



NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING
NETHERLANDS COMPARATIVE LAW ASSOCIATION

Democratic Revival or E-Sell Out? A Sceptic's Report on the State of E-Governance in the UK

Report to the XVIIth International Congress of Comparative Law, July 2006

Burkhard Schafer*

Readers are reminded that this work is protected by copyright. While they are free to use the ideas expressed in it, they may not copy, distribute or publish the work or part of it, in any form, printed, electronic or otherwise, except for reasonable quoting, clearly indicating the source. Readers are permitted to make copies, electronically or printed, for personal and classroom use.

1. Introduction and Methodological Preliminaries

This paper is based on the national report for the UK in the e-government session of the World Congress on Comparative Law in Utrecht 2006. To incorporate some of the critical discussions at the conference and to enhance readability, the questionnaire has been rather loosely incorporated into this account. Comparing e-governance poses a range of methodological challenges. Some of them will be discussed in the context of specific issues in this report. However, as these methodological problems informed some decisions regarding structure and emphasis of this report, we want to start with a short outline of the methodological problems that were encountered during our research, and how they have been addressed.

Generally, e-governance initiatives have been received very favourably and indeed often enthusiastically by academic commentators, not just in the UK¹ but across the world.² Where scepticism is voiced, it typically accepts the project of modernising governance through

* Burkhard Schafer is Senior Lecturer at the School of Law, Joseph Bell Centre, University of Edinburgh.

¹ See with further references for the UK e.g. very early Butler D, Stokes DE. (1974) *Political Change in Britain: The Evolution of Electoral Choice*, Macmillan, London; Jankowski N, van Selm M. (2000) "The promise and practice of public debate in cyberspace" In *Digital Democracy. Issues of Theory and Practice*, KL Hacker, J van Dijk (Eds.), Sage Publications, London, pp 149-165; Adams, N. J., Macintosh, A., and Johnston, J. (2005); 'e-Petitioning: Enabling Ground-up Participation'; *Challenges of Expanding Internet: E-Commerce, E-Business and E-Government*; Matohisa Funabashi and Adam Grzech (eds); 5th IFIP Conference on e-Commerce, E-Business and E-Government (I3E'2005); October 26-28 2005, Poznan, Poland, pp265-279

² See e.g. Barber B. (1984) *Strong Democracy: Participatory Politics for a New Age*, University of California Press, Berkeley; Bryan C, Tsagarousianou R, Tambini D. (1998) "Electronic democracy and the civic networking movement in context" In *Cyberdemocracy: Technologies, Cities and Civic Networks*, R Tsagarousianou, D Tambini, C Bryan (Eds.), Routledge, London, pp1-17; Hale M, Musso J, Weare C. (1999) "Developing digital democracy: evidence from Californian municipal web pages" In *Digital Democracy: Discourse and Decision Making in the Information Age*, BN Hague, BD Loader (Eds.), Routledge, London, pp 96-115; Matthias Finger and Gaëlle Pécoud (2003) From e-Government to e-Governance? Towards a model of e-Governance Electronic Journal of e-Government at <http://ejeg.com/volume-1/volume1-issue1/issue1-art1-finger-pecoud.pdf>; R. W'O Okot-Uma Electronic Governance: Reinventing Good Governance, at <http://www.electronicgov.net/pubs/index.shtml>; La Porte TM, Demchak CC, Friis C. (2001) "Webbing governance: Global trends across national level public agencies", *Communications of the ACM* 44(1), 63-67

technology, but cautions against unrealistic expectations.³ For these writers, while in principle a force for good, technology on its own is either at present not sufficient to radically transform existing models of governance, but may well be so in the future. The one exception to this general trend are papers that address the problem of the digital divide. They alert us to the possibility that policies promoted as enhancing democratic participation and social inclusion may in fact disenfranchise those parts of the population that lack access to computers, or are too unfamiliar with them to use them efficiently.⁴ Even there though, the analysis typically sees this as an accidental feature of the e-governance agenda, which can be overcome through appropriate technologies (e.g. digital TV) or education. In terms of comparative methodology, the point here is that the general function of e-governance initiatives is not doubted, only, if at all, is their efficiency questioned. This tendency by academic commentators to emphasise the potential of e-governance is in danger of getting reinforced in comparative analysis, where the traditional twin commitment to positivism and functionalism can tempt us to take the officially stated function behind e-governance initiatives, the policy goals and aspirations, uncritically at face value. The conceptual similarity between e-governance and e-commerce is an additional temptation for comparative lawyers to use methodological approaches that have worked well in comparative private law, but may be unsuitable for comparative government studies. For the UK at least, the main method of delivering-governance is not though law but political means, comparative politics therefore possibly methodologically more suited to analyse these developments. Functionalist assumptions in particular may be unproblematic in the more technical aspects of private law. In the much more politicised field of e-governance however, accepting the officially stated functions as also the intended function ought to be much more contested.⁵ This becomes particularly an issue if, as we will see in a number of examples below, the official rationale behind e-government initiatives shifts and changes frequently. In the UK, the ID card and its associated database has been described at different times as a means of crime control (which would remove it from the scope of this paper altogether), a way of accessing public services (e-government) or indeed as a precondition for secure e-voting (e-democracy).

This leads to the second methodological problem, determining the scope of e-governance and with this the scope of this report. The questionnaire invited us to take a broad, inclusive view of e-governance, covering all aspects of ICT in public administration, from e-voting to e-procurement by public bodies. Academic literature on this field however has developed conceptual schemata that not only define the scope of e-governance more precisely, they also offer helpful conceptual models of the interrelation between e-governance, e-government and e-democracy.⁶ Even though conceptual schema of this type are potentially very valuable in organising the hugely diverse and heterogeneous material, none of these models have been adopted for this analysis. The reason for this was a concern that classifications of this type impose artificial boundaries which distort the empirical material. While this is of course inevitably the case with any classification scheme, in the case of e-governance the result was

³ Typical e.g. Briony J Oates (2003), The potential contribution of ICTs to the political process, *Electronic Journal of e-governance* at <http://www.ejeg.com/volume-1/volume1-issue-1/issue1-art3.htm>;

⁴ See e.g. Norris, P. (2001) *Digital Divide: Civic Engagement, Information Poverty and the Internet in Democratic Societies* (Cambridge University Press: New York); Anna Malina, Ann Macintosh (2004) Bridging the digital divide: developments in Scotland, in *eTransformation in governance: new directions in government and politics*, Idea Group Publishing Hershey, PA

⁵ Especially when dealing with a government whose attitude to the truth has been distinctively post-modern.

⁶ Gordon, Thomas F., and Gernot Richter, (2002) "[Discourse Support Systems for Deliberative Democracy](#)" *eGovernment: State of the Art and Perspectives (EGOV)*. Eds. Roland Traunmüller and Klaus Lenk. Aix-en-Provence: Springer Verlag, 248-55; Matthias Finger and Gaëlle Pécoud (2001) From e-Government to e-Governance? Towards a model of e-Governance, *Electronic Journal of e-governance* at <http://www.ejeg.com/volume-1/volume1-issue-1/issue1-art1.htm>

deemed as too problematic. One of the functions of e-governance is to soften traditional bureaucratic and administrative boundaries, and to subvert traditional conceptual classifications such as the distinction between e-commerce and e-government, the public and the private sector, To describe this particularly significant aspect of e-governance made it desirable at least initially to avoid any commitment to predefined concepts and categorisations. Eventually though, comparative e-governance can hugely benefit from a more abstract and structured approach than the one presented here. Especially dynamic approaches such as the one proposed by Marijn Janssen and Anne Fleur van Veenstra⁷ which allows to rank e-governance initiatives on an evolutionary scale have some potential for comparative legal analysis of e-governance. This however remains a task for future research,

To address both problems and to achieve a better balance in the field of comparative e-governance, this report describes in its first part the historical development of e-government in the UK, reporting the official function and political goals as stated in policy document. In the second part by contrast, we indicate a more radically sceptical reading of e-government initiatives in the UK. In the first part, we will see that e-government has at least partly failed to achieve its stated goals, even when measured by the standards provided by the government. In particularly the hoped-for benefits for a democratic renewal still haven't materialised, as evidenced by the below expected uptake of e-government facilities by the citizens, In the orthodox reading, this is analysed as a partial failure to achieve its stated objective and to "function properly", a temporary setback until better (technologically better, better funded, better co-ordinated) solutions are found. In the sceptical reading of the second part, we offer an alternative understanding. In this reading, e-government has made considerable inroads towards its goals and has already qualitatively transformed modes of governance and democracy in the UK, only that these goals are not necessarily the same as the ones officially stated,

The background for our critical analysis is the problematic relation between e-commerce and e-government. E-governance has been described as e-commerce in the public sector.⁸ As we will see, the UK provides some evidence for this assessment. The porous interface between e-commerce and e-governance on the one hand, e-governance and e-democracy on the other, means that the e-governance agenda has the potential of radically subverting our understanding of the public sphere. E-democracy and e-governance in this model are not just different aspects of the use of ICT by the state, as Tom Gordon points out. There is a potential conflict between them. In this reading, successful e-governance strategies (understood as e-commerce in public services) will not only fail to achieve a more open, more democratic and accountable government, they have the potential to further weaken existing democratic institutions.⁹ The reader should bear in mind though that this radically sceptical reading is offered here mainly for methodological and pedagogical reasons, to argue the case against an overly naïve functionalist approach to comparative e-governance.

