

E-government and Good Government: An Impossible Equation in the new Network Society?

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1 State and Society

The *state* and *society* form the structural framework of our life-world (*Lebenswelt*). At any particular time, we live in a certain type of state and a certain type of society. Sometimes, rather often in fact, the terms state and society are confounded, although the phenomena they refer to are significantly different. Then again, the two have quite a bit in common. The state influences society and society the state. In principle the two should go hand in hand, leading us towards a better future, provided the rules of *democracy* are working.

Although far from an exhaustive analysis, one might describe the difference between state and society in the following terms. The state is the framework within which we organize our rights and the realization of these rights. It is largely a *normative concept* and, at the same time, an *actor* that exercises coercive power. Society, on the other hand, is primarily a *description* of how in what kind of technological, social and financial environment our activities and the workings of the market and government are organized in practical terms. It is customary to say that *we are the society*. Depending on the standpoint adopted at any given time, we find ourselves talking about different societies: civil society, the risk society, the knowledge society, the experiential society, the media society and the Information Society are typical examples of new classifications.

It has been my practice in recent years to begin many of my presentations in the field of legal informatics with a short discussion of the changes that are taking place in state and society.¹ And there is good reason to do it again here, for we are witnessing a significant change - a change in the state and in society. Our transition from the traditional - old-fashioned - administrative state to the new, modern European *constitutional state* has been under way for many years, but is far from complete. Then again, in an almost unbelievably short time, we have progressed in the development of *the information society* to *the network society*.

The constitutional state is in principle a single phenomenon. Its foundation lies in the *rule of law*. As the old saying goes, the country must be built on law. The more modern conception is that legislation in a democracy is to be manifestly based on human and fundamental rights. We endeavour to identify and recognize human rights as fundamental rights.² The present Finnish Constitution embodies this aspiration. Sections 1 and 3 merit citing here:³ “The constitution of Finland is established in this constitutional act. The constitution shall guarantee the inviolability of human dignity and the freedom and rights of the individual and promote justice in society. Finland participates in international co-operation for the protection of peace and human rights and for the development of society”.

¹ See for example Saarenpää, *Oikeusvaltio ja verkkoyhteiskunta* p. 106-108 in Aarnio – Uusitupa (eds) *Oikeusvaltio* (2002).

² About the concept of fundamental right see Ferrajoli, *Fundamental rights* p. 1 in *International Journal for the Semiotics of law* 14:1-33, 2001.

³ The present Finnish Constitution entered into force in March 2000. The reform of fundamental citizens' rights was carried out in 1995, following Finland's accession to the European Convention on Human Rights in the early 1990s.

The path from enshrining human and fundamental rights in the law to practices that realize these rights is a long one, however. The simple easily becomes complicated. Perhaps most importantly, the point of departure is not solely the procedures by which this is accomplished. That is, we should not, as is often done, describe the constitutional state primarily in terms of procedures. Analyses should distinguish at least procedure and content.⁴

The procedural constitutional state is the constitutional state most often dealt with in the legal literature; it is a state governed by the rule of law.⁵ It is the one where the actions of the government and the judiciary can be anticipated owing to clear procedural rules and where the enactment of laws increases because it is required that restrictions on human rights be prescribed by law. The change from the administrative state to the modern constitutional state has been and will be a significant one. One dramatic consequence is that *the general competence of the authorities* becomes restricted: they, too, must be able to base their actions on clear, acceptable rules.⁶

The material constitutional state is rather a more difficult notion to describe. This is doubtless the principal reason why many legal scholars on the constitutional state focus on the features of the formal constitutional state. However, the basis of the material constitutional state is very simple: it lies in respect for the human being. *Democracy* gives us the right to expect respect, and the fundamental rights are one guarantee of this respect. Where these are realized, government and the judiciary can be said to genuinely serve the human being. However, this requires much more than formal rules of procedure.

As we progress towards a democratic constitutional state in a more profound sense, essential is that recognition of our rights take place earlier in all activities that affect us, in government, lawmaking as well as the market. The task of government in protecting fundamental rights is not any more confined only to ensuring the legality of decision-making in administration and law courts. This broader conception would guarantee that our rights are realized more effectively, and we would be entitled to expect better quality service from different institutions in legal terms as well. For this reason, the legal perspective is - for example - a cornerstone of the planning of information systems and information management. In a word, we live a *society of legal planning*. The constitutional state requires nothing less. At the same time, the responsibility of those who

⁴ In the Finnish legal literature, Aulis Aarnio has pointed out that the formal constitutional state has acquired more material features than before with the development of what is known as the welfare state. He has focused on the realization of the principle of equality in the welfare state. For example, to Aarnio, adjustment is an issue associated with the material constitutional state. Predictability allows for flexibility. See Aarnio *Oikeusvaltio-Tuomarivaltio* p. 5-6 in Aarnio – Uusitupa *Oikeusvaltio* (2001). In their interesting distinction between form and content, Atyah and Summers present a list of 15 factors pertinent to drawing that distinction. For the most part, these can be linked with the distinctions between the formal and material constitutional state. See Atyah – Summers *Form and substance in Anglo-American Law* (1987) p. 411.

⁵ Cf. Ferrajoli *Fundamental rights* p. 16-17.

⁶ Section 2 of the Finnish Constitution expresses this clearly: The exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed.

influence our rights in one way or another grows. And such situations are becoming increasingly common in the Network Society.

What I mean by “*network society*” is – to put it in succinct terms - a society in which our work largely takes the form of informational work in a digital environment, in which the information infrastructure has come to rely crucially on information networks, and in which information networks have become the communication superhighways of the masses.⁷ The metaphor of the *information super highway* - current some years ago but now almost forgotten - is an apt one.⁸ We have acquired nothing less than a new infrastructure intended for the masses.⁹ What we see is a new kind of versatile, efficient use of networks that has been made possible by technological development, in particular technological *convergence*. Government and the market changed society in a few years from a static *information society* to a dynamic *network society*. We use networks and are increasingly dependent on them.¹⁰

2 The Legal Network Society

The literature on the development of information technology in society is already fairly extensive. If we look at the work of *Daniel Bell* and that of, say, *Frank Webster*, the difference is striking in both temporal and conceptual terms. The focal issues have varied, with work and the economy being the most prominent. What has received comparatively little attention in treatments of the changing society is however the *legal perspective*. When we combine the Network Society and the Constitutional State - and this is something we really must do – the outcome is once again in many ways a vision of a new society. We can speak of a *legal network society*. It is a society - from one point of view - in which the changes in how information technology is used, in the information infrastructure and in the information market result in significant *juridification* where information law is concerned. This society is one in which the exercise of our rights takes place to a considerable degree on networks and where legal communication is largely network based. Contributing markedly to this trend is the vigorous transfer of public services and administration onto information networks.

In the legal network society, the lifespan of *information*, *information templates* and *information commodities* is closely linked to various rights. And these rights may differ considerably in different situations. For example, it is one

⁷ This is how I have described the Network Society in my Finnish overview of Legal Informatics.

⁸ Cf. Borgman: *From Gutenberg to the Global Information Infrastructure* p. 22, where the author considers the expression information highway effective but simplistic.

⁹ The expression cybersociety has also been used. One of its central elements is often a novel redistribution of information in cyberspace. See, e.g. Jones: *Information, Internet and Community: Notes Toward an Understanding of Community in the Information Age* p. 14-15 in Jones (ed) *Cybersociety 2.0*.

