Towards a Judicature Act, 2015

by Stephen Hardy

This article canvasses the issues and advocates reform of the present antiquated High Court of England & Wales. In making the case for the modernisation of the existing High Court, this article analyses the current workload of the High Court since 2011 and the need to modernise in pursuit of specialism and expectations of the harmonisation of Her Majesty's Courts and Tribunals Service landscape. In arriving at a reformist model, this article proposes the disbandment of the pre-existing Divisions and replacing them with specialised Chambers fit for 21st Century.

INTRODUCTION

The Judicature Acts of 1873 and 1875 have come of age and could be viewed as anachronistic. Some 142 years have elapsed since the creation of the Supreme Court of Judicature, which was renamed the "Supreme Court of England and Wales" in 1981 under section 1 Supreme Court Act and thereafter became the "Senior Court of England and Wales" in 2005 (s 59, Constitutional Reform Act 2005), in order to distinguish it from the then newly constituted Supreme Court. The High Court as it is more commonly known today, which predominantly occupies the Royal Courts of the Justice – the UK's iconic legal landmark – has arguably outmoded Divisions and is in need of reform. Although since 2012 the High Court has also occupied the nearby Rolls Building, nicknamed "the Rolls Royce of modern courtrooms", combining judicial expertise in asset recovery, banking and financial services, company law, construction, insolvency & reconstruction, intellectual property and patents, professional liability, property, shipping, technology and trusts. In fact, even in 1880, when the Divisions of Common Pleas and Exchequer were abolished, the Queen's Bench, Family and Chancery Divisions remained intact. From then onwards, the framework of the UK's legal hierarchy seems entrenched. However, the present workloads of the variant existing Divisions of the High Court dictate new trends and provoke reformist ideals. To that and, this article traces the historical pathway of the High Court's tri-partite Divisions and analyses the current criticisms of the present, long-standing structure of the High Court of England and Wales.

THE HIGH COURT'S HISTORICAL CONTEXT

The High Court has since its inception had three distinct Divisions: Chancery, Queen's (or King's) Bench (QBD) and Family. Such then replicated the legal workload of the 19th Century and consequently three distinct areas of law emerged, although each Division provided its own a separate appellate jurisdiction from the first instance courts. Accordingly, each Division of the High Court has its own well-established roles and set of functions, as follows:

Chancery Division

The Chancery Division of the High Court is presided over by the Chancellor of the High Court, currently Lord Justice Etherton. Its workload is executed by 18 High Court judges, assisted by 6 Chancery Masters as well as 5 designated bankruptcy Registrars, and its jurisdiction deals with trusts, probate, insolvency and land matters. It also has specialist courts in patents and companies which deal with patents, registered designs and all company law matters, respectively. In practice, there is some overlap of jurisdiction with the QBD's

Commercial Court and common law jurisdictions.

However, certain matters are specifically assigned to the Chancery Division, namely corporate and personal insolvency disputes; the enforcement of mortgages; intellectual property matters, copyright and patents; disputes relating to trust property; and contentious probate, relating to wills and inheritance actions. Furthermore, most Chancery business is dealt with in London, as well as the 8 provincial High Court District Registries.

More recently, Lord Justice Briggs undertook a wide-ranging and comprehensive review of the Chancery Division (Chancery Modernisation Review, December 2013. http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CMR/cmr-final-report-dec2013.pdf), considering modernisation of the Division. His report acknowledged "specialisation" (at paras 1.50 & 16.14-161.5), as exemplified by his identification of 13 areas of Chancery engagement which he articulated under 4 broad headings: business & commercial, IP, company & insolvency and individual property (at paras 1.50 & 16.14-161.5). Therefore, although the Briggs Report defended the status quo, in terms of the retention of the "Chancery domain", it markedly sought to maintain the distinction between chancery work from that of the commercial and mercantile jurisdictions.

