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63

THE FUTURE OF THE NATIONAL CONSTITUTIONAL STATE

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SUMMARY

In a constitutional state the actions of government are subject to the rules of the law. This sets limits on the ability of government to act arbitrarily. This normative ideal of the constitutional state or '*Rechtsstaat'* is not in dispute. It contributes to the legitimacy of government action and provides the grounds on which the state can lay claim to compliance by its citizens with the rules of the law. Democratic legitimation strengthens those claims.

The importance of the *Rechtsstaat* increases in a society in which the population is becoming increasingly heterogeneous in nature and in which people's convictions and lifestyles diverge strongly. The values of the *Rechtsstaat* and the resultant norms and codes of conduct provide the minimal 'glue' between the various groups. Those in authority are not permitted to introduce or implement discriminatory laws. Citizens are able to invoke certain rights, irrespective of their origin, religious convictions, lifestyle or sexual orientation. Universal legal principles, such as the independent and impartial administration of justice and the guaranteed respect of human rights, are translated in a constitutional state into concrete regulations and rights that can be upheld even if resisted by those in authority.

Although the ideal of the *Rechtsstaat* goes uncontested, it is variously interpreted in practice. Lawyers emphasise the protection from the state, while citizens often interpret matters more broadly and give primacy to protection by the state. The values and principles of the *Rechtsstaat*, as formulated in abstract terms, can moreover be translated in various ways into concrete regulations, depending on time, place and circumstances. These regulations need to be brought into line with changing circumstances in national and international society. This may be done without any need for modification of the fundamental concept of the *Rechtsstaat* itself.

The hemmed in constitutional state

Recent developments taking the form of two long-term processes - internationalisation and individualisation - have left the constitutional state squeezed between two contending forces. Especially since the Second World War, a significant international legal order has arisen on the basis of international treaties. At European level, supranational law and domestic law have become increasingly interwoven. This has resulted in increased international legal protection and the greater subjection of the national legislature to the rules of the European Union. Doubts are therefore sometimes expressed about the future position of the national (constitutional) state. Has the national character of the state, including its territoriality, become overtaken by events? How much autonomy does the national legislature still have?

Within society itself, the constitutional state is being subjected to new and independent challenges on the part of self-assured and assertive citizens. Partly in response to the growth of the welfare state, there has been an increase in the range and type of government responsibilities. Pressure on government has consequently increased. There is much that the government is expected to achieve. At the same time the *Rechtsstaat* places exacting demands on government action which, in principle, should always be rule-based. The government ends up in a crossfire between the demands of the *Rechtsstaat* and the numerous demands of assertive citizens. That pressure manifests itself in two - sometimes conflicting - ways: the system of rules becomes ever more complex and bureaucratic, while the large stream of applications, procedures, complaints and defences create capacity problems and enforcement problems. The government is required to perform vigorously and effectively, but at the same time remains bound by the many self-imposed regulations and constraints.

The national 'Rechtsstaat' has a future

The decline in state sovereignty and the increased assertiveness of independent citizens have consequences for the way in which the ideal of the *Rechtsstaat* needs to be organised now and in the future. The most important conclusion in this report is that despite the ongoing process of internationalisation such a future does exist, provided that a number of conditions for the effective functioning of the *Rechtsstaat* are fulfilled.

Supranational law is an important framework for the process of internationalisation. Without the co-operation of nation-states, however, the implementation and indeed enforcement of such law would be inconceivable. The national *Rechtsstaat* continues to provide an indispensable frame of reference for the formulation of international law. The greater the influence and exemplary function of the national *Rechtsstaat*, the greater the chance of the further development of an international legal order that satisfies the norms of democracy under the rule of law.

The process of internationalisation does inevitably have - sometimes radical - consequences for the functioning of the national constitutional state. One of those consequences is that the role of one of the classical powers of state in the trias politica - the judiciary - has become more important. Seen from the viewpoint of the *Rechtsstaat*, this is a fully acceptable consequence.

Conditions for the effective functioning of the 'Rechtsstaat'

The most important conditions for the effective functioning of the *Rechtsstaat* may be summarised as:

- proper law enforcement, especially in the criminal sphere;
- a government that is performing adequately;
- an effective judicial system;
- a lively civil society, affording a foundation of support;
- sufficient public confidence in the law.

Continual preservation and overhaul - in some cases by way of 'long-term maintenance' - are required in order to satisfy these conditions. This is what is now required. An important change being called for in this connection - apart from the ongoing and now widely recognised need for more effective law enforcement - is the introduction of new forms of regulation, which will involve working more frequently with open norms. The latter will in turn affect (in the sense of enlarging) the role of the courts.

An important precondition for the proper functioning of the Dutch constitutional state is an effective government that gets things done. There is however a tension between what the government is expected to achieve and the extent to which the government is subject to the limitations imposed by the *Rechtsstaat* (for example the legality principle and the equality principle). Although this tension is not in itself new, it is being thrown into sharper relief in the current circumstances. Just like other large organisations, the result-based government is nowadays assessed in terms of effectiveness, efficiency, flexibility, rapidness of response, customer-friendliness and lack of red tape. The classical pattern of hierarchical government direction with strict and detailed rules is less and less in accord with modern requirements and current administrative practice.

New balances
The tensions in the modern constitutional state noted above have led to efforts at resolution and reduction. In particular, the adjustments of the *Rechtsstaat* that are being sought are to do with finding a balance between opposing requirements, desiderata, values and interests. The recommendations made by the Council in this report in order to ensure that the *Rechtsstaat* will continue to function effectively do not therefore relate to abstract values and principles of the *Rechtsstaat* but to practical arrangements in terms of concrete statutory measures and policy decisions.

The developments in the *Rechtsstaat* come down to five areas in which a new balance must be struck when two or more values and interests come into conflict. In order to promote the effective functioning of the *Rechtsstaat* now and in the future the Council has made a number of coherent recommendations in these five areas.

Recommendations

a) For more effective criminal law enforcement

- Reversal of the discretionary principle in criminal prosecution (i.e. invariable prosecution except where this is against the public interest) is desirable for a specific category of offences, namely serious violent offences.
- The working methods of the public prosecution service and the police in arriving at decisions concerning investigation and prosecution call for greater accountability and transparency.
- The effectiveness of the police system must be improved. The expansion of the capacity of the judiciary and public prosecution service is a logical consequence

of this, the latter so as to prevent congestion in the dispensation of justice.
- Minor offences could more frequently be dealt with by means of fines imposed at administrative level (including the public prosecution service), with the possibility of appeal to the courts.
- Stiffer penalties are not necessarily called for from the viewpoint of crime prevention; multiple offenders and young delinquents do however require extra attention and more intensive, preferably personal, guidance and support.
- The probation service needs to be involved to a greater extent in the guidance, support and return to society of the group of multiple offenders, who account in relative terms for the majority of the costs in the criminal law chain.

b) For improved governmental effectiveness:
- Consciously selected, temporary forms of non-enforcement in public administration are acceptable. All other forms of toleration - arising from administrative incapacity or capacity problems - should no longer be accepted. Uncontrolled forms of toleration can give way to publicly disclosed administrative enforcement strategies.
- The system of public administration can experiment to a greater extent and more systematically with new forms of regulation, leaving greater freedom for the executive agencies while at the same time preserving the possibility of ultimate review by the independent courts.
- The government will need to encourage the greater use of self-regulation and self-enforcement, for example in the fields of the environment, food and health safety. The government would have a supervisory role.

c) For a better balance between the responsibility of the government and citizens:
- The reform, in the sense of well considered limitation, of administrative rules needs to be coupled with the updating of legal guarantees, particularly in the broad field of public and public/private legal relations.
- With respect to private organisations performing public tasks (e.g. in education, healthcare, welfare and culture) there is a need for the systems of legal protection, quality control, transparency and accountability to be reformed and updated.

d) For the promotion of democracy under the rule of law in supranational and international contexts:
- Foreign policy and development cooperation need to be used in order to promote the principle of the *Rechtsstaat* in countries where that is currently lacking.
- The Dutch parliament will need to display greater involvement and take a more proactive stance in decision-making in the introduction of European legislation and regulations.
- A consistent Dutch input in international legal forums and in the implementation of international law in practice will need to be retained. The western conurbation of the Netherlands (*Randstad*) as the seat of international legal

organisations is highly important.
- Research should be encouraged into the consequences of internationalisation for domestic law, especially for the functioning of the Dutch legislature, courts and legal profession.

e) For an improved relationship between the powers of state:
- With respect to the jurisprudential task of the courts, a clear division of tasks will be introduced between the superior and lower courts.
- Greater input to the courts can be provided by experts from society, such as *amicus curiae* and other legal arrangements.
- The professional accountability and transparency of the judiciary as a whole, represented in the Council for the Administration of Justice, are important for promoting and monitoring the quality of jurisprudence.

Some of these recommendations require no more than the improved use of the existing possibilities or their virtually cost-free extension. Most of the recommendations, however, also require the input of more resources. An effectively functioning *Rechtsstaat* is worth that, now and in the future.

PREFACE

This report has been prepared by an internal project group of the WRR chaired by Dr. C.J.M. Schuyt, a member of the Council. In addition the following members of the Council and the staff formed part of the project group: Dr. P. den Hoed, Dr. J.C.I. de Pree (project secretary), D. Scheele, Prof. M. Scheltema, A.J. Strijers and I. Verhoeven.

The analyses in this report have been partly based on the results of various studies carried out for the Council. The following are being published more or less simultaneously with this report:
G.J.M. van den Brink (2002) *Mondiger of moeilijker? Een studie naar de politieke habitus van hedendaagse burgers (More articulate or more awkward? A study into the political habits of contemporary citizens)*, WRR Preliminary and Background Studies Series no. V115, The Hague: Sdu Uitgevers, and
W.J. Witteveen and B.M.J. van Klink (2002) *De sociale rechtsstaat voorbij (Beyond the social 'Rechtsstaat')*, WRR Preliminary and Background Studies Series, no. V116, The Hague: Sdu Uitgevers.

Use was made during the preparation of the report of suggestions and comments by Prof. M.A.P. Bovens, Prof. A.F.M. Brenninkmeijer, Prof. Y. Buruma, Prof. E.M.H. Hirsch Ballin, Dr. H.O. Kerkmeester, Dr. A. Klijn, Prof. M.A. Loth and Prof. H.G. Schermers. The Council is indebted to them for their contributions. The Council itself is of course only responsible for the contents of the report.

1 INTRODUCTION AND DEFINITION OF THE PROBLEM

1.1 INTRODUCTION

The need for the state to be subjugated to the rules of the law lies at the heart of the constitutional state or *Rechtsstaat*. The subordination of action by government and public power-holders to the law serves to enhance the legitimacy of government action. This in turn enables the state to make a justified claim on the obedience of its citizens (Bos 2001: 6-13).

Four different characteristics are traditionally regarded in the Netherlands and elsewhere in continental Europe as vital for one to speak of a *Rechtsstaat*: the separation of the powers of state, the legality principle referred to above, judicial independence and fundamental rights guaranteeing a certain freedom from interference by the state.

The concept of the *Rechtsstaat* is not in dispute. It has become the touchstone for a civilised, modern state. That does not mean that the elaboration of the *Rechtsstaat* concept and its everyday realisation take place along uniform lines in the various nations of the world. Nor is it so that the inherent normative ideas are universally self-evident. Precisely as a normative ideal the *Rechtsstaat* arouses tensions, which consistently manifest themselves in historically changing circumstances and provide grounds for adapting or revising the form taken by the *Rechtsstaat* in practice.

The *Rechtsstaat* is a historical achievement that partly arose in response to the *ancien régime* in France and the absolute claims by the British colonial power on its overseas colony (the later United States of America). The *Rechtsstaat* was also ushered in by the theories of state of the Enlightenment philosophers (Locke, Voltaire, Rousseau and Hume, etc.). In continental Europe this led to the *Rechtsstaat* and in the Anglo-Saxon countries to the doctrine of the *rule of law*. Both are based on a linkage between the controls over the state and on government action and the duty of obedience on the part of citizens (Raz, 1979: 212).

Although the ideal of the *Rechtsstaat* is not in dispute, there is less unanimity when it comes to the 'concept' of the *Rechtsstaat*. Academic and political opinions diverge concerning the scope of the *Rechtsstaat*: what is regarded as forming part of the core of the *Rechtsstaat* and what falls outside that core? That there is a core of the *Rechtsstaat* is accepted by most authors, but there is little if any consensus as to what that core is. Furthermore, the definition of the core depends on the historical circumstances. What was regarded in the nineteenth century as falling outside the core – e.g. universal suffrage – was regarded a century later as a standard element. Formal and material (i.e. substantive) attitudes concerning the *Rechtsstaat* alternate in history. For various authors the *rule of law* or the *Rechtsstaat* amounts

primarily to a system of formal requirements with which laws and legal institutions – including the state itself – must necessarily comply if there is to be any suggestion of a legal system in the first place. Raz regards the rule of law or the *Rechtsstaat* as one of the few institutions that really binds society together, guaranteed as it is in principle by the enforcement of rules by the firm hand of the police - the practical effectuation of state power (Raz 1979: 210-229). The values and norms of the *Rechtsstaat* have great binding force. Precisely in a society that is changing rapidly and becoming more heterogeneous in terms of composition and beliefs, that binding force is highly important.

Raz (1979) sums up (eight) principles for both the adoption of general rules and the organisation of legal institutions, which principles characterise the *rule of law*. Also very well known is the summary given by Fuller, who refers in his book *The morality of law* (1964) to an internal, implicit morality that makes law possible in the first place and names (coincidentally also eight) elements of the foundations of any legal system. These principles are always of two kinds:

- principles facilitating obedience to the law by citizens (promulgation, clarity, no retroactive effect, constancy of rules);
- principles that ensure that organisations concerned with the enforcement of law are able to do their work and so, subject to the law, can respond to violations of the law.

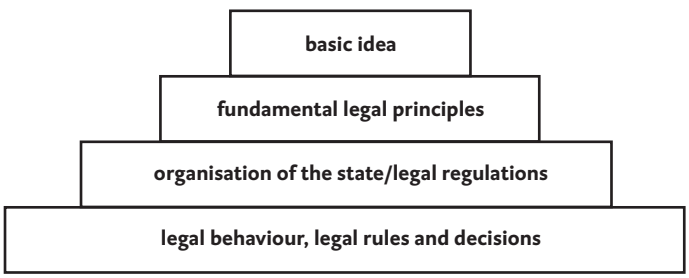
Ultimately it comes down in particular to the *knowability* and *performability* of rules. The *Rechtsstaat* and the rule of law amount to the fact that countering the arbitrary exercise of power by the state is linked to the expectation and duty of compliance by citizens with the rules.

1.2 THE RECHTSSTAAT AS A LAYERED CONCEPT

The why and how of the *Rechtsstaat* and the rule of law have been set out in broad terms above. The complicated nature of the concept of *Rechtsstaat* has not led to any reluctance in the Netherlands to use it. In particular the *Rechtsstaat* is alive as a term, which is readily drawn on in public debate. In particular it is used as a point of reference. References of this kind are evidently designed to lend force to the arguments against certain measures or in favour of a particular viewpoint. At the same time a reference to the *Rechtsstaat* emphatically underlines the undesirability of what is happening or has happened. In discussions of other subjects the *Rechtsstaat* is frequently cited, sometimes appropriately and sometimes inappropriately, whereby the content of the concept turns out to vary enormously. In a collection of press reports assembled in the course of preparing this report the *Rechtsstaat* was variously described as:
an historical achievement of western culture;
a counterpart to the police state;
a state that does not tolerate multiple, unprosecuted violations of the law;

a guarantee of essential freedoms for particular professional groups, such as lawyers and journalists;
assurance of the protection of individuals and minorities;
a state form that requires an effective judiciary;
an institution that is endangered by international terrorism, and
at the same time sets limits on the ways of fighting such terrorism.

In order to give the inherent tensions that the concept of *Rechtsstaat* evidently arouses a place, the concept of *Rechtsstaat* can best be regarded as *a 'layered concept'*, in which the following four layers may be distinguished.



First layer: basic idea
The subjugation of state power to the rules of the law. The underlying notions are the curtailment and reduction of arbitrariness and countering concentrations of power that could lead to unlimited state power or state terror.

Second layer: fundamental legal principles
These take the fundamental idea further and may be regarded as independent values of the *Rechtsstaat*. Examples include the principle of equality before the law, the principle of legal certainty, the principle of legal protection by an independent court, the principle of administration on the basis of a general rule and formal legislation, the principle of the serving government, the principle of the *lex certa*, the legality principle in criminal law and the principle of the non-retroactive effect of laws (Scheltema 1989).

Third layer: legal regulations
The third layer is concerned with the practical organisation of the state and, within that setup, the practical division of tasks between the various state organs, enshrined in legal regulations and legal arrangements. The distribution of tasks and the powers can diverge widely from one state to another without violating the concept and values of the *Rechtsstaat* (cf. *rule of law* versus *Soziale Rechtsstaat*; French versus British administrative law; right or no right of review by supreme court of justice; and relationship between parliament and president/executive, and so on).

Fourth layer: the practical implementation in the legal system
The fourth layer concerns the concrete elaboration in the form of legal rules and decisions and implementation decrees governing the day-to-day implementation and dispensation of justice. This concerns the practical elaboration of the basic ideas and values of the *Rechtsstaat*, for example regulation of the consequences of procedural errors, the appointment and remuneration of judges, the number of judicial processes in administrative and civil justice, and the imposition and execution of punishments, etc.

The various layers of the *Rechtsstaat* are repeatedly confused with one another – consciously or unconsciously – in the public and jurisprudential debate about the *Rechtsstaat*. Shortcomings in criminal law enforcement (fourth layer) are deemed not to be in accordance with the *Rechtsstaat* (first layer); a limitation of the powers of lawyers constitutes a threat to the *Rechtsstaat* (second and third layers); and a change in the judicial organisation (third and fourth layers) could mean an infringement of judicial independence (second layer) and hence of the *Rechtsstaat* (first layer).

In other words, regulations and concrete legal rules in conceptual layers 3 and 4 can vary according to time and place without undermining the fundamental idea. Historically, modifications of the *Rechtsstaat* therefore apply primarily to the two bottom-most conceptual layers and barely at all in the two uppermost layers. Changes in the arrangements of the *Rechtsstaat* will therefore relate almost exclusively to layers three and four. The basic idea does not get lost if specific changes are made to specific regulations. On account of their abstraction and universality, legal principles retain their force despite any legislative amendments. The *Rechtsstaat* in fact derives its strength from the ongoing combination of the general with the specific, of general principles with concrete rules: the concrete level is worked out in terms of the values of the *Rechtsstaat*.

Separating out the four conceptual layers of the *Rechtsstaat* makes it possible to pursue a twofold goal. This WRR report seeks:
- to provide a clarification of the normative idea of the *Rechtsstaat* under new historical circumstances (internationalisation, individualisation);
- to provide an analysis of the practical problems of the practical dispensation of justice in the light of the requirements of the *Rechtsstaat*.

In this regard attention needs to be devoted to both the *theory* of the *Rechtsstaat* and to the *practice* of the dispensation of justice, in brief to the normative ideas and values of the *Rechtsstaat* as well as to the day-to-day practice. The dialectic of theory and practice and of ideal and reality against the background of changing historical conditions forms the common thread of this WRR report.

1.3 MOTIVATION FOR THIS STUDY OF THE RECHTSSTAAT

The importance of the *Rechtsstaat* is not under discussion. It provides for civilised dealings between people, between citizens themselves and between a powerful government and its citizens. In addition the government, by abiding by the requirements of the *Rechtsstaat*, makes an important contribution to its legitimacy: the authority of the government is enhanced by putting the *Rechtsstaat* into practice as effectively as possible. The normative ideals of the *Rechtsstaat*, as articulated in many theories of the state, are translated into direct requirements in respect of government action. Complying with those requirements at all times and in all respects, however, is not straightforward. If excessive requirements are imposed on government action by virtue of the *Rechtsstaat*, this can reduce the decisiveness and effectiveness of government action, for example in combating crime.

The tension that is created by the requirements of the *Rechtsstaat* and the other interests of the government is a constantly recurring factor as circumstances change. The *Rechtsstaat* is, as it were, revised numerous times, its ideals are adjusted or verified and the day-to-day operation is continually subjected to new yardsticks. This is one of the most important reasons for embarking on a study of the *Rechtsstaat*, which deserves continual review.

Apart from the desirability of a contemporary review of the *Rechtsstaat* concept, there were also other, specific motivations for a study of the *Rechtsstaat*:

Shift in the relationship between the powers of state
It is evident that a shift is taking place between the three classical powers of state: the legislature, the executive and the independent judiciary. As originally conceived the democratically elected legislature drew up the general rules, the executive operated independently by virtue of those rules, and in the case of disputes concerning the interpretation of rules appeal could be made to an independent court. In the meantime reference is now made much less to the separation of powers and much more to a balance of powers (e.g. Witteveen 1991). These shifts and the consequences they can have for the equilibrium of the *Rechtsstaat* were the primary reasons for this report.

Pressure on the government
The demands made on government have become more numerous, e.g. because of the growth in the range of governmental provision, but have also become more diversified. There is therefore reason to review the link between the performing and the executive government and the law.

Growth in international law-making
Particularly since the Second World War, a significant international legal order has arisen, based on international treaties. In the European context this growth in the supranational legal order has obtained direct jurisdiction in the form of the na-

tional *Rechtsstaat*. EU law and national law have become increasingly interwoven. Is the national nature of the *Rechtsstaat*, including its territorial definition, becoming superseded? Will the European courts now impose law on the national courts? What will be left of the autonomy of the national legislator?

Demanding citizens

The *Rechtsstaat* imposes strict requirements on government action which, in principle, should always be rule-based. In addition citizens are also increasingly imposing independent demands on government. The government consequently finds itself as it were caught between two fires: a demanding *Rechtsstaat* and demanding citizens. This pressure coming from two sides manifests itself in two ways: the system of rules is becoming ever more complex and bureaucratic, while capacity problems are arising on account of the large flow of applications, public participation procedures, complaints, pleas and proceedings against the government on the part of assertive citizens. How then can the effective functioning of the *Rechtsstaat* still be assured in the longer term?