⁷ Marijn Janssen and Anne Fleur van Veenstra (2005) Stages of Growth in e-Government: An Architectural Approach, *Electronic Journal of e-governance* Vol 3 at <http://www.ejeg.com/volume-3/vol3-iss4/v3-i4-art5.htm>

⁸ Prins, J.E.J. (2001): *Electronic Government. Variations on a concept*, in Prins J.E.J. (ed), *Designing E-Government. Technological Innovation and Institutional Change*, Kluwer Law International

⁹ Similarly Bernd Carsten Stahl, (2005) *The Ethical Problem of Framing e-Government in Terms of e-Commerce*, *Electronic Journal of e-governance* at <http://www.ejeg.com/volume-3/vol3-iss2/StahlBernd.pdf>.

2. General Tendencies

The first question given to the national rapporteurs on e-governance asked us to describe the present status of e-government development in our country, to describe the position and pace of the developments and initiatives, the position of e-governance on the policy agenda, the general tendencies of e-governance and whether specific aspects of e-governance (e-information provision; e-communication; e-transaction or e-participation) is particularly pronounced.

Any attempt to describe e-governance in the UK is faced with a confusing multitude of policy documents, initiatives, proposals and standards. This is partly a result of the UK specific approach to implementing the e-governance agenda: While central government plays an important role, even there individual ministries pursue their own agendas and projects, only loosely co-ordinated by specially created offices such as that of the e-envoy. In addition, there are initiatives by local councils (with the result that citizen experience of e-governance can vary dramatically depending on which council they are living in) and the devolved parliaments of Scotland, Wales and Northern Ireland. In addition to this multiplication of actors, there is also a multiplication of applications: potentially, almost every field of law is impacted by e-governance, from the most trivial (a law that allows to pay traffic fines online say) to the most profound (e-voting, e-petitions).

This report therefore chooses a partly chronological accord of the main initiatives and documents in the field of e-governance since 1997, when the Labour election success brought it firmly on the agenda of UK politics. While in no way comprehensive, it highlights those events that either illustrate a specific point particularly well, or can be seen as giving a “distinctive flavour” to the UK approach to e-governance.

E-governance has been high on the agenda of the New Labour government ever since it was elected into power in 1997. Within month of the election, in October 1997, the government published the first of a series of ambitious targets, demanding that 25% of all dealings with government should be capable of being carried out electronically by 2002. It also instigated a study into the attitudes of individuals and small businesses to find out about their attitude towards electronically interacting with the Government. In the years that followed, fact finding studies of this type were used frequently and form a major input into policy formulation.

Despite this high profile for e-governance initiatives, it is important to point out already here that e-governance is seen from the beginning as a means to an end, not an end in itself. In the run up to the election, Labour committed itself to the twin goals of *better governance* through a better quality of regulation, and more *open governance*. Electronic governance is seen as the way in which these two goals can be achieved in a cost efficient way. To fully understand the e-governance developments in the UK, it will therefore be necessary to include some discussion of regulatory initiatives that address these two goals directly, and the general constitutional reform agenda of New Labour. The conceptual relation between e-governance and these broader reform attempts will be an issue for analysis throughout this report.

The most important example of a legal initiative related to, but not identical with e-governance in achieving these two goals was the early commitment to a freedom of information act. A white paper on freedom of information was published in 1997.¹⁰ In an interesting convergence between form and substance, an online consultation on the White

¹⁰ <http://www.archive.official-documents.co.uk/document/caboff/foi/foi.htm>

Paper followed.¹¹ Most projects within the e-governance agenda will use the same high profile approach to online consultation. As we will see in more detail below, the FOI Act viewed in isolation does not refer to e-governance or any form of electronic delivery of information. However, taken in context, it made it virtually impossible for public bodies not to adopt an ICT strategy.

In 1998, the Parliamentary Office of Science and Technology published the report *Electronic Government: Information Technologies and the Citizen*, which brought the three elements of public service reform together for the first time, and formed the blueprint for all future development.¹² This report assessed the use of information technology to improve the internal workings of public sector organisation and the delivery of public services, how to make government more transparent and how to re-invigorate democracy at all levels. It is maybe interesting to compare this earliest comprehensive policy statement with the latest such document, published 2005. In 1998, e-democracy played an explicit and important part of the proposal, if subordinate to the issue of improved service delivery. In the most recent document, e-democracy hardly features at all, This shift in emphasis is paradigmatic for e-government initiatives by the UK government, which over the years separated more and more the question of e-governance from the question of e-democracy, both conceptually and practically. By contrast, “devolved” initiatives, that is initiatives either by local councils or by the Scottish executive, kept a stronger connection between these two aspects.

Back to the temporal trajectory, in April 1998, the Government Secure Intranet (GSI) was launched. It provided central government departments with central e-mail and Internet access facilities, and a facility for secure data exchange across government. Again, some more general observations can help put this stage of the development into context. The GSI was the first of many large software infrastructure projects deemed necessary to achieve the government’s goals. Its preference for large centralised systems, inevitably of high complexity, became a recurring theme and also the Achilles heel of e-governance. While the GSI was successful in terms of cost efficient implementation, most of the later projects either run considerably over budget and time, or did not deliver at all, By contrast, some of the most successful e-government initiatives, at least in terms of citizen’s uptake, were more often than not decentralised, small scale projects on limited budgets.

The reason for this negative correlation between costs and citizen satisfaction could have been understood by the government as early as October 1998, when ‘*Electronic Government: the view from the queue*’ was published.¹³ This large-scale research project into people's attitudes to electronically-delivered government services showed that while the public was generally in favour of e-governance, it would use these services only if they provided additional benefits compared with traditional forms of interaction. Successful e-governance, by implication, would therefore have to result in a genuine change of the political and possibly the legal system, not just more efficient delivery of already established programs and procedures.

The results of this survey notwithstanding, the Government continued to see the solution for more efficient government in large technology projects, projects which it felt went beyond the capacity of the public sector to develop. A „public-private forum on electronic government“ was therefore launched in November 1998, to pool the expertise of the private sector, IT industry associations and the Cabinet Office's Central IT Unit (CITU). This point exemplifies the government’s preferred method of e-governance delivery through “public-private

¹¹ <http://foi.democracy.org.uk/>

¹² <http://www.parliament.uk/post/egov.htm>

¹³ [http://archive.cabinetoffice.gov.uk/e-envoy/reports-viewqueue/\\$file/index.htm](http://archive.cabinetoffice.gov.uk/e-envoy/reports-viewqueue/$file/index.htm)

initiatives” with major tasks delegated to the private sector. This raises a whole range of legal issues. Some of them, such as data privacy concerns, are germane to e-governance and will be discussed later. Others however, such as tendering, competition law and contract law, are generic for all types of private finance initiatives and large scale government projects, and hence fall outside the scope of this report. However, it is worth noticing that for instance in Chissick’s and Harrington’s “Practical guide to the legal issues of e-government”, more than a third of the book deals with issues of this type, and it makes up an even larger percentage of its core legal analysis.¹⁴

