

Access to Public Sector Information: In Need for Constitutional Recognition?

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Introduction

This contribution focuses on the role of the law and, in more specific terms, the role of the constitution in modelling access to public sector information in our virtual society. The question immediately posed is whether the constitution actually plays a role in setting a legal framework for access to public sector information. What are the present dilemma's regarding access to public sector in an information society and do they justify a provision at the constitutional level? The answer to this question highly depends on the role of a constitution in an information society and more in general the role of the constitution under the countries legal tradition. The primary aim of this contribution is to develop a vision on the role of the constitution when rectifying the present deficiency regarding access to public sector information. By way of an example, I have chosen the Dutch perspective. Thus, at various instances in this paper I will show how the Dutch government thinks about, and shapes, the constitutional status of access to public sector information. Of course, other countries as well may have dwelled upon the position of the constitution in light of the information society. Hence, I will start off in the subsequent paragraph, with a brief look at the legal status of access to public sector information in various countries.

A Cross-Border Glance at the Legal Status of Access to Public Sector Information

Various countries have thus far recognised in their legislation free access of citizens and businesses to official documents and other public sector information. When considering the present position of several countries, we note that some have explicitly recognised a constitutional right to access to public sector information, whereas other countries have included these provisions in a lower legislative level. Some countries, however, have not expressly recognised a right to access in their legislation.

Of the countries that have chosen to address access to public sector information in the Constitution, Sweden is the one with the most elaborate provision. Sweden recognizes in its Freedom of the Press Act a rather broad constitutional right to official documents, with detailed provisions on the scope of this right (Seipel, 1998). Belgium is another example in this row (Vande Lanotte, 1997). However, the provision included in the Belgium Constitution is far less detailed than the provision in Sweden.

Among the countries that recognise access to public sector information in their legislation, but not at the level of the Constitution are France, Canada and the United States. The US included the relevant provisions in the Freedom of Information Act (part of the Public Administration Act). In 1996, the Freedom of Information Act was amended in light of electronic information. The new rules are laid down in the

Electronic Freedom of Information Act Amendments. In Canada, article 2 of the Access to Information Act provides a right of access to information in records under the control of a government institution. Case law shows that, in case of doubt, this provision is often interpreted in favour of the requesting person ([1984], 1 F.C. 939 (T.D.); [1987], 1 F.C. 610 (T.D.)).

Germany has no legislation on access to public sector information, at least at a federal level. However, the German rules on freedom of expression specifically mention the right to get access to information from sources available to the public. At the level of the various Landern the right to access is recognised. The Constitution of Brandenburg, for example, stipulates: “Jeder hat nach Maßgabe des Gesetzes das Recht auf Einsicht in Akten und sonstige Unterlagen der Behörden und Verwaltungseinrichtungen des Landes und der Kommunen, soweit nicht überwiegende öffentliche und private Interessen gegenüberstellen.” (Giessen, 1997).

As known, in discussing and analysing topic related to the information society, one has to take into account the strong internationalising effects of ICT. Various ICT-applications are pre-eminently a cross-border affair. Thus, governments, in making ICT law, must emphatically take into account the international context in which the object of the regulation will have to thrive. What is more, in certain situations, ICT law should not be shaped primarily within the national context, but within the international context. This would imply that in discussing the constitutional status of access to public sector information, a paper like this should no longer focus on the national perspective. The opposite is in fact the case. Up to now, governments, in truly answering concrete ICT law questions, have not often taken the aspect of internationalisation into account. Often, the problem was already sufficiently hard to solve in the national context of the national law, meaning that little room was left for developing ideas about the international dimension of the problem. For many issues in the area of ICT law, this has, up to now, resulted in the primary focus of attention being on the national context. This situation is not altogether strange, since often the specifics of the regulation are determined by national legislative traditions as well as the specific developments and circumstances of a country. This also applies to issues at a constitutional level. For example, various constitutional provisions contain more or less detailed provisions on the scope of certain rights and obligations. These exceptions are often determined by the tradition and other specific situations in a certain country. Thus, in analysing whether or not the issue of access to public sector information is to be addressed at a constitutional level, the focus should first be on the national perspective. Nevertheless, this does not mean that no glance should be given to developments in other countries. In the remaining paragraphs to focus is on the Dutch perspective.

In 2001, the Dutch Cabinet presented four legislative proposals to Parliament to amend the Constitution to the digital era. One of these proposals deals with access to public sector information <<http://www.minaz.nl/data/998061487.pdf>>. Before discussing this proposal, I will first analyse the possible reasons for addressing the issue of access to public sector information at a constitutional level.

The Information Society: New Needs to Address Information-Related Issues

Our ICT dominated society is not referred to as an information society without good reason: information, data and knowledge constitute the driving forces behind a great many processes in our society. The central issue is who has disposal over what and, for which purposes. Focal concepts in this respect are the exclusivity of certain information and the rights to that information on the one hand and, free access and free distribution of information on the other. Looking at the area of intellectual property relationships, we note that a tendency towards more curtailment of the statutory restrictions on exclusive copyrights is placing increasing pressure on the freedom of information. An additional factor is that information only seems to acquire real value when it is released as a result of special processes, such as data-mining techniques. In a knowledge economy in which everyone can gain access to raw data (which is freely available via the public domain), the economic relevant component is precisely the processed data.

The dilemmas concerning the availability of information concern its character: information is, after all, a factor in our society which on the one hand, as an individual, economic and intellectual value, demands protection. However, on the other hand, free access and free dissemination of information is crucial in light of the values of our democratic constitutional state.