¹⁰ One form which this takes is *networking*. However, the ideas of network and networking often seem, following Castells, to be confounded - sometimes profoundly so.

thing to implement *access to documents* as a civil right to browse public documents and quite another to make such documents *available on open networks*. Similarly, it is one thing to listen to copyright music in a private gathering and another to make the same music available in digital form over information networks to an undefined group of recipients. In addition, the way in which information is *attached to its platform* in its documentation system can affect the opportunities we have to utilize it within the scope of the right to access. In speaking about the importance of *code* in the Network Society, *Lawrence Lessig* certainly found an appropriate slogan, although to him code is actually broader phenomenon that encompasses hardware as well.¹¹

In a democratic constitutional state, the natural way to address these new, or at least seemingly new, phenomena is to enact laws. And this is in fact what has been done. Examples are not hard to find, not at all. Directive after directive is changing the information market in particular and our participation in it. Europe is quite literally becoming *juridified*. This development is evident in the number of provisions, the regulation of new phenomena, and the raising of the standard of legislation required by the constitutional state. What we could once achieve through lower-level statutes and guidelines must now, as a rule, be properly enacted in the law. The structure of norms has changed. Juridification is an important phenomenon from the standpoint of both the state and society. In a democratic constitutional state we cannot avoid more detailed regulation of our ever more complex society. Regulation of new phenomena and the bringing up to date of old legislation are both important; as important. A typical example in the case of the Network Society might be regulation of what are known as *cyber crimes*. We can require that crimes perpetrated in a new way be regulated accordingly. Technology-neutral legislation is the most appropriate means for this. That has been the Finnish solution too.

On the other hand, increased complexity in legislation has a negative side where the individual and society are concerned. We have long assumed and continue to do so that citizens should know the law. Ignorance of the law has detrimental consequences. Yet, as legislation becomes more complicated, this assumption becomes more utopian; legislation becomes even less accessible to the citizen. Not surprisingly, citizens' faith in the legitimacy of society then diminishes as legislation becomes more complex. Following the ideas of *Risto Heiskala* we could say, that the new legal network society is an artificial society. Almost everything is regulated.¹²

Law is communication. The understanding of what it has to say is a critical factor if we are to improve society. *Law should be a simple phenomenon*; otherwise there is the risk that it will overstep the bounds of democracy. However in the network society reading law – the complex legislation – literally using legal databases is easier than ever. On balance, the relation between the democratic constitutional state and the legal network society is one charged with

¹¹ Lessig *Code and other laws of Cyberspace* p. 6.

¹² See Heiskala *Keinotekoinen yhteiskunta* p. 7 (1996).

many tensions. And these may very well increase as we progress apace towards e-government.¹³

3 E-government and the Network Society

The development of e-government can be examined from a number of angles. If one opts to view it as the use of technology in the interaction between government, citizens and organizations, the analysis would have to start in the mid-1800s when the telegraph and telephone were introduced. Even if we prefer to limit the perspective to the application of modern information technology, it is still necessary to go back to the 1960s, for it was then we began to speak of automation in administration. Even the introduction of information technology in administration brought with it quite an array of legal problems. Some could be attributed to a lack of education within the legal profession. Indeed, as recently as 1992 the Finnish Supreme Court had the dubious distinction of voting on whether a telefax received by the court was a *document*.¹⁴ Although the court ultimately answered in the affirmative, the fact that such a question had to be decided by a court – sitting in full session no less – does not show favourably on the knowledge and skills our courts have at their disposal for confronting change.

Genuine *e-government* is something quite different, something more than the use of IT when government and citizens communicate. Yet, in the terminology of the OECD we still find a limited definition: “The use of information and communication technologies (ICTs), and particularly the Internet, as a tool to achieve better government.”¹⁵ A somewhat broader definition, but one still largely focused on efficiency, is that found in a communication of the *European Commission* on the significance of e-government for Europe: Within the public sector, public administrations are facing the challenge of improving the efficiency, productivity and quality of their services. All these challenges, however, have to be met with unchanged or even reduced budgets. Information and communication technologies (ICT) can help public administrations to cope with the many challenges. However, the focus should not be on ICT itself. Instead it should be on the use of ICT *combined with* organisational change and new skills in order to improve public services, democratic processes and public policies. This is what eGovernment is about.¹⁶

The Commission’s description reflects well the gradual change in the attitude towards information technology in government. After the novelty wore off, the first focus was *efficiency* in government. This has since been replaced by a concern for improving the *quality* of government. In my estimation, the latter change is – and has to be – part and parcel of the development of the

¹³ Simon Singh: *The Code Book* (1999) p. 350.

¹⁴ KKO:1992:64.

¹⁵ Glossary of e-Government terms, OECD e-Government Project Website.

¹⁶ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. The role of e-government for Europe’s future, COM(2003) 567 final.

constitutional state. E-government is government in the Network Society in the age of the democratic constitutional state.

At the time, efforts were made to monitor the transition to the Information Society by keeping record of the number of computers and people using IT in their work. To some extent this practice continues today. One point of interest, for example, has been the number of home pages maintained by authorities.¹⁷ While this, too, is one indication of the change, we can only speak of genuine e-government when most of the services provided by the authorities are available in electronic form.¹⁸ Service here means the opportunity for *interactive use* via information networks. Most countries have no more than begun to make progress towards this end.¹⁹

4 Good Administration

The new *Charter of the European Union* mentions *the right to good administration* (Article II – 41): it has been accepted as a legal concept in Europe. But the road leading up to this development has been a long one. Good administration is at once a familiar and a remote notion. The term is close to us in the sense that it has only recently – but that much faster – begun to be used commonly. It is a sound, modern concept, which is easy to embrace. We, the citizens, demand *good administration*. And, for example, in Finland, which is considered as a forerunner in the area of good administration, the term found its way into the new Finnish Constitution at the end of the 1990s. Finnish citizens have a guaranteed right to good administration or – as it is in English translation – good governance.

Constitution, Section 21 - Protection under the law

Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice.

¹⁷ In Finland, for example, all municipalities now maintain websites. The first municipality to create a website did so in 1994; the latest and last went online in June 2004.

¹⁸ For an illuminating discussion, see also Klumpp *From Websites to e-government in Germany* p. 18-25 in Traunmüller – Lenk (eds) *Electronic Government* (2002).

¹⁹ An interesting development, and one showing just how fast the change is taking place, is that just a few years ago the use of computers in government was assessed largely in terms of information services. Yet this is only one aspect of electronic administration. On the development of information services, see, e.g. Lenk (ed) *Neue Informationsdienste im Verhältnis von Bürger und Verwaltung* (1990), passim.

Provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as the other guarantees of a fair trial and *good governance* shall be laid down by an Act.²⁰

Yet, good administration – or good governance - is a remote notion inasmuch as it is a very open, general concept whose specific content we are just beginning to contemplate. At the risk of overstating the case, it can be said that government was earlier to a significant extent a self-regulating part of the exercise of power in society. This being the case, the prevailing mentality was that citizens were subjects of government – yes, the doctrine spoke of “subjects” – and that free choice and free argumentation were the cornerstones of the organization of government. Also, the process of concretely guiding government towards serving the citizenry was overlooked in many, if not in fact most, countries.²¹ Finland, too, became accustomed to checking of legality after the fact a practice in which the decisions made shaped the work of government significantly.

It is only with the gradual shift towards the constitutional state that the relation between the citizen and government has changed or at least is changing. What we expect from government is nothing less than procedural precision, a statutory mandate for what it does, and service that recognizes the rights of citizens.²² That the legal profession or legal skills are needed ever earlier in the process of governing the constitutional state is another factor that inevitably affects government.

