

Governments Losing Ground

54

An exploration of administrative
consequences of information and
communication technology

1999

Summary of the 54th report

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Summary

The turbulent developments in information and communication technology (ICT) are changing the scale at which social interaction takes place. Concepts such as 'distance' and 'time' will play a radically different role; it is becoming more difficult to assign events to a particular place, and perhaps also less relevant; activities can be undertaken world-wide from almost any location. The declining ties to a particular territorial area will, it would seem, inevitably have consequences for the capacity of the national state to act, since the regulative and directive capacity of states derives to a significant extent from instruments (such as legislation and regulations) that are territorially bound. ICT can also provide impulses in more than one direction, combining both greater internationalization ('globalization') and greater emphasis on regional and local levels. In both cases there is a declining dominance on the part of the territorial level on which national governance is based.

This report surveys the impact of the ongoing and rapid extension of ICT in society on the national state as an institution. As in the case of other surveys of future developments, the report is by nature somewhat speculative. This does not detract from the central finding that changes in the knowability, assignability and enforceability of activities will also result in changes in the capacity of national governments to act effectively. It is important for this realisation to be discounted in future policy and not – as so often tends to be the case – to meet developments in terms of what is perceived as an unchanging capacity to act.

ICT penetration

ICT is penetrating many areas. At present the emphasis is on creating networks, which as it were form the backbone for the renewal of economic activity. Electronic markets are being generated, initially for suppliers of information products (banks, insurers, publishers and marketers) and later perhaps for a much wider circle of actors and products. This would appear to lay the foundation for a network economy in which functional elements (communication, management and use of information banks and all sorts of transactions) depend to a significant extent on the electronic exchange of information. A further breakthrough in the technology will not depend just on technical, economic or administrative factors but also on the social practice.

Deterritorialization

As noted ICT can work on two fronts: there is a genuine possibility of a social and economic movement towards both increases in scale to supranational level and decreases in scale to less than national level. The capacity to act of national governments will of course suffer if enterprises and individuals are able to conduct their activities from wherever they want with the aid of ICT. When the actor, action and consequence of an action which once generally took place in the same location become distributed over various countries and it can no longer be unambiguously determined within which territory an actor can be held liable for an action, a situation of 'deterritorialization' arises. This gives rise not just to practical problems (enforcement) but also to problems of a more fundamental nature. This applies in particular to the core legal function of the state, namely the monopoly over the imposition and enforcement of binding rules, which is heavily based on the factual notion that the actor, action and consequence are tied to one and the same place. Deterritorialization may mean that actions can no longer be attributed to a particular national legal regime. When this occurs, we end up as it were with 'governments losing ground'.

Capacity to act under pressure

Partly on the basis of an analysis into developments in various policy fields (namely market regulation, monetary policy, taxation and social and cultural policy) the Council reaches the conclusion in this report that the national government will no longer be able to make do with 'unchanged policies' with respect to the social consequences of ICT. The concept of the nation-state calls for a reformulation. ICT is expected to affect the territorial dimension of human activities so radically that the assumption of a constant capacity to act on the part of the state ceases to be axiomatic. This is not just an instrumental problem: the changes in the scale of social activity also involve a decline in the legitimacy of the nation-state. The identification of citizens with the nation-state will also decline as international influences and incentives on the one hand and local events on the other become more significant. A trend in this direction is already discernible in practical policy terms.

A correct perspective does, however, call for more precise definition. In the first place the impression should not be generated that internationalization and deterritorialization will henceforth render the national state superfluous. A highly important element of social interaction will remain nationally tied even under the highly intensive application of ICT in society. Secondly the nation-state is not a fixed parameter. Transformations are continually taking place and will make it possible to respond more effectively to external changes with a view to regaining the state's capacity to act. Other underlying principles of law are conceivable, as well as different types of government intervention, the exploitation of ICT possibilities by the state itself and the stepping-up of inter-state co-operation. All this is of course related to the desired regulation of the public domain in the future.

Whether this will ultimately amount to a gain or a loss is difficult to say at this stage. In the first place a balance will need to be struck between the declining capacity to act and the new possibilities for national regulation and direction on the one hand and the changing need for state regulation and direction on the other. Secondly this will ultimately be determined (in part) by the way in which national governments manage to respond to change. A vital factor in this regard is that foreshadowed changes must not just be assessed in terms of the existing capacity to act and the customary concepts. Such an approach would result in a reaction that is primarily based on the restoration of existing potentialities and to combating symptoms, and can bloc an innovative approach.

Open approach

For these reasons it is advisable to opt in favour of an open approach when it comes to the consequences of ICT within society. An open approach places the developments in a broader perspective, discounts the outlined change in context at supra-sectoral level and seeks flexibly to strike new balances between fundamental points of departure. In this respect it is vital to draw a clear distinction between what the nation-state can do and what it must do in that new context. In some cases a strengthening of current intervention is called for, while in some cases existing types of intervention need to be deployed differently; sometimes a switch needs to be made to a totally different type of intervention and sometimes the government must simply withdraw. In striking new balances there will, sometimes, inevitably be a trade-off between fundamental principles. The first, obvious such trade-off concerns a renewed capacity to act on the part of the nation-state by means of international and supranational co-operation at the expense of national autonomy. Similar trade-offs may be discerned in certain segments.

Although the developments are rapid the existing set of instruments will not be rendered inadequate at a stroke in the next few years. However, where it is a matter of finding new balances between fundamental principles and the development of new variants it is as well to take stock of a more distant future in policy terms at the present time. A definitive reaction of 'more of the same', in the sense of more of the same kind of legislation, more of the same kind of enforcement and so on, is unlikely to prove sufficient.

Preface

This report is the last to have been completed in the fifth WRR term of office (1993-1997). The report was prepared by an internal WRR working group, chaired by Dr. W. Derksen, a member of the Council. The other members of the project group were J.P.H. Donner, chairman of the fifth Council, H.C. van Latesteijn, deputy secretary, and staff members Dr. K.W.H. van Beek, Dr. J.M. Bekkering, Ms. N.D. Hielkema, Dr. F.J.P.M. Hoefnagel, Dr. R.M.A. Jansweijer, Dr. W.M. de Jong (project secretary) and D. Scheele. Other (temporary) members of the project group were Ms. M.F. Gelok, Ms. Y.C. Mets and T. Oterdoom.

The results of various studies conducted on behalf of the Council were used in compiling the report.

Introduction

1.1 ICT, society and the nation-state

As a result of the turbulent developments in information and communication technology (ICT) the scale of social intercourse is changing. Concepts such as 'distance' and 'time', the significance of which changed only gradually in recent centuries, are now taking quantum leaps and assuming a different role. In cyberspace it is difficult to determine precisely where something takes place. The assignment of events to a particular location has also largely lost its relevance: it has now become possible to undertake activities world-wide and from almost any location. The time-factor is also losing its significance now that activities are no longer linked to a particular place and tens of thousands of kilometres can be spanned in an instant. Needless to say the virtual world is not the same as the material world around us. At the same time, however, there can be very little doubt that the ICT revolution is having a direct impact on the 'real' world and that these effects will increase still further and will cut more deeply than at present.

At the least the continuing introduction of ICT, with the increase in both the ability to take instant stock of events elsewhere and the physical transportation possibilities, is vigorously propelling certain social trends. These impulses are not, however, uni-directional. The proposition that the internationalization (or 'globalization') of society is continuing is scarcely open to contradiction. At the same time, however, ICT can increase the social importance of lower territorial levels, both regional and local. We are concerned here with changes that can have both centrifugal and centripetal effects. The way this works out in specific situations will depend primarily on the particular aspects at issue and the scale on which these are operating.

Even if it must be acknowledged that developments in the field of information and communication technology are still hedged about by numerous uncertainties, it may safely be assumed that the impact of ICT will not leave the nation-state as an institution untouched. This applies in two respects, namely to the environment in which the State will function and to the State's capacity to act in that new environment. In concrete terms this comes down to the policy instruments that the State will have at its disposal in the future. As far as the changing environment is concerned, the current developments hold out prospects on the one hand of greater transparency in society, so that policies can be formulated and applied more realistically and more precisely. ICT can also increase the scope for democratic participation, for example by the introduction of various kinds of referendums if that should be desired. Whether the possibilities for greater transparency and participation will in fact be realised is however uncertain. Contrary effects are also conceivable, if the public (individuals and businesses) increasingly use ICT to construct 'separate worlds', as a result of which governments begin to lose the grip on social reality required for proper governance. It is conceivable that variations in the environment will at any event create dilemmas in which basic policy principles come into conflict with one another. To take one example, the improved collection of information in order to prevent transfrontier tax evasion may conflict with the principle of guaranteeing citizens' privacy.

In addition the capacity to act of nation-states is being challenged more fundamentally. Legal jurisdiction and the rule of law have traditionally rested on a territorial delimitation, which is being eroded with the spread of ICT. The process of internationalization in recent decades has already shown that the less territorially based nature of activities is weakening the national

capacity to regulate and direct. This applies all the more if activities extend to a number of states and will apply *a fortiori* if numerous activities are no longer tied to a particular locality. Assessing the consequences of this trend, however, is by no means straightforward. Strictly speaking such an assessment can only be made if the future capacity to act of national states and local government is juxtaposed against the future social requirement for regulation and direction, in that it is conceivable that while the capacity to act of the national state might decline, the need for such action might decline at the same time. In that case there would be no problem. It also needs to be borne in mind that the furtherance of public goals is at the present time by no means confined to the nation-state. States enter into co-operation with other states and form coalitions in order to defend their own territory, and an extensive system of international law has gradually evolved. The observation that the institution of the nation-state is subject to erosion need not therefore mean that it is impossible to promote the public interest in any manner other than by the unilateral action of the nation-state.

1.2 Thematic report

The basic theme of this report has been set out above. The Council is concerned here with the application and distribution of ICT and the implications this could have for the territorial dimension of human activity as well as the consequences for the nation-state. In particular we are concerned with the State's capacity to act, i.e. the ability of the State to achieve policy goals in new circumstances.

At issue here is just one segment of a much more all-embracing problem of social change due to ICT – a limitation which may be justified because, as noted, the territorial basis of governance is being threatened by ICT developments. Like any future study, this report is inevitably somewhat speculative in nature. Certain assumptions will not prove justified in due course, while it is also entirely possible that effects not emerging until a later stage have been overlooked. As far as the latter is concerned, the obvious comparison is with the introduction of television half a century ago, the far-reaching social consequences of which – especially for the relationship between the government and the governed – have only become clear gradually.

Why has the Council decided to undertake this survey of future developments despite the manifest uncertainties? The main reason concerns the close relationship between changes in the territorial dimension of human activity and territoriality as a structuring principle for the State. If discrepancies arise between these two, the standard response of adjusting policy instruments or goals is no longer sufficient, for an essential feature of the institution of the State is at issue. In this light the Council considers that the Dutch government (primarily the national government in the broadest sense) would be well advised to take early stock of the substantial changes to which the large-scale introduction of ICT could give rise so that it can prepare itself for those changes as best as possible.

This general observation is not to deny the fact that the Dutch government has already been intensively concerned with ICT – originally in the main with the computerization of processes and the relevant co-ordination of policy, but subsequently also with questions concerning the possibilities opened up by ICT and the way in which these can best be taken up. The latter concerns a wide diversity of substantive policy topics (e.g. strengthening the electronic infrastructure, shaping the telecommunications market and the introduction of ICT in education and training). No systematic analysis has however been conducted into the consequences of ICT for the public capacity to act. Is there sufficient policy recognition that the capacity to act is under threat? Or are

government policies only being brought into line with changing social circumstances, based on the premise that the capacity to act of governments is remaining more or less constant? In the latter case there is a risk that policy adjustments will not prove successful. The 'natural' inclination of (government) agencies to articulate social changes in terms of the assumption that the instruments used hitherto have lost none of their usefulness will not prove fruitful if the public capacity to act and the related possibilities for policy can no longer be regarded as a constant on account of the changes in the territorial dimension.

1.3 Arrangement of the report

Chapter 2 examines the likely social changes from the perspective of the nation-state. This concerns not just the extent to which the public capacity to act can change but also the extent to which the need for action by the nation-state may change, partly because other bodies take over some of the State's regulatory role and partly because certain forms of government regulation and direction are no longer required. These topics are worked out in more detail and assessed along two lines in Chapters 3 and 4. Chapter 3 examines the extent to which the law and public administration in the Netherlands are based on the territoriality principle, what consequences ICT has in this area and to what extent other principles could provide an alternative. Chapter 4 provides a detailed analysis of the consequences of ICT for the nation-state's capacity to act in three major policy areas (namely the economy and social and cultural affairs). Among other things the chapter examines the policy responses to date. Finally, Chapter 5 examines how the nation-state might be transformed as a result of the development of ICT and what positive and negative effects could arise from the resultant increases and decreases in scale.

2.1 Introduction

Due to developments in information and communication technology the social context in which the government operates is changing. This chapter provides an initial outline of the impact of ICT on the nation-state's capacity to act. The most characteristic feature of the nation-state in this regard is its linkage to a (precisely defined) territory. This 'territorial limitation' of nation-states' capacity to act is discussed in section 2.2. An increase in international traffic therefore involves a diminution in the importance of the nation-state (section 2.3). The increasing use of ICT in society, discussed in section 2.4, has not only given the process of internationalization an additional boost but also means that human activities can no longer be clearly localised (section 2.5). This deterritorialization can have particularly significant consequences for nation-states, since their capacity to act is often so expressly linked to their own territory and national borders (section 2.6). Finally, in section 2.7, the possible consequences are illustrated on the basis of Internet experiences.

2.2 The nation-state

The authority of the State extends to the borders of its own territory. Within these borders the State has the sole right to lay down binding rules, enforceable if necessary by the State's monopoly over force. The State is also the sole party authorised to raise taxes. The State may therefore be defined as the organization having a legitimate monopoly over the use of violence, regulation and taxation in a particular territory (in the words of Max Weber ¹⁾). We are concerned here with an ideal-type definition, i.e. a paradigm with heuristic value. Against the background of this ideal-type, modern states can for example be assessed in terms of their 'stateness', i.e. the extent to which they measure up to this ideal-type.

Aspects of this ideal-type are sovereignty and autonomy. A state is sovereign in so far as it has a monopoly over legislation, force and taxation. Autonomy indicates the capacity for a nation to direct its own affairs independently of other states. Autonomy is therefore also known as external sovereignty. The national borders become the territorial manifestation of the internal and external sovereignty. In this sense the capacity of the nation-state to act within its own borders is unlimited.

The empirical reality tends to differ from this ideal-type paradigm. States have for example never possessed unlimited autonomy. Nor has at any point in the past any one state had a monopoly in an absolute sense over the use of force, legislation and taxation. In the contemporary era, a number of European states have moreover decided to pool their sovereignty in the new organization of the European Union, which has the right to lay down rules in certain areas which the nation-states are then required to implement within their territories.

The evolutionary history of the State varies considerably. Five centuries ago the State in Western Europe was no more than one form of political organization, side by side with other forms such as city-states, kingdoms and federations. On the one hand law arose, more or less as the law of custom,

¹⁾ M. Weber, *Wirtschaft und Gesellschaft*, Tübingen, Mohr, 1921.

within empires lacking a precisely defined territory. On the other hand legislation and regulations arose within urban communities screened off by walls. Both legal systems existed side by side. Political power was therefore highly personal and local in nature.² A considerable degree of overlap between the personal claims to authority consequently arose. In some cases these were fought out while in others they co-existed.

During the intervening centuries the independent territory of the State was gradually demarcated by means of war. Paradoxically enough it was the absolute monarchs, in particular, who made an important contribution to the formation of the democratic modern state. As the territory of the state became more clearly demarcated, the national authority to which the citizens were subject became clearer. Sovereignty as a monopoly over the imposition of rules appeared on the scene. State boundaries assumed an ever greater significance for the exercise of authority. Nevertheless administrations at various levels of scale continued more or less to co-exist for a considerable period. The industrial revolution and, with it, the advent of the nation-state, however, left steadily less room for such a system.³ Local and provincial administrations were rendered subordinate to the State and lost their sovereignty. With the democratization of recent centuries state authority also gradually lost its personal character. Government authority became impersonal. Ideas about the sovereignty of the people contributed towards the emergence of constitutional democracy. In principle, the State henceforth embodied the nation's right of self-determination.

The process of modernization, including the industrial revolution, demanded a cultural homogenization. This was enforced by the States. Modernization consequently resulted in the fact that the State and the nation increasingly coincided.⁴ Education was particularly important in this regard. In the recent past the State, bureaucracy, judicial system and territory have become very closely intertwined. In the 20th century the classical liberal state under the rule of law was transformed into a social democracy, as a result of which the market and the economy also became bound up with the nation-state. In the second half of the 20th century the paradigm and the empirical reality have therefore drawn very close, with of course variations from one state to another.

Apart from the monopoly over force and the monopoly over the imposition of rules within the independent territory, the modern state also has an impersonal structure of power and legitimacy. The State is recognized as such by its citizens, since it embodies the collective wishes of these citizens and since, when exerting force, it is bound by rules regarding them. Law does not only provide the State with an instrument to direct and order, it also protects the citizens from arbitrariness by the government.

Apart from having an instrumental function, law in a constitutional democracy serves a guarantee function. The 'nation-state' is therefore not just a paradigm with heuristic value but also a normative construction. We are not concerned here with the links established by groups in society and nation-states themselves between nationalism and the nation-state. Of much greater importance is the fact that the nation-state forms a fundamental element of the system of public law. In thinking about the democratic state under the rule of law, the nation-state may in fact be regarded as a normative construction. We are no longer dealing here with an ideal-type but with an

2] See D. Held, *Democracy and the Global Order; From the Modern State to Cosmopolitan Governance*; Stanford, Stanford University Press, 1995.

3] I. de Haan, *Zelfbestuur en staatsbeheer (Self-government and governance)*; Amsterdam, Amsterdam University Press, 1993.

4] K. Koch, *Over staat en statenvorming (On the state and formation of states)*; Leiden, DSWO Press, 1993.

ideal. If the preconditions for democracy and legitimacy have been fulfilled, the modern state provides possibilities for giving expression to a nation's right to self-determination. It is not without reason that the concept of legitimacy crops up frequently in other definitions of the modern state.

Finally the nation-state is experienced by many civil servants as a normative construction. It is easy to cling to that image of the nation-state at times when changes in the overall setting necessitate a transformation of the nation-state. At the same time the desire to survive per se in turbulent situations in which there is a lack of any proper framework for future action is a normal aspiration for any institution and hence also for government.

Against this background it is understandable that the concepts of the nation-state and the modern state have become widely interchangeable in the academic literature. It is therefore important not to confuse the concept of the nation-state with nationalism. In the words of the sociologist Anthony Giddens: 'What makes the 'nation' integral to the nation-state [...] is not the existence of sentiments of nationalism but the unification of an administrative apparatus over precisely defined territorial boundaries'.⁵ In this report the concepts of the modern state, the nation-state and the national government are used side by side as synonyms.

2.3 Internationalization

As outlined above, history has displayed a trend towards the ideal-type nation-state; in the second half of this century there have however also been many contrary movements. A distinction may be drawn here between sovereignty (the sole right to impose rules) and autonomy (the capacity to realize independent policy goals) on the one hand and, on the other, the broader concept of the capacity to act (i.e. the ability to intervene effectively).

As far as sovereignty is concerned reference has already been made to the pooling arrangements in the European Union, arising from the desire to realize the capacity to act at an adequate (i.e. higher) level. As a result a supranational European legal order has arisen. In addition the ability to achieve national policy goals independently is declining due to the 'leakage' of policy effects across national borders and the fact that national societies are affected by decisions taken by others outside their own territory.

For some time now states have been seeking to limit the decline in the national capacity to act by means of mutual co-operation. As a result the capacity to achieve (internationally agreed) goals is increasing, while the ability to depart from those goals is declining. Effectiveness and degrees of freedom are being traded off against each other. The way in which the impact of international co-operation on a country's capacity to act needs to be evaluated therefore depends in part on the question as to how far such co-operation serves independent policy goals.

The changes in the environment of the nation-state since the Second World War may be described in more detail on the basis of three developments: the greater internationalization of the economy, the greater internationalization of culture and the intensification of co-operation between states. Needless to say in practice these developments are interwoven. We refer to internationalization if human activities or interactions between people extend to the territory of a number of states.

⁵] A. Giddens, *Social Theory and Modern Society*; Cambridge, Polity Press, 1987, p. 172.

The internationalization of the economy in recent decades has manifested itself both in the growth in (transfrontier) physical transportation associated with the internationalization of markets and in the international relocation of production activities. The volume of physical transfrontier transportation has increased. The fact that this increase is of regional rather than global significance does not detract from its transfrontier nature.⁶ The increase in the volume of transport is associated with increases in scale, shrinking trade barriers, falling transport costs (partly on account of infrastructural improvements) and structural changes. Structurally a certain shift has for example taken place from trade in unprocessed raw materials to trade in semi-manufactures and components. In relative terms fewer raw materials are transported and more are processed near the point of extraction (although in absolute terms the transportation of raw materials has also increased). Independent production facilities have of late been set up in numerous raw-material producing countries. In addition a trend is discernible in certain sectors from the transportation of final products to the transportation of components which are then assembled to customer specifications closer to the final market.

