

# PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

Edited by

Nicholas Bamforth

*Fellow in Law,  
The Queen's College, Oxford*

and

Peter Leyland

*Senior Lecturer in Law  
London Metropolitan University*



HART PUBLISHING  
OXFORD AND PORTLAND, OREGON  
2003

other sectors. Within the model, as information flows and budgets are allocated in response to traffic so too will the structure of government need to change to accommodate the supposed reality of citizen experience. (Indeed even services in traditional formats will follow this flow as they are bundled together with the online versions.) Information management and technology is to be the driver for a revolution in the organisation of government where departmental boundaries are eroded by a technological interface that is supposed increasingly to render them obsolete. This may result in what some scholars of public administration term 'isocratic administration' where structures of government are submerged below an interface which intercedes between government and the citizen, and in turn shapes how government organises itself to respond to the citizen. In other words, there may be a process of real structural change in the shape of government that accompanies changes in access to government and the flow of information that results.

Of course we may well doubt if such a revolution is realistic. There must be serious reservations as to whether the macro and micro political cultures of government, accustomed to working within individual departments and with separate budgets, can be transformed merely by technological innovation. Also, there should be significant question marks over the whether such an ambitious project of information engineering were possible—even if it were thought desirable. The record of success in large-scale e-government projects is not good and what is proposed here is even larger.<sup>51</sup>

However, we should consider the Government Gateway as attempting to promote a structural change that would have fundamental *constitutional* implications too. This system is offering a profound re-engineering of government. The Government Gateway offers to link up not only all aspects of central government but also devolved and local government and 'other public service providers' with little regard for the constitutional proprieties and relative competences of different branches and levels of government. Ideas of separation of powers, rule of law and basic principles of legality do not seem to have troubled the information systems engineers. From the standpoint of formal constitutional theory, not only are there issues over the penetration of the voluntary and private sector into government but also there should be concerns over the deployment of information gathered in one (public) context within another (private) one and vice versa. These issues are particularly important in the context of multi-level, multi-agency and multi-format government and give rise to a whole host of other issues about privacy, data

<sup>51</sup> The total cost of cancelled and over-budget government IT projects may exceed £1.5bn over the last 6 years according to *Computing* (March 2003). *The Economist*, 4 May 2002, details the record of e-government failures which include the computerisation of the Passport Office which resulted in increased delays and added £40m, projects within the Inland Revenue where costs doubled adding an additional £1.4bn and the Home Office scheme to computerise aspects of immigration applications which was abandoned after costing £77m. The examples could be multiplied. There is even evidence from a report published by the business process solution company eStream that many governments across Europe are building transactional e-government portals without introducing electronic processing in the back office, with the result that data will either have to be converted to and from digital and paper formats or governments will need to maintain hybrid, dual systems, leading to reduced efficiency. (see *E-Government Bulletin*, January 2003 or <http://www.eistream.com>)

