Constitutionally Guaranteeing Information Flow

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ABSTRACT

The thesis outlines the potential and limits of the constitutional recognition of a right to information. Relying on doctrinal and comparative methodology, it draws insights from the South African experience. The research suggests that, while there are theoretically solid justifications for recognising the right, constitutional recognition does not necessarily achieve the goals envisaged for it in practice. To achieve its potential, such a right needs continued acknowledgement and active support from all the branches of government of the state as a whole.

DECLARATION

This is to certify that:

(i) the thesis comprises only my original work towards the degree of Doctor of Philosophy;

(ii) due acknowledgment has been made in the text to all other materials used; and

(iii) the thesis is fewer than 100,000 words in length, exclusive of tables, maps, bibliographies, and appendices.

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Chapter 1: Introduction

I INTRODUCTION

As methods for disseminating information (such as the invention of the printing press and the advent of the internet) have multiplied, so have states' attempts to develop ways of guaranteeing people have access to the information they need. In 1766, Sweden adopted what many scholars regard as the earliest legislation to facilitate requests for access to state-held information—the *Kongl. Maj:ts Nådige Förordning, Angående Skrif- och Tryckfriheten* [His Majesty's Gracious Ordinance Regarding the Freedom of Writing and Printing].[1] The law that has been the inspiration for most modern information access laws and that is looked on as "an especially canonical transparency instrument" (the United States of America's *Freedom of Information Act*) was adopted two centuries later in 1966.[2] Between 1966 and 1990, seven countries adopted information access legislation.[3] However, since 1990 over a hundred additional countries have adopted either information access legislation or constitutional provisions entrenching a right to information.[4] This thesis is specifically concerned with the latter form of protection—the constitutional recognition of information access as a fundamental right. That is to say, the thesis focuses on constitutionally guaranteeing information access as one way of ensuring that information "flows" between states and their citizens or residents and between individuals.

The project focuses on section 32 of the South African Constitution as an example of an expressly recognised fundamental right to information.[5] The thesis poses the question: What insights can be gathered from the South African experience of having an express right to information in the

[1] See for example, David E Pozen and Michael Schudson, 'Introduction: Troubling Transparency' in David E Pozen and Michael Schudson (eds), *Troubling Transparency: The History and Future of Freedom of Information* (Columbia University Press, 2018) 1, 2; Greg Michener, 'FOI Laws Around the World' (2011) 22(2) *Journal of Democracy* 145, 147.

[2] *Freedom of Information Act,* 5 USC § 552 (1966) ('*US FOIA*'); Pozen and Schudson (n 1) 2–3; John M Ackerman and Irma E Sandoval-Ballesteros, 'The Global Explosion of Freedom of Information Laws' (2006) 58 *Administrative Law Review* 85, 111; Michael Riegner, 'Access to Information as a Human Right and Constitutional Guarantee: A Comparative Perspective' (2017) 50(4) *VRÜ Verfassung und Recht in Übersee* 332, 335.

[3] Denmark, Norway, Australia, New Zealand, Canada, Austria and the Republic of the Philippines. See Ackerman and Sandoval-Ballesteros (n 2) 97.

[4] Ackerman and Sandoval-Ballesteros (n 2); Riegner (n 2) 333 and 336.

[5] *Constitution of the Republic of South Africa 1996* (South Africa) 32(1) ('*SA Constitution*') Everyone has the right of access to (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights.

Constitution? My analysis of the South African experience suggests four insights about the conditions necessary for an express right to information to be effective.

I suggest that these four insights might be adaptable to other jurisdictions and, thus, could serve as valuable points of reflection for other states that want to consider including an express constitutional right to information in their constitution. Nevertheless, any such reflection should be done cautiously, taking into account facets of the South African experience that may not be shared elsewhere. At least four aspects of the South African constitutional context should be borne in mind. First, the South African Constitution provides for the judicial review of positive obligations arising from fundamental rights. Second, the South African Constitution includes a constitutional imperative to develop the common law to give effect to fundamental rights. Third, it endows the judiciary with broad remedial powers. Fourth, the Constitution establishes a fourth branch mandated with strengthening democracy and promoting and protecting fundamental rights.

The first insight from the South African experience is that to secure an adequate level of access to information, a framework of information access law is required—rather than one general instrument focused on making information accessible. That is to say, to make accessible all the information required to partake in democratic processes and exercise and protect fundamental rights requires multiple legal provisions that facilitate information access—an entire framework of information access law. Such a framework would include at least two types of access laws incorporating two mechanisms for making information accessible.

Firstly, regarding the types of access law, making information accessible requires both a "general access law" and "specific access provisions". By "general access law", I mean legislation principally focused on facilitating access to information. An example is South Africa's *Promotion of Access to Information Act, 2000* ("PAIA"),[6] a law that is principally concerned with making information accessible by enabling information requests. Contrastingly, "specific access provisions" refers to information access provisions inside laws that regulate some other issue. For instance, section 75 of the *Municipal Finance Management Act, 2003*,[7] requires proactive disclosure, mandating municipalities to publish certain information on their websites—such as the Municipal Manager's performance agreement. While the *Municipal Finance Management Act, 2003* is principally concerned with the administration of the financial affairs of municipalities, section 75 provides for information access.

[6] *Promotion of Access to Information Act 2000* (South Africa) ('*PAIA*').
[7] *Municipal Financial Management Act 2003* (South Africa).

Both types of access law are required to make information accessible. A general access law is required because it is impossible for a state to anticipate and address all information needs through specific access provisions; thus, an instrument is required that facilitates access to information in general. However, a general access instrument will not secure access to some information because it is designed to address information needs in general; thus, specific access provisions are also required.

Secondly, regarding mechanisms for making information accessible, legislation that facilitates access to information ordinarily does so either by facilitating requests for information or by requiring information holders to publish relevant information proactively. Some information needs can only be addressed adequately through proactive disclosure requirements because gaining access to information by request is not as straightforward as accessing information that is proactively disclosed. Some information, information that is particularly important for participation in democratic processes or for the exercise or protection of another fundamental right, must be easily accessible; thus, such information should be proactively disclosable. However, experience demonstrates that some information holders will (at least sometimes) avoid complying with disclosure requirements; thus, it is necessary to ensure that when proactive disclosure requirements are avoided, people can request the relevant information. Request law correlates with an enforceable right, thus allowing the public to enforce compliance and ultimately ensure that the relevant information is accessible.

The second insight from the South Africa experience is that for a right to information to secure effectively such a framework of information access law, it must be regarded as giving rise to multiple obligations. In other words, the right must require the state to enact all the legislation identified above as necessary to effect the right adequately. Additionally, as new information needs will occasionally arise, an information right should be regarded as continuously giving rise to new duties to respond to those new information needs.

The third insight is that to carry out effectively the multiple duties that arise from a right to information requires active contributions from all the branches of the state. That is to say, the branches of the state must work cooperatively to identify information needs that need to be addressed in law and to design and implement such laws.

The fourth insight is that the judicial enforcement of a right to information hinges on whether the constitutional provisions that deal with the scope and application of fundamental rights are suited to

facilitate the enforcement of positive obligations. Thus, either textually or through interpretation, the constitutional provisions that facilitate judicial review must provide for the review of inaction on positive duties arising from fundamental rights.

To arrive at these insights, I first establish (drawing on theoretical justifications for recognising a right to information) why information access matters in constitutional democracies. I highlight, in particular, how information access is expected to strengthen democracy and support the protection and realisation of other fundamental rights. Next, I justify the focus in this thesis on an express constitutional right to information by contrasting this approach with two other prominent means of guaranteeing information access. One contrasting example is of a state with no right of access to information which has nevertheless adopted information access laws—Germany. The other example is of a state that has no express constitutional right to information but which nevertheless derives a constitutional right to information from another fundamental right—India.

I argue that the optimal way to secure access to the information required to participate fully in democratic processes and protect and realise rights is express constitutional recognition of an information right. Thus the thesis focuses on South Africa as a well-known example of a state which has expressly recognised a constitutional right to information in section 32 of its Constitution and also enacted a general access law—PAIA.

In this thesis, I take a doctrinal analytical approach to studying the attempts of the different branches of the South African government at implementing the right to information. In my focus on the legislative branch, I argue that South Africa's national Parliament has an ongoing duty to give effect to section 32 of the Constitution. First, I show that multiple legal instruments are required to secure access to the information falling within the scope of section 32 of the Constitution. Second, I contend that for the existing legal instruments to be effective, Parliament must enact record-creation and record-keeping obligations. Lastly, I argue that the legislature must periodically review PAIA (and other information access legislation) to determine whether it must be amended, strengthened or even replaced.

In my focus on the judiciary, executive and fourth branch, I draw on public law scholarship on the separation of powers—particularly the concept of "comity"—to determine how the state ought to collaborate to realise the right to information. I rely on some of the elements of comity described in

the literature and the description of the functions of these branches in the South African Constitution to establish what is required of each branch to effect the right to information.

Regarding the judiciary, I argue that section 32 of the Constitution requires four things of the South African courts. First, courts must interpret and enforce effect-giving legislation. Second, courts must respect the underlying institutional choices underpinning effect-giving law. Third, courts must interpret and enforce the right itself. Finally, when appropriate, the courts must ensure that the branch best suited to do so develops effect-giving law.

Focusing further on the third duty the courts have respecting section 32 of the Constitution (interpreting and enforcing the right itself), I critically analyse recent decisions by the Constitutional Court on the right to information. I argue that the case law demonstrates that the general limitations clause (section 36 of the South African Constitution) is concerned with limiting state *action*, not inaction. As a result, while the Court professes to assess limitations of the right to information caused by state *inaction* under the general limitations clause, it has actually adopted a form of reasonableness review (the review standard the Court developed for socioeconomic rights). Ultimately I find that, if implemented as a second step, reasonableness review is a normatively attractive review standard for positive obligations under the right to information.

Next, I analyse the South African Human Rights Commission's annual reports to Parliament on compliance with the right to information, focusing on how the executive and fourth branches have contributed to realising the right to information. I argue that the state has underappreciated the importance of drawing on the capacities of these two branches in realising the right. I contend these branches have sometimes contributed to promoting the right and, at other times, missed opportunities to do so. These missed opportunities possibly arise from the fact that these branches have largely not recognised that they have a constitutional duty to bring unaddressed information needs to the legislature's attention. Similarly, when these branches have made recommendations to the legislature about how it can strengthen laws that facilitate access to information (such as when the South African Human Rights Commission has made recommendations about strengthening PAIA), the legislature has failed to act on those recommendations.

Lastly, I bring these understandings together. I argue that the findings suggest that for an express right to enhance access to information, it must be understood as giving rise to multiple obligations that can only be realised with input from all the branches of the state. Additionally, constitutional provisions

that deal with the scope and application of fundamental rights must be suited to facilitate the enforcement of positive obligations. Thus, either textually or through interpretation, the constitutional provisions that facilitate judicial review must provide for the review of inaction on positive duties arising from fundamental rights.

This chapter outlines how the thesis arrives at these core conclusions. The chapter starts, in part II, by situating the project within the landscape of existing literature on the South African right to information. Next, in part III, I provide some terminological clarification. Then, in part IV, I describe and justify the methods used in the thesis, and finally, in part V, I provide a brief overview of how I develop the key arguments in the following chapters.

II Situating the Project Within the Literature

This thesis is the first legal academic study to analyse South Africa's right to information comprehensively, as such, it contributes to scholarship on section 32 of the South African Constitution. The more extensive texts that deal with the right include a commentary by Ian Currie and Jonathan Klaaren and a reader by Ronée Robinson.[8] Both these works are primarily concerned with the legislation enacted by the South African National Parliament to give effect to the right to information, the *Promotion of Access to Information Act*, 2000 (PAIA).[9] Much of the scholarship, predating PAIA, also concentrates on the legislature's right to information obligations, arguing, for instance, for a comprehensive piece of legislation that will facilitate information access.[10]

The work following the enactment of PAIA falls broadly into four categories. First, several works focus on a particular aspect of PAIA or recommendations for strengthening the Act.[11] For instance, Leslie-

[8] Iain Currie and Jonathan Klaaren, *The Promotion of Access to Information Act Commentary* (Siber Ink, 2002); Ronée Robinson, *Access to Information* (LexisNexis Butterworths, 2016).
[9] *PAIA* (n 6).
[10] See for example, Lene Johannessen, Jonathan Klaaren and Justine White, 'A Motivation for Legislation on Access to Information' (1995) 112 *South African Law Journal* 45.
[11] See for example, Kate Allan and Iain Currie, 'Enforcing Access to Information and Privacy Rights: Evaluating Proposals for an Information Protection Regulator for South Africa' (2007) 23(3) *South African Journal on Human Rights* 570; Fola Adeleke, 'The Role of the Right to Information in the Contestation of Power in South Africa's Constitutional Democracy' (2016) 31(1) *Southern African Public Law* 54; Nomthandazo Ntlama, 'The Effectiveness of the Promotion of Access to Information Act 2 of 2000 for the Protection of Socio-Economic Rights' (2003) 14(2) *Stellenbosch Law Review* 273; Leslie-Anne Wood, 'More Than Just Details: Buttressing The Right of Access to Information with Information Manuals' (2011) 27(3) *South African Journal on Human Rights* 558; Fanie Cloete and Christelle Auriacombe, 'Counter-Productive Impact of Freedom of Access to Information-Related Legislation on Good Governance Outcomes in South Africa' (2008) 2008(3) *Tydskrif vir die Suid-Afrikaanse Reg [Journal of South African Law]* 449.

Anne Wood contends that the manuals that PAIA requires certain entities to compile, which, amongst other things, outline the types of information that entity holds, are crucial for enabling requests.[12] Consequently, Wood argues for amendments to sections in PAIA aimed at encouraging compliance with the provisions requiring the creation and publication of manuals.[13]

Second, some scholars have critically reviewed the state's efforts to implement PAIA, finding these attempts inadequate.[14] For example, after canvassing the relevant experiences of civil society and outlining related case law, Lisa Chamberlain argues that PAIA has "proved to operate rather as an impediment to rights realisation than as a tool for providing effective access."[15] While I am also concerned with Parliament's contributions to the realisation of South Africa's right to information (specifically in chapter 4) and, therefore, with PAIA as the principal information access law, this project's focus is broader, more theoretical and has wider implications. In this thesis, I concentrate less on the specifics of PAIA and more on determining, generally, what kind of duties arise for the legislature and other branches of government from section 32 of the Constitution. My focus on obligations also distinguishes this project from scholarship theorising about the nature of the right to information, particularly by Richard Calland.[16]

The third stream of scholarship moves beyond PAIA to analyse critically case law dealing with the right to information or in relation to which the right was (arguably) relevant—therefore focusing on the judiciary's role in effecting the right.[17] For example, Jonathan Klaaren has critiqued a core underlying

[12] Wood (n 11).
[13] Ibid 562–564.
[14] See for example, Iain Currie, 'Freedom of Information: Controversies and Reforms' in Hugh Corder and Veronica Federico (eds), *The Quest for Constitutionalism: South Africa since 1994* (Routledge, 2016) 169; Lisa Chamberlain, 'Assessing Enabling Rights: Striking Similarities in Troubling Implementation of the Rights to Protest and Access to Information in South Africa' (2016) 16(2) *African Human Rights Law Journal* 365; Tsangadzaome Alexander Mukumba and Imraan Abdullah, 'Enabling the Enabler: Using Access to Information to Ensure the Right to Peaceful Protest' (2017) 2017(62) *SA Crime Quarterly* 51; Marlise Richter, 'Affirmation to Realisation of the Right of Access to Information: Some Issues on the Implementation of PAIA' (2005) 9(2) *Law, Democracy and Development* 219.
[15] Chamberlain (n 14) 372.
[16] Kristina Bentley and Richard Calland, 'Access to Information and Socio-Economic Rights: A Theory of Change in Practice' in Malcolm Langford et al (eds), *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge University Press, 2013) 341 (arguing that the right to information, within the Hohfeldian scheme of the incidents of rights, is a "power" rather than a "claim" or "liberty" right—as most fundamental rights are usually classified); Richard Calland, 'Exploring the Liberal Genealogy and the Changing Praxis of the Right of Access to Information: Towards an Egalitarian Realisation' (2014) 61(140) *Theoria* 70 (contending that the right to information has a liberal heritage but has, in practice, been used in an egalitarian manner).
[17] Joo-Cheong Tham, 'My Vote Counts, International Standards and Transparency of Political Party Funding: Does the State Have a Duty to Provide for Continuous and Systematic Disclosure Elections' (2016) 8 *Constitutional Court Review* 74; Greame Orr, 'My Vote Counts: The Basis and Limits of a Constitutional Requirement of Political Disclosure' (2016) 8 *Constitutional Court Review* 52; Toerien Van Wyk, 'Don't Blame the Librarian If No One Has Written the Book: My Vote Counts and the Information Required to Exercise the Franchise' (2016) 8

assumption of the majority decision in the Constitutional Court matter of *My Vote Counts NPC v Speaker of the National Assembly* ('*MVC [No 1]*').[18] I also consider the Constitutional Court's right to information case law (particularly in chapter 5). Specifically, I critically analyse the decisions in *MVC [No 1]* and its sequel, *My Vote Counts NPC v Minister of Justice and Correctional Services* ("*MVC [No 2"]*).[19] However, my focus in assessing these decisions is on determining the nature of the Court's obligation to realise the right to information. That is to say, to the extent I engage with ideas about the nature of the right to information, I do so to support the further objective of establishing which duties arise from the right for the courts (and other branches of the state).

Finally, some scholarship focuses on the obligations of the executive and the institutions created by chapter 9 of the South African Constitution (the fourth branch) that emanate from the right to information but does so only tangentially.[20] For instance, Fola Adeleke reviews some of the South Africa Human Rights Commission's information access work as part of a critique of the assumption that information access will engender trust between the state and its subjects.[21] Similarly, Klaaren, in a paper identifying three ways the South African government has attempted to make administrative action more "just" (in the sense recognised in the right to just administrative action),[22] describes certain practices and policies of the executive designed to enhance information accessibility.[23] In this thesis, my engagement with the obligations of the executive and fourth branch goes beyond describing practices that might or are intended to enhance information access. Instead, I rely on a specific

Constitutional Court Review 97; Raisa Cachalia, 'Botching Procedure, Avoiding Substance: A Critique of the Majority Judgment in My Vote Counts' (2017) 33(1) *South African Journal on Human Rights* 138; Jonathan Klaaren, 'My Vote Counts and the Transparency of Political Party Funding in South Africa' (2018) 22 *Law, Democracy and Development* 1; Kevin Iles, 'Brummer's False Election' (2010) 26(1) *South African Journal on Human Rights* 164; Louis J Kotze and Loretta Feris, 'Trustees for the Time Being of the Biowatch Trust v Registrar Genetic Resources and Others: Access to Information, Costs Awards and the Future of Public Interest Environmental Litigation in South Africa' (2009) 18(3) *Review of European, Comparative & International Environmental Law* 338; Jonathan Klaaren, 'Open Justice and beyond: Independent Newspapers v Minister for Intelligence Services: In Re Mastelha' (2009) 126(1) *South African Law Journal* 24; Okyerebea Ampofo-Anti and Ben Winks, 'There and Back Again: The Long Road to Access to Information in M&G Media v President of the Republic of South Africa Comments' (2014) 5 *Constitutional Court Review* 466; Raashi Chauhan, 'The Constitutional and Statutory Obligations of Private Companies Regarding Requests for Access to Information Regspraak' (2018) 2018(1) *Journal of South African Law* 197; Natania Locke, 'The Application of the Promotion of Access to Information Act 2 of 2000 in Consumer Protection' (2007) 19(4) *SA Mercantile Law Journal* 461.

[18] *My Vote Counts NPC v Speaker of the National Assembly* (2015) 1 SA 132 ('*MVC [No 1]*').

[19] *My Vote Counts NPC v Minister of Justice and Correctional Services* (2018) 8 BCLR 893 ('*MVC [No 2]*').

[20] Jonathan Klaaren, 'A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights' (2005) 27(2) *Human Rights Quarterly* 539; Jonathan Klaaren, 'Three Waves of Administrative Justice in South Africa' (2006) 2006 *Acta Juridica* 370; Adeleke (n 11); Chapter 9 of the Constitution creates several state institutions, such as the Human Rights Commission and Auditor General, tasked with supporting constitutional democracy *SA Constitution* (n 5) 9.

[21] Adeleke (n 11) 64–65 and 68–69.

[22] *SA Constitution* (n 5) 33.

[23] Klaaren, 'Three Waves of Administrative Justice in South Africa' (n 20) 383–385.

theoretical understanding of the separation of powers to identify more broadly the types of obligations these bodies have regarding the right.

What should be apparent from the discussion thus far is that most of the scholarship on the South African right to information relates to distinct aspects of the state's obligations. That is to say, most works focus on PAIA, specific court cases or particular information-enhancing practices of the executive and fourth branch. Some scholarship has passingly considered how the legislature and the judiciary might cooperate in effecting the right.[24] Additionally, Jonathan Klaaren has given more detailed consideration to the joint obligations of these two branches of the state.[25] Klaaren argues that the effect of section 32 of the Constitution, read with the relevant transitional provision,[26] is that PAIA does not displace the legislature's obligation to enact law to give effect to the right. Instead, Klaaren contends, Parliament has an ongoing duty (when relevant) to adopt legislation to give effect to the right.[27] Concomitantly, he contends, the judiciary retains an obligation to determine the scope and content of the right—only owing deference to the legislature concerning the institutional design of the access legislation—and must provide a common law remedy if there is no legislated one.[28]

In this thesis, I build on Klaaren's argument that the judiciary and legislature ought to collaborate to make the right effective—each branch taking steps to effect the right.[29] My analysis of the South African experience with section 32 extends this argument by including the other branches of the state as additional partners that must also collaborate in the realisation of the right. My argument starts with the Constitutional imperative in section 7(2) of the Constitution that requires the state as a whole to "respect, protect, promote and fulfil the rights in the Bill of Rights." Drawing on theoretical work on the separation of powers doctrine, particularly by Aileen Kavanagh,[30] I establish what the obligations of the judiciary, executive and fourth branch are in relation to the right to information. Thus, this

[24] See for example, Currie (n 14) 170; Currie and Klaaren (n 8) 2.12-2.13; Jonathan Klaaren and Glenn Penfold, 'Access to Information' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (Juta and Company, Second, 2013) 62.2(a).

[25] Jonathan Klaaren, 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 *South African Journal on Human Rights* 549, 549; Klaaren, 'My Vote Counts and the Transparency of Political Party Funding in South Africa' (n 17).

[26] Item 23 of Schedule 6 of the *SA Constitution* (n 5) required the state enact the legislation 'envisaged in [section 32(2)] ... within three years of the date on which the new Constitution took effect.'

[27] Klaaren, 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (n 25); Klaaren, 'My Vote Counts and the Transparency of Political Party Funding in South Africa' (n 17) 5–8.

[28] Klaaren, 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (n 25) 550, 557 and 560–564.

[29] Jonathan Klaaren, 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 *South African Journal on Human Rights* 549, 563–564.

[30] Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press) 211.

project considers, concurrently and comprehensively, the right to information obligations of all four branches of the South African state—it is the first legal academic study to do so.

This thesis also contributes to a nascent body of comparative public law scholarship focusing on the constitutional recognition of a right to information as a means to secure access to the information required to partake in democratic processes and to exercise and protect rights.[31] Previous scholarship in this regard has focused on putting forward a model information access right or a methodology for comparing legislative instruments enacted to give effect to the right to information.[32] Still other work has focused on describing the genealogy of the right to information and how it has been used in practice, particularly in the global south, to realise socioeconomic rights.[33] This thesis argues that the South African experience suggests four insights about the conditions necessary for an express right to information to be effective. Thus, the thesis contributes to scholarship by raising points of reflection that might be useful for other states that want to consider including an express constitutional right to information in their constitutions.

III TERMINOLOGY

In this part of this chapter, I explain three terminological distinctions central to this thesis's arguments. First, in public law scholarship, the terms "freedom of information" (or "FOI"), "access to information" (or "ATI") and "right to information" (or "RTI") are often used interchangeably. With these terms, most scholars refer to a legal or constitutional right that gives rise to obligations falling on the state (or, in some instances, non-state persons) to make information accessible to the public, generally, or to citizens.[34]

[31] Roy Peled and Yoram Rabin, 'The Constitutional Right to Information' (2011) 42(2) *Columbia Human Rights Law Review* 357; Calland (n 16); Riegner (n 2).
[32] Peled and Rabin (n 31) (Peled and Rabin put forward a model formulation for a right to information); Riegner (n 2) (Riegner proposes a methodology for comparing legislative instruments enacted to facilitate access to information).
[33] Calland (n 16).
[34] See for example, Pozen and Schudson (n 1) 1; Peled and Rabin (n 31) 357; Riegner (n 2) 355; Ackerman and Sandoval-Ballesteros (n 2) 85–86; Richard Calland, 'Prizing Open the Profit-Making World' in Ann Florini (ed), *The Right to Know: Transparency for an Open World* (Columbia University Press, 2007) 214; Irma E Sandoval-Ballesteros, 'Rethinking Accountability and Transparency: Breaking the Public Sector Bias in Mexico' (2013) 29(2) *American University International Law Review* 399.