Two factors play a role in these developments. In the first place inter-industry trade and investment are heavily dependent on international wage differences and the quality of human capital. In this way parts of the production process are where possible contracted out over the entire world in order to obtain the best price/quality ratio. Secondly the mobility of physical capital goods has made it possible for the (ultimate) production to take place increasingly in the vicinity of the consumer in order to respond to the latter's wishes (i.e. intra-industry trade and investment).⁷ In fact the growing international interconnectedness of production activities which has been associated with the geographical segregation of various steps in the production chain is a development of more recent origin than the increase in the volume of transfrontier transport.⁸

Apart from the internationalization of the economy the second half of the twentieth century has also seen a globalization of culture. Although many morals and customs continue to be determined at national and local level, cultural differences have become much smaller in other fields. Furthermore, cultural differences now coincide much less clearly with the borders of the nation-states. The international homogenization of the culture has taken an unmistakable American slant in recent decades. Where the modern state is based on the notion that nations can determine their own future on the basis of their own norms and values, the world-wide homogenization of norms and values is not without significance. In the first place citizens get new opportunities for identification that are less closely linked to their own nation. Secondly there is less reason for a nation to preserve its own autonomy (and sovereignty) if nations' norms and values are merging (while the differences in norms and values coincide less and less with national borders).

The third development, the intensification of inter-state co-operation, is associated with the two developments noted above. The internationalization of the economy has undermined the autonomy of most nation-states, thereby inducing states to co-operate in order to achieve joint goals and to maintain their own capacity to act. Cultural internationalization has meant that norms and values have become more uniform, so that any barriers to co-operation can be more readily resolved. At the same time, the drive towards inter-state co-operation

^{6]} C. Osman, *Globalisation and Regionalisation: The Challenge for Developing Countries*; Paris, Development Centre of the Organisation for Economic Co-operation and Development, 1994.

^{7]} R.Z. Lawrence, A. Bressanc, T. Ito, *A Vision for the World Economy; Openness, Diversity and Cohesion*; Washington, The Brookings Institution, 1996.

^{8]} See also P. Krugman, *Pop Internationalism*; Cambridge Massachusetts, MIT Press, 1996.

has followed a wavy path, where sometimes the desire for preserving what is separate and distinctive has been in the ascendancy and sometimes the conviction that international co-operation offers new perspectives. The process of European integration has for example been taking place within these two extremes. In addition the willingness for inter-state co-operation will correlate negatively with the extent to which national norms and values need to be surrendered in the interests of co-operation. The willingness for international co-operation will also differ from one partner to another, as one state will need to make more concessions in the interests of internationalization than another.

Particularly in terms of their mutual interaction, the internationalization of the economy, cultural internationalization and international co-operation have had consequences for nations' autonomy, sovereignty and capacity to act. International co-operation, in particular, has placed the sovereignty of nation-states under pressure. The internationalization of the economy has undermined the autonomy of most nation-states. Cultural internationalization has helped citizens to come to a (better) understanding of these developments. In addition international co-operation increases the capacity to act of nation-states though with a simultaneous loss of autonomy (varying from one case to another).

2.4 Increasing use of ICT, shrinking importance of distance

Before examining the consequences of ICT for a state's capacity to act, it is worth examining ICT and its increasing prevalence in society. ICT itself is a collective term for the technologies used in the collection, storage, processing and transmission of information in varying forms (data, image, sound). In essence the invention of printing also falls within the scope of this definition. Partly for this reason the concept of ICT is reserved here for technologies that make it possible to collect, store, process and pass on information in dematerialized form.

The electronic exchange of information has a long history, going back to the invention of the telegraph in 1840. The second half of this century has seen the development of digital technology. Digitization has made possible a number of major developments, first in the form of computers and later also in telecommunications. Initially these two developments were independent of one another, but from the 1960s onwards they became increasingly interwoven as developments in the one field were used to introduce innovations in the other. The growing links between telecommunications and computers have been behind the introduction of the term ICT.⁹ Furthermore digitization made it easier to send not just data but also sound and images. The result was that the developments also extended to the audiovisual and consumer electronics sector and that the distinction between services and applications in such fields as telecommunications, computers, the media and consumer electronics became blurred. Until recently the search for new application possibilities for the infrastructure focussed primarily on the business market. Increasingly, however, the commercial focus now is on private individuals, who are making use of the possibilities of ICT.

In the 1980s there was a growing awareness that the information stored in computers in fact formed a basic element of the business process and that the thus available data and information derived from it provided indicators on the quality and progress of commercial operations. Apart from systems aimed at a particular operational activity, information systems were introduced with a view to providing management support. The level of integration of the computer and the environment consequently moved up a gear and networks

^{9]} Social and Economic Council, *Consumentenaspecten ICT: een voorstel voor een aanpak* (ICT consumer aspects: a proposal for a strategy); The Hague, April 1997, pp. 2-4.

became important. Computer and communication applications are now becoming increasingly integrated. Complicated information systems are for example arising that transcend the boundaries of organizations.¹⁰ A growing number of companies are now on the Internet or have their own intranet. In Europe 25 per cent of large businesses already have an intranet, a figure that was expected to have reached 66 per cent in the year 2000. In the United States over 90 per cent of the Fortune 200 companies have an intranet or said that they wished to install one in 1997.¹¹

Integration of geographically spread business processes

ICT makes it possible to influence and direct processes at a distance, so that it is no longer necessary to be on the spot in order to carry out those activities. In freight transport, for example, telematics applications are used to monitor the progress of goods flows at a distance, a process known as tracking and tracing. This makes it possible to adhere to plans much more precisely. The rapid availability of information at other establishments enables decisions to be taken more swiftly, so that it is possible to respond to changes in the external environment more quickly. ICT makes it possible to supply customized products on the basis of mass production, i.e. 'mass individualization'.

Co-operation between businesses at a distance may take either a horizontal or a vertical form.¹² In the case of horizontal co-operation, services or resources are shared by a number of organizations. Horizontal co-operation between organizations can be supported by EDI (electronic data interchange), shared databases and groupware such as e-mail, electronic diaries, group decision support systems, systems for the joint writing of reports, joint design systems and multimedia systems. ICT permits a 24-hour economy, in which teams of people spread all over the world to co-ordinate globally integrated design and production processes in line with differing local circumstances. Examples include the specific demand of the local consumer and local restrictions in regulation and the supply of input in the form of parts, raw materials and skilled labour.

Vertical co-operation involves companies in a relationship of customer and supplier. Telematics are for example used as a strategic aid in the logistics sector where production activities (often end-processing) are carried out halfway through the distribution chain and outsourced to logistics service-providers. Many secondary commercial activities, such as communication activities, catering and cleaning, are outsourced. ICT creates as it were a global village in which investment resources, means of production, planning, organization forms, raw materials and other resources used in production and marketing are no longer bound to a single locality but can be procured and deployed all over the world.¹³

Penetration of ICT in society

ICT penetrates many areas of society. Not just businesses but also households are increasingly using ICT. In the case of commercial organizations it is notable that ICT is resulting in a flatter network structure, in which more and more elements of the production process are being hived off. ICT enables rapid co-ordination between the various elements of the production process in various places. In addition ICT has made possible all kinds of new information products, such as interactive services, in which information is offered, either free or for payment (e.g. video-on-demand), or where transactions are concluded (e.g. telebanking). These electronic markets are particularly important for households. In addition teleworking and telelearning could become increasingly important for households.

^{10]} *Telematica*; Alphen aan den Rijn/Zaventem, Samsom Bedrijfsinformatie, 1997, pp. 247-248

^{11]} *Automatisering Gids*, Intranet special issue, 14 March 1997.

^{12]} D.L. Garcia, *Electronic enterprises: looking to the future*; Thesis, University of Amsterdam, 1997.

^{13]} *Telematica*, op. cit., pp. 15-16

To begin with users generally make use of new application possibilities in order to replace existing functions. New forms of behaviour do not emerge until after some time once the new possibilities have become clearer. As a result of the strong technology push, the needs of users with their divergent preferences and value systems tended to be left out of account. These needs are only gradually starting to play a greater role now that consumers have greater freedom of choice between various suppliers and applications. Since we are still at the start of the ICT society, future developments could take unexpected twists. By way of analogy with the early days of television, it may be noted that the threats and opportunities as perceived at that time did not encompass the impact of television on democracy or the phenomenon of hype. The cultural changes resulting from new technology often take some time to work through. Upon reaching a critical mass of users, however, the social penetration of a new technology can take place very quickly, as the rapid acceptance of cash dispensers indicates. This does not eliminate the fact that ICT has already achieved a breakthrough in certain areas. CNN is an important source of news throughout the world; international telephony has also become commonplace.

Nevertheless the developments are still in their infancy. The enormous growth in the technical possibilities makes it virtually impossible for users to keep pace with innovation. The price and limited user-friendliness are a further obstacle. It is not possible at this stage to indicate how and at what speed the changes will take place. High exponential growth figures in the early stages of a new development result in modest growth in an absolute sense. The growth figures in the ICT sector are, however, so high that their continuation after the initial phase could result in a rapid, apparently abrupt turnaround. Even though it is not possible to provide a precise indication at this stage of the effects of the shrinking importance of locality and distance it is clear that ICT has implications for society now and in the future.

2.5 ICT: new impulse for increases and decreases in scale

However unclear it may be to what extent and in what areas ICT will penetrate society, there is every likelihood that the internationalization of social intercourse will receive an additional boost from the ongoing application of ICT. This expectation relates both to the globalization of economic activity, cultural internationalization and the expansion of international relations. In addition ICT is expected to increase the importance of the local scale. These are two opposite movements that will diminish the importance of the nation-state as a scale of operation. We shall first examine how ICT fosters internationalization.

In the field of economic activity, the application of ICT contributes in the first place towards a reduction in transport costs, thus stimulating international trade (however much this may sometimes be confined to certain regions). Physical transportation is also affected by ICT in other ways. ICT is an important facilitating technology for the transport sector. The aforementioned shift towards the transportation of parts and semi-manufactures has for example been made possible primarily on account of the logistics support provided by ICT. ICT can also make an important contribution towards the better utilization of means of transport and transshipment points. Secondly ICT contributes towards the shortening of production cycles, meaning that research costs have to be earned back more rapidly. Developments such as concurrent engineering can substantially reduce the time-to-market for new products and designs. Entrepreneurs are however obliged to increase the size of their markets and also to explore marketing opportunities abroad. In addition, of course, there is a trend of rising research costs.¹⁴ Thirdly, ICT has given an enormous impulse to

¹⁴] Organisation for Economic Co-operation and Development, *Technology and the Economy, The Key Relationships*; Paris, OECD, 1992.

the globalization of financial markets. It is becoming ever simpler to shift capital around the globe, although the liberalization of capital markets has naturally helped in this regard as well. Fourthly the application of ICT supports ongoing changes in the organization of production. Dematerialization and the greater opportunities for relocation are resulting in the geographical relocation of production activities. The information and communication networks increasingly form the backbone around which economic activity is organized. In this regard the development of the information structure invites new forms of economic organization.

The conventional vision of the internationalization of economic activity was based around an integrated, hierarchically organized enterprise with a headquarters and various divisions for product development, production and marketing. The dominant communication direction was top-down. This organizational model of the classic multinational company contrasts with the organization models of the network organization and the virtual organization as have been evolving in recent decades, thanks in part to ICT.

The network organization is characterized by a congeries of independent businesses grouped around a core company, for example as suppliers. Communication is two-way, partly because the responsibility for the joint end-product is spread. Information networks are applied among other things at the product development stage, where the simultaneous input from various organizations can generate advantages in terms of time and cost. Another application concerns the streamlining of the work flow between the various participating businesses. In the network organization the production chain is split up into various processes each of which takes place within separate firms. In certain branches of industry it is customary for the various steps in the production chain to be geographically spread as well. On account of the shrinking importance of distance and national borders and the possibilities offered by ICT, various forms of international alliances have become established, thus supporting the emergence of network organizations.

The virtual organization is based around opportunistic co-operative links. The existence of global information networks as it were invites the temporary coalescence of efforts by various geographically spread parties in order to achieve a particular goal. It may be that there is a fixed initiator, who undertakes the co-ordinating tasks. It is also possible for the initiative to arise more accidentally. Upon completion of the project the parties go their separate ways, later re-emerging in groups of shifting composition. Such a form of market organization is for example customary in a highly fragmented industry such as construction. At domestic level this sector is generally organized around changing configurations of contractors and subcontractors. More international configurations arise for organizations primarily concerned with the production of product and market know-how, combined where appropriate with simple production work. Both the knowledge production and the physical production of the virtual organization are characterized by a large measure of international mobility. The existence of an advanced information structure is indispensable for the functioning of the virtual organization.

We may conclude that ICT plays a crucial role in these changes in the organization of economic activity. Many a domestic and multinational company is gradually changing into a network organization or even a virtual organization. This reorganization of activity in turn provides a substantial stimulus for international economic activity. The shift from a supply economy to a demand economy contributes towards this development. The end-products are preferably assembled in close proximity to the customer and in accordance with the latter's wishes.

Finally, the extent to which ICT contributes towards the internationalization of social activity is evident from the fact that with the intensification of international communications, not least through new communication networks such as the Internet, consumers are able to make use of foreign services comparatively straightforwardly. In addition this means that foreign producers are able to offer their services in the domestic market equally as straightforwardly, particularly when it comes to information products.

Similarly in the field of culture ICT has significantly boosted the process of internationalization that was already under way. ICT is leading to the further opening of borders. Citizens are coming into contact with the cultures of other countries with ever increasing ease and this development has by no means run its course. In a short space of time television programmes throughout the western world have begun to resemble one another. The Internet enables contacts to be established world-wide and information to be disseminated and collected globally. Norms and values are being exchanged world-wide. At the same time the technology provides the ability to contact 'like-minded people' world-wide. New possibilities of identification, including ones beyond national borders, are arising.

This development does not mean that cultural differences are being rubbed out internationally with each country's own culture having an equal chance. In the first place the cultures of certain countries (especially the United States) have the upper hand in the globalization of culture. The Internet, for example, is to a larger extent based around American norms and values. Other cultures come into their own much less. This does not detract from the fact that the cultural differences between many countries have shrunk and will become much smaller still. This certainly applies to the norms and values underlying government policy. Secondly the international homogenization of cultures has been accompanied by a process of greater differentiation at international level. Cultural differences between 'classes' and groups sometimes appear greater nowadays than cultural differences between countries. Such a fragmentation of the culture into many subcultures is certainly not declining as a result of ICT and is even being stimulated by it. Differentiation of this kind is, however, steadily less tied to national borders, however much morals and habits may remain national and local in nature. Thirdly, familiarization is not the same thing as being favoured. The cultural openness of today's world makes some year for the cultural identity of the nation-state. In this regard Guéhenno notes that nationalism at the end of the 20th century generally arises from defensive impulses, as a sign of introversion and fear of the world at large.¹⁵

Finally, ICT is indirectly promoting international co-operation through the globalization of economic activity and the culture. The internationalization of economic activity is forcing states to work more closely together if they are to preserve their capacity to act. The homogenization of norms and values facilitates such a development.

Internationalization and localization

ICT is not just providing additional impulses for the process of internationalization; the latter is also associated with contrary movements, as noted in the analysis above. On the one hand the same clothes are being worn in the same way all over the world, while on the other there is a fear of loss of separate identity. The local scale is also gradually becoming more important for ICT. This applies to both the economy and to the culture.

^{15]} Jean-Marie Guéhenno, *La Fin de la Démocratie*; Paris, Flammarion, 1993.

The advent of the network economy, to which ICT contributes so much, is also coupled with the search for a new local scale.¹⁶ ICT and the network economy are enabling new business establishment patterns, in which not just economic but also cultural factors play a major role. Even in the digitized economy face-to-face contact is expected to remain highly important (if only for the time being). On top of this the significance of local services is not declining in the network economy but is if anything increasing. As the (network) economy finds that it can get by with fewer jobs, new opportunities for labour-intensive support are arising in the immediate living environment.

The new possibilities for the differentiation of culture are also contributing towards new patterns of social interaction. In the first place ICT is likely to support the advent of new, small international communities, as new possibilities for identification are arising. Proximity is being provided by the new technology. Where proximity used to be the determinant factor for the creation of local communities, accessibility nowadays offers new opportunities for (virtual) local communities. Secondly, the importance of the small community may be strengthened as a response to the far-reaching process of internationalization. One response is to fall back on the special features of the State, but it is also conceivable that the special nature of the individual group will be underscored more firmly.

From the viewpoint of the nation-state, both developments – internationalization and the new forms of ‘localization’ – are highly comparable in one respect: the significance of the national scale is becoming less dominant in social intercourse. Seen from the vantage point of the nation-state we have therefore two movements, a centrifugal one extending to a larger scale and a centripetal one in which the scale is contracting. This development will certainly have consequences in due course for the nation-state as an institution and a normative paradigm. This however is to anticipate the question as to the consequences that ICT-stimulated developments in society could have for the nation-state’s capacity to act, which forms the subject of the next section.

2.6 Potential implications for the nation-state

The developments set in motion by ICT could radically alter the environment in which the nation-state operates. The remainder of this chapter concerns the consequences that such changes could have for the nation’s capacity to act. The discussion takes the form of hypotheses. To begin with it is assumed that if the environment crystallizes out less at the scale of the nation-state and also becomes more volatile, the nation-states’ capacity to act could be sharply eroded. At the same time states might seek to offset that loss through closer co-operation. A number of possible consequences of ICT are examined below: ‘avoidance’, ‘evasion’ and ‘leakage’.¹⁷

As a result of the ongoing internationalization of the production structure and financial markets, it is becoming easier for economic actors to ‘deposit’ their activities where this is commercially the most advantageous, bearing in mind the differing policies in the various states. In this way these actors are able to avoid national policy more readily. This is not a matter of ‘evasion’, i.e. acting at variance with the law. Businesses simply relocate their activities in order to avoid the policies of the country of origin. Although ‘moral’ factors might initially inhibit such behaviour, the norms in question will shift over time. As avoidance behaviour becomes more general it will become more accepted

^{16]} See also M. Castells, *The Rise of the Network Society*; Oxford, Blackwell, 1995.

^{17]} Also see: P.H.A. Frissen, *De virtuele staat. Politiek, bestuur, technologie: een postmodern verhaal* (The virtual State. Politics, government and technology: a postmodern story); Academic Service, 1996.

and greater numbers of economic actors will avoid disagreeable government regulations. Needless to say this will harm the effectiveness of government policy and could reduce the revenues of the states in question. The converse can also happen. As states seek to implement 'beneficial' policies on behalf of the 'domestic' market, actors from elsewhere will also benefit from those advantages, so that the hoped for boosts leak away.

In themselves these are not new phenomena. ICT is, however, making it possible for a greater number of actors to relocate activity more simply and quickly than had been the case until very recently. Small and medium-sized businesses are also able to internationalize, thus further undermining the effectiveness of 'national' economic instruments. A national government can, for example, still make agreements with a limited number of multinational companies, thus creating a platform for the preservation of national measures; examples include rulings concerning future tax regimes. If ICT permits a much larger number of companies to set up activities elsewhere, it is no longer feasible, however, that these companies receive customized treatment. Even if solutions could be found to the issue of localizability, the mass scale of non-place-bound activities could lead in practice to feasibility and enforceability problems that would ultimately undermine the capacity to act of the nation-state.

The finding that national policy is losing effectiveness as a result of 'avoidance and leakage' naturally provides an important impulse for more far-reaching forms of international co-operation, as spectacularly illustrated in France upon the commencement of Mitterrand's presidency: a 'socialist' economic policy, with an ambitious programme of nationalization, rapidly foundered because economic actors, savers and investors instantly took to their heels, with dramatic consequences for the French franc. In Europe, as is well known, market integration prompts supranational policy integration, under which the member states pool their sovereignty in European bodies in a number of fields, subsequently implementing (or being required to do so) the European legislation and regulations in their territory. In order to arrive at a collective policy, countries will of course sometimes be required to moderate their own policy preferences. Internationally shared attitudes, norms and values assume greater significance in relation to (specific) national attitudes, norms and values. In this way there is a certain international homogenization of norms and values, in which certain states play a greater part than others.

One problem with international co-operation in general and the implementation of an integrated policy in particular is that as long as this is not 'complete', there will continue to be gaps in the desired capacity to act. The enforcement of the legislation extending over the territory of a number of states will also leave something to be desired. In practice internationalization can also result in national ambitions being moderated and brought into line with the changing environment.

Deterritorialization as the ultimate form of internationalization

Internationalization is as old as the nation-state and distance has been shrinking for centuries. In itself there is therefore no reason to speak of a break in the trend. This changes, however, with the death of distance due to ICT. Actions have an effect on the territory of the one nation-state, while the actor finds itself ('at home') on the territory of another nation-state. Thus actions apparently take place in multiple states simultaneously. If sovereignty entails a monopoly to impose rules within territorial borders, this assumes a lack of ambiguity as to the territory within which that action is performed and the party within that territory who can be held to account as a result. It therefore presupposes a close geographical link between the actor, action and consequence.

If this link is lost as a result of the application of ICT, this may be referred to as deterritorialization. This term concerns a far-reaching form of internationalization which arises if human activities or interactions between people can no longer be unambiguously ascribed to a specific and appropriate legal regime. Evidently, there is a close relationship between deterritorialization and dematerialization: precisely on account of dematerialization distance is overcome and it becomes more difficult to ascribe activities and interactions unambiguously to the territory of a particular state.

