ONE

A functional framework

The administrative justice system is the mechanism through which government makes decisions about citizens' rights and entitlements (in respect of, for example, social security, immigration and housing), and the processes through which people can challenge those decisions (for example, through judicial review, ombuds and tribunals).[1] By scale, administration is by far the largest part of the state: it is where high-level policy discussions transform into the street-level coercion of citizens.[2] Like many other areas of law, society and government, administrative justice is now beginning to see the impacts of rapid technological advances. Early attempts at 'E-government'

[1] Administrative justice is also considered to be an aspect of the public and administrative law systems. I use the terms flexibly here. For a recent overview of the dynamics within administrative justice, see Thomas, Robert and Tomlinson, Joe (2017) 'Mapping current issues in administrative justice: Austerity and the "more bureaucratic rationality" approach', *Journal of Social Welfare and Family Law*, 39(3), 380.

[2] Zacka, Bernardo (2017) *Where the State Meets the Street: Public Service and Moral Agency*, Cambridge, MA: Harvard University Press.

and using 'ICT'[3] are now accelerating towards the emergence of the digital administrative state, and the prophecies of futurologists are being put to the test.[4] The essential promise of technology remains, as it always has done, of more and better for less effort.[5] The fundamental concern also remains the same; that by using new technology, we alienate older methods – and their benefits – that we ought to be preserving.[6] Looking at the present situation surrounding the developing digitalisation of administrative justice, it is clear that some new political dynamics are emerging as a result of recent changes. Activists are using online crowdfunding platforms to fund challenges to the policies of the government in the courts, advancing their campaigns through social media.[7] At the same time, a Conservative government – pursuing a long-term programme of fiscal austerity in response to the global financial crisis of 2008 – is attempting the most ambitious digitalisation of courts

3 See, for example, Margetts, Helen and Partington, Martin (2010) 'Developments in E-government', in Michael Adler (ed) *Administrative Justice in Context*, Oxford: Hart Publishing, Chapter 3; Bovens, Mark and Zouridis, Stavros (2002) 'From Street-level to System-level Bureaucracies: How Information and Communication Technology Is Transforming Administrative Discretion and Constitutional Control', *Public Administration Review*, 62(2), 174–84.

4 Susskind, Richard (2017) *Tomorrow's Lawyers: An Introduction to Your Future* (2nd edn), Oxford: Oxford University Press.

5 Similar basic claims made about technology were seen during the Industrial Revolution; see, for example, Daunton, Martin (1995) *Progress and Poverty: An Economic and Social History of Britain 1700–1850*, Oxford: Oxford University Press.

6 Ibid.

7 For instance, there has been a string of crowdfunded claims (of variable merit) seeking to challenge the government's approach to Brexit, such as *R (Webster) v Secretary of State for Exiting the EU* [2018] EWHC 1543 (Admin); *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

and tribunals ever seen.[8] The gamble is that slashing the justice budget, cutting approximately 5,000 court staff and closing hearing centres will not undermine but improve access to justice *if* the promise of technology is realised.[9] These examples merely scratch the surface of how digitalisation is starting to change the workings of administrative justice.

How are we to make sense of the present situation and the changes ahead? This is a core question facing many of those concerned with the administrative justice system in the UK: policy-makers, civil servants, non-governmental organisations (NGOs), judges, lawyers, researchers, citizens and others. This is also a puzzle for international observers, who are seeing – or will likely soon see – the impacts of technology on administrative justice in their own jurisdictions. In this book I set out a framework – based on four central issues – for understanding and analysing the varied impacts of new technology on administrative justice. I then apply this framework in the context of three case studies in each of the subsequent chapters. In selecting the case studies included here, my aim is not to be comprehensive, but to consider a wide range of technology-linked changes to administrative justice processes in the UK.[10] The case studies

8 These reforms are discussed in detail in Chapter Three. For general context, *see* Rozenberg, Joshua (2018) *The Online Court: Will IT Work?*, Guildford: Legal Education Foundation; Thomas, Robert and Tomlinson, Joe (2018) 'Remodelling social security appeals (again): The advent of online tribunals', *Journal of Social Security Law*, 25(2), 84–101.