But what all can be considered *good administration* or, more broadly, *good governance*? I think this question can be broached in at least two ways.²³ I will describe these briefly here:

First, as a concept, *good administration* is indisputably much related to other *good practices*. Society is nowadays full of good or best practices. And we can see good practices in legislation too.²⁴ It is a code of sorts, which comprises a number of components that change over time. In this perspective, the concept is always *an open one* but its core content at any given time is known. It is largely the task of the legal and administrative sciences to write more exact accounts of good administration. By looking for and imparting content to good administration, we help ensure that forms will not become formalities. This is one of the hallmarks of the struggle against *bad bureaucracy*.

Second, good administration as a statutory requirement is a matter which links government to the realization of citizens’ rights, above all fundamental

²⁰ The single Finnish term *hallinto* may, depending on the context, mean administration, government or governance.

²¹ See Kuusikko *Advice, Good Administration and Legitimate Expectations: Some Comparative Aspects*. European Public Law, Volume 7, Issue 3, 2001.

²² Section 22 of the Finnish Constitution unambiguously states that the safeguarding of fundamental rights is the responsibility of the public authorities: The public authorities shall guarantee the observance of basic rights and liberties and human rights.

²³ Saarenpää *A Legal Framework for e-Government* p. 382-383 in Traunmüller (ed) *Electronic Government* (2003).

²⁴ See for example the *Finnish Personal Data Act*, section 1: The objectives of this Act are to implement, in the processing of personal data, the protection of private life and the other basic rights which safeguard the right to privacy, as well as to promote the development of and compliance with good processing practice.

rights, in the constitutional state. We can speak of a channel between government and fundamental rights. This approach allows us to elaborate and assess the principles of good administration. These are then necessarily linked to the older principles based in administrative law. Good administration is and can not be a totally new phenomenon.

In the Finnish legal literature, *Olli Mäenpää* has published an interesting if somewhat brief general presentation of good government, which provides me with a solid foundation on which to proceed here. *Mäenpää* has divided the principles of good administration into the following five groups²⁵:

- 1) Lawfulness of government
- 2) Observance and safeguarding of fundamental rights
- 3) The principle of a government of civil servants, i.e., organizing government primarily through a civil service
- 4) General principles of administrative law
- 5) The principle of right of access to government documents.

Some may find the above classification surprising and ask whether it really adds anything new to the development of government and especially e-government. This is a valid question, for the list as such seems to comprise very familiar issues. This is largely how we have become accustomed to describing government.

But we can still answer the question in the affirmative. The notion of good administration elaborated by *Mäenpää* does introduce something very important. The issue is akin to that of a similarly open concept, the fair trial. It prevents government - or should - from being developed solely in terms of the *efficiency of its bureaucracy*. In this light, what we are dealing with – considering the traditions in this area – is a tool of the constitutional state that may in fact be more powerful than the *fair trial*. The principle of good administration obligates us to optimise the operation of government with a view to safeguarding citizens' rights. And here the *openness* of government is crucial of course.

To a certain extent, the OECD has described good governance in different, more general terms. Its list of the principles of *good governance* reads as follows:²⁶

- respect for the rule of law;
- openness, transparency and accountability to democratic institutions;
- fairness and equity in dealings with citizens, including mechanisms for consultation and participation;

²⁵ Mäenpää *Hyvän hallinnon perusteet* (2002).

²⁶ “www.oecd.org/about/0,2337,en_2649_37405_1_1_1_1_37405,00.html”.

- efficient, effective services; clear, transparent and applicable laws and regulations;
- consistency and coherence in policy formation;
- and high standards of ethical behaviour.

This list as well shows that good governance is really an aspiration – a *utopia* – that envisions efficient government that serves the individual. *Mäenpää* has most aptly remarked that management and governance perspectives are primarily perspectives of those whose task it is to develop governance.²⁷ Good governance as such it can no doubt be linked to the broader qualitative objectives of modern society. We have the right to expect, in fact demand, quality government.

In Finland, the concept of *good administration* has rather recently been adopted in the Administrative Procedure Act²⁸ in addition to its inclusion in the Constitution. The principal objective of the Act is the promotion of *good administration*.²⁹ An entire chapter of the law – chapter 2 - is dedicated to the content of that concept. The heading of the chapter is quite ambitious: *Fundamental principles of good administration*. However, a closer examination of the provisions reveals that the legislator has only brought out some of the principles described already above. No attempt has been made to create an exhaustive law. However, the law does carry a legal obligation. We have progressed to the level of concrete legal provisions, although the legislation speaks of principles. For this reason, the term good administration is also applicable. The headings of the sections provide a good overview of what the Finnish legislator considers to be the central principles of good administration:

Section 6 — Legal principles of administration³⁰

Section 7 — Service principle and appropriateness of service

Section 8 — Advice

Section 9 — Requirement of proper language

Section 10 — Inter-authority co-operation

²⁷ *Mäenpää Hallintolaki ja hyvän hallinnon takeet* (2003) p. 75-76.

²⁸ The Administrative Procedure Act entered into force at the beginning of 2004.

²⁹ Section 1 — *Objective of the Act*: It is the objective of this Act to achieve and promote good administration and access to justice in administrative matters. It is further the objective of this Act to promote the quality and productivity of administrative services.

³⁰ The content of this provision merits citing: An authority shall treat the customers of the administration on an equal basis and exercise its competence only for purposes that are acceptable under the law. The acts of the authority shall be impartial and proportionate to their objective. They shall protect legitimate expectations as based on the legal system.

I will not reflect on the elements of good administration in any more detail. Let the above examples suffice to show how difficult it is to find a consistent description. Good administration is an important objective in combating bad bureaucracy in the developing constitutional state. In each operational environment, the effort must be made to find content for the concept that best safeguards the rights of the individual. In this perspective, governance, government and administration are closely linked to one another as tools on different levels for implementing the democratic constitutional state.³¹ Good administration is the most detailed and powerful tool when organizing it.

5 Reconciling E-government and Good Government

5.1 A new State of Uncertainty

The concept of good government predates electronic government too but this fact does not necessarily entail serious problems. One may gain a first impression that there are only some few aspects of e-government and good government that need to be reconciled. The digital environment in which we live and work today clearly provides better opportunities for the flexible and comprehensive organization of different activities. Government is making use of the opportunities opened up by the *information systems*.³² We even find that many of the proposals advocating e-government today unabashedly favour *technological determinism*. In other words, we have blind faith in technological development. The efficient use of technology is assumed always to be a positive development.

Upon closer examination, however, the matter proves to be far more involved. The issue at hand is not the consistent development of government in a better direction but the appearance of *a new state of uncertainty*, which one sees so often in modern technological development. A number of *tensions* can be seen to arise between different professions and different occupations. Difficulties also occur in identifying legal problems and articulating them may take a long time. But more than anything else where IT is concerned it is the rebuilding of software that has been designed and produced on an ill-informed basis that is both expensive and slow.³³

When I assert that e-government marks the beginning of a new period of *uncertainty*, I naturally have an obligation to present some more exact justification for the claim. I will proceed to do this by describing briefly some tensions, which, in my view, inevitably arise where e-government is understood as *an array of information processes that rely on information systems*. The

³¹ Heikki Kulla characterizes the legal principles of good administration as principles linked to justice that form the core of good administration and at the same time represents standards of quality. Kulla *Hallintomenettelyn perusteet* p. 69-70.

³² See, e.g. The E-government imperative, OECD E-government studies, “www1.oecd.org/publications/e-book/4203071E.PDF”.

³³ See also Lenk – Traunmüller *Electronic Government: Where are We Heading?* p. 1-9 in Traunmüller – Lenk (eds) *Electronic Government* (2002).

fundamental point of departure here is the simple but important - in fact essential - notion of government as the most effective means of realizing the rights of the individual in the constitutional state. Seven main tensions can be identified.