Five years later, this “mixed economy approach” finds its fullest expression in the *draft policy framework to promote a mixed economy (private/public sector) supply of online public services in the UK*, published by the e-envoy (see below) in 2003.¹⁵ The framework suggests the establishment of ‘e-intermediaries’ who will supplement some core functions directly provided by the government with additional services based on market research of the needs of citizens. The overall objectives, again, are “greater choice” and a better “customer experience”, phrasing e-governance firmly in the terminology of a market in services, with the citizen understood as consumer. The specific privacy concerns that these mixed economies create are briefly discussed below. Here another point should be mentioned. The use of private sector companies, especially in the first stage, also included some major software developers. As a result, use of the websites and access to the services was more often than not depending on owning the right type of proprietary software, in particular the right type of browser. The equivalent, in brick and mortar terms, would be a government office that can only be reached through a private road, with the obligation to pay the owner money. This situation raises concerns across the legal spectrum, from public law issues such as excluding citizens from civic participation, to questions of unfair competition and anti-trust law. Only at a relatively late stage, and under the threat of legal action by firms with different software set-ups, were standards introduced that took open source software as a benchmark and required compatibility with a wide range of products. To mention here are the 2000 publication of the *e-Government Interoperability Framework (e-GIF)*,¹⁶ that sets out the government’s technical policies and standards for achieving interoperability and information systems. In particular, it adopts XML (Extensible Markup Language) as the primary standard for data integration and presentation on all public sector systems. The second document is the more recent document on *Open Source Software use within UK Government*.¹⁷ This policy states that the government will consider OSS solutions alongside proprietary ones – provided they provide value for money. A quick and non-representative check of selected government websites found that a minority still do not offer full functionality if accessed with one of the most widely used non-proprietary browsers (Mozilla).

Again back to the historical account, the next milestone was the publication of the *Modernising Government White Paper* in March 1999,¹⁸ which identified „Information Age Government“ as a key priority. The paper sets the target that 50% of all government services

¹⁴ M Chissick, J Harrington (2004) *E-Government. A practical guide to the legal issues*. Thomson, London

¹⁵ http://www.govtalk.gov.uk/documents/final_official_response.pdf

¹⁶ <http://www.govtalk.gov.uk/schemasstandards/egif.asp>. This site also contains a list of the most important technical standards for e-governance, from meta-data to XML to security issues and channel policies.

¹⁷ http://www.govtalk.gov.uk/documents/oss_policy_version2.pdf

¹⁸ <http://www.archive.official-documents.co.uk/document/cm43/4310/4310.htm>

should be capable of electronic delivery by 2005 and 100% by 2008. Several sub-targets were also announced:

- by 2004, all newly created public records were to be electronically stored and retrieved. This target has been met, with the focus now on incorporating legacy data.¹⁹
- By 2002, all civil government tenders were to be completed electronically, a target that has been missed.
- An electronically enabled general election was envisaged for the time around 2006. It is unlikely that this target will be met, for reasons discussed below.²⁰
- Tax payment: 50% of services available online by 2002. 100% by 2005, and 50% uptake by December 2005. In particular the target on uptake has been missed.
- Health service (in the UK a nationalised service): booking of appointments online by 2005, electronic transfer of prescriptions, medical records online and securely accessible by the patient. Implementation of this policy continues at the time of this report²¹.

The government white paper was followed by the *Modernising Government Action Plan*²², in July 1999. The Plan lists 62 commitments for the first two years of the Modernising Government programme.

By that time, two other developments had taken place. First, a network of „Information Age Government Champions“ had been set up. This group of over 30 senior Government officials within departments had been designated to champion the *Information Age Government* agenda within their departments and agencies. This point introduces the main way in which e-governance is implemented in the UK: rather than using formal legislation, policy documents with targets are published, and posts are created which have responsibility for these targets. The office holder uses political leverage, e.g. through funding decisions and access to political influence, to encourage departments to implement these policies. The „e-governance champions“ were later to be coordinated by the “office of the e-envoy”, a newly created post within the Cabinet Office, whose task it was to co-ordinate e-government projects across departments. The e-envoy had overall responsibility for the government’s policies regarding e-commerce, e-government and the Information Society. Interesting here is the dual responsibility for e-governance and e-commerce, which further supports the understanding of e-governance as “e-commerce in the public sector”, a conceptualization that focuses on the service delivery aspect of citizen-state interaction. In 2004, the Office of the e-Envoy was replaced by an eGovernment Unit in the Cabinet Office, led by a Head of e-Government.²³ This increased considerably the political power of the body charged with implementing the e-government agenda, and may have been in recognition of the fact that while the e-envoy had been successful in overseeing a high number of initiatives, he had lacked the political influence to co-ordinate the efforts of different departments efficiently and prevent turf wars. Lack of joint-up thinking, an abundance of localized activities and as a result a confusing web-presence had by this time been the most frequently cited criticism of the e-government project.

¹⁹ See also *e-government policy framework for electronic records management*. At http://www.nationalarchives.gov.uk/electronicrecords/pdf/egov_framework.pdf

²⁰ See also *In the service of democracy: A consultation document on a policy for electronic democracy*, at <http://www.auditel.ltd.uk/auditel/e-democracy.pdf>

²¹ www.doh.gov.uk/ebusiness_dh/index.htm

²² <http://archive.cabinetoffice.gov.uk/moderngov/action/intro.htm>

²³ <http://www.cabinetoffice.gov.uk/e-government/>

Second, in July 1999 central and local government signed the *Central Local Information Age Government Concordat*,²⁴ an agreement to encourage close collaboration and innovation in Information and Communications Technology. Ever since, local government and also the devolved Scottish Parliament (not covered by the concordat) played a major role in developing e-governance solutions, and in our opinion the most innovative ideas typically are to be found on this level of governance. While central government e-projects tend to focus on e-transactions and state-citizen communication, local bodies emphasise e-participation and citizen-state information, bringing e-governance closer to e-democracy,

In December 1999 and January 2000, two audit reports were published. First, in 1999, the National Audit Office (NAO) published the report *Government on the Web*.²⁵ One of its main conclusions was that the government's targets had played a useful function in focusing people's mind – mentioned was in particular the target of conducting 25% of citizen-government transactions electronically by 2002 - but that more progress was needed to reap the full benefits. Even more critical was the report by the Public Accounts Committee of the House of Commons in 2000, Its report *Improving the Delivery of Government IT Projects*²⁶ highlights a series of problems with a number of Government IT projects. They catalogue a long list of delays, confusion and inconvenience to the citizen and, in many cases, poor value for money to the taxpayer.

The main significance of these reports is that they further emphasise the understanding of e-governance as a form of business model, closely linked to e-commerce, with clear “bottom lines” and hard, quantifiable success criteria. The office of the e-envoy in particular published on its website a whole range of statistics on e-governance related issues, from the number of publicly accessible internet points to the UN e-government index.²⁷ This understanding of e-governance as a form of business model inevitably focused the attention on those aspects that are easily quantifiable, such as number of sitehits, number of transactions conducted or number of websites created. Issues that are less easily quantifiable, such as the quality of the citizen participation in the democratic process or the quality of the legislation created after e-consultation gets considerably less attention and risks becoming marginalized.

This use of models taken from the private sector became particularly apparent in the next two main documents on e-governance, which were both published in 2000, *e-Government: a strategic framework for public services in the Information Age*,²⁸ which contains the UK's official e-government strategy up to 2005, and the Cabinet office report *Successful IT: Modernising Government in Action*.²⁹

The first of these documents aimed at creating a supportive environment for the transformation of government activities, focusing on the application of e-business methods. It committed all public sector organizations to develop formal e-business strategies. The second document was based on a large-scale study into the handling of major Government IT projects, concluding with 30 recommendations on handling them.