9 Ministry of Justice (2016) *Transforming Our Justice System*, London. For a recent overview, see National Audit Office (2018) *Early Progress in Transforming Courts and Tribunals*, HC 1001, Session 2017–2019; House of Commons Committee of Public Accounts (2018) *Transforming Courts and Tribunals*, HC 976.

10 There are thus lots of areas I do not cover here which require detailed study. One important area is administrative decision-making; see, for example, Eubanks, Virginia (2018) *Automating Inequality: How High-tech Tools Profile, Police, and Punish the Poor*, New York: St Martin's Press; Oswald, Marion (2018) 'Algorithm-assisted decision-making in the public sector:

cover instances of the effects of technology both in internal government processes as well as external justice processes, such as courts and tribunals. They examine examples of changes imposed as part of public service provision and also where technology has led to change from the ground up. Some of the studies concern 'hard' process changes involving technology, whereas others look at the 'soft' cultural influence of technology and its associated modes of thought.

In Chapter Two I examine the growing use of crowdfunding – raising money via online platforms – as a means of covering the costs of judicial review cases. In Chapter Three I look at the ongoing HM Courts & Tribunals Service (HMCTS) 'transformation' project, which is putting courts and tribunals on a digital footing. My particular focus in that chapter is on the digitalisation of tribunals, where individuals can appeal government decisions. In the final chapter, I consider the use of new 'agile' methodologies – adopted and promoted by the technology industry and subsequently, civil servants – in building administrative justice systems. All of these issues throw up complex questions but, as has increasingly been recognised in recent years, the need for analysis in this quickly changing aspect of the administrative justice landscape is becoming more urgent, and so far, such analysis has been relatively scarce.

The approach adopted and advocated for in this book is a functionalist one.[11] My operating assumption is that the administrative justice system is ultimately social in character, as

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[11] Framing the issues using administrative law rules governing discretionary power', *Philosophical Transactions of the Royal Society A*, 376, 2128. For a detailed account of the foundations of this approach, see Loughlin, Martin (2005) 'The functionalist style in public law', *University of Toronto Law Journal*, 55, 361–403; Loughlin, Martin (2014) 'Modernism in British public law, 1919–1979', *Public Law*, 56. This is not an uncontested approach; for context, see Loughlin, Martin (1992) *Public Law and Political Theory*, Oxford: Clarendon Press. Nor, too, is the identification of functionalism a distinct approach; see, for example, Craig, Paul (2015) *UK,*

it still fundamentally revolves around the collectivist activities carried out by the state. Given this, my view is that administrative justice ought to evolve with society and be part of promoting a healthy *body politic*, focusing not just on controlling state power but enabling it too. I adopt the outlook that it is important to study all aspects of the relationship between law and administration – including the approach of administrators and all systems of redress – and not just the law as it is discussed by judges in courts. From this starting point, I suggest it is helpful to keep in mind four interrelated central issues that anyone seeking to understand the digitalisation of administrative justice must grapple with. These issues, which have long been core concerns of the administrative justice community, are evidence, politics, models and design. I will now elaborate each aspect of this framework in more detail.

Evidence

Digitalisation presents a set of new developments, and the primary task at the outset must be to understand the nature and impacts of these developments. Does the introduction of online social security appeals lead to more or less people being in receipt of benefits? Does the use of crowdfunding lead to more judicial reviews claims being lodged? Discussion about administrative justice has often suffered from a deficient evidence base. If we are to make claims about what systems ought to look like, facts are highly relevant. This may seem obvious, but public law research in the UK has failed regularly in this most fundamental of descriptive tasks in recent years. Although there are some noteworthy exceptions,[12] the priority of the

EU and Global Administrative Law: Foundations and Challenges, Cambridge: Cambridge University Press, p 103 *et seq*.

12 For instance, Maurice Sunkin has made a significant contribution to the understanding of how the judicial review system works in practice; see, for

majority of public law research – in line with prevailing academic trends[13] – is to try to identify 'the patterns, continuities, and discontinuities thinking displays, and the manner in which it shapes the politically possible.'[14] As a result, the field of public law is now heavy on insight and light on descriptive accounts of what is actually happening within the system.[15]

One consequence of this situation is that important debates about the desired outcomes that systems ought to achieve, or how systems ought to be designed, are complicated or obscured by lack of knowledge about (often relatively basic) facts.[16]

