103]

In order to fill this gap, we undertook an analysis of 3,366 House of Lords/Supreme Court cases from 1950–2019 that were available in the Westlaw database. We classified the parties according to 24 categories of appellants and 23 categories of defendants that emerged from the data. The results can be seen in Chart 13 in which these categories have been collapsed into five main groups in the interests of revealing major trends.

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101 Reynolds n 42 above; Mulcahy, 'Market for Precedent' n 9 above.

102 M. Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 L & Soc Rev 95. See also C.R. Albiston, *Institutional Inequality and the Mobilization of the Family and Medical Leave Act* (Cambridge: Cambridge University Press 2010).

103 These data are not published in *Judicial Statistics*.

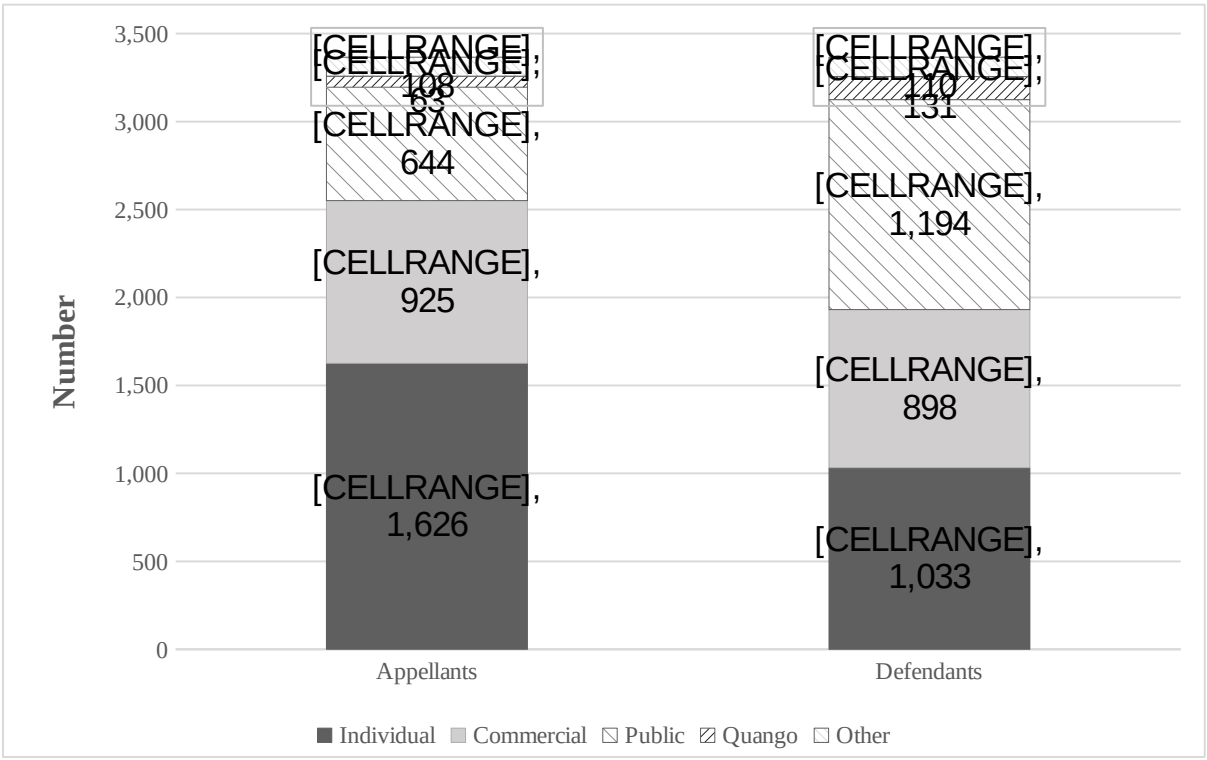

Chart 13: Categories of appellants and defendants in House of Lords/Supreme Court cases 1950–2019. (n=3,366)[104]

Rather predictably, three main categories of actor emerge from this analysis: individuals; companies or corporations;[105] and public bodies. Most information about the likely size and nature of the parties could be gleaned from public bodies, the majority of which were central

104 'Individuals' were where one party was a named person/people. 'Commercial' includes any party which had 'Co', 'Ltd', 'plc' or similar in its name. 'Public' included all cases involving the Crown, central, regional or devolved government, regional public authorities, educational bodies, courts and tribunals, or international organisations such as the EU. 'Quangos' included all parties which were identified as current or former quangos. The 'Other' category includes trustees, countries, trade associations, trade unions, religious organisations, universities, NGOs, charities, sports associations, mutual societies, trusts, and the press.

