

FOUR

How digital administrative justice is made

The recent MoJ and HMCTS digitalisation reforms, discussed in Chapter Three, have been developed primarily as an operational project. That is to say that, despite the reforms representing a major change to justice processes, there is expected to be comparatively little by way of substantive changes to the law (at least in the foreseeable future). The existing law will instead be given new practical enacting frameworks. This approach means that responsibility for deliberating on and developing digital processes has been left largely with civil servants within HMCTS and the MoJ, with Parliament only providing a ‘drip-feed’ of legislative activity and oversight thus far.¹ Other developments in the digitalisation of administrative justice – such as the increasing use of automated processes in public sector decision-making –

¹ Rozenberg, Joshua (2018) *The Online Court: Will IT Work?*, Guildford: Legal Education Foundation, p 12. The main legislative activity has focused on the Prison and Courts Bill, which has stalled on various occasions. So far we only have the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018. See also House of Commons Committee of Public Accounts (2018) *Transforming Courts and Tribunals*, HC 976.

have seen similar patterns. At the core of the story of how digital technology is impacting administrative justice is therefore civil servants, their approach to process design and the government's own IT capabilities.²

One key trend in administrative justice design in UK central government is that it is increasingly influenced by 'agile' or 'design-thinking' approaches.³ This method is underpinning how many online administrative justice systems, including online tribunals, are being constructed, and is being widely promoted by leading technologists in government. Although many lawyers will not be familiar with it, design thinking is now a well-established field of study in its own right. The premise is that design as a cognitive process – a 'more interpretative, intuitive mind-set that characterizes the arts and creative professions'⁴ – does not have to focus on products alone but can be extended to other fields.⁵ Design thinking therefore seeks to distil and find new applications for design as a way of thinking. Initially emerging in the 1960s and 1970s,⁶ the idea of studying design as a mode of thought was developed in the 1980s through to the modern day.⁷ There are long-established journals in the field, such as *Design Studies* and *Design Issues*. There are also many courses available that offer recognised training in this area, along with multiple research centres developing new lines of

² The key work on the design of administrative justice processes in the UK is Le Sueur, Andrew and Bondy, Varda (2012) *Designing Redress*, London: Public Law Project. There is limited literature directly addressing the issue.

³ I use the two terms interchangeably for the purposes of the discussion here.

⁴ Bason, Christian (2010) *Leading Public Sector Innovation: Co-creating for a Better Society*, Bristol: Policy Press, p 138.

⁵ Simon, Herbert A. (1969) *The Sciences of the Artificial*, Cambridge, MA: MIT Press.

⁶ Ibid.

⁷ See, for example, Rowe, Peter G. (1987) *Design Thinking*, Cambridge, MA: MIT Press.

thought.⁸ There is no precise definition of design thinking or the agile method.⁹ However, the core of the approach appears to rest on emphasising the perspective of ‘users’ of systems, developing prototype systems and consistently testing systems with users.¹⁰ These core tenets are commonly expressed in the five-part, non-linear design method of:

- empathising with users
- defining the problem
- ideating
- prototyping and
- testing.¹¹

Within this framework, multiple tools to support each of these exercises have also been developed.¹² For instance, the use

⁸ For instance, Stanford University now hosts the Legal Design Lab, a leading centre. A range of other organisations is working in this space too, for example, NuLawLab, Legal Design Jam and Carnegie Mellon’s CyLab Usable Privacy & Security Law. The growing literature on the application of design thinking to justice is well set out in Ursel, Susan (2017) ‘Building better law: How design thinking can help us be better lawyers, meet new challenges, and create the future of law’, *Windsor Yearbook of Access to Justice*, 34(1), 28.

⁹ Kimbell, Lucy (2012) ‘Rethinking design thinking: Part 1’, *Design and Culture*, 3(3), 285–306; Kimbell, Lucy (2012) ‘Rethinking design thinking: Part II’, *Design and Culture*, 4(2), 129–48. See also Dorst, Kees (2011) ‘The core of “design thinking” and its application’, *Design Studies*, 32(6), 521–32; Buchanan, Richard (1992) ‘Wicked problems in design thinking’, *Design Issues*, 8(2), 5–21.

¹⁰ Plattner, Hasso, Meinel, Christoph and Leifer, Larry (eds) (2011) *Design Thinking*, Berlin and Heidelberg: Springer-Verlag, pp 14–15.

¹¹ These stages have been expressed in various ways; see, for example, Rowe (note 7 above); Simon (note 5 above); Hagan, Margaret (2017) *Law by Design* [E-book].

¹² Alves, Rui and Nunes, Nuno Jardim (2013) ‘Towards a Taxonomy of Service Design Methods and Tools’, in João Falcão e Cunha, Mehdi Snene and Henrietta Sampaio da Nóvoa (eds) *Exploring Services Science*, IESS:

of ‘journey-mapping’ tools is now common. These tools help system-designers trying to understand how users come to use a service and what they experience at each step of the process. With the development of the agile approach, its influence has grown in many sectors – architecture, business, technology and management, to name only a few.¹³ Law is now one of those sectors,¹⁴ and so too is administration.¹⁵ The agile approach

International Conference on Exploring Services Science, vol 143, Cham, Switzerland: Springer, pp 215–29.