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example, Sunkin, Maurice, Calvo, Kerman, Platt, Lucinda and Landman, Todd (2007) 'Mapping the use of judicial review to challenge local authorities in England and Wales', *Public Law*, 545–67; Sunkin, Maurice and Bondy, Varda (2008) 'Accessing judicial review', *Public Law*, 647; Sunkin, Maurice and Bondy, Varda (2009) 'Settlement in judicial review proceedings', *Public Law*, 237–59; Bondy, Varda, Platt, Lucinda and Sunkin, Maurice (2015) *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences*, London: Public Law Project. For a wider context, see Halliday, Simon (2012) 'Public Law', in C. Hunter (ed) *Integrating Socio-Legal Studies into the Law Curriculum*, Basingstoke: Palgrave Macmillan, pp 141–60.

13 These trends are well traced in Tschorne Venegas, Samuel (2016) 'The theoretical turn in British public law scholarship', PhD thesis, London: London School of Economics and Political Science.

14 Freeden, Michael (1996) *Ideologies and Political Theory*, Oxford: Clarendon Press, p 39; Freeden, Michael (2000) 'Practising ideology and ideological practices', *Political Studies*, 48, 302–22, p 304.

15 Those interested in understanding the details of systems have commonly delved into to sub-fields such as social security law, immigration law, tax law and regulation; see, for example, Thomas, Robert (2011) *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication*, Oxford: Hart Publishing.

16 A very good example of this is the debate around how costs in judicial review cases are distributed. Lord Justice Jackson undertook a detailed review over a number of years, yet the absence of data (particularly quantitative data) in the review was remarkable; see Lord Justice Jackson (2009) *Review of Civil Litigation Costs: Final Report*; Lord Justice Jackson (2017) *Review of Civil Litigation Costs: Supplemental Report, Fixed Recoverable Costs*.

This situation could have often been avoided – or its impact could at least have been mitigated – if there was more focus in public law research on building descriptive accounts of how the administrative justice system works. This neglect of evidence-gathering can also be linked, at least in part, to the fact that administrative justice policy and system design has remained largely in the grip of professional judgement (mostly that of lawyers and civil servants) instead of moving towards greater reliance on evidence.[17] Whereas medicine has been able to transform itself into a primarily evidence-based science in the last century,[18] public law research – and law more generally – has largely resisted following a similar trajectory.[19]

In recent years, there have been some attempts by public lawyers, often with political science and social science backgrounds, to undertake empirical research on a range of important public law questions; for example, do constitutionally entrenched fundamental rights generally deliver on their promise of protecting people from harm and promoting social welfare?[20]

Researchers undertaking these studies are coming under increasing fire for a variety of reasons, often because of concerns about the links between cause and effects being drawn and

[17] For a general discussion, see Greiner, D. James and Matthews, Andrea (2016) 'Randomized control trials in the United States legal profession', *Annual Review of Law and Social Science*, 12, 295–312.

[18] Meldrum, Marcia L. (2000) 'A brief history of the randomized control trial: From oranges and lemons to the Gold Standard', *Hematology/Oncology Clinics of North America*, 14(4), 745–60.

[19] See Greiner and Matthews (note 17 above).

[20] See, for example, Law, David S. and Versteeg, Mila (2013) 'Sham constitutions', *California Law Review*, 101(4), 863–952; Chilton, Adam S. and Versteeg, Mila (2016) 'Do constitutional rights make a difference?', *American Journal of Political Science*, 60, 561–81, p 575; Chilton, Adam S. and Versteeg, Mila (2018) 'Rights without resources: The impact of constitutional social rights on social spending', *The Journal of Law and Economics*, 60(4),713–48.

a perceived failure to properly contextualise claims.[21] Such critiques may have some validity in particular instances. However, there are many basic questions about administrative justice where concrete data could be gathered and where such data could have great practical utility.[22] For instance, why are successful appeals from immigration decisions successful? This is a basic and fundamental question of administrative justice for which evidence could be found but a question about which there is little clear, systematic evidence available at present.