Weakened legitimacy

The grounds noted above for examining the functioning of the *Rechtsstaat* have one thing in common, namely a potential weakening of the legitimacy of government action. Matters have however by no means reached this stage as yet: confidence in the courts remains consistently high, and the same generally applies to other government agencies. Less pronounced, according to research, is the legitimacy of European legislation and regulations. In addition confidence in the police and judicial system is declining. The contribution made in theory by the *Rechtsstaat* to the legitimacy of the government must therefore be re-examined. Excessive demands on the part of the *Rechtsstaat* can furthermore prove counterproductive.

Serious offences

The attacks on 11 September 2001 in New York and the murder of the leading Dutch right-wing politician Pim Fortuyn on 6 May 2002 test the *Rechtsstaat* in two senses. In the first place it raises the question: how is this possible in a civilised, democratic *Rechtsstaat*? The expectations of stability and certainty that the *Rechtsstaat* has always aroused were suddenly dashed. But the fact that these inhuman and reprehensible events can take place has been unable to destroy the belief in the principles of the *Rechtsstaat* – which clearly came to the fore again in the response to these offences, especially as regards the detection, prosecution and trial of the suspects. Is the government able and willing to abide by the constraints imposed on it by the *Rechtsstaat* when it comes to combating serious offences? This applies all the more to the fight against international terrorism (Buruma 2001). Although this topic was not the primary reason for this study it does provide an indication of the growing topicality of the issue. Is the *Rechtsstaat* sufficiently underpinned by a typical *Rechtsstaat* ethos that is shared by its citizens and power-holders alike and that is permanently supported, even in difficult social

circumstances? A reappraisal of the *Rechtsstaat* can demonstrate that this ethos retains its currency.

1.4 ARRANGEMENT OF AND PROBLEMS ADDRESSED BY THE REPORT

1.4.1 PROBLEMS ADDRESSED BY THE REPORT

The problems addressed by the report are as follows:

1. What consequences do internationalisation and individualisation have for the effective functioning of the *Rechtsstaat*? What adjustments are required to the *Rechtsstaat* or in attitudes concerning the *Rechtsstaat* in order to do justice to the altered historical circumstances in which the national *Rechtsstaat* is currently required to operate?

2. What practical problems in administrative and criminal law enforcement and in the administration of justice constitute an obstacle to the effective functioning of the *Rechtsstaat* in the short or longer term?

1.4.2 ARRANGEMENT OF THE REPORT

Following the introduction a theoretical and historical analysis is provided in Chapter 2 of the *Rechtsstaat* and the leading interpretations of that concept, based on the academic literature. The chapter provides a brief description of the evolution of the Dutch *Rechtsstaat*, leading to a definition of the core of the *Rechtsstaat* and a delimitation of the classical vis-à-vis the social *Rechtsstaat*. The definition of the *Rechtsstaat* provided in that chapter is then employed throughout the remainder of the report.

Chapter 3 examines the historically changing circumstances in which the *Rechtsstaat* operates, with particular emphasis on the processes of internationalisation and individualisation noted above. These two developments together moreover place the traditional relationships between the private organisations of civil society and the state in a new light. The government is transferring a number of its tasks to independent private organisations. Civil society – which has a respectable history behind it – is consequently obtaining a new social significance. Is civil society in the process of revitalisation? What consequences does the withdrawal of government have for the relations between state and society? What is the relationship between the *Rechtsstaat* and civil society?

Other important changes, such as the ICT revolution and immigration, were discussed recently in other Council reports and have not therefore been treated as a leading issue in this report (WRR report *The Netherlands as immigration society,* 2001 and WRR report *On old and new knowledge,* 2002).

Chapter 4 proceeds to describe the consequences of the changing concept of the *Rechtsstaat* for the executive, judicial and legislative powers. In the case of the courts separate consideration is given to independence (4.2) and the capacity of the justice system (4.3). A legal-economic analysis of the infrastructure of the justice system indicates the extent to which the effective administration of justice can be regarded as one of the most important preconditions for the effective functioning of the *Rechtsstaat*.

The report ends with conclusions and recommendations in Chapter 5.

2 TOWARDS THE CORE OF THE RECHTSSTAAT

2.1 INTRODUCTION

In this report the *Rechtsstaat* has been taken as the common denominator for discussing a number of obstacles towards the functioning of the legal system. Although that denominator is an obvious one, both linguistically and substantively, it is not without its risks. On the one hand there is the risk that the *Rechtsstaat* is used as a catch-all concept that cannot otherwise be defined, as it would then lose its particular cogency. On the other hand the concept could become invested with a specific meaning, with which it was unduly monopolised. These kinds of pitfalls need of course to be avoided. That is also possible, for the identified risks can also be interpreted positively: the concept of *Rechtsstaat* has a sufficiently clear and convincing core and is also capable of being applied with sufficient flexibility in practice for it to retain its powers of attraction and usability in divergent circumstances. This chapter is concerned with a practical delimitation of the concept along these lines that will facilitate the assessment of recent and likely developments.

The diversity of the concept of *Rechtsstaat* and the attitudes towards it are discussed in more detail in the remainder of this chapter. Section 2.2 outlines the 'family relations' of the concept, while section 2.3 examines the history of the Dutch *Rechtsstaat*. Recent developments are incorporated in a separate delimitation of the concept, which of course forms a natural extension of the Dutch tradition (section 2.4).

2.2 FAMILY RELATIONS

Two major traditions need first to be distinguished in this regard, namely those of the continental European *Rechtsstaat* and that of the Anglo-Saxon rule of law. The differences may be blurring but have not yet entirely disappeared.

Rechtsstaat and rule of law

The essential difference between the *Rechtsstaat* and the rule of law is that the former places the emphasis on the subservience of the state to the law, whereas the latter places the emphasis primarily on the impersonal operation of the law that was created in the interests of the citizenry among themselves and which regulates their mutual relations. Government not by people but by rules was the underlying principle in the United States, which is taken here as the exponent of the rule of law. In the case of disputes concerning the interpretation of the agreed rules, resort to the courts was the most important remedy. Under the system of the rule of law the courts play the main role in safeguarding the rules. From the beginning the American Constitution has observed the doctrine of the separation of powers – qualified by numerous checks and balances – as strictly as possible (Commager

1978: 208-212). In so doing exclusive authority was assigned to the judiciary to test legislation against the constitution and to resolve disputes concerning the interpretation of the constitution. In the US it is the courts that safeguard the rule of law.

The European continental *Rechtsstaat* evolved in relation to a powerful, central feudal ruler, who represented not just the final court of appeal but also the collector of taxes, the legislature and the executive. The *Rechtsstaat* was in principle aimed at curbing the power of the central ruler and subjecting him to rules so as to suppress the arbitrary exercise of power. The underlying ideas date in part to the distant past and in part to the eighteenth century (Montesquieu, Rousseau and Kant). At any event they date from a period before the term *Rechtsstaat* was introduced around 1830 (Van der Pot-Donner 2001: 155). The *Rechtsstaat* was concerned with the vertical relations between the government and citizen (for the developments in France after the Revolution see Kriegel 1995). In contrast to the US, the prime instrument was parliament, which sought to provide certainty and protection by laying down general rules. The courts did not have a free role but were just 'a mouthpiece for the law'. The principal task of the courts was to apply the law and not to interpret the rules freely.

For these historical reasons the place of the courts in the continental European *Rechtsstaat* differs fundamentally from that under the rule of law. The major role of the courts in the US was, however, tempered by a greater democratic control: judges in the federal states are generally elected, while federal judges are appointed by the executive (i.e. the president) with the concurrence of Congress. In addition the system of trial by jury ensures that the judiciary in the US remains close to the people and is democratically legitimated. In Europe, by contrast, the role of the courts is traditionally less pronounced and also less democratically legitimated. Judges are not elected but appointed (in principle without party preference); they are professional judges and not lay judges in a jury system (with the exception of the lower courts in Belgium, as well as in the Netherlands during the period of French rule in the early nineteenth century). The present day suspicion concerning the marked influence of the courts in weighing interests in disputes between administrators and citizens may be placed against and understood in this historical context: judges lack the democratic legitimacy and duty of accountability that administrators do have.

Under the rule of law, the law is more democratic and the political system is more apt to be 'juridified'. Administrators and presidents are pursued in legal proceedings, without the system as a whole being undermined (although individuals themselves are, as the Lewinsky affair indicated). The stricter separation of powers in the US results in a struggle for competency between the three powers (legislature, executive and judiciary) that can never be definitively delimited or resolved.

In Europe by contrast the law and politics are as far as possible kept separate. The political system is less troubled by the law or by judges and the law. The judiciary are at a greater distance from the people. Judges do not 'play' politics. There tends consequently to be more of a balance between than a separation of the powers (and checks and balances between them). Under this system, the three powers in a *Rechtsstaat* face one another in a relationship of coordination and not as incompatible competencies.

Finally there is another characteristic difference between the Anglo-Saxon tradition of the rule of law and the *Rechtsstaat*. The divergent visions of the law – on the one hand as rules of an impersonal nature that provide a framework for the social development of citizens, and on the other primarily as a system addressed at regulating the rulers' use of power – turn out to some extent to influence attitudes concerning the question as to what may be expected of the modern state. The protection of the citizen in a *Rechtsstaat* is not just formal in nature but, since the time of Bismarck and especially since the Second World War and the advent of the welfare state, also substantive in nature. The *Rechtsstaat* is often mentioned in the same breath as the welfare state (Posner 1999: 100-108). It is accordingly no longer confined to the formal and general guarantees against arbitrariness, but – under the constitution and universal laws – has a duty of care to guarantee citizens a minimum existence. The classical fundamental rights (freedom of association and assembly, freedom of the press and freedom of religion) have been supplemented by social fundamental rights. While these do not have the same enforceability as the fundamental rights, they are often regarded in Europe as an essential element of the *Rechtsstaat*.

The 'social' element, however, barely plays a role in the rule of law, as the latter is interpreted more narrowly (no substantive test) while also having wider application (as the courts have wider freedom). This also means that social policy, supported in so far as possible by universal laws, is not by nature incompatible with the rule of law. There also turns out to be room for the courts to take social considerations into account in the interpretation of law.

The differences between the *Rechtsstaat* and the rule of law are therefore still sufficiently marked for the problem of the *Rechtsstaat* to be addressed in this report primarily from a continental European perspective. In this regard the rule of law may serve as inspiration and simultaneously contrast (absence of social dimension, excessive juridification).

No straightforward division

Although it has been shown that the contrast between the *Rechtsstaat* and the rule of law does not involve a straightforward division, it does still require some further elaboration. In the first place the two families are not composed of countries with an identical system. In the United States, for example, the separation of pow-

ers and the role of the courts are highly developed, while the principle of the sovereignty of parliament accords the courts in the UK a much less prominent position. In fact the (older) genesis of the rule of law in the UK also differs from that in the US: instead of 'a fresh start in a society with free citizens', the rule of law, as an aspect of the doctrine of the common law, was most definitely addressed to a monarch, if only verbally (Koopmans 1978: 83-84). Thus there are also countries within continental Europe with a strong centralistic tradition, in which greater power has been assigned to the government, and countries with a small civil service and a weak government. Legal protection against the government is highly developed in Germany, but weak in Spain. In the UK and Poland it is difficult to submit a complaint against the behaviour of a policeman, whereas in the Netherlands there are precise guidelines for doing so, as well as committees and a National Ombudsman.

In the second place changes are occurring in the *Rechtsstaat,* in different places and at different times. The social *Rechtsstaat* certainly did not arise universally and at the same time; this also applies to democracy, which achieved its now virtually indissoluble link with the *Rechtsstaat* only very gradually. In some cases certain elements of the classical *Rechtsstaat* were not realised until well after their initial formulation (see section 2.3).

2.3 THE DUTCH RECHTSSTAAT: DEVELOPMENTS AND ATTITUDES

2.3.1 THE CLASSICAL LIBERAL RECHTSSTAAT

Clear interest in the *Rechtsstaat* as such is evident from the literature in the last few decades only. There are no major differences of opinion among experts concerning the concept of the *Rechtsstaat.* In particular there is agreement concerning the core of the classical liberal *Rechtsstaat* as this developed in the nineteenth century. More importantly, there is agreement that the requirements, basic principles or characteristics remain vital. At the same time, even the most summary review of the practical elaboration of those principles makes it clear how their content has shifted. In this respect the four points are followed as set out for example by Burkens et al. (1997): the legality principle, the division of power, the independent judiciary and the fundamental rights. There is in fact no substantive difference from the three 'requirements' formulated by Donner in 1977:

a) 'that there is a basic law or constitution laying down binding regulations for the relations between government and citizens,
b) in which a separation of powers is assured, especially (1) legislation with parliamentary agreement, (2) an independent judiciary, deciding on matters not just between citizens themselves but also between the government and the citizen, and (3) government action based on the law,
c) and whereby the fundamental rights and freedoms of the citizen are defined and guaranteed' (Van der Pot 1977: 145).

The legality principle

The legality principle provides good illustrative material in support of the proposition that the *Rechtsstaat* is subject to ongoing development. The classical view is that the freedom of the individual forms the starting point for the *Rechtsstaat* and consistent with this the government can only bind the citizen on the basis of legislation. Such laws must by definition have their origin in a special organ – the legislature – and must be universal. That universality serves the concept of legal equality, while the ancillary requirement of general promulgation serves the concept of legal certainty.

These apparently straightforward requirements have generated various problems over time. For the larger part of the nineteenth century, from the Blanket Act of 1818 to the Meerenberg judgment of 1879, general rules, even when deriving from a Royal Decree (KB) not based on the law, could be introduced, violation of which was subject to punishment. After a brief period in which it was not permissible for any general rule to be adopted under an independent royal decree, the 'classical situation' was laid down in the constitution in 1887. Much later in respect of government action the question became increasingly topical as to whether 'service provision' (the German 'Leistungsverwaltung', as distinct from 'Eingriffsverwaltung') should have a statutory basis, especially where a major interest for the citizen was at stake. In the case of subsidy decisions, to which onerous conditions can be attached, the General Administrative Law Act has since 1998 introduced such an obligation, which had already been introduced on a scattered basis, on a universal basis. Matters have not yet however reached the point of the introduction of a 'material legal concept'.

Division of power

The background to the division and separation of powers has already been examined. The importance of the independent courts – see below – has always been the most self-evident element. The relationship between the legislature and the executive has been subject to major changes. To begin with, from 1814 onwards, a division was made in accordance with the ideas of Montesquieu. Under the so-called codification article in the Constitution, the exclusive task of the legislature was confined to universal rules in the private and criminal sphere. In addition to some extent competing legislative powers were in place for implementing the legality principle, of which the King made not particularly sparing use. The legality principle greatly extended the exclusive domain of the legislature, at the same time as the introduction of the universal requirement that (most) government action should have a statutory basis.

The fact that the administrative organ at national level (i.e. the government) also exercises the function of legislator together with parliament makes it difficult to designate changes in the division of power between the legislature and the executive more precisely. Nevertheless the fact that government action has grown greatly in both depth and breadth has meant that it has become increasingly difficult to

standardise such action directly in formal legislation. Open norms and (more detailed) regulation by administrative bodies have increased in scale, thereby potentially undermining the legality principle. The theoretical ideal of government administration that sets out to implement and is based on statutory norms has been replaced by the broader 'administration with a statutory basis'. The positive side of the flexibility of the system is however counterbalanced in the form of compensation under the general principles of proper administration (see further 4.1).

An independent judiciary

An independent judiciary goes back as far as the Dutch state itself. The courts are able to resolve disputes between citizens. From the viewpoint of the *Rechtsstaat*, however, it is particularly important that the citizen consequently has the possibility of testing the lawfulness of any administrative action touching on his or her interests. Nevertheless successful testing along these lines was rarely possible until the twentieth century. The public interest was deemed to mean that the administration required a substantial 'legal-free space', while furthermore review by higher administrative bodies was regarded as the most expert course of action. Not until the proposed introduction of general administrative case law was put on the back burner after lengthy discussion did the civil courts declare themselves competent on the simple ground that an unlawful (government) act had been alleged (Guldemond judgment, 1915). After that time legal protection was gradually developed further and, with the appointment of specialist administrative judges and also the introduction of general provisions (Administrative Decrees (Appeals) Act (BAB), Administrative Jurisdiction (Government Order) Act (AROB)) increasingly supplemented. After the European Court of Human Rights (ECHR) had declared appeal to the Crown to be inadequate (Benthem judgment, 1985) and particularly since the introduction of the General Administrative Law Act (AWB) (1994), it is now possible for virtually any form of government action to be reviewed by the courts. The independence of the Administrative Jurisdiction Department of the Council of State has however been challenged in the ECHR; in the current discussion the formal argument has centred on the government's dual role as judge and legislative advisor, apart from which the substantive objection has been voiced that the position of third-party stakeholders can sometimes be lost to sight (see Brenninkmeijer 2001; 2002).

At least equally as important is the fact that the assessment criteria are now a good deal broader than the initially rather marginal review by the civil courts. Not infrequently the assertion is made that here in particular there has been a shift in the division of power within the *trias politica*, on a scale that some find difficult to accept. In particular the courts are said to stretch the general principles of proper administration to the point that the judges sometimes 'sit in the seat of the administration'. The 'converse' accusation can also be heard – most recently with some emphasis when the implementation of a package of measures to increase the effectiveness of the administration of justice was at issue.

Such a shift is also discernible in the case of the relationship between the courts and the formal legislator. The constitutional prohibition on the testing of legislation is gradually losing its significance. This stems especially from the growth in directly operative provisions under international conventions where such testing is required. The EU and the sometimes surprisingly broadly interpreted provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) are important sources in this regard. Of a different order is the space that the legislature itself leaves - sometimes consciously - by formulating general concepts and open norms or entirely desisting from any specific regulation for the time being. Whether this reflects the need to react flexibly to social conditions or trends or whether it reflects uncertainty, the consequence can be a kind of tacit cooperation, rather than an undesired shift of power. When it comes to the judiciary, power in the normal sense of the word is in fact a somewhat dubious term. Judges have no power of independent initiation and if so desired the legislature can prevent most of their rulings from having any universal effect in the future. The independence and impartiality of the judiciary and the relevant guarantees are discussed in more detail in 4.2.

Fundamental rights

The fundamental rights have precursors in various (usually group-based) medieval privileges and in the protection against government violations that was laid down in limited fields during the days of the Dutch Republic. The two elements of the classic fundamental rights – protection of the individual/individual freedom, i.e. of personal freedom against certain violations by the government (freedom of religion and privacy of correspondence, etc.) and space for political activity (freedom of assembly, later universal suffrage) – are already recognisable to some extent here. While only a few fundamental freedoms appeared in the Netherlands Constitution of 1814, in 1848 the classical core was already complete. In 1917 the fundamental rights were extended by universal suffrage and the placement of universal and special suffrage on the same financial footing. In 1983 a complete catalogue, including fundamental social rights, was included in the first chapter of the Constitution. The need for updating is also an area of concern in respect of both the classical fundamental rights (e.g. 'digital fundamental rights') and fundamental social rights (e.g. the right to safety; see below).

In the case of the classical fundamental rights the emphasis in the Constitution is nowadays strongly on the most precise possible demarcation of the scope to curtail rights: under what conditions and to what extent can the state set limits on those rights? The linkage of the *Rechtsstaat* to the law does not in itself guarantee a state-free sphere, even in conjunction with democratic majority decision-making, the underlying notion goes. Incorporation in the Constitution reduces the risk of unfounded violations to the maximum possible extent (although in the case of a two thirds parliamentary majority in favour of change even the rights themselves are of course not inviolable).

The universal human rights formulated in international conventions over the past half century point to the same idea of natural, general rights. More generally the enshrining of fundamental rights, both classical and social, in international conventions is one of the most important changes in this field. Particularly where direct operation and a surprisingly broad interpretation go hand in hand (ECHR, since 1980), fundamental rights have turned out to extend to unsuspected social areas.

Similarly the view that fundamental rights imply more than the protection of the citizen against the state is no longer beyond the pale in the Netherlands. Examples include the horizontal operation of (classical) fundamental rights, where the parties are changing, and the social dimension of fundamental rights, where a duty to intervene is being added to the government's duty of non-interference. In neither case however has the extension of these rights been on a scale of any significance. Such extension does, however, apply to the social fundamental rights. These have appeared in the Constitution since 1983, but do not produce any clear obligations, let alone enforceable individual entitlements. As an indication of areas occupying a special place in the field of government responsibility, these fundamental rights are certainly important. The current private member's bill to introduce a provision concerning a hard to delimit concept such as safety (Art. 22a) may also be viewed primarily in that light.

2.3.1 THE DEMOCRATIC AND THE SOCIAL RECHTSSTAAT

Developments in the views about the decision-making by and tasks of the state have of course not left the *Rechtsstaat* (and attitudes towards it) untouched.

Democracy

In a discussion of the state (N.B.: not the *Rechts*staat) linked directly to his definition of the *Rechtsstaat*, Donner notes a special feature in relation to other legal entities, in so far as the state does not have a particular goal that can be used in order to test whether it is remaining within the province of its powers. It 'can arrogate to itself the most heterogeneous problems and activities as soon as these are deemed to arise from the general interest. For the goal (. . .) is essentially nothing other than that of commitment – not to a particular goal but about commitment itself, in order to facilitate and promote living and acting together' (Van der Pot-Donner 1977: 146). Despite this not insubstantial objective Donner perceives here the weakness of the *Rechtsstaat* idea: it focuses unduly on the institutional and legal aspects and asks in particular how the state should be organised, but does not pay enough attention to what the government should do. In order to provide a conceptual basis for the state the notion of the *Rechtsstaat* has to be linked up with other ideas. In the nineteenth century this was mainly the notion of the nation state, and in the twentieth century (still according to Donner) the idea of democracy.