²⁴ [http://archive.cabinetoffice.gov.uk/e-envoy/guidelines-cl_iag/\\$file/concordat.htm](http://archive.cabinetoffice.gov.uk/e-envoy/guidelines-cl_iag/$file/concordat.htm)

²⁵ http://www.nao.org.uk/publications/nao_reports/990087.pdf

²⁶ <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmpubacc/65/6502.htm>

²⁷ [http://archive.cabinetoffice.gov.uk/e-envoy/e-statmap-top/\\$file/estatmap.htm](http://archive.cabinetoffice.gov.uk/e-envoy/e-statmap-top/$file/estatmap.htm)

²⁸ [http://www.e-envoy.gov.uk/ukonline-estategy/\\$file/default.htm](http://www.e-envoy.gov.uk/ukonline-estategy/$file/default.htm)

²⁹ <http://www.ogc.gov.uk/index.asp?docid=2632>

A common theme in both documents was the need for considerable investment in the IT infrastructure, were the government ambitious aims to be realized. Taken together, they led to the “UK online initiative”, launched in 2000. Its main point was not just to bring e-governance and e-business under one roof, ambitious as this already would have been. Rather, it develop a much more comprehensive and ambitious vision of the “e-society”, Universal Internet access, literacy and usage in Britain by 2005 was envisaged as the outcome of this initiative, identifying as key objectives to “get people online, get business online, and get government online”. It is difficult to underestimate the importance, from the government’s point of view, of this document. Labour had so far defined its policy of the “third way” mainly in negative terms, as neither socialist nor unrestricted capitalist. It is in the field of e-democracy that the one positive vision of British society in the 21 century is expressed. The *Performance and Innovation Unit* contributed the specific e-government component through its report *e.gov: Electronic Government Services for the 21st Century*.³⁰ The report foresaw a £1 billion (EUR 1.5bn) investment in electronic service delivery over three years.

In 2000, two main gateways were launched, exemplifying one of the main design concepts of e-governance in the UK: all services should be accessible from the same website. Where in the brick and mortar world, citizens and civil servants have to travel to different locations to access and interact with different public services, in the online world, the physical separation between units and departments disappears. “Joint up government” means also that from the user perspective, interaction does not any longer take place with identifiable sub-units of governance, the state becomes so to speak more monolithic. It would be an interesting issue for further research if this change is only cosmetic, a useful feature of a website, or if it does indeed change the internal structure of public services in the UK. Since the traditional administrative divisions and the administrative law that governs them co-evolved over centuries, the impact on public law could be profound.

The first of these gateways, launched in February 2000, is the Government Gateway.³¹ It is essentially a central hub designed to help join up e-government services across government departments, that also ensures secure authentication and transactions. Its latest version, released in 2004, has 280.000 users, with a target of eventually around 1m users, possibly including such sensitive organizations as the NHS and the military. It is followed by UKonline.gov.uk, a citizen portal launched in December 2000,³² providing a “one-stop shop” to public services online. Information is presented on the basis of life-cycle events such as “at school”, “young family” “over 50”, with the user perspective replacing traditional departmental structures.

More than any other e-governance initiative, this portal also illustrates the government dealings with one of the main legal and political concerns with e-governance, the question of privacy. To allow citizens this type of interaction, an interaction that takes quite reasonably, the citizen’s own conceptualization of the relation as a starting point, it is necessary that data is exchanged across departmental boundaries. This should raise some concerns regarding data protection and privacy. The most common way of data protection after all is to create Chinese Walls between different organisations. The data protection act specifies that data must only be

³⁰ <http://www.strategy.gov.uk/downloads/su/delivery/e-gov.pdf>

³¹ <http://www.gateway.gov.uk/> At a much later stage, in 2003, the equivalent gateway for business is launched: Launch of the e-government portal for businesses <http://www.businesslink.gov.uk/bdotg/action/home?target=http%3A//www.businesslink.gov.uk/&domain=www.businesslink.gov.uk>, providing access to government information and services for businesses, business owners and managers.

³² Now a relaunched version at <http://www.direct.gov.uk/Homepage/fs/en>

collected if necessary. This provision becomes irrelevant if the organisation that had a justifiable need for the data is through its computing infrastructure automatically linked to all other “joint up” departments. Effectively, the government is offering a trade-off between privacy and convenience: since citizens do not want to fill in the same form twice, and want fast and efficient service delivery, they will not use the rights granted to them under a more rigorous reading of data protection law. This strategy proved to be highly successful, more so than the alternative line sometimes chosen by the government that uses external threats such as terrorism and crime as justification for privacy intrusion. Public concerns about privacy violation through e-governance remain muted,

The tension between convenience and privacy was highlighted shortly afterwards, in the April 2002 report *Privacy and data-sharing: The way forward for public services* by the Performance and Innovation Unit (PIU).³³ “Data efficiency” becomes the buzzword to reconcile the immanent conflict between privacy and data protection, with a clear emphasis on “better” use of personal data to deliver smarter, more trusted, public services. In this way, the legal conflict is rephrased into managerial terms of efficiency, implicitly assuming that efficient data handling is always also going to be more “privacy compliant”.

In April 2002 the National Audit Office report *Better public services through e-government* is published.³⁴ This report analyses how individual departments have progressed in implementing e-governance and highlights good practice which, if more widely applied, could help other departments. This illustrates a point made above: Instead of using formal legislation or creating legally enforceable rights (for citizens) and duties (for departments), a political approach is chosen, where the “best” departments are publicly praised, the “weakest” exposed and encouraged to follow in the future the lead of “beacon departments”. This feature sets the UK apart from e-governance initiatives in continental Europe, which on the whole tend to use a more legalistic approach.

In April 2002, the National Audit Office publishes its second report on e-governance, *Government on the Web II*.³⁵ Its main point is a recognition that while on the “supply side”, major improvements have been made and the online presence of government activities has been widespread, the “demand side”, uptake by citizens, has remained low. Take-up of services therefore becomes the new focus of the government agenda. We noticed above that UK citizens are willing to use online services, but only if they see clear benefits for themselves. The report indicates that up to that point, departments implementing e-government activities were primarily concerned with improving their internal efficiency, with benefits for citizens occurring only in a very indirect way. The generally low uptake also indicates that the plethora of documents, initiatives and policies described so far may give a misleading picture in assessing the impact e-governance has made in the UK.

Partly in response to this report, in June 2002 the strategic document: “*Delivering 21st century IT support for the NHS*” is published.³⁶ Partly in response, as dissatisfaction with the administrative side of the NHS is known as a major source for citizen dissatisfaction, and hence a natural target for delivering “added value”. The programme proposes an Electronic Care Records Service to ensure clinicians and health care professionals can access patient information, “whenever and wherever it is needed” – again, we note the potential data

³³<http://www.informationcommissioner.gov.uk/cms/DocumentUploads/150402%20privacy%20&%20data%20sharing.pdf>

³⁴ http://www.nao.org.uk/publications/nao_reports/01-02/0102704-I.pdf

³⁵ http://www.governmentontheweb.org/access_reports.asp

³⁶ http://www.connectingforhealth.nhs.uk/publications/all_images_and_docs/04071677.pdf

protection issues, here in a particularly sensitive area. It proposes further an Electronic Booking Service to make it easier and faster for GPs and other primary care staff to book hospital appointments for patients, and a system for the Electronic Transmission of Prescriptions. With a budget of £6.2 billion (EUR 9.32bn) over 10 years, this National Programme for IT in the NHS is the world's largest civil IT programme.

It could be argued that another paper published around the same time, the *consultation on a policy for e-Democracy*, was also a response to the diagnosed lack in take up of e-governance solutions.³⁷ With the public's attitude to the overly managerial approach to e-governance decidedly lukewarm, e-democracy had a chance to get back on the agenda. The consultation paper sets out the scope for using technologies to promote, strengthen and enhance civic participation. Government action is proposed in two main areas, e-participation and e-voting. However, as mentioned above, the main bodies engaged in this exercise are local councils. The website of this consultation offers an overview of the extremely diverse field of activities that local councils started to engage in as a result of the exercise, all with the aim of improving public input in local decision making.³⁸ The initial report is quickly followed by the launch of the *National Strategy for Local e-Government* in November 2002.³⁹ A comparison of this local e-governance project, run from the government's centre, with the consultation project on local e-democracy cited above is insightful.⁴⁰ While the e-democracy project website uses intensively academic input and comparative analysis to ground e-democracy projects firmly in a theoretical understanding of democratic participation, the chronologically later strategy project website on e-governance, directly associated with the deputy prime minister's office, once again has the focus on the citizen as mere *consumer* of government services. According to its self description, its aim is:

[...] a framework to transform local council services, joining them up with other public services and offering greater choice, convenience and accessibility for customers - and greater cost-effectiveness for councils. Among other things, the strategy will be implemented through a series of National Projects⁴¹ bringing several partners together to develop proven, cost effective, standard products, services and implementation roadmaps for the benefit of all local authorities.