Evidence will not give us complete answers about administrative justice – we cannot hope to measure our way out of making value judgements – but a better evidence base can provide a firmer platform on which to judge how best to pursue aims. In a recent speech, the Senior President of Tribunals, Sir Ernest Ryder, explained that digitalisation and other reforms are required to enable the judiciary to secure the effective administration of justice. However, the Senior President noted that future reforms can no longer be predicated on the views of a single judge formed on the basis of anecdote or impression: 'reform must be based on proper research; robust and tested.'[23] He concluded: '[i]f we are to secure open justice, all questions must be capable of being asked and examined. But examined properly. The judiciary must therefore support, promote, and commission research. Just as the unexamined life is one not worth living; the unexamined and unresearched reform may not be worth taking.'

It is a recurring theme of this book that there is insufficient evidence available to properly address the questions that the digitalisation of administrative justice presents, even at this

[21] Woods, Andrew Keane (2008) 'Discounting rights', *New York University Journal of International Law and Politics*, 50, 509.

[22] Certain processes can also be studied in detail with great success; see, for example, Thomas (note 15 above).

[23] Sir Ernest Ryder (2018) *Securing Open Justice*, Max Planck Institute Luxembourg.

relatively early stage of developments in the digitalisation of administrative justice. As such, further empirical research and data collection will be a vital tool in this area in the future. Empirical research and nuanced data collection could enable better understanding, better learning, better design and continuous improvement. It can analyse and validate the implementation of reforms by providing robust insights into how they are operating. Understanding digitalisation will require the use of a range of empirical methodologies and, moreover, would be enhanced by the pursuit of further methodological innovation.[24] For now, informed accounts on the evidence that is available is the best that can be hoped for.

Politics

A second key aspect of understanding and analysing digitalisation is reckoning with, what we may broadly call, the politics surrounding it. It has long been recognised[25] that administrative justice systems are, to some extent, artefacts of political beliefs: '[b]ehind every theory of administrative law there lies a theory of the state.'[26] These systems – which include both the law and the mechanisms that give practical effect to it – are, at foundational level, instruments through which political objectives can be achieved.[27] We also cannot escape the role of political judgement in assessing them. By using the terms 'politics' I do not hope

[24] In particular, under-used methods such as randomised control trials could be explored further in the context of online procedures; see Greiner and Matthews (note 17 above).

[25] See, for example, Laski, Harold (1925) *A Grammar of Politics*, Sydney, NSW: Allen & Unwin, p 578; Carr, Cecil (1941) *Concerning English Administrative Law*, Oxford: Oxford University Press, pp 10–11.

[26] Harlow, Carol and Rawlings, Richard (2009) *Law and Administration* (3rd edn), Cambridge: Cambridge University Press, Chapter 1, p 1.

[27] Duguit, Leon (1921) *Law in the Modern State* (translated by Frida Laski and Harold Laski), Sydney, NSW: Allen & Unwin.

to conjure up the image of something nefarious or unhelpfully partisan (although the tone of present public discourse on politics may create that assumption).[28] Instead, I mean simply a position on the desired outcomes a society and government ought to pursue. In this sense, accounts of whether changes linked to digitalisation are a success or not will ultimately be framed by political judgements of various kinds.

To be clear, politics exists in many variations and all politics can be relevant to the assessment of administrative justice. There is the obvious, broad left–right divide, as well as the myriad positions concealed within that simplistic categorisation. There are also particular politics that emerge around specific policy issues. For instance, the politics of technology, the politics of judicial review and the politics of the legal professions are all highly relevant to some of the issues discussed in this book. There is also a distinct politics of 'good administration' – that is, political views on the extent to which good government itself ought to be prioritised and promoted.[29] Even claims about commitment to the Rule of Law are imbued, or can be associated, with political preferences of some kind.[30]

All politics – whether they are the politics of those in public office or private citizens – are relevant insofar as they provide both the conditions in which developments in the digitalisation of administrative justice will take place and inform the metrics by which those developments can and will be assessed by reference

[28] Flinders, Matthew (2012) *Defending Politics*, Oxford: Oxford University Press.

[29] See, for instance, the discussion on the politics of administrative justice oversight in O'Brien, Nick (2012) 'Administrative justice: A libertarian Cinderella in search of an egalitarian prince', *The Political Quarterly*, 83(3), 494–501; O'Brien, Nick (2018) 'Administrative justice in the wake of I, Daniel Blake', *The Political Quarterly*, 89(1), 82–91.