A more fundamental, or at least closer, relationship between democracy and the

Rechtsstaat is established by Burkens et al. (1997). They reject the crucial assumption of the classical *Rechtsstaat*, namely that through equality before the law, a prohibition on privilege and rights of freedom everyone's starting position would be the same, so that 'the outcome of the competition in the political market (…) would be justified, namely the product of one' s own efforts and fate' (Burkens et al. 1997: 22). It is evident, they argue, that there are all sorts of factors that cannot be ascribed to the individual but that render fair competition an illusion. This applies all the more if the outcome of economic competition helps determine political influence (i.e. rights to vote on the ground of property qualification). With reference to Locke they proceed: 'It is at variance with natural equality, which requires that everyone can have an equal share in state power and the formation thereof (…) [and] at variance with natural freedom, which entails that the free individual can only be bound by state authority with his concurrence, (…) this state authority is constituted without his participation if he does not have certain minimum property qualifications.'

That connection between democracy and the *Rechtsstaat* has now become so close that the concept of *Rechtsstaat* is more frequently found in combination with the adjective 'democratic' than without. Various authors (Scheltema 1989; Witteveen 1996) even refer to the democracy principle as one of the central principles of the Dutch *Rechtsstaat* (and consequently turn 'democratic *Rechtsstaat*' into something of a pleonasm). When it comes to a description of the organisation of the Dutch state there is little objection to this; the same applies to the – normative – formulation of minimum requirements for the organisation of the state. Substantively, too, it is difficult to discard such links conceptually. The requirement that government action must have a statutory basis (the legality principle) for example largely loses its meaning if it becomes possible for the legislation in question to be adopted and amended without majority support. The existence of classical fundamental rights providing minorities with the room to become a majority or otherwise to influence decision-making is vital. And majority decisions that would simply bypass the fundamental or other rights or entitlements of minorities would not sit easily.

In the meantime the linkage with democracy as an idea giving the ('Recht)sstaat' 'its inherent, driving force' (Van der Pot-Donner 1977: 147) requires some clarification. This does not mean that it is clear what the state must at any event do (i.e. core tasks). In the same way that the *Rechtsstaat* in its simple form is primarily concerned with boundaries and conditions, democracy is primarily concerned with decision-making procedures. To take the metaphor further: democracy does indeed provide a (running) engine and a steering wheel, but the direction in which the wheels turn and even whether the accelerator is depressed, is determined from case to case and according to the state of affairs. At the most it might be said that the possibility of participation, which is the same for everyone, virtually implies that equal attention is given to the interests of – ever changing – minorities, such as the requirements and parameters for the organisation of the *Rechtsstaat* take freedom as their foundation.

Social dimension

In the same way that a kind of merger took place between 'democracy' and the *Rechtsstaat*, so ideas evolved in the second half of the twentieth century concerning a social dimension of the *Rechtsstaat*. 'What is the real significance of (these) fundamental rights [to which the *Rechtsstaat* and democracy relate] if certain minimum conditions with respect to income, housing, education and the like have not been satisfied in advance?', Burkens et al. (1997: 24) ask rhetorically. Wholly in line with the considerations that they apply to democracy, they argue that the social *Rechtsstaat* will need to guarantee not just 'freedom of' but also 'freedom to', by creating the conditions in which the citizen can in fact live in liberty. 'These rights enshrined in the Constitution of 1983 and in human rights conventions impose the obligation on government to create and maintain a social, cultural and economic infrastructure,' they conclude somewhat later.

At this stage the social rechtsstaat appears to be viewed as a special form of the *Rechtsstaat*. According to most authors, social interventions by the state are not a necessary precondition for the ability to talk of a *Rechtsstaat*. There are also various practical considerations supporting such a stance, such as the fact that the bar is placed rather high, while at the same time people will never agree on precisely where the bar should be placed and whether enough is being performed. These would appear to be matters that lend themselves particularly to democratic debate, in which conclusions can be drawn on the basis of changing attitudes and circumstances. It is not difficult to justify or even to demand any conceivable form of government activity on the basis of lofty ideals that do or should form the underpinning of the *Rechtsstaat*, such as individual freedom or opportunities for development for all. In practice, however, this gives rise to a disastrous confusion of tongues and debate about policy priorities on the basis of highly abstract principles and objectives, in which the precious concept of the *Rechtsstaat* gets lost to sight for want of capacity for discrimination. Furthermore it is not possible to this regard the fact that the 'social dimension' involves activities which by their nature are at variance with elements of the classical *Rechtsstaat*. In order to formulate the contrast in black and white terms, regulation by means of universal rules differs considerably from direction by means of targeted and specific intervention. By declaring the social dimension to be a necessary element of the *Rechtsstaat* the tension becomes built in in the latter concept (and furthermore loses its capacity for discrimination). This tension is the subject of considerable attention in the literature especially in Germany (*Rechtsstaatlichkeit* versus *Sozialstaatlichkeit*) as well as in the Netherlands '*Rechtsstaat* and direction'). Those who pick up on this tension nearly always opt – generally implicitly – for a definition of the *Rechtsstaat* in which the social factor is not an element. Implicitly too the tension would appear to amount to a plea for preference to be accorded in principle to the classical elements of the *Rechtsstaat* in respect of any government activity, whether this concerns a classical activity such as catching thieves or a social activity such as the provision of welfare benefits. This is not of course a political choice against the

social element; on the contrary. It is not denied that 'freedom to' is important for a meaningful use of 'freedom from'; the notion of the social dimension of classical fundamental rights, which holds that the government has a task to make those rights as widely accessible in practice, now enjoys almost universal acceptance.

2.4 CONCLUSION

The previous section demonstrates once again that there is a wide measure of consensus concerning the concept of the *Rechtsstaat*, although there can be differences of opinion concerning certain vital elements. As an initial conclusion, one could say that the *Rechtsstaat* might not be a fundamentally contested concept, but any definition is inevitably subjective in nature. The latter may apply to various aspects, ranging from the question as to whether the *Rechtsstaat* should or even can be neutral in its effects or the precise opposite (section 2.2.1), up to and including the optimal 'trias' relationships. More such general designations of the concept could be provided. The *Rechtsstaat* is for an example an 'aspirational' concept (Witteveen et al. 2002) which, in particular, points the way towards goals that are worth pursuing. It is certainly also a *flexible* and resilient concept, in the sense that in responding to certain developments elements can be modified without departing from the concept itself. The *layered* character, as established in chapter 1, is of course closely related to these characteristics.

It was noted at the beginning of this chapter that any definition of a concept involves a choice or even a series of choices. In this case these choices should be prompted in particular by the requirements of *practical usability*, which might entail that:

- the more or less generally accepted view as to what the core elements constitute should be stuck to as closely as possible;
- justice is done to the historical antecedents;
- capacity for discrimination is present; and
- flexibility is built in.

In this way the emphasis comes to lie on the four elements of the classical liberal *Rechtsstaat* discussed in section 2.3.2. This means that the *Rechtsstaat* is interpreted as a polity that ties the government to the law by recognising fundamental rights, that demands that government action be founded in the law, that effects a separation of powers between the legislature, executive and judiciary, and that guarantees the independence of the judiciary. This concerns the second layer from the diagram in the previous chapter; as also follows from that diagram, the form that these elements take in any one particular *Rechtsstaat* can diverge considerably.

The democratic element is of particular relevance in connection with the legality principle, as the legitimation for government intervention. The social dimension, interpreted as the duty on the part of the government to promote certain forms of provision, is limited under this setup to ensuring that the elements of the classical

Rechtsstaat, such as access to the courts, rights of freedom and political rights, are a reality (the fourth layer). In other words, we are dealing here with a state that not only feels bound by the law but which also feels obliged to guarantee the dominion of the law in a general sense. To that core the Council would add one further element: ensuring the physical safety of the citizens where possible. This addition is a natural extension of the fact that any state – and hence also our *Rechtsstaat* – by definition possesses a monopoly of force. In the event of a looming collision between such activities and the core, the core of the classical *Rechtsstaat* – and certainly the classical fundamental rights – will always take precedence in conceptual terms over those activities and also over other government policies. This need not however lead in any way to rigidity; the 'fourth layer', in particular, namely that of the practical elaboration of *Rechtsstaat* ideas and values, can always be adapted in line with contemporary developments.

The first and second layers of the *Rechtsstaat*, finally, are highly important in these respects, particularly as general guidelines, rather than as a source for a government programme of any kind.

Some further comments on this choice in favour of the *'classical rechtsstaat-plus'* may be in order. The notion whereby the core of the *Rechtsstaat* would consist primarily of the method – i.e. of tying the state to the law, the division of state powers and the guarantee of a state-free sphere for the citizen – is in many ways an attractive one. The more that one 'invests in the *Rechtsstaat*', the greater the chance that a political programme or, at the least, a package of core tasks, will be derived by the government from the concept de *Rechtsstaat*. To a much greater extent than at present, a call for state interference – or non-interference – would be justified in terms of the importance of the *Rechtsstaat*. In this way the concept would rapidly lose its capacity for discrimination. Since many of the government interventions being sought are directive in nature and aspire to a goal that often cannot be achieved by means of general rules alone, the chance moreover increases that the concept of the *Rechtsstaat* will itself create contradictions.

This does not of course mean that directive government action or action in the social sphere would not be appropriate in the case of a *Rechtsstaat* state. At issue is the fact that the *Rechtsstaat* is primarily a matter of form, of preconditions and boundaries, and not in the first place a matter of substance. Not social justice but

protection against government arbitrariness takes primacy.

3 INTERNATIONALISATION, INDIVIDUALISATION AND CIVIL SOCIETY

The *Rechtsstaat* operates in an environment that is continually – albeit gradually – changing. Changes in that environment may affect the organisation of the *Rechtsstaat* and the underlying assumptions. A number of fundamental developments are briefly examined in this chapter.

3.1 INTERNATIONALISATION

3.1.1 DEVELOPMENTS

Not every state is a *Rechtsstaat* according to the description given before. Conversely, however, the *Rechtsstaat* is of course to be viewed as a state, more especially as a nation-state of the type that has been customary in Europe over the past two centuries. The state too is subject to national law and legislation, which form the main principles for the activities of the state and regulate the behaviour of the citizens. This central position of the state and the exacting demands and high expectations to which it is subject may be designated in brief by the term *sovereignty*. Together with the indispensable elements of territory and population, this concept by definition forms a core element of the state: the authority of the state 'can lay greater claim to completeness than other forms of authority and can substantiate itself both internally and externally' (Koopmans 1976: 6). Internally this is in order ultimately where necessary to 'have the last word', and externally in order to do business with other states.

This picture has changed fairly radically, particularly over the past fifty years. All sorts of technological developments have led to a huge increase in international traffic, in the broadest sense, and hence also in international agreements. More than before we now have multilateral agreements – sometimes on a global scale – and agreements under which organisations are appointed with regulatory, judicatory, executive or supervisory powers. As long as such agreements and decisions still require the authorisation of the participating states from case to case in order to take effect in the national legal system, one cannot speak of any direct infringement of national sovereignty, but indirectly such effects do obtain. An indispensable precondition for the effective operation of this system is that agreements are, where necessary, translated into legislation at national level. Perhaps even more important is that the agreements contribute further to the process of internationalisation that was already under way with a de facto decline in the capacity to act of nation-states.

In addition another form of international cooperation appears to have grown in importance in recent times. By this is meant interventions, generally under the

flag of the United Nations, whereby intervention takes place in sovereign states on behalf of the 'global legal community' because those states are systematically violating human rights, providing a basis for terrorists and so on. A related development has been the administration of criminal justice in respect of certain offences (against humanity) whereby the universality principle and courts with worldwide authority play a role. The question arises whether this deepening of the international legal order will manifest itself more widely on a systematic basis.

The Dutch Constitution would not be automatically opposed to such a process of extension: 'the government promotes the development of the international legal order' (Art. 90 Constitution). Of more practical importance is the fact that the Constitution creates the possibility that legislative, executive and judicial powers be assigned to human rights organisations by or pursuant to treaty' (Art. 92), if necessary after approval by the States-General with a two thirds majority. This therefore means that the national authorities do not concur from case to case with limitations on sovereignty but that powers are transferred without its being clear how these will be used. The *European Union* is easily the most notable example of such a supranational organisation.

In order to prevent misunderstandings the Constitution (since 1956 and 1953 respectively) lays down in Article 93 that provisions in treaties and in decisions by human rights organisations the substance of which is universally binding obtain such binding power after they have been promulgated. Article 94 goes on to state that statutory regulations in force in the Netherlands shall not apply if such application is incompatible with such provisions and decisions. The most familiar example of a coherent series of such provisions, supported by its own monitoring system, is the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR).

A detailed analysis of the operation of the ECHR and EU indicates that the curtailment of national sovereignty is very considerable, and that the relations within the national *Rechtsstaat* also change, especially because of the relative decline in the influence of the courts and that of the legislature. The supranational nature of the Community and the direct operation and precedence of Community law do not however prevent:

- the implementation of directives being left to the member states, with a degree of freedom that can vary substantially from one directive to another (and sometimes also from one member state to another); and
- the national courts from playing a major role in the maintenance of, and hence testing against, Community law.

In relative terms the role of national organs in the implementation of the ECHR is at least as great.

An analysis of the consequences of two other, divergent international movements – the globalisation of the economy and the increase in transfrontier terrorism – in-

dicates that the fleshing out of an international legal order is becoming increasingly important. The limitations on national sovereignty which, for a country such as the Netherlands, remain manageable at this stage, will certainly grow.

3.1.1 INTERNATIONALISATION AND THE RECHTSSTAAT

General

The *Rechtsstaat* implies a subtle combination of, on the one hand, a limitation on state power and, on the other, the application of that power in order to respect individual freedoms and give them real meaning. Traditionally, the elaboration of the requirements that must be satisfied has been a matter for the nation-state. Tacit assumptions in this regard are that the state can have the last word and has the decisive vote, and that that word can be chosen in freedom, subject of course to the operative procedures.

A number of developments have been outlined in the preceding section that make it increasingly unrealistic to assume that the quality of existence in accordance with *Rechtsstaat* principles within the territory of a particular state depends solely on the organs of that nation state. Up to a certain point this has always been a fiction; events elsewhere and transfrontier contacts have always existed and exerted an influence. Nor are agreements between states by any means new, and compliance with the resultant obligations can impose limitations on domestic policy autonomy, i.e. internal sovereignty. Over the past fifty years there has been an enormous increase in external influences, more and more international legal rules are being introduced that take precedence, and powers have even been assigned to supranational organisations in order to determine such rules; international courts play a role in the interpretation and application of such rules. The exclusivity of the national legal system has been definitively breeched and there is every reason to assume that this trend will be sustained on an accelerated basis. A complex succession of factual and legal developments is now in place that cannot readily be countered: ever more matters, including those outside traffic in the broadest sense, are becoming transfrontier in nature. Examples include environmental problems and terrorist actions. This is leading to new international law, ranging from trade agreements to rules with respect to Security Council measures, which in turn are leading to new transfrontier activities. 'Multiple peaks' and 'legal development networks' (Hirsch Ballin 1999) are some ways in which the legal side of the new situation has been described.

The Dutch 'Rechtsstaat'

If we confine ourselves to begin with to the consequences that the legal phenomena, in particular, have for the Dutch *Rechtsstaat*, these may be summarised as follows:

1 A strengthening of the position of the courts in comparison with that of the executive and especially that of the legislature (interpretation of rules established elsewhere with direct effect and precedence over national law is the preserve

of the courts, except in the case of the ECHR and EU, where the international legal institution in question has the final say).

2 Weakening of the position of the Dutch legislature, not just in a relative but also in an absolute sense, as powers shift to international bodies.

3 Weakening of the position of parliament and strengthening of that of the government. In so far as the Netherlands has influence over rules applying in this country but determined elsewhere, that influence is not exercised according to the normal procedures of the Dutch *Rechtsstaat*. It is not the legislator but the government that plays the main role here. Similarly the duty of accountability towards parliament loses substance, since the lack of transparency of international decision-making is an obstructive factor. The role of civil servants in the negotiating process appears pronounced in certain areas.

4 A strengthening of the position of the citizen under the *Rechtsstaat* where the protection of his or her fundamental and other rights are deepened and broadened, but weakening where he or she is confronted by legislation (and consequently administration) which, at least materially, has less democratic legitimacy than national regulations.

For various reasons these phenomena need to be placed in a more general perspective. Thus it is difficult fully to escape the inevitability but also the benefits of internationalisation. The law plays a limited role in optimising the benefits and limiting the transfrontier problems. It has no longer just been a matter of international trade and disputes between states but also, for example, of the elevation of fundamental rights into universal human rights and the tackling of environmental problems and forms of crime at the appropriate, supranational level. It is also not without interest that the coming into being of more sources of power and law may be regarded as an extension of one aspect of the classical trias notion, namely the distribution of power and consequent reduction in the risk that the citizen will be subject to the arbitrary exercise of power.

In the second place the shifts in relations and powers is in many cases (especially in the EU, but also for example in relation to the ECHR) mitigated by the involvement of Dutch organs of state in the detailed formulation, application, interpretation and enforcement of numerous international rules. The end of the nation-state has not been brought into sight, either by globalisation (Koch 1997; Sassen 1999; Wolf 2001) or by the EU.

More important reasons for qualifying the consequences for the national *Rechtsstaat* lie in the nature of the *Rechtsstaat* itself: the national *Rechtsstaat* is a phenomenon that was virtually unknown before the 19th century and which can take divergent forms in practice. The institutions, rights and relationships that are now characteristic of the Dutch *Rechtsstaat* are unable to lay claim to infallibility or validity for all time. Much more important are the underlying objectives: protection of individual freedom, protection against arbitrary power, and promo-

tion of legal certainty and legal equality. These values are not just of a higher level of abstraction but have played a prominent role in legal thinking for much longer than the national *Rechtsstaat*.

These latter notions have been substantiated and elaborated by Witteveen et al. (2002). This publication also indicates how the elaboration of these values in the national *Rechtsstaat* can in turn serve as a source of inspiration for allowing them to come into their own in relationships other than those between the nation-state and the citizen: the rule of law, worked out in corresponding quality standards. That this approach contains an attempt to compensate for constitutional deficits that can arise from a lack of national guarantees will however be clear. Under this approach the citizen and the constitutional quality 'of his existence' are held to be central: certain guarantees are not just important in the citizen/nation-state relationship but also in other (unequal) relationships, it is held. At the same time it is evident that transnational networks of citizens are increasing in importance ('Global Issues Networks').

Needless to say the above considerations do not provide any yardsticks for the nation-state to employ unilaterally in its international legal and other dealings, for example as criteria for the decision-making by supranational bodies. They can however be valuable in formulating the input for negotiations on such matters as the further organisation of the EU. If something has major advantages this does not mean that shortcomings should be taken for granted. Output legitimation cannot systematically compensate for shortcomings in the democratic quality of the decision-making, and is moreover 'just' a political and not a constitutional-state argument.

The question arises as to whether there are grounds for drawing consequences for the Dutch arrangements. Should the testing prohibition of the courts for example be abolished? The Dutch Constitution is after all marginalised if new legislation and regulations are tested not against the Constitution but against all sorts of international law. And is it desirable and possible for the Dutch input in international decision-making to be organised in such a way that parliament obtains greater influence?

3.1.1 CONCLUSIONS

The international legal order

The emphasis so far has been on the consequences for the national *Rechtsstaat*, for the simple reason that this formed our starting point. At the same time, however, it became clear that it is not possible at this stage to develop an arrangement at supranational level that is comparable in qualitative terms with the national *Rechtsstaat*. Although the dependence on government power exercised outside the Netherlands is continuing to increase, the nation-state remains for the time be-

ing the most important point of anchorage for the legal order, including the international legal order. At the same time that dependence makes it vitally important for the principles of the *Rechtsstaat* to be guaranteed outside the Netherlands as well. Only if all nations function as a *Rechtsstaat* is a good international legal order possible and only then can the rule of law be brought closer in the international context.

In terms of international legal development, the nation-state has a totally different significance as a frame of reference from before. At present it is not so much the sovereignty of the state that is essential as the need for the state, as a hinge in the international legal order, to measure up to the requirements of the *Rechtsstaat.* These two points are summarised below and, where necessary, discussed in more detail.

The nation-state as reference point

The nation-state will remain vital for the rule of law in the future. Without an effective national *Rechtsstaat* it will not be possible for the international legal order to come fully into its own. This viewpoint is supported by a number of different arguments.

In the first place virtually all international legal rules and legal institutions assume the existence of supportive national legal systems. The recognition that international law takes precedence over national law is highly important since national legal institutions continue to play an important role in the implementation of international law. If international legal rules are enforceable - which is in many cases not possible in a manner consistent with domestic law - national legal institutions will often play an important role.

A second argument concerns the fact that national governments find themselves increasingly required to cooperate with one another. Crime, security, the environment and trade call for intensive relations between all sorts of authorities. The extent to which the requirements of the rule of law are respected elsewhere can be crucially important in this regard. If people regarded as suspects elsewhere would not face a fair trial or if governments are corrupt, such interaction ceases to be feasible. The current treatment of terrorists - including that by the American *Rechtsstaat* - indicates that the fight against terrorism makes it all the more necessary for the rule of law to be in place.

A third argument is related to the basis of the international legal order. This can only obtain a clear form of legitimacy if it is based on some form of recognition and acknowledgement by the individual countries. In practice that will be lacking in a country with no tradition of the rule of law: there will be no basis of experience as to what this means, existing leaders or structures may feel threatened by the underlying principles and there will be a lack of lawyers and legal procedures

accepted by society. The intellectual basis for accepting a proper legal order will be lacking. This will mean that it is not possible to make a contribution to the international legal order and indeed that the essential knowledge of how to do so will not be in place.