None of these approaches and other reactions to the report seem to have had much effect, and in September 2003, the Office of the e-Envoy publishes a document providing advice to government departments for developing strategies designed to improve the take-up of their e-services.⁴² With uptake in the UK again identified as disappointingly low, the document seeks to identify key drivers and blockers. The issue is conceptualised as a technological problem of web design, the underlying assumption, that e-governance is what people want, is not questioned. The same exercise, under new departmental "ownership", was repeated in 2004, with similar results.⁴³ These are just some of a whole series of different reports from different agencies, all coming to similar conclusions: uptake remains low, the hoped-for efficiency gains prove elusive, and all this can be changed if the right technical and organizational approach is taken – doing e-governance better, but not fundamentally different.⁴⁴

³⁷ <http://europa.eu.int/idabc/servlets/Doc?id=23060>

³⁸ <http://www.edemocracy.gov.uk/default.htm>

³⁹ <http://europa.eu.int/idabc/servlets/Doc?id=23063>

⁴⁰ <http://www.localegov.gov.uk/>

⁴¹ <http://www.localegovnp.org/>

⁴² <http://europa.eu.int/idabc/servlets/Doc?id=23070>

⁴³ <http://www.cabinetoffice.gov.uk/e-government/docs/bestpractice/pdf/sddg.pdf>

⁴⁴ See e.g. <http://europa.eu.int/idabc/servlets/Doc?id=23081>; <http://www.rcoe.gov.uk/rce/aio/10218>

As mentioned above, by 2003 the office of the e-envoy is replaced by the e-government unit. In addition, a “Chief Information Officers Council is created.⁴⁵ Composed of 30 Chief Information Officers from central government, local authorities and other public agencies, including police and the National Health Service, its remit is mainly to improve the success rate of Government IT projects. In 2005, they release: *Transformational government - enabled by technology*⁴⁶ a document arguably more remarkable in its use of a webcast by the PM next to it on the CIO’s website than through its content. As far as evidence of uptake is concerned, while availability of e-government services is by now uniformly high, uptake remains low amongst the general public, with a somewhat higher acceptance rate for government-business transactions: The percentage of individuals using the Internet for interacting with public authorities by 2004 gives the following picture: obtaining information 19.5%, downloading forms 6.9%, returning filled forms 3.4%. For businesses, the corresponding figures are: percentage of enterprises using the Internet for interacting with public authorities: obtaining information 31%, downloading forms 27%, returning filled forms 11%.

For many people, the expression e-governance and e-democracy are synonymous. E-democracy in turn is often reduced to e-voting. The report so far has already shown how misguided this assumption is. Few of the e-governance projects implemented in the first five years of the e-agenda dealt with e-democracy, and those that did, primarily on local council level and in some cases online consultancy for legislation, focused on participation through discussion forums. Only in 2003, large-scale and legally-binding e-voting trials were held during local elections in England, with 1.5 million voters in 18 areas able to vote by text message, through the Internet, at electronic kiosks, and also through digital television. Turn up was at around 21%, though overall participation was unaffected. The frequently expressed hope to attract new voters seems to be misguided, rather, people already committed to voting seem to have chosen the new form of participation.

This approach to e-voting, and e-voting in general, raises several problematic legal issues. First, “trialling” a voting technology this way seems almost by design to assume that e-voting does not make a substantial difference., nor face substantial problems. For if there had been major security problems – one of the most frequently cited risks - or a breakdown in technology (say data loss), a substantial number of people would have been effectively deprived of their vote. If on the other hand e-voting makes a substantial and positive contribution, results in technology enabled and disabled wards may well differ systematically, casting doubt on the legitimacy of traditionally elected candidates. In recognition of this problem, an amendment in the UK representation of the people Act 2000 (Part II Art 10) gave specific powers to allow this type of trial, and to obligate local councils to report any changes likely to be caused by the new technique. However, there is no mechanism to offer redress should one of these problematic scenarios happen.

Expert analysis of the result of this trial was largely sceptical.⁴⁷ Concerns were raised particularly concerning the lack of paper trails and the resulting verifiability of result. Manipulation either by insiders, or by technology savvy hackers casting multiple votes, were identified as the main concerns that could undermine public’s trust in the voting system. Since then however, much more mundane problems have been identified, problems that are not germane to e-voting, but affect all forms of distance voting including postal votes. In the last general election, widespread accusations of improper influence on voters using this method

⁴⁵ <http://www.cio.gov.uk/>

⁴⁶ http://www.cio.gov.uk/transformational_government/strategy/

⁴⁷ <http://www.ccsr.cse.dmu.ac.uk/resources/general/responses/edemocracy.html>

were raised. Especially in more socially conservative immigrant communities, there was serious concern that when voting from home, both the secrecy of the ballot and the independence of the voter were systematically compromised. Other allegations included “block voting” by community leaders and undue influence of party workers “helping” citizens casting the vote from home. While the criminal law provides sanctions for this behaviour, the difficulties of enforcement have cast doubt on distance voting in general, doubts that are so serious that it is unlikely that e-voting in general elections will now go ahead as originally planned “after 2006”.

The war in Iraq, a reduced parliamentary majority and as a result serious problems in other parts of the “modernisation strategy” moved e-governance somewhat into the backseat for 2004/05. The main developments were the following.

In 2004, Scotland launched its system of e-petitions. Citizens can directly petition the Scottish Parliament, whose website also allows to discuss petition proposals.⁴⁸ The success of this project has by now found interest in other countries, most notably Germany, Where the main trend in UK e-governance is towards a managerial system of efficient service delivery, Scotland’s devolved parliament moved into the other direction, towards a “strong” model of e-democracy. This difference in emphasis, repeated UK wide on the level of local councils, is also partly due to a different role of academic input. The Teledemocracy centre at Napier’s University in Edinburgh⁴⁹ ensured more decisive academic role in shaping e-governance initiatives in Scotland than present in projects initiated by the UK Government. On local council level in England, we found a similar attitude to “strong” e-democracy, and unsurprisingly, the technology behind the Scottish e-petition is now rolled out there as well.⁵⁰ This commitment to a theoretically informed approach to e-governance, as opposed to a purely managerial one, found its expression also in projects such as the e-community council, which offers a systematic approach to the most local form of political decisions making in the UK⁵¹, and the Highland Youth Voice (a democratically elected assembly for young people in the Highland Region of Scotland) developing their website and also supporting their e-voting system.⁵² E-consultations have been arranged on a wide variety of issues, from toxic waste management to education reform⁵³ and the blue sky “what sort of Scotland do we want to live in”.⁵⁴

In August 2005, the UK government signed a contract for the delivery of ‘Zanzibar’, an online e-procurement hub for public e-procurement processes. Efficient public sector-business interaction is its main goal, opening the public procurement market to smaller suppliers. Cost savings for the government are the stated key objective.⁵⁵ The legal significance of this approach could be in the field of competition law, though once again legal issues seem not to be the driving force.

In April 2005, the UK Government launched its latest strategy document *Digital Strategy*,⁵⁶ A short comparison with the first of these strategy documents was already given above. However, it is worth noticing that a concern previously raised primarily by academics, the

⁴⁸ <http://epetitions.scottish.parliament.uk/>

⁴⁹ <http://itc.napier.ac.uk/ITC/projectSummaries.asp#Project6>

⁵⁰ See e.g. <http://www.bristol-city.gov.uk/item/petition.html>

⁵¹ <http://www.ecommunitycouncil.org.uk/>

⁵² <http://www.highlandyouthvoice.org/home.asp>

⁵³ http://itc.napier.ac.uk/Documents/LT_Scotland_econsultation.pdf

⁵⁴ <http://e-consultant.org.uk/sustainability/>

⁵⁵ <http://www.ogc.gov.uk/index.asp?id=1001430>

⁵⁶ http://www.strategy.gov.uk/work_areas/digital_strategy/index.asp

“digital divide”, received for the first time a more prominent position in a government documents. Where in the past, e-governance was seen as the *solution* to lack of citizen participation, especially in deprived areas and for excluded social groups, this document for the first time comes close to acknowledging that the digital divide, unequal access to computers, internet and other such technologies, could indeed exacerbate rather than solve the problem. This could result in another main re-orientation. While most e-governance initiatives so far were software focused, looking at ways in which government bodies can get their activities online, the new focus seems to give due credit to the issue of supplying citizens with the hardware necessary to access these services.

