PUBLIC AND PRIVATE INFORMATION: THE ACCESS DICHOTOMY

by

KATRINA ROBERTSON KELLY

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Department of LAW

The University of British Columbia
Vancouver, Canada

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ABSTRACT

Access to information is a topic which has been extensively debated in recent years. Legislative schemes, which provide the public with a right of access to documents held by governmental bodies, have been enacted in numerous jurisdictions. However, the scope of such legislation has never been challenged: the access to information debate has presumed that it is only public sector information which should be subject to access legislation. Although private sector entities hold important and valuable information, such information is presumed to lie outwith the scope of the access debate. The aim of this thesis is to investigate the validity of this assumption.

The liberal public/private distinction, which operates to restrict the scope of the access to information debate is examined and critiqued in this thesis. It is argued that the liberal public/private divide is an unsuitable criterion for determining which information should be subject to access legislation. In order to identify a more suitable criterion, it is contended that the theoretical justification for access principles, which can be found in the concept of democracy, must be examined. It is concluded that a suitable test to establish the scope of access legislation might be related to whether information is socially consequential. This approach would move the focus of the access debate from the legal status of the entity in question into a more relevant sphere which would concentrate upon the content and effects of the information.

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They lay aside their private cares

To mind the Kirk and State affairs

- Robert Burns, "The Twa Dogs"
Kilmarnock Edition, 1786

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INTRODUCTION

THE TECHNOLOGICAL REVOLUTION AND INFORMATION EXPLOSION

> Information overload...is not an entirely accurate description of the condition of communications in America. There is no surplus of *meaningful* information...What we have, instead, is an ocean of irrelevant, purposeless, sensational, personal and trivialized material. In it float bits of vital information, which move more-or less undetected among the public relations throwaways and other forms of informational pollution.[1]

There can be no doubt that we live in an information world. In the last two decades we have witnessed an information revolution which has transformed the very nature of our society[2]. Technology has presented us with the facilities to transmit information instantaneously and in quantities which were inconceivable to previous generations. The information revolution has occurred primarily through two media: the television and the computer[3]. Television is a major source of entertainment and information to the developed world[4]. It conveys a unilateral informational stream about every imaginable subject, from current affairs and education to

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[1] Herbert I. Schiller *The Mind Managers* (Boston: Beacon Press, 1973) [hereinafter *The Mind Managers*] at 186.

[2] Neil Postman emphasises this point in *Technopoly: The Surrender of Culture to Technology* (New York: Vintage Books, 1992) at 20 where he states that "[n]ew technologies alter the structure of our interests: the things we think *about*. They alter the character of our symbols: the things we think *with*. And they alter the nature of community: the arena in which thoughts develop." [Emphasis in the original].

[3] These are, of course, not the only technological developments which have contributed to the information revolution. Developments such as facsimile transmission, satellite and cable facilities and many other innovations are also significant, but it is submitted that it is the television and the computer which have had the most impact on the ordinary individual.

[4] The statistics for 1992 show that in the United States 98.3% of households had at least one television, 72.5% of households had a video recorder and 60.2% of households had cable television. U.S. Bureau of the Census *Statistical Abstract of the United States: 1993 (113th Edition)*, (Washington D.C., 1993), at 561, Table No. 900. Canadian statistics for 1992 show a similar picture, with 97.5% of households having at least one colour television (42.7% have two or more), 73.8% of households having a video recorder and 71.4% having cable television. Statistics Canada *Market Research Handbook 1993-94*, (Ottawa, 1993), at 250, 253 and 251 respectively.

comedy, cooking, dramatised sex and, of course, consumer products and services. The television has revolutionised the average home: it sits at the epicentre of family life, mesmerising its viewers with a jumbled barrage of information[5]. Computers have also revolutionised our lives. At work, at school and in the home, computers are in abundance[6] and the portable "laptop" has ensured that in the developed world, computer free zones are a phenomenon of the past. Wherever a computer is situated and whatever the goal of its operator, its prime functions are to store, sort, transmit and receive and manipulate information. Keyboard communication, in the form of electronic mail and even computer chatlines, has become commonplace and geographical limitations are rendered obsolete by a technology which allows instantaneous, trans-continental communication. There can be no doubt that computers have permeated every aspect of our lives and that they are here to stay.

In our silicon based society, information is all around us and is flowing faster and further than ever. The increase in the ability to process information, and the consequent information glut, have resulted in at least two significant changes. Firstly, information is treated as a commodity which is bought and sold on the open market and secondly, the question of the free flow of information[7] has entered the political agenda. At first glance, both these trends may seem

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[5] In this respect, Postman has stated that "the tie between information and human purpose has been severed, i.e. information appears indiscriminately, directed at no one in particular, in enormous volume and at high speeds, and disconnected from theory, meaning, or purpose." See Postman *supra* note 2 at 70.

[6] Statistics show the dramatic increase in the use of computers which occurred during the 1980s. For example, in 1981, 2.12 million personal computers were in use in the United States, but by 1988 this figure had increased by over 2000% to 45.08 million. U.S. Bureau of the Census *supra* note 4 at 761, Table No. 1278.

[7] I will use the term "the free flow of information" instead of the commonly used term "freedom of information", as the latter is popularly assumed to mean "access to information". Access is, in fact, only one of the issues which is included in the broader concept of the free flow of information. A more detailed discussion of

surprising in light of the abundance of information which bombards us on a daily basis. However, it is not the trivia and other "information pollution" which is being valued and sought after: it is significant and meaningful information which is in demand. The two informational issues which are raised above will now be briefly considered, as their combined effect highlights some interesting problems.

Firstly, information has to a large extent been commodified. With increasing frequency, information is being regarded as a saleable good which will be disclosed only at a price: information is no longer freely available. A growing "information industry" has emerged which exists solely to profit from the sale of information on the open market[8] and companies which specialise in the manipulation and sale of information are becoming commonplace. For example, a market has emerged for computer databases containing detailed information on many different subjects and these are now widely available, but only to those who can pay for them. As a direct result, society is being divided into the "information rich" and the "information poor". It comes as no surprise to note that those members of society who are rich in information are those who are also rich in other respects. An "information underclass" is being created: the financially and educationally disadvantaged are being priced out of the

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this point is found on pp.5-6 below.

[8] This point is expanded upon by Herbert I. Schiller in *Who Knows: Information in the Age of the Fortune 500* (New Jersey: Ablex Publishing Corporation, 1981) [hereinafter *Who Knows*] at chapter three. He states at page 48 that "[h]uge private investments in the facilities to perform [information storage, processing and transmission]...made it possible and profitable to handle information as a saleable good. These newly offered opportunities for profit making are responsible for the quickening efforts to undermine and discredit the belief that information is a social good, a vital resource that benefits the total community when made freely available for general public use."

information market[9]. Schiller[10] notes that

> [u]nder the stimulus of market criteria, the new information technologies, for all their exciting features and potential, wind up facilitating the activities and expanding the influence of the already-dominant elements in the social order. At the same time, the practice of treating information as a commodity...promises to exacerbate old inequities in new ways.[11]

But information is a strange commodity. Information may be sold, but simultaneously retained by the seller. It has the potential to be inexpensive to produce: once the information has been collected and sorted, it may be duplicated and distributed at a minimal cost to the producer. Yet at the same time, information is often only truly valuable if its dissemination is restricted. If this is the view which is taken by information producers, then in some instances it may prove more profitable to sell information to a limited number of buyers at a high price. The relatively young market in information thus seems to be subject to a number of special considerations.

The second issue is that of the free flow of information. At first glance, the emergence of freedom of information issues at the same time that information is being commodified, may seem to be paradoxical. Concern about the free flow of information appears to directly contradict the limit upon informational flow which is inevitable when information is treated as

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[9] This argument is addressed by Gareth Morgan "Access To Information" in Jennifer E. Rowley ed., *Where the Book Stops: The Legal Dimensions of Information* (London: ASLIB, Association for Information Management, 1990). He highlights the plight of the "information poor", stating at page 59 that "[s]ources of help and information used by the poor are often poorly resourced themselves, so that information may not actually be available. The information poor do not know what to look for or where to look and although their advisors and helpers might know where to look and how to look they may not be able to afford to. Information is valued at what it is worth to commerce in most cases and not what an OAP or a voluntary advice centre can afford to pay."

[10] *Who Knows*, *supra* note 8.

[11] *Ibid* at xiii.

a commodity that is sold, rather than freely exchanged. Price is, after all, a restricting rather than a liberating factor. It therefore seems contradictory that society should place a market value on information while it is simultaneously campaigning for informational freedom. A brief examination of the interpretation which has been afforded to the phrase "freedom of information" will resolve this apparent contradiction.

The term "freedom of information" is a broad one which encompasses and compliments several other rights and freedoms[12]. This has permitted different interpretations of the notion of freedom of information to be employed in the public and private sectors respectively. In relation to the private sector, the emphasis has been on the right to *impart* information. Freedom of information is therefore commonly linked to freedom of expression when employed by entities in the private sector[13]. The media and corporations have utilised the concept of the free flow of information to sell their products throughout the world. Obviously, the information which is involved in this case is the information which these private entities *want* to share. For example, the numerous advantages of all types of products, blockbuster films and the details of celebrities personal lives are all vigorously disseminated on a world scale[14]. The argument changes where the public sector, or the state, is concerned. Here, emphasis is

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[12] For example, freedom of expression, freedom of the press, the right to know and the right to communicate are all closely associated with freedom of information.

[13] Although freedom of expression is portrayed in a rather negative light in this context, it is a valuable fundamental freedom. For further discussion of the merits of freedom of expression, see chapter 4 below at pp. 127-129.

[14] See *The Mind Managers*, *supra* note 1 for a discussion of this point. Schiller argues that an alliance of corporate and governmental interests are able to manipulate society through the control of the information infrastructure and the selective dissemination of information.

placed upon *access* to the vast reservoir of information in the hands of the government and the administrative bodies of the state. The argument is no longer for a gratuitous sharing of information, but rather the right to *obtain* information *even if the holder does not wish it to be disclosed.* The concern with public sector information is no longer discretionary sharing, but rather compelled disclosure[15].

The term "freedom of information" has attracted these different interpretations when used in the context of private and public entities. These distinctions are very often ignored or overlooked in the turmoil of the freedom of information debate. However, it should be made clear from the outset that this thesis will concentrate on the debate surrounding the latter aspect of "freedom of information", which can be more specifically labelled "access to information". The terminology used throughout this discussion will reflect this focus, and I will therefore refer to "access to information", rather than using the more popular, and often more confusing term "freedom of information"[16].

Meaningful information is a valuable commodity in the modern world. It is bought and sold on the free market. Yet in many countries an important distinction is made between two classes of information. Information which is deemed to belong to the public sector, or more

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[15] Principles of access to governmental information have been laid down in statutes in many countries, for instance the *Access To Information Act* R.S.C. 1980-81-82-83, c.111, Sch.I and the *Freedom of Information Act* 5 U.S.C. s.552 (1988). Such statutes will not compel a government to disclose all information which it holds. For example, exceptions to the principle of disclosure are frequently made for information which is relevant to national security, the maintenance of law and order and cabinet confidences.

[16] The lay person will be more familiar with the term freedom of information and will commonly utilise this terminology when referring to access to information.

precisely the state and its institutions, is treated differently from information which is regarded as belonging to the private sector, or civil society as a whole. Information which is classified as belonging to the public sector may be obtained upon demand and without payment, whereas private sector information is regarded as private property and the owner is in full control of dissemination and disclosure. It is therefore clear that there is a radical difference between the approach to public sector and private sector information. The distinction revolves around the legal status of the information.

The aim of this thesis is to examine the concept of access to information[17] and to determine whether the different treatment of public and privately held information is justified. It will be concluded that this criterion for determining information access, which is based upon legal status, is arbitrary and that a content based test, which considers the relative importance of the information, would be preferable. This argument will be structured as follows. Chapter one will examine the existing access to information debate and will conclude that the issue of access to privately held information is generally ignored. Chapter two will analyse three different legislative schemes for access to information and will demonstrate that the public/private distinction operates within each of these schemes. The validity of the dominant liberal public/private divide will then be considered in chapter three, which will demonstrate that it is an inappropriate vehicle for determining information access. Chapter four will concentrate upon the theoretical justification for access to information with a view to defining the principles

[17] As mentioned earlier, the emphasis will be on access to information, rather than freedom of information. The latter term also incorporates the notion of the right to disseminate information which the holder wishes to share. It is submitted that, in some respects, the former is more controversial, as it involves compelled disclosure.

that should determine which information is subject to access legislation. Chapter five will then conclude by suggesting an alternative criterion for determining information access, which is based upon the content, rather than the legal status of the information.

It is recognised that the arguments which will be made in this thesis are not without a degree of controversy. Any discussion which questions the "rights" of private sector entities to information in their possession is sure to provoke an unfavourable reaction from those who are "information rich", at least in relation to the information which they do not wish to disclose. Private entities who possess large quantities of often valuable information will be resistant to the unilateral and public surrender of this information. Information, after all, can be equated with power and very few private entities wish to relinquish power. However, the primary objective of this thesis is not to promote unjust treatment of private entities, but rather to raise an awareness about the assumptions which permeate the debate surrounding information access. Unless we are aware that we are reading the silent word "governmental" into the phrase "access to [governmental] information", then we will be dangerously unaware of the fact that our vision is being blinkered by the terms of our debate and will allow our social conditioning to preclude what are otherwise obvious routes of investigation. Information is important. We must ensure that we are properly informed about the information debate.

CHAPTER ONE

AXIOMS AND DICHOTOMIES: THE ACCESS TO INFORMATION DEBATE

Access to information is a subject which has recently received much attention. As technology developed to facilitate the manipulation of information and large data banks became commonplace, the subject of information access gained currency in both popular and academic debate. The access to information debate has spanned the globe, from Australia to Europe, and has taken place in many different forums and media. However, despite the widespread attention which the topic of access to information has attracted, the scope of the surrounding debate has been limited by the dominant liberal ideology[1]. This limitation has been primarily manifested in two assumptions which underlie the debate. The assumptions relate to the liberal conception of the public/private divide and the liberal conception of democracy respectively. The purpose of this thesis is to question these assumptions. This chapter will lay the groundwork for subsequent critical analyses by examining the nature of the assumptions which exist in the access to information debate.

1. A LIBERAL DEBATE

It is perhaps trite to note that any debate will be shaped and informed by the inherent beliefs

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[1] I do not use the term "ideology" in the negative sense of false consciousness, but rather in the broad sense defined by Eagleton as "a body of meanings and values encoding certain interests relevant to social power". See Terry Eagleton *Ideology: An Introduction* (London and New York: Verso, 1991) at 45.

and values of the participants. As long as this fact is recognised, underlying assumptions are likely to be addressed and the debate will not suffer. However, the situation becomes dangerous when the system of values which informs the debate is so ingrained into the lives and the consciousness of the participants that they are unable to recognise their own assumptions and prejudices. In such a case, the debate will often fail to tackle fundamental issues.

The access to information debate has taken place in a world where values espoused by liberalism are dominant. Liberalism is a system of political and legal thought[2] which centres around the concept of individualism. Society is viewed as being made up of many individuals, all with their own values, beliefs and rights, and the function of law is to mediate the inevitable conflicts which occur between these competitive, self-interested individuals. However, liberalism is not just an abstract philosophy: the liberal concept of individuality is so compelling that it has been internalised by many individuals and is even reflected in the operation of society[3]. Liberalism is so deeply embedded in the consciousness and thought processes of individuals that they are frequently blinded to the way in which liberal values shape their actions and beliefs. When debating a matter of importance, such as access to

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[2] Kennedy notes that liberalism was initially a mode of political thought, which was brought into the legal sphere through classical legal works, such as *Blacksone's Commentaries*. See Duncan Kennedy "The Structure of Blacksone's Commentaries" (1979) 28 Buff.L.Rev. 209.

[3] Roberto M. Unger *Knowledge and Politics* (New York: The Free Press, 1975) recognises the fact that liberalism has become embedded in modern society. He states at 118 that "[l]iberalism is a philosophical system. But it is also a type of consciousness that represents and prescribes a kind of social existence. As a philosophy, it belongs primarily to the order of ideas. As a sort of consciousness, it participates in the life of society. Like any view that has shaped a whole era in the history of thought, it overruns the boundaries of the realm of ideas and lays roots in an entire form of culture and social organization."

information, it is therefore imperative to be aware of the effect which a dominant ideology, such as liberalism, can have upon the debate. The scope of the access to information debate must not be taken for granted. Fundamental underlying assumptions must be questioned in order for the participants in the debate to be aware of the route which they are following: otherwise they will continue to stumble through the darkness, unaware that they are being led along a pre-determined path by their own liberal consciousness.

To date, liberal ideology has dictated the nature and scope of the access to information debate. The majority of participants in the debate[4] have been blind to the fundamental liberal assumptions which have dramatically moulded their arguments. There are two primary assumptions which will be focused upon in this thesis. The first relates to the liberal conception of the public/private distinction. Although there are many possible interpretations of the terms "public" and "private", the liberal distinction between the state (public) and civil society (private) has emerged as an important boundary in the access to information debate. Access to information legislation has only been contemplated in relation to the state and its agencies, all of which fall into the liberal "public" sphere. In contrast, the private sector has been consciously excluded from the scope of typical access legislation. The second fundamental assumption relates to the justification for the concept of access to information, which is usually explained with reference to the notion of "democracy". Democracy is a vague term, which can encompass many different models of democratic theory, but in the context of justifying access to information, the prevalent liberal model of democracy is assumed. This

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[4] See below, part 3 of this chapter entitled "Private Access to Public Information".

second assumption also inherently connects with the public sphere, as liberal democracy is restricted to a particular notion of democratic *government*[5]. It is therefore submitted that the liberal conception of the public/private distinction combines with the liberal version of democracy to limit the access to information debate to the public sphere. The assumptions which operate in the current access to information debate are particularly perilous as they are inherently related and are capable of providing mutual reinforcement.

There are therefore three main themes which run throughout this thesis, namely (1) access to information, (2) the public/private divide and (3) democracy. The purpose of the thesis is to argue that the liberal conception of the latter two themes operates to restrict artificially the scope of debate about the former. This chapter is designed to provide a largely descriptive background for subsequent analysis and to establish a basic map of the inter-relations between the three main themes. The remainder of the chapter will therefore concentrate first upon the concepts of public and private, highlighting the liberal interpretation of the terms and then relating this discussion to the access to information debate. Secondly, the concept of democracy will be introduced and once again related to the current access to information debate. Thirdly, to complete the topography of the area, the close relation between the liberal public/private distinction and liberal democracy will be demonstrated. Throughout this examination, the restricted scope of the current access to information debate will be highlighted.

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[5] Government institutions are assumed to be subject to democracy, but in other environments, such as the workplace and the family, democracy is regarded as an option, rather than a requirement. This therefore enhances the liberal notion of the public/private distinction.

2. THE PUBLIC/PRIVATE DISTINCTION

In order to understand the particular liberal interpretation of the public/private distinction and its effect upon the access to information debate, it is necessary to appreciate the range of possible interpretations which can be attributed to the terms "public" and "private". The following discussion will therefore examine the various implications of the terms "public" and "private", before proceeding to discuss the liberal conception of the public/private distinction. This is intended to provide a background against which the operation of the public/private divide in the access to information debate can be assessed.

"Public" and "private" are words which can be used in many different social, political and legal contexts[6]. They occur frequently in popular discourse[7], often without reflection as to their precise meaning[8]. "Public" and "private" are also notions which are central to legal discourse, which draws a fundamental distinction between public and private law[9]. The frequent and wide-ranging use of the terms has contributed to the cloak of ambiguity which surrounds them and they are often employed without clarification in a generic manner so that the listener or reader is required to discern the precise meaning for himself or herself. The

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[6] For a comprehensive consideration of these terms, see S. I. Benn and G. F. Gaus eds., *Public and Private in Social Life* (London and Canberra: Croom Helm Ltd, 1983).

[7] For example public park, the general public, public awareness, and private land, private affairs, private company.

[8] For a summary of the different meanings of "public" and "private", see below at pp. 17-20.

[9] For a description of the distinction between public law and private law, see Sir Harry Woolf *Protection of the Public - A New Challenge* (London: Steven and Sons, published under the auspices of The Hamlyn Trust, 1990).

terms public and private can thus mean different things to different people[10]. This has led Cane[11] to conclude that

> at a...concrete level, attitudes to the [public/private] distinction are more complex than...abstract analysis can capture...Proper understanding and appreciation of the public-private distinction and its use and abuse must begin with a recognition of its *multifaceted nature.*[12] [Emphasis added]

The multi-faceted nature of the public/private distinction is directly linked to the ambiguity surrounding the terms "public" and "private". In an attempt to clarify the various facets of the distinction, three areas of confusion will be considered; firstly, the different senses or contexts in which the terms "public" and "private" are used; secondly, the different meanings attributed to the terms and thirdly, the question of whether public and private should be treated as a dichotomy or as ends of a continuum. It is hoped that this attempt to explore the primary facets of the public/private distinction[13] will illuminate subsequent analysis.

(a) Different Senses of Public and Private

Benn and Gaus have identified three[14] separate, but inter-related, senses in which the concepts

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[10] It will be illustrated later that the meaning which is attributed to the words is often dependent on a person's political standpoint. See *infra* notes 36-39 and accompanying text.

[11] Peter Cane "Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept" in John Eekelaar and John Bell eds., *Oxford Essays in Jurisprudence* Third Series (Oxford: Clarendon Press, 1987).

[12] *Ibid.* at 78.

[13] This exploration of the concepts "public" and "private" relies on the excellent clarification of the public/private distinction which is provided in Benn and Gaus eds., *supra* note 6.

[14] Ruth Gavison "Information Control: Availability and Exclusion", chapter 5 in Benn and Gaus eds., *supra* note 6 at 115 refers to a fourth sense in which the words public and private may be used. She refers to it as the "moral" sense, namely when the terms are used to reflect the "moral merits of the situation".

of public and private can be employed, namely the descriptive sense, the normative sense and the prescriptive sense[15]. Each of these will be examined with reference, where appropriate, to related aspects of information discourse.

Perhaps the most common use of the terms public and private is in a descriptive sense. When the words are being employed descriptively, the objective is to illustrate the factual situation. For example, a park may be described as a "public" park to indicate that it is open to anyone who wishes to enter it. Similarly, a conversation may be described as a "private" conversation indicating, either that the participants are limited to a certain few individuals, or that the subject matter is of a sensitive nature. Indeed it is possible that the conversation could be private in both these respects. When the descriptive sense of the terms "public" and "private" is applied in relation to information, it describes the extent to which the information is actually known. Obviously, information can be described as private if very few people know the details, but the more it is disseminated, the more public it becomes[16].

The second sense in which public and private can be used is the normative sense and in this sense, the terms are utilised in relation to either social or legal norms. A good example of this is provided by Benn and Gaus[17] who point out that "[r]eading a letter without the permission

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[15] See Benn and Gaus supra note 6, chapter 1 at 11-12. Benn and Gaus recognise at page 12 that "[t]he prescriptive function is tightly tied...to the normative use", but argue that "normative uses do not always issue in prescriptions".

[16] When related to the availability of information, the descriptive sense of public and private can be seen as operating within a continuum. See below at pp. 20-21.

[17] See Benn and Gaus eds., *supra* note 6.

of the recipient or the sender is a breach of privacy if and only if it contravenes a social norm."[18] When the normative sense of public and private is employed in information discourse, it is often related to aspects of the ownership and control of information. In the above example, the recipient and the sender of the letter are in "control" of the information contained inside, and social norms dictate that they should be the parties who regulate access to it. However, it is not only social convention, but also legal status which is important. For example, information may be private in the normative sense if a person or a company is the legal owner of it. It should be noted that the normative privacy of information may not correspond with its descriptive privacy, if the information is in fact widely known[19].

When the labels public and private are being used to determine the particular outcome of a situation, they are being used in the prescriptive sense. This sense may often be found in the legal use of the terms. For example, the Supreme Court of Canada held in the case of *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd*[20] that the *Canadian Charter of Rights and Freedoms*[21] does not apply directly to private entities[22]. The

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[18] *Ibid.* at 11.

[19] The English case concerning the publication of the memoirs of a retired member of MI5, Peter Wright, (the "*Spycatcher*" case) nicely illustrates this point. At the height of the interest in the memoirs, the information contained in them was "private" in the normative sense, because it was protected from disclosure by Wright under the criminal sanctions of the *Official Secrets Act* (U.K.), 1911 (1 & 2 Geo. 5) c.28, and injunctions against third party publication were in place in England from June 1986 until October 1988. During this time, however, the information was available abroad and on the "black market" and it can thus simultaneously be regarded as being "public" in the descriptive sense. See the case of *Attorney-General* v. *Guardian Newspapers Ltd. and Others (No.2)* [1988] 3 All. E.R. 545.

[20] [1986] 2 S.C.R. 573 [hereinafter *Dolphin Delivery*].

[21] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c.11 [hereinafter the *Charter*].

result of this decision is that the application of the *Charter* will be dependent upon the classification of the entity in question as either public (governmental) or private[23]. In this situation, the terms "public" and "private" are operating prescriptively.

The various senses of the terms public and private are dependent upon different factors. However, we can see that the descriptive sense of the words is related to a factual situation, such as the actual extent of information dissemination, whereas the normative and prescriptive senses are fashioned by societal values and standards. The latter two senses of public and private will therefore tend to fluctuate from one society to another.

(b) Different Meanings of Public and Private

It is clear that there are many different meanings which can be attributed to the words "public" and "private". For example, the word "public" is given at least five meanings in the dictionary[24], two of which are "of, or relating to, or affecting the people as an organised

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[22] However, the *Charter* may apply *indirectly* to private entities. An example of this can be found in the case of *Re Blainey and Ontario Hockey Association* (1986) 54 O.R. (2d) 513. In this case, a twelve year old girl challenged the decision of the Ontario Hockey Association not to let her play in a boys' hockey team. Although her treatment was not covered *directly* by the *Charter*, as the Hockey Association was a private body, she was able to use the *Charter indirectly* to obtain a remedy. *The Ontario Human Rights Code*, R.S.O. 1981, c.53 [hereinafter the *Code*] permitted discrimination by such sporting organisations. Blainey therefore used the *Charter* to strike down the relevant section of the *Code* as unconstitutional, thus paving the way for her to raise an action under the modified *Code* to obtain her remedy.

[23] It can thus be seen that, in the prescriptive sense, the public/private distinction is operating as a dichotomy as opposed to a continuum. See below at pp. 20-21.

[24] *Webster's Third New International Dictionary*, Philip B. Gove ed., (Massachusetts: G. & C. Merriam and Company, 1966).

community"[25] and "accessible to or shared by all members of the community"[26]. These different meanings are both frequently utilised in information discourse and this fact undoubtedly serves to confuse debates on the topic. The phrase "public information", for example, could mean either information which has originated in a governmental department (and may or may not be widely known) or information which is available to everyone (regardless of its origination). These different interpretations of the phrase utilise the two respectful meanings of the word "public".

It is clear that the respective meanings of public and private are commonly perceived as opposites of each other[27]. However, the distinction between them can be varied, so that the respective contents, and therefore the respective meanings, change. Benn and Gaus illustrate a variety of ways in which the public/private divide can be drawn[28]. For example, the "private" realm may include matters pertaining to (1) individuals, (2) groups of individuals, such as families, or (3) entities with a legal status which is separate from that of the individual members, such as corporations or partnerships. Furthermore, these different elements which may exist within the "private" sphere are frequently grouped together and referred to in an

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[25] This meaning associates the word "public" with the government and affairs of the state, for example, public authority, public interest and public money. In the latter example, public is being used in its normative sense to describe the ownership and control of the money.

[26] This is a common meaning of the word "public" and is often used in the descriptive sense, for example public path, public forum, public place.

[27] The question of whether public and private have a dichotomous or a continuous relationship will be discussed in more detail at pp 20-21 below.

[28] See Benn and Gaus eds., *supra* note 6, chapter 2.

abstract manner as "the private sector"[29], a factor which no doubt contributes towards the confusion surrounding the meaning of the terms public and private.