¹³ See, for example, Brooks Jr, Frederick P. (2010) *The Design of Design: Essays from a Computer Scientist*, Boston, MA: Addison Wesley; Martin, Roger L. (2009) *Design of Business: Why Design Thinking Is the Next Competitive Advantage*, Brighton, MA: Harvard Business School Press.

¹⁴ Much thinking is taking place on the other side of the Atlantic in particular, see Hagan (note 11 above); Hagan, Margaret (2014) ‘Design thinking and law: A perfect match’, *Law Practice Today*, January; Rostain, Tanina, Skalbeck, Roger and Mulcahy, Kevin G. (2018) ‘Thinking like a lawyer, designing like an architect: Preparing students for the 21st century practice’, *Chicago-Kent Law Review*, 88(3), 743; Owen, Charles L., Staudt, Ronald W. and Pedwell, Edward B. (2001) *Access to Justice: Meeting the Needs of Selfrepresented Litigants*, Chicago, IL: Institute of Design and ChicagoKent College of Law, Illinois Institute of Technology; Szabo, Mark (2010) *Design Thinking in Legal Practice Management*, Boston, MA: Design Management Institute; Clarke, John A. and Borys, Bryan D. (2011) ‘Usability is free: Improving efficiency by making the court more userfriendly’, *Future Trends in State Courts*, 76; Mastarone, Ginnifer L. and Feinberg, Susan (2007) ‘Access to Legal Services: Organizing Better Selfhelp Systems’, Professional Communication Conference; Lippe, Paul (2013) ‘Do lawyers have the “design mojo” needed to rethink the delivery of legal services?’, *ABA Journal: Legal Rebels*, December; Ball, W. David (2014) ‘Redesigning sentencing’, *McGeorge Law Review*, 46, 817.

¹⁵ See, for example, Clarke, Amanda and Craft, Jonathan (2018) ‘The twin faces of public sector design’, *Governance*, 32(1), 5–21; Clarke, Amanda and Craft, Jonathan (2017) ‘The vestiges and vanguards of policy design in a digital context’, *Canadian Public Administration*, 60(4), 476–97; Anthopoulos, Leo G., Siozos, Panagiotis and Tsoukalas, Ioannis A. (2007) ‘Applying participatory design and collaboration in digital public services for discovering and redesigning eGovernment services’, *Government Information Quarterly*, 24(2), 353–76. There has also been some interesting design

has now become widely influential in the UK civil service and is gradually replacing, at least partially, the traditional top-down (or ‘waterfall’) approaches of civil servants in a variety of important policy areas.¹⁶ This is a key cultural change within central government that the digitalisation of administrative justice is simultaneously perpetuating and being shaped by. The most obvious manifestation of this trend to those outside of administration is how the language of governance is embracing a new vocabulary: ‘digital by default’, ‘agile’, ‘open’, ‘innovation’, ‘platform’.¹⁷ This is not meaningless bureaucratic language, but representative of important underlying changes of practice.

This chapter reflects on the increasing influence of agile processes in relation to the design of the administrative justice system. It starts by outlining the recent record of government IT projects, how agile methods were embraced as part of an attempt to avoid repeating historical failures, and what the main components of the approach are. I also draw on the limited evidence available to show how these approaches are being used in practice in the ongoing HMCTS tribunal reforms. I then turn to address how the ‘politics’ of agile are developing, ranging from the ‘evangelicals’, who believe the approach will herald a revolution in justice, to the ‘anti-designers’, who suggest that design processes involving technology may even pose threats

work in the context of the tax system; see Preston, Alan (2009) ‘Designing the Australian Tax System’, in Richard J. Boland and Fred Collopy (eds) *Managing as Designing*, Berkeley, CA: Stanford University Press; Terrey, Nina (2012) ‘Managing by Design – A Case Study of the Australian Taxation Office’, Unpublished PhD thesis, University of Canberra.

¹⁶ Policy is also now part of the design movement. For an overview, see Bobrow, Davis B. (2006) ‘Policy Design: Ubiquitous, Necessary, and Difficult’, in B. Guy Peters and Jon Pierre (eds) *Handbook of Public Policy*, London: Sage Publications, pp 281–315; Bason (note 4 above). For a popular account of these ideas in the UK, see Hilton, Steve (2015) *More Human: Designing a World Where People Come First*, London: W.H. Allen & Co.

¹⁷ O’Reilly, Tim (2011) ‘Government as a platform’, *Innovations*, 6(1), 13–40.

to key tenets of modern constitutionalism. After sketching out the emerging politics around agile, I show how its growth represents changing models of designing administrative justice. In particular, that it is attempting to shift emphasis on to users' preferences – something that I suggest ought to be welcomed but also potentially puts more traditional legal and good governance values in a precarious position. Finally, I look at the design of the agile process itself, making some recommendations on how it can potentially become more effective.

My overall argument is that, on the basis of the present evidence, the best hope for agile methods must be that they achieve the best systems within pre-established policy objectives and the practical realities of government. However, for the promised benefits of agile methods to be achieved, it must be applied with integrity. Moreover, greater thought must be given to how wider concerns and practice of public law and good administration fit alongside the agile method.