Rule of law demands on the nation-state

The important place that the state will continue to occupy in the legal system, linked to the fact that countries are mutually dependent on each other's institutions, makes it a matter of common interest to impose rule of law demands on each individual state. This is also necessary for the ability to continue providing a legitimate basis for the international legal order. A trend in this direction has been evident since the middle of the last century. The enshrining of human rights in the Universal Declaration was a clear milestone, while in Europe the ECHR not only laid down fundamental rights but, through the appointment of an independent legal tribunal to which citizens have direct access, also ensured an enforcement mechanism that complied with the quality requirements of the rule of law. In addition numerous other initiatives have been taken to enshrine civil rights in international arrangements.

Over the last decade a new dimension has been added. As a result of the crisis in the Balkans, and even more the terrorist attacks on 11 September 2001, the notion arose that the international community needed to lay down requirements for the national legal order. These events cannot be viewed in isolation but are a confirmation of the fact that islands of the rule of law in a world otherwise not based on the rule of law are vulnerable and ultimately potentially at risk. At any event they have become steadily less meaningful, since the quality of the rule of law in each country has consequences for the rule of law elsewhere; the rule of law in the Netherlands cannot therefore be assured in the absence of the rule of law in other countries and in the international legal order.

3.2 INDIVIDUALISATION AND CITIZENSHIP

3.2.1 DEVELOPMENTS

The *Rechtsstaat* is not only permanently affected by external developments in the field of internationalisation but also by internal developments related to the process of individualisation and the diversification of citizenship. Individualisation is reflected in the relative material and moral emancipation of individuals within the margins laid down by the collectivities on which people are increasingly dependent. The intensity with which this process takes place varies from individual to individual, while the process can also manifest itself differently for each individual in divergent aspects of everyday life. Individualisation is for example observable

in families, in industrial relations, within affective relationships and in leisure activities. In public life this process finds reflection in changes in political or social participation, the interaction between citizens and those responsible for framing or administering policies, and interaction among citizens themselves.

Closer analysis leads to the conclusion that there has been a further extension and *intensification of the process of individualisation* since 1960. In historical terms it would appear that particularly on the basis of their prosperity and cognitive skills, many people have become less dependent on their immediate social environment. This is strengthened by the fact that they can relocate more easily and have more information at their disposal, on the basis of which they can arrive at independent judgements. The government has had a big role in encouraging these developments, since it has created important collective conditions with the post-war macro-economic policy and education policies, as well as improvement of the transport and communication infrastructure, within which dependencies have been able to shift. Although not every individual is able to take advantage of these conditions to the same extent, it is fair to assume that everyone is affected by one or more of these developments and that a shift in dependencies has taken place for all.

This shift has consequences for the moral links between people, for the social pressure exerted by parents, ministers of religion, teachers and other people in positions of moral authority finds less resonance in the choices they make. Freedom and self-development appear to form an important norm in entering into ties. This may be explained in terms of the psychological effects of material and moral emancipation. According to Van den Brink (2002) there have been growing feelings of self-worth as regards economic, social, cultural and emotional aspects of daily life. This manifests itself among certain layers of the population in a self-aware and assertive life-style that used to be the preserve of the upper stratum of society. These effects mean that although self-aware and assertive individuals still allow themselves to be influenced by their immediate social environment, greater powers of persuasion and argumentation are required for this than hitherto. It is however clear that people can always be persuaded by others or by organisations, for which reason there are limits to their freedom of choice - witness for example the influence of modern media and marketing techniques. Which influences prevail does however depend increasingly on personal preferences and circumstances.

Material and moral emancipation are discernible not just in the immediate social environment but also in the relationships between citizens and the government. Many citizens invoke their personal preferences in public dealings. They moreover have higher expectations of and make greater demands on the public environment. The combination of individual preferences and high expectations and requirements can mean that citizens more rapidly feel affronted by government actions. Furthermore this combination can have the result that citizens actively concern themselves with public interests, with an increasing chance of conflict with the

government.
These developments are observable in the far-reaching *diversification of citizenship*, since citizens have been fulfilling more public roles since the 1960s and moreover do so in a variable manner. Citizens are nowadays not just (modern) subjects and voters but also co-producers of policy and clients. In terms of these roles civic activism currently means in practice not just contributing proactively to public affairs or the general interest (i.e. an active citizenship style), but also calculating, opportunistic and client-based responses and resistance to government decisions (i.e. an anticipatory citizenship style). In the case of this reactive form of citizenship it is in fact open to question whether this resistance cuts across the general interest, as long as we continue to assume that each new law is the product of a balanced weighing of interests in the general interest. Most of the resistance to government decisions is not *contra legem*, since use is made of legal remedies extended by the legislature itself.

The various roles and the way in which these are fleshed out in terms of the various citizenship styles make more exacting demands on the effectiveness, efficiency, justice, quality and legitimacy of both decision-making and the implementation of government tasks at all levels. Most citizens presumably operate on the basis of varying combinations of these criteria, depending on the demands they make of the government in terms of their citizenship style in a particular role. This has consequences for the stance taken by the government and for government action. At the point at which citizens behave as co-producers of policy, there are fairly horizontal relationships and the government has the opportunity to create shared meaning and consequently a foundation of public support. In doing so the government must seek to prevent unduly instrumental legal behaviour, particularly on the part of professional interest organisations. As far as citizens in their role as client are concerned it would appear desirable to continue the present process of professionalisation of government. The quality, effectiveness and efficiency of the services will be enhanced as a result with, it may be hoped, fewer complaints and legal proceedings. In the case of citizens acting in the role of a modern subject it is important for the government to be more persuasive. Working on the basis of vertical power relations would appear largely counter-productive since citizens with an active or an anticipatory style appear particularly in favour of horizontal power relations. It is precisely among these kinds of citizens that the government consistently needs to establish and consolidate its authority. Put differently, this calls for ongoing efforts to legitimate governmental authority vis-à-vis modern subjects and so to generate loyalty among them. In this regard the government needs to deal carefully with the numerous interests that are introduced into the process nowadays.

3.2.2 CONCLUSIONS

Seen in terms of the *Rechtsstaat*, individualisation and the diversification of citizenship would appear to have three important consequences. In the first place

there is a growing interaction between citizens and government, meaning that all sorts of personal interests are introduced into the shaping of public interests. Secondly the government has more difficulty with hierarchical direction, since some citizens are apt to assess the rules and their implementation more critically than hitherto. Thirdly a clear shift appears to be taking place in citizens' interests from input legitimation (representation) to output legitimation (quality, effectiveness and efficiency). The most important conclusion in this regard is that these are irreversible processes of change that do not directly endanger the *Rechtsstaat* but that do generate a discussion about the redistribution of responsibilities between government and individual citizens.

a. Growing interaction, hierarchical direction and output legitimation

Individualisation and the diversification of citizenship are leading to a growing interaction between individual citizens and the government. This development arises in particular from the behaviour of citizens with an active or an anticipatory citizenship style, who take a critical and demanding stance in their roles as co-producer of policy, modern subject and non-compliant client. In terms of these roles they emphatically introduce their personal interests or group interests in various ways. Particularly when citizens participate in the shaping of public interests in their role as co-producer of policy, the government increasingly takes a regulatory rather than a directive role in the process. This stance on the part of government also commonly arises in so far as the government and organisations within civil society work together. Where citizens act as modern subjects or non-compliant clients, priority needs to be given to effective performance and convincing argumentation. Ultimately, however, the nature of the government's key executive tasks means that there will always be a degree of hierarchy in these relations.

The numerous interests that are being introduced are resulting for the government in more complex interactions with the public, whereby the hierarchical role of the government is not always self-evident to the citizen. It is nowadays much more difficult for the government to take decisions that go uncontested by the public. In the first place hierarchical direction has become more complicated since ever more interests are being introduced ever more frequently. This increases the complexity of the decision-making process and makes it ever more difficult for the government to convince the public with effective arguments. Secondly many citizens have become more sensitive about vertical direction by the government and expect a horizontal approach instead. In particular self-aware and non-compliant citizens with an active or anticipatory citizenship style are guided to a greater extent by their personal preferences and have difficulty in accepting the exercise of authority by government. They will only change tack on the basis of convincing argumentation, while in some cases they cannot be persuaded at all. These citizens have adequate information at their disposal, which they know how to use effectively for their own purposes. Van den Brink (2002) calls this cognitive mobilisation. The consequence is that the legitimacy of government action depends more heavily on the provision and processing of information, the quality of the procedures and the way in which administrators

explain, defend and comment upon the positions they adopt.
In particular, the ambiguous behaviour of citizens with an anticipatory style causes problems in the case of hierarchical direction, since administrators and civil servants are constantly required to discover the circumstances in which such citizens will allow themselves to be governed or when they will instead respond in a calculating and opportunistic manner. This imposes exacting demands on the personal qualities of administrators and civil servants and on the procedures they come up with for their interaction with the public.

The problems of hierarchical direction are accentuated by the shift from input to output legitimation. In particular citizens with anticipatory and dependent citizenship styles have begun to assess the government in terms of the quality of services and the effectiveness and efficiency with which they are provided. As a result of the increased importance of output legitimation the government must do its level best to perform more effectively so as to establish the necessary public support for its actions. The chosen path of strengthening the quality and professionalism of public services therefore requires a great deal of attention in the coming years. Note should however be taken of the warning by Tops and Zouridis (2000) that the government pendulum should not swing too far in the direction of the active provision of services to the public. By amalgamating all sorts of services the risk is created of an overactive state that infringes the state-free sphere of the citizen. From the perspective of the *Rechtsstaat* this would be highly undesirable, since one of the functions of the classical *Rechtsstaat* is to guarantee that sphere.

b. Redistribution of responsibilities and the Rechtsstaat

As a result of the increased interaction with citizens, the problems with hierarchical direction and the shift from input to output legitimation, the *Rechtsstaat* can no longer rely, as Witteveen (2000: 141-142) puts it, on working with an 'assumed citizen'. In terms of their different roles, citizens impose more exacting demands on the regulatory framework and the implementation of government tasks. This calls for a review of the practical relationships between the government and citizens, subject to the principles of the *Rechtsstaat*. On the one hand this can be achieved by drawing up simpler and, for the citizen, clearer procedures, which are applied correctly in legal terms, while on the other this can be achieved by addressing citizens more clearly in terms of their responsibilities. Only once a redistribution of responsibilities has been achieved can there be a return to reciprocity in government/citizen relationships.

In looking for new allocations of responsibility between individual citizens and the government the problem arises that in its interaction with citizens, the government is expressly bound by the *Rechtsstaat* to the procedures, principles of proper administration and political primacy (Tops and Zouridis 2000: 26), while individual citizens are bound only by the general rules of the law. The government may not exceed the requirements arising from the guarantees of the *Rechtsstaat*, while citizens have much more scope within the bounds provided by the law to

behave (for example) in a calculating or opportunistic manner. It would sometimes be to the advantage of the government if it were able to handle these citizens differently from those who behave responsibly. The most important obstacle in this regard would appear to be an unduly rigid application of the equality principle by public-law executive organisations.

The equality principle forms part of the second layer of meaning of the *Rechtsstaat*, while its application in practice forms part of the fourth layer of meaning (see chapter 1 for an explanation of these layers). Since the fourth layer is heavily influenced by social changes, tensions can arise in the second layer. Given the changes identified in this chapter, this means, specifically, that it may be worth reviewing the application of *Rechtsstaat* principles, such as the equality principle. As long as demands are made for everyone to be treated equally on the basis of the guarantees provided by the government under the *Rechtsstaat*, it is for example difficult to tackle people who repeatedly commit fraud differently from those who always behave correctly. Put differently, opportunistic or calculating behaviour on the part of individual citizens cannot be tackled separately given the present application of the equality principle. A less rigid application of the equality principle, aimed at differentiated treatment according to the extent to which citizens have themselves accepted their responsibility, could however provide a solution. On this basis the government would be able to accord different treatment to citizens who do not treat their public interests responsibly, as long as such treatment did not cut across the legal protection afforded to citizens under the constitution and the body of legislation and regulations in respect of the exercise of power by the state and other citizens.

3.3 CIVIL SOCIETY

3.3.1 DEVELOPMENTS : GROWING OVERLAP BETWEEN GOVERNMENT AND PRIVATE INITIATIVE

The concept of civil society has evolved over the past ten years into a catch-all term for all sorts of developments in social relations. Initially, the term was primarily used in respect of the reconstruction of a new society in Central and East European countries (by Havel et al.). Dahrendorf for example defined three goals of the transformation of these countries:

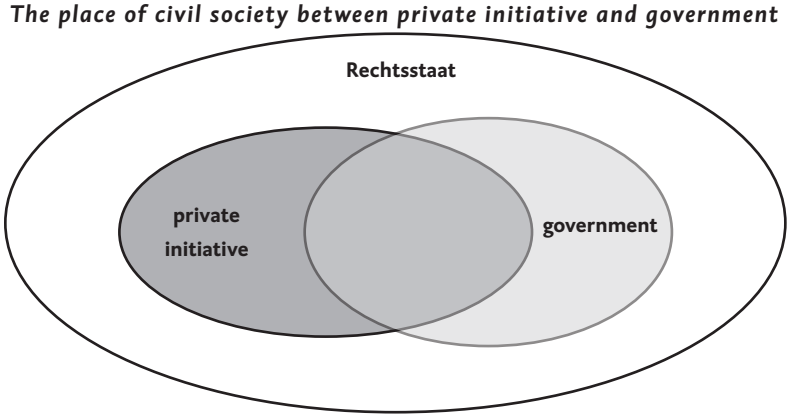
1. the formation of a modern *Rechtsstaat*;
2. the creation of a social market economy;
3. the construction of a civil society as a social and cultural foundation for both the above (Dahrendorf 1990).

Various designations of civil society in the Netherlands are in currency, but the classical designation is used here of organised private initiative. The latter originally arose from the professional associations of the 19th century among the upper-middle classes, the leadership of the churches, the trade union movement and

the associations of entrepreneurs. These organisations were not generally divorced from politics, if only because the founders in question had connections with politics and the associated social circles. In the early days these were social organisations concerned with public affairs. During the course of the 20th century, this world of private initiative in respect of public *affairs* evolved during the time of confessionally-based vertical divisions in society (*verzuiling*, or pillarisation) into organised private initiative for public *tasks*. It began then to take the form of the 'social middle ground', as Zijderveld named it, between the market and the government. Where reference is made in the Netherlands to civil society in an empirical sense this is referring to the social middle ground.

It is noted that the civil society has functions for the *Rechtsstaat* (as a training ground) and conversely that the *Rechtsstaat* has functions for civil society (countering the uncontrolled exercise of power and keeping alive the - collective - rights of freedom by the exercise of private initiative in practice). More generally it may also be posited that the *Rechtsstaat* and civil society supplement one another. They may both be regarded as each other's condition or complement, in the same way that formal ties and freedom are each other's complement. To a certain extent they overlap, within the context of the *Rechtsstaat*.

The place of civil society between private initiative and government



The overlap between the government and private initiative did not rise overnight. Initially, civil society arose out of society itself. Citizens (from the political and ruling class) organised facilities for the other classes. The government was not actively involved in this process, apart from preserving the Constitution. At political level, the start of active, more substantive state intervention was a matter for the political parties and political leadership of the country, in response to the social and educational issues and conditions of the Depression and war. Around the time of the Second World War the government began increasingly to subsidise social initiatives and to create structures for consultation with non-governmental organisations. The emphasis at that point was still on the conditions for the input side of the civil society. In the 1970s that also still applied to the construction of the

planning systems for coordination between government and civil society (e.g. the Welfare Framework Act). In recent years the emphasis has been more on control on the output side in respect of the performance of institutions, which are then held to account (by the government and/or users).

This state of affairs is demonstrable in virtually all large areas of provision in which private initiative and the government share the public arena, whether it comes to housing corporations, healthcare, welfare or employment services. The latter for example began from the bottom-up, among 'amateur' poverty-relief organisations, trade union unemployment benefit funds and employers' initiatives. In the initial stage this was still directly linked to income relief based on the administration of the unemployment benefit funds. This combination has now come to a provisional end with a renewed linkage of employment services to social insurance in the Centres for Work and Income. In the intervening period employment services first took the form of municipal unemployment grants, while later a licensing system and a ban on private employment exchanges (under the Employment Services Act 1930) were introduced and the manpower services (ARBVO) were fully centralised (1940). During the 1960s the employment services became an instrument of an active, constructive labour market policy and the preparations got under way for the decentralisation of the manpower services as a service institute (Employment Service New-Style with job centres). This ultimately resulted in administrative privatisation (1991). In brief, the overlap between government and private initiative has not always been there and did not emerge in its present form until the previous century.

The complementarity between civil society and the *Rechtsstaat* and their reciprocal positive influence are optimal if the correct distance is observed. That distance depends in part on circumstances and attitudes, but the two following principles always apply:

- the distance must not be so great that important public tasks are fulfilled in the absence of democratic and rule of law guarantees;
- the distance must not be so small that the *Rechtsstaat* and civil society threaten each other's vitality. The importance of a vital civil society for the vitality of the *Rechtsstaat* must be emphasised. But the converse also applies: a vital civil society assumes a vital *Rechtsstaat*. Precisely the counterweight provided by the *Rechtsstaat*, not just on the part of the organs of state but also of the citizens, must keep it vital.

3.3.1 CONCLUSIONS

The *Rechtsstaat*-civil society relationship has become particularly topical now that certain public sector services have shifted to civil society. This in turn has generated doubts as to whether civil society carries within itself the necessary capacity for renewal; it is more logical to assume that this must also come from the outside, in the form of counterpressure from the *Rechtsstaat* (e.g. sanctions and supervi-

sion) and from citizens as stakeholders. In the event of greater horizontalisation and inter-linkage in the relations between government and institutions it will be important for the formal allocation of responsibilities and the hierarchical structure to remain clear, and for bottom-up influence and counterpressure to remain possible.

Civil society operates under private law but partly fulfils public functions. The developments described in this chapter necessarily mean that the boundaries between private and public law are blurring. Rules of public-law origin are applied by way of analogy to relations in civil society, e.g. the handling of complaints and objections and rules concerning openness.

One consequence of this is that when public functions are assigned to private-law or privatised organisations, it may be expected that those institutions will also be accountable for the proper performance of those public tasks. The control must not therefore be channelled primarily through public-law supervision. To take one example, enforcement of the Compulsory Education Act should not be effected solely by the inspector of schools but schools themselves should play a role in this regard and render account accordingly.

Civil society is increasingly being used as a shorthand for the professional sphere, sometimes with a great deal and sometimes with little interprofessional review and disclosure of data concerning quality. The professionalisation also involves an obligation to strengthen the systems of mutual accountability and mutual comparability. The classical model of representative and at the same time effective professional implementation of public tasks, as described by Mill (1863/1958), appears - provided it takes a form consistent with the present-day requirements - to be coming back into vogue.

There are problems with democratic legitimation. These apply in particular to associations, as the contexts out of which the provision of facilities originally arose have disappeared. Compensation in terms of professional control is not fully able to meet the promise of greater democratic supervision of the institutions upon the withdrawal of government but it can help redress any shortcomings in the checks and balances in the relationships.

The need for greater accountability may find a new foundation in the general principles of law. An example of this would be the case where parents complain to a school about the poor standard of education that their child is receiving. At issue here is the quality of the individual service being provided. In many cases, however, there will be a link with a more general responsibility: where an institution is functioning inadequately the individual quality will also often be inadequate. Thus the concept of tort in law may apply in an individual case or more structurally in respect of action taken without due care. In this regard reference may be made to the legal provision concerning torts, which lays down that action should not be

at variance with the due care required in social interaction with respect to another person or to property (Art. 6: Netherlands Civil Code). A form of administration involving the serious neglect of the public interests for which the institution purports to stand could be at variance with that norm. This will tend to apply more to institutions in civil society, as interpreted here, than to companies, which have different objects. But even here the subject of 'socially responsible entrepreneurship' can result in a certain translation into law.

The thinking in terms of the accountability of private actors for the performance of public tasks also provides points of reference.

In addition the connection between formal regulation and self-regulation is becoming more important. A number of interesting experiments may be noted in this regard. Furthermore, the formulation of law in respect of such shifts in responsibility is often not just a matter for the government and the courts but also for the community organisations themselves, in the form of complaint and appeal procedures and requirements of due care.

Account must also be rendered to society for the services provided by non-governmental organisations. This does not follow automatically from interprofessional review or resort to the courts. In this regard published annual reports are important and transparency will generally be a requirement (e.g. concerning the combination of private and public flows of funds in the case of housing associations and broadcasting).

Finally: the *Rechtsstaat* is a building with a number of storeys (Witteveen et al. 2002). The institutional inter-linkage relates solely to the third level; below this is the level of the collective rights (right of association) and below this again the foundation layer of the rights of freedom. Above the level of inter-linkage there may be opportunities for the development of a level of professional and communicational accountability practices. It is also important that the complexity and lack of transparency in respect of the complementary relationships are not needlessly increased by the automatic extension and cumulation of internal administrative control systems. These can lead to ongoing bureaucratisation and can undermine the vitality of civil society, consequently impairing the ability of civil society to

underpin the *Rechtsstaat*.

4 PUBLIC ADMINISTRATION, PUBLIC PROSECUTION SERVICE, ADMINISTRATION OF JUSTICE AND LEGISLATION

That the organisation of the three traditionally distinguished state functions may be in need of review in the light of changing circumstances has already been seen. Further consideration leads to the following.

4.1 PUBLIC ADMINISTRATION

4.1.1 General

The most important guarantees that the classical *Rechtsstaat* demands of public administration is that the latter should be subject to the law, that fundamental rights are guaranteed and that there should be access to the courts if citizens consider that their rights have been violated by government action. Although these guarantees are now in place, this does not conclude the discussion about governance and the *Rechtsstaat*. This is more or less self-evident when it comes to the concrete elaboration of the objectives of the *Rechtsstaat*, in that the latter is required to function in a continually changing setting and can therefore never be completed. A major overhaul will therefore always be required from time to time.

Two problem areas may be identified with respect to the current tensions between the changing nature of public administration and the present form taken by the rule of law guarantees.

