

# EVIDENCE FOR THE COMMISSION ON JUSTICE IN WALES

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*- This evidence is also submitted on behalf of the Public Law Project –*

1. I was prompted to provide, and welcome the opportunity to offer, evidence to the Commission on Justice in Wales related to the effects of digitalisation on justice. I do so in both my academic capacity as Lecturer in Public Law at King's College London and also representing the Public Law Project, where I am Research Director.<sup>1</sup> My work on digitalisation has focused largely on administrative justice and public law, and particularly tribunals. My observations are therefore largely rooted in the experience of that context, but I will offer points at a more general level here.
2. Digitalisation in the context of justice is a vast topic and my evidence will therefore address three core points that, I would suggest, are worthwhile for the Commission to take account of. They are: (a) the nature of digitalisation in the justice context; (b) the experience with the digitalisation of tribunals under the ongoing HMCTS reform programme, in order to provide an example of some of the key issues arising in government-led digitalisation reforms; and (c) the possible benefits and disadvantages that digitalisation presents in Wales in particular. In covering this territory, my hope is to stimulate thinking about the broad ways in which digitalisation can be used appropriately within the justice system of Wales.
3. A note on the availability of evidence must be made at the outset. There is only a very thin empirical evidence base concerning the use of digital technologies in justice systems.<sup>2</sup> Claims of such technology being either an ideal solution or an impending disaster in the justice context are often not characterised by firm evidence but extensive speculation. Both viewpoints, until there is a firmer body of evidence and/or experience, ought to be treated with healthy scepticism.

## **The Nature of Digitalisation**

4. The prospect of the digitalisation of justice is, in many respects, relatively new, despite futurologists speculating about its possible impacts for some time now.<sup>3</sup> However, the

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<sup>1</sup> The Public Law Project is an independent national legal charity. Our mission is to improve public decision making and facilitate access to justice. We work through a combination of research and policy work, training and conferences, and providing second-tier support and legal casework including public interest litigation. Our strategic objectives are to: uphold the Rule of Law; ensure fair systems; and improve access to justice.

<sup>2</sup> HMCTS is developing an evidence base internally, but it is not being transparent about its research work and is not publishing the majority of it.

<sup>3</sup> e.g R. Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2<sup>nd</sup> edn 2017).

foundational conundrum of technological advancement is not new. On the one hand, the essential promise of technology remains, as it always has done, of more and/or better for less effort.<sup>4</sup> On the other hand, the fundamental concern is that, by using new technology, we alienate older methods—and their benefits—that we ought to preserve.<sup>5</sup>

5. When considering the role of, or possible role for, digitalisation within justice processes, it is important to remember that the essential nature of those systems—social, human creations of the state—remain as they always have done. Increasing use of technology should not make us lose sight of this. In particular, technologists have no special authority to make claims about the design of justice systems beyond purely technical issues, which are often very difficult to separate out from wider issues of system design.
6. Digital technology is best understood as a new material that has been discovered that can be added to the existing materials used in building justice systems. It is a means for advancing the functions of the state and justice, not some sort of transcendental change. The use of digital technology may bring about or represent changing politics or changes in society, and digital methods may provide a new form of governing which has certain consequences, but digital technology is no more than a tool through which a vision of the justice system can be implemented.
7. There is an overwhelming amount of literature on the effects, and possible future effects of, technology on law, government, and society. However, the fundamental questions about justice in the modern state remain as they have done for some time now. Sir Ivor Jennings, writing in the *Harvard Law Review* in 1936, said that the role of the administrative lawyer is to ‘advise as to the technical devices which are necessary to make the policy efficient and to provide justice for individuals.’<sup>6</sup> Those terms are a helpful frame: digitalisation is a technical device of administration and justice, we must understand it for what it can add, but also for its limitations.

### **A Case Study: The Experience with Tribunals Digitalisation within HMCTS**

8. I turn now to a topical example of digitalisation, the present HMCTS reforms relating to central government tribunals.<sup>7</sup> Before I turn to that example, it is important to highlight that ‘digitalisation’ is a highly ambiguous concept and can relate to various types of

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<sup>4</sup> Similar basic claims made of technology were seen during the industrial revolution, see e.g. M.J. Daunton, *Progress and Poverty: An Economic and Social History of Britain 1700-1850* (Oxford University Press, 1995).

<sup>5</sup> Ibid.

<sup>6</sup> W.I. Jennings, ‘Courts and Administrative Law’ (1936) 49 *Harvard Law Review* 426, p.430.