5.2 Seven Tensions

The first tension concerns the *significance of government* in the constitutional state. We must ask to what extent it is the responsibility of government to decide people's affairs and to what extent people's own decisions are accepted and the outcomes of these decisions registered. This fundamental question of the extent of individuals' right to *self-determination*, by no means a new one, acquires new meaning where e-government becomes capable of offering services in which our rights – for example, changing one's *family name* – can be exercised quite simply via electronic services. A *front-office* service can transfer the result to the *back office* without the authorities being involved. What is needed here is a fundamental comparison of the scope of individuals' right of self-determination and the actions of government; this is a comparison that for practical purposes has yet to be undertaken.

The second and a lot different tension has to do with the permissible boundaries of *automated decision-making*. In the development of information technology we have gradually reached the stage, which was predicted prematurely in the midst of the excitement over *expert systems* some years ago. Now, the doors to automated decision-making are already opening a little bit wider. The concept of a *semantic web* for example is becoming part of this development.³⁴ A semantic web on the information office and on the front-office levels is the key to decision-making on the back-office level. This opportunity afforded by technology is at odds with a central tenet of the constitutional state, which holds that decisions on individuals' rights may not be based solely on automated decision-making with no human involvement.³⁵

The third tension as well entails a significant societal line of demarcation. The transition to e-government imparts a fresh significance to the discussion of how *openness* can be realized in government. Access in the form of document and procedural openness is rather different than, for example, access in the form of software openness in information systems. *Openness* and *transparency*³⁶ are among the hardest cornerstones of modern democratic society to implement. The realization of this fact has varied in Europe. For this reason, Finland strongly advocated openness during its EU presidency 1999, so much so in fact that the name of the access to public information act passed at the time is in English called *the Act on Openness in Government Activities*.³⁷

³⁴ For more on the concept of a semantic web, see “www.w3.org/2001/sw”.

³⁵ In this perspective, the provision in the *European Personal Data Protection Directive* restricting automated decision making where assessments of person is concerned is an important milestone on the road to the constitutional state.

³⁶ Openness and transparency are different concepts, but very often used synonymous.

³⁷ A literal translation of the name of the Act in Finnish is “Act on the publicity of the actions of public authorities”.

Where e-government is concerned, openness poses the fundamental question what opportunities citizens – or, in a different perspective, the media – have on networks to make use of government information systems. The front office/ back office configuration is a tough issue – a so-called *hard case*. Genuine electronic government requires that both front office and back-office activities achieve a standard that adequately considers citizens' rights. But as long as electronic government can offer only front-office digitality and use of networks, we have only taken the first few steps on the road to that goal. In fact, we should draw a finer distinction, a tripartite one into *information office*, *front office*, and *back office*.³⁸ Here the information office handles simple communication. It is in fact a passive website or a limitedly active website whose visitors remain anonymous. The right to anonymity is perhaps most often in danger of being compromised when using e-government unless systems are built to favour anonymity. In network we are leaving signs everywhere.

The fourth tension has to do with *software*. One must ask to what extent we have the right to know how the information systems that process our information and handle our affairs work on the software level. We can now really speak of the transparency of information management. In this respect our right - albeit a limited one - according to the European Personal Data Directive to find out how programs assessing us work would undoubtedly signal a new era in the history of e-government.³⁹ Another issue that must be addressed in this context is the debate surrounding *open-source software* in the public sector. Openness in government should mean transparency of systems and openness in software as well. Yet the discussion of open source code has all too frequently been framed primarily as an economic issue. There are economic stakes involved of course but the most important thing in my view is the transparency of government.⁴⁰ It is in fact surprising how late the debate on open source started given the extent to which computers have been used in administration for years. On the EU level, the use of open source code and related issues are being monitored as part of the IDA programme.⁴¹

The fifth tension is an old one that constitutes one of the principal legal problems that faced government as it gradually began to use office automation in

³⁸ Sometimes it has been thought that the communications between the front and back office are handled by special intermediate software – middleware. However, it is preferable to create three separate offices due to their distinct legal nature.

³⁹ According to both recital 41 and Article 12 of the Directive, our right to obtain knowledge includes the right to obtain knowledge of the logic involved in any automatic processing of data at least in the case of automated decisions.

⁴⁰ In Finland, the approach to open source code has been formulated in Recommendation by the Finnish Ministry of Justice on the Openness of the Code and Interfaces of State Information Systems, Working Paper no 29/2003, published 15.10.2003 in following way: “As part of open source project bending in the Ministry of Finance, a study was made info to use open source methods in the development of tailored applications of State administration. A system build using open source methods was found to be viable alternative especially when the service needed by several administrative organizations, when open source components for the system already exist and when the transparency of the system is of particular significance.”

⁴¹ The website for the open-source directory can be found at: “www.europa.eu.int/ida/en/chapter/452”.

increasing measure. The question is one of our *privacy* in and in relation to government. At odds here are legal efficiency as protection of privacy and governmental efficiency related to the utility, quality and scope of data stores. Appropriately efficient government from the government's point of view is very often something quite different from legally efficient government from the point of view of our privacy. *An effective data warehouse* implemented in its purest form is always a risk to privacy.

The relation between privacy and government goes back to the very beginnings of the use of IT in administration. *Data protection* as a special form of the protection of privacy goes a long way towards protecting citizens against the real, invisible use of power by the naked society in the formal constitutional state. A look at the long development of data protection legislation might lead one to conclude that whatever tension there was between privacy and electronic government has already diminished considerably.⁴² Yet this is not the case at all. The development of IT provides enhanced opportunities for surveillance and monitoring and at the end of the day the bureaucracy is still often indifferent when it comes to data protection. It is quite revealing that in Sweden – the first country in the world to provide for data protection – a recent study determined that one-third of the social services boards in the country lacked written guidelines for how to deal with confidential information.⁴³

The sixth tension has to do with *the networking of government*. One of the first steps in this development has been the so-called *one-window* or *one-stop* principle, where one and the same civil servant can serve citizens in a variety of matters. Efficient networking shifts this principle from the local to the regional level. We can conduct our business with the government without having to take the so-called *rules of forum* into consideration. The Finnish new real estate system and soon-to-be-adopted common e-distrain forum are good illustrations of this.⁴⁴ Similarly, the question of limiting joint use of information systems is an essential issue affecting the rights of the individual. Networking also causes problems in linking government to the courts. What are the requirements for the joint use of information and communication systems between government and the courts? As one-stop government becomes more common, we cannot avoid a reassessment of the protection of privacy. One-stop generally means that different sets of data will be brought together.

Lastly, the seventh significant tension is reflected in *the document logistics* with which the government informs citizens of its work both generally and in

⁴² In this connection, it is worth mentioning that the somewhat protracted implementation of the *European Personal Data Directive* has been completed in summer 2004 in the old Member States with the adoption by France of new legislation conforming to the Directive.

⁴³ For more information, see the bulletin of the *Swedish Data Inspection Board* at www.datainspektionen.se/nyhetsarkiv/nyheter/2004/juni/2004-06-21.shtml.

