

## **INFORMATION RIGHTS**

### **Citizenship in the information society**

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## Abstract

Should the rise of the information society transform the idea and ideals of citizenship? This is a multifaceted question, which could involve issues such as civil rights on line, civil law on line, or citizenship in cyberspace. This is *not* what this paper is about. This paper focuses on one particular aspect of citizenship: constitutional rights. It argues for the recognition of a fourth group of civic rights: information rights. These are justified on an analysis of how the information society transforms three basic elements of contemporary citizenship: the citizen as subject, as *citoyen*, and as member of society. Three different types of information rights are distinguished: primary rights which give citizens direct access to information held by public institutions; secondary rights which involve the access of citizens to crucial information channels; and tertiary rights which deal with the horizontal information relations between citizens and private organizations. Also, the implications both for constitutional theory and for the day to day practices of governance are sketched.

## **INFORMATION RIGHTS<sup>1</sup>**

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##### *1. A sociology of civil rights in brief*

It has been half a century since the British sociologist T.H. Marshall delivered the Marshall lectures at Cambridge – which lectures, it should be added, were not named after him but in honor of philosopher and economist Alfred Marshall. These lectures formed the basis for what has since become the classic essay on citizenship and social class.<sup>2</sup> In that essay, Marshall drew a distinction between three elements of citizenship: ‘civil, political and social’. Each of these elements corresponds with a group of citizens’ rights that waxed into being in a different century and against a different social backdrop.

The civil rights are the most ancient. They can be traced back to the Magna Carta and the Habeas Corpus and, particularly in the 17th and 18th century, acquired both legal and philosophical foundation and gained constitutional recognition. These rights formed the trump cards blandished by the rising class of the bourgeoisie and landowners to secure their economic liberties and business interests against the autocratic kings. The 19th century, with its industrialization, urbanization and mass movements augmented these rights with a number of new political rights and granted various existing political rights to an increasingly broader section of the population. The 20th century, finally, was the century of the social rights. Building on the support provided by these newly acquired political rights, a series of social rights were constitutionally entrenched. The advent of the service economy, with its huge bureaucratic organizations and welfare institutions enabled a great many of these to become effectuated.

In the mid twentieth century, when Marshall was delivering his lecture, numerous Western countries were still caught up in the transition from an agrarian to an industrial and service economy. We are currently in the throes of yet another transformation: from an industrial to an information society. It is not necessary to be a historic materialist or sociologist to realize that alterations in social structures and production factors invoke important jurisprudential and constitutional questions.

This paper argues that the arrival of the information society is to be accompanied by consequences for the manner in which the citizenship ideal is given shape and substance. I have confined myself in this respect to one aspect only: that of the constitutional rights. I will be arguing in favor of the recognition of a fourth group of citizens' rights: *information rights*. The paper starts with a few words on the information society and citizenship. Subsequently it will further narrow down and define the concept of information rights and citizenship. It will conclude with the formulation of a new constitutional right to government information.

It should be noted that the argument developed in this paper is not purely academic. The constitutional context of this paper has been the Dutch Commission on Constitutional Rights in the Digital Era. This constitutional commission, installed by the Cabinet, has drafted proposals to adapt the Dutch constitution to the information society.<sup>3</sup> Hence the reader will find occasional references to Dutch or European constitutional theories and debates.

## *2. From the industrial to the information society*

The final decades of the twentieth century mark the 'fin de siècle' of the industrial era and herald the start of the information society.<sup>4</sup> The time-honored role of agriculture and industry as the powerhouse of the economy has gradually been superseded by the information sector. The sector encompasses a wide range of businesses and service providers: producers of information and telecommunication technology, suppliers of telecommunication and mail facilities, internet providers, software producers, graphic companies, producers of entertainment and culture, broadcasting networks, daily and weekly magazines, press offices, suppliers of information services, libraries, museums, universities and colleges, banks and

insurers, accountancy firms, law firms, advertising agencies, research institutes, designers, media consultants, management consultancy and many other types of consultants. All actively engage in the design and production of technologies, devices and services that are primarily aimed at communicating thoughts, concepts and emotions. In many western nations, the share contributed by industry to the domestic product is dwindling, as is the percentage of the working population in 'blue-collar' occupations. A growing number of people are active in the construction, collection, processing and communication of information, in the broadest sense of the word.

All this is mainly the consequence of the enormous development that has overtaken information and communication technology (ICT) throughout the past decades. This technology is characterized by the fact that it is digital. It makes use of transistors based on a binary system of calculation: 'high' or 'low', or 'on' or 'off'. Mainly owing to the spectacular increase in the capacity of memory chips has it become possible to store and process gigantic amounts of data digitally. As the size of the transistors gradually shrank, so did the size of the equipment making use of these. Take, for example, the development of the computer: first came the mainframes, then the PC, closely followed by introduction of the laptop and today, the palmtop and the smartcard. This process of digitalization and miniaturization has moreover been accompanied by 'mobilization'. Communication is becoming increasingly cordless – as is especially noticeable in many a train compartment, concert or lecture hall. A final important development is that of convergence and integration: innumerable information services make use of each other's infrastructure or are interlinked. Telephone connections today are no longer reserved for phone calls, but are also used for e-mail, the internet and videophones. Cable networks can be modified for telephone and internet purposes. As a consequence, the distinction between telecommunications, data and mass communication is prone to blurring and overlap.

A few short comments are in order to dispel any scepticism about digital hypes. The first is that every society is obviously an information society in a certain sense. Every form of social cooperation demands that information be exchanged. Castells therefore is perhaps more accurate when he refers not to an information society but to an informational society. Characteristic of this is that "information generation, processing and transmission become the fundamental sources of productivity and power".<sup>5</sup> The point is that not only agrarian products, machinery and tools or health care and social services, but

information products in the broadest sense of the word, too, have become important social goods. Today, true power is no longer wielded by the landed gentry, engineers or industrialists, but by management gurus, media barons or the owner of Microsoft.<sup>6</sup>

Secondly, this development has not suddenly occurred overnight. The social significance of information services and information facilities has been gradually expanding since the fifties. Only the mass application of ICT services and products has in recent years become so widespread. The recent spectacular development of ICT has seemed mainly to serve to strengthen existing trends rather than to initiate new ones. Therefore, the information society is more than the internet, or, defined somewhat more broadly, the electronic highway. Internet, intranet, e-mail, chipcards and any number of mobile forms of communication are all important new information channels, but they are certainly not the only ones.