Queen's Bench Division

The Queen's Bench Division, led by its President, currently Lord Justice Leveson, is composed of 73 High Court judges and has historically presided over common law cases, including debts, breach of contract and personal injury claims. Although the QBD has both a criminal and civil jurisdictions, much of the QBD's Civil list, more commonly referred to as 'common law' business actions, relates to contract, except those dealt with under the Chancery jurisdiction. More typically, contract cases in the QBD include defamation of character and libel; trespass; and negligence or nuisance.

Moreover, QBD judges also preside over more specialist matters, such as applications for judicial review in the 'Administrative Court', which remains part of the QBD, and construction matters in the 'Technology & Construction Court' (TCC). More commonly, in their criminal jurisdiction, QBD Judges are assigned to hear the most important criminal cases in the Crown Courts across the UK on the various Circuits, as well as some also sit in the Employment Appeal Tribunal.

However, the most ancient of jurisdictions in the QBD is the Admiralty Court. Most notably, the Admiralty Court has exclusive jurisdiction over certain maritime claims, including the arrest of ships, collisions and salvage. In addition, the 'Commercial Court' of the QBD deals with claims relating to the transactions of trade and commerce, including carriage of goods by sea, land and air; and, banking, financial services, insurance/reinsurance and agency, arbitration and competition matters. Furthermore, the "Mercantile Court" deals solely with business disputes which requires specialist judges but fall outside the remit of the Commercial Court or the Chancery Division. For instance, the Mercantile Court will only deal with claims that relate to a commercial or business matter in a broad sense (Pt 59, CPR) and are not required to proceed in the Chancery Division or in another specialist court.

The TCC in the QBD is a further specialist court which deals primarily with disputes in the field of technology and construction. TCC cases are managed and heard by specialist judges in London and at TCC hearing centres throughout England and Wales. Further, since April 23, 2014, a Planning Court has been created as an additional function of the QBD.

The QBD's Administrative Court has supervisory jurisdiction over all inferior courts and generally considers the validity of official decisions. Generally, such judicial review claims are heard by a single QBD judge who decides whether the matter is fit to bring to the court, in order to sift out frivolous or unarguable claims and if so, the matter is allowed to go forward to a full judicial review hearing with one or more judges. Although, since 2010 the Administrative Court has been regionalised, allowing "Crown List", judicial review, applications to be heard across the UK in the QBD Registries.

More currently, the President of the QBD was been tasked with a review of efficiency in criminal proceedings. The terms of reference of the Leveson Review were to "streamline and modernise the process of criminal justice" (http://www.judiciary.gov.uk/announcements/review-of-efficiency-of-criminal-proceedings-announced/). The Review was published on 23 January 2015, recommending the greater usage of video and other conferencing technology, more flexible court opening hours, and more effective case management (http://www.judiciary.gov.uk/announcements/review-of-efficiency-of-criminal-proceedings-announced/).

Family Division

Judges in the High Court also hear appeals from family proceedings courts as well as cases transferred from the County Courts or family proceedings courts. Most notably, the Family Division deals with controversial and sensitive matters such as divorce, children and medical treatment. These are often issues of great importance only to the parties, but may concern life and death scenarios.

The Family Division exercises jurisdiction to hear all cases relating to children's welfare and holds an exclusive jurisdiction in wardship cases. It is headed by a President of the Family Division, currently Lord Justice Munby, and comprises of 19 High Court judges.

The Family Division has been subject to change, comparative to the other two Divisions, it having been overhauled several times since its inception under the Judicature Acts which combined the Court of Probate, the Court for Divorce & Matrimonial Causes, and the then High Court of Admiralty. Subsequently, it was renamed the Family Division when the admiralty and contentious probate business were transferred to the two other Divisions, as observed above. More recently, Lord Justice Ryder's Review (Modernising Family Justice, July 2012 (Ryder LJ, http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/ryderj_recommendations_final.pdf) recommended a new six month time limit in care cases, in order to address the backlogs and delays in children cases. It furthered the usage of mediation, as a means of dispute resolution in family matters. More significantly, with the creation of the new family Court since 22 April 2014, High Court Judges in the Family Division have worked more cohesively with District, County and Magistrates' courts judiciary.