How agile developed and how it works

Historically, government has been a place where major IT projects faced almost certain disaster. The public sector has a long record of expensive failures and under-used services.¹⁸ This has been a problem in many countries, but the UK has been described in such terms as 'ground zero for IT management failures'¹⁹ and 'a world leader in ineffective IT schemes for government.'²⁰ IT failures within UK government have taken various forms: spiralling costs, delays and the collapse of proposed

¹⁸ Dunleavy, Patrick, Margetts, Helen, Bastow, Simon and Tinkler, Jane (2008) *Digital Era Governance: IT Corporations, the State, and e-Government*, Oxford: Oxford University Press.

¹⁹ Clarke, Amanda (2017) *Digital Government Units: Origins, Orthodoxy and Critical Considerations for Public Management Theory and Practice*, Working Paper, p 5.

²⁰ Dunleavy et al, p 70 (note 18 above).

reforms. The reasons for such failures have been multi-layered and complex.²¹ Things have, however, changed in recent years. Against a backdrop of widespread condemnation of IT projects, growing expense, a global financial crisis and various reports,²² the Government Digital Service was established. Introduced in 2011 as ‘Alphagov’, the Government Digital Service is a unit within the Cabinet Office with a mandate across the whole of government concerning digital strategy, services, hiring and procurement. Within a very short period of time, the Government Digital Service was widely seen as the global leader in digital government. It even topped the United Nations’ E-government rankings.²³

The Government Digital Service is seen as the first of a new breed of administrative organisations that have now spread across the world: government digital units.²⁴ Government digital units have certain distinctive features: they operate at the centre of the administration; they adopt a unified approach across government and borrow heavily from the tech sector in terms of their operational style; they introduce ‘start-up’ cultures associated with tech companies and prioritise user-centred design (adopting ‘design-thinking’ approaches); they exhibit a preference for data-driven decision-making; and they combine in-house talent with contracted-in talent to pursue government-led projects.²⁵ Government digital units typically also set down

²¹ Clarke (note 19 above).

²² House of Commons Public Administration Select Committee (2011) *Government and IT – ‘A recipe for rip-offs’: Time for a new approach*, HC 715-I; Lane-Fox, Martha (2010) *Directgov 2010 and Beyond: Revolution not Evolution* (www.gov.uk/government/publications/directgov-2010-and-beyond-revolution-not-evolution-a-report-by-martha-lane-fox).

²³ UN (United Nations) Department of Economic and Social Affairs (2016) *UN E-Government Survey 2016*.

²⁴ Similar configurations have been introduced in the US, Canada and Australia.

²⁵ Clarke (note 19 above).

criteria through service standard that all government digital services must comply with before they are put into action.

While government digital units are a growing trend internationally, they are still in their early days and there is limited research on them. Some questions also arise about their performance. Such units are not necessarily an all-conquering solution. In practice, these units have, perhaps quite naturally, sought to tackle ‘low hanging fruit’ first, fixing easy problems and making easy gains. This would, of course, make it easier to build an overall successful portfolio and make claims for further investment etc. More complex tasks – concerning, for example, large-scale organisational reforms such as the ongoing HMCTS reforms – may prove more difficult. The National Audit Office has noted that ‘while many government services are now available online ... departments and [the Government Digital Service] have struggled to manage more complicated programmes and to improve the complex systems and processes that support public services.’²⁶ However, the Government Digital Service has reported that 12 of the 25 projects on its initial work programme will see the benefits outweigh the costs of development within 10 years. It has been further observed that there is a real possibility of resistance to government digital units from within administration itself. There are many reports of UK civil servants disliking the ‘invasion’ of the Government Digital Service. The following quote, from a former Cabinet Office employee in 2012, demonstrates vividly this sentiment:

I think the interesting thing is if you talk to civil servants who aren't kind of “GDSonites” then they say “oh GDS is such arrogant wankers coming in and telling us how to do our jobs.” I mean I'm sure you've come across – I'm sure you've experienced the reputation of GDS within

²⁶ National Audit Office (2017) *Digital Transformation in Government*, p 7.

Whitehall, as you know not entirely positive. You know they are seen to be arrogant.²⁷

Such internal dynamics can lead to difficulties, the possibility of resistance to digitalisation and the need for outreach work within government. The Government Digital Service is actively seeking to combat this perception via outreach initiatives, for example, explaining its role to civil servants through a Digital Academy. More importantly, government digital units may also raise serious accountability questions. As the technology revolution continues to take hold, provision and control of government digital services and infrastructure will become increasingly important. With the digital unit model, it has been suggested that ‘the lines of accountability linking political decision-makers to government programming and spending [have] become blurred’, and that this challenge is ‘particularly acute in Westminster systems, with their vertical lines of individual ministerial accountability.’²⁸ On top of all of this, government digital units require sustained political support and can be very expensive.