There are at least four important characteristics of the information society that are relevant in this respect:

1. *Deterritorialization.* The information society extends far beyond national borders. The information process adds momentum to the ongoing trend towards the internationalization of the economy, society and culture. Information exchange tends on the whole not to be bound any longer to a specific place and can stretch virtually effortlessly across the territory of any number of states, perhaps not even being able to be traced or pinned to a specific location.
2. *Turbulence.* A second relevant characteristic of the information society is the high level of turbulence. New technologies and applications replace the former at an ever swifter pace, while their societal use and the social consequences thereof have become highly unpredictable – even for the producers of these products themselves, as, for example, Philips discovered with the Video-2000 and CD-I players. This lack of predictability is not only confined to the application of new technology. New knowledge reaches even the most remote corners incredibly quickly and can lead to rapid fluctuations and variations in behavior. As a result, the information society is in some respects, paradoxically, an ‘unknown society’.<sup>7</sup>
3. *Horizontalization:* this turbulence and proliferation of knowledge has intensified the importance of negotiation in social intercourse and at the same time caused the force of command to wilt. Large corporations and government institutions have relinquished their position as sole pillars of wisdom and are dependent for their information supply and attempts to shape policy to a large degree on actors in the

field. Markets and networks are therefore replacing the former hierarchies as the dominant form of social organization. Castells goes so far as to argue that horizontal networks have become the basic units of society.<sup>8</sup>

4. *Dematerialization*: The most important production factors are no longer physical labor and machinery, but data and data processing. Many primary social and economic goods are no longer tangible and physical, but intangible. The physical carrier, albeit paper, vinyl or tape is, after all, no longer of essential importance in the digital recording and processing of data. As a result, information can travel virtually unrestrictedly and be copied without any loss of quality. Now that information services and products are for a large part no longer tied to a physical carrier, they have also become extraordinarily difficult to keep track of and to check. As a consequence, the material goods owned by an individual no longer dictates his or her economic and social position in society. It has become far more important to have (control of) the access to information and information channels. Persons lacking a social security number, e-mail address, chip card or cable connection run a strong risk of social and political marginalization in the future.

This latter characteristic is particularly important here. What is the significance of the increasing importance of information as a social good for citizenship? Is it possible to function as a citizen in the information society without access to essential information distribution and reception channels? This not only demands a different definition of the traditional civic, political and social rights, but also the development of a number of digital *information* rights that extend further than the current regime regarding open government and the freedom of information.

### 3. *Rights on line, or what this paper is not about*

Before going any further, I wish to make it very clear exactly what I mean by information rights. I propose to illustrate this in the first instance by outlining what these are *not*:

a. *Civil rights on line*: the transition to an information society and in particular the advent of the internet have in the first place led to innumerable questions about the ‘old’ civil rights previously

identified by Marshall. The discussion about constitutional rights in the information society has hitherto mainly focussed on the scope and applicability of the classic civil liberties, such as the freedom of the press and freedom of speech, privacy of correspondence and of the telephone and the right to privacy.<sup>9</sup> Discussion has also been kindled on the digitalization of the right to vote, one of the political rights. In each case, the issue is whether the civil rights applying off line, in the physical, analog world should also apply on line, in a digital form or environment. These are important, constitutional matters of a rather technical nature. As it now stands, they are more concerned with *renovation* – modifying the constitutional state to keep pace with the modern times of the ICT environment. What I am after is an *innovation* of the constitutional state, the development of a new set of citizen rights next to the existing triad identified by Marshall.

b. *Civil law on line*: The term information rights is also used in a broader sense to refer to the proprietary rights to information. Here, too, the rise of the internet and other digital information channels has provoked a series of complicated questions and vehement debates on the application and enforcement of intellectual property and copyrights in a digital environment.<sup>10</sup> This is in fact a discussion about one of the most classic of civil rights, namely the right to property. Again, this is not what is at issue in the first instance – even though, as we shall see, some common ground is shared.

c. *Citizenship on line*: Typing the keywords citizenship and information into one of the internet search engines will yield, next to many of the above themes, references to discussions about citizenship on the electronic highway itself. These are mainly about the construction of the internet, or, to put it more elegantly, cyberspace as a political community and are concerned with issues such as internet identity cards or passports<sup>11</sup>, political leadership on the internet or digital political communities and digital civil movements. Although from a citizenship point of view this notion of citizenship on line would be a relevant and logical step, it is still too remote from reality to be considered seriously at this point in time. While it is true that deterritorialization has meant that national states have surrendered much of their jurisdiction and innumerable global economic networks and social linkages have developed, I am nevertheless assuming as the unit of analysis geographically delineated, national states. This means that I intend to confine myself to a



traditional definition of citizenship as national citizenship – i.e. as membership of a political community within the context of a national state.<sup>12</sup>

#### *4. Citizenship as a justification for information rights*

I am concerned, therefore, with the formulation of a new element of the classic idea of citizenship and with the development of a new group of rights which are able to be exercised by citizens against the state. Before arriving at a possible classification and design of these new civil rights, let me first clarify why we need them. What justifies the development of a separate series of information rights? The classic concept of citizenship, which is central to this question, features three basic elements, each of which can be traced back to one of the historic layers of the constitutional state previously distinguished by Marshall, namely: the citizen as subject, as citizen and as a member of society. These three elements of citizenship, confronted with the foregoing characteristics of the information society, show that we cannot always settle for the application of existing rights, but that new information rights must also be developed.

1. The citizen as *subject*: Information rights are first and foremost a pendant of the (information) obligations which citizens have as national subjects in the information society. This as underlying basis offers classic constitutional support for the recognition of information rights. Key to this is the principle of legality, in particular the requirements of legal certainty, lawfulness and cognizance. The considerable degree of turbulence and social variety in the information society is reflected in a considerable degree of turbulence and variety in the rules and regulations. Legislators are therefore faced with a tough dilemma. On the one hand, the classic requirement of legal *certainty* applies: legal subjects must be able to rely on the stability, definitiveness and the recognizability of rules and regulations. In a civil law country like The Netherlands it has always been held that the legality principle also calls for a formal definition of law. Legal certainty can be guaranteed only if tangible standards are laid down in, or can be reduced to, formal statutes. This requirement has been

formulated in the Netherlands with the greatest clarity by the vice-chairman of the Council of State, who, in his annual reports, year after year calls for less haste and greater meticulousness in legislation.