In theoretical terms, the unambiguous assignment of activities and interactions to the territory of a particular state is not a problem in many forms of internationalization, but the volatility and especially the mass nature of international traffic do constitute practical problems. If there is no longer a close link between the actor, action and consequence, ascription is both a practical problem and a problem in principle. Deterritorialization (further) underlines national sovereignty. The fact that the parties concerned may be localizable themselves does not detract from this problem as long as legislation and government regulations are so clearly based on the principle of territoriality.

Reduced capacity to act, reduced requirement

The requirement for government policy is constantly changing. Internationalization can change the policy environment to such an extent that less government intervention is required in order to achieve the same policy goals. There is likely to be less need to strengthen market forces by (and within) nation-states if open borders are already improving the operation of the market. The requirement for government intervention can also decline because policy goals are changing. Internationalization can for example result in the adaptation of policy in line with gradually shared international preferences.

Finally the nation-state may lose significance as an institution as a result of the two-sided process of increasing and decreasing scales. If citizens on the one hand identify to a greater extent with the international level and on the other also more with the local level, the declining capacity to act of the nation-state can no longer be treated just as a 'problem'. Particularly for this reason it is better to speak of a transformation than of a decline of the nation-state. Whether the increasing importance of the local level within the state will result in the strengthening of the national capacity to act is an open question. New forms of decreases in scale appear to a significant extent to be linked to new forms of increases in scale, making it difficult to draw up a net balance sheet.

2.7 The Internet as a case in point

Initially the Internet was an electronic network linking up researchers in various research institutes, inspired by defensive purposes of the US administration. Gradually the networks of many universities all over the world were linked up. This linkage made it possible for messages to be sent swiftly to colleague researchers elsewhere and to exchange data. Above all the Internet was primarily concerned at this stage with electronic mail and file transfer. Gradually, however, the Internet saw a shift. With the development of the World Wide Web, on which everyone can offer information on their own web sites, the search function was developed within the Internet. It soon became possible to place orders on the Internet (i.e. electronic commerce). It is therefore not surprising that the net has gained enormously in popularity since 1990. At present there are nearly 100 million connections world-wide; at the start of the next century 400 million businesses and households could be on-line.

As a public network the Internet has generated a new public domain. The net is no longer a specialist permanent telephone link between universities but has become a market for demanders and suppliers all over the world. In many respects this international network answers to its own 'laws'. Standard protocols used all over the world have for example been drawn up to enable computers to communicate with one another. No government played a regulatory role in this regard; the laws of the Internet are to date an interesting example of self-regulation.

From the point at which the Internet may be characterized as a public domain, however, the fact that it establishes its own laws has no longer gone uncontested. During the rapid expansion of the Internet the government has been confronted with such questions as:

- How is copyright handled under the Internet? How can copyright be controlled on the Internet if the recipient of texts can be localized only by means of his or her e-mail address, which is not a geographical address?
- How can offences on the net be countered (e.g. racial utterances, other forms of discrimination and child pornography) and is it possible to do so without severely limiting freedom of speech?
- How can the privacy of Internet users be safeguarded?
- And more generally: how should the market on the Internet be regulated, in the same way that the government is accustomed to regulate other markets?

These are familiar questions in a new environment. It is possible that the Internet itself will find a response. There are already numerous examples of self-regulation on the Internet. Others consider that the government should extend the responsibilities it accepts in 'normal' social intercourse to the Internet. This would not however be straightforward since the usual forms of government regulation cannot be applied as they stand.¹⁸

*Regulation of the market on the Internet versus regulation in the physical world*¹⁹

Regulation of the market on the Internet runs into two fundamental problems. In the first place the Internet is world-wide; it does not respect geographical borders and is accessible to anyone with a computer, the necessary software and a telephone line. The borders or entry points to the Internet as a public domain are formed by the monitor of the computer and the password with which access to the Internet is obtained. In this way the Internet is not a geographical but a virtual space. Secondly the services provided by the Internet are dematerialized. No goods are transported and there are not even any physical contracts. Each interaction is transformed into bits and is converted by the recipient into a comprehensible message or an economic good. In other words, Internet transmissions are highly volatile.

In a world in which national governmental power is linked to a specific territory the Internet is a new phenomenon. Being a virtual space it cannot be subdivided along geographical lines. According to Johnson and Post there is in fact little point in trying to do so since the activities on the Internet do not lend themselves to such subdivision on account of their volatility. If two businesses conclude a contract on the Internet, they are in principle at liberty to select whatever type of contract law they wish, for instance by using service-providers in any part of the world. Needless to say the inclination to withdraw from coercive law will be the greatest.

^{18]} J.P.H. Donner, *Grenzeloos recht (Law without borders)*; report to the Calvinist Lawyers Association, Zwolle, W.E.J. Tjeenk Willink, 1997.

^{19]} The remarks below are based among other things on David R. Johnson and David G. Post, *Law and Borders - The Rise of Law in Cyberspace*; Cyberspace Law Institute, <http://www.cli.org>, 1996.

For parties on the Internet the lines of communication used for their contacts or countries through which these pass, or the satellite in question used, are not a matter of concern. The Internet makes it possible to send messages via all sorts of countries without anyone's knowledge, including that of the messengers. The interaction (or transaction) takes place somewhere. They do not even need to know in which country the other party is established in order to achieve interaction. For the latter the Internet address is sufficient. Communication does demand that the parties can be localized, but we are concerned here with location in a virtual space, consisting of the addresses of machines. The system is indifferent to the physical location of those machines.

If actors, unlike activities, can be linked to a particular territory, the exercise of government power nevertheless remains problematical. Both practical problems and problems of principle arise. Even in cases where it would be possible to localize actors physically on the Internet (behind their screens), actors can reduce the possibility of doing so by choosing a service-provider in a different country and by engaging a number of other providers in different countries (including freeports) as intermediaries. Those wishing to evade the government on the Internet have a good chance of doing so in this way, particularly since the mass nature of the Internet traffic is a further complication for the government. And which government will seek to track down offenders on the Internet if it is not totally clear in advance that these are its own 'subjects'?

Even where interactions on the Internet end up in physical form, control is not always straightforward. How is the government to establish that I have undertaken a certain action on the Internet, the results of which exist only on the hard disk of my computer? And even if the interaction does crystallize out in the form of concrete physical products (e.g. as a result of transactions on the net), the actual national borders are not controlled in such a way that each physical product can be recognized as such.

However easy or difficult it may be to locate actors on the Internet and the consequences of their interactions physically, the fundamental problem is of a different nature. The judicial system of nation-states generally presupposes that the actor, action and consequence come under the jurisdiction of a single country, as they are in close proximity to one another. In the case of interactions on the Internet this precondition is not necessarily fulfilled and in many cases it is therefore not immediately clear in which jurisdiction a particular action has been performed. Precisely for this reason it is particularly difficult to delimit national legal regimes on the Internet and thus national borders lose their meaning. In the physical world, matters are different. Here, borders do retain an important social significance (even though it is often possible to drive across them without passport controls). National borders have a symbolic importance and at the same time constitute the boundaries of the judicial system. Two aspects may be distinguished in this regard. In the first place laws have no legal force on the other side of the border, where a different jurisdiction prevails, and secondly the law applies to everyone living within the territorial boundaries (cf. Chapter 3).

Furthermore, the force of law and government power are linked in modern society to legitimacy. Laws are adopted because they are drawn up in conjunction with the parties concerned. Laws are not just imposed but only come into force once a certain consensus has been reached in society concerning the nature and content of the regulations in question. It is the society within the same territory that must concur with the legislation. In this regard the notion of proximity is highly important: we regulate the conduct of those about us as we could otherwise be troubled by them. We regulate the noise nuisance of aircraft within our territory or the pub on the corner because otherwise we within our

territory could find ourselves inconvenienced. We have no inclination to regulate the noise nuisance or speed limit on roads in Brazil since these do not concern us: the conduct in a different territory does not in principle affect us (although internationalization has steadily reduced the validity of that principle). In the same way regulation has been left to local government where the behaviour in question has undesirable effects for immediate neighbours only.

While legislation and territorial boundaries are therefore interlinked in various ways in the physical world, this does not apply on the Internet. Anyone using the Internet will not encounter or even notice national borders. Geographical borders have lost their significance. Rules have lost their legal force and there is no government power to enforce the rules. National governments also lack the legitimacy to intervene on the Internet, which is by definition global. Finally the concept of 'proximity' loses its significance: people's actions on the Internet do not by definition have their most marked effect in the immediate vicinity. The whole world as it were draws near. In contrast to normal government regulation, the urgency to regulate human behaviour in direct geographical proximity is lacking on the Internet.

Other forms of regulation for the Internet

Nevertheless government regulation of the Internet is still possible. It has simply been noted that the regulation of the Internet with the existing legal concepts will run into problems. For, the law as it stands is to a significant extent based on the principle of territoriality, whereas activities on the Internet cannot be sheeted home to a particular territory. The basic problem does not just concern the nation-state but also international co-operation, in that the international regulation of joint territories is also based on the assumption that activities can be attributed to a particular territory.

It may well be that new legal concepts could fill this gap. National governments can for example impose obligations, either singly or together with states, on citizens using the Internet. We could draw a comparison with private land displaying a 'no trespassing' sign, while also stating that the prohibition applies only to those who fail to abide by the (non-legally valid) road signs on the site. At any event solutions will in particular need to be sought at the point where the virtual world of the Internet and the physical world of government regulations interface. The enforceability of such joint or national regulation of the Internet will, however, be a major problem. In theory it may be possible in due course to check every piece of information crossing a country's geographical borders. Quite apart from the ability to circumvent this by means of data encryption, any government seeking to pursue such policies would necessarily find itself at a disadvantage in global commerce. No country will readily make such a choice. At the same time, however, what is untenable need not necessarily be indispensable. Various areas of the Internet have their own self-regulation. Even the observance of these rules is often effectively regulated.

2.8 Hypothesis for further research

The Internet is presented here as a metaphor for the possibilities of deterritorialization offered by ICT. Allowance does however need to be made for breakthroughs by ICT in all sorts of areas of social interaction. Particularly important in this regard are the rapidly growing possibilities for real time interaction, where the actor, action and consequence are not in close physical proximity. In particular, it is difficult to resolve the question as to 'whose jurisdiction does the action come under?' In this way ICT can have significant consequences for the capacity of nation-states to act. The advent of commercial transmitters with what was for a long time an 'intangible' international status provides an indication as to how radical such developments can be.

Other developments may be anticipated in the near future too that will depend in part on the extent to which citizens and businesses seek new possibilities. National preferences may initially have an inhibiting effect, but these can quickly change as certain possibilities become more exploited. If health insurance can be taken out cheaply and easily on the Internet with a reputable company operating through a provider in a different country, it will not take long before such insurance is generally accepted. If it is possible to download music from the Internet onto one's own CD, the question as to whether and where VAT has been paid will rapidly be of little concern.

This therefore brings us in this exploratory chapter to the hypothesis that given the loss of jurisdiction, ICT will have consequences for the nation-state's capacity to act. Should this arise, it will face governments with policy problems of a new order. Conventional policy problems arise from changes in the social context, whereas the nation-state may be regarded as a constant. There are numerous such examples in the field of policy development: policies are continually adapted in order to respond to new social conditions. The nation-state as such is not at issue here.

As a result of ICT, however, the signs are that the nation-state (and its capacity to act) are at issue. The nation-state can no longer be regarded as a constant and a fundamental policy reaction is at issue, i.e. not just policy but the State itself has to change. It is difficult for governments to be sufficiently conscious of this. The ingrained reaction is not one of the transformation of state institutions but of responding to changes in terms of an unchanging nation-state.

The following chapters examine the proposition that the further application of ICT will have consequences for the nation-state's capacity to act. Chapter 3 tests the assumption in institutional terms. The question at stake there concerns the extent to which the jurisdiction of nation-states is conceptually based on the principle of territoriality and the extent to which this is in fact required. Chapter 4 tests the assumption in a number of policy areas: to what extent (and in what sense) does and will ICT contribute to the internationalization of social intercourse and in what sense will this affect the nation-state's capacity to act?

3.1 Introduction

The assumption that the penetration of ICT in society will have consequences for the nation-state's capacity to act is based in part on the observation that the State and territory are closely interwoven. This aspect is first considered in more detail in this chapter (section 3.2). The finding that the judicial authority of the Dutch national state is indeed closely linked to its territory – if less so given certain recent developments – naturally leads to the question as to the consequences of ICT for governmental and legal institutions.¹ These are examined in section 3.3, after which section 3.4 discusses the strategy that might be pursued in response to the changes.

3.2 Historical developments

3.2.1 The link between territory, the State and justice as a historical factor

By way of logical extension to the previous chapter, the spotlight here is trained on one aspect, namely territoriality, as a joint historical framework for the development of justice and the State individually, as a framework for the transformation of the State into a legal institution and as a framework for the emergence of state policy functions in a broad social field.

The territorial dimension has from the outset played a prominent part in the development of West European law in various ways. Traditional Roman law was primarily concerned with the law of material ownership and property. Whereas before then the law had formed an integral element of the religious system concerned with individuals, Roman law evolved into an autonomous system of norms based closely around land rights and land ownership. From that time on Western law was to a large extent based on the lack of space.² From Roman times onwards territory was the determinant factor for the legal regime: 'quidquid est in territorio, etiam est de imperio territorii'.

This territorial delimitation also applies to the organization of public administration. The modern state has arisen out of the gradual consolidation of political and administrative organizations in a certain area.³ Control over a certain geographical area permitted the actual exercise of authority and the mobilization of means of cohesion. This applies to both the previous feudalisms and the free cities. Even though the nature of the development of law differed fundamentally in both jurisdictions (individual freedom and democracy gained ever increasing weight especially in the cities), the area of practical authority and legal influence were in both cases to a large extent territorially determined. The law, administration and government traditionally rest virtually across the board on the implicit coercive power of territory and a materially tangible reality.

^{1]} Institutions in a general sense are interpreted here as mechanisms for social regulation that give expression to normative values and conceptions of reality in a specific factual context. Governmental and legal institutions are a sub-category of that phenomenon, with the special feature that the regulation imposed by those institutions can be enforced without the consent of those concerned in the particular case. In other words these are institutions with binding powers of authority, meaning that they play a tangible part in the social process.

^{2]} Jean-Marie Guéhenno, *La Fin de la Démocratie*; Paris, Flammarion, 1993; Dutch translation, Lannoo, Tiel, 1994, pp. 16 and 20.

^{3]} J.P.H. Donner, *Grenzeloos recht* (Law without borders); report to the Calvinist Lawyers Association, Zwolle, W.E.J. Tjeenk Willink, 1997, p. 11.

Even after the ideas of Montesquieu and Rousseau took practical hold after the French Revolution and birth was given to the modern state, we find that the character and mutual relationships between the State and law change significantly but that the territorial determination of state authority and the legal sphere does not. If anything the latter is strengthened by the increasing interdependence between law on the one side and the State on the other.⁴ The State is increasingly equated with the functions of development of the law, implementation of legislation and the administration of justice. The national legislation developed by the State is regarded as the pre-eminent source of law, which the State is able to amend in line with social requirements. Rousseau's idea of the sovereignty of the people, in particular, meant that the State was regarded even more predominantly as the main source of law as the law can only find its legitimation in the will of a national community and because democracy is the appropriate institution in that vision. Under this approach the law is interpreted as the regulation desired by the community itself, applying to and enforced for all citizens alike. In the case of all these factors – the idea of a national community, the exclusive jurisdiction of the government, and the geographical scope and enforceability of the law – territorial classifications acted as a common structuring principle, thereby also permitting the desired congruence between these various factors.

The ever closer links between the territorial states and law in the course of the previous and present century were marked by two-way traffic: the State was not just seen as the most important source and enforcer of the law but the actions of the State itself also had to abide by the requirements of a law. This was all the more important because the West European state also began to fulfil important economic and socio-cultural functions from the start of the nineteenth century. In an economic sense it permitted the development of national markets: the legislation laid down by the State in the form of general rules bearing equally on all citizens resulted in an extension of the market. The trade barriers from feudal times taking the form of privileges for certain regions or certain citizens were eliminated. Where the economic dynamics called for transfrontier trading activity, the joint action of the nation-states, in the form of trade agreements, provided the necessary legal framework. This framework found its complement in heightened government attention to the material infrastructure.

In a socio-cultural sense these states achieved a certain cultural integration and nation-building within their territories by means of language, education and media policy, while also providing freedom for the emancipation of previously suppressed population groups based on the principles of liberty and democracy.

3.2.2 The territory and current Dutch positive law and policy

General rules

In the first place Article 1 of the Dutch Constitution lays down equal treatment in equal cases for all people in the Netherlands. The territoriality principle is accordingly reflected in the formulation of one of the most important basic social rights: only Dutch people residing in the country have an entitlement to government assistance based under law (Art. 20 (3) Const).

Criminal law

Criminal law is particularly relevant in a number of respects. In the first place, the right to punish is the most intrusive form in which sovereignty is exercised. In addition the localization of the offence is highly important under

⁴ Ibid., p. 13.

Dutch criminal law for such questions as to which law applies, whether extradition is possible and whether the judicial system has jurisdiction and the power to prosecute. As in the case of the General Provisions (Kingdom Legislation) Act, the territorial principle is established as a general principle in the Criminal Code, in relation to determining both the relevant legislation and the jurisdiction, but a limited number of other principles also apply.

The main rule is firmly laid down in Article 2: Dutch criminal law applies to any party guilty of any criminal offence in the Netherlands. The territorial principle is a characteristic feature in most West European countries and is bound up with international law principles of authority over the territory of and the independence and equality between sovereign states.⁵ The right of the State to prosecute offences committed in its territory under its own law, irrespective of the nationality of the offender and the interests which have been injured, was recognized under international law as a fundamental right as early as the 1920s, while leaving the State a wide policy margin (the Lotus case).⁶

The exceptions holding that other principles apply for the determination of the jurisdiction and the applicability of Dutch criminal law for certain offences are as follows:

- The active personality principle holds that the link between Dutch criminal law and the Dutch citizen continues to apply even if the latter is outside Dutch territory. In so far as relevant here, Article 5 distinguishes two categories. The first concerns the offences that affect specifically Dutch interests: these include offences against the security of the State, helping aliens to remain illegally in the Netherlands for pecuniary gain, and also bigamy. The question as to whether the offence is also punishable in the country in which it was committed is irrelevant. The second category concerns acts committed by Dutch nationals that are punishable both in the country in question and the Netherlands as a serious offence. Apart from the earlier inability to extradite citizens, the most important reasons for this principle, are international solidarity and the interest the State has in its citizens behaving respectably abroad.
- The passive personality principle in Article 4 does not take Dutch citizenship as its point of departure but the protection of specific Dutch interests and the legal order, irrespective as to by whom and where they are at risk of being undermined. This principle is therefore frequently referred to as the protection principle or the principle of the violated legal order. Thus, on the basis of this principle, the scope of Dutch criminal law is extended under Article 4 to foreigners who commit offences abroad against the security of the Dutch state, such as espionage abroad and the violation of Dutch state secrets, the counterfeiting of Dutch stamps or the assassination of Dutch diplomats.
- Finally a number of offences are subject to the universality principle. Who commits the offence, where he or she does so and whatever interests are damaged are no longer of account in determining jurisdiction. These are offences affecting legal interests which all civilized states have in common. They include offences such as forgery, piracy or trafficking in hard drugs.

⁵] Jescheck, cited in J. R Emmelink, *Mr. D. Hazewinkel-Suinga's Inleiding tot de studie van het Nederlandse strafrecht* (Mr. D. Hazewinkel-Suinga's Introduction to the study of Dutch criminal law); Gouda, Quint, 1996, 15th impression, p. 511.

⁶] Not that the territoriality principle is clear-cut: the measures employed in order to determine location have very different results. Should one operate on the basis of the place where the offender acted actively or passively, the place where the instrument had its effect or the place where the consequence became manifest? The latter criterion, in particular, places the territoriality principle under severe pressure. The legislation or jurisprudence of most West European countries apply the 'ubiquity' principle on this point: the various measures are in principle equally relevant and a choice also needs to be made in connection with the requirements of the specific case (R Emmelink, *op. cit.*, p. 260).

This principle has been extended more widely again under the fairly recent Article 4a, under which Dutch criminal law applies to any person against whom criminal prosecution by the Netherlands has been taken over from a foreign state under a treaty giving the Netherlands that power. The EU and the Benelux, in particular, have treaties to this effect.

Among other things the specific position of the territoriality principle in criminal law emerges from international law, one of the principles of which is recognition of the independent right of a state to exercise criminal jurisdiction within its own territory. The legal question concerns the delimitation of the State's authority. The other, extraterritorial, principles are not self-evident and in many cases call for separate judicial legitimation, such as a special treaty. Furthermore the fact that a State gives itself extraterritorial legal powers within the limits of international law does not automatically mean that the State may also proceed to practical action, such as arresting people on another country's soil. The authority to do so must in turn be based on a separate treaty, as happened in Europe for example under the Schengen Agreement.