I use the terms "access to information" (or "information access") and "right to information" as these seem to predominate in current scholarship.[35] However, I distinguish between legal and constitutional recognition by referring to either an "information access *law*" (when referring to *legal* provisions) or a "*right* to information" or "information *right*" (when referring to *constitutional* recognition).

This focus excludes consideration of constitutional requirements for inter-branch information-sharing duties, duties falling on the branches of state requiring them to share information with one another. As inter-branch information-sharing obligations would not arise directly from a fundamental right with a non-state person right-holder, this area of study falls outside the scope of this thesis.[36]

Second, I use the concept of "transformative constitutionalism" to differentiate between two broad categories of constitutions.[37] The first category, transformative constitutions, includes founding documents that mandate the state to use legal means to bring about social and political change. In contrast, the second category, "preservative constitutions," encompasses those that "emphasise stability" and "a less interventionist state".[38] The term "transformative constitutionalism" was coined, by Karl Klare, to describe the South African Constitution when it was newly adopted. Klare defined transformative constitutionalism as:

> *"…a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."*[39]

[35] Riegner (n 2) 335; Calland (n 16) 70; Colin Darch and Peter Underwood, *Freedom of Information and the Developing World: The Citizen, the State and Models of Openness* (Chandos Publishing, 2010) 1 (fn 2).
[36] Such obligations would more directly arise from provisions on co-operative governance, such as those found in Chapter 3 of the *SA Constitution* (n 5).
[37] For critical analyses of the different ways in which the concept has been used see James Fowkes, 'Transformative Constitutionalism and the Global South: The View from South Africa' in Armin von Bogdandy et al (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press, 2017) 97; and Heinz Klug, 'Transformative Constitutionalism as a Model for Africa?' in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press, 2020) 141.
[38] Philipp Dann, Michael Riegner and Maxim Bönnemann, 'The Southern Turn in Comparative Constitutional Law: An Introduction' in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press, 2020) 1, 21.
[39] Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 146, 150.

Despite the emphasis being placed, in scholarship on transformation in South Africa, on a variety of intermediary goals—such as land reform—the concept remains one that relates more broadly to a constitutional commitment to using the law to shift social and political organisations towards becoming more democratic, participatory and equal.[40]

Lastly, I refer in the thesis to "negative" and "positive" *obligations* rather than negative and positive *rights*. The reference in scholarship to negative and positive rights relates to the historical distinction in international human rights law scholarship between "first" and "second and third" generation fundamental rights. These two categories correlate with the two major treaties adopted to give legal effect to the *Universal Declaration of Human Rights*—the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESC).[41] The rights protected in the ICCPR ("first" generation rights) are also often designated as "negative" rights—with those protected in the ICESC ("second and third" generation rights) labelled "positive" rights.

The terms "negative" and "positive" relate to underlying assumptions about the nature of the obligations arising from these rights. The assumption is that rights protected in the ICCPR ("negative" rights)—such as the right to freedom of thought, conscience and religion—only require inaction or non-interference.[42] Contrastingly, rights protected in the ICESC ("positive" rights)—such as the right to an adequate standard of living—require the provision of goods or services; in other words, they require someone (usually the state) to take positive action (not to simply refrain from interfering).[43]

However, the distinction between "negative" and "positive" rights has long been criticised.[44] Henry Shue, for instance, has argued that, generally, all rights give rise to both positive and negative obligations; therefore, the distinction that matters more is between "positive" and "negative" obligations or duties.[45] Or, as Jeremy Waldron has put it,

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[40] AJ Van Der Walt, 'Dancing with Codes - Protecting, Developing and Deconstructing Property Rights in a Constitutional State' (2001) 118(2) *South African Law Journal* 258.
[41] *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948); *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').
[42] *ICCPR* (n 41) Article 18.
[43] *ICESCR* (n 41) Article 11.
[44] See for example, Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton University Press, 1980) 35–51; Jeremy Waldron, *Liberal Rights: Collected Papers, 1981-1991* (Cambridge University Press, 1993) 24–25; Sandra Fredman (ed), *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008) 65; Katharine G Young, 'Introduction' in Katharine G Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press, 2019) 1, 15.
[45] Shue (n 44) 35–64.

> *the correlation of first- and second-generation rights with the distinction between negative and positive rights simply will not stand up. Many first-generation rights (for example, the right to vote) require the positive establishment and maintenance of certain frameworks, and all of them make costly claims on scarce police and forensic resources.*[46]

Therefore, I refer in this thesis to negative and positive obligations rather than negative and positive rights.

IV METHODS

The primary enquiry of this thesis is into the insights that can be gathered from the South African experience of having an express right to information in the Constitution. To highlight how South Africa's approach to guaranteeing information access is conventional and how it is unique, I have contrasted the South African approach with two other prominent approaches. The thesis is, therefore, partly comparative.

I have chosen India and Germany as comparator states because of key similarities and differences with South Africa. Like South Africa's Constitution, India's and Germany's constitutions are regarded as having transformative—rather than preservative—commitments.[47] Additionally, like South Africa's Constitution, adopted after years of colonial and apartheid rule during which secrecy played a significant role, India and Germany's constitutions were adopted after a period of political suppression (under colonial rule in India and a fascist regime in Germany).

However, unlike South Africa, neither of these states has *expressly* constitutionally recognised a fundamental right to information that gives rise to *positive obligations to make information accessible* (requiring the information holder to disclose information, even if it is against their wishes). Instead, these two states represent two prominent alternative ways constitutional democracies guarantee

[46] Waldron (n 44) 24.

[47] India and South Africa are frequently cited as examples of transformative constitutionalism, see for example Frans Viljoen, Oscar Vilhena and Upendra Baxi (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press (PULP), 2013); and Armin von Bogdandy et al (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press, 2017). I address the claim that Germany and India have transformative constitutions further along in this section of the chapter.

information access. First, some states derive a fundamental right to information from another constitutional right or principle.[48] Second, other states merely guarantee access through legislation.[49]

India is an example of a state that has derived a right to information from another constitutional provision, and Germany of a state that merely provides legal guarantees. The Indian Constitution does not expressly recognise a right to information—yet the Indian Supreme Court has held that the right to freedom of speech and expression includes a right to information, giving rise to positive obligations to make information accessible.[50]

Contrastingly, the German Federal Constitutional Court has rejected arguments that a right to information can be derived from the right to receive information enumerated in the *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] ("Basic Law").[51] Nevertheless, like South Africa and India, Germany has adopted national (federal or central) legislation primarily focusing on making information accessible.

As noted above, transformative constitutionalism refers to a constitutional commitment to using the law to progress "a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."[52] Typical features of such (transformative) constitutions include fundamental rights that give rise to justiciable positive obligations and that apply horizontally (between non-state persons) and not just vertically (between the state and individuals).[53] The South African Constitution famously includes justiciable socioeconomic and cultural rights that give rise to positive obligations and apply horizontally. These features are, however, also present in other constitutions—including the Indian Constitution. Therefore, while scholarship on transformative constitutionalism initially focused on South Africa,[54] comparative scholars have recently applied the concept more broadly.

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[48] Peled and Rabin (n 31) 371 and 373–380; Riegner (n 2) 337.
[49] Riegner (n 2) 337.
[50] *SP Gupta vs Union of India* (1981) Supp (1) SCC 87, 67.
[51] *Bundesverfassungsgericht [German Constitutional Court], 1 BvR 2623/95 and 1 BvR 622/99, 24 January 2001 reported in (2001) 103 BVerfGE 44* 60.
[52] Klare (n 39) 150.
[53] Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2017) 65(3) *The American Journal of Comparative Law* 527, 540–541.
[54] See for example, Cathi Albertyn and Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14(2) *South African Journal on Human Rights* 248; Elsa Van Huyssteen, 'The Constitutional Court and the Redistribution of Power in South Africa: Towards Transformative Constitutionalism' (2000) 59(2) *African Studies* 245; AJ Van Der Walt, 'Transformative Constitutionalism and the Development of South African Property Law (Part 1)' 2005(4) *Journal of South African Law* 655; AJ Van Der Walt, 'Transformative Constitutionalism and the Development of South African Property

As scholars started applying the concept of transformative constitutionalism comparatively, they looked to countries with intermediary goals similar to those of South Africa: goals related to reducing poverty and extreme inequality.[55] The states that this body of work has looked to include India, Brazil and other Latin American states—all of which fall within the "Global South". With the term "Global South", I refer to states with a shared "history of colonialism" and position within "the geo-political system", which can be contrasted with the position of states of the "Global North"—not to the geographic location of states.[56]

Not only were no examples from the Global North initially included in the debate about transformative constitutionalism, but Upendra Baxi has gone as far as suggesting that the concept distinguishes postcolonial Global South constitutions from those of the Global North.[57] However, as Michaela Hailbronner has argued, the particular intermediate goals (those currently shared by many postcolonial states) do not make a constitution transformative.[58] Instead, what makes a constitution transformative is the more abstract commitment to using the law to move social and political institutions continuously toward being more democratic, participatory, and egalitarian.[59] She argues that at least "functionally or substantively", transformative constitutionalism "bears important resemblance to legal developments in some Northern jurisdictions, such as Germany."[60]

Specifically, Hailbronner contends that even though the "German constitutional framers" had a "conservative orientation",[61] the early German Constitutional Court created a "transformative

Law (Part 2)' 2006(1) *Tydskrif vir die Suid-Afrikaanse Reg [Journal of South African Law]* 1; Dennis M Davis and Karl Klare, 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26(3) *South African Journal on Human Rights* 403; Sanele Sibanda, 'Not Purpose-Made: Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22(3) *Stellenbosch Law Review* 482.

[55] David Bilchitz, 'Constitutionalism, the Global South, and Economic Justice' in Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press, 2013) 41; Viljoen, Vilhena and Baxi (n 47); Dann, Riegner and Bönnemann (n 38); Bogdandy et al (n 47) 4.

[56] Dann, Riegner and Bönnemann (n 38) 14, for an account of the historic development of the term, see pages 5 to 7.

[57] Upendra Baxi, 'Preliminary Notes on Transformative Constitutionalism' in Frans Viljoen, Oscar Vilhena and Upendra Baxi (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press (PULP), 2013) 19, 20–26 (arguing transformation is a 'promise' that 'makes sense in the context of [the] betrayal' of colonialism).

[58] Hailbronner (n 53) 528.

[59] Ibid 529, 533 and 536.

[60] Ibid 535.

[61] Ibid 542.

doctrine" which endures to this day.[62] First, she notes, the Court created an understanding of fundamental rights as fundamental values that "had a radiating effect on the whole legal order, informing the application of legal rules in all fields of law, including private law" (thus, rights apply horizontally, even if indirectly).[63] Second, the Court was committed to sustaining "the potential for future change".[64] In other words, the German Constitutional Court's doctrine requires the Basic Law to be read as requiring the state to act to ensure social and political institutions become more just and equal. Therefore, like South Africa and India, Germany can be described as having a state with a "transformative" constitution. Comparing states that all have transformative constitutional commitments is beneficial for comparative purposes because it ensures the institutions have broadly similar goals.

There are some significant differences between South Africa, India and Germany that might otherwise make comparison difficult—differences, for instance, in the relative ages of their democracies, the size of their economies and levels of inequality and literacy.[65] However, the emphasis in the thesis is on constitutional guarantees for information access. These countries have similar constitutional projects—transformative—but different approaches to constitutionally protecting information access. These particular similarities (transformative constitutions) and differences (in the form of constitutional protection of information access) make the three states suitable comparators for the focus of this thesis.

That is not to say that the differences between these countries are insignificant. Indeed, because these states and their people have substantially different day-to-day experiences, any comparison must be

[62] Ibid 546.
[63] Ibid 543.
[64] Ibid.
[65] Relative age: The *SA Constitution* (n 5) was only adopted in 1996, whereas both the Indian and German constitutions were adopted in 1949; Economy size: the World Bank in 2022 classified the South African economy as "upper middle-income", India's as "lower middle-income" and Germany's as "high income" 'World Bank Country and Lending Groups – World Bank Data Help Desk', *World Bank Data Help Desk* (Web Page, 23 December 2022) <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>; Inequality: the World Bank rates South Africa as the most unequal country in the world with a Gini coefficient of 60.3 (measured in 2014), whereas India's coefficient is 35.7 (measured in 2011) and Germany's 31.9 (measure in 2017) 'Gini Index', *The World Bank Data* (Web Page, 23 December 2022) <https://data.worldbank.org/indicator/SI.POV.GINI>; Literacy levels: according to the Progress in International Reading Literacy Study (which assesses the reading comprehension of students from participating countries that are in their fourth year of schooling) South African students had the lowest level of reading comprehension out of the 50 participating countries. South Africa falls below the centre point of the scale, which is the mean of the combined achievement distribution, whereas Germany falls above the centre point. India was not a participant. 'PIRLS 2016 International Results in Reading', *PRILS 2016* (Web Page, 23 December 2022) <https://timssandpirls.bc.edu/pirls2016/international-results/pirls/student-achievement/pirls-achievement-results/>.

made cautiously. Nevertheless, the comparison only aims to sketch out the differences in the level and form of constitutional protection offered for information access in the three states—not to make claims about reasons for these developments. That is to say, the purpose of my comparison is to illustrate variance (not make claims about causality) to demonstrate why it is worth looking closely at the South African example.[66] Therefore, one limitation of the study is the narrowness of the comparative aspect which is restricted to comparing the three states' constitutional texts and relevant national legislative instruments as well as the related case law of their apex courts.

Following the comparative chapter, the primary focus of the thesis is on the attempts of the branches of the South African government to give effect to the right. The thesis is, therefore, primarily a doctrinal project. It is partly descriptive in that it outlines what the South African government has attempted thus far and partly normative in that it argues that the state has additional obligations with respect to the right. To set out how the different branches of government have attempted to give effect to the right, I have relied primarily on the case law of the Constitutional Court of South Africa, legislative instruments enacted by the National Parliament and official reports on information access—such as those submitted annually by the South African Human Rights Commission to the national Parliament.

My normative claims about why the South African state ought to do more to give effect to the right are underpinned by an "egalitarian-liberal" approach to interpreting the South African right to information. I borrow the term "egalitarian-liberal" from Michel Rosenfeld and András Sajó, who describe two broad approaches to rights within the liberal tradition as "libertarian-liberal" and "egalitarian-liberal".[67] To illustrate the difference between the two approaches, they note, "libertarian-liberals believe that formal equality is sufficient to secure individual autonomy for all, while egalitarian-liberals argue that meaningful autonomy requires a guarantee of minimum welfare rights."[68] As noted above, the South African Constitution includes justiciable socioeconomic and cultural rights that give rise to positive obligations and apply horizontally—thus, so far as it might be regarded as liberal, it would more accurately be described as egalitarian than libertarian liberal.

Whether the South African Constitution is liberal has been questioned. In fact, for Karl Klare, the South African Constitution's recognition of socioeconomic rights, substantive equality, positive obligations

[66] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014) 225.
[67] Michel Rosenfeld and András Sajó, 'Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech Rights in New Democracies' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2007) 142, 144.
[68] Ibid.

and horizontality do not just demonstrate that the Constitution encapsulates a transformative commitment but also make it "postliberal".[69] Klare contends the South African Constitution is postliberal because it "embraces a vision of *collective self-determination* parallel to (not in place of) its strong vision of individual self-determination" [emphasis in the original].[70] However, while libertarian liberalism would not be compatible with a broad understanding of rights, including socioeconomic and cultural rights, horizontality and positive obligations, it is not incompatible with liberalism *per se*.

Jeremy Waldron, for instance, has contended that a commitment to traditional liberalism (understood as a commitment to individual self-determination) is compatible with "welfare provision and the reduction of economic inequality."[71] To summarise a complex argument, there are three components to Waldron's contention that there is a connection between valuing individual freedom and recognising that states have positive socioeconomic and equality obligations. First, Waldron argues that a society that genuinely wants to ensure the civil and political freedom of the individual must necessarily care about that individual having access to the material means that make it possible for them to exercise and enjoy that freedom.[72] Second, he contends that a society that cares about the individual's freedom does so because it cares about the individual's dignity. Third, Waldron proposes that a society that cares about the individual's dignity would also care about their socioeconomic needs.[73]

Waldron's account of liberalism is compatible with "a vision of *collective self-determination* parallel to (not in place of) [a] strong vision of individual self-determination", as Klare points out the South African Constitution has. Thus, the South African Constitution can be characterised as egalitarian-liberal, and an egalitarian-liberal approach to rights in the Constitution is the most appropriate.

In its doctrinal analysis, the thesis principally draws on and engages with public law scholarship on information access. Therefore, a limitation of the study is that it does not draw extensively on works in other disciplines and areas of law that have analysed additional aspects of information access. While recourse to these sources is beyond this thesis's scope, they provide (as discussed in chapter 8) a foundation for further research.

[69] Klare (n 39) 156.
[70] Ibid 153.
[71] Waldron (n 44) 1–2 and 4.
[72] Ibid 4–10.
[73] Ibid 10–17.

V Overview

The first part of the thesis—chapters 1 to 3—establishes why an express right to information is the optimal way to secure access to the information required to participate fully in democratic processes and protect and realise rights. It outlines the values that underpin information access, describes the theoretical justifications for recognising a right to information and provides an overview of three common ways information access is recognised in constitutional democracies through case studies. This analysis of the forms of recognition allows me to highlight how constitutional recognition could support claims for legal instruments that might better facilitate access to information.

The next part of the thesis—chapters 4 to 6—considers the attempts of the various branches of the South African government to give effect to the right to information. The analysis in this part of the thesis juxtaposes the potential of rights recognition, identified in the first part, with the reality of implementation in a specific state—South Africa.

Finally, the third part of the thesis—chapters 7 and 8—concludes. Chapter 7 draws together the arguments from the preceding six chapters to highlight the insights that can be gathered from South Africa's experience with express constitutional recognition of a right to information. The chapter highlights four generalisable insights that can be derived from the South African experience with an express right to information. Chapter 8 concludes by summarising the research question and key findings, highlighting the ways in which the thesis has contributed to scholarship, outlining the implications of the findings and identifying areas for further research.

In what remains of this part of this chapter, I describe how the main arguments evolve throughout the substantive chapters—that is, chapters 2 to 7.

A *Chapter 2: Justifying the Recognition of a Fundamental Right to Information*

This chapter focuses on the reasons for guaranteeing access to information. First, the chapter outlines three values identified in public law scholarship as underpinning both legal and constitutional guarantees of information access—transparency, accountability and openness. With respect to each of the three values, I provide an account of the range of definitions for that value.

Next, chapter 2 provides an account of the four main theoretical justifications put forward in public law scholarship for the recognition of a fundamental right to information. First, the proprietary

justification holds that state-held information is the property of the state's citizens and residents and, therefore, should be accessible to them. Second, the democracy justification suggests that information access is essential for the proper functioning of institutions central to democracy. Third, the fundamental rights justification holds that people need access to information to realise their (other) fundamental rights. Fourth, the market efficiency justification contends that information access is necessary because information plays a vital role in market self-regulation.

Finally, I argue that the values of transparency, accountability and openness are most apparent in the democracy and rights realisation justifications for the recognition of a right to information. Thus, I conclude that these justifications are the strongest justifications for recognising a right to information that can support collective and individual self-determination.

B *Chapter 3: Comparing Approaches to Facilitating Access to Information*

This chapter compares different approaches to securing access to information. The chapter begins by identifying the three most prominent approaches to guaranteeing information access—mere legal protection and derived and express constitutional recognition of a right to information. Additionally, this chapter also differentiates between two types of legislative provisions for information access—"general access laws" and "specific access provisions". By "general access law", I mean legislation principally focused on facilitating access to information. Contrastingly, "specific access provision" refers to information access provisions inside laws that regulate some other issue.

Further, this chapter undertakes three case studies, analysing one example of each of the three approaches to making information accessible. First, I consider Germany as representative of a state with no constitutional right to information that has nevertheless adopted legislation to facilitate information access. Second, I examine the approach in India, where the Supreme Court has derived a constitutional right of access to information from another constitutional provision. Lastly, consider the situation in South Africa as an example of a state with a constitution that includes an express right to information.

Regarding each approach, I consider any relevant constitutional provisions, analysing the text, interest protected, nature of the obligations it gives rise to, right-holders, duty bearers and limitations. While Germany does not have a right to information, it does have a right to receive information. With respect to Germany, I analyse the right to receive information to show how and why it has been read so as not

to provide a right to information, leaving the German law dependent on legislation. I also briefly consider how each state's apex court has interpreted and implemented the relevant constitutional provision.

Finally, I emphasise how the first two approaches (mere legal and derived constitutional recognition) are limited in how they can achieve the ends emphasised in democracy and fundamental rights justifications. I conclude by proposing that express constitutional recognition offers the most substantial prospect of securing adequate access levels for securing access to the information required to participate in democratic governance and realise (other) fundamental rights.

C *Chapter 4: Express Constitutional Recognition – The Implementation Role of the Legislature*

Chapters four to six closely examine how the four branches of the South African state have attempted to effect section 32 of the Constitution (the right to information). Chapter four focuses on the legislature. I start this chapter by arguing that making information accessible requires legislative intervention. Further, I contend that under the South African Constitution specifically, the primary responsibility for designing and adopting access instruments to effect the right to information falls on South Africa's national Parliament.

Next, I critically analyse the attempts of the South African legislature at effecting the right to information. In this regard, I first outline the legislative framework that facilitates access to information. Here I draw on the distinction established in the previous chapter between general access laws and specific access provisions. I argue that the South African Parliament has adopted both a general access law (PAIA) and specific access provisions—a framework of information access laws that make information accessible.

I show that while PAIA is central to the legislative access framework, it is insufficient, on its own, to secure access. First, PAIA depends, for its effectiveness, on other legal provisions requiring information holders to record and keep information. Second, as a general access law, PAIA does not adequately balance access to *certain* information in a way that satisfies the right. Finally, I contend that periodically new information needs that should be addressed through specific access provisions will arise and that the information access framework must be amended accordingly.

D *Chapter 5: Express Constitutional Recognition – The Implementation Role of the Judiciary*

In Chapter 5, I consider the Constitutional Court's role concerning the right to information and whether it has fulfilled its obligations. I start this chapter by outlining the core obligations of the judiciary under the right to information. I draw on public law scholarship on the separation of powers and specifically on the concept of "comity" to identify four tasks for the judiciary regarding the right. First, courts must interpret and enforce effect-giving legislation. Second, courts must respect the underlying institutional choices underpinning effect-giving law. Third, courts must interpret and enforce the right itself. Finally, when appropriate, the courts must ensure that the branch best suited to do so develops effect-giving law.

Focusing on the Court's duty to interpret and give effect to the right to information, I argue that the limitations analysis in section 36 of the Constitution is unsuitable for assessing positive state action under the right to information. Instead, I contend, the Constitutional Court should adopt reasonableness review—as developed for socioeconomic rights adjudication—to assess effect-giving law. I contend that, if implemented as a second step, reasonableness review is a normatively attractive review standard for positive obligations under the right to information. Lastly, drawing on the Court's socioeconomic rights jurisprudence and the values underpinning information access identified in chapter 2, I identify factors the Court could consider when conducting reasonableness review for the right to information.

E *Chapter 6: Express Constitutional Recognition – The Implementation Role of the Executive and Fourth Branch*

In chapter 6, I consider the executive and fourth branches' roles concerning the right to information and whether they have fulfilled their obligations. I argue that these branches have access to information obligations arising from section 32 of the Constitution, which include but extend beyond compliance with existing information access law. In particular, I reason that these branches have an essential contribution to make to the collective realisation of the right to information—that is to say, they can assist the legislature in fulfilling its section 32 obligations.

I argue that these branches have at least three obligations concerning the right to information. First, both branches must comply with and implement existing information access laws. Second, both have

some obligation to encourage other state and non-state entities to comply with information access provisions. Third, the executive and fourth branch must contribute towards strengthening existing information access laws and the adoption of other legal provisions to facilitate access.

Next, I analyse specific examples of executive and fourth branch entities engaging in activities within the three categories of supportive action I identified. Based on this analysis, I conclude the chapter by arguing that while these two branches have on occasion attempted to support the legislature's information access work, those efforts have not been sufficient, nor have they been sufficiently appreciated. These findings suggest that the legislature, executive, and fourth branch all underappreciate their cooperation's importance for realising the right.

F *Chapter 7: Insights*

Chapter 7 applies the tentative conclusions from the preceding three chapters to respond to the thesis' central question. It proposes that the South African experience suggests four insights (outlined in the introduction to this chapter) about the conditions necessary for an express right to information to be effective. To derive the four insights from the South African experience, I first analyse the learning from the preceding chapters related to realising the right through legislation. Next, I analyse the findings from the preceding chapters regarding the judicial enforcement of the right. In each case, I emphasise the features of the South African constitutional context that have contributed to the insights I derive from the South African experience. Ultimately I propose that the four insights about the conditions necessary for an express right to information to be effective might be adaptable to other jurisdictions. Thus, these insights could serve as valuable points of reflection for other states that want to consider including an express constitutional right to information in their constitution. Nevertheless, this chapter also cautions that any such reflection should be done cautiously, taking into account facets of the South African experience that may not be shared elsewhere.