In addition to the above variations in the *broad scope* of the meanings which can be attributed to the terms public and private, there is also a possibility of confusion and dispute in relation to the *precise* definition of the terms. For example, where public is defined as the state and private as civil society, specific decisions must be made regarding entities which should be included in the governmental sector and those which should be included in the private sector. This was an issue in the case of *McKinney* v. *University of Guelph*[30], where the Supreme Court of Canada had to decide whether a university could be included in the definition of "government", and thus in the public sphere, for the purposes of the application of the *Charter*. The court was split on this issue, with a majority holding that universities are not governmental entities and thus not subject to the *Charter*[31]. The decision of the majority, as expressed by La Forest J., seems to be justified by the fact that, despite governmental influence in various matters concerning the universities in question, such as funding, the institutions were nevertheless autonomous in their decision making[32]. The minority, however, took a broader

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[29] This is taken to be the opposite of "the public sector", or the "governmental sector", and is the liberal interpretation of the public/private divide. For further discussion, see pp. 22-25 below.

[30] [1990] 3 S.C.R. 229 [hereinafter *McKinney*].

[31] La Forest J., Dickson C.J., Gonthier and Sopinka J.J. were in the majority on this issue, with Wilson J., L'Heureux-Dube and Cory J.J. in the minority.

[32] *Supra* note 30 *per* La Forest J. at 273-274.

approach[33], looking at governmental control over the entity and the question of whether the entity's function was traditionally performed by the government, in addition to considering the overall nature of the entity. The resolution of the question at issue appears to be dependent upon the opinion and approach of each judge, thus demonstrating that the precise meaning of public and private, is relatively subjective. If the meanings of public and private are indeterminate in this manner, then it is not surprising that the use of the terms is often imprecise and leads to confusion.

(c) A Dichotomy or a Continuum?

The relationship between the concepts of public and private can be regarded either as constituting a gradual slide along a continuous scale, or simply as one of starkly contrasting opposites: it can be treated as a continuum or as a dichotomy. When the descriptive sense is employed, characterisation as public or private is not always a straightforward matter and it would seem appropriate to treat the relationship as a continuous one[34]. For example, information which is known to only one person is undoubtedly private in the descriptive sense, but as it is disclosed to increasing numbers of people, it slowly begins to look less private and acquires a more public nature. To suggest that the information was private when, for example, fifty people know about its contents, but public when that number rises to fifty-one is obviously

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[33] Justice Wilson *ibid.* at 358 states that "we must take a broad view of the meaning of the term "government", one that is sensitive both to the variety of roles that government has come to play in our society and to the need to ensure that in all of these roles it abides by...the *Charter*."

[34] See *supra* note 16.

arbitrary. It therefore seems more natural to look at the descriptive sense of public and private as a continuum. In contrast, the prescriptive sense, implies a dichotomy. In this sense, where the criteria of public and private are being utilised to determine the outcome of a dispute, each case must be categorised in one way or another in order to determine which course of action is appropriate[35]. It is not useful in such circumstances to allow for the shades of grey which are implied in a continuum: a black and white dichotomy must be inferred for the prescriptive outcome to be certain. The classification of the public/private relationship as dichotomous or continuous will therefore depend in part upon the sense in which the terms are being utilised.

It can be seen from the above analysis of the concepts of public and private that they are indeed multifaceted and that this is liable to lead to confusion surrounding the meaning of the terms. They can therefore be employed in diverse contexts to argue in favour of diverse goals and objectives, often without any recognition of the underlying confusion. Many scholars agree that the way the public/private issue is interpreted depends upon the ideological and political stance of the interpreter[36]. MacLauchlan[37] goes as far as to state that "in truth the public/private distinction...[is] the most ideologically loaded bit...of jargon in our public law discourse."[38] It is therefore clear that different modes of philosophical and social thought will

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[35] The courts thus often treat the relationship between public and private as a dichotomy. See for example, *McKinney*, *supra* note 30.

[36] For example, see Benn and Gaus eds., *supra* note 6 at 16; Cane *supra* note 11 at 78; and Robert H. Mnookin "The Public/Private Dichotomy: Political Disagreement and Academic Repudiation" (1982) 130 U.Pa.L.Rev. 1429 at 1440.

[37] H. Wade MacLauchlan "Reimagining the State" (1990) 40 U.T.L.J. 405.

[38] *Ibid.* at 407.

assign different meanings to the terms "public" and "private" and will attach varying significance to the role of the public/private distinction[39]. In the context of this thesis, the primary concern is with the manner in which the liberal conception of the public/private divide has shaped the access to information debate. However, before the discussion can be focused upon the access to information debate, it is necessary to outline the approach which liberalism takes towards the public/private distinction.

(d) Liberal Ideology and the Public/Private Distinction

> "The distinction between public and private connects with a central tenet of liberal thought: the insistence that because individuals have rights, there are limits on the power of government vis-a-vis the individual."[40]

Liberal ideology places great significance upon freedom of the individual, and emphasises that no-one should be subjected to the coercion of the state, except in accordance with pre-existing legal prescription. The fact that liberal ideology has been dominant in modern western society can be at least partially attributed to the fact that the basic liberal conception of privacy, namely self-determination and personal security, is understandably attractive to the ordinary individual at a very fundamental level. Liberal ideology could not have been so effective if it did not reflect at least some of the feelings which individuals possess. Eagleton[41]

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[39] For example, liberal ideology presupposes that there is a dichotomy between public matters, which are identified with the state, and private matters, which relate to civil society. On the other hand, feminists have a different perception of the public/private divide. Feminist ideology views the public sphere as constituting the market place and the private sphere as constituting the family and argues that this split has been utilised in the oppression of women. See Judy Fudge "The Public/private Distinction: The Possibilities of and the Limits to the use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485.

[40] Mnookin, *supra* note 36 at 1429.

[41] *Supra* note 1.

recognises this when he states "[a] successful ruling ideology...must engage significantly with genuine wants, needs and desires."[42] Liberalism has successfully recognised that the concept of privacy is very important to the ordinary individual. Indeed, it is not disputed that the law must protect a certain sphere of personal privacy. For example, disclosure of the fact that a woman has had an abortion or that an individual is homosexual could cause the person in question much pain and have detrimental effects on his or her social standing. However, the desire for privacy does not necessarily imply that the individual is seeking to avoid the moral judgement of others. The seemingly innocuous disclosure of a person's name and address, for example, may violate his or her privacy if it is disclosed to the wrong person. Personal privacy is therefore a concept which provides the individual with protection from the outside world. It has a fundamental appeal to every human being. Birkinshaw[43] acknowledges this fact when he states that "there are spheres of our personal and public lives that are a legitimate object of secrecy. Without adequate protection for justifiable secrets our integrity can be compromised, our identity shaken and our security shattered."[44] The idea of personal privacy is part of the "grain of truth" which lies at the heart of liberal ideology. However, belief in the concept of personal privacy is fairly widespread: even opponents of liberalism are willing to concede to the importance of the concept. Unger[45] believes that the human desire for privacy reflects a real fear that, without such a right, the individual would be subject to the

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[42] *Ibid.* at 45.

[43] Patrick Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal*, (London: Wiedenfeld and Nicholson, 1988).

[44] *Ibid.* at 12.

[45] *Supra* note 3.

prejudices of the dominant social group. He states

> [t]he seriousness of the political premises of liberalism is a consequence of the accuracy with which they describe a form of social experience that theory alone cannot abolish. It is the experience of the precariousness and contingency of all shared values in society. This experience arises from the sense that shared values reflect the prejudices and interests of dominant groups rather than a common perception of the good. Thus, individuality remains an assertion of the private will against the conventions and traditions of the public life.[46]

It is clear that personal privacy is a genuine desire of ordinary individuals, and that this fact has played a part in the widespread appeal of liberal ideology.

However, it is important to note that this essential private sphere, which has such a powerful appeal, is the sphere of *individual* privacy. Liberal ideology does not only recognise the sphere of *individual* privacy, but extends its claim for freedom from state coercion to the *private sector in general.* The distinction between the individual and other non-governmental entities is blurred and the arguments which support individual privacy are utilised to place other private entities outwith state control. As a result, powerful corporations validly claim the same freedom from state interference which is afforded to individuals[47]. The fundamental appeal of individual privacy and the obfuscation of the term mask such realities and are utilised to sustain the liberal claim that the "private" sphere is correctly constituted by civil society as a whole[48].

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[46] *Ibid.* at 103.

[47] For example, corporations are not subject to the restrictions which are imposed by the *Charter.* See the case of *Dolphin Delivery*, *supra* note 20.

[48] The effects upon liberal theory of this expansion of the private sphere to include the whole of civil society will be discussed later in this thesis. See chapter 3 below, where the liberal version of the public/private distinction is subject to criticism.

The liberal interpretation of the public/private distinction therefore views state institutions as constituting the public sphere, and everything else, namely the whole of civil society, as constituting the private sphere. The previous discussion of the concepts of public and private[49] will have made it clear that this is only one of many possible interpretations of the public/private distinction, and indeed the liberal view of public/private distinction has been the subject of some trenchant criticism[50]. Nevertheless, it is the liberal vision of public and private which has been unquestionably prevalent in modern thought and legal discourse[51]. The dominance of the liberal interpretation of the public/private distinction has had a significant impact upon the access to information debate, and it is the effect of this impact which will now be considered.

3. PRIVATE ACCESS TO PUBLIC INFORMATION

Perusal of the literature which discusses the topic of access to information reveals a striking and universal assumption which features the liberal public/private divide. Popular articles,

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[49] Above at page 13 onwards.

[50] Cane, *supra* note 11 identifies various critiques of the public/private distinction. For further details, see chapter 3 below.

[51] The liberal interpretation of the public/private divide has been particularly dominant in relation to rights discourse. See, for example, the following articles: Dale Gibson, "The Charter of Rights and the Private Sector" (1982) 12 Man.L.J. 213; Peter W. Hogg, "The *Dolphin Delivery* Case: The Application of the Charter to Private Action" (1986-87) 51 Sask.L.Rev. 273; Robert Howse, "*Dolphin Delivery*: The Supreme Court and the Public/Private Distinction in Canadian Constitutional Law" (1988) 46 U.T.Fac.L.Rev. 248; Anne A. McLallan and Bruce P. Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986) 24 Alta.L.Rev. 361; Ghislain Otis "The Charter, Private Action and the Supreme Court" (1987) 19 Ottawa L.Rev. 71; and Brian Slattery, "Charter of Rights and Freedoms - Does it Bind Private Persons" (1985) 63 Can.Bar Rev. 157.

academic writings and government papers are all based upon the assumption that it is *only public sector information* which should be subject to access legislation[52]. The automatic presumption is that *private sector* information should be excluded. This presumption arises from a concern for the protection of individual privacy[53] and property rights in information. For example, a Canadian cabinet discussion paper[54] states that

> [t]he basic purpose of Access to Information legislation is to make available to the public more information concerning the operations of government. The legislation should not be used to pry into the private lives of citizens or into the confidential activities of corporate entities.[55]

The recommendation was therefore made that personal and corporate information[56] in the

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[52] I fell prey to this assumption when I was originally researching the suitability of access to information as a thesis topic. My research seemed to be automatically restricted to material relating to public sector information access and, realising that I should provide a justification for this restriction, I started to consider the reasons for it. As I became embroiled in the search for the answer to this question, I realised that the assumption itself needed to be exposed and hence my thesis topic was born.

[53] It is not suggested anywhere in this thesis that the principles of access to information should be utilised to obtain information which is solely concerned with an individual's personal life. The importance of individual privacy is noted above at page 23. For further discussion in the context of the freedom of information legislation in the United States, see Heather Harrison "Protecting Personal Information From Unauthorized Government Disclosures" (1992) 22 Mem.St.U.L.Rev. 755.

[54] Canada, Cabinet Discussion Paper, *Access To Information Legislation* (Ottawa: The Secretary of State and Minister of Communications, 1980).

[55] *Ibid.* at 13. In a later document, the Canadian government shows that it maintains this stance. The document states that "The government recognizes that Canadians need access to a wide range of information about their *government*." [Emphasis added]. See *Access and Privacy: The Steps Ahead* (Ottawa: Government of Canada, 1987) at 29.

[56] Participants in the access to information debate assume that corporate entities lie outwith the scope of access legislation because they should not be democratically accountable. This point illustrates the strong link between the two assumptions which permeate the access debate. The assumption that "democracy" is a valid justification for access legislation is discussed in more detail below in part 4 of this chapter entitled "The Assumption of One-Dimentional Democracy", and the notion of democracy is explored in depth in chapter 4 below.

hands of a government agency should not be subject to access legislation[57]. This is typical of the stance which is taken both by politicians and by commentators: the liberal public/private split is adopted without discussion and the values which it represents colour the debate without being challenged. The liberal vision of the public and the private spheres thus invisibly dictates the scope and nature of the access debate. This phenomenon is dangerous precisely because of its insidious nature: the issue of the public/private divide either goes completely unrecognised or is afforded only passing reference. It would seem that liberal values are so ingrained into the consciousness of the participants in the access debate that they are unable to recognise and question their own prejudices[58]. Without treatment for this myopia, the question of access to information will continue to revolve exclusively around the public sector.

The majority of commentators in the access to information debate simply do not consider the possibility that entities in the private sector, such as private corporations, could have *duties* rather than *rights* under access to information legislation[59]. These commentators are blinded

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[57] The reason for such a recommendation is not only due to concern for privacy and property rights. Most governments are also concerned that if private sector information may be the subject of an access request, then it would be more difficult to obtain information from private sector entities. This point is highlighted in a report to the Parliament of the Commonwealth of Australia entitled *Freedom of Information: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978* (Canberra: Australian Government Publishing Service, 1979) which states at page 30, paragraph 3.39 that "[c]learly there are cases when people, associations or other governments will think again about providing information to the Australian Government if they believe that...information could be drawn into the public domain under freedom of information legislation. We would not wish that to happen." For discussion of the personal and third party information exemptions contained in the Canadian Access to Information Act, see the discussion below, at chapter 3, part 1 entitled "Typifying Liberal Ideology: The Canadian Experience".

[58] This issue is discussed above at pp. 10-11.

[59] For example, Tom Onyshko "The Federal Court and the *Access To Information Act*" (1993) Man.L.J. 73, provides a substantive analysis of the cases which have arisen under the Canadian Access To Information Act. Onyshko states at page 76 that "access legislation cannot address the distribution of power in society. Powerful corporations will tend to be the ones with the resources needed to process and use government information available

to this possibility by their largely uncritical adoption of the liberal public/private distinction. It is true that a minority of commentators recognise that the access to information debate has been artificially confined to the public sector and occasionally question whether the private sector should be subject to access obligations[60]. However, these reflections are merely cursory departures from the authors' primary concerns, which remain typically centred around the public sphere. Any questions which are raised regarding the exposure of private sector entities to access legislation are left for future resolution[61]: there is a striking deficiency of any substantive or in depth analysis of the issue. Rather than focusing upon the validity of the public/private divide, most commentators seem to be consumed with the task of clarifying the boundary between the public and the private spheres[62].

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under an access law." Although Onyshko recognises the advantage which corporations have relating to the *rights* under the Act, he does not develop this line of thinking to consider whether these powerful private entities should have any *duties* under such a legislative scheme.

[60] For example, Gareth Morgan "Access to Information" in Jennifer E. Rowley ed., *Where the Book Stops: The Legal Dimensions of Information* (London: ASLIB, Association for Information Management, 1990) at 61 states that "there is a growing corpus of data which is, or should be, effectively public domain, but which *is difficult to obtain other than through commercial channels* and it is this which is disenfranchising many from the quality of life and the opportunities which should be theirs." [Emphasis added] The clear implication here is that the public/private divide should be reconsidered in relation to information access. However, this statement comprises the closing comments in Morgan's article and the idea is not developed: the problem is merely alluded to and then left for future analysis.

[61] For example, The Hon Mr Justice M.D. Kirby, Part I "Legal Aspects of Information Technology" in *Information, Computer, Communication, Policy* (Paris: Organisation for Economic Co-Operation and Development, 1983) at 25 states that "[s]o far, FOI [freedom of information] has been overwhelmingly a public sector debate. Private sector organisations are generally roped in to the extent only that they have dealings with agencies of government. It seems likely to me that the development of greater openness of administration will not be confined to the public sector but will gradually extend into the private sector as well." Although Mr Justice Kirby recognises the problem caused by the liberal public/private divide, he does not develop his argument that access legislation should be extended to the private sector. He merely raises the issue and then drops it again, clearly wishing to avoid any in depth analysis, leaving the substantive issue for future consideration.

[62] A good example of this is James Michael *The Politics of Secrecy: The Case for a Freedom of Information Law* (UK: National Council for Civil Liberties, 1979) at 26 to 28. Michael recognises the arbitrary nature of the public/private divide and touches on the problem which underlies the access to information debate. He states at page 27 that "government is about exercising power over people. Dividing organisations into "public" and "private" ones

There is one aspect of the access to information debate which requires commentators to deal directly with the public/private distinction, namely the issue of "reverse" freedom of information. This topic will be briefly considered, to determine whether commentators in this area make the same assumption about the public/private divide which dominates the rest of the debate.

"Reverse" freedom of information[63] has become a much discussed facet of the access to information debate, especially in the United States. As government became increasingly involved with the activities of the private sector, for example for purposes of regulation and licensing[64], it gathered growing quantities of "private sector" information. Freedom of information legislation in the United States is frequently used in attempts to compel disclosure of such "private" information which is held by the government[65]. "Reverse" freedom of

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is slightly artificial. Many decisions that affect us are made by "private" companies when they hire and fire and make new products, or stop doing business altogether." However, despite these comments, in the remainder of his article, Michael is more concerned with clarifying the public/private boundary, rather than questioning its validity. He therefore does not stray far from the usual terms of the debate. This is perhaps not surprising, as Michael is writing in context of the access to information debate in Britain, where there is as yet no access law for central government. His concern is clearly to make a case for such legislation. Consideration of access to *private sector* information would not be conducive to such a goal, as it would cause much controversy and would be likely to detract attention from his case for *public sector* access legislation. It is therefore not surprising that Michael adopts the liberal public/private dichotomy which is typical of the approach taken in the access debate.

[63] In the context of the debate in the United States, I shall use the term "freedom of information" rather than the arguably more accurate phrase "access to information", as the federal access legislation, the *Freedom of Information Act* 5 U.S.C. s.552 (1988) [hereinafter *Freedom of Information Act*], uses the former phrase in its title and most United States commentators refer to access legislation in this manner.

[64] The government has many other reasons to be involved with the private sector. Some further examples are the calculation of taxes, the distribution of government grants, import and export activities and the enforcement of the law. The collection of information from the private sector is vital to the execution of all of these government functions.

[65] It is often companies who utilise the freedom of information legislation in this manner, in an attempt to learn about the secrets of their competitors. See Ross W. McFarlane "Freedom of Information Can Prove Costly" (1983) 7 Can.Law. (No.4) 23.

information cases occur when a private sector entity, which has supplied information to the government, wishes to prevent its release in terms of the relevant freedom of information legislation. Such cases are termed "reverse" freedom of information because the objective is to protect, rather than liberate, information. This issue therefore deals directly with the operation of the public/private divide in the access debate: "reverse" freedom of information is the mechanism by which the private sector seeks to ensure that its information is protected from the effects of access legislation. In other words, it is an attempt by the private sector to carve out an exception to the rights which are provided by such legislation[66].

Commentators have approached the subject of "reverse" freedom of information from different perspectives. Some writers address the problem from the viewpoint of a corporate lawyer seeking to protect the interests of his or her client[67]. It is not surprising that commentators who adopt a corporate perspective are compelled to make the assumption that the public/private distinction has a justifiable place in the access debate, as this stance supports their argument

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[66] The drafters of the *Freedom of Information Act, supra* note 63, did not anticipate "reverse" freedom of information cases, and the Act is therefore silent on the matter. Disclosure of information which falls within the scope of one of the Act's nine exemptions is not *compulsory*, but the Act is silent concerning *discretionary* disclosure of such information by government agencies. The first "reverse" freedom of information case to come before the U.S. Supreme Court was *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979). The ruling in this case left an aura of uncertainty surrounding the issue of "reverse" freedom of information cases, with one of the main problems being the proper extent of the court's review of a government agency's decision to release information which the third party claims should be withheld. See Russell B. Jr. Stevenson "Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4" (1982) 34 Admin. L. Rev. 207 and Paul M. Nick "De Novo Review in Reverse Freedom of Information Act Suits" (1989) 50 Ohio St.L.J. 1307.

[67] See, for example, Peter C. Hein *Business Information: Protection and Disclosure, The Freedom of Information Act and Related Laws* (New York: Law and Business Incorporated, 1983).

that access legislation should not apply to any private sector information[68]. However, not all commentators subscribe to the corporate approach, and instead argue in favour of the disclosure of private information which is submitted to government agencies[69]. Nevertheless, these writers do not challenge the existence of the public/private distinction in the access debate: they are merely seeking to move the boundary a little. The argument for the release of private information in this context applies only to information which is located in the *public* sphere in the hands of government agencies[70]. The majority of "private" information will remain in the hands of private sector entities. The liberal public/private divide therefore remains intact.

It is submitted that, although writers who tackle the issue of "reverse" freedom of information

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[68] For example, Linda B. Samuels "Protecting Confidential Business Information Supplied to State Governments: Exempting Trade Secrets from State Open Records Laws" (1989) 27 Am.Bus.L.J. 467, conducts an examination of different state access laws with a view to assessing how companies can best protect their trade secrets. Her approach is clear when she states at 469 that "[s]tates should...clarify that exemption from disclosure of...trade secrets takes precedence over the operation of open records laws". Although Samuels is directly examining the public/private divide, she is doing so uncritically and, in fact, seeks to secure its present operation in the access debate. See also Mitchell W. Pearlman "Freedom of Information and its Impact on Business Entities in the 1990s" (1990) 64 Conn.B.J. 202. The analysis of "reverse" freedom of information from a corporate viewpoint is, however, not restricted to jurisdictions in the United States. See Paul Villanti "Freedom of Information as an Instrument of Discovery" in Michael Harris and Vicki Waye eds., *Australian Studies in Law: Administrative Law* (Sydney: The Federation Press, 1991).

[69] For example, John Badger Smith "Public Access to Information Privately Submitted to Government Agencies: Balancing the Needs of Regulated Businesses and the Public" (1982) 57 Wash.L.Rev. 331 argues that the disclosure of private information which is submitted to regulatory agencies is justified. He states at 344-345 that "[t]he current state of agency disclosure law...gives those who submit information protection beyond their legitimate interests in maintaining their technological advantages and gives too little consideration to the needs of those requesting information."

[70] See Dexter R. Woods, Jr. "Governmental Disclosure of Confidential Business Information Under the Freedom of Information Act" (1982) 9 Ohio N.U.L.Rev. 465. Woods does not present as strong an argument as Smith *supra* note 69, and he is more concerned with legal clarity. However, he expresses concern that corporate interests should not thwart the purposes of the *Freedom of Information Act*. He concludes at 487 that "[i]n trying to protect the business interest in preserving its confidential information...Congress should not slight the public interest in open government." It can thus be seen that Woods' argument is firmly centred in the public sphere.

are dealing directly with the public/private divide, they make the same assumption which dominates the rest of the access debate. The assumption that the *majority* of private information should remain outwith the scope of access legislation is never truly challenged, as the debate surrounding "reverse" freedom of information concentrates only upon private information which is held by public entities. The "reverse" freedom of information debate therefore continues to revolve around situations where corporations and other private entities are only *indirectly* subject to access legislation: the information must be in the hands of a public sector agency before the issue is raised. The full impact of the public/private divide, and the ideology which it represents, has not been examined by any of these writers.

The discussion thus far has demonstrated the absence of consideration which has been afforded to the public/private divide in the discussion of access to information. However, the information debate has produced at least one writer who has dealt directly with this matter. Boyle[71] has written an insightful article relating to the control and ownership of information and the way that such issues are affected by underlying social norms and assumptions. One of the main themes which he develops is a critique of the public/private divide[72]. He states that

> questions of information regulation, commodification and access...are often decided by an uncritical process of pigeonholing into a number of stereotypes of "public" and "private" information. These stereotypes have their roots in relatively basic assumptions about property, society, and privacy in a liberal

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[71] James Boyle "A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading" (1992) 80 Cal.L.Rev. 1413.

[72] Boyle's critique *ibid.* at 1433-1437 is of a similar nature to that which is developed in chapter 3 of this thesis.

state.[73]

After conducting a convincing critique, he concludes that "because there is in fact no intelligible geography of public and private, the attempt to resolve issues through a process of line-drawing gives us only an empty exchange of stereotypes."[74] Boyle then applies the critiques[75] which he has developed to the law relating to the ownership of information and illustrates his argument with diverging practical examples of instances involving the issue of information ownership[76]. Boyle is the only writer who has conducted a comprehensive analysis of the implications of the public/private divide in the context of the information debate. However, his work does not touch on the subject of access to information legislation as such.

The above discussion of the access to information debate has demonstrated that it takes place exclusively in the public sphere, adhering to the concept of the liberal public/private divide. The location of the boundary is disputed and sometimes re-drawn, but the primary assumption remains: private sector entities should not be subject to access legislation. Commentators generally seem to be unaware of their assumptions, blinded by their unquestioning, subconscious acceptance of liberal ideology. Those writers who do manage to bypass their

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[73] *Ibid.* at 1417-1418.

[74] *Ibid.* at 1436.

[75] Along with his critique of the public/private divide, Boyle draws attention to the problems which he perceives are created by the overly "romantic" notions which are attached to the concept of authorship. *Ibid.* at 1525-1534.

[76] The examples which Boyle has chosen are the law of copyright, the crimes of blackmail and insider trading and the issue of a patient's right to ownership of the genetic code contained in his own DNA which was the question raised by the case of *Moore* v. *Regents of the University of California*, 793 P. 2d 479 (Cal 1990), cert. denied, 111 S.Ct. 1388 (1991). It is the latter issue which Boyle refers to as "spleens", as the DNA sample in question was obtained from Mr Moore's spleen.

own prejudices do so only fleetingly, retreating hastily to the safety of their tunnel vision and leaving the questions which they posed unanswered. Only Boyle[77] has provided an in depth critique of the public/private divide in relation to information, but unfortunately he does not extend his analysis to cover the access debate. It can be safely concluded that there is a dearth of critical analysis in this area.

The powerful influence which the liberal public/private divide has upon the access to information debate is augmented by the fact that "democracy" is the justification which is frequently cited in support of access to information principles. The notion of democracy is most often limited to the government, and hence to the public sector, thus serving to ensure confinement of the debate to the public sphere. The assumptions which surround the concept of democracy in the access to information debate will therefore now be examined. Firstly, the notion of democracy as it is currently perceived will be briefly considered, followed by an analysis of the way that this affects the access debate.

4. THE ASSUMPTION OF ONE-DIMENSIONAL DEMOCRACY

> "Liberalism incorporates basic political commitments into its discursive rules...arbitrarily limiting the admissible range of application of its basic terms relating to freedom, equality, and democracy."[78]

"Democracy" is similar in nature to the concepts of public and private, in that it is a vague

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[77] *Supra* note 71.

[78] Samuel Bowles and Herbert Gintis *Democracy and Capitalism: Property, Community and the Contradictions of Modern Social Thought* (London: Routledge and Kegan Paul, 1986) at 16.

term which is capable of numerous different manifestations: throughout the history of democracy, various diverging models have emerged[79]. Some of these will be discussed in detail in chapter four[80], but for present purposes, it is adequate to note that these models are sufficiently diverse and numerous to make anything but a vague universal definition of democracy impossible. A reference simply to "democracy" is therefore ambiguous, leaving the individual free to interpret the term according to his or her values and beliefs. Given that it is liberal ideology which dominates the modern western world[81], it is therefore not surprising that liberal values underlie the contemporary version of democracy. When the term "democracy" is used, a model of liberal democracy[82] which reflects the operation of democracy in the western world is currently presumed to apply. The important fact about this model is that it involves a necessary separation of the public sphere (the governing bodies which are elected and subject to democratic principles) from the private sphere (the rest of society, which is made up of conflicting individuals and which is not subject to the democratic process). This separation is a prerequisite for any model of democracy which is based upon liberal principles[83] due to the importance which liberalism attaches to the principle of privacy

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[79] For an overview of the differing models of democracy, see David Held *Models of Democracy* (Stanford, California: Stanford University Press, 1987) [hereinafter *Models*].

[80] Below at pp. 106-122.

[81] See above at pp. 10 and 25.

[82] There are several models of democracy which fall under the umbrella of the term "liberal democracy". An excellent summary of these models is provided by C.B. Macpherson in *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977).