[30] See, for example, Bingham, Tom (2011) *The Rule of Law*, Harmondsworth: Penguin, which is orientated towards a liberal, internationalist conception of the state.

to. In my analysis, presented in the next three chapters of this book, it will inevitably be the case that certain preferences will be advanced and defended. To be able to assess the digitalisation of administrative justice, we must be prepared to understand and confront differing political assessments of various elements of digitalisation.

Models

To understand the digitalisation of administrative justice we must also think closely about the concepts that we commonly rely on when discussing the system. In December 1998, Martin Partington, a central figure in the development of the modern study of administrative justice, gave a lecture on the topic of 'Restructuring administrative justice' at University College London.[31] There, he outlined some of the key concepts of administrative justice: openness, confidentiality, transparency, secrecy, fairness, efficiency, accountability, consistency, participation, rationality, equity and equal treatment. There has been no shortage of other attempts to state the key concepts – often also described as 'principles' or 'values' – that an administrative justice system ought to respect. Indeed, it was observed by the Administrative Justice and Tribunals Council that the UK has a rich history of developing principles for administrative justice.[32] Many such attempts have come from institutions that engage with and are (or were) part of the administrative justice system itself.[33] Academic work also often

[31] Partington, Martin (1999) 'Restructuring administrative justice? The redress of citizens' grievances', *Current Legal Problems*, 52(1), 173–99.

[32] Administrative Justice and Tribunals Council (2010) *Developing Principles of Administrative Justice*.

[33] See, for example, Health Service Ombudsman (2009) *Principles of Good Administration*; Administrative Justice and Tribunals Council (2010) *Principles of Administrative Justice*.

refers to a range of similar concepts.[34] Beyond the concepts often specifically associated with administrative justice, the system – including digitalisation – can be considered through a range of other conceptual frameworks. It is now common, for instance, to see human rights analysis of administrative justice processes. Another common frame is that of constitutional principles (for example, the Rule of Law, the separation of powers, democracy, accountability).[35] Discrimination is also a prominent frame in digitalisation research and discussion so far.[36] Civil servants often refer to a particular bundle of concepts too, which often relate to operational concerns, for example, efficiency, proportionate use of resources and manageability.[37] The difficulty is not, therefore, in suggesting concepts that may be relevant to the digitalisation of administrative justice, but in making sense of what to do with all the concepts that are often thrown around.

There are two basic tasks such concepts can be used for: describing the system and assessing the system. When used for the latter purpose (they are often described as 'principles' or 'values' when used to this end), concepts are no more than political claims articulated in another form.[38] When used in this way, concepts can yield important insights. Talking in such terms can also provoke us to reflect closely on the judgements we

[34] See, for example, Mashaw, Jerry L. (1985) *Bureaucratic Justice: Managing Social Security Disability Claims*, New Haven, CT: Yale University Press; Adler, Michael (2003) 'A socio-legal approach to administrative justice', *Law & Policy*, 25(4), 323–52.

[35] On the rise of this framework in recent years, see Gee, Graham and Webber, Grégoire (2013) 'Rationalism in public law', *Modern Law Review*, 76(4), 708–34.

[36] See, for example, Gangadharan, Seeta Pena and Jędrzej, Niklas (2018) *Between Antidiscrimination and Data: Understanding Human Rights Discourse on Automated Discrimination in Europe*, London: London School of Economics and Political Science.

[37] Thomas and Tomlinson (note 8 above), referring to the 'government' view on administrative justice.

[38] See Loughlin (2005) (note 11 above).

make.[39] But such concepts have no objective meaning beyond the politics that animate them and the meaning ascribed to them by society. When used for explanatory purposes, concepts can be particularly helpful (in this context they are often referred to as 'models'). Models can help us clarify how systems work, how they are changing, and draw useful distinctions.[40] For instance, Jerry Mashaw's models of administrative justice have, along with subsequent iterations of those models by scholars such as Michael Adler, provided a framework that has enabled generations of observers to understand significant process changes.[41]

Although conceptual frameworks of various types can be valuable, we should take care not to become too bound up in concepts at the expense of how administrative justice actually functions in practice, which should always be the primary consideration.[42] We should also be careful to ensure that reliance on a variety of concepts, especially when hazily defined, does not lead to fuzzy thinking – which has sometimes been the case.[43]

A key point about explanatory concepts made in this book is that, just as the growth of the administrative state and globalisation in the 20th century gave us cause to revisit the concepts through which we understood the state, the growing

[39] Nason, Sarah (2016) *Reconstructing Judicial Review*, Oxford: Hart Publishing.

