

**RECONCILING THE IRRECONCILABLE: DEMOCRACY AND
THE NATIONAL SECURITY EXEMPTION TO THE RIGHT TO
FREEDOM OF INFORMATION**

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SUMMARY

The prevailing South African Constitutional order is defined in the Constitution of the Republic of South Africa as a sovereign constitutional democracy. Freedom of access to government held information by the public is a fundamental and indispensable tenet of a sovereign constitutional democracy. The essential link between the two is recognized by the South African Constitution which guarantees the right to freedom of information as a fundamental human right.

The Constitution simultaneously recognizes that all rights, including the right to freedom of information, may be subject to limitation. However any such limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The right to freedom of information is subject to often severe limitations in the arena of national security matters on the ground that the need for secrecy in this arena is self-evident. The limitation of the right may be necessary, but must, as in the case of all other limitations, be reasonable and justifiable in an open and democratic society. A comparative overview of most notably the United States of America, a stable and mature sovereign constitutional democracy, reveals that it, in the practical application of the limitation of the right to freedom of information in the arena of national security does not follow through on its commitment to democratic values.

In the practical application of the limitation, the United States may be accused of failing to meet the standards required by a sovereign constitutional democracy in the extent of power it affords the unaccountable executive branch of government over the control and dissemination of information in the arena of national security. More specifically, in the power it affords this branch to define national security. And further, in its failure to hold this branch accountable for decisions made in this regard.

This lack of accountability may be attributed to a conservative judiciary which as a matter of course defers to the executive and a failure on the part of the legislature to legislate alternative methods of accountability.

The question for South Africa is whether it having Constitutionally entrenched the right to freedom of information, will be able, in contrast to the United States, to maintain democratic standards in the practical implementation of the limitation of the right to freedom of information in the arena of national security.

Current practices in South Africa reveal that it has not been able to and

will not be able to maintain the necessary standards, without engaging in some fundamental changes. Primarily because of traditional and entrenched judicial and public attitudes as well as because of the extensive power afforded the executive branch in respect of control of information in the arena of national security and over the definition of national security.

The solution lies in a pro-active legislative programme designed to give effect to the right to freedom of information. Any such programme must actively limit the extent of discretionary power afforded the executive branch and where such power is necessary, make it subject to substantive review, in other words must enable one to hold the executive accountable for its decisions.

One of the primary tools for achieving this is by way of freedom of information legislation. Such legislation must expressly, and in sufficient detail, regulate exemptions to the right in such a manner as to make the successful invocation of such an exemption dependant on whether it is reasonable and justifiable in an open and democratic society. Further, any allegation of reasonableness and justifiability must be open to public scrutiny in a manner which would not jeopardize legitimate secrets.

The balancing of the competing interests poses a very real dilemma for any democratic society. This dilemma can however to a large extent be resolved by a change in judicial and public attitudes and legislative activism. The process of change has commenced in South Africa. This is evidenced in the Constitutional terms and tone as well as in a number of legislative initiatives to change existing national security laws and to introduce new laws such as the current Open Democracy Bill.

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INTRODUCTION

This week a Pretoria magistrate..., ordered that evidence heard at the bail application of [a] drug suspect... should be held in secret. This followed an application from the state prosecutor who had raised concerns about “national security”. No evidence was lead as to why national security would be endangered by an open hearing. And the magistrate offered no reasons for his peremptory order.¹

A brief glance at the reference footnote will reveal that this is an extract from an editorial comment penned, not in 1987 but 1997. The Sunday Times together with Business Day and the Freedom of Expression Institute were forced to make application to the High Court for an order compelling the lifting of the ban. They were partially successful in that the rest of the bail hearing was heard in open court. However, transcripts of the cross examination of the accused remained under wraps. This necessitated a further application to the High Court, compelling the release of that evidence to the public.

This incident raises a host of issues, in particular:

- The 1996 Constitution of the Republic of South Africa guarantees accountability and transparency, and in giving effect to this guarantee, enshrines the right to access to state-held information as well as the right to reasons for decisions. Why then are decisions such as the aforementioned being made?
- It is not only the denial of access to information which is cause for concern. More pertinently, this denial was ordered in the absence of reasoned argument which is indicative of an essentially slavish deference to:
 - The untested opinion of an unaccountable state official; and
 - national security.
- The magistrate’s deference to the prosecutor’s submission that

¹ Sunday Times, February 9 1997, Editorial comment

disclosure would be contrary to the interests of national security in the absence of argument on the point is contrary to the fundamental role of the adjudicator. Unfortunately however, the deference exhibited does not constitute a unique precedent. Our legal history is fraught with instances of unquestioning deference to the executive in the interests of national security. Although much of that legal history pre-dates the Interim and 1996 Constitutions.

- This particular instance of deference is significant in that the subject matter of the criminal proceedings at hand related to narcotics – which is not a subject one would automatically equate with national security as traditionally understood. The danger posed to freedom of state-held information in the arena of national security is therefore multi-layered. The failure to demand argument as to why the subject matter at hand constituted a national security issue raises the alarming specter of unquestioning deference to an ever expanding construct of national security, a construct with no definable boundaries.
- The actions, or more specifically, the inaction and resultant decision of the magistrate, are indicative of an attitude that issues pertaining to national security are non-justiciable – an attitude that does not sit comfortably in a constitutional democracy, especially one made subject to a justiciable Bill of Rights which includes the right of access to information.
- The opponents of the state's position in this matter questioned the decision and the attitude underlying it and were partially successful. Admittedly their application and limited success would have been inhibited from the outset prior to the enactment of South Africa's new Constitution. However, their partial success was achieved only after the expenditure of a great deal of time and money.

The 1996 Constitution of the Republic of South Africa embodies a number of supreme governing principles, adherence to which is a prerequisite for achieving the overarching objective of a constitutional democratic dispensation. These principles include, *inter alia*, a transparent and accountable government which self-evidently require the public to have access to government-held information as well as the closely linked right to reasons.

One may summarise the issues raised and opinions expressed in the Sunday Times editorial as a concern that these principles, exalted as fundamental human rights, were disregarded and violated by the actions of the prosecutor and the subsequent decision by the magistrate – all in the name of ‘**national security.**’

The editorial concludes with the following statement which reflects these sentiments:

Our experience this week convinces us yet again that the instinct for secrecy and suppression of debate is as strong now as it ever was – whether from state officials, politicians or businessmen who believe they are too exalted for public scrutiny.

Our Constitution embodies the principles of transparency. Our democracy is founded on it. It is rarely comfortable for those under the spotlight and it often greatly complicates life.

But we either commit ourselves to it or admit the high-flown rhetoric of the Constitution is merely a smoke screen for business as usual – secretly.

The subject matter of this thesis arises from the need to address concerns similar to those expressed in the Sunday Times editorial. In essence, this thesis seeks to address the underlying concern that South Africa may, despite its overt constitutional commitment to democracy, succumb to undemocratic information practices in the arena of national security, as has occurred in foreign jurisdictions, such as the United States.

As I will demonstrate in the course of this thesis, the United States is, despite its developed administrative legal system and firm institutionalised commitment to democracy and freedom of information, guilty of failing to maintain democratically acceptable information practices in the face of alleged national security interests.

This raises the following question. Will South Africa succeed, where systems such as those of the United States have failed in averting the threat posed to freedom of information and hence democracy by the interests of national security? This question becomes all the more pertinent in view of the fact that South Africa, unlike the United States, is a fledgling democratic society characterised by instability, high crime rates and extreme poverty, all of which increase the risk of succumbing to this threat.

The South African Constitution has in contrast to other constitutions, expressed and entrenched a far wider range of democratic principles and complementary rights, such as the right to freedom of information, reasons for a decision and the right to just administrative action. Will this be enough to compel

the state to promote and respect these rights and principles in the face of the entrenched Herculean strength of national security?

It will be argued during the course of this thesis that should the South African system succumb to undemocratic information tendencies in the arena of national security, the end result will be a general emasculation of the Constitution and the protection afforded by it. It will effectively be reduced to nothing more than “a smoke screen for business as usual – secretly”.

In turning to the magistrate’s decision, the prognosis for the South African system is not positive. The decision, made a mere eight months after the adoption of the 1996 Constitution, compels one to conclude that on the face of it, constitutional democracy in South Africa is faced with a significant threat in the guise of denial of access to information in the arena of national security.

The threat posed by denial of access to information in the interests of national security to our constitutional democracy is both fundamental and immense. The immensity and fundamental nature of the threat is revealed in the apparent ease with which the magistrate not only deferred to national security, but so deferred in the context of a criminal hearing, the subject matter of which one would not traditionally regard as falling within the parameters of national security. What is more, he did so at the behest of a criminal prosecutor who once again would not traditionally be regarded as a spokesperson for and arbiter in respect of what is and what is not in the interests of national security.

This raises the significant question of the fluidity and indeterminacy of the boundaries of national security, which if left unchecked could become monolithic in size at the behest of unaccountable officials. Should a precedent of secrecy in the ever expanding realm of national security be entrenched, the danger becomes obvious – an incremental malignant encroachment on, and deprivation of, the right to access to information and a disregard for the principles of accountability and transparency.

In the following chapters I will show that there is an essential link between freedom of information and democracy, and that democracy is predicated on an unfaltering acceptance and respect of the public’s right of access to information. This co-dependency accordingly implies that an unjustified denial of access to information in the arena of national security is tantamount to a denial of democracy. Should this fundamental threat posed by secrecy practices in the arena of national security not be recognised and curtailed, it will undermine and erode that which South Africans have fought for:

...a society based on democratic values, social justice and fundamental human

rights;

.....a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law.²

² Extract from the Preamble to the Constitution of the Republic of South Africa, Act 108/1996

CHAPTER ONE

THE CONSTITUTIONAL FRAMEWORK

Opponents of the pre-1993 South African order rejected its inhumane policies and practices under the umbrella criticism that they were undemocratic. The desire to create a new diametrically opposed democratic order culminated in the drafting of the Interim Constitution of the Republic of South Africa. The preamble to this document unequivocally articulates the desired objective:

In humble submission to Almighty God,
We, the people of South Africa, declare that-
Whereas there is, a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equalityso that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.
And whereas in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles.¹

The Preamble, in introducing the document marking a fundamental turning point in South African history, not only rejects the past dispensation, but also identifies the goals and aspirations of the new order. These goals and aspirations are summed up by the label given to the new order: a Sovereign and Democratic Constitutional State.

The extent of the commitment to achieving the goal of a sovereign and democratic constitutional state is expressed in the 1993 Constitution's recognition that it is but an interim one. The codification of the transitory status of the Interim Constitution was necessitated by the fact that the process culminating in its creation was undemocratic.

The overarching commitment to democracy dictated the demise of the Constitution. Its demise, anticipated in its preamble would occur upon the adoption, by democratically elected representatives, of a final Constitution designed to achieve the objectives of a sovereign and democratic constitutional state.

This overriding commitment to democracy was not only reflected in the

interim nature of the Constitution, but also in the simultaneous entrenchment in the Interim Constitution of certain constitutional principles which underpin a sovereign and democratic constitutional state, beyond the life span of the Interim Constitution.

The commitment to these principles is alluded to in the Preamble which states that elected representatives 'should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles'. These principles are then rendered unalterable and non-negotiable in clause 71(1)(a) which states that:

A new constitution shall-

(a) comply with the Constitutional Principles contained in Schedule 4.

The Schedule 4 principles constitute a template of the essential criteria for a sovereign and democratic constitutional state, as perceived by the drafters. These criteria include supremacy of the constitution, universal suffrage, a bill of rights, equality before the law, the separation of powers, an independent judiciary, a representative democratically elected government and the rule of law.

Most notably, for the purpose of this thesis, the Constitutional Principles expressly include, alongside these quintessential democratic features, freedom of information.

Principle 1X states that:

Provision shall be made for freedom of information so that there can be open and accountable administration all levels of government.

This recognition of freedom of information as a fundamental tenet of a sovereign constitutional democratic state is not unique to the South African order. It has been recognised as such in many jurisdictions. However, the express affirmation thereof, by recognising and entrenching it as a constitutional principle, is relatively unique. This incontrovertible affirmation is given practical effect by the elevation, in both the Interim and 1996 Constitution, of the right of access to information as a justiciable fundamental human right.³

³ Act no 108/1996, S 32

1.1 Freedom Of Information: An Essential Component Of a Sovereign and Democratic Constitutional State

An explanation of the proposition that public access to government-held information is a fundamental tenet of a sovereign constitutional democracy requires an analysis of each of its constitutive components. Through this unpacking one can identify the role played by, and the significance of information in relation to each. This analysis will provide not only the answer to the why, but also to the what. By positing the enquiry into access to information within this framework, one is provided with an avenue for exploring the content and ambit of the right to access to information in relation to its role and capacity for fulfilling the objectives aspired to in the adoption of a sovereign constitutional democracy.

An analysis of the component parts of a sovereign constitutional democracy is complicated by the diversity of opinion as to their meaning. The only common point amidst this diversity is the agreement that there is no singular definition or meaning of each. The task at hand will involve an exploration of the various theories ascribed to each and identify that theory which coincides with objectives sought to be achieved by the drafters of the constitution. The final choice shall then in turn inform the content and ambit of the right to access to government held information.

Etienne Murenik argued that the interpretation of the Interim Constitution required the prior step of establishing ‘what it is a bridge from, and what it is a bridge to’⁴. His advice is appropriate in respect of both the Interim as well the Final Constitutions. It is appropriate as they are both essentially the product of protracted efforts and desires to fundamentally change and eschew the past order. The decisiveness of this break with the past order is reflective of a desire to move to an order which represents the antithesis of the preceding order, one which attempts to prevent and prohibit practices of the past order. By identifying the prior objectionable features and practices, one can with a greater degree of certainty identify current objectives. An assessment of the potential for, and ability of, a sovereign constitutional democracy to achieve these objectives will provide a springboard to identifying the meaning and import of the component parts of the chosen dispensation, and the relevance of information in relation thereto.

I propose to provide a brief overview of the past constitutional order and identify those aspects of it which the current dispensation has sought to terminate. In the process of examining why they have been rejected, a framework of current objectives will be revealed. In examining these objectives within the context of the

⁴ Murenik E, “A Bridge to Where? Introducing the Interim Bill of Rights” (1994), 10, SAJHR p31

desired dispensation, it will become apparent that that access to information is as vital to the achievements of these objectives as secrecy was to the success of the past regime.

1.2 The Past Constitutional Order

The pre-1993 government's roots were founded in what may loosely be termed the classical liberal democratic tradition. This tradition is defined by a number of central institutions and practices, including the right to vote, parliamentary sovereignty, the separation of powers and the rule of law.

The pre-1993 government substantiated its claims to democracy by stressing its alleged adoption of and compliance with these institutions and practices.

1.3 The Traditional Classical Liberal Democratic Paradigm

The classical liberal democratic tradition and its attendant institutions and practices were fundamentally informed and defined by its conceptualisation of the state. The state in terms of this tradition is essentially equated with the government of the day and is perceived in minimalist terms in relation to the comparatively elevated status of the individual, who as a collective unit reigns supreme.

The emphasis on the supremacy of the individual (as opposed to the state) translated for the liberal democrat into the need for a democratic society, which may simply be phrased as 'rule by the people'. The impracticality of the literal application of such rule resulted in the acceptance of government/the state as a necessary evil. The apparent contradiction and inherent tension residing in the simultaneous need for "rule by the people" on the one hand and on the other, recognition of the state and its power to govern, was accommodated within the Social Contract theory, which Phillips sums up as follows:

Civil society was formed through a social contract. With a sharp eye to what most served their private interests, individuals came to see political order as necessary to let them get on with their lives; but it was this consent, and only this consent, that gave governments the right to rule.⁵

The theory of government by consent served to legitimate recognition of an external government *vis-à-vis* "the people" and its exercise of power in relation to

⁵ Phillips, A Engendering Democracy, 1991, p24

them. This theory, informed as it was by the pre-eminence of the individual, presupposed a distrust of power in the hands of government. Pursuit of democratic ideals and objectives dictated constant scrutiny of government to permit early detection and avoidance of misuse or abuse of that power at the expense of “the people”.

The ambivalent recognition of the need for government and simultaneous distrust thereof was the progenitor of a number of perceptions, institutions and practices which characterise traditional liberal democracies. These include the minimalist state as located within the divisive public-private template, representative democracy, parliamentary sovereignty, the rule of law and the separation of powers.

These conventions, founded as they were on the same objectives of the limitation, control and checking of government power, drew upon each other in the course of their development and refinement in such a manner so as to create a political order characterised by conceptual fluidity. It is fluid in the sense that each depends on the other for effect, and to some extent, substance. The result has been a doctrinal blurring in that one cannot be defined and discussed without invoking the other.

1.4 The Minimalist State

The most central and definitive of these conventions is the traditional perception of the state which is founded on the fundamental traditional liberal emphasis on the individual, liberty of the individual and the protection of that liberty at all costs - even at the cost of recognising the state and affording it the power to protect those liberties.

Recognition of the state and recognition of its power to protect those liberties was inherently contradictory and threatening to the fullest possible enjoyment, by the individual, of those liberties. It was recognised that the protection of liberty required the simultaneous curtailment of the exercise of liberty. Despite the traditional liberal emphasis on liberty or freedom and the importance thereof, the traditional political philosophers such as Locke, Hobbes and Bentham all agreed that absolute freedom in the sense of a complete lack of fettering of action would inevitably result in social chaos and the deprivation in any event of the minimal needs, rights and liberty of many.

This recognition that all individuals are entitled to a minimum of freedom required institutional restraints and regulation of the exercise of that freedom, if need be, by force, when the exercise of that freedom resulted in the deprivation of

the freedom of another.⁶

The power to curtail the freedom of the individual was located in the state. Consequently recognition of the state and its power posed an inherent risk to the fundamental precept of the desired society, but was simultaneously recognised as essential to the continued existence of that society.

However, the desire and perceived need to minimise that risk engendered a very particular view of the state - the minimalist state, contained by the ideologically constructed chasm between "The Public" and "The Private".

1.5 The Public/Private Divide

The extent of the state's power over its subjects was inherently curtailed by the assumption that:

...there ought to exist a certain minimum area of personal freedom which must on no account be violated, for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or sacred. It follows that a frontier must be drawn between the area of private life and that of public authority.⁷

The end result was a recognition of the state, limited however in its functions by the public/private divide. The recognition, legitimacy and role of the state was confined to the realm of the public:-

..the public-political domain, the reserve of state/government with its external and internal concerns: diplomacy, warfare, law enforcement and a minimum amount of organised charity."⁸

It was believed that this divide preserved the integrity of the essence of freedom of the individual, which in terms of this tradition was pre-eminently defined as , liberty from interference by the state beyond the shifting, but always recognisable, public frontier. Consequently, the state was reduced to what Lasalle

⁶ Berlin, I "Two Concepts of Liberty" in *Liberalism and its Critics* (Ed) M Sandel, 1984, p20

⁷ Berlin, I, op cit, p17

⁸ Heller, A & Feher, F *The Postmodern Political Condition*, 1988, p100

contemptuously described as the functions of a nightwatchman or traffic policeman.⁹

The formal limited role of the “night-watchman” state of classical liberal theory was “limited to the functions of protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts, and so on¹⁰”, but was precluded from intruding or regulating what may be referred to as the social and economic dimensions of society.

The public/private divide and the strict harnessing of the state’s activity to the realm of the public formed the theoretical basis for development of the particular concept of state and government and dictated the nature, form and content of political institutions designed to limit the role of the state to its assigned political role.

1.6 The Minimalist State, Sovereignty, Representative Democracy and the Separation of Powers

G D H Cole in his introduction to Jean Jacques Rousseau’s The Social Contract – Discourses, identifies the Sovereign of political philosophy, as:

..that body in a society in which formal political authority ought always to reside, and in which the right to such authority does always reside.¹¹

In terms of Rousseau’s theory of Sovereignty, which has informed traditional democratic philosophy, that sovereign body in a democracy is “the people”. Sovereignty of “the people”, being one of the foundational precepts of classical liberal theory, meant that recognition of the minimalist state did not amount to recognition of government as sovereign. The state was recognised merely as a tool, subject at all times to the true sovereign – “the people”.

Cole summarises Rousseau’s thesis as follows:

Sovereignty... is in Rousseau’s view absolute, unalienable, and indivisible. It cannot be limited, abandoned, or shared save among a number of equals. It is an essential part of all legitimate social existence that the right to control the destinies of the society shall belong, in the last resort, to the whole people.

The legislative power, or Sovereign, is always supreme, the executive or

⁹ Berlin, I, op cit, pp 19-20

¹⁰ Nozick, R, “Moral Constraints and Distributive Justice” in Liberalism and its Critics, (Ed) M Sandel, 1984, p100

¹¹ JJ Rousseau The Social Contract – Discourses, Translated and an introduction by G D H Cole, 1913, p xx

government, always subordinate and derivative.....The government's function is merely to carry out the decrees, or acts of will, of the Sovereign people.....In delegating the powers necessary for the execution of its will, it is abandoning none of the supreme authority. It remains sovereign, and can at any moment recall the grants it has made. Government, therefore, exists only at the Sovereign pleasure, and is always revocable by the sovereign will.¹²

Rousseau's terminology moves from "the people" to that of "the General Will" which represents the people as a whole, as a body politic, in whom sovereignty resides.

The transformation from a collection of disparate individuals to that of the body politic is by consent of the people, who in consenting become "signatories" to the Social Contract – the fundamental basis of political society and justification for government/state in the presence of an unerring commitment to liberty of the individual.

Rousseau explains the Social Contract as follows:

Each of us puts his person and all his power in common under the supreme direction of the general will, and in our corporate capacity, we receive each member as an indivisible part of the whole.

At once, in place of the individual personality of each contracting party, this act of association creates a moral and collective body, composed of as many members as the assembly contains voters, and receiving from this act its unity, its common identity, its life, and its will. This public person, so formed by the union of all other persons.....now take [the name] of *Republic* or *body politic*; it is called by its members *State* when passive, *Sovereign*, when active, and *power* when compared with others like itself. Those who are associated in it take collectively the name of *people*, and severally are called *citizens*, as sharing in the sovereign power, and *subjects*, as being under the laws of the state.¹³

And ultimately, the "signatories" to the social contract willingly consent thereto and participate therein because:

¹² JJ Rousseau, op cit pp xx1-2

¹³ JJ Rousseau, op cit p 13

The social treaty has as its end the preservation of the contracting parties.¹⁴

As pointed out by Phillips in The Classic Debates¹⁵, a direct and literal application of Rousseau's theory of sovereignty would require something akin to the Athenian model of 2 millennia ago. The citizens of Athens would meet 40 times a year to consider and decide issues of state. Of the full quorum of 6000, a council of 500 were chosen to formulate policy proposals. These members then each in turn served on the committee of fifty, the presidency of which was held by one individual for only one day.

Clearly modern society could not and cannot sustain anything remotely similar to the aforesaid model and the stringent requirements of its citizens to devote themselves to management of the state.

The continuing commitment to locating sovereignty in the people whilst simultaneously ensuring constructive governance was and is apparently, in the liberal democratic tradition, resolved in the institution of representative democracy, premised on the delegation of the sovereign power by consent of the people. The theory of representation itself is formulated in such a way as to inherently limit the abuse of any power so delegated, and is supplemented in this regard by a theory of accountability premised on parliamentary sovereignty, the separation of powers and the rule of law.

The theoretical framework and justification for representative democracy is succinctly summarised by Hirst as follows:¹⁶

Political authority is presented as a delegated power brought into existence by the expressed will of the people...The ultimate sovereign power must be given expression in some representative body to which that power is delegated. The national assembly or parliament is 'sovereign' because it expresses the delegated power of the people and it is legitimately so because it is 'representative' of the people's will. The assembly or parliament is a sovereign legislature that makes laws to take the form of universally applicable general rules, which single out or disadvantage no individual citizen or group of citizens. The assembly then delegates a portion of its own power to an administrative apparatus in order to give execution to and to enforce these laws. The executive portion of the democratic government is answerable to the legislative assembly or to the judiciary as interpreters and

¹⁴ JJ Rousseau, op cit p 27

¹⁵ A Phillips, op cit p23-24

¹⁶ P Hirst, Representative Democracy and its Limits, 1990, pp 24-25

guardians of the law. The sovereign will of the people expressed through the assembly and its laws will infringe the basic liberties of none of the citizens because these laws are universally applicable to all, and the people as a whole will not consent to the infringe those inalienable rights which they each possess as individuals. The delegated power of execution and enforcement must put the legislation into effect sine ira et studio, therefore, it cannot damage the liberties of the law-abiding. If the executive act in an arbitrary or partial way then it will be called to account to the assembly.

Representation guarantees that the legislature experiences the will of the people, who cannot wish to harm themselves, and the doctrine of the answerability of the executive to the legislature ensures that the delegated power of government is not abused. Democracy and the rule of law are thus fully compatible.

It is this framework which informed many modern democracies, including to a great extent the pre 1993 South African constitutional order.

1.7 Is Access to Government Held Information a Fundamental Tenet of the Classical Liberal Democratic Tradition?

In The Darker Reaches of Government, Anthony Mathew's asks whether democracy demands that citizens have access to information regarding the executive branch of government, i.e. whether the executive arm should be subject to the scrutiny of the general public as is judicial and legislative activity.¹⁷

Proponents of secrecy and limited access to government information would answer this question in the negative and affirm that democracy can continue and even flourish unhindered in the absence of public access to information in respect of the activities of the executive branch of government.

These arguments in favour of government secrecy and consequential limitation of public access to government held information share a common theme, namely the justification of functionalism.

The proponents argue that such access is in fact undesirable because it impedes effective administration in that it serves to weaken the executive and their ability to 'deliver the goods'. This they argue is especially true in the modern state which regulates and operates in a technically sophisticated society which is further characterised by a scarcity of resources. The complexity and detail of modern

¹⁷ A Mathews, The Darker Reaches of Government, 1978, pp1-2

welfare and management operations require expertly qualified and objective administrators to implement them unhindered by the scrutiny of the masses or judiciary, who by definition are ill equipped and unqualified to make sense of or pass judgement on the actions of the administrators.

Writers such as Walter Lippman argue that public interests can be managed only by a specialised class and that:

This class is irresponsible for its acts upon information that is **not** common property, in situations that the public at large does not conceive, and it can be held to account only on the accomplished fact.¹⁸

It is further argued that should the general public be permitted access to this information to which it is not entitled by virtue of its lack of expertise, the executive branch would be emasculated in its ability to deliver efficient and effective services as the machinery of government would grind to a halt.

This sentiment is strongly expressed by Lippman in the following statement:

Where mass opinion dominates government, there is a morbid derangement of the functions of power. This derangement brings about the enfeeblement, verging on paralysis, of the capacity to govern.¹⁹

Comments such as these and the broader justifications for denial of access to information and scrutiny of the executive functioning are mirrored to a large extent in the arguments put forward by Michel J Crozier, Samuel P Huntington and Joji Watanuki. They advocate a moderation of democracy as the cure for 'the problems of governance in the United States'.²⁰

Although they do not specifically and expressly single out the issue of denial of access to government held information in their call for a moderation of democracy, it is nonetheless implicit in their submission that a democratic political system depends on a substantial degree of apathy and non-involvement on the part of individuals and groups in society.

They argue that democracy will have a longer and more effective life if it is not subjected to the pressures and consequent dangers of an informed, participant electorate. The dangers they argue are *inter alia*, the deligitimation of authority

*¹⁸ W Lippman, Public Opinion in A Mathews, The Darker Reaches of Government at p3

¹⁹ W Lippman, The Public Philosophy in Matthew's Op Cit p 3

²⁰ M Crozier, S Huntington, J Watanuki, 'The Crisis of Democracy' in Key Concepts in Critical Theory: Democracy, 1993, p99

generally and the loss of trust in leadership, an overload on government and the expansion of the role of government in the economy and society.²¹

These dangers they argue, stem from the ‘internal dynamics of democracy itself in a highly educated, mobilised and participant society’. They argue that the demands generated by these internal dynamics, which it is submitted include, access to information held by, and scrutiny of the functionings of the executive branch of government, are antithetical to the governance of democracy. They argue that the governance of democracy necessitates that:

The claims of expertise, seniority, experience, and special talents may override the claims of democracy as a way of constituting authority.²²

The crucial element common to the arguments put forward by these writers, which requires closer scrutiny, is the fundamental assertion that democracy and secrecy in the executive branch of government and its administration are compatible.

Mathews argues that the sentiments expressed by Lippmann, and it is submitted, those of Crozier et al,

express some of the central tenets of... ‘Tory democracy’, [the basic features of which] are the belief in hierarchy as a condition for order, the acceptance of authoritative leadership and the duty of the masses to obey their elected leaders. Of special concern to the citizen’s right to information is the belief that democracy is essentially the right to select parliamentary representatives.²³

These central tenets of ‘Tory democracy’ are a product of the traditional liberal conception of democracy discussed earlier in this chapter. Not only do the arguments of Lippmann and Crozier *et al* express the central tenets of ‘Tory democracy’, but more fundamentally, the sustainability of their proposition that secrecy and democracy are compatible, is dependant on these central tenets and hence on the traditional liberal conception of democracy.

It is submitted that the proposition that secrecy and democracy are compatible, is sustainable within, and only within the context of the traditional liberal conception of democracy, which in view of its particular nature is not

²¹ M Crozier, et al, op cit, pp 100-103

²² Ibid

²³ Mathews, op cit, p 3

predicated on freedom of information. It will be shown that it is by its very nature not predisposed to recognition of a right to access to government-held information, and further, that a host of forces and developments in modern society have acted in unison to further entrench this absence.

I will further argue that this absence is indicative of a flaw in the classical tradition which ultimately negates the attainment of one of its primary objectives, namely the limitation and control of an excess and abuse of public power.

This flaw is in turn the product of modern political society's continued ascription to the traditional liberal democratic model, which raises to the foreground, questions as to the truly democratic nature of this tradition within the modern context.

Ultimately, it is submitted that the proposition that democracy and secrecy are compatible, is fundamentally flawed as it is premised on an outdated fiction. It is premised on a particular democratic paradigm which can no longer be truly regarded as delivering the ideals and objectives of democracy. Secrecy and "democracy" may be compatible within the theoretical framework of the classical tradition, premised on representative democracy and its attendant institutions, but this does not mean that secrecy practices are democratic.

The characteristic features of the traditional liberal democratic model discussed thus far may be summed up as follows:

- A recognition of the necessity for government.
- A desire to curb the extent and power of government.
- The checking and control of government power through:
 - The doctrine of separation of powers,
 - a strictly demarcated public/private divide; and
 - the rule of law as enforced by the courts;
- An apparent retention of power by the people through the institution of representative democracy, which is both the location for participation by the people and the means of controlling and checking the power delegated by them.

At first glance, the logical assumption is that this system, with its emphasis on the limitation and control of government power and the theoretical location of sovereignty in 'the people', must depend for its success on an informed populace, who at every turn are aware of the machinations of government. Any lack of knowledge would emasculate "the people" of their ability to determine when and

how government has overstepped its bounds of authority and take the necessary corrective measures. In short, that access to government held information is a *sine qua non* for the successful operation of this system.

This assumption, as logical as it may appear, is however not true. The traditional paradigm in the context of the modern administrative state is paradoxical. It signifies a system which is distrustful of government and accordingly driven by the need to curb, control and check its power and ambit. Accordingly, it should be premised on, and serve to justify, access to information. However, this is not the case, as it in practice, serves to justify secrecy and the denial of access to government-held information.

The reason for this paradox is located in the disjunction between, on the one hand, the reality of the objectives, functions, forces and tensions prevailing in the modern state, and on the other hand, the theoretical traditional vision encoded in 1) the public / private divide, 2) the adherence to the notion of the minimalist state, 3) the attendant reliance on and conceptualisation of the separation of powers, 4) the focus on the *ex post facto* control of government and 5) the institution of representative democracy.

The continued ascription to this theoretical framework within the context of the modern administrative state has seen the evolution of a political dispensation characterised by a decisive dislocation between “the people” and government, the former occupying the private and the latter the public realm. The combined forces of the public/private divide and the belief that representative democracy is the equivalent of rule by “the people”, has seen the evolution of rule “by the people” into “rule of the people”. This inversion of sovereignty, identity and status of the ruler and ruled has become entrenched within public/private discourse. The end result has been the creation of a distanced and often paternalistic government, the machinations and functions of which, falling as they do within the “public” realm, are beyond the public’s frame of reference.

The focus on *ex post facto* control and checking of government, implicit in this paradigm, further distances “the people” from acquiring a working knowledge of and participation in government, which in turn justifies and legitimates their exclusion. The necessity for information relating to government is not perceived as a pre-requisite for sustaining the relationship between the government and the governed. A demand for information only manifests itself and acquires legitimacy after the fact, at that point when government appears to have transcended its legitimate scope and abused its power.

This theoretical evolution has informed the reasoning and justification underlying the proposition that secrecy and democracy are compatible. The

arguments presented in support of this proposition draw on the language of the original traditional idiom, and in so doing appear both feasible and legitimate.

In terms of these arguments, the size of society, the complexity of modern-day government and increasing urgency thereof necessitates a manageable and productive organisational structure. This structure, in view of the size of society and the diversity of its needs, precludes direct participation by the electorate. In addition, the complexity and urgency of those needs means that expert swift government action is necessary. The impossibility of direct participation and the need for expert swift action automatically implies a hierarchical organisational structure.

Within this hierarchical structure, government however remains democratically legitimate through the institution of representative democracy. The theory is that it guarantees rule by “the people” or the electorate, who participate in government through their elected representatives who now act in the electorate’s stead. So too, the institutions and conventions of representative democracy guarantee accountability of the executive branch of government in that it is accountable to the legislature and therefore to the people.

The delegation of power by “the people” to their elected representatives who, through the electoral process, occupy the pinnacle of the hierarchical structure, has as a necessary concomitant, engendered the requirement of trust in the elected leadership. This hierarchical structure and the delegation of power to a limited number of representatives means that the people are as a matter of necessity excluded from the workings of government. The corollary of this is the creation of expertly qualified leadership, being as they are in the know and accordingly legitimately trusted **and**, more pertinently, an unqualified electorate, unqualified by virtue of their exclusion. This lack of qualification and expertise requires obedience to those more qualified and legitimately precludes direct participation in government.

As Lippmann revealingly points out, the electorate are accordingly precluded from questioning the authoritative leadership, lacking as they do, the knowledge or expertise to question the actions of ongoing government. The leadership is accountable to the electorate ‘only on the accomplished fact’.

The dislocation and distance is further entrenched by the fact that accountability of the executive branch is of course also achieved through the mechanics of representation. The executive is accountable, not directly to the electorate, but to the legislature. The electorate are equipped only to assess government at this stage and in this forum. Likewise, it is at this point they are legitimately able to participate by expressing their disapproval or approval by voting to retain or replace their elected representatives.

The language of representative democracy therefore clearly precludes participation by the electorate in, or information as to the ongoing process of government between periodic elections.

The complexity and scale of modern government clearly necessitates a more active executive/administrative branch of government who, in order to function effectively, require wide ranging powers.

The necessity for increased delegation of power to this branch does not however, in terms of traditional theory, erode the democratic nature of government, nor does it warrant heightened public scrutiny of this branch. Democracy and accountability is safeguarded by the fact that this branch remains, despite its apparent extended power, no more than the “traffic policemen” of the minimalist state. Its subordinate status is guaranteed by the fact that parliament retains ultimate control in steering government. It retains the power to make policy decisions for which it, parliament is accountable to the electorate. Any delegation of power to the executive is premised on the assumption that the power so delegated will be limited to the power to implement the chosen policy. Should the executive abuse or transgress the limits of its authorised power, it would be accountable to parliament and accordingly accountable to the electorate.

Scrutiny of and access to information relating to the executive branch of government and its bureaucratic infrastructure is accordingly rendered redundant, and even counter-productive. This perspective is lent further credence by a combination of what Gerald Frug identifies as the ‘Formalist’ and ‘Expertise’ models of bureaucratic legitimacy,²⁴ the origins of which are located firmly within the traditional democratic paradigm.

In terms of the ‘formalist’ model, the bureaucracy is perceived as a rationalized, disciplined mechanism for implementing the wishes of its creators, the legislature, and by extension, the electorate. Bureaucratic power is not threatening because it is an objective instrument under the control of those who delegated power to it.

The ‘expertise’ model, which it is submitted, is a product of the dynamics of the growth in the size of the executive and its administration, recognises that this growth has forced the legislature to grant a greater degree of discretionary power to the executive. In so doing, it is recognised that the degree of external parliamentary control is lessened. However, this decrease in external control does not justify the electorate stepping in and demanding access to information about the workings of

²⁴ Gerald Frug, “The Ideology of Bureaucracy in American Law” in (1984), Vol 97 Harvard Law Review, pp 1282 -1283

this branch of government as an alternate form of accountability. Such access is precluded on the ground that they, the electorate, are not qualified to assess this information and further that it would frustrate the smooth running of the bureaucracy and the achievement of its objectives.

In addition, in terms of this model, the need for scrutiny is precluded by the fact that there is no reason to fear the extended discretionary power of the executive branch of government. The need for scrutiny is precluded, because those who exercise the power are experts whose 'professionalism simultaneously limits the scope of their power, prevents personal domination and makes possible the creativity and flexibility necessary to effectiveness.'²⁵ In fact, scrutiny of and participation in the process is undesirable as the electorate's lack of expertise and professionalism would expose the running of the country to 'the danger of mass democracy' or, 'supremacy of the emotional over rational decision-making'.²⁶

Even the most ardent proponent of the 'expertise' model would however recognise that it represents an ideal which is rarely achieved in bureaucratic practice. The answer to the excesses of the 'expertise' model, advocated by subscribers to the traditional liberal democratic experience, is not public scrutiny of the ongoing business of government. The answer instead is found in what Frug identifies as a fourth model of bureaucratic legitimacy, namely the 'judicial review' model.²⁷

The 'judicial review' model recognises the need for accountability of the administrative branch and that such accountability must be externally imposed. However, this model once again resorts to the traditional paradigm in constructing a suitable mechanism of accountability. In terms of this model, the executive branch and its administration is held accountable through the process of judicial review. The preservation of the power, and the sanctity of parliament, constitutive as it of the 'will of the people', is the primary factor which legitimates judicial review and which determines its scope and purpose. In terms of the traditional model of administrative law, which is a product of the traditional democratic paradigm:

...the legislature maps the boundaries of regulatory authority; agencies act, with a Marshallian filling in of details; and reviewing courts keep administrative power within statutory limits.²⁸

²⁵ Ibid

²⁶ AJ Polan Lenin and the End of Politics, 1984, p 105

²⁷ Frug, Op cit, p 1283

²⁸ Joel Yellin, "Science, Technology, and Administrative Government: Institutional Designs for Environmental Decisionmaking" in (1983), Vol 92:1300, Yale Law Journal, p 1302

Democracy, or rule by “the people” translates into parliamentary sovereignty which is organised through the doctrine of the the separation of powers. Accumulatively therefore, democracy dictates that the executive branch of government being subordinate to the legislature, be held accountable to it in respect of the fulfillment of its mandate, namely the ‘filling in of details’ and no more. The scope of judicial review is limited to ensuring due compliance with the dictates of the sovereign parliament, and by extension, the dictates of the electorate. Judicial review thus guarantees accountability, thereby precluding the necessity for direct public scrutiny of and access to information regarding the executive branch of government.

At the end of the day, in terms of the traditional liberal democratic paradigm and the theories spawned by it, there is apparently no need, or justification for, public access to government-held information. The objectives justifying demands for such access, namely participation, transparency and accountability are achieved, without recourse to freedom of information. Instead, they are achieved through the instruments of representation and accountability to the legislature, and through the court structures if necessary. In fact, to permit such freedom of information would simply frustrate the process of government, to no avail. In short, secrecy and democracy are compatible.

The question that must be asked is whether this assertion is valid and sustainable within the context of the modern administrative state. It is submitted that it is invalid and unsustainable within this context in view of the fundamental failure of the traditional liberal democratic paradigm to deliver effective democracy in the modern administrative state. The proposition that democracy and secrecy are compatible depends, as shown above, for its sustainability, on the sustainability and sufficiency of the traditional approach to democracy which equates representative democracy with rule “by the people”.

It is submitted that representative democracy and its attendant supplementary institutions fail to deliver on the promise of “rule by the people” and to ensure effective accountability as a means of controlling executive abuse of power. This failure in turn negates the validity of the proposition that secrecy and democracy are compatible, depending as it does on the effectiveness and validity of the traditional liberal democratic paradigm.

¹ Act no 200/1993

CHAPTER TWO

DEMOCRACY AND THE MODERN ADMINISTRATIVE STATE

The minimalist state which informed the traditional liberal idiom no longer reflects or accommodates the reality of modern government. It has been replaced with the modern large-scale administrative state which:

...denotes the phenomenon by which the state institutions influence many aspects of the lives of citizens, especially those aspects which relate to the economic and social dimensions. It describes a system of governance through which public policies and programs, affecting almost all aspects of public life, are influenced by the decisions of public officials.¹

The growth in the size and complexity of society together with an ever decreasing pool of resources has seen a comparable growth in the size, functions and power of the state. Its recognition and role is no longer limited to the traditional public sphere of life, but now extends overtly into the private spheres, providing extensive social and economic regulation and management.²

Writers such as Lippmann and Crozier argue that it is precisely the size and complexity of the modern administrative state which dictates that the governors be left "to get on with the job", unassailed by public scrutiny. Their assertions are however flawed in their failure to recognise that the change in the scale-of-government has been accompanied by a change in power relations within government as well as between government and the governed. Recognition of the full extent and implications of the modern administrative government in fact dictates a conclusion converse to the one reached by them. If democracy is to be achieved, secrecy practices must be set aside and freedom of access to government-held information promoted and protected at all costs.

The growth in the complexity of the functions of the state has seen more than a mere escalation of the size of government. It has seen a concurrent realignment of state functions as between the different branches of government. More importantly, that realignment has created the potential for a comparable shift in power which in turn requires a reassessment of traditional mechanisms for the checking of that

¹ V Seymour Wilson & O P Dwivedi The Administrative State in Canada, p5, quoted in Alan C Cairns "The Past and Future of the Canadian Administrative State" in (1990), 40 University of Toronto Law Journal, p 322

² P Hirst, op cit, p29

power.

The legislature, still in name, formulates policy, but now in an expanded arena, extending beyond the limited public sphere. The implementation and regulation of the chosen policy choices still rests with the administrative branch of government. However, in fulfilling its mandate, which is necessarily extended in tandem with the expanded scope of the state, its actions now affect almost every aspect of the daily lives of the electorate.

The extended ambit of government and increase in the complexity and urgency of the services rendered by it has seen an increasing reliance on the administrative branch for delivery of these services. This increased reliance has in turn seen a concomitant growth in specialisation and expertise on the part of the administration, which has engendered a legislature which is increasingly dependant on the administrative branch of government, not only for implementation but also for information and advice as to policy formulation.

The non-expert legislature has, by circumstance, been compelled to delegate ever increasing powers to the administrative branch of government. The increased degree of delegation has seen a fundamental change in the character and function of the administrative branch from its traditional policing function into a more active one of effective policy formulation and planning, a function previously within the exclusive domain of the legislature.

The cumulative result of these factors is that power in the administrative state, as indicated by the name given to it, is now largely *de facto* vested in the administrative or executive branch of government, to the extent that Cairns refers to this arm of government as 'governments in miniature'.³

This *de facto* shift in power is attributable not only to increased delegation, but also to one of the defining features of the administrative state which serves to sustain, and provides the space to capitalise on, the power implicitly imparted by the act of delegation. This feature is identified by writers such as Hirst and Cairns as the phenomenon of 'continuing government'.⁴ 'Continuing government' is a product of the immensity and complexity of the state's social and economic regulation and the delivery of services in this arena. Fulfillment of these objectives requires long-term planning and uninterrupted implementation. By necessity therefore, the government administrative process is ongoing.