[83] Held notes that the separation of the public and the private spheres is necessary for any model of liberal democracy when he states under the heading of "[j]ustified prescriptions of liberalism" that "[s]eparation of the state from civil society as an essential prerequisite of a democratic order." See *Models supra* note 79 at 276.

and the autonomy of the private sphere. Liberal ideology emphasises individual rights and freedoms: it would be contrary to this fundamental tenet of liberal thought to contemplate the introduction of democracy directly into the private sphere, thus allowing the wishes of the electorate to determine the policies of private entities. Such a measure would permit legitimate individual rights to be directly overridden by the will of the democratic majority[84]. Meaningful personal autonomy would cease to exist. Liberalism therefore restricts the concept of democracy to the public sphere. In a similar manner to the way in which the liberal public/private divide is universally accepted, the current understanding of democracy subconsciously follows the liberal pattern: the term "democracy" is assumed to operate only in the public sector. Rather than invoking the image of a rich tapestry of varying ideas and beliefs, "democracy" is commonly assumed to be a rigid concept fitting only into the contemporary liberal mould. The effect which this restricted view of democracy has upon the access to information debate will now be considered.

5. DEMOCRACY: AN AXIOMATIC JUSTIFICATION?

The concept of democracy plays a crucial role in the access to information debate: the participants in the debate agree that the justification for access to information centres around the notion of democracy. References to democracy are peppered throughout the access to

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[84] Of course, democracy can act *indirectly* upon private individuals. For example, this can happen when the democratically elected government decides to regulate an activity, such as the control of firearms or drugs. This, however, has arguably less impact than the direct operation of democracy in the private sphere which would entitle the entire electorate to vote upon the policies of, or elect representatives to take decisions for, bodies such as a church or a trade union.

information debate. They are situated strategically, frequently at the start of a discussion, and seek to validate consideration of the subject. "Democracy" and "governmental accountability" are phrases which are regularly used in this context in an almost cursory fashion. The literature which is directed at the general public is particularly prone to the superficial treatment of democracy. For example, in relation to the access to information debate in British Columbia, it has been stated that "a state which is *truly democratic* will ensure that its people have maximum access to, and control over, vital information"[85] and "[t]hat is why freedom of information legislation is so important - in an age when citizens are feeling increasingly powerless, cynical, and alienated, *the future health of our democracy is at stake.*"[86] These references to democracy are afforded little further discussion. Democracy is presented as an unqualified and self-evident good which deserves little explanation: the approach embodies emotive rhetoric, rather than rational explanation.

The treatment of democracy is not quite as superficial in works which are aimed at a more academic audience. For example[87], in a recent article, Onyshko notes that "[a] healthy

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[85] B.C. Freedom of Information and Privacy Association, *Freedom of Information and Protection of Privacy in British Columbia: The Steps Ahead* (unpublished, 1991) [Emphasis added].

[86] British Columbia, *Extending Freedom of Information and Privacy Rights in British Columbia* by Barry Jones, (Victoria: B.C. Ministry of Government Services, 1993) at 5 [emphasis added].

[87] There are many instances of work relating to access to information which treat democracy in a similar manner. For a range of examples see James Michael *The Politics of Secrecy: The Case for a Freedom of Information Law* (UK: National Council for Civil Liberties, 1979); Donald C. Rowat ed., *Administrative Secrecy in Developed Countries* (New York: Columbia University Press, 1979); Andrew C. Gordon and John P Heinz eds., *Public Access to Information* (New Jersey; Transaction Books, 1979); Ian Eagles, Michael Taggart and Grant Liddell *Freedom of Information in New Zealand* (Auckland: Oxford University Press, 1992); Harold C. Relyea "Business, Trade Secrets, and Information Access Policy Developments in Other Countries: An Overview" (1982) Admin. L.Rev. 315; James Elliot "The Freedom of Information Act 1982 (CTH) and its Effect on Business Related Information and Confidential Information in the Possession of Commonwealth Agencies" (1988) 14 Monash

democracy requires that citizens receive as much information as possible, so that they can participate as fully as possible in government."[88] Similarly, a British commentator writes that "[d]emocracy demands that government be open and public...Freedom of information legislation would restore to the citizens of the UK...the real power to choose, to influence, to control and to dismiss governments."[89] In these instances, the concept of political participation is being used to assist in the explanation of why access to information is important for democracy. However, it is clear that these writers are presuming that the liberal conception of democracy, which accepts the public/private divide, should apply. Other interpretations of democracy are ignored, and there is no analysis of the full implications of the presumed liberal model. Once again, it can be seen that liberalism is so deeply rooted in the commentators' consciousness that they are blinded to possibilities which deviate from the liberal norm. The democratic justification for access to information is consequently devoid of true meaning, existing in the debate as little more than an empty ideological shell.

In order for these problems to be overcome and for the principle of access to information to be accorded proper justification, it is submitted that it is necessary for writers to recognise their liberal bias and to consider which of the many variations of democracy could be best used to support the argument for access to information[90]. In doing so, they should also consider *why*

U.L.Review 186.

[88] Onyshko *supra* note 59 at 75.

[89] Rodney Austin "Freedom of Information: The Constitutional Impact" in Jeffrey Jowell and Dawn Oliver eds., *The Changing Constitution* (Oxford: Clarendon Press, 1985) at 366.

[90] It will be suggested that the model of participatory democracy is best suited to supporting the case for access to information legislation. For further discussion, see chapter 4 below.

democracy itself is desirable[91], as this would then give the access to information debate a solid foundation. These issues are rarely addressed in literature concerning access to information, leaving a gaping lacuna in the debate. However, at least one writer appears to have recognised that the justification of access to information cannot be satisfied only with references to democratic catchwords. Birkinshaw[92] states that

> [freedom of information] leads into Open Government in so far as it necessitates access to governmental decision-making in a more public and participatory form. The claims for such are couched in terms of a right to know, a democratic right. *Such claims are easily made, but more difficult to justify* if one has not established what theory of democracy one accepts.[93] [Emphasis added].

In summary, it is submitted that although the concept of democracy is commonly referred to during discussions concerning access to information, it is rarely given the full consideration which it deserves. The liberal model of democracy, which accepts the public/private divide, is automatically presumed. The result is a debate without proper foundations and without concrete justification, which is balancing precariously on slogans. The debate desperately needs to be grounded: this can only be achieved through a full discussion of the nature of democracy and an exploration of the reasons for its support of the principle of access to information[94].

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[91] This question will be addressed in chapter 4 below.

[92] *Supra* note 43.

[93] *Ibid.* at 20. Birkinshaw then goes on to note that the crucial feature linking information access and democracy is the control of power. For further discussion of this point, see page 135 below.

[94] These issues will be fully explored below in chapter 4.

6. MUTUAL REINFORCEMENT

The discussion in this chapter has focused on two assumptions which presently form the foundations of the access to information debate. The first assumption is that it is only information which is situated in the public domain which should be subject to access legislation, and the second is that "democracy" is a self-evident justification for the principle of access. Why have these assumptions become so ingrained into the access debate? This question has been answered throughout the course of this first chapter. Firstly, it has been shown that both the assumptions have their foundations in liberalism, which is the dominant ideology in the modern western world. It is therefore not surprising that these liberal assumptions should remain unchallenged and become imbedded into the fabric of the access debate. Secondly, the two assumptions have been mutually reinforcing each other[95]. The term "democracy" is commonly and automatically linked to the idea of government. Therefore, if "democracy" is the word which is used to justify access to information, then it is a short and natural step to the assumption that information access should be limited to the public sphere. This logic also works in the reverse direction. If it is assumed that access to information is only applicable in the public sphere, then it is easy to further assume that this is because information access is justified by reference to democracy. The two assumptions are logically connected and seem to reinforce one another.

The access to information debate has hitherto been restricted by the operation of these

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[95] This fact has been noted throughout the course of this chapter. See above at page 12 and page 34.

uncontested assumptions: the challenge is to recognise this fact and try to look beyond them. That is the aim of this thesis. Chapters three and four are therefore respectively dedicated to investigating each of these assumptions[96]. However, before this investigation commences, it is necessary to determine whether the law reflects the same attitude towards the public/private distinction which is prevalent in the access to information debate. The following chapter will therefore examine the operation of the public/private divide in various schemes of access to information legislation.

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[96] Chapter 3 is concerned with the public/private distinction, and chapter 4 with democracy.

CHAPTER TWO

THE LEGISLATION

The latter half of the twentieth century has been a period of governmental growth. With the advent of the welfare state and increasing governmental regulation, governments began to come into contact with the ordinary person with greater frequency than ever before. As a natural result of increased pervasiveness, government agencies began to accumulate large quantities of information. As computer technology developed, government and private companies alike were able to manipulate information more and more efficiently. Inevitably, issues of information access found their way onto the political agenda[1], and several states passed legislation to control the flow of information[2]. One of the primary[3] legislative trends which has emerged in this area reflects a desire to ensure that information in the hands of the

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[1] British Columbia, *Extending Freedom of Information and Privacy Rights in British Columbia* by Barry Jones, (Victoria: B.C. Ministry of Government Services, 1993) notes that increased government activity, coupled with advanced communication have contributed to the concern surrounding information issues. Jones states at page 5 that "today governments everywhere are much more pervasive. The public policy decisions of government today have personal repercussions for every member of society. That power, and all its implications are quickly communicated to a better-educated, articulate population through the eyes of the modern media."

[2] The purpose of such laws is to make information public or private in the normative sense, in the hope that these legal norms will facilitate the retention, or the initiation, of the information's public or private nature in the descriptive sense. See Ruth Gavison, "Information Control: Availability and Exclusion" in S.I. Benn and G.F. Gaus eds., *Public and Private in Social Life* (London and Canberra: Croom Helm Ltd., 1983) at 115. For a discussion of the meaning of the normative and descriptive senses of public and private, see chapter 1 above at pages 15 and 16.

[3] Freedom of information legislation is the principal method by which states seek to create a norm of "public" information, but there are several legislative trends which have emerged that create a "private" information norm, such as copyright and patent laws.

government may be accessed by members of the public[4]. It is the relationship between such access to information legislation and the public/private divide which will be analysed in this chapter.

Although there are differences in the approach of various western style freedom of information legislative regimes[5], one common factor is that they do not directly extend to the private sector[6]. The following examination will provide an analysis of different types of legislative schemes, the objective being to determine how the public/private split is operating within this field and to identify any underlying ideological assumptions.

There are two basic models of legislation which provide for information access. The first seeks to provide a general right of access to any person, and the second is more specific, seeking to provide an individual with access to the files which concern him or her. Although these goals are related, it is the motivation which lies behind them that differs: in the first instance, the concern is with the right to access, whereas in the second, the focus is upon the

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[4] For example, the *Freedom of Information Acts* (United States) 1966 and 1974, the *Official Information Act* (New Zealand) 1982, the *Freedom of Information Act* (Australia) 1982 and the *Access To Information Act* (Canada) 1982. These acts make provision only for access to information held by the government and do not extend to the private sector.

[5] For example, the Canadian *Access To Information Act* provides for an Information Commissioner to deal with complaints concerning access, whereas no such provision is made under the federal *Freedom of Information Acts* in the United States.

[6] The public/private split in this area is not as straightforward as this statement might imply: although the private sector is not *directly* subject to freedom of information legislation, there may be instances when information which originated in the private sector, but which was subsequently transferred to the government, is subject to release. See, for example, section 20(2) of the Canadian *Access To Information Act* 1982 which provides for mandatory disclosure of "the results of product or environmental testing carried out...on behalf of a governmental institution." See note 28 *infra*. See also the discussion of "reverse" freedom of information in chapter 1 above at pp. 29-32.

privacy rights of the individual[7]. These goals may be incorporated into a single piece of legislation[8] or they may be dealt with in separate statutes. In order to make the issues clearer, legislation of the latter type, which concerns only one access goal, will be focused upon in this chapter. Firstly, it is proposed to analyse the Canadian *Access To Information Act* 1982[9]. This relatively young statute focuses upon the general right to access and can be regarded as typifying the employment of the public/private split in this area. Secondly, a legislative scheme which provides an individual with access to his or her own personal information will be examined, namely the British *Data Protection Act* 1984[10]. This act has been chosen for examination because it has implications for private sector agencies, and therefore raises questions about the public/private divide. The third type of legislative scheme which will be examined is ostensibly of the same nature as the first. However, it is not the nature of the legislation which singles it out for attention, but rather the fact that statutes in this group have been interpreted in a manner which has clear implications for the private sector. This has occurred in several state jurisdictions in the United States[11]. The statutes in Texas[12] and

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[7] Access to files concerning an individual may be necessary for his or her privacy rights, because that individual is then aware of the relevant information which is being held by another and can then take steps to have any false information corrected. For further discussion, see below at pp. 60-65.

[8] See, for example, the New Zealand *Official Information Act, 1982*, New Zealand R.S. Vol.21, No.156 which states in section 4 that its purpose is firstly "[t]o increase progressively the availability of official information to the people of New Zealand" and secondly "[t]o provide for proper access by each person to official information in relation to that person." See subsections (a) and (b) respectively.

[9] *Access To Information Act* R.S.C. 1980-81-82-83, c.111, Sch I [hereinafter "the ATI Act"].

[10] (U.K.), 1984, c.35. [hereinafter "the DP Act"].

[11] See, for example, the Arkansas *Freedom of Information Act* Ark. Code Ann. s.25-19-101 to 107 (1987 and Supp. 1989) and John J. Watkins "The Arkansas Freedom of Information Act: Time for a Change" (1991) 44 Ark.L.Rev. 535 and Lawrence W. Jackson "Arkansas Freedom of Information Act - Working Papers and Litigation Files of Attorneys Hired by Public Entities are Subject to Disclosure" (1991) 13 U.Ark. Little Rock L.J. 725.

Florida[13] will be focused upon, as the interpretation which has been afforded to them appears to challenge the public/private divide.

1. Typifying Liberal Ideology: The Canadian Experience

Bill C-43, which eventually became the Canadian ATI Act, was introduced in July 1980 by a Liberal government, after more than a decade of debate about access to information[14]. The proclamation of the Canadian ATI Act in 1983 can be regarded as the culmination of this debate: it gives the Canadian public a general right of access to information held by the federal government[15]. The ATI also establishes the office of information commissioner[16] who has power to investigate any access complaints that the public may have, and if this proves to be unsatisfactory, provision is made for further review by the Federal Court[17]. However, the ATI Act is limited in scope. For example, it explicitly states that it only applies to

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[12] The *Open Records Act*, Texas Civ. Stat. Art 6252-17a (Vernon Supp. 1988). [hereinafter "the Texas Act"].

[13] The *Public Records Act*, Florida Statutes (1991) Chapter 119. [hereinafter "the Florida Act"].

[14] A summary of the history of the access to information debate in Canada is provided by Tom Onyshko "The Federal Court and the *Access To Information Act*" (1993) Man.L.J. 73 at 76-82 [hereinafter "The Federal Court"].

[15] It is important to note that access to information which is held by *provincial* governments in Canada is not covered by the federal legislation, and each province has the choice to enact its own access legislation. Indeed, some of the provinces led the Canadian access debate by passing legislation prior to the enactment of the federal ATI Act. See the Nova Scotia *Freedom of Information Act*, S.N.S. 1977 c.10, the New Brunswick *Right to Information Act*, S.N.B. 1978 c.R-10.3 and the Newfoundland *Freedom of Information Act*, S.N. 1981 c.5.

[16] See sections 30-40 of the ATI Act, which deal with the commissioner's powers and duties, and also sections 54-66 which concern the structure of the commissioner's office.

[17] See section 41 of the ATI Act.

"information in records under the control of a *governmental institution*"[18]. The term "governmental institution" is defined as any department of the federal government which is listed in the first schedule to the Act[19]. It is therefore clear from the outset that the ATI Act is limited in its application not only to the public (or governmental) sphere but more specifically to those branches of government which are explicitly included in the legislation. As a result, only those government departments and agencies which are named in the legislation will be required to provide information in terms of the ATI Act. This use of inclusive, rather than exclusive, drafting has been the subject of criticism, *inter alia* on the grounds that new governmental agencies will not automatically be covered by the statute. Rankin[20] states that

> [a]lthough politically understandable, it is regrettable that the draftsmen did not provide a list of government institutions *not* subject to the Act...in lieu of the inclusive approach which has been adopted...As a result of drafting an inclusive list, problems of interpretation are bound to arise.[21] [Emphasis in the original].

Furthermore, not all information in the control of the specified governmental departments will be subject to disclosure if access is requested. The ATI Act provides for various broad exceptions to the right of access[22], and some of these exceptions seek to preclude access to

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[18] See section 2 of the ATI Act. [Emphasis added].

[19] See section 3 of the ATI Act, which is the interpretation section.

[20] T. Murray Rankin, "The New Access To Information and Privacy Act: A Critical Annotation" (1983) 15 Ottawa L.Rev. 1 [hereinafter "A Critical Annotation"].

[21] *Ibid.* at 8-9.

[22] See sections 13 to 27 of the ATI Act for broad descriptions of the types of records which are exempt from disclosure.

information which is regarded as belonging in the "private" sphere[23]. The wide exceptions contained in the ATI Act have been the subject of criticism on the basis that they are contrary to the objective of the statute, which is to facilitate, and not impede, the liberation of information[24]. For example, North[25] argues that "the Canadian legislation lacks even handedness and contains sweeping limitations on access to information held by the government."[26]

The main sections of the ATI Act which deal with "private" information are section 19, which concerns "personal information", and section 20, which concerns "third party" information. These sections of the Act will provide the focus for the following examination, which will seek to determine, firstly, how the public/private distinction operates within the framework of the legislation, and secondly, the way in which this is approached by the courts.

(a) The Legislation

Both section 19 and section 20 establish broad mandatory[27] exceptions for "private"

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[23] I use the term "private" in this context to refer to the whole of civil society. For a discussion of the different interpretations of the term "private", see chapter 1 above at pp. 17-20.

[24] See "A Critical Annotation", *supra* note 20 and John D. McCamus "Bill C-43: The Federal Canadian Proposals of 1980" in John D. McCamus ed., *Freedom of Information: Canadian Perspectives* (Toronto: Butterworths, 1981) at 266.

[25] P. M. North "Public or Private? A Paradox for 1984: Aspects of the Law Relating to Freedom of Information and Confidentiality" (1985) D.U.L.J. 90.

[26] *Ibid.* at 112-113.

[27] Both section 19 and section 20 of the ATI Act contain the words "*shall* refuse to disclose" [emphasis added] and the use of the word "shall" implies that the non-disclosure is mandatory.

information to the general right of access which is contained in the ATI Act. These exemptions can be placed in two categories, namely "class" exemptions, where all information falling within a class of documents will be exempt[28], and "harm" exemptions, where information which is likely to cause a specified kind of harm will be exempt[29]. The use of mandatory class exemptions in the ATI Act has been criticised by Rankin[30] who considers them to be particularly draconian and encouraging of unnecessary secrecy[31]. The exemptions to disclosure which are contained in sections 19 and 20 of the ATI Act are, however, further qualified by provisos which state that, in certain circumstances, "private" information may be released. In most such instances[32], the release of such information is at the discretion of the head of the government institution in question[33].

Section 19 of the ATI Act deals with "personal information" and is closely linked to the Canadian *Privacy Act*[34]: privacy is, after all, the flip side of the access to information coin[35].

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[28] See sections 19(1), 20(1)(a) and 20(1)(b) of the ATI Act, which are all "class" exemptions.

[29] See sections 20(1)(c) and 20(1)(d), which are both "harm" exceptions.

[30] "A Critical Annotation", *supra* note 20 at 12.

[31] Rankin states *ibid.* at 12 that "if the government institution "shall not" disclose the information, then even the most innocuous information *must* be withheld" [emphasis in the original].

[32] Section 20(2) provides for mandatory disclosure of environmental testing which was carried out for the government by a third party. See *supra* note 6. The remainder of the provisions which allow for the disclosure of "private" information are all discretionary.

[33] Subsections 19(2), 20(5) and 20(6) all begin with the words "[t]he head of a government institution *may* disclose..." [emphasis added]. The use of the word "may" implies that the disclosure is discretionary.

[34] *Privacy Act* R.S.C. 1980-81-82-83, c.111, Sch.II. [hereinafter *Privacy Act*].

[35] See the discussion in chapter 1 pp. 22-24 above, where the value of personal privacy is considered

The phrase "personal information" is defined with reference to the *Privacy Act* as "information about an identifiable individual"[36]. Such information can be discretionarily released in terms of section 19 if the person in question consents to the release, if the information is already available to the public or if any of the conditions contained in section 8 of the *Privacy Act* are complied with. Section 8 lays down a further thirteen situations in which personal information may be released, most of which are related to matters of public administration[37]. However, a broad discretion is provided under section 8(2)(m), which allows personal information to be disclosed where the head of the relevant governmental institution is of the opinion that "the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure". The decision as to whether the information should remain private or be released thus hinges upon the definition of the term "public interest", which is sufficiently indeterminate[38] to provide a seemingly broad discretion under this subsection. The discretion is, however, somewhat fettered by the use of the word "clearly", which implies that where there is doubt as to the benefit to the public interest, the information should not be released. This subsection therefore requires the head of the relevant governmental institution to perform a balancing act between the public interest in disclosure and the individual's right to privacy. In light of this fact, it is submitted that Rankin makes a valid point when he states that "the

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[36] *Privacy Act* section 3. This section includes a non-exhaustive list of examples of such personal information, and subsections (j) to (m) specifically exclude some types of information from this definition for the purposes of the ATI Act.

[37] For example, in terms of section 8(2)(l) personal information may be disclosed "to any government institution for the purpose of locating and individual in order to collect a debt owing [to the government]".

[38] For discussion of the term "public interest", see S.I. Benn and G.F. Gaus eds., *Public and Private in Social Life* (London and Canberra: Croom Helm Ltd., 1983) at 44-47 and also Gavison *supra* note 2 at 116-118.

total effect of this subsection is unclear."[39]

Section 20 of the Act provides for four mandatory grounds of non-disclosure which are all related to "third party" information. A "third party" is defined in the ATI Act as a person or entity other than the person making the access request or a government institution[40], so by definition a third party is a member of the "private" sector[41]. The exclusions under section 20 essentially cover a third party's trade secrets, its confidential information and information which "could be reasonably expected" to change the third party's financial position, prejudice its competitive position or interfere with its negotiations[42]. The exemption under section 20(1)(a) which relates to "trade secrets" is a mandatory class exemption[43], but the term "trade secret" is not defined in the ATI Act. It is clear, however, that this can be regarded as a very broad category, and it has been defined by the Canadian courts in the following manner:

> [a] trade secret may consist of any formula, pattern, device or *compilation of information which is used in one's business*, and which gives him an opportunity

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[39] See "A Critical Annotation" *supra* note 20 at 22.

[40] See section 3 of the ATI Act.

[41] The term "private" is used here to refer to civil society.

[42] Section 20(1) provides that information is not subject to disclosure if it comprises
"(a) trade secrets of a third party;
(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
(c) information the disclosure of which could *reasonably* be expected to result in material financial loss or gain to, or could *reasonably* be expected to prejudice the competitive position of, a third party; or
(d) information the disclosure of which could *reasonably* be expected to interfere with contractual or other negotiations of a third party." [emphasis added]
The use of the word "reasonably" in the latter two parts of this subsection implies that the test is an objective one.

[43] The result of this mandatory class exemption is that even innocuous information may not be released. See *supra* note 28.

> to obtain an advantage over the competitors who do not know or use it.[44] [Emphasis added].

In addition to the protection which is provided to the private sector by the broad terms of subsection 20(1)(a), subsection 20(1)(b) has been criticised as being extraneous[45] and, as such, clearly demonstrates the determination of the legislative drafters to ensure that private sector information should not be included within the scope of the ATI Act. This determination could be at least partly attributable to the experience in the United States regarding the federal freedom of information legislation, where it has been reported that

> the practice in the U.S. has shown that it's not government information that is being sought. About 80 per cent of the requests for information to U.S. federal agencies...have been made by businesses seeking information about the secrets of their competitors.[46]

In a similar manner to section 19, section 20 allows for the discretionary disclosure of third party information if the consent of the third party is obtained[47] or if it is clear that the public interest favours disclosure[48]. The scope of the discretion to disclose third party information in the "public interest" does not appear to be as broad or as explicit as the discretion contained in the corresponding provision which relates to personal information[49], but nevertheless, the

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[44] See the case of *R.I. Crain Ltd* v. *Ashton* [1949] 2 D.L.R. 481 at 486. For further definition of a trade secret, see David Vaver, "Civil Liability for Taking or Using Trade Secrets in Canada" (1981) 5 Can.Bus.L.J. 253.

[45] Rankin has stated that "paragraph 20(1)(b) could safely be deleted from the [ATI] Act with no apparent loss of legitimate business confidentiality." See "A Critical Annotation" *supra* note 20 at 20.

[46] See Ross W. McFarlane, "Freedom of Information Can Prove Costly" (1983) 7 Can.Law. (no.4) 23 at 23.

[47] See section 20(5).

[48] See section 20(6),

[49] This is because the words "in the opinion of the head of the institution" are included in section 8(2)(m) of the *Privacy Act* but not in section 20(6) of the ATI Act. The result is that the disclosure of personal information appears to carry more discretion than the disclosure of third party information.

confidentiality or availability of the information can still be argued to be dependent upon the concept of the public interest.

It is clear from this brief examination of sections 19 and 20 of the ATI Act that the liberal conception of the public/private distinction plays a central role in determining whether specific information in the hands of the government may be the legitimate subject of an access request. The exceptions contained in sections 19 and 20 indicate that the intention of the legislation is to ensure that information which relates to the private sector should remain private in the normative sense[50]. The liberal dichotomy between government (public) and civil society (private) comes into play as the legislation attempts to prescribe access for governmental information whilst steadfastly maintaining the confidentiality of non-governmental information. There is a practical, as well as an ideological reason for this. If "private" information in the hands of the government could be the subject of an access request, then private actors seeking to protect the confidentiality of their information would be reluctant to provide the government with the information it required. In order for the government to ensure the co-operation of the private sector, an argument can be made for the treatment of non-governmental information as confidential[51].

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[50] For an explanation of the normative sense of public and private, see chapter 1 above at pp. 15-16.

[51] However, this argument is only valid when the availability of information is determined with reference to the public/private divide. For example, if information access was dependent upon a factor related to its content rather than the classification of the information as public or private, then it would be irrelevant, for the purposes of access, whether the government or a private entity had possession of the information. Under such circumstances, the argument that the government must retain the confidentiality of third party information to ensure their co-operation, becomes obsolete. For further discussion about other criteria for determining information access, see chapter 5 below.

A delicate balancing act is performed by the Canadian ATI Act which carefully negotiates the liberal tightrope that separates the public domain from the private. It is clear that a tumble into the private sector is to be avoided at all costs, as is demonstrated by the "belt and braces" approach to third party information which is adopted in section 20[52]. The precise demarcation of the public/private boundary is otherwise a difficult task and this is demonstrated by the complex nature of the legislation, notably the large number of exceptions and the requirement for various qualifications to these exceptions. It further seems that the boundary between the public and the private spheres is not determinate in terms of the legislation, due to *inter alia* the degree of discretion which is involved when the public interest factor comes into play[53]. The legislative scheme thus seems both to typify the liberal attitude to the public/private distinction and to exhibit some of the weaknesses which are inherent in liberal theory[54].

(b) The Approach of the Courts

Despite the adherence of the legislative scheme to the liberal conception of the public/private distinction, there is sufficient indeterminacy to allow for a somewhat different interpretation of the ATI Act by the courts. Although the bare bones of a statutory scheme are provided by

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[52] See *supra* note 45 and the accompanying text.

[53] Schneiderman has criticised the exceptions under section 20 of the ATI Act, stating that "[i]t would appear that the mandatory third party exemptions are vague and in need of legislative clarification. The exemptions are multitudinous and may even be inclusive of each other." See David Schneiderman, "The Access To Information Act: A Practical Review" (1987) 7 Advocates' Q. 474 at 481.

[54] For example, Benn and Gaus eds., *supra* note 38 at 44-47 believe that liberals have difficulty coherently explaining the concept of "public interest", despite the fact that this concept is central to liberal theory. For further discussion of this criticism of liberal theory, see chapter 3, part 1 ""Double Think": The Fundamental Contradiction" especially at pp. 80-81.

the words contained in the legislation, the full impact can not be assessed until the flesh has been added by judicial interpretation. The approach of the courts to the public/private distinction contained in the ATI Act will therefore now be considered.