International private law

The territoriality principle has not played the same dominant role here as elsewhere. The territorial principle was only dominant in certain legal doctrines in the distant past: in sixteenth century French law and, to a much lesser extent, Dutch seventeenth century law. Other principles such as the nationalities principle, the autonomy of the parties in the choice of legal system and the principle of *lex fori* as well as the principle of the most favourable law have determined international private law to a much greater extent in Western Europe over the course of time.

The territoriality principle has, however, consistently played a major role in the law of tort, as the civil counterpart to criminal law, which is so closely bound to this principle. In recent years, however, this principle has been much less strictly applied in the law of tort. Technological developments are making it increasingly difficult to determine the *locus delicti* and questions of the settlement of claims with which this civil law is concerned are increasingly being divorced from the question of personal guilt, which is central in criminal law.⁷

Public administration and administrative law

In the first place much public administration and law is subject to the territoriality principle by virtue of the nature of the policy object. An example concerns spatial policy and law: making material investments on the one hand and regulation of the spatial behaviour of citizens on the other. Perhaps more important here is the broad social and cultural field. The state is not primarily regulating the behaviour of citizens but taking practical measures, putting an infrastructure in place and providing public facilities. The policy context here is traditionally national and in many cases also regionally or locally determined. Thus social policy was from its origins until the middle of this century purely national policy, aimed at existing labour relations in the Netherlands and derivative relationships.⁸ The same may be said of education, health and cultural policy, which have traditionally been inwardly oriented. Compared with other sectors the international orientation here is fairly recent. Still now the nation-states seek to preserve their policy autonomy and the special features of their system of provision in these fields in the European context.

⁷ L. Strikwerda, *Inleiding tot het Nederlandse Internationale Privaatrecht* (Introduction to Dutch International Private Law); Groningen, Wolters Noordhoff, 1995, 4th edition, p. 198 ff.

⁸ M. G. Rood, *Introductie in het sociale recht* (Introduction to Social Law); Arnhem, Gouda, Quint, 1996, 6th edition, p. 285.

European and other supranational law

The European Community as it came into being after the Second World War may be regarded as a response to the 'classical internationalization' as described in the previous chapter. In itself the EU does not breach the territorial determination of administration and law. In practice European unification has meant the linkage of law, administration and territory at a higher level of scale by means of direct harmonization (and generally also administrative co-ordination). The European internal market provides room for transnational developments, first and foremost in the economic field, on the implicit assumption that this economy will in large measure remain territorially determined at European level. The administrative and legal institutions of the EU are fashioned accordingly. Not only is their jurisdiction territorially determined but the relationship with the national institutions is hierarchically organized on the basis of (above all) territorial criteria, in which regard public administration and the law applying to the higher territorial level take precedence.

In one significant area recent developments at European level do, however, involve a certain breaching of the territorial principle, with European law providing opportunities for the extra territorial operation of national law, albeit expressly within the European territorial limits.

3.2.3 Recent administrative and legal developments at international level

General

In a general sense there are two significant developments. By way of supplementation to the direct harmonization and standardization of law noted above, the first of these is a legal development towards indirect harmonization consistent with national legislation. On the basis of the principle that the national rules and solutions are in principle equivalent, this development is resulting in the co-ordination, mutual recognition and harmonization of such national legislation, as noted at the end of section 3.2.2. Products and services produced in the country of origin and placed on the market in accordance with the national laws in question must, within the conditions laid down for each subject or at European level, also be admitted in another country. An example concerns the mutual recognition of national education certificates which provide an entitlement to practise professionally. There is no question of any direct European harmonization of education systems. Such European regulations do however imply that the various education systems are brought into relation with one another and start competing with each other, thus providing incentives for spontaneous bottom-up harmonization. Such constructions particularly provide prospects for those policy areas where the own weight of national states and national identities continues to play a major role.⁹ Of particular relevance in our context is that national law obtains extraterritorial effects in this way.

In the second place attention needs to be drawn to the administrative development of a differentiated complex of voluntary co-operation and network formation between the various public and often also private actors at the various supranational levels with respect to specific subjects. ICT provides a major stimulus in this regard.¹⁰ National states are an important participant in this process. The form of co-operation is also differentiated and very much pragmatically determined: there are by no means always formerly binding arrangements. The institutional frameworks within which agreements are

⁹ See: J.P.H. Donner (rapp.), *Europa wat nu?* (Europe what now?); WRR, Preliminary and Background Studies Series V 91, The Hague, Sdu, 1995, pp. 70 ff and p. 95.

¹⁰ Anne-Marie Slaughter, 'The Real New World Order'; *Foreign Affairs*, vol. 76, no. 5, pp. 183-197.

reached can also differ widely. The most important aspect is perhaps that these new transfrontier arrangements largely concern the topics which have traditionally been the preserve of public administration and law. As in the case of the first development mentioned above a process arises of two-way penetration and interweaving of supranational and national policy and legal spheres.

Both developments are of interest in a number of respects. The state remains an active partner and the legal and administrative developments cannot be properly understood within the existing concepts: in particular, clear-cut, territorial hierarchy gives way to more horizontal links. Two well established but recently revitalized principles are at issue here: the comity principle and legal pluralism.

Redefinition of the comity principle

The comity principle has traditionally played a role in international law and the national law of certain states, especially where there were conflicting claims and interests of various national legal systems and jurisdictions. Under the classical principle, each state has the duty in such situations to take into consideration both its own interests and that of the other state and, after a mutual comparison, precedence is given to the legal regime and jurisdiction of the State whose interest is the greatest. In this way room was created for extraterritorial principles, especially the principle of the affected legal order, irrespective of the place where the action in question is taking place.

The more recent concept of positive comity, as advanced for example by the United States, adds a more active dimension to this principle: mutual support of and voluntary co-operation between states and other actors across the borders in order to solve problems perceived as common. Certainly where states reach agreement on results to be achieved jointly in the field of law enforcement, this development may also involve a strengthening of another principle, namely the universality principle. This strengthening need not percolate through into full-scale harmonization of criminal law and law enforcement. What is at issue is that the relevant arrangements are based on a universal consensus concerning the punishability of the behaviour in question and the need to combat them on a co-ordinated basis. It is also in the interest of the states themselves to comply with such agreements, as they will otherwise have difficulty in invoking reciprocity. In that sense self-regulating mechanisms arise that serve to stimulate the observance of the agreements.

Within the EU, transfrontier co-operation has been taken furthest in the tripartite relationship between the member states themselves and with the European Commission, particularly as regards law enforcement. The further extension of such co-operation is not readily compatible with the continuing primacy attached to the autonomy of the member states in the field of regulation and enforcement on the basis of the territoriality principle. Hirsch Ballin and De Moor-Van Vugt ¹¹ accordingly see a clear trend in the international developments in the field of law enforcement towards a growing distance with respect to the physical action and the associated legal fixation on a particular time and location. Legal subjects are instead being legally addressed in terms of their responsibility within processes, irrespective of where these took place.

¹¹ E.M.H. Hirsch Ballin and A.J.C. de Moor-Van Vugt, 'Rechtshandhaving op een grenzeloze markt' (Law enforcement in a market without frontiers) ; in: R.A.J. van Gestel and Ph. Eijlander (red.), *Markt en wet*; Deventer, W. E. J. Tjeenk Willink, 1996, pp. 135-148.

The recent Treaty of Amsterdam appears to confirm this approach. At any event it provides far-reaching new possibilities in this direction.¹² The European Council has been assigned the task of regulating legal co-operation in civil affairs with transfrontier consequences in so far as necessary for the effective functioning of the internal market. Elements of international private law and civil procedural law can in this way form part of Community law. Not just police and legal co-operation will be promoted in the criminal law field; the European Council can also lay down rules in order to ensure that national legislation does not impede co-operation. In addition the Council may lay down rules to prevent jurisdictional disputes between states and, for certain offences, the Council can lay down minimum regulations in relation to the elements of criminal offences. Furthermore the Council draws up conditions under which authorities may act in the field of supervision, investigation and justice on the territory of other member states.

Revival of legal pluralism

Legal pluralism has a long history. With the advent of the modern state this concept has been displaced by that of the national legal entity. The recent internationalization has led to a certain revival of legal pluralism.¹³ A critical factor in modern legal pluralism is the way in which the concept of the legal unit is given practical effect. The legal unit is interpreted here no longer as a monolithic structure in which the various legal spheres are strictly delimited and hierarchically regulated. Legal pluralism is based on a different paradigm for the legal unit: an open construction, in which the various legal spheres interact on a more equal basis and start to refer to each other and in which various configurations of links between the legal spheres are possible, given the specific characteristics of the field in question to be regulated. Under a uniform regime in a monolithic construction, either one or another legal regime will apply. The pluralist concept makes it possible to strike a new balance between unity and differentiation.

Two lines of communication are relevant for the development of pluralism: the relationship between the law of national and supranational public bodies and that between the law of the State and social self-regulation. In the former case the concern is not just with the previously described development of indirect spontaneous harmonization on the basis of the mutual formal recognition of national rules; at least equally as important is the fact that national legislators, administrators and judges, even where formally they remain autonomous, increasingly apply an international frame of reference and incorporate into their decisions comparisons with developments in other countries and at international level.

Consequences

The most vital aspect is perhaps that on the one hand the State loses sovereignty and autonomy and national legislation loses its status as the outstanding legal frame of reference, but that on the other hand the State's capacity to act can be preserved, even in circumstances of far-reaching internationalization and deterritorialization. Under the new public order the nation-state is no longer the spider in the web but does remain an important partner within all sorts of co-operative arrangements.

^{12]} See: J.P.H. Donner, 'De derde pijler en de Amsterdamse doolhof' (The third pillar and the Amsterdam maze); *SEW, Tijdschrift voor Europees en economisch recht*, October 1997, Vol. 45 no. 10, pp. 370-378.

^{13]} K.J.M. Mortelmans, 'De aansluiting van de ontwerp-mededingingswet bij het EG-mededingingsrecht: symbiose en osmose' (The correspondence between the draft competition act and EC competition law: symbiosis and osmosis); in: Van Gestel en Eijlander (red.), *op. cit.*, pp. 79-134.

A number of important limitations and drawbacks concerning this development immediately spring to mind. The room for such new arrangements as referred to in this section is heavily conditioned by the constellation of power, by convergence and divergence in political and economic interests and by cultural factors. This applies to both the topics and the partners qualifying or wishing to do so for co-operation. Voluntary arrangements cannot provide an all-embracing, comprehensive solution.

As in the case of spontaneous self-regulation there is moreover generally no question of factual equality between the co-operating partners. The highly functional nature of the co-operation also leads to a certain fragmentation within the State, as its individual components operate in highly different networks. At the least, democratic accountability within the nation-state for such external functioning calls for new arrangements and structures.

3.3 Consequences of ICT

ICT has highly diverse consequences for administrative and legal institutions. In the first place changes in the 'game' are discussed. The changes in the 'playing field' – the territorial dimension around which this chapter centres – are then examined. Finally, it is seen that not everything changes: some things remain or are even strengthened.

3.3.1 Changes in the game ¹⁴

The nature of the players

If administrative and legal institutions are to work effectively it is essential for there to be clarity as to who is recognised as a player or legal subject; that this legal subject can also be effectively identified; and that there is clarity about the legal subject's responsibilities. The new technological developments produce changes in two areas.

In the first place new players are added. Three developments may be distinguished.

1. The new electronic provision of services is characterized by a tiered provision at various levels, so that there is no longer a clear-cut act of communication. Multiple, new types of providers and intermediaries are arising whose function differs inherently from that of the central controlling bodies in the classical broadcasting model. The assignment of legal responsibility and liability for these kinds of professional activities can no longer take place within the existing system of law, as this is to a large degree a non-comparable new situation of action with its characteristic risks. An example is the loss sustained as a result of the transmission of incorrect information by the provider as a relayer of messages. As in any other sector in which certain professional practitioners (such as doctors) or institutions (such as banks) occupy a key position, a specific regulation of responsibilities for these new kinds of professional activity would appear desirable. At any event this question needs to be posed.¹⁵

¹⁴ See for this section also J.E.J. Prins and R.W. van Kralingen, 'De invloed van informatie- en communicatietechnologie op het recht' (The influence of information and communication technology on the law); in: M.F. Gelok and W.M. de Jong (ed.), *Volatiliseren in de economie*, WRR Preliminary Background Studies Series V98, The Hague, Sdu Publishers, 1997, pp. 105-123.

¹⁵ See in particular: E.J. Dommering, 'Internet: een juridische plaatsbepaling van een nieuw communicatieproces' (Internet: the legal locus of a new communication process); in: Gelok and De Jong (ed.), op. cit., pp. 140-141. Dommering contends that recent jurisprudence illustrates how the dissemination of information on the Internet takes place within a structure where responsibility can no longer be traced. He however also makes clear that a tendency has consequently arisen for each 'innocent' but identifiable link in the distribution chain and identifiable individuals who are prepared to enter into public debate to be tackled with the legal instrument deemed strongest on that occasion.

2. ICT creates the possibility of new actors who exist only in the form of an e-mail address and whose identity need not necessarily correspond with physical characteristics in the 'real' world. Physical organizations will increasingly need to make way for more dynamic virtual organizations. ICT enlarges the possibilities to set up the right organizational constellation for the situation prevailing at that time. The law does not as it stands have the instruments adequately to regulate organizational units that are changing rapidly in terms of size and composition. Persons and businesses can in this way identify themselves in all sorts of ways and act with various 'virtual' identities. In an electronic environment in which various ICT applications make it possible for communication and relationship patterns to change, depending on the activities in question, physical organizations need no longer be the sole form of organization taken by an actor or legal person.
3. The central legal concept of legal act and the associated legal concepts of intent, guilt and error presuppose that legally relevant actions arise only in relation to human activity. The advent of ICT, however, often renders human intervention superfluous. A stock management system can for example order products automatically once the stock figures fall to a certain point. In this new situation the existing legal concepts no longer retain their original significance.

Secondly, the nature of the existing actors changes. This phenomenon also occurs in various ways:

1. Most important is the interactive nature of the new media. The automatic identification of the citizen with the role of consumer and information-recipient in the classical media no longer holds good. The consumer has also become a more active participant and in part also a producer in information flows: he or she can also make selections and combinations of their own.
2. Technological developments have also resulted in a shift in the relative position of power of the various actors. Now that a large volume of information can more effectively than before be collected and processed systematically, rapidly, reliably unobtrusively, i.e. without the knowledge of the party concerned, businesses are able to form a more precise picture of the individual consumer; tele-shopping and loyalty schemes such as Air Miles are familiar examples. The dividing line under the present system of law between personal details and anonymous data is therefore losing its practical significance. ICT provides the possibility of tracing the latter data to personal data. In this situation privacy becomes much more of an important consideration in the entire process of the information chain: how can the citizen retain any control over the way in which others deal with the data they have provided? The traditional question as to the limited data over which the citizen has an absolute right of privacy becomes less important. Here too the development is not clearly to the benefit of certain actors, in that ICT also creates new possibilities for product differentiation, so that the consumer is able to give expression to his or her own specific preferences.

Shifts in the respective positions of power between the various actors do not just relate to privacy. The important legal principle of the compensation of inequality is also at issue here. In the employment relationship, for example, where this principle has traditionally played a major role, ICT provides opportunities for new management-information systems that are used to assess employees' productivity.

3. Finally important shifts are taking place in the scale on which the various actors operate. Until recently it was regarded as axiomatic that physically small organizations also had a limited territorial range. Only a limited number of large multinationals were in a position to select the legal regime that favoured them most. In the new situation, small and medium-sized businesses can also be active world-wide. Existing rules based on the scale of the individual business come under pressure as they were drafted in terms of assumptions that have become steadily less realistic.

The objects or 'marbles' in the game

By objects or 'marbles' is understood here the added – especially informative – value which each individual or collectivity wishes to realize, preserve or expand within the system of social and economic activity. The fact that this game can only be played on the basis of an effective regime of delimited property rights requires no further argument. On this point it is dematerialization, in particular, which is leading to fundamental shifts. As long as the added informative value takes the form of a tangible reality or is linked to some form of tangible manifestation, the regulation of exclusive property is perfectly feasible, as there are objective points of departure for such regulation. This then provides the customary framework for our law of property. Dematerialization, in which such manifestation and linkage disappear and where information and software are supplied by electronic means and are no longer linked to a physical carrier, calls for new kinds of property rules for non-physical goods such as e-mail addresses and domain names on the Internet. In addition dematerialization calls for a review of the existing legal distinction between goods and services and the relevant legal consequences. Dematerialization means that many more results of human activity form part of the services regime. It is however questionable whether the rational or underlying intention behind the regulation of classical services should also apply to services 'new-style'.

Finally dematerialization has consequences for the present regulation of formal requirements and evidentiary value in so far as legal acts no longer take tangible form such as written documents. The conversion of written documents into electronic versions is more than the introduction of a new, legally neutral medium: it creates an inherently different contractual situation, in which current law can no longer provide the same guarantees since the practical assumptions on which the existing rules are based no longer hold good. In the present system of law, for example, the evidentiary value of the notarial deed is limited to the personal observations and activities of the notary, given the presupposition that the notary can in fact establish that all the preconditions have been satisfied. Upon the conversion of the written notarial deed into an electronic variant, the possibility of observation is narrowed down in practice.

The time dimension

In a general sense this concerns the turbulent nature of modern technologies. The process of legal development and certainly that of formal legislation is insufficiently geared to the high rate of turnover of new technologies and the social and legal problems to which these technologies give rise. Furthermore this is not just a matter as to whether the administrative and legal institutions are able to cope with such rapid change. Because the law and administration, as argued in section 3.4.1, must also provide a frame of reference for the longer term it is undesirable for them to 'co-vibrate' with the contextual changes and so end up in a permanent state of flux.

Certainly the sort of administration and law is a differentiating factor in this regard. Forms of administration and law setting out to bring technological and social processes into line with public goals by means of permanent and detailed adjustment will become obsolete more quickly than administration and law that confine themselves to laying down general parameters offering a certain stability in relation to the chain of technologies. Furthermore detailed rules imply a marked classification and categorization of human activity. The technological turbulence in fact results in a variety of new types of human activity that pay little attention to such legal classifications.

More specifically the time dimension arises in respect of the periods now laid down by law, which remain based on old assumptions concerning speed, in which physical distance was a delaying factor. A reduction in the current statutory periods would appear called for in the new situation.

The type of game: the nature of the interaction

A number of changes in the nature of social interaction have already emerged implicitly: the advent of new actors, as a result of ICT, changes in the role of the existing actors and changes in the time dimension alter the nature of the interaction in terms of increased complexity, greater opacity and less automatic reliability when it comes to the identity of the actors.

An aspect not so far referred to may be even more fundamental, as this touches the type of regulatory concepts at issue here: the new communication patterns created by ICT, especially in the form of the Internet, do not presuppose the existence of a central, monitoring authority. The joint communication protocol on which the Internet is based means that computer networks are able to communicate with one another and that each individual user can establish links with any addressable computer domain. The role of intermediaries in the Internet is inherently different from that of the government and broadcasting organizations in the classical system of broadcasting, which have a central monitoring function. By its nature the Internet is a market of individual transactions and not one of movement directed from above.¹⁶

In particular, this decentralised nature places state intervention in a different light. The technological necessity for such intervention which characterised the classical broadcasting model from the inception has lapsed. Now that state intervention has become less axiomatic its normative legitimation has become more important.

3.3.2 Changes in the playing field: the territorial dimension

Section 3.2 brought out the extent to which the territoriality principle is a guiding normative concept for the present-day state: in general as an integrative framework for the various functions of the State and more specifically in the determination and enforcement of binding rules of conduct. This section begins by examining the latter function of the State: the point where the administrative and legal institutions overlap and where the State acts as a legal institute. The administrative/policy functions are not examined until later, since the impact of deterritorialization on both types of functions tends to differ.

The state as a legal institution

Deterritorialization as a factual process has an adverse effect on territoriality as a normative structuring principle in two ways. The principle will lose substantive significance given further deterritorialization since the necessity for binding regulation in the immediate geographical vicinity will decline. This is because the principle assumes that the citizens subject to the national legal order perform actions whose injurious effects in need of redress apply first and foremost within the national territory. This assumption becomes less realistic with deterritorialization.

Furthermore the principle will lose practical feasibility in such a situation since the ascription of a particular action to a particular territory and hence to a specific legal regime will become more difficult. It may be possible to localize the various elements of the action – the position of the actor, the location where the instrument applies and the consequence – but the clear-cut localization of the action itself is the exception rather than the rule in a situation of deterritorialization. Under the territoriality principle, however, the location of the action provides the point of departure for binding regulation and the enforcement of those regulations.

^{16]} *Ibid.*, p. 138.

The fact that of all developments set in motion by ICT deterritorialization most radically affects the interrelationships between administrative and legal institutions may be illustrated on the basis of the fictitious situation in which there was both virtualization and dematerialization but the territorial dimension had not changed and the territoriality principle therefore continued to hold sway in practice.