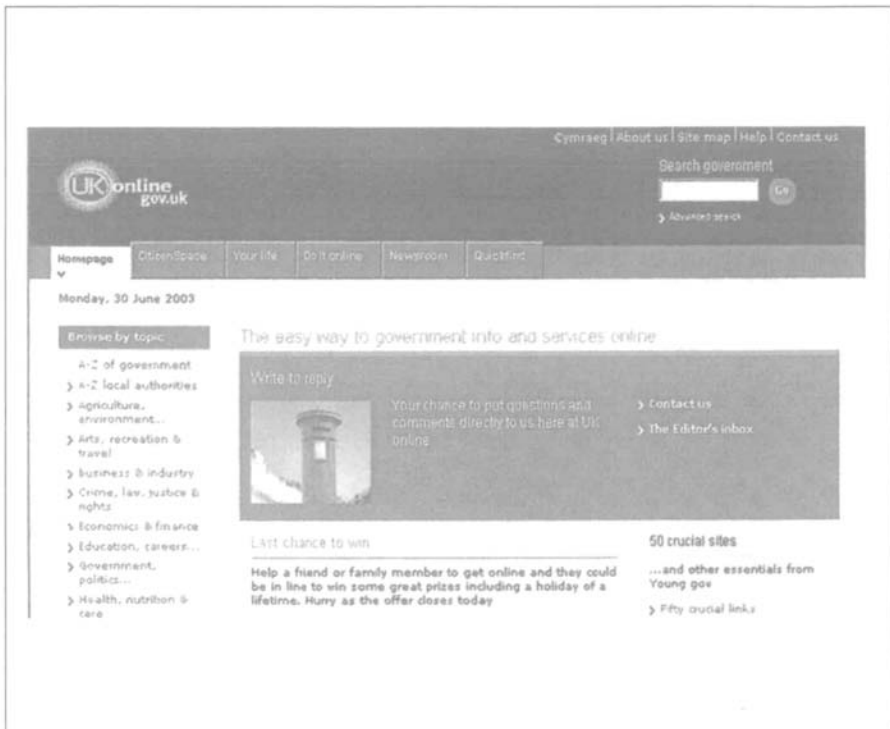


FIGURE 7.5: *UKonline home-page*

protection and confidentiality and human rights. In its fullest form, the e-government revolution would effect a transformation in government and it is unimaginable that the Government Gateway could ever provide what it terms 'authentication, security and routing [sic]' that would be capable of taking into account the legal and constitutional issues involved.

Even in its present form as UKonline, the Government is putting considerable effort and resources into this technology of governance in its attempt to structure the interaction between itself and citizens. As the UKonline home page suggests, the Government's present strategy works on a model of the citizen as *consumer*. It offers a service that essentially facilitates the customer of government services. The home page offers links to five other options. (See Figure 7.5.) 'Quickfind' is a search engine that links to various government departments. The 'Your Life' button is a public information service themed around life-changing events across eight 'Life Stages'. 'Newsroom' is another government information service. 'Do it Online' offers the opportunity to apply directly online for an (as yet limited) number of services such as passport, TV licence, fishing licence and tax self-assessment. Although there has been some research about which services online users

would use,<sup>52</sup> this has not amounted to more than market research about demand for products. It has not by any means amounted to a more sustained discussion about how government-citizen relations more generally should be structured. There is, however, also a CitizenSpace site (currently under review<sup>53</sup>). This is an embryonic consultation forum where government offers online versions of traditional consultations. Here Government seeks views but in a highly systematic and regulated way, even specifying 'tips' to those consulted in order to maximise effectiveness. (It seems that the ideal citizen within CitizenSpace must not only be an active one but also read diligently all the material, be brief, provide evidence, respond to questions as the tips suggest.) It is perhaps significant that although this is 'government-direct', without the intermediary influence of an elected representative, it can not be characterised as 'democracy-direct'. Even the planned relaunch of CitizenSpace outlined in the recent consultation paper<sup>54</sup> will not develop consultation beyond a fairly tightly controlled interaction where, essentially, citizens offer their views on proposals already made in the same way as consumers might make suggestions about products or services. Indeed, there seems to be a view that the Cabinet Office Code of Good Practice and some official best practice guidance<sup>55</sup> represents the highest stage of evolution of government-citizen dialogue. This is far from the case and the essential idea that citizens simply obtain, read and then comment upon lengthy documents from government departments remains officially unchallenged.

Indeed, it is easy to critique UKonline as attempting to restructure the relationship between government and citizen into something closer to that between government and consumer.<sup>56</sup> Listing services online and offering this as an alternative way of doing business does not necessarily amount to doing any more than most medium-sized corporations do in relation to selling their products and establishing ways to complain. In relation to consultation, simply operating a website with contact points may amount to little more than an electronic 'suggestion box' or a survey of those who both have the technology and a desire to engage with government online.