The first case in which a "private" third party sought review of a ministerial decision to disclose "third party information" under the ATI Act was the case of *Maislin Industries Ltd* v. *Canada (Minister for Industry, Trade and Commerce, Regional Economic Expansion)*[55]. This case arose when a journalist made an access request in terms of the ATI Act to the Department of Industry, Trade and Commerce for information concerning the government's decision to provide Maislin Industries Ltd with $34 million in loan guarantees. The government minister refused to release certain parts of the documents in question, on the ground that they contained confidential "third party" information in terms of section 20(1)(b) of the ATI Act. Maislin, however, objected to the disclosure of *any* information under the ATI Act, and the case was taken to the Federal Court for resolution. Before dealing with the specific issue before him, the judge, Mr Justice Jerome, made some general comments regarding the nature of the ATI Act, utilising section 2, which sets out the purpose of the Act, to justify a broad interpretation. He stated that

> since the basic principle of [the ATI Act]...is to codify the right of public access to government information, two things follow: first, that such public access ought not [to] be frustrated by the courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure; second, the burden of persuasion must rest upon the party resisting disclosure whether, as in this case,

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[55] (1984) 80 C.P.R. (2d) 253 (F.C.T.D.) [hereinafter *Maislin*]. Such applications by a third party to review a decision to disclose information under freedom of information legislation are often referred to as "reverse" freedom of information cases. This kind of case will commonly arise when there is a dispute as to where the public/private boundary should lie.

> it is the *private corporation or citizen*, or in other circumstances, the *government*.[56] [Emphasis added].

There are two issues which are raised by Mr Justice Jerome in this statement. Firstly, by favouring disclosure, the court makes it clear that it prefers an expansive, rather than a restrictive, interpretation of the Act. This purposive approach has been followed in subsequent court decisions. For example, Mr Justice Rothstein recently stated his belief that

> [w]hen Parliament has been explicit in setting forth the purpose of an enactment and principles to be applied in construing it, I am of the opinion that such purpose and principles must form the foundation on which to interpret the operative provisions of the Act.[57]

The court therefore seems to feel comfortable declaring that it will afford the ATI Act a broad interpretation in light of the legislation's explicit purpose clause[58]. Secondly, the text which is emphasised in Mr Justice Jerome's statement highlights the fact that the court did not wish to differentiate procedurally between the public and the private sectors, but believed that support or rejection of disclosure should determine the allocation of the burden of proof[59]. This approach has been favourably received by commentators. For example, Rankin approves of this aspect of the *Maislin* decision for two reasons. He argues that "[t]his conclusion is to

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[56] *Ibid.* at 256. Mr Justice Jerome expanded upon the first part of this comment in the later case of *Information Commissioner* v. *Minister of Employment and Immigration* (1986) 5 F.T.R. 287 at 292 where he stated that "[a]ccess should be the normal course. Exemptions should be exceptional and must be confined to those specifically set out in the statute."

[57] *Information Commissioner (Canada)* v. *Prime Minister (Canada)* (1992) 57 F.T.R. 180 (F.C.T.D.) at 189.

[58] Purpose clauses are now relatively rare in Canadian legislation. Rankin makes this point when he notes that "[t]his sort of purpose clause is not frequently found in Canadian legislation. Even hortatory preambles are increasingly rare; it is significant, therefore, that a purpose clause of this sort is contained in the body of the statute itself." See T. Murray Rankin "Case Comment: *Maislin Industries Ltd.* v. *Ministry of Industry, Trade and Commerce*" (1985) 8 Admin.L.R. 314 [hereinafter "Case Comment"] at 317.

[59] Indeed, the parties to the case were in agreement that the burden of proof should be borne by the party who was objecting to the disclosure of the information.

be applauded, not only since it is consistent with the spirit of the Act, but also for the very practical reason that it is the third party which is in the best position to substantiate its claim of confidentiality."[60] This approach has been followed in subsequent cases[61].

With regard to the substantive issue in the *Maislin* Case, the court held that section 20(1)(b) requires both an objective *and* a subjective test of the confidentiality of third party information to be satisfied before that information is exempt from disclosure. In other words, the information must be confidential in nature (objective) *and* it must have been treated as confidential by the party which is objecting to its disclosure (subjective)[62]. The adoption of this twofold test obviously makes it more difficult to satisfy the burden of proof when claiming the exception under section 20(1)(b): the court is once again demonstrating its preference for disclosure. Perhaps not surprisingly, the court in *Maislin* held that the information in question should be disclosed, the third party having failed to persuade the judge that the information was confidential by objective standards.

The substantive test which was established in *Maislin* has been followed and elaborated upon in subsequent cases. The test was applied in the case of *Montana Band of Indians* v. *Canada*

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[60] See "Case Comment" *supra* note 58 at 317. Onyshko agrees with Rankin on this point. See "The Federal Court" *supra* note 14 at 121-122.

[61] See, for example, *Merck Frosst Canada Inc.* v. *Canada (Minister of Health and Welfare)* (1988) 20 F.T.R. 73 and (1988) 22 C.P.R. (3d) 177 (F.C.T.D.) at 179 [hereinafter *Merck Frosst*].

[62] The first branch of the test established by Jerome A.C.J. in the *Maislin* case has been criticised as being unclear. Schneiderman *supra* note 53 at 480 remarks that "[t]he test adopted by Jerome A.C.J. to determine whether information is confidential in its nature does not leap out at the reader even upon a careful reading of his reasons for judgement."

(Minister of Indian and Northern Affairs)[63], where it was held that both branches of the test were satisfied and the information in question was therefore exempt from disclosure in terms of section 20(1)(b). In the case of *Ottawa Football Club* v. *Canada (Minister of Fitness and Amateur Sports)*[64], Justice Strayer held that an agreement between the government and a third party stating that the information in question is confidential is not sufficient to make that information confidential in nature. The objective part of the test is therefore not satisfied by such an agreement.

Subsections 20(1)(c) and (d) have also been the subject of judicial interpretation[65] and were considered by the Federal Court of Appeal for the first time in the case of *Canada Packers Inc.* v. *Canada (Minister of Agriculture)*[66]. This case involved a dispute about the disclosure under the ATI Act of meat inspection team audit reports regarding Canada Packers Inc. The motions judge in this case had adopted a direct causation test, which meant that a party claiming the exemption must "establish a *likelihood* of substantial harm"[67] to its financial, competitive or negotiating position before the information in question was exempt from

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[63] (1988) 59 Alta.L.R. (2d) 353 (F.C.T.D.).

[64] (1989) 23 C.P.R. (3d) 297 (F.C.T.D.)

[65] Subsection 20(1)(a) does not seem to have produced as much jurisprudence as the other subsections, but it has been raised in a few cases. See, for example, the *Merck Frosst* case *supra* note 61.

[66] (1988) 87 N.R. 81 (F.C.A.) [hereinafter *Canada Packers*].

[67] *Ibid.* at 88, paragraph 15 [emphasis in the original].

disclosure[68]. The appeal court, however, did not agree that this was the test which should be applied. Justice MacGuigan, reading the judgement of the court, stated that

> [w]hat governs...in each of the three alternatives in paragraphs (c) and (d) is...the initial verb, which is the same in each case, viz. "could reasonably be expected to". This implies no distinction of direct and indirect causality but only of what is reasonably to be expected and what is not.[69]

The court therefore laid out the test for subsections 20(1)(c) and (d) as requiring "a reasonable expectation of *probable* harm"[70]. Although this test requires more than a mere *possibility* of harm, it places a less onerous burden upon the party resisting disclosure than the direct causation test which was adopted by the motions judge. The court then noted that where several documents are involved, as in the case at hand, each document should be separately evaluated in terms of Section 20. On the facts of the case, which involved reports of meat inspection audit teams, the court concluded that the test for subsections 20(1)(c) and (d) had not been satisfied and the information should therefore be disclosed. The test established in the *Canada Packers* case was followed by the Federal Court of Appeal in the case of *Saint John Shipbuilding Ltd* v. *Canada (Minister of Supply and Services)*[71]. Hugessen, J. A., who delivered the opinion of the court stated that "the threshold must be that of probability and not, as the [third party]...would seem to want it, mere possibility or speculation."[72]

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[68] In establishing this direct causation test, the motions judge *inter alia* relied upon authority from the United States. The U.S. *Freedom of Information Act*, 5 U.S.C s.552 (1988) has provisions similar to subsections 20(1)(a) and (b) of the Canadian ATI Act, but not to subsections 20(1)(c) and (d).

[69] See *Canada Packers supra* note 66 at 89, paragraph 21.

[70] *Ibid.* at 89, paragraph 22 [emphasis in the original].

[71] (1990) 107 N.R. 89 (F.C.A.)

[72] *Ibid.* at 91 paragraph 5. For a more detailed explanation of this issue, see "The Federal Court" supra note 14 at 132-139.

The above examination of the courts' treatment of section 20 demonstrates two major, and arguably contradictory, trends. Firstly, the courts seem to be taking a purposive approach to the legislation, preferring disclosure to secrecy. Secondly, as is demonstrated by the test for subsections 20(1)(c) and (d), the courts nevertheless on occasion appear to be attempting to strike a balance between publicity and privacy[73]. Although the court is clearly making statements which support the broad spirit of the ATI Act, some commentators are sceptical about judicial willingness to put these sweeping statements into practice. In a recent review of the impact of the ATI Act, Onyshko states that "[d]ecisions on some issues show that while the court pays lip service to these principles, it often makes decisions which seem to fly in their face."[74] It is arguable that this somewhat schizophrenic attitude towards the public/private distinction can be explained by the nature of the legislation. Although the *purpose* of the legislation is reasonably progressive, in that it seeks to provide a *right* of access to information[75], the legislative *scheme* has been structured through the liberal public/private distinction. When attempting to interpret the Act, the courts are thus caught between a rock and a hard place: they are urged to look *favourably* upon disclosure, whilst simultaneously being constrained by detailed provisions which strive to *prevent* the disclosure of "private" information. The liberal public/private dichotomy thus operates within the legislative scheme

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[73] With regard to subsections 20(1)(c) and (d), the direct causation test would have provided a difficult hurdle for a third party to overcome. In this situation, access would be favoured. Conversely, if all that was required was proof a mere possibility of harm, then it would have been much easier to establish an exception in terms of subsections 20(1)(c) or (d), thus favouring privacy. By adopting the test of "a reasonable expectation of probable harm", the court attempted a compromise and hoped to strike a balance between access and privacy.

[74] "The Federal Court" *supra* note 14 at 91.

[75] Provision for a right of access to information is a progressive step for a system which was previously based upon notions of secrecy. See T. Murray Rankin *Freedom of Information in Canada: Will the Doors Stay Shut?* (Canadian Bar Association, 1977).

to restrict the application of the legislation by the courts. Although the legislation is indeterminate regarding the location of the public/private boundary, it is clearly supportive of the liberal concept of a division between the public and the private spheres. This poses a problem for the judges, who accept the liberal public/private distinction which is laid down in the legislation, but are left without a clear indication of where the boundary should be drawn. The result is a degree of confusion in the judiciary's resolution of specific problems and disputes which are governed by broad legislative provisions.

In summary, it is submitted that the liberal public/private distinction affects the legislative scheme contained in the ATI Act and consequently also affects the approach of the judiciary[76]. The Canadian ATI Act can thus be regarded as typifying the liberal approach towards the creation of a general right of access to information. The second type of legislation in which access to information rights are created is that which concerns personal privacy, and it is one such legislative scheme which will now be considered.

2. The British Data Protection Act: Access for Privacy

It has already been noted that freedom of information legislation is almost always limited to the public, or governmental, sector and the above analysis of the Canadian Access To Information Act exemplifies this trend. The situation in Britain, however, is somewhat different. Although there is no comprehensive statute which provides for access to

[76] It should be noted that the majority of the judiciary are likely to be sympathetic towards liberal ideals.

governmental information[77], disclosure of information in both the governmental *and the private* sectors is provided for in certain circumstances under the *Data Protection Act* (U.K.) 1984[78]. The introduction of a legislative scheme which compels private entities to disclose information, would seem to imply that the tradition liberal public/private dichotomy has been abandoned, or at least eroded. Cursory examination of the DP Act is, however, sufficient to shatter any such illusions.

The 1984 Act was born, not from a concern about access to information, but rather to ensure that Britain would not be at a trading disadvantage within Europe[79]. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data[80], which was concluded in 1981 under the auspices of the Council of Europe, was designed to create a "free market in data flow"[81] between signatory states. Britain, which did not want to suffer commercially by remaining outside this market, enacted the DP Act as a prerequisite to ratification of the treaty. The provisions of the DP Act have been fairly criticised as being

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[77] The *Local Government (Access To Information) Act* (U.K.) 1985, c.43, however, essentially provides for access to information for local authorities. See Patrick Birkinshaw, *Government and Information: The Law Relating To Access, Disclosure and Regulation* (London: Butterworths, 1990), especially Chapter 4, and Tim Harrison *Access To Information in Local Government* (London: Sweet and Maxwell, 1988), Chapter 1.

[78] See *supra* note 10.

[79] See R.C. Austin, "The Data Protection Act 1984: The Public Law Implications" (1984) Public L. 618. Austin examines the DP Act and concludes at 634 that "[d]ata protection may thus be one of the first steps along the road to open government...It would be a fitting irony for a Government so opposed to the very idea of freedom of information legislation, to have obtained the passage, for largely commercial reasons, of legislation indirectly creating public rights of access to official information."

[80] European Treaty Series No. 108.

[81] See North *supra* note 25 at 106.

"particularly torturous"[82], containing many exemptions and exclusions[83]. The DP Act will therefore not be considered in detail, but rather a broad outline will be drawn to determine the manner in which the public/private distinction is operating.

The 1984 Act is restricted in its scope to automated personal data[84], the effect of this being that personal information held on computer is regulated by the Act, but information which is held manually is excluded[85]. In this respect, the 1984 Act is far from comprehensive. However, as noted earlier, *all* "data users", both governmental and private, who hold personal data on computers are covered by the DP Act[86]. Data users must register with the Data Protection Registrar[87] to avoid committing an offence and must thereafter collect, store and use personal information in compliance with the Act. In particular, an individual (the "data subject") must be informed by a data user that he holds personal information about that individual. The data subject is then entitled to access to the information concerning him/her

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[82] See Patrick Birkinshaw *Freedom of Information: The Law, the Practice and the Ideal*, (London: Wiedenfeld and Nicholson, 1988) at 170.

[83] For example, see Part IV of the DP Act, which includes an exemption for *inter alia* information held for the purposes of payrolls and accounts (section 32).

[84] See section 1 of the DP Act.

[85] At this point, it should be noted that the right of access to personal information in certain manual files which are held by the government may be provided for by other legislation. See, for example, the *Access To Personal Files Act* (U.K.), 1987 c.37 [hereinafter the "ATPF Act"], which supplements the DP Act by providing for the creation of regulations which would allow such a right of access to both computerised and manual files held by specific government departments. So far, two regulations have been made under section 3 of the ATPF Act, extending its coverage to local authority housing and social services departments.

[86] For the definition of "holding" personal data, see the DP Act, section 1(5).

[87] See section 4 of the DP Act.

and he/she may request a copy of it or that it be corrected or erased[88].

Disclosure of information in terms of the 1984 Act is therefore of a limited nature: an individual does not have a general right of access, but may only access information which is personal to him/her. It is thus apparent that the effect of the legislation is not to promote *publicity* of information, but rather to protect its *privacy*. Individuals are granted access to information held *inter alia* by the "private" sector in order to strengthen the most fundamental notion of privacy, namely individual privacy[89]. To this effect, privacy rights within the "private sector" have merely been prioritised, with the individual right to privacy taking precedence over the right of entities in the private sector to have control over the information which they hold. The public/private dichotomy therefore remains intact and it can be argued that, despite its impact on the private sector, the 1984 Act continues to operate within the traditional liberal public/private dichotomy.

A similar scheme for access to personal information is provided for in Canada under the *Privacy Act*[90]. There are two main differences regarding the respective coverage of the British and the Canadian legislative schemes. Firstly, the Canadian *Privacy Act* applies to both

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[88] See the DP Act, section 24 and Schedule 1, Part I, Data Protection Principle Number 7.

[89] See the breakdown of the concept of privacy provided by Benn and Gaus eds., *supra* note 38 at Chapter 2 and discussed above at pp. 22-24.

[90] *Supra* note 34, at section 12.

computerised and manually stored information[91], thus covering a wider variety of information mediums than the DP Act. The second difference between the statutes concerns the public/private distinction: unlike the DP Act, the *Privacy Act* applies only to government held information, thus excluding the private sector from the scope of the legislation. This exclusion of information held by the private sector may have been at least partly dictated by practical concerns. For example, due to the nature of the Canadian constitution, it is arguable that the federal government can only pass legislation in respect of federally registered companies. An attempt to extend the principles of the *Privacy Act* to the private sector may therefore be largely unsuccessful, as it would only be effective with respect to federally registered companies. This would create a legal anomaly which would benefit companies registered provincially. Another practical concern is related to the enforcement of such a scheme in the private sector. It is likely that the implementation and policing of an access scheme covering the private sector would be very costly and difficult to manage[92]. The restriction of the access provisions under the *Privacy Act* to the public sector has nevertheless been criticised by Onyshko[93] as a "glaring shortcoming"[94]. Onyshko argues that "at a minimum, individuals should have quick and easy access to personal information held by government *and private*

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[91] Section 3 of the *Privacy Act* defines "personal information" as "information about an identifiable individual recorded *in any form*" [emphasis added].

[92] The implementation of the DP Act in Britain seems to have caused some problems, due to the large number of registrations under the Act and the difficulties associated with compelling such registration. See N. Savage and C. Edwards, "Implementing the Data Protection Act 1984" (1986) J.Bus.L. 103.

[93] Tom Onyshko, "Access to personal information: British and Canadian legislative approaches" (1989) 18 Man.L.J. 213 [hereinafter "Access to Personal Information"].

[94] *Ibid.* at 221.

sector agencies"[95] [emphasis added]. By adopting this argument, however, it is submitted that Onyshko does not go as far as to venture outwith the liberal public/private dichotomy: his concern is for personal privacy and individual rights and these notions are central to liberal ideology[96].

The situation regarding access by individuals to personal information which is held by others can thus be viewed in a somewhat different light from access which is provided to the general public. Legislation for the former is justified with reference to different principles than the latter and, indeed, can be seen as performing a different function. Legislation which permits access to personal information for the individual in question can be applied to the private sector without unduly threatening the liberal conception of the public/private dichotomy.

3. Texas and Florida: Redefinition of the Private Sector?

The legislative schemes which have been considered thus far have been shown to conform to the liberal ideological view of the public/private distinction. It seems, however, that some freedom of information legislation may be more difficult to slot into an ideological pigeonhole. Two examples of state legislation in the United States of America which seem to threaten private sector immunity from legitimate access requests, will be considered. The first is the

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[95] *Ibid.* at 216.

[96] Furthermore, even if Onyshko's reform of the *Privacy Act* was adopted, the effect would be the same as that which exists under the British Data Protection Act: private sector rights would merely have been prioritised and the public/private dichotomy would remain.

Texas *Open Records Act*[97] and the second is the Florida *Public Records Act*[98]. Both these statutes have been interpreted in a manner which seems to provide justification, in certain circumstances, for access requests concerning documents in the hands of the private sector, which are not personal to the individual requesting the information. The following examination will attempt to determine whether these freedom of information schemes truly deviate from the liberal ideological norm or whether they have merely adopted it in a different guise.

At first glance, the Texas *Open Records Act*, like most other freedom of information legislation, appears to apply *only* to governmental documents. Indeed, the Texas Act specifically states that "all persons are...at all times entitled to full and complete information regarding the affairs of *government* and the official acts of those who represent them as public officials and employees"[99] [emphasis added]. The door was left open for some private entities to be included in the scope of the Texas Act by the broad language adopted in section 2(1)(F), which utilises the notion of public (i.e. governmental) funding[100] in the definition of the term "government body". This term explicitly includes "the part, section, or portion of every organization, corporation, commission, committee institution, or agency which is supported in whole or in part by public funds, or which expends public funds."[101]

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[97] *Supra* note 12.

[98] *Supra* note 13.

[99] See section 1 of the Texas Act.

[100] Section 2(1)(F) of the Texas Act defines "public funds" as "funds of the State of Texas or any governmental subdivision thereof."

[101] Section 2(1)(F) of the Texas Act.

One of the prime sources for interpretation of the Texas Act is the Attorney General, who frequently issues written opinions on the scope of legislation[102]. It is the Attorney General who, in a series of opinions concerning the interpretation of section 2(1)(F), extended the scope of the Texas Act from governmental and quasi-governmental institutions to include any private entity which receives full or even partial funding from the Texas state government[103]. This interpretation has not been explicitly rejected by the courts[104].

The extension of the scope of the Texas Act to include private entities has been criticised by Keeling[105] who does not believe that the Attorney General's opinions are in accordance with the intention of the legislation. Although he presents some valid arguments[106], the tone of Keeling's article is defensive and he appears to be ideologically opposed any erosion of the autonomy of the private sector. He believes that

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[102] The attorney general's opinions, although not strictly binding upon the judiciary, are of persuasive value. See *Jones* v. *Williams*, 45 S.W.2d 130 (1931).

[103] See Texas Attorney General Open Records Decisions numbered 228 (1979); 302 (1982) and JM-116 (1983).

[104] See for example, *Kneeland* v. *National Collegiate Athletic Association (NCAA)*, 650 F.Supp. 1047 (W.D. Texas 1986), rev'd at 850 F.2d 224 (5th Cir. 1988). The district court in this case found that the NCAA, which is a private association of universities, was a "government body" in terms of section 2(1)(F) of the Texas Act, because part of its funding was derived from state supported institutions. On appeal, the decision was reversed. However, it was not reversed on the basis that the NCAA was a private entity and thus did not come under the scope of the Texas Act, but rather because the NCAA was providing services for payment and thus had a "contractual defence". See also the case of *A.H. Belo Corporation* v. *Southern Methodist University*, 734 S.W.2d 720 (Texas App - Dallas 1987).

[105] Byron C. Keeling "Attempting to Keep the Tablets Undisclosed: Susceptibility of Private Entities to the Texas Open Records Act" (1989) Baylor L.Rev. 203.

[106] For example, he points out that a consequence of utilising the criterion of public funding to determine whether a private entity is a "governmental body" in terms of the Texas Act, may be that private bodies refuse to apply for or accept public funds in order to protect the confidentiality of the information that they hold. *Ibid.* at 229.

> [t]he attorney general opinions on the scope of the Open Records Act are *dangerous*, because they may be used to reach information about which the public has no inherent "right to know"....the Open Records Act has been used as the vehicle to attempt to reach information only tangentially related to the purposes for which the public funds were received[107] [emphasis added].

This passage shows that Keeling is adopting a traditional stance and is fully supportive of the liberal conception of the public/private dichotomy as applied to freedom of information legislation[108]. The use of the word "dangerous" shows that Keeling is exceptionally nervous about any application of such legislation to the private sector. Keeling's apprehension implies that the Attorney General's interpretation of the Texas Act has taken a step towards the abandonment of the liberal public/private dichotomy. However, when the impact of the Texas Act is carefully considered, it can be seen that nothing quite so revolutionary has occurred. The interpretation of the Texas Act certainly brings some traditionally "private" entities within the scope of the "public" sphere, but this shift is limited to those bodies which receive public funds. Furthermore, the Texas Act contains the usual exemptions from disclosure where certain types of information, such as "trade secrets"[109] or information which may benefit a competitor[110] are involved. It is therefore submitted that, rather than taking the first step towards abandoning the liberal ideological public/private distinction, the Attorney General's interpretation of the Texas Act has merely shifted the boundary line between the public and the private spheres. The dichotomy remains: the only difference is that some bodies which would

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[107] *Ibid.* at 227.

[108] In other words, Keeling believes that access to information should be restricted to government, or "public" documents.

[109] See section 3(a)(10).

[110] See section 3(a)(4).

previously have been regarded as private have now crossed the boundary into the public sector for the purposes of the Texas Act.

A comparable situation exists in Florida with respect to the state *Public Records Act*[111]. The Florida Act begins in a similar manner to the Texas Act with a declaration that all state records shall be subject to disclosure[112]. However, the wording in the Florida Act which opens the legislation to application in the private sector does not focus on the concept of public funding, but rather upon the concept of an "agency" which is acting for the state. Section 11(1) of the Florida Act defines "public records" as including "documents...made or received pursuant to law or ordinance or in connection with the transaction of official business *by any agency*" [emphasis added]. The term "agency" is then defined as including any "private agency, person, partnership, corporation or business entity acting on behalf of any public agency."[113] The question of interpretation in respect of this piece of legislation then becomes one of when a private entity is deemed to be "acting on behalf of a public agency".

The Florida courts have grappled with the above question on several occasions, engineering various tests to resolve the problem[114]. The approach of the courts has been criticised by

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[111] *Supra* note 13.

[112] Section 1(1) of the Florida Act states that "[i]t is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person."

[113] See section 11(2).

[114] See, for example, the case of *Schwartzman* v. *Merritt Island Volunteer Fire Department,* 352 So. 2d 1230 (Fla. 2d Dist. Ct. App. 1977) which utilised a "totality of factors" test and *Fox* v. *News-Press Publishing Co.*, 545 So. 2d 941 (Fla. Dist. Ct. App. 1989) in which the court looked to see if the private entity was performing what was essentially a governmental function.

Rivas[115], who believes that the right of access under the Florida Act to documents held by the private sector is unclear. As a result, private entities are unsure about the confidentiality of their records and, on occasion, have gone to great lengths to protect that confidentiality[116]. Rivas postulates that a reason for the lack of clarity in the law could be the fact that the governmental and the private sector interact in so many different ways, thus resulting in many factual situations in which a private entity could "act on behalf of" the government[117]. Indeed, in this respect, the Florida Act seems to open more possibilities for access to "private" documents than the Texas Act[118].

Does this suggest that the Florida Act is exhibiting symptoms of an abandonment of the public/private dichotomy? It is submitted that once again this question must be answered in the negative. Although the Florida legislation arguably pushes the boundary between the public and the private spheres further into the traditionally "private" domain than any of the other statutes so far considered, it is clear that the dichotomy remains. The criterion for access to documents in the possession of "private" entities is still a connection with the "public" sector, and once again, this merely involves a definitional, rather than a conceptual change.

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[115] Robert Rivas "Access To "Private" Documents Under the Public Records Act" (1992) 16 Nova L.Rev. 1229.

[116] See, for example, *Times Publishing Co* v. *City of St Petersburg*, 558 So. 2d 487 (Fla. 2d Dist. Ct. App. 1990), in which negotiations between a company and the city were conducted without the city being in possession of any related documents. The only records kept by the city were the city attorney's five inch stack of personal notes!

[117] See Rivas *supra* note 115 at 1247.

[118] Unlike the Texas Act, the Florida Act does not contain an exemption for "trade secrets" and in this respect, the private sector is even more vulnerable than it is in Texas. See Patricia E. Chamberlain, "The Public Records Act: Should Trade Secrets Remain in the Sunshine?" (1991) 18 Fla.St.U.L.Rev. 559.

Three different types of legislative schemes have been considered above, namely the Canadian ATI Act, which is typical of many freedom of information statutes, the British Data Protection Act which provides for access to "private" documents in order to help protect the privacy of individuals, and the Texas and Florida regimes which allow limited public access to documents held by private entities. Each of these legislative schemes has been shown to operate within the confines of the liberal conception of the public/private divide. Furthermore, the discourse surrounding such pieces of legislation appears to reflect a preoccupation with determining precisely where the boundary line between the public and the private should be drawn[119]. One of the main reasons for this is that the conflict between access to information and the concept of privacy can not be resolved in black and white terms: a compromise is often required. As we have seen, this makes it very difficult to draft legislation and the resultant statutes are often seem to be torturous[120]. As Gavison[121] has noted "in society and in individual life, the desirable solution of the privacy/publicity conflict is rarely complete privacy or total publicity but some balance between the two which *cannot* be abstractly specified"[122] [emphasis added]. As any statute must be to a certain extent abstract in nature before it can apply universally, it will by definition be extremely difficult for a freedom of information statute to draw a clear line between the public and the private sectors.

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[119] See, for example, the cases concerning the Canadian ATI Act above at pp. 53-60, Keeling *supra* note 105 and North *supra* note 25. North identifies the public/private issue, but then becomes preoccupied with correctly defining these spheres.

[120] See, for example, the Canadian ATI Act discussed above at pp. 47-53.

[121] See Gavison, *supra* note 2.

[122] *Ibid.* at 121-122.