Effective control of and power over the process therefore rests in the hands of the administrative branch who, unlike the legislature, remains constant and is not subject to change at election time. The make-up of the legislature may change. However, the new legislature inherits old on-going programs, and for Cairns:

³ Cairns, *op cit*, p 325

⁴ Cairns, *op cit*, p 358 & Hirst, *op cit*, p28

The pastness of the programs is the essence of the administrative state, for it is the source of the bureaucracy's prominence in modern government.⁵

This continuum means that parliamentary cabinet government and the leadership it is supposed to provide in theory is, in the administrative state, largely a fiction. The administrative branch or the bureaucracy must, as a matter of necessity, be afforded significant power to maintain the government process which cannot grind to a halt and recommence afresh after each election.

2.1 The Administrative State and Representative Democracy

The evolution from the minimalist state of earlier times to the modern administrative state and the attendant implications thereof for prevailing power dynamics within government, and as between government and its citizens, raises the question as to:

...whether the legal doctrines inherited from that earlier time can meet the challenges posed by the exigencies of modern government and the web of dependency upon the state in which we now find ourselves entangled.⁶

Posed differently, the question is:- Is the classical liberal tradition with its emphasis on representative democracy and its attendant checks and balances, which to a large extent excluded the administrative branch of government from its frame of reference, able to deliver on the objectives of democracy and accountability in the modern administrative state?

* Hirst argues convincingly that representative democracy in the modern political context can no longer deliver on the objectives of democracy, that it no longer delivers any approximation of 'rule by the people'. Likewise the additional complimentary mechanisms making up the balance of the legal doctrine inherited from the past, intended to ensure responsiveness, accountability and control are also fundamentally flawed and therefore unable to deliver on their intended objectives. They are by necessity flawed and incapacitated as they are founded, in both their objectives and content, on the now inaccurate traditional assumption that representative democracy is constitutive of 'rule by the people'.

He argues that representative democracy can no longer be equated with "rule by the people" and any theory premised on the assumption of similarity 'involves grave contradictions and grossly implausible assumptions when set beside the

⁵ Cairns, Ibid

* ⁶ John Frecker 'Law and Leviathan: Introduction' in (1990), 40, University of Toronto Law Journal, p 305

actualities of modern politics'.⁷

The first and most important of these contradictions is that:

It identifies a decision-procedure for selecting personnel with one for selecting policies or laws. In choosing the one the people choose the other. But it is assemblies or parliaments which make laws and governments that make decisions and not the people. The electors choose some of the personnel involved in making the governmental decisions, but they cannot directly choose the decisions. The electors may reject personnel who submit themselves for re-election as representatives for the choices they *have* made but always relative to some very limited set of alternative personnel and on the basis of no more than suppositions about the choices they in turn may make.⁸

The second false assumption is that the legislature passes laws of general application which have received genuine democratic populist assent. Further, that the executive is an impartial agency which merely applies these laws. The reality of the matter is however very different as:

Most legislation consists in delegating powers of decision and action to executive agencies, that have the derived power to make such rules as necessary and administer an activity as they see fit within some broad statement of objectives.....Likewise, in the doctrine government is supposed to possess a doubly delegated authority, from the people to the legislature and from the legislature to government. In practice, government is a continuing agency devising policies and pursuing objectives, and it is also a party government. Far from being a servitor of the legislature, government is the initiator of legislation: the legal requirements necessary for the policy programs of civil servants and senior party members are brought to the legislature and carried through it by means of party discipline. The members of a party government must take a great deal of the continuing policy and decision-making initiated within the government's administrative machine as given; it can initiate, alter or superintend only a small fraction of it.⁹

He concludes justifiably, that representative democracy is in fact, not a type of rule by the people, but rather a form of legitimization of rule. Representative democracy:

⁷ J Frecker, op cit, p 25

⁸ Ibid

⁹ Ibid

Ceases to be a form of delegated rule *by* the people and instead becomes a form of rule by professional politicians *over* the people, in which some of those rulers are periodically changed by the mechanism of election.¹⁰

In short, the act of voting every five years does not ensure a democratic society or serve as a mechanism of accountability. It 'means no more than the opportunity to pass judgement, in a single act, upon hundreds of thousands of decisions made by the government since the last general election.'¹¹

This inability to ensure democracy and accountability cannot be cured by recourse to the related and supplementary mechanisms of accountability of the administrative branch of government to the legislature (and hence the electorate) and judicial review. These mechanisms, in view of the fact that they are premised on the assumptions and requirements of the liberal democratic tradition with its emphasis on representative democracy, fail in turn to achieve the objective of checking the exercise [and abuse] of power by the administrative branch of government in the modern administrative state.

Accountability of the administrative branch of government to the legislature and accordingly to the electorate, one of the fundamental premises of representative democracy, has increasingly been eroded. This erosion has been an inevitable consequence of the increased delegation of power by the legislature to the executive. The extent of delegation has burgeoned to such an extent that it in many instances can no longer be regarded as the delegation of power, but as the transfer or alienation of power. The transformation of delegation into a transfer or alienation of power has undermined the ability on the part of the legislature to control, or hold the administrative branch accountable. Delegation proper assumes ultimate control of the process by the delegator and continuing accountability to the delegator by the delegatee. Modern government practices are such that the legislature's control over the process has been diluted to such an extent that that element of accountability, so central to the notion of delegation, has been lost. In the absence of this element, delegation has been transformed into the alienation of power.

The same may be said of judicial review as a mechanism of control and accountability in its current form, premised as it is on the assumption of effective legislative guidance of and control over the executive. It does not result in effective accountability or control¹² as:

¹⁰ Ibid

¹¹ E Mureinik, 'Reconsidering Review: Participation and Accountability' in Administrative Law Reform, 1993, p35

¹² D Davis, 'Administrative Justice in a Democratic South Africa' in Administrative Law Reform, 1993, p29

The conceptual apparatus used by the judiciary has been characterised by a formalistic reluctance to recognise the growth of executive power (to the detriment of legislative legitimacy and civil liberties) and to develop legal rights and remedies to meet the challenges of the 20th century administrative state.¹³

The unavoidable conclusion that must be drawn is that representative democracy in the modern political context of the administrative state is unable to deliver any remote approximation of democracy in the sense of ‘rule by the people’. Likewise those institutions premised in their design and function on the liberal traditional model and the assumptions underlying representative democracy are rendered ineffective as restraints on the exercise of government power.

In fact, one encounters a complete inversion of the original intended objectives – instead of serving as mechanisms of restraint, accountability and participation by proxy – modern big government has been enabled to use ‘representative democracy, parliamentary government and liberal constitutionalism as means of legitimation’ of the unauthorised use of power and has ‘simultaneously suffered little restraint in its actions’ as:

The “sovereign power” of the people’s representatives gathered in the legislature has been placed at the service of the executive through enabling legislation.¹⁴

The modern administrative state operating as it has within this outdated democratic paradigm has allowed the administrative branch the space for extensive secrecy practices. In addition, this paradigm has not only provided the space, but also served to justify and legitimate that secrecy. Adherence to the principles and institutions of this paradigm has imparted a false sense of security in the minds of all affected role players. Non-disclosure as a standard practice is depicted through the lens of the traditional paradigm as unnecessary in view of alleged prevailing guarantees of participation and accountability, and presented as a dilatory burden on the ability of the administrative branch to deliver often urgently needed services.

The state, or more specifically the administrative branch thereof, has capitalised on this space permitted for secrecy to its fullest capacity, to the extent that:

...secrecy [has become] a main behavior aspect of a functioning

¹³ H Corder, ‘Introduction: Administrative Law Reform’ in Administrative Law Reform, 1993, p2

¹⁴ P Hirst, Op cit, p 105

bureaucracy.¹⁵

The reasons as to why the appeal of secrecy has been so strong are diverse. Friederich attributes it to the fact that secrecy is functional and an inevitable product of the discretion afforded the administrative branch government. His argument that the source of secrecy and the prevalence thereof in government is attributable to the institution of bureaucracy and its practices is shared by Max Weber who argues that:

The concept of the “official secret” is the specific invention of bureaucracy and it defends nothing so fanatically as this attitude.¹⁶

Hirst locates the inclination towards, and the prevalence of bureaucratic secrecy, in a combination of modern party government and the phenomenon of continuing official administration and policy initiation. These factors, he argues lead to a double pressure toward secrecy and the control of policy information.

On the one hand:

The party leaders want an administration which is loyal and responsive only upwards and which reveals only those aspects of policy or information pertaining to it which suits the governments political purposes. [On the other hand] the officials in turn pursue long-term departmental policies which leads to rule of the unelected official – not only in routine matters, but in major issues that either never come before the elected representatives or only before a small number of senior ministers on a need to know basis and with strong pressure to pursue official policy.¹⁷

Perceptions from within the bureaucratic structure itself also generate routine secrecy practices. An example would be the prevalence of opinion held by bureaucrats that secrecy promotes improved and a more efficient administration. The assumption underlying this perception is that secrecy frees it from ‘unnecessary legislative, judicial and public oversight which would simply serve to delay and frustrate ‘getting the job done’. Related to this efficacy factor is the specialisation of functions, a trait common in the modern administrative state. It serves to engender secrecy as ‘secrecy is frequently a by-product of expertise and is resorted

¹⁵ Friedrich, C Constitutional Government and Democracy, Theory and Practice in Europe and America, 4th ed, p55

¹⁶ Max Weber in Marsh N (Ed), Public Access To Government Held Information, 1987, p2

¹⁷ Hirst, Op Cit, p 31

to by specialised departments to secure an advantage over rival departments.¹⁸

Whatever the reasons, there is an inherent tendency toward secrecy within the administrative branch of the modern administrative state, which tendency has resulted in secrecy being the norm rather than the exception. These secrecy practices have found legitimation and acceptance within the traditional democratic vision and bureaucrats have accordingly been enabled to argue, with reference to standard democratic practices and institutions, that this all pervasive secrecy is compatible with democracy.

It is submitted that these assertions are untenable. Once one recognises the inadequacies of the liberal democratic tradition *vis-à-vis* its ability to deliver democracy in the modern administrative state, one must recognise that the assertions of compatibility of secrecy and democracy are unsustainable, depending as they do on the efficacy of this tradition.

Recognition of these inadequacies not only debunks these assertions, but also compels recognition of the immensity of the threat posed by institutionalised secrecy to the attainment and maintenance of democratic values and procedures.

Extensive state secrecy practices do not however only pose a threat to democracy, they also harbour more general threats to the governance of all, not only those that aspire to democratic ideals.

2.2 The Threats Posed by Secrecy ✓

The threat posed by secrecy to the governance of society generally is summed up succinctly in the following quotation from President Wilson:

Everyone knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety.¹⁹

Mathews elaborates on this statement by providing a comprehensive itemisation of the dangers of secrecy for 'good government' which is summarised hereunder.²⁰

Blanket government secrecy practices are dangerous in the cover they provide, and even the tendency they have to promote, at best, mismanagement, and at worst, corruption, nepotism and the abuse of power generally. In short, they allow and encourage 'official lawlessness'. The tendency of broad pervasive secrecy practices to promote routine lawlessness is found in the phenomenon whereby the 'official secret' is misused as a shield behind which illegal practices, mistakes and

¹⁸ Mathews, Op Cit, p 14-15

¹⁹ In A Mattehws, op cit, p27

²⁰ Ibid

irregularities are permissively concealed.

Writers such as Lippmann argue that information only becomes relevant after the decided fact as government can only be held to account on the accomplished fact. The exclusion of public scrutiny at any earlier stage is justified by their lack of expertise and consequent inability to evaluate information about the state official's conduct preceding the final outcome.

This argument fails within the context of abuse of power. Arguing that lack of expertise disenables the citizens from evaluating the merits of the official's conduct is in and of itself paternalistic and hugely problematic. To argue that the citizens lack expertise and the ability to determine what constitutes conduct which amounts to an abuse of power is absurd.

The alternative argument presented by writers such as these is that, assuming the electorate are qualified to detect an abuse of power, they will be afforded the opportunity to do so on the basis of information made available after the fact. This is illogical as it is safe to assume that where one encounters an abuse of power, the perpetrator of that abuse will actively seek to conceal all evidence thereof and will have been afforded the prior opportunity to do so by a system predisposed to concealment.

As such, discovery of abuses will often be a mere matter of chance and circumstance. Further, the information, if and when disclosed within the context of an accusation of abuse of power, is exposed to the potential danger of misrepresentation, manipulation and other transgressions inevitably employed by the government official, department or political party accused of abusing its power.

The element of deception inhering in secrecy practices is doubly harmful in that it does untold harm to the relationship of trust between government and its citizens. Regular institutional secrecy practices can lead to a culture of mistrust, the end result of which is a generic disbelief of all information provided by government. The danger herein lies in what Mathews refers to as 'information pathologies', which see, not only the citizens, but their leaders as well, unable to discern the truth. Any such fundamental inability can only lead to and aggravate government mismanagement.

The pervasive danger of secrecy is evidenced by its ability, not only to do untold harm to the government process, but also in its ability to do harm to fields of practice in which government has an interest and accordingly asserts control over. So for example, government secrecy can and has often resulted in the retardation of science and technology. The importance of these fields in relation to military strength has seen an increased blanket of secrecy over these matters which certainly are of vital importance to society as a whole. The extent of government secrecy in these areas can lead to government obtaining a monopoly, not only over the information, but as a result of that monopoly, over scientific progress generally.

These illustrations of the dangers of secrecy are accumulatively indicative of a fundamental problem inhering in government secrecy practices - attributable to the essential link between secrecy and power and the built in propensity for the abuse of that power by maximising secrecy practices.

The link between secrecy and power is based on the fact that knowledge, especially in the information-age of today, is a form of power. Consequently, when political leaders wish to extend their power they almost inevitably extend the scope of official secrecy. Knowledge, being a form of power means that secret knowledge is conducive to absolute power. Not only does secrecy permit the concealed abuse of power, it also serves as a source of power.

It is this essential link between secrecy and power which lies at the heart of the threat posed by institutionalised bureaucratic secrecy to democracy. Democratic discourse is characterised by its particular concern with the location of sovereignty or power and control of the exercise and abuse of that power in "the people". The prevalence of secrecy and consequent monopoly over information by the executive branch of government and its bureaucratic infrastructure holds the danger of an effective shift in democratically acceptable power balances from the sovereign legislature to unelected, unaccountable officials.

Secrecy allows the executive to operate in the absence of scrutiny by the legislature and the people and as such is the antithesis of accountability.

Secrecy practices not only render government unaccountable, but also render it unresponsive to the electorate, either directly or through its representatives. It weakens the power of the elected representatives to act responsively to the electorate. The alternative, namely the electorate's direct scrutiny of and participation in government is rendered meaningless in the absence of freedom of information.

Direct or more active public participation in an order characterised by all pervasive secrecy practices is inherently problematic as secrecy:

... is a fact strongly responsible for what Eric Fromm has called a 'pathogenic feature' of modern society - the alienated passive man'.²¹

A democratic order must be based on a politically aware, responsive and responsible electorate. Public participation, whether in its direct form, or its related form of a politically aware, civic minded electorate is doomed to failure in the presence of long standing pervasive secrecy practices which exclude the electorate from knowledge of and held by government because:

²¹ Ibid

...people refuse to participate only where politics does not count...they are apathetic because they are powerless, not powerless because they are apathetic.²²

In view of the intense correlation between secrecy and power, people who are 'kept in the dark' are rendered powerless and as a consequence, apathetic.

This correlation between apathy and secrecy is explained by Sidney Verba's observation as to the high correlation between how much we participate in politics and whether we think ourselves competent or politically effective.²³ Secrecy practices are tantamount to precluding participation, and in turn engender an attitude of incompetence or inability to participate, because of a lack of knowledge. Ironically, it is precisely this lack of knowledge/incompetence which advocates of bureaucratic secrecy latch onto in support of continued secrecy practices and more often than not, the self-same advocates argue that increased participation is doomed to failure because of a lack of public interest or response.

At the end of the day, secrecy and its essential link with power means that the modern administrative state within the context of traditional paradigm and its emphasis on representative democracy, is enabled to excuse and in fact justify government secrecy. This has, in most modern states, translated into a governmental system which 'grows by accretion, that is...unresponsive and unaccountable'.²⁴ In short, a fundamentally undemocratic government, premised as it is on secrecy – the antithesis of democracy for Durkheim, for whom, democracy is:

A condition of effective mutual interaction based on adequate information between the state and civil society.²⁵

²² B Barber, 'Strong Democracy' in Key Concepts in Critical Theory: Democracy, 1993, p269

²³ S Verba, The Civic Culture, in A Philips, op cit, p 39

²⁴ Hirst, op cit, p31

²⁵ E Durkheim, quoted in Hirst, op cit p33

CHAPTER THREE

THE MODERN ADMINISTRATIVE STATE, DEMOCRACY AND FREEDOM OF INFORMATION

The modern administrative state is a reality which will predominate and increase in strength alongside the continually decreasing availability of resources and the international growth in population.

Recognition of this reality and the attendant transformation of the dynamics of government and the relationship between government and its citizens necessitates answering the question posed by Frecker – Do the legal doctrines that we have inherited, premised as they are on a completely different perceptions of the state i.e. the minimalist state, meet the challenges of the modern administrative state?

The answer to this question, as argued in the preceding chapters, is a resounding no. The next step is to ask what is required to meet the challenges of the modern administrative state so as to ensure democratic government.

Although the legal doctrines inherited are unable to meet the challenges of the modern administrative state, it must be stressed that the ideals and objectives underlying those doctrines are still perfectly valid and in fact more pressing than ever before. The ideals and objectives of democracy remain the attainment of a form of 'rule by the people' and the correlative need to subject the exercise of government power to control and review to preserve popular sovereignty.

However:

One thing is certain, we cannot place undue reliance on representative democracy in doing so.¹

Having said this, Hirst cautions that:

It would be foolish to imagine that we can abandon the mechanism of representative democracy or completely abandon the institution of party government. Most people would greatly fear losing the vote; at least it offers some constraint on the actions of government.²

*Objectives of
democracy
Note*

¹P Hirst, op cit, p30

² Ibid, p 33

Recognition of the fact that the outdated minimalist state of the traditional idiom has been supplanted by the modern administrative state does however require a shift to a democratic paradigm which is capable of accommodating both the modern state and sustaining democracy. This shift requires a rejection, not necessarily of the institutions and practices of the traditional paradigm, but of the underlying assumptions and attitudes on which they are based. It requires that these assumptions be recognised as inaccurate and the implementation of an infrastructure designed to address the inadequacies and lacunae created by them.

The envisaged paradigm shift must recognise and accommodate the realities of a shift in functions traditionally fulfilled by the legislative branch of government to the executive and its administration and the consequential potential accompanying shift in power.

These shifts have seen a realignment in the fabric of the doctrine of the separation of powers which has resulted in a fundamental change in the relationship between government and its citizens. In terms of the traditional paradigm the focus is on the relationship between the electorate and the legislative branch of government. The legal doctrines inherited sought, through that branch of law most suited to the specific objectives, to regulate that relationship. Accordingly emphasis and reliance was placed on constitutional law as the means to ensuring a democratic society as opposed to administrative law, a mere subsidiary of constitutional law, premised on and designed to give effect to the prevailing constitutional vision. The lesser prominence of administrative law within this idiom is attributable to the perceived lesser threat posed by the administrative branch of government which is in turn founded on the diluted relationship between the executive branch of government and its citizens. Designed as it was to regulate a diluted relationship between the citizens and the mere 'traffic policemen' of the state, subjugated at all times to the will of the legislature and hence the will of the people, it was accordingly not preoccupied with the aversion of the threat of the usurpation or abuse of power by 'the traffic policemen'. Accordingly administrative law developed independently of and in the absence of democratic influences and pressures.

Recognition of the dynamics and dangers of the modern administrative state to the maintenance of democratic ideals has forced proponents of democracy to reassess their earlier constitutional vision, primarily forcing a questioning of the sufficiency of representative democracy to deliver on those ideals. The inadequacy of representative democracy has required, and as will be shown, has seen a transformation of the constitutional framework of the modern democratic administrative state so as to give effect to the ideals and objectives of democracy. It is submitted that administrative law, like its constitutional counterpart, is faced with the regulation of an entirely different relationship, now

characterised by many of the same concerns originally the preserve of the relationship between the legislative branch of government and the people. These concerns originally saw the development of a constitutional legal system concerned with and designed to limit and review the use and abuse of power by the legislative branch of government. The shift in power relations within the state and as between the state and its citizens requires not only a shift in the constitutional vision, but also a shift in the focus and shape of administrative law, being as it is an instrument for giving effect to the precepts embodied in the constitutional framework. This shift in focus and shape must be moulded by the need to give effect to the broad democratic ideals and objectives articulated by the new constitutional vision.

The modern administrative state is predisposed to undemocratic tendencies only so long as it operates within a constitutional model defined by a narrow adherence to the traditional paradigm with its emphasis on representative democracy and the assumptions underlying it. If the constitutional model were to change and give expression to another form of democracy capable of giving effect to democratic ideals and objectives of effective participation and accountability, and the relationship between the executive and the people recognised for what it is and accordingly democratised, there is no reason for the modern administrative state to be an undemocratic one.

Representative democracy fails to deliver on the two primary objectives of a democratic society in the modern administrative state. Its primary tool of participation, albeit in a substituted form, namely the elected representative, fails to deliver by proxy the objective of political participation. It fails to guarantee the effective vocalisation of the electorate's interests and concerns requiring redress by government, which was reluctantly recognised for precisely that purpose. The vote and judicial review, being the intended mechanisms for the attainment of the accountability of government to the electorate, are also unable to deliver on their promises. Both failures are largely attributable to the fact that the true locus of power and regulation in the modern administrative state, vested as it is in the executive and its administrative bureaucracy, falls outside the parameters of the traditional democratic paradigm, its assumptions and emphasis on representative democracy.

The solution lies in a shift from the traditional liberal paradigm and its assumption that representative democracy is in fact constitutive of democracy, in the sense of rule by "the people". It must be replaced with a paradigm which recognises the inadequacies of the tool of representation to deliver on rule by "the people" and accordingly places less of a premium on representative democracy. Once the inadequacies are recognised the shift must address the resultant lacunae and recognise and facilitate a more aggressive and direct form of participation by

the electorate across the full spectrum of government, including participation in and scrutiny of the administrative branch's activities.

Questions as to how to democratise the administrative state depend on whether it is possible to achieve the objectives of effective participation by the electorate, responsive government and accountability of the administrative branch of government. Mureinik argues that democracy will only be attained in the modern administrative state if the routine relationships between the government and its subjects are democratic. This will depend on how bureaucratic officials treat the people they govern in their daily dealings with them; on the ability to democratise the every day decision making processes of government, as this is where the true locus of power resides.³ It is within these relationships that the objectives of participation, responsiveness and accountability must be achieved in order to sustain a democratic society.

Direct participation by the electorate in the routine decision making processes of government is clearly not feasible as a general rule. As such alternative mechanisms which would achieve the objective of effective participation must be identified and put into place. As to what constitutes a suitable alternative mechanism will depend on the objective of participation.

The primary objective of participation is responsive government, which is:

A government which perceives social pressures as sources of knowledge and opportunities for self correction.⁴

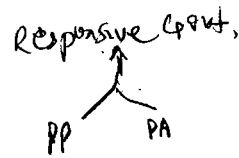
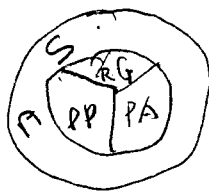
* Public participation is premised on an ongoing interaction between the government and the governed so that government may continually be advised of the public's interests and concerns for the purpose of initiating or amending government action to accommodate and give effect to those concerns.

The objective of participation is to afford the participant the opportunity to 'have a say in government' by being afforded the opportunity to affect decisions and influence outcomes which have a bearing on the participant.

* Accountability is an integral feature of a democratic society and the flip side of participation. In terms of the traditional paradigm, accountability translates into the duty of the representative to account to its constituency in respect of action taken in response to its interests and concerns. As such it is an integral component of responsive government. In the modern administrative state accountability means that the executive or administrative branch, as the decision-

³ E Mureinik 'Reconsidering Review: Participation and Accountability' in Administrative Law Reform, 1993, p 35

⁴ Lourence J Boulle, 'Administrative Justice and Public Participation in American and South African Law' in 1986 TSAR, p 137



makers in government, must account to its subjects for those decisions and chosen courses of action which effect their interests and concerns.⁵

The democratisation of the administrative state depends on whether or not government is rendered responsive. Attainment of a responsive government depends on participation and accountability in the daily routine relationships between government and its citizens.

As stated previously, direct participation is not a feasible option and in fact certain forms of direct participation such as the referendum are undesirable as they are no guarantee of responsive government. The yes/no option presented to the participants of a referendum does not amount to effective participation or accountability as it provides a once off opportunity to have, a possibly uninformed say in a proposed policy still to be implemented. The implementation of policy in the administrative state is an ongoing continuous exercise requiring continuous control and direction. This is not possible *via* the referendum. Further, once the yes/no vote is taken, accountability is problematised as the outcome of the vote may be used as a source of legitimacy for future conduct not envisaged by the voters.⁶

The route to achieving effective public participation and accountability so as to ensure responsive government is through the transformation of administrative law. Administrative law, as the body of law intended to regulate the relationship between the executive, its administration and its subjects, must define the public's participatory rights, the content of which will be guided by achieving a balance between the dictates of practical government and the need for responsiveness, and must further provide mechanisms for the enforcement of these rights. Likewise, administrative law must provide mechanisms for the delivery of effective accountability by way of imposing a duty on the state to justify its decisions and courses of action to the public.

3.1 Freedom of Information and Democracy/ Responsive Government

Responsive or democratic government in the administrative state is, in terms of the objectives of the envisaged paradigm shift, fundamentally and wholly dependant on the public's freedom of access to government held information. Institutionalised government secrecy practices are not compatible with, justified or legitimate in a responsive democracy. Information is the essence of responsive democracy, so much so that Harold L Cross concluded that, without freedom of information, 'the citizen's of a democracy have but changed

⁵ E Mureinik, op cit, p40

⁶ P Hirst, op cit p33

their kings.’

Effective participation is the cornerstone of responsive government and hence democratic government. Freedom of information is in turn the cornerstone of effective participation and therefore democracy is inextricably dependant on freedom of information. As a matter of logical necessity, effective participation requires that the participants have free access to information to enable them to engage in rational and effective participation.

A democracy which guarantees participation, but denies access to information or in which citizens act on false, distorted or incomplete facts will be a perversion of democratic government as their participation will be rendered ineffective as:

Without information the citizen can't criticize policy. Without a voice and a right to put forward views the citizen cannot contribute to political and social change.⁷

Accountability, the second essential component of a responsive democratic government, like participation, depends entirely for any meaningful effect on freedom of access to government information. Accountability in the administrative state is premised on the duty of the state to justify its decisions. Justification will be impossible without a disclosure of the reasons for the decisions as well as all circumstantial factors necessary to assess the feasibility of the justification. Accountability is impossible without free access to information as accountability demands transparent government. *Democracy → power ← Information*

The essentiality of this link between information and democracy is sourced in the fact that information is a significant form of power. The foundational tenet of democracy is popular sovereignty – power must reside in “the people”. As such, democracy dictates that the people be afforded the right to access to information, and that mechanisms be put into place to limit the control of this power by the government. These requirements are essential to preventing it from enjoying a monopoly over information, and hence power.

In short, democracy requires that the shift from the minimal state to the modern administrative state be accompanied by an appropriate political-legal paradigm shift, premised in its design and implementation on freedom of information. This shift must be recognised in the prevailing constitutional order and then given effect and primarily be steered by the branch of law suited thereto – namely administrative law.

⁷ J Klaaren & L Johannsen & J White, ‘A Motivation for Legislation on Access to Information’ in (1995) Vol 112, SALJ, p45

3.2 Recognition Of The Need For, And Implementation Of A Paradigm Shift

Many democratic societies have recognised the need for this paradigm shift. This shift, necessitated by the clear need for responsive government has, in those jurisdictions which have engaged in the process, accordingly been from a paradigm characterised by representation, to one characterised by a more aggressive form of popular participation. This shift in focus from representation to effective participation necessitated a correlative transformation of indirect mechanisms of accountability of the administrative branch, by proxy. A shift in focus to direct scrutiny, as opposed to through the lens of representation. In short, the shift has been to a paradigm characterised by transparent government and a culture of government justification.

In view of the direct correlation between the dictates of the shifted democratic paradigm and the administrative branch of government, the route chosen by these jurisdictions has largely been through the transformation of their administrative legal systems, with a view to the democratisation of the administrative branch of government. Further, in view of the direct correlation between such democratisation and freedom of information, the focus of their transformation energies has been, as a matter of logic, the recognition, regulation and protection of freedom of access to government held information.

The transformation, spearheaded by freedom of information concerns has found expression in a framework of legislative enactments, commonly known as freedom of information laws.

A contextual reading of these legislative enactments reveals that they, in accordance with democratic dictates, are premised on more than the desire to simply permit access to brute information, for the sake of information alone. In addition, they recognise and protect access to information for the purpose of ensuring, not only scrutiny of, but also, access to government process and decision-making in a more public and participatory form.

In essence therefore, these legislative acts give expression to, not merely a need to know, but expression to the recognition of a democratic right to know.

Countries which have chosen the route of transformation and given effect thereto by placing a premium on the protection of freedom of information include, Canada, New Zealand, Australia and the United States. These countries initiated their freedom of information and open government policies some time ago, some as early as the 1970's. South Africa has only recently joined the international trend and the process is still in its infant stages. It has and shall continue to draw on the experiences of the legal systems of these jurisdictions as

a source of information and guidance in the development and implementation of its freedom of information and open government policies. South Africa has much to learn from these systems as it shares with many of them a common constitutional heritage, based on the traditional liberal democratic paradigm and the legal doctrines which formed an integral part thereof.

South Africa, like its counterparts, has sought to remedy the inadequacies of its heritage, whilst recognising the need for and maintaining certain elements of it, such as the tools of representation. However, the recognition of this need has been accompanied by a recognition of the fact that the tools of representation are precisely that – merely tools for political organisation to be utilised as a means to an end. A recognition that the tools do not constitute the desired end, namely democratic rule by “the people”.

South Africa, like its counterparts, has to accordingly devise mechanisms and institutions to supplement the organisational structure so as to establish and maintain a truly democratic society. South Africa, which shall be discussed in greater detail at a later stage, has like its counterparts, recognised in principle that freedom of information is one of the primary keys to democracy, but it has, unlike many of its counterparts only recently engaged in the constructive implementation of this principle – and it is here that South Africa has much to learn, both positively and negatively. South Africa has the benefit of hindsight in respect of those systems which have operated for a considerable period of time, and must identify and avoid any fundamental weaknesses exhibited by those systems.

3.3 Canada and New Zealand

Canada and New Zealand will be referred to only briefly at this stage by stating that their commitment to responsive democratic government finds expression in comprehensive freedom of information acts.⁸

3.4 The United States

The United States’ experience is a valuable source of information and a useful tool for comparison in view of its longstanding history of a commitment to human rights and its proud assertion of being a modern constitutional democracy. This has translated into comprehensive and expansive freedom of information and open government policies which were implemented at a comparatively early stage. As such the United States shall to a large extent be the focus of this thesis’

⁸ Canada – The Access to Information Act 1982 & New Zealand – The Official Information Act 1982

comparative exercise.

The American history, in relation to the issue of public access to information and scrutiny of the executive branch of government, has seen the growth of an unequivocal recognition of the public's right of scrutiny of, and access to state-held information. This recognition finds expression in a lattice work of legislation devoted to protecting and regulating these rights.

Public's right
of scrutiny

→ Note

This legislation includes *inter alia*, The Government in the Sunshine Act of 1976, the Privacy Act of 1974, the Freedom of Information Act of 1966 and subsequent amendments thereto, the Federal Advisory Committee Act of 1972 and the Administrative Procedure Act of 1946.

The Government in the Sunshine Act of 1976 imposes a duty on government agency's within its scope, to publicise, in advance, details of the time, place and subject matter of their meetings. The public are then entitled to attend the meetings. Provision is made for meetings to be closed to the public under certain circumstances, however, the agency remains under an obligation to maintain a complete record of the meeting and make same available to the public.

The aim of the Sunshine Act is to:

Open up to the public, portions of the 'deliberative processes' of certain agencies. It does not provide a right to participate in decision-making, nor can it be invoked to insist that a meeting be held.⁹

The right to participate in decision-making is however an integral element of the United States' administrative legal system. It is recognised and protected under certain circumstances in terms of the Administrative Procedure Act – 5 U.S.C., Chapter 5. (A full discussion of this act is however beyond the purview of this thesis and is only mentioned to show the comprehensive nature of this system in relation to the rights of the public *vis-à-vis* the administrative branch of government.)

The Federal Advisory Committee Act has as two of its primary objectives, keeping both the public and Congress informed as to the advisory committees and ensuring that whenever possible, advisory committee meetings are open and accessible to the public.

The Privacy Act:

Regulates the collection, control, content, dissemination and use of certain categories of government information and focuses upon 'systems of records' established, controlled or maintained by an agency....

⁹ Patrick Birkinshaw, Freedom of Information, The Law, the Practice and the Ideal, 1996, p59

It allows individuals on whom executive federal agencies have documents..to examine the documentation after a written application.¹⁰

The Freedom of Information Act is the most wide ranging and comprehensive expression and protection of the public's right to information held by the administrative branch of government, constituting as it does the pinnacle of responsive democratic government.

The act entitles anyone, upon application, to have access to an agency's records if that agency is covered by the act. As pointed out by Birkinshaw, an applicant does not have to demonstrate a specific interest in a matter to view the relevant documents – an idle curiosity suffices. The legislation provides a presumptive right of access to documents and files to anyone – not it should be noted, an American citizen.¹¹

Further, the Act provides expressly for de novo review of a decision to deny access to requested information. In so doing it confirms the necessity of, and gives effect to, the need for responsive and justified government action in its provision that:

On complaint, the district court of the United States.....has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records... shall be withheld under any of the exemptions set forth in subsection (b)... and the burden is on the agency to sustain its action.¹² (my stress)

It is clear from the brief survey of the content and purpose of these acts that the American administrative legal system has recognised and put into effect the public's right to access to information and scrutiny of the workings of the administrative branch of government. The reasons for this recognition may be derived from the objectives of the aforesaid body of legislation as a holistic unit.

As a whole, the body of legislation seeks not only to allow access to the information for the sake of mere access, but seeks to allow access for the purpose of facilitating participation, accountability and responsive government. These objectives were confirmed and the pursuit thereof given top level impetus when in 1993, the President and the Attorney-General publicly committed themselves

¹⁰ Ibid, pp 60-61

¹¹ Ibid, p51

¹² S 552(a)(4)(B)

to making the operation of the Freedom of Information Act more 'effective to enhance openness and participation. [And] The opposition has not been slow to laud these virtues also to enhance the role of the consumer *vis-à-vis* government.'¹³

The United States' has accordingly since the 1960's embarked on a concerted program of guarantees to access to information, which program is a logical growth of its recognition of a need for a paradigm shift within the context of the modern administrative state.

As Carl Friederich points out, the American experience of democracy is constitutional democracy as opposed to democracy simply as rule of the majority, without any constitutional framework within which majority decisions are made. Note

He further points out that at the heart of a constitutional democracy is the notion of the division of power.¹⁴ The division of power is central to a constitutional democracy as it is the primary mechanism for achieving the objective of constitutionalism, namely, the safeguarding of each member of the political community as a person. Constitutionalism achieves this objective by ensuring a system of effective restraints upon government action, by the division of power. Put another way, constitutionalism (and the division of power) 'is a body of rules ensuring fair play, thus rendering the government "responsible"'.¹⁵

As such, a constitutional democracy requires a strict separation of powers between the three branches of government, the legislature, the executive and the judiciary. The concomitant of this requirement is the need for structures to ensure that each branch acts only within the parameters of its constitutionally dictated role, in other words, structures which enforce accountability. Placing constitutional democracy within the context of the modern administrative state requires a recognition of the inadequacy of the traditional democratic structures of accountability, namely accountability only to the legislature. This recognition is one of the progenitors of the recognition of the need for the people to have a right of access to information and scrutiny of the workings of the executive branch of government, thereby rendering it accountable to the electorate for its actions.

The United States' recognition of the above and its commitment to a constitutional democracy is expressed in the legislative framework discussed above. Its commitment to a participatory constitutional democracy has developed to such an extent that it has in fact elicited responses such as those by Michel J Crozier *et al*, discussed earlier in this work, that America has gone too far and

¹³ P Birkinshaw, *op cit*, p51

¹⁴ Carl J. Friederich, Constitutional Government and Democracy, Theory and Practice in Europe and America, 4th ed, p 4

¹⁵ *Ibid*, p 24

that the future stability of the country depends on a reversal of the trend of encouraging participation, accountability and responsiveness.

3.5 Australia

Australia's recognition of the need for a paradigm shift and the effective realisation thereof was given expression in the late 1970's in a complete overhaul of its administrative legal system. This process was guided and driven to a large extent by its freedom of information and open government policies, which found expression in two primary pieces of legislation premised on these objectives.

Australia, like its counterparts discussed above, has since the early 1980's vested in every person a qualified right to access to information in the possession of government through the Freedom of Information Act of 1982.

Like its American counterpart, it too has provided for *de novo* review of agency decisions generally, as well as of agency decisions to refuse access to information, by a body external to the decision-making agency.¹⁶

Unlike the United States however, the Australian federal Freedom of Information Act vests that appeal jurisdiction in a body specifically created for that purpose, namely the Administrative Appeals Tribunal (AAT). The AAT was a further product of the comprehensive overhaul of the Australian administrative legal system designed to democratise government by making it responsive and accountable. The creation of the AAT was a concrete response to the recognition of the inadequacies of the traditional judicial review system to realise the objectives of responsive, accountable government. The rationale underlying the creation of the AAT within the context of these objectives, was to, *inter alia*, provide individuals with more accessible and effective avenues of redress against government decisions. Unlike the limited review functions traditionally vested in the courts, the right of appeal is much wider and 'in fact requires the decision to be remade'. The appeal function vested in the AAT expressly vests in it the power to revise decisions 'on the merits' or to 'stand in the shoes of the original decision-maker'.¹⁷

The Australian commitment to attainment of the objective of responsible government through transparency and premised as such on freedom of information, is given further impetus by a legislatively constructed duty imposed on the state to furnish information in the form of written reasons for an adverse decision, upon request. This duty is imposed by S 13 of the Administrative Decisions (Judicial Review) Act 1977 which requires:

¹⁶ P Bayne, 'Freedom of Information in Australia' in Controlling Public Power 1995, p 176

¹⁷ C Saunders, 'Appeal or Review: Administrative Appeals in Australia' in Controlling Public Power 1995, p199

..a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which these findings were based and giving reasons for the decision.

It is clear that the premise of the Australian freedom of information laws described above, like those of the United States, is attainment of the objective of responsive government founded on participation, transparency and accountability.

As such:

...in Australia, freedom of information laws are seen as an element of a democratic society.¹⁸

Freedom of information in Australian law is, as in the United States, accordingly recognised as a fundamental democratic right. That is to say it is recognised in and of itself as a democratic right, as for example the right to vote. It is recognised first and foremost as an end, in and of itself, as opposed to a means to an end. This is most decisively indicated by the wide framing of S 11(1) of the FOI Act which vests the right to access to information in every person:

Subject to this act, every person has a legally enforceable right to obtain access in accordance with this act...

As such:

... a person seeking to exercise his or her right need not show any personal interest in obtaining the information sought. The right to access is premised on a person's 'right to know' rather than a need to know.¹⁹

3.6 Evaluation

Having established that both the United States and Australia have actively engaged in the required paradigm shift, dependant on and therefore spearheaded by freedom of information laws, one must ask the next question: – To what extent have they succeeded, in their chosen route, in democratising government?

This evaluation, which will focus primarily on the American legal system,

¹⁸ P Bayne, op cit, p 173

¹⁹ Ibid, p 174

will seek to assess the results and effects of the practical implementation of the freedom of information laws, as against Robert Dahl's ideal democratic standards. Dahl's thesis is that if these standards are met then a system has attained perfect democratic processes and a perfect democratic government.²⁰

*Note
Very important*

Robert Dahl's standards are, it is submitted, an ideal tool to use as a yardstick for determining whether or not a system is truly democratic. It is an ideal tool as the standards stated by him co-incide with the concerns expressed thus far in this thesis in relation to the modern administrative state. The correlation is attributable to the fact that the concerns expressed so far relate to the attainment of the objectives of democracy and Dahl's standards are essentially an expression of those objectives in an organised, logical and systematic way.

Dahl's thesis, in view of its focus on the objectives of democracy, does not prescribe the method or mechanics for obtaining such objectives. As such his five ideal standards can be used to assess a multitude of different systems claiming to be democratic, irrespective of the minute particularities of those systems and differences between them.

His thesis is rendered more directly relevant and useful to the inquiry at hand in view of his use and insistence on what he refers to as polyarchy, as an essential component of democracy. As will be shown, the notion of polyarchy encompasses a number of rights, institutions and processes which are characteristically fundamental precepts of the systems under discussion, being as they are, reflective of the traditional (but insufficient) criteria of a democratic order. Dahl's thesis like this thesis opines that these criteria are an integral and essential component of democracy, but insufficient to constitute democracy in and of themselves. His thesis is that a truly democratic order cannot therefore only comply with the criteria of polyarchy, but must also meet the stated five ideal standards. This proposition reflects one of the central tenets of this thesis - that the traditional liberal democratic vision and its attendant infrastructure is not sufficient in the modern administrative state to render the state truly democratic.

*Necessary but
not sufficient*

Dahl's statement of five ideal democratic principles co-incide with the submissions made thus far as to what is required in addition, to supplement the insufficient traditional programme. The balance of his principles, completing his vision of an ideal democratic order, which co-incides with the vision adopted by this thesis, will accordingly serve as an invaluable tool in evaluating the systems discussed herein.

²⁰ R Dahl, 'Selection 7 From Democracy and its Critics' in Key Concepts in Critical Theory: Democracy, 1993 p 57 - 66

3.7 Dahl's thesis

Dahl's thesis is that in order for a system to be regarded as truly democratic it must comply with on the one hand, the five ideal standards characteristic of democracy and on the other must comply with the seven criteria of a polyarchy.

He points out that:

The five criteria are standards – ideal standards, if you like – against which procedures proposed ought to be evaluated in any association. Any process that met them perfectly would be a perfect democratic process, and the government of the association a perfect democratic government.²¹

He recognises that the attainment of the standards, being ideal standards, is often difficult and perhaps even impossible. He admits, as does the writer hereof, that 'a perfect democratic process and a perfect democratic government might never exist in actuality'.

Despite this word of caution, and even assuming that the ideals can never be achieved in their entirety, it is no reason 'to throw in the towel' and accept anything less than maximum possible compliance with the standards simply on the basis of the difficulties involved in achieving them. It is admitted that a democratic society which does not achieve all five standards perfectly, as is probably the case with all associations, might not be perfectly democratic. However, it is submitted that any 'democratic' society which does not engage in a continual process of evaluation of its practices and procedures with a view to identifying where it fails to meet the standards, and actively seeks to redress those problems – as a continuing process – cannot be called even an imperfect democracy. A democratic society must strive at all times to attain the ideal standards.

3.8 Dahl's Polyarchy

For Dahl, all democratic associations must have a political order which complies with the seven minimum institutions, rights and processes characteristic of what he refers to as a polyarchy. They are, elected officials, free and fair elections, inclusive suffrage, the right to run for office, freedom of expression, alternative information and associated autonomy.²²

²¹ Ibid, p57

²² Ibid, p64

Polyarchy he notes is in fact a type of political order distinctive of many modern governments. This is not surprising as 'the institutions of polyarchy are necessary to democracy on a large scale, particularly the scale of the modern national state.' However, 'to say that all seven institutions are necessary is not to say that they are sufficient.'²³

Their sufficiency will depend on whether they comply with, or give effect to, the five ideal standards or distinguishing features of a fully democratic process in relation to the *demos*. For Dahl, these five ideal standards are:

1. Effective participation;
2. Voting equality at the decisive stage;
3. Enlightened understanding;
4. Control of the agenda; and
5. Inclusivity.