<sup>52</sup> See, eg, Cabinet Office, *Electronic Government: the View from the Queue* (1988) which contains the detailed research about potential customer take-up of online services and the Oftel surveys into residential consumer use of Internet services [www.oftel.gov.uk/publications/research/index.htm](http://www.oftel.gov.uk/publications/research/index.htm) and the Office of National Statistics' figures on Internet access at [www.statistics.gov.uk/pdfdir/intacc0402.pdf](http://www.statistics.gov.uk/pdfdir/intacc0402.pdf). There are also studies about the wider use of the Internet for connecting with a range of public officials. See, eg, S Coleman, (ed), *Democracy Online: What Do We Want from MP's Web Sites?* (2002) and more general studies such as H Margetts and P Dunleavy, *Cultural Barriers to e-government* (2000) London: Audit Office.

<sup>53</sup> A review of CitizenSpace is one of the aims of the consultation *In the Service of Democracy: A Consultation Paper on a Policy for Electronic Democracy* (2002) which aims to capture for government some of the enthusiasm that interactive television shows such as Pop Idol and Big Brother have engendered in Britain and elsewhere. For details of this consultation see further [www.edemocracy.gov.uk](http://www.edemocracy.gov.uk)

<sup>54</sup> *Ibid.* This suggests that 100% of government public consultation should be online and that Green and White Papers should include a moderated public discussion forum. Significantly, this is to be hosted by government.

<sup>55</sup> See [www.cabinet-office.gov.uk/servicefirst/2000/consult/code/consultationCode.htm](http://www.cabinet-office.gov.uk/servicefirst/2000/consult/code/consultationCode.htm) and [www.servicefirst.gov.uk/1998/guidance/users/index#cont](http://www.servicefirst.gov.uk/1998/guidance/users/index#cont)

<sup>56</sup> See further J Morison and D Newman, 'On-line Citizenship: Consultation and Participation in New Labour's Britain' (2001) 15 *International Review of Law, Computers and Technology* 171.

In fact it can be seen from a governmentality perspective that what is occurring is an exercise in governmentality: a new technology of governance is being attempted. An issue has been identified about how to 'modernise' and ideas of information technology have been enlisted as part of a possible solution. Resources are being directed towards identifying and establishing e-government as a space for government. Specialist personnel and expertise are being created and new vocabularies are developed to describe and control this as a governable area. Concepts are being developed to analyse and manage the various issues found there. Links are being made to concentrations of expertise, particularly in private sector IT companies, and 'solutions' are being developed. The overall effect is that the interaction between government and citizens is being mediated, shaped and controlled.

#### E-GOVERNMENT: A TECHNOLOGY OF DEMOCRACY

Having characterised e-government through the UKonline initiative as being concerned with creating and controlling a space, and establishing it as a governable area, an important clarification must now be added. There is, of course, more involved in e-government than the initiatives of government itself. The idea of governmentality is not simply about accounting for how the state exercises power and control. Indeed to tell the story of e-government from the perspective only of UKonline is as misleading as a history that is about only kings and queens. The governmentality approach stresses how power operates only through networks, through bodies and individuals taking up ideas or rejecting them, modifying initiatives, suggesting alternatives and shaping, influencing and directing how programmes are carried out. There are many players in the e-government arena in addition to those parts of the formal system involved in UKonline. While one story of e-government is about various bodies and agencies (more or less) within government endeavouring to establish and control a governable space, there is another narrative of bodies, agencies and individuals outside formal government, engaging only to degrees with government efforts, and at the same time offering alternatives by way of critique, good practice exemplars, codes of practice etc. The full story of this is far beyond the limits of this chapter. However, it is possible to highlight some of the major democratic issues that have been identified there. It is these that should be of particular concern to constitutionalists.