Despite it still being early days in their development, it is apparent that the rise of government digital units is effectively creating what Amanda Clarke has dubbed a ‘new government-IT orthodoxy’.²⁹ Certain key features define this shift. First, a preference for ‘agile’ user-centric development, with heavy use of prototyping. Second, changes in procurement methods, including more reliance on in-house talent and more use of (when outsourcing is used) small and medium-sized enterprises. Third, the use of ‘open’ standards that allow solutions to be shared and reused across government (the Government Digital Service describes this approach as one that aggregates demand across government for common services but disaggregates the

²⁷ Clarke, p 32 (note 19 above).

²⁸ *Ibid*, p 36.

²⁹ *Ibid*, p 15.

supply of these services). Fourth, the creation of government-wide policies on digital initiatives. And fifth, the building of a new culture around digital service.

One core aspect of this ‘new orthodoxy’ of technology in government is the growing use of agile design processes. The agile approach is now routinely found in any aspect of government where the Government Digital Service has been involved. In the context of the HMCTS reforms discussed in Chapter Three, the Government Digital Service has been very influential and the agile approach has been widely adopted in order to implement those changes. HMCTS’ specific model has the following four stages:

1. *Discovery*: Finding out what users need, what to measure and what the constraints are.
2. *Alpha*: Building a prototype, testing it with users and learning about it.
3. *Beta*: Scaling up and going public.
4. *Live*: Learning how continuously to improve the live service.

This approach has also been adopted alongside the ‘Digital Service Standard’, which the Government Digital Service states that ‘all public facing transactional services must meet.’³⁰ This Standard includes requirements to ‘understand user needs’, ‘do ongoing user research’, ‘use agile methods’ and ‘iterate and improve frequently’. HMCTS has also adopted new tools – such as journey and stakeholder mapping – that are traditionally part of the agile approach. These new agile approaches – manifesting how ‘digital-era policy design instruments tend to privilege the participation of non-government actors in government

³⁰ Gov.uk (no date) ‘Digital Service Standard’ (www.gov.uk/service-manual/service-standard). A design manual is also available, which includes processes for system design and testing.

activities³¹ through what are commonly called ‘co-production’ techniques³² – have synchronised easily with the increasing emphasis placed on the ‘user perspective’ in administrative justice policy in recent decades.³³

Aside from the Government Digital Service, Policy Lab – a small team within the Cabinet Office established in 2014 – has also made a concerted effort to promote agile methods within government. Policy Lab was created as part of wider changes to the Civil Service.³⁴ In response to challenges from politicians, academia, the press and others, the *Civil Service Reform Plan* was made in 2012. It made a commitment to make ‘open policy-making’ the default approach. This meant that policy-making should draw on a full range of external experts, from academics to those who will deliver the policy. It was also promised that civil servants working on policy will have the necessary skills and expertise, can use up-to-date tools and techniques, and have a clear understanding of what works in practice.³⁵ One

³¹ Clarke and Craft (2017), p 482 (note 15 above).

³² Joshi, Anuradha and Moore, Mick (2004) ‘Institutionalised co-production: Unorthodox public service delivery in challenging environments’, *Journal of Development Studies*, 40(4), 31–49. See also Bovaird, Tony and Loeffler, Elke (2013) *We’re All in this Together: Harnessing User and Community Co-Production of Public Outcomes*, Birmingham: Institute of Local Government Studies, University of Birmingham.

³³ For some background discussion on the rise of user-centred design in administrative justice policy, see Tomlinson, Joe (2017) ‘The grammar of administrative justice values’, *Journal of Social Welfare and Family Law*, 39(4), 524–37.

³⁴ For background on the creation of Policy Lab, see Kimbell, Lucy (2015) *Applying Design Approaches to Policy Making: Discovering Policy Lab*, Brighton: University of Brighton; Bailey, Jocelyn and Lloyd, Peter (2016) ‘The Introduction of Design to Policymaking: Policy Lab and the UK Government’, Design Research Society 50th Anniversary Conference. For a wider discussion on the development of this type of organisation, see Bellafontaine, Teresa (2013) *Innovation Labs: Bridging Think Tanks and Do Tanks*, Policy Horizons Canada.

³⁵ HM Government (2012) *Civil Service Reform Plan*, June.

year later, a Civil Service report promised to fund a Policy Lab to promote innovative techniques such as design thinking to approach policy problems in a new way.³⁶ It also promised to develop a culture where there was openness to new evidence, which would involve a broader range of experts and processes where practical experimentation would be the starting point for solving problems. This means that developing process designs by trialling, testing and iterating was widely encouraged. The ongoing remit of Policy Lab is to support policy-makers to change their approach to policy-making by demonstrating new tools and techniques, offering skills training and facilitating long-term shifts in policy-making practice.³⁷ Policy Lab works with a range of partners within government and sees its work as pushing for design-led change within the policy-making community in government.³⁸

It is unclear exactly how agile processes have been working in practice, especially in the context of the HMCTS reforms to courts and tribunals.³⁹ Indeed, further research into the dynamics of these processes would be very insightful in terms of both understanding the process – what its benefits and limitations are – and how its operation may be improved in the context of administrative justice going forwards. The most information, in the context of the HMCTS reforms, is known about the agile method as it is being applied in the context of putting the social security tribunal on a digital footing. A summary released by government gives an impression of the scale and nature of this exercise.⁴⁰ From June 2017 to October 2018, the team focusing

³⁶ Civil Service (2013) *Twelve Actions to Professionalise Policy Making: A Report by the Policy Profession Board*, October.