If the processes of polyarchy do not comply with, or give effect to these standards, they are insufficient to constitute a democratic order. The existing order must then be supplemented and encode additional institutions, rights and processes, which do give effect to the five ideal standards.

This thesis has concluded that the seven institutions of polyarchy are in fact insufficient, premised as they are on an outdated view of the minimalist state. They fail to give effect to the ideal standards or objectives of a truly democratic process in relation to the *demos* in the modern administrative state. More specifically, the institutions of polyarchy do not satisfy the criteria of effective participation and enlightened understanding.

The systems discussed thus far have, in the transformation of their legal systems, given expression to the recognition of the fact that the prevailing political order of polyarchy, although necessary, is insufficient for attaining democratic rule. It is insufficient in its failure to give effect to effective participation and enlightened understanding. They have, in recognition of this insufficiency introduced additional rights, institutions and procedures to give effect to these standards/objectives— which have been organised within the framework of freedom of information laws.

The transformed and amended systems must however be subjected to the same evaluation, as the institutions of polyarchy. They too must be evaluated against Dahl's five ideal standards to determine if the transformed supplemented system does in fact attain the highest possible degree of democracy.

²³ Ibid, p 65

3.9 Do The American And Australian Systems Comply With The Five Ideal Standards Of A Democratic Process in Relation To The *Demos*

One may conclude, on the basis of the preceding discussions, that the freedom of information laws of these two countries, premised on and informed as they are by the objectives of responsive government, seek to guarantee participation and accountability. In so doing, it is submitted that they comply with Dahl's democratic standards of enlightened understanding, effective participation and voting equality at the decisive stage.

Unlike Dahl, this thesis places enlightened understanding as criteria number one, prior to the criteria of effective participation and voting equality at the decisive stage, as the latter two criteria are intrinsically dependant on enlightened understanding.

Dahl formulates the criteria of enlightened understanding as follows:

Each citizen ought to have adequate and equal opportunities for discovering and validating (within time permitted by the need for a decision) the choice on the matter to be decided that would best serve the citizen's interests.²⁴

This criterion implies that a democratic order must incorporate procedures which afford citizens the opportunity for acquiring an understanding of government process and policies, of its means and ends, not only as it pertains to the interests of the affected individual, but in respect of all other relevant persons as well. In other words the procedures must afford an opportunity for the acquisition of global knowledge in order to allow the individual to operate or participate rationally within the context of the political community.

Accordingly, procedures which cut off or suppress information are not democratic and conversely procedures which foster the attainment of this criterion may be called a democratic procedure.

The Australian and American systems, as illustrated above, clearly comply with this criterion, most notably in recognising and protecting that all persons have a right to all information, not just information deemed necessary for the protection or furtherance of some localised personal need or right. The breadth of the recognition and protection of the right to information also complies with the further requirement that processes relating to the *demos* must in their operation be inclusive.

²⁴ R Dahl, op cit, p60-61

Inclusivity requires that:

The *demos* should include all adults subject to the binding collective decisions of the association.²⁵

The freedom of information laws of these countries are in their design and application geared towards responsive government in that access to information is assured, not just for the sake of mere brute access, but to facilitate participation, accountability and transparent government. The full spectrum of freedom of information laws and their accompanying procedures accordingly go a long way to meeting the criterion of effective participation which is formulated by Dahl as follows:

Throughout the process of making binding decisions, citizens ought to have an adequate opportunity, for expressing their preferences as to the final outcome. They must have adequate and equal opportunities for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than the other.²⁶

It is submitted that the American system does, in its combination of open government legislation, in the mechanisms provided for direct participation in its Administrative Procedure Act and in providing for *de novo* appeal in relation to information requests, comply with the requirement of effective participation. In addition these legislative expressions indicate a compliance with the requirement of voting equality at the decisive stage, which requires that:

At the decisive stage of collective decisions, each citizen must be ensured an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by any other citizen. In determining outcomes at the decisive stage, these choices, and only these choices, must be taken into account.²⁷

The same conclusion may largely be drawn in respect of the Australian system, except in so far as to say that this system at present does not go as far as its American counterpart. Unlike the American system which actively facilitates prior participation in the government decision-making process, the Australian system's focus is on *ex post facto* accountability, more so than direct prior

²⁵ Ibid, p 63, footnote 8

²⁶ Ibid p 58

²⁷ Ibid

participation. It lacks legislation akin to the American Sunshine Act and the American provision for participation in collective agency decision-making, in for example the Administrative Procedure Act. This lapse has however been recognised and currently under scrutiny and proposals have been put forward to remedy this omission.²⁸

Dahl's democratic criteria discussed thus far are, despite their insistence on inclusivity and participation, completely compatible with the requirements of efficiency demanded by the governors of the modern administrative state. Often arguments for efficacy have translated into arguments that inclusive participation can be damaging to the process of government because of the drain it places on resources and the necessary delays it would cause. Dahl's criteria are capable of taking cognisance of these arguments in that they require, not absolute direct participation in every sphere and in every decision, but require **effective** participation. That is to say, the procedures put into place must ensure that, in their effect, they achieve the objectives of direct participation. The procedures put into place must ensure that participation is guaranteed where it counts. There is no prescription as to the form that those procedures must adopt and there is nothing to preclude the adoption of procedures which facilitate participation in a constrained and regulated form so as to ensure an organised system which does not jeopardize the smooth running of government. Achieving this balance between the dictates of democratic ideals and the dictates of the efficiency of the administrative state is the challenge for modern democracies. Procedures designed to facilitate the attainment of democracy in relation to the *demos* must at all times make concessions to the efficient and successful running of the country, which concessions are necessary in view of the fact that the *demos* is in itself a massive, diverse and complex entity, the nuances of which cannot always be fully accommodated. However, the true test of democracy is whether, in making those concessions, the procedures do not cross the minimum threshold of democracy and err in favor of the interests of government at the expense of the maximum possible attainment of democratic ideals or objectives. It is to these concessions that we now turn, as it is here that the danger for democracy is most pronounced and accordingly the site for putting claims of democracy to their most stringent tests.

²⁸ At present the Legislative instruments Bill 1994 is on the table as a proposal in this regard. "It sets out a comprehensive regime for the making, publication and scrutiny of delegated legislation." Report on Legislative Instruments Bill 1994, House of Representatives Standing Committee on Legal and Constitutional Affairs, February 1995, p1

CHAPTER FOUR

FREEDOM OF INFORMATION AND THE 'NATIONAL SECURITY' EXEMPTION

The concessions referred to in the preceding chapter are, in the context of freedom of information, made in the freedom of information laws' provision for the exclusion of certain categories of information, by positing them as exemptions.

Both the Australian and American freedom of information laws recognise as one such exempt category of information, information relating to issue of 'national security'. It is to this specific exemption that this thesis now turns its evaluative exercise. The question that must be addressed is whether the legal systems under consideration, in both their formulation and application of this exemption, maintain a democratically acceptable balance between the apparently competing interests at play.

Why the 'national security' exemption? In answering the question as to whether or not a system is democratic, one must subject stated claims to democracy to the most stringent of tests. The claims must be tested in those areas of practice which have traditionally, through time, posed the hardest problems for the maintenance of democratic ideals. In overcoming the difficulties posed in these areas to democracy, effective solutions are hard to come by. These difficulties often result in inadequacies, which if not addressed, can serve to fundamentally undermine attaining a democratic order.

It is precisely the magnitude of the threat and the difficulty of resolution which requires that issues such as these be placed firmly on the table for discussion. In the absence of this discussion the source of the difficulties cannot be identified and accordingly attempts to resolve the problems will be frustrated.

National security epitomises one such area. The magnitude of the risks involved in this arena for democracy and society generally are such that it poses an apparently irreconcilable dilemma for democracy, most notably in the arena of freedom of information. The national security versus freedom of information debate raises some of the strongest arguments in favour of secrecy practices and accordingly some of the severest problems for democracy. Simultaneously, the magnitude of the potentially adverse consequences of untrammelled secrecy practices in the arena of national security for society generally, exerts an equal pressure for the maintenance of democratic procedures and ideals. It presents, in the context of freedom of information, the ultimate Gordian knot.

4.1 Democracy and National Security

Democracy and national security often co-exist in what can only be described as an uneasy relationship.....democracy and security invoke different and very often incompatible values.¹

Yaniv, a proponent of extensive secrecy practices in the arena of national security, concludes that as a result of these incompatible values, the co-existence of democracy and national security is fraught with inherent problems. There is a prevailing consensus amongst a number of writers that the root cause of the problem is that the whole question of national security and democracy appears to pit, within the discourse of the traditional paradigm, the two concepts as polar opposites pulling against each other. On the one hand, the state, which in this context exists in its most pristine form in the conduct of the 'quintessential function of the state'² and on the other hand, democracy and its attendant values, focussing on its aberration of the state and control of the power exercised by it.

These problems, in view of the intricate interrelationship between democracy and information, crystallise most instructively within the context of freedom of information. This fundamental tenet of a democratic order is problematised by the fact that national security areas, traditionally understood to include:

Government intelligence, internal [and external] security and defence operations are traditional areas of secrecy and therefore pose hard problems for a democratic society. A democratic society is confronted with the problem that some intelligence activities require maximum secrecy and that its missions may be spoilt by publicity, whereas democratic government requires publicity.³

The strength of this reasoning in justification of secrecy is, it is submitted the original source of the national security exemption. The justification for this exemption appears to acquire further impetus in the modern state. Claims of the need for efficacy and exclusive expertise are generated by the fact that the national security dimension of the state has grown in size and complexity in tandem with the growth in size and complexity of the modern state. The result:-

¹ Avner Yaniv, National Security and Democracy in Israel, 1993, p1

² P Birkinshaw, op cit, p26

³ A Mathews, op cit, p18

A growth in the state's intelligence and security programs and the state departments devoted to these tasks, complicated by the influence of modern technology on matters such as warfare. These factors, in conjunction with the potentially catastrophic consequences for society, were the relevant state departments to fail in their assigned tasks, all go toward a wide spread demand for and acceptance of limiting the right to freedom of information, participation and accountability in this arena. In short, the dictates of democratic or responsive government are often readily sacrificed in the interests of national security.

Concurrently however, these factors together with the fact that "national security involves the most developed form of information technology, much of it highly secret, [and] covers the most intrusive of information gathering exercises conducted on behalf of government agencies"⁴, means that the concerns raised in this thesis in respect of democracy and freedom of information in the modern state are equally, if not more pertinent in the national security context.

These concerns are rendered more pertinent and urgent in view of the potential for catastrophic consequences for society in this arena. The immensity of this potential has escalated in accordance with the 'increase in the destructive capacity of weapons and the contemporary involvement of science and the military'. For society at large the result has been the aggravation of an 'ancient problem to a critical problem'. It is precisely this factor, namely the safety and well being of society, often presented as the ultimate justification for secrecy, which likewise requires and justifies the free availability of information in this arena. The bottom line now more than ever is that:

If democracy means anything at all it must imply a substantial measure of involvement of citizens called upon to pay the ultimate price in decisions concerning war and peace – 'those who are to bleed and die have a right to be consulted.'⁵

There is no doubt that a cord of tension bisects the issue of national security within a democracy, which tension often expresses itself aggressively and seemingly irreconcilably. This tension exists precisely because of the premium placed on information, participation and accountability in a democratic society. The tension may cause difficulties and require complex solutions, but it must be resolved and accommodated within democratically acceptable parameters, failing which, any commitment to democracy, despite finding expression in a multitude of other arenas will come to naught. A democratic

⁴ P Birkinshaw, op cit, p26

⁵ A Mathews, op cit, p20

society, if it is to legitimately sustain its claim to democracy must face the problem and engage in a continual evaluation thereof in relation to its own structures with a view to locating and implementing appropriate solutions, as:

... a society that demonstrates no concern for this problem has ceased or is ceasing to be democratic.⁶

We turn now to an evaluation of the American, and to a lesser extent, the Australian systems' formulation and application of the national security exemption, with a view to assessing whether or not they succeed in this arena, to achieve and maintain democratic objectives.

4.2 The United States – Freedom of Information, Democracy and National Security

The United States, as mentioned previously, is a valuable source of information and a useful tool for evaluative and comparative purposes. Its value lies in the fact that it is characterized, not only by a long standing commitment to democracy, which has found expression in an advanced and comprehensive open government/freedom of information policy, but also has an advanced and comprehensive national security policy and correlative infrastructure.

4.3 The National Security Exemption In The United States

The American Freedom of Information Act guarantees public access to agency information, subject to a number of exemptions. The two exemptions which are traditionally raised in justification of the denial of access to information, on the ground that disclosure would be contrary to the interests of national security, are the exemptions of information:

1. (A) specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;⁷ and information;
2. specifically exempted from disclosure by statute ..provided that such statute (A) requires that the matters be withheld from the public in such a

⁶ Mathews, op cit, p 18

⁷ S 552(b)(1)

manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.⁸

The following discussion will focus on these two exemptions as expressed in the Freedom of Information Act. Similarly worded exemptions are found in the other acts relating to access to information, disclosure and participation. As such, the discussion in regard to the Freedom of Information Act may be regarded as being equally applicable, in so far as is relevant, to the balance of the legislation referred to in previous chapters.

4.4 The Application of the National Security Exemption to Freedom of Information

It is recognised by both proponents of extensive secrecy in the realm of national security⁹ and those opposed to the breadth of this practice¹⁰ that the First Amendment of the United States' Constitution affords the public a constitutional democratic right to know. The premise of the First Amendment theory which gives rise to this right is that 'the people as sovereign need to be kept informed of all matters affecting the public interest... [it] is the essence of democratic government.'¹¹

Fein explains this theory as follows:

The first amendment fosters several vital constitutional values which government secrecy may impair. The first amendment supports the protection and encouragement of informed public colloquy "to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means" [*DeJonge V Oregon*, 299 U.S. 353, 365 (1937)]. Enlightened public discussion or criticism of government policies enables the electorate to form intelligent opinions whether particular public officials should stay in office or whether particular government practices should continue..¹²

Both proponents for and against extensive national security secrecy

⁸ S 552(b)(3)

⁹ Bruce E. Fein 'National Security and the First Amendment: Access To Classified Information: Constitutional and Statutory Dimensions' in Summer (1985), 26 *William and Mary Law Review*, p 813

¹⁰ Thomas I. Emerson 'Comment on "Access to Classified Information: Constitutional and Statutory Dimensions"' in Summer (1985), 26 *William and Mary Law Review*, p846

¹¹ Ibid

¹² Bruce E. Fein, op cit, p183

practices recognise that there is a need to limit the right to access to information within this context. However, they part ways in drawing the democratically permissible and legitimate boundaries demarcating the scope of this limitation.

In addition to the two national security related exemptions provided for by the Freedom of Information Act quoted above, the right to access to information is further limited in the arena of national security by the government's right in civil actions to lodge a formal claim of state secrets privilege. This privilege is successfully raised if the Secretary of the blocking agency files a personal affidavit, which may be filed in camera, asserting a formal claim of privilege to protect certain state secrets relating to national defence and security.¹³

Writers such as Mary Cheh, who advocate access to information, whilst conceding that this right cannot be absolute, criticise the American administrative legal system for failing to achieve, in the formulation and application of these national security limitations, a constitutionally or democratically justifiable balance between these two apparently competing values.

Cheh argues that exemption one of the FOIA which exempts disclosure of classified information 'is not so much an exemption as a license to withhold', because the executive branch both establishes the criteria for classification and performs the actual classification of the information.¹⁴

Her sentiments are echoed by writers such as Michael Hughes¹⁵, Thomas Emerson¹⁶ and Harold Koh¹⁷ who all appear to be of the view that the American executive branch of government has a stranglehold on information in the arena of national security. This stranglehold they argue is neither constitutionally nor democratically justifiable. They argue that in effect, exemptions in the name of national security, such as exemptions one and three in terms of the FOIA, do not constitute limitations of this right, but a negation thereof, and as such a negation of the essence of democracy.

These writers are all largely in agreement as to the cause of this jump from a theoretically recognised need for a democratically acceptable limitation of the right to know, to a negation of the right in the practical application of the exemptions. The root cause is an excess of power accorded by the legislature to,

¹³ Kathleen Buck, 'Access to Classified Information: Constitutional and Statutory Dimensions: The First Amendment - An Absolute Right?' in Summer, (1985), 26 William and Mary Law Review, p 856

¹⁴ Mary M. Cheh, 'Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information', in (1984) Vol 69, April Cornell Law Review, p 691

¹⁵ Michael Hughes, 'CIA v Sims: Supreme Court Deference to Agency Interpretation of FOIA exemption 3' in Fall (1985), 35 Catholic University Law Review, p 279

¹⁶ Thomas I. Emerson, op cit, p846

¹⁷ As set out in Todd D. Peterson, 'Book Review of The Law and Politics of Shared National security Power by Harold H Koh, New Haven, Conn: Yale university Press 1990' in (1991), Vol 59 The George Washington Law Review, p 747

and appropriated by, the executive arm of government in respect of its control over disclosure of information in the arena of national security. This over breadth of power is then exacerbated by insufficient institutional checks and balances on the appropriation and exercise of that power, most notably an impotent judiciary, unjustifiably eager in its deference to the executive branch and legislative acquiescence to the *status quo*.¹⁸

It is submitted, as will be illustrated hereunder, that the criticisms levelled against, and the conclusions drawn by these writers in respect of the American legal system in the arena of national security, especially with regard to the role played by the three branches of government, are correct.

4.5 The Executive's Control of National Security Information

Exemption one to the FOIA exempts information properly classified pursuant to an Executive order, as being in the interest of national defence or foreign policy. This exemption unequivocally places the power over and the function of classification of this information in the hands of the executive. In so doing it places control over access to that information in the hands of the executive. The president, in his capacity as head of the executive, may by executive order, not only determine a scheme for classification and dictate what is to fall within that scheme, but may also in so doing control, or more specifically, prevent access to that information.

The executive power is comprehensive and unlimited by statute. It includes, as illustrated by President Reagan's notorious executive order of 1982¹⁹, the power to establish a comprehensive classification system, to set the criteria to be used in determining what information is to be regarded as classified, to specify broad or narrow categories of information to fall within the ambit of the classification system, the power to limit disclosure of the information to authorised persons and the power to determine who qualifies as an authorised person.

Presidents Reagan's executive order capitalised extensively on the power afforded the executive and established a comprehensive scheme for classifying and withholding national security information. It identified three levels of classification and directed executive officials to classify material falling into predetermined wide ranging broad categories of information. They ranged from military plans to exceedingly wide fluid categories such as the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national

¹⁸ Cheh, Op Cit, pp691-3; Emerson, Op Cit, p 847, Hughes, Op Cit 287 & Koh, in Peterson Op Cit, p 748

¹⁹ No 12, 356 of 1983

security, intelligence activities. The obviously comprehensive nature and breadth of these categories was however not deemed sufficient and they were, in effect, rendered limitless by the additional catch-all category of ‘other categories of information that are related to the national security and that require protection against unauthorised disclosure as determined by the President’.²⁰

The order, having cast the net very wide, then, as a general rule precludes disclosure of classified information to anyone other than executive branch officials whose trustworthiness has been determined by an agency head or designated official and only if such access is essential to furthering a legitimate government purpose.²¹

At 4.1(c) the Order does provide that in the event that classified information should be permitted to be disseminated outside the executive branch, such dissemination would only be permitted under conditions that would ensure the same degree of confidentiality protection as that ensured within the executive branch.

By limiting disclosure to select members of the executive branch only, the Order not only restricts public access, but also access by the legislature or Congress – all at the behest and control of the executive branch of government.

Birkinshaw concludes that the effect of this Executive order was to reverse a previous trend of relaxation of security classifications and ‘broadened the [executive] discretion to create official secrets’, which effect was a result of the Order doing away with many of the prior safeguards against over enthusiastic classifications.²²

This observation by Birkinshaw certainly is substantiated by the breadth and extent of the categories of information set out in the order as candidates for classification. This breadth coupled with the mandatory, rather than permissive tone directing the executive official’s classification energies to these categories gave rise to a new trend, where:

... mandatory secrecy requirements rather than permissive ones became more common, the balancing test requiring the weighing of public access against the government need for secrecy was eliminated, and systematic declassification was cancelled.²³

The sum total effect of Reagan’s order was - a massive restriction on

²⁰ Exec. Order no. 12, 356 at 163-69 (@ 1.3 (a)(1)-(10))

²¹ Op Cit 4.1(a)

²² P Birkinshaw, Op Cit, pp 51-52

²³ Ibid

previously available information.²⁴

However, in 1995, this executive order was substantially amended by Executive Order No. 12, 958 which has gone some way towards reversing the trend of automatic or mechanical classification, and the attendant automatic denial of access to the classified information, by:

1. shortening the period of classification to 10 years in most instances,
2. introducing, as a general rule, automatic declassification after 25 years,
3. restoring the 'balancing test' in obliging the decision to classify to be guided by considering whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure,
4. removing presumptions, in some areas, against automatic classification,
5. requiring concise reasons to be given on the documents for classification, and
6. establishing a Security Classifications Appeals Board and Policy Advisory Council.²⁵

The liberalisation of the 1982 Order, although it does on the face of it contain the potential for a less severe curtailment of access to information, it does not, it is submitted go to disposing of Mary Cheh's criticism. It does not alter the fact that exemption one is not so much an exemption as a license to withhold.

Her criticism is not disposed of because, even though the amendments may have a liberalising effect on the availability of information, that effect remains at the behest and under the control of the executive branch of government. The effect will remain in operation only as long as the executive branch of the day desires this result. The amendment does not reflect any fundamental change, as at the end of the day, the executive branch still both establishes the criteria for classification and performs the actual classification of the information. In so doing it still controls access to information, which control is not subject to any external constraints. There is nothing to preclude the reversal of the current

²⁴ As per the finding of the National Co-Ordinating Committee for the Promotion of History, in Birkinshaw, *Op Cit.*, p52, footnote 5

²⁵ Birkinshaw, *op cit.*, p 52

emerging trend evidenced by the prevailing Order by a future, or even the current, executive.

In addition, the liberalisation of the information system in the arena of national security depends on more than the tone set by the prevailing executive order. It further depends on a commitment by the executive branch of government and its administration in its entirety, not only the head of that branch, to act in accordance with the tone as set, and in the absence of voluntary compliance, it requires an effective enforcement mechanism, namely the judiciary.

The judiciary has in the past, even in the face of attempted liberalisation by the executive and even the legislature, of access to information in the arena of national security, tenaciously refused to enter the fray and has not liberalised its approach accordingly. There is nothing to indicate that this attitude has or will change simply as a result of a more beneficent executive.

At the end of the day, the 1995 Order does not fundamentally change the fact that the executive branch of government is accorded immense and largely unchecked power to classify information and accordingly control the availability of information. The extent of the power accorded the executive has not changed. The extent to which that power is actually capitalised on may see-saw in accordance with the prevailing executive attitude, but any self-imposed limitation of that power remains revocable at the behest of the executive.

In addition, the power to classify information and any limitations in respect thereof, is not fatal to the executive's control over access to information in the arena of national security. Any limitation in this arena may always be supplemented and the effect of that limitation rendered redundant by the executive's exercise of its power to control information and its disclosure other than by means of classification.

So for example, in terms of exemption three of the FOIA, the government may refuse disclosure of information on the ground that it would be contrary to the interests of national security, as authorised by some other act of parliament prohibiting disclosure in this arena.

The statutes relating to questions of national security envisaged by this exemption generally grant the executive branch a broad degree of discretion. It accordingly enjoys extensive power to determine when exemption three may be invoked and the disclosure of information refused.

For example, S 102(d)(3) of the National Security Act of 1947 authorises the director of the CIA to protect intelligence sources and methods from unauthorised disclosure. Needless to say the act does not define intelligence sources and the applicability of the act and its scope is therefore left to the determination of the director of the CIA, left largely unchecked by the judiciary

which, as will be discussed, exercise deference to the executive determination in cases of dispute.

The government has also employed the Espionage Act to successfully prohibit disclosure of information which related to issues other than spying to which the act was commonly thought to have been directed.²⁶ Other acts which supplement the power of the executive in this regard are *inter alia* the Atomic Energy Act of 1954 and The Department of Defense Authorisation Act of 1984.

In addition to exemption three and its host of subsidiary acts of parliament, the executive branch's power to control information and restrict its disclosure, is founded in the state secrets privilege. This privilege may be invoked at the behest of the Secretary of the blocking agency on the ground of protection of secrets relating to national defence and security.

The scope for control of information through this route is immense. It is arguably even greater than through the classification or exemption three route. The reason is that exemption one exempts information classified in the interest of national security, which is limited by the wording of the exemption to national defence or foreign policy.

As such, there exist two criteria in terms of exemption one, which may result in some limitation of its scope:

- a. the material must have gone through the correct classification procedure, and
- b. the definition of national security is limited, albeit a broad and imprecise limitation, to the traditional areas of national defence and foreign policy (huge concepts in and of themselves).

These two limiting factors appear to be absent when invoking the state secrets privilege, and to some extent, so too in the application of exemption three. Unlike exemption one, which refers specifically to, and accordingly equates national defence with national security, the state secrets privilege refers to national defence and security as two distinct concepts. It accordingly contemplates something more than mere national defence as falling within the ambit of national security. The ambit of national security is accordingly limitless, the limits of which are left in the hand of the executive branch.

The immensity of power accorded the executive branch in this regard has, as in the case of exemption one and three of the FOIA, been left largely unchecked by the courts. Judicial deference to the executive branch is the order of the day, due to sentiments such as those expressed in the case of Halkin v

²⁶ Ibid, p 55

Helms. The court based its finding on the view that the state secrets privilege is absolute, and that the need for well-informed advocacy must give way to the government's privilege against disclosure of its secrets of state. Accordingly it held that the standard of review in considering the privilege was a narrow one and that courts should accord the "utmost deference" to executive assertions of the state secrets privilege.²⁷

4.6 Judicial Constraints on the Executive Exercise of Control of National Security Information

Michael Hughes commences his discussion on the legislative history of the American FOIA with the following statement:

The enactment of the FOIA, which followed a decade-long effort to amend the public access section of the APA, was a first step into the sunshine. It provided the public with a judicially enforceable right of access to information generated by the federal government. Although the drafters were cognizant that certain areas would need to be outside the scope of the Act, the presumption was in favor of disclosure wherever possible, with the judiciary serving as guardian of the public's statutory right to know.²⁸(my stress)

His conclusion as to the objects of the Act is founded on comments made during congressional sessions dealing with the act, such as:

Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure; and

This bill is not to be considered... a withholding statute in any sense of the term...It is our intent that the courts interpret this legislation broadly, as a disclosure statute and not as an excuse to withhold information from the public.²⁹

Despite these clear statements of legislative intent which dictate a broad construction of the act, the Courts, in applying the Act, 'often took a deferential approach whenever any agency invoked one of the nine exemptions', most

²⁷ 598 F. 2d 1 (D.C. Cir. 1978) @ 7, as discussed in Buck, Op Cit. P857

²⁸ Michael Hughes, op cit, p284

²⁹ FOIA Source Book, p 38 (Comm. Print 1974) in Hughes, Ibid, footnote 60

notably, whenever exemptions one and three were invoked in the context of national security.

The Supreme Court in the leading case of Mink v EPA interpreted exemption one in favor of the executive branch. It held that once exemption one had been raised by an agency in respect of classified material, the court was precluded from considering the merits of the decision to classify, and was precluded from compelling the release of the documents. Further, that the Act did not allow for in camera examination of the documents to determine whether unclassified segments could be disclosed.

The argument was raised, and accepted by the three dissenting justices, that if an agency raised an exemption, including exemption one, the Act, in view of its legislative history, directed the courts to review matters *de novo*. In so doing, the Act in effect placed the onus on the agency raising the exemption to justify its argument, on the merits, in favor of nondisclosure.

This argument was rejected by the majority of the court which held the view that the FOIA's legislative history supported this conclusion in respect of all the other exemptions, except for exemption one. In respect of this exemption, the legislative history supported the conclusion that it should be treated differently than the other exemptions for purposes of court review. The court's role was limited. Once the agency demonstrated that the specific items were entitled to the exemption's protection, in other words, that they were classified, the judiciary's role was at an end. If the items were shown to be classified the court was not able or entitled to second-guess the classification decision made by the executive branch.³⁰

Hughes explains that the deferential approach adopted by the court, despite the apparently clear earlier statements of legislative intent, was to some extent explicable in view of some confusion surrounding the legislative history of the FOIA. The statements relied on by Hughes to support his reading of the Act reflected the sentiments of the Senate report which accompanied the FOIA proposal. This report however differed from the House report on the FOIA which adopted a far more restrictive and conservative approach to the Act. This uncertainty of legislative intent, coupled with a subsequent restrictive interpretation by the Attorney General and ambiguities in the original Act provided ammunition for the court's deferential approach.³¹

However, subsequent to, and as a result of the deferential decision in the Mink case, the legislature eradicated any further doubt on the matter and amended exemption 1, and those sections of the statute relating to judicial

³⁰ Mink v EPA, 410, U.S. (1973) @ 78 – 96, as discussed in Hughes, Op cit p288

³¹ Ibid, 287

review.³²

The reasoning for this amendment was as follows:

It is essential.....to the proper workings of [the Act] that any executive branch review, itself, be reviewable outside the executive branch. And the courts – when necessary, using special masters or expert consultants of their own choosing are the only forums now available in which such review can properly be conducted.³³

These sentiments culminated in the 1974 amendments to exemption one and an express extension of the courts' power of review in respect of all exemptions. The relevant amendment to the FOIA now reads as follows:

(B) On complaint, the district court of the United Stateshas jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section and the burden is on the agency to sustain its action.³⁴(my stress)

As pointed out by Hughes, the language adopted by Congress 'buttressed the role of the courts in reviewing agency actions to withhold information under any exemption, although the debate had centred on exemption one. The in camera examination of documents denied under exemption one, however, was discretionary, not mandatory.'³⁵

The effect of this amendment was clearly to override the effect of the Mink decision which advocated the treating of exemption one differently to the other exemptions in so far as the court's power of review was concerned. The language of the amendment is clear: The court's power of review *de novo*, applies to **all** exemptions, and the burden is on the agency relying on the exemption to satisfy the court that it applies on the merits.

Subsequent to these amendments, the Court of Appeals in Ray v Turner, 587 F.2d 1187 (D.C. Cir. 1978) at 1195, set out the courts power of *de novo*

³² Ibid, 293

³³ S.Rep. No 854, 93d Cong., 2d Sess. 13-17, 28 -31 (1974), reprinted in the Joint Source Book, in Hughes Op Cit , p291, footnote 115

³⁴ S 552 (a)(4)(B)

³⁵ M Hughes, op cit p293

review in the national security context under the amended FOIA as follows:

- (1) The government has the burden of establishing an exemption.
- (2) The court must make a *de novo* determination.
- (3) In doing this, it must first “accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record.”
- (4) Whether and how to conduct an in camera examination of the documents rests in the sound discretion of the court, in national security cases as in all other cases.

The court further confirmed that these powers and duties applied to both exemptions one and three.

The sentiments expressed in the 1974 amendments and the legislative debate preceding them, constituted a clear statement of the legislature’s commitment to a policy of disclosure under the FOI Act, and that, that policy was not to be weakened without due cause in the arena of national security by a deferential court.

Despite this legislative affirmation of a policy of disclosure and its applicability to all exemptions, the Supreme Court in the case of Administrator, FAA v Robertson, subsequent to the 1974 amendments, once again deferred to the executive branch’s interpretation of exemption three, in the context of national security. In so doing it sanctioned non-disclosure at the behest of the executive branch clearly not sanctioned by the legislature.³⁶

At the time of the Robertson case exemption three protected matters ‘specifically exempted from disclosure by statute’. The court of appeals, following the unambiguous direction given by the wording of the exemption, rendered all the clearer in view of the most recent amendments to the Act, disallowed the agency’s reliance on this exemption. It found that the statute relied on by the FAA permitted the agency too broad a discretion for it to meet the FOIA’s exemption three requirements.³⁷

The Supreme Court however, despite the clarity of wording and legislative intent, adopted a deferential approach to the interpretation of this phrase and reversed the Court of Appeals finding. It concluded that statutes which afford the executive branch a broad degree of discretion in determining whether to permit disclosure or not, based as in this case, on the administrator’s determination as to whether or not it was in the public interest, qualified as a nondisclosure statute

³⁶ 422, U.S. 255 (1975)

³⁷ Hughes, op cit, p267

for the purpose of exemption three.

The dissenting opinions of Justice Douglas and Brennan show up the contrived nature of the majority opinion. They held that the legislative history of the amendments to the Act and the wording of the exemption, namely “specifically exempted” did not embrace the discretionary nature of the section in dispute. The discretionary nature of the power, together with its vague public interest standard could not in their opinion be construed as a matter “specifically exempted”.³⁸

The approach adopted by the majority of the court in the Robertson case was clearly not in accord with the legislative intent which found specific expression in the amendments to exemption one, but was of general application to the interpretation of the Act, and all exemptions thereto as a whole. The court’s blatant disregard of the legislature’s intention in interpreting exemption three resulted in the 1976 amendments to exemption three. This round of amendments unequivocally sought to reverse the Robertson decision and in so doing affirmed the dissenting justices’ view.

The amended exemption specifically sought to remove from the exemption’s protection, discretionary statutes such as those which formed the subject of dispute in the Robertson case. Exemption three, as amended, now permits the withholding of information prohibited from release by another statute, only if that statute:

(A) requires that the matters be withheld from the public in such manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.³⁹ (my stress)

Hughes argues that:

The 1974 and 1976 amendments to the FOIA demonstrate that, in the past, Congress has not hesitated to overturn Supreme Court decisions that it believed were contrary to the Act’s disclosure mandate. These legislative overrulings reaffirm Congress’ continuing commitment to a strong public policy favoring disclosure under the FOIA and to narrow interpretation of the exemptions.⁴⁰

It is submitted that one can take Hughes’ argument one step further and

³⁸ at 268 (Douglas & Brennan, JJ dissenting)

³⁹ 5 U.S.C. @ 552(b)(3) (1982 & Supp. I 1983) as discussed in Hughes Op Cit @ p296

⁴⁰ M Hughes, op cit, p 296-7

argue that the 1974 and 1976 amendments are an expression of Congress' more deep seated commitment to protection of the principles of a participatory, constitutional democracy. The amendments all go to strengthening the constitutional prescription of the separation of powers in their progressive curtailment of executive overreaching of power through the use (or abuse) of extensive discretionary powers, particularly in respect of that most important right of access to information. The effect of the amendments is a reclamation, by the legislature, of the power to at best decide, and at worst, to materially guide executive decisions in respect of disclosure or non-disclosure of information.

The core of the amendment to exemption three is a constraint on the exercise of discretion by the executive branch. Decisions regarding access to information which are the product of a discretionary exercise of power are not accorded protection by the FOIA exemption in so far as that discretion has not been guided by the legislature in the enabling act, by means of criteria which have been identified and sanctioned by the legislature.

In addition, Congress, in its unequivocal affirmation of the courts powers of review in respect of all invocations of all FOIA exemptions, most notably, in the arena of national security, strengthened a further institutional mechanism for controlling and checking the exercise of executive discretion according to legislative and constitutional precepts.

One would be entitled to assume that the American experience in the arena of national security and access to information, from this point forward, would be one characterised by a strict judicial attitude in response to claims of exemption by the executive.

This assumption does not however hold true. The judicial trend, subsequent to these amendments, has been one of deference to the executive branch of government in the face of claims by the executive of non-disclosure in the interests of national security.

4.7 Judicial Review – Post 1974 and 1976 Amendments

The court's approach to exemption one and the review of claims thereof, has despite the clarity of legislative intent, continued to display excessive deference to classification decisions of the executive. The result:- 'Rarely has the judiciary compelled the government to reveal classified information.'⁴¹

The courts and proponents of this trend have justified this approach by looking to certain Congressional statements made in respect of the FOIA amendments, such as:

⁴¹ B Fein, op cit, p 821

The conferees recognise that the Executive departments responsible for national defense and foreign policy matters have unique insight into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information laws, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.⁴²

It is submitted statements such as these do not, contrary to the courts' opinion, justify the approach adopted by them. Their approach has been characterised, not by merely according substantial weight to the agency, but a fundamental presumption in favor of the agency, as evidenced by the statements made by the court in the case of Alfred A. Knopf, Inc v Colby⁴³. The court, as required by the Act, recognised its power to review the decision to withhold information by the executive in terms of exemption one. It further recognised that the decision to withhold would only be upheld if it was found to be classified and classifiable under the prevailing Executive Order. However, the court effectively rendered this power nugatory by stating that in exercising this power, its starting point would be a presumption in favor of the executive that the public official who classified the information, properly discharged his official duties.

The aforesaid presumption, as with any presumption, effectively shifts the onus to the applicant to prove his or her case as opposed to the agency bearing the onus. The shifting of the onus is rendered even more onerous by the courts tendency to defer to the agency's reasoning underlying the classification decision on the basis of the agency's perceived expertise.

This approach by the court is reminiscent of decisions such as Mink which predate the 1974 amendments and which were founded on the belief that 'national security' matters were to be treated differently, that the standard of review was to be much lower and that the onus would be on the applicant.

The amendments were designed to eradicate precisely this line of thinking. They expressly placed review of 'national security' issues, raised within the context of exemption one, on par with all other exemptions, by expressly requiring *de novo* review of classification decisions, and by placing the burden of proof on the state.

It would be naïve to imagine that the framers of the amendment did not

⁴² S. Con. Rep. No. 1200, 93d Cong., 2d Sess., reprinted in in 1974 U.S. CODE CONG. & AD. NEWS 6285, 6290

⁴³ 421 U.S. 992 (1975)

expect the court, in reaching its conclusion with regard to the classification decision, to give due consideration to the agency's affidavit. However, to argue that the intention of the framers of the amendment was to create a presumption in favor of the agency is not sustainable – their intention was in direct opposition to this.

The trend of judicial deference is revealed in other cases such as, CIA v Sims⁴⁴. This case involved the judicial interpretation of the scope of exemption three as amended in 1976. The question was specifically whether a provision of the National Security Act of 1947 which authorised the Director of the CIA to protect intelligence sources and methods from unauthorised disclosure, qualified as an exemption three statute.

In addition the court was faced with the question as to whether or not certain individuals and institutions involved in a research program and that provided information to the agency were “intelligence sources” within the meaning of the National security Act for the purposes of the FOIA exemption.

On both of these issues the court found in favor of the CIA and held that the exemption was applicable and that the material was protected because it related to intelligence sources.⁴⁵

The findings of the court hinged on its interpretation of “intelligence sources”, which if narrowly construed would have precluded the possibility of the CIA invoking exemption three.

In the court's view, an “intelligence source” was anyone who “provides or is engaged to provide information the Agency needs to fulfill its statutory obligations.”⁴⁶

This was an outright rejection of the previous court of appeals definition which defined “intelligence source” as a “person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.”

In adopting a much wider definition, as advocated by the CIA, the court effectively increased the scope of exemption three. The wider definition allowed a far more extensive body of information, than intended by exemption three, to be shielded from disclosure. In addition, in defining “intelligence sources” in the broadest possible terms, it effectively left decisions as to what constitutes an intelligence source at the sole discretion of the agency. In so doing it lowered the burden of proof to be met by the agency and accordingly, the court largely

⁴⁴ 105 S.Ct 1881 (1985) as discussed in Hughes, Op Cit, p296

⁴⁵ @ 1890 & 2

⁴⁶ @ 1892

negated it review powers.

These criticisms were acknowledged by Justice Marshall who, despite concurring with the majority's final finding, pointed out that the court in accepting the overly broad interpretation of "intelligence source" was giving the CIA director the type of discretion that Congress sought to eliminate in its 1976 amendments.⁴⁷

Justice Marshall further pointed out that a more expansive reading of "intelligence sources" ignored the more rigorous review required by the national security exemption, namely exemption one, which although not raised, was of relevance in view of the subject matter. Further and more fundamentally, it was incompatible with the overall legislative scheme which unequivocally afforded the judiciary an active role in limiting the discretion of agencies to refuse information requested in terms of the FOIA.⁴⁸

Justice Marshall's reasoning in favor of a restrictive definition of "intelligence sources" and the consequences of adopting a broader definition is summarised by Hughes as follows:

Justice Marshall reasoned that his reading of "intelligence source" was more in keeping with the spirit of the FOIA than the overly deferential approach favored by the majority. In fact, he opined that the majority's position actually frustrated the efforts of congress to achieve the delicate balance between the public's need for information and the government's need for confidentiality in some of its operations...[He] believed that in its unquestioning acceptance of the arguments advocated by the agency, the Court was violating the FOIA's requirements that the judiciary review *de novo* agency claims of exemption. In addition, he maintained that the majority in effect was substituting its own judgement for that which properly belonged to the legislative branch.⁴⁹

The last point made could be refined further and one may conclude that the majority was not so much substituting its judgement for that of the legislative branch, but in accepting the agency's argument, it was condoning the executive's usurpation of a legislative function.

Hughes concludes that as a result of the Sims decision, which reflects the current generally deferential approach of the courts to the FOIA national security exemptions, 'those who voice concern over increasing government secrecy will

⁴⁷@ 1898

⁴⁸@ 1895-6, as discussed in Hughes, op cit at p283

⁴⁹M Hughes, op cit, p301

again have to turn to Congress if sweeping executive and judicial policies favoring nondisclosure are to be overturned.⁵⁰

4.8 Australia – Freedom of Information and The National Security Exemption

The Australian federal Freedom of Information Act, like its American counterpart, exempts matters relating to national security. They are exempt, directly in terms of S 33(1)(a), and indirectly in terms of S 38(1). These provisions and the applicable law will not be discussed in detail so as to avoid unnecessary duplication, but will only be discussed in so far as they either depart in their effect from the American provisions or in so far as they echo the same problems encountered in the application of the American provisions.

Section 33(1) states that:

A document is an exempt document if disclosure of the document under this Act:

- (a) would or could reasonably be expected to cause damage to:
 - i.) the security of the Commonwealth;
 - ii.) the defence of the Commonwealth; or
 - iii.) the international relations of the Commonwealth, and

Section 38(1) provides that:

- Subject to subsection (1A), a document is an exempt document if;
- (a) disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment and
 - (b) either:
 - (i) that provision is specified in Schedule 3; or
 - (ii) this section is expressly applied to the document, or information, by that provision, or by another provision of that or any other enactment.

Unlike the American FOI Act exemptions, no system of classification is utilised by the act and accordingly the decision as to whether requested information is a national security matter and accordingly exempt, requires a fresh and independent appraisal and consideration by the decision-maker. In addition, the decision-maker is obliged, in terms of the language of the exemption provision, to consider during the course of his or her consideration of the

⁵⁰ Ibid, p305

requested information, whether the disclosure thereof would, or could reasonably be expected to cause damage to the Commonwealth's national security. As such, an inherent limitation is built into the decision-making process by the legislature's choice of wording in S 33(1)(a) of the Act. This is contrary to its American counterpart which leaves the matter entirely to the discretion of the executive in permitting non-disclosure on the grounds of classification. The executive, in classifying is not compelled by the American Act to weigh any stated competing interests according to a predetermined standard.

The Australian Act's express limitation of non-disclosure, to information which if disclosed, would or could reasonably harm the country's security or defence, does not extend to the imposition of a limitation regarding the type of harm envisaged. When it comes to questions of the type of harm, the language used in the S 33(1)(a) is, as in the case of the American exemption, extremely broad. It fails to give guidance on, or define, what constitutes national security or defence. This determination is left entirely in the hands of the decision-maker. The only potential restraint on the exercise of the decision-maker's discretion in this regard is the availability of an application for *de novo* appeal by the AAT that the requested information does fall into an exempt category. This option is however, as in the American context, not available in the arena of the national security exemption.