The examination in the first two chapters has shown that both the freedom of information debate and the scope of access to information legislation are being dictated by the overwhelming, but largely unrecognised, presence of the liberal public/private divide. Although commentators have demonstrated a preoccupation with the precise demarcation of the public and private spheres, they are unwilling to question the benefit of the dichotomy in a more critical manner. This attitude is reflected throughout the access legislation itself and the way in which it has been interpreted. An assessment of the merits of employing the public/private divide as the determining factor in the access to information debate is desperately needed.

CHAPTER THREE

THE PUBLIC AND THE PRIVATE: A LEGITIMATE INFORMATION DIVIDE?

> A crude bifurcation of the social world into government and citizens is simply untenable in a modern political economy that aspires to principles of democratic governance.[1]

The world of information access has been profoundly affected by a "crude bifurcation" along the lines of the liberal public/private divide. It has already been shown that the access to information debate has, for the most part, revolved around the issue of access to *governmental* information[2]. The restriction of the access to information debate to the public sphere has thus far attracted little attention: the possibility of legislating for public access to information which is held by *private* entities appears to have been almost completely ignored. This is perhaps not surprising. The assumptions which are implicit in the prevalent attitude to privately held information reflect a society which treats information as private property[3] and furthermore places great emphasis on the maintenance of property rights[4]. The result is an "information

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[1] Allan C. Hutchinson "Mice under a chair: Democracy, courts, and the administrative state" (1990) 40 U.T.L.J. 374 at 377. This quote highlights both issues which were raised in chapter 1 in relation to the access to information debate, namely the public/private divide and the question of democratic justification. The first of these issues will be dealt with in this chapter, and the latter in chapter 4.

[2] See chapter 1 above.

[3] The law protects information in a similar way to property. There are several laws which protect the privacy of information, such as patent and copyright laws, and the law of confidence which *inter alia* gives protection to "trade secrets". With regard to the latter point, see *Seagar* v. *Copydex Ltd.* [1967] 2 All. E.R. 415.

[4] See, for example, the case of *Harrison* v. *Carswell* (1975) 62 D.L.R. (3d) 68 (S.C.C.), in which the majority of the court emphasised the fundamental importance of property rights. Dickson J. states at page 83 that "Anglo-Canadian jurisprudence has transitionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law."

divide" in Western societies. The separation of information into the obtainable and the unobtainable is dependent upon the legal status of the information and not, as might be imagined, its content. This separation occurs along the lines of the liberal public/private divide: information which is in the hands of the state is deemed to be a suitable subject for the application of freedom of information laws, but that which is held by the private sector is regarded as being outwith the scope of such legislation and so remains inaccessible to the public. An invisible line is thus drawn through the heart of the freedom of information debate. Information in the public sector and information in the private sector are afforded different sets of values and assumptions. The glaringly obvious question is never asked: is the liberal public/private distinction a suitable information divider?

This is the question which will be addressed in this chapter. The concepts of public and private have already been analysed and a description has been provided of the liberal public/private divide[5]. This chapter will therefore focus on the critiques which the liberal public/private divide has attracted. During the course of this analysis, it is hoped to demonstrate that the liberal public/private distinction is an arbitrary and unsuitable criterion for determining the availability of information for public scrutiny[6]. It should be emphasised at the outset that the purpose of this critique is to highlight the weaknesses of the *liberal*

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[5] See chapter 1 above.

[6] Exposure of the arbitrary nature of the public/private divide raises questions about democracy, which has been thus far restricted by liberal ideology to the public sphere. How can the concept of democracy, which is most often cited as a justification for access legislation, help in the search for a more suitable criterion to determine the availability of information for public access? This question will be tackled and the subject of democracy will be fully explored in chapter 4 below.

public/private divide: it is *not* suggested that the public/private divide should be completely abolished. The importance of personal privacy is explicitly recognised and the arguments of those commentators who wish to completely eradicate this notion are unequivocally rejected[7].

Two different, but arguably related, categories of critique of the liberal public/private distinction will be dealt with. Firstly, the general argument that liberalism utilises two inherently contradictory models will be examined. Secondly, consideration will be given to various critiques which highlight the artificial nature of the distinction. Both these critiques strike at the heart of the liberal understanding of the public/private divide.

1. "DOUBLE THINK" : THE FUNDAMENTAL CONTRADICTION

> Double think means the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them.[8]

It has been claimed that the liberal conception of the public/private distinction relies on contradictory beliefs, making the theory dependent upon utilisation of the concept of "double think". Unger[9] and Kennedy[10] have both written at length about the "fundamental contradiction" that exists in social life and which they believe liberalism seeks to deny. Benn

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[7] Most critics of the liberal public/private distinction recognise the importance of personal privacy. See *infra* notes 62 and 77 and the accompanying text. The argument of those critics who wish to *totally* abolish the public/private distinction are rejected. See *infra* note 68 and accompanying text.

[8] George Orwell, *1984*, (London: Secker and Warburg, 1987) at Part II, Chapter 9.

[9] Roberto M. Unger *Knowledge and Politics* (New York: The Free Press, 1975)

[10] Duncan Kennedy "The Structure of Blackstone's Commentaries" (1979) 28 Buff.L.Rev. 209.

and Gaus[11] and Cane[12] conduct similar critiques, arguing that the liberal theory of public and private relies upon two different models which promote fundamentally disparate notions of the individual in society.

Unger and Kennedy both begin their critiques by describing what they refer to as the "fundamental contradiction" of social life. The fundamental contradiction arises because society is structured so that human beings have both a private and a public side of their lives, which are inherently incompatible. The private world nurtures the desire for uniqueness and individuality, but cannot satisfy the individual's instinctive yearning for acceptance by others[13]. To obtain such acceptance, the individual must move into the public realm, where the collective of society threatens to subsume the identity of the individual[14]. This is the fundamental contradiction of social life: the public realm of others is indispensable to an individual's existence, whilst simultaneously being incompatible with it. The result, according to Unger[15], is that

> the self flees constantly from the public to the private life, only to be compelled

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[11] S.I. Benn and G.F. Gaus eds., *Public and Private in Social Life* (London and Canberra: Croom Helm Ltd, 1983) at chapter 2.

[12] Peter Cane "Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept" in John Eekelaar and John Bell eds., *Oxford Essays in Jurisprudence* Third Series (Oxford: Clarendon Press, 1987).

[13] Unger, *supra* note 9 at 59-60 argues that "[the individual's] private existence is marred by the fear that it inhabits a world of illusion, because its opinions and impressions are not shared by others and a world of helpless discontentment, because it is chained to the wheel of unsatisfied desire. To overcome the sense of illusion, it must be able to persuade others that its views of the world are not mad."

[14] In relation to the public sphere, Unger *ibid.* at 59 argues that "[i]n its public existence, the self is threatened by the loss of its individual identity and of mastery of its own future."

[15] *Ibid.*

> in the interests of its survival as a private person to deal publicly with others. Thrown back and forth between two fates, it cannot accept either as a resting place.[16]

Although this may sound rather theoretical, the fundamental contradiction manifests itself in human behaviour and insecurity on a daily basis. It is revealing to note that most individuals display a "public identity" when they venture out into the world of others, masking their true identity which is only revealed in private moments. This mildly schizophrenic behaviour highlights the reality of the public and private spheres and their inherent incompatibility: why would it be necessary to switch identities if the two worlds were compatible?[17] Furthermore, who can deny that they have felt the insecurity which exists in the private sphere, and have sought reassurance in the public sphere through the acceptance of others? The search for the uniqueness which is provided by the private sphere is also universal: each human being must feel a degree of self-worth and self-importance in order to survive[18].

The fundamental contradiction is therefore a reality of social life. Liberalism seeks to deny

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[16] *Ibid.* at 60.

[17] Unger, *ibid.*, recognises this schizophrenia when he states at 61 that "[t]he self whose continuity your obedience ensures is not your own, but merely the mask you are compelled to wear in order to win the approval that you crave. The others save you from being nothing, but they do not allow you to become yourself."

[18] The fundamental contradiction can be used to explain some of the problems which women commonly face. Women are socialised to seek acceptance in the world of others primarily from men. In the search for this acceptance, a woman will frequently make sacrifices in order to secure or cement a relationship with a man, but in doing so she may be subsumed into the realm of the other and lose sight of her own private identity. Feeling unable to return to the private sphere, the woman is trapped in the public sphere, which alone is incapable of fulfilling her human needs. The fundamental contradiction can therefore explain why women in such a position often lose their sense of self-worth and self-importance, and need to distance themselves from the relationship, and thus from the public sphere, in order to regain these feelings.

this contradiction by splitting the world into two spheres, the public and the private[19]. This masks the pain of the fundamental contradiction and allows individuals to live in a dichotomous world, whilst simultaneously denying the existence of the dichotomy. Kennedy[20] argues that the element which mediates between the public and the private spheres is the law, which reflects liberal values and beliefs. Law is divided into private law and public law, and in both legal spheres the role of others is interpreted as being non-threatening to the identity of the individual. Kennedy states

> [i]n civil society, others are available for good fusion as private individual respecters of rights; through the state, they are available for good fusion as participants in the collective experience of enforcing rights. A person who lives the liberal mode can effectively deny the fundamental contradiction.[21]

However, he notes that the law itself reflects the fundamental contradiction: in order for an individual to be free (i.e. protected from coercion by others), it is necessary for that individual's freedom to be restricted (i.e. he must submit himself to the law). Kennedy states that "[c]oercion of the individual by the group appears to be inextricably bound up with the liberation of that same individual."[22] The attempt of liberalism to mediate the fundamental contradiction therefore fails, as liberalism itself is impaled upon the reality of the contradiction.

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[19] Kennedy, *supra* note 10 argues at 286 that "the essence of liberalism is that it mediates the fundamental contradiction by splitting the universe of others into two opposed domains: one of right-bearing individuals, and another of power-wielding state officials enforcing those rights."

[20] *Ibid.*

[21] *Ibid.* at 217.

[22] *Ibid.* at 212.

Unger argues that the liberal public/private distinction is constantly breaking down[23]. He argues that it is only because of liberalism's artificial enlargement of the private sphere to include the whole of civil society[24], that it has been able to curb the conflict between the public and the private which takes place inside every individual. He states that "[i]t is only through the multitude of private associations with which all modern states have surrounded themselves and through the family that the antagonism inside the person is kept within manageable bounds."[25]

The application of the "fundamental contradiction" methodology therefore reveals the inherently contradictory nature of liberalism. The liberal world is split into two incompatible spheres, yet it is presented through the mediating power of the law as a harmonious whole[26]. The attempts of liberalism to reconcile the fundamental contradiction are doomed to failure, as liberal ideology itself embodies the contradiction: the dichotomy between the public and the private which exists within the individual is merely turned outwards and reflected onto society, manifesting itself in the liberal public/private divide. In a similar manner in which the

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[23] Unger, *supra* note 9 states at 73 that "the [public/private] distinction is always breaking down. The government takes on the characteristics of a private body because private interests are the only interests that exist in the situation of which it is a part. Thus, the state is like the gods on Olympus, who were banished from the earth and endowed with superhuman powers, but condemned to undergo the passions of mortals."

[24] For a more detailed discussion of the liberal expansion of the private sphere, see chapter 1 above at page 24.

[25] Unger, *supra* note 9 at 60.

[26] John Moon "The Freedom of Information Act: A Fundamental Contradiction" (1985) 34 Am.U.L.Rev. 1157 describes how the U.S. *Freedom of Information Act* operates to mediate the fundamental contradiction. He concludes at page 1159 that "[w]hen applied to the [*Freedom of Information Act*]...the "fundamental contradiction" reveals that this government disclosure law is an artificial mediation of our incongruous desires for autonomy and community".

individual experiences the antagonism of eternally fleeing between the public and the private, liberalism is constantly fleeing from the notion of individualism (private), which lies at the heart of the ideology, to the necessary but contradictory concept of the collective (public). This aspect of the contradictory nature of liberalism is expanded upon by both Benn and Gaus[27] and Cane[28].

Benn and Gaus[29] identify two models which they name the "individualist" model and the "organic" model. The most basic level at which the notion of privacy can operate in the individualist model is that of a specific individual. Not surprisingly[30], Benn and Gaus identify this model as being dominant within liberal ideology which, as has already been noted[31], places emphasis on individual freedom. However, Benn and Gaus argue that the individualist model is insufficient to account for other notions which are important to liberal ideology, such as the "public interest"[32] and the importance of participation in public life[33]. To find

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[27] *Supra* note 11.

[28] *Supra* note 12.

[29] *Supra* note 11 at chapter 2.

[30] See C.B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977), who recognises at page 2 that "the central ethical principle of liberalism...[is] the freedom of the individual to recognise his or her human capacities."

[31] See above at pp. 22-24.

[32] Benn and Gaus, *supra* note 11, argue that liberals often use the public interest card to "trump" other individual rights, such as privacy. The problem with the individualist theory, however, is the identification of the rights which may be overridden in this manner and those which may not. In the light of this difficulty, the public interest argument thus becomes a "rhetorical stamp of approval" (see page 47) and, within the confines of the individualist model, is empty of any meaning.

justification for these notions, they believe that liberals must turn to the supplementary organic model. The basic unit operating within this secondary model is not an identifiable individual, but rather a mutually connected social group of people[34]. The organic model provides justification for the community values which can be found in liberal theory, such as the notion of the "public interest". However, it is argued that this model is also unsatisfactory, as many liberals feel uneasy about the lack of recognition which is accorded to the individual[35]. Benn and Gaus[36] therefore conclude that the liberal public/private divide draws upon two inherently incompatible models, thus demonstrating the "fundamental contradiction" which operates within liberal theory.

> [T]ry to combine the models and the individual's relation to society certainly will be a puzzle. He will be seen both as an independent agent standing apart from others and a member intimately tied to a social whole and sharing a common life. And it does not seem at all misleading to say that these are the two pictures of man upon which liberalism draws.[37]

Cane presents a very similar critique of liberal ideology[38], which he conducts in more general

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[33] Some liberals (for example, John Stuart Mill) believe that individuals should participate in public life because such self-development is in the interests of the community as a whole. See C.B. Macpherson, *supra* note 30 at 50-64. Benn and Gaus eds., *supra* note 11, however, do not believe that the individualist model provides any justification for concern about community matters.

[34] Benn and Gaus argue that this can be distinguished from a mere aggregation of individuals because, as Hobhouse states "the whole is something more than the sum of its parts." Hobhouse, *The Metaphysical Theory of the State* (London: Allen and Unwin, 1926) at 27, quoted in Benn and Gaus eds., *supra* note 11 at 50.

[35] For example, the organic model does not seem to allow for individual privacy, as it does not recognise the individual as a unit.

[36] *Supra* note 11.

[37] *Ibid* at 61.

[38] See Cane, *supra* note 12 at 57-61.

terms than Benn and Gaus. He identifies two incompatible versions of individualism, which he labels "passive individualism" and "developmental individualism". Passive individualism, Cane argues, connotes a negative rights approach and encompasses the idea that the individual should be free from interference to pursue his own business. This is obviously closely connected to the "individualist" model advocated by Benn and Gaus. Similarly, Cane's developmental individualism corresponds with Benn and Gaus' "organic" model. The notion of developmental individualism is more closely linked to the concept of the community: individuals are perceived to have positive rights which allow, and indeed encourage, direct participation in political decisions. Cane points out that the public/private distinction will be less intelligible for the developmental individualist, who emphasises that community activity is important for individual self-fulfilment.

The "fundamental contradiction" critique of liberal theory provides an insight into the ideological problems which surround the liberal conception of the individual and the implications which this has for the public/private distinction. It seems that liberals must perform subconscious "double think", accepting that the individual is simultaneously competitive[39] (in the private sphere) and co-operative[40] (in the public sphere). There is thus much underlying confusion and uncertainty regarding the status of the individual in the community and consequently also regarding the location of the public/private divide. Marx[41]

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[39] Benn and Gaus' "individualist" model and Cane's "passive individualism".

[40] Benn and Gaus' "organic" model and Cane's "developmental individualism".

[41] Karl Marx, "On the Jewish Question" in Lloyd D. Easton and Kurt H. Guddart eds., *Writings of the Young Marx on Philosophy and Society*, (New York: Anchor Books, 1967).

recognised this point when he stated that

> man leads a double life...In the *political community* he regards himself as a *communal being*; but in *civil society* he is active as a *private individual*, treats other men as means...and becomes the plaything of alien powers[42] [emphasis in the original].

2. AN ARTIFICIAL CONSTRUCT: CHALLENGING THE DISTINCTION

The public/private distinction has often been criticised as being incapable of providing an adequate description of the world. Attacks of this nature vary in their severity from some critics who are disillusioned by the increasing number of "difficult" cases which do not fit easily into the dichotomy[43], to others who view the public/private distinction as a liberal ideological distortion of reality.[44]

One of the first writers to oppose the public/private distinction on ideological grounds was Karl Marx[45], and he did so in the context of religion. Marx, who viewed religion as an oppressive force, was writing at a time when the German state had abandoned Christianity as its official religion and had become atheist. Although Marx welcomed this move, he believed that it had

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[42] *Ibid.* at 225.

[43] For example, Carol Harlow ""Public" and "Private" Law: Definition without Distinction" (1980) 43 Mod.L.Rev. 241 states at 257 that "[t]he structure of the modern state is such that public and private industry, autonomous statutory bodies, regional boards and central government departments all jostle for place. They carry on identical functions which are allocated in a haphazard fashion...No activity is typically governmental in character nor wholly without parallels in private law."

[44] See, for example, Alan Freeman and Elizabeth Mensch "The Public-Private Distinction in American Law and Life" (1987) Buff.L.Rev. 237.

[45] See Marx, *supra* note 41.

merely transferred religious oppression into the "private" sphere, thus creating an illusion of religious emancipation[46]. In this manner, Marx criticised the separation of the political (public) from the social (private), stating that

> [t]he throwing off of the political yoke was at the same time the throwing off of the bond that had fettered the egoistic spirit of civil society...The *political revolution* dissolves civil life into its constituent elements without *revolutionizing* these elements themselves and subjecting them to criticism[47] [emphasis in the original].

Criticism of the public/private divide has become more prevalent in recent years, as the state has been increasingly implicated in the traditionally "private" sphere[48] and private companies have increased their power, gaining influence in areas regarded as "public"[49]. The result has been a growing blur between the public and the private, which Horwitz[50] recognises when he states

> [p]rivate power began to become increasingly indistinguishable from public power precisely at the moment, late in the nineteenth century, when large-scale corporate concentration became the norm. The attack on the public/private distinction was the result of a widespread perception that so-called private institutions were acquiring coercive power that had formerly been reserved to governments.[51]

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[46] The argument presented by Marx is structurally very similar to modern feminist reasoning. For example, see Judy Fudge "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485.

[47] Marx, *supra* note 41 at 239-240.

[48] For example, the state places controls on the way that companies conduct business, such as competition laws, and state social services have been created to ensure that children are properly looked after by their parents.

[49] A relevant example of this is the emergence of the information industry, which Schiller argues is seeking to control a sector which was previously dominated by the state. See Herbert I. Schiller, *Culture Inc. The Corporate Takeover of Public Expression*, (Oxford: Oxford University Press, 1989), particularly at Chapter 4.

[50] Morton J. Horwitz "The History of the Public/Private Distinction" (1982) 130 U.Pa.L.Rev. 1423.

[51] *Ibid.* at 1428.

The public/private distinction thus raises many questions regarding cases which are difficult to classify and which adopt neutral shades of grey, refusing to conform to a monochromatic dichotomy[52]. For example, a "private" company may perform a traditional state function, be funded by state monies and/or the government may own a percentage of its shares. Which of these circumstances, or combination thereof, would suffice to take the company from the private into the public sphere?[53] It is difficult, if not impossible, to answer this question by reference to a set of objective standards and it is arguable that the answer will be influenced by subjective or political preferences. This is shown by Mnookin[54] who asserts that political parties in the U.S.A. and indeed politicians in general, are likely to differ as to where the public/private boundary should lie. The problem which is created by the liberal public/private divide is that it attempts to impose a theoretical model of a clear-cut dichotomy upon what often appears to be a descriptive continuum[55]. The result is confusion regarding the precise location of the public/private divide which, as we have seen, leaves the door open for subjective interpretation.

The confusion between the public and private spheres and the apparently arbitrary nature of

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[52] See Harlow, *supra* note 43.

[53] Benn and Gaus discuss the concept of a "state agency". See Benn and Gaus eds., *supra* note 11 at 14.

[54] Robert H. Mnookin "The Public/Private Dichotomy: Political Disagreement and Academic Repudiation" (1982) 130 U.Pa.L.Rev. 1429.

[55] For a discussion of the public/private divide operating as a dichotomy and as a continuum, see chapter 1 pp. 20-22 above.

the boundary between them provides the basis for a refined left-wing attack upon the distinction[56]. Hutchinson and Petter[57] believe that the liberal public/private distinction is without foundation and argue that every sphere may be classified as public because in theory the state has universal power to legislate and change the status quo[58]. They argue that "the attempt to limit state activity to efforts directed at changing the status quo is misconceived; the state is equally implicated in the retention of the status quo."[59] Hutchinson and Petter therefore see the exercise of private power as the exercise of delegated state power which escapes the usual democratic checks and balances. The liberal preoccupation with delineating the public and private spheres is thus regarded as a smokescreen, obscuring the ideological nature of the distinction. "If the distinction between the public and the private is without substance, the liberal enterprise of seeking to police the boundary between the two spheres is at best futile and at worst covertly ideological."[60] The solution suggested by Hutchinson and Petter is a complete rethink of liberal ideology in general and the public/private issue in particular. Hutchinson, writing later and this time alone, argues the same point[61] and again concludes that "[i]n seeking...to oblige the ship of state to sail under democratic colours, it is necessary to throw liberalism overboard and cast off the moorings of the public/private

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[56] See, for example, Allan P. Hutchinson and Andrew Petter, "Private rights/Public Wrongs: The Liberal Lie of the Charter", (1988) 38 U.T.L.J. 278; Freeman and Mensch, *supra* note 44; and Karl E. Klare "The Public/Private Distinction in Labour Law" (1981-82) 130 U.Pa.L.Rev. 1358.

[57] *Ibid.* at 284-286.

[58] See Hutchinson's similar claim *supra* note 1.

[59] Hutchinson and Petter, *supra* note 56 at 285.

[60] *Ibid.* at 286.

[61] Hutchinson, *supra* note 1.

distinction."[62] It seems, however, that Hutchinson is willing to concede that not *everything* is within the public domain and he appears to allow an exception for the necessary sphere of individual privacy and personal autonomy[63]. In doing so, he is recognising the "grain of truth" which lies behind liberal ideology: personal privacy is an important value[64].

Hutchinson and Petter's perspective can be compared to that of Freeman and Mensch[65], who make a similar left-wing critique of the public/private divide, but who appear to take a more radical perspective. Freeman and Mensch view the public/private divide as an "artificial construct"[66], but, unlike Hutchinson and Petter, they leave no room in their theory for personal privacy or autonomy: "[p]rivacy means alienation...To have the private choice is to be left alone with it."[67] They believe that the liberal public/private split is organized so that a tripartite relationship between self, state and other emerges. The result is that there can be no true connection between self and other, as relations are conducted through the "alienating" medium of the state[68]. Not surprisingly, Freeman and Mensch conclude that the

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[62] *Ibid.* at 403.

[63] *Ibid.* at 400, where Hutchinson states "[a]n abandonment of the public/private distinction does not mean that everything becomes public and the individual loses all sense of privacy or personal autonomy." See also the comment on Hutchinson's article by H. Wade MacLauchlan "Reimagining the State" (1990) 40 U.T.L.J. 405 at 408.

[64] For further discussion of the importance of privacy and the "grain of truth" which lies behind liberal ideology, see chapter 1 above at pp. 22-24.

[65] *Supra* note 44.

[66] *Ibid.* at 238.

[67] *Ibid.* at 238-239.

[68] *Ibid.* at 242. A similar argument is made, in the context of rights discourse, by Peter Gabel, "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves" (1984) 62 Tex.L.Rev. 1563. Gabel argues that individuals are alienated from each other by the State, and live in a condition which he terms "substitute

public/private distinction should be abandoned. In its place, they envisage an anarchical utopia where there is no fear of others and consequently no need for any conception of personal privacy. Their ideal consists of

> [c]ommunities where relationships might be just "us, you and me, and the rest of us," deciding for ourselves what we want, without the alienating third of the state...[and]...replacing our pervasive alienation and fear of one another with something more like mutual trust, or love.[69]

It is submitted that these admirable, but arguably unrealistic aspirations detract from the credibility of Freeman and Mensch's critique, leaving Hutchinson and Petter as the more plausible modern left-wing critics of the public/private divide.

The other ideological challenge to the public/private distinction which will be briefly considered is that of feminist thinkers. There has been a plethora of feminist scholarship on this topic[70] and the comments in this context will serve only as an overview of the feminist perspective. Feminists attribute the label "public" to the economic market, which is associated primarily with men, and the label "private" to the family, which is associated primarily with

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connection" (see page 1580). He states at page 1578 that "the way that we constitute ourselves through the State is revealed in the role that we allocate to it in legal thought, as the entity that "allows" us to act by granting us our rights. We constitute ourselves through the State by collectively agreeing to attribute to it our own powers of self-observation, thus making it the politically legitimate "reviewing agency" that serves as the authority for our alienated or "delayed" actions."

[69] Freeman and Mensch, *supra* note 44 at 256-257.

[70] See, for example, E. Gamarnikow and J. Purvis *The Public and the Private* (London: Heinemann Educational Books Ltd., 1983); C. MacKinnon "Feminism, Marxism, Method and the State Toward a Feminist Jurisprudence" (1983) 8 Signs: Journal of Women in Culture and Society 635; M. McIntosh "The Family, Regulation and the Public Sphere" in G. McLennan, D. Held and S. Hall eds., *State and Society in Contemporary Britain: A Critical Introduction* (New York: Polity Press, 1984) at 204; D. O'Helly and S.M. Ravenby *Gendered Domains: Rethinking Public and Private in Women's History* (New York: Cornell University Press, 1992); F. Olsen "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv.L.Rev. 1497; N. Rose "Beyond the Public/Private Distinction: Law, Power and the Family" (1987) 14 J.L.& Soc'y 1.

women[71]. They argue that the public/private distinction as it presently exists is utilised by liberal ideology to perpetuate the unequal treatment of women. Although women are formally equal in the eyes of the law, feminists argue that discrimination has merely been relegated to the private sphere. The structuring of society into the public and the private thus creates an illusion of equality in the public sphere, whilst legitimating continuing acts of discrimination in the private sphere. For example, Pateman[72] argues that "liberalism is structured by patriarchal as well as class relations, and...the dichotomy between the private and the public obscures the subjection of women to men within an apparently universal, egalitarian and individualist order."[73] The chimera of equality which is created by the public/private dichotomy thus frustrates feminist attempts to achieve meaningful equality. In order to eliminate discrimination altogether, feminists believe that it is therefore necessary to abandon the public/private distinction. Judy Fudge[74], writing in the context of the limitations imposed upon Charter litigation by the public/private distinction[75], states that

> [t]o date, the public/private distinction has operated primarily as a barrier to using constitutionally entrenched rights to end women's oppression...[and it] has operated in a variety of ways to exclude judicial scrutiny of the private sphere of the market.[76]

She therefore concludes that "it is crucial that the public/private split be overcome (or at least

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[71] For example, see Fudge, *supra* note 46.

[72] Carole Pateman "Feminist Critiques of the Public/Private Dichotomy" in Benn and Gaus eds., *supra* note 11.

[73] *Ibid.* at 283.

[74] *Supra* note 46.

[75] See the discussion concerning the *Dolphin Delivery* case, chapter 1 above at pp. 16-17.

[76] Fudge, *supra* note 46 at 551.

eroded) if *Charter* litigation is to be used to further feminist struggles."[77] Like Hutchinson and Petter, however, feminists are reluctant to advocate the outright abolition of the public/private distinction as a solution to gender oppression. Many feminist writers realise that the notion of privacy is essential to some of the ideals which lie at the heart of their ideology, such as the right of women to exercise control over their own bodies and the "right to choose" whether or not to have an abortion[78]. Although it would therefore seem that feminists wish to re-evaluate the concepts of public and private, the precise nature of such a re-evaluation is, as yet, uncertain. Regardless of the reforms which are favoured by feminists, it is clear that the challenge to the public/private distinction, as it currently exists, is a central tenet of feminist ideology.