105 Commercial parties were identified by any reference to being a limited company or corporation.

government departments, local authorities or regional bodies funded directly from the public purse, such as NHS Trusts or regional police commissioners. Further analysis showed an overall increase in the proportion of cases brought by individuals from a low point of 38 percent in the 1950s to a high point of 58 percent in the 2010s. Cases involving commercial appellants had a less steady trajectory, but overall there has been a drop in the proportion of cases involving appellants in this category from 34 per cent in the 1950s to 21 per cent in the 2000s before a rise to 27 per cent in the 2010s. There are clearly limitations to these bare data, not least of which is an understanding of the size of companies and corporations or the resources available to individuals, but the data do not suggest a wholesale abandonment of the appellate courts by those concerned with private law issues as has been suggested elsewhere.[106]

[106] Looking at the size of the commercial parties would have involved reading the case and doing further searches in the business press and at Companies House. This is a project that we intend to undertake in the future.

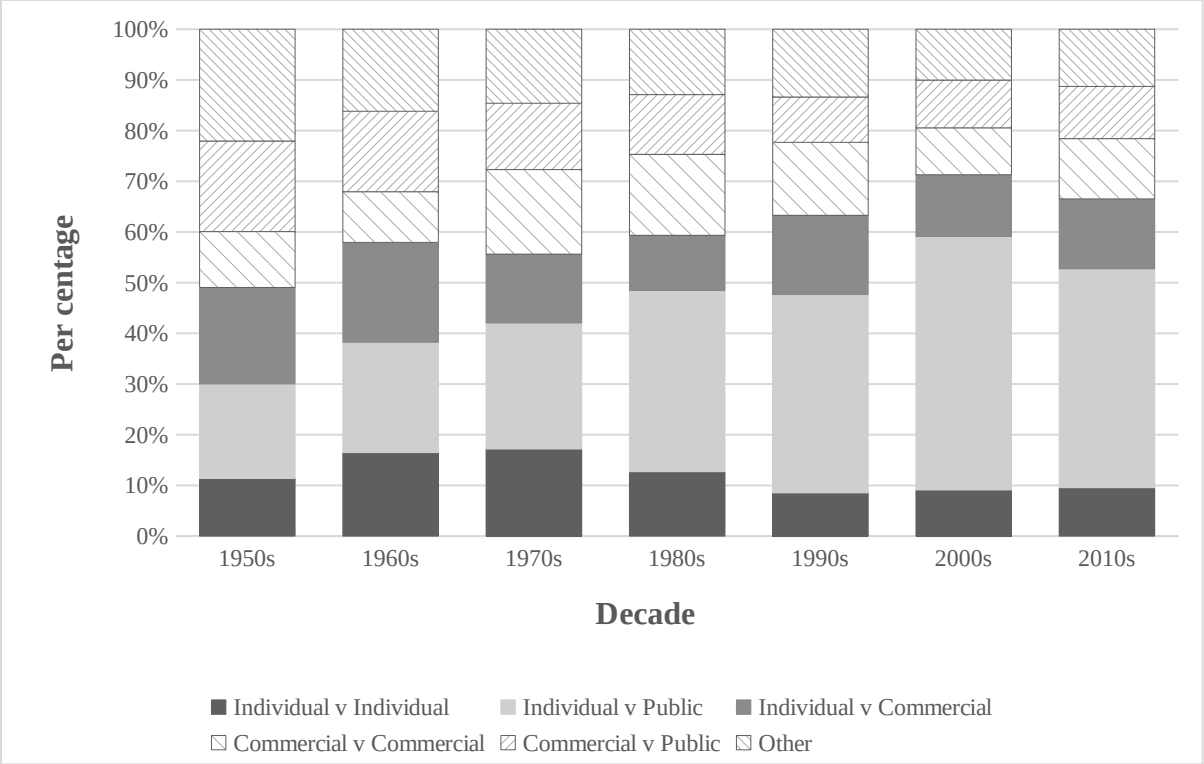

Chart 14: Proportions of different party configurations in House of Lords/Supreme Court cases by decade between 1950 and 2019.[107]

Chart 14 provides further information about who was suing whom. This shows that the largest sub-set of civil cases going to the Supreme Court now involve individuals and public bodies. This has changed from the 1950s when the largest sub-set was litigation involving individuals and commercial parties. It is also noticeable that while the cases in each of the six bands shown in Chart 13 were fairly evenly spread in the 1950s, cases involving individuals and public bodies has increased from 18 per cent of all cases in the 1950s to 50 per cent in the 2000s and 43 per cent in the 2010s. This can be explained by the increasing number and proportion of appeals concerned with public and constitutional law, equality and human

[107] The 'other' category comprises the combinations of 'Commercial v Individual', 'Public v Individual', 'Public v Commercial', 'Public v Public' and all cases with either 'Quango' or 'Other' as one or both parties, each of which account for under 10 per cent of the total cases.

rights, and health and social welfare likely to involve a public-service provider. Significantly, the proportion of cases involving a commercial appellant and defendant which stood at 11 per cent in the 1950s stands as 12 per cent of all cases in the 2010s.