Unlike the American model however, this failure is not solely the result of judicial conservatism, but is the direct result of an express proviso to S 33(1) of the Australian Act which states that:

Where a Minister is satisfied that a document is an exempt document for a reason referred to in subsection(1), he may sign a certificate to that effect (specifying that reason) and, subject to the operation of Part VI, such a certificate, so long as it remains in force, establishes conclusively that the document is an exempt document referred to in subsection(1).⁵¹

This proviso unambiguously precludes the possibility of a *de novo* appeal in respect of the decision not to disclose information in the interests of national security. In so doing it treats the national security exemption differently to other exemptions. An aggrieved party does retain the right to pursue the remaining limited alternative remedy of judicial review, as opposed to an appeal, of the decision. However, that review is limited to review of whether 'reasonable grounds' exist for the claimed exemption.

Unfortunately judicial conservatism has seen the adoption of an approach

⁵¹ S 33(2)

to the scope of review in this context 'which robs even this limited scope of review of much significance'.⁵² Accordingly, even the built-in limitation to the national security exemption referred to earlier, namely the duty to weigh the interest against the likelihood of harm, is rendered largely redundant.

The courts' conservative deferential approach was confirmed by the Federal court in the case of Department of Industrial Relations v Burchill⁵³ where it was held that:

...to be reasonable, it is requisite only that [the grounds stated in the conclusive certificate] be not fanciful, imaginary or contrived, but rather that they be reasonable, that is to say based on reason, namely agreeable to reason, not irrational, absurd or ridiculous.

Bayne notes that this test of reasonable grounds, framed as it is in a double negative, in effect casts a burden of proof on the applicant.⁵⁴ His criticism coincides largely with the criticisms levelled at the implications of the American court's approach to its review functions in this arena. Therefore, the approach of both systems may, at worst, be said to be premised on a presumption of reasonableness in favour of the agency, which presumption is not easily rebutted. Alternatively, at best, should this test be seen to in fact impose the onus of proof on the agency, the standard for discharging it is so low as to effectively amount to a favourable presumption.

It is further submitted that the approach adopted by the courts to review for unreasonableness in the arena of national security (in the presence of a conclusive certificate) is reactionary in comparison to the general developmental trend in administrative law to expand the application of the ground of review for reasonableness. Contrary to this trend, the courts' approach harks back to the traditional constrained view of judicial review - a legacy of its English heritage.

This legacy was found to be inadequate in the provision of just administrative action and was accordingly the subject of large-scale change in the process of Australia's general overhaul of its Administrative legal system in the 1970's. These changes saw not only the establishment of the AAT, but also a codification of more extensive and pervasive grounds of review in the Administrative Decisions (Judicial Review) Act 1977.

The minimisation of the potential of review as an effective constraint on the exercise of the national security agencies' discretionary power to withhold information is taken one step further, so as to render it completely ineffective.

⁵² P Bayne, *op cit*, p 183, footnote 17

⁵³ (1991) 14 AAR 408 @ 411

⁵⁴ P Bayne, *op cit*, p 183

The reviewing body is precluded, in the event of a conclusion that the decision was unreasonable, from setting aside or revoking that decision⁵⁵. Contrary to its usual remedial powers, it is limited to merely recommending that the conclusive certificate be revoked.

The rationale for the inclusion of a conclusive certificate proviso and the attendant emasculating of appeal and review as mechanisms of control in relation to national security issues, was that very sensitive documents required additional protection from disclosure, as the exemptions alone would not suffice.⁵⁶ Further, that this additional protection would be assured by locating decisions as to disclosure of these documents at the highest official level.

Criticisms levelled against the Australian response to these concerns are not primarily directed at this underlying rationale. The critics are concerned with the methods chosen to accommodate it, and the adverse consequences of the implementation of those methods. The upshot of the matter is that the reach of the chosen methods enables the decision-maker to capitalise on his or her untrammelled discretion, whether mistakenly, unreasonably or abusively, to protect information not envisaged or intended to fall within the democratically acceptable meaning of 'very sensitive documents'. It in fact allows the decision-maker to determine the founding criteria for sensitivity, as opposed to limiting his or her actions to assessing the content of documents as against pre-determined criteria for sensitivity. The potential for the misuse and abuse of this power in this arena is huge.

As such, criticisms may justifiably be levelled against the immense degree of discretion granted by virtue of the Act's failure to prescribe prior constraints, or *ex post facto* mechanisms of accountability for failing to operate within those constraints.

One particular aspect indicative of the immensity of the breadth of this power and the impact thereof on the availability of information relates to the time period for which the certificates may remain in force. The Act omits to prescribe any such time limits and accordingly information which is the subject of a certificate may potentially be excluded from the public eye permanently or way beyond the life span of the sensitivity of the material.

Recognition of the unacceptable breadth of the certificates and their effect on the availability of information prompted the Senate Standing Committee in its 1987 report to recommend, in an attempt to limit that effect, that the time period for which the certificates would remain in force should be limited.⁵⁷

The Act was duly amended, but this amendment falls far short of

⁵⁵ S 58 FOI Act

⁵⁶ Freedom of Information Issue Paper 12, September 1994, p45

⁵⁷ *Ibid*, p 46

addressing the Senate Standing Committee's underlying concerns. The amended act provides that the period for which the certificates may remain in force **may be limited by regulation**.⁵⁸ As such it leaves the choice of limitation, and in the event of a choice in favor of limitation, the determination of that time period, entirely at the sole discretion of the executive decision-maker.

The legislature's reluctance to act decisively in response to criticisms of the Act's failure to balance the dictates of national security concerns with the dictates of the right to freedom of information, as indicated by the conservative approach adopted in this amendment, means that the issue of conclusive certificates remains firmly on the table.

It was tabled as an issue for discussion by the Law Reform Commission in Issue Paper 12. The following issues or concerns, all of which relate to the breadth of the unreviewable discretion afforded by the certificates, and the implications thereof for a democratic society premised on freedom of information, were raised:

- Are the provisions for conclusive certificates necessary?
- Should the AAT (or any other external review body) be given power to make determinative decisions in relation to conclusive certificates?
- Should the considerations that the AAT has to take into account in considering conclusive certificates be redrafted to enable account to be taken of the public interest in disclosure?
- Should conclusive certificates expire automatically after a specified period of time?⁵⁹

⁵⁸ Freedom of Information Amendment Act 1991 (Cth) S 36A

⁵⁹ Freedom of Information Issue Paper, Op cit, p 46

CHAPTER FIVE

DEMOCRACY, FREEDOM OF INFORMATION AND THE NATIONAL SECURITY EXEMPTION

Proponents of the right to freedom of information as an essential tenet of a constitutional democracy all agree that this right is not absolute – most notably so in the arena of national security. However, the prevailing consensus within this camp is that any limitation on this right, including and especially, limitations in the arena of national security, must be justifiable and sustainable as against the dictates of a sovereign constitutional democracy.

Accordingly, recognition by a legal system of exemptions to, and consequent limitations of, the right to freedom of information, does not justify the automatic conclusion that the system is fundamentally flawed. However, any such exemptions and consequent limitations, must upon evaluation, not be of such a nature, be applied or be permitted to be applied, so as to negate the central principles of a sovereign constitutional democracy.

There are those who apparently locate themselves within the democratic camp and who argue that the systems discussed in the preceding chapter are, despite the nature and pervasive extent of the secrecy practices permitted in the arena of national security, truly democratic. They argue that these practices are compatible with democratic principles. In their view, treating national security matters differently, in comparison to other exemptions to the right to information, is democratically and constitutionally justifiable. The basis for this conclusion is that the national security exemption constitutes a special case. As such, it falls outside of the traditionally accepted democratic standards pertaining to information generally, **and** outside of those pertaining to other exemptions. The democratic standards themselves in respect of the national security exemption are different, dictated by the special needs and interests at play in this arena, and it is against these different standards that the practices must be evaluated.

One such proponent is Bruce Fein. He concedes that a constitutional democracy requires that the public be afforded access to information relating to government practices and policies. He further concedes that the importance of freedom of information finds support in the protection and encouragement of informed public discussion and debate “to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained

by peaceful means.”¹

On these, and the following points, there is no substantial difference between him and many other proponents of access to information as an essential democratic right. He and other like-minded writers agree that, in the absence of the right to freedom of information, the primary democratic objective of responsive government would remain elusive. To this end Fein advocates freedom of access to state-held information by the public so as to enable them to engage in a form of self-government or participation in the process.²

He concedes further that freedom of information is vital not only to responsive, but also qualitative government. Public disclosure and consequent public input is generally accepted by him as leading to an improved quality of decisions.

In short, he concedes that a modern sovereign constitutional democracy, premised as it is on informed public debate and discussion, a degree of self-government or participation, and a responsive government prepared to embrace the opportunity for improved decision-making, requires recognition and protection of the right to access to information.

Having made these fundamental concessions, he nevertheless argues that the American legal system’s formulation and application of the national security exemptions is quite compatible with the value ascribed to freedom of information in a sovereign constitutional democracy.

5.1 The Compatibility Of National Security Secrecy Practices and Democracy

Fein recognises that the American legal system’s formulation and application of the national security exemptions allows for extensive secrecy, and often routine non-disclosure practices, to the detriment of the right to access to information. He concludes however, that the system and its practices are compatible with democracy. His argument in support of this conclusion consists primarily of two legs.

The first is that secrecy may, in limited circumstances, be justified in a constitutional democracy to attain ends, and maintain government interests, which take precedence over a completely informed public – and that secrecy in the arena of national security qualifies as such, in view of the important interests

¹ B Fein ‘ National Security and the First Amendment: Access to Classified Information: Constitutional and Statutory Dimensions’ in Summer (1985) 26 *William and Mary Law Review*, p 812 – quoting an extract from *De Jonge v Oregon*, 299 US 353, 365 (1937) with approval.

² *Ibid*, pp812-813

sought to be protected thereby.³

The second leg of his argument is that issues of national security are of such a nature as to render this arena fundamentally different from other functions of government. This fundamental difference means that secrecy or denial of access to information makes no difference to the attainment of the broader democratic objectives of accountability, participation, responsiveness and the attendant benefit of improved decision-making. These objectives, he argues, because of this fundamental difference, do either not apply in the arena of national security, or if they do, are capable of being achieved through more appropriate, alternative means, not dependant on freedom of information.⁴

The interests referred to under the first leg of Fein's argument are in his words "national interests [which] concern in a fundamental sense our national survival"⁵. Not surprisingly, the examples used by him to illustrate his point, fall largely within the realm of the military.

There is, he argues, a compelling interest in maintaining secrecy of weapons information, because disclosure may aid the military strength of international enemies, or may undermine the fighting capacity of the country's armed forces. These interests require protection of this information from disclosure, not only during periods of war, but even during peacetime, as this type of information may at all times be exploited by terrorists and used to the detriment of the country.

Other types of military information worthy of protection from disclosure are, by way of example, the plans of a nation's armed forces, details of its military troops and tactics.

In addition, he advocates the extension of protection against disclosure, on the same grounds, to include 'national interests' other than purely military secrets. The extended national interest arena includes information relating to foreign relations, treaties and executive agreements. These interests, he argues, require protection and justify secrecy beyond the military ambit, and outside of the war context, as secrecy in these areas is often a pre-requisite for the deterrence of military aggression and for avoiding the endangerment of lives.

Failing to maintain secrecy in this extended arena could have the following adverse effects:

- Express or tacit agreements between countries would be scuttled or their terms adversely skewed, if the content of negotiation deliberations, or advice given to the Head of the Executive were disclosed.
- It would 'chill' candid discussions between Presidents.

³ Ibid, pp810-811

⁴ Ibid, p814

⁵ Ibid, p810

- It might adversely affect national interests by undermining an agreement otherwise advantageous to the nation.

Further, many of these considerations, he argues, retain their force, even after negotiations have been concluded, because it may affect future negotiations.⁶

Interests such as these, he argues, focused as they are toward “safeguarding the nation’s survival, or supporting urgent foreign policy or national security goals, may require the President to withhold classified information from the public or Congress.”⁷

To paraphrase Fein, he argues that extensive secrecy in this arena is justifiable in view of the nature of the interests sought to be protected, and further, moving onto the second leg of his argument, does no harm to democracy because the usual democratic concerns relating to freedom of information are answerable within the national security context.

This second leg of his argument appears to be premised on the assumption that the reasons for regarding the right to know as a fundamental democratic right are rendered largely redundant in the national security arena. This assumption underpins his argument that national security secrecy practices are compatible with democratic principles and values. The two are compatible as denial of the right to information does no harm to attaining democratic objectives, or conversely were it to be respected in this arena, would not have the desired democratic results. Objectives such as responsive, accountable and quality government are not dependant on freedom of access information classified in the interests of national security.

So for example, he argues that the right to know, so as to enable the citizen to evaluate government action, is not essential in this arena. The public has no need for particular items of classified information in order to evaluate government performance. The public, he argues, are able, in the light of the masses of non-classified information available, to assess the state’s national security programmes without having recourse to classified information.

In his view, information of this nature is rendered even less essential by virtue of the fact that the public, in engaging in the process of evaluation, are concerned primarily with whether or not national security policies have been successful and that:

..the particular items of classified information employed in achieving success or in suffering defeats are, at best, of secondary interest. The

⁶ Ibid, p810-811

⁷ Ibid, p 806

electorate generally know, without access to classified information, whether the nation is at war, or has strengthened its alliances, or has improved its international posture.⁸

The public are accordingly enabled, on the basis of available information, to evaluate government policy. Furthermore, should the public be dissatisfied with the revealed policy and practices, denying them access to classified information does not impair their democratic power to vindicate their own national defence or foreign policy preferences. Such denial does no harm to accountability of the executive as the electorate still retain indirect control over their preferences through the electoral process, which ensures not only accountability, but responsive government as well. Should the public, upon evaluation, be displeased, it can make its preferences known and an “incumbent president virtually may be ousted from office if the public believes his foreign policies have failed.”

With regard to the democratic premise that access to information engenders better decision-making, he argues that:

..the likelihood that publicity of government deliberations and consequent public input will improve the quality of decisions or agreements is insubstantial. [Because] Members of the public ordinarily lack the time or comprehensive knowledge needed to make a productive contribution to national security decision-making by the government.⁹

This essentially elitist view is shared by writers such as Walter Lippmann who is more unambiguous and outspoken in his belief that:

..popular opinion cannot be right on the large questions of war and peace since these matters require a knowledge and experience which ordinary people lack.¹⁰

Fein hedges his elitist argument with the rider that even were government decision-making likely to be improved, such improvement would apply only in limited circumstances, and any limited benefit derived, would in any event be outweighed by the harm publicity would cause.

The expertise argument excludes the public from both participating in the decision-making process and engaging in a qualitative assessment of such

⁸ Ibid, P 814

⁹ Ibid, p815

¹⁰ In Mathews, op cit, p21

decisions with a view to holding the decision-maker accountable in respect thereof. Its exclusionary power however goes further than merely excluding the public from participation and accountability procedures. It also serves to justify absolute and exclusive control by the appointed experts, namely the executive, at the expense of the other two branches of government – the legislature and the judiciary. National security decisions, specifically questions as to what in fact constitutes the interests of national security, is by necessity the preserve of the executive experts. These determinations, and consequent decisions to refuse access to information, are beyond questioning outside of that elite circle, whether it be by the public, the judiciary or the legislature as:

Only a national government which has day-to-day experience of conducting international relations can judge when disclosure of information in its possession concerning international relations or national security is justified.¹¹

Fein and other like-minded writers use the expertise argument to sustain their conclusion that the limitation of public access to government held information, legislative exclusion and inertia and judicial conservatism and deference in the arena of national security, is democratically sustainable.

5.2 The (in)Compatibility Of National Security Secrecy Practices and Democracy

Writers such as Thomas Emerson, Mary Cheh and Anthony Mathews would disagree with the conclusions drawn by Fein. They argue, it is submitted, quite correctly, that the American system's treatment of the national security exemptions, is fundamentally problematic and irreconcilable with the dictates of a modern sovereign constitutional democracy. The problem lies in a number of features characterising the American system, which result, not in the limitation of the fundamental democratic right to freedom of information, but the negation of this central right. The negation of this right in turn irredeemably frustrates the attainment of the democratic objectives of participation, accountability and responsiveness.

The features which these writers are critical of may be summarised as follows.

In the formulation of the exemptions, the executive is afforded too broad a discretion to define, and/or to determine, the scope of their application. The key

¹¹ Norman Marsh (Ed) Public Access to Government Held Information, 1987, p9

term of 'national security', which is the stated criteria for determining disclosure, or more specifically, denial of access to information, is a "concept of enormous ambiguity". It is "virtually without limitation", and is capable in the context of modern society of embracing almost any aspect of society.¹² The legislature, in the drafting of the exemptions, has failed to limit the scope of this term. This failure is attributable to its failure to provide guidance as to its meaning and content. In so doing it has afforded the executive branch an almost limitless discretion to ascribe a meaning to it, and to determine its content, and as a result, this branch has been afforded equally extensive power over an effectively limitless arena of information.

It is this feature which prompted Cheh's criticism that:

The exemption in the Freedom of Information Act which exempts disclosure of information properly classified as 'secret in the interest of national defence or foreign policy' is not so much an exemption as a license to withhold. [Because] The executive Branch both establishes the criteria for classification and performs the actual classification of such information.¹³

This criticism is valid as against both the American and the Australian Freedom of Information exemptions, in both their wording as well as their recourse to classification on the one hand and conclusive certificates on the other.

The adverse consequences caused by this legislative inertia are compounded by prevailing judicial attitudes (which as was illustrated are immune to legislative directives to change) of conservatism and deference to executive branch decisions. The prevailing judicial approach, informed by the "political question doctrine or similar prudential issues"¹⁴, has resulted in the judiciary failing to fulfil its intended role, namely to check the exercise of executive discretionary power. Conversely, the effect of the judiciary's attitude is a condonation and legitimation of the ever increasing extent of discretion in the arena of national security.

Legislative inertia and judicial deference have together fostered a legal environment entirely at odds with the fundamental democratic tenet that the public have a constitutional right to know. As discussed earlier, the fundamentality of this tenet finds recognition in the same systems' Freedom of Information Acts, which vest the right to know in all persons, irrespective of

¹² T Emerson, op cit, p 846

¹³ M Cheh, op cit, p 691

¹⁴ Mark D Robins 'Book Review of National Security Law by Stephen Dycus' in (1991) Vol 11 Boston College Third world Law Journal, p 380

need, which expressly create presumptions in favour of disclosure, and which locate the onus to disprove these presumption on the state.

The American system, in its formulation of the national security exemptions and judicial attitudes thereto, reveals an irreconcilable inconsistency, in respect of the sentiments underlying, on the one hand, these express affirmations of the right to know, and on the other hand, the sentiments underlying the limitation of this right in the arena of national security. The sentiment underlying the affirmations are inverted, in the formulation of the national security exemptions, and judicial attitudes thereto. The latter two factors act in concert so as to effectively, and unjustifiably, create a converse presumption in favour of non-disclosure in this arena. In so doing the onus is shifted and placed on the citizen seeking the information. The effect of this is to erode the integrity and status of this right to information as a fundamental democratic right.

The objection is not to the existence of the national security exemption in principle, but to the underlying premise informing its formulation and application, which effectively inverts the status of the democratic right to information in this context.

The ethic of non-disclosure engendered by the dynamics of the national security exemption has in fact seen and sustained the exclusion, not only of the public from this arena, but also the legislative branch of government from national-security information and decision-making. This exclusion found expression in, for example, section 4.1(a) of President Reagan's order, which precluded disclosure of classified information to anyone other than executive branch officials. This trend however pre-dates Reagan's directive as evidenced by the American experience during the Vietnam war and the Cuban affair, which witnessed bodies with constitutional authority over questions of war and peace becoming the victims of defence secrecy. In the former instance, congress was consistently kept in the dark, and in the latter, the CIA kept vital information even from the head of the executive.¹⁵ The extent and consequences of this alarming trend in the United State are summarised succinctly by the novelist and social commentator Gore Vidal:

We have not declared war since December 1941 and we have fought about 50 wars since then. That means that the House of Representatives has given up its great powers and the power of the purse is now rather dubious since the executive does all sorts funny things when it wants to raise money without consulting the House it feels the House won't go along.

¹⁵ A Mathews, op cit, 21

The Constitution doesn't work.¹⁶

Our local South African experience serves as a further example of this dangerous trend toward legislative ignorance of national security secrets. One simply has to look to the host of senior parliamentarian's testimony at the Truth and Reconciliation Commission's hearings. They routinely alleged that they did not know of the security branch's covert atrocities. (Of course circumstances are such that the veracity of these statements are open to question.)

Despite the damage this trend does to one of the foundational precepts of a sovereign constitutional democracy, namely the separation of powers and the directly related question of sovereignty in a democracy, there are those who argue that the exclusion of the legislature from access to such information, and in fact, national security decision-making, is quite compatible with democratic principles. One of the justifications for this proposition is the danger of leaks from within the legislature and the consequent danger for national security. (The proponents of this argument, needless to say, do not deal with the danger of leaks from within the executive branch and why the propensity for leaks should be any less here as opposed to from within the legislative branch.)

One such proponent is Lee Weingart who argues that the danger of leaks is so compelling that the legislature's functions must be limited, so as to preclude it not only from such access, but also so as to generally preclude its law making functions from legislating on access to national security information.

He argues that this domain falls entirely within the exclusive jurisdiction of the executive branch, and that the legislature's role in this regard should be limited to the prevention of mismanagement or wrongdoing. It is therefore, in the arena of national security information, limited to legislating for example, only whistleblower legislation.¹⁷

This argument, that the legislative branch of government should be precluded from access to national security information, and by extension, excluded from formulating policy and enacting legislation in regard to access thereto, provides a key to understanding one the fundamental problems with the national security 'exemptions' as discussed thus far. The extent of the damage done by this argument, and the ease with which such damage is espoused, to the fundamental, traditional pegs of a sovereign constitutional democracy, is indicative of the underlying undemocratic assumptions informing this point of view. These assumptions are irreconcilable with the separation and division of powers, parliamentary sovereignty *vis-à-vis* the executive, the rule of law and

¹⁶ Interview with Gore Vidal, Mail and Guardian, March 19-25, 1999, p 25

¹⁷ Lee C Weingart 'Who Keeps the Secrets? A framework and Analysis of the Separation of Powers Dispute in *American Foreign Service Association v Garfinkel*' in (1990), Vol 59 George Washington Law Review, p229

accountability - the traditional foundational precepts of constitutional democracy.

The doctrines of parliamentary sovereignty and the separation of powers do not emerge from this argument, in support of excluding the legislative branch from this arena, remotely intact. The reasoning underlying this argument seeks to place the legislative branch as a mere limited mechanism of control, in respect of only wrongdoing or mismanagement, as opposed to a policy steering mechanism. This reasoning runs counter to the primary tenets of parliamentary sovereignty, and the separation and division of powers, as between the legislative and executive branches of government.

The envisaged placement of the legislative, *vis-à-vis* the executive branch, expresses and gives credence to an inversion of power between these two branches of government. The implications for constitutional democracy and the allocation of power on which it is premised are profound. The end-result has been that:

... the Constitutional allocation of authority over national security and foreign affairs has become distorted due to executive overreaching, congressional acquiescence and judicial indifference.¹⁸(my stress)

Constitutional democracy's separation and division of power is central to the sustainability of the classical liberal democratic tradition's theories of representation, or participation by proxy, and accountability – the theoretical guarantors of popular sovereignty.

In relying on these central precepts, traditional theory has been able to justify significant degrees of secrecy and institutionalised inaccessibility to the executive branch of government, in relation to the electorate. The main point supporting this exclusion is that the electorate's access to, and participation in, the executive branch's activities is both unnecessary and undesirable. It is unnecessary because the primary objectives of participation and accountability of this branch to the electorate, are guaranteed, by proxy, through their elected representatives, who collectively ensure responsive government. The elected representatives, or parliament, in response to the electorate's needs and interests, formulate appropriate policy by way of legislative enactments. The legislature's delegation of power to the executive is limited to the power to implement that policy, under the control of the legislature. The possibility of executive overreaching is minimal as it is routinely accountable directly to parliament. In addition, legislative control is enforced through the courts, in terms of the theory of the rule of law.

¹⁸ H Koh, in T Peterson, op cit, p 748

Classical liberal democratic theory and its rationale for justifying secrecy, has, as discussed in the preceding chapters, been subject to stringent criticism. The theory and underlying reasoning in support of institutionalised secrecy has been debunked, in view of its ineffective delivery of participation and accountability. It was precisely this inefficiency which necessitated a paradigm shift to a constitutional vision of democracy premised on the central democratic right to freedom of access to information.

Traditional theory, with its emphasis on representative democracy, is fraught with problems in delivering on the objectives relating to responsive government, but does, nonetheless provide some succour. However, even the minimal protection afforded by it is lost by the exclusion of the legislative branch of government from this domain. The reasoning underlying this exclusion makes a mockery of even those limited mechanisms of participation, control and accountability encoded in the traditional doctrines underpinning the theory of representative democracy.

Within the national security context, this reasoning has seen the exclusion of the legislature, the only link between government and the electorate, and has accordingly eliminated the traditional democratic route to participation and accountability of the executive to the electorate, even if such was by proxy. The legislature's envisaged role in this arena as a mere "watchdog" in cases of abuse of power, reveals a skewed focus on posterior control as opposed to prior participation. This focus by its very nature precludes delivery of one of the central ideals of democracy - responsive government through prior participation. Even the envisaged posterior control by the legislature is severely curtailed and emasculated by the limitation of its role to that of a "watchdog". The limitation of its "watchdog" role to cases of mismanagement and abuse, rather than in respect of substantive content and direction of executive conduct, means that the degree of accountability of the executive to the legislature falls far short of the degree prescribed by classical traditional democratic theory.

In addition, the ordinarily available limited opportunity for effective public control and rectification through judicial review, has also been precluded. The capacity of judicial review as a means of accountability, has in practice, been emasculated within this context.

Accumulatively, the inversion of power and absence of even those traditional mechanisms of participation and accountability in the national security arena pose significant and insurmountable problems for any assertion that national security secrecy practices are compatible with democracy. The effective displacement of even the traditional, but outdated and ineffective democratic mechanisms and procedures is indicative of the extent of the disparity between the assumptions and attitudes informing issues of national security and

democracy. The attitude revealed by the level of disregard for even these traditional procedures is indicative of a fundamental lack of respect and commitment to the attainment of the democratic objectives of participation and accountability.

The national security exemptions' position outside of the obligations imposed by the law generally so as to ensure democracy, is arguably democratically justifiable. This location is anticipated and provided for in the freedom of information laws' recognition of certain exempt categories, of which national security is only one.

However, the national security exemptions have, through their formulation, and in their application by the executive branch and the judiciary, been treated differently, not only to the generally applicable law, but most notably, differently to the other exemptions. This difference in treatment has resulted in the national security exemptions, or more specifically, the denial of information in terms thereof, unlike the other exemptions, subject to the law's secondary level of checks and balances designed to ensure that the exemptions are applied so as not to unduly negate democratic principles and ideals. This difference in treatment translates into the claim that the national security exemptions, unlike the other exemptions, are in fact not to be regarded as an exemption, in the ordinary sense of the term, to the ordinary rules of democracy and freedom of information. The reference to an exemption naturally implies an exemption to some pre-existing fundamental standard. The national security standard however becomes its own pre-existing standard, displacing all other (democratic) standards, including the standards of traditional theory. As such the national security exemptions are not exemptions, but constitutive of the rule itself. The defining principles and standards of a sovereign constitutional democracy, and the implicit importance of freedom of information in relation thereto, become the exemption in this arena, permitted limited application only for the purpose of control of abuse. This inversion, it is submitted, amounts to a complete negation of democratic principles and standards and no amount of argument can overcome this difficulty. Any argument of compatibility between national security and democracy is fundamentally incoherent as democracy is displaced in its entirety.

The potential for the wholesale displacement of traditional democratic standards and institutions inhering in the assumptions underlying the national security exemptions, strengthens, rather than weakens, as argued by proponents of secrecy in the national security arena, the need for the recognition and protection of the democratic right to freedom of access to information.

In the absence of such recognition and protection, the executive branch of government is permitted to operate unhindered by public pressure and remains

unaccountable in respect of its activities. The absence of public pressure and accountability allows the space, which has been capitalised on, for not only the existence, but also the incremental “growth of unilateral executive authority”¹⁹.

5.3 The Dangers Of Secrecy Inhering In The National Security Exemptions - For Democracy And Good Government

In the absence of participation and accountability the prevailing ethic of secrecy creates the space for the expansion of the national security arena, and the attendant expansion of the power and functions of the executive branch responsible for it. This expansion is intricately linked with the definition of national security, or more specifically, the lack thereof. This lacunae effectively locates the power to define within the exclusive jurisdiction of the executive branch of government, and ‘once government controls the definition of national security, there is no limit to what information it may decide falls within this category’.²⁰ Further, in the event of questions being raised as to the legitimacy of the inclusion of certain information, the decision-maker simply has to raise the defence of expertise to block any questioning of their decisions.

The spectre of secrecy of course means that the chances of being afforded the opportunity of even being able to raise one’s question is minimal – one is simply not privy to the substance of the decisions or the workings of this branch as a matter of course.

The prevailing ethic of secrecy, in conjunction with the indeterminacy of the concept, creates the space for the ready expansion of circumscribed and legitimate secrecy into broader unauthorized and illegitimate secrecy practices. These extended and illegitimate secrecy practices in turn mean an extended area of government subject to no restraints, and “where intelligence and security officials are subject to no or few legal restraints, they very easily constitute themselves into new and unaccountable centres of power in the state.”²¹

The scope for abuse of this power inhering in these practices, and the cover implicitly provided thereby, allows for the assumption of new and unauthorized functions, which assumption is often the precursor of abuses and illegalities, under cover of the national security exemptions.²²

The space created has been capitalised on, more often than not, to further illegitimate agendas, as illustrated by the following tendencies and trends,

¹⁹ H Koh, op cit, p 752

²⁰ A Mathews, op cit, p 20

²¹ Ibid

²² A Mathews, op cit, p19

identified by Mathews²³.

Within the intelligence agencies, whose primary function is the collection of intelligence material and its evaluation, there has been a tendency “to extend their functions under the shield of secrecy to covert operations”.

Related to the above tendency, is the tendency on the part of the security branch of government to shroud more than military matters in secrecy. As a result, the denial of the right to know or participate is extended to matters only indirectly related, or even wholly unrelated, to matters traditionally and legitimately regarded as relating to national security. As a consequence, the extent of the political arena amenable to public scrutiny and participation is incrementally reduced at the behest of an unaccountable executive as secrecy practices are transformed into ‘super secrecy’ practices. This tendency towards super secrecy is borne out by the American experience. In the United States, past experience has shown that the classification process is grossly overused and often abused in that millions of documents are, as a matter of routine, stamped as classified.²⁴ This observation is vindicated by the discussion in the preceding chapter relating to President Reagan’s executive order which compelled automatic classification of certain information falling within broad categories without the necessity for establishing, prior to classification, whether disclosure of that specific information would adversely affect national security interests. The National Co-Ordinating Committee for the Promotion of History found that the order’s tone and directive did in fact result in indiscriminate classification of vast amounts of information. As a direct result of Reagan’s order there was a massive restriction on previously available information.²⁵

Exclusive control of information and prevailing extensive secrecy practices afford the controller the opportunity for the manipulation of information, which may degenerate into disinformation practices for the purpose of enhancing power or weakening the position of opponents. In addition it permits the space to cover up incompetence, mistakes and corruption.

This sampling of the adverse effects of secrecy within the national security context goes to show the dangers posed thereby for democracy and the democratic right to freedom of information. They all gravely injure the citizen’s right to know and the attendant rights to responsive and ‘good government’.

Not only do they gravely injure the citizen’s right to know, but also give rise to further problems for good governance and decision-making. For example, super secrecy practices often have the result of impairing rather than enhancing the “critical judgement of those who evaluate intelligence and of those who act

²³ A Mathews, op cit pp 18-21

²⁴ Emerson, op cit p 846

²⁵ See footnote 24 , Chapter 4

on the evaluations, ” because:

...secrecy encourages the worst kind of agents for objective reporting and discourages the consideration of alternative sources of information and views.²⁶

5.4 Responses To Proponents Of The Compatibility Of The American And Australian National Security Exemptions To The Right To Freedom Of Information And Democracy

The aforesaid observations and discussions serve to undermine the validity of arguments such as those raised by the likes of Fein and Lippmann and serve to inform the following responses thereto.

Responses to Fein’s argument are not so much located in an attack on the first leg of his argument, that the nature of the interests falling within the ambit of national security require protection from non-disclosure. Fein’s critics acknowledge that there are certain interests which require protection from disclosure. These critics are however sceptical of the *bona fides* and legitimacy of some of the claims made by government that disclosure will in fact harm national security, in view of the frequency of, and the motives underpinning such claims.

The motives for such claims are viewed with skepticism in view of the intricate relationship between secrecy, or the power over information, and power generally. The nature of this relationship provides a compelling incentive for executive security branch personnel to engage in exaggeration, or even outright distortion of the truth. It serves as a source of extended power. This power is sourced in, and legitimated by the belief in the public’s eye of the existence of a threat, as this belief in turn translates into an acceptance and even the defence of permissive secrecy and unaccountability. Often, the simple invocation of the label “national security” evokes this belief in the public’s mind. Therefore:

Defining a problem as a national security issue automatically legitimises the use of exceptional means in response to that problem.²⁷

Accordingly allegations of harm to national security, permit the scope for increased power. The limits of that scope are determined, at the end of the day, by those who have the power to define or label. This concern finds expression in Michel Foucault’s concern with power. For Foucault:

²⁶ Mathews, op cit, p19

²⁷L Nathan, The Changing Of The Guard: Armed Forces and Defence Policy in a Democratic South Africa, 1994, pp 24-25

Power is not a negative but a positive phenomenon: “Power produces; it produces reality; it produces domains of objects and rituals of truth” (SP, pp196/194). *Discipline and Punish* eloquently testifies to this new attitude toward power, for a central contention in this work is that the social role of the prison was not to repress delinquency but to create it.. By thus manufacturing a threat to social stability, the prison provided a rationale for the construction of the vast apparatus of control and discipline that now dominates bourgeois society.²⁸ (My stress)

In terms of the national security exemptions under consideration, allegations of harm to national security legitimate, and by extension, an extension of power. The security branch of government are enabled, in terms of the ethic underpinning these exemptions, characterised by an unquestioning acceptance of purported allegations of harm, to establish illegitimate, untested and unaccountable centres of power in the state. This power is sourced in the perceptions generated by exaggerations and distortions of the threat of harm. The temptation for unjustified allegations is all too real.

These perceptions are generated, not only by outright fabrications of allegations of harm, but also through more sophisticated means of manipulation of information. These more subtle distortions, which may on the face of it appear to justify the assertion of harm to national security, are on closer scrutiny (which is of course precluded in the ordinary course of events), often revealed for what they are – mere rhetoric designed to prompt a public, legislative or judicial response which condones and ‘legitimizes’ further opacity.

Cass Sunstein cautions against accepting even apparently substantiated allegations of harm at face value, in view of the power vested in those with a monopoly over information, and the tendency to capitalise on that power, to pursue illegitimate ends. The monopoly enjoyed over all relevant information translates into the power to manipulate the information ultimately disclosed and the facts presented in support of allegations of harm.

He notes that “the reduction of social risks has perhaps been the most intense preoccupation of regulatory government in the last quarter century [and] an extraordinarily wide range of agencies. . . . are obliged to protect [society] against the dangers they face in daily life. Here democratic aspirations loom large. Here those aspirations have often been disappointed.”²⁹ Sunstein’s discussion points specifically to agencies responsible for the regulation of civil social risks, as opposed to, for example, ‘military’ type social risks. However, the

²⁸ A Megill, *Prophets Of Extremity: Nietzsche, Heidegger, Foucault and Derrida*, 1987, p241

²⁹ Cass R Sunstein ‘Informing America: Risk, Disclosure, And The First Amendment’ in Winter 1993 *Florida State University Law Review*, p 653

national security agencies certainly would fall within the broad context of his argument, as they are imminently geared toward protection against danger. His comments are accordingly equally applicable to the national security agencies, as in fact has been shown thus far.

He argues that one of the reasons why democratic aspirations have often been disappointed in this context is because of the agencies' deliberate and sustained efforts to retain absolute decision-making power, and their complete lack of effort to benefit from, or to increase citizen participation in the decision-making process. One routine method of justifying and maintaining the exclusion of democratic processes, including access to information, is by focusing the public's, and even the legislature's attention, not on the full spectrum of possibilities of outcomes, but "instead on isolated extreme cases".³⁰ These isolated extreme cases are then presented and depicted as constituting the norm, or in other words, as being generally applicable, and the standards are set accordingly. The standards set in the context of freedom of information are broad and generally applicable secrecy practices, rather than isolated instances of secrecy, tailored in accordance with reality of the infrequency or limited applicability of the extreme case resorted to as justification. This skepticism of allegations of harm in the face of the tendency to manipulation and exaggeration is shared by Emerson in his observation that:

Experience has shown that government claims of harm to national security are highly exaggerated and must be viewed with the utmost skepticism.³¹

An element of this type of information manipulation and exaggeration is evidenced in, for example, Fein's reasoning with respect to purported allegations of harm to the country's national defence. Most of the interests referred to, and the dangers alluded to by him, in this context, are rationally located within a war-time context. In the hands of writers such as Fein, they are, with a glib slip of the tongue, presented as justifications for secrecy even in peacetime. This jump in logic requires substantial explanation and justification. It is not sufficient to offer, in lieu of the required explanation and justification, one or two isolated extreme cases in justification of secrecy as a general peace-time rule, which cases will often be chosen precisely because of the potential for extreme consequences inhering therein. What is required is rational justification on a case by case basis, which is based on a real probability of harm as opposed to a mere assertion of harm. Without this rational justification, allegations of harm amount to no more

³⁰ C Sunstein, *op cit*, p 653

³¹ T Emerson, *op cit*, p 846

than expedient scare tactics.

Apart from this cautionary note of skepticism, Fein's opponents do not fundamentally disagree with the essence of the first leg of his argument. They agree that certain interests do require the protection afforded by secrecy. Their opposition centres primarily on the those aspects of his argument falling under the second leg of his argument in support of his conclusion that prevailing national security secrecy practices and democracy are compatible.

To recap, he argues that the democratic assumptions and objectives underpinning the right to information are unable, because of the nature of national security, to be realised in this arena, even if the information were available. Alternatively, in the event that democratic assumptions and objectives are realisable in this arena, those assumptions and objectives can be achieved by means other than access to information. Accordingly, denial of information or secrecy does no harm to democracy and the two are accordingly compatible.

By way of illustration, he argues that the democratic objective of enabling the electorate to evaluate government policy and actions is not frustrated in this arena by denying access to, for example, classified information. This is so for two reasons. On the one hand, the public still has access to the masses of unclassified information, which should suffice for these purposes. On the other hand, the public generally, in engaging in such an evaluation, are not concerned with the particularities of government policy and actions. They are concerned only with success or failure, and as such, detailed classified information, is only of secondary importance.

His argument that the public retains the right to access to masses of unclassified information is open to dispute when viewed in the context of the trends which have developed in the arena of national security. One such trend, as pointed out earlier, is the massive growth of the body of classified information in the United States which has meant a massive restriction on available information. As such, his assertion that the public has recourse to masses of information is incorrect.

In addition to questioning the actual quantity of unclassified information that is available, one must also question the content and veracity of that information. The power vested in the controllers of that information to manipulate and distort, as well the incentive to in fact engage in such conduct, must be borne in mind when evaluating information that is readily available.

Fein's proposition that the public has access to masses of unclassified information and hence are able to engage in evaluating government performance is problematised if one assumes that at least some of that information is inaccurate or even distorted. Even if one were to assume that all available unclassified information was not tainted, one could not confirm, with confidence,

the public's ability to rationally evaluate government action. Any such evaluation would be on the basis of an incomplete selection of information, which may be presented or perceived out of context. The ability to evaluate a comprehensive policy or programme must surely be significantly impaired if that evaluation is based only on isolated bits of information, rather than on the full spectrum of relevant information.

Fein's presumption that the availability of unclassified information is sufficient for the purposes of evaluation is buffered by his assumption that the public, in evaluating government action, are not concerned with the individual items of information, but only with the success or failure of national security policy. This assumption fails to justify extensive secrecy practices in two respects. Firstly, it fails to take into account the fact that the power to manipulate information includes the power to manipulate perceptions as to outcomes. In addition, and more fundamentally problematic, is the assumption itself, that the public are concerned only with outcomes. The one point which has been stressed in this thesis is that political society has realised that focussing only on outcomes or results has failed to deliver on the democratic promise of responsive and accountable government. The nature of the modern state is such that participation in, and knowledge of, ongoing government is vital to democracy. This recognition fostered the recognition of a need for a paradigm shift, in which democratic governments have engaged. This shift, by virtue of its focus on responsive government has recognised the right to information as a fundamental democratic right to know, as opposed to limiting recognition of that right to instances where the public can show a direct and specific need for it. These sentiments are equally applicable to national security branch of government as it certainly forms an integral part of, and exhibits the same characteristics as all other branches of the state.

Fein's assumption that the public are interested only in outcomes:

...underestimates the force of [this] precept... that the public have a constitutional right to know...- that the people as sovereign need to be kept informed of all matters affecting the public interest... [a precept] which goes to the essence of democratic government."³²

There is nothing inhering within the context of national security matters to justify the displacement of this fundamental precept. In fact, the argument raised by the likes of Fein, that the dire nature of the consequences of decisions in this arena are justifications for such a displacement, pale in comparison to the

³² T Emerson, op cit, p846

antithesis thereof. Writers such as Fein:

... ignore the moral right of the citizens in a democracy to have relevant knowledge of and influence upon the terrible decisions of war – a right which no one has expressed more cogently than Jefferson: “It is their sweat which is to earn all the expenses of war, and their blood which is to flow in expiation of the causes of it.”³³

Fein’s third proposition in support of his conclusion that secrecy and democracy are compatible is that denial of access to information in this arena does no harm to the public’s democratic right and ability to vindicate their preferences. Assuming that they are in fact enabled, on the basis of available information to assess the outcomes of the government’s national security policies and programmes, they are able to vindicate any dissatisfaction through the power of the vote. The American electorate retain the ability to remove the President, who is both the head of the executive and head of national security, from office by means of the vote.

This argument, when viewed in the context of the discussion to date, lacks cogency in its failure to account for the fact that:

By the time a secret is discussed in a public... setting, it no longer exists as a secret. But the trails in memory that secrets leave reveal the distances they have travelled, the force of their passage, the gashes they have left in the ongoing order of things.³⁴

In the context of national security, the legacy of that secrecy is potentially for the people, one of mayhem and destruction. This potential renders the power to remove the President, only after the fact, of little value. In this context, the power to remove the President or the government of the day, amounts to no more than too little, too late.

Resorting to the vote as a tool of participation and control, in lieu of access to information, cannot sustain the argument that national security secrecy practices are compatible with democracy. It is precisely the inadequacy of this tool which fostered the paradigm shift toward a more democratic form of governance.

The American Watergate saga provides a concrete example of the inadequacy of the vote, and the consequences of that inadequacy, in the arena of

³³ A Mathews, op cit, p 21

³⁴ K L Scheppelle Legal Secrets – Equality and Efficiency in the Common Law, 1988, p5

national security. In addition, the legislative response to this saga is instructive in that it expressed a recognition of, and dissatisfaction with these inadequacies, which were remedied by strengthening the right to access to national security information.