The first problem area is related to the tension that can arise between the perfectioning of the rule of law guarantees against improper governance and the requirement for the system of public administration to carry out its tasks effectively and efficiently. *Attitudes concerning the efforts that the government may be expected to make have changed and are changing.* The critical citizen wants top-level procedural and substantive performance at once, while the government is increasingly subject to constraints, in so far as it has not already lost powers. Divergent positions taken by various parties are reinforced by arguments having their inspiration in the *Rechtsstaat*. Thus the debate several years ago concerning the juridification of public administration was initiated by administrators who considered themselves to be unduly bound by strict rules and procedures. In the case of the debate that periodically flares up concerning tolerance and enforcement the situation is more complicated, but ultimately here too the issue is one of various forms of tension between guarantees and substantive results. Any form of non-enforcement is apt to be rejected as administrative 'underperformance' or 'opportunistic use of the legislator's products'. On the other hand, it may also be noted that a policy

of tolerance is indispensable in order to resolve certain tensions between the law and reality, on condition that this is done in a way that provides legal certainty and makes control possible.

The second problem area is to do with *changes in the nature of governmental activity and the setting in which that activity is performed*. These changes exert pressure on important assumptions on which the rule of law guarantees are based. A basic assumption, which in fact never entirely corresponds with reality, is that the public interest should be promoted on the basis of law in a system of hierarchical direction by the system of (public) administration. That hierarchical direction operates not just externally but also internally: ministerial responsibility and the subordination of the civil service are also vital in order to ensure that governmental activities take place in line with the principles of the *Rechtsstaat* and in accordance with democratic criteria.

4.1.2 RECHTSSTAAT AND ADMINISTRATIVE TASKS: RULE OF LAW GUARANTEES AND THE EFFECTIVENESS OF PUBLIC ADMINISTRATION

The laying down of substantive standards for government action by means of the law is no longer possible even by way of approximation. So that guarantees can nevertheless be provided against the improper use of the extensive powers assigned by the legislature to the executive, general principles have been developed - principles of proper governance - that do make it possible for government action to be appraised in terms of certain general viewpoints. These guarantees are primarily procedural in nature. In so far as they concern the substance they limit the room for administration in a general sense, for example by demanding proportionality or rejecting evident unreasonableness. The government is also increasingly required to provide insight into the policies that are being conducted, for example by the adoption of policy rules.

Clearly, such arrangements can act as a burden for the system of public administration. They do, however, also provide a translation of the requirements of the *Rechtsstaat*. The question that consistently arises is how the requirements of the *Rechtsstaat* and the requirements of effective governance can best be reconciled. This issue is reflected in a number of current areas of debate, which are discussed below. Since both the tasks of government and the society in which public administration has to be performed are changing, this is a question that must continually be answered anew. Periodic *general* tensions between freedom of action and guarantees must therefore be accepted as self-evident.

Juridification

A broadly-based debate concerning this tension was conducted several years ago under the banner 'the juridification of public administration'. Among other things the Cabinet memorandum published under this title in 1998 stated:

'In the field of public administration juridification is taken as including not just the growing density of regulation and procedural density but also the scope for judicial review. Juridification becomes a major problem in the field of public administration where it obstructs the efficacy of administration and hence the balance of the trias politica' (Ministry of Home Affairs and Kingdom Relations 1998: 5).

Earlier in the memorandum (ibid.: 2) it was stated that 'the excessive juridification of society may be regarded as one of the major issues of our current age' and that 'the heart of our democracy is consequently at risk of silting up at political/ administrative level'.

The discussion, that did not result in concrete measures, was of interest from the viewpoint of the rule of law since 'the *Rechtsstaat*' had been invoked by various parties in support of divergent standpoints. Administrators emphasised the actual or threatened disruption of the balance within the *trias politica* to their detriment as a result of the increasing influence of the courts. Their opponents emphasised the importance of judicial independence. The former moreover pointed to their democratic legitimation, which they saw as being stronger than that of the judiciary, which was not required to render political account. In abstract terms there was agreement about the role of the law in establishing norms and about the legality principle, but this turned out to reach its limits when it came to the extent of subjection to the law.

Tolerance and enforcement

Whatever the case may be, the *Rechtsstaat* plays a specific role in the argument. This is only to be expected, since it is ultimately a matter of the relationship between administrative freedom and guarantees against the abuse of power by the state. That is less self-evident when considering the extent to which the government is *obliged* to act. Even so, 'the *Rechtsstaat*' is frequently cited as an argument in favour of action in the debates that regularly flare up concerning toleration and enforcement. To quote the WRR report *Rechtshandhaving* (Law Enforcement) of 1988: *'The Rechtsstaat is more than a combination of legal guarantees vis-à-vis the government; it also entails the obligation to ensure that in the dealings between the government and citizens and among citizens themselves the law comes into effect and, if necessary, is enforced effectively'* (including the italicisation from WRR 1988: 19). And one page further on: 'The *Rechtsstaat* implies in brief the legal duty of maintenance of the law.' These categorical assertions are however qualified when it comes to criminal law enforcement. Changes in the system of guarantees for the citizens may be required in order to prevent the obligation for the law to come into effect from being endangered in a changing social context. But *'an unduly unilateral instrumental-policy approach by the legislator would be risky here'* and 'a fully-fledged *Rechtsstaat* continually demands the combination of "due process" and "crime control"' (ibid.: 20-21). What is noted in relation to law enforcement in a social democracy under the rule of law - which may for the sake of convenience be

equated with the administrative enforcement at issue here - also emphasises that in fact the concern is with inducing the legislature to make adequate arrangements for enforcement. The adequate arrangements embrace 'an adjustment of legislative policy, that should be placed much more strongly in an implementation and enforcement perspective'.

Toleration takes many forms, which have been identified with increasing precision since the concept was introduced by Van Buuren (1988). The Ministry of Justice policy document *Grenzen aan gedogen* (Limits to toleration) distinguished as variants the dichotomy of implicit versus explicit (still referred to in the ministerial 'letters of toleration' of the Ministry of Housing, Spatial Planning and the Environment (VROM) and the Ministry of Transport, Public Works and Water (V & W) of 1990/1991 as 'passive versus active'), prospective versus retrospective, ad hoc versus generic and unconditional versus conditional. At least equally as important are the motives, whereby 'unwillingness' and 'indifference' are to be condemned and 'setting priorities on account of lack of capacity' may be categorised as unavoidable. Both types play a role in both criminal law and government action. This also applies to the most complicated category, consisting of political choices based on the weighing of various aspects of the general interest. In the case of criminal law the toleration of drugs for personal use is a familiar example: the net gains to be made in the field of public health are the decisive factor. In environmental policy non-intervention in anticipation of changes of the requirements or abolition of the infringements is not unusual. To take a specific example, closure of a factory because the right machine is being delivered two weeks too late has disproportionate economic consequences and might not survive scrutiny in terms of Section 3:4 of the General Administrative Law Act. Numerous authors have defended toleration in such cases as a means of dealing with the inevitable tension between the law and fairness. Van Oenen (2000) for example speaks of 'knowing how to deal with frictions in the legal order arising from tensions inherent in any legal order,' and Michiels (2001) emphasises the *authority* to manage and the importance of weighing interests.

Testing against the relevant general elements of the *Rechtsstaat* results in the case of the most discussed variant - administrative toleration in the sense of conscious non-intervention - in the following supplementary conclusions (see also Jurgens 1996: ch 3). If such toleration takes place arbitrarily, the law becomes nothing more than an instrument in the hands of the administration and the statutory function of providing legal certainty and legal equality loses meaning. If the toleration takes place systematically and consistently, the latter objection of conflict with the legality principle does not apply. It may however lead to a one-sided shift in the balance of power within the *trias politica*, and especially in democratic relations. If the policy of toleration is known, adjustment is however also possible, which is what makes tacit toleration such a dubious phenomenon, not only if it springs from unwillingness but also if it is based on capacity shortages.

Between the extremes of full-scale enforcement (impossible and 'unliveable') and turning a blind eye to everything (undermining democracy and the law), which are both unacceptable, there is a broad field in which decisions continually have to be taken as to whether or not to enforce. In the case of criminal and administrative law, the existence of a well-considered decision (or series of decisions) is in practice a condition for intervention. This does not in any way mean that toleration provides the point of departure, but that intervention must not be automatic. There is, in short, an essentially 'free field' in which general principles of the *Rechtsstaat* determine when and under what conditions enforcement is or is not permitted or is in fact essential.

Review against elements of the *Rechtsstaat*, including concepts of particular relevance such as legal certainty and legal equality, is not the only way of assessing toleration and enforcement. Inadequate enforcement can also be simply assessed in terms of its substantive consequences, i.e. the results of government policy and, more generally, social circumstances lag behind the justified expectations.

From this viewpoint enforcement has also increasingly become a subject of political debate. The inclination to label shortcomings in enforcement as an important cause of undesired events appears to be growing. This is at its most evident in fields such as public safety and common law crimes, where the consequences are at their most discernible and where moreover a special governmental responsibility may be said to exist in terms of the *Rechtsstaat* concept.

Recent policy intentions in the field of public safety provide grounds for suspecting that the priorities have shifted. The announcement in the Cabinet position in response to the Oosting committee report concerning the Enschede firework disaster (BZK 2001: 20), that toleration will only take place in express circumstances and temporarily, points to a tightening up in this crucial area. At the same time, however, it is becoming ever clearer that more and better government direction and enforcement along traditional lines cannot be the sole response. The complexity of the material and shifting (power) positions supply arguments for the assignment to private individuals of responsibilities that are more in line with the growth in their influence.

4.1.3 ADMINISTRATIVE TASKS AND THE RECHTSSTAAT: CONSEQUENCES OF CHANGES IN CONTENT AND IMPLEMENTATION OF GOVERNMENT TASKS FOR TRADITIONAL RECHTSSTAAT GUARANTEES

A number of phenomena have been noted at the end of section 4.1.2 that affect the scale and nature of the government's responsibilities and the organisation and method of implementation. It was noted that such changes can have negative effects on a basic assumption concerning the *Rechtsstaat* guarantees for the citizens

vis-à-vis the government, namely that governance amounts to politically and judicially controllable implementation of the law, or at least action that can be traced back to law. As examples of such phenomena, which come on top of the fact that governance has in fact always involved more than just implementation of the law, a number of issues going back some time were cited, such as interlocking complexes of legislation and open powers. The increase in individualisation and greater assertiveness of the citizen (3.2) are other factors that can have an influence in this area: the greater the diversity, the less the room for legislation having universal effect and the greater the risk of conflicts of interest. The greater the assertiveness the greater the risk that an implementation mentality based on strict rules will no longer be accepted and that exacting demands on both the procedural and the substantive side at once will overburden the actual implementation. In addition the changes in civil society described in section 3.3 impose different demands on government action.

Upon closer analysis there turns out to be a fairly complicated complex of broad, almost autonomous shifts affecting the scale and implementation of government responsibilities. That changes in society have such effects goes without saying, but it would appear as though a multitude of radical developments have been taking place simultaneously during the last two decades. Apart from those just mentioned these include, more or less in chronological order of impact, internationalisation, deregulation and privatisation, professionalisation and ICT/knowledge-intensification. Most of these phenomena affect one another; one may in part be a reaction to one or more other phenomena.

It is customary to examine these kinds of developments largely in the light of the potential consequences for *the effectiveness of government action*. From this angle attention has also been devoted in a number of recent Council reports to ICT/communication technology (WRR 1998), ICT, professionalisation, internationalisation and privatisation (WRR 2000) and ICT/knowledge-intensification (WRR 2002). It was examined to what extent the existing methods of government direction would remain usable and where equivalent alternatives should be sought. The factual analyses are not however any less usable if primacy is given to the changes in the *Rechtsstaat* field. Briefly summarised these are as follows.

The traditional system of direction by universal laws, implemented by subordinate civil servants, is losing much of its significance. This is due to a number of differing, sometimes mutually reinforcing developments, which barely lend themselves to effective influence by the national state and which are indeed often even supported or launched by the state. These phenomena sometimes entail significant advantages. It is evident that professionalisation can also lead to improvements in quality and that ICT and internationalisation can greatly increase efficiency. More generally it may be said that in terms of obtaining the maximum substantive results, a system of central direction by no means always deserves preference. For this reason alone there is little merit in examining the extent to and way in

which adjustments need to be made in response to the identified shifts from the viewpoint of the effectiveness of government policy; the fact that those policy results, as noted previously, are not without significance for the embedding of the *Rechtsstaat* makes no change to this.

The 'old' system is however relevant not just from the general viewpoint of government direction but also from the special angle of the guarantees provided against arbitrary power by the *Rechtsstaat*. This becomes all the more clear if the *Rechtsstaat* guarantees are also included under the general heading of 'quality of the administration', as done in earlier WRR reports (the points of reference in *Safeguarding the Public Interest* and the basic values in *Of Old and New Knowledge*).

For the sake of good order: by no means always is there a self-evident threat to the aforementioned guarantees. It would be equally possible to speak of a distribution of authority in order to prevent the concentration of power and arbitrariness as it would of a fragmentation that is undermining the foundation afforded by uniform laws. Furthermore it is difficult to bypass the substantive side: fragmentation can also reduce efficiency in the same way that 'know-all' professionals can improve standards. This does not however eliminate the fact that compensation must be sought where the identified changes can adversely affect the guarantees of the *Rechtsstaat* by undermining the traditional assumptions concerning the operation of and control over the administration. If at the same time those changes generate imbalances between the realistic possibilities of the government to perform, as hampered by those changes, and the consequently heightened expectations concerning the results of government intervention, there is then reason to reconsider the elements of the system, devised as they were with a view to different circumstances.

4.1.4 POSSIBLE SOLUTIONS

A general conclusion to arise from the foregoing must be that marked restraint is desirable when using *Rechtsstaat* arguments in the discussion about the position and actions of the system of government. The *Rechtsstaat* principles are simply not sufficiently clear-cut and adequate. The more that 'the *Rechtsstaat*' is used for what are in fact or at least primarily political disputes and the more the *Rechtsstaat* is for example also simultaneously required to provide maximum guarantees against and protection by the government, the greater the danger that the concept will lose any true distinctiveness.

At the same time solutions may be put forward for the identified problems. It was seen that toleration is by no means a phenomenon that, in all its variants, is at variance with the *Rechtsstaat*. Provided that it is limited, knowable, controllable and contestable by those concerned, toleration increases the guarantees against the government in comparison with the situation in which the inevitable cases

of non-enforcement are ad hoc and emerge only in retrospect. Non-enforcement does, however, need to be limited as far as possible, while enforcement needs to be elevated into the basic principle. The point of departure should be that not just in the case of conscious non-enforcement - i.e. toleration - but in fact in any stance taken by the government in which enforcement takes place solely on the basis of explicit decisions, the government is in fact - unintentionally - prescribing the law. But even if one regards enforcement as the final element of policy, an acceptable general level is vital as a component element in the foundation of support for the *Rechtsstaat*. All this points in the direction of a *knowable enforcement strategy*: without elevating enforcement into an inviolable principle, a reasoned and regularly updated statement of priorities lending itself to political debate will be provided in respect of any broad package of regulations.

With respect to the developments noted in section 4.1.3 a redistribution of responsibilities is put forward as the main response. This could mean that - sometimes at the expense of the legality principle - duties for citizens or businesses are laid down in terms of somewhat more general norms; it could also mean that regulations are abolished entirely and even that the government decides that certain tasks should be placed with or returned to other parties.

4.2 THE JUDICIARY

4.2.1 INTRODUCTION

The judicial system has been accorded a special place in the *Rechtsstaat*. It acts in order to resolve disputes between citizens, who are able voluntarily to submit their disputes to a court of law. The courts also resolve differences between citizens and governmental institutions. A special form of conflict between the government and citizens is formed by the administration of criminal justice, in which the public prosecution service represents the state and acts as plaintiff and whereby citizens are brought before the courts as suspects. Private individuals and legal entities can both turn to the courts, although the capacity in which they do so will differ. Large organisations, in the form of private-law and public-law legal entities, have increasingly become parties to legal proceedings in recent decades. Parties are therefore resorting to the courts in all sorts of capacities in order to obtain an independent judgment in respect of a conflict or legal dispute.

One condition for the ability of the courts to operate in a *Rechtsstaat* is that their independence should be enshrined in the Constitution. Judges cannot be dismissed and cannot be held to account by government agencies in respect of decisions taken in the course of exercising their official duties. They act as a third power in the system of state. This is also how Montesquieu saw matters, after he had made a study of the operation of the state system in England, where there were rudimentary forms of jurisprudence independent of the king. In the *ancien régime* judges were subordinate to the king and enjoyed only a limited freedom to

hand down judgments.
A great deal has however changed since the *trias politica* was devised and initiated. In particular the courts have been given a more central place, both in the trias and in society. From having responsibility for applying the law the courts became explainers or interpreters of the law and, later, helped shape the law. With the evolution of the classical *Rechtsstaat* into the democratic and social *Rechtsstaat*, in combination with the growth in governmental responsibilities, a growing need arose among citizens for appeal to judicial control over the political and administrative exercise of power. The growth in administrative jurisprudence has been characteristic of this. Other social developments have left a major stamp on modern legal developments, thereby indirectly strengthening the position of the courts, which became allowed to interpret all these new rules and general provisions and principles in concrete cases.

The major social development was the general increase in prosperity that took place after the Second World War. The greater level of trade, buying and selling and consumption all increased the likelihood of legal disputes, some of which had to be resolved by the courts.

The democratisation of social relationships brought more equal rights, which were also exercised in the field of justice and, in particular, in the access to the courts. The legal protection in the field of social insurance law (unemployment and social benefits), rent and labour law and aliens law was extended. From time to time this involved fundamental issues, such as the granting of equal rights to men and women in the field of social security. Democratisation was however coupled with the recognition of divergent life-styles. In the law of persons and family law this resulted in new legislation (e.g. single-sex marriages) and into legal rulings that provided recognition for a multiplicity of personal and family relationships.

Similarly the constant expansion of scientific and technological knowledge has resulted in a more prominent role for the courts. This applies in the medical and legal sphere, where for example an indefinite concept such as 'unbearable and hopeless suffering' consistently needs further interpretation for the purposes of assessing euthanasia. Mutatis mutandis it also applies to other technical spheres where new developments will lead to legal issues (superconductors, information processing, electronic payment transactions, storage of hazardous waste, waste processing and the legal consequences of industrial disasters, etc.).

All these social developments are more or less reflected in the changing stance taken by the courts in society. The courts are themselves more actively involved and are also more actively involved by other parties. Confidence in the courts remains high. This trend towards a more central place for the law in general and the courts in particular is sometimes referred to in terms of the overall concept of juridification. The latter is a consequence of both the greater formalisation and more business-like nature of the relationship between more individualistic and

assertive citizens (see 3.2) and of the more active stance being taken by the courts themselves. A notable feature in this regard is that the increased involvement on the part of the courts - criticised by some as 'meddlesomeness' - has not reduced public confidence in the courts but has in fact strengthened it (WEF 1999: 8.05).

The increased public confidence in the courts does however require qualification. The relations between citizens and the courts are mediated by attorneys, who play a role of their own in this process of juridification. The number of attorneys has increased enormously since the early 1970s, namely from 2,000 in 1972 to 12,000 in 2000, a six-fold increase in the space of 30 years. Attorneys act as important gatekeepers for the courts. They are in large measure able to determine which cases are and are not submitted to the courts. The courts are therefore largely passive and reactive rather than directive. But once the courts have honoured the numerous actions and initiatives of attorneys a feedback mechanism is generated whereby the expectations that have been aroused - the resort by citizens, assisted by their attorneys, to the courts – are strengthened. Juridification stemming from increased resort to the courts is therefore a self-reinforcing process, which is beyond social restraint or control.

These developments provide grounds for examining two aspects in more detail, namely the place of the courts in the *trias politica* and the quality of the judicial organisation.

4.2.2 The courts in the trias politica

Are the courts being given too much influence? As a result of the developments outlined in the previous section, some people take the view that the courts have obtained an unduly central place in the *trias politica*. In Dutch reference is even made to the development of the *Rechtsstaat* into the *rechtersstaat*, i.e. an evolution from the Rechtsstaat to judge made law. In the case of the system of public administration this concern led to a report by the Van Kemenade working group, *Bestuur in geding* (1997), and to the Cabinet policy document *Juridisering in het openbaar bestuur* (December 1998), previously referred to in 4.1. The fact that as noted the concern expressed there rapidly ebbed away is by no means surprising when it comes to the position of the courts. The courts do not initiate procedures but assess cases brought before them. The rules of European international law are increasingly drawn upon in this regard.

What the report by the working group does correctly note is the fact that the decisions taken by the courts are often not sufficiently definitive or clear, so that the administration does not know 'what it is about'. Legal proceedings slow down policy and so result in a waste of time and money. It is therefore more a matter of policy being hindered rather than of the courts not being allowed to pronounce on administrative matters (Wolthuis 2000: 246). The question therefore arises as to whether the looming collision between two powers of the *trias politica* should be

interpreted as a conflict in which the judge is 'sitting in the seat of the administration' or rather as a dispute concerning administrative efficiency and the possibilities for improving the quality of administration.

The increased influence of the courts is leading to greater uncertainty and unpredictability. On account of the independent nature of the judiciary the question arises as to the democratic legitimacy of decision-making by the judicial system (Rijpkema 2001). What is the relationship between the legislator and courts in the current polity? Do the courts have an independent role to play in a democracy under the rule of law or does that role derive from laws made by the government and parliament?

In the old doctrine concerning judicial freedom in relation to the legislature there are two opposing views (e.g. Wiarda 1972; Dworkin 1986; Cass 2001; Loth 2001). One view regards the courts and the judiciary as an independent element of the *Rechtsstaat*, which contributes towards the framing of law on an equal basis. This is accordingly referred to as judicial activism or judge-made law (Rijpkema 2001). In resolving specific disputes, the judiciary assign themselves a large measure of freedom in the interpretation of legal texts. The judge is in a manner of speaking principal.

Under another view the power of the judiciary derives solely from the democratically elected legislature. The courts act with restraint in interpreting legal provisions and, in specific cases, refer back to the legislature for amendment or adjustment of the rules as necessary. This is known as the judicial restraint view, with the courts acting as a weak agency (Cass 2001).