On the other hand, there is a pressing political and social need for *flexibility*. Social intercourse demands fast amendments to rules and regulations and preferably standards that are as far as possible not contingent on technology or are media neutral to avoid having to wait for years with each new application until the law has been changed. Even in civil law countries, therefore, general rules are increasingly taking the form of self-regulation, court law and private law guarantees. The question is whether the principle of legality always demands standards to be formally incorporated into public law. In an information society, the cognizance requirement is likely to be far more important than that of a statutory basis. Incorporating standards into the law is not absolutely necessary for legal certainty (after all, no one knows the law anyway). It is far more important that national subjects are informed in good time of their rights and duties.<sup>13</sup> Cognizance is therefore far more important than formal legality<sup>14</sup>.

The way out of the dilemma is therefore not the further refinement of and meticulous compliance with the procedures for formal legislation, as is constantly advocated, for example, by the Dutch Council of State. That solution places exclusive emphasis on 19th century forms of legal certainty, without due consideration of the fact that our society today lacks the relatively simple structure of the 19th-century early industrial society. Elsewhere, I have therefore proposed to replace the formal legal notion by that of a *virtual legal notion*.<sup>15</sup> No longer is it crucial to legal certainty that tangible standards be incorporated into formal law; instead, citizens are entitled to (electronic) information about their legal position. This means that citizens must swiftly and easily be able to gain insight into all relevant rules and regulations, policy rules, case law, standard regulations and other forms of self-regulation. Here again, the use of ICT can help to eliminate numerous physical, financial and intellectual barriers.

I have explicitly referred to a citizen's *right* to information towards the authorities. After all, what is wanted is not airy public information or mass education campaigns, but enforceable, adequate, specific and timely information. Information rights stemming from a virtual legal notion are not concerned with education or 'communication', but with a very elementary component of the legality

principle. To a far greater extent than is now the case will public institutions be expected to support individual subjects in determining their legal position, for example by actively providing in various forms information specifically tailored to specific categories or situations. Only if legal subjects are able to be offered the certainty that they will be informed on time and adequately of their rights and duties will it be possible to put the principle of formal legality into more perspective.

2. The citizen as *citoyen*: A traditional tenet on which classic, democratic citizenship is based is that of constitutionally guaranteed access to (public) information.<sup>16</sup> This applies in the first place to the public nature of the process of policymaking and legislation. The right to vote can only be exercised in a meaningful fashion when all deliberations and decision-making on the part of the legislative body are open and accessible. Over the course of time, this has been expanded to include the activities of the executive power. In most western countries, a high degree of open government is acknowledged to form an extremely important condition for the effective democratic control of government action. To date, however, effectuating this kind of open government has met with all kinds of practical problems and legal barriers put in its way by reluctant authorities.<sup>17</sup> Making public documents actually available to individual citizens or interest groups costs a great deal of time and money. Numerous papers must be gathered together, reproduced and sent. The digital information supply easily evades such problems by eliminating a number of these physical and financial barriers. Via hyperlinks and search engines citizens decide for themselves which information is deemed relevant, reproduction is virtually free, and sending and receiving can in principle take place at any time.<sup>18</sup> This could well deliver a huge boost to the process of democratic accountability and control.

This broadening of the democratic process is not confined, however, to the accountability phase, but extends to include policymaking itself. The digital era offers abundant possibilities for bringing the classic republican ideal of politics as a debate between well-informed citizens into the realm of reality.<sup>19</sup> Information rights can be a means to discharge the tension between experts and laymen inherent to the democratic state, as they can promote the further democratization of professional expertise. They can provide voters, interest groups, and democratic representatives with easy access to professional information, thus breaking the grip of the established policy advisors.

However, they are meaningful for other reasons as well. The turbulent, horizontal nature of the information society also entails that the public authorities have surrendered their knowledge monopoly. They generally lack the expertise to assess accurately the value of technological developments and their social consequences, leaning heavily on the contribution of other social actors in the preparation of policy. Moreover, unequivocal technical interpretations of these assessments are often not feasible, as they tend to depend on political assumptions and valuations. The political debate in the information society is therefore far more reflexive and narratable in character than in the industrial society, where the word of the public authorities and scientists was law.<sup>20</sup> The political debate is no longer restricted to results, conclusions and recommendations, but extends to assumptions, starting points and presuppositions. It is no coincidence that a permanent need for background information and reappraisal has arisen in debates about infrastructural projects, the expansion of the airports, biotechnology or the impact of disasters on health. The authority of public institutions and science is no longer self-evident. All this means that open government in the information society cannot remain limited to access by the public to official, definitive documents, but that data sets, models and background studies – even when unused – may also be relevant. These data, too, have become more accessible thanks to the process of digitalization. Hence information rights are not only important because they support the traditional process of democratic steering and accountability, but also because they can serve as a tool in helping to expand the reflexive nature of democracy. Not only will this enable policy intentions and policy results to be subjected to critical review; the often implicit starting points and assumptions on which these are based can also be examined.

3. The citizen as *member of society*: Information channels, information services and information products are crucial social and economic goods in an information society. This applies, not only to the relationship between the public authorities and citizens, but also between the citizens mutually. Those without access to information and information channels can generally wield very little political and administrative influence, in addition to running the risk of social exclusion, of losing ground on the labor market and of encountering hindrances in his or her personal development. Access to

information and to information channels may therefore justifiably be considered a ‘primary social good’, as John Rawls phrased it. Without such access citizens are rendered almost completely unable to make rational choices and to draw up a rational life plan.<sup>21</sup> At the same time, however, this access thus becomes a question of social justice, which means that the public authorities cannot continue to remain aloof if large groups of the population are structurally incapable of gaining access to these facilities. A much-heard phrase in that connection is that of the ‘digital divide’ that is threatening to split the information society. Recent studies have shown that the gap between the ‘information rich’ and the ‘information poor’ maybe widening in some advanced information societies.<sup>22</sup> On the wealthy side of the gap are the two-parent families, usually in the upper income bracket and particularly represented by white citizens in urban areas. They increasingly have access to computers and internet connections. This is far less the case for children from single-parent families, the rural population and blacks and Latinos. The digital divide therefore not only reflects existing socio-economic contrasts; it threatens to enhance them.