[40] See, for example, Rawlings, Richard (2008) 'Modelling judicial review', *Current Legal Problems*, 61(1), 95–123, p 103.

[41] Mashaw (note 34 above); Adler (note 34 above). See also Richards, Zach (2018) *Responsive Legality: The New Administrative Justice*, Abingdon: Routledge; Kagan, Robert A. (2012) 'The Organisation of Administrative Justice Systems: The Role of Political Mistrust', in Michael Adler (ed) *Administrative Justice in Context*, Oxford: Hart Publishing, Chapter 7; Halliday, Simon and Scott, Colin (2012) 'A Cultural Analysis of Administrative Justice', in Michael Adler (ed) *Administrative Justice in Context*, Oxford: Hart Publishing, Chapter 8.

[42] See Duguit (note 27 above).

[43] Tomlinson, Joe, 'The Grammar of Administrative Justice Values' 39(4) *Journal of Social Welfare and Family Law* 524.

digitalisation of administrative justice gives us cause to do so again.[44] The alternative is to try to understand an increasingly digitalised state by seeking to awkwardly fit developments into possibly outdated frameworks, something that would risk making those who do so pedlars of an increasingly irrelevant nostalgia.[45] Where necessary, we should be willing to reconceptualise and even abandon conventional models of understanding, and devise new models so that we can better explain the changing administrative justice system. At the same time, traditional models may prove important in understanding wrong turns in digitalisation. This is a complex and constantly evolving task, but it is a critical one.

Design

Administrative justice systems give rise to myriad questions of institutional design.[46] For instance, how is the aim of having an

44 For instance, see Rubin, Edward (2005) *Beyond Camelot: Rethinking Politics and Law for the Modern State*, Princeton, NJ: Princeton University Press.

45 See Rubin, ibid, p 6. The infamous example of this in English administrative law is A.V. Dicey's rejection of the existence of administrative law in England and Wales: Dicey, Albert Venn (1959) *Introduction to the Study of the Law of the Constitution* (10th edn), Basingstoke: Macmillan, pp 336–8. He later had to abandon this position (at least partially) in the face of overwhelming evidence to the contrary: see Dicey, Albert Venn (1915) 'The development of administrative law in England', *Law Quarterly Review*, 31, 148. See also the critique of Maurice Hauriou and Henri Berthelémy in Duguit (note 27 above).

46 By institutions I mean 'the structures that are to house and refine our disputes and the processes that are to regulate the way we resolve them', a definition taken from Waldron, Jeremy (2013) '*Political* political theory: An inaugural lecture', *Journal of Political Philosophy*, 21(1), p 8. On institutional design in administrative justice in the UK context, see Bondy, Varda and Le Sueur, Andrew (2012) *Designing Redress: A Study About Grievances against Public Bodies*, London: Public Law Project; Tomlinson, Joe and Lovdahl Gormsen, Liza (2018) 'Stumbling towards the UK's new administrative settlement: A study of competition law enforcement after Brexit', *Cambridge Yearbook of*

easy-to-access online tribunal appeal form realised? What should the costs rules applicable to crowdfunded judicial reviews be? How can perceptions of judicial independence be maintained in video-linked hearing processes? Digitalisation presents many such design questions. In one sense, the design of public institutions is the bread and butter of what public lawyers do and are interested in.[47] The actual task of designing public institutions is, however, notoriously difficult. Moreover, the administrative justice system is, to borrow the phrasing of Richard Stewart, densely complex.[48] In this context, designing (or reforming) administrative justice systems is a task riddled with unresolvable tensions and trade-offs. Gunther Teubner argues that these systems are placed under the competing demands of efficacy, responsiveness and coherence.[49] That is to say, citizens and others demand administrative bodies to be successful in managing their role, to be responsive to the public will and to be aligned with the foundational commitments of society. Teubner contends that any design or re-design of an administrative institution that sought to improve its performance in one of these three respects would almost certainly have negative effects on at least one of the other two. In other words, 'from one or another perspective,

European Legal Studies, 20, 233–51. For a US perspective, see Mashaw, Jerry, L. (2005) 'Structuring a dense complexity: Accountability and the project of administrative law', *Issues in Legal Scholarship*, 5(1).