One can agree with the reference made by the former President of the Supreme Court, S.K. Martens, to the view developed by that body that 'in the given constitutional relations, the courts will exercise restraint when it comes to intervening in a statutory regulation' (Martens 2000: 750). With the expression 'in the given constitutional relations' the Supreme Court indicates that it attaches great value to the good relationships within the *trias politica* (ibid.: 751).

In other words, the judiciary knows its place in the *trias politica* and exercises restraint with respect to political and social issues, where the primacy of politics should prevail, but has deliberately taken a more independent stance in the framing of law out of the need to provide a consistent interpretation of vague and open norms. For even in those cases in which the judiciary has participated in the formation of law, e.g. with respect to the assessment of euthanasia, this has been done in close accordance with what the law permitted. The task of the judiciary in framing law must not be confused or identified with totally free interpretation that cuts across the law and regulations: subject to a limited freedom of interpretation, the courts remain bound by the law and regulations.

Seen in this way the obvious question concerning the democratic legitimation of the judiciary as framers of law is qualified but retains its significance. Here again we may quote Martens, who states calmly in the article previously referred to: 'Certainly, judges do not derive their legitimation from the fact that they have been elected. But the basis of our state system is not just representative democracy but also and in particular the rule of law: the Netherlands is a *Rechtsstaat*. The *Rechtsstaat* makes no sense without a judiciary, which is obliged "in accordance with the law" to administer justice and hence also to shape law. The legitimacy of the judiciary is therefore different in nature but not therefore less than that of the two other powers of the *trias politica*' (Martens 2000a: 751).

The legitimation of the courts is moreover strengthened by rules based on the principle of the *Rechtsstaat* concerning the public nature of the administration of justice and the grounds for judgments and rulings, whereby consistency of jurisprudence is highly important. The orientation towards the prevailing pattern of norms consequently becomes visible and controllable.

The conclusion with respect to the democratic legitimation of the courts consequently follows: the *Rechtsstaat* recognises certain jurisprudential tasks of the courts, whereby the subordination of the courts to the law provides sufficient counterweight to their irremovability and independence.

4.2.3 QUALITY

Apart from this internal subordination of the courts to the law the judiciary should be subject to greater external accountability. Who monitors the monitors? In the case of an independent body that is assigned a more central role within the *Rechtsstaat,* transparency of the judicial machinery and of the way in which the system of justice is organised may be expected, in the same way that this is now regarded as self-evident for other professional organisations. In the same way that public disclosure and the substantiation of decisions help in assessing the quality of individual judicial rulings, a transparent quality policy for the judiciary as a whole can be in the interests of the external accountability of the monitors of the *Rechtsstaat*.

In December 2001 two laws came into force aimed at the modernisation of the judiciary: the Courts (Organisation and Administration) Act (27 181) and the bill introducing a Council for the Judiciary as a new authority in the legal system (27 182). The Council for the Judiciary, which officially got off the ground on 1 January 2002, performs an overarching role within the judicial system. It is responsible for the preparation of and budgeting for the courts as a whole, the allocation of the budgets to the individual courts and the provision of operational support. At the same time the Council is required to provide support for the uniform application of the law and the promotion of legal quality. The Council for the Judiciary therefore operates 'at a distance' from the Minister of Justice, although the lat-

ter does remain responsible for determining the overall budget for the judiciary. Negotiations concerning budgets and estimates are not, as before, conducted by the individual courts but by the Council for the Judiciary. This has given the Council a new position, in between the Minister Justice and the individual courts, that was not hitherto known constitutionally.

With the new laws the courts have been given a hierarchical administration responsible for directing the management of the Courts (e.g. organisation, budget and operations, accommodation, quality and personnel). This introduces an integral management, under which the members of the judiciary themselves obtain responsibilities for the management and implementation of their tasks in respect of the dispensation of justice.

Both the Council for the Judiciary and the court administrations specifically refrain from any involvement in the substantive assessment and handling of individual legal cases or certain categories of cases. The independence of the judiciary in individual legal cases was not an issue in the modernisation of the judiciary. The individual courts are independent, but the exercise of court powers takes place within a judicial system that lays down professional requirements and reaches agreements with the individual judges and tribunals (for example the individual court Divisions) with regard to managerial tasks.

Generally speaking there is satisfaction with this process of modernisation, but a number of dangers have also been identified. At heart these come down to the tension that is observed between the professional autonomy of judges and the requirements in terms of modern managerial practice. The latter has however been in acute need of modernisation, while it was also time for a new orientation by the judiciary on its place in society. Subject to the need for judicial independence, efficient managerial practice may also be expected of the courts. In particular this concerns the tension between quality and speed or between professional criteria and financial possibilities - a tension that exists in any modern professional organisation. Only if the financial or managerial limitations were totally to frustrate the ability for cases to be settled sufficiently quickly, so that international treaty obligations in respect of the handling of legal cases within a 'reasonable period' were breached, would there be a direct conflict between legal requirements and managerial possibilities.

In any professional organisation there is a tension between the logic of professional action and the logic of management. Highly trained service-providers wish to retain autonomy of decision; integral management turns them into part of the larger organisation, in some cases even making them a subordinate link in the chain. The judiciary is a good example of such a professional organisation. Nevertheless there need not be any conflict between the requirements and values of professional action and managerial criteria. The endorsement of this proposition calls first for a brief description of the quality of the administration of justice, followed by some

comments on quality management systems.
The quality of the administration of justice is a topical issue. The pressure of work of the courts has increased. The Ministry of Justice is insisting that efficiency be increased. As articulated in newspapers, weekly magazines and professional journals, many judges are concerned that this will be at the expense of the content of their work. As against the fear that 'the quality of the work will suffer' there is the more optimistic expectation 'that much remains to be gained from more modern management practice and that firm management is urgently required' (Volkskrantmagazine 2000). An awkward feature of such conflicting views is that the concept of quality is not generally defined in more detail or remains undefined. Nevertheless, it remains possible to arrive at certain conclusions by distinguishing three characteristics of good quality jurisprudence, based in part on the 'mental attitudes' (*esprit*) identified by Pascal. Seen in this light, judicial quality arises in an *esprit de finesse* and is indispensable for the continuity of the legal system. It in fact determines the normative content of a society and the continuation of the public discussion concerning the norms of a society. The concern for the proper management of the judicial infrastructure and the right administrative conditions for the proper administration of justice arises from the *esprit de géométrie*. The *esprit de politesse* (although not named as such by Pascal) leads to important ancillary socio-psychological characteristics of judges and to the communicational features of a legal process.

Together these form the quality of the of justice system, but it would be simplistic to say that all three are equally as needed or necessary. The conclusion could be reached that of the three quality criteria for the good administration of justice the most important is that of judicial quality, followed by administrative adequacy, and that finally a supplementary place must be set aside for socio-psychological skills.

Lastly the quality of the individual judges is of course important. Special attention needs to be paid in this regard to the further training which, in comparison with other professional groups such as doctors and attorneys, goes less far or even appears to fall short (Van der Doelen 2000: 158) in all sorts of areas on account of the burden of activities. A survey carried out among judges indicated that a majority considered they suffered from substantial gaps in knowledge of European and international law (NJB 2001: 1923). The gaps in specialist expertise in certain areas can also be overcome by making use of deputy judges (in many cases specialist lawyers or specialist legal practitioners). Although this use of deputy judges may not be so desirable for other reasons and could be reduced in the coming years, it does emphasise the growing need for specialisation and the need to tap 'external' expertise in a wide range of fields. The modernisation of the judiciary and greater responsiveness to the rapid changes in society call for a high level of professionalism with regard to knowledge and skills.

4.2.4 CONCLUSIONS

Public confidence in the courts remains notably high. That confidence has been gained by a greater openness on the part of the judiciary towards society, particularly in comparison with the period immediately before or after the Second World War. The openness and greater involvement in social developments are also reflected in the recognition of the jurisprudential role of the judiciary. The judiciary have achieved this more central role in law-making for reasons such as the existence of international treaties and resultant jurisprudence and the restraint displayed by the Supreme Court on controversial political issues. The place of the judiciary in the *Rechtsstaat* - especially in the *trias politica* - does not prevent such a jurisprudential task. This development could be formally laid down in a clearer division of jurisprudential tasks between the lower and higher courts. This division of tasks could also help alleviate the growing burden borne by the highest legal bodies, which would consequently be able to concentrate on their jurisprudential task. The possibility would also need to be created for parties other than those directly concerned to express their opinion in respect of matters of jurisprudential importance.

The recognition of the central role for the courts does however mean that the modernisation of the dispensation of justice and of the judiciary needs to be tackled seriously. The traditional backlog in modernisation and pressure for innovation in comparison with other professional organisations is no longer consistent with the modern age. The judiciary will need to be able to render account concerning this process of modernisation to parliament and society, without in so doing endangering the independence of the judiciary in the *Rechtsstaat*. As an overarching organisation, the Council for the Judiciary is an obvious choice in this regard.

This process of modernisation is in particular concerned with the preservation of the quality of the administration of justice and the systematic development of such quality management. Education, professional training and specialisation are seen as being of prime importance in this regard. Much could still be improved in this area. Since these quality-enhancing elements are managed from within, as an expression of the independence of the judiciary as a whole, greater transparency and systematic evaluation could also be insisted upon as a counterweight for society.

4.3 THE EFFECTIVE ADMINISTRATION OF JUSTICE

4.3.1 INTRODUCTION

A self-evident element of the *Rechtsstaat* is that the law is put into effect, a leading aspect in turn being that conflicts can be resolved with the aid of the law. This imposes capacity requirements. When analysed from an economic viewpoint a number of new concepts are required.

By the *administration of justice* is meant the way in which society resolves its disputes with the aid of the law. The administration of justice provides a statistical picture of the resolution of disputes in all elements of society. This concerns any activities to which the dispensation of justice is in principle applicable. Society must be ablethat to test action against the law in problematical situations. The justice system provides the necessary legal review to meet the demand. By the justice system is understood the complex of (in particular) governmental functions aimed at allowing the law to run its course. Within the justice system there are also parties that provide the citizen with legal advice but who do not belong to either the judiciary or the executive.

The justice system is not the only party involved in the resolution of social conflicts. By no means every dispute concerning the lawfulness of action results in legal proceedings. Apart from the justice system there are various other possibilities for obtaining justice. The vast majority of disputes are resolved by citizens themselves. Virtually all relations are subject to certain forms of friction that could, in principle, be made the subject of litigation. The potential for social conflicts is inherently unlimited. This could constitute a threat to the tenability of the legal machinery and the balanced administration of justice. Personal responsibility and self-reliance are requirements for keeping the administration of justice in balance. Nevertheless society imposes certain expectations on the legal machinery in order to keep the administration of justice in order. The question is whether this expectation can be realised in a socially effective way.

Conditioning of the legal machinery by the Rechtsstaat
The *Rechtsstaat* lays down certain rules of the game for the legal system. The citizen is for example protected against the power of the legal system. Under the *Rechtsstaat* judges are required to be independent and impartial, the dispensation of justice is public, there is a right of defence, and rulings must be explained and justified (Lower House 1993-1994). The *Rechtsstaat* also calls for adjudication within a reasonable period. In addition the government is required to provide sufficient protection for the life and property of offenders, victims and witnesses. The *Rechtsstaat* also protects the citizen against all sorts of enforcement functions forming part of the legal system, such as the police. On the other hand the legal system is also required to afford the citizen protection in a *Rechtsstaat*, for example where the citizen's safety is under threat.

Question
Within the *Rechtsstaat* there are more or less problematical situations in various areas of the law. In the case of civil law the emphasis is placed in a democracy under the rule of law on the importance of material equality of access to the law, while in practice differences in people's material positions lead to inequality. In the case of administrative law it is a matter of providing a guarantee of legal certainty in dealings with administrative agencies, but this guarantee is sometimes

at risk of being stifled by the sheer volume of proceedings. In the case of criminal law the protection of suspects against the power of the legal system is juxtaposed against the protection of citizens by the legal system. The question posed here in relation to civil law and administrative law concerns the way in which the access to the law can be safeguarded in a socially effective way. The question in relation to criminal law concerns the extent to which the action of the criminal law system within the parameters of the *Rechtsstaat* and in relation to the objectives of criminal law can be effectively deployed.

4.3.2 CIVIL LAW

In the civil law sector the problem arises that access to the courts is not equal for all. Distorted power relations can prevent the parties to a dispute from having equal opportunities of obtaining relief. In the first place this concerns parties who are confronted by disputes on no more than an ad hoc basis and those who are systematically involved in disputes. Distorted power relations do not however play a role just when various types of legal entities are in dispute but also in the case of disputes concerning matters in which the commercial interest is relatively limited.

Legal aid remains effective in order to redress the equality in material access to the courts arising from differences in ability to pay. There are however also limits to that effectiveness. At the level of income at which the right to legal aid just cuts out or where the litigant is required to make a large personal contribution, the demand for legal aid is at a minimum. Furthermore, legal aid is unable entirely to offset the ability to procure legal assistance in a dispute that is taken to court, even if the range of legal aid were to be substantially extended. In this regard it also needs to be borne in mind that legal aid can also result in disproportionate resort to the courts.

The legislature needs to keep a close watch on unequal positions of power that could have a bearing on whether or not citizens decide to refer a dispute to the court. Legislation, in particular, provides a means of redressing imbalances in power. Special attention also needs to be paid to cases where the commercial interest does not weigh up against the costs of a lawsuit. Such cases regularly crop up. Greater emphasis on more minor forms of judicial process, such as the system of disputes committees, could provide a way out in such cases. In the case of such alternatives the customary standards for the dispensation of justice must be guaranteed as far as possible, such as a certain independence and maximum impartiality, or at least a proportionate representation from various elements of society. A limiting factor in this regard is that it will generally be the institutional party, as the one regularly involved in disputes, that arranges the alternative to litigation. The government should ensure that these alternatives meet the requirements of the *Rechtsstaat*. Finally consideration could be given to an extension of performance-based remuneration or other alternatives in those instances where legal aid is inadequate. One alternative would for example be a credit facility administered by

the Legal Aid Councils.
There can be no question of excessive resort to the courts or comparable alternatives from a social viewpoint if the costs incurred for the legal resolution of disputes are less than the loss avoided due to the preventive effect of the law. Such loss can be avoided precisely on account of the signal sent out by legal judgments. In many cases there is insufficient empirical evidence concerning the preventive effect of the law to draw practical conclusions concerning disproportionate resort to the law. But even in the absence of any preventive effect on the part of the law, the dispensation of justice still fulfils a useful function, namely in regulating the compensation for loss or damage suffered. In the Netherlands there need be little concern about disproportionate resort to civil law. Generally speaking access to the law is sufficiently demanding for there to be if anything too little resort to the courts. If it were possible to specify a socially effective level of civil procedure on the basis of the deterrent effect of the law, the difficulties of access to the courts leave it open to question as to whether this level of dispensation of justice for the injured party is in fact achievable. In that event the concern about the inadequate precautions taken by the defendant would be realistic. In this regard it is not without importance to shorten the lengthy completion times of civil actions on the merits. Particularly in the case of parties who are only occasionally involved in a dispute, the lengthy completion periods have a negative effect.

The law, which also encompasses published court rulings, has a major effect on the behaviour of the citizen without any coercion being applied. Spontaneous observance of the law is at a high level and in easily most cases citizens know how to sort out matters themselves in accordance with the relevant guidelines laid down by the law. The signalling function of judicial rulings is at its strongest where these are effectively communicated to the relevant sectors of society. The strength of the signal that is sent out is also stronger the clearer it is, i.e. if the rulings by various courts are clearly consistent. Consideration could be given to the clearer differentiation of the functions of the higher and lower courts. With a view to strengthening the signalling function, the higher courts should be primarily concerned with matters of general interest, while specialisation on the rapid and efficient handling of a large number of cases is more a matter for the lower courts. However, to the extent that this would limit the possibility of a second substantive examination by the courts this would be at the expense of the opportunity to correct judicial rulings.

From an economic viewpoint, the introduction of a performance-based fee for legal representation only makes sense in the case of people who would otherwise be unable to pay. An alternative would be the provision of credit guarantees, for example under the auspices of the Legal Aid Councils. In appropriate cases such guarantees could be provided in addition to the customary legal aid. In particular this would concern additional evidentiary costs.

4.3.3 ADMINISTRATIVE LAW

The problem of administrative law concerns preventing the guarantees provided to the citizen concerning the quality of administrative decisions from giving rise to excessive litigation. To this extent there is a parallel with the problem noted in respect of civil law, i.e. that here too access to the law is at issue. In the case of administrative law the capacity of the legal system is stretched by the somewhat excessive level of litigation brought about by the ease of access to the law. Legal proceedings take ever longer to complete, thereby undermining the very protection that administrative law is designed to provide.

As in the case of civil law it is in principle desirable to aim at a level of judicial proceedings in which compliance - in this case by government agencies - rises to the point at which this justifies the costs that the administrative law entails. This is on the assumption that the need to appeal against administrative decisions is tempered by the legal validity of the decisions. However, because that need is not prompted by what might be categorised a socially effective level of judicial proceedings but, instead, by a cost/benefit trade-off at micro level, the scale of appeal may require some adjustment. At present the access to administrative law is virtually unimpeded. The most obvious way in which to regulate the level of appeals would therefore be to increase the cost of access to the administrative courts. In so far as use is made of legal aid, however, the access costs are not a factor and a certain degree of screening would be required when deciding on legal-aid applications.

The spontaneous observance by administrative bodies is not, however, necessarily guaranteed, because here too a commercial trade-off needs to be made it micro-level that does not necessarily lead to a sufficient measure of lawfulness and hence also not necessarily to a socially effective level of justice. Government agencies can find themselves tempted to pass the implementation costs on to the legal system. In order to prevent this, the full on-charging of the costs of the legal proceedings is (as in the case of civil law) desirable where appeals are upheld. At the same time, however, it needs to be ensured that this does not lead to an increase in the number of false-positive decisions by government agencies. Separate measures are required for this.

The signalling function can also be strengthened in the case of administrative law. The less direction provided by the jurisprudence and the less clear the signal therefore is, the greater the policy discretion for government agencies and, potentially, the legal uncertainty for the citizen. In assessing measures to promote legal unity, such as the provision of a second authority, the consequential juridification needs to be weighed against the juridification avoided as a result. This makes it possible to assess the ability to appeal from the viewpoint of efficiency. In this connection consideration could be given to concentrating the work of the appeal courts on cases that would send a clear signal to society, in the same way as that being pro-

posed for civil law. The deterrent effect would then make it possible for the root cause of the maximum number of potential cases to be tackled with the minimum number of actual rulings.

4.3.4 CRIMINAL LAW

Over the past twenty years changes in public opinion have seen a hardening of the penal climate in respect of certain offences (e.g. sex offences, crimes of violence and public order offences). This hardening of the climate has not resulted in any reduction in crime. The fact that the scale of the criminal justice system failed to keep pace with the increase in crime during the 1980s was not a major factor in the growth of crime. The latter is affected only marginally by the level of investigation and prosecution by the criminal justice system. The proposed expansion of the criminal justice system is expected to result in a substantial increase in the level of punishment, but no major effects on the incidence of crime are to be anticipated: too much of the growth in crime is taking place outside the government's sphere of influence. The level of punishment handed down could increase because crime is also becoming more serious in nature. Given the limited effectiveness of crime prevention the Council does not consider a further increase in penalties to be opportune.

The ongoing rise in crime makes it virtually impossible to hand down punishments for *every* offence committed. From the viewpoint of the *Rechtsstaat* it is important for the priorities that are set not to be given any absolute status, as this would act as an open invitation to commit criminal offences that are regarded as less serious without fear of punishment. The enforcement of criminal law needs to be visible in all areas in which there is criminal activity. The general deterrent effect of the punishment imposed can be increased by means of targeted and credible publicity. This can also increase confidence in criminal law enforcement. Even in the case of low clear-up rates for more minor offences, the public punishment of the odd criminal act has a symbolic value that can also be of importance for the victims of unsolved offences. In terms of the *Rechtsstaat* the setting of priorities should not be governed by capacity shortages but by considerations of general interest as to which offences do and do not require the attention of the justice system. In this connection it is worth spelling out the interpretation given to the common interest in relation to the application of the principle of discretionary power. In the case of more serious offences it would be advisable to abandon the principle of positive expediency in respect of both investigation and prosecution and once again to be guided by the principle of negative expediency. In cases where the police do not follow up a report of a serious offence this should be justified in terms of an appeal to the general interest. The same applies to the public prosecution service when it is decided not prosecute more serious offences. Partly in view of the greater emphasis on the legitimacy of the action taken by government agencies, such an increase in transparency would be highly desirable.

Perhaps unnecessarily, the Council would note that efforts at intensification at the start of the criminal law chain can lead to bottlenecks in later stages. It sends out a particularly bad signal both to society and to the police if the results of criminal investigation come to nothing as a result. In order to relieve the burden on the criminal justice system consideration could be given to allowing the public prosecution service to impose a fine, with the possibility of appeal to the courts, in respect of more minor offences, where guilt has more or less clearly established.

The Council also takes the view that the considerations underlying the expansion in police capacity lack transparency. Without seeking to contest the need for an expansion in police capacity, it would be desirable for there to be a greater measure of accountability concerning the resources used for investigative purposes. Precisely because the objectives of the police system are diffuse it is unclear to what extent the resources made available serve the set goals. This applies all more with respect to investigation, since crime is to a significant extent developing autonomously. Disappointing results in the investigation field and a low clear-up rate by international standards raise questions concerning the internal efficiency of the police system.