Accordingly, notwithstanding these reviews, the historic and distinctive Divisions of the High Court have remained entrenched and intact, along their divisional lines over the last Century.

NEW CASELOAD TRENDS

Given these historic foundations of the High Court, it is unsurprising that the three distinct divisional workloads of the High Court have fluctuated. More recently, from 2011-13, some new trends in the variant workloads of the High Court have emerged. For instance, the Queen's Bench Division workload appears more heavily reliant upon its administrative work, given a decrease in its Admiralty and personal injury claims. In contrast, the Chancery Division has presided over an revitalised increase of work in terms of companies-related applications, whereas the Family Division has received a temporary increased workload due to the aftermath of the "Baby P" inquiry.

In summary, Table 1 highlights an increase in generic workloads across the Divisions. Yet, it also evidences fluctuating trends in Chancery and Family, which are largely influenced by financial and policy factors.

Table 1 – High Court workload

	2011	2012	2013
Chancery	3,381 claims	3,789 claims	3,561 claims
QBD	41,000 trials	33,000 trials	48,000 trials
Family	1,251 matters	1,219 matters	2,248 matters

Source: Court Statistics – Quarterly, 2012, 2013 & 2014. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321352/court-statistics-jan-mar-2014.pdf

More specifically addressing each Division's data, below, we can observe that:

Table 2 – Chancery Division workload

	Claims issued	Trials listed
2011	3,381	1,119
2012	3,789	1,146
2013	3,561	1,131

Sources: Chancery Modernisation Review, 2013 http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CMR/cmr-final-report-dec2013.pdf

Court Statistics – Quarterly, 2014

Table 2 highlights that the Chancery Division has a constant trial allocation, albeit a fluctuating pattern of claims. Yet, the chancery workload for bankruptcy work is increasing by 14 per cent (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321352/court-statistics-jan-mar-2014.pdf).

Table 3 – QBD workload

	Claims issued	Trials listed
2011	3,381	1,119
2012	3,789	1,146
2013	3,610	1,087

Source: Court Statistics – Quarterly, 2014

Table 3 shows that the QBD's claims for debts and contractual disputes remain half of its workload, whilst the TCC's workload has remained constant and stable over the last six years. The healthiest workload trend for the QBD

lies in its Administrative Court. Most notably, applications for JR increased from 11,505 in 2011 up to 12,575 in 2012 to 15,707 in 2013. Yet, overall, in 2013, the QBD workload creased across the board by 10 per cent (at p. 38 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321352/court-statistics-jan-mar-2014.pdf).

Table 4 – Family Division workload

	Public applications	Private applications	Total applications
2011	3,381	1,119	4,500
2012	3,789	1,146	4,935
2013	4,318	1,127	5,445

Source: Court Statistics – Quarterly, 2014

Table 4 highlights that the Family Division's workload shows an increase in public law matters and a decreasing workload in private law. Whilst this is to be expected, as such a trend coincides with the radical changes to the funding of family law cases.

Yet, it still only represents 2 per cent of the public law and 0.8 per cent of the private law applications made in the family law courts arena. In contrast, the probate workload has steadily increased since 2007 to-date, highlighting a 6 per cent increase overall, being managed by 11 District Probate Registries (including 18 Sub Registries), witnessed only 97 contested probate cases before the Chancery Division in 2013.

Overall, this statistical evidence does not purport to provide a complete description of the entirety of the High Court's workload. However, in HMCT's quarterly statistics, whilst hard to encrypt between the variant divisions of the High Court, general trends do emerge, as identified above. To that end, the overall "snapshot" of the last three full reported years of High Court operational workload, evidences an increase from 12,500 (2011), 14,000 (2012) and 17,800 (2013).

CURRENT ANACHRONISTIC FEATURES

From the statistical data a snapshot of the small, but discrete and increasing family law jurisdiction emerges, as does a buoyant Chancery Division due to commercial proceedings and a changing QBD in decline, given its new pre-occupations with contractual claims and judicial review applications. Despite such emerging trends in their respective workloads, three major criticisms of the High Court as currently constituted remain.