In such a situation the State as autonomous formal legislator, with all the democratic and legal guarantees which this entails, could prescribe a binding framework for the process of transformation of the law, not so much instead of as by way of a supplement to self-regulation. In particular legislation could safeguard a number of matters of coercive general interest, transcending the interests of the social actors as parties in that process of self-regulation. An example would be the constitutional aspects. The law could in addition provide a certain direction for this process by laying down conditions in respect of such matters as democratic representativeness and the factual equality of the participants in the process of self-regulation and by taking account of the interests of third parties who were not directly involved in the process. One of the weaknesses of totally free self-regulation is that the interests at stake tend not to be equally as well organized in a social and political sense. A statutory system of self-regulation could correct this. The law could moreover provide a coercive framework as regards observance. Finally the use of technological innovations, as a new means for the better enforcement of existing rules, could be guided and conditioned by the legislator in this way.

The contribution made by the courts to legal innovation could also come into its own more effectively in this fictitious situation. Because ICT affects basic concepts of law and raises normative issues of political prioritization too, neither leaving everything to the courts nor free self-regulation is a totally adequate solution. In the fictitious situation described above, the legislator could also effectively condition this process by itself formulating assessment guidelines for the new situations created by ICT, which would then provide the courts with a frame of reference.

The above makes it clear that the State fulfils a number of unique and essential functions with respect to the democratic legitimation of the law, jurisprudence and law enforcement. Where these functions are anchored in the territoriality principle, the declining importance of territory deprives these functions of a firm foundation. A totally free system of self-regulation would only partly compensate for this erosion of state power. Thus one could indeed argue that it is these very changes in the territorial dimension themselves that make the deepest inroads into the institutions of the State and the law.

The state as administrator and policy-maker

Outside the realm of the law, deterritorialization also creates problems for the State in matters of administration and policymaking, particularly in areas where the State as the administrator provides public services to the community. In part these concern normal adjustments in policy. In this way deterritorialization and other developments set in train by ICT affect the social demand for these facilities.

In addition basic concepts of administration and policy are at issue. The distinction between the public and private domain which is of such importance for government administration and policy calls for reformulation. The same applies to the concept of a nationally coherent system of facilities, which is important in many sectors; deterritorialization can result in erratic dividing lines, whereby certain elements and aspects have a solid geographic basis in one policy sector but not in another. In the case of health care, for example, financing, insurance and high-quality medical services will be affected much

more by deterritorialization than the nursing of the chronically sick. A development such as tele-learning will drive a wedge into the existing interrelationships between national educational facilities. Where these erratic dividing lines also manifest themselves in the relationship between sectors it becomes more difficult to conduct integrated policies at suprasectoral level.

In a procedural sense the principle that policy must be conducted in interaction with those directly concerned cannot be sustained as it stands given the shrinking importance of the territorial dimension. Only when all co-actors form part of the national community and the national policy regime can such interaction be organized in representative bodies and consultative platforms.

3.3.3 What remains unchanged or is being enhanced?

Socio-cultural aspects

As a formal institution, the State might lose some of its effectiveness, but its natural complement, the national community, obeys sociocultural laws of its own. The state reinforces the national community to a great extent, but there is no one-to-one relationship. Socioculturally determined structures tend to persist in relation to technological, economic and governmental changes. One such example is Poland, which as a nation-state disappeared from the map on several occasions, thereby strengthening rather than weakening the Polish sense of nationhood. Frijhoff's view of the Dutch situation is that it is precisely the typical way in which values and standards come into being in the Netherlands, the specifically Dutch method of consensus-formation, that will remain an important cultural factor in the future.¹⁷

Socio-cultural reality also functions as an autonomous factor in another respect. Over the years citizens have built up certain expectations vis-à-vis the State; in a democratic state these are a crucially important domestic factor. There is certainly no obvious (sense of) harmony between the State's capacity to act, as determined by objective, by technological and by economic factors, and what the citizens expect from it.

Instrumental aspects

The new virtual world does not replace the real world but acts as an additional complicating factor. Physical reality does assume another meaning through this process, but its sense of tangible reality remains intact. This latter fact implies that the State still has many effective instruments at its disposal, also in the legal sphere. This even applies to the State's power to devise unilaterally binding and enforceable rules of conduct for its own territorial jurisdiction. There are always many situations which, by their very nature, can be effectively determined at a territorial and national level. A comparison can be made here to the municipal penal code, which, despite the increasing of scale, is still a highly useful and effective way of dealing with certain situations.

But it is mainly in the non-compulsory, i.e. voluntary, sphere that the State can still be effective also in a legal sense as well. By acting as a facilitator, the State can abolish certain outdated legal mechanisms no longer effective in today's conditions from the body of national law, and if needed it can create new facilities which will benefit those who wish to use them. In its roles as a market player under private law and as a 'bulk consumer' of ICT products, the State can act as a trend-setter and a role-model by concluding high-quality in

¹⁷ W.Frijhoff, 'Eigenzinnig Nederland, Europa en de toekomst van een cultuurnatie' (The stubborn Netherlands, Europe and the future of a culture-nation); in: A. van Staden (ed.), 'De nationale staat, onhoudbaar maar onmisbaar'; Special issue of *De Internationale Spectator*, The Hague, Clingendael, 1996.

the legal sense as well government contracts for ICT products and services. Moreover, the State can itself take part in the self-regulation process and enter into voluntary agreements on this matter with other interested parties.

Furthermore, the State retains the power to pass measures, e.g. banning certain acts, making material investments and providing public facilities that remain to a large extent territorially determined, mostly at local and regional level, such as a neighbourhood school or a regional retirement-home. Here again it remains true that while the State can keep making good use of certain instruments in the new situation this still says nothing about the social utility of doing so. As a result of the ICT-based changes in the context, it may in fact become harder to answer the latter question. Thus it has always been traditionally difficult to assess in advance the longterm social benefits of material investments when formulating investmentpolicy, given the long periods of time involved. Technological turbulence makes the task more difficult again. In such situations, there is a risk that the State, in the interests of its own survival, will focus firmly on such in their own right still effective instruments without paying too much attention to the difficult question of the inherent usefulness of doing so.

Special reference may be made here to the direct or indirect provision of information, as it is this kind of intervention which ICT enhances. In particular, information designed to modify behaviour is now already used more and more to support and reinforce mandatory government intervention. As ICT enhances the former instrument and weakens the latter, this raises the question as to whether these instruments could be mutually interchangeable? In this context, one example would be statutory measures to protect consumers with a view to compensating them for their lack of equalparty status in commercial dealings. As the consumers' relatively weak position is usually due to a lack of knowledge and information, the question arises as to whether the new ways of supplying information cannot adequately compensate for the State's reduced ability to offer them legal protection.

For a balanced view, it should also be noted that the State's enhanced instrumental power has been the subject of lively debate in recent administrative and legal literature. Frissen for example argues that policies can be ever more realistically designed on the drawing-board.¹⁸ While ICT allows the government to provide better 'custom-built' public services, it also demands a greater degree of registration of data as well as a greater degree of control over data supplied by the public. The linking of various databases can also be used to improve general policy-making, where policy-makers can focus very sharply in advance on specific social situations, e.g. social deprivation, to use their findings as a basis for example for distributing welfare subsidies. In this way an increasingly detailed picture of the individual citizen emerges. The keener policy-makers are to intervene even more effectively and to provide even more custom-built public services, the more their ambitions conflict with principles such as privacy.

Over the last few years the private sector has been more and more obliged to collect, link and supply data on behalf of the State; according to Berkvens¹⁹ this trend is leading to the 'silent nationalization of the private sector', which is by no means always matched by enhanced access by private individuals to official government data. Governments are selling their data to commercial publishers while excluding others. As the government executive bodies themselves have

^{18]} P.H.A. Frissen, 'De virtuele werkelijkheid van informatisering in het openbaar bestuur' ('Virtual reality of IT in public administration); *Bestuurskunde / Administrative Science*, vol. 3, no. 5, 1994, pp. 209-219.

^{19]} J. Berkvens, 'Van Heerendiensten naar Informatiediensten. Op weg naar de tweede privacycrisis' (From statute labour to information services. On the way towards the second privacy crisis'); in: P.H.A. Frissen, A.W. Koers and I.Th.G. Snellen (ed.), *Orwell of Athene? Democratie en samenleving*; The Hague, Sdu, 1992.

access to the genuine sources of information, it is they who have the best tools for creating a custom-built policy. The question here again is: does this affect the primacy of the political process when formulating policy?

3.4 Concluding remarks

3.4.1 Administrative and legal institutions: special characteristics

Administrative and legal institutions must be seen as an expression of specific values and ways of perceiving reality. The traditional system of unemployment law for example defines the concept of 'labour' from the viewpoint that, given the inherent inequality of the parties in the employer/employee relationship, the law is obliged to redress this inequality.

It is important to separate the normative meaning of institutions from how they actually work, as this normative meaning has its own particular dynamic. A nation's cultural image can, for example, play an important part in defining its sense of self and in legitimizing its existence. In its symbolic effect this (self-)image acts as a reality, even though an impartial outsider would in fact say that little of that actual culture really exists. The tension between normative meaning and actual effect makes institutional changes, such as those reviewed here, a complex topic. Institutions are derived from both a specific reality, within which they must function, and ideas and images of a reality, as carried in peoples' minds (and which are difficult to abandon). It is unfair to argue on the basis of a one-sided causal relationship between a changing reality and institutional changes and to misjudge what the public really expect from their institutions. Should, for example, the State lose its ability to achieve its own ends within a changing context, this would not necessarily mean that it had lost its authority in the eyes of its own citizens.

The distinction between the normative and the enabling aspects of institutions is of importance for yet another reason. The territorially-based relationship of the State, the law, the economy and the socio-cultural community has been an important framework for creating central fundamental values, e.g. democracy, freedom, equality before the law, economic development and socioeconomic emancipation. In any process of institutional change, there will always be a transitional stage where the classical institutions – the traditional legitimizers of these values – are growing less effective, while the possibility of new and more effective institutional forms has not yet become clear or exists only in embryonic form. Failure to distinguish between the institutional form and the values themselves will mean that the existing institutions will still be retained for as long as possible during this time of transition. There is no incentive then to search for new institutional forms to represent these highly-prized values. The transformation process is thus needlessly hindered, as in this view the transformation process is seen as equalling a loss of values.

There is a second important distinction here, namely between the abstract level and the level of actual functioning, or between the ideal-type and the reality. Transformation can only be properly understood and comes out well if the necessary changes at both levels are recognized; transformation means more than just changes at practical level. Dealing in abstractions here is a separate autonomous factor. Until recently the link with the national territory was rightly and automatically viewed as one of the elements par excellence defining the nation-state.²⁰ If this notion is maintained and this premise is not questioned, one cannot fruitfully imagine the existence of another kind of state with a different set of defining characteristics. This can

²⁰ H. van der Wuesten, 'Het grondgebied van de staat' (The national territory); *Facta*, vol. 53, no. 5, September 1997, pp. 8-11.

mean that the issue of institutional change is sometimes needlessly made harder by the fact that one is working from legal and constitutional notions that are theoretically still prevailing but no longer accord with recent practice. Thus the classical notion of the State as a centralized, formalistic bureaucracy working along standardized guidelines with highly-specialised departments has long ceased to correspond with reality.

The point is particularly relevant in this context now that it has been shown above that the territoriality principle predominates, both where the validity of the law and the exercise of judicial power are concerned and in the field of public administration, but that other principles have also traditionally applied, albeit as exceptions rather than general rules. Transformation need not therefore mean a total break with tradition, but can also mean a revitalization of principles other than territoriality already embodied in the legal and administrative system.

Finally, institutions such as the State and the law play a valuable role in stabilizing the workings of society. They impose legally binding rules on what actors might reasonably expect from one another in their everyday dealings. In this way the participants can anticipate their counterparts' reactions and there is a clear-cut system of social norms to provide guidance for the settlement of disputes. If the State and the law wish to be able to supply this element of stability, then they themselves must also prove their stability and durability over a somewhat longer period of time.²¹ This fact does not argue against change as such but it does argue against a state of *never-ending* adjustment. For this reason, tension exists between the essential character of these institutions and the turbulent nature of modern technologies, following each other in rapid succession. These stabilizing functions are clearly autonomous factors that complicate and generally delay each process of transformation. The same applies to their normative meaning, which we examined first.

3.4.2 The nature of the impact of ICT on the State and the law: a balance

The essential elements of the impact of ICT on administrative and legal institutions can be formulated as follows: An essential precondition for the meaningful and effective functioning of institutions such as the State and the law is the congruence between the assumed reality on which they are founded and the actual changes to the environment in which they operate. The processes started and enhanced by ICT adversely affect this balance, particularly where assumptions regarding territory, distance, time and matter as determinants of human behaviour are concerned.

There are four characteristics of the impact on the institutions of the State and the law of the developments set in motion by ICT:

1. Affected are not so much specific sectors of the law and government policy, as certain general dimensions. The effect cuts right across all sectors. Where the law is concerned, there is clearly more involved here than the customary need partly to reformulate the rules in view of social change. ICT also affects central, fundamental legal concepts, e.g. how to define the notions of property and legal procedure. This also involves a number of essential legal functions, e.g. the provision of 'transparency' and a clearly-defined structure of accountability.²²

^{21]} On this topic see in particular: Scientific Council for Government Policy (WRR), *Orde in het binnenlands bestuur* (On the organisation of public administration); Report to the Government no. 49, The Hague, Sdu uitgevers, 1995, p. 33 ff.

^{22]} On the other hand, sometimes it will be nothing more than the normal trend that is at stake, according to which new conditions require new laws, administrative practices and policies, and where institutional change as such is not on the agenda, e.g. legal time-limits that are based on yesterday's world. This sort of lesser change also does not affect the main body of the topic under discussion here.

2. Second, ICT's impact is clearly highly *unpredictable*. This not only applies to continuing technological change itself. More importantly, no clear-cut relationship exists linking technological developments with institutional change. The mere fact that these institutional changes involve not only a great many different special interests but a wide range of human expectations as well means that negative feedback mechanisms as a form of social reaction are particularly hard to predict. The aim is to achieve a negative, conservative backlash, which will keep existing institutions albeit somewhat weakened in their present form whatever the cost, because of the values they embody. Thus the most obvious risks when viewed *ex ante* as in this report, e.g. the State's growing inability to enact binding and enforceable rules of conduct, might on further consideration well turn out in hindsight to be less serious than the actual changes in the behaviour of legal practitioners and politicians due to ICT and changes in what the public expect from them. In this report the comparison has already been made with television and its mass impact at first unrecognised on politics and governance.
3. Third, ICT's effects are *ambiguous*. This emerges the most clearly in the institution of the State. The same technological changes that diminish the State's external powers can also partly increase the effectiveness of certain instruments of official policy.
4. Fourth, ICT's impact raises questions *at several different levels*. The most essential is the conceptual level: the relationship between assumptions concerning reality and the changing reality itself. Where there is no agreement, there will be questions of an essentially instrumental nature, but it is fairly pointless to deal with just this aspect here. Also involved are the substantive demands made on government action, as determined in part by the availability of the genuine alternatives created by ICT. The Internet's decentralized nature is the most indicative example of these changing needs.

ICT does not have the same degree of effect on the State as on the law; in the form of deterritorialization, ICT most fundamentally affects the functioning of the State, in two particular respects:

1. The concept of territoriality as a framework for integrating the various functions of the State is being eroded.
2. The same applies to an essential function of the State in its role of a legal institution: the legal and unilateral enactment of binding rules of conduct and the power to enforce these rules. In other words: the classical role of the State in bestowing democratic legitimacy on the law, lawmaking and law enforcement is being undermined. The legal notion of territoriality as a foundation for autonomy, i.e. the State's monopoly on unilaterally enacting and enforcing binding legislation, is under threat. This latter fact implies that ICT particularly encroaches upon those areas where administrative and legal institutions overlap and where the State functions as a legal institution.

Many of the questions raised by ICT touch on the essential characteristics of the institutions as such. In this way many of the changes started and intensified by ICT are encroaching upon fundamental concepts of existing law, administration and policy. There is a genuine process of transformation under way in the sense that ICT affects the foundations of legal and administrative institutions. Today's foundations are not disappearing, but are losing some of their dominance; they are less than before secure bastions and call for the problems to be addressed.

The changes set in train by ICT will also not only lead to an erosion of the capacity to act of the State and the power of the law. The changes as outlined do after all show a variegated picture. The State can still achieve a great deal at both national and international level, particularly in the noncompulsory, i.e. voluntary, sphere of activity. The law should also be partly seen as an open and adaptable system capable of responding to new problems. Certainly

where the law acts mostly as a facilitator the present legal system might well contain a number of mechanisms that could prove very useful to the parties involved in the new situation.

3.4.3 Possible solutions

If the main problem caused by ICT is the diminishing power of the State to pass legally-binding and enforceable laws, there are three separate methods, i.e. starting points, that could compensate for this loss of official authority. One cannot say in advance which of these methods is appropriate; working on a case-by-case basis with due regard to changing circumstances, a choice will have to be made; combinations of all three methods may even be desirable. Sometimes, as seen in section 3.3.3, there will also be no need for compensation. Moreover, policy-agreements free from any formal sanctions might work in certain situations, given the mutual interest of the parties involved in complying with the terms of the agreements. The feasibility of such arrangements is the crucial element here. Instead of formal sanctions, a real alternative might be to construct working mechanisms to encourage participants to uphold and maintain normal, i.e. accepted, standards of conduct in their dealings.

Where the latter does not apply, one might first think of other non-coercive methods such as subsidies or education schemes. For this option, which of course is often inadequate, the reader is referred for brevity's sake to section 3.3.3.

Self-regulation could be a second option, where the government does not intervene at all, as just referred to. This approach is the obvious choice considering that the spontaneous and decentralized nature of the interactive processes which ICT allows gives the 'social players' themselves a large stake in solving the legal problems raised by ICT; it also allows them to make best use of the ways of implementing changes provided in this instance by the existing law. Besides, the Internet also has its own ways of applying sanctions on offenders, in particular its ability to bar them. Here there is to a large extent a matching demand for and supply of self-regulatory measures. Certainly where the law functions as an open system and acts more as a facilitator and enhancer than an enforcer as applies in much of private law, domestic and international there is room for using self-regulation as a way of creating new and effective mechanisms. Thus real-life practice also reveals the existence of all sorts of new forms of self-regulation, e.g. in the case of the registration of domain-names and the involvement of independent third-parties to guarantee the integrity and authenticity of the users and the data.

In short, ICT offers all kinds of ways of making best use of the advantages of self-regulation: using the expertise of those directly involved, the development of rules more adapted to practical situations, flexibility and a greater readiness to abide by these rules. Real-life practice also indicates that the law can sometimes support and give a sense of direction to the self-regulation process: Where a judge must make a ruling in cases not covered by existing legislation, he may make an independent contribution to new case-law.

Although it adapts well to the nature of an important ICT phenomenon like the Internet, self-regulation itself cannot be seen as a wholly satisfactory way of bridging this gap. As self-regulation here usually means a system of *free* self-regulation, not subject to and unchecked by existing legislation, there is a particular danger that a spontaneous new order will arise, but one almost exclusively determined by the *de facto* power and special interest groupings. In other words, an order not quite complying with a set of normative standards linked to the notions of democracy and the constitutional state standards which the classical system of national law usually does safely guarantee and embody or could guarantee. In again other words, there is a so-called 'profit

and loss account' operating here at a more basic level. Unorthodox solutions for unorthodox problems already created by free self-regulation will sometimes fall short of the mark when compared with those offered by a statutory system of self-regulation. In this case the law protects general interests and the interests of third-parties and can provide legal remedies, e.g. regarding the equal-party status of all parties operating within a self-regulatory system.

A third method could be to keep on activating a number of *legal principles that allow the creation of various ways of co-operating at an international level*. These principles, which have already been revived and renewed independent from ICT's influence, were already discussed in section 3.2.2. The activation of the comity of nations principle and the accompanying principle of legal effect were discussed earlier mostly in terms of the relationships between (sovereign) states. Both principles can however also play a role when deciding where to draw the dividing lines between the private and the public, i.e. official, regulatory systems an issue raised by ICT and the Internet in particular. One argument for government intervention is, of course, the self-interest of nations in preventing ICT-users and Internet-users from evading current national law as laid down in the *physical* world of the present. In so far as the 'smugglers' trail' of re-routing traffic via the Internet affects those values and interests as promoted by governments, official steps to prevent such traffic could reasonably be justified. As a counter-argument, one might say that use of the Internet could be partly seen as citizens exercising their rights to freedom of communication: rights enshrined in international law that nations must in principle respect. The classical version of the comity of nations principle and its concomitant principle of the affected legal order do provide some kind of framework for considering these problems. The inherent autonomy of the Internet is thus recognized and put into perspective. To the extent that nations have a generally accepted sole responsibility for safeguarding certain interests and legal values, they could in principle justify infringing the autonomy of the Internet.

The alternative option of international -operation also has its disadvantages: just as they did with self-regulation, the twin factors of *profit* and *loss* are also essential characteristics of the State and the law: International co-operation preserves the State's capacity to act and by virtue of its very flexibility allows the State to respond to those problems caused by ICT. By contrast, the State will lose some of its sovereignty and independence. This applies not only to the State's inherent autonomy, its power to set and achieve its own objectives. In a procedural sense, the State will also lose some of its own democratic and legal culture a culture which traditionally incorporates its own national lawmaking process. Furthermore, as section 3.2.2 has shown, the strictly functional relationships will weaken rather than strengthen the State's powers of integration. In any event, new mechanisms will need to be introduced to preserve these powers. The same applies to the internal democratic accountability within the State of its external functioning. Finally, as with free self-regulation, the problem here is that of (ensuring) the equal-party status of those involved in international co-operation. The voluntary nature of many of these arrangements will generally make it harder to find a definitive solution which is legally binding on all parties concerned.