Recidivism is the subject of ever growing interest. The fact that a significant proportion of offences are committed by a relatively small number of offenders does not in itself provide a frame of reference for the effective tackling of crime. An intensive monitoring system in the case of out-and-out recidivists with clear obligations on the part of those concerned would rapidly ran into conflict with the principles of the rule of law. Limitations on freedom simply on account of the risk of criminal behaviour would be an undue infringement of citizens' rights. Recidivism does however involve a special situation. It can be in the interests of both the convicted person and society for the individual concerned to be subject to certain social constraints so as to promote structure and social ties in the latter's life. For such a solution to work it is necessary to create prospects for social participation by clients who are known to be awkward. In the first place this should consist of the guaranteed direction of such people into suitable employment and education (as many of them are still young). In exchange cooperation could be demanded. Non-compliance could involve penalties for those concerned, for example more extensive monitoring arrangements. Consideration could also be given to the instrument of suspended sentences. Without a well-equipped probation service, as the front-line executive agency, and without a police system that can if necessary wield a big stick, a policy of vigorous socialisation has little chance.

4.4 RE-EVALUATION OF THE LEGISLATION

4.4.1 GENERAL

What consequences do the changes in the environment of the *Rechtsstaat* have for the place of formal legislation? If the law loses its central place, are vital *Rechtsstaat* values also lost in the process?

More generally, reference needs first to be made to the special relationship between the legislature and the judiciary. The requirement of universality means that the legislator is at once able to achieve more and less than the courts. On account of its universality the law applies equally to all (the equality principle), whereas the courts always apply the law in specific instances and in disputes between two parties. But where the legislator often does not manage to take far-reaching account of the details of concrete situations, the courts are in a position to do so. The increasing inability to anticipate social situations in detail and the difficulty of taking ever more account of the interests and desires of individual citizens make the law a less sharp instrument for government regulation.

Conversely, the courts are, in contrast to the legislature, unable to appoint advisory bodies, set up licensing systems or impose penalties on violations under administrative or criminal law (Polak 1987: 24). The courts are much less able to take account of all the interests at stake or to consult representatives of special interest groups. The primacy of the legislature over the courts is unlikely to give way quickly in respect of this general worrying of interests. Similarly in respect of the requirement to impartiality there are notable differences between the legislature and the courts: whereas the impartiality of the judiciary is a basic precondition for the *Rechtsstaat*, it is clear to all that the legislature does in general allow party-political viewpoints to be registered and taken into account in legislative decisions. In this way the legislature and the judiciary, each with its own methods, both work on the realisation of various objectives of the *Rechtsstaat*: drawing up general rules on the basis of legal certainty, legal equality and legality and testing of the application of the law in specific instances by the courts (i.e. protection against arbitrariness).

A second general point of consideration is the role of parliament as co-legislator. This deserves particular attention if one takes the view put forward by Waldron that legislation is not just the formulation of a social norm but also the outcome of a political trade-off of interests (Waldron 1999). Modern, 'assembled' legislation is always the product of large administrative and representative bodies, that ultimately arrive at a single if provisional decision. In doing so compromises are the rule rather than the exception, but do not detract from the legal validity of the law (although the technical quality can sometimes suffer). In addition the legislator is assisted by large administrative departments, advisory committees, external

consultative bodies and specialist legislative departments within ministries. Many hands make the law, but this process, which can often take an extremely long time, ranging from two to ten or twelve years, is no more transparent as a result. As a result of the many-headed preparation the role of parliament as co-legislator also escapes the spotlight to some extent. In terms of expertise and attention, government departments have a big lead over members of parliament when it comes to the drafting of legislation. This undermines the clean division of tasks between the executive and the legislature, because the former can also exert a marked influence on the legislation, for example through the initial choice in favour of certain types of legislation. Consultations concerning legislation can consequently become highly specialised and are capable of being followed by just a handful of insiders and parliamentary party specialists, thereby adversely affecting the visibility to the public of parliament as legislator, however unjustly.

The role of parliament as co-legislator is also reduced by a further two important factors. Over the past ten years coalition agreements have generally laid down so many matters in advance that public consultation, amendment and criticism by parliament have declined. The 'monism' in the relationship between the government and parliament has had the effect of detracting from the classical picture of legislation as the final element in a public exchange of views in which a definitive decision is taken by vote. From the viewpoint of a democracy under the rule of law, the reduction in the authority of parliament as co-legislator as a result of this 'consensus' politics is a matter of regret.

A second factor that *appears* to be reducing the role of parliament is the influence of European legislation. A great many Dutch laws are determined in Brussels (estimates of the percentage of European legislation in the total number range from 40% to 60%). The influence of the Dutch parliament on Brussels legislation is less than it might be. Much European legislation is arrived at by means of bureaucratic negotiation. The European dimension of the legislative process increases the gap between citizens and legislation and - presumably - has a negative effect on the public's willingness to accept new legislation. Formally, however, the European regulations are always implemented in Dutch law. If one wishes to reduce the negative effects of the invisible legislative process, parliament would need to pay greater attention to the preliminary process preceding the adoption of European regulations and directives. This preliminary stage could also be assigned a place in the proceedings of the national parliament.

4.4.2 OLD AND NEW PROBLEMS OF LEGISLATION: VARIATION AND EMBEDDING

Problems concerning legislation are as old as the law of Solon. During the first decade of this new century three legislative problems will be attracting particular attention:

a the continuing influence of 'Europe' on domestic legislation;
b new social phenomena associated with developments in technology, medi-

cal and biological knowledge and ICT; these developments also have a strong international dimension, since the scientific innovation generally takes place outside Dutch borders or at least pays little attention to territorial borders;

c the level of expertise required in order to transform new technological and scientific developments into rules or laws.

Although these are by no means new factors, they do introduce new and different emphases in the legislative debate. Is the legislator capable of dealing adequately and consistently with developments in technology and science? Doesn't the legislator often 'lag behind the facts'? Where is the legislator when planning and regulation are required? One of the most important characteristics of the knowledge society is the unpredictability and uncertainty of future developments. In contrast to a more traditional society that is governed by stable norms and is consequently more overseeable, a knowledge society is subject to constant change. Science does not stand still. The market of information goods reacts exceptionally quickly, and preferably worldwide, driven by technological possibilities.

What there is a need for, if one observes the developments precisely and listens to the actors in these fields, is a certain embedding, in the form of either economic norms or reliable agreements. The embedding may be said to be normative where reference can be made to the social values enshrined in the fundamental rights and the Constitution.

Embedding and standardisation, in the sense of the acceptance of norms, are not however identical with central direction by means of detailed legislation. The standardisation is prompted by practical requirements of the market or society in general, arising in many cases from technological developments themselves. At issue in an unpredictable knowledge society - in which ICT, biotechnology and other technologies can serve as examples - are therefore the admission of the maximum *variation* in conjunction with the necessary embedding. In due course variation will give rise to standardised practices, which in turn will exert influence on the further developments (i.e. the path-dependence of innovations).

What role can the legislator play in this process of variation and embedding? Despite the assertion that legislation is losing its central role, the legislator can in fact play an important role by laying down the fundamental scope of innovation and broad shifts in norms. This is not a matter of detailed legislation - as before - or of legislation as an instrument of hierarchical direction. It is more a matter of the law as a symbolic expression of the fundamental norms of society. By indicating the normative, economic or technical embedding, the formal law becomes a source of collectively binding decisions, which, while they might contain a great many open norms, can nevertheless provide the political community with a frame of reference.

How these norms might then be worked out, implemented and enforced in prac-

tice is left to citizens and corporate actors themselves (for example in the form of covenants or self-regulation). The combination of variation and embedding also helps prevent the need for laws to be amended and adjusted in quick succession. This model of variation and embedding, designed for the ICT sector, can also be used in other areas of legislation that have run up against the limits of the classical detailed, hierarchically directive rules.

4.4.1 CONCLUSIONS

The model of variation and embedding flows from the discussions about the shortcomings of the central hierarchical direction of social processes by means of legislation. The criticism of this classical form of regulation concentrates especially on the fact that central rules and regulations fail to or inadequately correspond with the circumstances of the social field to be regulated.

A re-evaluation of legislation as a source of law and as a social and political frame of reference applies in particular to topics in respect of which it is deemed necessary for the legislature (i.e. the government and parliament) to lay down clear norms and standards. If these social norms and standards are confined to the main points and choices in principle and do not seek to lay down in detail how the field should be 'regulated', legislation will then be able fully to retain the central place assigned to it in the democratic *Rechtsstaat*. 'The dignity of legislation' (Waldron 1999b) could even be enhanced as a result.

Such a re-evaluation would benefit from reflection by parliament on the function of legislation and its role in the legislative process. That role currently concentrates on the assessment and where necessary amendment of legislative proposals that have been tabled by the government. The choices in principle have already been made at this point. A more pro-active approach could mean that parliament itself also paid attention to the place of legislation in present-day society, the fundamental choices at issue and the input it wished to make itself.

This also raises the question of the input made by parliament towards the European process of legislation. That input towards the Dutch contribution to this process is necessarily confined by the structure of the process. This does not eliminate the fact that parliament could pay greater attention to the choices to be made. The impression now is that it is not until the implementation of European legislation and regulations that parliament is first confronted by decisions that have already been taken but which it would ideally have wished to influence at an earlier point.

5 THE FUTURE OF THE NATIONAL RECHTSSTAAT: FINAL OBSERVATIONS, CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

5.1.1 THE IMPORTANCE OF THE RECHTSSTAAT

The importance of the *Rechtsstaat* is not in dispute. Historically and ethically, the *Rechtsstaat* marks a civilised manner of dealing with state power, which is subordinated to the rules of the law. The *Rechtsstaat* represents important values that are pursued and converted into practice by citizens and power-holders. The *Rechtsstaat* results in a situation in which - partly through the actions of government - safety, order, welfare, freedom and tolerance prevail within a certain territorial area (Van der Hoeven 1989).

The values and principles of the *Rechtsstaat* must however be preserved; they are not self-executing. The *Rechtsstaat* is based around an ethos of self-evident behaviour and expectations. The preservation of the values of the *Rechtsstaat* resembles the maintenance of a friendship, which needs from time to time to be confirmed and renewed. If it is neglected the most important values will become ossified and lag behind what is deemed desirable. Sometimes they will get lost entirely.

Conditions for the effective functioning of the Rechtsstaat

The *Rechtsstaat* also calls for the careful monitoring of the necessary conditions for its effective functioning. These are:

a that the government implements tasks ethically, especially in the field of law enforcement;
b that the government performs up to standard in areas in which it has provided citizens with guarantees;
c that the judiciary is capable of fully implementing its task of affording legal protection;
d that civil society is working and flourishing;
e that the population has sufficient confidence in the law and is prepared to abide by the rules of the law faithfully and voluntarily.

If these conditions are sufficiently present they strengthen the *Rechtsstaat*: the government and the public power-holders respect the rules and the citizens subject themselves to the obligation to abide with those rules. In this way the subjection of power-holders to the law is linked to the subjection of citizens to the collective decisions (i.e. the laws) of a society. A reciprocity between government and citizens is generated that contributes towards the legitimacy - i.e. voluntary acceptance - of the law and, hence, indirectly to the democracy under the rule of law.

The functioning of the *Rechtsstaat* is therefore subject to an interaction that may be understood in part from its historical origins and evolution. Initially the emphasis was on state restraint and on the subjection of state power to the limiting rules and principles of the *Rechtsstaat*. However, with the development of a social *Rechtsstaat*, as arose in particular after the Second World War, the *Rechtsstaat* manifested itself in a new, positive and, most notably, performance-based sense. The government is not just subject to the rules of the law but also performs by determining the rules of the law and by allocating rights to citizens, which go much further than constitutional rights alone. This twin assignment created and still creates tensions. On the one hand the government must meet the expectations of performance, while on the other it is required to abide with the self-imposed obligations and constraints put in place for the legal protection of the citizens. The government as it were has one hand tied behind its back, whereas it must at the same time serve the public with both hands.

Rechtsstaat, safety and the importance of law enforcement

Nowhere is this tension reflected more sharply than in criminal law and law enforcement. The core of the *Rechtsstaat* concerns the protection *against* arbitrary government action, protection against the state. Nevertheless protection is demanded at the same time *by* the state. This applies in particular to combating crime and other phenomena that can violate the integrity and interests of the citizens (e.g. international terrorism). This dual assignment - protection against and by the state - inevitably involves tensions. The protection by the state calls for effective action against (serious) offences, while investigation and prosecution must at all times meet the highest standards of the *Rechtsstaat*. This problem has gained currency with issues of national and international safety. In the struggle against terrorism are states able and willing to abide by the self-imposed principles of the *Rechtsstaat*? How do the guarantees of the *Rechtsstaat* weigh up against the extremely broadly formulated European arrest warrant? Although this problem does not form the main subject of this report, it does serve as background for the importance of the *Rechtsstaat*.

The new circumstances that are currently challenging the *Rechtsstaat* to make adjustments consist of two shifts. In the first place a process of globalisation is taking place under which decision-making powers are being transferred from national to international and supranational level. Secondly modern citizens are becoming more assertive and resourceful and are demanding and indeed arrogating to themselves greater autonomy and personal responsibility vis-à-vis the government.

The *Rechtsstaat* consequently finds itself squeezed between two unmistakable social forces which, as a result of recent developments in the two long-term processes, have assumed a fresh momentum.

5.1.1 THE NATIONAL RECHTSSTAAT AS AN ONGOING POINT OF REFERENCE

Viewed historically the development of the *Rechtsstaat* has always been linked to a *national* jurisdiction and a separate territory. The guarantees of the *Rechtsstaat* are closely bound up with the position of the nation-state. The point of departure here is that the nation-state is sovereign within its own territory, must exercise its power there and need not share that power with other power-holders. The guarantees of the *Rechtsstaat* must ensure that that power is not exercised arbitrarily or in favour of the few, but in the best interests of the public.

This point of departure corresponds less and less with reality. The position of the nation- state is changing as a result of the developments in the international context and those within the states themselves. The nation-state is no longer sovereign within its own territory: legally and in practice the state is closely bound by what happens and what is decided in the international context. At the same time governments are increasingly required to take account within their own countries of the increased independence of citizens and non-governmental organisations, which increasingly take responsibility themselves to promote the public interest, such as the provision of education and management of hospitals. In practice the government shares numerous responsibilities with other players and is unable to act as sole guarantor for the general interests of the public. Citizens themselves and non-governmental organisations share power with the government and have also obtained independent positions of power.

The reduced sovereignty of the state and increased power of independent citizens have consequences for the way in which the *Rechtsstaat* needs to be organised now and in the future. As long as the national state can be viewed as the fulcrum of power the *Rechtsstaat* guarantees will be concerned with subjecting that power to the rules of the law. But now that the states can no longer lay exclusive claim to such a position of power and since supranational systems of government and governmental, non-governmental and private national and international organisations exert major influence on citizens' welfare, those guarantees lose significance if they concentrate solely on the functioning of the national state. In this new national and supranational interplay of forces the *Rechtsstaat* needs a new orientation and to take a different form.

On the face of things the national *Rechtsstaat* is losing ground, caught as it is between international developments and the transfer of powers to supranational agencies on the one hand, and the domestic shift of administrative powers and political decision-making on the other. The response by the 'hemmed in' *Rechtsstaat* to this dual movement towards supranational and subnational levels of operation must not be an effort to turn these movements around – assuming this were possible in the first place. The response should instead lie in formulating a modern vision on the function of the *Rechtsstaat* and in devising strategies for strengthening its functioning: for the main conclusion to emerge from the analyses in this report

is that *the national Rechtsstaat is not losing its central function*. That central function continues to exist, but the way in which it is exercised is changing and will also need to be changed in a normative sense in order to be brought into line with the new circumstances.

This reflects the fact that the European and international legal orders remain dependent on the national state and its organisations for the implementation of decisions and treaties. The jurisprudence of the international and European legal bodies becomes part of national law and international rules are applied by national courts in national cases. Supranational arrangements are not (yet) taking the form of a *Rechtsstaat* over and above the national *Rechtsstaat*, with fully functioning and authorised agencies, analogous to those of the national *Rechtsstaat* (i.e. legislator, executive and judiciary). Although calls are sometimes made for a European *Rechtsstaat* - for example by Dahrendorf - the European Union is an organisation *sui generis*, based entirely on the national *Rechtsstaat*. In other words, the national *Rechtsstaat* retains its central function as an anchor point for international and supranational organisations and as an example for subjecting the power of governments to the rule of law.

5.1.2 SEARCHING FOR NEW BALANCES

The shifts in the powers of the national *Rechtsstaat* to supranational organisations and the simultaneous adherence to national sovereignty and identity are an example of the structural shifts in modern society. The changes have not yet crystallised out. Although the - virtually irreversible - direction is clear, the respective delimitations of tasks are not. Joint efforts are being made to strike a new balance between national authority and international powers, and between international agreements and national implementation, while it is recognised at the same time that a new balance has not yet been found. Everything remains in a state of flux.

An equivalent process may be discerned within the national *Rechtsstaat* itself: numerous shifts in powers and numerous changes in mutual relations, without any more definitive answer being found to those changes. The government is looking for another, less centralised role. Citizens want to be less dependent on the government, but to make a call on that same government if confronted by disasters or adversity.

The *Rechtsstaat* itself is also subject to change, especially in terms of the mutual relations between the three classical powers of state.

Other political centres of power, such as the media, multinational companies and large voluntary organisations of citizens, exercise influence on the functioning of society and, indirectly, on the *Rechtsstaat*. Legislation and jurisprudence have become more the focus of interest.

The major relations between all these social actors (citizens, legal authorities and corporate actors) are as it were obtaining the character of exercises in balance. This is not in itself new for the *Rechtsstaat*, which has after all consistently sought to strike new balances: a balance between the powers, a balance between different - sometimes conflicting - values, and a balance in the distribution of powers and responsibility. Precisely by mobilising conflicting values and social forces, society safeguards itself against extremes and excesses.

In the responses to the numerous social changes that have a direct bearing on the operation of the *Rechtsstaat*, this search for new balances will need to take centre stage. The principles of the *Rechtsstaat*, with their abstract norms and values, are always capable of fresh interpretation and application in specific and often new circumstances. In this way the *Rechtsstaat* can help guarantee both preservation and change.

This report has set out to describe relevant development as effectively as possible. Desired adjustments to the *Rechtsstaat* relate in particular to the search for a new balance between conflicting criteria, wishes or values. The recommendations made by the Council in order to ensure that the *Rechtsstaat* will continue to function effectively in the future are accordingly not related to the abstract values and ideals of the *Rechtsstaat* but relate in particular to the way in which they are worked out in prctice in specific statutory measures and policy intentions.

The developments essentially amount to five points in respect of which a new balance is sought:

1 the tension between the increased demands with respect to effective law enforcement and the continuing importance of legal protection under the *Rechtsstaat*;
2 the tension between the expected performance by the government and the extent to which the government is bound by constraints imposed by the *Rechtsstaat* on the part of the state;
3 the tension between the responsibility of the government for public tasks and the personal responsibility of the citizens;
4 the tension between the national *Rechtsstaat* and the supranational and international formation of law;
5 the tension between the three powers of state: the more central role of the judiciary in relation to the legislature and the executive.

Each of these areas of balance is discussed below. The relevant recommendations have already been included in the summary at the beginning of the report, to which reference is made for the sake of brevity.

5.1 THE FIRST BALANCE: EFFECTIVE ADMINISTRATION OF JUSTICE

The concept of the administration of justice was introduced in 4.3. By this is understood the complex of ways in which a society resolves its conflicts with the aid of the law. The quantitative aspects of this conflict solution - the number of conflicts, methods, length and costs - are key aspects in the administration of justice. Such administration may be said to be effective if a certain balance has been struck between the costs and benefits of the overall resolution of disputes. In particular this concerns the balance between the disputes that citizens, groups of citizens and organisations resolve at their own initiative and the disputes that are resolved by means of legal proceedings and by government bodies. Excessive resort to the resolution of disputes by means of litigation will strain the capacity of the *Rechtsstaat* and the ability to settle disputes properly and promptly. If however judicial overload means that disputes are more frequently resolved in a society independently or by individuals taking the law into their own hands, the ethos of the *Rechtsstaat* can then be discredited. In brief the housekeeping book of the *Rechtsstaat* must be in order in terms of both quality and quantity.

One of the most important preconditions for preserving and fostering the ethos of the *Rechtsstaat* is effective law enforcement. The public desires more effective administrative and criminal law enforcement. The inadequate investigative capacity of the police and judicial system could in due course seriously undermine confidence in the *Rechtsstaat*, manifesting itself among other things in an increase in individual taking the law into their own hands and violent conflict resolution. The organisation of the judicial chain will need to be greatly improved in terms of the effective input of personnel and other resources. This also has consequences for the capacity of the judicial system: failure to strengthen the capacity of the judiciary will inevitably lead to congestion in the near future. Since 'waiting lists' in the administration of criminal justice are not consistent with the principles of the *Rechtsstaat*, such congestion will either lead to the failure to follow up reported offences or to capacity-based discretionary dismissals, with a potential weakening of confidence in the rule of law. Urgent measures are required in order to prevent such undermining of the *Rechtsstaat* by non-effective law enforcement.

Easily the most shortcomings in law enforcement apply to criminal justice, i.e. detection, prosecution, the detention of convicted persons and support by the probation service for offenders upon their return to society. The low clear-up rate of offences in the Netherlands, which lags far behind that in neighbouring countries - especially Germany - is well known. Even in the case of serious offences, the criminal justice system often fails to respond. The low clear-up rate in comparison with Germany applies to *all* categories of offences. This indicates that such suboptimal detection could be based on the differences in working methods and organisation of the police. If certain offences commonly fail to elicit a response, this may - as argued above - weaken public confidence in the *Rechtsstaat*.

5.2 THE SECOND BALANCE: PERFORMANCE, LEARNING AND MORE EFFECTIVE REGULATION

On the one hand the government has bitten off more than it can chew and aroused expectations concerning what it is able to deliver in all sorts of areas, while on the other the government is subject to all sorts of constraints. The tension between the two patterns of expectations has long been a factor in public administration but, in the new circumstances described in 4.1, has assumed a more pregnant significance. The performance-based government is now assessed in terms of effectiveness, efficiency, flexibility, speed of action, client-friendliness and absence of bureaucratic hassle, in the same way that citizens are accustomed to dealing as customers with large private companies. The classical patterns of hierarchical government direction of strict and precise statutory regulations, under the leadership of a politically responsible minister, correspond less and less with present-day, modern requirements and administrative practice.