Chapter 2: Justifying the Recognition of a Fundamental Right to Information

I INTRODUCTION

In chapter 1, I introduced the central research question animating this project: What insights can be gathered from the South African experience of having an express right to information in the Constitution? In this chapter, I focus on reasons for guaranteeing people access to information.

First, in part II, I outline three values identified in public law scholarship as underpinning both legal and constitutional guarantees of information access—transparency, accountability and openness. With respect to each of the three values I provide an account of the range of definitions for that value. I conclude part II by arguing for a particular understanding of each of the values in relation to the South African Constitution.

Next, in part III, I give an account of the four main theoretical justifications put forward in public law scholarship for the recognition of a fundamental right to information. The first philosophical rationale for an information right holds that information is property. In terms of this justification, information held by the state, is property held on behalf of that state's citizen's and residents and, therefore, should be accessible to them. The second justificatory argument is that information access is essential for the proper functioning of institutions central to democracy. The third philosophical justification for information access is that people need information in order to realise their (other) fundamental rights. Finally, the fourth justification holds that information access is necessary because information plays a vital role in market self-regulation.

Finally, in part IV, I argue that the values of transparency, accountability and openness are most apparent in the democracy and rights realisation justifications for the recognition of a right to information. Thus, I conclude, these justifications are the strongest justifications for the recognition of the right to information.

II THE VALUES UNDERPINNING INFORMATION ACCESS

Comparative public law scholarship dealing with access to information identifies transparency,[74] openness[75] and accountability[76] as values relevant to legal and constitutional guarantees of information access. Even in works that fail to recognise these concepts as norms, principles or values *expressly*, they are often described or presented as desirable ends.[77] The scholarship also regularly refers to the related idea of an 'open society' as an associated ideal.

In this part of the chapter, I outline the range of definitions for the values of transparency, accountability and openness in public law scholarship. My purpose in analysing these definitions is simply to identify the range of meanings acknowledged within scholarship in the field. It is not my intention to make any claims about the relative weight these values ought to be accorded when balanced against other values or public interest concerns.

While scholarship in this field often references these concepts, few works provide definitions, leading to inconsistent and contradictory uses of these terms. In essence, this is problematic as it can lead to confusion. Therefore, I also argue in this part of the chapter for better conceptual clarity and for greater care in the use of terminology within the field.

[74] Eric Messinger, 'Transparency and the Office of Legal Counsel' (2013) 17(1) *New York University Journal of Legislation and Public Policy* 239, 243; Cass R Sunstein, 'Output Transparency vs Input Transparency' in David E Pozen and Schudson Michael (eds), *Troubling Transparency* (Columbia University Press, 2018) 187, 4; Jerry L Mashaw, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61(4) *Boston University Law Review* 885, 901; David E Pozen, 'Freedom of Information beyond the Freedom of Information Act' (2017) 165(5) *University of Pennsylvania Law Review* 1097, 1113 and 1156; Mark Fenster, 'Transparency in Search of a Theory' (2015) 18(2) *European Journal of Social Theory* 150, 150–151; Calland (n 34) 214.

[75] Sandoval-Ballesteros (n 34) 408; Ulf Oberg, 'EU Citizens' Right to Know: The Improbable Adoption of a European Freedom of Information Act' (1999) 2 *Cambridge Yearbook of European Legal Studies* 303, 311 and 326; Riegner (n 2) 358.

[76] Sandoval-Ballesteros (n 34) 408; Pozen (n 74) 1137; Gia B Lee, 'Persuasion, Transparency, and Government Speech' (2004) 56(5) *Hastings Law Journal* 983, 1016.

[77] Primavera De Filippi and Lionel Maurel, 'The Paradoxes of Open Data and How to Get Rid of It: Analysing the Interplay between Open Data and Sui-Generis Rights on Databases' (2015) 23(1) *International Journal of Law and Information Technology* 1, 1 and 3; Sandoval-Ballesteros (n 34) 408; Pozen (n 74) 1102, 1115 and 1131.

A *Transparency*

1 *Definitions*

Definitions in the scholarship for 'transparency' have one thing in common, the attribute of being left or made 'visible' or, instead, in the context of information, of being left or made 'available'. I prefer to use the term 'available', given that information can be accessed with senses other than just the visual. This core attribute of transparency is often contrasted with complete or partial opacity (being wholly or partly unseen or unavailable) or with the act of rendering something wholly or partly opaque (that is, obfuscating or being secretive).[78] In definitions for 'transparency,' the *availability* feature is conveyed using terminology like: 'open' (Frederick Schauer and Patrick Birkinshaw),[79] 'visible' (Mark Fenster),[80] 'disclosing' (Adam Candeub),[81] 'available' (Anne Florini, Schauer and William Mock),[82] susceptible to 'scrutiny' (Schauer and Birkinshaw) or 'examination' (Schauer),[83] 'observable', and 'accessible' (Birkinshaw).[84] Although these authors use different phrases, the idea is the same: leaving or making information available and knowable. Therefore, as already noted, I refer to this attribute as 'availability'.

While the definitions for transparency in public law scholarship dealing with information access all recognise the attribute of *availability*, they differ in how they narrow or widen the scope of this core attribute. Some definitions narrow the scope by further recognising a specific *subject* regarding which information needs to be available. Other definitions narrow the scope through the recognition of a *purpose* for transparency. Still, other definitions widen the scope by recognising a purpose for the availability of information or requiring both availability and *understandability*.

The narrowest definitions simply recognise the core attribute—requiring nothing more than *availability*. Frederick Schauer, for instance, defines transparency as: "the capacity of being seen

[78] Frederick Schauer, 'Transparency in Three Dimensions' 2011(4) *University of Illinois Law Review* 1339, 1345; Adam Candeub, 'Transparency in the Administrative State' (2013) 51(2) *Houston Law Review* 385, 393 and 398.
[79] Schauer (n 78); Patrick Birkinshaw, 'Freedom of Information and Openness: Fundamental Human Rights?' (2006) 58(1) *Administrative Law Review* 177.
[80] Fenster (n 74) 150 Fenster defines 'transparency' as a command that "a governing institution must be open to the gaze of others."
[81] Candeub (n 78).
[82] Ann Florini, 'The Battle Over Transparency' in Ann Florini (ed), *The Right to Know: Transparency for an Open World* (Columbia University Press, 2007) 1; Schauer (n 78); William Mock, 'On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency' (1999) 17 *John Marshall Journal of Computer & Information Law* 1069.
[83] Schauer (n 78); Birkinshaw (n 79).
[84] Birkinshaw (n 79).

without distortion" and, in the context of information specifically, as being "open and available for examination and scrutiny".[85] He defines transparency, therefore, in terms of the *availability* attribute only ("open and available for examination and scrutiny").

Other definitions, narrower in scope, limit the *availability* element by specifying a subject. William Mock, for instance, defines transparency as "a measure of the degree to which information about official activity is made available to an interested party."[86] Here the *availability* attribute ("make available") is limited to information related to "official activity", which Mock further defines as including "official laws, regulations, actions, processes, and conditions".[87] At the same time, however, Mock's definition is also broader because it requires that the relevant information be "understandable".[88]

Making information understandable may, in many instances, require more than ensuring that it is made available just as it is. Certain information may, for instance, only make sense when understood in context and, thus, may require the compilation and disclosure of additional information to make it understandable. Mock's definition, therefore, limits transparency to information about the state;[89] yet, it is also somewhat more expansive in that the requirement of "understandability" could be taken to demand more than just passively ensuring availability.

Birkinshaw similarly recognises the element of *availability* as being limited through a relation to the subject of government affairs, which, in turn, he sees as pertaining to "official decisions" and "processes of governance and lawmaking".[90] Also, like Mock, he sees an additional element of "comprehensibility", which he notes explicitly may lead to more than just leaving or making information available, including a possible requirement to simplify information.[91] Additionally, Birkinshaw includes in his definition of transparency a requirement that "adequate reasons" be given whenever the exercise of power affects the public interest or individuals' rights.[92] In this latter respect, Birkinshaw includes in his definition of transparency something that most scholars in the field regard as an aspect of the value of accountability: the *giving of an account*.

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[85] Schauer (n 78) 1343.
[86] Mock (n 82) 1082.
[87] Ibid.
[88] Ibid.
[89] Mark Fenster also limits his working definition to the state, defining transparency as a command that "a governing institution must be open to the gaze of others." Fenster (n 74) 150.
[90] Birkinshaw (n 79) 189.
[91] Ibid.
[92] Ibid.

Anne Florini's definition, on the other hand, is an example of a definition that is both narrowed through the specification of a *subject* and *purpose*, as well as potentially widened through the specification of *purpose*. Florini defines transparency as "the degree to which information is available to outsiders that enables them to have informed voice in decisions and/or to assess the decisions made by insiders."[93] In this definition, the *availability* element ("information is available") is limited to the *subject* of "decisions" and decision-making. Her definition is further limited because it stipulates that it applies only to the *participation in or understanding of* decisions—it, therefore, excludes from its ambit information that is not necessary to enable these actions.

Florini's definition is, arguably, also expanded through the stipulation of a purpose because a requirement that decisions must be assessable or open to participation may demand more than simple availability. For information to be available enough to enable participation in, or the critical assessment of, decisions may, for example, mean that the information needs to be made accessible in a particular format. Such a requirement might, in turn, create an obligation to 're-package' information within the appropriate format.

While Florini's definition does not limit transparency to the state, its ambit is limited to decisions and decision-making. One might argue that this is not much of a limitation in scope, given that most information will either disclose a decision or be relevant to a future decision. Florini's definition is indeed open to wide interpretation; however, the 'decisions and decision-making' qualification is also open to narrower interpretation. A restrained understanding of this later qualification may envision only information *directly* related to the relevant decision as subject to disclosure. Such an understanding would restrict the range of information the definition contemplates as needing to be available.

Further, Florini's definition only envisages empowering people to understand decisions that have already been taken or empowering people to participate in the making of a decision. The participatory element, present in the latter aspect of the purpose, suggests that what Florini is contemplating is not decision-making generally but rather decisions for which people other than the decision-maker have a right to have their views taken into consideration. If, indeed, this definition is limited to the making of decisions of that nature, it does not relate to information relevant purely to the making of personal decisions.

[93] Florini (n 82) 5.

Even if Florini's definition were to be understood to refer to any information related to any past or future decision, there is still some information it would not cover. For instance, someone might have a naturally occurring, non-fatal, non-transmittable, incurable illness for which no medical or lifestyle intervention could offer relief. If someone held information of this kind about someone else, this definition would not anticipate the availability of that information because it would not be relevant to any past or future decision. There are likely reasons why it would be desirable to ensure transparency regarding information of this kind, at least towards the person who has developed the illness. For example, it might offer emotional relief to have an explanation for symptoms. Be that as it may, my purpose here is only to highlight how this definition is limited, not to argue for the normative desirability of either a narrower or a broader definition.

The definitions for transparency have identified the *availability* of information as a core attribute of transparency. I have shown that some definitions leave this attribute unqualified. In contrast, other definitions narrow the scope by making the need for information availability dependent on whether the information relates to *state affairs* or *decision-making*. Florini narrows the scope further through the specification of the *purpose* of enabling *participation in* or *understanding of* decisions. This *purpose,* however, also broadens the scope of her definition because it is no longer simply about *availability*; but also about enabling further action, which in turn might create additional obligations. Lastly, the definitions narrowed through a limitation to the subject area of *state affairs* are also broadened to include an *understandability* requirement rather than just *availability*.

2 *Mechanisms for Realising Transparency*

Adam Candeub claims to provide a definition, but his definition identifies conditions for ensuring the realisation of the value rather than describing the phenomenon of transparency. Nevertheless, his description highlights, and thus affirms, aspects of transparency that the definitions discussed above have identified.

Candeub notes that he wishes to move beyond the idea of transparency defined "as access to information" and instead identifies what he refers to as "two primary elements" of transparency.[94] His first element is the need to "lower" the "cost of accessing information" – because, he notes,

[94] Candeub (n 78) 387.

information is not, in fact, available if only available upon payment of a prohibitive cost.[95] His second element is the need for someone disclosing information to ensure that they also disclose ancillary information—if that ancillary information is required to understand the information primarily disclosed (he calls this "computational transparency").[96] While he does not *expressly* limit transparency to state affairs, the paper in which he contends transparency has two primary elements only deals with and only contemplates the availability of state-held information.

Both of Candeub's elements identify practicalities that prevent the achievement of transparency when a state attempts to provide access through an access-to-information regime. Indeed, making information accessible, but only at a prohibitive cost, will not ensure that the information is actually *available*. However, this only demonstrates that removing cost barriers may be necessary to ensure the *availability* of information. Therefore, Candeub's first element is a condition for ensuring *availability* (availability being an element of transparency recognised in the scholarship discussed above) rather than itself being an aspect of transparency.

Similarly, it is true that, for there to be *understanding*, it may be necessary to ensure that ancillary information is made accessible along with the information principally being disclosed. Nevertheless, this again only shows that providing access to additional information may be necessary when disclosing information through an access-to-information regime that values understandability. Candeub's second element is a condition for ensuring *understandability* (an element of transparency recognised in some of the scholarship discussed above).

Candeub, therefore, rather than providing a different definition, demonstrates how access to information regimes may require more than simple disclosure to give effect to the value of transparency. His discussion of these factors shows an underlying view of what transparency is that is aligned with the definitions for transparency that recognise *availability* and *understandability* as elements of transparency; and transparency as related to the *subject* of *state affairs*.

[95] Ibid.
[96] Ibid 388.

B *Accountability*

Public law scholarship about access to information often refers to 'accountability' (or 'public accountability') without explaining the term's meaning,[97] sometimes while explicitly referring to accountability as a value.[98] The definitions that do exist for the term all describe a mandatory action ('giving account') and a need for related sanctions. The mandatory action I refer to is the requirement to 'give an account' of some action or decision. In the public law scholarship, reference to the idea of 'giving account' is conveyed using the terms 'answer for',[99] 'explain'[100] and 'justify'.[101] Beyond this core (giving account and related sanctions), some definitions describe a subject area to which the account giving relates; some specify the actor responsible for giving an account, and some specify the recipient of the account giving.

When broadly conceived, the definition of 'accountability' is limited to the core aspects of giving account and related sanctions. For example, Eric Messinger leaves unspecified who needs to give an account and which audience should receive that account. He relies on Jack Goldsmith's definition of accountability,[102] summing up Goldsmith's definition as being to "disclose one's activities, explain and answer for them, and subject oneself to the consequences of the institution to which one is accounting".[103] Messinger, therefore, sees accountability as being about the availability of information ("disclose one's activities"), a giving of account ("explain and answer for") and related sanctions ("subject oneself to the consequences"). He does not specify who must give the account or to whom that account ought to be given.

In the discussion above on the value of transparency, I noted that 'availability' is a key element of the definition of transparency. Thus, Messinger's definition of accountability combines (with its reference to the disclosure of activities) both ideas that other scholars in this field regard as typifying

[97] Florini (n 82); Calland (n 34); Candeub (n 78); Sunstein (n 74); Fenster (n 74); Seth F Kreimer, 'The Freedom of Information Act and the Ecology of Transparency' (2007) 10(5) *University of Pennsylvania Journal of Constitutional Law* 1011.
[98] See for example, Pozen (n 74) 1137.
[99] Oren Perez, 'Open Government, Technological Innovation, and the Politics of Democratic Disillusionment: (E-)Democracy from Socrates to Obama' (2013) 9 *I/S: A Journal of Law and Policy for the Information Society* 61; Messinger (n 74).
[100] Jennifer Shkabatur, 'Transparency with(out) Accountability: Open Government in the United States' (2012) 31(1) *Yale Law & Policy Review* 79; Messinger (n 74).
[101] Shkabatur (n 100).
[102] Jack Goldsmith, *Power and Constraint: The Accountable Presidency After 9/11* (W W Norton, 2012).
[103] Messinger (n 74) 286.

'transparency' and ideas that others relate to 'accountability'. This mixing of concepts contributes to a lack of conceptual clarity that could be a problem for the field.

Somewhat more specific, but still leaving the scope quite broad, are definitions that only add to the two core aspects a specification that the actor who needs to give account is anyone exercising some form of power. Perez gives such a definition in an article exploring the possibilities for and limits to democratic engagement over the internet.[104] He defines accountability as "the need of a power-holder to have to answer for her action or inaction and to be exposed to potential sanctions."[105] Perez, therefore, identifies an account-giving element ("have an answer for") as well as a related sanctions element ("exposed to potential sanctions"). For Perez, the need to give an account attaches to any person or entity *in a position of power*. However*,* he does not identify a specific audience for receiving the account.

The most detailed definitions for 'accountability' add to the core elements (of giving an account and related sanctions) the specification of the relevant actor that must give an account and the audience entitled to receive the account. Shkabatur gives such a detailed definition in an article arguing for changes to online transparency regimes aimed at regulating public administration.[106] In contrast with Perez, however, Shkabatur talks about '*public* accountability' and relates the term to any person exercising *state power*.[107] Moreover, she understands 'public accountability' as requiring "explanation and justification of agencies' activities to the public; and an accompanying mechanism for public sanctions."[108] Thus, Shkabatur also recognises an account-giving aspect ("explanation and justification") as well as a requirement for related sanctions ("accompanying mechanisms for public sanctions"). Additionally, she identifies the account givers as certain holders of public power—"agencies"—and specifies an audience entitled to receive the account, namely "the public".

As Shkabatur defines accountability, the account must be given publicly rather than to a specific person or group of persons. Shkabatur, in referring to 'public accountability' rather than just 'accountability', thus, seems to be conveying ideas of giving an account *in a public forum* and giving an account about the *use of public power*.

[104] Perez (n 99).
[105] Ibid 73 ft 36.
[106] Shkabatur (n 100).
[107] Ibid 82.
[108] Ibid.

Therefore, the definitions for accountability all recognise a need to ensure *account giving* concerning certain actions or decisions and a need to ensure that there are sanctions in place that attach to undesirable actions or decisions. There is, however, a spectrum of views on whom this duty to account attaches to: from being left open or unspecified (Messinger), to attaching to power-holders of any kind (Perez), to attaching only to the holders of state power (Shkabatur).

C *Openness*

Of the three values, openness has received the least attention and is consequently the most underdeveloped. Scholarship often refers to 'openness', but the term is rarely defined. Often, the word openness is used in scholarship to convey a sense of making something visible or data available;[109] or it is described as the opposite of secrecy.[110] In other words, there is a body of scholarship within the field that uses the term 'openness' as a synonym for 'transparency'—at least, transparency understood in the way that I have shown it gets used in literature in this field. However, at other times, "transparency and openness" principles are listed as separate concepts—apparently regarded as distinguishable from one another.[111] It is therefore essential to consider whether 'openness' is something different to 'transparency' and, if it is, what it is that 'openness' refers to as distinct from 'transparency'.

Birkinshaw is one public law scholar in the field that does define 'openness'.[112] He provides separate definitions for 'openness' and 'transparency' and generally treats the concepts as distinct but additionally notes that they convey "similar" ideas.[113] He describes 'transparency' as making information about government affairs available.[114] Further, he recognises several mechanisms and

[109] Fenster (n 74) 150; Schauer (n 78) 1351; Lee (n 76) 1020; Shkabatur (n 100) 93 and 112; Gary D Bass, 'Big Data and Government Accountability: An Agenda for the Future' (2015) 11(1) *I/S: A Journal of Law and Policy for the Information Society* 13, 20 and 31–32 ('Big Data and Government Accountability'); Florini (n 82) 4, 7–9, 11–12 and 14; Calland (n 34) 216, 226 and 230.

[110] Rick Snell and Rowena Macdonald, 'Customising Freedom of Information Law Reform in South Pacific Micro-States' (2015) 104(6) *The Round Table* 687, 689; Andrew Keane Woods, 'The Transparency Tax' (2018) 71(1) *Vanderbilt Law Review* 1, 51; Rhys Stubbs and Rick Snell, 'Pluralism in FOI Law Reform: Comparative Analysis of China, Mexico and India' (2014) 33(1) *University of Tasmania Law Review* 141, 164 ('Pluralism in FOI Law Reform').

[111] De Filippi and Maurel (n 77) 1; Pozen (n 74) 1102; Woods (n 110) 48 and 50–51; Robinson (n 8) 34; Tristan Robinson, 'Federal FOI Reform and Media Access to Government Information: A Transparency Revolution or Just a Better Foothold?' (2010) 14(62) *AIAdminLawF* 65, 66; Birkinshaw (n 79) 183 and 194.

[112] Birkinshaw (n 79).

[113] Ibid 190.

[114] Ibid 189–190.

values as related to this goal of ensuring availability, including the recording of certain kinds of information and the *observability of governance processes*.[115]

On the other hand, he defines openness as the "processes that *allow us to see* the operations and activities of *government at work*" (emphasis added).[116] For Birkinshaw, therefore, openness is the collection of laws and systems that make governance processes observable. Therefore, he sees 'openness' as a set of mechanisms necessary for realising one aspect of transparency. I take a different view for reasons that will become apparent from my analysis below of the scholarship on the concept of the 'open society'. I agree that 'openness' and 'transparency' should be considered separate but related concepts. However, I suggest that 'openness' is itself a value, not just a collection of mechanisms for realising an aspect of the value of transparency.

1 *The Open Society*

I start considering what openness might mean by examining a related concept that is often referred to in scholarship in this field—the concept of the 'open society'. While there are few definitions for the term 'openness' in public law scholarship that focuses on access to information, 'the open society' is defined somewhat more often. In this part, I consider the definitions for 'the open society' and the relatedness of this concept to the concept of 'openness,' arguing that openness ought to be understood as relating to participation in and critical engagement with political and social governance.

2 *Karl Popper's Open Society*

The term 'the open society' is, by many information scholars, traced back to the work of Karl Popper.[117] Therefore, I start by laying out how Popper understood the notion of 'the open society'. In *The Open Society and Its Enemies,* Popper contrasted the open society with the idea of a 'closed society'.[118] According to Popper, a closed society is one in which social conventions, specifically regarding an individual's role within the social hierarchy, are regarded as innate and unquestionable.[119] A person's

[115] Ibid 189.
[116] Ibid 190.
[117] See for example: Christopher Witteman, 'Information Freedom, a Constitutional Value for the 21st Century' (2013) 36(1) *Hastings International and Comparative Law Review* 145, 245; Perez (n 99) 68; De Filippi and Maurel (n 77) 4; Cynthia H Conti-Cook, 'A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public' (2019) 22 *CUNY Law Review* 148, 161.
[118] Karl Popper, Alan Ryan and EH Gombrich, *The Open Society and Its Enemies: New One-Volume Edition* (Princeton University Press, NED-New edition, 1994).
[119] Ibid 164.

obligation within this kind of society is to act out *unquestioningly* a predetermined role connected with their position in the social hierarchy.[120] Such a society regards a person's actions as the logical consequence of being in a predetermined social position and requiring no prior decision-making; further, actions and decisions are never open to "critical consideration."[121]

In contrast, Popper saw the open society as one that views social conventions as questionable customs, not facts of nature.[122] In particular, while accepting some form of hierarchy as inevitable, an open society regards social positions as changeable and critical discussion as an essential social and political practice.[123] This society views actions as resulting from choices, not merely the logical consequence of being in a predetermined role.[124] People are understood to be capable of estimating the effects of their decisions and related actions and are held responsible for choosing to prefer some outcomes over others.[125] A person's obligation to society is, therefore, to use "what reason [they] may have to plan as well as [they] can for both [the] security and freedom" (emphasis omitted) of their community.[126] Therefore, for Popper, an open society is a society in which there is an entitlement to question social conventions. This entitlement, in turn, leads to an obligation to use reason to participate in the governance of society, specifically through critical discussion, and a duty to take responsibility for decisions.

Thus, the open society, as conceived by Popper, is concerned with ensuring that the members of society *participate* in, and *critically engage* with, decisions related to the governance of society and that there are *consequences* for decisions that impact the lives of others. The latter characteristic (that of consequences) is similar to the consequences aspect of the value of accountability (as understood in scholarship on information access). Therefore, the Popperian open society is concerned with providing for participation in and critical engagement with decisions related to the governance of society and ensuring concomitant *accountability*.

[120] Ibid.
[121] Ibid.
[122] Ibid 164–165.
[123] Ibid 165.
[124] Ibid.
[125] Ibid.
[126] Ibid 189.

3 *'The Open Society' in Information Access Scholarship*

Public law scholarship on information access sometimes defines the concept of the open society, and at other times deals with the concept without expressly providing a definition. The first part of this section outlines definitions in the scholarship for the open society, the second part how the concept has been used in work more concerned with mechanisms for realising an open society.

(a) Definitions for the Open Society

Scholarship in this field recognises, often while relying on Popper, several elements to the concept of the open society. This scholarship highlights the aspects of the open society that are relevant to the field of information access. Some scholars recognise only some elements, while others recognise multiple elements, providing more expansive definitions. At a minimum, the scholarship describes the open society as a society in which there is *critical engagement*. For instance, Conti-Cook, quoting Popper, simply defines an open society as one that "sets free the critical powers of man."[127] Her reliance on this quote suggests that the aspect of the open society that Conti-Cook regards as essential, at least as it concerns access to information, is *critical discussion*.