The social and liberal overtones of this justification for the right to information at the same time argues in favor of an actively supporting role of the government authorities in social and economic life. This can yield various kinds of individual or collective claims towards these authorities. In the first place, the public authorities are themselves extremely important producers of information – recall the many databanks and general registers under its administration. This information could be made available to all, either for a very minor charge or based on an income-linked system. In the second place, these authorities can guarantee universal access to general information *channels*. This yields no direct, individual claims towards the government but is an expression of collective responsibility. In the past, this reasoning was applied to regular telephone networks and other public utilities, such as public transportation, gas, electricity and water. As soon as ICT networks start to fulfil a crucial role in social intercourse, the access of citizens to these networks becomes an issue of public interest. This does not necessarily imply that the public authorities should be responsible for supplying this access itself, as it used to in the case of telephone networks, gas and electricity. It can also achieve such access by imposing price ceilings or connection obligations, by offering targeted subsidies, by instituting production funds or simply by creating favorable market conditions. The most

drastic situation is the one where the authorities enforce access to specific information (sources), even when held by private actors. This brings us to the horizontal effect of information rights —about which more, later.

### 5. *Information rights in triplicate*

Two conclusions may be provisionally drawn on the grounds of the foregoing. In the first place, information rights are concerned with much more than the description of open government set down in the current freedom of information legislation. The current rules on open government are for the most part mainly a question of *public hygiene*. This regulation is intended to increase the transparency of public administration, with a view to better democratic control and social accountability of government. By contrast, the information rights are most of all an element of *citizenship*. They concern first and foremost the social functioning of citizens, not only in relation to the public authorities, but also in their mutual relations and their relations with private legal entities. Information rights should be part of the civil rights chapter of constitutions, together with the other individual rights.

Secondly, there is no single information right, there are a number of different information rights, which are justified in part on other grounds and lead to different claims towards the government. Broadly speaking, from the perspective of the relationship between citizen and public authorities, three groups may be distinguished:

1. *Primary information rights*: These are rights giving citizens direct claims to access to actual (government) information.
2. *Secondary information rights*: These are the rights entitling citizens to government support in gaining access to crucial information channels. They are secondary because they confer no direct right to concrete information, but solely a right to access channels possibly conveying information.
3. *Tertiary information rights*: These are rights that support citizens in their horizontal information relations with other citizens and with private legal entities. They are tertiary because the role of the

government remains solely confined to establishing a framework within which citizens themselves fulfil their own information needs.

#### *6. Primary information rights: the right of access to government information*

The primary information rights are of the greatest interest from a constitutional perspective. They offer citizens a direct claim on the government for concrete information. They are moreover justified by each of the three grounds for justification distinguished in the above. They are, in the first place, an essential condition for the transformation of the principle of legality and for the ensuing transition from a formal to a more virtual notion of legal certainty. In the second place, they are hugely important to the further development of democracy in the information society. A right of access to innumerable public documents and policy papers not only strengthens the process of democratic accountability but also helps to promote the reflexiveness of the democratic debate. Finally, a broader accessibility to government information can encourage the social and economic participation of wider groups of citizens.

The legal aspects of this primary claim will work out differently per policy area and per type of information concerned, dependent on the degree to which these grounds for justification are present. For this reason, I have referred to information *rights*. The common denominator is, however, the fact that primary information rights are always concerned with a *right of access to public government information*. This general description contains a few key elements that demand further elaboration.

*Government information*: The first question immediately presenting itself is: what does government information comprise? In the first place, the information in question must be held by bodies and organizations that may be considered governmental.<sup>23</sup> Next, this information must be crucial for the social functioning of citizens. Obviously, not every random snippet of information needs to be saved and made available to the public. The three justification grounds set forth in the above can help to establish more specifically what this ‘crucial for the social functioning of citizens’ entails. From the

perspective of the constitutional state, this concerns all information that could be helpful to establish the legal position of the citizens. In the first instance, this comprises effective legal rules and regulations, convention texts, Orders in Council, Royal Decrees, policy rules, zoning plans, administrative decisions, case law, standard regulations, covenants and the explanatory notes to these. It moreover extends to the (public) drafts of the foregoing and to information about the preparations for administrative decisions. After all, it is crucial that citizens in social and economic life are able to gain a timely and adequate knowledge of their rights and duties, and possible changes occurring therein. This applies to an even greater extent where compulsion is concerned on the part of the government. Obviously, too, the registers managed by the government are included, such as the land register, the trade register, the cartel register, to name but a few. In a number of countries, such as the Scandinavian countries, the US, the UK, and The Netherlands, government information of this kind is already subject to general regulations on public access, such as Freedom of Information Acts, notification procedures, or specific regimes. As far as this is concerned, the novelty is not the nature of the information but mainly the way in which access is provided to this, and its legal character, about which more later.

From the perspective of the citizen as citizen, access to all relevant policy information is crucial. This encompasses in the first place policy documents, bills, explanatory statements, reports of hearings, recommendations of advisory bodies, research reports, official reports and lists of decrees. Here again, all these are often already publicly available – albeit in many cases not in a generally accessible manner. New in this respect is the fact that background information, such as exploratory studies, official recommendations, statistical data, mathematical models and data sets, should also be made accessible. After all, they provide insight into the assumptions and presuppositions underlying the policy elected. In addition, it is important for democratic decision-making and accountability to have a knowledge of the policy alternatives, whether tabled or not.

Crucial for citizens as members of society is the easy availability of access to government information that can assist in bolstering their socio-economic position. Such information includes, for example, public registers, datasets and statistics, archives and the like.