³⁷ Kimbell, p 5 (note 34 above).

³⁸ *Ibid.*

³⁹ The best resource for this has been the Inside HMCTS Blog, <https://insidehmcts.blog.gov.uk>

⁴⁰ These numbers are based on the most charitable reading of the data published under FOIA Request No 180918020.

on the tribunal conducted seven rounds of ‘discovery’ research and eight rounds of ‘alpha’ testing. The testing was done with a variety of users: appellants, judges, senior medical members of the tribunals, claimant representatives and the DWP. For the testing, the total number of users engaged by the time the data was produced was 68; 29 were appellants and 26 were judges, along with two expert medical members of tribunals. From the DWP, five officials and five presenting officers were involved. One representative was spoken to. Most of the ‘lab’ testing sessions were done in London (13), with other labs being held in Manchester (1), Birmingham (1) and Newcastle (1). One session was held remotely. Around this, a series of more traditional research projects – such as surveys – were undertaken, but little is known about those exercises. What this information suggests is that the testing activities within the agile process being used in the HMCTS reform programme are, in practice, on a relatively small scale. There may be more activities occurring now, but the general opaqueness of agile processes makes this impossible to establish at present.

Beyond waterfall: changing models of design

How can we understand the shift in approach that is occurring in administrative justice design processes? The key change appears to be one of emphasis, from professional (civil servant) judgement to user judgement.⁴¹ In other words, the traditional ‘waterfall’ model of design is being rejected where agile methods are adopted, at least partially.⁴² Instead of system designs originating within the administration based on internal

⁴¹ On the emphasis of users generally, see Mintrom, Michael and Luetjens, Joannah (2016) ‘Design thinking in policymaking processes: Opportunities and challenges’, *Australian Journal of Public Administration*, 75(3), 391.

⁴² How design approaches link in with traditional approaches remains an unresolved question.

views on what operational demands are, the new model of design seeks to have civil servants relinquish some degree of control via prioritising user preferences. These preferences are understood through the activities of prototyping, testing and research. From one perspective, this involves opening up what used to be a relatively closed policy discussion about system design to involve users. This is part of a wider trend in public administration towards user participation in the design process – other methods, aside from agile design, have also been used to achieve similar ends. For instance, many administrations are trialling the crowdsourcing of policy with the aim of increasing participation and finding better results.⁴³ This shift in orientation is also represented in how theories of public administration in the emerging digital era have moved from traditional Weberian ideas of structured bureaucracy⁴⁴ to emphasising non-governmental actors being part of a more open process of designing the state.⁴⁵

In seeking to change the nature of the conversation to be more open, what preferences are most prominent in the conversation may also change. Under the old model, the

⁴³ See, for example, Aitamurto, Tanja and Landemore, Helene (2015) 'Five design principles for crowdsourced policymaking: Assessing the case of crowdsourced off-road traffic law in Finland', *Journal of Social Media for Organizations*, 2(1), 1–19; Gao, Huji, Wang, Xufei, Barbier, Geoffrey and Liu, Huan (2011) 'Promoting Coordination for Disaster Relief – From Crowdsourcing to Coordination', in John Salerno, Shanchieh Jay Yang, Dana Nau and Sun-Ki Chai (eds) *Social Computing, Behavioural-Cultural Modelling, and Prediction*, Berlin and Heidelberg: Springer, 197–204.

⁴⁴ Weber, Max (1922) *Economy and Society*, Chapter 11.

⁴⁵ Dunleavy et al (note 18 above); Noveck, Beth Simone (2009) *Wiki Government: How Technology Can Make Government Better*, Washington, DC: Brookings Institute Press; O'Reilly (note 17 above); Dunleavy, Patrick and Hood, Christopher (1994) 'From old public administration to new public management', *Public Money & Management*, 14(3), 9–16; Pollitt, Christopher and Bouckaert, Geert (2011) *Public Management Reform: A Comparative Analysis: New Public Management, Governance, and the Neo-Weberian State*, Oxford: Oxford University Press.

priorities as determined by policy officials were central. Broadly speaking, these were often understood to be concerns of system-manageability (for example, cost and speed of processing) and classical values of good governance (for example, procedural fairness, independence). User needs may have also been factored in to the process but traditionally, this would be done based on working out what a rational user would require. By including users more directly in the conversation about the design of systems, other preferences may gain more traction. For instance, considerations such as convenience and speed – often understood to be key preferences of users – may be given much more emphasis if user input is taken into account seriously.⁴⁶

It is important to note, however, that the agile design model does not actually pass decision-making control to users, as that remains with government. The impact of widening the conversation is dependent on how views are factored in overall by officials. Moreover, when agile methods and processes are adopted, they are used within the limits of the relevant department's budget (which is usually fixed in advance) and broadly pre-established policy objectives. This means that the conversation that is opened up is typically narrow; for instance, it is about *how* a system or part of a system operates online rather than *if* a system operates online.