Other definitions recognise additional characteristics of 'the open society'. Most commonly, this body of scholarship acknowledges *participation* in societal governance as a core aspect of such a society; and as an aspect to which the characteristic of *critical discussion* relates. *Transparency* is also generally recognised as a key feature of such a society, as is *accountability*, though somewhat less commonly.

De Filippi and Maurelt deal with the term 'open society' in an article exploring the tensions between the values they identify as underlying the 'open data' movement – openness, transparency and accountability – and the value of privacy.[128] They recognise *transparency*, *participation* and *critical engagement* as integral features of an open society. In a footnote, they remark that Popper defines the open society from an "epistemological perspective" but that they use the term to refer to "a society that operates in a transparent manner and where most of the data and information are disseminated freely and available for anyone to access and reuse."[129]

[127] Conti-Cook (n 117) 161 quoting; Popper, Ryan and Gombrich (n 118) xi.
[128] De Filippi and Maurel (n 77).
[129] Ibid 4 ft 20.

De Filippi and Maurelt, therefore, use the term the open society to refer to the availability and useability of information and thus to convey ideas of 'accessibility' and 'understandability' (as discussed above concerning the value of 'transparency'). They do, however, also note that, in a Popperian sense, the open society is a society that is "responsive and tolerant" and has "political mechanisms" that are "transparent and flexible".[130] De Filippi and Maurelt, therefore, recognise *transparency* as one of the critical aspects of an open society. Further, their references to responsiveness, tolerance and flexibility concerning political processes suggest that they also regard *participation* and *critical engagement* as features of the concept.

The description of the open society that recognises the most elements recognises *transparency*, *accountability*, *participation* and *critical engagement* as defining features of such a society. Luna and Fairfield use the concept in such a way in a paper in which they reason that "data-driven [criminal] prosecution" ought to be made "susceptible to testing" through transparency.[131] In arguing that state systems should be testable, challengeable and transparent, they rely on what they regard as the values underlying the open society. They describe the term 'the open society' in a similar way to that in which Popper does, that is, by first noting what sort of state systems would *not* accord with an open society and then, with reference to Popper, by observing what the open society does require in this regard.

Luna and Fairfield argue that closed societies have "systems that are functionally ex parte and hidden, untested and unchallengeable, operating in an environment of unequal access to data".[132] Contrastingly, they reason that in an open society "state action" is "transparent, accountable, and responsive, all as the result of a critical approach to public dialogue and the maintenance of liberal democratic processes."[133]

Luna and Fairfield also contend that closed societies adopt "the structures of totalitarian governance, which, inter alia, centralize decision-making and often quash debate about state action."[134] This latter statement suggests that they regard an open society (being the opposite of a closed society) as one that ensures tolerance and provides for more inclusive decision-making. Tolerance, in turn, suggests that there would be scope in such a society for reasonable disagreement and debate or, to put it differently, for *critical engagement*. For Luna and Fairfield, then, an open society is a society in which

[130] Ibid.
[131] Erik Luna and Joshua AT Fairfield, 'Open Society and Its Digital Enemies' (2013) 99–100 *Cornell Law Review Online* 217, 218.
[132] Ibid.
[133] Ibid 226.
[134] Ibid.

there is: *transparency*, *accountability* and *critical engagement*. Further, their reference to "responsiveness" and the suggestion that tolerance and inclusive decision-making is central to the political structures of the open society indicates that they also regard *participation* as an essential aspect of such a society.

Therefore, the explanations of 'the open society' in scholarship on information access all recognise *critical engagement* as an essential characteristic of such a society. Some definitions go further and connect critical engagement to *participation* in social and political governance. The definitions that recognise participation as an element of the open society also recognise *transparency* as an attribute of such a society. Luna and Fairfield additionally recognise *accountability* as a critical feature of such a society. Thus, definitions of 'the open society' in the scholarship on information access reflect all the elements present in Popper's depiction of the open society; and, in addition, also the value of *transparency*.

(b) Mechanisms for Realising the Open Society

These characteristics also appear in scholarship that deals with the concept without expressly providing a definition. Perez, for instance, does not define the term 'the open society' but does identify what he regards as "the key normative commitment underlying the ideas of e-democracy and open government". With 'open government,' Perez refers to a concept encapsulated in the "Open Government Declaration" (OGD) and many other 'open' and 'e-democracy' projects.[135] The OGD is a commitment, endorsed by every country member of the Open Government Partnership (OGP),[136] to champion "the principles of open and transparent government".[137]

The OGD includes an acknowledgement by members that there is a call for "openness in government" and a commitment to "uphold the value of openness in our engagement with citizens…."[138] E-democracy, in turn, refers to using new technology to achieve more openness and accountability.[139] While 'open government' and 'the open society' are not precisely the same thing, the "key normative

[135] Perez (n 99) 65–67.
[136] At present 75 members.
[137] 'Open Government Declaration', *Open Government Partnership* <https://www.opengovpartnership.org/process/joining-ogp/open-government-declaration/>.
[138] Ibid.
[139] Ibid; Perez (n 99) 66–67.

commitment" identified by Perez as underlying open government reflects some of the same elements identified in the scholarship discussed thus far as forming part of the 'open society'.[140]

The normative commitment Perez identifies is "the claim that the citizen-body as a whole should be given meaningful opportunities to take part in the political process."[141] A commitment to ensuring that politics and governance are participatory—in a meaningful way—is, therefore, what underpins the open government concept.[142] While Perez does not specify what he means by "meaningful participation," he suggests elsewhere that the open government movement and e-projects hope to achieve "reflexive and epistemologically complex deliberative processes".[143] Perez' description of the deliberative process suggests that *critical engagement* is also an essential aspect of the underlying commitment. In other words, Perez understands the open government concept as including a commitment to *participation* in and *critical engagement* with governance.

4 *Openness as a Distinct Feature of the Open Society*

'Openness' and 'the open society' are not precisely the same concept, yet, both are commonly referred to in public law scholarship about information access. The concept of an open society, discussed above, reflected the values of transparency and accountability and the idea of enabling participation in and critical engagement with political and social governance. This latter aspect—participation in and critical engagement with political and social governance—is distinct from (yet interrelated with) transparency and accountability. Given that 'openness' is an aspect of the open society but also distinguishable from transparency and accountability, I refer to the aspect of the open society that relates to participation in and critical engagement with political and social governance as 'openness'. Distinguishing 'openness' in this way would make sense of the fact that the term openness is often recognised in the literature on information access as something other than 'transparency'.

As noted above, Birkinshaw sees openness as the mechanisms that ensure governance processes are observable—that is, as mechanisms for realising the value of transparency in a particular field. However, openness, from my analysis of the literature in the field, seems to be a value in and of itself. Therefore, I contend that openness is, in fact, a separate characteristic value of the open society, along with the values of transparency and accountability. Further, openness as a value refers to, at least,

[140] Perez (n 99) 69.
[141] Ibid.
[142] Ibid 72.
[143] Ibid 67.

critical engagement in political governance and, at most, participation in and critical engagement with social and political governance.

D *The Three Values in South African Constitution*

In this part of the chapter, I consider how the values of transparency, accountability and openness ought to be understood in the context of the South African Constitution.[144] These values feature very prominently in the Constitution.[145] For instance, the Preamble states that the Constitution was adopted to "[l]ay the foundations for a democratic and open society". Similarly, section 1 provides:

> *The Republic of South Africa is one, sovereign, democratic state founded on the following values:*
>
> *a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.*
> *b. Non-racialism and non-sexism.*
> *c. Supremacy of the constitution and the rule of law.*
> *d. Universal adult suffrage, a national common voters roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness.*

As I noted in chapter 1, the South African Constitution is regarded as "transformative"—that is, it seeks to change, not preserve, the political and social status quo. This understanding of the South African Constitution as requiring both social and political change is relevant to understanding what the values of transparency, accountability and openness mean within the Constitution.

Recall from chapter 1 that transformative constitutionalism is a "long term project" in which the law is supposed to be used to transform "a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."[146] Moving shifting a country's social and political organisations towards becoming more democratic, participatory and equal necessitates the identification of intermediary goals. One important intermediary goal, identified early

[144] *SA Constitution* (n 5).
[145] See for example, ibid 1, 41, 57, 70, 116, 152, 195, 199, 215 and 216.
[146] Klare (n 39) 150.

on by Etienne Mureinik, is the need to transform the "culture of authority" prevalent during apartheid into a "culture of justification".[147] Mureinik defined "a culture of justification" as one in which "every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion."[148]

The definitions, in scholarship, for transparency (discussed above) all included the concept of information *availability* but some limited transparency to *state affairs* or *decisions and decision-making*.[149] In contrast, others expanded the scope requiring not just availability but *understandability*. The South African Constitution only explicitly recognises transparency as a value in relation to state governance.[150]

However, the Constitution does expressly commit to an "open society" in the Preamble and the general limitations clause, which provides that rights can be limited "to the extent that the limitation is reasonable and justifiable in an open and democratic society…."[151] As discussed above, the concept of the open society includes the values of openness, accountability and transparency. Therefore, by embracing the concept of an open society, the Constitution incorporates the value of transparency. Additionally, the South African constitutional commitment to transformation is not only to political but also to social transformation, as evidenced by the horizontal application of the rights in the Bill of Rights.[152] As a result, the value of transparency within the South African Constitution cannot be said to be limited only to government affairs.

Similarly, given that information access supports the exercise of fundamental rights (as argued below, in part III section C) and that the South African Constitution includes a broad range of rights,[153] transparency in the South African Constitution cannot be said to be limited to decisions and decision-making. As I argued concerning Florini's definition of transparency, decisions and decision-making could be understood narrowly and, as such, might not relate to certain types of information. Further, the commitment to becoming a community based on persuasion rather than coercion suggests that

[147] Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 32.
[148] Ibid 32.
[149] See Part II section 0.
[150] *SA Constitution* (n 5) 41, 71(1)(b), 70(1)(b), 116(1)(b), 195(1)(g), 199(8), 215 and 216(1).
[151] Ibid 36.
[152] 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' Ibid 8(2).
[153] The Bill of Rights enumerates 27 separate rights. Ibid 9–35.

understandability is a core aspect of transparency in the South African Constitution. Therefore, the value of transparency in the South African Constitution necessitates information availability—without qualification—and understandability.

The definitions for accountability discussed above all included the concepts of *giving account* and *being subjected to sanctions*.[154] However, some of the definitions limited the scope of accountability by specifying the *actors that need to give account*, the *subject* they must account on or the *persons to whom they owe an account*. The South African Constitution's commitment to equality and a culture of justification "in which every exercise of power is expected to be justified" suggests accountability should be understood as limiting the account-giving to actors that hold or exercise power.[155] Further, the persons or groups to whom accounts are owed should include anyone potentially affected by the exercise of that power. Therefore, the value of accountability in the South African Constitution necessitates power holders to give an account of the exercise of power to anyone potentially impacted by the exercise of that power.

Lastly, in the analysis above,[156] I argued that openness is at least critical engagement concerning governance and, at most, both participation in and critical engagement with social and political governance. Again, the intermediary transformative goal of creating a culture of justification is relevant to understanding what openness means in the South African Constitution. A "community built on persuasion" would embrace both elements of openness—participation and critical engagement. Further, the commitment to transforming social institutions means the concept should be understood as including political *and social* governance. Thus, the value of openness in the South African Constitution refers to participation in and critical engagement with social and political governance.

E *Call for Greater Conceptual Clarity*

My analysis of the scholarship in the field that provides definitions for the values of transparency, accountability and openness shows a lack of conceptual clarity. A failure thus far to carefully differentiate between these three values has led to inconsistent use of the terminology. That has led to some definitions incorporating core aspects of the other values. So, for instance, some definitions for 'transparency' include a core aspect of what is generally regarded as 'accountability'.[157] Similarly,

[154] See Part II section B.
[155] Mureinik (n 147) 32.
[156] See Part II section C, specifically subsection 4.
[157] See Part II section A, specifically subsection 1.

some definitions for 'accountability' include the most central aspect of the definition of 'transparency'.[158] Further, the term 'openness' is sometimes used as a synonym for 'transparency' and, at other times to indicate something distinguishable.[159]

The scholarship's failure to be precise about these concepts is problematic because while they are interrelated and mutually supportive, they do refer to different aspirations. It is necessary to distinguish between the concepts because what might be required to give effect to each of these unique aspirations might be different. Additionally, it would only be possible to review accurately the success of implementing mechanisms if it were clear what the unique objective is that they seek to realise. In addition, scholarship in the field will be significantly improved if references to the same terminology were references to the same concept—avoiding, for instance—conceptual misunderstandings.

A further problem is a tendency to define these values with reference to the mechanisms aimed at their realisation.[160] This inclination is a problem because it confuses the objective with the concrete steps aimed at achieving that objective. It is necessary to distinguish between the definitions and the mechanisms because it is only possible to improve and optimise mechanisms for realising values if it is clear what those mechanisms aspire to accomplish.

III THE THEORETICAL JUSTIFICATIONS FOR THE RIGHT TO INFORMATION

In public law scholarship on the right to information, four main theoretical justifications are put forward for the right to information. The first philosophical rationale for an information right holds that state-held information is the property of the state's citizens and residents and, therefore, should be accessible to them. The second justificatory argument is that information access is essential for the proper functioning of institutions central to democracy. The third philosophical justification for information access is that people need information in order to realise their (other) fundamental rights. Finally, the fourth justification holds that information access is necessary because information plays a vital role in market self-regulation.

[158] See Part II section B.
[159] See Part II section C.
[160] See Part II section A subsection 2 (for an example in relation to transparency), Part II section B (for an example in relation to accountability) and Part II section C (for an example in relation to openness).

A *The Proprietary Justification*

The proprietary justification is usually made in one of two ways—the first concerns funding, and the second agency. The justification, as it relates to funding, holds that information generated by the government, or in furtherance of state-funded projects, is created at the taxpayer's cost; thus, it is the taxpayer's property.[161] This contention could be extended by arguing that information not created by the state but held by it is held at the taxpayer's expense and, therefore, the taxpayer has a strong claim to it.

Regarding agency, the proprietary justification holds that information held by the state is held on behalf of the country's people and, therefore, belongs to the people. State officials and civil servants are agents of both citizens and residents because they are appointed to work in the interest and to the benefit of citizens and residents. Therefore, the information these agents generate in furtherance of their duties, or that is generated in furtherance of projects related to their duties,[162] is information belonging to the principal of the agents—the citizens and residents.[163]

However, the proprietary justification is somewhat limited because it only explains why citizens and legal residents should be recognised as rights holders and justifies access only to state-held information.

B *The Democracy Justification*

Another justification for recognising a right to information is the argument that information access should be protected and actualised (or made possible) because it is essential for democracy.[164] Peled and Rabin, for instance, argue that "access to information is central to the proper functioning of a democratic regime."[165]

[161] Peled and Rabin (n 31) 365–366.
[162] Such as when state functions are contracted out to be performed by private entities.
[163] Peled and Rabin (n 31) 365–366; Riegner (n 2) 348.
[164] Peled and Rabin (n 31) 360; Yvonne Donders, 'International Covenant on Economic, Social and Cultural Rights: Accessibility and the Right to Information' in Tarlach McGonagle and Yvonne Donders (eds), *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press, 2015) 89, 92 ('International Covenant on Economic, Social and Cultural Rights'); Riegner (n 2) 347.
[165] Peled and Rabin (n 31) 360.

Democracy is commonly understood as a system of governance in which members of society have a say in how they are governed—either directly or by choosing their representatives.[166] The democratic justification for a right to information relates to the role information plays in empowering people to have a say in how they are governed. Arguments for a right to information, made from democracy, relate primarily to opinion formation, participation (people choosing how they will be governed by voting and direct participation in decision-making) and accountability.

Regarding opinion formation, the contention is that for people to have a say in how they are governed, they need first to form opinions about how they want to be governed. Moreover, to form such opinions, people need access to relevant information.[167] Second, regarding participation, the argument is that—whether by voting for representatives or through direct participatory mechanisms—people need access to relevant information to participate in decision-making processes.[168] For instance, for voters to exercise their right to vote meaningfully, they need to know about the potential representatives listed on the ballot, what they stand for, whose interests they have at heart and how faithfully they have previously delivered on their promises. Similarly, for people to make useful contributions to public consultation and commenting processes or participate in referenda, they need to have information relevant to the issue being discussed or decided. Thirdly, the accountability argument is that, within a representative democracy, state officials act on a mandate given to them by the voters. Thus, the voters have a right to monitor officials' actions and decisions, and to provide such oversight, voters need access to information about those actions and decisions.[169] Relatedly, providing the public with access to information about officials' actions and decisions is also believed—at least to some extent—to deter corruption and other abuses of state power.[170]

The democracy justification for a right to information is similar to the philosophical argument for recognising a right to freedom of expression that proceeds from democracy. The democratic justification for freedom of expression posits that free expression is important because it contributes to a "free flow" of information.[171] The free flow of information is, in turn, important because people need relevant information to exercise their right to decide how or by whom they are governed and to hold representatives accountable.[172]

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[166] NW Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018) 147–148.
[167] Riegner (n 2) 345.
[168] Peled and Rabin (n 31) 361 and 363; Riegner (n 2) 347–348.
[169] Peled and Rabin (n 31) 366–367.
[170] Ibid 368.
[171] Adrienne Stone, 'The Comparative Constitutional Law of Freedom of Expression' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing, 2011) 406, 414.
[172] Ibid.

Thus, both the arguments for freedom of expression and access to information are concerned with protecting and promoting democracy by ensuring that the citizens and residents of a state have access to relevant information. Not only does the right to information share this theoretical foundation with freedom of expression, but it is also often regarded as an aspect of freedom of expression.[173] For instance, in its General Comment No. 34 on Article 19 of the *International Covenant on Civil and Political Rights*, the United Nations Human Rights Committee (UNHRC) states that "Article 19, paragraph 2 embraces a right of access to information held by public bodies."[174]

However, as Maeve McDonagh has argued, despite all the overlap, the rights to freedom of expression and access to information focus on different persons involved in the exchange of information.[175] Freedom of expression is primarily concerned with the giver of information, whereas the right to information focuses on the information receiver.[176]

A possible challenge to McDonagh's distinction between these rights would be that freedom of expression is sometimes understood to include an information receiver's right. For instance, under international law, the UNHRC recognises that a person's right to express themselves gives rise to a corresponding right to receive the information expressed.[177] Nevertheless, the information receiver's right is limited to receiving the information someone else has shared in exercising their right to expression. In other words, the receiver's right is to information *willingly* shared. The duty corresponding to the right to receive is an obligation is not to interfere in the receiver's access to information that has been shared voluntarily.

By contrast, the right to information entitles the right holder to access irrespective of whether the information holder is willing to share the information or not. The right to information, therefore, gives

[173] In public law scholarship, for example: Calland (n 16) 73; Andrew T Kenyon, 'Complicating Freedom: Investigating Positive Free Speech' in Andrew T Kenyon and Andrew Scott (eds), *Positive Free Speech Rationales, Methods and Implications* (Hart Publishing, 2020) 1, 2–3; In international law, for example: *Claude Reyes and others v Chile* (2006) Series C 151 (Inter-American Court of Human Rights, 2006) 77; UN Human Rights Committee, *General Comment No 34, Article 19, Freedoms of Opinion and Expression* UN Doc CCPR/C/GC/34 (12 September 2011), 18–19.

[174] UN Human Rights Committee (n 173) 18; Article 19(2) provides 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.' *International Covenant on Civil and Political Rights 1966* (Treaty Series, 999, 171) 19(2).

[175] Maeve McDonagh, 'The Right to Information in International Human Rights Law' (2013) 13 *Human Rights Law Review* 25, 29.

[176] Ibid.

[177] UN Human Rights Committee (n 173) 13, 14 and 18.

rise to a different obligation: a duty to disclose information falling within the scope of the right regardless of the information holder's wishes. That is to say, the right to receive protects a slightly different interest that the right to information, and the protected interests correlate with different obligations.

The distinction between the rights to receive information and access information can also be described using the "free flow" metaphor used in the philosophical argument for recognising a right to freedom of expression that proceeds from democracy.[178] Under the democracy justification for freedom of expression, people should be allowed or empowered to contribute to a flow of information that will support democratic participation. Relatedly, we could say the right to receive prohibits the state (or, anyone) from preventing people from accessing the flow of information. Contrastingly, the right to information requires information holders to contribute to the flow of information.

C *The Fundamental Rights Justification – Made from Freedom of Expression*

The right to freedom of expression has itself formed the basis of a justification for recognising a right to information. The argument for a right to information, made from freedom of expression, is that information access is a "precondition" to free expression.[179] That is to say, for someone to be able to express beliefs and ideas, they would first have to form views and opinions—and to form such views and opinions, they would need to have access to information.

As noted above,[180] while free expression protects the ability of people to provide information that can assist opinion formation and prevents interference with that information sharing, the right to information does something slightly different. The right to information *requires* the duty bearer to provide the right holder with the information required to form opinions that underpin expression. Thus, some information informing a person's opinions might come from willing sources (exercising their freedom of expression) and others from (potentially unwilling) sources that are required to provide that information.

Since freedom of expression is also sometimes justified with reference to democracy,[181] there is some overlap between a free expression justification for information access and a democratic one. However,

[178] Stone (n 171) 414.
[179] Peled and Rabin (n 31) 360; McDonagh (n 175) 29; Riegner (n 2) 345.
[180] At paragraph B.
[181] At paragraph B.

free expression is also justified on several other bases.[182] So far as some forms of expression might be non-political, a right to information justified in terms of freedom of expression would also extend to data underlying opinion formation concerning non-political expression.

D *The Fundamental Rights Justification – Made from Socioeconomic Rights*

The fundamental rights justification has also been made with reference to the realisation of socioeconomic rights. This justification is usually formulated with the South African approach to socioeconomic rights (or a model like it) in mind. Famously, the South African Constitutional Court has determined that the justiciable socioeconomic rights in the Constitution require the state to develop and adopt policies that could, realistically, lead to the realisation of the rights.[183]

The justification for an information right, made from socioeconomic rights, is concerned with how information can help socioeconomic right holders claim their rights when the state is required to develop and implement policies to realise those rights. Therefore, the justification holds that information should be accessible for at least four reasons. First, when people are aware of services and programmes adopted by the state to address their socioeconomic needs, they can take advantage of them.[184] Second, as in relation to democracy generally, when people are aware of state policies and have access to information about relevant programmes, they will be able to hold the state to account for its related decisions, actions and inaction.[185] Third, when indigent communities are aware of the state's socioeconomic programmes, this can allow for self-actualisation at a communal level, as communities can develop initiatives that could strengthen the state's programmes.[186] Lastly, giving people access to relevant information during the development phases of policies and programmes facilitates participation because they can identify and remedy gaps and inaccuracies—ensuring the state acts on the "best possible information."[187]

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[182] See Stone (n 171) 413–414 for an account of the three most prominent philosophical justifications for freedom of expression; aside from democracy, this includes 'the search for "truth"' and free expression's 'relationship to human autonomy'.

[183] Katharine G Young, 'Proportionality, Reasonableness, and Economic and Social Rights' in Mark Tushnet and Vicki C Jackson (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press, 2017) 221, 252; David Bilchitz, 'Towards a Defensible Relationship Between the Content of Socio-Economic Rights and the Separation of Powers: Conflation or Separation?' in David Bilchitz and David Landau (eds), *The Evolution of the Separation of Powers: Between the Global North and the Global South* (Edward Elgar, 2018) 57, 63.

[184] Donders (n 164) 90; Riegner (n 2) 346.

[185] Donders (n 164) 90 and 112; Riegner (n 2) 346.

[186] Johannessen, Klaaren and White (n 10) 48.

[187] Ibid.

There are many similarities between the two types of rights justification—both emphasise how information access enables the realisation of other fundamental rights. However, while arguments about the importance of information for expression often emphasise individuals or the press, contentions about information for socioeconomic rights usually stress development at a community level. The different emphases mean that the two forms of fundamental rights justification (together) suggest that information access can support individual and collective self-actualisation.

E *The Economic Efficiency Justification*

Another justification for recognising a right to information is the economic efficiency justification.[188] The economic efficiency justification is less prominent in public law scholarship about the right to information than the democratic and rights justifications. Nevertheless, scholars have argued for the recognition of a right to information, at least partly because of the role of information in ensuring a fairer marketplace. Mark Fenster has summarised a standard version of the justification as a claim that information "enables individuals to make better decisions… regarding their engagement in the market, resulting, for example, in changed consumer and industry behavior…."[189] Another version of the justification is, as Jonathan Klaaren notes, a claim that "the provision of information can restructure the very rules of the market itself."[190]

There is reason to be sceptical about the ability of information access laws (at least, those designed thus far) to facilitate access in a way that will make a difference systemically (that is, "restructure the rules of the market"). As Michael Riegner argues, the empirical data suggest that while general access laws often "shift power relations in individual cases", it is more challenging to use them to "destabilise entrenched power structures."[191]

The economic efficiency justification and the right-based justification proceeding from socioeconomic rights can seem similar, but there is a difference. While the market-efficiency justification is concerned with making the market fair for those already participating in it, the socioeconomic rights justification is concerned with assisting people currently excluded from the market with entering it.