*Public:* Obviously, the right of access to government information is not absolute. There are interests that can take precedence over the three grounds for justification stated in the above. For this reason, primary information rights extend in principle only to public information. However, this means very little in itself. What is crucial is who determines what public information is and what is not and by what standards. This cannot be left to the discretion of the public organization itself, as this would lead to the actual operation of this constitutional right being determined by the agency whose power it is meant to curtail. Hence the authority to regulate what information is public and what is not should be vested in the legislator, thereby operating on the premise that all government information should in principle be public, unless weighty and specific interests should dictate otherwise. Rights to privacy will be among these interests. Citizens and companies must, for example, be able to rely on the fact that private information or corporate secrets required to be reported to the government do not become public. The government itself also has a number of legitimate interests that are not compatible with full or with immediate public disclosure.<sup>24</sup> Most of the standard Freedom of Information exemptions do apply here, such as national security, diplomatic interests, the unhindered investigation of offences, and financial interests (for example the premature disclosure of price-sensitive information or monetary measures).

*Access:* The most important question is what 'access' means in this connection. At least three different aspects are concerned. In the first place, a *physical* aspect: a right to access to government information entails that this information be at least physically accessible. It must be possible to look up and to read this information directly. (In the light of the ongoing dematerialization it is not necessary to literally be able to touch or hold this, merely that this information be directly able to be consulted). This physical accessibility can be implemented in a stodgily limited, passive manner, as demonstrated time and again in practice by many Freedom of Information Acts: information is provided only on explicit request and often after prolonged legal procedures, or is confined to making the relevant documents available for public inspection at a public library or city hall. This information right can, however, be given a more active interpretation, by providing citizens directly and voluntarily with information.

Even more far-reaching is the option in which information is supplied proactively by the government directly to specific groups, sometimes even without a specific request.

Secondly, the *financial* aspect: a right to have access to information implies that the costs of this should not bar large groups from such access. As yet, this is a problem that remains to be overcome. Much government information is public, but only available at a steep price to individual citizens. Anyone currently desiring to consult the Dutch legislation or case law via his or her personal computer must first order a CD-ROM from commercial publishers costing several thousand guilders.

Finally, the *intellectual* aspect: the information provided must be well-organized and comprehensible. Here, again, there is a wide bandwidth in level of accessibility. At the minimum level, raw, unprocessed information is made available at remote corners of the web. By including references, hyperlinks, and search engines better attempts to fulfil the information requirements of citizens can be made. A major step forward, compared to present day freedom of information practices, would be the provision of digests or summaries in common language of the information that could be found at various sites, or the use of expert systems that guide citizens to and through the information on the basis of everyday, non-professional terms and issues.

Hitherto, the government has been somewhat reticent in fulfilling its various disclosure and notification obligations. Generally, passive disclosure is opted for and confined to publication or announcement in the Bulletin of Acts, Orders and Decrees or in the National Gazette together with displaying the unprocessed documents for public perusal at a public library or city hall. Whoever wishes to learn more or to keep abreast of developments must regularly visit either the library or city hall, or order their own copy from the commercial publishers, or take out a subscription for a variety of loose-leaf publications or expensive CD Roms. The rapid development of ICT has since eliminated many of the practical and financial barriers to a more active fulfillment of the primary information rights. Nearly all relevant legislation and regulations, case law and policy documentation are available in digital form, due to their having been drafted with the help of word processing software. All these documents and data can be made directly available via the internet without any loss of quality. Citizens can make use of this from their home and there are no printing, copying or mailing expenses attaching. It is moreover possible to make numerous references to other relevant sources of

information at reasonable cost. In addition, information profiles may be compiled and customized information provided that is specifically tailored to citizens or groups of citizens about their legal position.

Should, however, the government always do what it can? Should it guarantee the widest possible access, physically, financially, and intellectually, within the boundaries of privacy and national interest set down in the above? Again, the basic issue is whether the nature of the information in question is crucial to the social functioning of citizens. The more affirmative the answer to this question, the more active a stance will the government have to assume. This is most clearly the case with regard to rules and regulations. Now that the use of soft law, such as self-regulation, judicial law and policy regulations continues to gain ground, with formal law offering increasingly less support, it is becoming more and more important that the government provide specific information to citizens and commercial enterprises about their legal position. All relevant regulations relating to a particular area of the law should be made available, complete with explanatory notes, and regularly updated. It could do so, for example, by:

- Creating legislation and case law sites that can be accessed free of charge;
- Electronic subscriptions to regulation and case law information.

However, in the field of policy information, too, the electronically connected government could anticipate, far more than is now the case, the citizens' demand for information. Beers rightly noted that administrative bodies, when designing their data processing systems, should be expected to take the accessibility thereof to citizens into account. Swedish legislators have already incorporated this requirement into the laws on public access.<sup>25</sup> More concretely, this could imply the following:

- Standard procedures for the automatic electronic availability of public documents;
- Regular maintenance and management of digital archives;
- Digital anticipation by creating keyword registers and hyperlinks when preparing documents;
- Authorization systems (is this indeed government information?) and authenticity guarantees (is the information up to date?)

When drafting these standard procedures, designing these digital archives and creating these registers, hyperlinks and guarantees, it is extremely important to proceed on the basis of the citizens' need for information, and not to be guided solely by the internal logic of the policy process or the administrative procedures.

This may sound more expensive than it need be. Most of these provisions will be the automatic byproducts of the ordinary electronic handling of legislative or executive actions. Digital archives, keywords, hyperlinks, and guarantees will be a regular part of the digital administrative process. Obviously, costs may play a role in determining the degree of accessibility. Purely on the basis of pragmatic, financial reasons, for example, citizens have no corresponding right to receive hard copies of all information provided electronically, free of charge. Were that to be the case, there would be considerable risk of this primary information right failing to work out in practice. Printing and delivering is much more expensive than web-posting or sending attachments via e-mail. As regards the primary information right discussed above, what is possible *on line* does not automatically mean that this should also be implemented *off line*. On the contrary, in this respect the on line obligations of government are in fact much more stringent than its off line obligations.

And finally, how proactive should the government be? Should it be bothering citizens with all this government information? What about the risk of information overload, of over-sated citizens, who are unable to see the forest for the trees? This is not a major issue here. After all, information *rights*, not information *duties* are under discussion. Citizens have the right to free electronic access to all legislation and regulations, case law, conventions, official reports and all the other policy information referred to in the foregoing, but are certainly under no obligation actually to take advantage of this.