A First Evaluation

E-governance is undoubtedly very high on the agenda of the UK government, ever since the election of a Labour government in 1997. Equally clear is that some major developments have taken place, and that on the “supply side”, that is government information and services online, the UK is arguably one of the leaders the field. On the demand side however, things look different: Uptake of services remains low, and few of the initiatives have found their way into mainstream awareness. Purely managerial projects fare far worse than those on local council level, or by the Scottish executive, which focus on active citizen participation.

The specific approach, and insistence on, e-governance by the UK government has to be seen in the context of its political project of a “third way” between socialism and free market liberalism. The government is willing to increase substantially funding for public services, but only as a “quid pro quo” by which these public services adopt a “consumer centred ethos” and improve on their “service delivery”. As we have seen, it is this underlying agenda that brings e-commerce and e-governance closely together. The managerial and consumerist agenda also helps to explain different degrees of accomplishment of the e-governance agenda. Most comprehensively deployed are forms of e-information provision, the e-government equivalent of advertising. At the end of 2003, there were more than 3000 gov.uk websites, covering all ministerial departments. Equally comprehensive is the web presence of local authorities. In second place are forms of e-communication and e-transaction, with systematic and obvious differences resulting from differentiation of function between various state agencies, Local councils in particular have a clear focus on e-communication, both council-citizen and citizen-council. The former takes mostly the form of electronic newsletters, the latter the form of email and online “guestbooks” for comments, criticism and praise. By contrast, offices such as Revenue & Customs have an emphasis on e-transactions, allowing for instance tax declarations and payments online. E-transactions and e-communication initiatives include citizen-government but also government-government and business-government communication and transaction. The latter in particular blurs the boundaries between e-governance and traditional e-commerce,

Least develop are forms of e-participation – in analogy, while a company may ask their customers for their opinion, this does not mean to allow them directly to influence the company strategy or to sit on the management board. Public consultation of major legislative proposals has a long tradition in the UK, and e-governance in this context means little more than a web-presence of this procedures, allowing citizens to submit their comments by email or directly on the project website. While facilitating the process, its nature remains therefore unchanged. E-voting for Parliamentary elections was postponed twice, and after negative experience with other forms of distance voting it is unlikely that any major developments will happen in the near future. E-voting has however been trialled in some local elections. Some local councils went a step further and deployed e-voting to canvass votes not just on the membership of the council during an election, but also on specific proposals or aspects of the

budget, expanding e-elections to e-referenda. The e-petition, introduced in Scotland by the devolved parliament, is the most high profile approach to e-participation and one of the few examples of a genuinely new form of citizen participation brought about by the e-governance initiative. It is also one of the few examples of e-governance specific legislation being introduced. It allows not only Scottish citizens, but everybody worldwide to directly petition the Scottish Parliament, with responses by Parliament and reports about action taken available from the same website. The website also includes discussion and comment facilities. The technology implemented for the e-petition fulfils four different functions: It allows individual citizens to address directly Parliament. Second, it allows citizens to co-ordinate their action, by creating open lists inviting others to sign. Third, it allows debate between citizens about the merit or demerit of the petition or the way it is formulated. Fourth, it establishes a channel by which Parliament can communicate its decision on the petition and inform about any actions taken. Taken together, this can be seen as a first step towards a “thick” or deliberative model of democracy, a development that goes beyond more efficient delivery of traditional services, but changes the wider political culture,

3. Comparative Legal Input

This questioning this part of questionnaire was if comparative research, conducted by academic researchers or done by or at the request of a government agency or commission, influences the debate on possible changes in your law with respect to e-government.

The use of comparative legal analysis is patchy, and depends largely on the sponsoring organisation. Legislative proposals that originate with the law commissions or the law societies tend to include a comparative analysis. A typical example can be found in the report by the Scottish Law Commission on the creation of an electronic land registry, which draws on experience in Canada and Germany. While this document is in the UK context exemplary in its use of comparative analysis, even here it is noticeable that the descriptive account of foreign law is not based on the type of theoretical or methodological underpinning demanded by designated comparative lawyers. This potentially overestimates as a result the possibility to learn from and to transplant foreign legal solutions. By comparison, projects dominated by political bodies, from parliamentary initiatives to projects run and implemented by local councils, tend not to use systematic reviews of foreign law at all. This may be surprising, given that the main target of the e-government initiative, to make the UK world leader by 2008, uses explicitly a comparative standard, and international comparisons are frequently used to assess the progress of the e-governance strategy. Comparisons of technical solutions, success rates and practical experience are therefore much more common than the comparison of legal issues of e-governance. The website dedicated to local e-democracy for instance has an impressive range of documents that survey experience of e-democracy in other countries, using again the “best practice” approach mentioned above. None of them however seem to look at the different legal environments within which e-democracy operates, or has a dedicated legal analysis.⁵⁷ Two exceptions to this rule are worth noticing. The debate preceding the enactment of the Freedom of Information Act took a much closer look at foreign law, in particular at the US experience. However, as noted elsewhere, while FOI was one of the main driving forces behind e-governance, the act regulates government activity also in the absence of electronic delivery mechanisms. The second exception too is somewhat tangential to e-governance. Somewhat unusually, the debate on a national identity card saw the use of comparative legal arguments by both proponents and opponents in the mainstream

⁵⁷ <http://www.e-democracy.gov.uk/aboutus>; for comparative, non-legal documents see e.g. the documents at http://www.e-democracy.gov.uk/knowledgepool/default.htm?mode=8&pk_class_term=838&open=838&app_code=7&data_pk=&returnstring=

public debate, regrettably often with very little knowledge on both sides. Opponents utilise the widespread eurosceptic sentiment in the British public to argue that ID cards are inimical to the British way of life, something only the “authoritarian” systems of continental Europe could countenance, while proponents use the same argument to demonstrate that having an ID card does not automatically result in a police state. Both sides are of course misguided – the proposed UK ID card does not have a counterpart in continental Europe, the connected database proposed for the UK is much more far reaching and potentially problematic for privacy concerns than anything that can be found elsewhere.

4. The Nature of E-Governance Initiatives

This section of this report will address several of the questions of the questionnaire together:

- a. Have any regulatory initiatives been taken to address these problems (such regulatory initiatives may also include codes of conduct, trustmarks, netiquette specifically aimed at e-government, etc.)
- b. Does your country prefer to regulate the problems that arise in the area of e-government by means of legislative initiatives or does one in general favour non-legislative measures?
- c. Do international regulatory initiatives, international policy documents and other international initiatives have an impact on the developments in your country? If yes, could you mention examples?
- d. Did your national system of law undergo any recent changes, as the result of either legislative initiatives or judicial intervention in the area of e-government?
- e. What were these changes, in what specific area of law and with what aim were these changes introduced (e.g. for security or authentication reasons; liability; etc.)
- f. Do these changes reflect a different approach to the on-line world than the off-line world (in other words, is the adagium ‘what applies off-line also applies on-line’ followed or are specific rules for e-government introduced)?

E-governance in general is policy driven, with a clear primacy of the political over the legal. This is in line with the traditional approach of the UK to public law and governance: the doctrine of supremacy of Parliament and a strong executive, together with the absence of a written constitution and a supreme court, result in the slow evolution of practices and conventions to the status of law. Policy documents and procedures therefore play an important role shaping the de-facto legal environment of e-governance. Secondary legislation in the form of statutory instruments that regulate the implementation of primary legislation is the other most widely used instrument to address legal issues of e-governance. Indeed, Parliament gave with the Section 8 of the Electronic Communications Act 2000 wide authority to the responsible ministers to amend primary legislation for the purpose of authorizing or facilitating the use of electronic communications.