⁴⁴ *Act on the Land Information System and Related Information Service* provides an opportunity to access information on a piece of property from a location other than the municipality in which the property is located. What we have here is thus a new kind of infrastructure law. The first section of the Act reads as follows: The objective of this Act is to organise a national information service concerning real estate and other units of land and water areas based on information technology. This service is implemented by means of a centralised Land Information System, which is intended for public use.

individual cases. From the point of view of the individual, the issue at hand is the protection of his/her privacy and equality in public communication. Where the efficiency of government is concerned, the question relates to the type of document systems that are used. The era when we erased private information in paper documents should be behind us. But it is not; not at all. A significant proportion of the information systems used in government are still based on traditional *word processing*. We have an interesting example of this in Finland in which the Supreme Administrative Court handed down an important preliminary ruling in a tax secrecy case. In order to achieve an information balance between the parties, it granted an attorney in a matter pertaining to his taxation the right to obtain information from a decision in a similar case falling under the secrecy provisions. In the decision, the names of people and other information to be kept secret were blocked out. In a developed document system this would be taken care of by the software.⁴⁵

5.3 Different Levels of View

Anyone looking at the above short list might wonder why it is so limited. Where are *data security* and, for example, the *digital signature*? Don't such very prominent topics in the Network Society involve new, interesting legal issues where e-government is concerned? And shouldn't we speak of the application of *telemedicine* in public health care? This is also one of the focal areas of the e-society 2005 programme.

Indeed we should, but these issues come up either in a different way or they are connected with the main tensions already mentioned. It is essential to point out that we cannot address the opportunities and problems of the development of e-government on a single dimension. Not all issues are of the same order. We should distinguish at least *meta-level issues, decisions involving legal principles and decisions at the system level*.⁴⁶

The foregoing discussion of tensions falls mainly on the level of principles just like the discussion of governance. It represents a typical examination of the confrontation between *law and technology*, an analysis that is essential in the constitutional state. We are looking for a *voluntaristic* solution to the question of how technology can best be utilized.⁴⁷

The *meta level* embraces questions through which we take a position on the status of *the information infrastructure* in building e-government. Analogously, on the level below principles, we look for detailed answers in appropriate methods and technologies. There we come face to face with the workings of good government on the everyday level in the building and utilization of databases and information networks.

⁴⁵ KHO 2002:52.

⁴⁶ Saarenpää *A Legal Framework for e-Government* p. 379-381.

⁴⁷ I use voluntarism here deliberately as the opposite of determinism. It is consistent with voluntarism to expect people to be able to guide the development of technology favourably or even to resist it.

The meta-level issues fall into at least two main categories. These are *data security* and the *identity of the individual*. Each is a fundamental legal question; and each has been addressed in different ways in different countries, often without due consideration of the issues. It must also be borne in mind that the data security of open information networks is primarily the outcome of something other than the development of European government. If we could start afresh today, the open networks we would build would no doubt be different. We would take the significance of code in society seriously in a different way.

In the long, long history of security, and its still brief electronic counterpart, the legal aspects have been neglected or dealt with through haphazard legislative measures. I have elsewhere described the progress in noticing this situation as a development characterized in the early 1990s by the attitude that data security was a “nice thing to have“. It is possible to go beyond this – and we have – to an assessment of data security from the legal perspective as well. A good example nowadays is the Finnish *Act on the Openness of Government Activities*. According to the Act, data security is one of the factors, which the authorities are to take into consideration in developing information systems in government. Data security is part of the code of *good information management*, which the Act sets out in detail. It is something that should be taken into account in developing information systems. We can say that data security is seen as an integral part of any such system.⁴⁸

However, there are two essential stages that must be reached after this. The first is the understanding of data security not merely as an obligation of the authorities but as *a right of the individual*. We have a right to data security. For example, the data security obligation provided for by the EU Personal Data Directive can be construed as a citizen’s right to data security. The important provision on data security in the Personal Data Directive is not a merely technical one. When we combine it with the objective of the Directive we can observe that proportionality where data security is concerned should be assessed primarily from the standpoint of the rights of the individual rather than the economic considerations of the controller. If we understand security in this way, we rise to the level of the tensions involving principles described above.⁴⁹ We

⁴⁸ It must be borne in mind, however, that data security is not specifically mentioned in the objectives of the law and in connection with good information management practice it is only one of a number of considerations to be taken into account. The relevant part of section 18 reads as follows: 4) plan and realise their document and information administration and the information management systems and computer systems they maintain in a manner allowing for the effortless realisation of access to the documents and for the appropriate archiving or destruction of the documents, the information management systems and the information contained therein, as well as for the appropriate safeguarding and data security arrangements for the protection, integrity and quality of the documents, the information management systems and the information contained therein, paying due attention to the significance of the information and the uses to which it is to be put, to the risks to the documents and the information management systems and to the costs incurred by the data security arrangements.

⁴⁹ For example, section 32 of the *Finnish Personal Data Act* follows the Directive in setting out the principle of proportionality prominently: The controller shall carry out the technical and organisational measures necessary for securing personal data against unauthorised access,

need the *principle of proportionality* if we are to successfully determine the level of data security, which must be observed in order to ensure the protection of *privacy*.

There is still one step left on the thorny path to data security and that is to reflect on the significance of the *information infrastructure* for the enjoyment of our *fundamental rights*. The transition to e-government will, except in the case of certain elementary services, lead to a situation where information networks will constitute the new superhighway by which the masses communicate with government. Our fundamental rights will be exercised to an increasing extent on information networks. Data security requirements can and should be imposed. *The infrastructure must be secure.*⁵⁰

In 2001, *Erich Schweighofer* and *Thomas Menzel* edited a work entitled *Auf dem Weg zu ePerson*. This was an apt choice of title. When we speak of e-government, we should speak of those who benefit from it. The *ePerson* is a citizen who manages his or her relation with the authorities primarily via networks. Citizens must have a right to do so and an equally valid right to conduct these activities in a secure infrastructure. The idea of the eSociety 2005 programme that data security should be promoted through *best practices* is a positive step in that direction. But it is not enough. A *code of conduct* would of course be more than this. What is ultimately at stake here are however our fundamental rights. The protection of those rights should not depend on best practices alone. We need a *data-secure infrastructure* and the *right to use it* generally and especially for e-government.

In this perspective, in Finnish Legal Informatics we have pointed out that our right to data security is or should be a kind of *meta-level fundamental right*.⁵¹ It is a precondition for the proper realization of our other fundamental rights in e-government. The information superhighway should be secure, which is not the case. If this perspective is neglected, we will abandon the constitutional state and – when thinking e-government - revert to the administrative state.

against accidental or unlawful destruction, manipulation, disclosure and transfer and against other unlawful processing. The techniques available, the associated costs, the quality, quantity and age of the data, as well as the significance of the processing to the protection of privacy shall be taken into account when carrying out the measures.

⁵⁰ In fact, in this context we should distinguish a number of different types of security, whereby data security and infrastructure security form the most fundamental forms from which we proceed to software, commodity and information security. In the international debate, however, data security and information security are often confused.

⁵¹ We brought this perspective to the fore for the first time, on the initiative of *Tuomas Pöysti*, in a report on the need for data security legislation drawn up for the Finnish Ministry of Finance by the Institute for Legal Informatics at the University of Lapland. The report did not result in any new legislation. On the contrary, the Ministry of Transport and Communication is currently beginning a report on the realization of fundamental rights within the framework of the present provisions governing data security. See also Pöysti *Tehokkuus, informaatio ja eurooppalainen oikeusalue* p. 454.