Whoever does not wish to access certain information is not required to do so. Electronic information supplied via the internet allows citizens to decide for themselves whether or not to make use of their access to this information. No unasked for, unwanted stacks of printed matter in the mailbox, or pushy public information messages on the TV or radio. Far easier is it to decide simply not to connect. The point is that the information is available in a conveniently simple manner – in physical, financial and intellectual respects – to those citizens who need it. This may very well imply a

duty on the government to provide for digests and summaries that are easily accessible, but not a corresponding duty for citizens to actually access and read them.

In exceptional cases, where information is concerned that is extremely crucial for the social functioning of citizens, the government may well have a pro-active, initiating obligation to ensure that this information is furnished to all relevant citizens, such as in the case of printed or electronic notifications to the parties interested in an application for a building or demolition permit, permits under the Nuisance Act, and amendments to zoning plans, or to inform tax subjects or persons entitled to a benefit of any changes occurring in their legal position.

### *7 Secondary information rights: the right to support in gaining access to information channels*

A general right to electronic access to government information is merely a first step towards enabling citizens to find their way around in the information society. It constitutes – in the most literal sense of the word – a right only on paper if too many citizens lack the actual connections needed to access this information. The risk is considerable that, just as was the case with regard to the civil liberties in the 19th century, the well-to-do bourgeoisie alone will have the knowledge and resources to take maximum advantage of this information right. The first reports on the emergence of a digital divide may be regarded as the writing on the wall. Moreover, in the modern information society, the government is by no means the sole, or often even the dominant producer of information that is relevant to the social functioning of citizens. Numerous other forms and sources of information have become at least as important. A right of access to (government) information is consequently only a limited means to achieve a socially just distribution of information. Ensuring electronic accessibility to (government) information amounts to very little if large groups of the population lack all access to computers, cable connections and internet facilities. From a socio-liberal point of view on citizenship, therefore, it is an issue of social justice that the government also support citizens in gaining access to crucial societal information channels. A secondary information right of this kind contains a few elements that merit further explanation:

*Support in gaining access:* Here again, the question that arises is that of what should be understood by access. Just as in the case of the primary right, a distinction can be made between physical, financial and intellectual support. *Physical* support is, above all, the government's concern in ensuring that the information channels can function unimpeded. There is, after all, no squeezing blood from a stone. It is vital, therefore, that the continuity and integrity of crucial information channels be guaranteed. Furthermore, the government may also concern itself with a broader physical availability in a geographical sense: is the level of access sufficient throughout the entire country, from the affluent suburbs to the rural areas? The main concern from the *financial* perspective is ensuring that this access is affordable, not only for the double income, dual career residents of the Amsterdam canal district, but also for the widow from Appelscha – in the Dutch telecom world the proverbial example of the socially underprivileged. Traditionally, telephone access has been characterized by a universal service regime that imposes physical and financial obligations and limitations on network managers and service providers. However, there is also an *intellectual* aspect to this access. Citizens must possess the skills needed to make use of these channels. This is, on the one hand, a question of general literacy, basic education and computer training, on the other hand one of user friendliness and operating ease. Regarding the first, several countries have tentatively commenced to make financial grants to schools for purchasing facilities to teach ICT and other information skills to students.

The foregoing reveals that the type and degree of support provided by the government can differ strongly, depending on the importance of the information channel and the nature of the situation. The government is unlikely itself to provide this access, contrary to its ventures in the past into the postal and telephone business. The majority of ICT markets have been liberalized and compete ferociously amongst themselves, as a result of which areas such as mobile telephone networks and the internet have grown into fiercely competitive issues with regard to the physical, financial and intellectual accessibility. To date, this has led to the rapid realization of national coverage, plummeting user's costs and increased user friendliness. Dynamic competition also occurs. In that case, not only do the various firms compete against each other, competition also arises between technologies and industrial branches, which causes the options open to consumers to increase strongly.<sup>26</sup> A good

example is the rise of GSM networks and mobile telephones. They have made telephone communication so inexpensive and so convenient that a universal service regime for the regular network remains barely necessary. The widow from Appelscha is better off with a GSM cell phone, than by being connected to the fixed network. In such circumstances, the role of the government can generally be confined to that of a market manager. Its main task is to allow the market to function as well as possible and to oversee issues relating to joining, interconnections, innovation and fair competition. The situation will change completely in the face of a shortage – whether or where this could actually happen is an empirical question falling outside the theoretical bounds of this paper.

*Information channels:* on which information channels should the government focus? Fixed telephone networks, newspapers, broadcasting networks, mobile telephone networks, the internet, cable connections? The turbulence in technological development and social application make it well nigh impossible to forecast and determine which channels will be the preferred channels. The criterion to be applied should therefore once again be that the information channel is crucial for the social functioning of citizens. Until recently, such channels included, for example, fixed telephone networks, the postal system, newspapers, and the broadcasting networks. Even now, in many countries each of these channels is subject to a separate legal regime, complete with special limitations, price caps, subsidy regulations or public facilities. Their social role, however, has already partially been replaced by mobile telephone networks, e-mail and the internet; and new channels are lurking on the horizon. It should therefore be up to the legislator and to the executive power, as a policymaker, to determine which information channels are both vital and scarce enough to warrant some form of government support for citizens to gain access.

#### *8. Tertiary information rights: horizontally operating rights*

This paper has maintained a classic perspective on constitutional rights, viewing these namely as the rights of citizens towards their state. This is a relatively anachronistic notion of citizenship. Does it

still make sense to regard national authorities as central actors? As we saw in the above, the (constitutional) power of the national states is decreasing sharply due to deterritorialization. Obviously, this can be dealt with by changing the unit of analysis and by thinking and speaking in terms of European or global citizenship, instead of national citizenship.<sup>27</sup> A far more complicated issue from the citizenship point of view of constitutional rights is the trend towards horizontalization, i.e. the fact that much of the power exercised in society is no longer concentrated in the government. The government has become one of the many players in the political game. The activities of publishing groups, media magnates, software companies, cable operators, insurance companies, broadcasting networks, researchers, consultants and interest groups often have a far greater impact on the organization of the public domain. Should these primary and secondary information rights therefore also not apply towards private organizations as well?