3.4.4 Conclusion

As one must conclude from the previous section, there are ways of compensating for the erosion of the state's capacity to act. Generally speaking, however, they are not entirely satisfactory alternatives and taken as a whole are also not a panacea. These changes are also still at a very early stage too early in fact to have any clear idea of all the pros and cons of all the various options. Some strategic points of interest and certain ways of approaching the subject can however be mentioned here. This concluding section first examines

the correct viewpoints: What are the relevant issues in the various stages of the transformation process? The next points to be examined, in a general sense, are: when should or should not the government intervene? When should it take the initiative? When should it react to the events in question?

Relevance of the various viewpoints

The somewhat obsessive question as to whether we are dealing with a technological, social or legal issue or one of political regulation does not get us much further. More relevant is the order of priority in which the various relevant viewpoints are placed. What kind of questions should be asked and in what order? This can be explained as follows.

Technological changes are partly responsible for other kinds of human interaction and communication patterns, which in turn lead to new demands, new interests and new possibilities with respect to political regulation. The next issue, i.e. the desired level of change in administrative and legal institutions, must therefore focus on this new kind of social interaction and not on technological changes as such. Thus the 'new' facts are not primarily technological by nature but arise instead from different situations of social interaction. Johnson and Post²³ give an example of a similar approach to the matter of copyright. Within the new working environment of the Internet, the crucial factor is not so much who owns the products but the guaranteed identity, security and reliability of the supplier and the data he or she supplies. This raises the question as to whether there are other kinds of rules dealing specifically with this new state of affairs. If we merely see the Internet as a new technical medium, the key concern becomes to incorporate it into existing law, without the new social situation being identified.

When analysing institutions, two questions arise: 1. which actual assumptions that underpin existing institutions are now becoming illusory? 2. which normative principles are at issue in this new situation? This normative approach is partly a question of political will and partly one of law. In the latter case, we are dealing with generally accepted legal values. Dommering's²⁴ outline of legal reactions to the Internet shows the value of this normative approach, particularly the need to involve all the relevant principles in the actual analysis. Most suggestions have a common failing in that they only focus on a single relevant aspect or principle.

The next question demands a completely fresh approach again: how to decide the feasibility and effectiveness of the new legal and administrative mechanisms designed to deal with the new situation? The real determinants here are political, economic and cultural factors. They determine the power relationships and how exactly other 'players' feel about key issues, i.e. the level of consensus and disagreement over these issues, and the positions they take where their own special interests are concerned. In the new situation, such issues are much more prominent, because they generally need to be resolved within an international context. At the national level one can at least reckon on a basic communality of interests and a general consensus of shared values. At the international level, however, such favourable (negotiating) conditions are far less likely to occur.

Initiating or reacting?

It is clear that the State can influence on extra-institutional factors in two but limited different ways. First, as was established earlier, the issue of the need for new law, administration and policy is not primarily determined by the new

^{23]} D.R.Johnson and D.G.Post. 'Law and border. The Rise of Law in Cyberspace'; *Stanford Law Review*, May, 1996. See also <http://www.cli.org/>.

^{24]} Dommering, op. cit., p. 144 ff.

technology as such but by the new situations created by ICT use. The latter can affect the State in many different ways, but an ultimate freedom of choice for citizens and social institutions is not merely a fact but in our type of society an important normative factor as well. Second, practical new mechanisms to find appropriate solutions will need to be introduced particularly at international level, where the nation-state is only one of the players at the table.

Both sets of limitations on state power influence the transformation strategy the State will use, and especially whether this can and must be initiatory or primarily reactive. It is obvious that were the State to act purely as an initiator, such an approach would conflict with the true nature of the transformation process. A policy of initiation is perfectly feasible and useful provided that the State draws up a conditional programme or contingency plan to prepare itself for a number of likely scenarios. This would mean that various potential social scenarios had already been assessed in terms of their legal and administrative consequences before they have actually taken place. What kinds of interventions would provide the best response to these potential situations and under what international conditions would new administrative and legal mechanisms be feasible and effective?

In the actual execution of policy the State would then only be able to react, given the specific need and choices that occur in a particular area at a particular moment. The conditional programme therefore works more as a kind of stockroom of potentially deployable, effective reactions. As a good deal of preliminary work has already been done, the State would be in a position to react calmly and carefully to any sudden changes in the context.

4.1 Introduction

This chapter will examine in greater detail to what extent the changes in the functions of time and place caused by the advent of ICT affect the nation-state's capacity to act. That is, on the basis of a particular objective, itself not under discussion here, it will be examined in what sense ICT affects the possibilities for achieving these objectives. To this end, fifteen separate objectives were analysed in five policy areas: the regulation of markets, monetary policy, taxation, social policy and cultural policy. Section 4.2 gives a brief summary of the results of these analyses. Section 4.3 confronts these trends with demonstrable reactions within present policy towards the advent and spread of ICT.

4.2 Effect of ICT on the government's capacity to act

There are two aspects to the government's capacity to act: first, the ability of the government to intervene in social processes, and secondly, the need given a specific social objective for government intervention. As this section will show, ICT can affect both these aspects, sometimes differently. Section 4.2.1 will outline the possible effects of ICT on existing policy instruments for fifteen different policy objectives. Section 4.2.2 will then examine one specific case in more detail: supervision of the credit system, as this particular area gives a good idea of how ICT affects both the options available to the government and the demand for official intervention. Section 4.2.3 briefly repeats this analysis for the fifteen policy objectives. In section 4.2.4 some conclusions are drawn.

4.2.1 Effects on 15 policy objectives

Below it is described for each of the fifteen policy areas under review which policy instruments are currently used and how ICT affects the way these instruments work.

Guaranteeing the market

Guaranteeing the market means guaranteeing the basic preconditions for the efficient functioning of markets. The government's main instruments are proprietary rights, which include legislation in the field of intellectual property: copyright, design rights, and patent rights and law, et cetera. Another aspect relates to the law that lays down options to enforce transactions.

For the enforcement of proprietary rights, technological change and the opportunities offered by international co-operation appear to be the main imponderables. Encryption techniques might well supply a solution to the unknown risks of digital copying. The problem here however is whether technological answers are an adequate solution and whether or not a high or higher degree of international co-operation will be needed. The problem there might be that such co-operation must involve not just the 'well-disposed' nations, but all nations. This brings us straight to the second aspect: ICT's potential impact on the options available to governments when organizing market guarantees: how legally to enforce cross-border (private) transactions. ICT's increased opportunities for cross-border commerce will also mean an increase in the demand to monitor such transactions. This will not only put pressure on national governments to work together internationally, but will also increasingly force business partners to render visible and guarantee their reliability.

Guaranteeing market forces

The guaranteeing of market forces goes one step further than just guaranteeing markets. The most important element here is the control of mergers and countering the abuse of market power. The official powers are laid down in competition law. The new 1997 Competition Act replaces the relevant leniency of the malpractice system with a new system of outright prohibition.

In a number of areas national markets are now more open to new competition from abroad. The developments surrounding ICT are partly responsible for this situation. For example, the retail trade now faces competition via the Internet from faraway lands in respect to anything that can in theory be sent by mail-order. New challenges could arise, for example, in the software market where a single producer (e.g. Microsoft) could gain a *de facto* monopoly position, with neither the Dutch nor the European anti-trust authorities being able to do much about this. Markets also exist, e.g. telecommunications, electricity or public transport, where the government itself traditionally operated and where it now organizes competition (see below).

Encouraging market development

When encouraging market development, two things are involved. First, changing outmoded policies to allow market forces to operate more effectively. This takes the form of various deregulation and privatization campaigns; the official instruments involves both scrapping existing policies and creating new rules for new markets. Thus deregulation of the telecommunications services market goes hand in hand with developing new rules to ensure that this market also functions properly. Secondly, it involves initiating and encouraging the development of new markets. Among other things the instruments for achieving these objectives are to be found in innovation and technology policy.

ICT can be shown in several areas to be one of the driving forces behind deregulation and privatization. Striking examples of this are telecommunications and commercial television. ICT can contribute in more areas to the (continued) growth of market forces in respect of tasks traditionally regarded as the government's responsibility. For example, in the public transport, health care and social security sectors ICT appears to allow a degree of market conformity which until now was not technically feasible.

The assistance offered to market operators to innovate and develop new technology is another story. It may be argued that ICT offers new ways of giving more 'targeted' support to companies. The effects of ICT are however unclear, especially where it can have the effect of promoting the 'leakage' of support to other countries. When viewed within the totality of the market-incentives policy, technology and innovation subsidies are in fact modest and account for only a fraction of the amounts involved in the government's export-credit insurance schemes. Here ICT seems to offer increasing scope for the misuse of funds. Furthermore, people start to lose sight of the 'added-value' of such assistance; ICT has in fact also helped in developing an effective private insurance market.

On balance, in the case of market stimulation the importance of the knowledge infrastructure implies a shift from supporting companies to supporting people, and with this a shift from a policy of technology and innovation to one of education and training. It is no coincidence here that the Dutch Ministry of Economic Affairs is also starting discussions on the topics of employability and life-long learning.

Enforcing common interests in the market

Where market players essentially pursue their own interests, collective interests can get pushed aside. This involves matters such as safety, land-use

and the environment, et cetera. There are fundamentally three classes of official instruments to moderate the external effects of the production process: orders and prohibitions, the introduction of market incentives, and suasion (sometimes leading to self-regulation).

Although it is difficult to categorize ICT's influence in this area, it is discussed below in terms of these three classes of instruments. ICT has a number of different effects sometimes working against one another that help to reduce external effects via orders and prohibitions. On the one hand ICT offers greater opportunities for enforcing orders and prohibitions; on the other it also offers new ways of avoiding or even evading them. The government can use ICT to organize new price incentives; road-pricing can be very specifically targeted using ICT techniques. At the same time ICT limits the government's ability to introduce rules that differ from those used abroad.

The matter becomes even more complicated in the case of suasion. Here the government can try and use the new channels of communication to persuade consumers on various issues, e.g. environmentally-friendly behaviour. The question is however whether this will have much impact amidst a growing flood of information. Much more interesting is the role information plays in the environmental behaviour of producers, e.g. in the relationship between producers and consumers. This information has its own dynamic, the results of which are not as yet fully clear:

- producers try and placate consumers with claims of 'green' behaviour;
- environmental organisations try to explain to consumers who the bad guys are;
- producers ask environmental organisations/auditors for a certificate of 'green' behaviour;
- consumers sometimes genuinely punish producers for (alleged) 'non-green' behaviour;

and so on. An interesting by-product of how easily news hits the street and is distributed is that the government itself may also show up as a polluter in a number of cases thus losing some of its credibility as a 'natural protector of the environment'. The long-term results of these complications are at best unclear.

Stable prices

The job of stabilizing prices has been delegated to the central bank at present still De Nederlandsche Bank (DNB) but increasingly the European Central Bank (ECB). The introduction of the euro will not in fact affect the instruments at the central bank's (banks') disposal. The present system of money market instruments is so arranged as to make it continually necessary for the commercial banks to be collectively in the 'red' with the central bank, i.e. the DNB. The DNB, by issuing liquidity-paper in the form of Nederlandsche Bank Certificates (NBCs) and by using the 'money market cash reserve', creates an artificial shortage in the money market. This shortage forces the banks to call on the DNB's credit facilities at rates to be decided by the DNB: the official interest rate on advances and the special interest rate on loans. By setting these rates the DNB fixes the level of growth of the money supply and hence price movements.

Examination of the impact of ICT on the money market shows it can indeed massively affect monetary transactions but that on balance it need not affect the chances of guaranteeing stable prices. The arrival of electronic payment methods, e.g. the 'electronic purse' (smart-card), will probably mean that during a transitional period it will be harder to predict the velocity of circulation of money, with a temporary loss of control over the growth of the money supply. Past experience, however, shows that the introduction of new payment methods are never so disruptive as to seriously threaten price stability.

Supervision of the credit system

The supervision of the credit system may be regarded as a special objective. Just like the control of price-levels this task has also been delegated to the DNB. The DNB's main instrument is the granting of licences to credit-providers, thus giving it the power to bar from the Dutch markets those parties which fail to satisfy the DNB's requirements.

The next section will deal in detail with the various possible trends regarding the supervision of the credit system.

Collecting group resources: taxation

To function in any way at all, the government needs money. Taxation is its main instrument for achieving this aim. The advent and spread of ICT presents the tax authorities with a multitude of threats. First, it creates greater scope for tax-evasion. At the same time, however, the tax authorities now also have more ways of tracing such evasion. On balance there is no reason to think that ICT will give either side any structural advantage over the other. ICT may mean nothing more than the next round in the permanent battle between governments and tax-payers.

Secondly, certain notions will need a fresh interpretation in the light of ICT. Thus the (international) definition of the 'permanent establishment' provides a starting-point for corporation tax. In the case of electronic commerce, it is still not clear what grounds there are for drawing a useful dividing-line to make the notion of the 'permanent establishment' a meaningful one in this situation as well. Another example refers to the distinction between goods and services which in international commerce determines the place where the said activity is taxed with sales tax or VAT: services in the country of supply, goods in the country of sale. This is to do with the fact that services are generally consumed where they are produced (e.g. education), whereas goods are generally consumed where the customer lives (e.g. motor cars). One cannot make such a distinction with electronic products and services (e.g. long-distance education, or the car manufacturer's customer help-desk): these are services that are consumed as products. In combination with the point raised previously, i.e. tax-evasion, an additional factor here is how visible one can make the use of electronic services to the tax authorities: How would the tax authorities know if I had downloaded information about my motor car? ICT can certainly devise more ways of checking if payments are being made for this service, so that the tax authorities can then collect the revenue along these lines. But here too it remains unclear where the answers should be finally sought.

Thirdly, companies and individuals alike have ever greater prospects of arranging their affairs under a tax-regime that actually favours their efforts. This not only means a growing workload for the tax authorities but also more pressure on policy-makers to set lower rates than those levied abroad for the widest possible range of activities.

Promoting a reasonable distribution of income

Promoting a reasonable distribution of income primarily means that the highest earners contribute the most to public services. The ability-to-pay principle of taxation is an important way of achieving this objective.

As individuals also have more chances of choosing a relatively favourable tax-regime for themselves, redistribution of incomes via taxation could obviously be harder to achieve. It seems unlikely that the progressive tax-scale, such as that incorporated in the current income-tax rates schedule, can be maintained for much longer. It should however be borne in mind that the redistribution effects of the taxation system have always been tempered by the fact that much tax-expenditure benefits the same people who have to pay the highest

tax-rates. On balance this results in a relatively uniform system, with over the years a definite and visible move towards lower and more uniform tax-rates together with fewer tax-allowances. ICT would seem to reinforce this trend.

'Steering' economic development

Attempts are being made in all sorts of areas to promote economic growth and to steer it in particular directions. Activities that are seen as advancing economic growth include, for example, saving, investing and the promotion of research. Activities where attempts are made to steer the economy include environmental pollution, the labour market and entrepreneurship. The official fiscal instruments have been used more than once to steer the economy.

ICT essentially offers a very powerful range of technical possibilities for implementing specific tax policies in all kinds of areas. ICT makes it easier to apply such measures and can also help in accurately targeting specific areas. At the same time however it may be observed that for specific taxes (e.g. environmental levies) a certain caution is observed due to the difficulties of maintaining an adequate level of control. Sparing use is also made of specific tax concessions, as these would actually increase taxes, whereas here the lowering of taxes is the priority.

Organizing risk-solidarity

Risk-solidarity means that the government is responsible for ensuring redistribution amongst groups with varying levels of risk. A hallmark of a risk-solidarity insurance scheme is that some groups will clearly benefit from the policy, i.e. their premiums are lower than their expected claims, while for other groups such insurance is disadvantageous. The government's instruments here are either to levy taxes and make payouts itself (e.g. via unemployment or sickness benefits) or to segment a specific market and to regulate it strictly, e.g. the Sickness Absence Reduction Act (WTZ).

The advent and distribution of ICT has potential consequences for organizing risk-solidarity within the Netherlands' national borders. For instance, private health insurers might start to offer their insurances from abroad thus to be able to offer insurances that do not include the collective MOOZ (Elderly Health Insurance Fund Patients (Joint Funding) Act) and WTZ surcharges. This could force the government to replace these premiums by contributions out of general revenues. There does however need to be room for such an approach and if tax-avoidance becomes the norm, this could not be assumed. It should also be noted that insurers are already now in a position to avoid certain elements of Dutch legislation by means of foreign arrangements but do not in fact do so. By such action the insurers show that their image and a good relationship with the Dutch government and the health-care institutions are (still) more important to their policy-holders than cheaper policies.

Organising income-solidarity

Income-solidarity refers to the redistribution of income from rich to poor. On the taxation side, solidarity is expressed in terms of the ability-to-pay principle (see above); on the performance side, in the principle of (individual) needs. Income-solidarity is established especially through various forms of general provision (e.g. rent-relief) and national insurance schemes (e.g. the state pension), as well as though via employee insurance contributions (e.g. income-related sickness insurance fund premiums). The government's instruments here are either to levy taxes and make payouts itself or to segment a specific market and to regulate it strictly.

In due course the use of ICT can make it harder to organize income-solidarity. Examples include the avoidance and evasion of premium payments on the one hand and the improper receipt of income support on the other. Both types of

abuse also occur now, but ICT offers more people easier ways of abusing the system. In particular, it would seem that incomes generated via the Internet will be hard to trace. It should however also be noted that the technique whereby payments will be made via the Internet remains unknown, but ultimately it may offer the tax authorities and welfare agencies precisely the means it needs for supervising their clients properly.

Providing for cultural freedom

The phrase 'cultural freedom' here means to 'live and let live', i.e. creating a climate of mutual tolerance, and 'personal empowerment', i.e. giving people the power to make the best of their lives. Personal empowerment means equipping people with the skills, the knowledge and, generally also, the financial means to make genuinely free choices in their lives. Statutory legislation is the instrument for ensuring a climate of mutual tolerance. Public services, i.e. education and subsidies, are the instruments of empowerment.

ICT does not alter any of the basic rights in the field of cultural freedoms. Legislation is being prepared to safeguard the confidentiality of electronic mail and to be able to get the power of investigation at the providers, but is not expected to lead to any real break with the existing complex of guarantees of personal freedom. Where cultural freedom can be categorized as either mutual tolerance or personal empowerment, ICT definitely affects the latter: it offers limitless scope for individual development, but also the risk of a new class of 'digital illiterates' who – deliberately or otherwise – allow ICT's opportunities to pass them by.

Providing for cultural equality

Cultural equality means providing access to cultural facilities and banning discrimination on – among other things – the grounds of citizens' cultural preferences. Access to cultural services is promoted by provision of facilities and services and through official subsidies. Non-discrimination is enforced by statutory legislation.

ICT alters none of the basic rights in the field of cultural equality. It does however appear that ICT encourages and can further promote the accessibility of a whole range of cultural statements, and in this way provides its own separate stimulus to the process of cultural equality.

Providing for multiculturalism and socio-cultural integration

Socio-cultural integration is the basis for making multiculturalism a social reality. Traditionally the emphasis was on promoting a multicultural society. The official means for achieving these goals are statutory legislation, public services and subsidies. ICT also appears to supply its own separate stimulus to multiculturalism (cf. 4.2.3).

Providing a culture of excellence

The principle of cultural quality must be understood in terms of excellence as the official yardstick for government support. The instruments here are the granting of subsidies and the institutional arrangements that channel subsidies to those areas where cultural excellence is thought to lie: the Cultural Council and the Literary Fund, et cetera, and finally, particularly education and statutory legislation.

ICT has no effect on the possibilities for disbursing subsidies. ICT could however have some effect on the arguments for the granting of subsidies, e.g. the fact that ICT has a beneficial effect on alternative incomes flows that can promote the idea of cultural excellence, as well as the fact that the ever-growing diversity of cultural expression makes it harder for the government to lay down clear-cut criteria for the subsidization of certain categories of cultural excellence.

4.2.2 Supervision of the credit system

ICT's impact on government policy is a highly variegated one. This section is a first attempt to categorize these influences. The starting point here is the changing social context: is it the instruments whose effect is changing or does ICT affect the policy issue itself? To get some idea of the various categories, the example is discussed below of the potential changes that the supervision of the credit system could undergo in the (near) future. The example is illustrative in terms of both the uncertainties in relation to factual developments and the potential relevance for government policy.

Currently those who operate in the Dutch financial-services market must satisfy certain criteria before receiving a licence to trade from De Nederlandsche Bank (DNB). The DNB thus has *de facto* powers of barring those parties which fail to meet its requirements. At present ICT already allows foreign financial-services providers the chance of directly targeting Dutch clients – via the Internet – without giving the DNB any means of forcing these foreign companies to comply with its licensing requirements. The foreign bidder therefore has a competitive edge in view of the (extra) costs involved in the DNB's licensing requirements and it thus can for example offer a higher return on savings and investments or ask a lower interest rate for a mortgage or a loan. The foreign companies can also be a riskier bet for the Dutch client, in so far as non-compliance with DNB licensing requirements makes them a less reliable prospect.