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[188] Thomas Blanton, 'The World's Right to Know' [2002] (131) *Foreign Policy* 50, 53; Mark Fenster, 'The Opacity of Transparency' (2005) 91 *Iowa Law Review* 885, 899; Jonathan Klaaren, 'The Human Right to Information and Transparency' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press, 2013) 223, 227.
[189] Fenster (n 188) 899.
[190] Klaaren, 'The Human Right to Information and Transparency' (n 188) 227.
[191] Riegner (n 2) 365.

Socioeconomic rights commit the state to ensuring that all individuals have access to the essential goods and services required to stay alive and function within modern society. Such essentials include food, water, housing, education and primary health care. The underlying assumption is that these guarantees of access to essentials have "equalizing potential"; they are expected to make it possible for people otherwise excluded from society, to participate.[192] That is to say, more than just making the marketplace fair, information that supports socioeconomic rights is supposed to ensure everyone can partake in the first place. Thus, access to information concerning socioeconomic rights differs from access to information and the marketplace because the focus is on supporting programmes aimed at entry into the market.

IV THE JUSTIFICATIONS THAT BEST SUPPORT A RIGHT TO INFORMATION

In this part of the chapter, I argue that the democracy and fundamental rights justifications together provide the most substantial foundation for recognising a broad fundamental right to information that will support both collective and individual self-determination. In chapter 1, I noted the purpose of this study is to learn from the South African experience with an express right to information. Additionally, I noted that, core to the South African experience is that the Constitution has an egalitarian-liberal character, meaning that it incorporates, in parallel, both a collective and an individual vision of self-determination. Thus, I am particularly concerned with a fundamental right to information that will support both collective and individual self-determination.

There are two reasons for regarding the democracy and fundamental rights justifications as providing the best basis for a broad fundamental right to information that will support both collective and individual self-determination. First, the democracy and fundamental rights justifications reflect all the values discussed in part II above that underpin information access. Second, these two justifications assist with determining the weight of an information interest when the right to information must be balanced against another right or interest.

First, all four justifications—proprietary, democracy, fundamental rights and economic efficiency—are concerned with making information available and therefore reflect the availability aspect of the

[192] Rodrigo Uprimny, Sergio Chaparro Hernández and Andrés Castro Araújo, 'Bridging the Gap: The Evolving Doctrine on ESCR and "Maximum Available Resources"' in Katharine G Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press, 2019) 624, 641.

transparency value. Recall that the transparency value has been defined at least as including information *availability*, with some definitions limiting the scope to *state affairs* or *decisions and decision-making* and others expanding it to include an *understandability* element.[193]

Above, I noted that the proprietary justification holds that information held by the state must be accessible to citizens and legal residents because they are the ultimate owners of that information. I also noted that the economic efficiency justification contends that information ensuring fair market participation should be accessible to participants in the market. Thus, both these justifications are concerned with the accessibility of certain information, reflecting the "availability" aspect of the transparency value. However, neither of these justifications is directly concerned with the values of accountability and openness.

Recall that the definitions for the accountability value included *giving account* and *being subjected to sanctions*. However, some definitions limit the scope of accountability by specifying the *actors that need to give an account*, the *subject* about which they must give an account or the *persons to whom they owe an account*. Recall also that I have argued that the value of openness encompasses at least critical engagement concerning governance and, at most, both participation in and critical engagement with social and political governance.

Above, I noted that the democracy justification is concerned with ensuring the accessibility of information required to form opinions to participate in democratic governance decisions and hold to account persons exercising public power. Thus, this justification reflects the "availability" aspect of transparency and, given that it is concerned with enabling democratic participation, also the "understandability" aspect of transparency. Additionally, because the justification is concerned with ensuring that persons exercising public power can be held accountable, it also reflects a version of the value of accountability (one dealing with public accountability). Lastly, because this justification is concerned with participation in and critical engagement with democratic governance, it also reflects the aspect of the value of openness related to political governance.

Similarly, I noted that the fundamental rights justification, as made from freedom of expression, holds that the information required to form opinions to engage critically in social and democratic governance must be accessible. Additionally, the fundamental rights justification made from socioeconomic rights holds that the information required to enter the market economy and to hold to account the state

[193] See part II paragraph 0 above.

regarding its policies for realising socioeconomic rights must be accessible. Both these versions of the fundamental rights justification reflect the "availability" aspect of the value of transparency, and given that both are concerned with enabling participation, also the "understandability" aspect of transparency.

Further, as the fundamental rights justification made from freedom of expression is concerned with participation in and critical engagement with the social and democratic governance of society, it reflects the value of openness. Likewise, the fundamental rights justification made from socioeconomic rights is concerned with enabling entry into the market economy and enabling participation in the development and implementation of the state's socioeconomic rights policies. As such, the fundamental rights justification made from socioeconomic rights also reflects the value of openness. Thus, the democracy and fundamental rights justifications, taken together, reflect the values of transparency, accountability and openness and provide a solid basis for recognising a broad information access right that will support both collective and individual self-determination.

Second, the democracy and fundamental rights justifications can guide state-actors with determining how much weight to accord to an information interest when it conflicts with another right or interest. Arguably, the proprietary justification provides a basis for a wide-ranging vertical information right (a right that only applies between the state and its subjects), as it provides a reason for making all state-held information accessible. However, it is not desirable to make all state-held information accessible. The release of some state-held information could undermine other fundamental rights, such as the right to privacy, or the state's ability to govern. Thus, information access must be balanced against other rights and interests, and the proprietary justification offers no assistance with determining how much weight to accord to the relevant information interest during a balancing exercise.

For instance, a ministerial diary and a record of an assault complaint made to law enforcement are both examples of state-held information. In terms of the proprietary justification, both these pieces of information belong to citizens and legal residents because the state created them at tax-payer expense and while working in the interest and to the benefit of citizens and residents. However, both these records contain personal information—the names and other identifying characteristics of individuals. Thus, these pieces of information also deserve a level of protection under the right to privacy.

The proprietary justification does not assist with determining how to balance an interest in ministerial diaries or a record of an assault complaint against the identifiable individuals' right to privacy.

Contrastingly, the democratic and fundamental rights justifications can assist with determining how much weight to give to the information interests.

For instance, under the democratic justification, the interest in ministerial diaries is weighty as it goes directly to the aspect of the justification concerned with ensuring voters can hold elected officials to account. The interest in ministerial diaries is weighty enough to warrant public disclosure (especially given that the minister's privacy interest concerning this record is less weighty as it relates to their public role and not their private life). Contrastingly, under the democratic justification, little weight would attach to an interest in an individual assault complaint. Depending on the circumstances, the fundamental right justification might warrant disclosure of the assault complaint to particular persons—depending on whether access might support the exercise of a right (such as the right to a fair trial).

Therefore, the democracy and fundamental rights justifications reflect the values that underpin guarantees of information access and provide a basis for determining how to balance inform interests against other rights and interests. As such, the democracy and fundamental rights justifications provide the best basis for the recognition of a right to information that can support both collective and individual self-actualisation.

V CONCLUSION

In this chapter, I have provided an account of the definitions in public law scholarship for the values of transparency and accountability, and argued for a definition for openness. Additionally, I have argued for a particular understanding of these values in the context of the South African Constitution. Further, I have outlined four theoretical justifications for the recognition of a right to information. I have argued that, of the four justifications, the democracy and fundamental rights justifications offer the best basis for the recognition of a right to information that can support both collective and individual self-determination. In the chapters that follow I rely on the democracy and fundamental rights justifications to examine critically the forms of constitutional recognition of a right to information and the South African government's attempts at effecting section 32 of the Constitution.

Chapter Three: Comparing Approaches to Facilitating Access to Information

I INTRODUCTION

In chapter 2, I outlined the values underpinning legal and constitutional guarantees of information access and the theoretical justifications for recognising a fundamental right to information. I argued that the democratic and fundamental rights justifications provide the most robust basis for the recognition of a broad right of access to information supporting collective and individual self-determination.

This chapter is concerned with different approaches to securing access to the information identified as important in the theoretical justifications outlined in chapter 2. That is to say, this chapter deals with the ways in which states endeavour to secure access for people to the information they need to participate in social and political governance and to realise other fundamental rights. I argue that express constitutional recognition of a right to information is advisable for a constitutional democracy committed to ensuring residents have access to the information to participate fully in democratic processes or exercise their fundamental rights. I do this by comparing the South African approach of express constitutional recognition of a right to information to the primary alternative approaches to guaranteeing information access—legal protection by statute alone (which I term "mere legal protection") and derived constitutional recognition of a right to information. I rely on comparators that, like South Africa, have transformative constitutional commitments but have different approaches to information access: Germany and India.

The chapter begins by distinguishing, in part I, between the primary alternative approaches to guaranteeing information access. I further differentiate in this section between two types of legislative provisions for information access—"general access laws" and "specific access provisions". By "general access law", I mean legislation principally focused on facilitating access to information. Contrastingly, "specific access provision" refers to information access provisions inside laws that regulate some other issue.

Next, in part III, I briefly explain the overlap between transformative constitutionalism and the justifications for the right to information. I note that despite their shared transformative constitutional commitments and the overlap between transformative constitutionalism and the justifications for the right to information, Germany, India and South Africa guarantee information access differently. I argue that the different approaches to information access, despite the shared constitutional commitment, make these states suitable comparators.

Thus, I analyse each of these three states' approaches to making information accessible. First, I consider Germany as representative of a state with no constitutional right to information that has nevertheless adopted legislation to facilitate information access. Second, I examine the approach in India, where the Supreme Court has derived a constitutional right of access to information from another constitutional provision. Lastly, consider the situation in South Africa as an example of a state with a constitution that includes an express right to information.

Regarding each approach, I consider a relevant constitutional provision, analysing the text, interest protected, nature of the obligations it gives rise to, right holders, duty bearers and limitations. With respect to Germany, the relevant constitutional provision I focus on is a provision the Bundesverfassungsgericht ("Federal Constitutional Court") has been invited to read as including a right to information. I analyse this provision to show how and why the Federal Constitutional Court has found it does not provide a right to information, leaving guarantees of information access in Germany dependent on legislation. Regarding India, the provision I analyse is the one from which the Indian Supreme Court has derived a right to information, and in relation to South Africa, I consider section 32 of the Constitution (the express right to information).

I also briefly consider how each state's apex court has interpreted and implemented the relevant constitutional provision. Finally, I emphasise how the first two approaches (mere legal and derived constitutional recognition) are limited in how they can achieve the ends emphasised in the democracy and fundamental rights justifications. I conclude by proposing that express constitutional recognition offers the strongest prospect of securing adequate access levels of access to the information required to participate in democratic governance and to realise (other) fundamental rights.

II WAYS OF SECURING INFORMATION ACCESS

In this part of the chapter, I distinguish between the ways in which information access is primarily secured by constitutional democracies as well as between two types of information access legislation. First, scholarship on information access identifies three main ways information access is guaranteed—merely through legislation, derived constitutional recognition or express constitutional recognition. Scholars have noted that since the 1990s, there has been an "explosive" increase in the number of countries adopting legislation specifically to facilitate access to information.[194] Roy Peled and Yoram Rabin go as far as to say that "nearly all liberal democratic states" have adopted such laws.[195]

Additionally, comparative constitutional law scholars have noted an increase in the number of states that recognise information access as a constitutional right. These scholars note that since the early 1990s (as part of a "third wave of democracy") several Latin American, African and Central European states have included express fundamental information rights in newly adopted constitutions.[196] Other, more established democracies have included an information right by amendment or interpretation (that is, by deriving it from another constitutional right or provision).[197] States that recognise information access as a fundamental right usually also enact legislation to facilitate access.[198]

Second, there are two types of information access legislation—general access legislation and specific access provisions. Germany is regarded as a late adopter of legislation facilitating information access, having enacted the *Gesetz zur Regelung des Zugangs zu Informationen des Bundes* [Federal Act Governing Access to Information held by the Federal Government] only in 2005.[199] Michael Riegner argues Germany might have been late to enact specialised information access law as it had adopted many other access provisions serving similar purposes as those for which information users in other countries use dedicated information access laws.[200] For instance, he notes that empirical research

[194] See for example, Ackerman and Sandoval-Ballesteros (n 2); Calland (n 34) 230; McDonagh (n 175) 25–26.
[195] Peled and Rabin (n 31) 370.
[196] Ibid 370 and 372; Riegner (n 2) 337–338.
[197] Peled and Rabin (n 31) 371 and 373–380; Riegner (n 2) 337.
[198] Riegner notes that information rights 'typically mandate the adoption of [access to information] legislation' Riegner (n 2) 337; Adam Samaha argues that comparing case law on the right to information across multiple jurisdictions demonstrates that judiciaries often only establish a disclosure principle. Courts then rely on other state institutions to create legal mechanisms that balance the interest in disclosure against other interests that are important in a constitutional democracy and facilitate access. Adam M Samaha, 'Government Secrets, Constitutional Law, and Platforms for Judicial Intervention' (2005) 53(4) *UCLA Law Review* 909, 931–932.
[199] *Gesetz Zur Regelung Des Zugangs Zu Informationen Des Bundes 2005* [Federal Act Governing Access to Information held by the Federal Government] ('*IFG*') I have relied on the English translation of the IFG provided by the Bundesministerium der Justiz [the Federal Ministry of Justice].
[200] Riegner (n 2) 356–357.

suggests that journalists frequently use South Africa's *Promotion of Access to Information Act, 2000* ("PAIA")[201] to request public-interest information.[202] In Germany, on the other hand, this function is fulfilled by specialised press and media legislation.[203]

While there could be some overlap between the purposes for which dedicated information access laws can be used and the objectives underlying information provisions in other laws,[204] these types of access provisions can also be distinguished. Laws that are principally concerned with facilitating access to information—what I am referring to as "general access laws"—are instruments intended to provide a mechanism for accessing information in general. By contrast, information access provisions inside laws that are principally concerned with regulating some other issue—what I am referring to as "specific access provisions"—are intended to facilitate information access for a particular purpose.

As a result, general access laws do not ordinarily have specific types of information or particular information users in mind. Instead, they allow "anyone" or any "citizen" to request information or require an information holder (usually the state) to publish information widely.[205] Thus, a key distinguishing feature of a general access law is that requesters do not need to "identify the capacity in which they ask for information" or "disclose why the information is being sought."[206] Contrastingly, access provisions within laws that are principally concerned with regulating some other issue provide access either to particular information users or specific types of information. These provisions might also require information users to demonstrate, for instance, that they fall within a category of users that the specific access provision targets (such as the media).

An example of a specific access provision is section 35 of the South African *Uniform Rules of Court Act*, *1959* ("*Uniform Rules*").[207] Although this Act is principally concerned with regulating the conduct of court proceedings, section 35 provides for the disclosure of information. That section requires parties to a litigated dispute to notify each other at a particular point in the proceedings of any recorded information they hold that is relevant to the dispute. In addition, the *Uniform Rules* provide for copies

[201] *PAIA* (n 6).
[202] Riegner (n 2) 357.
[203] Ibid.
[204] That is, laws principally concerned with something other than information access.
[205] See for example, *PAIA* (n 6) 11(1) and 50(1); *The Right to Information Act 2005* (India) 3 ('*RTIA*'); *IFG* (n 199) 1(1).
[206] Sarah Holsen and Martial Pasquier, 'What's Wrong with This Picture? The Case of Access to Information Requests in Two Continental Federal States – Germany and Switzerland' (2012) 27(4) *Public Policy and Administration* 283, 287; Mario Gomez, 'The Right to Information and Transformative Development Outcomes' (2019) 12(3) *Law and Development Review* 837, 841.
[207] *Uniform Rules of Court Act 1959* (South Africa).

of that information to be made accessible to the other party if requested or for the information holder to object to the disclosure on valid grounds.

The valid grounds for objection to the release of information under section 35 of the *Uniform Rules* (such as attorney-client privilege) differ from the grounds for denying access to information under PAIA—the law with information access as its primary purpose. Therefore, information not accessible under PAIA might be accessible to litigants under section 35 of the *Uniform Rules*. For instance, PAIA requires an information holder to refuse a request for access to a business' "financial, commercial, scientific or technical information".[208] However, if the information is relevant to the legal action, a company's financial, commercial, scientific or technical information would ordinarily be disclosable to other parties to the litigation under section 35 of the *Uniform Rules*.

Both PAIA and section 35 of the *Uniform Rules* facilitate access to information; both balance information access against other critical interests—but there are two significant differences. First, section 35 applies only to particular information users (litigants) and specific information (information relevant to the legal dispute), whereas PAIA applies to all information and can be used by anyone. Second, the balance between information access and other significant interests is struck differently in the two pieces of legislation.

The difference in the balancing lies in the fact that these two types of access law—PAIA and section 35 of the *Uniform Rules*—serve similar but slightly different purposes. Whereas section 35 of the *Uniform Rules* provides access to ensure a fair hearing, PAIA provides a mechanism for requesting information not made accessible under specific access provisions like section 35. As a result, the legislature was not contemplating specific information or information users when it adopted PAIA—instead, it balanced the information interest against other interests in the abstract. However, the legislature did have in mind specific information users and uses when it adopted section 35 of the *Uniform Rules*. The different expectations about the types of information the relevant provision will apply to and the possible users of the information account for the difference in how the legislature struck the balance between access and other interests in the general access law and the specific access provision.

Therefore, specific access provisions cannot stand in to secure the information access that a general access law provides. Instead, a general access law is a mechanism that would cover the information needs that the legislature might not have anticipated and provided for in specific access provisions.

[208] *PAIA* (n 6) 36, 64 and 68.

III CASE STUDIES

In this part, I consider examples of the three approaches identified in part II above to the protection of information access. First, I consider the form of recognition exemplified by Germany—mere legal protection. Second, I look at India as an instance of a state with no express constitutional right to information but which has derived an information right from another constitutional provision. Lastly, I look at South Africa as representative of a state that has expressly constitutionally provided for a right to information that requires disclosure.

As I explained in chapter 1, the comparator states—Germany, India and South Africa—were chosen because they all have "transformative" constitutions yet guarantee information access in three distinct ways. "Transformative" constitutionalism refers to a constitutional commitment to using the law to move a state's "political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."[209] Comparing states that all have transformative constitutional commitments is beneficial for comparative purposes because it ensures the institutions have broadly similar goals.

Additionally, the ends that transformative constitutionalism is committed to overlap with those identified as significant in the theoretical justifications for a right to information. In chapter 2, I outlined the theoretical justifications for a right to information. I argued in that chapter that the democracy and fundamental rights justifications provide the best basis for recognising a right to information that can support collective and individual self-actualisation.

As a brief reminder, arguments for a right to information, made from democracy, relate primarily to opinion formation, participation (both by voting and direct participation) and accountability. The fundamental rights justification is made both from freedom of expression and socioeconomic rights. First, the fundamental rights justification made from freedom of expression holds that information must be accessible to people so that they can form opinions to express. Second, the fundamental rights justification made from socioeconomic rights focuses on how information can make socioeconomic right holders aware of and enable them to participate in a state's socioeconomic upliftment programmes.

[209] Klare (n 39) 150.

If information access supports, as is assumed in the democracy justification, accountability and participation, it would further the transformative commitment to making society more democratic and participatory. The right to information would require the law to be used to make information disclosure mandatory. As the right to information would not just enable but *require* information-holders to share the information needed by individuals to participate in their state's democratic processes, it would encourage political participation and the deepening of democracy.

The rights justification, made from freedom of expression, also directly supports the participatory objective of transformative constitutionalism. First, if information access does aid political expression in the form of voting and direct participation in democratic institutions, a right to information could support the transformative commitment to increasing political participation (and, therefore, indirectly, democracy). Similarly, if information access supports non-political expression, a right to information would promote non-political participation in other societal structures.

Additionally, the rights justification, made from socioeconomic rights, illustrates that information can support the participatory end of transformative constitutionalism at a community as well as an individual level. This justification also primarily highlights participation in a social and economic sense rather than simply a straightforwardly political sense.

Lastly, these justifications also demonstrate how information could support the egalitarian end of transformative constitutionalism. As noted above, the right's justification from socioeconomic rights holds that access is necessary because information can support socioeconomic upliftment programmes. These programmes are designed to provide basic goods and services to disadvantaged individuals and to make participation in economic institutions possible for people currently excluded. Thus, information access could assist a move toward more equality by empowering otherwise disadvantaged groups and persons to take advantage of laws and policies meant to address their disadvantage.

Despite their similar transformative constitutional commitments and the overlap between these commitments and the reasons for recognising a right to information, Germany, India and South Africa guarantee information access in different ways. The juxtaposition of the shared constitutional commitments and the distinctive approaches to guaranteeing information access make these three states suitable comparators.

In the rest of this part of the chapter, I consider, in relation to each state, a relevant constitutional provision, analysing the text, interest protected, nature of the obligations it gives rise to, right holders, duty bearers and limitations. As part of this exposition of the scope and content of the rights in each jurisdiction, I also engage with some central judgments issued by the apex courts of the three countries.

A *Germany*

As Michael Riegner has noted, some more established democracies have been reluctant to constitutionally recognise a right of access to information (or a constitutional duty to disclose information).[210] I use Germany as an example of a state with transformative constitutional commitments (like India and South Africa)[211] but which, like some other established democracies, merely provides legal recognition of a right to access information.

Germany does have a constitutional right to receive information but not a constitutional right to access information. The German right to receive information is expressly provided for in Article 5.1 of the *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] ("Basic Law"). In relation to Germany, I analyse the text of Article 5.1 to show how and why it has been read so as not to provide a right to information, leaving the German law dependent on legislation.

1 *The Constitutional Text*

Article 5 of the German Basic Law provides:

> *1. Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.*

[210] Riegner (n 2) 337.
[211] See chapter 1 for an explanation of how I use the term "transformative constitutionalism" and why Germany can be regarded as having transformative constitutional commitments.

2. These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

…

[emphasis added]

2 *The Interest Protected and the Nature of the Obligation*

The interest protected by Article 5.1 of the German Basic Law is the freedom to inform oneself from "generally accessible sources." The German Federal Constitutional Court has determined that the phrase "generally accessible sources" in Article 5.1 refers to information the holder has purposely made publicly available.[212]

In the matter of *1 BvR 2623/95 and 1 BvR 622/99*,[213] the Federal Constitutional Court was invited to find that Article 5.1 encompasses a right of access to information, not just a right to receive information.[214] The Court rejected the argument, finding instead that Article 5.1 does not alter the fact that information holders have the prerogative to decide whether to make information generally accessible.[215] Thus, the right in Article 5.1 is a right to receive information willingly shared—not a right to information (that obliges the disclosure of information).

3 *The Right Holders*

Article 5 of the German Basic Law identifies the right holders of the right to receive information as "every person". The Federal Constitutional Court's decision, in the matter of *1 BvR 1687/92*,[216] confirmed that "every person" in Article 5.1 extends the scope of the right beyond citizens to other persons living in Germany. The applicant, in that matter, was not a German citizen but a Turkish

[212] *Bundesverfassungsgericht [German Constitutional Court], 1 BvR 46/65, 3 October 1969 reported in (1969) 27 BVerfGE 71* 43–44 ('*Liepziger Volkszeitung*'); *Bundesverfassungsgericht [German Constitutional Court], 1 BvR 1687/92, 9 February 1994 reported in (1994) 90 BVerfGE 27* 13–14; *Bundesverfassungsgericht [German Constitutional Court], 1 BvR 2623/95 and 1 BvR 622/99, 24 January 2001 Reported in (2001) 103 BVerfGE 44* (n 51) 58 and 60–61.
[213] *Bundesverfassungsgericht [German Constitutional Court], 1 BvR 2623/95 and 1 BvR 622/99, 24 January 2001 Reported in (2001) 103 BVerfGE 44* (n 51).
[214] Ibid 34–35.
[215] Ibid 60.
[216] *Bundesverfassungsgericht [German Constitutional Court], 1 BvR 1687/92, 9 February 1994 Reported in (1994) 90 BVerfGE 27* (n 212).

national living permanently in Germany. The applicant-lessee lived in rental accommodation and sought permission from the lessor of the property to put up a parabolic antenna outside the building. The antenna would have enabled the applicant to receive television broadcasting from Turkey. As the lessor refused to permit the antenna, the lessee approached the Local Court for relief.

The Local Court held that neither the tenancy agreement nor the Civil Code provided the lessee with any grounds for a claim—to the contrary, it found that the Civil Code requires courts to protect lessors' property rights (specifically, in this case, the interest in maintaining the building façade).[217] The lessee appealed the Local Court decision to the Regional Court, which dismissed the appeal as the lessor had arranged to install a cable television connection to the building.[218] The lessee then appealed to the Federal Constitutional Court.

The German Federal Constitutional Court noted that the Higher Regional Courts had previously developed standards for interpreting the Civil Code as it relates to antennae installation.[219] These standards aimed to balance the property rights of owners against tenants' information interests, bearing in mind that the Basic Law prohibits anyone from interfering in someone else's information access.[220] Under the judicially developed standards, a lessor could only refuse permission to install an antenna if they installed a cable connection to the property.[221]

The Court found that generally, if a lower court applied the standards developed by the Higher Regional Courts, its application of the Civil Code would be constitutionally compliant.[222] However, the lessee was a foreigner—a Turkish national living permanently in Germany—and only minimal Turkish programming was accessible by cable connection.[223] The Court noted two purposes underly the right in Article 5.1, that is, the role information plays, first, in the maintenance of democratic order and second, in personality development.