In practice the system of public administration seeks ways out in trying to meet these dual requirements. The inability in practice to continue satisfying all the rules of classical government direction and fully controlling all the rules has resulted in various forms of toleration. The enforcement of administrative law exhibits shortcomings, which came to the surface in intensified form in the case of the disasters in Enschede and Volendam. A natural response to the disasters was to tighten up the enforcement of the regulations. Another response was to ban any form of toleration. However understandable this might be, this was not, in the Council's view, the right lesson to be drawn from the evident shortcomings in administrative law enforcement. The modern requirements imposed on the system of public administration instead call much more for modified methods of administration and regulation in combination with various forms of self-regulation and self-enforcement, complemented by supervision and legal review. Might it not be better for the government to be transformed into a learning government and and more effective government that still respects the guarantees of the *Rechtsstaat*?

Performance

In practice the system of public administration has already moved in a direction where performance-orientation is given priority over rigid adherence to the rules, for example in the restructuring of problem neighbourhoods. There is much greater emphasis on customisation, under which citizens are helped as effectively as possible on an individual basis. Needless to say this often comes into collision with the classical regulations based on the principles of legal equality and legal certainty (Hes 2001; Hertogh 2002). If one wishes to do as much 'justice' as possible to citizens' highly differentiated interests and desires, the principles of the classical *Rechtsstaat* can then come under threat. A negotiating or horizontal system of public administration will deal differently - and will *need* to deal differently - with citizens than a hierarchically organised system of administration. The numerous

forms of negotiation-based administration and the various forms of administrative tolerance have hugely complicated and clouded the relationships between citizens and government under administrative law.

Many areas are marked by both excessive and inadequate regulation. Calls are simultaneously made for old rules to be abolished and new ones to be created. Calls are made for better and more effective government action and, at the same time, for less government interference. While there are good reasons to cut down on administrative regulation, the guarantees afforded by the *Rechtsstaat*, seeking as they do to limit the arbitrary exercise of government power, must not be lost to sight when doing away with obstructive rules. The elimination of superfluous administrative regulations and ineffective legal protection is urgently required in the interests of effective government. This also involves the updating of legal guarantees.

Learning

The insight that effective government can no longer be based just on classical hierarchical direction by means of detailed regulations is strengthened by new social developments. The advent of the knowledge society calls for different forms of government action and a different role for the government. The government will need not so much to withdraw fully as to act vigorously at specific moments and in its own way.

In the WRR report *Of old and new knowledge* (2002) it was indicated that central direction by means of rules and regulations runs into problems in a knowledge society. Society is changing so quickly and the knowledge necessary for determining what should happen is so widely available, that it is much less possible than before for administrators to determine from a central place what should be done in order to achieve a particular interest. This changes the relationship between the government and those subject to its rules. Regulations in the interests of (for example) education, the environment or healthcare no longer precisely lay down the desired behaviour of the institutions or firms concerned. Instead, a certain freedom must be provided so as to ensure that the available knowledge can be used to best effect in furthering the interest in question. Variation in application is often required, for example to take advantage of new developments. A new balance therefore arises between what the government is still permitted to do and what the government may expect from citizens and the private sector.

Smart regulation

The classical, hierarchically ordered system of public administration is based around highly detailed rules of implementation. Modern administration (both government and private) generally calls for flexibility, resourcefulness and a wider margin of discretion in responding to the full range of new and ever-changing issues and circumstances. In order to respond to the numerous variations and differences in practice, fewer implementation rules and regulations are considered desirable.

But this does not mean that a statutory basis or framework is no longer needed or desirable in a modern system of administration. The contrary is true: the basis of government action and the major underlying principles must still be enshrined for the *Rechtsstaat* guarantees to come into their own. However, the notion that legal certainty and legal equality are best served by laying everything down as precisely as possible in terms of statutory rules and regulations is no longer functional. That notion is based on two assumptions rejected in this report as no longer tenable, namely that the government is still capable in the knowledge society of achieving effective direction by means of strict rules drawn up in advance, and that the responsibility of the citizens or private organisations can be confined to compliance with the rules laid down by the government.

The legislation will therefore generally need to confine itself to the foundations and overall normative framework, in which powers and responsibilities are clearly laid down (see the conclusion of chapter 9). This also gives a different content to the legality principle under the rule of law: clear laws delimiting the powers in fact make modern administration and good management possible.

In this regard the role of government also becomes clearer. This amounts not so much to a withdrawal by government as such but to a government that withdraws in order to create space for good citizenship and good management. In doing so the government quite specifically assumes its own responsibility in certain key areas, which it then explains clearly. For example, in the field of the enforcement of safety regulations or service quality standards there is no longer a demand for the government to exercise the necessary supervision at all times and in all places *itself*. The government does however need to ensure that such enforcement of safety and quality standards by the organisations or industry associations concerned has been regulated. The government therefore draws up outline rules while leaving the actual implementation to the organisations themselves, for which it provides them with the necessary policy freedom. This amounts to a carefully selected combination of clear legislation and a high degree of self-regulation in respect of implementation. This may be a suitable model for the new role of government: an active (or newly active) government that is less closely involved in the regulation of implementation across the board but which lays down the responsibilities and accountabilities more clearly and effectively.

Under this approach towards regulation, the legislator clearly formulates the main elements of policy and defines what the implementing agencies (which may also include private bodies) are required to do. The implementing agencies are given greater discretion in deciding how to achieve the agreed performance. Self-regulation and self-enforcement provide complementary forms of regulation in this regard. All too frequently there remains a lack of incentives in the present situation for switching to self-regulation. The government can in its turn itself supervise

compliance with self-regulation and self-enforcement (this is 'meta' supervision: ensuring that the implementing and private agencies enforce the laws, agreements and performance contracts).

This type of regulation inevitably has consequences for legal protection. On account of the greater involvement of citizens themselves, by means of negotiating administration or self-regulation, the risk of the unilateral exercise of power is in principle less pronounced than in the case of a government that takes decisions and imposes rules and regulations autonomously. At the same time, however, greater participation in the framing of legislation and regulations does not provide a complete guarantee against arbitrariness. For this reason there is a need for legal protection to be updated in the light of the new administrative and regulatory practices that have already arisen.

Given the frequent use of open norms in broad-brush legislation and regulations, review by the independent courts will remain the necessary final element in new forms of regulation. There sometimes turns out to be a total lack of any legal protection against radical decisions by newly created implementing agencies, for example accreditation committees in the sphere of education. Apart from the reform of regulations, legal protection under the *Rechtsstaat* needs to be updated in this regard.

Where the government radically limits the freedom of citizens and exercises radical influence over their physical and mental integrity - as applies in respect of the deprivation of liberty under criminal law or the withdrawal of essential licences for citizens in all sorts of areas - classical legal protection must remain fully unimpaired. The classical principle can continue to apply here that the more the government intervenes in the life and freedom of its citizens, the more that legal protection is required.

5.3 THE THIRD BALANCE: REDEFINITION OF RESPONSIBILITY IN THE RELATIONSHIP BETWEEN CITIZENS AND PUBLIC ADMINISTRATION

The role of the government in relation to modern citizens is in need of review. Developing a consistent vision on that role is however exceptionally difficult. Developments in society and within government itself are taking place in quick succession, leading to a welter of rules and regulations. Modern citizens do however want greater freedom and independence. As described in 3.2, it is to some extent misleading to speak of 'the' modern, assertive citizen, making it more difficult for the government to act towards citizens on a uniform basis. Citizens with a detached, expectant and dependent attitude face government on a totally different footing from well-informed and active citizens who promote their interests through various kinds of self-organisation. It is particularly at the cutting face of public tasks and private initiative by citizens and organisations that the redefini-

tion of responsibility needs to be worked out.
The responsibility for the public interest is no longer solely a matter for the government. On account of the characteristics of the knowledge society, in which the government is no longer able and must not seek to play a central role, and with the earlier transfer of certain public responsibilities and services to private organisations, the government is no longer the sole accountable party. A plethora of public and private organisations handle public tasks in cooperation with one another. This calls for an open and positive stance on the part of the organisations concerned and an open, responsive and cooperative form of regulation.

Greater room and freedom are created for civil society, i.e. the community and non-governmental organisations that have undertaken public tasks, such as hospitals, schools, housing associations and welfare institutions. Many of these institutions have been set up under private law, but have public financing arrangements and a mixed regime of accountability and control. Civil society receives a fresh impulse since a renewed appeal is made to the personal responsibility of citizens in both new and traditional areas of public responsibility.

Greater personal responsibility for the citizens will however need to be coupled with new forms of accountability. Responsibility presupposes the internalisation of norms and motives by the citizens themselves. They come ' from inside out' and cannot be enforced. There is however a difference between responsibility and accountability, in that accountability comes 'from outside' and consists of the imposition of and compliance with external norms in the fulfilment of tasks.

Personal responsibility is coupled with a form of self-regulation. But if the tasks performed are regarded as public tasks, a certain form of accountability to society as a whole is called for. Organisations and institutions must render account for the quality and type of service, for the procedural protection of clients or patients and for the observance of general principles of good governance (absence of any conflict of interests, proper complaint handling and conflict resolution). Account also needs be rendered for the way in which the public interest in general is served.

New network-based organisations and organisational forms will need to be accepted. A new delimitation of tasks between the government, citizens, government agencies and private organisations need not solely be regarded as the horizontalisation of relations between the administration and citizens: in certain areas and at the right points the government retains a strong separate - and hence vertical - responsibility. Horizontal relations can be effectively combined with vertical, in the same way that public agencies are able to cooperate effectively with private organisations.

Acknowledgement that the government is no longer able to regulate and control the public interest solely from a central point does not mean that it is required to abandon its ideal notion of the *Rechtsstaat*. It is more a matter of redefining the

relationship between government and citizen and adjusting a large number of regulations that have been developed, especially in the third and fourth layers of the *Rechtsstaat* concept. The relationship between public-law and private-law regulations is of particular importance in this regard. Traditionally, vertical relations between the government and its citizens are governed by private law and horizontal relations among citizens by private law. In the new situation a complex citizen-citizen-government relationship has arisen with both horizontal and vertical aspects. Citizens provide public services to each other, although these are performed under the ultimate responsibility and supervision of the government. An extensive and complicated system of public-private legal relations has therefore arisen that is now inherently non-transparent.

5.4 THE FOURTH BALANCE: THE NATIONAL RECHTSSTAAT, INTERNATIONALISATION AND THE RULE OF LAW

Internationalisation increases the importance of the rule of law elsewhere while simultaneously confronting the Dutch *Rechtsstaat* with new challenges.

For the Dutch citizen the *Rechtsstaat* will become increasingly dependent on the existence of the rule of law outside the Netherlands. If a citizen crosses the border it is important that he or she be protected against the arbitrary exercise of government power elsewhere. But even within the Netherlands citizens have become more dependent on government power exercised outside the country, both by other states and by international organisations. The reliability of governments and legal systems outside the Netherlands consequently has a direct bearing on our security (e.g. crime, terrorism and food) and our prosperity (e.g. the euro and market regulation) and in fact virtually all interests promoted by the government in the public interest.

It was indicated in 3.1 that the rule of law cannot be achieved in the international context in the same way as that possible within the national state. An arrangement comparable with the national *Rechtsstaat* is not to be anticipated for the time being at supranational level, and certainly not at global level. There are however international moves towards the rule of law and global civil society - although the national *Rechtsstaat* must remain the bedrock for the rule of law, including that at international level. The further development of the international legal order also depends on the extent to which the countries forming part of that order operate as a *Rechtsstaat*. Sovereignty can therefore no longer be central in international relations; instead each country has the obligation to act as a hinge in the international legal order by measuring up to the standards of the *Rechtsstaat*.

The growing interaction between government power exercised inside and outside the Netherlands makes it highly important to bear in mind the consequences of that interaction from the viewpoint of the *Rechtsstaat*. This raises the following questions:

a To what extent can the rule of law be promoted outside the Netherlands?
b What consequences does internationalisation have for the way in which the Dutch guarantees for the rule of law operate?
c What influence can the Netherlands exert over the content of the law applying to Dutch citizens?

5.4.1 PROMOTION OF THE RULE OF LAW OUTSIDE THE NETHERLANDS

'The government promotes the international legal order', states Article 90 of the Constitution. Government policy has indeed consistently been directed towards this. The urgency of doing so may be underlined in terms of the position taken by this report. National and international rule of law are becoming so closely interrelated that rule of law guarantees within the Netherlands itself are no longer adequate.

The promotion of the international legal order may be regarded as the task of ensuring that the guarantees of the rule of law also come into their own in international relations. As indicated previously, the international legal order can only come to fruition if the countries forming part of it function along *Rechtsstaat* lines. It is therefore necessary for the international community to hold each country to account in terms of the extent to which it complies with the rule of law. That remains justified provided those requirements are general in nature - i.e. are not imposed by a powerful country that does not itself fulfil those requirements - and are feasible. By the latter is meant the fact that transformation into a *Rechtsstaat* is not possible without sufficient knowledge and experience concerning the rule of law. The laying down of requirements therefore involves the complement that help must be offered for such transformation.

5.4.2 CONSEQUENCES OF INTERNATIONALISATION FOR THE ORGANISATION OF THE RECHTSSTAAT IN THE NETHERLANDS; DEMOCRATIC LEGITIMATION

The close links between the Dutch *Rechtsstaat* and decision-making outside the Netherlands are also leading to a shift in relationships within the Netherlands. In this regard Europe has the biggest impact. An important consequence that has already been examined is the shift between the elements of the *trias politica*, under which the position of the judiciary is becoming stronger in relation to that of the two other powers, the legislature and the executive.

The Council has the impression that that input has now become largely the preserve of the government, in which a major role may also be assigned to civil servants and lobby groups, while the lack of transparency of the process leaves a great deal to be desired. Sector-specific and more technocratic considerations can consequently receive undue emphasis. Parliament appears poorly placed to exert any

major directional or controlling influence and is more concerned with influencing the implementation of previously adopted European rules than with the preparation of those rules.

A straightforward solution is not available. Parliament - in principle an equal partner with government in the framing of legislation and otherwise responsible for supervising the government - is not equipped to contribute towards international decision-making. The Danish model, in which parliament has greater responsibility for determining the government's negotiating mandate, would certainly be an alternative, while also being subject to certain drawbacks. The most important conclusion to be drawn is that from the viewpoint of the Dutch *Rechtsstaat* it is unsatisfactory for parliament to devote greater attention to the details of implementation than to the broad lines of European legislation and regulations.

The government could make a contribution by informing parliament in good time about European decision-making. For the remainder the government will itself need to determine to the extent to which it is prepared to submit to the limitations inherent in the current method of operation. The Lower House could for example modify its working methods in the sense that Standing Parliamentary Committees would each examine the international and EU dimension in terms of the rule of law and not just leave this to specialists, as the rule of law is so closely bound up with citizens' expectations and therefore deserves a place in the deliberation of legislation.

5.4.3 HOW DOES THE NETHERLANDS EXERT INFLUENCE ON THE GROWING INTERNATIONAL FORMATION OF LAW?

If one examines the core areas of the law, it is clear that a process of internationalisation is taking place - sometimes as a conscious expression of will, in other cases by stealth. European legislation and treaties are contributing to this process, while in addition the administration of justice can develop so rapidly that Dutch law is simply displaced by US or British law. The internationalisation of the administration of justice is accelerating this process, so that elements of the administration of justice are being shifted abroad. In this way Dutch legal opinions are losing their significance and the law is exerting its effect in this country in the absence of any role in that process by the Dutch legislature or courts. Such developments apply not just to private law (recent examples include the US-inspired rules concerning transactions in securities and company audits) but also to criminal and administrative law.

Dutch influence on this international process is sometimes no more than limited. In Europe the big countries exert a major influence. Anglo-American views often predominate throughout the western world or at global level. But precisely because the Netherlands has only limited potential to influence matters, it is highly important for it to have a sound strategy. A policy of drift is likely to lead to the

discovery after some time that external developments mean that substantial elements of Dutch law no longer have practical effect within the country itself. Corporate law, the guarantees provided by criminal law and the organisation of legal protection under administrative law are for example already being affected by the formation of law outside the Netherlands.

In order to optimise the Dutch input insight is needed into the development of law at international level. The potential of the Netherlands in this area and its strengths also need to be established in this regard.

The formation of law in the international context is a process that takes place in a totally different way from that within the national *Rechtsstaat*. In the virtual absence of the institutions of the *Rechtsstaat* in the international arena, the process takes place in a non-transparent and unstructured way. Power factors play a role, particularly when it comes to international rules and regulations. If international legal bodies are set up, this could be conducive to the international rule of law. Since the courts will not have the legitimation characteristic of the legislature, they will need to legitimate their rulings in some other way. It therefore becomes highly important for the reasons on which judgements are based to be consistently spelt out. These courts will therefore need to focus as effectively as possible on the attitudes towards law and the rule of law in the countries and communities of importance to them. That will also be vital if these legal rulings are to be accepted as legitimate and convincing.

More generally it is fair to say that the (international) formation of law is a process in which elements of power can on the one hand play a role, while on the other the interaction between the administration of justice, the science of law, the courts and legislators will be a factor. The latter means that argumentation, consistency and legal culture make a contribution towards the content of the law.

5.5 THE FIFTH BALANCE: SHIFTS IN THE TRIAS POLITICA

Shifts between the three classical powers of state of the *Rechtsstaat* are discernible under which the judiciary has gained in relative importance. This is due in the first place to the influence of international and in particular European formation of law (e.g. EHCR jurisprudence), which is increasingly applied by the national courts in the dispensation of justice. In particular this applies to the interpretation of fundamental rights and procedural regulations and facilities. In addition the influence of the courts has been increased at national level as it has become increasingly difficult in all sorts of areas to regulate social situations by means of detailed laws. Supplementary jurisprudence has made a separate contribution to the formation and development of the law, particularly through the application of the principles of reasonableness and fairness and other open norms laid down in the law. As outlined in 4.2, this development is by no means at variance with the principles of the democratic *Rechtsstaat*. Although judges are not democratically elected in con-

tinental legal systems, their role in the interpretation of laws and norms - provided this is done carefully and with restraint - is wholly consistent with the principles of the *Rechtsstaat*. This also applies if this trend is strengthened by the increasing use made of open norms in formal legislation (see 4.4) and the judiciary then play an even more key part as the final touchstone for such norms.

The recognition of this substantial law-building task of the courts may however provide grounds for modifications to be made to the judiciary's formal task and the way in which the highest legal bodies operate. A formal regulation of the rights of the courts to test formal legislation against the Constitution, as sometimes called for, would be a confirmation of an already established practice, especially as far as the classical fundamental rights are concerned. The pressure exerted by the international formation of law makes it almost unavoidable for this power of the courts in our country to be formally enshrined, at least as far as the latter area of classical fundamental rights is concerned.

5.6 THE FUTURE OF THE RECHTSSTAAT

Does the national *Rechtsstaat* have a future? This question, which has been at the heart of the analysis in this report, may be answered in the affirmative. The *Rechtsstaat* has a strong hold on the population as a symbol for a system of legal principles and standards. These standards and principles are not subject to doubt. Attacks on these principles, as in the case of acts of violence or one-off miscarriages of justice, do not undermine that belief in the *Rechtsstaat*. On the contrary: the fundamental idea and leading principles are reconfirmed by the responses to observed departures from the norms of the *Rechtsstaat*. In the ensuing debate the ethos of the *Rechtsstaat* emerges strengthened and reinvigorated.

The balance sheet of the *Rechtsstaat* in the Netherlands is a positive one: the fundamental rights are observed and there has long been marked confidence in the independent administration of justice among the public, despite complaints from time to time by individual litigants. There have been no sharp disputes concerning the Constitution or other principles of the *Rechtsstaat*. The essence of the classical *Rechtsstaat*, which is concerned with control over the exercise of state power and the prevention of arbitrariness, is not in any immediate danger.

This conclusion is not however sufficient for the future of the *Rechtsstaat* to be permanently assured. When it comes to the conditions for the effective functioning of the *Rechtsstaat*, changes have taken place that call for specific attention by the government. These changes, which are largely the result of international developments and the increased assertiveness and independence of citizens, unquestionably have consequences for the *Rechtsstaat*. The changes amount in practice to shifts in the relations among citizens themselves and between citizens and the government. Shifts are also discernible in the tasks performed by the government itself, especially in the ratio between the 'performing' and protective tasks. It is

easier to indicate what the government is not allowed to do (the basic idea of the classical *Rechtsstaat*) than to determine precisely what the government must do and how it is to do so (the modern social *Rechtsstaat*). Finally marked shifts are taking place between national and international decision-making processes and the relevant institutions. Movements and networks of citizens acting at transnational level can also help in the form of checks and balances to concentrate governments on a rule of law perspective. States such as the Netherlands are able to help such groups. In these circumstances the *Rechtsstaat* is borne by transnationally engaged citizens.

The balance between the three classical powers of state is also subject to change. As noted in this report, a more central role has been assigned to the judiciary. The relationship between the legislature and the judiciary is now a dynamic one and calls for subtle interaction. In addition the developments in the system of public administration mean that the courts are obtaining a greater role when it comes to the interpretation and testing of the many new open norms in legislation and regulations. The analysis of this report confirms that more frequent use will of necessity be made in legislation and rules of open norms. This does not mean that the judiciary will sit 'in the seat of the administrator', but does form a final touchstone for the citizens in a system of changing and more open relationships. A more effective and resourceful system of administration having a greater measure of freedom and contracting out more tasks to private-law organisations will ultimately be unable to do without this legal-protection touchstone. These shifts in the balance between the courts and the administration can come into their own right more effectively if a re-evaluation is also conducted of the role of formal legislation and the role of parliament as co-legislator. In an open society with highly divergent attitudes and convictions, both nationally and internationally, open norms are inevitable. As a collectively binding factor, formal legislation as the legal source of these open norms can re-establish its place in the legal system.

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