At the same time, ICT's advent and spread will make it increasingly easy for clients themselves to gather information on the reliability of financial-services providers. The clients have a personal stake in finding out exactly whom they are dealing with; this translates into a heavy demand for specialist assessment as to the reliability of these companies, which in turn results in a professional supply of specialist assessors. In addition, the financial-services companies themselves help to create this market; they too have an interest in proving their reliability by means of independent assessors. The easier the access to markets, the greater their incentive will be. When there was no ICT, there were significant gains in having a centrally-regulated supervision and market-entry policy; it was cheaper (the transaction costs of the sort of ratings-data needed for this purpose would be relatively high) and in these conditions undoubtedly easy to sustain. The arrival and spread of ICT could alter the demand for supervisory controls.

This example shows that changes in governmental capacity to act are a complex matter. It is not merely the fact that government action can achieve more or can achieve less; nor the fact that government action is more necessary or less necessary. In the example the current instruments are gradually displaying gaps. The example also indicates that existing instruments are gradually becoming less essential (or could become so; the future remains full of uncertainties). At the same time, however, the issue of guaranteeing quality and reliability also reappears on the agenda, and the government must keep its finger on the pulse somewhere else and in a different way. A licensing procedure and means of checking the licensing requirements must be supplemented or maybe partly replaced by a transparent assessment process; the latter will assess the quality of an information market, and will if necessary and if possible ensure that this market functions properly. For this to happen, the government will among other things need to develop specific criteria for assessing the workings of an information market. It also needs to develop instruments to (help) remedy any shortcomings in this market or to enable it to work more efficiently.

This is not the place to explain how this should be achieved, but it is certainly evident that these new activities could differ radically from those the government is now developing in its attempt to control the quality of the credit-system. At present, we have here a governmental activity in the classical sense of the word: the establishment of standards through statutory rules, the testing of performers in terms of those rules, and the issuing of licences, et cetera. In future, it will be more a case of guiding a market process, where the government not only has less hold over the process (parties can operate from beyond the jurisdiction of the Netherlands), but where it has a different kind of hold. It will not be a matter of: 'How do I assess this financial-services provider in terms of these rules?' and (probably) also not: 'How do I tell the consumer about the quality of this provider?' It will be something more like: 'How do I assess whether the consumer has enough ways and means (and what is enough?) of finding out about the quality of financial-services providers?' and also: 'How if that proves necessary do I influence the availability, quality, accessibility et cetera of such data?' And also: 'How, in the new situation, would we deal with the probably unavoidable errors made by consumers in choosing financial-services providers where we are no longer able to bar unreliable operators from the Dutch market?' And finally: 'How damaging would it be to the growth of this market were I to use my existing monopoly myself to start operating in this market?'

It should once again be emphasized that this is a situation that *could* occur. It is by no means certain that it will be impossible in the future to deny financial-services providers access to the Dutch market. The media-law has shown the difficulty of specifically targeting certain services to the Dutch market without thereby becoming subject to Dutch legislation. The commercial broadcaster RTL, which originally evaded Dutch law by formally incorporating itself in Luxembourg, could now after all be subject to Dutch law as RTL operates in practice from Dutch soil. These developments in no way rule out the possibility that financial services will also turn out to have certain characteristics that force foreign competitors to conform to the appropriate national legislation. This also allows one to ask if there is really still a need for a credit-system policy in its present form or whether a market supplying information on financial-services companies would perform the functions of the current system less well, just as well, or perhaps even more effectively.

The above clearly shows that changes in the governmental capacity to act relate to both changes in the possibilities of existing policy instruments and a change in demand for (existing forms of) policy. Here one must stress that 'policy-demand' does not relate to the objective itself; the need for a high-quality, reliable credit system is not at issue here. The question is merely how far and in what way is it necessary and possible for the government to make its own contribution to this process?

The example of the credit-system also clearly shows that one cannot plainly and objectively measure the growth in the demand for and the possibilities of government policies. An estimate has to be made, which will be fairly subjective in nature. The arguments for such an appraisal are briefly summarised again below.

1. ICT essentially allows financial-services companies to operate in the Dutch market without needing to obtain a licence from De Nederlandsche Bank.¹ In the first place we are dealing here with the risk that parties will in fact offer services from abroad, e.g. via the Internet, without first obtaining a DNB licence. In this context it may be argued that operating from a favourable base (in terms of laws and taxes) offers companies such a commercial edge that they

¹ Wherever De Nederlandsche Bank is referred to, also read: possibly in future either the European Monetary Institute or its successor, the European Central Bank (ECB). This distinction is not important for the principles of policy at issue here.

will in fact exploit this opportunity. It can however just as well be argued that financial transactions such as saving, lending and investing require a high degree of physical proximity to allow a proper assessment of the risks involved. On balance, this only results in speculation as to the exact costs of the transactions in both situations. From this the Council assumes that the transaction costs will, at least in some cases, work in favour of the foreign competitor. In other words, there will be foreign firms in the Dutch market who will want to operate without a DNB licence.

The second issue here is the risk that the DNB will in fact not always be able to trace the parties in question and to force them to comply with the DNB licensing requirements. As Chapter 3 has shown, the development of international legal co-operation might very well eliminate this risk altogether. For instance, the 'comity of nations' rule could be used to force financial institutions operating from abroad to still submit to DNB checks or similar market-entry requirements. Furthermore, the market-potential of a foreign company offering its services on the Dutch market might well seem poor without a DNB licence. Without it, the company's market-potential could even be so poor that the DNB could indeed have *de facto* if not *de jure* powers of forcing all foreign bidders in the Dutch market to submit to DNB controls. The DNB licence will then work as a 'hallmark' and without it the Dutch client will have no faith in the reliability of the foreign competitor. Both mechanisms could work, but to be effective international co-operation would have to involve all countries and the hallmark function would make heavy demands on the DNB's marketing skills. For these reasons, the WRR would not underestimate the chances of financial institutions operating in the Dutch market without a DNB licence.

2. ICT basically allows the existence of an accessible, transparent, reliable market to supply information on financial-services providers. There has already long been a market for rating the reliability and creditworthiness of individual parties and commercial companies, an example being the ratings given to banks by companies such as Moody's. It is also clear that banks actively use these type of report-marks to advertise their services. As for the matter in hand, the question is whether the ratings-market will also be open for use by all and sundry. This is not even a matter that people will keep on consulting the market-ratings of reliable companies. They will not look to see if Moody's gives the Postbank a favourable rating every time they make a transfer. The issue here is whether the 'electronic bush-telegraph' has sufficient range to give consumers timely and effective warnings about unreliable operators. ICT makes it so much easier to gather and publish this kind of data that a market for these services could in fact arise and operate.

These assessments now determine the conclusion regarding the government's capacity to act with respect to supervision of the credit-system: ICT's influence makes current policy both less feasible and less necessary. Needless to say, this assessment can also be made differently. It may also be noted that this assessment means a need still exists – or can exist – for a credit-system controls policy, but that the demand for policy and the available instruments will differ radically from the current situation.

4.2.3 The demand for policy

The above argument can be repeated for each of the objectives discussed above. It would however be going too far to spell out the argument in quite such detail for each of these objectives. The subjective appraisals as made in section 4.2.2 can however be presented in general terms:

1. where there may be room for a potential market, it is assumed that this market will in fact appear;
2. where there is a chance that parties might well use ICT to withdraw from the national sphere of influence as this gives them an advantage, it is assumed that this will happen.

The necessary room for when making these assessments has been set out in detail above. If these appraisals are made differently, the survey of changes in the capacity to act set out below will also look different.

Table 4.1 surveys the impact on the government's capacity to act based on assumptions as described above. As noted, ICT's impact will alter the capacity to act in terms of both the possibilities of government policy options and the policy issues.

Table 4.1 ICT's impact on governmental authority

	Policy issue basically unchanged; current policy still necessary	Completely different policy issue; current policy (in part) less necessary
Policy options basically unchanged; current instruments adequate for task	Stable prices Collecting group resources: taxation Ensuring cultural freedom Providing for cultural equality Enforcing common interests in the market	Encouraging market growth 'Steering' economic development Providing for cultural freedom Providing for cultural equality Providing for cultural quality Providing for multiculturalism and socio-cultural integration
Radically changed policy options: existing instruments (in part) no longer adequate for task	Guaranteeing the market Promoting a reasonable distribution of income Organizing risk-solidarity Supervising the financial system	Guaranteeing market forces Supervising the financial system

When reading Table 4.1 it needs to be borne in mind that this is only a rough indication of a trend in time. All the objectives under review are more or less all located in the upper left quadrant and under ICT influence could gradually shift towards the quadrant in which they appear in Table 4.1.

By 'trend in time' we are also referring to the meaning of the row and column headings: 'policy-options essentially unchanged' in this table means that the challenges to the instruments in the policy area under review do not exceed the current dynamic. Thus, for example, the 'collecting group resources: taxation' policy-objective does indeed raise really important issues of policy but it is not expected to deviate from the current trends in this area.

Mixed or multiple trends affect a number of policy objectives. Thus one will find 'cultural freedom' and 'cultural equality' featuring in both the upper left and the upper right quadrants. The reasons for this are as follows. The use of statutory rules to promote cultural equality and freedom still remains – as much as it did before – both feasible and necessary. The same applies to the active promotion of cultural freedom and cultural equality, where it involves equipping people with basic skills and knowledge, as is done when giving young people a compulsory general education. ICT enhances this very task of government. For these reasons, 'cultural freedom and equality' have a place in the upper left box.

For other less essential cultural services, ICT creates a different situation where the government now has less need to ensure that everyone has the same chances for self-development and for example to work towards a geographically even spread of cultural facilities. In view of ICT's independent stimulus to the goals of cultural freedom and accessibility, placement of part of the cultural services in the right-hand box is at least justified.

Special considerations require that 'providing for multi-culturalism and socio-cultural integration' is placed in the upper right-hand box. This placement is based on the consideration that the government's task of creating a healthy balance between multiformity and integration will lead to new demand for policies as a result of ICT's influence. Traditionally this policy was concentrated at the national level, where the government's structural guarantee of national multiformity always took precedence and where national integration was seen as a built-in asset, i.e. something not requiring so much attention from policy-makers. ICT breaks through this national framework, greatly extends the social 'playing-field' and at international level allows the creation of new patterns of cultural integration and multiformity which are hard to apply within the national cultural frameworks. As ICT can lead to increased traffic between cultures and new cross-border meeting-places as well as new forms of cultural isolation, one cannot easily predict the direction in which these new cultural patterns will develop.

It is however obvious that traditional policy-responses will no longer work, as the national cultural framework – until recently the dominant one – is now no longer the automatic frame of reference. In view of the new forms of international multiformity made possible by ICT, there is less need for the traditional policy fixation on national multiformity. The government's concerns about providing a basic level of national integration in the new situation in fact calls for more attention, because ICT offers new forms of cultural segmentation at national level. Certainly one can say here that the observation that there is – in part – less need for current policy does not mean the policy issue disappears completely. The policy is merely changing its essential nature.

Subject to these qualifications, Table 4.1 provides a preliminary classification of the kind of impact ICT could have on government policy. The example of the supervision of the credit-system examined in detail in section 4.2.3 showed that further subdivisions were possible. Thus three separate subcategories may be distinguished within the 'less need for policy' category:

1. there is less need for policy in the literal sense;
2. the demand for policy shifts to a meta-issue: instead of government supervision of the credit-system, the policy issue shifts to one of checking if a working mechanism is in place that provides clients with suitable information;
3. the policy-issue focuses on the specific sub-sector or shifts to another topic. Where cultural policy is concerned, compulsory youth-education becomes even more important and the issue of national cultural integration also demands more attention. This is also the case with the knowledge-infrastructure aspect, which is one of the aims of the market incentives programme: i.e. a shift from *economic* policy to *education* policy. And finally the example of supervision of the credit-system may be cited once again, where the meta-issue in 2 above may by nature belong more in the competition-policy category.

As for policy instruments, the survey in Table 4.1 shows a much simpler picture. In all cases where ICT undermines the powers of existing instruments, the issue is ICT's ability to offer individuals or companies new or more accessible opportunities for free-rider behaviour. In particular, the three solidarity objectives (ability-to-pay taxation principle, equality of risk and equality of income-distribution) know they face a new challenge in the form of ICT.

4.2.4 Conclusion

This section is a summary of the material showing that ICT's impact does indeed alter the government's capacity to act. Here there appear to be two distinct trends:

1. given certain objectives, ICT influences the instruments of official government policy;
2. given certain objectives, ICT influences the demand for a specific policy.

These two influences together determine the changing capacity to act of the government. In this regard it also became clear that it is not possible to speak of the changing capacity to act as though this were a single isolated process: the capacity to act is evolving in different ways for different objectives. In practice, all four possible combinations of trends 1 and 2 will occur.

4.3 Current policy reactions

The growth of ICT has not just emerged suddenly but is an ongoing process. This means that the reaction to this process is already apparent in a number of issues in the everyday practice of policy-making. Current reactions to ICT do not always provide an adequate response to the new challenges as identified above. As Table 4.1 led one to expect, it is precisely those cases where the instruments and the policy-issue are subject to different influences, that come lower down the list of policy-makers' priorities. Table 4.2 provides a brief survey of this.

Table 4.2 Current reactions to the various types of challenges

	Policy issue essentially unchanged; current policy still necessary	Completely different policy-issue; current policy (in part) less necessary
Policy options essentially unchanged; existing instruments adequate for task	Normal policy development	Abandonment of current policy not explicitly on the agenda
Policy options basically unchanged; current instruments (in part) no longer adequate for task	Threats to customary method of organizing solidarity still hardly on the agenda	Policy appears to adjust automatically

The most serious problems occur in the field of solidarity, if only because the problems in this particular area will be both serious and highly conspicuous. So ICT seems to offer (and go on offering) individuals various ways of avoiding the cost-aspects of territorially organized solidarity. Thus it seems possible that foreign insurers will offer health insurance policies without any price-increasing national, solidarity levies. Or, more radically still, that health insurance policies will be offered from abroad with far much sharper selection in terms of the health of policy-holders, meaning in time that mainly the 'bad' risks will stay with domestic insurance companies. Also where workers' insurance schemes are concerned, new opportunities also appear to be arising or existing possibilities are becoming more accessible for the avoidance of paying insurance premiums in the Netherlands. It should be borne in mind that these are still just potential trends and not yet actual facts.

In addition to this, attention could be drawn to the possibilities of either abandoning the policy in question or fashioning it in a completely different way. Governments and organisations alike generally have a tendency to ensure their own survival, even if the direct usefulness of doing so is sometimes in doubt. In the case of certain policy-objectives, the advent and spread of ICT certainly seems to justify keeping a watchful eye on changes in the level of policy demand. The production of policy where this is no longer required by society is wasteful and often counterproductive. In this context one can point to the gradual fusion of telecommunications, IT and media. These three sectors are rapidly heading towards a state of more or less total integration; but where policy is concerned, they are still regulated by three different government departments (Transport, Public Works and Water Management, Economic Affairs and Education, Culture & Science), with each department operating in its own very distinct way. In each of the three separate policy areas ICT strongly affects those issues with which policy-

makers are already preoccupied as it is. The active integration of policy for these sectors could render a number of elements of specific policy production redundant without in fact endangering the policy objectives themselves.

4.4 Conclusion

Setting out the various policy areas in this chapter reveals that for most objectives developments in ICT alter both the policy possibilities and the demand for policy. These changes also by no means always proceed in tandem. When it comes to organising various forms of solidarity for example, ICT would appear seriously to limit what can be done with the existing instruments, while there will be no lessening of demand for such policy. In addition, however, there are also certain areas where ICT alters social situations in such a way that certain objectives can be attained without the need for specific government intervention. Where the payment of subsidies and the granting of tax-concessions are concerned, ICT for example offers prospects of serving a far wider range of 'worthy' causes, whereas at the same time there is also less need for them.

Current policy is already actively accommodating the advent and spread of ICT in many areas. ICT however not only has an impact within policy areas but also influences the relationship between policy areas. Examples of this set out in the table above affect the supervision of the credit-system, which may well need a different sort of policy in the future, and the developments in the IT-sector, where separate policy areas will become increasing interlinked. The question is whether one can find responses to these sort of developments within the existing policy-clusters. In a number of cases, these will require a strategic 'rethink' at a more general level.

Conclusion: transformation of the nation-state

5

5.1 Introduction

ICT is changing society. Social issues which may require government intervention are changing; traditional problems are becoming less significant and new ones are emerging to take their place. ICT offers the government new opportunities, whilst the opportunities for the various government levels (local, national and international) are shifting. The implications of the wide-scale use of ICT for the functioning of society and of the government are as yet only partially visible. Every report on this subject is therefore unavoidably somewhat speculative in nature.

The Council has attempted in this report to explore one aspect of the interaction between ICT, social change and the functioning of government: what consequences does the use of ICT in society, and in particular in terms of the territorial dimension, have for the governmental capacity of the nation-state to act? This question relates not so much to how a national government can sustain itself as an institution in a changing context; rather, the key issue is to examine which socially relevant tasks a national government still can and must fulfil within that changing context.

When developing policy to deal with social issues in the future, it cannot be assumed that the parameters which apply today will still be valid. Developments in the field of ICT impinge on many facets of government policy. Moreover, the development of ICT not only changes the social environment – something which of itself forces the government to provide new answers – but also the capacity to act of the State itself. There is a danger of the social environment being approached from the perspective of an outmoded concept of the nation-state and outdated ideas concerning the ability of that state to act. ICT has such a far-reaching impact on the social system that the nation-state and its ability to act will also have to be redefined.

The ‘nation-state’ is defined here as the organisation which holds the legitimate monopoly within a given territory for the use of force, the imposition of regulations and the levying of taxes. The nation-state has the authority and actual ability to impose legal and other obligations unilaterally on the population within its own (national) territory and to enforce compliance with those obligations, by means of force if necessary. Understood in these terms, the nation-state is generally associated with sovereignty (the monopoly referred to) and autonomy (the ability to achieve objectives independently of others). This nation-state is accorded a wide capacity to act within its own borders. Naturally, reality is often different. Nation-states have traditionally been involved with other states and dependent on developments in those other states. Today this involvement has become so intensified that modern states attempt to maintain their ability to act in many areas by limiting their sovereignty, traditionally through co-operation in international organizations and, since the Second World War, in Western Europe through the founding of the European Community – now the European Union – which on the basis of the sovereignty transferred to it can draw up rules and create rights which apply directly for its citizens.

Notwithstanding all the nuances, the concept of the sovereign state is a useful starting point here. In the first place because of the close historical interrelationship that has grown up between the nation-state, the legislature, the accountability of government policy and the national territory. Secondly,

the nation-state is not only a theoretical but also a normative construct. The system of public law and the realization of collective interests and amenities is based on the existence of a nation-state. In this sense, the concept of the constitutional democracy is also fundamentally linked to the nation-state.

Below we shall take stock. Chapters 3 and 4 have shown that the idea that the capacity of national governments to act is changing under the influence of ongoing internationalization and deterritorialization is gaining support both institutionally and empirically (section 5.2). For a correct perspective, however, it is necessary to be more precise in three respects (section 5.3). First: which part of government action is affected by this process? Second: what options are available to compensate for any loss in the capacity of the nation-state to act? And third: what need is there for a national order within the new context of an internationalizing and 'informatizing' society? Taken together, the answers to these three questions demonstrate that we are not seeing the end of the nation-state. The changes can however be so far-reaching that we can speak of a transformation of the State in the sense of changes in the defining characteristic of that institution. It is wise to keep this in mind, so that those responding now to expected developments will be better equipped for new tasks in the future. The final section of this chapter, therefore, looks at ways in which the developments can best be approached.

5.2 The capacity to act under pressure

Changes in the environment

The use of ICT results in a dual movement. On the one hand ICT contributes to further internationalization (referred to elsewhere as globalization), by shrinking distances and blurring territorial boundaries. On the other hand, ICT can contribute to the increasing importance of the local level (partly because ICT increases the possibilities for organizing the large-scale on a small scale). These processes of upscaling and downscaling have been described above both in terms of their economic and cultural impact.

Within the sphere of *economic activity*, ICT leads to a reduction in transport costs and thus provides a boost for international trade. ICT also fosters processes such as the shortening of product cycles, which force businesses to seek their sales markets outside their own national borders. ICT has also already given an enormous boost to the internationalization of the financial markets. Finally, the use of ICT supports changes in the organisation of production. National and multinational businesses are being transformed into network organizations, a development which itself provides a considerable stimulus to international economic activity. New patterns are emerging in the establishment of businesses. Distance is becoming less important and the quality of the local environment is becoming more important. Companies forming part of international networks are organizing into small local clusters. Thus the large-scale is organized in a small-scale way and as a result, social, cultural and other societal factors are becoming more important than economic factors in determining patterns of business establishment and activity.

In the area of *culture*, too, ICT has led to a further blurring of boundaries. On the one hand this is leading to increasing homogenization of culture at international level, creating a world in which norms and values can be interchanged globally (though despite this interaction, the cultural values of one particular country, such as the United States for example, are dominant in many respects within that single world culture). On the other hand, technology offers an opportunity for greater contact world-wide between people with shared attitudes. New opportunities for identification and cultural differentiation are arising, allowing new international cultural communities to arise. Where in the past physical proximity was the decisive factor in the creation of local communi-

ties, today accessibility is becoming more and more important for the formation of (virtual) communities. In addition, regionalization and 'localization' constitute a reaction to the process of internationalization, with forces towards international homogenization being countered by a desire for cultural individuality.