5.4 Identity

The second meta-level issue has to do with our *identity* in e-government. This brings one of the basic questions of democracy to the fore, that of our relation to others - other citizens, communities and government as well. Identity entails our interface with individuals and communities. Contrary to conventional notions, it is not merely a question of our being identified. *Identity* and *identification* are two different, very different matters indeed. Identity includes the question of the kind of *image* of us that is created through the various factors that affect our identity. This image is defined and shaped significantly by our right to privacy. But the issue is every bit as much one of our public image. It must also be borne in mind that we live in an increasingly individual-oriented society. As Zygmunt Bauman observes: "Casting members as individuals is the trademark of modern society". Individualization increases the number of identities each of us has.⁵² E-government will shape *our identities* profoundly. In fact, we need one or more identities in order to participate in e-government and to make use of its services. Here, the digital signature is however usually offered as a ready solution. And it is blithely reiterated that the digital signature offers an opportunity for the strong identification of an individual. This is – or so the logic often goes – what is needed in the modern e-government.⁵³

This is a really *devastating misconception* and, at the same time, a clear indication that the question has not been considered on *the meta level*.⁵⁴ A good example is the approach taken by the Finnish government in developing e-government by introducing a single electronic identity card; one card. The electronic identity card was introduced in 1999 but in keeping with the one-card policy, since June 2004 it has been possible to put social security data on the card as well. At this writing, this is still voluntary but the change has the express aim of increasing use of the card. This development involves problems not only in principle but also in practice given the card's present level of data security.⁵⁵ We have set data protection legislation back to square one. The trend should, however, be the reverse.

Clearly, the digital identity card will become more common both within individual countries and at the European level.⁵⁶ As such, this can be considered

⁵² *Human Individually, Together* p. XIV in Beck – Beck-Gernsheim (eds) *Individualization* (2002).

⁵³ The digital signature can most likely already be characterized as an essential part of the image being promoted in the effort to market electronic governance. *See, e.g., COM* (2003) 567 p. 15.

⁵⁴ For my part, I have been aghast when I have seen how the literature on e-government repeatedly claims that a digital signature is needed to constitute binding agreements. In legal perspective, this is not the case, unless the law so prescribes. But we already have huge digital signature markets.

⁵⁵ The use of the electronic identity card has been rather limited thus far. For the most part, it has been used as a passport, for, contrary to the principles of data protection; the card is of a hybrid type. It has the information necessary for using it as a passport printed on it and in addition functions as an electronic smart card.

⁵⁶ The use of the digital identity card is becoming more common in Finland, because the traditional identity card is no longer issued. Nevertheless at this writing the number of

progress. But these heady technological developments should not cause us to overlook the *legal framework* within which they take place. The *one-card principle* is apparently user friendly but poses risks where fundamental rights are concerned. The technological imperative seems to be overtaking legal considerations, however.

This development – also bureaucratic in nature – merits criticism. How our identity is provided for in the Network Society on the everyday level should not be reduced to a technical consideration. On the other hand, continuous improvements in technology offer enhance opportunities to retain *anonymity*. This is already possible within certain limits with the digital signature and services making use of automatic agents provide further opportunities.⁵⁷ These opportunities are often overlooked due to the emphasis on reliable identification. In electronic administration in particular the anonymity of the client is the central point of departure. For example in Finland we have as a rule the right to obtain information without revealing our identity.⁵⁸ This is of course the way things should be in the constitutional state.

6 Two Steps Forward

The arguments I have presented briefly show, in my estimation, how our efforts to develop government bring us face to face with integral issues of the constitutional state. The matter at hand is not the exploitation of technology or nudging government in the direction of e-business.⁵⁹ It must also not be merely making government more efficient in bureaucratic terms. What we are dealing with is *the transformation of the constitutional state from a manual to a digital environment*. Good government must be adapted to accommodate this change.⁶⁰

One might assert that such a development is already under way. And it is being guided by the *European Union*. After all, the eEurope 2005 programme emphasizes the importance of not only creating a *legal framework* but also establishing *good practices*.⁶¹ And this is no doubt as it should be. But the

electronic identity cards in use is only some 55 000.

⁵⁷ On anonymous agents, see, e.g. Brazier et al. *Are Anonymous Agents Realistic?* p. 69-79 in Complex 5/03.

⁵⁸ Openness Act 13.1 §: A request for access to an official document shall be sufficiently detailed, so that the authority can determine which document the request concerns. The person requesting access shall be assisted, by means of official diaries and indexes, to specify the document to which access is being requested. The person requesting access need not identify himself/herself nor provide reasons for the request, unless this is necessary for the exercise of the authority's discretion or for determining if the person requesting access has the right of access to the document.

⁵⁹ Discussions of electronic administration often refer to e-commerce as a pioneer. This association may cause us to focus on the wrong things in developing e-government. Cf. e.g. Wimmer *E-Government im Trend der Verwaltungsinformatik* p. 249-255 in Schweighofer – Lachmayer (eds) *Auf dem Weg zur ePerson* (2001).

⁶⁰ See also Traummüller – Wimmer: *E-Government at a Decisive Moment: Sketching a Roadmap to Excellence* p. 1-15 Traummüller (ed) *Electronic Government* (2003).

⁶¹ For more details, see the action plan at: “europa.eu.int/information_society/europe/2005/all_about/action_plan/index_en.htm”.

transition to eEurope has failed to see the big picture in much the same way as discussions of postmodern society did some years ago. Action plans combine a range of objectives without giving sufficient consideration to how these are to be carried out.

There is no need here to go into greater detail on how the advent of the Network Society has taken most of us by surprise. Suffice it to say that technological development has played the most prominent role in what has happened. However, *legislative openness* made it possible to proceed with few constraints. Law, contrary to a common misperception, does not normally lag behind development. Sound legislation provides every opportunity for societal development. This is one of the fundamental questions of the relationship between technology and law. Good, technology-neutral legislation is not an obstacle to the use of technology. Problems only arise when the legislator is not alert enough in averting the possible detriments of openness. As the use of IT has increased, the *risk* posed by less-than-vigilant legislators has grown.⁶² But the point is not merely that the legislator must wake up to new developments. If we reflect on the things - in addition to the obstacles inherently posed by bureaucracy - that jeopardize the smooth functioning of good government in e-society, we can identify at least two salient considerations. One is that the theories of legislation are seriously out of date; the other is that in Europe professional skills are becoming increasingly differentiated. This is not a good combination for the future.

6.1 Towards a new Legislation

Recent years have been marked by an increase in the quantity of directives and legislation related in various ways to information networks. We certainly have no cause to accuse European legislators of idleness; not at all. Some of this new legislation can very well be attributed to the ongoing transition to a constitutional state. We are accustomed to associate with the development of the constitutional state the requirement that things be set out in the law. More and more things, above all those having to do with fundamental rights and freedoms, are being legislated. Personal data protection is a good example. The importance of *privacy* has grown in our open society. Some of the new legislation can be attributed to new phenomena – or ones perceived as new. Digital data processing prompts a need for legislation governing various information processes in new ways. Personal data protection is a good example of this, too. Likewise, electronic accessing of government services by citizens reveals another focus of interest on the part of the legislator.