With regard first to the provision of services online, there is sometimes a belief that the Internet is somehow automatically open and accessible, and therefore more democratic. This is not necessarily the case. Indeed there is a view that e-government development can occur in several styles or formats with varying characters and degrees of democratic potential.<sup>57</sup> More practically, a number of

<sup>57</sup> The SOCITM and IDEA, *Local E-Government Now: A World Wide View* report produced in 2002 characterises e-government development as falling into three broad categories: 'e-services', concerned with securing and providing government services by electronic means; 'e-governance', concerned with

organisations have developed measures to evaluate the provision of services. The Society of Information Management (SOCITM)'s *Better Connected 2002 Survey*<sup>58</sup> provides an overall review of best practice across local authority websites in Great Britain. It also reports on a test carried out on the ability of local authority websites to respond to the sort of needs that a range of local authority customers, such as a business expanding in a new location or a family moving house, might have. Using various scenarios, the test examines the degree to which government is joined-up, the use of interactive applications, community leadership and usability. Overall, performance across government websites is very patchy. Some do not even provide contact telephone numbers or basic contact addresses. Ratings are also given on how websites performed on specific tasks such as answering e-mails, providing access for those with disabilities<sup>59</sup> and technical performance. The resulting performance tables and 27 pages of advice for website managers is a valuable tool for improving both content and usability of government websites generally.

The Arizona-based research team, CyPRG, has developed the Website Attribute Evaluation (WAE) system.<sup>60</sup> This offers a 43 point scale to measure, at least in part, some of the democratic attributes of systems. The WAE measures openness in terms of the two goals of *transparency* and *interactivity*. Transparency relates to the minimal information that is necessary to navigate the organisation as depicted in the information on the site. Interactivity is a measure of visitor convenience and assesses the extent to which the site is navigable to the user or 'clickable'. This WAE system provides a stern critical voice against those who believe that the technology is by nature open and that e-government automatically equals efficient, open and more democratic government. The global average score for transparency at the last measure was 7.4 out of a possible 21 and for interactivity it is 2.6 out of a possible 18. It may be that constitutional lawyers would wish to add extra dimensions relating to accountability, confidentiality, data protection and privacy. Indeed, one of the major points of this chapter is to argue that establishing such criteria is now necessarily the business of constitutional lawyers. Moreover, there must be issues about access. Although services may be available outside office hours on a '24/7' basis, the issue of a digital divide remains. There may be many individuals and groups, including particularly those who are low income, elderly or otherwise

linking up citizens, stakeholders and elected representatives to participate in the governance of communities; and 'e-knowledge' where the emphasis is on developing the skills and ICT infrastructure to exploit knowledge for competitive advantage. The Republic of Ireland (along with Brazil, Hong Kong and Singapore) is characterised particularly as having an 'e-knowledge' quality with the emphasis on community-based economic and social regeneration. The United Kingdom meanwhile is characterised as being within an e-services model.

<sup>58</sup> SOCITM, *Better Connected 2002? A Snapshot of All Local Authority Websites (2002)*. See also the e-envoy's guidance to official webmasters ([www.e-envoy.gov.uk/webguidelines.htm](http://www.e-envoy.gov.uk/webguidelines.htm)).

<sup>59</sup> Various organisations dealing with disability provide guidelines for best practice in this field also. For example the RNIB offer a 'See it Right' accreditation to websites that provide accessibility to people with visual impairment (<http://www.rnib.org.uk/seeitright>).

<sup>60</sup> See C Demchak, C Friis and T La Porte, 'Webbing Governance: National Differences in Constructing the Face of Public Organisations' (2000) (available via [www.cyprg.arizona.edu/wea.html](http://www.cyprg.arizona.edu/wea.html)).

vulnerable, who do not have access to ICT.<sup>61</sup> It is important that e-government does not introduce any sort of an idea of IT competence as a qualification for meaningful or enhanced citizenship and services.