The above analysis of the criticism which the liberal public/private divide has attracted, highlights the fact that it appears to be unrealistic and theoretically contradictory[79]. The uncertainty which surrounds the precise location of the liberal public/private divide has resulted in a device which can be employed in various guises to further the subjective goals of individuals from different parts of the political spectrum. The meanings and implications which are attributed to the notions of public and private are malleable and dependent upon the objectives of the person employing the terms. The reality of the public/private divide is that

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[77] *Ibid.* at 489.

[78] See, for example, Carol C. Gould "Private Rights and Public Virtues: Women, the Family and Democracy" at 10-15 and Anita L. Allen "Women and Their Privacy: What is at Stake?" chapter 13, both in Carol C. Gould ed., *Beyond Domination: New Perspectives on Women and Philosophy* (New Jersey, U.S.A.: Rowman and Allanheld, 1983).

[79] It should be noted, however, that the liberal public/private divide is ideologically effective, as it is accepted by the majority of the population of the western world.

it is often arbitrary and can operate as an ideological smokescreen.

The impact of the nature of the public/private divide upon information access is substantial[80]. When the public/private divide is used in the freedom of information debate, it is used prescriptively, as information will be subject to access to information legislation only if it falls into the public sphere. The criticism which the public/private divide has attracted suggests that the outcomes regarding information access are arbitrary and theoretically inconsistent. The public/private divide, with all its uncertainty and ideological contradictions does not appear to be the criterion upon which the availability of information should depend. What, then, should be the criteria? This question lies at the heart of the access to information debate and, in order to contemplate an answer to it, the justification of access to information must be examined. As has been previously demonstrated, access to information is most often justified with reference to democracy[81]. It is this issue which will be tackled in the next chapter.

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[80] See chapter 1 above.

[81] See chapter 1 above.

CHAPTER FOUR

DEMOCRACY AND THE THEORETICAL FOUNDATIONS Of ACCESS TO INFORMATION

INTRODUCTION

It has already been demonstrated that mainstream writings on the topic of access to information frequently seek justification for the concept in the notion of democracy. However, references to the term "democracy" in the context of the access to information debate are brief and inadequate: a liberal vision of democracy is presumed which restricts the scope of the concept to the public sphere[1]. Furthermore, analysis of the critiques of the liberal public/private distinction has revealed that it is an inadequate criterion for determining whether information should be subject to access legislation[2]. It is possible that a more suitable criterion for determining information access can be discovered by conducting an in depth examination of the concept which provides the foundation for the principle of access to information, namely democracy. This examination must move beyond the presumptions which commonly accompany the use of the term: different models of democracy should be analysed and their relative importance to the access to information debate assessed. The argument in favour of access to information requires a solid foundation. This chapter will therefore be devoted to investigating the connection between access to information and democracy in order to determine the relationship between, and the relative importance of, these concepts and to

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[1] See chapter 1 above.

[2] See chapter 3 above.

provide some insight into possible criteria for determining the scope of access legislation. The examination will begin with consideration of the general meaning and implications of democracy. This initial foray into the field of democratic theory will demonstrate that, in relation to the access to information debate, one of the most important concepts is participation. A detailed analysis of the role of participation in various models of democracy will then be considered. Following this in depth examination of the aspects of democratic theory which are relevant to the access debate, the problem will then be considered from the opposite angle and the importance of access to information to democracy will be addressed. The debate in this chapter will be concluded by bringing the strands of the argument together: the operation of the liberal public/private divide in democratic discourse and the implications for access to information will be considered. The discussion in this chapter will lay the theoretical foundations for the following chapter, which will consider a possible alternative to the public/private divide as a criterion for determining the scope of information access legislation.

1. THE DEMOCRATIC SPECTRUM

Despite its frequent usage, democracy is an elusive concept and it is often assumed to represent an unqualified good, beyond which further enquiry is unnecessary. It is frequently believed that once the plea of democracy has been made, the argument which it seeks to support is automatically legitimated[3]. Herein lies the danger in basing an argument on the notion of

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[3] David Held "Democracy: From City-States to a Cosmopolitan Order?" in David Held ed., *Prospects For Democracy: North, South, East and West* (Cambridge: Polity Press, 1993) [hereinafter *Prospects for Democracy*] makes this point when he states at 13 that "[d]emocracy bestows an aura of legitimacy on modern political life: laws, rules and policies appear justified when they are "democratic"."

democracy; it is all too easy to make the assumption that democracy is an absolute and easily defined good. It is not. For years, scholars have been grappling with the concept of democracy, attempting to establish exactly what it means and by which mechanisms it should be secured. There is a plethora of writing on the subject, from systematic treatises[4] to accounts of the history of democracy[5]. Needless to say, the many writers who have contributed to the body of literature surrounding the notion of democracy have all advanced their own particular approach to and interpretation of the concept, some of which coincide, but many of which are in conflict with each other[6]. Furthermore, the variations of democracy are not restricted to the realm of theory, but are also apparent when the practical application of the concept is considered. There are numerous constitutional systems around the world which are considered to be "democratic", but none of these operate in precisely the same way and, indeed, some of them are very different[7]. Furthermore, democracies around the world are at various stages of development: there are established democracies, such as the United States and Britain, and there are fledgling democracies, such as those which have recently emerged in Eastern Europe, which face different challenges from their Western forebears. Democracy, then, is a concept which permits many variations, both in theory and in practice. However,

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[4] For example, those provided by Bentham and Dahl. See Jeremy Bentham *Works*, J. Bowring ed. (Edinburgh: Tait, 1843) and R. A. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956).

[5] See, for example, John Dunn ed., *Democracy: The Unfinished Journey 508 BC to AD 1993* (Oxford: Oxford University Press, 1992).

[6] For a good overview of the various models of democracy, see David Held *Models of Democracy* (Stanford, California: Stanford University Press, 1987) [hereinafter *Models*].

[7] For example, Britain and Germany are both undoubtedly considered to be democratic regimes, yet they present very different models. Britain has an unwritten constitution and operates on a "first past the post" voting system, whereas Germany has a written constitution and utilises a form of proportional representation for its voting system.

there are at least two basic variations of democracy, which, in their extreme forms, can be described as lying at opposite ends of the democratic spectrum. These variations are direct democracy and representative democracy[8]. Each will be discussed in turn in an attempt to shed some illumination upon the nature and meaning of democracy.

(a) Direct Democracy

Direct democracy can be regarded as ideal or "pure" democracy, in that it requires every member of a democratic constituency to vote on every exercise of power which affects that constituency. Such a system is best applied where there is a limited number of people within the democratic constituency, such as a family group, or a small business[9]. Where the state is involved, however, the democratic constituency becomes much bigger, incorporating every citizen within that state, and the practicality of direct democracy in these circumstances becomes questionable. Until recently, political theorists have simply dismissed the concept of direct democracy as completely impractical and, logistically speaking, almost impossible. However, with the advent of computer technology, the means for implementing direct voting systems exists: it is technologically possible for every home to be equipped with a voting button and for the results of referenda to be processed quickly by computer. These advances in technology have led some contemporary democratic theorists to advocate that such electronic

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[8] Held, *Prospects for Democracy*, *supra* note 3 at 15, notes that there may be a third model of democracy. This is based upon a single party model, such as the system which was in operation in the Soviet Union. Held recognises that this third model attracts some doubt as to whether it is actually a form of democracy.

[9] There are many different constituencies within which democracy can operate, the state being only one such constituency. Democratic regimes can operate within the family, the workplace, the local community, the political party or any other group of people which come together for a common purpose.

voting measures be implemented[10]. However, even if this is accepted, it is still arguable that the ideal of "pure" democracy can never be obtained. Not only, as Macpherson points out, would there be problems with the framing of questions to be answered by electronic polls[11], but, perhaps more importantly, participation by the population in every single issue would require such attention and effort that members of society would be unable to usefully perform other tasks[12]. This point is made by Beetham[13], who notes that

> [t]he spatial difficulty of having millions of citizens deliberating in one place could now be overcome by communications technology...Yet an electronic voting button operated alongside a special television channel in every living room would not overcome the problem that the work of legislation requires full-time attention if the issues are to be fully debated and understood. Any society with similar requirements to our own...could only afford to have a relatively small number devoted full time to this activity.[14]

This problem is sidestepped by the advocates of electronic voting, who redefine the concept of "direct democracy" to include electronic polls on only "important" issues. For example, Budge[15] states that "direct democracy can be characterized as a regime in which the

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[10] See, for example, Benjamin Barber *Strong Democracy: Participatory Politics for a New Age* (Berkeley, California: University of California Press, 1984) and Ian Budge "Direct Democracy: Setting Appropriate Terms of Debate" in *Prospects for Democracy, supra* note 3 at 136.

[11] See C.B. Macpherson *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977) at 95-98.

[12] This point should not be confused with the argument made by J. Schumpeter *Capitalism, Socialism and Democracy* (New York: Harper, 1942) and others that ordinary citizens are incapable of properly understanding political issues regarding the governing of their society. In contrast to Schumpeter's view, the submission put forward here is that citizens simply would not have enough time in the day to fully consider the issues in order to cast their vote as well as going about their usual business.

[13] David Beetham "The Limits of Democratization" in *Prospects for Democracy, supra* note 3 at 55.

[14] *Ibid.* at 63.

[15] *Supra*, note 10.

population as a whole votes on *the most important* political decisions" [emphasis added][16]. Clearly, then, such a regime falls somewhat short of the democratic ideal, which would require referenda on every political decision. The argument that "pure" direct democracy is unattainable thus seems to be valid. However, this does not mean to say that we should regard the concept of direct democracy as useless or worthless; although it may lie outwith our grasp, the ideal which it represents can act as a guide, helping us to determine how we may best follow the democratic path.

(b) Representative Democracy

The practical model of democracy which has been developed over the years to operate in place of the unattainable ideal of direct democracy is known as representative democracy. When the term "democracy" is used in the modern world, it is almost always used in the sense of liberal representative democracy (ie representative democracy which espouses liberal values)[17]. Representative democracy solves the problems posed by direct democracy by requiring citizens to appoint representatives to a legislative body in infrequent but regular elections. These representatives can then devote their whole energies to the issues concerning society; an indirect form of democracy is achieved. This model of democracy, however, is not without its problems. At worst, representative democracy can be viewed as a system for removing power from the hands of ordinary citizens and placing it in the hands of the elected elite; relatively infrequent elections are the only form of political participation by the masses, who

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[16] *Ibid.* at 137.

[17] "Liberal democracy" is a term which covers several models of democracy. See Macpherson, *supra* note 11. However, in all its forms liberal democracy involves the election of representatives to a legislative body.

for the rest of the time are subject to an oligarchy[18]. This interpretation of representative democracy can be regarded as lying at the opposite end of the democratic spectrum from the ideal of direct democracy. The challenge for advocates of democracy is therefore to find a compromise which recognises both the equality of direct democracy and the practicalities of representative democracy[19].

2. THE ELEMENTS OF DEMOCRACY

The preceding discussion may have shed some light upon the nature of democracy, but it remains to be considered why the concept of democracy is deemed to be necessary and to identify the factors which distinguish a democracy from other political regimes. There are at least two elements which operate as common threads binding modern democratic regimes together. Indeed, it is arguable that without these elements a regime can no longer validly claim to be flying the democratic flag. The first of these elements is the notion of equality, which exists within the many variations of democracy, from direct to indirect, and provides a justification for democracy. From the concept of equality comes the second element, namely

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[18] This view was put forward by Jean-Jacques Rousseau, *The Social Contract* (London: J. M. Dent & Sons Ltd, 1913) at 78. Indeed, it is not inconceivable that a pessimist or a cynic would wish to argue that this is the reality of some existing modern democracies. For example, the conservative regime which ruled Britain during the 1980's was regarded as particularly unresponsive to the popular voice in the periods between elections.

[19] It will be suggested later that the appropriate compromise is the concept of participatory democracy, in which representatives are elected, but the process of participation nevertheless carries on in the form of political education, lobbying and other measures. See pp. 115-122 below.

that political power should be both accountable and visible[20]. The question of accountability naturally only arises in relation to representative democracies, where political power is concentrated in the hands of elected representatives. In this case, accountability is essential to the existence of democracy, for it is arguable that without it the system loses its democratic character and becomes an oligarchy. Both of these elements will be considered.

(a) Equality

The concept of democracy can be said to arise from the notion that all members of society are equal. The precise meaning of equality in this context embodies the idea that, because every person has a stake in the outcome of decisions affecting the community, then it is logical and just that every person should also have an equal say in the decision making process[21]. The recognition of the fact that everyone has an equal stake or interest in community decisions derives from the individuality and worth inherent in each human being, and the fact that the community exists to improve the lives of its members. Cohen[22] argues that democracy is justified with reference to such equality, when he notes that

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[20] This is because, if all individuals are considered to be political equals, then it follows that a small group which is appointed as an administrative body should be accountable to the other members of society. The individuals in power have no more or less right to make decisions than individuals who have no power: accountability is an attempt to solve the imbalance in equality which results from power being placed in the hands of a small group in a representative democracy.

[21] Of course, the concept of democracy has not always been associated with the idea that every *person* should have an equal part to play in the outcome of community decisions. Most significantly, women were excluded from the early writings on democracy, such as those of Jeremy Bentham and John Stuart Mill. This is because in the 19th century women were considered to be legally dependant upon men, and thus the idea of giving them political responsibility would likely never have occurred to the men who were writing about democracy at that time. Held notes that "[i]t was only with the actual achievement of citizenship for all adult men and women that liberal democracy took on its distinctively contemporary form." See *Prospects for Democracy, supra* note 3 at 20.

[22] Carl Cohen "The Justification of Democracy" in John Arthur ed., *Democracy: Theory and Practice* (California: Wadsworth Publishing Company, 1992).

> [e]very...[person] has a life to lead; it is a life unique, irreplaceable, having dignity but no price. In living such a life all...[human beings] are equal, and that is why they have, every single one, an equal stake in the decisions of the community whose general purpose is the protection and improvement of the lives of its members. In summary: the special and inclusive nature of the political community gives to every...[person] an equal concern in the outcome of its decisions.[23]

The equal stake which individuals have in community decisions is commonly recognised in representative democracies by the right to vote and such equality is popularly expressed in the slogan "one person, one vote". It may thus be observed that the concept of equality from which the notion of democracy derives is limited to the notion of political equality. Economic and social equality, which stress equal distribution of financial resources and social standing respectively, are regarded by the advocates of democracy in general, and liberal democracy in particular, as being less important than equal political standing. It should be stressed that this does not mean that economic or social equality are disregarded; on the contrary, many modern democratic regimes have implemented a welfare system[24] and have adopted a bill of rights[25]. The point is that it is *political* equality which is the indispensable element of equality in a democracy[26].

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[23] *Ibid.* at 207. It should be noted that I have edited this quote to refer to "people" and "human beings", rather than "men", which was Cohen's politically incorrect choice.

[24] Although welfare systems can not bring about economic equality, they do operate to redistribute wealth throughout society and can be regarded as recognition by the state of the fact that every person is entitled to a certain minimum standard of living.

[25] A bill of rights will guarantee citizens certain formal equalities, such as the right to equal treatment without discrimination as to race or sex or religion. Although this will not in itself eradicate social inequalities, it demonstrates that the state is willing to take steps towards achieving this goal.

[26] The fact that economic inequality is not directly addressed by modern liberal democracies is highlighted by Macpherson *supra* note 11 throughout his discussion. He states at page 9, "I want...to argue that the most serious, and least examined, problems of the present and future of liberal democracy arise from the fact that liberal democracy has typically been designed to fit a scheme of democratic government onto a *class-divided* society" [Emphasis in the original]. The problems which this raises are highlighted by Samuel Bowles and Herbert Gintis

This notion of equality is not without its problems[27]. Firstly, individuals who are inherently egoistic are unable to exist together as equals without a conflict of interests. This problem is addressed by social contract theory[28] which argues that, in order for individuals to pursue their own interests within a peaceful society, they must each submit to the rule of a governing body. This body, in consideration of the power which has been given to it, is to act in the interests of society as a whole. In a democracy, the common interest is determined by the wishes of the majority of citizens, which are expressed through the electoral process. This leads us on to the second problem. If every member of society has an equal stake in the outcome of decisions, but the governing body decides in accordance with the wishes of the majority of the population, then this appears to be merely the tyranny of the majority of citizens over the minority of citizens. The difficulty here is the reconciliation of the concept of equality with the concept of freedom. Individuals can not be equal if some are able to assert their wills and wishes over others. The answer which has been provided by modern liberal democracies has been to entrench a bill of rights into the constitution of the state, so that basic individual freedoms are protected and any conflicting laws which are democratically passed will be struck down as invalid. It can thus be seen that the concept of political equality has raised many difficult questions for theorists, but it has nevertheless endured and remains the central

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Democracy and Capitalism: Property, Community and the Contradictions of Modern Social Thought (London: Routledge and Kegan Paul, 1986) who argue at 174 that "the equality of all before the law is also the privilege of the wealthy to exploit the dispossessed."

[27] Although the two issues which are highlighted here could be discussed at great length, it is unnecessary to do so in this context. The comments are merely to draw attention to the problems, not to examine them in any detail.

[28] For a good sample of writings on social contract theory, see Michael Lessnoff ed., *Social Contract Theory* (Oxford: Basil Blackwell Ltd, 1990).

justification for the highly acclaimed concept of democracy.

(b) The Accountability of Power

It follows from the idea of equality, as discussed above, that no one person should have significantly greater power over community decisions than any other member of that community. This obviously presents a problem in a representative democracy, which is structured in such a manner as to allow one person to participate in political decision making on behalf of many other members of society. The logical solution is that the political representative must be accountable to the members of society which he or she represents. When this reasoning is applied on a larger scale it can be seen that the state legislative and administrative bodies, which operate on behalf of all members of that state, should be accountable to the general population. The principle of accountability is directly based on the recognition of all citizens as political equals and is therefore inevitable in a representative democracy.

What exactly does the concept of political accountability entail? This question can only be answered with reference to the exercise of power within society: in order for an administration to be accountable, it must wield power in an open manner. This point becomes clearer when a democracy is compared to an autocracy. The theoretical power structure in an autocracy is the antithesis of that in a democracy. If society is imagined to be a pyramid, with the citizens at the base and the decision maker at the peak, then in an autocracy the power flow is from the top downwards, whilst in a democracy, the flow is from the base upwards. The power in

an autocracy is therefore held by and emanates from only one source, namely the autocrat. The autocrat is accountable to no-one, and he may therefore make decisions in private, without providing any reasoning for those decisions; the autocrat thus wields *secret* power. Bobbio[29] notes that

> [i]n the autocratic state the state secret is not the exception, but the rule: important decisions must be taken away from the prying eyes of the public in any shape or form. The highest grade of...power, namely the power to make decisions binding for all...coincides with the maximum degree of privacy surrounding rulers and their decisions.[30]

It is this absolute secrecy and the resulting absolute power which is challenged by democracy. In contrast to an autocracy, power in a democracy is theoretically spread equally amongst all members of society. In a representative democracy, citizens will have elected representatives to wield power on their behalf, but this power, which is admittedly concentrated in the hands of the representatives at the top of the pyramid, nevertheless still originates from its base. The citizens, who hold ultimate power in a democracy, are entitled by virtue of that power to be informed not only of decisions which have been taken, but also of the reasoning behind these decisions and the facts upon which they were based[31]. It is only through the exercise of open power that the decision making body can be truly accountable. However, it should be noted that the concept of open power is not absolute. For example, some government operations may be required to be kept from public knowledge due to their sensitive military or national security

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[29] Norberto Bobbio *The Future of Democracy: A Defence of the Rules of the Game* (Minneapolis: University of Minneapolis Press, 1987)

[30] *Ibid.* at 87.

[31] This is the key to the importance of freedom of information in a democracy, and will be further developed below in part 4 of this chapter, which is entitled "The Importance of Access To Information as a Democratic Tool".

nature, and it is not disputed that in these cases secrecy should be preserved for the benefit of the whole community. The crucial point is that in a democracy, where power is accountable, such secrecy should be the exception rather than the rule and it should not endure for longer than is absolutely necessary. The governing criterion for the toleration of limited secrecy is the interest of the community as a whole, and not that of individuals or elites. Without accountability, and the predominance of open power, political equality in a representative democracy is worthless, as citizens are unable to take informed decisions regarding how best to exercise their power (most commonly represented by a vote) in the political process.

To summarise, it can be seen that the twin principles of political equality and accountability stand together as the hallmarks of democracy. However, both of these principles would be meaningless without at least some degree of participation: political equality essentially translates into equality of opportunity to participate, and accountability can not be truly achieved unless citizens are able to express their opinions through participation. It is therefore to the concept of participation that we now turn.

3. THE EBB AND FLOW OF PARTICIPATION IN DEMOCRATIC THEORY

Thus far, it has been demonstrated that the basis of democracy is the notion of political equality, and that accountability is essential to the operation of a representative democracy. The idea that participation goes hand in hand with the concept of accountability has already been briefly alluded to, and it is this theme which will now be developed. Without

information, meaningful participation is impossible, as citizens are unable to make the choices necessary to participate effectively unless they are fully informed about the decisions which have been taken by their elected representatives. Information, therefore, provides the crucial link between political accountability and participation. In the context of this enquiry, which is seeking a justification for access to information, it is therefore necessary to examine the concept of participation in further detail.

Information is crucial to the concept of participation. There are different levels of participation which are reflected in the democratic spectrum. The greatest degree of participation exists in a direct democracy, where citizens take part in every political decision. The lowest level of participation exists at the opposite end of the spectrum, where only the minimum requirements of democracy are fulfilled, and the sole political activity of members of society is vote for their representatives once every four or five years. Between these extremes, there lie other possibilities involving various degrees of citizen participation, such as questioning or lobbying representatives, taking part in political debates or rallies and voting in occasional referenda on important issues, such as amendments to the constitution. However, regardless of the level of participation, accurate information is an essential prerequisite to its efficacy: even in a direct democracy, participation will be meaningless unless it is based upon accurate information. However, the degree of participation which is encouraged in any society will nevertheless affect the degree to which access to information is considered to be important: a society which

places little emphasis upon participation will be unlikely to place value upon strong access laws[32]. The concept of participation, like democracy itself, is mutable and will change depending upon the nature and beliefs of the society in question. As is the case with many other issues surrounding the concept of democracy, scholars have been unable to agree upon the ideal level of participation which should be practised by ordinary citizens. Traditional and contemporary attitudes towards democratic participation in a representative democracy will therefore be examined.

(a) The Pioneers of Universal Franchise: Bentham and J.S. Mill

There are two main models of democracy which were developed in the writings of early liberal scholars. These models have been labelled by later commentators[33] as protective democracy and developmental democracy. These models will be given a brief consideration, with a view to identifying the relative significance of participation in each. The focus will be on the work of Jeremy Bentham and John Stuart Mill, who helped to fashion the protective democracy and developmental democracy models respectively.

One of the most prominent early writers on the subject of liberal democracy was Jeremy

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[32] It is arguable that access to information is even more important if only minimal participation is provided for, as the participation which does take place will be more important to the maintenance of a democratic regime. However, it is submitted that participation and access to information can act as barometers for each other: if participation is minimal, then the ruling elite will have greater control and will be likely to resist access laws in order to maintain its control. Conversely, if participation is encouraged by the governing body, then they are less likely to seek to deny the access to information tools which make participation meaningful.

[33] For example, Macpherson, *supra* note 11 and *Models*, *supra* note 6.

Bentham[34]. In order to appreciate Bentham's views on the question of participation, it must be kept in mind that he was writing in the early nineteenth century, when the right to vote was reserved for a small proportion of the population which comprised upper class, wealthy men. The questions surrounding the notion of participation at this time were therefore almost solely concerned with the extension of the franchise. Although Bentham came to believe that universal manhood franchise was necessary[35], he did so rather reluctantly and as a logical result of his arguments, rather than any belief that increased political participation was inherently desirable. For Bentham, the necessity of an increase in the franchise was a result of his belief that human nature was to be self-interested and competitive. Similarly, it was assumed that any government would not act in the interest of society as a whole, but would pursue its own self-interest, unless it was prevented from doing so. Bentham's logical conclusion was that the franchise should be extended. He believed that increased participation would protect the population from the excesses of government, as the government would thereby be forced to act in the common interest or face being ousted by the electorate at the next election. Pateman[36] makes this point when she notes that

> [t]he participation of the people has a very narrow function; it ensures that good government, i.e. "government in the universal interest", is achieved through the sanction of loss of office. For Bentham...participation thus had a purely protective function, it ensured that the private interests of each citizen were protected.[37]

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[34] *Supra* note 4.

[35] In his early writings, Bentham was in favour of a limited manhood franchise, excluding the poor and the uneducated, but over a period of thirty years of writing, he came to the conclusion that universal manhood franchise was preferable. See Macpherson, *supra* note 11 at 35.

[36] Carole Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970).

[37] *Ibid.* at 20.

It is for this reason that Bentham's model of democracy can be described as protective democracy[38].

Participation plays more central role in the model of developmental democracy and in the writings of John Stuart Mill[39]. J.S. Mill was more optimistic about human nature than Bentham; rather than focusing on the introspective, self-regarding qualities of individuals, J.S. Mill looked towards the possibilities for human development, believing that all individuals could and should improve themselves. Democratic participation was seen by J.S. Mill as a vehicle which could bring about a change in society. The extension of the franchise would provide citizens with an interest in government and politics, and it was hoped that this would lead to citizens informing and educating themselves about matters of common interest[40]. This process of education and participation would then become self-perpetuating; the more individuals participated in the political process, the more they would learn and the more they learned, the more they would wish to participate[41]. In this manner, J. S. Mill believed that previously self-interested and absorbed individuals would become more aware of the needs and

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[38] There were other writers who contributed to this model, notably James Mill, *An Essay on Government* (Cambridge: Cambridge University Press, 1937).

[39] For analyses of Mill's writings, see Pateman, *supra* note 36 at 28-35 and Macpherson, *supra* note 11 at 50-64.

[40] It can be noted at this point that J.S. Mill's hope of increased participation and education would be impossible without information which is freely available to citizens. J.S. Mill can thus be regarded as an indirect advocate of freedom of information.

[41] It is interesting to note that, despite the high moral content of J.S. Mill's theory, he can not be regarded as a true egalitarian, for he was unwilling to grant everyone equal participation in the political process. He believed that educated citizens should have greater political weight than those who were uneducated and so believed that votes should be weighted, giving the educated multiple votes and others only a single vote. For further details, see Macpherson, *supra* note 11 at 58-59.

concerns of society as a whole. It can thus be seen that participation played quite a different role for J. S. Mill than it did for Bentham.

(b) The Cynical Democrats: Competitive Elitist Democracy

With the advantage of historical hindsight it can be argued that J. S. Mill's expectations that, after the extension of the franchise, voters would be caught in a self-perpetuating cycle of participation and education, were completely unrealistic. Indeed, this is the view taken by an influential group of mid-twentieth century writers who followed a school of thought originally formulated by Joseph Schumpeter[42]. The resulting model of democracy has been variously termed "competitive elitist democracy"[43], "the contemporary theory of democracy"[44] and "equilibrium democracy"[45], and I shall follow Held in referring it as the "competitive elitist" model of democracy.

Schumpeter's model of democracy was formulated because of a credibility gap which he perceived between "classical" democratic theory, and the practical operation of democracy in the mid-twentieth century: his theory was intended to bridge that gap. Rather than searching for the social benefits which could result from democracy, as J. S. Mill had done, Schumpeter

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[42] *Supra* note 12. See also Dahl, *supra* note 4, Giovanni Sartori *Democratic Theory* (Detroit: Wayne State University Press, 1962) and Harry Eckstein "A Theory of Stable Democracy", App. B of *Division and Cohesion in Democracy* (Princeton, N.J.: Princeton University Press, 1966).

[43] See *Models*, *supra* note 6 at 184.

[44] See Pateman, *supra* note 36 at 13.

[45] See Macpherson, *supra* note 11 at chapter 4.

therefore concentrated upon the mechanisms of democracy, believing that its benefit lay solely in its value as a system for electing political leaders. Participation in the political process therefore plays a minimal role in Schumpeter's theory: voters need not consider political issues when casting their vote, as their only function is to decide which elite group should have control of policy decisions. Pateman[46] states that

> [i]n Schumpeter's theory of democracy, participation has no special or central role. All that is entailed is that enough citizens participate to keep the electoral machinery - the institutional arrangements - working satisfactorily. The focus of the theory is on the minority of leaders.[47]

Indeed, some of the writers who have developed Schumpeter's ideas believe that political apathy on behalf of the large majority of the population in a democracy is necessary for the stability of the system. Eckstein[48] bases this proposition on the belief that a political system is more likely to be stable if it has a governmental power structure which reflects the other power structures in that society[49]. He therefore argues that, because power structures in modern society, such as in the workplace and the home, often deny the opportunity for participation, then democratic regimes must exercise a degree of authoritarianism in order to maintain their stability. Participation thus not only plays a peripheral role in Eckstein's theory, but is also, to a certain degree, discouraged. The stability of the system, and the efficacy of the decision making process in between elections, is deemed to be threatened if participation

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[46] Pateman, *supra* note 36.