This historical episode illustrates the potential space for extreme abuse of power at the highest level, within this arena, under cover of the protection provided by extensive and institutionalised secrecy. The vote in this instance, although utilised after discovery of the executive abuse of power, was inadequate in its inability to prevent, rather than cure that abuse. The inadequacy of this tool was confirmed by the frenetic legislative activity in the months immediately following this saga which culminated in the 1974 and '76 amendments to the Freedom of Information Act. These amendments aimed (albeit ineffectively) to strengthen the right to know, specifically within the national security context, presumably so as to avoid a repetition of the unacceptable abuse of power which was made possible by the system and its protection of secrecy. It was:

... the first major step forward in helping to restore the confidence of the American people in the institutions of government by purging the body politic of the secrecy excesses which marked the sordid Watergate cover-up.³⁵

Fein's arguments thus far are all located within the largely problematic discourse of representative democracy with its emphasis on the vote as the pinnacle of democracy. The language of representative democracy creates the space for the assumption that the voting electorate engage in the process of government every five years or so when they cast their vote, and are accordingly a body distanced from, and ignorant of the interim machinations of government. It is therefore hardly surprising that Fein, in view of his reliance on representation and the vote, confidently concludes that freedom of information and consequent increased public awareness, does not in this arena, lead to improved decision-making, in view of the public's lack of time and knowledge.

This argument is problematic in view of the fact that it becomes a self-fulfilling prophecy. It depends for its cogency on prior public exclusion, which is in fact responsible for creating that lack of knowledge. As such, the argument is rhetorical, as it is ultimately that original public exclusion which justifies further public exclusion, and not the lack of knowledge. In addition, his conclusion that denial of access to information is justified by the public's lack of expertise may be subjected to the same criticism levelled against Lippmann's similar reasoning

³⁵ Statement by Rep. Thompson, 120 Cong. Rec. 34, 168 (1974), in Hughes, *op cit*, p23, footnote 147

and conclusion, by Mathews that:

[He] fortifies his case by a concealed assumption that the citizen's right to information is virtually the right to take the final decision. The final decision will inevitably be taken by the constituted authorities of the general public. What is demanded is not that these authorities be deprived of their constitutional authority to act but that their judgement on behalf of the people be conditioned by as full an adversary discussion of the issue as the philosophy of the open society implies.³⁶

Fein's arguments fail in their entirety to address these fundamental concerns, and accordingly fail to sustain his conclusion that democracy and national security secrecy practices are compatible. His arguments fail to recognise the extent of the harm done by the American system's national security secrecy practices to democracy. They fail to recognise that these practices negate, not only the democratic rights of participation and accountability, which are of vital importance to democracy in terms of the shifted paradigm, which the American system purports to have engaged in. In addition, they negate the traditional precepts of constitutional democracy. It is precisely this negation, and the extent thereof, which leads to the conclusion, contrary to that reached by Fein, that the right to access to information must be protected at all costs in this arena.

5.5 Non-judicial Safeguards Against Abuse Of The Power To Withhold Information In The Interests of National Security

Despite the conclusions drawn by him, Fein does recognise the potential for abuse of the system. He concedes that, in the American context, the President could misuse his classification powers to withhold information which would not damage national security.³⁷

The remedy for him does not lie in increased legislative protection of the right to freedom of information, nor does it justify or require a more pro-active judiciary. He argues that the potential for abuse does no intrinsic harm to democracy as there are effective non-judicial safeguards against such abuse.

The starting point and the key to the operation of the safeguards identified by Fein, is the substantial probability of leaks from within the executive branch itself. He maintains that such leaks would reveal patterns of improper

³⁶ A Mathews, op cit, p 21

³⁷ B Fein, op cit, p817

classification, or abuses generally and **thereafter** the legislative branch of government would be entitled and enabled to investigate such abuses.

In addition, the legislature could, having discovered the abuses, utilise its fiscal powers to exert pressure on the executive branch to co-operate in the investigation and correction of the abuse. This type of pressure could even be exerted under the threat of a refusal to pass legislation requested by this branch.

The public, he argues are afforded the opportunity of limiting abuse in view of its power of vindication exercised through the vote. In the American instance, the President may, in fear of the potential adverse consequences at election time, as a matter of expediency, not engage in excessive or abusive secrecy practices.

In a similar vein he argues that the President's successor could inform congress or the public of any abuses practised by his or her predecessor.

This last point fails to take into account that in the United States, the outgoing President may specify that certain documents may not be made publicly available for up to twelve years.³⁸ More fundamentally, his argument fails to acknowledge the reality of modern-day national security management structures which, by virtue of their size, are not under the daily direct control of the head of the executive, which in the American and South Africa scenario is the President. These structures, or more specifically the intelligence and security agencies act largely independently of the head of the executive. In addition, they are part of the modern ongoing administrative state, which is largely immune to changes effected by periodic elections. Accordingly, this branch is not subject to, or inclined to act in fear of, or with respect to, preferences expressed by the public through their votes.

The problem with the inefficiency of the vote as a mechanism of ensuring accountability has formed one of the central tenets of this thesis. These inefficiencies are however magnified here in view of the fact that in the national security arena, the executive branch is not even indirectly accountable to the people through their representatives. At least in the other areas of government administration, this formal, albeit inadequate, nexus, upon which representative democracy is premised, is recognized. In the absence of this formal nexus between the administration and the people, the people are left with the wholly inadequate alternative of relying on leaks from within the executive as the starting point for control. Not only does the adequacy of his entire argument depend on the wholly unsatisfactory existence of leaks, but more significantly on sufficient leaks to enable the discovery of patterns of abuse. The extent and entrenchment of the culture of secrecy, which he seeks to justify, is such that

³⁸ 44 U.S.C. @ 2204 (1982)

there is little, or no likelihood, of the requisite number of leaks occurring which would reveal patterns of abuse. This *ad hoc* and unreliable solution is completely untenable as the source of a safe-guard against abuse and certainly cannot be seriously regarded as providing an effective alternative to more stringent mechanisms of accountability through the judiciary and public access.

One simply has to cast one's eye to the wide spread extent and consequences of the prevailing national security secrecy practices discussed earlier, to conclude that these alternative non-judicial safeguards fail to deliver on the democratic objectives of responsive accountable government.

The failure of these non-judicial safeguards is intrinsically tied up with the more fundamental failure of the underlying argument that national security secrecy practices and democracy are compatible. The underlying argument fails to recognise the reality and the true extent and nature of the incompatibility of the two, and accordingly any solutions informed thereby will by necessity fail. The success of any proposed solutions to reconciling national security secrecy practices and democracy depend for their success on whether or not they in fact address the true problems inhering in, and generated by the co-existence of the two. Any solution will depend for its success on an identification or recognition of the problem of compatibility for what it is, as well as the full extent thereof.

CHAPTER SIX

THE NATURE AND EXTENT OF THE INCOMPATIBILITY OF DEMOCRACY AND THE NATIONAL SECURITY EXEMPTION TO THE RIGHT TO ACCESS TO INFORMATION

All armed forces and defence policies are constructed around a set of philosophical assumptions about such critical issues as state sovereignty...Most importantly, the assumptions have to do with the concept of security. What is security? Whose security is at issue? And by what means should security be ensured? The way in which these questions are answered at a conceptual level will have a major bearing on actual policies and strategies.¹

Although this quotation refers specifically to armed forces and defence policies, the points made are equally applicable to the issues raised in this thesis. The issues raised in this thesis are contextually broader, but of the same genre. Ultimately, the philosophical assumptions informing actual defence policies will be the same philosophical assumptions which inform attitudes adopted to the national security exemptions to the democratic right of access to information. They will both, at the end of the day, be determined by the same assumptions about democracy in the national security context.

In the national security context, democratic assumptions purportedly ascribed to by the prevailing order are subjected to the stress of the state's power, in its most pristine form. This stress is attributable to the apparent juxtaposition between, on the one hand, the state's apparently extensive power exercised in the conduct of its 'quintessential function', and on the other hand, democratic objectives and values which are opposed to any authoritarian imposition of the "strong-arm" of the state.

The official route adopted in addressing the dilemmas which this stress poses for sustaining democratic ideals and aspirations, will be determined by the level of commitment to the latter ideals and aspirations. Any superficiality in that commitment will crystallise in the route adopted, and the true underlying assumptions, often disguised under the thin veneer of democratic terminology, will be revealed for what they are.

¹ L Nathan, The Changing Of The Guard. Armed Forces and Defence Policy in a Democratic South Africa, 1994, p 9

The manner chosen to resolve this potential conflict will depend on, and be informed by philosophical assumptions about the state and democracy. It will be informed by assumptions central to democratic discourse, most notably assumptions about sovereignty. More specifically, it will be informed by assumptions about the location of sovereignty, which in a democracy is vested in “the people”, and in an authoritarian state, in the externally constructed state itself.

The often unstated choices made at this prior conceptual level will, as pointed out by Nathan, have a major bearing on all actual national security policies and strategies, including national security information policies and strategies. The right to freedom of access to state-held information is a democratic essential. As a matter of routine, most legal systems recognise national security information as qualifying as an exemption to this right. The national security exemption to the right to freedom of information accordingly constitutes a potentially direct point for conflict of the competing interests at play. These exemptions are therefore an appropriate site for establishing a particular system’s true prevailing underlying assumptions.

In the previous chapter it was argued that Fein’s arguments, in support of his conclusion that the American national security exemptions are compatible with democracy, are not valid. This invalidity, it is submitted, is rooted in their failure to recognise, and address, the true nature and extent of the problem posed for democracy by these exemptions. The nature and extent of the problems posed by them for democracy is revealed by the true character of the assumptions underlying their chosen formulation and their method of application. The character of these assumptions is, at the end of the day, responsible for rendering the exemptions, in both their current formulation, and in their application, irreconcilably incompatible with democracy.

Fein’s failure to recognise these assumptions, and therefore the true nature and extent of the problem is in itself symptomatic of the problem at hand, and for this reason, to some extent explicable. The true character of the underlying assumptions is not always manifestly apparent. The truth of the matter is often eclipsed by the proffered ‘democratic’ signifiers encoded in the formulation of the exemptions. The failure of the likes of Fein to recognise the assumptions for what they are, may to some extent be attributed to them succumbing too readily to the perceptions created by the specific location and the language of the exemptions. These signifiers encourage and facilitate the conclusion that the exemptions are compatible with democratic ideals and objective, despite their apparent undemocratic tendency toward super-secrecy. The foundation for this conclusion lies in the perceptions created by the contextual location of the exemptions.

The national security exemptions are located, sourced, and phrased as

exemptions within the context of the broader, generally applicable freedom of information laws. These laws are in turn located within the broader context of the overarching legal system which overtly purports to subscribe, and to give effect to democratic ideals and objectives. The contextual location of the exemptions presents them as forming an integral part of this overarching system, from which they derive their fundamental nature.

This location facilitates the rationalisation of the resultant secrecy practices as being compatible with democracy. The exemptions, like the broader freedom of information laws, are perceived as part of, and the product of a broader framework committed to democracy. The exemptions are an integral part of this order and must accordingly share the same source and democratic assumptions. Being sourced in the same framework as the freedom of information laws, and formulated by the same lawmakers responsible for the rest of the legal system characterised by its subscription to the democratic way, the exemptions are assumed to have been formulated and applied in a manner consonant with the underlying democratic assumptions. They must accordingly be compatible with democracy.

Fein's susceptibility to this path of rationalisation is seen in his emulation of the discourse of the exemptions in the substantiation of his conclusion. He locates his supporting arguments squarely within democratic discourse by clothing them in democratically acceptable terminology and by falling back on traditionally accepted, but outdated, democratic institutions and perceptions.

His arguments accordingly suffer the same fate as the exemptions. Their mere representation in democratic terms does not inevitably lead to a conclusion of compatibility with democracy. His arguments presented in support of his conclusion are, like the national security exemptions themselves, once denuded of their superficial veneer, unable to sustain the conclusion of compatibility. Once denuded of this veneer they are revealed to be premised on the irreconcilably undemocratic assumption that in the arena of national security, sovereignty is located in the state, and not in "the people".

The American and Australian national security exemptions are, in both their formulation and application, wholly incompatible with democracy for the same reason. They are premised on an assumption about state sovereignty which is irreconcilable with the inflexible, democratically dictated location of sovereignty. The exemptions, as will be shown hereunder, are premised on an assumption that in matters of national security, sovereignty is, and ought to be, located in the external state, as an entity separate and distanced from its citizens. They are therefore incompatible with democracy which dictates that sovereignty is, and ought to be, located in "the people".

The objections raised in the preceding chapter to the formulation and application of the national security exemptions are summarised here once again.

They are summarily revisited as they are indicative of the truth and extent of these underlying undemocratic assumptions about the location of sovereignty, which inform these exemptions.

The exclusive extended discretion afforded the executive branch of government in its power to define the inherently ambiguous concept of national security, locates within this branch an extended, and potentially illegitimate source of power. The power to define the term national security, and accordingly determine its limits, is a source of power, because:

Defining a problem as a national security issue automatically legitimises the use of exceptional means in response to that problem.²

The extent of the discretion afforded, together with the fact that the actual exercise of that power is not subject to scrutiny by the legislature, the judiciary, or the public, effectively constitutes a disintegration of the division of power dictated by the democratic doctrine of the separation of powers. The executive branch, in its power of exclusive control over information in the arena of national security, as well as its exclusive power to determine what in fact falls into this category, acquires a power traditionally the preserve of the legislative branch of government. By locating this power of determination in the hands of the unaccountable executive it is afforded the power to determine the scope and ambit of the national security arena. Implicit in this power is the power to determine the extent, ambit and terms of the extraordinary powers which are generally permitted and legitimated in this arena. The executive branch is at the end of the day answerable to no other branch or person for the decisions made in the process of exercising that power. The power of self-determination, together with this lack of accountability, means that the legislature, as representative of “the people”, is deprived of the power to define and control. The public too are denied this power in their denial of access to information, determined by this branch of government to be national security information. In these denials the democratic assumption of popular sovereignty is subverted. The denial of popular access, whether directly, or indirectly by an unaccountable executive, constitutes a denial of the power to control government through participation in, and scrutiny of its process. Therefore, a denial of access to this information constitutes a denial of popular sovereignty. It is this subversion which at the end of the day is responsible for the fact that:

Excessive resort to ‘national security’ as a justification for state action is

² L Nathan, *op cit*, p 24-25

invariably accompanied by a shift from constitutional to authoritarian form of governance.³

The implications of the chosen formulation and application of these exemptions, for the separation of powers, are indicative of a failure to acknowledge and respect one of the fundamental precepts of democracy – that is the democratically dictated location of sovereignty or power, in “the people”.

The democratically prescribed location of sovereignty, in terms of the shifted democratic paradigm, however translates into, and finds practical application in more than the doctrine of the separation of powers. In terms of this paradigm, information, which is a very real form of power, or more specifically the right of access thereto, must be located in “the people”. Furthermore, it requires that this location must be respected and protected at all costs. It is this essential democratic assumption of popular sovereignty which, in the modern administrative state, translates into the recognition and protection of the right of access to state-held information as a fundamental democratic right.

The national security exemptions fail, in their formulation and application, to recognise and protect this right as a fundamental democratic right. They disregard the general tone and prescriptions encoded in the freedom of information laws and all other exemptions to the right, which are moulded on, and give effect to the dictates of the shifted paradigm.

The generally applicable freedom of information laws, of which the exemptions constitute an integral part, are founded on the pre-eminence of the right of access to information as a fundamental democratic right. They are accordingly formulated so as to give concrete and practical effect to this underlying premise. This effect is successfully achieved in the formulation and application of all the exemptions encoded in the freedom of information laws, except for the national security exemption. The formulation of the former exemptions expressly create prior presumptions in favour of disclosure. Furthermore in the event of the state seeking to withhold information in terms of one of these exemptions, the onus to disprove this presumption is unequivocally placed on the state. In applying these exemptions the courts have willingly adhered to these clear statements of legislative intent and held the relevant state organ to account for any infringements of the right of access to information.

In contrast, the national security exemptions are formulated, and applied by the courts, in such a manner so as to give effect to presumptions of non-disclosure rather than presumptions of disclosure. The inversion of this presumption has meant that in matters relating to the national security

³ Ibid

exemptions, the onus of disproving that presumption has been shifted to public. In contrast therefore, the national security exemptions, in their effect, confer a prior right to secrecy on the state in the arena of national security. The prior recognition of the state's right to secrecy means that the public's right to information is accordingly displaced, and its status as a founding fundamental right inverted.

The essential link between information and power means that this displacement and inversion of the right to access to information constitutes a disregard and denial of the democratically prescribed location of sovereignty.

The reality of this inversion and displacement, and the assumptions underlying it, are deftly concealed by the use of the classificatory term - "exemption". The Collins English Dictionary defines the word "exempt" as "freed from or not subject to an obligation, liability". The term accordingly implies some pre-existing obligation which is of general application, except in the permitted exempt case. The use of this term within the context of the freedom of information laws, which unequivocally affirm the universal applicability of this right as a fundamental right, automatically appears to marginalise the status of the exempt category of information. National security information is, within this legislative framework, presented and seen as an exemption to the prior obligation to disclose. As an exemption to the prior generally applicable rule, the exemption is accordingly defined, and its ambit determined by the prior obligation. This obligation, despite the exemption, remains generally and otherwise operative. Accordingly, the exemption is seen as a momentary and isolated deviation from the prevailing general rule, rather than as displacing the general rule in its entirety. At a more fundamental level, by classifying national security information as an exempt category, it is presented as being afforded protection from disclosure, but not at the expense of the general rule, or at least, at the least cost to the general rule. Accordingly, the reference to an exemption forces one to assume that the underlying starting point or assumption informing the recognition and formulation of the exemption, is a democratically appropriate assumption.

However, in practice, in the context of prior standards and exemptions, the national security exemptions to the right to information are no exemptions at all. The practical inversion and displacement of the right to information effected by the formulation, application and enforcement of these exemptions means that the claims to secrecy are not regarded as an exemption. Instead, they constitute, in the context of national security, the general rule. In this context, non-disclosure of all national security information becomes the prior rule against which access to information is now regarded as the exemption. This is evidenced by the reversal of the relevant presumption and onus in this arena, which offer no assistance in response to the tendency toward excessive classification.

This inversion of the general rule effected by the national security

exemptions places them in opposition to the democratic assumptions upon which the prevailing freedom of information legislative framework is premised. This framework, in the premium it places on the right to information, and the extensive protection afforded to this right, expresses and concretely protects the democratic assumptions of sovereignty, and the related assumption of the separation of powers.

This theoretical framework, despite its recognition that the protection of popular sovereignty requires protection of the right to information, does recognise that this right is not absolute, and may be limited under exceptional circumstances. The legal framework however, seeks, as a general rule, in terms of the prevailing democratic paradigm, to unequivocally subordinate the exempt, exceptional circumstances to the right to information. In theory, the legal framework, premised as it is, on the democratic assumption of sovereignty, is premised on the protection of that location at all times. The power to withhold certain information, in terms of this framework, may not do damage to the location of sovereignty. Accordingly, the power to so withhold must be implicitly authorised, or at least be capable of *ex post facto* review and ratification, by the sovereign *demos*. In practise this means that the withholding of the specific information must have been anticipated and authorised by “the people”, acting through their elected representatives, or directly. Alternatively, the substance of the decision to withhold must be subject to, and withstand scrutiny, after the fact. This theory has in fact, to a large extent, found application in the freedom of information acts generally, and more specifically, in their formulation and subsequent application of the exemptions, other than the national security exemptions.

The national security exemptions are, in both their formulation and application, treated differently in comparison to the other exemptions. This difference is indicative of the true underlying assumptions informing the national security exemptions. Perceiving and applying these exemptions differently is in fact tantamount to locating the national security exemptions outside of the prevailing legal framework - outside of law and beyond the power and control of “the people”, both indirectly through their elected representatives, and directly.

The national security exemptions are, in effect, posited outside of the prevailing democratic paradigm and its attendant location of sovereignty. Herein lies the implausibility of any assertion of compatibility of the national security exemptions to freedom of information and democracy – it is premised on an insurmountable inconsistency. Claims of compatibility with democracy are fallacious as these claims and justifications place the national security exemption outside of the prevailing democratic paradigm, and are premised on assumptions characteristic of an undemocratic paradigm.

6.1 The National Security Exemption and Carl Schmitt's Decisionist Theory Of Sovereignty

In short, the current national security exemptions to the right to access to information are fundamentally incompatible with democracy as they are premised on, and give effect to a perversion of the democratic theory of sovereignty. Democracy locates sovereignty in “the people”, whereas the national security exemptions locate sovereignty, in their location of exclusive control over information falling within this exemption, as well as over the definition of the concept, in the hands of the unaccountable executive branch of government.

This location of control, through an exemption, over national security information, and over the definition and ambit of what in fact constitutes national security, locates the national security exemptions firmly within the parameters of Carl Schmitt's decisionist theory of sovereignty, as opposed to the democratic theory of sovereignty. For Schmitt, “Sovereign is he who decides on the state of exception.”⁴ The Collins English Dictionary defines an exception as “anything excluded from or not in conformance with a general rule, principle, class, etc”. Accordingly the language of a national security exemption, in so far as it assumes a prior generally applicable rule or standard constitutive of the ordinary, and an extra-ordinary deviation in relation to that norm, is synonymous with Schmitt's language of the “exception”.

Carl Schmitt's theory of sovereignty is useful as a tool for analysing the relationship between democracy and the national security exemptions. Its utilitarian value lies in the fact that it unequivocally reveals the truth of the philosophical assumptions underlying the manner in which the American and Australian legal systems purport to balance or reconcile the tensions inhering in this relationship.

The factual site for the location of power in terms of the American and Australian national security exemptions, co-incides with Schmitt's theory of sovereignty. Schmitt's theory of sovereignty is the product of a paradigm purposefully and unashamedly set up in opposition to the democratic paradigm and its attendant theory of sovereignty. The correlation between the two accordingly reveals the truly undemocratic nature of the assumptions underlying these exemptions.

Schmitt's theory of sovereignty is the product of his specific political philosophy and view of the state. Accordingly, the synonymity as between the respective locations of sovereignty, further reveals that the American and

⁴ C Schmitt, Political Theology, 1985, p 11 in Schwab, The Challenge of The Exception: An Introduction to the Political Ideas of Carl Schmitt Between 1921 and 1936, 2nd ed, p 44

Australian exemptions are ultimately premised on the same political philosophy and view of the state ascribed to by Schmitt.

The correlation between these exemptions and Schmitt's theories ultimately reveals the invalidity of the claims of compatibility between the exemptions and democracy. The purported legitimacy of locating extensive, and hence sovereign power in the hands of an unaccountable executive in the arena of national security is not, despite assertions to the contrary, founded on democratically acceptable grounds. This legitimacy is instead founded within the wholly undemocratic paradigm ascribed to by Schmitt.

These assumptions and grounds of legitimacy, once they are recognised for what they are, render any assertion of compatibility between democracy and the national security exemptions entirely unsustainable.

In addition to this incompatibility, the correlation with Schmitt's paradigm reveals that the exemptions, and the arguments canvassed thus far, attempt, by clothing the issue in democratic terminology, to disguise these underlying assumptions. Thus their synonymity with Schmitt's theory allows for the recognition of the often disguised, despotic undemocratic nature of the national security exemptions.

This recognition is the starting point to finding an appropriate and democratically acceptable solution to democratising the national security exemptions.

6.2 Carl Schmitt's Theory Of The State, The Political and Sovereignty

Schmitt's thesis is useful in that it accommodates the apparent duality exhibited by the modern administrative legal systems under discussion. These systems have purportedly recognised that democracy requires access to information and have accordingly, through open government legislation, given expression and protection to the right to access to information. They have however simultaneously permitted the right to information, and by extension, the integrity of democracy, to be fundamentally eroded in their protection of executive branch secrecy in the arena of national security.

Schmitt's thesis does not seek to reconcile this duality and attendant inconsistency, nor does it offer a solution. It does however reveal the duality for what it is: A duality which cannot be democratically sustained. Schmitt's thesis, which ultimately and ominously led him to make common cause with the despotic and authoritarian Nazi regime, is premised on the assumption that this duality and the true power relations encoded therein, do not constitute a problem requiring a solution. It does not constitute a problem, because for him, the recognition and maintenance of democratic ideals and objectives in the national security arena is not a priority. In fact, for him, in this arena, these ideals and

objectives are both undesirable and inappropriate.

Instead, the undemocratic location and authoritarian exercise of power by an unaccountable executive in this arena was for Schmitt a necessary and desirable solution to a pre-existing problem, for which democracy was, and is, unable to provide a solution. In this arena, legitimacy and sovereignty are dictated by criteria other than democratic criteria.

Schmitt's thesis was largely premised on an attack on liberalism, more specifically on its insistence that the state is, and should, in its entirety be, subject to the law. He argued that this proposition fails in two respects. First, it fails to reflect the truth and the extent of state power, which in the national security arena, is not in fact subject to the law. His second normative objection to this proposition is that, not only is it inaccurate, but is also undesirable in the national security arena. This thesis agrees with his first line of attack, but rejects the second.

The formulation and application of the national security exemptions, and the power afforded thereby, certainly points to the same conclusion as to the inaccuracy of liberal theory, as drawn by Schmitt. That is to say that the state in this arena, is in fact, contrary to the prevailing democratic insistence on the rule of law, released from all obligations to comply with prevailing constitutional principles.

His thesis recognises that liberal theory is to a limited extent able to justify and sustain its founding assertion that the state is subject to the law. Liberal democratic theory is correct, and an accurate reflection of state power, in as much as:

By and large, governmental agencies concerned with matters of social and economic organisation operate through managerial imperatives and are subject to at least some minimal legal regulation and political control.⁵

Schmitt argued that liberal theory is however inherently limited to these social and economic dimensions of the state. His criticism is confirmed by Hirst, in his observation that the social and economic agencies do not exhaust the full spectrum of state agencies. There are additional agencies, most notably the national security agencies, which do not, in practice, accurately reflect, or give effect to the classical theoretical imperative that the state ought to be subject to the law. In reality they are not subject to even 'minimal legal regulation and political control'. These agencies are accordingly, in reality, not accommodated

⁵ P Hirst, *Op Cit*, p 118

within the liberal paradigm and its insistence on the rule of law.

The inherent incapacity of traditional liberal theory to accommodate the national security agency's functions and powers is evidenced in those modern, purportedly democratic societies founded on this tradition. They are forced, in view of this incapacity, to accommodate these functions and powers as exemptions to the prevailing rule of law. In so doing, they expose a fundamental inconsistency which cannot be explained with reference to the liberal democratic paradigm.

The functions and powers of these agencies are, in reality, far more appropriately and accurately accommodated within Schmitt's paradigm. His theory of sovereignty and "the political" appears to offer a far more accurate description and rational explanation of the power exercised by these agencies and their source of legitimacy.

This correlation between his theory of sovereignty, and the reality of these exemptions, debunks the purportedly democratic connotations of "the exemption". It debunks the implicit perception, generated by the contextual usage of this term, of subordination to the law. The correlation between the practice of the national security exemptions and Schmitt's theory reveals that the national security exemptions do not in fact constitute an exemption or exception to the democratic standards and norms. It reveals that the functions and powers exercised in terms of these exemptions are not, in fact, subject or subordinate to these standards and norms.

The national security exemptions, when placed within the context of the security of the state, do not connote, as implied by traditional theory, an exemption or exception to prior democratic norms or standards. Instead, they in fact constitute a standard, and generate resultant norms all of their own. Ultimately, the democratic standards and norms encoded in the law, are in fact subject to the exemptions.

In terms of Schmitt's theory this arena of the state cannot be accommodated, or explained, within the parameters of the liberal paradigm, even when constituted as an exemption. Liberal theory is inherently unable to explain or accommodate the national security functions and powers of the state, because of its failure, and its refusal to recognise that in reality, "all legal orders and law, including the rule of law have an 'outside', that they rest on a politics which is prior to and not bound by law."⁶ This prior political arena is the archetypal site of state security, which is also therefore, outside of, prior to and not bound by law. More importantly, this arena can never in fact be bound by law, and therefore can never be accommodated within liberal democratic theory in view of its

⁶ P Hirst, *op cit*, p112

insistence that the state is, and should, in its entirety, be subject to the law.

For Schmitt, the prior political arena is intrinsically a matter of security of the state. The national security exception or exemption cannot therefore, in fact, constitute an exception to the prevailing legal framework. It cannot be regarded as such, because an exception or exemption, by its very nature, presumes a prior existing standard against which that exemption or deviation is defined. An exemption's dependency on the existence of a prior a standard for its definition, substance and ambit, automatically implies that that prior standard is the progenitor of the exemption. This latter point is unsustainable in terms of Schmitt's theory of "the political". For him, the political, is in fact, not only prior to, but also the progenitor and source of (its own) law. Accordingly, the national security arena which is synonymous with the political, is likewise, not only prior to, but also the progenitor and source of law.

In identifying "the political", and hence the national security arena, as the progenitor and prior source of law, Schmitt's theory of "the political" is essentially a question of sovereignty - often alternatively defined as the source of, or the power to make law.

The relationship between his theory of "the political" and his chosen location of sovereignty co-incides largely with Thomas Hobbes' theories of the genesis of the state, its source of legitimacy and sovereignty.

Schmitt's conceptualisation of "the political" and attendant conceptualisation of the state is reminiscent of Hobbes' theory of the genesis of the Leviathan state as a necessary solution to the state of nature. Schmitt's conceptualisation of the political as "relation[s] of enmity which forces groups to struggle one with another, not to compete but to contest not to discuss but to confront", co-incides to a large extent with Hobbes' state of nature. Hobbes' state of nature, which preceded the recognition of the state, was characterised by a state of war, of all against all, which made life 'nasty, brutish, and short.' In this state of nature, there was no property, no justice or injustice - only 'force and fraud [which] are, in war, the two cardinal virtues.'⁷ For both Hobbes and Schmitt, the interchangeable state of nature and the political pre-dated the state, which in fact originated in response thereto. For Schmitt:

The concept of the state presupposes the concept of the political. States arise as a means of continuing, organising and channelling political struggle. It is political struggle which gives rise to political order; a body involved in friend-enemy relations inevitably becomes political whatever its origin or the origin of the differences leading to enmity..... To view the

⁷ B Russell, *A History of Western Philosophy*, 1984, p535

state as the settled orderly administration of a territory, concerned with the organisation of its affairs according to law, is to see only the stabilised results of conflict.⁸

Likewise for Hobbes, the desire and necessity for self-preservation in the state of nature heralded the genesis of the state. The desire and need to bring an end to the state of nature saw the members of society willing to submit to government. As such, the recognition of government, and the legitimacy of its actions, in so far as they were directed toward the safety and security of society, was founded on society's interest in self-preservation. The legitimacy of the state (as sovereign) was founded on the necessity for order as opposed to chaos. The resultant voluntary submission to government was as between the members of society by covenant. In terms of this covenant it was agreed that sovereignty or power would, as a matter of necessity, be conferred on one man or an institution, so as to ensure that the covenant could be enforced, as 'covenants without the sword, are but words.' Accordingly this fictional covenant is not:

..as afterwards in Locke and Rousseau, between the citizens and the ruling power, it is a covenant made by the citizens with each other to obey such ruling power as the majority shall choose. When they have chosen, their political power is at an end... When the government has been chosen, the citizens lose all rights except such as the government may find it expedient to grant...the ruler is not bound by any contract, whereas the subjects are.

In short, the covenant heralded the genesis of the Leviathan State or, "one supreme authority not limited by the legal rights of the other bodies."⁹ One not subject to, but the source of law.

For Hobbes, that supreme authority, or sovereign, was that person or body able to restore order. The ability to restore order is the determining legitimating factor. The person or institution which is in fact able to restore order is also, because of that ability, entitled to obedience or subservience. For Hobbes, '*autoritas, non veritas, facit legem*' - he who has authority can make the laws.

Schmitt's parallel thesis concludes in a similar vein. For him, the need to contain the political relations of enmity necessitated and legitimated the authoritarian state. The authoritarian state was dictated by the need for oppressive and determined action – the only possible solution to the threats posed to the safety and security of the community by the prevailing chaos. Conversely, necessity precludes democratic, consensual government in "the

⁸ P Hirst, op cit, p109

⁹ B Russell, op cit, p535

political” arena. Power is vested in that person or institution able to control the political. Power, or sovereignty is accordingly sourced in the political, and legitimated by the ability to bring an end to state of “the political” by restoring order through the suppression of the the danger posed by the relations of enmity. The political relations of enmity and their subsequent containment pre-dates the ordered structured State and the resultant (democratic) constitutional and legal order. The political, and by extension, the power sourced therein, logically and necessarily pre-dates that constitutional and legal order, and is not bound by it.

For Hobbes, the state of nature terminated upon the genesis of the state. Whereas for Schmitt, the threat of instability remains ever present. It is however not always imminent, and during periods of relative peace – during what he refers to as periods of normalcy – it is merely latent. So too for Schmitt, the “Leviathan state” is always present, but latent, in accordance with the latency of the threat to order. The authoritarian power of the latent Leviathan state is not visible or necessary during periods of peace. This does not however mean that it does not exist, it is merely ‘veiled by the routine of normalcy’.

Schmitt argued that the relatively stable period of the eighteenth century was a period of such latency. Political stability and the consequent lack of threat allowed the space for the development and victory of Locke's theoretical constitutional ordering of the state and the development of democratic legal doctrines, such as Montesquieui’s separation of powers, designed to give effect thereto. It allowed the space for the recognition and implementation of a democratic order characterised by consensual popular rule and its attendant insistence on subjugating the state’s power to the law.¹⁰

Threats to the safety and security of society, having been suppressed, were not an immediate and primary concern of the government of liberal theory. The state’s role and power in this regard was accordingly not a primary issue for liberal theory. During this period of normalcy, the state was perceived as being concerned primarily with the social and economic regulation and development of society. The lack of urgency and harm in the event of the state failing in its regulatory functions precluded the need for determined and oppressive, authoritarian measures. Accordingly, the space existed for the development of liberal theories of sovereignty. The absence of the need for “decisionist” government permitted the democratic location of sovereignty in “the people”. It permitted the recognition of the exercise of sovereign power through the elected representatives of “the people”, and the attendant subordination of the state, to the laws, as passed by the representatives of the, now, sovereign electorate. The state’s subordination was to the law generated by the sovereign legislature,

¹⁰ G Schwab, *op cit*, p 47

which included subordination to the prevailing constitution and the individual legislative acts of parliament which sought to give practical effect to the principles contained therein.

Schmitt argued that the circumstantial context of “normalcy” resulted in the security function of the state, and the power dynamics inhering therein, simply not being factored into this classical liberal theoretical framework. The liberal theoretical frame of reference therefore does not include, or even anticipate, the (repressed) power of the state as protector. Accordingly, it cannot explain or accommodate the national security power and function of the state. Likewise, the location of sovereignty in ‘the people’, and the subjection of the state to the constitution and the law is designed, and therefore only applicable in a state of normalcy. By definition, the democratic imperatives of popular sovereignty and the rule of law only explain, and apply in respect of, government functions in the social and economic realms. That is to say, only in respect of those state functions and powers operative during these periods of normalcy.

There exists at all times, however, a latent outside to the legal and constitutional order which prevails during these periods of normalcy. There remains at all times the latent threat of chaos, or a threat to the security of the state and its prevailing democratic constitutional and legal order. In other words, there remains at all times the threat to national security. The prevailing constitutional and legal order, in view of the fact that they were allowed to develop only as a result of the original suppression of threats to the community’s security, are intrinsically dependant on the exercise of the prior political power responsible for that original suppression. As with the latent threat itself, the measures necessary to address it, fall outside of liberal theory and accordingly outside of the prevailing constitutional and legal order. In fact, the prevailing constitution and legal order can only survive the intrusion of the now patent threat, if that original constituting political act continues to be sustained by some existing political power. That power is by definition, outside of, and therefore, not subject to that constitutional order.¹¹

The latent threat, once it becomes patent, constitutes a state of exception to the normal order. Not only does liberal theory not anticipate the state of exception due to the contextual roots of its origin. More importantly, it is fundamentally unable to do so because of its insistence on subjecting state power to a prescribed and preformed law. For Schmitt, the state of exception cannot, by its very nature, be anticipated or articulated in terms of a pre-formed law. It is for this reason that it can never be subject to the law. As in the state of nature, the imperative is to restore order, or a state of normalcy. Therefore, the resurrection

¹¹ P Hirst, *op cit*, p 112

of the latent threat is by necessity, accompanied by the emergence of the latent original sovereign. The latent original sovereign is that person or institution able to recognise the now patent threat, and who is able to restore the state of normalcy. It necessitates the emergence of a “decisionist” sovereign who, once he or she has recognised the threat, is afforded the power to take decisive steps to suppress the threat, including if necessary suspension of the constitution. Accordingly the constitution, or prevailing legal framework is subject to the state of the exception. The acts taken by the person or body with this capacity do not depend for their legitimacy on the constitution, which may in any event be set aside, but in the power to identify the potential threat and to protect society. Necessity demands this location of sovereignty, and a failure to recognise this will inevitably result in chaos, a return to Hobbes’ perpetual state of chaos.

Schmitt’s theoretical negation of constitutional democracy is not, despite the nexus between his theory and the “state of the exception”, limited to the “state of the exception” or the strictly demarcated national security arena. His location of sovereignty in the authoritarian state in exceptional circumstances, ultimately has the effect of negating the democratic imperative of popular sovereignty in its entirety. In terms of his theory, the true location of sovereignty does not in reality, even in times of normalcy, reside in ‘the people’. Sovereignty at all times resides in that body or person with the power, not only to restore society to a state of normalcy, but more importantly that person or body with the capacity and power to decide whether a normal situation exists. In other words it resides in that body or person enabled and empowered to determine when in fact the security of the state is threatened, and by extension, to determine what in fact constitutes such a threat. Accordingly, ‘Sovereign is he who decides on the exception’, which is by its very nature, and by necessity, outside of law.

Schmitt states his argument as follows:

From a practical or theoretical perspective, it really does not matter whether an abstract scheme advanced to define sovereignty...is acceptable. About an abstract concept there will be no argument....What is argued about is the concrete application, and that means who decides in a situation of conflict what constitutes the public interest or interest of the state, public safety and order...and so on. The exception which is not codified in the existing legal order, can at best be characterised as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law.¹²

¹² C Schmitt, op cit, in P Hirst, op cit, p 112

Hirst expands on this statement in the following explanation and practical application of the underlying principles:

The sovereign is a definite agency capable of making a decision, not a legitimating category (the people) or a purely formal definition (plenitude of power, etc., etc.). Sovereignty is *outside* of law, since the actions of the sovereign in the state of exception cannot be bound by laws (necessity has no laws)...The sovereign (no abstraction but a definite agency) determines the possibility of the rule of law by deciding on the exception: "For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists." (Political Theology, p13)¹³

The definite agency, in the context of this thesis, that branch of government accorded extensive discretionary power to withhold information on the ground that disclosure would harm the interests of national security. More fundamentally, it is that agency afforded the power to invoke the national security exemptions, or state of exception, on the basis of its analysis of the facts. This power translates into the power to define the concept, to determine what in fact constitutes national security, and to determine its limits. This agency is sovereign, because, in Schmitt's terms, it is empowered to decide on the applicability or inapplicability of the exemption, and likewise the applicability or inapplicability of the law. The national security branch officials, in their exclusive power to not only prohibit access to information in the interests of national security, but in their power to define national security, are sovereign. They are sovereign as they have the power to determine what constitutes a threat to national security, and when in fact security is so threatened. Once it has decided that national security is threatened, the situation of normalcy terminates. The termination of normalcy in the context of the national security exemptions to the right of access to information means that the law, including prevailing constitutional principles are rendered inapplicable. Therefore, the invocation of the exemption is accompanied by the displacement of the generally applicable democratic right of access to information.

As illustrated during the course of discussions thus far, this is in fact what is permitted, and what in fact occurs, when the national security exemption is invoked by a national security official. Any allegations that this conduct is contrary to democratic principles and the law, is met with the following Schmittian rebuttals. First, the dire consequences for the maintenance of order

¹³ P Hirst, op cit, p112

necessitate the granting of this unilateral decisive power. Furthermore, this power cannot be anticipated and circumscribed by the law, because it is implicitly premised on the perception of a threat. The range of potential threats cannot be quantified and circumscribed by law. To attempt, or to insist on it being so circumscribed, is to disable efficient and decisive action in response to a threat not anticipated by the law. Furthermore, the security branch personnel are uniquely qualified, as opposed to any other state or civil sector, to assess and anticipate potential threats. Therefore, it is inappropriate for the legislative branch of government to dictate the lawful parameters within which this power may be exercised. In short, this arena is, by necessity not amenable to democratic principles and procedures.

The combination of actual practice once the exemption has been invoked and the arguments in support thereof, clearly locate the current national security exemptions within Schmitt's paradigm.

Therefore, the national security exemptions, and the arguments in support thereof, are not compatible with the dictates of a sovereign constitutional democracy. They are, in reality, premised on the dissolution of constitutional democracy in their location of sovereignty in the hands of the 'uncommanded commander', or the national security branch of government. This location is not democratically legitimated, but legitimated by necessity.

To accept and condone the current formulation and application of the national security exemptions, is to accept that 'sovereign is he who decides on the exception'. Accordingly, to accept and condone these exemptions is to accept that location of sovereignty in the national security branch decision-makers. To accept this is to admit that "most of our formal constitutional doctrines are junk."¹⁴

This admission does not inevitably mean that democracy is to suffer the same fate. Junking the traditional "democratic" doctrines does not automatically junk democracy. In fact it requires a renewed and revitalised commitment to democracy through a reassessment, not of the original democratic objectives underlying the existing doctrines, but a reassessment of the doctrines themselves. They must be reassessed with a view to establishing any deficiencies and inadequacies which impact on their ability to give effect to their purported founding objectives. They must be critically scrutinised with a view to establishing to what extent they implicitly permit undemocratic tendencies.

The doctrines must, if necessary, be reconceptualised. This reconceptualisation depends on a recognition of the reality of the limited liberal frame of reference exposed through Schmitt's criticisms. Schmitt's criticisms as

¹⁴ Ibid, p 119

to the disjunction between liberal theory and reality, point directly to the deficiencies of that theory, and the space inhering therein for the realisation of undemocratic consequences. His criticisms are valid, but his conclusions are not inevitable. They can be avoided by a reconceptualisation, at a theoretical level, of liberal constitutional doctrines. This reconceptualisation requires, at the outset, a recognition of the realities of the prevailing national security powers and functions of the state. Likewise it requires a recognition of the fact that traditional doctrines do not accommodate these realities.

The failure of these doctrines does not however inevitably imply the failure of liberal democracy's insistence on subjecting the state to the law. This objective remains valid. However, liberal democracy's traditional frame of reference must be expanded so as to embrace the full spectrum of government, to include the national security functions and powers of the state.

Up until now this sphere has implicitly been permitted to operate outside of the law. Constitutional doctrines must be reformulated so as to expressly acknowledge the state's security function and delineate democratically appropriate boundaries within which it may operate.

The democratisation of the national security exemptions to the right of access to state-held information will depend on the prior reconceptualisation of liberal constitutional doctrines. The national security exemptions, falling as they do within "the public", security arena will only be amenable to democratisation if the underlying constitutional doctrines overtly embrace, and in so doing, subordinate this arena to the law.

The process of assessing traditional democratic doctrines with a view to identifying their deficiencies in delivering on democratic objectives, and their subsequent reconceptualisation, has already commenced. It has commenced in the assessment and rejection of the doctrine and procedures of representative democracy in the modern administrative state. It has been recognised that this traditional democratic paradigm is not able to deliver on that essential democratic ideal of responsive government in the modern administrative state. Accordingly, this recognition has engendered a shift toward a democratic paradigm, better able and suited to deliver on this democratic imperative. This shift has seen the displacement of the status of representation as the quintessential democratic ideal and tool, and the simultaneous recognition of access to information held by the administrative branch of government as vital to democracy. The key to the importance of such access lies in the fundamental link between information and power, and therefore in the fundamental link between access to information and the realisation of the democratic imperative of popular sovereignty. For this reason, the public's access to information is recognised, guaranteed and protected as a fundamental democratic right.

This paradigm shift is however not complete. It remains embedded in, and

constrained in its retention of the traditionally divisive public/private template. That is to say, the state is in terms of the shift thus far, more so than ever, divested of sovereignty and subject to the law in its subjection to the public's fundamental right to know. However, this improved model of democracy remains applicable only in respect of the state's social and economic dimensions.