When we move on to consider the role of e-government in consultation and its contribution to democratic participation there is again a large agenda beyond UKonline and its limited idea of CitizenSpace. Once more it should be stressed that there is nothing about ICT that necessarily improves consultation or enhances democracy. Indeed, Barber believes that it is important to distinguish between different types of democracy—plebiscitary, representative and participatory—and appreciate that some aspects of ICT may enhance certain forms more than others.<sup>62</sup> For example, the speed of new technology will be an attraction to plebiscitary systems while its interactive quality will appeal to proponents of more participatory forms of democracy. Barber also expresses a view, developed further by Sunstein,<sup>63</sup> that the Internet may in fact operate against proper deliberative democracy because it fragments communities by allowing us to screen out the sort of unwanted information that often in normal life forms a common experience and encourages truly joint, endogenous decision-making.

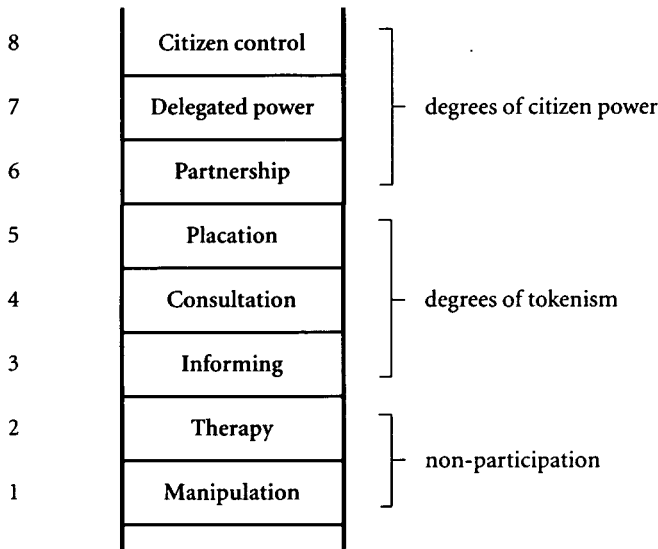


FIGURE 7.6: Eight rungs on a ladder of citizen participation

<sup>61</sup> Figures on IT use suggest that 56% of the population has now used the Internet and time spent online is increasing. The majority of 15-24 year olds are using the internet at home and 82% of this group have accessed the Internet at some time. See Office of National Statistics, *Internet Access: Households and Individuals* (April 2002) and Oftel Residential Survey, *Consumers' Use of the Internet* (February 2002).

<sup>62</sup> B Barber, 'Which Technology for Which Democracy? Which Democracy for Which Technology?' (2001) *International Journal of Communications Law and Policy* 1. (See [www.ijclp.org](http://www.ijclp.org))

<sup>63</sup> C Sunstein, *Republic.com* (Princeton, Princeton University Press, 2001).