The overwhelming majority of legal changes necessitated by e-governance have been implemented this way. In addition, policy papers, benchmarks and procedures play an important role in implementing e-governance. A typical example are the *E-Policy Principles* published by the e-envoy in 2001, a set of guidelines for policy makers that act as a checklist for legislation. The aim is to “mainstream” e-governance into the law making process: new legislation, and where possible older laws, should always be evaluated with regard to their impact on e-services, both public e-governance and private e-commerce.⁵⁸

⁵⁸ [http://archive.cabinetoffice.gov.uk/e-envoy/guidelines-eprinciples/\\$file/](http://archive.cabinetoffice.gov.uk/e-envoy/guidelines-eprinciples/$file/)

However, this general picture requires modification in some important aspects:

a) legislation as “catalyst” for e-government.

Two pieces of formal legislation, while not explicitly about e-government, have had nonetheless considerable practical influence on the agenda.

First, there is the Data Protection Act of 1998, which came into force in March 2000.⁵⁹ The Act regulates the treatment of personal data and information, regardless of their form (paper or electronic), and applies to both private and public organisations. The Act contains eight Data Protection Principles, according to which all data:

- must be processed fairly and lawfully.
- obtained and used only for specified and lawful purposes.
- adequate, relevant and not excessive.
- accurate, and where necessary, kept up to date.
- kept for no longer than necessary.
- processed in accordance with the individuals rights.
- kept secure.
- transferred only to countries that offer adequate protection.

The act also grants a right to citizens to get access to their own data.

Second, there is the Freedom Of Information Act 2000, which became fully effective in January 2005.⁶⁰ It provides statutory rights for members of the public to apply for access to information held by public sector bodies. The main features of the Act is a general right of access to information held by public authorities in the course of carrying out their public functions, subject to certain conditions and exemptions. Of these exemption, “commercial confidentiality” has proven to be the most widely used, and most frustrating, exemption, preventing access to information on how government spends taxpayers’ money if private sector commercial interest are involved. As noted above, this mode of public-private delivery is typical also for e-government and ironically, an agenda intended to deliver “more open government” has itself avoided serious scrutiny in this way, most recently when the Government refused to release cost estimates for the database that will underpin the UK ID card. Despite this exemption, in the short period of the existence of the act, the public has made widely use of this entitlement –so widely that the government is considering now to allow public bodies to charge for the information in order to curb “frivolous” (i.e. potentially embarrassing) requests. The Act has a strong enforcement regime, creating the new *Office of Information Commissioner*,⁶¹ and a new Information Tribunal, with wide powers to enforce the rights under the Act. The Act also imposes a duty on public authorities to adopt a scheme for the publication of information. The legislation applies to a wide range of public authorities, including Parliament, Government Departments and local authorities, health trusts, doctors' surgeries, publicly funded museums and universities, Scotland has its own *Freedom of Information (Scotland) Act 2002*, which differs in detail from the English counterpart.⁶²

⁵⁹ <http://www.opsi.gov.uk/acts/acts1998/19980029.htm>

⁶⁰ <http://www.opsi.gov.uk/acts/acts2000/20000036.htm>

⁶¹ <http://www.ico.gov.uk/eventual.aspx>

⁶² <http://www.opsi.gov.uk/legislation/scotland/acts2002/20020013.htm>

Neither Act makes electronic communication or data handling mandatory. For this reason, they cannot be considered conceptually core to the e-governance question. Nonetheless, organisations can in reality only comply with these Acts if their data is stored electronically, and if they have efficient electronic communication tools in place. The Freedom of Information Act requires for instance that requests for data are complied with within 21 days, hardly possible for large organisation unless their data is stored electronically and easily searchable. The Act also requires that the organisation has a publicly available, constantly updated publication policy. Again, while paper documents would be legally permissible, the need for constant updating and public availability means that publication on websites is the easiest and most cost efficient way to comply with the Act.

In conclusion, while benchmarks, targets and policy documents, the preferred method of regulating e-governance, rely on purely political means to enforce “top down” compliance (from the displeasure of the prime minister to funding allocations, promotions or “naming and shaming”), the FOI and Data Protection Acts enable citizens “bottom up” to legally force organizations directly to adopt e-governance policies.

b) e-governance as catalyst for legislative change.

While FOI and data protection law, while not in themselves core to the e-government agenda, de facto influence its evolution, the opposite type of influence also takes place: Laws are changed not so much directly as a response to e-governance initiatives, but because these initiatives will de facto change the environment within which these laws operate. A typical example for this are proposed changes in Scots property law. Inadequacies of the legislation regarding the land register and the “public trust” in it – itself a comparative legal transplant from Germany, had been recognized long before the e-government agenda and are conceptually independent from it. Reform proposals were discussed by the Scottish Law Commission independently from any concerns about e-governance. However, it was the proposal to create an “*Automated Registration of Title to Land*” that gave this debate a renewed urgency.⁶³ The creation of an online land register and electronic land registration itself, once it goes ahead, will have the appearance of a minor technical change in the law, implemented through an order under the already mentioned section 8 of the Electronic Communications Act 2000. From the perspective of this order, the change does not effect substantive elements of Scots property law, but only enables a bureaucracy to do old things in new ways. However, distrust in the security of electronic transactions has given new urgency to the older debate on issues such as public trust in the land register, void and voidable titles and positive prescription. Considerable changes in Scots property law are now likely to go ahead, motivated amongst other things by the fear that the move to electronic land registers and the problems and dangers it bring will make pre-existing weaknesses in the law unbearable.

c) external influences.

The UK government relies primarily on non-legislative techniques to implement e-governance, and “pure domestic” project reflect this attitude, which sees e-governance as little more than a technical adjustment to business practices, implemented through managerial tools.

Where there is formal legislation, it is more often than not the implementation of EU directives. This is the case for the above mentioned Data protection Act that gives effect to the EU Data Protection Directive (95/46/EC). Other examples of implementation of important

⁶³ <http://www.ros.gov.uk/artl/latestnews.html>

legislative provisions that affect e-government are the *Electronic Communications Act (2000)*⁶⁴ and the *Electronic Signatures Regulations 2002*.⁶⁵ The Electronic Communications Act 2000 creates a legal framework for electronic commerce and the use of electronic signatures, both in the private and public sectors. Together with the Electronic Signatures Regulations 2002, they implement the European Directive 1999/93/EC on a Community framework for electronic signatures.

Another interesting example for this model is the *Re-use of Public Sector Information Regulations 2005*.⁶⁶ It implements the EU Directive 2003/98/EC of 17 November 2003 on re-use of public sector information (PSI Directive). This issue deserves particular attention, given that the preferred mode of delivery for e-governance in the UK is through private – public partnerships and gives as a result a central role to the private sector. Indeed, one could argue that behind the e-government agenda hides a massive outsourcing of previously public functions to the private sector. This raises a whole range of legal issues, from privacy concerns to questions of liability. However, it may be important to keep in mind that the UK does not have a separate system of administrative courts so that at least procedurally, it does not normally matter to the citizen if problems are caused by a public body, or a private organisation that delivers services for this body.

Mirroring the Information Commissioner whose task is enforcement of the freedom of information act, UK Government established an Office of Public Sector Information (OPSI),⁶⁷ whose responsibilities include the coordination of policy standards on the re-use of public sector information. It is attached to the Cabinet Office, and advises on and regulates the operation of the re-use of public sector information. As with the FOI, primary adjudication in contested cases does not happen through the courts, but through a politically appointed office holder. So even in cases where formal legislation is used, the tendency is again to assert the primacy of politics and leave adjudication and interpretation outside the reach of the courts. This general pattern not only explains why judicial intervention in e-government issues is rare, if not non-existing. It also indicates an attitude towards e-government in the UK that is essentially less legalistic than that promoted by the EU.

5. How Much Has E-Governance Changed the Legal System of the UK?

To answer this question, some distinctions from comparative law may be helpful:

First, we should distinguish between *law in books* and *law in action*. While there have been undoubtedly many e-governance initiatives, some of them requiring implementing legislation, the low uptake of services means that as far as “law in action” is concerned, change is much less dramatic than the flurry of activity would indicate. Most of the e-governance initiatives allow to do old things in new, more efficient ways – there was for instance always a consultation process before a law is enacted, but with these processes now online, potentially more citizen can participate. For this type of reform, the low de facto uptake is an even more problematic result, indicating little substantial change.

Second, we should distinguish between the level of rules, and what Legrand calls “legal mentality”, the general ideological, cultural and cognitive environment within which law operates.