A truly democratic society must endeavour to attain, not only an effective democratic government, but also a comprehensively democratic order. Achieving the latter objective requires a further novel doctrinal jump. It requires the express, and unequivocal recognition that democracy requires that the national security arena of the state be equally subject to the law. It accordingly requires, within the context of this thesis, that the state's interests, functions and powers in this sphere, be expressly and unequivocally subordinated to the public's right of access to information. This requires a reformulation of the national security exemptions so as to expressly and unequivocally subject and subordinate them to the law. That is to say, they must unequivocally be subject to constitutional democracy's principles of participation, accountability and transparency, and accordingly, to the public's prior supreme right of access to information.

6.3 The Problem of Sovereignty and the National Security Exemption in Perspective – The Product of the Liberal Democratic Public / Private Divide

Modern constitutional democracies do in fact, despite the elevated status of the right to information, permit extensive, arbitrary and authoritarian secrecy practices in the arena of national security. This paradox points to an underlying assumption that democratic standards and ideals are valid and permissible only in relation to a limited sphere of government. It points to the assumption that only the social and economic regulatory functions of government permit the realisation of the democratic drive to popular colonisation of the state. Conversely, it points to the conclusion that the national security function of the state does not, by its very nature, permit such colonisation. It reveals that these exemptions are ultimately premised on an acceptance of the assumption that the state is, in this arena, Hobbes' "Leviathan", all-powerful state in which "citizen's have no need of governmental information and nor do those who purport to speak on their behalf. Government is absolute. It is absolute because it needs absolute power to defend society."¹⁵

There is substantial evidence to suggest that this democratically destructive assumption is in fact rooted in the classical liberal democratic

¹⁵ P Birkinshaw, *op cit*, p 18

tradition, upon which many modern constitutional democracies are founded. This assumption is implicitly encoded in liberal theory's limited focus and terms of reference. It finds expression in, and is perpetuated by a number of classical constitutional doctrines, most notably in the divisive traditional liberal public/private dichotomy.

The liberal tradition's recognition of the state, and its primary concern with limiting the power and role of the state through its subordination to the will of "the people" is fundamentally informed by, and expressed in terms of this dichotomy.

The state, in terms of traditional democratic theory is recognised as an objective, external entity in:

...the public-political domain, [which is recognised as] the reserve of government with its external concerns: diplomacy, warfare, law enforcement and a minimum amount of charity.¹⁶

This traditional public-political domain co-incides with Schmitt's language of "the political". For both Schmitt and liberal theory, this public-political arena is one primarily concerned with issues of the political security and stability of the state. The synonymity between Schmitt's thesis and liberal theory however goes further than a common language. This synonymity of terminology is in fact indicative of a broader common national security discourse.

Liberal theory appears inconsistent in its conceptualisation of the state. There is a marked difference between its conceptualisation of the state in the public-political domain, and its conceptualisation of the state in terms of its insistence on democratisation of government. The state in the latter instance is conceptualised and defined in terms resonant, not of the public-political sphere, but of the traditional private arena. The discourse of liberal theory implicitly precludes the public-political domain from its democratic narrative which seeks to curtail government through democratic procedures. Its insistence on democratic government, and its application of this principle, is inherently limited to the state's power to control and regulate the social and economic dimensions of society. By implication therefore, it, like Schmitt's theory, excludes the public-political national security arena from democratic parameters.

The implications of the public/private divide in terms of liberal theory's recognition of, and concern with the limitation of government, is that the state is recognised as sovereign in the public domain, whereas popular sovereignty is the order of the day in the private arena. The implication of this division for the

¹⁶ I Berlin, *Op Cit*, p 17

location of sovereignty is evidenced by, and a by-product of, liberal theory's primary concern with the protection of the rights of the individual. More fundamentally, these implications are inevitable in view of its conceptualisation of the ambit and content of those rights, which is intrinsically linked with its conceptualisation, recognition and limitation of the state.

Classical democratic theory's dedication to democratic (and hence limited) government, or to rule by "the people" is essentially a dedication to protecting "the people's" rights and interests. Those rights and freedoms are, for liberal theory, the individual's social and economic rights, rather than the community's collective rights to, and interest in the preservation of the collective community, or the state. This particular focus on the individual's rights and their chosen definition is a product of the central value ascribed by liberal theory to protection of the individual's private property, the epitome of the private domain. Locke, one of liberal democracy's founding fathers, quantified the centrality of private property to the liberal democratic thesis, in his identification of the two fundamental rights with which men are born. The one was understandably, the right to life. The other, placed on par with this crucial right, and enjoying an equal status, was the individual's right to inherit his father's property. The value of private property was such that it warranted the recognition of government. It was:

The great and chief end of men uniting into commonwealths, and putting themselves under government... the preservation of property; to which in the state of nature there are many things wanting.¹⁷

The centrality and importance of private property and the consequent premium placed on its protection, translated not only into a recognition of government, but was the impetus for the insistence on civil, rather than authoritarian government. Traditional classical discourse reflects the centrality of the protection of private property to its democratic purpose. That is to say its primary objective in seeking to limit state power is intrinsically dependant on its concern with the protection of proprietorial rights. The centrality of these rights translated into their recognition as the founding, or fundamental democratic rights.

The democratic imperative was to protect these proprietorial, or private rights, from absolute state power, from interference by the state. This particular democratic slant is reflected in the language and reason for ascribing to the public/private doctrine. The public/private doctrine was essentially an endeavour

¹⁷ Locke, J, Two Treatises of Government, p180

to limit state power in the private, or socio-economic domain. The public/private divide was the means of protecting the individual, or more specifically the liberties of the individual from interference by the state, beyond the public frontier. Conversely, the public/private divide implicitly anticipated and authorised extensive state power in that public-political domain.

The implications of this conceptual divide are further evidenced in liberal theory's definition of unlawful state conduct. That is to say, in its definition of undemocratic state power, or power exercised in contravention of the terms of consensual government. The entire question of unlawful state action was, by definition, limited to the private domain of proprietary rights. Unlawful state power was the exercise of power which sought to:

...invade the property of the subject, and to make [itself], or any part of the community, masters or arbitrary disposers of the lives, liberties or fortunes of the people.¹⁸

The entire democratic imperative, which sought to subject the state to the law, or subject it to the will of "the people", was essentially an endeavour to prevent the intrusion of the state into this domain of proprietary rights. It was an endeavour to ensure that "the people" retained control over their socio-economic rights.

Liberal democratic theory, by virtue of its focused terms of reference, simply does not address, and therefore require, a similar subjection of the state's power and functions in the public-political domain, to the will of "the people". This omission ultimately translates into a tacit, unstated acceptance of absolute government, or state sovereignty, in the overtly public domain. This conclusion, which ultimately means that classical liberal theory is not that far removed from Schmitt's thesis, is further substantiated by a further correlation between the two paradigms. Liberal theory, like Schmitt's theory, identifies the public-political domain in terms resonant of Schmitt's political arena. In addition, liberal theory implicitly locates this domain prior, in time, to the democratisation of the state, or the social contract. Hence it locates this domain, as Schmitt does, outside of the democratic legal framework. The universally shared assumption is that prior to existence of the state, society was in a perpetual state of chaos, it was continually exposed to the threat of destruction. For the likes of Schmitt, Hobbes, Locke and Rousseau alike, the recognition of the state was preceded by a state of political turmoil. Further, the recognition of, and society's willingness to subject itself to, government is explained by all concerned, by reference to the overriding

¹⁸ Ibid, p 228

interest of self-preservation. The common denominator is ultimately the justification of necessity. Although unstated, liberal theory in fact anticipates Schmitt's decisionist government in this arena, as a matter of necessity.

Recognition of the state in this arena, as opposed to the later private arena, is essentially a recognition of the need for external regulation and control of each individual's absolute freedom, which if left uncurtailed, would inevitably mean a return to the prior state of chaos. The emphasis in this arena is on the restraint of liberties (by the state). Whereas, in the private arena, the emphasis is on the desire to protect individual's rights and liberties. The subtle difference in emphasis, when placed within the divisive public/private template, reveals an implicit juxtaposition between the security of society on the one hand, and on the other, the curtailment and restriction of liberties. It ultimately reveals a juxtaposition between state security and democracy. In the public-political domain, state powers exercised in furtherance of state security implicitly take precedence over the individual's liberties in that domain. Whereas in the private domain, the individual's freedom, which in this context means his or her right of control over private property, takes precedence over the state's power. Therefore, the state is in the public-political arena, in terms of the public/private perspective of traditional theory, implicitly recognised as sovereign, and hence not subject to the law.

The traditional liberal democratic state, the extent of its powers, and its subjection to popular sovereignty or the law, is fundamentally moulded by the imposition of the divisive public/private template. The resultant implicit exclusion of the public-political domain from democratic control fundamentally informed the legal framework and infrastructure of liberal democracy. The legal systems of democratic societies informed by the traditional democratic paradigm have accordingly also developed within the confines of the public/private template. This is evidenced in their expression and perpetuation of the state's national security powers outside of democracy and beyond the reach of the law.

The emergence of the modern administrative state has resulted in a democratic paradigm shift toward more effective democratic procedures. It has accordingly seen a resurgence of the importance of effective public participation and accountability, and a resultant de-emphasis of the tools of representation. It has seen the introduction of additional democratic procedures to facilitate the actual attainment of these democratic objectives. Likewise, it has seen the novel recognition of rights, such the right of access to information held by the administrative branch, as essential democratic rights.

However, this paradigm shift has, at the end of the day been incomplete. It has tenaciously retained the liberal traditional divisive public/private template. As a result, democracy has been revived and revitalised, but only in the traditional private arena. As evidenced by the national security exemptions, the public-

political domain has remained outside the parameters of the realigned democratic paradigm, as it did in terms of the traditional paradigm.

The democratisation of the national security exemptions depends on a comprehensive paradigm shift to one which seeks, in addition to revitalising democracy, to accommodate within its parameters, the public-political national security arena. It requires a shift to a paradigm which actively seeks to draw it in and make it subject to the law, or the will of “the people”. In short, the democratisation of the national security exemption depends on the dissolution of the residual public/private divide in the formulation and implementation of its enhanced principles and procedures.

6.4 National Security, Sovereignty, The Public/Private Divide and Dahl’s Fourth Ideal Democratic Standard – Control of the Agenda

An order which purports to be democratic must, to truly be regarded as such, engage in a comprehensive paradigm shift. Failing which, the retention of the residual public/private divide template will frustrate the attainment of democracy, as measured against Dahl’s fourth ideal democratic standard. An order premised on this divide, even were it to create and implement democratic procedures of the highest order, even if it were to emulate the quintessential Athenian democratic procedures, would remain essentially undemocratic, as it would deprive the *demos* of final control of the agenda.

Dahl illustrates this requirement with the following hypothetical scenario set in the cradle of democracy:

..let us suppose that Philip of Macedonia, having defeated the Athenians at Chaeronea, deprives the Athenian assembly of the authority to make any decisions on matters of foreign and military policy. The citizens continue to assemble forty times a year and decide on many matters, but on some of the most important questions they remain silent. With respect to “local” matters, the Athenian polis is no less democratic than before, but with respect to foreign and military affairs the Athenians are now governed hierarchically by Philip and his minions. Would we want to say that Athens was now fully democratic or was as democratic as it had been before?¹⁹

This hypothetical scenario could be mistaken, were the names and places to be changed, for many modern democratic societies. Most notably, it could be

¹⁹ R Dahl, *op cit*, p 61-62

mistaken for those systems discussed during the course of this thesis. These systems, within the specific context of the subject matter of this thesis, have extended their recognition and protection of democratic principles and procedures to include the novel right of access to state-held information. This recognition has translated into the general constitutional principle that this right is constitutive of an essential democratic right and the state's, or government's interests are accordingly subordinated to it. In addition, access to information is recognised as a democratic process, necessary for the delivery of responsive government. It has accordingly been implemented and guaranteed as between the *demos* and the administrative branch of government, who are obliged, as a matter of routine to facilitate and ensure the unhindered flow of information to the public. Democracy, in the sense of effective rule by "the people" is accordingly rendered more effective than ever, in the modern administrative state. However, the new and revived democracy remains limited in its application to the "private" arena. The "public" arena, or the national security function of the state has remained impervious to democratic pressures.

The exclusion of the national security arena from the democratic imperative is evidenced by the prevailing national security exemptions to the right of access to information. This exclusion is evidenced in their conferral of extensive and unchecked discretionary power on the executive branch of government, not only to withhold information in the interests of national security, but more significantly in its effective power to define national security.

The exclusion of the *demos* from access to national security information at the sole behest of this branch and, more importantly, in their exclusion from participating in, or control over the definition of the term "national security", means that democratic process is rendered inapplicable in this arena, at the behest of an unaccountable executive.

Accordingly, one must conclude that the systems discussed in this thesis, as does Dahl in respect of his hypothetical Athens, are, despite their compliance with the democratic criteria of effective participation, voting equality at the decisive stage and enlightened understanding, not fully democratic. They may only be regarded as "fully democratic with respect to [their] agenda", but would nevertheless be a "travesty of democracy. For the citizens could not democratically decide matters they felt to be critically important other than those the rulers had allowed to remain on the pitifully shrunken agenda of the neutered democracy."²⁰

The systems discussed, in their formulation and application of the national security exemption, effectively afford the executive branch of government, final

²⁰ Ibid

control of the agenda. It enjoys final control of the agenda in its power to define the term “national security”. The fluidity and indeterminacy of the term means that the final agenda is subject to incremental shrinkage at the behest of the executive branch of government. The breadth of the final agenda is determined by the breadth of the definition adopted by it. An expanded definition constitutes an expansion of the traditional public domain, which is implicitly excluded from democratic process.

For Dahl, the requirement of final control of the agenda is essentially a question of sovereignty:

The criterion of final control is perhaps what is also meant when we say that in a democracy the people must have the final say, or must be sovereign. A system that satisfies this criterion as well as the other three could be regarded as having a fully democratic process in relation to the *demos*.²¹

Depriving the *demos* of final control of the agenda is to deprive the *demos* of their democratic entitlement to sovereignty. Accordingly, depriving the *demos* of final control of the agenda is fatal to democracy. The democratisation of the national security exemptions depends on the extension of that essential democratic criterion of popular sovereignty to this arena. Revesting sovereignty in the *demos* in turn depends on the *demos* enjoying final control of the agenda. Final control of the agenda, and hence democracy, requires that the current paradigm shift be absolute in its rejection of the public/private divide implicitly responsible for locating final control of the agenda in the hands of the unaccountable executive branch of government and its administration.

²¹ Ibid

CHAPTER SEVEN

RECONCILING THE IRRECONCILABLE: DEMOCRACY AND THE NATIONAL SECURITY EXEMPTION TO THE RIGHT TO FREEDOM OF INFORMATION – FINAL CONTROL OF THE AGENDA

The national security exemptions to the right to freedom of information are, in their current formulation and in their application, located beyond the parameters of constitutional democracy. This location is evidenced by the fact that these exemptions are not subject to democratic processes and standards, and accordingly not subordinated to the essential right of access to information. “The people” are excluded from participating in, access to information about, and posterior scrutiny of decisions, as to what constitutes national security. Likewise, they are equally excluded from any subsequent decisions to prohibit disclosure of information on the ground that it would harm national security as defined. This exclusion is effected in practical terms through the preclusion of prior legislative control over the definition of the term “national security”, by the preclusion of direct popular participation in the decision-making process, and in the denial of legislative, popular or judicial scrutiny of the decisions. Instead the power to define and to decide is placed within the exclusive jurisdiction of the unaccountable executive branch of government.

The location of this power in the hands of the executive branch is tantamount to affording it sovereign power. This location of sovereign power is contrary to the fundamental democratic premise of popular sovereignty, although not contrary to the implicit assumptions underlying the traditional classical democratic paradigm. This location of sovereignty is a product of, and explicable in terms of the public/private doctrine so fundamental to this paradigm and its principled and procedural infrastructure. This doctrine implicitly anticipates and legitimises state sovereignty, as opposed to popular sovereignty, in the public domain. It accordingly implicitly anticipates and legitimises the location of sovereignty in the hands of the unaccountable executive branch of government in all matters pertaining to state security, the epitome of “the public”.

The fact that the dynamics of the current national security exemptions can be rationalised by reference to doctrines characteristic of the traditional classical democratic paradigm does not render them democratic. The underlying conclusion, that the traditional classical paradigm is deficient in view of the failure of its doctrines and resultant practices to give effect to democratic objectives, has been recognised by most modern democracies. These democratic

societies, such as America and Australia, recognised that democracy could not be achieved and sustained in the modern state whilst formulated and given effect to through the traditional institutions of representative democracy. They have accordingly engaged in a democratic paradigm shift founded on the need to ensure the attainment of the democratic criterion of popular sovereignty. The realigned democratic perspective has accordingly displaced the prior premium placed on the tool of representation to achieve participant, responsive government and accountability. Instead, representation is now simply seen as one of the many, and possibly more important procedures required for the attainment of a democratic order.

This shift has seen the institutional recognition and protection of rights such as the right to freedom of access to state-held information as procedurally necessary. More importantly, this right has been recognised as more than a procedural means to attain democratic ends, but as an essential democratic end, in and of itself, in view of the fact that information and power, and therefore, information and sovereignty, are one and the same.

The shift from the classical traditional democratic paradigm has however not been complete. It has been re-evaluated, and its traditional procedures and practices as between the state and the *demos* subsequently amended, reformulated and supplemented. Despite these changes, societies which have engaged in this shift are not fully democratic in terms of Dahl's democratic paradigm. In terms of his paradigm, they have only given effect to the democratic ideals of effective participation, voting equality at the decisive stage, enlightened understanding and inclusivity. This is not enough. Their democratic process in relation to the *demos*, in terms of the realigned paradigm, is fundamentally limited. The democratic processes and principles apply, and give effect to these democratic ideals, in relation to all state activity falling within the traditional "private" domain. It does not extend to "the public" domain, in that it does not find application in matters relating to national security. The shift from the classical traditional democratic paradigm has only been partial in that the realigned paradigm remains fundamentally entrenched within the divisive public/private template.

As long as the *demos* are excluded from "the public" domain, democracy will remain elusive, because their exclusion constitutes an erosion of that all-definitive democratic criteria of popular sovereignty.

A legal order which fundamentally limits the ambit of popular sovereignty can, by definition, not be regarded as democratic. The attainment of democracy requires the dissolution of the fundamental public/private divide and its implicit prior anticipation and legitimation of the exclusion of democratic processes from this arena. In the context of the national security exemptions to the right to

freedom of information, democracy requires that these exemptions be unequivocally posited within, and be made subject to, the prevailing democratic framework. Access to information must constitute the first priority in accordance with the prioritisation of popular sovereignty.

Any system which fails to engage in this comprehensive paradigm shift will not, in terms of Dahl's democratic paradigm, be fully democratic. It will implicitly be rendered unable to comply with the essential democratic ideal of final control of the agenda, as the prior assumption of the exclusion of the *demos* from "the public" national security domain deprives them of final control of the agenda. They are precluded from deciding on whether "the public" arena should be democratised. More importantly, should they so decide, they are precluded from deciding what matters fall within this "public" arena.

Deprivation of final control of the agenda is essentially undemocratic in that it amounts to depriving the *demos* of sovereignty. They are deprived of the final say with regard to the extent and applicability of the democratic process.

Final control of the agenda means that:

The *demos* must have the exclusive opportunity to decide how matters are to be placed on the agenda of matters that are to be decided by means of the democratic process.¹

This requirement does not mean that the *demos* are required, or even qualified to decide or participate in every question requiring a binding decision. Likewise, in the context of freedom of information, it does not presuppose that the *demos* require access to **all information**, or that it is qualified to decide in every given situation whether or not the information requested should be disclosed. This extreme position is clearly both practically untenable and theoretically unsustainable.

Control of the agenda does however:

...presuppose...that the *demos* is qualified to decide (1) which matters do or do not require binding decisions, (2) of those that do, which matters the *demos* is qualified to decide for itself, and (3) the terms on which the *demos* delegates authority.²

In other words it does not presuppose that the *demos* is qualified to decide every matter or participate in every matter, but it does presuppose that decisions

¹ R Dahl, op cit, p62

² Ibid, p63

as to the *demos*' competence or limits, and hence the limits of the democratic process, are to be decided by the *demos*, and not by the executive branch of government. Final control of the agenda, in its emphasis on locating sovereign power, that is to say, the power to have the final say, in the national security context, amounts to a rejection of "the liberty limiting principle called legal paternalism". This principle seeks to wrest the power of decision from the *demos* on grounds resonant of Schmitt's theory of sovereignty. These grounds are based on justifications of protection from harm. The question of harm, as a matter of necessity, requires determined and unilateral action. In view of the "expert" knowledge of government, they are exclusively equipped to detect the possibility of harm, or potential threats to the security of the state. Accordingly, necessity dictates that government be afforded the exclusive power to detect, and avoid the realisation of this harm, by taking what ever steps it, as the expert, deems necessary. The process must accordingly be steered or guided by government, and the electorate are subject to that government imperative, for their own good.

The attitude revealed by this justification:

Seems to imply that, since the state often perceives the interests of individual citizens better than do the citizens themselves, it stands as a permanent guardian of those interests *in loco parentis*.³

Reducing this attitude to its essential underlying assumption reveals that it is premised on a prior assumption of popular incompetence. It is accordingly premised on a prior assumption as to the limits of the democratic process, which limits are encoded in the legal framework, as dictated from above. In other words, the ambit of the agenda is dictatorially pre-determined, and therefore, the *demos* are unconditionally deprived of final control of the agenda. Legal paternalism not only precludes the public from final control of the agenda, it is also a destructive assumption which has the potential to undermine the success of democracy in, even, the accepted private sphere. In short, it becomes a self-fulfilling prophecy. It:

...is preposterous. If adults are treated like children they will come in time to be like children. Deprived of the right to chose for themselves, they will soon lose the power of rational judgement and decision.⁴

The current formulation and application of the national security

³ Feinberg, J, ' Legal Paternalism' in *Social Philosophy*, p45

⁴ Ibid

exemptions deprive the *demos* of final control of the agenda, not only in the extent to which they are deprived of control, but also in the implicitly paternalistic grounds on which such deprivation is justified.

These exemptions deprive the *demos* of final control of the agenda in their vesting of the extensive power that they do, in the unelected, unaccountable executive branch of government. This branch acquires final control of the agenda, not only in its unreviewable power to deny access to information on the ground that disclosure would threaten national security, but more importantly, in its extensive, unilateral, unreviewable, discretionary power to define national security. The power to define means the power to decide what in fact constitutes national security. It is in this power that this branch is definitively and unequivocally afforded final control of the agenda. The act of defining a matter as a national security matter “legitimately” locates it within the “public” domain, and accordingly off the agenda of matters amenable to democratic process. In the context of the national security exemptions, the indiscriminate over-use and abuse of labeling matters as a national security issue has translated into an ever decreasing agenda of matters “that are to be decided by means of the democratic process.”

By granting this branch of government an almost limitless, unreviewable discretion to define national security, and accordingly to determine the parameters of democratic process, the *demos* are deprived of final control of the agenda. They are deprived of the power to decide:

(1) which matters do or do not require binding decisions, (2) of those that do, which matters the *demos* is qualified to decide for itself, and (3) the terms on which the *demos* delegates authority.”⁵

These decisions are taken by the executive branch of government, and often, more importantly, by its administration. In allowing this branch an unlimited discretion to effectively decide what is in fact not a national security issue and therefore amenable to democratic process, it is allowed to decide the competence and limits of the *demos*, and impose that decision from the top down. As such, it effectively has the power to establish its own terms within which to exercise the power ‘delegated’ to it by “the people”.

The key to this illegitimate location of power is in the formulation and extent of the discretion afforded to the state official. The lack of constraints or guidance in the granting of this discretion constitutes a subversion of the original democratic founding assumption which legitimates state action in a democratic

⁵ Dahl, R, op cit, p63

order. It subverts the underlying democratic assumption of delegation, which in terms of democratic theory is “a revocable grant of authority”⁶. The revocability of the grant of power is intrinsically determined by the prior constraint of that power by the terms agreed to by the *demos*. These terms are, in terms of democratic theory, by necessity, limited to the power to give effect to a predetermined policy choice. The power of choice, and formulation, of the underlying policy at all times being retained by the *demos* in accord with the democratic requirement of final control of the agenda.

Should the terms of delegation be permitted to become too broad or flexible, in other words, should the delegation be a delegation of an unlimited, unconstrained discretion, the grant of authority becomes irrevocable. It becomes irrevocable, as too broad a degree of discretion allows the delegatee to move beyond merely giving effect to a predetermined policy choice, to being permitted to actually make those policy choices. In short, the delegation of power mutates into the alienation of power and accordingly the *demos* can no longer be regarded as sovereign, but now subject to an absolute unaccountable sovereign, namely the executive branch of government.

In the context of freedom of information and the national security exemptions, the extended, unreviewable, discretionary power to define national security, ultimately translates into the power to make broad national security policy choices, rather than the power to implement a prior policy choice. This underlying concern that the extent of the power vested in this branch constitutes an alienation, rather than a delegation of power is succinctly summarised by Birkinshaw:

I cannot envisage arguments which would establish and successfully support the need for no restriction on freedom of information. The difficulty lies in allowing government prerogative alone to call the tune.⁷

Insisting that the national security exemptions give effect to the requirement of final control of the agenda, in both their formulation and application does not, as will be discussed hereunder, ignore or disregard the fact that:

Any responsible advocate for open government and freedom of information must accept that there are subjects which we do not need to know about.⁸

⁶ Ibid

⁷ P Birkinshaw, op cit, p 20

⁸ Ibid, p24

Final control of the agenda as a democratic essential, as formulated by Dahl, is implicitly cognisant of this fact and permits the space to accommodate it. Any legal system which fails to recognise this space and accordingly discounts this requirement on the ground that it is incompatible with national security's unique concerns, cannot justifiably claim to be democratic.

This requirement has the capacity to accommodate the exclusion of certain matters outside of the competence and limits of the *demos*. It accepts that there are certain matters which are not amenable to democratic process in view of the limited competence and interests of the *demos*. However, it does not accept that the prior identification of the matters as matters not amenable to democratic process, is itself not amenable to democratic process. Final control of the agenda dictates that the *demos* retain the power to decide the limits of their own competence and on the basis of that determination, determine what matters they consider to be unsuited to democratic, rather than unilateral decision-making.

But it is only those specific pre-determined matters which may be excluded from democratic process, and not the underlying decision as to the amenability of the matter.

According to this criterion, a political system would employ a fully democratic process even if the *demos* decided that it would not make every decision on every matter but instead chose to have some decisions on some matters made, say, in a hierarchical fashion by judges or administrators. [However, it could only be said to employ a fully democratic process] as long as the *demos* could effectively retrieve any matter for decision by itself.⁹

In short it permits delegation of the power to decide specific pre-determined issues in a pre-determined and authorised manner, to the administrative branch of government. It does not permit alienation of the power to decide what these issues are. The boundary between delegation and alienation, as pointed out by Dahl, is not always easy to discern or enforce. Despite this difficulty, it is submitted that a key indicator which alerts one to the potential for overstepping this boundary is the practice of "delegation" of extensive discretionary powers to the administrator, especially if the exercise of that power is rendered unreviewable.

⁹ R Dahl, op cit, p62

7.1 Rendering the National Security Exemption Compatible With The Democratic Requirement of Final Control Of The Agenda – Proposed Solutions

As long as the national security exemptions permit the executive branch of government final control of the agenda they will remain incompatible with democracy. In other words, as long as they constitute, in their formulation and application, an alienation, rather than the delegation of power, they will not comply with the democratic requirement of final control of the agenda. The adverse consequences of this for the democratic status of the prevailing order, are not limited to the national security arena alone. The deprivation of final control of the agenda by these exemptions, poses, in view of Schmitt's theory of sovereignty, a threat to the democratic status of the legal order as a whole. In the context of the national security exemptions to the right to freedom of information, Schmitt's location of sovereignty in that agency who decides on the state of exception, is most pertinently applicable. The extensive power afforded by these exemptions to define the term national security potentially subjects an indeterminate range of government functions, decisions and interests to the risk of being precluded from democratic process. The term national security is sufficiently broad to encompass an indeterminate range of issues. Once defined as such, the issue at hand will be precluded from the agenda, and the agenda is subjected to the risk of consisting of a reduced number of largely insignificant matters. In short, permitting the executive branch control of the "national security" agenda affords it control of almost the entire nature and ambit of the agenda.

A number of writers have recognised the full breadth of the implications of the democratically unacceptable national security exemptions to the right to information. They have recognised that the key to avoiding these implications is through the reconciliation of the exemptions with democratic standards and ideals. The key to this reconciliation lies in the issue of the nature and extent of the discretionary power granted in terms of the exemptions.

They have accordingly proposed solutions which seek to inhibit the extent of the power delegated, with a view to inhibiting the mutation of the delegation of power into the alienation of power. In short, they have put forward practical proposals designed to "eliminate unnecessary discretionary power and to check, confine and structure necessary discretionary power". By focussing on the limitation of discretion, these proposals seek to achieve a democratically acceptable balance between discretionary power which is not excessive, and accordingly a threat to final control of the agenda, and discretionary power which

is adequate so as to enable the executive to effectively fulfil its role.¹⁰

In the context of the right to freedom of information and the national security exemptions thereto, these proposals have focused on the limitation of the discretionary power of the executive branch to define, and accordingly determine the limits of national security. Conversely they also focus on reinvesting that power in the *demos*. They focus on reinvesting it directly, through the creation of direct participatory mechanisms, and indirectly, through the affirmation of the legislative branch's prior control of the executive's activities in this arena. In addition, these proposals have sought to ensure posterior control and accountability through the creation of effective legislative and judicial mechanisms for posterior scrutiny and evaluation.

The complexity of society, politics and the issue at hand means that the solutions to democratising the national security exemptions will not be singular or simple. Accordingly, the proposals put forward are diverse and multifold. However, at the end of the day, they accumulatively constitute a holistic programme designed to guarantee that the right to freedom of information is recognised and protected as a fundamental democratic precept in this arena. They accumulatively seek, through this recognition and protection of information, to ensure that the *demos* are not deprived of final control of the agenda or their legitimate claim to sovereignty.

One of the primary focuses of these proposals is the prior restraint of the extent of discretion afforded the executive branch by the legislature. These proposals, in focussing on the limitation of discretion, seek to ensure that:

A clear distinction [is] drawn between identifying and analysing threats on the one hand, and formulating policy on security and defence on the other.

The legislative branch of government, as representative of the *demos*, is responsible for policy formulation, and must, in terms of the above requirement, retain ultimate control of the definition of national security and the limits of this arena. An act of delegation which deprives this branch of this power is contrary to the requirement of final control of the agenda. This requires legislative activism, it requires that:

Legislatures that recognise the need for discretionary judgement should so far as may be feasible, give administrators direction, rather than *carte*

¹⁰ Davis, K C, Discretionary Justice: A Preliminary Enquiry, 1977, p 3 & 27

¹¹ L Nathan, Op Cit, p25

blanche.¹²

As such, it has been strongly advocated that the national security exemptions must, in their formulation, provide a greater degree of specificity and guidance as to what constitutes national security. More specifically, the legislature must identify, in advance, specific sub-categories of information, the disclosure of which would be harmful to national security. These pre-determined matters, which by democratic consensus are known and agreed to fall squarely within the ambit of national security, as consensually defined, would then, on this ground, legitimately be excluded from the obligation to disclose. Examples of the types of matters anticipated are, “tactical military operations, design of weapons, and those aspects of diplomatic relations when confidentiality in the negotiation process is expected by all parties.”¹³

The rationale underlying this approach is that any solution must, unlike existing restraint mechanisms which “work to correct past mistakes rather than to effect the necessary fundamental transformation[s]”¹⁴, focus on a fundamental transformation of the system, premised on prevention rather than a cure.

In addition, in accordance with the dictates of rational accountable government, the mere limitation and specification of categories of information is not in itself sufficient. The specification of pre-determined matter must be supplemented by the imposition of a positive duty on the decision-maker. The decision-maker must be obliged to evaluate each individual request for information which potentially falls within these categories, with a view to establishing if disclosure would, **in fact**, result in harm to these specified interests. In other words, legislation must only permit refusal of access to such information in the event that disclosure would “cause real, not speculative, harm”¹⁵ to national security. A closely related proposal is that the wording of the exemptions must render the decision to refuse access to the information falling within one of the specified categories, discretionary as opposed to mandatory.¹⁶

The Canadian Access To Information Act has in fact followed these suggestions and given effect to the objective of legislative control of the definition of national security and control of the discretionary decision to refuse access. This is achieved through the formulation of its national security exemption which substantively defines the term and which dictates the legitimate

¹² W Gellhorn “Protecting Human Rights in the Administrative State” Human Rights: The Cape Town Conference: Proceedings of the First National Conference on Human Rights in South Africa, p 178

¹³ Emerson, T, op cit, p 848

¹⁴ Boren, D L, ‘The Winds of Change at the CIA’ in (1992) Vol 101 The Yale Law Journal, p 858

¹⁵ The Open Democracy Bill: A Critical Review, Report by The Human Rights Committee, The Black Sash and IDAS (PIMS), unpublished, p 6

¹⁶ Johannsenn L, Klaaren J & White J, op cit, p 56

parameters of the discretionary power to refuse access. The latter control is ensured by the imposition of a duty on the decision-maker to engage in the actual weighing up of the competing interests, with a view to establishing if actual harm to national security will occur if the information is disclosed. Refusing to disclose on the grounds of anything short of a reasonable likelihood of actual harm will not constitute a legitimate exercise of that discretionary power.

A mere sampling of the relevant provisions clearly illustrates the extent to which such limitation is in fact possible, without unduly and detrimentally precluding the necessary element of flexibility¹⁷ :

The head of a government institution may refuse to disclose any record... that contains information, **the disclosure of which could reasonably be expected to be injurious** to the conduct of international affairs, the defense of Canada... or the detection, prevention or suppression of subversive or hostile activities, including without restricting the generality of the foregoing, any such information:

- ◆ Relating to military tactics or strategy, or relating to military exercises or operations undertaken in preparation for hostilities or in connection with the detection, prevention or suppression of subversive or hostile activities;
- ◆ Relating to the quantity, characteristics, capabilities or deployment of weapons or other defense equipment or of anything being designed, developed, produced or considered for use as weapons or other defense equipment or of anything being designed, developed or produced or considered for use as weapons or other defense equipment.
- ◆ A further five similarly worded provisions complete the list of matters falling within the ambit of national security. They include matters relating to the defence or other military force responsible for the detection, prevention or suppression of subversive or hostile activities; matters relating to intelligence in respect of subversive or hostile activities and foreign states; information relating to scientific equipment or methods for collection of intelligence referred to in the preceding paragraphs; information relating to prescribed international negotiations, diplomatic correspondence; and information relating to specified communications or cryptographic systems.

¹⁷ Access To Information Act, 1982, section 15(1)(a-i)

In addition to specifying the limits of the type of information or the type of matters in respect of which information may be withheld, the Act goes further in its endeavour to preclude the danger of expansion of the definition of national security. It does so by identifying and defining potentially ambiguous, and hence flexible terms, contained in the specified list of matters. In its choice of terms requiring clarity it limits, not only the definition of national security, but also the permissible ambit of the national security functions and roles of the responsible agencies. So for example, it defines the term ‘defense’ as:

Defense of Canada ...includes the efforts of Canada..towards the detection, prevention or suppression of activities of any foreign state directed toward **actual or potential attack** or other acts of aggression against Canada...¹⁸

In addition the Act defines, with a similar degree of specificity, terms such as “subversive or hostile activities”. In so doing, it precludes the extension of these terms beyond their prior, legitimately pre-determined ambit and thus limits national security powers and functions to an arena enjoying democratic consensus.

Any serious proponent of pre-determined legislative guidance and control of the definition of national security, cannot propose this solution in an information vacuum. In order to be in a position to provide guidance, the legislature must be equipped with extensive national security knowledge. Prior legislative guidance and control in the absence of an informed legislature would validly be subject to criticism. An uninformed legislature would, by definition, be incompetent on the ground that it lacked the necessary expertise or the ability to see the issues at hand in perspective.

The same principles apply in respect of public participation. Responsive government requires that the public be afforded the opportunity for direct participation in the circumscription of the permissible national security ambit. Accordingly, the public must be afforded the opportunity to participate in the drafting of the enabling limiting legislation. Effective and constructive public participation at this level naturally requires that the public be informed as comprehensively as possible so as to render its participation rational.

Freedom of information legislation must therefore provide for guaranteed, unlimited access by the legislative branch of government to sensitive national security information.¹⁹ Any such legislation could of course accommodate the

¹⁸ Section 15(2)

¹⁹ Koh, In Peterson, T, op cit, 757

concern for leaks by encoding carefully worded safety mechanisms to ensure confidentiality, much the same as has been done so as to prevent leaks from the executive branch.

In a similar vein the national security exemptions must be formulated so as to ensure maximum public access to national security related information. In this context:

This will require a meaningful level of transparency... While some degree of secrecy will be necessary, the emphasis should be on *freedom of information* rather than on *protection of information*.²⁰

Needless to say, a programme of democratisation of these exemptions assumes the implementation of procedures to facilitate public participation at every practical stage, which usually translates into participation prior to the drafting of relevant legislation.

Participation in the formulation and limitation of the national security exemptions will of course be of little value in the absence of effective enforcement mechanisms and accountability. Limitation of the extent of permissible discretionary power through clearly constructed boundaries will mean very little if there are no means of scrutinising executive conduct with a view to ensuring compliance. Likewise, it will come to naught if there are no means of demanding justification for non-compliance and remedies capable of enforcing compliance.

The proposed mechanisms of scrutiny and accountability include scrutiny by, and accountability to, the legislature, as well as to the public directly. Koh has proposed that legislative scrutiny and accountability could be achieved through the establishment of a consultative group, drawn from the ranks of the legislative branch of government. The executive branch, including the specific intelligence agencies, would be obliged to furnish regular reports to this group and consult with them on a regular basis in regard to issues concerning national security.²¹ Other proposals include parliamentary scrutiny of regulations relating to national security information, as well as of classification decisions. In addition, these regulations once scrutinised, should be published. Prior legislative scrutiny would constitute a pro-active approach as it would ensure prior conformity with legislative dictates as well as the dictates generally of a sovereign constitutional democracy.²²

Direct accountability of the decision-makers to the public will of course be

²⁰ L Nathan, *Op Cit*, p25

²¹ Koh, in Peterson, *op cit.* 757

²² Meer, Y S, 'Legislative Control of the Executive' in Controlling Public Power, p84

achieved by, first and foremost, maximising access to information and imposing a duty on the decision-maker to furnish reasons for a decision to withhold information. This would enable the public to engage in personal rational assessment of the decisions taken, as against the criteria set out in the enabling legislation.

In addition, direct accountability requires a system of effective and intensive external judicial review of decisions and actions taken in this arena. Concerns about the disclosure of sensitive information during the course of legal proceedings are not insurmountable. They may be overcome by making provision for in-camera proceedings at the presiding officer's discretion. Koh argues that the limitation of judicial review on the grounds of the judiciaries lack of competence or ability in respect of national security matters are redundant as:

The courts will have no more trouble applying the proper Constitutional and statutory standards in this area than they do in other complex cases.²³

A further, and perhaps more compelling answer to these concerns about the judiciaries lack of competence and ability is to be found in the creation of specialised courts. These courts would be limited in their focus to matters of national security. Their specialised focus would over a relatively short period of time facilitate their acquisition of the degree of expertise demanded by opponents of judicial review.

Experience has shown, as evidenced by the American judiciary's track record, that the greatest stumbling block to effective judicial review is to be found in judicial attitudes to questions of national security. As a result, progressive legislation which directs the judiciary to engage in substantive judicial review may not be sufficient to realise the objective of accountability through review. Current judicial ideology has the potential to undermine the most overt expressions of legislative authorisation of judicial review.

The American deferential and conservative attitude toward matters of national security is not unique to this jurisdiction. It is also a common feature of the prevailing South African judicial ideology.

Judicial ideology is used here in the sense ascribed to it by David Nicolson who explains the concept as:

..[the] set of beliefs and assumptions about the judicial function. It describes what judges conceive of as their proper role – what they can and cannot do – and is reflected in the mode of reasoning which they employ.

²³ Ibid, p 758

Judicial ideology deals with issues such as judicial precedent, statutory interpretation, and the relationship between the courts and other organs of government.²⁴

It is conceded that the prevailing South African judicial ideology *vis-à-vis* the relationship between the courts and the executive branch of government has matured significantly from the ideology of the 1980's. Current judicial attitudes are more appropriate to the dictates of constitutional democracy. As a result the courts are more willing than ever to engage in an increasingly substantive review of administrative acts. However, a question arises as to whether it has matured sufficiently to cast off the shackles which have traditionally inhibited its power of review in the arena of national security.

It is submitted that the traditional liberal democratic paradigm with its emphasis on the public/private divide, and resultant institutional perception that matters of national security are overtly political and hence non-justiciable, has contributed significantly to the character of judicial ideology. Legislative activism may prove insufficient in purging judicial ideology of its adherence to these residual, but fundamental, aspects of its heritage.

There are a number of indicators pointing to this conclusion. One such indicator is the decision of the magistrate referred to in the introduction to this thesis. That decision, it is submitted, is the product of an attitude which is prevalent amongst the South African judiciary, especially in regard to matters which they regard to be overtly political. National security is perceived by both the public and the judiciary as the epitome of the political.

The prevailing attitude in respect of "political" matters is that they are non-justiciable. National security matters, as the epitome of "the political", are therefore indisputably beyond the purview of judicial review. The prevalence and strength of this attitude is clearly reflected in the following comment made as recently as 1995 by Judge John Hlope, a judge of the Cape Division of the High Court:

Judicial review has its limits and it is submitted that it would be counterproductive to extend judicial review beyond those limits. The areas unsuitable for judicial action are best left outside the purview of judicial review. Furthermore, it must be stressed that the judiciary, by its very nature, is ill-qualified to adjudicate upon matters of high policy. Judges are trained in fact-finding and the application of legal rules to those facts.

²⁴ D Nicolson, 'Ideology and the South African Judicial Process – Lessons from the Past' (1992) Vol 8, SAJHR, p53

They are not trained to adjudicate matters of policy. The application of policy calls for the balancing of the interests of the individual and the interests of the community at large, and the courts do not have the resources or techniques for assessing the worth of the policy.²⁵

It is submitted that the ideology informing the attitude reflected in his arguments will constitute a substantial impediment to the prospects of substantive judicial review of matters relating to national security. It will frustrate the attainment of meaningful accountability in a future South Africa. There is a strong possibility that the courts of the future may well find themselves subject to the same criticism leveled against the denigrated executive minded court of the 1980's. That is to say that, like the executive minded courts of the 1980's, they

... are not prepared to perform their ... duty of control in the sphere of what they perceive as 'state security', which is precisely where executive discretion represents the greatest threat to the life and liberty of the individual.²⁶

Any revolutionary programme which seeks to ensure effective accountability through review by an objective, external and independent body, must take into account the inherent limitations of our traditional court structures. It must take into account the entrenched self-imposed limitations of judicial review which mitigate against attainment of this objective. Judge Hlope, in the same article, proposes a practical alternative which has the capacity for overcoming the problems posed by the inherent limitations of judicial review.