Though it is tempting to characterise the 43 per cent of cases involving an individual against a public body in the 2010s as reflecting a classic one-shotters versus repeat players scenario, it is important to look at the role of experienced strategic litigators in transforming one-shotters into repeat players. Alan Patterson has argued that commercial repeat players, such as those involved in tax and shipping cases, might once have had some discretion over the order in which issues were taken to appeal in order to influence the trajectory of precedent, but that today it is only central government departments and certain interveners that now appear with sufficient regularity before the courts to play for the rules.[108] However, in the field of discrimination law, it has been argued that statutory commissions such as the Disability Rights Commission have played an important role in supporting cases brought by individuals.[109]

Our analysis of cases going to the House of Lords/Supreme Court shows that, although very few cases are initiated by non-governmental organisations (NGOs) and pressure groups, the influence of these bodies can be seen through the independent evidence and submissions on the scope and impact of the law that 'interveners' now make.[110] In contrast to the situation in

[108] On this point see Mulcahy, 'Market for Precedent' n 9 above.

[109] S. Cretney, 'Family Law' in L. Blom-Cooper, B. Dickson and G. Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009).

[110] See further JUSTICE *To Assist the Court – Third Party Interventions in the Public Interest*, (JUSTICE, 2016); C.R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in*

the US, interveners were rare in the UK courts until the 1970s and it was only in 1992 that practice directions and standing orders of the House of Lords first contained a paragraph dealing with this group.[111] Interventions in the House of Lords and Supreme Court have however risen significantly since then from just 2 in the 1970s to 12 cases in the 1980s, 12 in the 1990s, 116 in the 2000s and 165 in the 2010s.[112] The 306 cases from the 1950s onwards in which there has been an intervention have involved 517 interveners, or an average of 1.7 intervener per case, with the largest number of interveners in one case being 12. As others have noted, it is apparent that since it was created in 2009 the Supreme Court has also been more disposed to allow organised groups to intervene than individuals.[113]

Comparative Perspective (London: University of Chicago Press 1998); C. Harlow and R. Rawlings, *Pressure Through Law* (London: Routledge, 1992).

111 See further Practice Directions 3, 6 and 8 and Rule 15 of the Rules of the Supreme Court at http://www.supremecourt.uk/procedures (last visited 8 June 2020). See also S. Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 Adelaide LRev 159.

112 Unlike the main parties, interveners are not usually named in the case name, and there appears not to be any particular requirement as to how they should be recorded in a case report. Westlaw was electronically searched for all House of Lords/Supreme Court cases in which the word 'intervener' was included and was then checked to ensure that it was a reference to third-party interveners. For cases between June 1998 and July 2009, the House of Lords' minutes of proceedings data were also checked for references to 'intervener'. These records contain details of all applications by interveners and whether they are successful or not. The search period used on Westlaw began in 1949, but the earliest reference to an intervener was in 1970.