Firstly, although the High Court is composed of three divisions, it is in effect sub-divided into 12 particular litigation areas, and therein overlapping jurisdictions emerge to some degree – for example, commercial work in both the QBD and Chancery Divisions and probate within the Chancery and Family divisions. Secondly, the three distinct Divisions are too generic in title and the nature of their work and are un-thematically divided and underpinned by ill-structured assumptions of their historic rather than actual workloads. Thirdly, the current structure of the High Court does not reflect nor explicitly recognise judicial expertise. For centuries the judiciary has organised themselves, and although since 2006 the Judicial Appointments Commission (http://jac.judiciary.gov.uk/about-jac/about-jac.htm) has selected them upon the basis of their expertise and skill-sets, the High Court has failed to expressly demonstrate and overtly utilise that expertise in some areas.

Addressing each criticism in turn, firstly and foremost, an analysis of the currently constituted High Court evidences that the current 12 active jurisdictions of the High Court can be distilled down to six distinct clusters. Secondly, the current caseload of the High Court departs dramatically from the historic litigation upon which it was based. Moreover, the pre-existing Family Division is the only High Court Division which reflects its actual workload. Finally, the archaic labels of QBD, Chancery and Family do not reflect the expertise of the judiciary in dispensing justice in their respective regular workload. For instance, the Administrative Court judiciary's expertise in public law is lost behind the generic label, whilst their expertise thrives daily in their function. Yet, under recent public law reform, 80 per cent of the Administrative Court's workload was transferred to the Upper Tribunal.

An overhaul of the High Court is therefore long overdue and a case for reform can be made out.

"BLUEPRINT" FOR REFORM

In contrast to the High Court, elsewhere within the UK's courts and tribunals system, specialised chambers have emerged and now have a strong foothold. For instance, the UK's tribunals' landscape provides at the First-tier level of Tribunals, some eight specialist chambers exist, which are distilled to five specialist Upper (Appeal) Tribunals.

Such a "new" framework provides for a modern, user-friendly, expert acclaimed and already tested model upon the UK legal landscape. Therefore, applying such a model, a reformed High Court could consist of five distinct, expert chambers, namely:

(i) Administrative Chamber

(ii) Commercial Chamber – incorporating Admiralty, Commercial, Mercantile, Bankruptcy & Companies

(iii) Technology, Construction & Intellectual Property Chamber

(iv) Common Law & Costs Chamber

(v) Matrimonial, Care & Probate Chamber

Each specialist Chamber would be presided over and directed by a President, preferably a Lord Justice of Appeal in Ordinary. The Senior President would remain the Vice-Chancellor of the High Court. Further, each Chamber would have 20-30 specialist judges and two masters (to be known as "Chamber Associates") who would list and organise each Chamber's business, as well as allocate sittings and undertake interlocutory matters.

The newly constituted High Court could be restructured as follows:

Administrative Chamber (AC)

This Chamber's scope of work would solely involve judicial review. The rationale for such a Chamber is the burgeoning caseload in excess of 11,000 applications for permission to apply for Judicial Review, a 70 per cent increase since 2007 (Judicial Review Statistics, 2007-11, MoJ, April 2013), notwithstanding the regionalisation of Judicial review hearings. Only 10-15 specialist public law designated judges would manage this Chamber's list.

Commercial Chamber (ComC)

This Chamber's scope of work would encapsulate the pre-existing workloads of bankruptcy, companies, mercantile, trusts, land, commercial and admiralty. The generic rationale for this specialist Chamber is the theme of corporate business and 30 specialist Commercial designated judges would make up this Chamber.

Technology, Construction & IP Chamber (TCIPC)

This Chamber's scope of work would involve the existing work of the TCC and all copyright, designs, patents and trade-marks. The Chamber will be comprised of 20 TCC and 10 specialist IP judges.