[47] *Ibid.* at 5.

[48] *Supra* note 42.

[49] Eckstein *ibid* at 234 states that "a government will tend to be stable if its authority pattern is congruent with the other authority patterns of the society of which it is a part."

is anything other than minimal. The competitive elitist model of democracy therefore seems to justify participation in a similar way to Bentham: its function is purely protective. Pateman notes that in the competitive elitist model, participation

> is participation in the choice of the decision makers. Therefore, the function of participation in the theory is solely a protective one; the protection of the individual from arbitrary decisions by elected leaders and the protection of his private interests.[50]

As a description of modern liberal democracy, the competitive elitist model is, to a large degree, accurate[51]. Modern politics is shaped by the party system, and it is the party elites, not the population at large, who have the greatest influence upon policy decisions: voters may often experience a feeling of helplessness, believing that they have no real power and are reduced to a choice between the lesser of two evils[52]. However, the substantial validity of the competitive elitist model as a justification for democracy has been criticised by several contemporary scholars[53].

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[50] Pateman, supra note 36 at 14.

[51] Macpherson, *supra* note 11 at 83 agrees with this. Beetham, *supra* note 13 at 64 does not agree with Macpherson on this point. He believes that Schumpeter's model is "simply inaccurate" and "represents more a yearning for an untrammelled form of elective dictatorship than a realistic account of how liberal democracies actually operate, or what is required for them to work effectively." Beetham bases this on the belief that a representative democracy will not function effectively unless it "allows its citizens a much greater level of political activity than the minimum involved in the vote." Although I agree with Beetham on this last point, I nevertheless believe that the competitive elitist model of democracy is a far more accurate *descriptive* model of modern democracy than its predecessors.

[52] This is particularly applicable in a "first past the post" voting system, such as that which operates in Britain. A voter may prefer the policies of a smaller party, but feel that he or she must vote for one of the main parties in order for that vote to "count". In this system, votes are often cast "negatively", that is the *least worst* of the main parties is supported. These feelings are reflected in the relatively low levels of electoral participation by citizens in Western democratic nations in recent years. See Dennis F. Thompson *The Democratic Citizen: Social Science and Democratic Theory in the Twentieth Century* (London: Cambridge University Press, 1970) at 53-55.

[53] For example, Pateman, *supra* note 36; Thompson, *ibid.*; and Macpherson *supra* note 11.

One of the arguments against competitive elitist democracy has been to draw attention to the tautological nature of the assertions that only a "minimum" amount of participation is required, unless the stability of the system is to be jeopardised. The problem centres around the determination of the amount of participation that is required before stability is threatened. It would seem that this is indeterminable until after the system has been destabilised. Thompson[54] highlights the problem when he notes that "[w]ithout a criterion for how much participation would actually disrupt the system the argument amounts to this: Too much (i.e. whatever is disruptive) will be too much (i.e. will disrupt the system)."[55] This argument is also mentioned by Pateman[56], who states that "we arrive at the argument that the amount of participation that actually obtains is just about the amount that is required for a stable system of democracy."[57] The stability argument of the competitive elitist democrats would thus seem to be circular and without foundation.

Macpherson[58] bases his main argument against the competitive elitist system on the inequality which it fosters. He points out that in modern society, citizens are unequal in terms of their education and money, and hence their power to put forward political ideas. The rich and the educated therefore have the potential for greater political influence than the poor and the uneducated: economic and social inequality will thus lead to political inequality. Macpherson

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[54] Thompson, *supra* note 52.

[55] *Ibid.* at 67.

[56] *Supra* note 36.

[57] *Ibid.* at 7.

[58] *Supra* note 11.

believes that the unavoidable result of such inequality is political apathy, as those who are disadvantaged are discouraged from active participation. It is political apathy, and therefore, he argues, inequality, which are presented by the competitive elitists as being necessary for the stability of the democratic system[59]. Furthermore, Macpherson argues that the competitive elitist model itself contributes directly to political apathy. He believes that "the party system has been the means of reconciling universal equal franchise with the maintenance of an unequal society"[60]. Macpherson thus argues that the twofold result has been, firstly, the obfuscation of real political concerns, because parties present themselves in such a manner as to foster universal appeal[61], and secondly, decreased governmental accountability to voters, due to the "continual compromise" which is required to cope with existing inequalities[62]. Macpherson therefore believes that the competitive elitist model of democracy performs a purely protective function and, because of the inequality which it supports, it is unable to advance towards the

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[59] Macpherson, *ibid.* at 88 states that "those whose education and occupation make it more difficult for them than for the others to acquire and marshal and weigh the information needed for effective participation are clearly at a disadvantage: an hour of their time devoted to political participation will not have as much effect as an hour of one of the others. They know this, hence they are apathetic. Social inequality thus creates political apathy. Apathy is not an independent datum."

[60] *Ibid.* at 69.

[61] Macpherson, *ibid.* at 66 argues that in a two party dominated system "each party tends to move towards a middle position...It must do this in order to be able to project an image of itself as a national party standing for the common good, without which image it fears it will not stand much chance of long-run majority support." However, in a multi-party system, "no party can have an unequivocal undertaking to the electorate because both the party and the electorate know that the party will have to compromise continually in the coalition government." The result of such continual compromising in order to gain support is that political issues become blurred. See page 69.

[62] Macpherson *ibid* at 68 argues that "what requires continual compromise is the opposition of interests *in the country*, whether or not that opposition is represented within the government. A government...cannot have this room for manoeuvre if it is held closely responsible even to the parliamentary party, let alone to the outside party as a whole." As a corollary, responsibility to the general electorate in such circumstances would be impossible.

democratic ideal which, after all, is based upon the notion of equality[63].

Pateman's[64] main criticism of the competitive elitist model of democracy is that the writers who support the competitive elitist model of democracy have all accepted and built upon Schumpeter's erroneous view of a "classical" model of democracy. They have then proceeded to represent this "classical" model to be totally unrealistic when compared to competitive elitist theory. Pateman points out the inadequate basis of this whole argument, by showing that there was more than one "classical" model of democracy[65]. She highlights the differences between the protective model and the developmental model, discussed above, which she believes have been merged and distorted by the competitive elitist school of thought into one "classical" model. The result is a theoretical confusion which, Pateman believes, conveniently and incorrectly leaves the way clear for the competitive elitists to present their own theory as the only viable option[66]. Pateman, along with several other contemporary scholars, believes that this is not the case. Together, these writers have recently formed a new school of thought and developed a new model of democracy. Unlike the competitive elitist model, the new model emphasises the value of participation in democratic theory. It is to the participatory model of democracy that we now turn.

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[63] See pp. 99-102 above, where the concept of equality in relation to democracy is discussed.

[64] Pateman, *supra* note 36.

[65] *Ibid.* at Chapter 1.

[66] Macpherson, *supra* note 11 at 85 also refers to this confusion generated by the competitive elitists.

(c) Participatory or "Strong" Democracy

The proponents of the participatory model of democracy all share the belief that it is only through an increase in participation that modern society will become more equal[67] and that the political process will become more responsive to the electorate. They therefore argue that it is the implementation of a more participatory system which will best further the democratic cause[68].

Thompson[69] puts forward a theory of citizenship which places a strong emphasis upon the value of political participation. He lists five main reasons why he believes that participation is necessary[70]. Firstly, he notes that participation can be said to protect citizens against the "abuse of power" by government. Taken alone, this function is the minimum required in a democracy, and indeed, it is this protective function which is stressed by the competitive elitist democrats. Thompson concludes that the protective function of participation, standing alone, is not adequate[71] and that its satisfaction is dependent upon the satisfaction of the second and

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[67] Macpherson *ibid.* at 94 admits that more participation would not remove all inequities in society, but believes that "low participation and social inequity are so bound up with each other that a more equitable and humane society requires a more participatory political system."

[68] See above at section 2 of this chapter entitled "The Elements of Democracy", where the concepts of equality and political accountability are discussed with reference to democracy.

[69] *Supra* note 52.

[70] *Ibid.* at 55-67.

[71] He states *ibid.* at 56 that "[a]t best, the absence of disapproval or protest is merely a negative indicator...the existence of opportunities [such as elections] to express effective disapproval is not sufficient even as a "negative" protection against violation of majority interests."

third functions of participation which he identifies. Secondly, Thompson believes that "extensive participation is necessary so that all interests are considered and expressed by those who know them best."[72] He argues that, even if some citizens do not participate, then it is still possible for pressure groups to indirectly represent the interests of the non-participating individual[73]. The third function which is noted by Thompson stresses the educative value of participation and therefore reflects the ideas of J. S. Mill. Thompson believes that it is only through participation in the political process that a citizen can come to learn how to express his wishes in political terms: it is thus only through the medium of participation that citizens will learn what their political needs are[74]. Thompson therefore concurs with J. S. Mill in his belief about the validity of a self-perpetuating cycle of participation and education[75]. The fourth function of participation is that it legitimises the acts of those in power, in that participating citizens are more likely to understand the system and feel satisfied with it[76]. Lastly, Thompson notes that participation can promote self-realisation in citizens. Those who participate may feel that their political voice is effective and is heard, and may also develop

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[72] *Ibid.* at 56.

[73] Thompson *ibid.* at 60 states that "the failure of some citizens to vote or to belong to groups does not prove that these citizens' interests are excluded in a way that would violate the second function of participation."

[74] Thompson *ibid.* at 61 states that "we cannot justify regular non-participation by a citizen on the ground that he knows his own interest best. For a citizen cannot be said to know what his interests are until he participates to some degree."

[75] For a summary of the ideas of J. S. Mill, see page 108 above. Thompson *ibid.* at 62 reflects Mill's beliefs regarding participation when he states "[t]he more a citizen participates, the more he is exposed to political ideas, the more political experience and self-confidence he acquires - and hence the more politically knowledgeable he becomes. At the same time, the more knowledgeable he becomes, the easier it is for him to participate."

[76] Thompson *ibid.* at page 64 notes that, although there seems to be an association between participation and satisfaction, there is no conclusive evidence to this effect.

a more community oriented perspective[77]. This function is closely linked to the educative role of participation, and also seems to be drawing upon the work of J. S. Mill, who believed that participation would improve the individual and provide him or her with a feeling of social worth.

We can therefore see that Thompson's attitude towards participation is remarkably different from that of the competitive elitist democrats, and that it has more in common with the model of developmental democracy. His perspective is shared by other writers who advocate the participatory democratic model. Macpherson[78] and Pateman[79] both advocate increased participation, and Pateman stresses the educative function, once again following the example of J. S. Mill. She states that

> [t]he major function of participation in the theory of participatory democracy is...an educative one, educative in the very widest sense, including both the psychological aspect and the gaining of practice in democratic skills and procedures...Participation develops and fosters the very qualities necessary for it; the more individuals participate the better able they become to do so.[80]

Another important factor that unites the advocates of participatory democracy is that they believe that participation will increase the community awareness of individuals; in other words,

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[77] Barber, *supra* note 10 and Pateman, *supra* note 36 also believe that participation can encourage social responsibility in individuals. For further discussion, see *infra* notes 81-93 and the accompanying text.

[78] Macpherson *supra* note 11 at 107 concludes that "[t]he prospects for a more democratic society are thus not entirely bleak. The move towards it will both *require* and encourage an increasing measure of participation" [Emphasis added].

[79] Pateman, *supra* note 36.

[80] *Ibid.* at 42-43.

participating citizens will become more aware of the value of the *public* interest[81] as opposed to their own *private* concerns. This point is made particularly clear by Barber[82], who contrasts the liberal tradition of democracy, which he refers to as "thin" democracy[83], with his vision of participatory, or "strong" democracy. He views liberal democracy as traditionally supporting the pursuit of private goals for purely private gain, by its persistent focus upon the individual and its perception of politics as the means for resolving the conflicts between these individuals[84]. Barber argues that liberal democracy "depicts politics as nothing more than the chambermaid of private interests."[85] Liberalism and its focus on the individual therefore operates to ensure that private interests are disguised and promoted as being in the public good. In contrast to this, Barber's system of participatory "strong" democracy seeks to "transform" and redefine private concerns in terms which can be related to public, or community, concerns. He states that

> [t]he stress on transformation is at the heart of the strong democratic conception of politics...strong democracy...aspires to transform conflict through a politics of distinctive inventiveness and discovery. It seeks to create a public language that will help reformulate private interests in terms susceptible to public accommodation.[86]

It is through the medium of participation that Barber envisages this transformation from private

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[81] I use the term "public interest" to refer to the interest of the community as a whole. See chapter 1 above for a full exploration of the concepts of "public" and "private".

[82] *Supra* note 10.

[83] Barber *ibid.* at chapter 1 provides a full description and criticism of "thin" democracy.

[84] Barber, *ibid* at 5 states that "[a]utonomous individuals occupying private and separate spaces are the players in the game of liberal politics; conflict is their characteristic mode of interaction."

[85] *Ibid.* at 118.

[86] *Ibid.* at 119.

to public taking place[87]. However, Barber's vision of strong democratic participation reaches beyond the traditional liberal democratic view of participation as being primarily an exercise of the right to vote. He believes that one element which is essential to participation in a strong democracy is continuing discussion, and states that "there can be no strong democratic legitimacy without ongoing talk."[88] The "talk" which is envisioned by Barber is broader than the word would suggest, encompassing the whole process of exploring and debating issues with a view to developing common ground upon which to act. He stresses that this "involves listening as well as speaking, feeling as well as thinking, and acting as well as reflecting."[89]

Barber's views about the transformation of the private to the public are shared by other writers who advocate the participatory model of democracy. Pateman[90] believes that areas, such as the workplace, which are presently considered to be within the "private" realm, must be recognised as truly political, and democratised. She believes that it is only by gaining experience of democracy on a daily basis at a local level that individuals will learn to

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[87] Indeed, Barber *ibid.* at 132 defines "strong" democracy, with reference to participation, as "politics in the participatory mode where conflict is resolved in the absence of an independent ground *through a participatory process* of ongoing, proximate self-legislation and the creation of a political community capable of transforming dependent, private individuals into free citizens and partial and private interests into public goods" [Emphasis added].

[88] *Ibid.* at 136.

[89] *Ibid.* at 178. See also the "[n]ine functions of strong democratic talk" which Barber lists at 178, and explores in more detail at 179-198. The nine functions are "1. The articulation of interests; bargaining and exchange; 2. Persuasion; 3. Agenda-setting; 4. Exploring mutuality; 5. Affiliation and affection; 6. Maintaining autonomy; 7. Witness and self-expression; 8. Reformulation and reconceptualization; and 9. Community-building as the creation of public interests, common goods, and active citizens." The first two of these, he believes, are already recognised by liberals, but numbers three to eight are depreciated by them. The last function outlines the whole purpose of strong democratic talk.

[90] *Supra* note 36.

participate fully in national politics[91]. If participation is extended in this manner to traditionally "private" spheres, then Pateman believes that individuals will become more aware of the benefits of participation and have a better understanding of community issues. She argues that "[i]n the context of a participatory society the significance of his vote to the individual would have changed; as well as being a private individual he would have multiple opportunities to become an educated, public citizen."[92] It thus seems that Pateman, like Barber, is linking a transformation of the private to the public with the notion of participation. Indeed, most advocates of the participatory model of democracy seem to place an emphasis upon the development of community spirit through increased participation[93].

The participatory model of democracy can thus be viewed as a more organic model of democracy than any of the others which have been discussed. Although contemporary writers may found some of their ideas upon those of the developmental democrats, in particular J. S. Mill, it is clear that their model has wider implications for society as a whole. Not only do they have a broader notion of what constitutes participation, but they also envisage democratic participation taking place in areas other than the political arena. Unlike the model of

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[91] Pateman, *ibid.* at 42 states that "[t]he existence of representative institutions at national level is not sufficient for democracy; for maximum participation by all...democracy must take place in other spheres in order that the necessary individual attitudes and psychological qualities can be developed."

[92] *Ibid.* at 110.

[93] Macpherson *supra* note 11 at 99 also raises this point when he discusses the factors that he believes are necessary for a participatory democracy. One of these factors is a change in the population's self-image from consumers to "exerters and enjoyers of the exertion and development of their own capacities...[which] brings with it a sense of community." He clarifies this point by stating that "[o]ne can acquire and consume by oneself, for one's own satisfaction or to show one's superiority to others: this does not require or foster a sense of community; whereas the enjoyment and development of one's capacities is to be done for the most part in conjunction with others, in some relation of community."

competitive elitist democracy, which fulfils a descriptive function and attempts to justify *existing* systems of democracy, the model of participatory democracy looks *beyond* the constrains of traditional attitudes and pursues a system which its proponents hope will come closer to the democratic ideal.

However, not all contemporary writers are in agreement that increased participation should be encouraged. For example, Stankiewicz[94] believes that the proponents of the participatory theory of democracy are anarchists at heart, who wish to dispense with power structures in society[95]. He rightly notes that the advocates of participatory democracy wish to reform the social and political order, but he then expresses his disapproval for this by essentially repeating the stability argument of the competitive elitists. He argues that

> [t]he basic objection to the participationists' view is that society is much too important to be meddled with for the sake of "educational" goals...an attempt to give competence through permitting or encouraging participation is irresponsible.[96]

Not only is Stankiewicz's tone arrogant, but his vision is limited. Unless society is prepared to take some chances and allow such "meddling" to occur, then it will stagnate. Changes in the political or social structure will always be, to a degree, experimental, as the outcome can never be accurately predicted until the particular change in question has occurred. The

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[94] W.J. Stankiewicz *Approaches To Democracy: Philosophy of Government at the Close of the Twentieth Century* (London: Edward Arnold Publishers Ltd., 1980), particularly at Chapter VII, entitled "Participation in Democratic Theory".

[95] He states that ""[p]articipation" is designed by and for those who do not want to believe in a structure of authority; it is also a method of doing away with the latter." *Ibid.* at 163.

[96] *Ibid.* at 164.

proponents of participatory democracy, far from wishing to eradicate the structures of society, merely believe that they should be reformed in such a way that will allow citizens to have a greater influence upon the political process. The legitimacy of the political process and its institutions is not challenged; the goal is not anarchy, but democratization.

It is therefore arguable that the model of participatory democracy has emerged as the most feasible progression for the modern democratic world. The competitive elitist model, although realistic, provides little self-justification and provides no vision for the future. Participatory democracy, with its emphasis on individual involvement and community values, provides a vehicle which can help us to secure the democratic goals of equality and political accountability.

4. THE IMPORTANCE OF ACCESS TO INFORMATION AS A DEMOCRATIC TOOL

The above discussion has provided us with an overview of the relative importance of participation throughout the history of democratic theory. Since the middle of this century, the dominance of the model of competitive elitist democracy has ensured that participation has been marginalised. However, it has been suggested above that participation should play a more central role in democracy, and indeed that the theoretical foundation for such a change has already been laid by the writers who favour participatory democracy.

How do these nuances of democratic theory impact upon the concept of access to information?

The key to this question, as has already been suggested[97], lies in the fact that access to information is a prerequisite of political participation. Citizens are unable meaningfully to participate without accurate information relating to their political decisions. As a result, the greater the emphasis which is placed on participation in democratic theory, the greater the importance of access to information. A society's commitment to access to information can be seen as a barometer of its commitment to democracy and *vica versa*. Access to information is crucial to the theory of participatory democracy, but tends to be sidelined by competitive elitist democracy, which devalues participation. It should be emphasised that this does not mean access to information is worthless in a democratic regime which adheres to the competitive elitist model. The act of voting, which is the only act of participation for most citizens in a competitive elitist democracy, is meaningless if the individual has no facts upon which to base his or her decision. In other words, when an election occurs, a government can not be held accountable for its actions if information about these actions and their consequences is not available to the electorate. Access to information, then, is important even to competitive elitist democrats, but undoubtedly plays a larger role in the theory of participatory democracy. Indeed, participatory democracy arguably presupposes that an access to information regime is both important and necessary for individuals to participate effectively in and learn about the political process[98]. This presupposition implicitly underlies the writing of all the proponents

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[97] See above at page 93.

[98] Held, *Models*, *supra* note 6 at 262 recognises this in his summary of participatory democracy when he lists "[a]n open information system to ensure informed decisions" as one of the "general conditions" of this model of democracy. Information is not only crucial to participation, but is essential to modes of dissent, such as protest and lobbying.

of participatory democracy. For example, Thompson[99] states that "[p]olitical discussion helps make other forms of participation meaningful."[100] The clear presupposition is that political discussion itself (and therefore participation) can only be meaningful if it is based on full and accurate information. Thompson emphasises the importance of information more clearly when he states "[a]s long as the citizens who do vote *are informed about what the rulers do* and are not controlled by rulers, a majority of...voters are a threat to rulers if an election result can remove rulers from power"[101] [emphasis added]. Barber[102] also recognises the importance of information to participation when he states that "[i]nformation is indispensable to the responsible exercise of citizenship and to the development of political judgement."[103]

It is therefore evident that access to information is important in any democratic society, as it is necessary for effective participation. In order to develop this concept in more detail and understand more fully how access to information interacts with participation, the importance of access to information shall be further considered. It is arguable that access to information has a twofold importance, namely its *intrinsic importance* and its *extended importance*. I use the term *intrinsic importance* to refer to the benefits which will immediately occur upon exercise of the freedom, and the term *extended importance* to refer to its wider benefits. Each

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[99] *Supra* note 52.

[100] *Ibid.* at 86.

[101] *Ibid* at page 55.

[102] *Supra* note 10.

[103] *Ibid.* at 276.

will be considered in turn.

(a) The Intrinsic Importance of Freedom of Information

The intrinsic importance of access to information is apparent when we consider the direct results of an access to information regime. Such a regime allows members of the public to have access to the files and records of designated information holders, and, as such, allows the public to gather information. Regardless of the worth or the nature of the information which is involved, the inevitable consequence of its procurement is the acquisition of knowledge by the information gatherer. Knowledge can obviously be derived directly from the content of the information. However, even if the information itself has discrepancies or is inaccurate, it will nevertheless contribute indirectly to the knowledge of the information gatherer by revealing something about the information holder. The information gatherer may deduce that the information holder is acting on the basis of flawed information, or that records have been poorly kept, or that the organisation itself is inefficient. Whatever the nature of the information which is acquired, an access to information regime will increase the knowledge of those who take advantage of it. In other words, it has an educative effect[104]. However, this is merely the immediate effect of freedom of information: its necessity to a democratic system only becomes apparent when its extended importance is considered.

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[104] Indeed, the education which occurs when citizens gather information in order to facilitate participation in the political process is a benefit which is deemed to be important by those writers in favour of participatory democracy. See above at pp. 115-122.

(b) The Extended Importance of Access to Information

A citizen is unlikely to take the time and the trouble to actively seek out information which is being held by another unless there is a motive for doing so. The motive may be education alone, but it is often the case that information is obtained for the information gatherer's wider objectives. The U.S. Freedom of Information Act[105], for example, has been used by individuals, groups and businesses for numerous diverging purposes[106]. These include, for example, ensuring the safety of government approved or tested products or drugs[107], the investigation of government fraud, unethical practices or wasteful spending[108], or the retrieval of documents which can be useful in court, for example in support of an individual's fight against discrimination[109]. It can thus be seen that, although knowledge is the short-term goal which unites all information gatherers, it is common for them have wider objectives which

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[105] 5 U.S.C. s.552 (1988).

[106] See Evan Hendricks ed., *Former Secrets: Government Records Made Public Through the Freedom of Information Act* (Washington D.C.: Campaign for Political Rights, 1982). This book comprises a list of various instances in which the American Freedom of Information Act has been used, giving brief details about each case. As such, it provides a useful overview of the differing purposes for which the legislation has been utilised.

[107] For example, in 1980, the Public Citizen Health Research Group obtained documents from the federal Food and Drug Administration (FDA) which showed that the manufacturer of a drug called Selzcryn had failed to report that the drug was known to cause liver damage. As a result of this disclosure under the Freedom of Information Act, the FDA requested prosecution of the drug manufacturer. *Ibid.* at 21.

[108] For example, Professor P. Cohen of Harvard University utilised the Freedom of Information Act to obtain documents from the Department of Health, Education and Welfare which provided details of federal audits on universities' spending of government research grants. These disclosed that some institutions were using government money to pay employees who had not worked on authorized research projects. This fact was later publicised in an article in the *New York Times* on 8th January,1978. *Ibid.* at 64.

[109] For example, the Southeast Women's Employment Coalition obtained data from the Federal Highway Administration which demonstrated an under representation of women employees in several state transportation departments. The Coalition used this data in discrimination lawsuits. *Ibid.* at 74.

require action beyond the initial step of obtaining information. In this light, access to information can be regarded as a *tool* which is instrumental in achieving the long-term objectives of the information gatherer. This is the *extended importance* of access to information and it is herein that its true value lies: rather than standing alone as an inherently virtuous tenet, access to information exists as an instrument facilitating other means and goals. One such goal is political participation, regardless of whether that might entail forming a political opinion, voting, participating in a debate, or lobbying a representative.

(c) The Crucial Role of Freedom of Speech

The prime value of access to information in a democracy is therefore its function as a *tool* which enables citizens to participate in the political process. However, access to information when standing alone is often not sufficient to enable active political participation. Another tool which frequently operates in conjunction with access to information is freedom of speech. Once information has been obtained, the information gatherer may wish to disseminate that information or to express his or her opinion about it, and in such a case freedom of speech is imperative if the extended goals of information gathering are to be fulfilled. For example, the revelations that a specific drug causes cancer, or that a government official is using public funds for his own benefit, are inconsequential if the individuals who obtain such information are forced to keep it to themselves: the drug will continue to kill and the official will continue

to be corrupt[110]. The close connection between access to information and freedom of speech is evidenced by the First Amendment to the American constitution. Although the First Amendment specifically guarantees freedom of speech[111], it is silent regarding freedom of information. However, in 1965, the Supreme Court interpreted this section as including the right to a free flow of information[112], and this concept was embodied in statute a year later in the *Freedom of Information Act*.

Access to information and freedom of speech can therefore be regarded as tools which allow citizens to meaningfully participate in a democratic society. Indeed, the availability of freedom of expression and information can be regarded as a twin litmus test in the determination of whether or not a society is democratic. This issue has been raised in the British House of Lords[113], where Lord Bridge, in a strong and rather emotional statement argued that

> [f]reedom of speech is always the first casualty under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what

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[110] It can therefore be seen that freedom of expression can operate in a very positive manner. This is in contrast to the questionable use of the principle of freedom of expression by large corporations to justify the dissemination of information which is beneficial to them. See the discussion above at page 5.

[111] The First Amendment of the American Constitution states that "*[c]ongress shall make no law* respecting an establishment of religion, or prohibiting the exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances" [emphasis added]. Similarly, the Canadian *Charter of Rights and Freedoms* sets out the following fundamental freedoms in section 2(b): "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

[112] See the case of *Griswold* v. *Connecticut* (1965) 381 U.S. 479, in which the court said at page 481 that "[t]he right to freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read... and *freedom of inquiry*, freedom of thought and freedom to teach" [emphasis added].

[113] In the case of *Attorney-General* v. *Guardian Newspapers* (1987) 3 All E.R. 316.

the public may and what they may not know.[114]

Freedom of speech is therefore inextricably linked to both access to information and participation: it is meaningless without the former and necessary for the latter.

It can thus be seen that access to information is important in many respects. As well as having an intrinsic educative effect, it is a prerequisite for meaningful speech and meaningful participation, both of which are essential to democracy. The participatory theory of democracy, with its emphasis upon citizen involvement in the political process, serves to further bolster the importance of freedom of information.

5. THE PUBLIC/PRIVATE DIVIDE: A BARRIER TO DEMOCRACY?

It can be concluded from the above analysis that access to information scholars have a sound basis for justifying access to information with reference to democracy. However, it is submitted that such justifications of access to information often fail to question the meaning and implications of "democracy", and ignore the fact that the true value of a democratic regime lies in the guarantee that the exercise of socially consequential power will be accountable to the population. This failure to examine the deeper meaning of democracy is not accidental: it is a direct consequence of the dominance of the liberal public/private divide[115]. In order to provide a solid foundation for the argument that the public/private divide has operated as a

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[114] *Ibid.* at 346. Lord Bridge was dissenting in this case.