He proposes that the solution lies in the creation of specialised administrative tribunals to review government actions or decisions relating to matters of national security.²⁷ It is submitted that the envisaged administrative tribunals will go some way to ensuring effective accountability of the executive branch of government in respect of decisions made pursuant to the exercise of a discretionary power. The envisaged tribunals would be created by legislation and afforded substantive appeal, rather than, a review jurisdiction. Their status as a legislative construct, separate in design and function from the traditional courts, together with their attendant specialist jurisdiction, holds the potential for overcoming concerns about expertise and lack of competence in the face of the

²⁵ Hlope, J, 'Judicial Control of Administrative Action in a Post-Apartheid South Africa – Some Realities' in Controlling Public Power, p66

²⁶ Corder, Hugh 'Crowbars and Cobwebs: Executive Autocracy and the Law in South Africa', inaugural lecture given at the University of Cape Town, 5 October 1988, in (1989) 5 SAJHR, p 17

²⁷ Hlope, op cit, p67

‘political’ nature of the subject matter. These tribunals would simultaneously provide an accessible avenue of redress for the public who’s rights or interests have been effected by an executive decision.

It is submitted that these tribunals hold, in comparison to the traditional courts, the potential to achieve a balance between, on the one hand, the need for accessible and meaningful structures of accountability and effective remedies, and on the other hand, the need for considered expert review. This potential lies in the envisaged origin, nature, role and composition of these tribunals. They would “slot neither into the judiciary nor the administration and ... [be] granted specifically designed powers of appeal by Parliament...”. Unlike the judicial branch of government, the tribunals would “simply be seen as performing their [legislatively] ascribed functions”, namely the making of final, legally enforceable decisions in respect of executive decisions questioned by the public.²⁸

The touted success and acceptance of the tribunals lies in their potential ability to accommodate the diversity of concerns at play. It is submitted that tribunals that were modeled on a tribunal structure similar to that proposed by Professor Farmer, would succeed in accommodating and balancing the full range of concerns relating to external review by court structures. In terms of his proposed structure, the tribunals would have:

1. The ability to make final, legally enforceable decisions;
2. Independence from any department of government;
3. Hearings held in public and having a judicial nature, without necessarily having the formality of a court of law;
4. The possession of expertise;
5. The requirement to give reasons; and
6. The right of appeal to a court of law on points of law.²⁹

A tribunal exhibiting these characteristics would operate within a legislatively constructed ideology amenable to review of national security matters. The careful and considered choice of adjudicators would overcome concerns about competency to engage in review of the merits which is essential to accountability of the executive branch. The appropriate qualifications of its members would overcome these concerns and would legitimise the tribunals in the eyes of the public.

It is submitted that the cumulative implementation of the extensive and

²⁸ K Govender, “Administrative Appeals Tribunals” in *Controlling Public Power*, 72

²⁹ JJ Farmer, *Tribunals and Government* (1974), 184, in K Govender, *op cit*, 72

diverse range of proposals discussed thus far would go a long way toward reconciling democracy, freedom of information and the national security exemptions thereto. However, any such programme must, if it is to achieve the overall objective of guaranteeing that the *demos* retain final control of the agenda, take cognisance, not only of prevailing judicial ideology, but perhaps even more importantly, of prevailing public ideology.

Attainment of the requirement of final control of the agenda requires a transformation of the legal system and of judicial and executive attitudes. The success of any such transformation, will however at the end of the day, depend on public interest and initiative. The requisite transformation will only proceed and be successfully implemented at the behest of, and in response to overt public demand. In addition, once the democratic structures are in place, the transformation will amount to effectively very little if the structures and procedures designed to democratise this arena of government, are not actively utilised by the public.

It is submitted that prevailing public ideology may frustrate the full fruition of the envisaged changes. Public perceptions and attitudes have been moulded by the historical attitudes and institutionalised legal constraints of the classical traditional democratic heritage. Current attitudes have been fundamentally informed and shaped by the this heritage with its emphasis on the public/private divide and exclusion of the *demos* from the arena of the expert national security decision maker. The tenacity of these attitudes may impede the democratisation of the national security arena. The process of transformation of the legal system may amount to a formal rejection of that heritage. However, one must bear in mind that the public's attitudes are not as easily changed.

The public's response to the transformation of the national security arena may frustrate the realisation of the overarching objective of ensuring that final control of the agenda is in fact vested in them. The public may be apathetic in its failure to in fact reclaim final control of the agenda. The danger of this likelihood increases in accordance with the current degree of public apathy and acquiescence. Public apathy and acquiescence is a social reality. It is a product of the traditional paradigm, which consistently excluded the public, not only from the national security arena, but from government generally. This history of exclusion is responsible for the prevailing public ideology. The term public ideology is used here to denote not only belief systems, but also relates to questions of power. Ideology, in this context, relates to popular belief systems and the relation between these systems and the legitimation of the power of a dominant group. More specifically, ideology has to do with the ways in which

meaning (or signification) serves to sustain relations of domination.³⁰

Historical forces have engendered a public ideology with respect to national security matters characterised by popular disempowerment and a generic belief in the public's lack of expertise and competence. This belief is not, as is clear from the discussions during the course of this thesis, an inherent given. It is the product of historical tradition which has to a large extent been capitalised on as a source of executive discretionary power and a source of legitimacy of the exercise of that power.

The success of any freedom of information programme within the national security context will to a large extent depend on the dissolution of prevailing popular ideology. Public perceptions must be changed with a view to engendering, confirming and enforcing the public's competence and ability in this arena. This transformation, it is submitted, will be the most difficult to achieve in practice. In view of the fact that ideologies are fundamentally the constructed product of key signifiers, prevailing public ideology in the national security domain is intrinsically related to the power of the traditionally perceived meaning (or signification) of the term, national security. The term must be deprived of the connotations of expertise and exclusivity automatically associated with it. The first and foremost step toward achieving this lies in the demystification of the term. The key to demystification lies in the imposition of a duty on the national security branch to engage in routine practices which give effect to the objectives of transparency and justification. These practices must become the norm and be made automatically applicable in respect of all national security matters which do not as a matter of necessity require secrecy. Likewise, the right to freedom of information, must at all costs within the context of national security be actively protected and given as wide an application as possible, and must be seen to be so protected and applied.

³⁰ T Eagleton, *Ideology*, p5

CHAPTER EIGHT

DEMOCRACY, FREEDOM OF INFORMATION AND THE NATIONAL SECURITY EXEMPTIONS IN SOUTH AFRICA

8.1 Freedom Of Information And Democracy: The Interim And 1996 Constitutions Of The Republic Of South Africa – Recognition Of The Need For, And The Implementation Of, A Paradigm Shift

South Africa, like other democratic societies, recognised that the attainment of democratic aspirations and ideals necessitated a paradigm shift from the traditional liberal democratic model with its emphasis on representative democracy and its attendant institutions and structures. For South Africa, the recognition was driven, as in the case of other jurisdictions, by the realisation that the dynamics of the modern administrative state rendered the classical liberal paradigm inadequate. The impetus for change in South Africa however acquired an added urgency in the light of its political history. Historically, South Africans have suffered the very real consequences of the concrete realisation of the potential space inhering in the traditional liberal democratic paradigm which may be capitalised on by an unjust and immoral government. In South Africa, more so than in other countries, adherence to the traditional liberal democratic paradigm enabled government to use ‘representative democracy, parliamentary government and liberal constitutionalism as a means of legitimation’ of the unauthorized use and abuse of power, in the name of “national security”, and ‘suffered little restraint in its actions’. In addition, it was enabled to do so, under cover of an institutionalised blanket of secrecy and disinformation. This opacity, like the atrocities committed under the cover provided by it, found justification and legitimacy within the context of the then prevailing paradigm.

For South Africa, the expression of the need for a paradigm shift and the implementation thereof was not, as in other jurisdictions, reflected in *ad hoc* legal developments and refinements. The South African paradigm shift was revolutionary in that it was expressed and implemented in wholesale rejection and replacement of the previous dispensation with a new constitutional order, founded on, and designed so as to realise the objectives of democracy, in the true sense of “rule by the people”. It was expressed and effected in the drafting and adoption of an entirely new Constitution.

The 1993 Interim Constitution was premised on, not only a commitment to the creation and attainment of a democratic order, but a democratic order

diametrically opposed to the previous order. The envisaged 'sovereign and democratic constitutional state' was one implicitly defined, in both its objectives and content, by its aversion to, and rejection of the past. In short, it heralded a 'ringing and decisive break with [the] past.'¹

A unifying, essential feature of all three conceptual components of the new Sovereign and Democratic Constitutional State, is the public's right to access to government - held information.

The centrality of the right to information to the success of the desired dispensation is recognised in the Interim Constitution in its elevation of freedom of information as a Constitutional principle in terms of section 71(1)(a) and Principle 1X. These provisions entrenched the right to freedom of information as a fundamental non-negotiable central tenet of the South African Sovereign and Democratic Constitutional state. Unlike the Interim Constitution itself, this principle was rendered permanent and an obligatory component of the envisaged Final Constitution.

8.2 Freedom of Information – An Essential Feature Of The South African Sovereign Democratic Constitutional State

Constitutionalism is that discipline concerned with questions of power within, and between society and the state. The Constitution is in turn, a formal expression of the legally prescribed location and separation of that power. Accordingly, the Constitutional recognition and entrenchment of freedom of information as a Constitutional principle, and as a fundamental human right, constitutes a formal recognition of one of the central tenets of the revised democratic paradigm: Information is a form of power.

Sovereignty, in democratic discourse, requires that power be located in the people. This is accordingly where the South African Constitution locates it by constitutionalising the right to freedom of information and further, by entrenching it as a fundamental human right.² By entrenching it as a fundamental human right it is implicitly recognised as a cornerstone of democracy, as in terms of Section 7(1) of the Final Constitution:

[The] Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

¹ *S v Mhlungu and Others* 1995 (3) SA 867 (CC) @ 873-4, para8

² The Constitution of the Republic of South Africa, Act 108/1996, S 32

The attainment of democracy depends, as in the case of all democratic paradigms, on the realisation of the fundamental principle of popular sovereignty. In terms of the revised democratic paradigm ascribed to by the Constitution, this fundamental principle necessitates the elevation of the public's right to access to government - held information as a cornerstone of democracy. The right to know is the right to power. Popular power, or sovereignty, therefore implicitly subordinates the state's control over information, or its claims to secrecy, to the fundamental right to know. Accordingly, the fundamental human right to access to information is supreme, and in practical terms this means that:

The Bill of Rights [and hence the fundamental right to government – held information] applies to all law and binds the legislature, the executive, the judiciary, and all organs of state.

The constitutionalisation of freedom of information and the elevation thereof as a fundamental human right underscores the impetus of the intended paradigm shift. Democracy, in terms of this paradigm shift, is revived as “rule by the people”. The original democratic objectives of responsive and accountable government are reaffirmed as democracy's primary objectives. In addition, this reaffirmation is given practical effect by guaranteeing the key to achieving these objectives, by guaranteeing the right to freedom of information - a necessary precursor for participation and accountability.

In terms of the South African Constitutional vision, the right to freedom of information in a sovereign constitutional democracy serves a dual function. Freedom of information is on the one hand, a primary and central constitutive value or ideal in and of itself, in view of the fact that it is constitutive of power. It is however also of practical importance. It is not only of conceptual importance, but is also a tool or process, vital to the successful delivery of the host of other values and ideals, including transparency and accountability, so central to constitutional democracy. This duality of the value of the right to information is summarised by Selby Baqwa as follows:

Access to information is important. It is important because it is a constitutive part of the freedoms related to communication. It is, however, not simply one of the civil liberties the existence of which makes democracy valuable. It is also a necessary condition for any democratic regime to work. Unless it is sufficiently well informed about the government's activities, the public cannot have the power to subject the government to its own values, principles and preferences. For as long as official documents remain unavailable, so long as those who make them public can be legally prosecuted, the scope of

efficient public interest action will remain extremely narrow.³

The South African Constitution recognises freedom of information as a fundamental constitutional principle. Likewise, it recognises, participation, accountability and responsive good government as fundamental constitutional principles. In addition to recognising freedom of information as a fundamental constitutional value in and of itself, it recognises that realisation of the latter principles is entirely dependant on the practical implementation of the former principle.

The following extract from the Constitution recognises the fundamental value of participation, accountability and responsive government to democratic government:

Section 1:

The Republic of South Africa is one sovereign democratic state founded on the following values:

(d) Universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. (my stress)

The Constitution accordingly equates democracy with the original democratic objectives of accountability, responsiveness and openness. However, in giving effect to these overarching democratic objectives, the Constitution, in accordance with the revised democratic paradigm ascribed to by it, seeks to guarantee the fullest realisation of these objectives. It recognises that South Africa is a modern administrative state and that these democratic objectives depend on the democratisation of the previously marginalised, administrative branch of government. Therefore, it expressly imposes a duty on all organs of state to adhere to, and to give effect to these basic values of accountability, responsiveness and openness. In addition to the general duty imposed on all organs of state in terms of section 8(1), the Constitution singles out, and expressly obliges the administrative branch of government to adhere to these values. In terms of S 195(1):

Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(e) People's needs must be responded to, and the public must be

³ Advocate Selby Baqwa, The South African Public Protector, 'Welcoming Address' to IDASA Workshop on The Draft Open Democracy Bill, 28 August 1997, Unpublished.

- encouraged to participate in policy-making.
- (f) Public administration must be accountable.
 - (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

The South African Constitution, as evidenced by the preceding selection of provisions, has unequivocally recognised the need for, and sought to effect a democratic paradigm shift, with a view to ensuring, as opposed to paying mere lip service to a sovereign, democratic state.

What is perfectly clear from these provisions of the Constitution and the tenor and spirit of the Constitution viewed historically and teleologically, is that the Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is 'justifiable in an open and democratic society based on freedom and equality'. It is premised on a legal culture of accountability and transparency... [these are the] purposes sought to be advanced by their enactment.⁴ (my stress)

The Constitution equates democracy with responsive, transparent and accountable government, in the fullest sense of the term. Most notably, democracy is, in terms of the Constitution, wholly dependant on a responsive, transparent and accountable administrative branch of government.

The Constitution recognises that democracy, as defined, is wholly dependant on the fullest recognition and protection of the right of access to state – held information. The fundamental connection between, on the one hand, the attainment of democracy - or an accountable, responsive administration amenable to public participation - and, on the other, the right to access to information , is recognised in the Interim Constitution in its directive that:

Provision shall be made for freedom of information so that there can be open

⁴ Shabalala & Others v The Attorney General of the Transvaal & Ano., 1996 (1) Sa 725 (CC0 at para 26

and accountable administration at all levels of government.⁵

The Final Constitution has recognised the importance of this right to democracy in following through on this directive. Not only has it entrenched the right as a fundamental right. It has, in the formulation thereof, adopted a significantly expansive format. Unlike the Interim Constitution, the right of access to information is not dependant on a prior infringement of the individual's rights. **Every person** has, in terms of section 32, a fundamental right of access to information. In addition to its general freedom of information provision founded on the Interim Constitution's directive, the Final Constitution recognises the essentiality of the link between responsive democratic administration and the right to information in its specific imposition of a duty on the administrative branch to furnish information in the form of written reasons for administrative action which adversely affects the public's rights.⁶

The fundamental and intrinsic link between the objectives of democratic government and the right to access to information held by the administrative branch has found judicial recognition in a number of cases.

In the case of S V Makwanyane the court confirmed that the Constitutionally created ethos of accountability is wholly dependant on the state and its administration being compelled to answer for its actions and being subject to critical scrutiny.⁷ And that:

Section 23 [the fundamental right to access to information] is... a necessary adjunct to an open democratic society committed to the principles of openness and accountability.⁸

The Final Constitution is by its very nature a document which embodies the founding political principles on which the South African state is to be governed. A principle is defined by The Collins English Dictionary as "a general truth or law; the essence of something; a constituent of a substance that gives the substance its characteristics or behaviour". The Constitutional provisions which recognise the dual value of the right of access to information are an expression of one such essential founding principle, or *Grundnorm*, of a sovereign constitutional democracy: Public access to state-held information.

The Constitution is "a prescriptive and not a descriptive document; [it] indicates how state power should be exercised and not how it is exercised in

⁵ Act 200/1993

⁶ *Ibid*, S 33(2)

⁷ 1995(3) SA 391(CC) @431, para 88

⁸ Oozeleni V Minister of Law and Order, 1994 (3) SA 625 (E) at 642

practice. [It] is normative, ... it denotes which set of values should be upheld in the governing process.”⁹ The values or principles encoded in the Constitution provide the substantive essence which must be reflected in, and respected by the legal and political infrastructure. The terms and provisions of the Constitution therefore, by definition, lack detail and specificity as to exactly how, and to what extent those government agencies obligated to it, should give effect to the stated principle.

The Constitution, in recognition of this fact, and in recognition of the potential harm that could be done to this primary value through legislative inertia, directs that national legislation be enacted to concretise this right, to give practical effect to it, in order to ensure the realisation of a sovereign, constitutional democracy.¹⁰

This legislation has not as yet been enacted, but currently exists in the form of a proposed bill – The Draft Open Democracy Bill¹¹. The title of the bill is, in its choice not to emulate the title of similar foreign legislation, indicative of the intention of the drafters to give effect to this right, not in abstract, but in the context of the furtherance of the objectives of transparent and accountable government.

The immediate object of the Bill is, in terms of clause 3(1)(a):

To provide for public access, as swiftly, inexpensively and effortlessly as reasonably possible, to information held by governmental bodies without jeopardising good governance, personal privacy and commercial confidentiality.

The immediate objective of the Bill is therefore, in accordance with the Constitutional directive, to give practical effect to the public’s right to access to government-held information. The starting point in achieving this objective is through the imposition of a general mandatory duty on the state to disclose **any** information requested.

Despite any other legislation,any person **must**, on request, but subject to this Act, be given access to **any** record of a government body.

The Bill is accordingly premised on a prior presumption of a disclosure of information, rather than the protection of information. The public’s right to access is prior to any confidentiality interests the state may have. The latter are expressly subordinated to the former.

⁹ L Boule, B Harris & C Hoexter, *Constitutional and Administrative Law: Basic Principles*, 1989, p 20

¹⁰ S 32(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden of the state.

¹¹ Draft Open Democracy Bill, No 18381, in *Government Gazette*, 18 October 1997

The chosen route for attaining the immediate objective of the Bill, namely to guarantee, and provide mechanisms for implementing the right, has however been fundamentally informed by the broader contextual objective of the Bill. The Bill is, in terms of the broader constitutional objective, a vital key to the attainment and maintenance of constitutional democracy. Accordingly, the Bill, in providing for access to information, identifies its broader contextual objective as:

Generally, to promote transparency and accountability of all organs of state by providing the public with timely, accessible and accurate information and by empowering the public to effectively scrutinise, and participate in, governmental decision-making that affect them. (my stress)¹²

The Bill, in its original draft, in both the prescribed ambit and content of the right and correlative duties, clearly located the right to freedom of information within the context of the attainment of these expansive objectives. The original draft sought to guarantee access to information in such a manner so as to promote transparency and accountability, to ensure effective scrutiny and so as to enable effective public participation in governmental decision-making. Despite the fact that the Bill's current format differs in certain respects to the original draft, most notably in its exclusion of its "open meeting" provisions, it remains nonetheless committed to the broader objectives. In fulfilling these objectives:

The bill is very ambitious and seeks to encompass within a single piece of legislation matters frequently covered by several statutes in other jurisdictions. At its most expansive, the bill sought to:

- ◆ Give citizens access to information held by government bodies
- ◆ Allow citizens to attend meetings of government bodies
- ◆ Prevent government from misusing information it holds about individuals...
- ◆ Protect government officials who disclose governmental wrongdoing...¹³

The Bill has yet to be enacted, and until such time, the right to information remains bedded within its broad Constitutional format, and accordingly remains subject to the uncertainty of the interpretive process.

¹² Clause 3(1)(h)

¹³ 'The Open Democracy Bill: A Critical Overview, December 1997', A report by The Human Rights Committee, The Black Sash and IDASA (PIMS), unpublished

8.3 Limitations On The Right To Freedom Of Information - A Constitutional Perspective

The Constitution recognises that all fundamental rights entrenched in the Bill of Rights, with the exception of certain non-derogable rights, are not absolute and are capable of limitation. The right to freedom of information is not classified as a non-derogable right and is therefore subject to limitation.

However, in terms of S 36(1) of the Constitution:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including -

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose (my stress)

In addition, where government action has an adverse effect on an person's rights, the government agency responsible for the adverse action or decision is obliged, in terms of S 33 (2) to furnish written reasons for such action or decision. Clearly, the limitation of a person's rights, including the right to freedom of information, constitutes an adverse effect and accordingly warrants a statement of reasons in respect of such limitation.

One of the purposes for compelling the furnishing of written reasons under these circumstances is to enable the recipient to determine whether or not the decision-maker has complied with the further duty imposed in terms of S 33(1). In terms of this provision, the administrative branch of government bears a duty to act reasonably. It is submitted that this means *inter alia*, that the reasons furnished for the decision or action must, in relation to the decision or action taken, be reasonable and justifiable as measured against the dictates of an open and democratic society, as required by the Constitution's general limitation provision.

The cumulative effect of these provisions is to engender and entrench a culture of justification and accountability, so as to allow for the realization of the objectives of a sovereign constitutional democracy.

It is submitted that this culture of justification and accountability requires that any administrative act which deprives a person of one of their fundamental rights as contained in the Bill of Rights, be presumed unconstitutional. It requires

in turn that the state bear the onus to prove the contrary. That is to say, that the onus is on the state to prove that the limitation is constitutional. Accordingly, any administrative decision pursuant to the exercise of a discretionary power, to refuse access to requested information, is in terms of the Constitution, presumed to be unconstitutional.

In other words, the Constitution creates a presumption in favour of disclosure as the norm and places the onus of proving the contrary, that is to say, that non-disclosure is reasonable and justifiable in an open and democratic society, on the state agency.

In fact, one can go as far as to say that the entrenchment of the right as a fundamental right creates a presumption against the constitutionality of the conferral of extensive executive discretionary power to limit the rights in the Bill of Rights, including the right to information. Accordingly, the Constitution in fact creates a presumption that no executive or administrative agency is authorised to exercise a discretionary power to withhold information, unless the contrary is proven by the state. Further, in order to discharge that onus, the state must prove to the court that the decision to withhold that information, (and in fact the exercise of the discretionary power to so withhold the information), measured as against the reasons given for withholding the information, is both reasonable and justifiable in an open and democratic society.

These implications of the constitutionalisation of the right to freedom of information, in respect of the presumptions created, the location of onus and the standard of proof required to discharge that onus, were confirmed by Jones J in the case of Commissioner of SAPS v A-G, Eastern Cape. The court was referred to Canadian law which recognises that the State, in criminal matters, has a discretionary power to withhold information. It was argued that the same rule applies in South African law. The court rejected this argument on the following grounds:

[The Canadian position]...is that the State has in a proper case a discretion, reviewable by the Courts, to withhold information which would ordinarily be disclosed to the defense. This must be shaped to the principles of our Constitution and to the sphere in which it operates. The Canadian Charter does not contain a specific provision like our S 23 [of the Interim Constitution]. In Canada the right to information is not a direct constitutional right; it is a development arising out of the right to make full answer and defense which is not itself a charter right. It is one of the fundamental principles of justice referred to in S 7 of the Canadian Charter of Rights.....It is accordingly not inappropriate for a Canadian Court to speak of a discretionary withholding of information vested in

officers of State which is subject to the Court's powers of review. It is, however, inappropriate to confer a discretion upon an official of State to withhold information from an accused in the face of a fundamental right to that information which is directly guaranteed by the Constitution.

¹⁴ (my stress)

The court having confirmed a presumption against the conferral of a discretionary power to withhold information, acknowledged that the discretionary limitation of the right could be justified under certain circumstances. However, the onus to disprove this presumption fell on the state. The onus to set aside the presumption in favour of disclosure would only be discharged if the state was able to prove that the limitation of the right was justifiable:

But the fourth principle can be given a modified application: while S 23 gives the defense a right to the information in the police docket, there may be justifiable restrictions upon that right which satisfy the conditions of S 33(1) of the Constitution. If there are, State officials may claim the restrictions. If the defense do not accept that claim, the Courts will be called upon to adjudicate upon the issue.¹⁵

As to what would be required to satisfy the court that the exercise of discretion and consequent limitation of the right was justifiable, in other words what would be required for the state to discharge the onus of proof, was set out in some detail in the case of S v Sefadi by Marnewick AJ:

For the limitation on the right of access to information in the statements contemplated by S 23 of the Constitution to be valid, the limitation ... has to comply with three different requirements laid down by S 33(1). In the first place, it has to be reasonable to maintain the existence of the limitation constituted by the privilege. In the second place, the existence of the privilege has to be justifiable in an open and democratic society based on freedom and equality. In the third place, the limitation constituted by the privilege should not negate the essential content of the right in question.¹⁶

¹⁴ 1995 (1) SA 799 (E) @ 830-831 J-D

¹⁵ @ 831 D-F

¹⁶ 1995 (1) SA 433 (D & CLD) @ 438 B-D

Although both of these cases dealt with the specific question of an accused's right of access to information contained in police dockets, it is submitted that the statements made during the course of these judgements are of general application. They are of general application to all discretionary limitations of the right to information in view of the fact that these judgements were premised on the broad implications of the constitutionalisation of the right to information as a fundamental right, for the recognition and validity of discretionary power to limit that right.

The rationale underlying these judgements was informed by the dictates of the Constitution. In expressly constitutionalising and entrenching the right to freedom of information as a fundamental right, the Constitution unequivocally confirmed that all limitations thereto are subject to the express constitutional principles, including the rule of law. They are made subject to the rule of law as this principle, in terms of section 1(c) of the Constitution, enjoys an elevated status equal to the supreme status of the Constitution.¹⁷ Accordingly, the right to freedom of information, encoded as it is in the Constitution as a founding principle and as a fundamental right, is supreme and enjoys an elevated status in relation to all other interests not specifically provided for in the Constitution, including the interests of the state. Accordingly, any discretionary limitation of that right not expressly authorised by an enabling act of parliament is presumed to be contrary to the law and to the Constitution, unless it can be shown that it is justifiable in an open and democratic society. In addition, it is submitted that even a discretionary limitation authorised by an act of parliament, is presumed contrary to the Constitution. In view of the fact that all laws are subject to the Constitution which disapproves of unconstrained discretionary limitations of the fundamental rights contained therein, the legislation itself which authorises such a discretionary limitation of the right to information will be presumed unconstitutional. By extension, any subsequent exercise of that discretionary power will suffer the same fate, unless the contrary is proven.

The comparative jurisdictions discussed in this thesis have not expressly entrenched the right to freedom of information in their Constitutions. Some of them have nonetheless recognised its elevated status as an essential democratic right. However, any such recognition is an interpolation of the existing Constitution. Its recognition as a constitutional fundamental is derivative, a status recognised by necessary implication. For example, in the United States, the right to freedom of information is recognised as a necessary, but unstated adjunct to The First Amendment rights.

¹⁷ S1(c): The Republic of South Africa is one, sovereign, democratic state founded on the following values:
Supremacy of the constitution and the rule of law.

The fact that the democratic status of the right remains constitutionally unstated has afforded the courts and the executive branch the space to overlook the fundamental status of this right. It has implicitly allowed and justified judicial elevation of the state's purported national security interests above the public's right to know, when reviewing claims to the national security exemptions to this right. The mere legislative recognition and protection of this right as a fundamental right through the creation of prior presumptions of disclosure of information rather than protection of information have failed to accord it the requisite pedigree. The diluted prestige and strength of legislative pronouncements in relation to the prestige and strength of a concurrent written constitution has meant, in the arena of national security, that the right to freedom of information is easily, and "justifiably" sacrificed in the interests of the all important objective of the safety of society.

It is submitted that the South African Constitution has sought to address this particular lacunae by expressly constitutionalising and entrenching the right to freedom of information. It has left no doubt on the matter. In constitutionalising the right, the Constitution has subordinated **all** government action, not only to the law in the narrow sense of the word, but more importantly, to the overarching constitutional principles. Accordingly, by implication, it prohibits all acts 'outside the law', whether it be outside the parameters set by legislation or outside the parameters set by the Constitution.

8.4 Limitations Of The Right Of Access To State-Held Information In The Interests Of National Security – Constitutional Prescriptions

The Constitution, as it must, permits the space for legislatively ordained restrictions of the right of access to information, in the interests of national security. This space is permitted subject to the condition that such restrictions, often formulated in terms which afford an individual, or agency, a discretionary power to withhold information on the ground that disclosure would harm national security, comply with the criteria set out in the Constitution's limitation provision. As such:

In appropriate and genuine circumstances it is likely that law restricting access to information on the grounds of national security would be upheld¹⁸

The envisaged acts ordinarily formulate these restrictions to the right to

¹⁸ J Klaaren, 'Access to Information' in Chaskalson et al, Constitutional Law of South Africa, p24-8

freedom of information in such a manner as to generally authorise the limitation of the right in the event that disclosure would harm the interests of national security. Therefore, implicit in the power to restrict, is a prior obligation on the decision-maker to identify and analyse the potential harm that disclosure would or could cause to national security. The process of threat detection is a complex issue and the actual identification of a threat is “inherently subjective because [it] relies on *perceptions* of threats”.¹⁹ The full spectrum of potential threats cannot be circumscribed by the law, in the narrow sense, that is to say by the enabling legislation, in view of the indeterminacy and complexity of the matter at hand. Therefore the terms of the enabling legislation authorising the decision to limit the right on these grounds invariably confer discretionary powers on the decision-maker, and the decision to limit the right on these grounds is invariably the result of the exercise of that discretionary power. The national security discretionary power, by virtue of the nature of the subject matter at hand, is not immediately and obviously amenable to prior circumscription by the law. By extension, strictly speaking, all such discretionary decisions to withhold information in the interests of national security are therefore outside of the law, but nonetheless legal, in the sense that they are exercised within the terms of the discretion afforded by the enabling legislation. However, in view of the Constitution’s preclusion of the discretionary limitation of the rights contained in the Bill of Rights, these decisions, *prima facie*, fall beyond the Constitution’s permissible boundaries.

The discretionary limitation of the right of access to information is in terms of the Constitution, presumed to be outside of the constitution’s legal framework, and therefore unconstitutional. Therefore, one may conclude that any actions taken by a government official in terms of such law, so as to deny access to information would certainly be closely scrutinised by the courts. This conclusion is shared by Jonathan Klaaren who argues that:

..the courts will certainly closely scrutinise an assertion of national security in view of the long history of the abuse of this ground and in view of the conflict between the notion of national security and the constitutional value of openness.²⁰

The presumption as to the unconstitutionality of the discretionary executive limitation of the right to know will remain operational, and the refusal of access will remain unlawful, unless that presumption can be rebutted, by

¹⁹ L Nathan, Op Cit, p23

²⁰ Ibid

showing that the discretionary decision does in fact comply with The Law. That is to say, by showing that it is justified in terms of the criteria set out in the limitations clause of the Constitution.

Could it be argued, as proponents of extensive secrecy practices and discretionary power in the arena of national security would seek to argue, that the Constitution implicitly intends the aforesaid principles to apply to exemptions generally, but not to the national security exemption. Or that, if it does apply to this exemption, the standard of proof required to discharge the onus on the state to show the justifiability of its actions, must, as a necessity of circumstance, be significantly lower.

The answer to both questions is clearly no. The Constitution has expressly entrenched the right to freedom of information and thereby subordinated all law or conduct to it. In addition, any remaining doubts as to the inclusion of the national security function of the state within the categories of “law or conduct” so subordinated, are expunged by the sentiments expressed in section 37 of the Constitution. This section, which deals with “States of emergency” is of direct significance to the issue at hand. A “State of emergency” is surely one of the most direct expressions of decisions taken in the interests of the prevention of harm to national security.

The Constitution directly and unequivocally makes the declaration of a state of emergency, the power to do so, and more importantly the powers exercised during such a state, subject and subservient to the Constitution. Section 37 specifies the lawful circumstances under which such a state may be declared²¹ and it vests in the courts, the power to decide on the extent to which these lawful circumstances have been complied with. In other words, the courts are vested with the power to determine the validity of –

- ◆ A declaration of a state of emergency;
- ◆ Any extension of a declaration of a state of emergency; or
- ◆ Any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.²²

It is submitted that the sentiments expressed and the constraints imposed by this provision, in respect of a legislative declaration of a state of emergency, clearly indicate that discreet executive instances of denial of access to information, on the ground that disclosure would be harmful to national security, must be subject to both the Constitution. If the declaration of a state of

²¹S 37 (1),(2) and (4)

²² S 37(3)

emergency by the legislative branch of government is subject to the law, then surely the more isolated daily discretionary decisions by lower ranking state officials relating to questions of state security must also be so subject.

Any remaining doubts as to the supremacy of the law (in the narrow sense) and the Constitution over the national security function of the state are laid to rest by Chapter 11 of the Constitution. The inclusion of this chapter, which is expressly and exclusively devoted to the Security Services, visually locates these functions within, and by implication, subject to the broader constitutional framework. This implied location of subordination is expressly confirmed by the provisos that:

National security must be pursued in compliance with the law, including international law, and

The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law.²³

The pervasiveness of these directives is all-encompassing. Even the President's actions as head of the national executive and as Commander-In-Chief of the defence force, are expressly subject to the Constitution and its overriding principle of popular sovereignty.²⁴

The constitutional context and directives dictate the unavoidable conclusion that executive or administrative discretionary limitations of the right of access to information, in the interests of national security, are, as with all other discretionary limitations, equally subject to the law and the Constitution. This means that the substance of the decision, or more specifically the underlying allegation of harm, must be substantiated in terms of the criteria set out in the Constitution, and any other relevant law. In addition, it means that the courts are competent, qualified, and in fact obliged to assess the substance of the validity of any such assertion.

²³ Sections 198(c) & 199(5)

²⁴ See section 203(1) of The Final Constitution – The President's declaration of a state of national defence is subject to the veto power of "the people's" elected representatives.

8.5 Limitations Of The Constitutional Right Of Access To State-Held Information In The Interests Of National Security: A Prognosis – Is The Fate Of The South African Constitution To Be “A Smoke Screen For Business As Usual – Secretly”?

Constitutionalism is a prescriptive and not a descriptive doctrine; it indicates how state power should be exercised and not how it is exercised in practice. It is normative, that is it denotes which set of values should be upheld in the governing process. These values require more than just a set of constitutional rules: as is often observed, not every country with a constitution upholds the principles of constitutionalism. The fact that it is prescriptive and normative does not make constitutionalism something that is not ‘real’; its principles do influence the practice of government and are a significant ingredient in the constitutional systems of the world. They provide a standard by which the record of individual government systems can be measured, and by which one can be compared with another. It has some influence on those who operate the state system: policy – makers, administrators, and most importantly, judges. However, it does not describe how political systems actually work in practice.²⁵

The question that arises is whether the Constitutional national security ethic is, or will be, mirrored in the prevailing South African political and legal systems. Is it, or will it be embraced by the state’s three branches, namely the legislature, the executive (and its administration) and the judiciary.

This thesis will commence this enquiry by scrutinising the judiciary, in view of their essential role as guardians of the Constitution. The question in relation to this branch is whether it will, in the practical application of the Constitution to discretionary denials of access to information on the ground that disclosure would be contrary to the interests of national security; in fact comply with its constitutionally dictated duty. Will it engage in the requisite degree of scrutiny of assertions of harm to national security?

If one simply has reference to the magistrate’s court decision referred to in the introduction to this thesis and the concerns raised in respect thereof, answering this question unequivocally in the affirmative is not as simple as it may appear. The tone set by the circumstances and initial, but automatic outcome of that decision do not bode well for the future implementation and protection of the Constitutional vision. It does not bode well for the presumptions of openness and accountability in the context of the national

²⁵ L. Boule, Harris & Hoexter, Op Cit, p 20.

security exemption to the right to freedom of information.

The magistrate's decision must be viewed within the broader context, and as a product of prevailing judicial ideology. As evidenced by the comments made by Judge Hlope, who is now in fact the Deputy Judge-President of the Cape High Court, quoted in the previous chapter, prevailing judicial ideology is characterised by its tenacious adherence to an attitude of non-justiciability of national security matters. The rationale being that these matter, falling as they do within the overtly political/public domain, are not amenable to judicial scrutiny and review. The import of magistrate's decision, viewed within this context, and as a product thereof, compels one to question the strength of Klaaren's optimistic conclusion that:

The courts will certainly closely scrutinise an assertion of national security in view of the long history of the abuse of this ground and in view of the conflict between the notion of national security and the constitutional value of openness.²⁶

In contrast, there exists the very real danger that the courts will not generate the requisite level of caution and skepticism in respect of assertions of national security necessary to lay the foundation for the development of a Constitutionally appropriate judicial ideology.

It is submitted, as evidenced by the tone of the current judicial statements and findings, that the judiciary's fundamental conservatism, founded in its liberal democratic heritage, will prove far stronger and more resilient than the force of the lessons to be learnt from the past. Accordingly, one cannot place undue reliance on this branch alone to ensure the democratisation of the national security exemptions.

It is not only prevailing judicial ideology which may frustrate attainment of the democratic objectives of transparency, accountability and participation. The attainment of these democratic objectives in the national security arena is, as discussed in the previous chapter, also significantly threatened by prevailing popular or public ideology. Judicial ideology may frustrate the Constitutional vision in its failure to enforce the Constitutional principles and values. The threat posed by an inappropriate popular ideology is, on the other hand, potentially more severe and pervasive. Its systemic ability and tendency to be perceived and presented as a source of legitimacy has profound implications for the impetus for change on the ground.

The public, as much as the judiciary, has good reason, in view of the

²⁶ J Klaaren, *Ibid*

lessons to be learnt from the past, to adopt an increased level of awareness of the dangers inhering in assertions of, and claims to, the interests of national security. Accordingly the public, like the judiciary, ought to be less inclined to respond blindly to scare tactics. More fundamentally, they ought to be less inclined to tacitly condone and even encourage extensive security powers and the resultant extensive secrecy practices in this domain.

Unfortunately the public's memory is, as in the case of the judiciary, proving to be short lived. The force of the lessons to be learnt from the past are proving insufficient to sustain popular awareness of, and pressure toward the eradication of the space permitted by claims of national security interests for democratically unacceptable practices in this arena. Present social dynamics are threatening to supercede the lessons to be learnt from the past. Public reaction to these dynamics, which reaction, it is submitted is a product of our long-term socialisation and entrenched national security ideology, is, as in the past, exhibiting tendencies to succumb to the appeal of Schmitt's simple alternative of absolute control or chaos. This tendency is responsible for Yaniv's observation that:

..any rise in the "threat barometer" of a democracy leads inescapably to tensions between the requirements of democracy and those of security.
 ..threats breed "fear" and, as a result, a well informed willingness to tamper temporarily ... with fundamental liberties.²⁷(my stress)

That is to say, it is responsible for the dilution of popular commitment to the Constitution.

Current social dynamics in South Africa are such at present that the "threat barometer" is on the rise.

We are experiencing in this country what can be described only as a crisis of social order. All around us, we see its signs. We feel the fear and the apprehension in our lives. Those of us who have thus far been exempt wonder, not unreasonably, when the tide of criminal depredation will wash up around us and slop into each of our lives.²⁸

A common and prevalent, discernable response to this crisis has been a renewed skepticism about the value of constitutionalism. It has generated a skepticism about a culture that revolves around rights. This skepticism translates

²⁷ A Yaniv, op cit, p 1

²⁸ E Cameron, "Constitutionalism and the Rule of Law" in (1997) Vol 114, Part III, SALJ, p 504

into a wide spread ideology, reminiscent of Schmitt's ideology, which:

...doubts the value of law at all in a period of social crisis, [which is wide spread because] The premises of this viewpoint are powerful and in some ways attractive:

- ◆ It suggests that legal rights are an obstruction to public safety.
- ◆ It urges that direct coercive action by the state is required in the maintenance of social order and that, to the extent that the legal system inhibits such action, it is inimical to public welfare.
- ◆ It argues that legal principle must (temporarily) be sacrificed in the attainment of social order.²⁹

These premises constitute and articulation of Schmitt's theory of "The Political", the state and sovereignty in relation to matters of national security. They emulate Schmitt's aversion to, and displacement of, The Law. The immediate connection made between the prevalence of the law and the Constitution and social chaos, conversely assumes that a return to order depends on the displacement of the law and the Constitution. Therefore, like Schmitt, proponents of these premises effectively seek to locate national security matters outside of, and not subject to, the law (in the narrow sense), as well as the Constitution. A regression to a state of chaos, which is how many South Africans would describe prevailing social dynamics, must be met with a parallel regression to authoritarian, absolute government. The imperative is to end the state of chaos, and that imperative, and that imperative alone, dictates and justifies resorting to repressive "decisionist" state action. In short, it dictates and justifies resorting to means outside of the democratic legal-political paradigm.

The blatancy of Schmitt's terms to describe these calls for the temporary sacrifice of our Constitutional rights, and his overtly undemocratic assumptions to explain the premises underlying those calls, are an anathema to any self-proclaimed democracy. However, despite the fact that his theories offer an accurate description and explanation of these calls, they remain a regular feature of South African society, which continues to ascribe to the democratic way. This fundamental inconsistency is explicable in terms of the traditional democratic paradigm, which has been rejected by the terms and tone of the Constitution. Public attitudes have however lagged behind in this rejection, thereby rendering the purported paradigm shift incomplete. Public attitudes, perceptions and the

²⁹ Ibid, p508

resultant ideology, in regard to matters of national security, remain bedded within the divisive “public/private” residue of that prior paradigm. Public ideology, which has seen calls for the effective exclusion of democratic and constitutional principles from the arena of national security, in the interest of self-preservation, cast back to, and find legitimacy in the theories of the traditional philosophers such as Rousseau and Locke. These theories have informed the liberal democratic tradition, a heritage which has substantially informed prevailing national security ideologies. This tradition, it is submitted is largely responsible for the perception that:

...the problem of ‘freedom’ and the problem of ‘security’ for human beings in society are basically the same problem, looked at from two opposite angles.³⁰

This perception is in turn largely responsible for affording government greater discretion and power to infringe on our ‘freedom’, by force if necessary, to ensure “effective enforcement of a minimum of social order, our physical safety and well-being, our economy, our spiritual life itself.”³¹

An example of this type of reaction and the resultant calls for more extensive and decisive government action and power is currently playing out in the Western Cape. This area is experiencing a crisis of “urban terrorism” caused by the alleged activities of the militant Muslim vigilante group known as PAGAD. The perceived inability and incapacity of the government officials responsible for the restoration of law and order, to put an end to this crisis, has elicited calls for special legislative measures to deal with urban terrorism.

³² These calls translate into calls for legislation to confer extraordinary (discretionary) powers on government agencies responsible for policing matters such as urban terrorism, that is extraordinary in relation to existing legally prescribed and constrained powers.

What is of course of concern is the fact that the pervasiveness of these attitudes are such that they are not limited in their application to individual and isolated instances of infringement of rights. The ideological assumptions underlying these attitudes in fact “set the general tone of discussion”.

³³ The pervasiveness of these attitudes facilitate a move from *ex post facto* condonation of a specific infringement to a an *a priori* unquestioning acquiescence to, and condonation of a national security culture characterised by

³⁰ R N Berki, *Security and Society: Reflections on Law and Order and Politics*, 1986, p1

³¹ Cameron E, *Ibid*, p 508

³² Saturday Argus, January 16/17 1999, p1

³³ Berki Rn, *ibid*, p2

extensive powers. It is these powers which hold the potential for the routine infringement of rights in the ‘interests of national security’. In short, they found an ideology characterised, not by a recognition of the need for limitation of constitutional rights in terms of constitutional criteria, but one characterised by disdain for constitutionalism, in the national security arena.