Common Law & Costs Chamber

This Chamber's scope of work would involve defamation/ libel, personal injury and high-value breach of contract, negligence and nuisance claims. Such would be presided over by 20 specialist Common Law judges and five Senior Costs judges.

Matrimonial, Care & Probate Chamber (MCPC)

This Chamber's scope of work would involve all family law matters and all probate matters, contentious or otherwise. This jurisdiction would be dealt with by 20 specialist family law designated judges working alongside five dedicated Chamber-appointed mediators and 10 probate judges. The Office of Public Guardian (OPG) could also be assigned under the supervision of this Chamber.

From such a "brave new world" the High Court would relinquish its criminal jurisdiction to hear the most serious criminal trials. However, in a modern judiciary where on the various circuits across the UK numerous senior Circuit Judges are ticketed for murder trials, such a justification for High Judges to travel and oversee the most serious of criminal trials seems somewhat outmoded and unnecessary, both in terms of the public interest being served as well as the public purse being saved. For instance, in 2012 (Court Statistics Quarterly, January - March2013, Table 3.3) QBD judges heard 1,396 trials out of the overall Crown Court case load of 84,549 trials, contributing to 1.6 per cent of the overall caseload. Such expertise could be effectively utilised elsewhere.

Moreover, of the 107 Justices of the High Court, comprising currently of 18 Chancery, 19 Family and 70 Queen's Bench judges, these could be deployed, accordingly to their expertise and skill-sets to the five specialist Chambers, re-constructing a modern High Court. In any event, such a reconstituted High Court would seek to demonstrate a modern approach to the administration of justice and therefore, give the Public greater confidence in the revitalising influence of legal services.

CONCLUSION

In conclusion, in July 2014 it was announced that the new investment (Lord Chief Justice [Final] Report (2014), ch 7) of £713 million which had been secured from HM Treasury would enable Her Majesty's Courts and Tribunals Service to undertake major modernisation, including the use of modern technology, an improved estate and modernisation of current working practices to deliver a more effective, efficient and high performing courts and tribunals. As advocated in this article, the modernisation of the High Court cannot escape such an agenda. In fact, the Upper Tribunal's specialist chambers framework already provides a model for modernisation for the High Court, by way of formulating a re-deployment of its pre-existing legal expert areas into the court system.

If Her Majesty's legal estate is to be truly reconciled as one effective service for the user, then reform of the High Court must be fast-tracked and undertaken, ensuring complementary expertise to that of the Tribunals Service. Consequently, adopting the same specialist, expert approach a modernised High Court could re-arrange and model itself, based on the current emerging workloads from the last five years' pattern of trends, and enabling itself with the already available expert resource from within its existing judiciary. A reconstituted High Court, as advocated, would be fit for the modern era and equipped to manage the new legal challenges ahead. For

instance, as advocated by the Leggatt and Auld respective Reviews, HM's Courts and Tribunals system would sit in harmony, amidst the overarching framework from Supreme Court to Senior Court down to Specialist Court (see Lord Chancellor's Department, *Tribunals for Users: One System, One Service-Report of the Review of Tribunals by Sir Andrew Leggatt*, March 2001, (http://www.tribunals-review.org.uk/) and Auld, *A Review of the Criminal Courts of England and Wales* by Lord Justice Auld, September 2001 (http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/). Such a new legal, institutional framework would embrace regional trial centres and continue to regionalise the extent of the newly constituted High Court to outside London.

A new Judicature Act is long overdue, although any such change should not be piecemeal. Above all, a review of the each of the existing Divisions is a priority in order to explore the options for change. Consequently, a quinquennial review of the Tribunal and Courts System should be undertaken by a newly appointed Standing Committee, in order to ensure that the courts and tribunals remain in step with the needs of the judiciary as well as legal services users. A High Court fit for the twenty-first legal century, founded on its strong, historic expertise is required. Now is the time for a modernised High Court and a new Judicature Act 2015.

Stephen Hardy

Professor of Law, University of Bolton