Regarding the second purpose underlying Article 5.1 (personality development), the court found that foreign nationals need access to television programming from their home country to maintain their language and cultural connection with that country.[224] The Constitutional Court found that the

[217] Ibid 3.
[218] Ibid 4.
[219] Ibid 21–25.
[220] Ibid.
[221] Ibid 23–24.
[222] Ibid 26.
[223] Ibid 6, 8 and 27.
[224] Ibid 27.

Regional Court had erred when it failed to give weight in its interpretation of the Civil Code to the unique information needs of the lessee as a foreigner.[225] That is to say, the lessee's need to maintain a linguistic and cultural connection with Turkey falls within the scope of the right to receive information in Article 5.1 and, therefore, should have been taken into account by the lower courts. This case illustrates that the term "every person" in Article 5 of the Basic Law extends beyond citizens to other persons in Germany.

4 *The Duty Bearer(s)*

The German Federal Constitutional Court's case law also illustrates that the right to receive information applies vertically and horizontally. The matter of *1 BvR 46/65* ('*Liepziger Volkszeitung*' [Liepzig People's Newspaper])[226] is an instance of the Court applying the right vertically—between the state and a non-state right holder. *Liepziger Volkszeitung* dealt with a challenge to the constitutionality of a court decision that authorised the confiscation of a newspaper. In that matter, the complainant, a private individual, challenged the authority of the state to prevent him from accessing a particular newspaper. The Court determined that a newspaper was a generally accessible source within the meaning of Article 5.1.[227] Thus, the state could not prevent German residents from receiving the Liepziger Volkszeitung—unless it met the constitutional requirements for limiting the right.[228]

The matter of *1 BvR 1687/92*,[229] discussed in paragraph 3 above, is an example of the Court applying the right to receive information in Article 5.1 horizontally to a dispute between private individuals. The lessee-applicant was a private individual, and the lessor was a (private) housing association.[230] That is to say, even though neither party was a state entity, the Court found the Article 5.1 right to receive information applied to the dispute. Consequently, the Court found that lower courts should have taken the right to receive information into account when interpreting relevant provisions in the Civil Code.[231] Therefore, the duty one German resident owed another not to prevent the other from accessing generally accessible information sources had to be given legal effect by the courts through their application of the Civil Code.

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[225] Ibid 20.
[226] *Liepziger Volkszeitung* (n 212).
[227] Ibid 31 and 50.
[228] Ibid 33 and 50.
[229] *Bundesverfassungsgericht [German Constitutional Court], 1 BvR 1687/92, 9 February 1994 Reported in (1994) 90 BVerfGE 27* (n 212).
[230] Ibid 1.
[231] Ibid 33–35 and 38.

5 *Limitations*

The German right to receive information is subject to limitation under an internal limitation clause (Article 5.2 of the Basic Law), which is subject to further provisions in a general limitation clause (Article 19 of the Basic Law). First, Article 5.2 of the Basic Law provides that the right to receive information "shall find [its] limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour." Second, Article 19 requires that any law limiting the right to information must apply generally (that is, not only to a specific case) and must specify that it applies to the right to information.[232]

6 *General Access Legislation*

Despite the Article 5.1 right to receive information not giving rise to a positive obligation to disclose information, the German *Bundestag* [Federal Assembly] has adopted general access legislation. The *Gesetz zur Regelung des Zugangs zu Informationen des Bundes* [Federal Act Governing Access to Information held by the Federal Government] ("IFG") facilitates access to information by request.[233] The Act applies only to "federal" agencies and institutions and only to "official information" about "administrative tasks". However, the IFG also applies to persons and entities engaged to carry out administrative tasks on behalf of the federal government.[234] "Official information" is defined as "every record serving official purposes" but excludes draft documents and notes.[235] Additionally, the IFG specifies that any other legislation regulating access to official information (aside from two particular provisions) will take precedence over the IFG.[236]

Further, requests made under the IFG may be refused on a specified number of grounds, including protecting international relations, state security, the privacy of a third party, or trade secrets.[237] The IFG also makes provision for the imposition of fees. Additionally, the Act provides for administrative appeals against adverse decisions and further appeals to a "Federal Commissioner for Freedom of

[232] Article 19.1 provides that if a right-specific limitation allows for the restriction of a right by or in terms of a law, the relevant law must be generally applicable (not tailored to apply to a specific case). Additionally, article 19.2 prohibits infringements that limit "the essence" of the right. *Grundgesetz Für Die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] ('*German Basic Law*').
[233] *IFG* (n 199) 1 and 7.
[234] Ibid 1.
[235] Ibid 2.
[236] Ibid 1(3).
[237] Ibid 3–6.

Information."[238] Finally, the Act requires the relevant agencies to proactively disclose their organisational chart (organogram) and file plan (usually, a description of the types of records held by an organisation, where they are stored and for how long).[239]

Even though the IFG only applies to Federal agencies, some Länder (state or provincial level governments) have also adopted general access laws. However, only thirteen of Germany's sixteen Länder have enacted such laws.[240]

Sarah Holsen and Martial Pasquier have established that German federal authorities receive fewer information requests under the IFG than other countries with similar general access laws (including India).[241] As will become apparent from the Indian and South African case studies below, the general access laws of other states often apply at every level of government, not just the federal (national or central) level. Holsen and Pasquier identify this difference in how widely applicable access laws are as a possible explanation for why German authorities receive fewer requests under the IFG than other states with similar general access laws. Holsen and Pasquier contend that it makes sense "that the central or federal administration will receive fewer requests than those at the lower levels since their competencies are essentially linked to domains that do not directly interest the citizen in more than a marginal way (defense, foreign relations, etcetera)."[242] Therefore, the lack of general access laws at the more localised level might mean that information required by German residents to participate in democratic governance or exercise or protect rights might not be fully accessible.

B *India*

1 *The Constitutional Text*

The Indian Constitution does not expressly recognise either a right to receive information or a right to access information. However, the Indian Supreme Court has determined that the right to freedom of

[238] Ibid 9–10.
[239] Ibid 11.
[240] Alexander Dix, 'Weshalb Wir Ein Bundestransparenzgesetz Brauchen [Why We Need a Federal Transparency Act]' [2022] (2) *Zeitschrift für das gesamte Informationrecht [Journal for all information law]* 53.
[241] Holsen and Pasquier (n 206) 284–290.
[242] Ibid 290.

speech and expression, found in Article 19 of the Indian Constitution, includes both a right to receive information and a right of access to information.[243] Article 19 of the Indian Constitution provides:

> *1. All citizens shall have the right-*
>
> *a. to freedom of speech and expression;*
>
> *…*
>
> *2. Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.*

Further, in a few cases, the Indian Supreme Court has drawn a connection between the right to information and the right to life, recognised in Article 21 of the Constitution.[244] In *Reliance Petrochemicals Ltd v Proprietors of Indian Express Newspapers Bombay (P) Ltd*,[245] a matter related to press freedom, the Court went as far as saying, "the right to know is a basic right… under Article 21 of our Constitution."[246] Article 21 of the Indian Constitution provides that "no person shall be deprived of his life or personal liberty except according to procedure established by law."

[243] *State of UP v Raj Narain* (1975) 4 SCC 428, 74; *SP Gupta vs Union of India* (n 50) 67; *Prabha Dutt v Union of India* (1982) 1 SCC 1, 2; *Union of India v Association for Democratic Reforms* (2002) 5 SCC 294, 30; *People's Union for Civil Liberties v Union of India* (2003) 4 SCC 399, 16, 27 and 108; *Resurgence India v Election Commission of India* (2014) 14 SCC 189, 29; *Central Public Information Officer, Supreme Court of India v Subhash Chandra Agarwal* (2020) 5 SCC 481, 85, 266 and 269 ('*CPIO Supreme Court of India*').
[244] *Sheela Barse v State of Maharashtra* (1987) 4 SCC 373, 8 and 11–13; *Reliance Petrochemicals Ltd v Proprietors of Indian Express Newspapers Bombay (P) Ltd* (1988) 4 SCC 592, 34; *Essar Oil Ltd v Halar Utkarsh Samiti* (2004) 2 SCC 392, 38.
[245] *Reliance Petrochemicals Ltd v Proprietors of Indian Express Newspapers Bombay (P) Ltd* (n 244).
[246] Ibid 34.

2 *The Interest Protected and the Nature of the Obligation*

The Indian case law suggests that the Indian right to information relates to information about the state's actions or decisions[247] and information that non-state persons hold if it is required to exercise or protect (at least certain) fundamental rights or to participate in democratic governance.[248] The Indian Supreme Court has found that these interests give rise to non-interference and disclosure obligations. That is to say, the Supreme Court has determined that Article 19 encompasses both a right to receive information (similar to Article 5.1 of the German Basic Law) and a right to information (similar to section 32 of the South African Constitution).

For instance, the Court has recognised a right to receive information (corresponding with an obligation of non-interference) in *Prabha Dutt v Union of India.*[249] In that matter, the Court determined that Article 19(1) of the Constitution protected a journalist's right to interview prisoners—if those prisoners were willing to be interviewed.[250] Contrastingly, in *Union of India v Association for Democratic Reforms*,[251] the Court recognised a right to information (corresponding to a duty to disclose information). In that matter, the Court found voters ought to have access to certain information about candidates standing for election to the legislature—such as prior criminal convictions.[252] Rather than leaving it to the information holders (the candidates standing for election) to decide whether to disclose information, the Court required the Election Commission to make rules compelling candidates to disclose relevant information.[253]

3 *The Right Holders*

Article 19, the right to freedom of speech and expression, from which the right to information is derived, applies to "citizens." While it has never been a question before the Court whether the right to information could apply more broadly to non-citizen residents of India, the Supreme Court has

[247] See for example, *State of UP v Raj Narain* (n 243) 74; *SP Gupta vs Union of India* (n 50) 65 and 67; *Dinesh Trivedi v Union of India* (1997) 4 SCC 306, 16.
[248] See for instance, in relation to the right to vote and information about candidates standing for public office, *Union of India v Association for Democratic Reforms* (n 243) 30–38; *People's Union for Civil Liberties v Union of India* (n 243) 26–27, 92, 109 and 111; See, in relation to the right to life and privately-held information relevant to a government decision, *Essar Oil Ltd v Halar Utkarsh Samiti* (n 244) 36; See in relation to the right to information itself, *Union of India v Namit Sharma* (2013) 10 SCC 359, 39.5.
[249] *Prabha Dutt v Union of India* (n 243).
[250] Ibid 2.
[251] *Union of India v Association for Democratic Reforms* (n 243).
[252] Ibid 34 and 38.
[253] Ibid 48.

repeatedly referred to the right as "citizens' right to know".[254] It appears that because the information right is derived from a right that is limited to citizens, it has had the effect of also limiting the information right to citizens. Therefore, derived recognition could limit the extent to which an information right can secure access to the information required to participate in and engage critically with political and social governance and exercise fundamental rights.

4 *The Duty Bearer(s)*

The Indian Supreme Court's case law on information access demonstrates that the information right derived from the right to freedom of speech and expression applies vertically and horizontally. For instance, in several decisions, the Court has determined that the right to information extends to all information about state actions or decisions (vertical application).[255] In other decisions, the Court has found that certain information held by non-state persons falls within the scope of the right to information (horizontal application).[256]

5 *Limitations*

Article 19(2) of the Indian Constitution only allows for the limitation of the right to freedom of expression (and the additional rights it encompasses, like the right to information) if the infringement is in the "interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality, or in relation to contempt of court, defamation

[254] Ibid 30; *People's Union for Civil Liberties v Union of India* (n 243) 92; *Resurgence India v Election Commission of India* (n 243) 20; *Essar Oil Ltd v Halar Utkarsh Samiti* (n 244) 36; *CPIO Supreme Court of India* (n 243) 251 and 269.

[255] *State of UP v Raj Narain* (n 243) 74 (holding that '[t]he people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries... the particulars of every public transaction in all its bearing'); *SP Gupta vs Union of India* (n 50) 65 and 67 (holding citizens have a right to information related to 'the functioning of the Government.'); *Dinesh Trivedi v Union of India* (n 247) 16 (holding citizens have a right of access to information about 'the affairs of the Government'); *Union of India v Association for Democratic Reforms* (n 243) 30 (holding that '[t]he people of the country have a right to know every public act, everything that is done in a public way by the public functionaries').

[256] *Union of India v Association for Democratic Reforms* (n 243) 34 (finding information about persons standing for political office falls within the scope of the right to information); *People's Union for Civil Liberties v Union of India* (n 243) 27, 78(B), 123(1) and 131 (confirming the decision in Union of India v Association for Democratic Reforms); *Essar Oil Ltd v Halar Utkarsh Samiti* (n 244) 36 (finding information related to private projects that could adversely affect the environment and therefore the right to life falls within the scope of the right to information); *Union of India v Namit Sharma* (n 248) 39.5 (finding certain information about persons nominated to hold positions of power within the ombudsperson responsible for oversight of the Right to Information Act, 2005 falls within the scope of the right to information).

or incitement to an offence". However, the Indian Constitution does not include a general limitation clause that further facilitates limitation.

6 *General Access Legislation*

The Indian National Parliament has adopted a general access law, the *Right to Information Act, 2005* ("RTIA").[257] The RTIA applies to all agencies at every level of government except for intelligence and security agencies (unless the information relates to alleged human rights violations or corruption) and the State of Jammu and Kashmir.[258] However, in Jammu and Kashmir, the equivalent *Jammu and Kashmir Right to Information Act, 2009,* applies.[259]

The RTIA applies to all information held or controlled by any public authority and privately-held information to which the state has a lawful right of access.[260] It facilitates information access by way of written requests.[261] The RTIA sets out a limited number of grounds on which a request might be refused, including to protect international relations, state security, the privacy of a third party or trade secrets.[262] The RTIA also makes provision for the imposition of fees and for requesters to appeal decisions on their requests to Central or State Information Commissioners.

Additionally, the Act has an "overriding effect" over all other laws regulating information access in effect at the time of its enactment.[263] Finally, the RTIA requires government agencies to "catalogue and index" records they hold to facilitate requests under the RITA and proactively publish organisation and file plans.[264] The RTIA does not indicate that it is intended to give effect to the right to information. Nevertheless, the Indian Supreme Court has determined that the RTIA "was enacted in order to ensure smoother, greater and more effective access to information and provide an effective framework for effectuating the right to information recognized under Article 19 of the Constitution."[265]

[257] *RTIA* (n 205).
[258] Ibid 1(2) and 24.
[259] *Jammu and Kashmir Right to Information Act 2009* (Jammu and Kashmir).
[260] *RTIA* (n 205) (2)(f) and (j).
[261] Ibid 6.
[262] Ibid 8–9.
[263] Ibid 22.
[264] Ibid 4.
[265] *Central Board of Secondary Education v Aditya Bandopadhyay* (2011) 8 SCC 497, 12.

C *South Africa*

1 *The Constitutional Text*

The South African Constitution expressly recognises a fundamental right to information that gives rise to obligations to disclose information. Section 32 of the Constitution provides:

> *1. Everyone has the right of access to-*
>
> *(a) any information held by the state; and*
> *(b) any information that is held by another person and that is required for the exercise or protection of any rights.*
>
> *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 on the state.*

2 *The Interest Protected and the Nature of the Obligation*

In South Africa, the interests protected are, first, information "held by the state" and, second, information held by a non-state person, which another person requires to exercise or protect another right.[266] The South African Constitutional Court's case law confirms that the right gives rise to positive obligations to make information accessible.

For instance, in *Shabalala and Others v Attorney-General of the Transvaal and Another* (*Shabalala*),[267] the Court determined that certain information in police dockets should be accessible to defendants under the right to information in criminal law cases.[268] The Court found that the information holder (the state represented by the prosecution) could not decide whether or not specific information should be accessible.[269] Instead, the Court required the Supreme Court of Appeal and the High Courts to

[266] *SA Constitution* (n 5) 32(1)(a) and (b).
[267] *Shabalala v Attorney-General of the Transvaal* (1995) 12 BCLR 1593 ('*Shabalala*').
[268] Ibid 36 and 55.
[269] Ibid 54 and 57–58.

develop the common law to ensure a reasonable balance between defendants' information rights and other legitimate interests, such as the protection of witnesses.[270]

Similarly, in *My Vote Counts NPC v Minister of Justice and Correctional Services* ("*MVC [No 2]*"),[271] the Court found that information held by political parties and candidates (non-state persons) about how who funds them is required by citizens to exercise their right to vote meaningfully.[272] Therefore, the Court concluded that this funding information should be made available to citizens (and organisations such as the media and academia that might make the information more accessible to citizens).[273] Further, the Court determined that the information was not accessible under existing law, and, therefore, the Court required the legislature to remedy the defect.[274] In the interim, until the legislature enacted a law that would reasonably facilitate access, the Court determined that the holders of the right to information could rely directly on section 32(1)(b) of the Constitution to access such funding information.[275]

3 *The Right Holders*

Section 32 of the South African Constitution identifies the right holders as "everyone". In the matter of *Khosa and Others v Minister of Social Development and Others*,[276] the Constitutional Court of South Africa considered the meaning of the word "everyone" as used in section 27(1)(c) of the South African Constitution—the right to social security.[277] The *Khosa* matter was a challenge by destitute persons with permanent residence status to the constitutionality of social security legislation that limited benefits to citizens.

The Court noted that some rights in the Bill of Rights (including the rights to vote and access to land) extend only to "citizens". In contrast, other rights, including the right to social security, apply to "everyone". Further, the Court noted that section 7(1) of the Constitution describes the Bill of Rights as enshrining the fundamental rights of "all people in our country".[278] Therefore, the Court found, the

[270] Ibid 58.
[271] *MVC [No 2]* (n 19).
[272] Ibid 26–52.
[273] Ibid 44 and 53–58.
[274] Ibid 66, 68, 72 and 75–76.
[275] Ibid 88.
[276] *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* (2004) 6 SA 505 ('*Khosa v Minister of Social Development*').
[277] *SA Constitution* (n 5) 27(1)(c)'Everyone has the right to have access to... social security...'
[278] *Khosa v Minister of Social Development* (n 276) 47.

"word 'everyone' in [section 27] cannot be construed as referring only to 'citizens'."[279] Consequently, the Court held that by excluding them from its ambit, the social security legislation infringed on permanent residents' rights to social security.[280]

Like the right to social security in section 27, the right to information access in section 32 of the Constitution extends to "everyone" and, therefore, not just citizens. Additionally, in *MVC [No 2]*,[281] the Constitutional Court found "'everyone' is wide enough to accommodate both a juristic and a natural person."[282]

4 *The Duty Bearer(s)*

The right to information in section 32 applies both vertically and horizontally. Section 8(2) of the Constitution provides that fundamental rights in the Bill of Rights bind all organs of state and non-state persons if relevant, "taking into account the nature of the right and the nature of any duty imposed by the right." Additionally, section 32(1)(a) explicitly applies to "the state" and section 32(1)(b) to "another person" (other than the state).

In the case law of the South African Constitutional Court discussed thus far, the Court recognised disclosure duties arising from the right for both state (*Shabalala*) and non-state persons (*MVC [No 2]*). Additionally, the Court has required the state (the judiciary in *Shabalala* and the legislature in *MVC [No 2]*) to develop the law to regulate access to relevant information.

5 *Limitations*

The right to information in section 32 is subject to limitation in terms of an internal limitation clause (section 32(2)) and a general limitation clause (applying to all rights in the Bill of Rights), found in section 36 of the Constitution.[283] Two judgments of the South Africa Constitutional Court have found

[279] Ibid.
[280] Section 27(2) introduces a right-specific limitation to the right to social security, providing the state must implement "reasonable" measures to give effect to the right. Ultimately, the Court found the exclusion of permanent residents from social security legislation was not reasonable and therefore did not meet a right-specific balancing enquiry ibid 79–82.
[281] *MVC [No 2]* (n 19).
[282] Ibid 20.
[283] *SA Constitution* (n 5) 32(2) provides that national legislation enacted to give effect to the right 'may provide for reasonable measures to alleviate the administrative and financial burden on the state.'

that the right to information was limited either by state action or inaction—*Brümmer v Minister for Social Development and Others* ("*Brümmer*")[284] and *MVC [No 2]*.

The *Brümmer* matter involved limiting state *action*. In *Brümmer*, the applicant challenged the constitutionality of a provision in PAIA that only allowed a requester 30 days to launch a court challenge against a decision to deny an information request. The Constitutional Court, relying on evidence from an *amicus curiae* (a non-profit organisation that frequently made information requests),[285] determined that 30 days was insufficient to bring a review application under PAIA.[286] Thus, the Court found that the provision limited the right to seek judicial redress and "in effect also the right of access to information".[287]

Having determined that the prescription clause limited the right to information, the Court considered whether the limitation was "reasonable and justifiable" under section 36 of the Constitution. Section 36 provides:

> 1. *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.*
>
> 2. *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*

[284] *Brümmer v Minister for Social Development* (2009) 6 SA 323 ('*Brümmer*').
[285] Ibid 14 and 54.
[286] Ibid 54–56.
[287] Ibid 57 and 62.

Ultimately the Court found the limitation was not reasonable and justifiable, requiring Parliament to remedy the defect.[288]

The *MVC [No 2]* matter involved state *inaction*. As noted above, the Court determined that voters require access to information about who funds political parties to exercise their right to vote meaningfully. Thus, political funding information falls within section 32(1)(b) of the Constitution.[289] Previously, in *My Vote Counts NPC v Speaker of the National Assembly* ('*MVC [No 1]*'),[290] the Court had concluded that PAIA was the legislation envisioned in section 32(2) of the Constitution.[291] Therefore, the *MVC [No 2]* Court focused on whether PAIA provided access to private funding information. As PAIA provides access only to recorded information and neither PAIA nor any other law required private funding information to be recorded or preserved, the Court found PAIA did not facilitate access to the information.[292]

Additionally, the Court found that even if the information were recorded, PAIA would not ensure private funding information was accessible. The Court found that the request process is "cumbersome,"[293] and some of the grounds in PAIA that require information holders to deny a request would apply to private funding information.[294] Therefore, the Court held that even if private funding information was recorded and the records were kept safe, PAIA would not provide *reasonable* access.[295] Regarding justifiability, under section 36 of the Constitution,[296] the Court simply stated that there could be no compelling reasons to justify the limitation caused by the state's inaction (regulating private funding information).[297] As I argue in chapter 5, despite the Court's cursory reference to the limitation's justifiability, it had, in fact, already assessed the legitimacy of the limitation when it considered the "reasonableness" of access under PAIA.[298]

[288] Ibid 70 and 89.
[289] *MVC [No 2]* (n 19) 26–52.
[290] *MVC [No 1]* (n 18).
[291] 'National legislation must be enacted to give effect to [the right to information], and may provide for reasonable measures to alleviate the administrative and financial burden on the state.' *SA Constitution* (n 5) 32(2).
[292] *MVC [No 2]* (n 19) 66 and 68.
[293] Ibid 66.
[294] Ibid 67.
[295] Ibid 66.
[296] The general limitation clause. *SA Constitution* (n 5) 36.
[297] *MVC [No 2]* (n 19) 67.
[298] I return to the reasonableness test in chapter 5.

6 *General Access Legislation*

In fulfilment of the requirement in section 32(2) of the South African Constitution that "[n]ational legislation… be enacted to give effect" to the right to information, South Africa's national Parliament enacted PAIA. PAIA facilitates access to information by way of formal requests.[299] It applies to both "public bodies" and "private bodies." First, public bodies are defined to include every state entity at every level of government and all entities carrying out state functions or exercising state power.[300] Additionally, PAIA applies to all recorded information held by public bodies.[301] Second, private bodies are defined as including all non-state juristic persons, political parties and every natural person or partnership that carries on a trade, business or profession.[302] Further, concerning private bodies, PAIA applies to all recorded information that they hold that is required by another person (to exercise or protect another right).[303]

PAIA also makes provision for requests (to public or private bodies) to be refused on several grounds, including to protect international relations, state security, the privacy of a third-party natural person or trade secrets.[304] Additionally, PAIA makes provisions for the imposition of fees.[305] Further, PAIA provides for appeals against adverse decisions on requests. Appeals can be lodged, first, concerning some public bodies, with a higher authority within that body,[306] and second, concerning any request to an Information Regulator.[307] Moreover, once appeals have been exhausted, PAIA provides that a requester can further challenge a decision by launching a review application in a court.[308]

PAIA also requires public and private bodies to create and proactively publish manuals to assist requesters in making information requests.[309] These manuals should include, for instance, an address for the body and details about "the subjects on which the body holds records and the categories of records held on each subject".[310] Finally, section 5 of PAIA provides that PAIA applies "to the exclusion

[299] *PAIA* (n 6) 11 and 50.
[300] Ibid 1.
[301] Ibid 11.
[302] Ibid 1.
[303] Ibid 50.
[304] Ibid 34, 36, 41, 63, 64 and 68.
[305] Ibid 22, 54 and 75.
[306] Ibid 74.
[307] Ibid 77A.
[308] Ibid 78.
[309] Ibid 14 and 51.
[310] Ibid 14(a) and (b) and 51(a) and (b).

of" any other legislation that prohibits or restricts access to information and is "materially inconsistent with an object, or a specific provision of [PAIA]".