Changing capacity to act of the nation-state

These processes of upscaling and downscaling affect nation-states because they change their environment and thus in time their ability to order and control that environment. These developments are giving citizens and businesses more opportunities to circumvent the policy and (legal) obligations imposed by the nation-state. Internationalization could mean that deviating national policy has unintended and unexpected consequences; policy competition by its very nature sets limits to the available policy options.

In addition to this 'quantitative' leap in developments, a 'qualitative' leap is also taking place. The use of ICT is giving distance and time another meaning, because it will become increasingly simple to develop activities on a global scale *without actual physical relocation*. In this respect we seem to be seeing a break in an existing trend. Up to now, the process of upscaling and internationalization has mostly involved a more effective and faster bridging of distance and space, whilst retaining or even increasing the local physical movement. ICT makes it much simpler for actions to take place within the territory of one nation-state, or even simultaneously in several states, whilst the initiator is located within the territory of another nation-state ('at home').

This represents a challenge to the sovereignty of nation-states, i.e. their monopoly to formulate rules within their own territory. This monopoly assumes that there is consensus on where an action is performed and who can be held accountable for it. It therefore assumes that the initiator, the action and the consequence are in a recognizable and attributable relationship to each other, something which will often be the case with geographic proximity. This is most clearly the case in the criminal law, with its strongly territorial basis.¹

The core of the problem here lies in the declining importance of the national scale for social intercourse, where the legal power and legitimacy of national governments are strongly linked to territory. This territorial determination applies most strongly for the use of the law as an enforcing policy instrument, but for other policy instruments, too, the democratic legitimacy for government action lies within the territory of the nation-state. Partly because of this, the political and policy context of governments is still predominantly national in character, in spite of the internationalization process. National elections are dominated almost entirely by national issues, or at least by issues which are seen and understood by the public in terms of national interest. Internationalization appears to relate primarily to 'foreign affairs' in election programmes.

Where the functioning and functions of the State are so closely interwoven with territory, administrative area and national borders, changes in the scale of social intercourse have far-reaching consequences for the institutions of the nation-state and national legal systems. As a political, social and economic integration framework and as a basis for the functioning of the government, territory is in this case losing value. What is at issue here is not only an instrumental problem – the State is able to do less – but also the possibility that changes in the scale of social intercourse will erode the legitimacy of the nation-state too. It was argued in Chapter 4, for example, that social security and the levying of taxes have in

¹ M.H. Hirsch Ballin and A.J.C. de Moor-Van Vugt, 'Rechtshandhaving op een grenzenloze markt' ('Law enforcement in a borderless market'); in: R.A.J. van Gestel and Ph. Eijlander, *Markt en wet*; Deventer, W.E.J. Tjeenk Willink, 1996, pp. 135-148.

common that the basis for their legitimacy is being put under pressure by internationalization and deterritorialization. This makes it more difficult to apply the principle of redistribution through the tax system and to enable the 'good risks' in the social security system to help pay for the 'bad risks'. Any system which is exposed to increasing opportunities to circumvent it will ultimately prove to be largely untenable. Internationalization and deterritorialization of economic activity could make it possible and attractive for more and more citizens to decide no longer to pay the high rates required by the Netherlands. If the 'top' 10 per cent decide to go elsewhere, the system will retain insufficient legitimacy to remain intact.

Internationalization will not put immediate pressure on social security and healthcare systems, but it will raise questions regarding their affordability, and thus contribute to change. In those areas of the social security system where the insurance principle is more important than redistribution, the relationship between paying for a broad risk cover and enjoying the benefits of the system can be tightened. Government intervention will then be less necessary. Nevertheless, there is a danger that the 'good risks' could leave the employee insurance system in such numbers, for example via constructions for the self-employed, that insurance is no longer a viable option for those left behind. Redistribution is also becoming more difficult in the area of (private) medical insurance, precisely at a time when it appears to be more needed because the risks of policyholders are becoming better known. In time, foreign providers could begin operating on the Dutch market without being bound by the Dutch rules. For this very reason the Council argued earlier for a general basic insurance for medical expenses.²

Where proximity is replaced by accessibility, the socio-cultural integration of society itself can be called into question. As indicated in Chapter 4, however, an active national and international policy can be pursued in this area, in which new instruments to promote socio-cultural integration can be tried out.

5.3 Developments in perspective

As stated in the introduction to this chapter, a more precise definition is needed in three respects in order to place the developments in perspective. First: which areas of government action are affected by this process? Second: what opportunities are available to compensate for any loss in the capacity of the nation-state to act? Third: what need exists for a national order within the new context of an internationalizing and 'informatizing' society? This section looks at these questions.

Internationalization and deterritorialization do not mean that the nation-state will be left with nothing to do in the future. Even with intensive use of ICT, some social intercourse will remain physically tied to society in terms of location; some human activities (e.g. in the local services sector) will hardly lend themselves to internationalization and deterritorialization. Some areas of social intercourse – and therefore some areas of government activity – will not be affected by internationalization. Against this, the internationalization of other activities could have major consequences for the nation-state. Moreover, internationalization does not affect a margin of citizens and businesses, but a margin of the activities of virtually all citizens and businesses. To a large extent, citizens and businesses will retain a national orientation, but the same citizens and businesses will begin operating more and more internationally.

² Netherlands Scientific Council for Government Policy, *Public health care. Priorities and a Sound Financial Basis for Health Care in the 21st Century*; Summary of the 52nd Report to the Government, The Hague, 1997.

A range of instruments can be adapted in response to the changing environment. Examples include changes in the law, a shift towards other types of government intervention and intensification of international co-operation.

Changes in the law

Whether the close linkage between state, law and territory is still necessary is a legitimate question. Does a declining societal importance of territory always imply a reduction in the importance of law and government, or do legal concepts develop which are less sensitive to these changes? Chapter 3 referred in this context to developments such as the gradual international harmonization of legal systems, a new interpretation of the 'comitas principle' and a broader acceptance of legal pluralism. The classic comitas principle means that every state has a duty in the event of conflicting jurisdictions to look at both its own interests and those of the other State concerned. Following a mutual comparison, the legal regime and jurisdiction of the State whose interests are greater should prevail. In the more recent concept of 'positive comity', a more active definition is given to this principle: mutual support by and voluntary co-operation between states and other actors across national borders in order to resolve what are perceived as shared problems. In the case of legal pluralism, legal unity is no longer thought of in terms of uniformity and equality, but as an open construct in which different but equivalent legal regimes can interact and refer to each other.

In addition to this, a shift from the territoriality principle to the 'personality' principle is conceivable. This 'personality' principle is not an unknown phenomenon; in fact it has long been the basic principle of family and marital law. A Muslim who is legally married to several wives elsewhere is also regarded as legally married in the Netherlands and will not be prosecuted for bigamy. Nevertheless, problems can be foreseen here: there are many areas in which it is less plausible that the Dutch law will apply only to people with a Dutch passport. At the very least, this will do nothing to foster integration within the Dutch territory.

When trying to move away from a territorial basis for the application of the law to human activities not only theoretical questions are involved, but also practical problems of enforcement. Generally speaking, citizens still 'localize' themselves, but this applies to a much lesser extent to their 'deterritorialized' activities. The fact that a person derives income from international activity, for example, may well be a visible fact, but where that income is derived, its size and its source are more difficult questions. Even where deterritorialized transactions 'manifest themselves' in the form of a physical product, the huge size of the goods flows across 'open borders' can make them difficult to spot.

Underlying these practical problems is the fundamental fact that, while it may be possible to 'de-couple' the law from a given territory, this is much more difficult with the governmental power needed to ensure compliance with the law. Enforcement requires that the *de facto* opportunity and authority to do so coincides with the scope of the applicable legal rules. Where distance and boundaries have a limiting effect on activities and physical movement, this can generally be assured within the nation-state or through co-operation between States.

There are several reasons making it likely that the rules will tend to focus more on the 'conditions for participation'. Anyone wishing to get something from the national government will have to adhere to certain rules. It is also likely that more scope will have to be given to self-regulation. At legislative level it will then be sufficient to have a number of very generally formulated norms and safeguards. In an approach such as this the government facilitates by providing guidelines to help the actors within the various sections of

society to move to self-regulation.³ It will be clear that this also results in great changes for the public. The notions of legal certainty and uniformity, so closely associated with the constitutional democracy and the welfare state, will have to be defined differently.

Other types of government intervention

Where the law no longer offers a solution, other forms of government intervention could gain ground. Other ties could emerge between nation-states and societal actors. Transaction will then become more important than is currently the case. Conditions will be attached to certain rights. The insurance principle could become more important. The relations between States and societal actors could thus become generally more 'horizontal'.

Generally speaking, governments will themselves be able to benefit from the application of ICT, among other things because of the greater opportunities for linking databases, particularly across national borders. While it will not be simple to get a grip on crime in this way (criminals do not sit still, and there is a danger that governments will be trying to win 'the last war'), ICT could also prove useful in combating international crime. It may be that some relaxation of the laws on privacy will then be needed.

Co-operation between States

Some compensation for the declining capacity to act of the nation-state can be found in international co-operation. The example of the European Union has already been mentioned, a body which on the grounds of the sovereignty invested in it can formulate rules and achieve solutions at a higher level than the individual nation-states.

It is likely that further internationalization of social intercourse will lead to a further structuring in some respects. There could be a greater need for international order and control as citizens and businesses from different countries become more closely involved with each other. As norms and values become more internationally homogenized, international co-operation will become easier.

Of itself, intensification of international co-operation does not represent a trend-break; it is the continuation of a process in which power in many fields has been 'elevated' over the centuries from local to regional and then to national level. Two qualifications are necessary here, however: in the first place formulating and enforcing policy becomes more difficult as more states become involved in the co-operation; secondly, this is all the more true in the case of deterritorialization, i.e. the principle is abandoned that the activities of citizens or businesses take place somewhere where the norm-setting and enforcing government can have a say over the subject performing the activity, the activity itself and the consequences. In principle it makes no difference here whether we are talking about the territory of one State or the joint territory of several States.

In the future, international co-operation may be mainly a transgovernmental and functional phenomenon. Representatives of nation-states will then attempt to reach agreements and develop joint behavioural lines which contribute to the international order, for example with regard to the supervision of movements of capital for the insurance industry, or courts which have greater contact with each

³] J.E.J. Prins and R.W. van Kralingen, 'De invloed van informatie- en communicatietechnologie op het recht' ('The influence of information and communication technology on the law'); in: M.F. Gelok and W.M. de Jong Jong (eds.), *Volatilisering in de economie* ('Volatilization of the economy'); WRR Preliminary and Background Studies V98, The Hague, Sdu publishers, 1997, pp. 105-123.

other and begin converging in their approaches. Acknowledgement of each others' sovereignty and keeping a distance from each others' national regulations could then develop into co-operation in which other countries are alerted to infringements of their jurisdiction. In such a system of functional co-operation, the nation-states could retain their pivotal position, at the very least functioning as representatives of their own citizens in international activities. The nation-state could remain reasonably intact in such a model, if the international co-operation also supports the state's national legislation.

What do we still need?

The capacity of nation-states to act may be declining in an internationalizing and informatizing environment, but there are also likely to be opportunities for accommodating or even compensating entirely for any losses. An assessment of gains and losses ultimately depends on the need for control and order by the nation-state in a future society, or in other words the desired ordering of the public domain.

It is impossible to say at this moment which ordering of the public domain will be desirable in the future. Based on current policy objectives, however, the question can be asked as to how much government intervention will be needed in the future policy environment. Internationalization of social intercourse means that some objectives will in the future be achieved without the need for an actively intervening government. The development of market forces could be an example here: the international environment stimulates the development of these forces, where in the past such a stimulus had to come much more from the individual nation-states.

Taking the prevailing policy objectives as a starting point, it is useful to distinguish four situations, as shown earlier in Chapter 4:

Table 5.1 Classification table

A undiminished possibility undiminished need	B undiminished possibility diminished need
C diminished possibility undiminished need	D diminished possibility diminished need

The importance of this (heuristic) scheme lies in the ability it affords to trace and limit future problem areas. After all, the only problematic situations are those in which the nation-state loses the capacity to act while the need for it to act does not diminish at all (situation C), and those situations in which the capacity of the nation-state to act does not decrease, whereas there is less need for government action (situation B). This enables the scheme to function as an aid in a selective policy approach. The two other situations, in which the positive trends dominate on balance, demand less policy attention.

The classification table helps to prevent the formation of a limited view of the developments resulting from ICT. It makes clear that ICT may in some areas have little influence on the capacity of the government to act. In addition, in some areas the need for government action will decline as a result of ICT. Focussing too fixedly on those areas in which the capacity of nation-states to act declines while the need for government action remains, means that these other developments will erroneously be ignored.

Continuing the theme of the classification table, the inventory of different policy fields in Chapter 4 brought to light that for most policy objectives, both the possibilities of and the demand for policy change as a result of ICT. These

changes do not by any means take place at the same rate in all cases. For example, in the organisation of different forms of societal solidarity and fairness, ICT appears to restrict (possibly seriously) the possibilities of the existing policy instruments, whereas the demand for that policy does not appear to diminish (situation C). On the other hand, there are areas in which ICT changes society to such an extent that certain policy goals can be achieved without the government having to take specific action. In the case of subsidies and the granting of tax benefits, for example, ICT creates opportunities for serving a much richer pallet of 'good' objectives, whereas the need for this diminishes (situation B). In the latter case, for example, what is involved is the creation of a physical infrastructure for sectors of industry which no longer play a pivotal role.

Less contentious are the developments in categories A and D. The far-reaching protective regulation of the small and medium-sized business sector will no longer be possible in the future, but also no longer necessary or even desirable. The same applies for the structural safeguarding of pluralism by the national government. In many cases a more supplementary policy will be sufficient. Tasks which do remain necessary, but which are also possible (albeit sometimes by using entirely different instruments), include for example the care for the intangible infrastructure, in particular the general education system, the encouraging and fostering of co-operation between companies with their roots anchored in the Netherlands, strengthening the supply of labour on the jobs market in other ways, structuring the physical environment, building homes and roads, creating a genuinely good public transport system, conserving nature, organizing homecare services, et cetera.

5.4 The importance of an open approach

In general, the congruence between public authority, the law and the public will be something that is less self-evident within a given territory in the 'international network world', whereas this concept is a fundament of the nation-state. To some extent it will be rekindled on a smaller scale on the basis of other principles (e.g. housing and quality of the residential environment): ICT will stimulate processes of decentralization and downscaling. To a degree it will also be rekindled at international level, where ICT provides an additional boost to co-operation between nation-states.

Whether the ultimate outcome will be a gain or a loss cannot be predicted in advance. In the first place a judgement will have to be made between the declining capacity to act and the new opportunities for national order and control on the one hand, and the changing need for order and control by nation-states on the other. What opportunities are there for compensating for a possible loss of capacity to act? What need will there be for ordering and control by nation-states in the future 'international network world'?

Secondly, the ultimate outcome will be determined in part by the way in which national governments respond to the changes. It is crucial here to acknowledge the fact that not only the social environment and issues will change under the influence of ICT, but also the function and capacity to act of the government. Evaluating the changes from the basis of existing possibilities and customary concepts will lead to a reaction which is geared mainly to the restoration of the existing possibilities and to treatment of the symptoms. The State as we know it today is also the product of transformation influenced by social, economic and technical changes; it is not an end-point of development.

Solutions always emerge. Even without government policy, society will order itself and the nation-state will transform. The question here, however, is whether the State will transform itself with alert and well thought-out solutions, or whether it will simply become a prey to developments. For this

reason it is useful to opt for an open approach rather than a defensive one when it comes to assessing the consequences of ICT in society. Approaching the changes in the social environment defensively brings the risk that the necessary transformation of the nation-state will not take place in the desired way.

A defensive approach which clings to existing concepts is above all an approach which focuses on the negative aspects, leading to a discussion which is conducted too much in terms of 'the end of ...'. With regard to democracy, adopting such an approach means sticking rigidly to the primacy of political democracy and closing the eyes to new forms of democracy, which could be facilitated with the help of ICT. With regard to the law, a defensive approach means clinging to the State as the only source of the law, putting an unjustified focus on the declining capacity of the nation-state to act. Culturally, a defensive approach leads to protectionism and thus deprives citizens of new opportunities.

An open approach puts developments in a broader perspective, takes account at super-sectoral level of the changing context outlined above and looks in a flexible way for new balances between fundamental principles. This creates a clear distinction between what the nation-state can do and what that State must do in the new context. Sometimes strengthening of the current ability to intervene is appropriate; sometimes existing forms of intervention must be used differently; sometimes it is necessary to switch to a completely different type of intervention (in particular, a shift from legal to actual intervention is likely); and sometimes the government must withdraw altogether.

In the quest for new balances, there will sometimes be an unavoidable exchange of fundamental principles. The most obvious example here relates to a renewed capacity of the nation-state to act through international co-operation, at the expense of national autonomy. Good examples of such trade-offs can also be found in other areas, however. In the area of taxation, for example, there is likely to be a shift from the prevailing legal approach to a more economic approach, with the nation-state remaining perfectly capable of generating sufficient tax revenues. In the generation of those revenues there may well be a need for more extensive gathering of information, which will have to be weighed against considerations concerning the protection of privacy.

Similar trade-offs also occur with regard to the organisation of solidarity in society. Here, fairness will have to go hand in hand with effectiveness and enforceability. Here again the insurance principle (with unknown risks) is ranged against the solidarity principle (with unequal risks). In making such choices the issue is not one principle or the other, but the transition between the two. Attempts to hold on to the status quo are at great risk of falling between two stools. Recognizing this necessary exchange and the shifts at a more fundamental level may well be the most essential aspect of the open approach proposed here.

The existing policy instruments will not simply become inadequate overnight in the years ahead. However, it is better – particularly in this case – to be prepared for the longer-term future. The standard response of 'more of the same' (more legislation, more enforcement, etc.) will be counterproductive.

The Council has published the following Reports to the Government

First term of office

- 1 Europese Unie (European Union), 1974.
- 2 Structuur van de Nederlandse economie (Structure of the Netherlands Economy), 1974.
- 3 Energiebeleid op langere termijn (Long-term Energy Policy), 1974. Reports 1 to 3 have been published in one volume.
- 4 Milieubeleid (Environment Policy), 1974.
- 5 Bevolkingsprognoses (Population Forecasts), 1974.
- 6 De organisatie van het openbaar bestuur (The Organization of Public Administration), 1975.
- 7 Buitenlandse invloeden op Nederland: Internationale migratie (Foreign Influence on the Netherlands: International Migration), 1976.
- 8 Buitenlandse invloeden op Nederland: Beschikbaarheid van wetenschappelijke en technische kennis (Foreign Influence on the Netherlands: Availability of Scientific and Technical Knowledge), 1976.
- 9 Commentaar op de Discussienota Sectorraden Wetenschapsbeleid (Comments on the discussion Paper on Sectoral Council of Science Policy), 1976.
- 10 Commentaar op de nota Contouren van een toekomstig onderwijsbestel (Comments on the White Paper on the Contours of the Future Education System), 1976.
- 11 Overzicht externe adviesorganen van de centrale overheid (Survey of External Advisory Bodies of the Central Government), 1976.
- 12 Externe adviesorganen van de centrale overheid, beschrijving, ontwikkelingen, aanbevelingen (External Advisory Bodies of the Central Government: Description, Developments, Recommendations), 1977.
- 13 'Maken wij er werk van?' Verkenningen omtrent de verhouding tussen actieven en niet-actieven ('Do we make Work our Business?' An Exploratory Study of the Relations between Economically Active and Inactive Persons), 1977.
- 14 Overzicht interne adviesorganen van de centrale overheid (Survey of Internal Advisory Bodies of the Central Government), 1977.
- 15 De komende vijfentwintig jaar, een toekomstverkenning voor Nederland (The Next Twenty-Five Years: a Survey of Future Developments in the Netherlands), 1977.
- 16 Over sociale ongelijkheid, een beleidsgerichte probleemverkenning (On Social Inequality: a Policy-oriented Study), 1977.

Second term of office

- 17 Etnische minderheden – A. Rapport aan de Regering; B. Naar een algemeen etnisch minderhedenbeleid? (Ethnic minorities – A. Report to the Government; B. Towards an Overall Ethnic Minorities Policy?), 1979.
- 18 Plaats en toekomst van de Nederlandse industrie (Industry in the Netherlands: its Place and Future), 1980.
- 19 Beleidsgerichte toekomstverkenning: deel I. Een poging tot uitlokking (A Policy-oriented Survey of the Future: Part I. An Attempt to Challenge), 1980.
- 20 Democratie en geweld – Probleemanalyse naar aanleiding van de gebeurtenissen in Amsterdam op 30 april 1980 (Democracy and Violence – an Analysis of Problems in Connection with the Events in Amsterdam on April 30, 1980), 1980.

- 21 Vernieuwing in het arbeidsbestel (Prospects for Reforming the Labour System), 1981.
- 22 Herwaardering van welzijnsbeleid (A Reappraisal of Welfare Policy), 1982.
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