The danger herein, as pointed out by Cameron, is that the Constitution is the “first hedge we cut down in the struggle for social order. [Whereas] it should be the last”.³⁴

Any society shaped by perceptions and attitudes such as these of course exposes itself, in its unquestioning ethos, to the potential dangers of abuse of the extensive power conferred. In the context of freedom of information, it exposes society to the danger of abuse of power through the manipulation of information so as to mould and present it as information pertaining to security. The incentive to do so lies in the opportunity presented to capitalise on the prevailing ethos of acquiescence. This ethos may be capitalised on in the secure knowledge that the invocation of the term national security will preclude any significant level of questioning or calls for accountability, as reference to the term invokes emotive as opposed to rational responses. And of course that public acquiescence is then identified by those exercising these extraordinary powers as a source of legitimation for their conduct. The potential for this danger is echoed in the following statement by Peter Gastrow, the Western Cape Director’s statement in response to the PAGAD “crisis”:

Lets deal with the situation in a rational, open and honest way without whipping up hysteria. Constant use of the word ‘crisis’ does not help, because that is when people fail to think rationally.³⁵

The irrational use of the security related term ‘crisis’ was recognised by him as laying the foundation for a slide down the “slippery slope” to uncontrolled and uncontrollable government power, in his statement that:

While I agree that extraordinary measures are needed to deal with urban terrorism, these must fall within the parameters of the Constitution.³⁶

The first point to bear in mind in respect of claims to prevailing popular attitudes as a source of legitimacy is that any such claim is inherently unconstitutional. A fundamental premise of constitutional democracy is that

³⁴ Cameron, *ibid*, p510

³⁵ Sunday Argus, *ibid*.

³⁶ *Ibid*

democratic standards and questions of participation in power are not determined at the discretion of the dictator, **or at the discretion of the “dictatorial collective”**. A constitutional democracy overtly and expressly displaces democracy in the sense of simple and absolute rule of the majority. It insists on the constraint of that rule within the prevailing constitutional framework. Majority rule is subject to the supremacy of the constitutional framework and the values enshrined therein.³⁷

In addition, allegations of, or claims to popular legitimacy of the exercise of unconstitutional powers in the national security context, must be regarded skeptically. They depend on the validity and rationality of the prevailing popular perceptions founding popular ideology. These perceptions must themselves be regarded with skepticism given the power and incentive to manipulate the information on which those perceptions are based. In the national security context there exists the very real possibility that popular opinion is premised on incomplete, inaccurate, exaggerated and distorted information.

The immediate solution to the danger inhering in prevailing popular ideology is to insist on external legislative and judicial enforcement of the Constitutional principles and directives. The long term solution, which is intrinsically linked with the right to freedom of information, is to ensure maximum enforcement of this right in the arena of national security. Maximum access to information by the public is a pre-requisite for the demystification of the term, which is in turn essential to the development of a constitutionally appropriate popular ideology. Information is essential to the success of a fundamental transformation of prevailing public ideology into a constitutionally appropriate ideology. Transformation depends on an informed public, who on the basis of complete and accurate information will be empowered to engage in rational, as opposed to emotive participation.

8.6 Defining National Security in South Africa

In the interim, until such time as popular and even judicial attitudes to questions of national security undergo the requisite transformation, the danger exists for the acceptance of unconstitutional claims for extended national security powers. This danger is, as in other jurisdictions, exacerbated by the flexibility and indeterminacy of the term national security.

This flexibility and indeterminacy is directly related to the definition, or more specifically the lack of definition of the term ‘national security’. Current South African legislation which regulates the interplay between information and

³⁷ Friederich, C, op cit, p4

national security pre-dates the Constitution, and is accordingly formulated in accordance with assumptions particular to the traditional democratic paradigm. This inevitably means that the relevant legislation fails to define national security. Therefore, when it affords the executive, and its administration, the power to decide to withhold information in the interests of national security, it effectively affords them the power to decide what in fact constitutes national security.

In South Africa the resultant potentially extended ambit of national security, and the attendant ambit of extraordinary executive powers, is further complicated by the current climate of transformation. A systemic feature of this climate is a tendency toward an extended reconceptualisation of national security. The argument is that national security, in view of the diversity and reality of the dangers facing the security of South African citizens, can no longer be solely equated with 'political' violence and hostilities. The security of the state must, in terms of this school of thought, be redefined in holistic terms, as:

...an all encompassing concept that enables the individual citizen to live in peace and harmony; to have equal access to resources and the basic necessities of life; to participate fully and freely in the process of governance; and to enjoy the protection of fundamental rights.³⁸

In short, national security must, in terms of this school of thought, be reconceptualised so as to include more than the traditional military dimensions of security, that is to say, the archetypal 'political' matters. It must include the 'private', non-military, social and economic security dimensions of society.

The proposed reconceptualisation of national security is predicated on the prevailing Constitutional vision of the developmental benefactor state. The state is obliged to respect, protect and develop its citizen's rights and freedoms. The ambit of this obligation is however not limited to the protection of the political rights and freedoms, traditionally encoded in constitutions, from external threats. It is fundamentally extended in accordance with the prevailing reconceptualisation of rights and freedoms. Fundamental rights and freedoms, as reflected in the Constitution, expressly connote the right to social justice and a qualitative life. Security of the state, or protection of the citizen's rights and freedoms must accordingly connote protection against threats posed to its citizen's social and economic rights. The state's protective role, that is to say, its security role, is premised on a vision of the state freed from the traditional public/private constraints of classical liberal theory, that is to say a state actively

³⁸ Nathan, L, Op Cit, p 15

involved in the social and economic spheres of society.

From a constitutional perspective, this signifies a first, and significant step in the rejection of the residual public/private template. However, it constitutes merely the first step which must be followed through in both the substance of legislative directives and in the practical implementation of those directives. In the absence of legislative activism and control, the constitutional context may simply serve as an expedient source of legitimacy for excessive executive action in the national security arena. The right to freedom of information, and by extension, the supremacy of democracy, may at the end of the day, be subject to an even greater corrosive threat, at the behest of an unaccountable executive branch of government.

Should legislation, and the judiciary, continue to permit this branch an extensive, unreviewable discretion to define national security, and to identify threats to security, within the reconceptualised context of national security, their power may simply be extended. The reconceptualisation of national security dissolves the public/private division. Herein lies both its strength and its weakness. The traditional conceptualisation provided at least some, albeit an imprecise and indistinct, boundary as to the definition of the term. By extension, it offered as at least some constraint on the executive power to define. The connotations of the term “national security”, and the resultant expansive authoritarian powers “legitimated” thereby, were to some extent inherently limited by the terms of reference of the traditional conceptualisation. The mere extended reconceptualisation of the term, as endorsed by the Constitution, could result in the dissolution of even this prior, albeit indistinct and imprecise constraint on the power of this branch in this arena.

Should the dissolution of this division not be accompanied by a similar and concrete democratic reclamation of this extended arena through legislative and judicial activism, the end result may be a “legitimate” denial of access to an ever increasing body of information.

The “public” sphere has up until now permissively precluded the intrusion of democratic ideals, practices and procedures. Not to actively follow through on the constitutional dissolution of the public/private divide could result in the extension of the ambit of the permissibly excluded public domain. Rather than being seen as an extension of the private, and hence, democratic domain, it could lead to the converse expansion of “the public” and the correlative expansion of that arena not susceptible to democracy.

In view of the strength of both popular and judicial connotations attached to the mere label “national security”, the danger is that by subsuming matters social and economic within its frame of reference, the mere invocation of the term could legitimate extensive authoritarian power beyond the traditionally

“public” domain. Likewise, its mere invocation could lead to a greater body of information being “legitimately” precluded from the obligation to disclose, on the ground that disclosure would be contrary to national security, as determined by an unaccountable executive branch of government.

8.7 Current Practice – The Executive’s Power to Define National Security in South Africa

The South African legal system, like many of its international counterparts, does not provide a legislative definition of national security. Like its counterparts, it may be accused of conferring on the executive branch officials an expansive degree of discretion to define the term. A prime example of this may be found in The Protection of Information Act of 1982. This act prohibits the disclosure of information relating to matters traditionally regarded as falling within the national security arena, including information relating to the defence of the Republic, a military matter, or the prevention of terrorism. In addition, it prohibits the disclosure of information falling into the broad generic category of “security” information.

The act fails to provide any guidance as to the content of these concepts, except in so far as it purports to define a ‘security matter’. In terms of S 1(1)(c) a security matter is defined as:

Any matter which is dealt with by the Agency or the Service as defined in section 1 of the Intelligence Services Act of 1994 or which relates to the functions of that Agency or Service or to the relationship existing between any person and that Agency or service.

The ‘Agency’ is defined in terms of S 1 of The Intelligence Services Act as ‘the National Intelligence agency; and the ‘Service’ as ‘the South African Secret Service, the Intelligence Division of the National Defence Force and the National Investigation Service of the SAPS’.³⁹

The matters dealt with by the ‘Agency’ and its functions are set out in the National Strategic Intelligence Act No 39 of 1994:

- ◆ Domestic intelligence, which is defined as intelligence on any internal activity, factor, or development which is detrimental to the national stability of the Republic, as well as potential threats to the constitutional

³⁹ The Intelligence Services Act No 38 of 1994

order of the Republic and the safety and well being of its people.⁴⁰

- ◆ Counter-intelligence, which is defined as measures and activities designed to counteract hostile intelligence operations, protect classified intelligence, to counter subversion, sabotage and terrorism.⁴¹
- ◆ Departmental intelligence, which is defined as intelligence regarding any threat to the national security and stability of the country which falls within the functions of a department of state.⁴²

And the ‘Agencies’ functions are to –

Gather, correlate, evaluate and analyze the above intelligence; and on the basis thereof, to identify any threat or potential threat to the security of the Republic or its people.

The relevant provisions dealing with the ‘Service’ are very similar in formulation, differing only in so far as the source of potential threats are referred to as external, rather than internal.

Ultimately, the definition of a security matter, in terms of the aforesaid provisions, amounts to no more than the tautologous definition of matters concerning the national security and stability of the country. In addition, it implicitly anticipates the extension of the ambit of this unquantified concept to include matters falling outside of the traditional security arena. This extension is anticipated, by way of example, in the National Strategic Intelligence Act’s reference to, not only the safety, but also the “well being” of society, as a matter dealt with by the ‘Agency’.

The definition is rendered no more specific by its reference to the traditional security terms such as subversion, sabotage and terrorism. Even these traditional security concepts remain undefined. The lack of definition in respect of these concepts is compounded by the fact that they were constitutive of crimes in terms of the Internal Security Act 74 of 1982, which act has since been repealed in its entirety. The repeal of this act constituted a rejection of the state sanctioned response and approach to issues such as these, within the broader context of a rejection of the previous dispensation’s high handed approach to matters of national security. Viewed within this context, the repeal of the act left a legal vacuum, which to date has not been filled. One cannot even turn to the common law for guidance in regard to these terms or crimes, because, they,

⁴⁰ S 1(ix)

⁴¹ S 1(v)

⁴² S 1(viii)

unlike sedition and treason, do not constitute common law crimes.

At the end of the day, the definition of these terms and the definition of national security is, in terms of the Protection of Information Act, left in the hands of the national security officials. This is clearly evidenced in both its failure to define the relevant terms and in its mandatory directive not to disclose information falling within these undefined categories. More specifically, in its mandatory directive that information which such official knows or reasonably ought to know falls within these categories, may not be disclosed.

Section 4 of the Act, entitled Prohibition of Disclosure of Certain Information codifies this mandatory directive as follows:

- (1) Any person who has in his possession or under his control or at his disposal –
- (b) any document, model, article or information –
- (i) which he knows or reasonably should know is kept, used, made or obtained in a prohibited place or relates to a prohibited place, anything in a prohibited place, armaments, the defense of the Republic, a military matter, a security matter or the prevention or combating of terrorism....

And who -

(aa) discloses such...to any person other than a person to whom he is authorised to disclose it or to whom it may be lawfully disclosed or to whom, in the interests of the republic, it is his duty to disclose ...

shall be guilty of an offence....(my stress)

The determination of what the highlighted categories encompass and whether certain information falls into those categories is left entirely at the discretion of the person in possession thereof, which in practice, is usually the national security official. Further, the official is prohibited from disclosing **all information** falling into those categories, irrespective of whether or not such disclosure would harm the national security interests of the country. Accordingly, this Act, in effect prescribes the mandatory wholesale exclusion of **all information** in the ambiguous arena of national security, at the sole discretion of the national security official.

The Protection of Information Act, for these reasons, poses an inherent threat to the democratic status of the right of access to information. This threat manifests itself in the unrestrained discretion afforded the national security official in the Act's failure to provide prior guidance as to the parameters of

national security, and in its failure to impose a duty on that official to weigh the harm of disclosure against the right to information. In the context of national security information this right is, despite its constitutionalisation, displaced in its entirety by the breadth of the Act's mandatory directive.

The extent of the potential damage inhering in this Act, which is admittedly the product of another era which pre-dates the Constitution, is not mitigated by the possibility of *ex post facto* control by the judiciary. Judicial review in this arena is inherently problematic in view of prevailing judicial ideology. The prevailing judicial ideology is in fact confirmed and aggravated by the terms of this Act. There is nothing in the Act to nudge the judiciary toward adopting a more Constitutionally appropriate approach. In fact, the terms and the tone of the Act encourage and entrench an inappropriate approach. The court is invited to regard decisions taken in terms of the Act as non-justiciable. This invitation lies in the mandatory tone and terms; the Act's imposition of a criminal penalty for disclosure; and by its failure to define the relevant terms, which failure may unequivocally be interpreted as a legitimate source of extensive discretionary power to define and decide. The court is invited to retain its traditional approach, more suited to the pre-constitutional dispensation, by more than the terms of the Act. It is invited to do so by the prevailing legislative attitude of condonation of the breadth and extent of the powers conferred by this act. This legislative attitude of condonation is evidenced by the legislature's failure to amend this Act subsequent to the passing of the Constitution, so as to bring it in line with the dictates of the shifted democratic paradigm. The legislature's failure in this regard is clearly indicative of it remaining mired within the residual traditional paradigm's public/private perspective in regard to national security matters. It constitutes concrete evidence of the fact that the paradigm shift in South Africa has not been complete, and it affords the judiciary the ideological space to follow its traditional course.

Judicial conservatism and legislative inertia certainly provide the space for the executive branch and its administration to draw on its definitive powers granted by the Protection of Information Act, to take the initiative in reconceptualising the term national security. The Act, in its reference to the extremely broad term, 'security matter', allows the scope for an extension of the arena of national security beyond its traditional boundaries. This undefined term is specified as a national security category alongside, and therefore, in addition, to the traditional national security categories such as subversion, terrorism and defence of the republic. Once placed within the context of the drive for a reconceptualisation of national security, the Act empowers the executive branch to extend the ambit of the national security arena beyond those traditional categories. It creates the space for the inclusion of issues relating to the social

and economic stability of the country, and threats thereto, within the ambit of the subject matter covered by its draconian provisions.

By implication, should claims of non-disclosure of information on the grounds of national security be allowed to prevail and go untested, the consequences would be profound for the right to freedom of access to government held information. By extension, this right could be denied across the fullest spectrum of information. The denial of access to information, and confirmation of that denial by a deferential judiciary, on the grounds of the interests of national security, would include the denial of a vast and new arena of information previously outside of the traditional ambit of national security.

The traditional 'narrow' view of national security which has dominated official thinking for many years is reflected in the following definition:

The ability to preserve the nation's physical integrity and territory; to maintain its economic relations with the rest of the world on reasonable terms; to protect its nature, institutions and governance from disruptions from outside; and to control its borders...as the condition of freedom from external physical threat which a nation state enjoys....it is really physical violence which is generally perceived to be...the real and tangible danger to its survival. [and also as] The preservation of the reigning political structure against any change, save change through channels which that structure has previously defined as legitimate.⁴³

The traditional definition, over time, crystallised into a number of identifiable threats. Simon Baynham, writing in 1990, identified the following as traditional threats to the national security of South Africa:

- ◆ The sustained build-up of high-tech military hardware in nearby states.
- ◆ Problems with the procurement of military equipment due to an arms embargo.
- ◆ Poor relations with neighboring states.
- ◆ Civil war and increased political strife in neighboring states.
- ◆ Continued threats of violence by both left and right wing extremists.
- ◆ Increased ethnic, racial and class conflict.
- ◆ Increased militancy due to increasing unemployment and urbanisation.⁴⁴

The sufficiency of this traditional approach to national security has

⁴³ Prof M Hough, 'National Security and Strategic Doctrine in the RSA' in *Paratus*, October 1990, p54

⁴⁴ 'Defence and Security Issues in a Transitional South Africa' (1990) Vol 14, no 3, *International Affairs Bulletin*, 4

however increasingly been questioned. It has been criticised for its inability to accommodate contemporary South African realities in its failure to take into account the full range of security issues facing South Africans today.

Maxi van Aardt is one such critic who argues that the real dangers constituting a threat to our national security are in fact no longer the threats falling within the traditional national security paradigm. Instead the greatest threats to our nation's security emanate from civil unrest, migration, diseases, drought, famine, environmental degradation, debt and unemployment. In short, van Aardt argues that the biggest singular threat to our national security is "the very survival of human collectivities".⁴⁵

This view is echoed by that of Prof Hough who similarly argues that South Africa, like other third world countries, is faced with a unique security dilemma, characterised by poverty, scarce resources, the need for institution building and respect and personal dignity.⁴⁶

Both of these writers argue that national security ought to be redefined in accordance with the real location of threats to our national survival. In addition, a reconceptualisation not only requires a redefinition of national security, but a reassessment and redefinition of national security objectives. The primary national security objectives, argues van Aardt, should focus, not on the mere maintenance, but on the actual provision of security.⁴⁷

This seems to suggest that national security must focus on addressing and remedying the causes of unrest, insecurity and related threats to the stability of the country, as opposed to merely attempting to suppress and avoid the physical symptoms which generally find expression in violence and discord. In achieving this objective national security must by necessity be seen as a broader concept than mere military preparedness.⁴⁸

These concerns and criticisms have not been limited to the ranks of academic writers, but have found expression from within government. They have been taken into account and driven the state's initiative to reconceptualise national security. The resultant reconceptualisation has, most notably, taken place within the context of the security related agencies of the South African government. The location for the discussion of the need for a reconceptualisation has been within the context of the traditional military-security agencies, such as defence and intelligence agencies. The reconceptualisation has not necessarily been accompanied by a re-evaluation as to which agencies are responsible for the

⁴⁵ M van Aardt, 'In Search of a more Adequate Conceptualisation of Security for Southern Africa: Do we need a feminist touch' (1993) Vol 20, no1, June, *Politikon*, p58

⁴⁶ Hough, M, *ibid*, 58

⁴⁷ van Aardt, *ibid*, p 61

⁴⁸ Hough, M, *ibid*, p54

provision and protection of the nation's extended security. The extended security matters are still eminently regarded as falling within the domain of the traditional defenders of security. This is cause for concern as it is reflective of an attitude which seeks to militarise all aspects of national security, rather than one which seeks to demilitarise the notion of security. The danger in this failure to invert the military emphasis is that if national security in all respects is militarised, it is implicitly located, in its extended version within the political domain in which extraordinary powers are the norm.

This militarised location of the extended reconceptualised national security is evidenced by the fact that it is dealt with, at a state level, in both the Draft White Paper on National Defence⁴⁹ as well as the White Paper on Intelligence⁵⁰. They have, in their tone and content, been informed by concerns to extend the ambit of national security.

Chapter 2 of the Draft White Paper on Defence, entitled 'The Challenge of Transformation', commences with a discussion of 'National Security Policy and the RDP'. The content and tone of this discussion reveals a decisive shift toward the broader understanding of national security, which is encoded in the reflected in the chosen definition of security, as:

..an all-encompassing condition in which individual citizen's live in freedom, peace and safety; participate full in the process of governance; enjoy the protection of fundamental rights; have access to resources and the basic necessities of life; and inhabit an environment which is not detrimental to their health and well being.⁵¹

The content and tone of the framework set out by the White Paper on Intelligence reveals a similar approach to that adopted by the defence draft paper. That is to say, it adopts a broader approach to the content of national security, and accordingly, a broader vision of the role and function of intelligence agencies in South Africa.

The White paper devotes an entire section, entitled 'Towards a new national security doctrine', to this issue. It identifies the traditional narrow approach to security and the corresponding role and function of intelligence as follows:

The traditional and more narrow approach to security has emphasised

⁴⁹ Defence in a Democracy: Draft White Paper on National Defence For the Republic of South Africa, 21 June 1995

⁵⁰ White Paper on Intelligence, October 1994

⁵¹ p 4

military threats and the need for strong counter-action. Emphasis was accordingly placed on the ability of the state to secure its physical survival, territorial integrity and the independence, as well as its ability to maintain law and order within its boundaries. In this framework, the classic function of intelligence has been the identification of military and paramilitary threats or potential threats endangering these core interests, as well as the evaluation of enemy intentions and capabilities.⁵²

The White Paper then proceeds to reject this 'military-strategic' approach to security in favour of 'security in the modern idiom', in other words security in:

...more comprehensive terms [which] correspond with new realities since the end of the Cold War era. [Which] realities include the importance of non-military elements of security, the complex nature of threats to stability and development, and the reality of international interdependence.⁵³

The White Paper advances two reasons for adopting this new approach. First, it is in accord with the international security agenda which is shifting to the full range of political, economic, military, social, religious, technological, ethnic and ethical factors that shape security issues. Second, following this international trend, the White Paper recognises that the main threat to the well-being of individuals and interests of the nation is not a neighboring army, but internal and external challenges such as economic collapse, overpopulation, mass migration, ethnic rivalry, political oppression, terrorism, crime and disease.⁵⁴

Following on from the above framework, the following key features are identified as underpinning the 'new' philosophical outlook on intelligence:

- ◆ Security is conceived as a holistic phenomenon and incorporates political, social, economic and environmental issues.
- ◆ The objectives of security policy go beyond achieving an absence of war to encompass the pursuit of democracy, sustainable economic development and social justice.
- ◆ Regional security policy seeks to advance the principles of collective security, non-aggression and peaceful settlement of disputes.

⁵² p6

⁵³ Ibid

⁵⁴ Ibid

In practice, this, in terms of the White Paper means that:

The broader and modern interpretation of the nature and scope of security leads to the conclusion that security policy must deal effectively with the broader and more complex questions relating to the vulnerability of society. National security objectives should therefore encompass the basic principles and core values associated with a better quality of life, freedom, social justice, prosperity and development.⁵⁵

As laudable as the sentiments underlying the expansion of the ambit of national security might be, there remains nonetheless a danger in the contextual location of the extension of that ambit. In the absence of fundamental changes in prevailing popular, judicial and national security branch ideology, the danger for the integrity of the democratic right to freedom of information is clear – a correlative incremental malignant encroachment on the ambit of the right to freedom of information.

8.8 Reconciling The Right To Freedom Of Information And The Interests Of National Security In South Africa – Recognition Of The Dilemma And Solutions Thereto, Actual And Proposed

The White Paper on Intelligence, having extended the ambit of national security, implicitly recognizes the potential danger inhering therein. It recognises the potentially unacceptable consequences for the attainment of the standards and ideals dictated by the Constitutional vision of a Sovereign, Constitutional Democracy. It recognises that these consequences can only be avoided if the prevailing national security branch's ideology is transformed so as to render it Constitutionally appropriate. It recognises that achieving this change will require a fundamental transformation of the intelligence community, its attitudes, functions and methodology.

The White Paper accepts that:

The creation of a new intelligence dispensation in South Africa [must] be accompanied by a review of the underlying principles of the system to be transformed.

It implicitly realises that the democratisation of South Africa will be

⁵⁵ Ibid, p 7

meaningless unless it extends to all spheres of government, including the 'transformation and democratisation of the intelligence community.'⁵⁶

Transformation and democratisation is recognised, within this context as requiring recognition and implementation of, *inter alia*, the following principles:

1. Political neutrality,
2. Legislative sanction, accountability and parliamentary control,
3. The balance between secrecy and transparency,
4. The separation of intelligence from policy making.⁵⁷

Having recognised the need for democratisation of this branch of government, the White Paper proceeds to formulate proposals for the concrete implementation of the aforesaid principles. These proposals include, *inter alia*, a Code of Conduct to govern the performance and activities of individual members of the intelligence services, guidelines as to the composition of the intelligence community and mechanisms for the control and coordination of intelligence.

The primary focus of the paper appears to fall on legislative control and coordination of the intelligence role and function. In so doing, it recognises that transformation at an administrative level will depend on legislative initiative and guidance. Ultimately, constitutionally appropriate, and sufficiently detailed legislative control and guidance must be the first step toward transformation at an administrative level of government. A commitment by the intelligence community to the rule of law will automatically, in the presence of legislative control, go a long way to ensuring constitutionally appropriate conduct and attitudes by the intelligence community.

Accordingly, the primary route for ensuring compliance with these principles appears to be legislative control through:

- ◆ A clearly defined legal mandate;
- ◆ Parliamentary oversight;
- ◆ Budgetary control and
- ◆ Ministerial Accountability.

These proposals, by virtue of their focus, clearly seek to address one of

⁵⁶ Ibid, p9

⁵⁷ Ibid

the primary issues raised during the course of this thesis, namely the control of discretionary power. Control of discretionary power is accordingly implicitly recognised as the route to democratic governance which requires that:

...the government must exercise meaningful control over the intelligence community through a range of measures: the separation of intelligence functions; obliging the agencies to operate in a legal capacity; controlling access to the executive; and differentiating the functions of collection, reporting, coordinating and review.⁵⁸

The term 'government' here is used to connote the legislative branch of government, which, as the representative's of the *demos* must engage in prior, ongoing control by means of a clearly defined legal mandate. In addition, it must engage in posterior oversight to ensure compliance with its prescriptive mandate. These steps are required to ensure that the legislature or Parliament, as representatives of the *demos*, subordinate the administrative branch to its sovereign power.

These proposals have to some extent been put into practice, most notably in the form of the Committee of Members of Parliament on and Inspectors-General of Intelligence Act.⁵⁹ This Act established a parliamentary committee on intelligence, consisting of a number of members of parliament. This committee is assigned the task of reviewing and making recommendations in respect of the role and conduct of the intelligence agencies, as well as in respect of any proposed legislation relating to the intelligence agencies.

This Act, in recognition of the fact that parliamentary control will be meaningless in an information vacuum, directly addresses the issue of legislative access to information in the 'national security arena'. It affords the committee access to intelligence, information and documents held by the intelligence agencies, under certain circumstances.⁶⁰ It must be noted that the Committee is not granted a general right to such information, but is granted a conditional right. It is entitled to this information, only to the extent that it is necessary for the performance of the Committees functions, and further, provided the information does not contain details of the name or identity of any person or body engaged in intelligence activities, or of a confidential source of that information. The Act does make provision for the resolution of any dispute in this regard by way of referral thereof to a committee composed of the Inspector – General responsible for the service concerned, the head of the Service, the chairperson of the

⁵⁸ Ibid, p11

⁵⁹ Act No. 40, 1994

⁶⁰ Section 4

Committee and the relevant Minister. This committee constitutes the final arbiter in matters such as these and as such there is no question of an appeal to a further body or court of law.

As such, the right of access to information by the legislative branch of government is a limited right. The extent of that limitation, and by extension, the extent of the committee's right to information, is effectively determined by the holder of the information. Ultimately it is the holder of the information who is afforded the discretionary power to determine whether or not the Committee requires certain information to perform its designated function, or whether it falls outside one of the other specified conditions. This limitation, although subject to review by an external body, headed by an independent objective third party, is, it is submitted unsatisfactory. The potential for the exclusion of information from the purview of the Committee is significant.

In addition, this limitation is unnecessary, in view of the multitude of safety mechanisms built into the Act to prevent leaks from the committee. Firstly, the committee is comprised of only a limited number of members of parliament and secondly, the members of the committee are, as in the case of the intelligence service, obliged to handle the information in accordance with prevailing security guidelines.⁶¹

These limitations are rendered all the more problematic in view of the fact that this Act and all other acts remain silent on the public's right, or the rights of parliamentarians not part of the committee, to access to 'national security' information. In the absence of direct legislative regulation in this regard, this right remains regulated by the existing legal framework, of which The Protection of Information Act, which has to date not been repealed or amended, forms an integral part. The lack of definition in the Protection of Information Act and the extensive discretionary powers granted in terms thereof to the executive branch of government, has not been remedied or supplemented by any subsequent legislation. Accordingly, the public's access to information in the 'national security' arena has not been addressed or brought into line with the stated objective of the democratisation of the government's national security function.

The Committee of Members of Parliament on and Inspectors-General of Intelligence Act is not sufficient to guarantee the democratisation of the national security arena, most notably, with regard to access to information. The Act's provision for parliamentary oversight is insufficient as this route is only one of the many solutions required. In addition, the form of parliamentary oversight provided for by the Act is limited in two respects. It is limited by the limited focus and ambit of the Act. It is also limited by the nature of the oversight

⁶¹ Section 4(1)(b)&(c)

process. It is a formal intermittent procedure which by its very nature will ensure oversight of only a limited number of “big” issues. The numerous daily, mundane decisions made during the routine business of the national security functionaries, and by implication, those decisions which have the potential to effect our daily lives, are implicitly beyond the purview of the Act. As a whole the Act is limited by the fact that it anticipates, to a large extent, posterior parliamentary oversight, rather than consistent prior legislative control of discretionary power implicit in this arena. There have been no significant legislative measures in this regard.

The public’s prior and routine right to ‘national security’ information requires express clarification and overt protection in view of the dangers for democracy should that right be left to determination by the executive branch of government, or alternatively, determination by a reluctant judiciary.

The Open Democracy Bill has recognised this need and sought to address it in its recognition and formulation of the prior right of access to information. In addition, it has recognised, and sought to address the dilemmas posed for this right in the national security arena in its formulation of a ‘national security’ exemption.

Clause 37 of the Bill, entitled Defence and security of Republic states that:

- (1) The information officer of a government body may refuse a request for access to a record of the body if its disclosure would be likely to substantially harm the national defence or security of the Republic by –
 - (a) frustrating any measure for the prevention, detection or suppression of –
 - (i) aggression against the Republic;
 - (ii) sabotage or terrorism aimed at the people of the republic or a strategic asset of the republic, whether inside or outside the Republic;
 - (iii) an activity aimed at changing the Constitutional order of the republic by the use of force or violence; or
 - (iv) a foreign hostile intelligence operation;
 - (b) jeopardising the effectiveness of a government body, branch of that body or person responsible for the prevention, detection or suppression of an activity contemplated in paragraph (a)(i),(ii),(iii) or (iv) by disclosing its or his or her capabilities, deployment or performances;
 - (c) jeopardise the effectiveness of-
 - (i) arms; or
 - (ii) other equipment, including communication or

- cryptographic systems, used or intended to be used....by disclosing their or its capabilities, quantity, deployment or performance; or
- (d) jeopardising the effectiveness of methods or equipment for collecting, assessing or handling information used for the prevention, detection or suppression of an activity contemplated in paragraph (a)(i – iv), or disclosing the identity of a confidential source of information used for that purpose.

8.9 Evaluation Of The Open Democracy Bill's 'National Security' Exemption

The Bill's exemption clearly seeks to address many of the problems relating to the reconciliation of freedom of information and national security as discussed during the course of this thesis. In view of the fact that the primary source of these problems is to be found in the conferral of extensive discretionary powers on the executive, not only in respect of the decision not to disclose, but also in the power to define national security, the focus of the Bill's exemption is the constraint of that discretion.

The exercise of discretion to withhold information in the interests of national security is first and foremost constrained by the imposition of a duty on the decision-maker to actively engage in a process of the weighing of competing interests. Further, in evaluating the weight of the interests, refusal of disclosure is permitted only in the event that such disclosure would cause real and not mere speculative harm.

The focus of the exemption is accordingly directed toward the protection of information, the **content** of which requires exemption, as opposed to the privilege of broad categories of information characterised by the source of the information or the protection of particular government departments.⁶²

This emphasis on the content as the determining factor qualifying information as exempt, is carried further as a mechanism of constraining discretion, in the specific delineation or definition of national security information. The Bill has followed the Canadian example in setting out detailed definitions as to what qualifies as 'national security' information. In other words, it provides a definition of national security for the purpose of freedom of information, or more specifically, for the purpose of denying access to requested information.

⁶² The Open Democracy Bill: A Critical Review, December 1997, op cit, p5

The Bill seeks through this drafting techniques to prevent a tendency toward arbitrary blanket secrecy practices, which endeavor is carried further by the fact that the invocation of the exemption is rendered discretionary, as opposed to mandatory in the event of information in fact falling within the exempt category.⁶³

The Bill's emphasis on the constraint of discretion as a necessary concomitant of a democratic society finds unequivocal expression in its public interest override clause. Clause 45, obliges the disclosure of information, including information falling within the 'national security' exemption, should public interest warrant it. In instances such as these, the discretion to withhold is entirely eradicated if the interests of open, accountable and participatory administration outweigh the need for protection of information. This clause amounts as such to an unequivocal affirmation of the elevated status of the right to information in an open and democratic society, vis-à-vis, the interests of national security.

The Bill, as is apparent from the aforesaid sampling of its provisions, clearly commences from the point of prior prevention of abuse of discretion, rather than merely focusing on the *ex post facto* control thereof. It is concerned with prevention rather than a cure. The focus on prevention through the prior constraint of discretion is further evidenced by the Bill's failure to include, as in the American and Australian Acts, as an exempt category, information which is protected by any other secrecy legislation. The Bill accordingly addresses the lacunae permitted in the other systems for the exercise of discretionary powers to disclose and to define categories of exempt information, in terms of legislation, other than the freedom of information legislation. The Bill expressly precludes the possibility of refusal of access in terms of such legislation which permits or obliges non-disclosure on terms other than those stated in the Bill. Any such legislative authorisation of the exercise of discretionary power would, in terms of Article 2, be invalid as ground for non-disclosure as, in terms of article 2:

This Act applies despite any other legislation whether that legislation came into effect before or after the commencement of this section.

Therefore, in theory, the Protection of Information Act and its broad discretionary terms would, in terms of the above provision, be rendered subject to the terms of the Bill. The refusal of access to information on the grounds stated in the Act, which differ in style and content from the Bill's provisions,

⁶³ Article 29 (b): The information officer...may refuse a request for access to a record contemplated in Sections....37

would be unlawful. However, it remains to be seen whether the Bill will be passed in its current form. The extremity of the difference between the terms and the tone of the Bill and the Protection of Information Act is indicative of the fact that they are the products of polar ideologies. The Bill's provision that it prevails over any other legislation constitutes an articulation of the victory of its root ideology. Accordingly, the passing of the Bill in its current form will constitute the last step required to complete the current democratic paradigm shift. If it is passed, the Protection of Information Act will have to be revised in its entirety. Whether this step will come to fruition remains to be seen as the Bill must be passed by the same legislature which has to date left the Protection of Information Act untouched.

The Bill's focus on *a priori* prevention, the detailed regulation of discretion, and the attendant effective presumption in favour of disclosure which is given effect to by the positive duties imposed on government to disclose at all costs, subject to severely curtailed limitations, is indicative of the fact that:

The Bill is more than the sum of its parts and more than a change in the law. It is about creating a new culture; both inside and outside government in which openness in government is practiced in the spirit as well as the letter of the law and that government information is available for inspection by the real owners of the information – the public.⁶⁴

In short it seeks to re-invest in the public its democratic entitlement to sovereignty in the national security arena. In short, it seeks to confirm the public's final control of the agenda.

The Bill's focus on prior legislative control, limitation and even prevention of the exercise of discretionary powers is supplemented by its provision for *ex post facto* control of the exercise of that power through a number of mechanisms designed to give effect to the dictates of accountability. Having set the lawful parameters of the exercise of the discretionary power to withhold information in the interests of national security, a number of mechanisms are established to ensure that any exercise of that discretion complies with the lawful criteria set out in the Bill.

The first of these mechanisms is a general duty on the information officer who refuses a request for access to information, to notify the requester of that decision and to furnish the requester with the reasons for that decision, including:

- ◆ the findings on all material questions of fact, referring to the material on

⁶⁴ The Open Democracy Bill: A Critical Review, op cit, p 7

- which those findings were based;
- ◆ the reasons for the refusal (including the provision of this Act relied upon to justify the refusal) in such manner as to enable the requester to understand the justification for the refusal and make an informed decision about whether to lodge an internal appeal with the head of the governmental body or to utilise any other remedy in law available to the requester; and
 - ◆ that the requester may lodge an internal appeal with the head of the governmental body against the refusal of the request, and the procedure for lodging the internal appeal.⁶⁵

This duty clearly also applies to a denial of access to information in terms of the 'national security' exemption, as evidenced by its expansive and detailed formulation. It is clearly, in its formulation, premised on the control of discretion in terms of the criteria of rationality. Any refusal of access must be rational as opposed to arbitrary, and the decision-maker is required to justify its decision in rational terms as determined and sanctioned by the Bill.

The culture of justification and accountability is further entrenched in the availability of an appeal to the head of the relevant department. Clearly however an appeal to the head of the department alone is insufficient in that the appeal does not lie to an independent objective outsider.

This problem is to some extent addressed by the Bill's provision for applications to the High Court in respect of a decision by the information officer or the Head of the Department on internal appeal.⁶⁶ In terms of this provision an applicant refused access on appeal, either by the information officer or Head of Department, may make application to the High Court for appropriate relief. The Bill does not expressly confer on the High Court an appeal jurisdiction, but rather an extended review jurisdiction to determine if the refusal of access to information is in fact justified in terms of the Bill's exemptions. The nature of the court's power is extrapolated from clause 79, which clearly and unequivocally places the onus of proof that the refusal is justified in terms of the Bill, on the government department claiming the exemption. In terms of this article, the High Court's power is evidenced by the wording of article 79, which specifies that in any application brought in terms of Chapter 2, which deals with Court applications, the onus is as specified. The Court is therefore empowered to determine the justifiability of the decision sought to be reviewed in relation to the criteria as set out in the Bill. The Court's extended review power is clearly

⁶⁵ Article 20(1) & (2)(b)

⁶⁶ Chapter 2

intended to extend to all claims of refusal of access, including refusal on ‘national security’ grounds. In addition the standard of review is no lower in this arena than in other arenas, as is evidenced by Clause 78 which expressly states that the Court, in reviewing the decision, “may examine **any record** of a government body to which this Act applies, and **no such record may be withheld from the court on any grounds.**” (my stress) The Bill makes provision for the balancing of the Court’s power to examine all records and the need for protection of certain information from disclosure for good reason. However in the presence of good reason, determined according to the criteria set out in the Bill’s exemption clauses, the Court is not precluded from access, it is simply precluded from disclosing that information to any other person.

Its extended review power is further substantiated by the remedial powers granted to it in terms of clause 80. In terms of this clause, the Court is entitled to “make any order or other decision which it considers just”, including but not limited to:

- (a) confirming, amending or setting aside the decision which is the subject of the application in question.⁶⁷

The power to set aside a decision in the context of a refusal to access to requested information must by implication connote the power to reverse that decision, and effectively substitute the original decision with that of the courts. That is to say, should the court decide to set aside the decision, and should this not imply that the decision is in effect reversed, this remedy would be rendered meaningless. Therefore, the power to set aside the decision effectively amounts to the power of appeal or substantive review of the merits, as the setting aside of the decision amounts to remaking the original decision in response to the request for information.

This lengthy analysis of the Court’s implied extended powers of substantive review is necessitated by the fact that the Bill is not expressly clear in its statement as to the court’s powers. It does not unequivocally indicate the precise power of the court. In other words, whether it is afforded a review or an appeal function. The aforesaid discussion reveals that the Bill appears to clothe the court’s powers in the language of review, but the content of the provisions are more indicative of an appeal function.

The Bill’s approach to this issue is entirely unsatisfactory. Firstly because, in the absence of affording the court the power of appeal, it fails to deliver on the full implementation of the necessity for appeal from the decision of the original

⁶⁷ Article 80(2)(a)

decision-maker to an independent, objective and impartial body. This requirement is necessitated by the status and importance of the right to freedom of information.

The second problem with the Bill's approach to, and its formulation of the Court's powers, is the space it implicitly permits for a conservative court to avoid engaging in substantive review of the overtly political issue of denial of access to information on the ground that it would be contrary to the interests of national security. The court, in the absence of an express directive to engage in *de novo* review, may well be afforded the opportunity to follow the approach adopted by courts in other jurisdictions. The courts may, in terms of the Bill, decline to subject the decision-maker's reasoning as based on the alleged facts to any meaningful degree of scrutiny.

The solution to this problem is, as argued in the previous chapter, the creation of an independent and impartial suitably qualified administrative appeals 'national security tribunal'. A tribunal of this nature, specifically mandated to review decisions not to disclose information on the grounds relating to national security, *de novo*, will negate the need for the Bill's ambiguity.

The argument in favour of this route as a viable and effective mechanism for the implementation of the requisite degree of scrutiny and accountability is strengthened by the available evidence as to its feasibility and practical attainability. One simply has to peruse the decision of the Commission of Inquiry Into Alleged Arms Transactions Between Armscor and One Eli Wazan and Other Related Matters⁶⁸. This Commission of Inquiry was set up as an independent tribunal, outside of the ordinary court structures. During the course of its investigations it was presented with the argument that certain information sought by it could not be disclosed as such disclosure would be contrary to the interests of national security. The Commission subjected the claim, on the basis of the merits presented in support thereof, to substantive intensive review and found that the claim was not justified. The Commission, exhibited none of the restraint evidenced by the courts in the past and still even today, in asserting its power of review over matters of national security. It in fact asserted that, in view of the importance of the right to access to information in an open and democratic society, the standard of review and the requirements to discharge the onus on the claimant that such right should be displaced, was substantial. In discharging this onus, the state was required to tender substantial proof in support of its allegation of harm, and further had to prove that the likelihood of harm was both realistic and persuasive. That is to say, the state's conclusion as to the actuality

⁶⁸ First report, Johannesburg, 15 June 1995

of harm, had to be based on concrete factual detail.⁶⁹

It is submitted that this decision and the forum within which it took place has much to offer by way of illustration as to the way forward in resolving disputes between claims to access to information and claims of harm to national security in a sovereign constitutional democracy.

8.10 Some Concluding Points

The preceding discussion in respect of the Open Democracy Bill, and related information legislation, does not purport to be definitive or comprehensive. It has focused on only a limited number of a multitude of relevant provisions and issues arising out of those provisions, within the context of this thesis. The provisions discussed have been selected with a view to illustrating the complexity of the matter at hand and the resultant complexity in isolating and implementing appropriate solutions in response thereto.

The one conclusion that may be drawn with certainty is that the issue of reconciling national security interests and the right of access to information in a sovereign, constitutional democracy, is complex and difficult to address. South Africa has however, more so than other jurisdictions, recognised the issue for what it is: A question of sovereignty.

South Africa has accordingly, unlike other jurisdictions, expressly constitutionalised the right to freedom of information, in recognition of the fact that one is dealing with a question of power.

In addition, it has been recognised that the mere constitutionalisation of the right is insufficient, especially within the context of national security. The complexity of the relationship and the immensity of the tension between these two potentially conflicting interests has necessitated a programme of legislative reform, not only in the arena of the right to information, but also in the arena of national security. This programme of reform has sought to address many of the problems and criticisms directed at the legal systems of other jurisdictions.

The South African legal system has illustrated an attempted practical implementation of the theoretical proposals for reform which have been put forward with a view to reconciling freedom of information and national security in a sovereign, constitutional democracy.

The South African steps in this regard are still, to a large extent, tentative and in their infancy. It is at this stage that the system must be evaluated and any problems and omissions addressed. The South African legal system certainly does exhibit a number of problems and omissions which may hinder or frustrate

⁶⁹ Ibid, p15

the reconciliation of the two issues.

These problems and omissions must be addressed now, prior to the system becoming concretised and fixed, as this concretisation usually goes hand in hand with the concretisation of judicial, public and administrative attitudes and responses to the issue at hand. The danger is that should such attitudes, as influenced and determined by an inadequate system, become fixed, any subsequent realisation of the inadequacy of the system, and the mere amendment of that legal system will be rendered insufficient to rectify the problems at hand. The mere amendment of the legal system will not guarantee the requisite fundamental transformation of the entrenched underlying attitudes and values.

A failure to address the current inadequacies and omissions so as to ensure maximum access to information in the national security arena will have enormous consequences, not only for democracy, but also for the *demos* directly as a collective body. The direct harm which may be inflicted in the absence of effective and comprehensive restraints and checks dictates that the focus at all times must be on prevention rather than a cure. In the arena of national security, focusing on a cure often amounts to no more than "too little, too late".

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