47 For example, Madison, James (1987) 'Federalist No 51', in James Madison, Alexander Hamilton and John Jay (eds) *The Federalist papers*, Harmondsworth: Penguin, p 319. More recently, there have been wide-ranging discussion on constitutional design; see, for example, Ginsburg, Tom (ed) (2012) *Comparative Constitutional Design*, Cambridge: Cambridge University Press.

48 Stewart, Richard B. (1975) 'The reformation of American administrative law', *Harvard Law* Review, 88, 1667, p 1813.

49 Teubner, Gunther (1987) 'Juridification: Concepts, aspects, limits, solutions', in Gunther Teubner (ed) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust, and Social Welfare Law*, Berlin: Walter de Gruyter, 3–48.

every institution will fail, or be seen as partially failing.'[50] In this light, the pursuit of administrative justice could be seen as a 'perpetually unsatisfactory project of institutional design', which even has 'a certain fatalistic hue.'[51] While institutional design is no easy task, it remains at the unavoidable core of administrative justice.

In respect of digitalisation in particular, the approach advocated for in this book is that control of institutional design questions ought not to be yielded to those who possess technological expertise. There is a risk of this in discussions around digitalisation because new technology can be difficult to understand, and it comes with its own (often hidden) methods and politics when deployed in institutions.[52] The social, human project of government is still the essential nature of the administrative justice project and the increasing use of technology should not make us lose sight of this.[53] Moreover, at least for the foreseeable future, humans will still be operating digital systems, and they will certainly be designing them.[54] Technologists have no special authority to make claims about institutional design beyond purely technological solutions. Technology is best conceived as a new material that has been discovered, which is to be added to the existing materials used in building systems. We should understand it as a means for advancing the functions of the state, not as some sort of transcendental change. In this sense, the digitalisation of administrative justice is similar to the expanding

50 See Mashaw (note 34), p 14.

51 Ibid.

52 For a discussion, see Mulligan, Deirdre K. and Bamberger, Kenneth A. (2018) 'Saving governance-by-design', *California Law Review*, 106(3).

53 See, generally, Broad, Ellen (2018) *Made by Humans: The AI Condition*, Melbourne, VIC: Melbourne University Press.

54 On this aspect of digitalisation, see Raso, Jennifer (2017) 'Displacement as regulation: New regulatory technologies and front-line decision-making in Ontario works', *Canadian Journal of Law and Society*, 32(1), 75–95, p 75.

use of contracted-out services in the 1980s – it is a new method, not a new end. The use of digital technology may bring about or represent changing politics and the form of technology-enabled decision-making may itself have certain consequences, but technology is no more than one tool in a state's toolbox (and it is certainly not a tool with magical properties which can somehow circumvent questions of politics).[55] The basic task of public lawyers remains, as Sir Ivor Jennings put it in 1936, to 'advise as to the technical devices which are necessary to make the policy efficient and to provide justice for individuals.'[56]

A starting point

Having set out a framework for analysing the progressive encroachment of technology in administrative justice, the following chapters offer my analysis of three significant, recent developments. My ambition is that the framework used here will be a robust way for others approaching the digitalisation of administrative justice to analyse what can often seem, especially for those working at the frontlines of these changes, tricky to assess at a macro level. On the basis of the analysis presented in the next three chapters, I suggest practical recommendations for each area.

My analysis in this book is a starting point in at least two senses – one practical and one more significant. At this early stage in the digitalisation of administrative justice, there is a limited evidence base to operate on, and further experiences with developing technologies may ultimately lead to different conclusions being drawn in the future. Moreover, any analysis of the digitalisation of administrative justice – the same as any position taken on the shape and function of the state – is open

[55] More will be said on this topic, in Chapter Four in particular.

[56] Jennings, William Ivor (1936) 'Courts and administrative law', *Harvard Law Review*, 49, 426, p 430.

to being contested.[57] For those who disagree with the arguments advanced here, my hope is that such disagreement provokes more detailed thinking on the important challenges presented by ensuring justice in an increasingly digital state.

[57] As Loughlin has pointed out, '[t]here is no metaphysical truth, there are no transcendent standards of correctness that lie outside the practices'; see Loughlin (2005), p 66 (note 11 above).