<sup>7</sup> Ministry of Justice, *Transforming Our Justice System* (London: 2016), p.15. See generally: J. Rozenberg, *The Online Court: Will IT Work?* (2017); H. Genn, ‘Online Courts and the Future of Justice’ (The Birkenhead Lecture, Gray’s Inn, 2017) available at <  
[https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead\\_lecture\\_2017\\_professor\\_dame\\_hazel\\_genn\\_final\\_version.pdf](https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf)> [accessed 22.03.2018].

change. For instance, digitalisation may both be imposed by government or it may emerge from the ground-up.<sup>8</sup> Some effects involve ‘hard’ process changes,<sup>9</sup> whereas other effects may relate to the ‘soft’ cultural influences of technology and associated modes of thought.<sup>10</sup> The HMCTS reforms are a major example of government-led, top-down digital change in a justice system.

9. As regards tribunal appeals, the Ministry of Justice and HMCTS are implementing a wide-ranging court reform and digitalisation programme across the justice system.<sup>11</sup> Moving tribunals appeals online is central to this agenda.<sup>12</sup> These reforms will be initially developed and piloted in social security tribunals and work has already begun in that respect—the pilot begins later this year. The aim is for social security appeals to be dealt with through a range of methods, including ‘continuous on-line hearings.’<sup>13</sup> The overarching strategy is to increase access to justice while making large savings in terms of efficiency.
10. While these reforms may yield the intended benefits to some extent, there are also multiple areas of concern with moving tribunal appeals online. Such concerns are more pronounced when it is considered that the changes are being made in the context of fiscal austerity and recent restrictions to legal aid. Though I do not seek to be comprehensive, the key issues in this area can be summarised as follows:<sup>14</sup>
  - a. Not all tribunal users will want to use online pathways and some will be unable to. HMCTS is developing assisted digital programmes, but we are yet to see if these services will function properly and if appropriate benchmarks have been used to design them;<sup>15</sup>
  - b. Whether tribunal users can opt out of online hearings or if some will be forced to use the online process will be critical. So too will be the way in which it is determined if any case is suitable for online adjudication;

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<sup>8</sup> See e.g. J. Tomlinson, ‘Crowdfunding and Public Interest Judicial Review’ [2019] *Public Law* (forthcoming).

<sup>9</sup> The HMCTS reform programme is a good example of this.

<sup>10</sup> See e.g. J. Tomlinson, ‘The policy and politics of building tribunals for a digital age: how design thinking is shaping the future of the public law system’ (2017) *UK Constitutional Law Association Blog*; J. Tomlinson, ‘Public Law in Pieces: A Reply to Professor Sossin and Some Suggestions for HMCTS (2018) *UK Constitutional Law Association Blog*.

<sup>11</sup> See n 7 above.

<sup>12</sup> For discussion, see: R. Thomas and J. Tomlinson, ‘Remodelling social security appeals (again): the advent of online tribunals’ (2018) 25(2) *Journal of Social Security Law* 84; R. Thomas and J. Tomlinson, *The Digitalisation of Tribunals* (UK Administrative Justice Institute and Public Law Project, London, 2018).

<sup>13</sup> For discussion on changing models of tribunal adjudication, see n 12 above.

<sup>14</sup> For a wider survey, see n 12 above.

<sup>15</sup> Ministry of Justice, *Transforming our justice system: assisted digital strategy, automatic online conviction and statutory standard penalty, and panel composition in tribunals: Government response* (2017); JUSTICE, *Preventing Digital Exclusion from Online Justice* (London, 2018).

- c. The procedural fairness in online tribunals will be key, both in terms of actual process and perceived legitimacy;<sup>16</sup>
- d. Consistently, empirical research has shown that process affects tribunal decisions substantially. A key issue will be the extent to which online processes may affect the outcome of appeals, and the amount of overall successful appeals;
- e. The debate around online appeals seems to be premised largely upon the basis that the process will not typically involve legal representatives. There are questions therefore around what role lawyers and representatives can play, and how online procedures and outcomes differ depending on their presence or absence;
- f. There is concern about the lack of clarity around the mechanisms that will allow the principle of open justice to be given suitable effect;<sup>17</sup>
- g. In respect of the planned efficiencies of online tribunals, there are at least two large risks.<sup>18</sup> The first is that the system becomes overloaded and processes are weakened without further investment. The second is that, in order to make savings, some users are forced to use online hearings when they would rather not; and
- h. What data will be captured from online justice systems and the extent to which that should be published is becoming the subject of an important disagreement.<sup>19</sup>

11. This is not a comprehensive map of the issues presented and issues may vary from context to context, yet the above provides an indicative guide to some of the challenges involved in digitalisation in the justice context.