IV The Benefits and Limits of the Different Forms of Guaranteeing Information Access

I argued in chapter 2 that it is necessary to ensure the residents of a state have access to information to ensure they can participate in or critically engage with social and political governance structures and exercise their fundamental rights. In part III, I examined examples of the three prominent ways of guaranteeing information access—mere legal protection and derived and express constitutional recognition of a right to information. The preceding analysis highlights three ways in which mere legal protection of information access might fail to secure access to the information required to partake in democratic processes and enforce fundamental rights.

First, ordinary legislation can be overridden by other legislation—a constitutional right cannot. In Germany, where the protection of access to information depends entirely on ordinary legislation, information access is vulnerable because of the limitations of ordinary legislation; this includes that ordinary legislation can be overridden. For instance, Germany's IFG specifies that—except for two exceptions—the provisions in other laws regulating access to official information will take precedence over the IFG.[311] In other words, if some other law limits access to official information, the IFG cannot be relied on to access that information. In contrast, the Indian RTIA and South Africa's PAIA both provide that those laws take precedence over other laws that limit access.[312] Thus, in India and South Africa, the fact that the relevant legislation effects a constitutional right appears to give it extra authority.[313] In any event, in India and South Africa, unlike Germany, other laws that limit access to information can be challenged under judicial review for infringing on the right to information.

[311] *IFG* (n 199) 1(3).
[312] *RTIA* (n 205) 22; *PAIA* (n 6) 5.
[313] Given that these laws give effect to constitutional rights, they might be considered "quasi-constitutional" in the same way as "super-statutes" elsewhere. Eskridge and Ferejohn define "super-statutes" as legislation that establishes "a new normative or institutional framework for state policy" which "'stick[s]' in the public culture" to such an extent that "its institutional or normative principles have a broad effect on the law". They argue that while super-statutes can be repealed or altered, they will generally trump ordinary law. William N Jr Eskridge and John Ferejohn, 'Super-Statutes' (2001) 50(5) *Duke Law Journal* 1215, 1216–1217.

Second, a constitutional right is likely to be cast in more general terms than a statutory provision. In Germany, the IFG only applies to official information about administrative tasks in final form (not to draft records or notes). Therefore, the IFG would not apply to all information held by the state that could be relevant to public discourse or required by someone to exercise or protect a right. Similarly, the IFG only applies to federal agencies and institutions; thus, it does not apply to information held by other state agencies. As Sarah Holsen and Martial Pasquier have argued, authorities often hold the information related to the issues that directly concern individuals at a more local level.[314] As the IFG does not apply to local agencies and not all the Länder have enacted general access legislation, there are parts of Germany where individuals cannot rely on a general access law to access information. Suppose Germans are aggrieved by the fact that the legal framework does not secure access to some state-held information or allow for requests to some agencies. In that case, they must follow the political process to secure more robust information access legislation. Whereas, the South African case of *MVC [No 2]*, discussed above,[315] illustrates that if legislation fails to provide adequate access to information, a broadly formulated right to information can be relied on to challenge the law for being too narrow to effect the right.

Third, a constitutional right has moral and political force; thus, constitutional recognition could assist the residents of a state if they attempt to persuade the political branches of that state to enact law to facilitate access to information. Taking further the example discussed above in relation to the second point about the value of constitutional recognition, suppose a law facilitating access to information in India or South Africa is similarly narrowly formulated. In those circumstances, citizens and residents that lobby their legislature for changes to the law could rely on the fact that there is a constitutional imperative to provide access to the information. Reliance in such circumstances on a constitutional right could add moral and political force to the arguments for more robust legal protection for information access.

The Indian case study demonstrates why express constitutional recognition would be better suited to securing access to the information required to partake in democratic processes and enforce other fundamental rights. As I noted above, in India the right to information appears to limit right holders to the same category of right holders recognised by the right from which it is derived. That is, because

[314] Holsen and Pasquier (n 206) 290.
[315] See part III, section C, subsection 2.

the right to free expression is a right that is limited to citizens, the right to information, derived from that right, is (seemingly) also limited to citizens. Thus, a right to information derived from another constitutional provision could be constrained by the scope of the provision from which it is derived.

In conclusion, if a state wishes to secure access for its residents to the information they might need to participate in or critically engage with social and political governance structures and exercise their fundamental rights, it is best to provide for a right to information. Constitutional recognition is better than mere legal protection for three reasons. First, a constitutional right is not vulnerable to override by ordinary legislation; additionally, it appears that legislation that gives effect to a fundamental right would also be less vulnerable to override. Second, a constitutional right is likely to be cast in more general terms than a statutory provision; thus, enabling right holders to rely on judicial review to advocate for additional legislative protection whenever existing access laws are inadequate. Third, a constitutional right's moral and political force strengthens arguments for effect-giving law, irrespective of whether they are made in a legal or political forum.

Additionally, even though an apex or constitutional court might derive such a right from another constitutional principle, it is better to expressly recognise the right to avoid it being curtailed unintentionally by the scope of the underlying right. Derived constitutional recognition limits the derived right to the terms in which the founding right (the one from which it is derived) is expressed. As a result, if the founding right excludes certain right holders or the obligations it gives rise to only apply to some entities, the derived right will be similarly limited. Contrastingly, express constitutional protection allows a state to formulate the right purposely to ensure it covers all aspects of the interest it is supposed to protect. Thus, the optimal way to secure access to the information required to partake in democratic processes and protect and realise rights is express constitutional recognition of an information right requiring disclosure.

Having established the advantages of express constitutional recognition of a right to information, I turn in the following chapters to consider how the branches of the South African government have attempted to give effect to section 32 of the Constitution.

Chapter 4: Express Constitutional Recognition – The Implementation Role of the Legislature

I INTRODUCTION

In the previous chapter, I outlined three approaches in constitutional democracies to guaranteeing information access—mere legal protection and derived and express constitutional recognition of a right to information. I argued in that chapter that the optimal way to secure access to the information required to partake in democratic processes and protect and realise rights is express constitutional recognition. In this and the following two chapters, I critically analyse the branches of the South African state's attempts at implimenting an express right to information.

In this chapter, I focus on the South African legislature's attempts at implementing section 32 of the South African Constitution—the right to information. I argue that the South African legislature is obligated under section 32 to reassess continually the legislative framework that facilitates information access and amend and adopt access laws if required to effect the right. Furthermore, I contend that the legislature must collaborate with the other branches of state to carry out its ongoing duties concerning the right to information. Thus, I reason, a right to information will not secure access to the information required to partake in democratic processes and protect and realise rights if it is understood as only giving rise to a once-off obligation to enact effect-giving law.

My intention with this chapter is not to argue for specific changes to South Africa's legal framework for effecting the right to information. Instead, I intend to demonstrate that because the Constitution entrenches a fundamental right of access to information, the legislature has an ongoing obligation to reassess that framework and will occasionally need to amend access laws or adopt new ones.

To make this argument, I start, in part II, by contending that making information accessible requires legislative intervention. Further, under the South African Constitution in particular, the primary responsibility for designing and adopting access instruments to effect the right to information falls on the South African legislature.

Next, in part III, I critically analyse the attempts of the South African legislature at effecting the right to information. In this regard, I first outline the legislative framework that facilitates access to information. Here I draw on the distinction established in the previous chapter between general access laws and specific access provisions. In that chapter, I defined general access laws as laws principally focused on facilitating information access—in South Africa, the *Promotion of Access to Information Act, 2000* ('PAIA').[316] Contrastingly, I defined specific access provisions as legal provisions that facilitate access to information for a particular purpose and can be found within laws that regulate an issue other than information access. An example of a specific access provision would be a provision in consumer protection legislation requiring retailers selling food to disclose something to buyers about the food's content.

I argue that while PAIA is central to the legislative access framework, it is insufficient, on its own, to secure access. First, PAIA depends, for its effectiveness, on other legal provisions requiring information holders to record and keep information. Second, as a general access law, PAIA does not adequately balance access to *certain* information in a way that satisfies the right. Finally, I contend that periodically new information needs that should be addressed through specific access provisions will arise and that the information access framework must be amended accordingly.

In part IV, I consider the nature of PAIA as an information access law. I note that PAIA grants access to information by request and that this type of law can be contrasted with laws that oblige information holders to disclose information proactively. In this part, I engage with the public law literature that has critiqued request laws. In particular, I focus on an argument that request laws, like PAIA, might support a neoliberal agenda. I contend that more empirical research is required to sustain the arguments that request laws support neoliberalism. However, I also argue that because South Africa has a "transformative" Constitution, it must take seriously a critique of request laws as supporting entrenched power relations. In the introductory chapter, I noted that "transformative constitutionalism", as I use it in this thesis, refers to a constitutional mandate for the state to use legal means to bring about social and political change.

Finally, I argue that Parliament cannot undertake the enormous task of reassessing the efficacy of the legislative framework for granting access to information without support from the other branches of government. Therefore, to give effect to the right to information requires the legislature to work collaboratively with the other branches of government.

[316] *PAIA* (n 6).

II MAKING INFORMATION ACCESSIBLE REQUIRES LEGISLATIVE INTERVENTION

The South African right to information is found in section 32 of the Constitution. Section 32 of the Constitution provides:

> 1. *Everyone has the right of access to-*
>
> *(a) any information held by the state; and*
> *(b) any information that is held by another person and that is required for the exercise or protection of any rights.*
>
> 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 on the state.*

This part of the chapter focuses on how the state ought to give effect to section 32. First, I outline arguments in the literature that propose legislatures are best suited for developing the legal frameworks required to make information accessible. Next, I argue that in South Africa specifically, Parliament must play a crucial role in effecting section 32 of the Constitution. In the following section, I consider what South Africa's Parliament has done to effect the right.

A *The Legislature as the Branch Best Placed to Effect a Right to Information*

In order to make information accessible, the state must adopt laws that create legal obligations to record, keep and disclose information.[317] Thus, the primary mechanism for making the right to information effective is law. All three traditionally recognised branches of government (the legislature, executive and judiciary) have some capacity to make law. First, the legislature, through statute, sets out "broad, general, statements of the law."[318] However, it is often the executive that will prepare draft legislation on behalf of the legislature.[319] Second, the executive will frequently issue (through power

[317] Ackerman and Sandoval-Ballesteros (n 2) 94.
[318] Barber (n 166) 60; In South Africa, the legislature's authority to adopt legislation is set out in sections 44, 104 and 156 of the *SA Constitution* (n 5).
[319] Barber (n 166) 69; In South Africa, the executive's authority to prepare and initiate legislation is set out in sections 85 and 125 of the *SA Constitution* (n 5).

delegated to it within statutes) more "detailed, technical, rules" to augment the general statements of law enacted by the legislature.[320] Lastly, the judiciary makes law through its decisions, whether because those decisions are binding on lower courts (as in common law systems) or because they are persuasive (as is often the case in civil law systems).[321]

Even though all three of the traditionally recognised branches of government have some capacity to make law, the legislature has a crucial role in making the right to information effective through the enactment of law. Firstly, as the executive's law-making power is delegated, it plays a secondary role in creating law and, therefore, in making the right to information effective. Nevertheless, the executive has an indispensable contribution to make to the project of effecting the right through law—this role is discussed in chapter 6.

Secondly, public law scholarship on the right to information outlines two reasons why the legislature, rather than the judiciary, should principally be responsible for developing the legal instruments that will facilitate information access. First, as David Pozen and Michael Schudson argue, securing access to information requires the state to incur some costs, and decisions on resource allocation are best left to the representative branches of the government.[322] Second, judicial law-making is not well suited to developing the extensive legal framework required to secure information access. As Pozen and Schudson argue, judicial law-making is "piecemeal, much slower, and much less systematic" than regulation by legislative enactment.[323] Similarly, Lene Johannessen, Jonathan Klaaren and Justine White contend that access legislation is necessary to ensure courts are not "swamped" with cases in developing access processes and setting limits.[324]

The limits that Johannessen, Klaaren and White note need to be set on the right to information arise from the fact that some information access can undermine the purposes underpinning the recognition of the right. That is to say, while access to some information can empower right holders to participate

[320] Barber (n 166) 68–69.
[321] Ibid 62; In South Africa, the 'inherent power' of the judiciary to develop the common law is enshrined in section 173 of the *SA Constitution* (n 5).
[322] Pozen and Schudson (n 1) 41; On the cost of making information accessible see also, Fenster (n 188) 907; Anna Colquhoun, *The Cost of Freedom of Information* (University College London) (Report, December 2010) <https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/cost-of-foi.pdf>; Pozen (n 74) 1123–1124.
[323] Pozen and Schudson (n 1) 42.
[324] Johannessen, Klaaren and White (n 10) 51.

in democratic processes and exercise and protect their rights,[325] access to other information can undermine democracy and rights.

For example, regarding democracy, Richard Calland, relying on the work of the cultural studies theorist Clare Birchall,[326] argues that the political opponents of a democratic state could use certain information, if disclosed, to undermine its "legitimate endeavours".[327] The concern here is that information about a project for which the state does have an electoral mandate could be used, for instance, out of context by ideologically opposed groups wanting to undermine the project.

Similarly, information access could potentially infringe on other rights. For instance, granting one person access to another person's personal information would infringe on the latter person's right to privacy. Thus, while information access could support and enhance democracy and rights realisation, it could potentially also undermine democratic governance and aid the infringement of rights. Ultimately, as information access can undermine the ends it is supposed to support, interests in information access must be balanced against conflicting rights and democratic interests.

In sum, as securing information access could have cost implications for the state and statutory law-making is more systematic and expeditious than judicial law-making, the right to information ought to be made effective through statute. Additionally, effect-giving legislation must balance the interest in information access against conflicting rights and interests to secure the underlying purposes of protecting and promoting democracy and fundamental rights. However, that is not to say the judiciary has no role to play, the courts still have a crucial role in effecting the right—their role will be the focus of chapter 5.

B *Giving Effect to Section 32 of the South African Constitution*

In South Africa, the state's obligations regarding the right to information arise from sections 32(2) and 7(2) of the Constitution (a provision that applies to all the rights in Chapter 4 of the Constitution—the Bill of Rights). First, section 32(2) of the Constitution provides that "[n]ational legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state." While section 32(2) of the Constitution does not name an agent responsible for enacting national legislation to effect the right, section 44(1)(a)(i)

[325] See chapter 2.
[326] Clare Birchall, 'Transparency, Interrupted: Secrets of the Left' (2011) 28(7–8) *Theory, Culture & Society* 60.
[327] Calland (n 16) 75.

establishes that the national "Parliament" has the authority to pass national legislation. Thus, the obligation in section 32(2) to enact "national legislation" to effect the right to information falls on the national Parliament.

Second, section 7(2) provides that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights." The Constitutional Court has determined that the phrase "the state" in section 7(2) refers to the state *as a whole*.[328] Specifically, the Court found that "the obligation [under section 7(2)] to enact legislation to fulfil the rights in the Bill of Rights falls [jointly] upon the national executive, organs of state, Chapter 9 institutions, Parliament and the President."[329] Therefore, the Constitution gives rise to two categories of obligations relating to the right to information. First, the national Parliament (specifically) must enact legislation to give effect to the right to information. Second, the legislature must, jointly with the other branches of government, ensure legislation is enacted to realise the right.

In response to the requirement in section 32(2), Parliament has enacted the *Promotion of Access to Information Act, 2000* ("*PAIA*").[330] PAIA plays a crucial role in making information accessible in South Africa, but it fits within an entire framework of information access that together facilitates access. In the next section, I describe the legal framework that facilitates information access, demonstrating how PAIA depends for its effectiveness on the existence of other legal provisions. I also describe how the information access framework includes specific access provisions (provisions facilitating access for a particular purpose). Finally, I argue that these specific provisions are necessary to, adequately, balance particularly information interests against other rights.

III South Africa's Legal Framework for Information Access

In chapter 3, I identified two types of information access laws, "general access laws" and "specific access provisions." I defined general access laws as legal instruments intended to provide a mechanism for accessing information in general (that is, not contemplating any specific classes of information or information users). Contrastingly, specific access provisions are provisions that facilitate access for a particular purpose and are ordinarily found inside legislation that is principally focused on regulating another issue. I argued in chapter 3 that specific access provisions cannot stand in for a general access law, as general access laws cover the information needs that the legislature might not have anticipated.

[328] *Women's Legal Centre Trust v President of the Republic of South Africa* (2009) 6 SA 94, 21–23.
[329] Ibid 21.
[330] *PAIA* (n 6).

In this chapter, I demonstrate that South Africa's legal framework includes both general access laws and specific access provisions. I argue here that a general access law also cannot adequately effect a right to information on its own for two reasons. First, because general access laws balance the interest in information access against other rights and interests in the abstract, they cannot on their own secure an adequate level of access to some information. Paragraph A of this part of the chapter outlines how PAIA as a general access instrument balances the information interest against other rights and interests in the abstract. Paragraph B outlines how specific access provisions within South Africa's legal framework facilitating information access differ from PAIA in how they balance particular information interests against other rights and interests. Further, I argue that for the state to secure adequate access to the information falling within the scope of section 32 of the South African Constitution, its legal framework must include some specific access provisions.

Second, to make information accessible, at least in terms of a law like PAIA that provides access to recorded information, the law must require information holders to record information and keep those records. Paragraph C demonstrates how provisions in other laws make information accessible under PAIA.

A *South Africa's General Access Law and How it Balances Rights and Interests*

PAIA, enacted by Parliament in response to the requirement in section 32(2),[331] is a general access law as it was not designed to grant access to any specific types of information or information users. Principally, PAIA facilitates access through *requests* by prescribing a process for making, managing, and deciding information requests. Legislation that facilitates access by request can be contrasted with "proactive" (or "affirmative") disclosure laws.[332] Under proactive disclosure laws, information holders must disclose specific information automatically (without any request).[333]

[331] *SA Constitution* (n 5) 32(2) requires the state to enact national legislation to give effect to the right to information.

[332] The literature uses both terms, I use the term "proactive disclosure". For examples of use of the term 'proactive disclosure' see Laurence Tai, 'Fast Fixes for FOIA' (2015) 52(2) *Harvard Journal on Legislation* 455; Christoph E Mueller and Bettina Engewald, 'Making Transparency Work: Experiences from the Evaluation of the Hamburg Transparency Law' (2018) 16(2) *Central European Public Administration Review* 69; and Klaaren, 'My Vote Counts and the Transparency of Political Party Funding in South Africa' (n 17); For examples of use of the term 'affirmative disclosure' see Kreimer (n 97); Michael Herz, 'Law Lags behind: FOIA and Affirmative Disclosure of Information' (2008) 7 *Cardozo Public Law, Policy, and Ethics Journal* 577; and Pozen (n 74).

[333] Some scholars refer to these duties as 'affirmative disclosure' obligations, see for example Kreimer (n 97) 1020; Margaret B Kwoka, 'FOIA, Inc.' (2015) 65(7) *Duke Law Journal* 1361, 1365; Pozen (n 74) 1101.

Regarding the request process, PAIA requires anyone seeking to access information to complete a prescribed request form asking for access to specified, recorded information.[334] The prescribed form for requests to the state does not require a requester to give reasons for their request. Contrastingly, the form for all other requests (requests to non-state persons or entities) requires a requester to explain which right they wish to exercise or protect.[335]

While the Constitution in sections 32(1)(a) and (b) makes provision for rights to information held by "the state" and by "another person" (non-state persons), PAIA makes provision for requests to "public bodies" and "private bodies".[336] The term "public body" is defined in section 1 of PAIA as including every department of state or administration at every level of government and all other functionaries that exercise state power or perform a state duty, whether in terms of the Constitution or another law. The definition of "public body" in PAIA is similar to the Constitution's definition of an "organ of state".[337] Thus, the term "public body" in PAIA appears to be coterminous with the phrase "the state" in section 32(1)(a) of the Constitution (the vertical aspect of the right to information).[338]

Contrastingly, PAIA defines the term "private body" more narrowly than the phrase "another person" in section 32(1)(b) of the Constitution (the horizontal aspect of the right to information). PAIA defines "private body" as including all juristic persons, political parties and natural persons and partnerships that carry on a profession, trade or business, but only regarding information related to that profession, trade or business.[339] As PAIA does not extend to all non-state persons, it limits the right to information by being under-inclusive.

PAIA provides that an information holder must grant a request for access to information if a requester has correctly filled in the prescribed form and no "grounds for refusal" apply.[340] That is to say, PAIA establishes that access is the default and that it may only be refused in specific circumstances set out

[334] *PAIA* (n 6) 18.
[335] As the horizontal aspect of the right to information only applies to information 'required for the exercise or protection' of a right. *SA Constitution* (n 5) 32(1)(b).
[336] *PAIA* (n 6) 11 and 50.
[337] '"[O]rgan of state" means (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution— (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer' *SA Constitution* (n 5) 239.
[338] 'Everyone has the right of access to any information held by the state'. Ibid 32(1)(a).
[339] *PAIA* (n 6) 1.
[340] While PAIA uses the term "grounds for refusal" request laws in other countries, and much of the literature, refers to "exemptions".

in the Act. The grounds for refusal are set out in chapter 4 of PAIA[341] and make provision, amongst other things, for refusals on the basis that the information requested is personal information, commercial information, confidential information, or its disclosure could endanger the safety of individuals.[342]

Should an information holder refuse an information request, PAIA requires the information holder to state the grounds for refusal on which they rely and to provide adequate reasons for their rejection of the request.[343] Further, PAIA requires the information holder to notify the requester of their decision within 30 calendar days.[344] Should the information holder not provide the requester with a decision within the prescribed time frame, PAIA deems the request refused and entitles the requester to appeal the deemed refusal.[345]

PAIA also includes override provisions that require information holders—in specific circumstances—to disclose requested information even if one of the grounds for refusal in chapter 4 applies to the information. Specifically, sections 46 and 70 set out two requirements for disclosing requested information even if a ground for refusal applies to that information. First, the information, if disclosed, would "reveal evidence of (i) a substantial contravention of, or failure to comply with, the law; or (ii) imminent and serious public safety or environmental risk". Second, the public interest in disclosing the information outweighs the harm the relevant ground for refusal (such as a refusal on the basis that the information requested constitutes personal information) seeks to mitigate. Thus, PAIA makes provision for the limitation of the right and includes a narrow exception allowing the right to triumph in specific circumstances.

Further, requesters can appeal a decision (or deemed decision) not to grant access or only to grant partial access. In some instances, requesters can appeal an adverse decision to a more senior government official and, in other instances, to the Information Regulator.[346]

[341] PAIA has a chapter 4 in Part 2 of the Act (dealing with requests to public bodies) and also in Part 3 of the Act (dealing with requests to private bodies)—chapter 4 in both Parts 2 and 3 deals with grounds for refusal of a request.
[342] *PAIA* (n 6) 34, 36, 37, 38, 42, 63, 64, 65, 66, and 68.
[343] Ibid 25(3) and 56(3).
[344] Ibid 25, 27, 49, 56, 58 and 74 and 77A.
[345] Ibid 27, 58, 74 and 77A; 'Deemed' refusals are also sometimes referred to in the literature as 'mute' refusals, see for example, Ackerman and Sandoval-Ballesteros (n 2) 125.
[346] *PAIA* (n 6) 27, 58, 74 and 77A.

While PAIA primarily grants access to information by request, it includes a narrow proactive disclosure obligation. Sections 14 and 51 of PAIA require public and private bodies (as defined) to compile and publish on their websites and make available at their offices a PAIA manual. The sections 14 and 51 "PAIA manuals" must include the relevant body's contact details, an index of the categories of records it holds and a list of all the records it discloses proactively, whether voluntarily or in terms of statutes.[347]

The grounds for refusal and the public interest test balance the information interest protected by the right to information against other rights and interests. Therefore, PAIA does some of the balancing work that I argued above is required of access laws.[348] However, as PAIA is a "general access law", it contemplates no specific type of information or information user. As a result, PAIA balances the right to information against other rights and interests *in the abstract*.

B *Specific Access Provisions and the Balance Between Rights*

Aside from PAIA, which secures information through requests and the legal provisions that make requests possible, the South African legal framework facilitating information access also includes specific access provisions. Recall from chapter 3 that specific access provisions secure access to information for a particular purpose. Some of the specific access provisions also provide access by way of request, but others provide for proactive disclosure.

For example, section 26 of the *Companies Act, 2008* facilitates requests, setting out a procedure for requesting certain company records—which, it expressly provides, operates as an alternative to requesting through PAIA. Similarly, Rule 15 of the Competition Commission Rules (regulations issued by the Minister of Trade and Industry in terms of section 21 of the *Competition Act, 1998*) makes provision for requests for information held by the Competition Commission.

Contrastingly, section 75 of the *Municipal Finance Management Act, 2003*,[349] requires proactive disclosure, mandating municipalities to publish certain information on their websites—such as the Municipal Manager's performance agreement. Similarly, section 3 of the *Foodstuffs, Cosmetics and Disinfectants Act, 1972* ("*Foodstuffs* Act") requires anyone selling food to disclose on the label if the food is a "mixture or a blend of foodstuffs" or a blend of "different kinds or grades of the same foodstuff".

[347] Ibid 14 and 51.
[348] See part II paragraph A, above.
[349] *Municipal Financial Management Act 2003* (n 7).