<i>Consultation model</i>	<i>Type of interaction</i>	<i>Examples</i>
Question and answer	Simple public web-page with questions and 'voting'	Youth question Florida Governor <a href="http://www.myflorida.com/eog/kidspage/Questions.htm">http://www.myflorida.com/eog/kidspage/Questions.htm</a> BBC Talking Point <a href="http://newsvote.bbc.co.uk/hi/english/talking_point/default.stn">http://newsvote.bbc.co.uk/hi/english/talking_point/default.stn</a>
Electronic petitions	View a petition online, sign or amend and join discussion forum	Petitioning the Scottish Parliament <a href="http://www.scottish.parliament.uk/parl_bus/petitions.html">www.scottish.parliament.uk/parl_bus/petitions.html</a> Petitions to 10 Downing Street <a href="http://www.number-10.gov.uk/output/page598.asp">www.number-10.gov.uk/output/page598.asp</a>
Document + policy comment	Respondents add comments to policy document, can include 'threads' and horizontal communication between groups and individuals	e-democracy toolkit developed by International Teledemocracy Centre <a href="http://www.ict.napier.ac.uk/ITC_Home/ITC/e-toolkit.asp">http://www.ict.napier.ac.uk/ITC_Home/ITC/e-toolkit.asp</a> Dutch experience of interactive consultation collected at <a href="http://www.inbzl.nl/international/documents/pab907.htm">http://www.inbzl.nl/international/documents/pab907.htm</a>
On line guests/ panel	Decision-makers or experts on a virtual stage answering questions on pre-chosen topic for agreed time	Young peoples' views on human rights in East Belfast <a href="http://www.eastbelfast.com/youth/">http://www.eastbelfast.com/youth/</a> US Presidential debate <a href="http://www.webwhiteblue.org/rcd/">http://www.webwhiteblue.org/rcd/</a>
Online conference	A conference replicated online over a period of days or weeks including workshops, breakout sessions, 'coffee time chats' etc	Scottish Youth Summit <a href="http://www.youthsummit.org.uk">http://www.youthsummit.org.uk</a> World Bank Development Forum <a href="http://www.worldbank.org.devforum/ongoing.html">http://www.worldbank.org.devforum/ongoing.html</a>
Online spatial decision support systems	Virtual modelling of planning options and interactive questioning of planners and community	Pilot studies carried out by geographers from Leeds University at <a href="http://www.ccg.leeds.ac.uk">http://www.ccg.leeds.ac.uk</a>
Communities of practice/interest relating to particular topic or consultation process	Online tools for e-mail list group, informal or more structured and focused information exchange. Can include questionnaire, opinion polls, brainstorming etc	Law Commission 290 pp. consultation on housing law in questionnaire form <a href="http://www.landlordlaw.co.uk">http://www.landlordlaw.co.uk</a> Bologna civic network <a href="http://lipoerbole.bologna.it/">http://lipoerbole.bologna.it/</a> Research for public policy-making <a href="http://www.yougov.com">http://www.yougov.com</a> or <a href="http://www.prforum.com">http://www.prforum.com</a>
Live chat events	Interact in real-time, Q and A with politicians and (especially) youth groups or hard to reach minorities in structured process hosted by facilitators	Politicians talk to East Belfast Youth <a href="http://www.eastbelfast.com/youth/">http://www.eastbelfast.com/youth/</a> EU Commission Europa Chats <a href="http://europa.ue.int/comm/chat">http://europa.ue.int/comm/chat</a>



Consultation model	Type of interaction	Examples
Live multi-media events	'Lunch speaker' or press conference with interactive tv or webcast, poll, questions, text available online etc.	Wisconsin Interactive TV Project <a href="http://itv.wpt.org/examples">http://itv.wpt.org/examples</a> NASA Mars Teaching Training Conference <a href="http://quest.arc.nasa.marsconf">http://quest.arc.nasa.marsconf</a> London's Camden Council engaging with young people <a href="http://www.camden.gov.uk/young/index.cfm">www.camden.gov.uk/young/index.cfm</a>
Online deliberative poll	Public consultation with 'quick votes' from both self-selecting and representative samples	By the People – A National Conversation about America in the world <a href="http://www.pbs.org/newshour/btp/polls.htm">http://www.pbs.org/newshour/btp/polls.htm</a>

FIGURE 7.7: Methods and examples of online consultation

More simply it can be noted that there is a significant difference between consultation that involves participation and leads genuinely to citizen empowerment and more superficial forms of consultation where views are sought but with little effect. Figure 7.6 indicates a ladder of participation with only the top three rungs amounting to genuine active citizenship where citizens as civil masters can control the policies and activities of civil servants and representatives.<sup>64</sup> Any technology must be judged in terms of how it contributes to meaningful participation. Again there are exemplars, standards and codes available to suggest best practice. The Hansard Society work is particularly valuable in this regard.<sup>65</sup> Much of this is summarised in the view expressed by Coleman that 'democratic deliberation is best conducted within the context of a neutral public space, under the aegis of a fiercely independent, non-partisan organisation.'<sup>66</sup> There are also other sources such as Stephen Clift's *e-government Briefing Book* with its top ten tips<sup>67</sup> and the Institute of Public Policy's *Good Practice Guidelines*.<sup>68</sup> In a paper written with David Newman, the author sketched out a model of consultation that was participatory, based on conversations where preferences are shaped in an interactive

<sup>64</sup> Figure 7.6 is taken from a classic article by S Arnstein, 'A Ladder of Citizen Participation' [1969] *Journal of American Institute of Planners* 216–224, 217.