Upon closer inspection, some of the new legislation would seem to derive from a lot different aims, however. An apt example here might be the processing of personal data in working life. The Personal Data Directive is a general one

⁶² This is one of the observations made in the above-mentioned data security report of the Institute for Legal Informatics.

whose scope is broad enough to cover working life too.⁶³ Likewise, the Finnish Data Protection Act is a general Act, also covering working life. Nevertheless, soon after the Data Protection Act was passed, a separate law was enacted on the protection of privacy and data protection in working life. And in late 2004 a substantially amended version of this Act will come into force. Why? The reason is simple. The players in the labour market wanted to keep regulation of working life in their own hands. We see the often-cited *negotiated lawmaking* showing its muscle here.⁶⁴ Likewise, some – indeed a significant amount – of the new legislation turns out to accommodate the aims of various interests. What we have is not development of the modern constitutional state in the proper sense of the word but *market-dictated* or *bureaucracy-dictated* legislation. The amount of legislation increases because this is advantageous for the exercise of power. More and more legislation is enacted – seemingly in keeping with the principles of the constitutional state – but in fact partly at variance with them. Negotiated lawmaking is very often the famous invisible hand using power.⁶⁵

Negotiated lawmaking is a phenomenon, which is also lauded in practice. Drafters strive to bring to the fore the positions of different interest groups and the problems associated with different practices in a sufficiently early phase of the drafting process. To a certain point this is all well and good. But the limit is the development of the constitutional state. We are, as noted above, receiving more and more legislation that relates to our fundamental rights and the exercise of those rights in the network environment. Negotiated lawmaking poses risks when such legislation is being drafted, for it easily causes the contributions of independent experts and groups of users to be overlooked.⁶⁶

A second problem has to do with the *rights connected with infrastructure*. Society is required to have different infrastructures for different activities. We speak of a channel or a structure providing the environment – and a secure one – within which we can work. Typical public infrastructures include roads, water and sewage systems, and electricity grids and telecommunications networks. There are in fact a lot of public infrastructures around us. These different infrastructures combine to make up the operational environment of a society at a given time. From the standpoint of the individual, infrastructures – or at least some of them – form the basic services that one expects from society. Public infrastructures are significant elements in societal as well as political terms. In this light, it is interesting that they have prompted extremely little research. When we assess the position of information networks as an operational environment today, we can certainly describe the whole that they form as an infrastructure. In Europe, and most of the rest of the world as well, *information networks* have already become the superhighway of the masses. We have gained

⁶³ The Finnish Act on the Protection of Privacy in Working Life can be found at: “www.finlex.fi/pdf/saadkaan/E0010477.PDF”.

⁶⁴ It must be admitted that the increased importance of different tests was one impetus for the new law.

⁶⁵ Cf. Lessig *Code* p. 6: “The invisible hand, through commerce, is constructing an architecture that perfects control – architecture that makes possible highly efficient regulation.

⁶⁶ My example from the working life is of course not the best one in this connection, because the participants of that game are the same as in the working life generally too.

a new public infrastructure.⁶⁷ The relation between infrastructure and law is utterly important in the new Network Society. An infrastructure requires a legal framework. It is not an exclusively technical or economic entity. This is where the state comes or should come in. When an emerging infrastructure becomes important, if not before, the legislator should take an interest in it. The role of the state in maintaining infrastructures has varied from country to country. In Europe, the state has typically had a number of roles – designer, controller and even operator. The critical infrastructures have had - and to a substantial extent still have - a significant number of factors associated with them that restrict competition. Telecommunications is a good example of this. As *Gregor Kutzschbach* observes, telecommunications was previously considered to be a natural government monopoly.⁶⁸

The beginning of this century brought a new body of five directives – a continuation of the 100 or so largely technical directives that were already on record. The aim of the five instruments – one, known as *a framework directive*, and four associated directives⁶⁹ – is to establish a uniform system of regulation that addresses the challenge of convergence. They seek to create a system that provides access to a reasonably priced and first-rate communications infrastructure and includes a broad range of services. This is clearly a step in the right direction. The impacts of *convergence* – or at least some of them – have already been acknowledged. The communications infrastructure has been taken seriously. Communication has really changed. And when we add to these developments the e2005 action plan, based on efficient use of cheap broadband networks, it would seem that the legal framework for the burgeoning European network society is very much up and running. The European legislator is following societal development closely. The state has recognized the responsibility it has for regulating infrastructure.

Or has it? I for one would dispute this claim to some extent, for the relation between infrastructure and law appears to be understood primarily as regulation of the market and attention to technological development. There is something missing. That something is the right of the individual to make effective use of what is a significant infrastructure. One might be tempted to refute this assertion by citing the *framework directive*. After all, the recitals mention the development of communications infrastructure for the needs of citizens. And then there is the *Universal Service Directive*, which was adopted expressly to guarantee access to a minimum level of services.⁷⁰ And eEurope 2005 Action Plan, for its part, is

⁶⁷ See also Borgman *From Gutenberg to the Global Information Infrastructure* p. 18-19.

⁶⁸ Kutzschbach *Grundrechtsnetze* p. 32-35.

⁶⁹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (*Framework Directive*).

⁷⁰ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (*Universal Service Directive*), Recital 4 : Having regard to the opinion of the Committee of the Ensuring universal service (that is to say, the provision of a defined minimum set of services to all end-users at an affordable price) may involve the provision of some services to some end-users at prices that depart from those resulting from normal market conditions.... And Section 1: Within the framework of Directive 2002/21/EC

largely based on the idea that the use of networks will increase considerably. Moreover, Article III-144 of the new EU Constitution obligates the Union to contribute to the establishment and development of trans-European networks if its citizens are to derive full benefit from networks. Don't these developments demonstrate that the citizen's perspective has been adequately taken into account? Isn't this enough of a legal framework?

Something is still missing here, however. And that is a fundamental analysis of the rights of the individual in light of the opportunities offered by the information infrastructure. I have not noticed that any such analysis has been carried out as yet on the EU level. The telecommunications directives are primarily market-oriented directives. Their objective is to sort out competition; the human being is a secondary concern.⁷¹ If and when we take a look at the relation between infrastructure and law from the standpoint of the rights of the individual, we find ourselves confronted by a number of essential and fundamental questions. These range from basic rights to universal services and from freedoms to surveillance. It is equally important that we reflect on how various infrastructures differ from one another.

A good example of what serious consideration of the new infrastructure can lead to – in a positive sense – is the Finnish *Act on Electronic Services and Communication in the Public Sector*.⁷² The focus of the Act is administration that relies on information systems and is linked to data networks; all kind of data networks. In the Network Society, administration is required to offer network services. This is one elementary part of e-government. The opportunities to provide these services are prescribed in the law. The first section of the Act, which sets out its objective, merits citing here: The objective of this Act is to improve smoothness and rapidity of services and communication as well as information security in the administration, in the courts and other judicial organs and in the enforcement authorities by promoting the use of electronic data

(Framework Directive), this Directive concerns the provision of electronic communications networks and services to end-users. The aim is to ensure the availability throughout the Community of good quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market. See also Directive 2002/19/EC of the European Parliament and of the Council of 7 March on access to, and interconnection of, electronic communications networks and associated services (*Access Directive*), Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (*Authorisation Directive*) and Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services.

⁷¹ In the German legal literature, *Gregor Kutzschbach* has presented some interesting reflections on the relation between fundamental rights and infrastructure. He talks about networks of fundamental rights, one observation being: "Der Gedanke des Grundrechtsnetzes erhebt das Netz aus grundrechtlicher Sicht eine besondere Funktion, da erst durch das Netz der vielfache Grundrechtsgebrauch durch Netzbetreiber und Nutzer möglich wird, und sich der jeweils individuelle Nutzen oder schaden progressiv oder degressiv mit der Grösse der und Komplexitet des Netzes verändert." Unfortunately, he is primarily interested in competition, less so in the individual's cultural and social fundamental rights.

⁷² The Finnish word '*asiointi*' – translated to *service* - is difficult to translate. It means everyday interaction between a citizen – or community – and government. It thus refers to the use of administrative *services*.

transmission. The Act contains provisions on the rights, duties and responsibilities of the authorities and their customers in the context of electronic services and communication.

From the standpoint of electronic government, the new Act is an extremely important piece of legislation. It obligates the authorities to build up a system of electronic administration that makes interactive services possible. And it is a step towards round-the-clock administration.⁷³ The issue is no longer merely the use of technology to improve opportunities to interact with the authorities.

It is not possible here to go into the Act in any depth. That would require a presentation of its own. What is essential is that we notice that the legislator has endeavoured to remain up to date in the transition to the Network Society. The Act as an infrastructure Act represents legislation that is essential in such a development.