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<sup>16</sup> Technology can, for instance, impact perceptions of fairness significantly. For an example in a different context, see: H. Wells, 'The Techno-Fix Versus The Fair Cop: Procedural (In)Justice and Automated Speed Limit Enforcement' (2008) 48(6) *The British Journal of Criminology* 798.

<sup>17</sup> See generally: Sir E. Ryder, "Securing Open Justice" (Max Planck Institute Luxembourg, 2018) available at <<https://www.judiciary.gov.uk/wp-content/uploads/2018/02/ryder-spt-open-justice-luxembourg-feb-2018.pdf>> [accessed 22.03.2018].

<sup>18</sup> On the financial dimensions of the current HMCTS project, see: National Audit Office, *Early progress in transforming courts and tribunals* (HC 1001, Session 2017–2019).

<sup>19</sup> The Legal Education Foundation is at the forefront of this discussion at present.

## **Key Challenges and Opportunities in Wales**

12. I turn now to the challenges and possible benefits of digitalisation in relation to Wales in particular. While not being comprehensive, the following issues I would highlight as particularly important considerations:

- a. Online procedures can benefit jurisdictions where populations are often remote from court centres.<sup>20</sup> For those normally required to travel long distances to an oral hearing, or where transport infrastructure is not fully developed, online processes may prove to be a distinct improvement in terms of accessibility. The geography of Wales means there is a possibility of such claimed advantages being particularly meaningful in practice;
- b. There are questions around the desirability of a two-speed (*i.e.* partially online) justice system. For instance, it seems—as I have seen nothing to indicate that this will be case—that Welsh tribunals will not be included in the ongoing HMCTS reforms. The situation being created is one where a two-track system will be open to Welsh residents—some processes will be online, some not;<sup>21</sup>
- c. For the Welsh justice system, the HMCTS reforms are a good learning opportunity. The HMCTS project is large and, even its strongest supporters, acknowledge failures will be inevitable. Those failures, as well as the successes of the reforms, can create a helpful template for Wales;
- d. A related question is the design of any online systems that are created. If online processes are to be set up for Welsh justice systems, should their design be aligned with HMCTS or should a distinctive Wales design be adopted?;
- e. Online procedures do not avoid foundational issues of economic inequality. For instance, internet access, and quality of any access available, link closely with wealth.<sup>22</sup> Digital processes may, in some instances, recreate old inequalities that are extant in Wales in a new online context;
- f. There are ways in which online processes may put Welsh citizens at a disadvantage due to network capabilities. In 2017, Ofcom reported that coverage

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<sup>20</sup> For instance, video-link hearings have been used in remote areas of the U.S.

<sup>21</sup> The same is happening in England too, with tribunals which are not attached to central government are not undergoing digitalisation.

<sup>22</sup> In 2015, of the 14 per cent of households in Great Britain with no internet access, some explained this on the basis of equipment costs being too high (14per cent) and access costs being too high (12 per cent), see: Office for National Statistics, *Statistical bulletin: Internet Access - Households and Individuals* (2015) available at <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2015-08-06> [accessed 22.03.2018].

in Wales has improved, but there is a lot more work to do before voice and data services match those available in other parts of the UK.<sup>23</sup> Both indoor and outdoor geographic coverage is lower in Wales than in the UK as a whole by around 10%. This is an issue many expect to reduce over time, but it may create a particular barrier in the context of rural Wales; and

- g. For public law systems such as tribunals, involvement from decision-making departments seems particularly important to creating both organisational learning within government and ensuring the promised efficiencies are actually secured. This is a context where Wales has a great opportunity to set the standard in online dispute resolution—the HMCTS tribunals seem to be suffering from a lack of communication between HMCTS and key departments such as the DWP.<sup>24</sup>

13. If I could be of any further assistance to the Commission, I would be happy to provide more evidence on any points raised here.

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<sup>23</sup> Ofcom, *Connected Nations 2017* (2017).

<sup>24</sup> For a public example, see E. Dugan, 'A Senior Judge has Suggested Charging the Government for Every "No-Brainer" Benefits Case it Loses in Court' (*BuzzFeed News*, 9 November 2017) available at <[https://www.buzzfeed.com/emilydugan/most-dwp-benefits-cases-which-reach-court-are-based-on-bad?utm\\_term=.lfa9d2BEe#nxV2m9Zrn](https://www.buzzfeed.com/emilydugan/most-dwp-benefits-cases-which-reach-court-are-based-on-bad?utm_term=.lfa9d2BEe#nxV2m9Zrn)> [accessed 22.03.2018].