An emerging politics of design?

Agile methodologies have, as noted above, been adopted across various sectors. Given this rapid growth, it is perhaps unsurprising that a politics around the use of agile design methodologies is now starting to emerge. A range of positions

⁴⁶ Berthoud, Richard and Bryson, Alex (1997) 'Social security appeals: What do the claimants want?', *Journal of Social Security Law*, 4(1), 17–41; Richardson, Genevra and Genn, Hazel (2007) 'Tribunals in transition', *Public Law*, 116.

can be taken, in particular in relation to governments' use of this approach, running from the more to the less enthusiastic. It is helpful to categorise views into four commonly held viewpoints.⁴⁷

First, there are those who may be labelled *the evangelicals*. These are people who suggest that agile methodologies are waiting to revolutionise the administrative justice system, and the rest of the world needs to catch up. There are many international conferences on agile methodologies and legal design. These are often not forums primarily for critical reflection of the approach itself, but more for discussion on how the approach can be advanced, applied and promoted. For advocates of this approach, it could even be suggested that democratic participation is enhanced through agile processes, as individuals have a greater role in the process of designing government.⁴⁸

Second, there are the *moderate advocates*. These are those who promote design thinking as an idea but also seek to question its application and how it integrates into extant ways of thinking about administrative justice. Canadian administrative law scholar Lorne Sossin is a good example of a moderate advocate. In a recent article, he stated his belief that 'design frameworks will transform how we think about administrative justice.'⁴⁹ His claim was that design thinking, and in particular, user-centred design, has been 'too often is missing in the design of administrative tribunals.'⁵⁰ Instead, he suggests, when lawyers have focused on design they have focused on design in a narrow legal sense,

⁴⁷ These are generally broad characterisations of different viewpoints.

⁴⁸ For a discussion on this point, see O'Reilly (note 17 above); Noveck (note 45 above); Margetts, Helen and Dunleavy, Patrick (2013) 'The second wave of digital-era governance: A quasi-paradigm for government on the Web', *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences*, 371.

⁴⁹ Sossin, Lorne (2017) 'Designing administrative justice', *Windsor Yearbook of Access to Justice*, 34(1), 87–111.

⁵⁰ *Ibid*, p 87.

such as the design of statutory mandates and procedures.⁵¹ At the same time, in government, a ‘top-down’ policy-making process that serves the interests of a ruling government has been adopted.⁵² The result, Sossin claims, is that the ‘administrative justice system in Canada at all levels of Government (federal, provincial, municipal, Indigenous) is generally fragmented, poorly coordinated, under-resourced in relation to the needs of its users and has multiple barriers of entry.’⁵³ His view is that the application of design thinking, with its ‘bottom-up’ philosophy, will lead to overall better systems. Sossin, however, acknowledges that many tenets of the design-thinking approach that he outlines have long been promoted, by academics and by others.⁵⁴ He takes the position that agile methods are an evolution of an existing and helpful approach, the application of which needs to be expanded.

Third, there are the *sceptics*, who are uncertain what the agile approach adds to existing ways of thinking about designing administrative justice systems. The concern here is that the adoption of agile methods may represent no more than superficial language that dresses up the process of administrative justice reform in bureaucratic language, potentially even obfuscating important issues of substantive policy and process design as a result.

Finally, and this is perhaps the most interesting of categories, there appears to be an emerging school of *anti-designers*. A

⁵¹ Ibid, p 87. For instance, Sossin cites from the Canadian context: Ellis, Ron (1987) ‘Administrative tribunal design’, *Canadian Journal of Administrative Law & Practice*, 1, 134; Ellis, Ron (2013) *Unjust by Design: Canada’s Administrative Justice System*, Vancouver, BC: University of British Columbia Press.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ See, for example, Leggatt, Andrew (2001) *Tribunals for Users: One System, One Service, Report of the Review of Tribunals*, London: Ministry of Justice, paras 15.16–15.17.

clear articulation of this type of stance, albeit made in the context of regulation, has been offered by Deirdre Mulligan and Kenneth Bamberger, two US scholars who launched a critique of ‘governance by design’.⁵⁵ They argue that design approaches ‘bake in’ certain types of political preference, and that conventional structures of accountability are ‘fundamentally ill-equipped’ to provide effective scrutiny of this. The risk they identify is that design approaches may subvert traditional models of public governance.⁵⁶ They argue that ‘governance-by-design has undermined important governance norms’ and its form, coupled with the lack of space for scrutiny, means there has rarely been ‘a meta-discussion about when and whether it is appropriate to enlist technology in the service of values at all.’⁵⁷ The result may be that the outcome of a design process is that key choices ‘recede from the political as they become what “is” rather than what [democratic] politics has determined ought to be.’⁵⁸

Agile as institutional design

Thinking about the ‘design of design’ may seem odd, but it is important. The process by which systems are created are naturally vital to the system citizens ultimately experience. It is important therefore to consider the positive and negative features of any design process.