113 S. Shah, T. Poole and M. Blackwell, 'Rights, Interveners and the Law Lords' (2014) 34 OJLS 295.

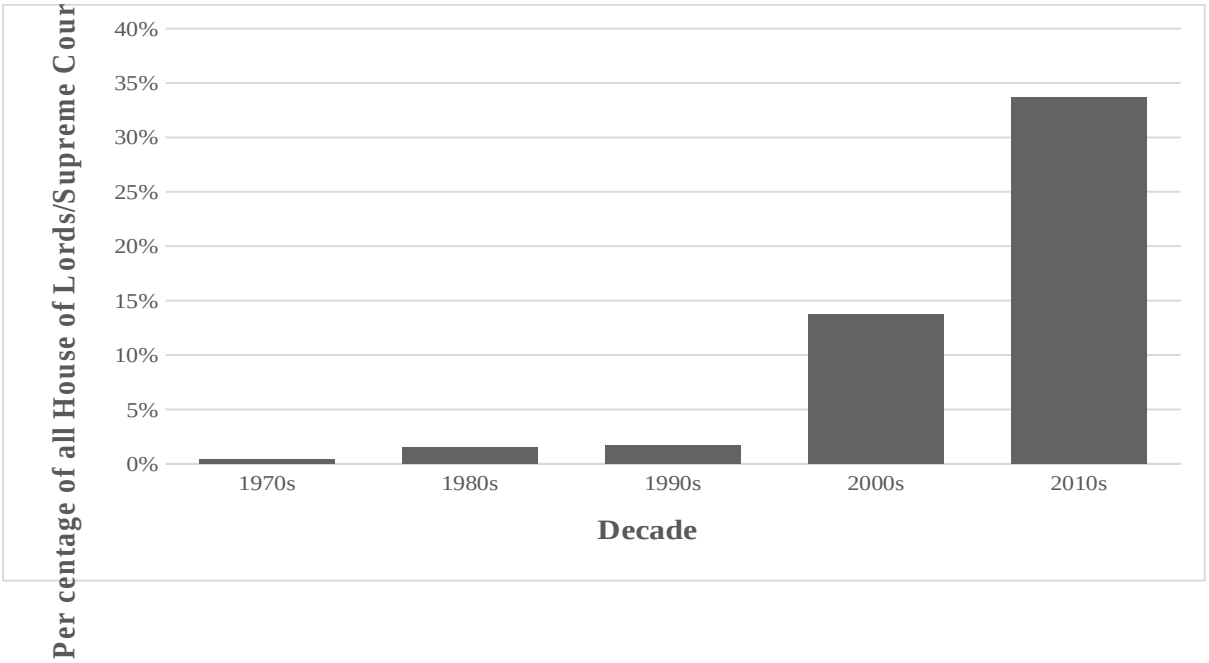

Chart 15: House of Lords/Supreme Court cases involving interveners 1970–2019 as a proportion of all House of Lords/Supreme Court business.

A number of explanations have been put forward for the increasing presence of third-party interventions. It has been argued that the judiciary have adopted a more liberal attitude towards allowing them standing which has been justified by the more general interest in developing the law in the field of human rights during the Bingham era in the House of Lords.[114] Others have found explanations in shifting patterns in the way that NGOs featuring prominently in interventions work. In our sample NGOs constituted the largest single group of interveners, with 80 NGOs appearing 207 times. Carol Harlow and Richard Rawlings have argued that NGOs were spurred to turn to the legal system to instigate policy change from the 1980s as they were increasingly excluded from the sort of pre-legislative discussions of

[114] On this point see B. Dickson, 'A Hard Act to Follow: The Bingham Court, 2000-8' in L. Blom-Cooper, B. Dickson and G. Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009). in Blom Cooper et al n 13 above and Shah, Poole and Blackwell n 113 above.

policy that had been the norm before the Thatcher administration.[115] In their view, this forced many campaign groups to resort to the courts to challenge the legislation that they had no hand in crafting. In their work on interveners in the House of Lords up to 2009, Shah and colleagues found that repeat player NGOs were taking on an increasingly important role in framing legal arguments.[116] Chart 15 updates the data they collected. Our analysis shows that the trend towards increased intervention is ongoing with two organisations – JUSTICE (30 cases) and Liberty (29 cases) – standing out as repeat-player interveners, followed by the AIRE Centre (13) and Re-Unite (11).

These data prompt two further observations. First, the fact that central government departments and law officers constitute the second largest group of interveners after NGOs also makes clear, as Sarah Hannett has argued, that intervention is not the sole preserve of groups that prioritise the interests of the disadvantaged.[117] Secondly, discussion of interveners to date has tended to focus on the type of organisations that intervene rather than on the absence of organisations that have the resources to intervene but are completely absent from the statistics.[118] There are undoubtedly interesting issues to be raised about the lack of participation of large corporations, multinationals and technology giants in strategic litigation and intervention. While trade and professional associations – such as the International Tin Council, Exporters of Citrus Fruits and the Finance and Leasing Association – do feature in the data, only 35 appeared as interveners in comparison to 51 NGOs. Significantly, repeat

115 Goriely n 43 above; Harlow and Rawlings, *Pressure through Law* n 100 above.

116 Shah, Poole and Blackwell n 113 above.

117 S. Hannett, 'Third Party Intervention: In the Public Interest?' [2003] PL 128.

118 See for instance M. Arshi and C. O'Cinneide, 'Third-Party Interventions: the Public Interest Reaffirmed' [2004] PL 69.

players in this group were dominated by groups representing lawyers. The Law Society intervened 13 times, the Media Lawyers Association on 6 occasions, the Bar Council on 5, and the Association of British Insurers twice. By way of contrast, of the 30 cases in which commercial organisations intervened, there were none that appeared twice. It is also noteworthy that within this group only Aviva plc is amongst the highest-earning companies in the UK.[119] These data suggest that commercial parties are either much less well organised than prominent NGOs, do not see third-party interventions as a valuable way of influencing the law, have not identified issues where there is a pressing need for precedent, are less interested in pursuing issues in the public or general commercial interest or have a preference for settlement. Since the ability to engage in informal discussions with policy-makers is the mark of the true insider it may also be the case that corporation prefer to exert their influence on the legal system through parliamentary lobbying away from the public eye. Indeed, it has been argued that powerful groups tend to positively avoid the sort of ostentatious campaigns associated with 'outsider' groups for the very reason that it is suggestive of impotence in gaining access to a private audience and negotiations.[120] This is clearly a fertile area for future research.