One might object yet again here that my concern over the development of infrastructure legislation is unfounded. After all, the Act on Electronic Services and Communication in the Public Sector shows that the legislator has been most vigilant. This is doubtless the case, but one must go a step further and ask whether this law - drafted by authorities and giving them rather extensive discretion as to how electronic services are organized - is in fact the right approach to developing legislation. My answer is "no". Despite its many redeeming features, the Act is just a single law dealing with the infrastructure. What is lacking here is elaboration of general doctrines of infrastructure legislation and the development of special infrastructure rights. By infrastructure rights I mean a new type of rights, rights which enable the proper use of an infrastructure. In the context of the information infrastructure, this would mean access to open networks as a new type of *fundamental right*. Similarly, the underpinnings of the information infrastructure would be given the status of public commodities. If we can accomplish this, the infrastructure would not end up being at the mercy of market forces, bureaucracy or sole rights. And we could connect e-government to such infrastructure without problems.

6.2 Towards a new Education

Among its many defining characteristics, our society is very much an *education society*. It provides broad as well as specialized learning. Even the simplest things are seen as requiring training, this being particularly the case with IT. The first step in any consideration of the impact of e-government on the common and legal education is to dismiss the threats of overeducation, in particular apparent overeducation. We are accustomed to seeing extensive educational offerings that match the rapid developments in IT. Hours and hours of training are offered for even relatively simple things. The idea that learning to use IT is a slow and difficult process has sold well. The simple is marketed as complex. Clearly, the transition to e-government will give rise to an extensive need for what will be

⁷³ Section 6 - *Accessibility of the authorities*: The authorities shall make sure that their electronic data transmission equipment is in working order and, as far as possible, accessible by the customers and other authorities also outside office hours.

rather elementary training. There is no doubt that this is needed. The fear of technology and resistance to change are typical human reactions. The fear of technology should not be a barrier between citizens and e-government. But I will not go into this issue further. It is more important to talk about the education of the professions.

I would argue that the introduction of e-government will compel us to reassess the content of education in the fields of law and administration as well as the implications for the training of other staff. Here, too, e-government can be seen to involve far more than the use of appropriate IT tools in communication between citizens and government. One key to appreciating the new situation where professional skills are concerned is a reappraisal of *shared expertise*. In recent years, the debate on expertise has often dealt with the role of shared expertise, for example, in the self-learning organizations. This perspective can be applied to the division of expertise among the professions. Every profession has its *basic methods* and commensurate expertise.⁷⁴ As the academy and the professions have developed, we have progressed to the point where method and skills have become fragmented; we have seen the emergence of ever narrower specializations. Already more than a decade ago, the well-known Finnish sociologist *Antti Eskola* wondered aloud what would happen if narrow specializations took over in society?

Today *Antti Eskola's* question is more topical than ever. We must ask who is responsible for the realization of the constitutional state and the rule of law in the era of e-government? The answer is straightforward in my opinion. We cannot entrust this process exclusively to the legal professionals any more than we can to administrative or IT experts. We are entering a period where responsibility and expertise are shared such that responsibility, too, is shared and is based on collaborative activity. We have to educate professions and professionals who have the ability to communicate with one another sufficiently and effectively. What I have in mind here is nothing less than a solid liberal arts academic education. Without such a background, e-government might turn out to be a mockery of what government should be.

Where the legal education is concerned, the new shared expertise embraces two goals: we should try to raise the general standard of academic education by investing in *Legal Informatics* and *Information Law* in faculties of law as well as – and perhaps more importantly – by improving the quality and increasing the quantity of legal training in the study of administration. Increased legal training – in legal informatics – is an inexpensive but effective remedy for dealing with the tension between good and bad bureaucracy. However, I should hasten to point out that legal training here cannot mean legal training in the traditional sense. Lawyers working in the Network Society, amid the reforms in the constitutional state, find that they themselves face a rather daunting change. It is a change that will reshape the basic methods of our profession, too. We can divide this method into three components – *knowledge, skills and procedure*. Of

⁷⁴ By basic method, I mean that there is a method guiding the work of the professions and directing of attention to what is important in each discipline. It is the basic method that differs from profession to profession. The notion of a basic method originally came to me from the ideas of *Alois Trollier*.

these, it is skills that take on a heightened significance in the Network Society. The theoretical standard of our professional skill is rising. We must learn to more readily recognize what is right. And we have to become better at communicating this to others. It is only then that the message of what is right or wrong can effectively overcome the barriers of limited scope that bad bureaucracy tends to place in our path.

Another essential step will be to realize the benefits of *teamwork*. With the Finnish *Openness Act* obligating authorities to teach people working with information systems the legal parameters of their work, we can extrapolate to propose that further education in our field should be made available to all staff in administration. This part of the provision on good practice on information management reads as follows:

“ The authorities shall see to it that their personnel are adequately informed of the right of access to the documents they deal with and the procedures, data security arrangements and division of tasks relating to the provision of access and the management of information, as well as to the safeguarding of information, documents and information management systems, and that compliance with the provisions orders and guidelines issued for the realisation of good practice on information management is properly monitored

Here, too, we see the fundamental meaning of *shared expertise*: shared expertise cannot be separate expertise. In this perspective, *juridification* can be seen as beneficial.

7 Conclusion

E-government and good administration are coming into our lives on both the national and European levels. They should proceed hand in hand. There should be a smooth shift from good conventional administration to good e-government. If one looks at the objectives set out in the various programmes, there would seem to be virtually no obstacles to such a transition. There are any number of organizations and interests guiding and studying the development of both.

Yet, in my view, there is something missing. And that is a fundamental legal analysis of e-government. Of course, the many provisions on conventional government and administration should be every bit as applicable to e-government as well. For example, the new Finnish *Administrative Procedure Act* is technology-neutral legislation. The Act and its provisions on good administration are intended to be applied equally in conventional, manual and electronic government.

But electronic government is more than conventional government. It can and should be regarded as an information process or, to be more precise, a body of information processes. This point of departure is a simple one to observe. The moment we interact with government a legally regulated information process is and must be set in motion.⁷⁵ And it continues until our file - the documents and descriptions of our case - is archived. There are numerous legal challenges along

⁷⁵ Saarenpää *A Legal Framework for e-Government* p. 377.

the long path that this information takes. To address these challenges successfully we need a new right to infrastructure and this falls within the discipline of *Information law*.

Information Law can primarily be considered one of the general legal sciences. This is why it has been developed as part of Legal Informatics. Legal Informatics is like an elevator between a social contract and the different ways in which information is processed. Information Law is part of Legal Informatics and there is a social need for it as one of the increasingly independent general legal sciences. The scope of Information Law includes an examination of the processing of information and the transmission of information in the operational environment created by the new information infrastructure.

The development of Information Law would merit a more extensive treatment, which is not possible here. Where electronic government is concerned, I will be content to point out that a modern Information Law would serve traditional Administrative Law in the study of electronic administration. It is indicative of the tradition of Administrative Law in Finland, for example, that the discipline has paid scarcely any attention to e-government. Most treatments of administrative law contain only scattered references to the use of electronic services and e-government.

If we look at the transformation of good government into e-government analytically, we are compelled to discuss in all seriousness how the requisite education can be provided for government personnel too. The user of every information system in e-government is at the same time a new *gatekeeper for the constitutional state*, and in this capacity is required to have sufficient legal skills. This will require the new type of education mentioned above; training that embraces legal as well as other professional skills.

In light of the principles of good administration, we are compelled to introduce a new legal principle: we need a principle of the *legal assessment of the information systems* used in e-government. As soon as we start thinking of how data is attached to a particular information technology platform, we must ask what impact and risks the implementation we choose might have on our rights.

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