At the outset, it ought to be noted that agile approaches have some features that may be considered helpful. First, they can lower the risk of large-scale disasters. Building systems piece by

⁵⁵ Mulligan, Deirdre K. and Bamberger, Kenneth A. (2018) ‘Saving governance-by-design’, *California Law Review*, 106(3), 697–784. The argument in this article has a wider scope than just agile processes, but it engages with similar concerns about ‘design’ method in the context of government technology.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, p 698.

⁵⁸ *Ibid.*

piece can mean that problems can be more easily located and fixed than in one large system. It also avoids the moment where there is one ‘big-bang’ roll-out of a new process (which carries the potential for huge disaster). This is because, under the agile method, new processes incrementally go online after rounds of testing. Agile may also more easily facilitate feedback to allow for improvement beyond the initial design phase.⁵⁹ Second, agile methods can give users of the system a greater voice in the design process. It has often been observed that administrative justice processes have been influenced by elite users of the system – particularly lawyers – rather than ordinary citizens.⁶⁰ At the same time, agile processes can also allow the actual voices of users to be heard, rather than assumptions being made about what users want or how they experience processes. Finally, agile processes seek to foster a greater emphasis on evidence-based policy-making. This has long been argued to be necessary by administrative justice commentators.⁶¹ With the growth of digital processes, there is also the possibility of capturing more detailed data on administrative justice processes (although there are debates around what data precisely should be collected, what data should be made public and what data should be shared across government). Agile processes may allow the most to be made of ‘big data’ through directly incorporating searching for all available evidence into the process.

Agile processes have various features, however, which may limit their effectiveness. There are two main types of limitation. First, there are those limitations that are intrinsic to the method itself. For instance, the iterative aspect of the agile method means that when research and testing is conducted, it is usually

⁵⁹ For a wider discussion of the role of this kind of feedback, see Coleman, Stephen and Gotz, John (2001) *Bowling Together: Online Public Engagement in Policy Deliberation*, London: Hansard Society.

⁶⁰ See, for example, Sossin (note 49 above).

⁶¹ For a recent example, see UK Administrative Justice Institute (2018) *Research Roadmap*.

on specific parts of a process. Due to this, there remains a need for changes to be assessed in the wider systems in which they exist, as well as end-to-end testing of the overall processes that are built. Moreover, working in an iterative way can make it difficult for external stakeholders, including external researchers, experts and those affected by changes, to engage with the design process. Agile processes also put emphasis on what users want. As explained above, there may be many good reasons for installing processes that turn the dial in this direction. However, there is a risk with the present procedure of over-reliance on the user perspective, and care must be taken not to too willingly emphasise values often preferred by users – such as convenience – over traditional concerns such as procedural fairness.⁶² With technologists and civil servants exercising a large amount of control over the important details of the design of systems, the importance of classical legal values, such as fair process, may get lost. Lord Reed, in the landmark *UNISON* ruling, gave a warning to this effect:

... [t]he importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the “users” who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings.⁶³

Agile design risks justice processes being conceived as ‘merely a public service like any other.’

The financial costs of user research and testing may prove a further limitation. For example, to do effective user research,

⁶² Berthoud and Bryson (note 46 above); Richardson and Genn (note 46 above).

⁶³ *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [66].

research teams, that take relatively long periods of time to work, are required. The reliance on engaging with users could also present problems in some contexts. Tracking down users of the justice system willing to spend time talking with government about their experiences with government may pose problems. Some may be worried about engaging and others may not want to engage at all. It may even be difficult to find users in the first place. For instance, in respect of immigration tribunals, users may speak different languages, many have left the country and many may be cautious about disclosing information to government based on past negative experiences. The issues around the practical implementation, financial and otherwise, of the agile method may ultimately lead to user research and testing only being conducted on a small scale. This could undermine how representative, and therefore reliable, the outcomes of agile processes are. At the same time, this can give the impression that it provides ‘more heat than fire with rhetoric far outpacing its uptake.’⁶⁴

It must also be highlighted that agile testing is not public and focuses on narrow topics. It cannot therefore be seen as a proxy for deliberative, public debate or even traditional forms of public consultation. The relationship between traditional forms of public consultation and agile testing presents various tensions. In the current HMCTS reforms this tension is perhaps best demonstrated by how observers are complaining about a lack of consultation whereas the government feels as though it has been constantly consulting. This ultimately goes to a wider issue of how ‘the role of individual citizens and non-governmental

⁶⁴ Clarke and Craft (2017) (note 15 above). See also Clarke, Amanda (2014) *Government-Citizen Relations on the Social Web: Canada and the United Kingdom*, Oxford: Oxford University Press; Clarke, Amanda and Francoli, Mary (2017) ‘Digital Government and Permanent Campaigning’, in Alex Marland, Anna Lennox Esselment and Thierry Giasson (eds) *Permanent Campaigning in Canada*, Vancouver, BC: University of British Columbia Press, 241–58.

organizations in social problem solving [by government] remains unclear in the digital age.’⁶⁵

Finally, there are questions about the capacity of governments to move from traditional modes of working to new agile processes. Some studies have suggested this may be a key problem,⁶⁶ particularly in relation to the capacity of government to understand how to integrate new forms of evidence gathered by more citizen participation and big data.⁶⁷

A second set of limitations relates to the application of agile methods in the wider context of political and governmental reality.⁶⁸ In this wider setting, agile methods are typically deployed within broadly pre-established policy objectives, meaning the results of the process, no matter how well-managed the method is, will also be limited. Governments may choose to reform a process for a number of reasons, and these motivating reasons often shape the overall process.⁶⁹ Perhaps most significantly, since agile processes have become more prevalent in the UK, they have usually been deployed within certain budget structures in mind, specifically, with the need to reduce costs or to ensure effective working within restricted budgets. If resources are scarce, there is simply going to be a limit to what is possible.