Who decides what cases progress to appeal?

The power to influence which precedents are set may also be determined by the power of the Supreme Court justices to determine which cases they hear. Kagan's work on US State

[119] See further Global Database, 'Top 50 Companies in the UK by Revenue' (2017) at https://www.globaldatabase.com/top-50-companies-in-uk-by-revenue-in-2017 (last visited 2 March 2021).

[120] P. Whiteley and S. Winyard, 'Influencing Social Policy: The Effectiveness of the Poverty Lobby in Britain' (1983) 12 J Social Policy 1.

Supreme Courts demonstrated that declines in certain types of legal work were more pronounced in courts that had more control over what entered their docket, suggesting a clear judicial preference for certain cases.[121] The discretion to decide the nature of workload renders an understanding of judicial culture critical in understanding trends.[122] The control that the House of Lords/Supreme Court have achieved over their docket since the 1990s[123] has prompted Blom-Cooper and Drewry to argue that this now effectively allows the Justices to 'cherry pick' the matters they want to consider or produce 'justice à la carte'.[124]

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121 R.A. Kagan and others, 'The Evolution of State Supreme Courts' (1978) 76 Mich LRev 961.

122 Kagan et al n 92 above.

123 In the 1950s the House of Lords had given permission for appeals in 16 per cent of the cases entered, but this has risen to 82 per cent projected for this decade. On this point see further M. Beloff, 'The End of the Twentieth Century: The House of Lords 1982-2001' in L. Blom-Cooper, B. Dickson and G. Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009).

124 Blom-Cooper and Drewry n 13; G. Drewry and L. Blom-Cooper, 'The House of Lords and the English Court of Appeal' in L. Blom-Cooper, B. Dickson and G. Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009).