⁶⁴ <http://www.opsi.gov.uk/acts/acts2000/20000007.htm>

⁶⁵ <http://www.opsi.gov.uk/si/si2002/20020318.htm>

⁶⁶ <http://www.opsi.gov.uk/si/si2005/20051515.htm>

⁶⁷ <http://www.opsi.gov.uk/>

As we have seen, as far as the level of legal rules is concerned, change takes place more in the periphery (FOI, data protection law). For the main issues of e-governance, non-legislative methods are preferred. Despite the high level of political support for e-governance, there is no unified piece of e-governance legislation, no “E-government Act”.

Located somewhere in between individual legal rules and broad legal mentality are two issues that deserve further attention.

We already talked about the e-petition in Scotland. One of its unique features is that it gives everybody, not just UK citizens the right to petition the Scottish Parliament. Contributions from the US and Canada are a frequent occurrence on cultural issues, but also the limited foreign policy of the Scottish Parliament received in this way input from those it is directed at. The Freedom of Information Act has the same wide scope – everybody worldwide can request access to information held by public bodies in the UK. Citizens from developing countries for instance could request information on who the recipients of foreign aid from the UK is. If these legal rules set a trend, we do see here indeed a fundamental change in our understanding of citizen, or at least of “stakeholder in the democratic process” – and possibly even a move towards a truly global notion of cyberdemocracy.

The second issue is the National ID card, which was already mentioned in the passing. Undoubtedly, it means a considerable legislative project, raising serious privacy concerns and one that as we saw also goes to the very heart of the self-understanding of UK citizens. The reason why it is mentioned here is that it is by no means clear if it is part of the e-government field, highlighting a persistent methodological problem in writing about e-governance for/from a comparative perspective. Electronic data storage is of course key to this proposal, which would see every citizen issued with a unique ID, and a data storage that links this ID to information from a wide range of services, such as e.g. benefit entitlements, electoral registration or health service entitlements. When the proposal was first introduced, the Home Office described them as entitlement cards, which would facilitate access to public services and the “one stop” model described above: with my card and the information on it, every government service could give me access to all services and information I’m entitled too, even if it is not “owned” by the department I’m currently interacting with. In this version, the ID card was clearly part of the e-government initiative – but also singularly unsuccessful to get public support. In 2003, the rationale for the card had shifted to control of illegal immigration – not any longer core to the e-government agenda, and by 2005, after the London attack, it had mutated to a weapon in the war against terror, a topic for comparative criminal lawyers. Most recently though, “high tech identify theft” has been given as the main rationale for the card - and with that, a closer link to e-governance/e-commerce been re-established.⁶⁸

On the level of “legal mentality”, the situation may look different. For the government at least, e-governance is part of a cultural sea-change in UK constitutional theory. It is claimed to transform “subjects” to active, informed and outspoken “citizens”, a picture that most certainly does grave injustice to the pre-e-government citizen. Nonetheless, seen in this way, e-governance does indeed converge with quite far-reaching reforms elsewhere, initiatives that are so to speak “close by” and loosely related to e-governance. To mention here are reforms towards an “open government”, and also the much wider project of constitutional reform that saw e.g. reform of the House of Lords. While the latter is not related to e-governance at all, both form part of an attempt to “modernisation” of society through constitutional reform.

⁶⁸ See in particular WM Grossman, "Identifying Risks: National Identity Cards", (2005) 2:1 *SCRIPT-ed* 2 @: <http://www.law.ed.ac.uk/ahrb/script-ed/vol2-1/idcards.asp>

As argued above, it is doubtful that the mere use of computers for online tax returns will have the result of changing the self-understanding of British democracy, too much of the e-government agenda is formulated in purely managerial terms. Indeed, even if e-governance initiatives result in a change of legal mentality, it is by no means certain that it will be the one described as goal by the government. An alternative, altogether more cynical analysis could run along these lines: As we saw, legislation is not the preferred method for the government to implement e-government policies, relying on political targets, technical standards and institutional incentives instead. This has the somewhat ironic consequence that a policy that at least in part aims to invigorate democracy in the UK has largely bypassed democratic discussion in parliament. To some extent, this again reflects the managerial drive behind much of e-government activity. A more problematic interpretation though would link this aspect of the e-governance agenda with more general changes in the political landscape of the UK. Under traditional public law doctrine, legislative power in the UK is held by the Parliament, constituted in its two chambers, the House of Commons and the House of Lords. Laws are approved by both houses, although the procedure assumes that the House of Lords can only delay, not stop approval of laws. Executive power is exercised by the Government, headed by the Prime Minister and his Cabinet. The Government is answerable and accountable to the House of Commons. By constitutional convention, Ministers are chosen from among members of the Commons. In its reform of the House of Lords, the government has already substantially strengthened the role of the Prime Minister to appoint members to the House of Lords. By the same token, the convention to appoint cabinet members from among members of Parliament has increasingly been set aside in favour of appointing outside experts with personal ties to the Prime Minister, whose style of governance has often been described as “presidential”. Part of this (US) presidential approach is a more pronounced tendency of the government/the Prime Minister to bypass Parliament and “communicate with the nation” directly, be it through focus groups or indeed referenda, a form of decision making more widely used now than under previous UK governments. As these forms of direct participation are particularly amenable to electronic delivery, these changes taken together could be seen as part of a more fundamental change of the nature of parliamentary democracy in the UK, with an increasingly strong executive and a “presidential” prime minister who receives his mandate not any longer (only) from Parliament, but holds a more direct mandate from the people whose opinion can be canvassed 24/7 by the click of a mouse. A good example, with a direct link to the e-government agenda, was the launch of the online consultation on the freedom of information act, <http://foi.democracy.org.uk/>, which not only directly invited the public to contribute to the discussion on the proposed Act – this possibility existed before – but linked the Act to pictures of the Prime Minister surrounded by happy children, making it a vote on him as much as a vote on the proposal. The dark side of e-democracy then is a weakening of democratic structures, by either recasting genuine political concerns as purely managerial questions of efficiency, or by bypassing traditional check and balances and circumventing Parliament.

Even the apparently unproblematic use of websites, electronic newsletters and emails to enhance state-citizen communication, when viewed from this perspective, can become problematic. As mentioned above, in particular websites of local councils focus on this aspect of e-governance. Surely, a better informed citizenry is highly desirable for the democratic process, and giving citizens a more comprehensive understanding of the political process good in itself? However this too can be seen as an attempt to circumvent traditional forms of scrutiny and balance of powers. It allows state organs to communicate directly with the citizen, without the media as go-between. In the past, a citizen would receive most of his information about the activities of his elected representatives through third party intermediaries. While newspapers and TV programs would use as an input government

sources, they (hopefully, ideally) filter them through an analytic mesh and subject them to critical scrutiny. This level of critical analysis disappears when the state too becomes a publisher. It requires from the citizen a more discerning approach to online resources. In the same way in which we have to teach our students that Wikipedia is not as reliable a source as the Encyclopaedia Britannica, internet users have to develop new skills to distinguish between editorial and factual reporting and different types of online information. A quick survey of council websites showed that indeed, the distinction between editorial and factual comment was often much less clear than in a good newspaper.

6. Remaining Challenges

The last group of questions asked to identify those legal problems that are considered key problems and challenges.

Most of these issues have been discussed elsewhere, therefore just a quick summary is given here.

For the government, the biggest challenge remains uptake. Solutions are mainly technical in nature (easier access, more channels, better design). Lack of trust by the public seems not to be the main reason for lack of uptake, though this is the area where legislative measures are proposed as a remedy.

Privacy remains a main concern for academics and citizen rights movements alike, but the debate, with the exception of the ID card, is strangely muted. The governments offer of convenience (or safety) for privacy seems by and large to work with the wider public. This may also be partly due to the fact that privacy as a legal concept is generally underdeveloped in the UK, as can be seen in other areas where it clashes with other rights – the balance between freedom of the press and privacy for instance is much clearer in favour of the former than it is e.g. in Germany. In such a legal-cultural environment, developing a privacy/data protection jurisprudence may in the medium term be a matter for the European courts.

Cite as: Burkhard Schafer, *Democratic Revival or E-Sell Out? A Sceptic's Report on the State of E-Governance in the UK*, vol. 10.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2006), <<http://www.ejcl.org/103/article103-12.pdf>>.