This brings us to the horizontal operation of the information rights. This is currently still very weak: in The Netherlands the competition law only would appear to offer some legal ground for a horizontal right to information.<sup>28</sup> In fact, all three justification grounds are arguments in favor of strengthening this horizontal effect. The horizontal operation of information rights is in the first place an important condition for the democratic process to thrive and prosper. When politics moves aside to make place for the private legal entities that will increasingly shape and determine the public domain, democratic accountability must also shift. Social organizations will no longer be able to hide behind an Annual Accounts Act and be compelled to render a far broader social account. This is particularly the case where self-regulation impacts on third parties – which it often does. In such cases, the horizontal operation of these rights is also necessary because of the virtual notion of law, because here too public access is an important prerequisite for cognizance and legal certainty. Private organizations will at times also be required to allow their information sources to be made public, for example if that information is crucial to the democratic debate. Examples include a horizontal right to access to scientific sources, studies, recommendations and archives.

Much can be said in favor of such horizontal information relations from the perspective of social justice. If information products are considered to be primary social goods, the fact that they are in the hands of private parties need offer no obstacle to a policy of redistribution. This could imply, for



example, that private parties may not claim an exclusive right of access to news items, art collections, cultural manifestations, national events or even sports, and that these should remain reasonably accessible to each and every citizen.<sup>29</sup>

It is conceivable even that in the future these horizontal rights will, in an empirical sense, form the primary information rights of citizens. I have classified these here as tertiary rights only because they are tertiary *towards the government*. They offer no direct right to government information, or to tangible support by the government. Citizens must gain access on the strength of their own efforts. On the other hand, they do demand from the government a framework making horizontal rights possible. This means, for example, the drafting of a legal regulation laying down the information rights of citizens and the information obligations of private organizations, providing for the possibility of appealing to the (civil) court or the judicial authorities.

#### 9. *Classic or social rights?*

An important general question concerns the legal nature of these information rights. Are legal proceedings an option if these information rights are felt to have been breached? Are they guarantee or instruction standards, is the government expected to deliver concrete results or is it merely required to make an effort? These questions once again rake up the old issue of the distinction between classic and social constitutional rights. How should the new information rights be classified? Vlemminx has convincingly demonstrated, that a strictly drawn distinction between classic and social rights, between guarantee and instruction standards is both outdated and unfruitful.<sup>30</sup> All constitutional rights entail some degree of legal obligation on the part of the government and therefore always represent a guarantee to some extent. His proposal is to use the degree of policy freedom available to the government in defining a constitutional right as a touchstone. The greater the policy freedom, the less of a guarantee this forms and the more it resembles a social constitutional right. Thus, one can distinguish four types of obligations that can stem from constitutional rights<sup>31</sup>:

1. An obligation to respect: the government must respect the freedoms of the citizens and refrain from violating these.
2. An obligation to ensure: the government shall actively work to give direct and concrete substance to the rights of citizens.
3. An obligation to promote: the government has an obligation to foster the realization of these rights, for example by means of long-term policy programs.
4. An obligation to protect: the government must protect citizens against unlawful violations of their constitutional rights by other citizens.

Except for the first obligation, these concern in each case an obligation on the part of the government to perform. However, the degree of policy freedom differs strongly, and therefore the possibility of enforcing compliance at law varies as well. The government has only limited policy freedom in the case of obligations to respect and obligations to ensure, and a review by the court should certainly not be ruled out in the light of the possible impact on the content of the constitution. The cut-off is between obligation two and three. Obligations to promote tend to involve extended processes in which the authorities are largely free in defining its policy, dependent on the situation and the available resources. A direct appeal to the court is, generally speaking, not possible as the constitution offers very little on which to proceed. The protection obligations, too, tend to be legislative tasks rather than concrete claims towards the government.

This typology allows more to be said about the legal nature of the various information rights that I have expounded on here. The primary information right mainly imposes an obligation to ensure on the government. The government must be able to guarantee to citizens that they will have access to concrete information. It has, it should be noted, only a limited freedom to draft policy. This right can be made sufficiently concrete for compliance therewith to be reviewed by the court. In that respect it is similar to the right to vote, the right of petition and the right to legal aid.

The secondary information right mainly imposes obligations to promote on the government. It must ensure that citizens have sufficient access to socially relevant information channels. This is a general, long-term policy obligation in which the government has a great deal of freedom in determining how to fulfil this promotion obligation. This secondary information right will generally

not be concrete enough to yield direct claims in court. It is in any case an incentive for the legislative to draft more specific regulations that in turn are able to lead to concrete claims that can be reviewed in court. In this respect this secondary information right is comparable to (components of) the right to education and the right to employment.

Finally, the tertiary information right primarily imposes an obligation to protect on the government. The government must take measures to ensure that the primary and secondary information rights are upheld in the mutual relations between citizens. This yields in the first instance no direct claims of citizens towards the government. It mainly operates to task the legislator to create a framework for such horizontal relations. As soon as this framework is in place, however, it is very well possible for concrete obligations for government bodies to ensue from this – e.g. for the justice authorities or the judiciary, to protect citizens in the course of their mutual dealings with one another. In that respect it resembles the principle of equality, the right to privacy or the right to the free choice of work.<sup>32</sup>

#### *10. Constitutional embedding*

Each of the three groups of rights distinguished by Marshall was ultimately embodied in constitutions or citizen charters. Should that also be the case for the information rights discussed here? This is first and foremost an issue that comes within the scope of (constitutional) legal theory: are these rights of such fundamental nature that they merit a place in the Constitution? If too many rights are admitted to the constitutional Olympus, its divine status will become tarnished. One of the outspoken critics of the constitutionalization of political and social rights has been Maurice Cranston.<sup>33</sup> His critique can be transformed into a test for the ballotage of new constitutional rights. In the first place, these must be rights that are able to be translated into concrete positive rights (which implicitly disqualifies the majority of social rights). Moreover, the candidate right should have a universal character and not be linked to a particular social or economic status, such as, for example, employee status. In the third place, either fundamental freedoms or primary social goods should be concerned. This Cranston-test

for constitutional rights is inherently conservative and a considerable number of the rights long recognized in the Dutch Constitution would probably not make the grade. I am nevertheless of the opinion that the information rights described here would stand quite a good chance. This is particularly so as regards the primary information right. As we saw in the above, the primary information right translates readily into concrete positive rights that can be directly enforced in court. This holds to a lesser extent for secondary and tertiary rights, as these operate indirectly. On the other hand, all the information rights discussed are universal in nature. They can be accorded to each citizen, whatever his or her social or legal position, or even to everyone actually or virtually on a national territory. I have further endeavored to demonstrate that in an information society, access to (government) information and to societal information channels can be crucial to the legal, political and social position of citizens.