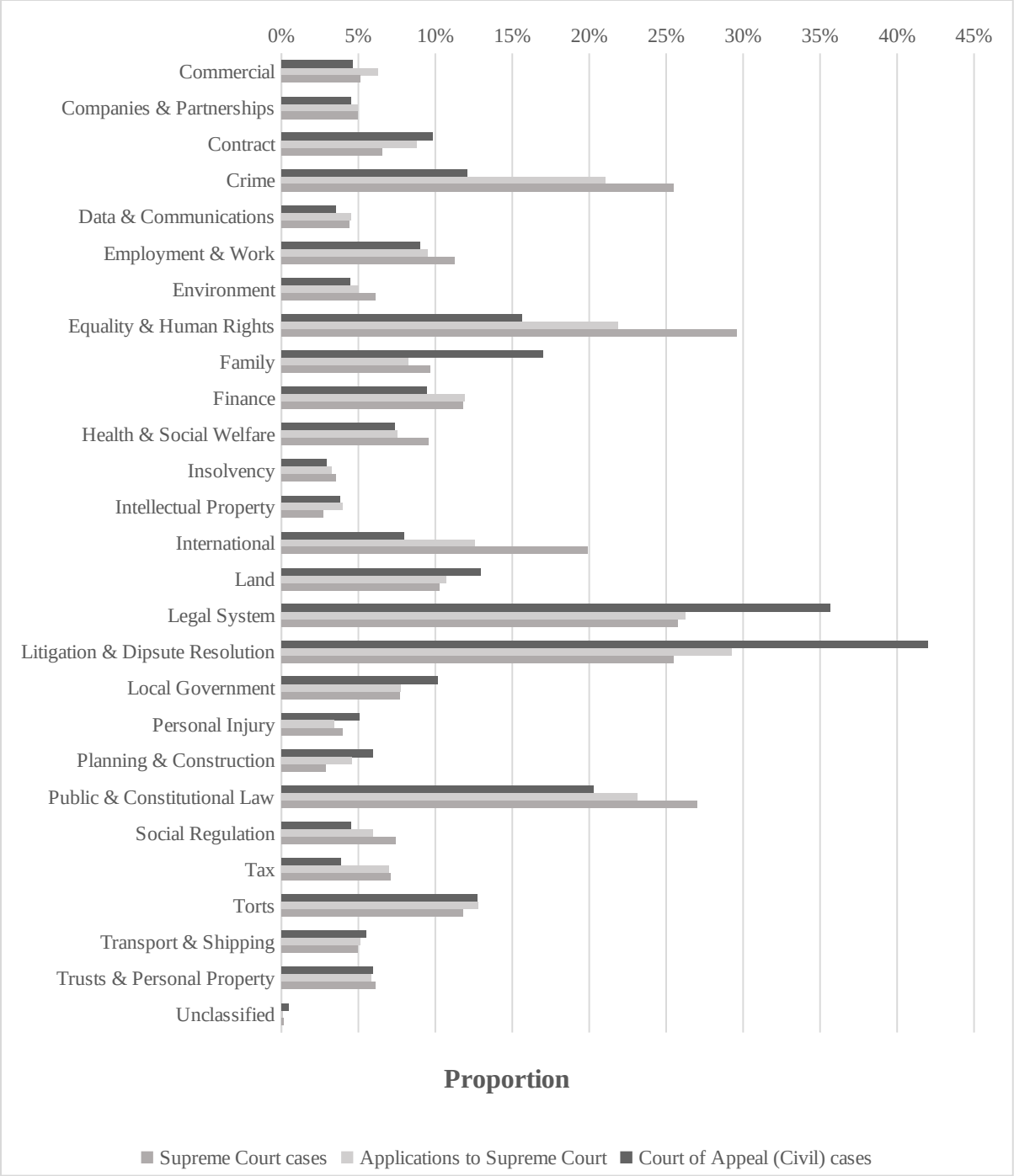

Chart 16: Cases heard in the Court of Appeal (Civil) and applications to appeal and cases heard in the Supreme Court as a proportion of all applications and all cases heard by topic (multi-code) 1 October 2009–31 December 2019.[125]

[125] Court of Appeal (Civil) cases n=6,918; Supreme Court applications n=2,061; Supreme Court cases n=703.

In an attempt to provide a more detailed account of the filtering process we undertook an analysis of the 6,918 Court of Appeal (Civil Division) and 703 Supreme Court cases by Westlaw topic codes 2009-2019.[126] We also analysed 2,061 of the 2,148 applications considered by the Supreme Court from the day it opened in 2009 to 2019 by Westlaw topic codes for the cases applying to appeal.[127] Chart 16 shows the results of this analysis. Each topic category shows applications in an area as a proportion of all applications, and cases heard in that category as a proportion of all cases heard. It can be seen from this that certain types of cases, such as those involving equality and human rights, international and public and constitutional law, were much more likely to be successful at application stage and that others, such as litigation and dispute resolution, contract, legal system, torts and planning and

[126] Whilst cases can be appealed to the Supreme Court from a number of different lower courts, the Court of Appeal (Civil Division) provides the bulk of the Supreme Court's case load. From data *in Judicial Statistics*, between 1950 and 2016, and analysis of case reports on Westlaw from 2017 to 2019, an average of 68 per cent of appeals entered were from the Court of Appeal (Civil Division). From 2010, after the Supreme Court opened, the proportion of cases from the Court of Appeal (Civil Division) has averaged 73 per cent. Therefore, whilst the proportions of topics in the Court of Appeal (Civil Division) does not represent the entirety of the pool of potential applicants to the Supreme Court, it is a viable approximation.

[127] Where multiple cases were listed together in the application, these were treated individual applications as each case was assigned a unique reference number in the permissions to appeal database and there could be different outcome for individual cases within the application. Details of the topics for these applications were recorded for all cases in the applications. For 94 applications, either it was not possible to identify the appealing case, or the case could be identified in Bailii but did not appear in the Westlaw database (a number of cases appealing from Northern Ireland appeared in Bailii but not in Westlaw). Of the 94, 7 applications were successful and the Westlaw topics for the case as it appeared in the Supreme Court were entered into the database.

construction, were less likely to succeed. In some instances, the sheer bulk of applications in areas such as litigation and dispute resolution (628) and the legal system (564) suggests that hard choices have had to be made about which cases to address because of the capacity for these issues to overwhelm all other cases.

Unfortunately, the Supreme Court does not give reasons for accepting cases, but it does provide a short explanation of the reasons why it has refused an application. A content analysis of these short explanations show that the phrases used map closely onto the formal grounds for appeal, often employing a combination of all three (multi-code).[128] The data available on the refusal to allow an application is produced in Table B below. This demonstrates that the most likely ground for refusal is that there is no arguable point of law. Given our earlier discussions of trends in commercial litigation, it is interesting to note the relatively high proportion of commercial, company and partnership cases in which there is said to be no issue of general public importance to be decided.

Topic	Applications			Reasons for Refusal		
	Granted	Refused	Total	Does not raise a (arguable) point of law	Matter not of general public importance	Not an issue that ought to be considered by the Supreme Court at this time
Commercial	36 (35%)	66 (63%)	**104**	61 (92%)	46 (70%)	32 (48%)
Companies & Partnerships	26 (30%)	60 (70%)	**86**	58 (97%)	38 (63%)	25 (42%)
Contract	50 (35%)	92 (64%)	**143**	90 (98%)	59 (64%)	38 (41%)
Crime	142 (41%)	206 (59%)	**349**	186 (90%)	108 (52%)	101 (49%)
Data & Communications	30 (38%)	49 (61%)	**80**	48 (98%)	24 (49%)	25 (51%)

[128] In addition, reasons are given for a refusal to refer to the Court of Justice of the European Union. These are not shown here.