The dilemmas concerning power over information are evident in the field of media (pluriformity), intellectual property law, communication secrecy and freedom of communication, (criminal) investigations and privacy. They are also obvious in the area of access to public sector information because the demand for information is the binding factor in the case of a great many issues relating to a democratic constitutional state. After all, in a society in which the collection, storage and processing of information and the decisions based upon this information is becoming more and more of a central issue, access issues are, by definition, becoming more and more relevant. Hence, for the public sector, disposal of information usually translates into power.

In addition, we note other changes that ICT causes. ICT strengthens the tendency in our society towards privatisation and horizontalisation. Information gathering, processing and distributing are increasingly dominated by the private sector.

The Role of a Constitution in an Information Society

From the above it becomes clear to consider adequate legal guarantees concerning the access to information and, in particular to government information. We must then ask ourselves whether this necessity is big enough to warrant a provision at a constitutional level. Four arguments can be presented in favor of such a provision:

- The rapidly changing information society brings about changes which affect and influence the democratic constitutional state. Provision of digital information on the government can strengthen the traditional instruments of democratic control and result in the revitalisation of the democratic process;
- The application of electronic information services, especially when it concerns the government providing active dissemination of information and the further diffusion of law and legislation and parliamentary documents – offers a possibility to provide

a more efficient way of providing principles of legality and especially the demand of acknowledgement, legal certainty and equality of law;

- The increasing interest for information services and products has led to making the citizen more dependent on information channels and information brokers. Exclusion from obtaining information can lead to the prolongation of social-economic deprivation and to new types of social marginalisation;
- Access to information regarding the government has become essential for the political, legal and social position of citizens. The government should therefore guarantee that conditions enable the full participation of citizens.

Despite these arguments it is of course crucial to determine whether possible regulations regarding the access to government information are rightly incorporated in the constitution considering the nature of the constitution. In other words, does a provision directly linked to highly dynamic developments in the information society belong in the special type of legal document as is our constitution? To answer this question, the first thing is to determine what the purpose of the constitution exactly is. The purpose will be different for each country. In some countries the constitution is very traditionalist and new rights and obligations are only incorporated when the developments have become fully clear. There has to be, as it were, a constitutional maturity. In other countries the constitution is more like a guideline and has a progressive and exemplary function.

Defining a Constitutional Right to Access in the Information Society

If a constitutional status is chosen to access government information, then obviously a number of issues arise. The first is whether citizens can and should directly access this information? What exactly does the term access mean? It does not seem unreasonable for the government to want to make some assessments before certain information is made available to citizens. After all, the government is in a position to consider whether or not information can be disclosed especially when, for example, it concerns certain confidential business information.

Another point is whether the government has a duty to provide (electronic) access. To what extent is the government obliged to make government information freely available to the public? To my opinion such a duty concerns in any case the provision of so-called basic data of a democratic constitutional state which includes legislative texts, judicial decisions and documents pertaining to public authorities.

In addition, we face the question of how the term 'government' should be defined. The same question concerning definition also applies to the term 'documents pertaining to public authorities'.

Finally, there is a question of whether the public bodies are actually prepared in day-to-day practice to implement the provision and thus to face the important implications of the proposal. Government authorities are often reluctant to the progressive policy towards the openness which is imposed on them. But also the constitutional obligation towards openness will have a number of consequences for the organisation government information provision.

Restricted to Public Sector Information?

Naturally, we should ask ourselves whether the fundamental right to the access of information should be restricted to the government. The horizontal effect of openness, in other words the claim for common interest information from individuals and private enterprises is also becoming increasingly important. As mentioned one of the four arguments mentioned above was that the increasing interest for information services and products has led to citizens becoming more dependent on information channels and information brokers. To deny access to such information can lead to the perpetuation of social and economic deprivation and to new types of social marginalization. This applies to both the public and private sector. One can state that citizens in general have the right to obtain information concerning themselves which is otherwise accessible to third parties. This also includes information available in the private sector. It is indeed this right which can lead to the right to informational self-determination.

The Dutch Legislative Proposal

With all these considerations in mind, we can finally turn to the recent proposal of the Dutch government to address the issue of access to public sector information at a constitutional level. As mentioned above, the cabinet approved summer 2001 a proposal to amend the Constitution along the following lines:

1. Everyone has the right to access information available from the government. This right can be restricted by law;
2. The government will be responsible for the accessibility to government information.

The first paragraph of the proposed constitutional rule stipulates the entitlement to information. This can be restricted by either formal law or a delegated regulation. The term “access” assumes that when a request for information is submitted a positive response is to be given by the authorities. The government must always be in a position to be able to consider whether information is to be withheld. The second paragraph is formulated as a duty of care to provide information. This obliges the government to provide access of its own accord to information available from the government. This obligation covers information considered vital for the functioning of citizens. The Dutch cabinet considers this in particular to be the so-called basic information relevant for the functioning of the democratic rule of law, which includes regulations, judicial decisions and information held by the representative authorities.

What is understood as “authority” in the proposal? According to the Dutch cabinet this means all authorities under Article 1:1, paragraph 1, General Administrative Law Act. This concerns not only administrative bodies at government level but also the States General, the judicial power, the Council of State, the National Ombudsman, etc. It also includes the decentralized bodies and legal persons governing the public entities. The term therefore covers more than the present Dutch law on openness of the government (Wet openbaarheid van bestuur), which merely covers ‘administrative bodies’. The term ‘information available from the government’ includes all kinds of information, including information available from other persons or bodies, but specifically meant for

the relevant government authorities and falling under the responsibility of the government authority. For example, this would include among others research reports commissioned by the government. "Information", covers not only written documents, but electronic information and verbal agreements as well.

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