⁶⁵ Clarke and Craft (2017), p 484 (note 15 above).

⁶⁶ Mergel, Ines and Desouza, Kevin C. (2013) ‘Implementing open innovation in the public sector: The case of challenge.gov’, *Public Administration Review*, 73(6), 882–90; Clarke, Amanda (2019) *Opening the Government of Canada: The Federal Bureaucracy in the Digital Age*, Vancouver, BC: University of British Columbia Press.

⁶⁷ Painter, Martin and Pierre, Jon (2005) ‘Unpacking Policy Capacity: Issues and Themes’, in M. Painter and J. Pierre (eds) *Challenges to State Policy Capacity: Global Trends and Comparative Perspectives*, Basingstoke: Palgrave Macmillan, pp 1–18.

⁶⁸ Clarke and Craft (2017) (note 15 above). For further discussion, see Considine, Mark (2012) ‘Thinking outside the box? Applying design theory to public policy’, *Politics & Policy*, 40(4), 704–24.

⁶⁹ Le Sueur and Bondy (note 2 above). There is very limited literature directly addressing the issue.

The highest aim, therefore, can only be that agile methods have features that allow for the development of the best process within the money that is available. There also remains an old problem: the operational gap between government departments.⁷⁰ This wider institutional issue within central government can risk undermining drastically the benefit of agile approaches. There is little sense, for example, in HMCTS designing a user-friendly online social security tribunal procedure which is preceded by processes in the DWP that are often seen to be not user-friendly at all.⁷¹ Calls for ‘joined-up’ thinking in administrative justice are nothing new. However, the lack of coordination between different government departments can undermine the deployment of the user-centred agile approach. Finally, there are obvious questions about how comfortably evidence fits alongside the more expressly political dynamics within administration.⁷²

Recommendations

It is as axiomatic as anything is in administrative justice that making systems better for users is a good idea. The tricky questions relate to how that happens and the extent to which user preferences should be given priority. For the benefits of agile, as promised by it advocates, to be realised, the approach must be applied with integrity. Practically, the realities of government – with, for example, tight budgets and departmental

⁷⁰ Freedland, Mark (1999) ‘The Crown and the Changing Nature of Government’, in Maurice Sunkin and Sebastian Payne (eds) *The Nature of the Crown: A Legal and Political Analysis*, Oxford: Oxford University Press, Chapter 5.

⁷¹ See, for example, Thomas, Robert and Tomlinson, Joe (2019: forthcoming) ‘A different tale of judicial power: Administrative review as a problematic response to the judicialisation of tribunals’, *Public Law*, which shows the effects the DWP’s MR pre-appeal process has on the operation of the tribunal.

⁷² Cairney, Paul (2016) *The Politics of Evidence-based Policy Making*, Basingstoke: Palgrave Macmillan.

silos – make this tricky. Furthermore, the limitations of the method – even when applied with integrity – must be accepted. Agile methods are typically deployed within broadly pre-established policy objectives, meaning the results of the process, no matter how well executed, will also be so limited. As such, it is difficult for agile methods to be thought of as a substitute for genuine public debate and consultation.

The best hope for agile methods must be that they achieve the best systems within pre-established policy objectives and the practical realities of government. Time will tell if this is the case in practice, and further investigation into the dynamics of these processes would be insightful, in terms of both developing understanding and improving the process. However, for now, various steps could be taken to improve the present design process. In particular, thought could be given to how wider concerns of ethics and good governance fit within the agile method, as well as allowing wider external engagement with the process. In this respect, a series of relatively low-cost improvements are possible. First, the fragmented nature of agile methods means that, even within the parameters of a particular design process, there may be a lack of joined-up thinking. Adopting end-to-end testing of processes at various stages could mitigate this risk. Second, to ensure traditional concerns of public law and good government – such as procedural fairness – are fully considered and not displaced inappropriately by user preferences, consideration should be given to setting up expert advisory groups on particular projects or to creating a good governance standard, to sit alongside the Government Digital Service's Service Standard. The aim would be to promote wider considerations than the agile method may directly facilitate. And third, to allow more external engagement with design processes, a commitment could be made that research undertaken within government as part of a design process – wherever practicable and within the appropriate limits of data protection laws, research

ethics etc – will be published, even if only in summary form.⁷³ This could improve transparency and facilitate a wider public conversation.

⁷³ Instructive discussion and helpful principles can be found in Sedley, Sir Stephen (2016) *Missing Evidence: An Inquiry into the Delayed Publication of Government Commissioned Research*, Sense About Science.

