The Right to Know in Constitutional Design and Democratic Government: The Relevance of the Catholic Intellectual Tradition

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Although recent years have witnessed a renewed interest in democracy and constitutionalism across the world, the same period also has been characterized both by a widespread skepticism about politics and government, on the one hand, and by the challenges (new to some countries) presented by domestic and international terrorism, on the other. In view of these developments, the question of public access to government information has taken on critical importance in a range of constitutional democracies. Thus, most commentators would admit that the people's right to know what their government is doing is essential to the proper functioning of a democratic society. Otherwise, the people could not participate effectively, or in an informed way, in either the formulation of public policy or in the direction of those who are charged with executing it. In this sense, access to information may be viewed as a strictly utilitarian value; but access to information also relates more fundamentally to the dignity of democratic citizenship, and, ultimately, to the dignity of the human community and the individual human being. Similarly, most also would admit that governments must do the work of government, that is, that they have a responsibility to govern effectively. Discharging that responsibility will require them to keep some secrets, with respect to some subjects, to some extent, and for some period of time. But it is undoubtedly the case that most governments, regardless of their constitutional or ideological foundations, try and keep more matters secret (and to do so for longer periods of time) than is either necessary or desirable. Indeed, many governments go to great lengths to keep secret even the fact that they have secrets, which presents special problems for citizens who wish to know what their government is doing.

Thus, the subject of access to government information is both important and complex. Indeed, it is a foundational question for democratic government. What light does the Catholic intellectual tradition, represented by official pronouncements since the Second Vatican Council, but also by the earlier work of individual Catholic thinkers who sought to integrate modern concepts of democracy and liberalism with their faith, have to shed on this important subject?

The subject of access to government information is clearly a matter for law, at least to some extent; the whole subject cannot, consistent with democratic values, be relegated to the realm of the "exception." But how should the law approach the problem of access to government information, and at what level? For example, should the right of access to government information be entrenched at the constitutional level, with some sort of judicial enforcement, or should the subject of access to information be left to ordinary political processes? Existing constitutional arrangements reflect a variety of

answers to this question. Some, such as Hungary, Poland, and South Africa, have entrenched a right of access to government information in their constitutional texts. Other countries, like Canada and the US, have not constitutionalized the subject, but have relied on more easily altered forms of law, such as statutes or administrative regulations of varying specificity and degrees of legal authority. In addition, to facilitate the enforcement of such rights, individual nations (and supranational organizations) have assigned varying degrees of authority and responsibility to the judiciary. Finally, regardless of whatever legal form the right of access to government information may take in a particular constitutional regime, the right is regarded more seriously in practice by some regimes than by others.

Many differences – historical, philosophical, political, and cultural – doubtless could be used to explain why different constitutional systems have adopted one or another of these various approaches to the problem of access to government information. The most important, however, might well be the view that a particular constitutional system takes with respect to the proper role of the individual in the governmental system. In the US, for example, the founders placed great faith on the architectural design of the government – which established a system of checks and balances (both within the federal government and between the states and the federal government) – not only to ensure the proper functioning of government, but to ensure the protection of individual liberty as well. Indeed, some of the founders had such faith in that system of checks and balances as the principal safeguard of individual liberty that they believed that there was no need for a separate bill of rights. Under this theory, citizens could rely on the various departments of the federal government – and the states – to act as watchdogs with respect to the activities of the federal government. Individual citizens would have little role to play in that regard. For the most part, US courts have affirmed that approach by declining, when pressed, to infer any general "right to know" from arguably relevant constitutional provisions, such as the First Amendment. In this respect, the enactment of the Freedom of Information Act in 1966 (like the adoption of the Seventeenth Amendment providing for the popular election of senators) was a fundamental innovation. As a practical matter, however, that innovation has been received with varying degrees of enthusiasm, not only by the political branches, but also by the courts. Enforcement of the Freedom of Information Act has been uneven, to say the least, and the culture of government secrecy intensified in the Administration of President George W. Bush.

More recent constitutions take a different approach, at least as a formal matter, to the problem of access to government information. Many recently-adopted constitutions entrench a right of access to government information in the constitutional text, although such rights, of course, cannot be deemed absolute and require further elaboration, both legislatively and judicially, for their implementation. The entrenchment of such rights in constitutional documents, however, signifies both the theoretical importance of positive rights in the new constitutional regimes and the important theoretical position occupied by individual citizens in those regimes. Whether those theoretical positions translate into increased protection for the right of access to government information is another question

altogether, but the underlying formal and theoretical differences are nonetheless significant.

How the right of access to government information can be protected most effectively in the US, or in any democratic society, presents fundamental questions of constitutional theory and design. In recent years, some democracies have experienced a substantial growth in executive power and a concomitant diminution of legislative power. For that reason, issues relating to public access to government information have become even more important, as the legislative branch has been handicapped in fulfilling that role.

I have been examining these questions in the context of another project, which considers the question of access to government information in a democracy as a problem in political philosophy and constitutional design. But the theoretical justification for a right of access to government information obviously presupposes certain insights and concerns relating to human dignity, the dignity of citizenship, and the proper ends and means of democratic government. It seems worthwhile to consider these (and possibly related) issues in light of Catholic social teaching and its concern for structural justice. For these purposes, I would propose to focus on such recent church documents as Gaudium et Spes, Pacem in Terris, Dignitatis Humanae, Mater et Magister, Populorum Progressio, Centesinus Annus, and Caritas in Veritate, among others. What insights do these documents provide with respect to the problem of access to government information and the type of full citizenship that such a right signifies in terms of human dignity and structural justice? In addition, however, I would like to resist the temptation to think that the efforts of the Catholic intellectual tradition to deal with these issues began with the Second Vatican Council, or even (at least in some respects) with Rerum Novarum. Thus, in addition to thinking about these issues in the context of official church proclamations, I will consider the relevance of earlier Catholic intellectuals, such as LaMennais, Lacordaire, Montalembert, Acton, and Newman, among others. I will consider what insights might be derived from their efforts to come to terms with modernity, liberalism, and the democratic ethos.