<sup>65</sup> See particularly S Coleman, *Realising Democracy Online: A Civic Commons in Cyberspace* (London, Hansard Society, 2001); S Coleman, 'UK Citizens Online Democracy: An Experiment in Government-Supported Online Public Space' in *G8 Democracy and Government On-Line Services: Contributions from Around the World* (available at <http://www.statskontoret.se/gol-democracy/foreword.htm>); N Hall, *Building Digital Bridges: Creating Inclusive Online Parliamentary Consultations* (London, Hansard Society, 2001).

<sup>66</sup> *Realising Democracy Online: A Civic Commons in Cyberspace* (2001).

<sup>67</sup> <http://www.netcaucus.org/books/egov2001/>

<sup>68</sup> IPPR, *Code of Practice in E-Participation in Local Government* (2002), 19. See also the Consultation Charter provided by the Consultation Institute at <http://www.consultationinstitute.org> and the IDEA Knowledge toolkit available at <http://www.idea-knowledge.gov.uk>

process of discussion rather than simply counted in an exercise to identify the majority position.<sup>69</sup> It is a model drawn from literature on mediation and has the advantage that there are a range of computer support tools to sustain it. Indeed, there are many such models available and many instances of innovative democratic technology being matched with novel information and communication technology to produce improved participation and decision-making. Figure 7.7 shows several examples of good practice from consultations that have actually taken place using a range of democratic and ITC techniques.

All of these, along with the codes of practice, guidelines and standards urged by various bodies and individuals, can act as a corrective to the idea that UKonline, with all that it entails for the nature and quality of government, is the only way of developing e-democracy.

## CONCLUSION

The critique of UKonline with which this examination of e-government has concluded is not intended to suggest that there are not any advantages to offering services online or providing electronic forms of consultation. The potential of e-government to connect citizens with government services and to widen and deepen participation must not be underestimated. However, the main thrust of this chapter has been to argue that e-government should be seen within the context of a wider modernising government initiative. This in turn relates to broader changes in the nature of government as it has mutated towards ideas of governance where the role of the state and its levels and forms of operation have changed.

It has been argued that these wider changes, and their effect on public law understandings of state, law and power, are best understood from a perspective that develops the insights of the governmentality approach associated with the work of Michel Foucault. Such an approach takes us to wider questions. Why did e-government come to be seen as governable space? How does this relate to the modernising government programme and the wider assumptions about the role of the state? How does law combine with other tactics and strategies to mobilise power across various networks? How does this affect our understandings of what the state is and the ways in which it governs? What effect does putting government online have on the structures and relationships of government more generally? How does government seek to structure the interaction between citizens and the administration through controlling the interface by means of which they meet? Are there alternative ways of developing and managing this space? How can we widen our understanding of the nature of government to encompass all this and develop the democratic potential that is entailed?

<sup>69</sup> Above n 56. See also the 'very general' checklist for designing and facilitating web events provided by Full Circle Associates at <http://www.fullcir.com/community/designingonlineevents.htm>.

The governmentality perspective begins to provide answers in terms of developing an idea of government as involving the creation and deployment of a whole range of technologies connecting multiple centres of power within an exercise of government that is wider and more complex than that which is contained within traditional understandings within public law scholarship. This is a critical perspective that enables us to strip away the naturalness of the workings of government and see the activity of government encompassing the creation of governable spaces where technologies of government compete with technologies of democracy to realise individual programmes within wider schemes of governance.