Topic	Applications			Reasons for Refusal		
	Granted	Refused	Total	Does not raise a (arguable) point of law	Matter not of general public importance	Not an issue that ought to be considered by the Supreme Court at this time
Employment & Work	58 (37%)	98 (62%)	**157**	97 (99%)	56 (57%)	42 (43%)
Environment	19 (23%)	63 (77%)	**82**	61 (97%)	34 (54%)	27 (43%)
Equality & Human Rights	158 (43%)	211 (57%)	**371**	193 (91%)	94 (45%)	93 (44%)
Family	50 (36%)	90 (65%)	**139**	86 (96%)	30 (33%)	22 (24%)
Finance	77 (42%)	109 (59%)	**185**	104 (95%)	68 (62%)	52 (48%)
Health & Social Welfare	66 (52%)	60 (47%)	**127**	56 (93%)	27 (45%)	27 (45%)
Insolvency	13 (30%)	29 (67%)	**43**	29 (100%)	15 (52%)	13 (45%)
Intellectual Property	19 (29%)	46 (71%)	**65**	43 (93%)	26 (57%)	26 (57%)
International	102 (46%)	120 (54%)	**221**	108 (90%)	60 (50%)	55 (46%)
Land	66 (38%)	109 (62%)	**175**	108 (99%)	61 (56%)	52 (48%)
Legal System	135 (30%)	321 (71%)	**454**	309 (96%)	177 (55%)	147 (46%)
Litigation & Dispute Resolution	153 (31%)	344 (69%)	**496**	330 (96%)	185 (54%)	153 (44%)
Local Government	47 (39%)	74 (61%)	**121**	73 (99%)	38 (51%)	33 (45%)
Personal Injury	21 (39%)	34 (63%)	**54**	34 (100%)	22 (65%)	23 (68%)
Planning & Construction	17 (21%)	64 (79%)	**81**	61 (95%)	33 (52%)	24 (38%)
Public & Constitutional Law	134 (35%)	248 (65%)	**384**	228 (92%)	115 (46%)	97 (39%)
Social Regulation	42 (41%)	60 (59%)	**102**	60 (100%)	30 (50%)	24 (40%)
Tax	50 (42%)	70 (58%)	**120**	69 (99%)	34 (49%)	34 (49%)
Torts	80 (37%)	137 (63%)	**216**	130 (95%)	78 (57%)	67 (49%)
Transport & Shipping	34 (41%)	48 (59%)	**82**	48 (100%)	30 (63%)	22 (46%)
Trusts & Personal Property	41 (42%)	57 (58%)	**98**	55 (96%)	33 (58%)	20 (35%)
Unclassified	1 (50%)	1 (50%)	**2**	1 (100%)	1 (100%)	1 (100%)
Total	**562 (34%)**	**1,078 (66%)**	**1,642**	**1,022 (95%)**	**572 (53%)**	**483 (45%)**

Table B: Supreme Court applications granted and refused by subject and reasons given for refusal of leave to appeal (multi-code) by subject March 2012–December 2019 (n=1,642).[129]

[129] There were 55 applications in this period that could not be identified on Westlaw. Two applications were granted and refused in part, these have been included under both granted and refused in the relevant topics.

Writing in a North-American context, Pacelle has offered a more nuanced account of the filtering process than is suggested in the notion of 'cherry picking' alluded to above.[130] He has argued for increased attention to be given to such issues as the 'agenda-building' capacity of particular courts, the individual and collective goals or values of the court and the rise of new issues and groups. Work on agenda building has been much more muted in the UK than in the US where Supreme Court appointments are political but attention has however been drawn to the ways in which human rights became a more prominent part of the work of the House of Lords under the leadership of Lord Bingham.[131] In a similar vein, Lord Hope has stated that Lady Hale helped transform the regularity with which family law cases are considered.[132] Conversely, attention has also been drawn to the ways in which a conservative House of Lords was often slow to adapt to the growing egalitarianism of the twentieth century in the field of discrimination law or the acceptance of new forms of action such as pure economic loss or nervous shock.[133] Patterson's recent work on the UK Supreme Court has provided invaluable insights into how applications are heard and the increasing interest in filtering applications by senior judges since 2003. He has argued that judges specialising in a particular area of the law are much more likely to be assigned to application panels considering cases in that area than in previous eras, giving individual experts much more scope to determine developments in their field.[134] His work has also drawn attention to an

130 R. Pacelle, *The Transformation of the Supreme Court's Agenda: From the New Deal to the Reagan Administration* (London: Routledge, 2019); see also R.L. Pacelle, B.W. Curry and B.W. Marshall, *Decision Making by the Modern Supreme Court* (Cambridge: Cambridge University Press, 2011).