My answer to this basic legal theoretical question is therefore obviously in the affirmative. Recognition of information rights is an important constitutional innovation that can help to render the constitutional state an appropriate accommodation for the information society. Such embedment is particularly important in European constitutions, the light of the shift of political power in Europe from national political arenas to the European Union. The European administration is currently characterized by a strong, almost nineteenth century closeness.<sup>34</sup> The information rights discussed in the foregoing represent a major step forward compared to current and proposed European legislative and administrative practice.<sup>35</sup>

I therefore am closing with a final, legislative question: what should such a new, constitutional right to information look like? In The Netherlands the Commission on Constitutional Rights in the Digital Era, following the line of reasoning of an earlier version of this paper, proposed the following amendment to the first chapter of the Dutch constitution:

1. Everyone has a right of access to information held by the government. This right can be restricted by or under law.
2. Government shall attend to the accessibility of information held by the government.<sup>36</sup>

This constitutional amendment encompasses only the primary information right. It affords citizens a general claim on access to information held by public bodies and organizations. It is subsequently at the discretion of the legislative to establish which absolute or relative exceptions to this could possibly be made. The legislative can also more closely specify the physical, financial and intellectual requirements to be demanded on such (electronic) accessibility. To this end, the commission has also proposed that the existing freedom of information act should be transformed into a much more general act on public information. This general act on public information may be the vehicle for the development of the secondary and some of the tertiary information rights which have been described here.<sup>37</sup>

The contours of a broad range of information rights with a constitutional grounding are thus slowly becoming discernible. Their further development can help to ensure that the information society does not become a society in which access to information is a privilege reserved for a particular social class. In this way, the citizenship ideal envisaged by Marshall retains its vitality into the 21st century.

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## NOTES

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<sup>2</sup> Bottomore & Marshall 1950/1992.

<sup>3</sup> The author has been a member of this commission. The views expressed in this paper are his own and do not represent the opinions of the other commissioners. However, as will be explained in the final section, the commission has endorsed most of the arguments of this paper.

<sup>4</sup> See for sociological discussions Castells 1996; 1997, for legal discussions Lessig 1996, for philosophical discussions Graham 1999, and for political discussions Bellamy and Taylor 1998.

<sup>5</sup> Castells 1996, p. 21, n33.

<sup>6</sup> These are basically the symbolic analysts of Robert Reich 1991. These are taken by him to comprise the sectors and professional groups engaging in the production, processing and manipulation of words, images, emotions and symbols, such as lawyers, consultants, advertising specialists, publishers, software designers and the entertainment industry.

<sup>7</sup> Van Gunsteren 1998.

<sup>8</sup> Castells 1996, p. 469.

<sup>9</sup> See among others Beeson 1996; Bennett & Grant 1998; Raab & Bennett 1998; and the papers collected by Liberty 1999.

<sup>10</sup> See Boyle 1996, 1997; Lessig 1999.

<sup>11</sup> See Miller 1997.

<sup>12</sup> See for various other contemporary citizenship issues Van Gunsteren 1998.

<sup>13</sup> Scheltema 1996, p. 1358.

<sup>14</sup> This obviously does depend on the area of law concerned. The principle of legality is put more easily into perspective in the field of (economic) administrative law compared to criminal law.

<sup>15</sup> Bovens 1999, p. 19.

<sup>16</sup> See Curtin & Meijers 1995, p. 77-78.

<sup>17</sup> Ecclestone 1999; Curtin & Meijers 2000.

<sup>18</sup> See for example the following web sites: [www.opengov.uk](http://www.opengov.uk); [www.firstgov.gov](http://www.firstgov.gov); [www.overheid.nl](http://www.overheid.nl).

<sup>19</sup> Pocock 1975; Van Gunsteren 1998.

<sup>20</sup> See Beck, Giddens & Lash 1994; Beck, Hajer & Kesselring 1999.

<sup>21</sup> Van den Hoven 1994, p.369.

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<sup>22</sup> US Department of Commerce 1999. Studies in The Netherlands indicate that the digital divide may only be a temporary phenomenon (SCP 1999).

<sup>23</sup> For the sake of convenience I have refrained from discussing which bodies and organizations may be so considered, as I am well aware that the many privatization and quangocratization operations make it difficult in practice to answer this question.

<sup>24</sup> The quality of decision-making, for example, may become seriously impaired if all internal deliberations are presented in such a way that these are easily traceable to the separate individuals involved (cf. McLaughlin & Riesman 1986).

<sup>25</sup> Beers 1998, p. 303-304.

<sup>26</sup> Dyson & Gilder 1994, p.5.

<sup>27</sup> This yields sufficient analytical problems in itself, see Curtin 1997.

<sup>28</sup> Hugenholtz 1998, p. 256.

<sup>29</sup> Hugenholtz 1998, p. 257.

<sup>30</sup> See Vlemminx 1998; Vlemminx & Kummeling 1995.

<sup>31</sup> Based on Van Hoof 1984; Vlemminx 1998, p 24-31; Vlemminx & Kummeling 1995:78.

<sup>32</sup> The system used by Van Hoof and Vlemminx invokes the question of whether there are also information rights belonging to the first category, i.e. rights imposing abstention obligations on the government. Such rights do indeed exist: the freedom to receive, to collect or to pass on. As these classic civil liberties are more or less laid down in, for example, art. 10 of the ECHR, they are not discussed separately in this paper – they mainly come under the heading “civil rights on line” from paragraph 3.

<sup>33</sup> Cranston 1967. See for a more general discussion of this issue Wellman 1999.

<sup>34</sup> Curtin & Meijers 1995.

<sup>35</sup> Curtin 2000.

<sup>36</sup> Commissie Grondrechten in het digitale tijdperk 2000.

<sup>37</sup> A secondary information right could be formulated as follows: ‘Government has a duty to ensure that everyone has equal access to social information channels’. It expresses the enormous importance of access to information channels without imposing an explicit obligation on the government itself to realize this access. In due course, the Constitution may explicitly provide tertiary rights too. This, however, demands a broader discussion of the position of the horizontal relations issue in the Constitution than can be given within the scope of this paper.