[115] The liberal public/private divide and the criticism which it has attracted has already been discussed in detail. See chapter 3 above.

barrier to democracy, it is necessary to consider the exercise of socially consequential power by private entities and, in relation to the access debate, their possession of socially consequential information.

(a) Socially Consequential Power

The liberal tradition has restricted the operation of democracy to what it has defined as the public sphere, namely the state and its institutions. The liberal public/private divide has provided an insidious barrier to the application of democratic principles within the "private" sphere: decisions within this sphere are deemed to be the prerogative of the controlling individual and, as such, are not open for general debate or popular control. Democracy has thus traditionally been limited, without question, to the public sphere. However, the exercise of socially consequential power has not been so limited: it is common for "private" entities to wield power in a way that impacts society as a whole. The best example of this is the power of the large modern corporation, which can affect every aspect of our society. Large companies frequently take decisions which have far reaching consequences: they have power over and make choices about people, money, resources and the environment. McConnell[116] recognises this when he states that

> deference of government to private groups does not eliminate the phenomenon of power. Power exists in the hands of these groups. It is both inward and outward looking: it is power over the members of the groups and it is also power over matters affecting the larger community.[117]

Companies may wield such power, but because they are classified as belonging to the "private"

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[116] Grant McConnell *Private Power and American Democracy* (New York: Alfred A. Knopf, 1966).

[117] *Ibid.* at 5.

sphere, they are not held accountable to those members of society that their decisions affect[118]. Even if the internal operation of the company is democratic, it will still remain unaccountable to the external community which is affected by its decisions. Furthermore, the membership of companies and other private groups is limited, often to small sections of the population which have similar interests and desires. As a result, the objectives of the company or group will be limited and it is unlikely to unilaterally decide to act in the interests of the community as a whole[119]. Bowles and Gintis[120] make this point when they note that

> [t]he liberal interpretation would seem to render democracy safe for elites - democracy is confined to a realm (the state) relatively unlikely to interfere with the wielding of economic power and limited to forms (representative government) insufficient for the consolidation of popular power.[121]

It can thus be seen that private groups and companies are shielded from democracy, and the constraints of accountability, by the liberal public/private divide. Bowles and Gintis take this line of argument a stage further and argue that the consequence is the *domination* of private corporations in modern society, and they define "domination" as "a form of socially

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[118] This is not the only way in which a company benefits from being classified as belonging to the "private" sector. Not only are companies free from democratic checks and balances which should accompany the wielding of socially consequential power, but they are also viewed as holding the same rights and freedoms as individuals and are thus, in some cases, protected from government interference. For example, in the case of *Ford v. Attorney-General of Quebec* [1988] 2 S.C.R. 712, it was held that corporations have a right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*. The double benefit which corporations gain being assigned to the private sphere is summarised, with reference to power, by Alan Hutchinson "Talking the Good Life: From Liberal Chatter to Democratic Conversation" in Allan C. Hutchinson and Leslie J.M. Green eds., *Law and the Community: The End of Individualism?* (Toronto: Carswell, 1989) where he states at 176 that "[t]he major effects of...[the]...traditional way of thinking are twofold: by treating corporations separate from the State, it overlooks the important influence of corporations over the government; and, by treating corporations as being the same as citizens, it ignores the exercise of power by corporations over citizens."

[119] McConnell, *supra* note 116 at 6 argues that "[a] group having a narrow constituency will probably have relatively narrow and concrete ends, usually economic and material in character."

[120] *Supra* note 26.

[121] *Ibid.* at 117.

consequential yet democratically unaccountable power."[122]

(b) Socially Consequential Information

This line of argument can be applied to information. Not only do companies wield socially consequential power which is democratically unaccountable, but a natural consequence of this is that they also possess socially consequential information. This information is manipulated and controlled through private channels and is unavailable to the public[123]. The fact that private entities hold socially consequential information is a premise which is crucial to the proposition that access to information should be extended to the private sector. It is, however, difficult to prove. If it can be demonstrated that private entities hold important information which is unavailable to the general public, then the truth of the statement fails: if the information has been discovered, then it must be publicly available. In order to overcome this problem, the issue will be tackled from a historical perspective by considering legislation which already provides for the disclosure of such information.

Part II of the *Canadian Environmental Protection Act*[124] provides for regulation of toxic substances by the federal government. It would be impossible for the government to contemplate such regulation without access to information held by private sector entities which

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[122] *Ibid.* at 101.

[123] Herbert I. Schiller Culture Inc. The Corporate Takeover of Public Expression, (Oxford: Oxford University Press, 1989) at 72 recognises this when he states that "[a]s computerization and information processing extend throughout the economy, the influence of the for-profit information companies widens. Decisions over the production, organization, storage, and dissemination of information are considered and decided upon without the presence of the public and its representatives."

[124] R.S.C. 1985, c.16 (4th Supp.) [hereinafter referred to as "CEPA"].

deal with toxic and potentially toxic substances. CEPA therefore makes provisions regarding information about toxic substances. These provisions can be split into two groups. The first group relates to the disclosure of information to the government[125], whereas the second relates to general disclosure to the public[126]. The inclusion of both groups of provisions demonstrates that private entities possess information which is socially consequential. The second group of provisions in particular highlights this fact. The general rule contained in section 20(1) is that information obtained from private entities which is accompanied by a request for confidentiality[127], shall not be disclosed. However, disclosure is permitted at the discretion of the government minister in certain circumstances[128], the most notable of which is under section 20(6). This subsection authorises the minister to disclose information if, after balancing the interests involved, he believes that the "public interest of public health, public safety or the protection of the environment...clearly outweighs in importance" damage to the interests of the private submitter which would occur upon release of the information[129].

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[125] See sections 15-18 of CEPA. The most important provisions here are contained in sections 16 and 17. Section 16 provides the government minister with the discretionary power to require private entities to furnish him with information regarding toxic and potentially toxic substances. Section 17 imposes a positive duty upon commercial entities to inform the government minister if that entity has reason to believe that a substance with which it deals is "toxic or capable of becoming toxic". The term "substances" is given a very wide definition in section 3 of CEPA as "any distinguishable kind of organic or inorganic matter, whether animate or inanimate". The duty which is imposed upon private entities in section 17 is therefore similarly wide ranging.

[126] See sections 19-24 of CEPA.

[127] The request for confidentiality is laid down by section 19(1) of CEPA.

[128] Section 20(2) provides for discretionary disclosure of certain types of information, such as safety precautions and procedures in respect of a substance, and section 20(4) sets out certain circumstances in which information may be disclosed, such as where the supplier has consented in writing.

[129] Section 20(6) of CEPA states "the Minister may disclose information... where (a) the disclosure is in the interest of public health, public safety or the protection of the environment; and (b) the public interest in the disclosure clearly outweighs in importance any material financial loss or prejudice to the competitive position of the person who provided the information or on whose behalf it was provided." Section 20(7) provides that notice of

Although this subsection provides for the disclosure of socially consequential information, even at the expense of the private entity from which it originated, it should be noted that disclosure is wholly dependant upon the discretion of the government minister. This situation can therefore be distinguished from a direct extension of access legislation to the private sector, where it is the general public who would be responsible for invoking the concept of social consequence[130].

The above provisions of CEPA demonstrate that private entities do hold information which is socially consequential. The public/private divide ensures that such information is currently exempt from access legislation. Private companies are consequently doubly shielded from democracy: not only is the power which they wield unaccountable, but it is also difficult for the general public to obtain complete information relating to the wielding of that power[131].

(c) Bridging the Divide

The limitation upon democracy which is imposed by the liberal vision of public and private has undoubtedly affected the way that the majority of writers have approached the subject of access to information. Access to information is justified with reference to democracy. Democracy

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a disclosure under section 20(6) should be given to the supplier of the information.

[130] The balancing test which the government minister preforms under section 20(6) of CEPA may sound very similar in nature to the test of social consequence which is proposed in chapter 5. However, there is a fundamental difference between the two. Under CEPA, the government minister is the only party who can invoke the notion of public interest, whereas the proposed application of the test of social consequence to access legislation would enable any member of the community to utilise the notion of the public interest to support their access request.

[131] Obviously, companies will want to disseminate information which is favourable to them, and will attempt to cover up that which is unfavourable. It is the latter type of information which the public will have difficulty obtaining.

operates only in the public sphere[132]. Therefore access to information is restricted to the public, or governmental, sphere. The fact which is conveniently ignored in this equation is the breadth and reality of power. Access to information is seen as a mechanism to limit only *governmental* power and the existence of power in the private sphere is ignored. The private sector lies on the other side of the public/private fence, and it is therefore disregarded as a subject for an access to information regime[133]. It is therefore the public/private divide which leads to the flawed reasoning that restricts the scope of democracy (and thus access to information) to the public sphere. As we have seen throughout this chapter, democracy exists as a mechanism to control the exercise of *socially consequential* power. Such power *is not* automatically restricted to the public sphere and private entities, in particular corporations, frequently exercise such power. If socially consequential power exists in the private sphere, it then remains to be asked whether democracy should be extended to that sphere, so that private entities which wield socially consequential power would be directly accountable to the electorate. Indeed, such an extension is already being advocated by some of the proponents of the participatory theory of democracy, who wish to introduce democracy into the private sphere in order to "transform" private interests into common interests[134]. For example, Pateman believes that democratic systems should operate in traditionally "private" spheres,

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[132] In other words, it is only public sector bodies which wield power with the sanction of the electorate. Although private sector entities may be affected by the decisions which are taken by a democratically elected government, they are self-governing and are not answerable to the general public.

[133] Private entities are sometimes subject to freedom of information legislation, but this is always in instances where the public/private divide is maintained. See chapter 2 above.

[134] See supra notes 81 to 93 and the accompanying text.

such as the workplace[135]. Other writers acknowledge the fact that society cannot be described as truly democratic until democratization reaches the private sphere[136].

If it is accepted that, for the above reasons, democracy should be extended to the private sphere, then it must also be accepted that access to information should also be so extended. It should be noted that it is not suggested that such extensions into the private sphere should be without limitation. It has been maintained throughout this discussion that democracy is pertinent only to the wielding of power which has social implications for the community, and if this is the criterion which is adopted, then democracy (and consequently access to information) would rightly be excluded from areas which are truly private, such as personal relations[137].

The extension of democracy into the private sector is a radical step which would meet with much resistance and disapproval. However, it is *not* necessary to assert such an extension of *democracy* in order to provide a theoretical basis upon which to found the argument that *access to information* should operate within the private sector. It has already been shown that access

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[135] See Pateman, supra note 36.

[136] For example, Bobbio *supra* note 29 at 32 argues that "[a]s long as the process of democratization has not make inroads into the two great blocks of power from above which exist in developed societies, big business and bureaucracy - leaving aside whether this would be desirable even if it were possible - the process of democratization cannot be said to be complete."

[137] Most writers acknowledge that a certain degree of privacy is necessary. For example, Bobbio *ibid.* at 92 states that "[i]t goes without saying...that event the most democratic state guarantees citizens a sphere of privacy or secrecy, for example by making violation of private correspondence a crime...or with legislation which protects the privacy and intimacy of individual or family life from the prying eyes of public authorities or the agencies in society which mould public opinion."

to information is necessary for democracy to operate effectively. There is no reason why the free flow of information should be restricted only to the liberal "public" sphere. Governments all around the world take decisions which affect private bodies, and the efficacy of these decisions cannot be properly measured unless full information is available. Often, this information will be unavailable except within the corporation which is affected. Furthermore, even when the government is not currently involved in a certain area, if a company is making decisions which affect the community, then the community should be informed about these decisions. It is only through the availability of such "private" information that individuals will be equipped to formulate their opinions on the lack of government intervention. The result is that governmental policies, which sit squarely within the public sphere, cannot be properly formulated without access to information which is in the hands of the private sector. This is the theoretical foundation for the extension of freedom of information to the private sector which does not require a similar extension of democracy. The democratic justification for freedom of information remains, but in order to satisfy the requirements of democracy in the public sphere, it is argued that an extension of freedom of information into the private sphere is necessary.

CHAPTER FIVE

SOCIAL CONSEQUENCE: THE WAY FORWARD?

The discussion in this thesis has questioned the hitherto restricted scope of access to information legislation. It has been shown that the limitation of such legislation to the public sphere is not sufficiently grounded in the reasons for access to information. Instead, this limitation has naturally flowed from the dominance of liberal values in the modern world. Furthermore, the democratic justification for access to information has been investigated, and democratic principles have been demonstrated to provide a theoretical foundation for the extension of access legislation to the private sector[1]. The key to such an extension lies in the realisation that the wielding of socially consequential power, which democracy seeks to control, occurs in the private as well as the public sphere. The reality of such power is denied by the liberal public/private dichotomy, which encourages a *laissez faire* approach to the private sector: information generated by and/or held by the private sector, which is vital to the community, is unavailable for public consideration and scrutiny. As a result, governmental action or inaction relating to private sector entities is often incapable of being properly evaluated by the electorate: this democratic failure is a direct result of a lack of information.

The primary objective of this thesis is to highlight the problem described above, and to emphasise that it has occurred because of the blinkered approach which has been taken towards access to information legislation. Liberal values are so deeply embodied within the access

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[1] See chapter 4 pp. 135-137 above.

debate that participants are unable to look beyond the ideology of the liberal public/private divide to question the proper scope of access regimes. This thesis has endeavoured to remove the veil of liberalism which has hitherto dictated the terms of the access debate, and expose the underlying principles of democratic participation which *should* inform it. These issues have been dealt with in the preceding chapters: the access to information debate has been critically examined and principles which indicate a way forward have been considered. To conclude, this chapter will move the discussion beyond critical analysis and suggest one possible solution to the problem.

1. THE TEST OF SOCIAL CONSEQUENCE

> Liberal social theory's arbitrarily asymmetric treatment of state and economy stems, we believe, from the untenable notion that the capitalist economy is a private sphere - in other words, that its operation does not involve the socially consequential exercise of power.[2]

The scope of access to information legislation is currently determined by the *legal status* of information. The issue revolves around the liberal public/private divide and access is permitted only if the information is deemed to be "public". It has already been noted that this test ignores the *content* of the information in question and the importance of that information to society as a whole. It is submitted that a more suitable test would focus upon the content of the information, and would permit disclosure of information which is of social consequence, regardless of its status as "public" or "private". Information which is in the hands of a private

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[2] S. Bowles and H. Gintis eds., *Democracy and Capitalism: Property, Community and the Contradictions of Modern Social Thought* (London: Routledge and Kegan Paul, 1986) at 67.

entity would therefore be just as susceptible to disclosure under this access regime as public sector information[3]. Such a test would correspond with the democratic justification for access to information: democracy seeks to control the wielding of socially consequential power and it is therefore logical that the availability of information should depend upon the relevance of that information to society[4].

By definition, the test of social consequence does *not* involve a blanket extension of access to information legislation to the private sphere, and it has been emphasised throughout this thesis that the concept of personal privacy an important one which should not be abandoned[5]. The test of social consequence recognises this, as it allows an extension of information access to the private sphere without *unjustifiably* permitting disclosure of private information: the interest which society has in the information must always be significant enough to overcome the privacy rights of the individual or the private entity[6]. In each case, the question is one of a

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[3] The test of social consequence would therefore render obsolete the whole debate surrounding the disclosure of private sector information which is in the hands of a public sector agency. The public or private status of the information would no longer be an issue, as the focus would be on the importance of the information to society. Private entities would be just as susceptible to information requests as governmental ones. As a result, there would be no need for private bodies to be reluctant to provide the government with information due to fear of an access request. See *supra* chapter 1, note 57.

[4] This does not necessarily mean that democracy itself should be extended to the private sector. For further explanation, see chapter 4 above at page 137.

[5] See chapter 1 above at pp. 22-24.

[6] This concept of balancing the interests of society against the interests of the individual is one which is well known in western legal systems, especially in relation to human rights legislation. For example, the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*, (U.K.), 1982, c.11 [hereinafter the *Charter*], sets out various rights, such as freedom of religion in section 2(a) and freedom of expression in section 2(b). However, the individual's rights which are contained in the *Charter* can be overridden by "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (section 1). The override is provided for circumstances in which the interests of society outweigh the individual's rights, and the court has performed the balancing act which is involved in this process on many occasions. For

balancing of interests. However, it should not be forgotten that it is the *consequences* and *effects* of the information in the hands of the private entity which is important, rather than the *legal status* of the entity. The crucial element introduced by the test of social consequence, which is absent in current regimes that focus on the public/private distinction, is therefore the notion of community. Access to information legislation is presently so concerned with the classification of information as either public or private and the protection of information which belongs to private entities, that an important issue is completely overlooked: would the release of the information be significant for society? The test of social consequence would remove the emphasis from the classification of information and addresses this crucial issue. The access to information debate would consequently move into a more relevant sphere.

The test of social consequence is best clarified by illustration. For example, a company's internal records show *inter alia* that (1) one of its factories is leaking potentially damaging chemicals into the local river, and (2) the new design of the company's leading sports car model has been completed. Under current access legislation, neither piece of information would be liable to disclosure, as information which is contained in a company's private files is automatically precluded from disclosure. However, if the test of social consequence is applied, it is apparent that the first fact is liable to disclosure whereas the second is not:

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example, in the case of *R* v. *Keegstra* [1990] 3 S.C.R. 697 the court considered whether the dissemination of hate propaganda warranted protection under section 2(b) of the Charter, and if it did, whether this right should be overridden by section 1. The majority of the court held that the hate propaganda was protected under section 2(b), but that, in terms of section 1, society was justified in criminalising the activity. Dickson C.J. states at 764 that "expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way." This case illustrates the way in which the interests of society as a whole can outweigh the interests of the individual.

leaking chemicals is an obvious cause for concern to the community, but information about the company's new sports car model is not. Disclosure of the information about the leaking chemicals would benefit the community, as steps could then be taken to stop the leak and attempts made to repair the environmental damage. However, if the information regarding the company's new sports car model were to be released, there would be no community benefit to outweigh the financial harm which would be caused to the company. Although this is a hypothetical example, the issues which it raises are very real. Information relating to the environment is an obvious example of information held by private companies which is important to the community[7]. The community has a right to know if a company is releasing chemicals into the local river, regardless of whether this is intentional or accidental: the chemicals will have an impact upon the quality of river water, affecting the plants and wildlife that inhabit it and may have repercussions for the people who use and live near the river. Socially consequential information can be held by many other types of private entities. For example, a company which owns a chain of restaurants will hold health and hygene information which is important to the people who eat there. A construction company will hold information about the safety of the building sites which it manages and the materials which it uses in its constructions. It is illogical that such important information should be unavailable to the general public simply because it is in the hands of a private sector entity. The test of social consequence directly addresses this problem.

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[7] See CEPA discussion above at pp. 132-134.

2. OBJECTIONS TO THE TEST OF SOCIAL CONSEQUENCE

Although the test of social consequence would improve access to information legislation in the manner described above, it is recognised that the test itself presents some difficulties. Indeed, if the test were to be introduced, it would undoubtedly attract much criticism from those who believe that the private sector should not be liable to disclose information in terms of access legislation. The full implications of the utilisation of the test of social consequence would obviously require extensive and detailed research, which is outwith the scope of the current analysis. However, in order to justify the submission that the test may be a suitable alternative to the liberal public/private dichotomy, it is necessary to address two of the main objections which are likely to be raised.

(a) Definition

The first and most important problem which is raised by the test of social consequence is that of definition: how can the term "socially consequential information" be adequately defined? Without a satisfactory definition, the scope of resulting access to information legislation would remain indeterminate and may be interpreted in a subjective manner, according to the values and beliefs of the interpreter. These are criticisms which have been raised earlier in this thesis with respect to the public/private divide[8].

It can be said that information is "socially consequential" if its content substantially affects the

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[8] See chapter 3 above.

lives of individuals within the community[9]. This is a somewhat vague definition as it is heavily reliant upon the interpretation of the term "substantial effect". Indeed, the difficulties which arise become apparent when specific cases are considered. For example, would information relating to the treatment of laboratory animals by a private company be "socially consequential" and thus liable to disclosure under the proposed test? Although the way in which laboratory animals are treated can be argued to have no direct effect upon the lives of individuals in the community[10], some people may feel that the humane treatment of animals is a matter of concern to society as a whole. Another illustration of the test of social consequence which provides some uncertainty relates to the amount of money which a company spends upon advertising a product. It is clear that this information has an impact upon society, as the more that is spent, the more the public is being persuaded to buy the product. However, the company may argue that this information is not of *sufficient* social consequence to warrant falling under the scope of access legislation.

The above examples both demonstrate that definitional problems which might arise if social consequence were to be introduced as a test to determine the scope of access to information legislation. These problems could, however, be alleviated if the access legislation in question were to include a definition of the term: a definition approved by the legislature would, after

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[9] Bowles and Gintis, *supra* note 2 at 67 define a "socially consequential action" as "one that both substantively affects the lives of others and the character of which reflects the will and interests of the actor."

[10] It can be regarded as irrelevant to the lives of most individuals whether laboratories treat animals in a humane manner. However, experiments which are performed upon animals, whether they are humanely executed or not, will indirectly affect the lives of members of the larger community, who will be consumers of the resulting products and medical procedures. The issue of whether or not experiments should be conducted can therefore be separated from the question of whether the animals are humanely treated: unlike the former, the latter has no direct effect upon the members of society.

all, provide democratic legitimacy. However, significant research would still be required to determine an adequate definition of the term "socially consequential". It is submitted that despite some definitional difficulties, the test of social consequence is preferable to the present test which is based upon the public/private distinction. Although both tests result in a degree of indeterminacy, the present discussion surrounding the public/private divide is concerned only with the *legal status* of the information, whereas the discussion following the introduction of a test of social consequence would concentrate upon the *content* and effects of the information. This would shift the focus of the debate into the proper sphere. The disclosure of information is better justified with reference to its content than its legal status: the former is inherently bound up with the importance of the information, whereas the latter is merely an artificial construct for determining ownership[11]. Despite its indeterminacy, the test of social consequence is therefore preferable to the application of the public/private divide, as it serves to move the access to information debate into the correct realm.

(b) The Restriction of Property Rights in Information

The second objection to the test of social consequence which will be considered relates to

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[11] The arbitrary nature of the public/private divide and the fact that it is empty of substantive considerations is highlighted by Christopher D. Stone "Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?" (1982) 130 U.Pa.L.Rev. 1441. After discussing different legislative strategies for deterrence, and noting that the public/private divide generally operates in this realm to impose liabilities on private actors and policies of intervention on public actors, Stone poses the following question. He asks at 1458-1459 "whatever balance between monetized penalties and interventions is indicated in any particular circumstance by the character of the hazard, etc., *is there any independent reason to shift our relative reliance from one strategy to the other, based upon the organisation's mix of public or private characteristics?* In the terms of the nuclear fuel processor, is there any reason to alter the balance between interventionist and penalty strategies depending upon whether the utility handling nuclear fuel is investor-owned or municipal?" [Emphasis in the original]. The clear implication is that he believes the question should be answered in the negative.

private property rights. The automatic response which private companies are likely to give to the suggestion that a test of social consequence be introduced, is that it would restrict their private property rights. Why should a company surrender its information to a person who makes an access request?

It is not disputed that the inevitable consequence of the introduction of the social consequence test would be a restriction of the informational property rights of private entities. However, it is submitted that it is not unusual to restrict the rights of private entities and individuals for the benefit of society. Private rights in heritable property, for example, are commonly and often significantly restricted by planning laws, which are designed to benefit the community in which the property is located[12]. Other property rights are also commonly restricted: the objective of the regulatory state is to restrict private property rights for the benefit of society[13]. Why should informational rights benefit from any special advantage? It is submitted that it is indeed reasonable to suggest that in certain circumstances the property rights of a private entity should be overridden by the interests of society. Furthermore, "trade secrets" should not be exempt from the test of social consequence. Suppose that a manufacturer of soft drinks conducted tests which indicated that the "secret formula" for its lemonade is likely to cause cancer. Although the composition of the "secret formula" is a trade

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[12] For example, building plans must be submitted for approval by the local authority, which will consider the design and proposed use of the property and its suitability for the proposed location. Local residents will normally be given an opportunity to object to development. It is not unusual for a property owner's rights to be overridden by the interests of the community in such instances. For instance, a landowner's wish to develop a public house on his property may be precluded by local legislation or rejected by city planners who believe that the development would be disruptive to the neighbourhood.

[13] For example, health and safety regulations govern the production and use of a wide range of goods, and the disposal of property is often regulated for environmental reasons.

secret, it is submitted that the interest of society in ensuring consumer protection should outweigh the interest of the company in maintaining its trade secrets. Information regarding the "secret formula" should therefore be accessible to the extent which is necessary to protect the interests of society[14].

Objections to the test of social consequence which are based upon opposition to the restriction of private property rights demonstrate the tendency of private bodies to be "information greedy". In other words, private sector entities are inclined to regard information access in a positive light when it is applied to someone else, but in a negative light when they are called upon to disclose their own information: they advocate access to that which others know whilst seeking to retain confidentiality for themselves. The private sector is therefore inclined to applaud access to *governmental* information, whilst expressing horror at the concept of compelled disclosure of its *own* information[15]. This paradox is masked by the liberal public/private distinction, which disguises the realities of "information greed", by exempting private entities from the scope of access legislation. As a result, it is regarded as unacceptable and almost unthinkable to suggest that documents in the private sector should be available for

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[14] It is recognised that the extent of the release of this information would be likely to be disputed. The very minimum which should be released in the given scenario is the fact that the ingredients in the lemonade is likely to cause cancer. However, it may also be necessary to release a list of the ingredients which make up the "secret formula" so that independent tests can be carried out and the carcinogenic ingredient isolated.

[15] In our society where information often equates with power and profit [see Herbert I. Schiller, Culture Inc. The Corporate Takeover of Public Expression, (Oxford: Oxford University Press, 1989), particularly Chapter 4], it is easy to see why such an attitude would be advantageous. P.M. North "Public or Private? A Paradox for 1984" (1985) D.U.L.J. 90, remarks at 91 that "[t]he paradox is that greater access to information and greater freedom to disseminate information is fine if it concerns the anonymous "government" or if it relates to *you* - but if it relates to *me*, there is increasing pressure to make the information more protectable" [emphasis in the original]. This point is also made by Ruth Gavinson "Information Control: Availability and Exclusion", Chapter 5 in S.I. Benn and G.F. Gaus eds., *Public and Private in Social Life* (London and Canberra: Croom Helm Ltd, 1983) at 121.

public scrutiny. The plea to informational property rights seeks to exploit these attitudes which have been fostered by the public/private dichotomy of current access regimes.

If the double standard which is inherent in "information greed" is to be overcome, it is submitted that the concept of informational property rights must be balanced against the interests of society, for example in the notion of social consequence. Rather than giving priority to private interests, the scope of information access legislation should be determined with reference to the content of the information.

3. CONCLUSION

The above discussion has raised some of the issues associated with the test of social consequence, and has attempted to briefly outline some of the arguments which may be put forward on both sides of the discussion. Although this examination has only begun to scratch the surface of the debate, the use of the test of social consequence to determine the scope of access to information legislation presents one possible way forward. The full implications of the implementation of such a test are as yet unclear and require detailed research and analysis. This is a task for the future. However, the path of the future cannot be adequately plotted without a clear vision of the route that has been travelled in the past. This thesis has attempted to provide the critical analysis of the access to information debate that is necessary for it to break out of the current cycle of assumptions and move forward. Whatever direction such a move should take, it is important that the future debate is unencumbered by the arbitrary nature

of the liberal public/private distinction, which serves to protect the interests of private corporations. As Hutchinson[16] remarks

> [t]he major effects of the traditional way of thinking about the state are twofold. By treating corporations as separate from the state, such thinking overlooks the important influence of corporations over government, and by treating corporations as being the same as citizens it ignores the exercise of power by corporations over citizens. Each effect combines to insulate corporations from democratic regulation and to facilitate their manipulation of economic and therefore political power; they are the favoured and bastard offspring of the traditionalists' marriage to the public/private distinction.[17]

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[16] Allan Hutchinson, "Mice under a chair: Democracy, courts, and the administrative state" (1990) 40 U.T.L.J. 374.

[17] *Ibid.* at 378.

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