131 Shah, Poole and Blackwell n 113 above.

132 A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Oxford: Hart Publishing, 2013).

133 Hale n 37 above and Stevens n 77 above.

134 Paterson n 132 above.

increased emphasis on collegial working and group discussion of issues since the creation of the Supreme Court.[135] As with many of the arguments in this article, this is material which is ripe for further development by socio-legal scholars.

CONCLUSION

The data presented in this article have challenged some of the arguments made in the existing literature on the vanishing trial. They demonstrate that the radical drop in the number of cases coming into the system has now abated and that the number of trials has not only levelled off but is experiencing a relatively modest increase. Contrary to the assumption that a reduction in the number of trials held leads to a significant drop in the amount of precedent produced, this article has shown that precedent produced by the House of Lords/Supreme Court has been increasing for some time. It has also made clear that the focus of the final court of appeal has, over a significant period of time, shifted away from adjudication of economic disputes between individuals towards disputes that concern individuals' interactions with the state. These data and the explanations for them offered here are important for a number of reasons. Accounts of litigation trends over time have been made difficult by the paucity and quality of judicial statistics, making the collation of the sort of data contained in this article time consuming. This severely limits the ability of the academic community to track broader social, political and economic trends in who is using the legal system, the issues they are bringing for resolution and the different types of work that come before each layer of the system for trial and appeal. These sorts of insights are critical for those interested in questions about who is being served by the litigation system. They also allow us to discuss the sorts of cases that dominate the work of the Supreme Court and to ponder the mystery of why other disputes are absent from its work.

[135] ibid.

Future research could usefully pursue a range of questions prompted by the data. What types of individuals and commercial entities are taking cases to appeal? Who is funding them? What impact have changes in funding arrangements had on the type of case getting to the Supreme Court? What types of cases are being diverted to private forums? Would we expect a diminishing number of cases involving welfare recipients after the recent reduction in the availability of legal aid or more test cases fuelled by NGOs or third-party interventions on their behalf? What impact is this having on the way that law and society interact and function? It soon becomes clear that the extensive list of questions posed by this research cannot be answered in the space available in one article, or by reference to the public data currently available. It is hoped that the sizeable datasets presented here will act as a spur to further research looking across specialist fields of litigation.

Appendix A: Westlaw topics and sub-topics

Crime sub-topics: administration of justice offences; assault and non-fatal offences; communications and information offences; company and commercial offences; criminal appeals; criminal defences; criminal evidence; criminal liability; criminal procedure; drug offences; extradition; firearms and weapons offences; fraud and bribery; inchoate offences; money laundering; murder and manslaughter; national security offences; police; public order offences; road traffic offences; sentencing; sexual offences; terrorism; theft and offences against property; youth justice system.

Equality and human rights sub-topics: equality and discrimination; human rights.

Family sub-topics: children; children court orders; conflict of laws; family, divorce and relationship breakdown; divorce financial remedies; domestic violence injunctions; family alternative dispute resolution; parentage and assisted reproduction; registration of life events; relationships; sexuality and gender.

Finance sub-topics: banking; banking and financial services regulation; borrowing and lending; consumer credit; financial instruments and transactions; global financial system; insurance; investments; Islamic finance; money; mutual societies; raising capital; securities; security.

Health and social welfare sub-topics: disabilities, diseases and conditions; health care; health information and data; health professions; medical research; medical technology; mental capacity; mental health; NHS; pharmaceuticals; private health industry; social care; social security administration; social security benefits.

International sub-topics: EU law; international disputes; international organisations; international trade; private international law; public international law; space law.

Legal system sub-topics: access to justice; contempt of court; coroners; courts and tribunals; courts and tribunals administration; inquiries; judges; jurisprudence; legal methodology; legal profession; legal services; legal system rights and principles; legal system sanctions.

Litigation and dispute resolution sub-topics: alternative dispute resolution; arbitration; civil appeals; civil claims; civil enforcement; civil evidence; civil remedies; costs; funding arrangements; judgments and orders (civil); limitation of actions; parties and group litigation.

Public and constitutional law sub-topic: administrative law; armed forces; Brexit; constitutional law; constitutional law Northern Ireland; constitutional law Scotland;

constitutional law Wales; crown and government; ecclesiastical law; elections and referendums; immigration; judicial review; legislation; national security; nationality; parliament; political parties; public finance; public order; public procurement.