As with record-creation and record-keeping provisions, some specific access provisions that facilitate information access by request or proactive disclosure predate the Constitution, while others have been enacted later. Generally, however, even the provisions enacted after the adoption of the Constitution do not explicitly acknowledge that they play any role in making the right to information effective. Nevertheless, these provisions do make the right realisable.

For instance, the information that section 3 of the *Foodstuffs Act* requires sellers of food to disclose falls within the scope of section 32(1)(b) of the Constitution (the horizontal aspect of the right to information). Section 32(1)(b) of the Constitution provides that "[e]veryone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights." First, section 3 of the *Foodstuffs Act* relates to information held by anyone selling food ("another" (non-state) person). Second, the information disclosable under section 3 of the *Foodstuffs Act* is needed to exercise and protect the right to bodily integrity ("any other right"). The content and "kinds or grades" of the content of foodstuff could impact someone's health and well-being; thus, information about it enables people to decide which food they put in their bodies—an aspect of their right to bodily integrity.[350] Thus, the information disclosable under section 3 of the *Foodstuffs Act* is information held by another person and required to exercise or protect another right. As such, section 3 of the *Foodstuffs Act* is a legal provision that makes the right to information effective.

Additionally, like PAIA, section 3 of the *Foodstuffs Act* does some of the balancing work that I argued above a legal instrument effecting an information right must do.[351] However, section 3 strikes a different balance than PAIA between a consumer's interest in knowing about the food's content and a business' commercial interest in keeping its recipe confidential. A PAIA request for a record containing the ingredients in a commercially sold product could be refused on the basis that it is commercial information, the disclosure of which might harm the business interests of the manufacturer (a ground for refusal in chapter 4 of PAIA).[352] While it might be appropriate in a constitutional democracy to protect legitimate commercial interests, as PAIA does, there are specific instances when the information interest weighs heavier in light of the rights or interests it supports. When the information

[350] Bodily integrity in the sense of a person's right to decide what substances enter their body. The right to bodily integrity is recognised in *SA Constitution* (n 5) 12(2) which provides that '[e]veryone has the right to bodily and psychological integrity...'
[351] Part II paragraph A.
[352] *PAIA* (n 6) 36, 42, 64 and 68.

interest weighs heavier, specific access provisions are required in order to ensure that the information needed to protect or exercise a right is, in fact, disclosed—not just requestable.

The information, proactively disclosable under section 3 of the *Foodstuffs Act*, is an example of an information interest that weighs heavier in view of the right (bodily integrity) it supports. Thus, section 3 of the *Foodstuffs Act* (or a legal provision like it) is necessary for making the right to information effect. The same is true for some other information that would not be disclosable under PAIA—because the balance in PAIA is struck the abstract—but is required to exercise or protect a right.

There is information that falls within the scope of section 32 of the Constitution which will not be accessible under PAIA, because it balances information access against other rights and interests in the abstract. Thus, while PAIA is necessary (as I argued in chapter 3) it is not sufficient on its own; it will not secure adequate levels of information access on its own. Specific access provisions are also necessary because they contemplate particular information interests and can, therefore, be accorded sufficient weight in the balancing exercise.

C *The Legal Provisions Making PAIA Useable*

While section 32 of the Constitution establishes a right to "information," PAIA only applies to "records," defined as "recorded information—regardless of the form or medium."[353] Despite applying only to recorded information, PAIA itself includes very few record-creation and record-keeping obligations.[354] Instead, PAIA's effectiveness depends on provisions in other legislation that ensure that (some) information is recorded and kept—and therefore requestable.

For example, section 50(1) of the *Companies Act, 2008*[355] requires every South African company to create and maintain a securities register. That is to say, every company must create and keep a register detailing specific information about any securities the company has issued—such as the names and contact details of the registered owners of shares.[356] The legislature has enacted hundreds of legal provisions, like section 50(1) of the *Companies Act*, that require state and private entities to create and maintain records.[357]

[353] Ibid 1 and 3.
[354] One exception is the recently inserted section 52A, enacted in response to a judgment of the Constitutional Court. *PAIA* (n 6).
[355] *Companies Act 2008* (South Africa).
[356] Ibid 26(2)(b)(iv)(bb).
[357] Van Wyk (n 17) 104.

Generally, the legal provisions that require information holders to create or maintain records do not explicitly acknowledge that they play any role in making the right to information effective. In fact, while many record-creation and keeping provisions have been adopted since the enactment of the Constitution, many others predate the Constitution. For example, the *Occupational Health and Safety Act, 1993,*[358] predates the constitutional recognition of a right to information. Nevertheless, provisions in the Act compel employers to create and keep records. For instance, section 19 of the Act requires certain employers to establish health and safety committees, and section 20 allows these committees to make recommendations to employers. Section 20 obliges the committees to record and keep copies of recommendations made to employers.

Provisions like section 20 of the *Occupational Health and Safety Act, 1993*, adopted before the enactment of the Constitution, could not have been adopted to give effect to the right to information. However, section 20 does facilitate the right to information. Recall that section 32(1)(b) of the Constitution provides that "[e]veryone has a right of access to any information that is held by another person and that is required for the exercise or protection of any rights." Information about recommendations made to employers by health and safety committees is information held by *another person*.[359] Employees with legitimate concerns about their safety at work could use recommendations made by their health and safety committee to enforce their legal right to a workplace that is as free from risk to their health and safety as is "reasonably practicable".[360] Thus, the workers' information interest in the recommendations made by their health and safety committee would fall within the scope of section 31(1)(b)—as it is required to exercise a right (to a workplace free from risk to health and safety).[361] As section 20 of the *Occupational Health and Safety Act, 1993* ensures that health and safety recommendations are recorded, the information becomes requestable under PAIA. Therefore, section 20 plays a role in making the right to information effective, and if it did not exist, the right to information would require its enactment.

In sum, PAIA is national legislation that facilitates information access (as required by section 32(2) of the Constitution) and therefore contributes towards making the right effective. However, PAIA

[358] *Occupational Health and Safety Act 1993* (South Africa).
[359] The Constitutional Court has confirmed that 'another person' refers to all persons other than the state, and includes natural and juristic persons. *MVC [No 2]* (n 19) 20.
[360] *Occupational Health and Safety Act 1993* (n 358) 8(1)'Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.'
[361] The South African courts have determined that the 'right,' referred to in section 32(1)(b), that needs to be exercise or protected is any justiciable right. See, *M & G Media v 2010 FIFA World Cup Organising Committee* (2011) 5 SA 163; *Institute for Democracy in South Africa v African National Congress* (2005) 3 All SA 45 ('*IDASA*').

depends in turn for its effectiveness on the record-creation and record-keeping obligations found in other laws primarily aimed at regulating matters other than information access.

IV TYPES OF GENERAL ACCESS LAWS

PAIA primarily grants access via a request procedure. In the section above, I argued that PAIA alone is insufficient for effecting the right to information—additional legal provisions are required to make PAIA effective. In this section, I consider whether PAIA, as a *request* law, is adequate for protecting and realising the right to information or whether a general access law facilitating access through *proactive disclosure* would be better suited to the purpose. Proactive disclosure, sometimes referred to in the literature as "affirmative disclosure", refers to the publication of information automatically (without the need for a request).

A *Proactive Disclosure*

The Indian, South African, and German general access laws discussed in chapter 3 all include proactive publication clauses.[362] However, these clauses only require agencies or organisations to publish information like their organisational chart (organogram) and file plan (a description of the types of records held by an organisation, where they are stored and for how long).[363] In effect, these clauses require the disclosure of "metadata" (information about information); thus, they assist requesters in making requests.[364] However, these clauses do not require agencies to proactively disclose the substantive information people might ultimately need or wish to access.

Contrastingly, other states, including ones from which South Africa drew inspiration in the drafting of PAIA, have amended their general access laws to include more comprehensive proactive disclosure requirements, making substantive agency information accessible.[365] Specifically, the Australian and United States of America (US) Freedom of Information Acts (FOIA) now require agencies to publish routinely requested information proactively.[366] Both states' Acts also provide exemptions from proactive disclosure, such as for individuals' personal and commercially sensitive information.[367]

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[362] *IFG* (n 199) 11; *RTIA* (n 205) 4; *PAIA* (n 6) 14 and 51.
[363] *IFG* (n 199) 11; *RTIA* (n 205) 4; *PAIA* (n 6) 14 and 51.
[364] Mark Weiler, 'Legislating Usability: Freedom of Information Laws That Help Users Identify What They Want' (2016) 7(1) *Journal of International Media and Entertainment Law* 101, 103.
[365] Currie and Klaaren note the drafters of PAIA relied on Australia's FOIA and to some extent also on US FOIA. Currie and Klaaren (n 8) 24.
[366] *US FOIA* (n 2) (a)(2); *Freedom of Information Act 1982* (Cth) 8(2)(g).
[367] *US FOIA* (n 2) (a)(2); *Freedom of Information Act 1982* (n 366) 8(2)(g).

Australia's FOIA further requires government agencies to publish their "operational information" if the information relates to decisions that might impact the public or members of the public.[368] Operational information is defined in the Act as information an agency holds that assist it in making decisions related to the performance of its functions or exercise of its powers.[369] Additionally, agencies must ensure their published operational information is "accurate, up-to-date and complete."[370] Significantly, the Act provides that if an agency fails to publish operational information, a member of the public engaging in an activity related to that information may not be prejudiced as a result of the unavailability of that information.[371]

B *Scholarly Critiques of Request Laws*

These amendments to the US and Australian FOIA follow years of public law literature criticising aspects of request laws and how they are implemented,[372] as well as recommendations for more comprehensive proactive disclosure requirements.[373] Scholarly criticism of request laws falls broadly into two categories. First, over many years scholars have identified various ways in which request laws are rendered inefficient or ineffective by how they are implemented.[374] Second, some commentators have recently argued that request laws or information access more broadly could support a neoliberal agenda.[375]

The first stream of critiques highlights how request laws are made less effective through implementation. For instance, scholars have argued that information holders often fail to comply with request laws, for example, by simply not responding to requests.[376] Scholars have also contended that some judges defer to the information holder on whether an exemption from disclosure ("grounds for

[368] *Freedom of Information Act 1982* (n 366) 8(2)(j).
[369] Ibid 8A.
[370] Ibid 8B.
[371] Ibid 10.
[372] For summaries of such criticisms see, Ackerman and Sandoval-Ballesteros (n 2) 123–130; and Kreimer (n 97); The amendments to Australia's FOIA were enacted in 2010 with the adoption of the *Freedom of Information Amendment (Reform) Act 2010* (Cth); Whereas the changes to US FOIA were introduced in 2016 by the *FOIA Improvement Act of 2016* PL No 114-185, 130 Stat. 538.
[373] See for instance, Ackerman and Sandoval-Ballesteros (n 2) 108; David C Vladeck, 'Information Access: Surveying the Current Legal Landscape of Federal Right-to-Know Laws' (2007) 86(7) *Texas Law Review* 1787; Herz (n 332) 578–579.
[374] For instance, John Ackerman and Irma Sandoval-Ballesteros argue data on the processing of requests by the executive branches of governments in several states suggest request laws 'are not doing their jobs.' Ackerman and Sandoval-Ballesteros (n 2) 126.
[375] See for example, Calland (n 16) 76.
[376] Ackerman and Sandoval-Ballesteros (n 2) 125–127.

refusal" under PAIA) applies without questioning the information holder's claims.[377] Specifically, courts frequently defer, without interrogating them, to agency assertions that the release of information threatens national security[378] or corporations' claims that a release will damage their competitiveness.[379] Furthermore, scholars have argued that request laws are expensive for the state to implement and expensive for requesters to enforce.[380] Lastly, scholars have lamented the broad wording of some exemptions—particularly "national security" exemptions—or how they have been interpreted expansively.[381]

Other scholars have responded to several of these critiques either by disputing the veracity of some of the claims or suggesting ways in which the difficulties with requests laws could be countered. For instance, concerning arguments that many judges are overly deferential, Seth Kreimer contends that some judges are more sceptical and an information holder that refuses access on spurious grounds risks coming before such a judge.[382] Similarly, regarding (some) information holders' failure to comply with request laws, John Ackerman and Irma Sandoval-Ballesteros argue that the judiciary and ombudspersons can challenge these practices when interpreting and enforcing the law.[383] The legislature could also assist in curtailing evasive practices when exercising oversight over the executive.

Regarding the costs to the state of implementing request laws, some commentators have noted that in the US, FOIA compliance costs make up only a tiny fraction of the total annual federal budget of the US government.[384] For instance, Laurence Tai points out that in 2013, FOIA processing costs amounted to "just over 0.01%" of the US federal government's budget.[385] On the other hand, David Pozen has countered that the reported expense of FOIA processing does not reflect the actual cost, as reported figures do not include indirect expenses.[386] For example, some of the expenses not always accounted

[377] Kreimer (n 97) 1032; Pozen (n 74) 1099.
[378] Fenster (n 188) 891 fn 16; Meredith Fuchs, 'Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy Information Regulation: Controlling the Flow of Information to and from Administrative Agencies' (2006) 58(1) *Administrative Law Review* 131, 163–168; Kreimer (n 97) 1014; Susan Nevelow Mart and Tom Ginsburg, '[Dis-]Informing the People's Discretion: Judicial Deference under the National Security Exemption of the Freedom of Information Act' (2014) 66(4) *Administrative Law Review* 725, 738.
[379] Vladeck (n 373) 1794.
[380] Antonin Scalia, 'The Freedom of Information Act Has No Clothes' (1982) 6(2) *Regulation* 14, 16; Fenster (n 188) 907; Pozen (n 74) 1123; Ackerman and Sandoval-Ballesteros (n 2) 109; Kreimer (n 97) 1020–1024.
[381] For a summary of these criticisms see Ackerman and Sandoval-Ballesteros (n 2) 101–105.
[382] Kreimer (n 97) 1052.
[383] Ackerman and Sandoval-Ballesteros (n 2) 108.
[384] Charles J III Wichmann, 'Ridding FOIA of Those Unanticipated Consequences: Repaving a Necessary Road to Freedom Note' (1997) 47(6) *Duke Law Journal* 1213, 1255; Tai (n 332) 457.
[385] Tai (n 332) 457.
[386] Pozen (n 74) 1123–1124.

for include the "prorated salaries" of officials that assist on an *ad hoc* basis with request processing.[387] *Ad hoc* assistance includes non-FOIA staff helping FOIA officials determine whether an exemption applies or searching their emails for requested information.[388]

As it is difficult to quantify many of the indirect costs Pozen has identified,[389] it is difficult to say that such indirect costs significantly increase the costs of implementing a request law. It seems unlikely that the indirect costs would add significantly enough to the tiny fraction of government expenditure attributable to reported costs,[390] to make a pronounced difference.

The essence of the second major critique of request laws—they might support a neoliberal agenda—is that request laws are underpinned by an assumption that the state will invariably oppress *individuals*;[391] and that the private sector poses no similar threat.[392] As a result, it is argued, request laws are overly individualistic—focusing on the individual right holder at the expense of the broader public interest—and neglectful of inequalities between non-state persons.[393] In public law scholarship, these arguments are newer and have not been elaborated on as much as those about ineffective implementation. Recently, however, David Pozen has raised a more comprehensive critique that demonstrates how requests laws can be individualistic and might be protective of powerful private interests.[394]

Pozen's arguments draw on some of the more common critiques that request laws are made ineffective through poor implementation but go further, claiming that request laws are inherently problematic.[395] Pozen contends that it is "a feature, not a bug," of request laws that they support powerful private interests and exacerbate inequality.[396] In addition, he argues that request laws—as they do not require

[387] Ibid 1124.
[388] Ibid.
[389] As Pozen acknowledges, ibid.
[390] Tai (n 332) 457.
[391] Calland (n 16) 76.
[392] See for instance, Sandoval-Ballesteros (n 34) 400–401 (arguing many request laws are problematic in so far as they do not secure access to information held by non-state entities that carry out '"public" functions' 'such as schooling, healthcare, prison management, infrastructure and insurance'.).
[393] Pozen (n 74) 1101 and 1103–1104.
[394] Pozen (n 74).
[395] Pozen's paper critiques US FOIA in particular, but, as he points out, the essence of US FOIA's 'basic features' have been 'replicated' in the general access laws of many other countries. More specifically, Pozen argues the negative 'distributional implications' of US FOIA… have 'persisted over time and repeated themselves in other jurisdictions.' Thus, his critique applies to modern request laws more broadly. Ibid 1106–1107 and 1112.
[396] Ibid 1112.

requesters to give reasons for requesting state-held records—give rise to an individual right disconnected from "public policy goals".[397]

Pozen brings together his argument about the disconnect between requests and public interest goals with previous critiques of US FOIA that are critical of the fact that the largest group of US FOIA users are corporations.[398] Pozen contends that a "request-driven structure invites a kind of corporate capture".[399] Additionally, Pozen connects this argument with another common criticism of request laws—that using a request law effectively often requires requesters to have time, resources and expertise.[400] Pozen argues that, in combination, these criticisms suggest that request laws advantage well-resourced individuals and entities.[401] That is to say, request laws can perpetuate and aggravate inequalities. Margaret Kwoka has suggested ways to remedy these effects; in particular, Kwoka recommends stronger proactive disclosure requirements.[402]

Further, Pozen argues that while US FOIA was at least partially adopted to address the secrecy of a growing (in the 1960s and 70s) security division within the US government, it fails to provide access to those records.[403] Perversely, Pozen contends, rather than providing access to information held by security agencies US FOIA is often used to discredit and undermine the "domestic policy bureaucracy".[404]

Pozen identifies three ways in which, he argues, the bureaucracy's "capacity and legitimacy" is undermined.[405] First, FOIA requests take government officials away from their ordinary tasks when they assist with processing those requests.[406] Second, the prospect of a request impacts how candidly officials engage in deliberation (internally and with external stakeholders) which could in turn impact the quality of government decisions.[407] Third, the request process could be used to influence

[397] Ibid 1103–1104.
[398] For a study demonstrating the corporate use of US FOIA, see Kwoka (n 333); For an early version of this critique, see Scalia (n 380) 16.
[399] Pozen (n 74) 1103, 1112 and 1117.
[400] See for example, Kreimer (n 97) 1020–1024; Vladeck (n 373) 1789–1792; and, specifically in relation to fees levied, Ackerman and Sandoval-Ballesteros (n 2) 109.
[401] Pozen (n 74) 1113.
[402] Kwoka (n 333) 1429–1430.
[403] Pozen (n 74) 1118–1123.
[404] Ibid 1101 and 1123–1136.
[405] Ibid 1123.
[406] Ibid 1124.
[407] Ibid 1126.

government agencies' policy-making and agenda-setting "by giving those who oppose their work a low-cost tool with which to harass and embarrass them."[408]

C *South Africa Should Be Open to Amending or Replacing PAIA*

The last of the three ways Pozen argues the bureaucracy is undermined is particularly important for the South African right to information. The urgency for South Africa arises from the country's constitutional commitment to transformation, the importance of socioeconomic rights to that objective and the role government policy is expected to play in realising socioeconomic rights.[409] As government policy is central to South Africa's commitment to becoming a more egalitarian society, I want to focus on the third way Pozen argues that the bureaucracy could be undermined.

Pozen claims businesses and non-profit organisations "that object on ideological grounds to an agency's mission or… leadership" use US FOIA in two ways to undermine agencies.[410] First, Pozen argues, if "threatened by a new regulatory or enforcement policy", these groups "use FOIA to 'dig up dirt' on the policy and the people behind it."[411] Second, he contends, these groups "use FOIA to extract large volumes of background documentation, which they then communicate back to the agency in an effort to 'overload' its staff and shape the administrative record."[412]

These claims may have merit; however, if the potential problems are to be addressed, further empirical research is required to back up the anecdotal evidence underpinning these contentions. Nevertheless, these contentions highlight the need for South Africa to consider carefully which legal mechanisms

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[408] Ibid 1127.

[409] In the introductory chapter, in the methods section (section IV), I outlined why South Africa's Constitution is regarded as transformative and explained the connection with the implementation of socioeconomic rights. Further, the South African Constitutional Court has famously rejected a minimum core approach to judicial review in socioeconomic rights cases. The Court instead developed a "reasonableness review" standard in terms of which courts assess the reasonableness of state policies aimed at effecting the rights. Thus, state policies are important for the realisation of socioeconomic rights. Chapter 5 engages with some of the scholarly literature responding to the Court's development of a reasonableness review standard.

[410] Pozen (n 74) 1127.

[411] Ibid; To support this claim, Pozen cites, R Karl Rethemeyer, 'The Empires Strike Back: Is the Internet Corporatizing Rather than Democratizing Policy Processes?' (2007) 67(2) *Public Administration Review* 199, 206 The reference is to a comment made in an interview with an agency head.

[412] Pozen (n 74) 1127; To support this claim, Pozen cites, Wendy E Wagner, 'Administrative Law, Filter Failure, and Information Capture' (2011) 41(8) *Environmental Law Reporter News & Analysis* 1321, 1380 fn 224 The reference relates to a practice that has sprung up around the US agencies' negotiations with stakeholders regarding the development of regulations. Some of these negotiations happen off the record. However, the cited footnote states that, if it suits a stakeholder to have the negotiations form part of the official record, they will request information about the negotiations using FOIA. The stakeholder will then submit the released record as part of their on-the-record submissions.

best achieve the goals of the South African Constitution. As noted in section II paragraph B above, the South African state has a constitutional mandate to protect, promote and fulfil all the rights in the Bill of Rights (section 7 of the South African Constitution). The rights the state needs to effect include the right to information and the socioeconomic rights central to the Constitution's transformative nature. Therefore, South Africa—particularly the legislature (as the branch of government best placed to give effect to the right to information)—must be open to considering whether PAIA needs amendment or even replacement.

Pozen has noted several alternative information access mechanisms that could replace (partially or potentially wholly) request laws (or at least, in the US, FOIA). These mechanisms include proactive disclosure laws, whistle-blower protection, legislative oversight and legal provisions that make the bindingness of a decision or policy contingent on its publication.[413] Pozen argues that these mechanisms "do not suffer from the same pathologies" as those he identified regarding US FOIA (ineffective in granting access to information held by the security agencies and undermining the bureaucracy). However, there are reasons to be sceptical about the effectiveness of some of Pozen's proposed mechanisms too.

For instance, scholarship in political science suggests that whistle-blower protection is also ineffective in securing access to information held by security agencies.[414] Additionally, this scholarship raises other potential problems with whistle-blower protection, including that whistle-blowing can be detrimental to whistle-blowers.[415] Thus, while whistle-blower protection is likely necessary for protecting a right to information (and more generally for accountability), it is not a likely contender for being the principal information access legislation.

Proactive disclosure is a more likely contender for being a central mechanism for facilitating access to information.[416] Proactive disclosure seems to mitigate against many of the concerns raised in the scholarship critical of request laws. First, costs relating to building information release mechanisms

[413] Pozen (n 74) 1101 and 1107–1110.
[414] See for example, Vladeck (n 373) 1533–1535; Allison Stanger, *Whistleblowers: Honesty in America from Washington to Trump* (Yale University Press, 2019) 8–9 and 11–12.
[415] Stanger (n 414) 9–12.
[416] A pilot comparative study from the field of journalism has used empirical evidence to compare the Australian federal government's proactive disclosure model with an Australian state government's request model. This research suggests that access by proactive disclosure is more straightforward and cheaper than access by request but requires advanced internet and information technology skills. Johan Lidberg, 'Next Generation Freedom of Information – from "Pull" to "Push": A Comparative Study' (2015) 1(37) *Australian Journalism Review* 81.

under proactive disclosure laws will only be incurred once while disclosure will happen with agreed regularity. Thus, while they must be funded, the processing costs per disclosure will probably be lower. Second, proactive disclosure is to the public in general or specific groups of people based on a need for the information—which means disclosure is not limited to the well-resourced capable of requesting it.

However, proactive disclosure will not address the problem of information holders ignoring or evading their obligations under the law. Under request laws, as noted in paragraph B above, officials interpret exemptions broadly to allow them to withhold information. Proactive disclosure laws must also balance information access against other rights and interests; therefore, they must also incorporate exemptions. Therefore, under proactive disclosure provisions, information holders could continue interpreting exemptions in ways that allow them to keep hidden embarrassing or politically sensitive information (or information that discloses criminal conduct). However, given that this information will not form the basis of a request, there will not necessarily be someone enforcing compliance. Therefore, it seems likely that request laws still have an essential function in the overall legal framework for securing information access.

Pozen has suggested proactive disclosure regimes could be "enforced by agents such as inspectors general, ombudspersons, and auditors."[417] This suggestion seems compelling, but there are reasons to be cautious about the ability of an ombudsperson (or similar type role) to enforce disclosure requirements. First, such an office could, like the courts, tend to defer to information holders' decisions about whether an exemption applies. Second, such an office would have to be well funded to offer the kind of oversight required, and given that request law implementation has historically been "chronically underfunded",[418] there is reason to doubt an ombud would be better funded. Finally, it seems unlikely that an ombud could double-check every disclosure decision. Thus, there is still a risk that specific information can remain undisclosed, which suggests there would still be a need for a mechanism to request undisclosed information.

[417] Pozen (n 74) 1101.
[418] Ibid 1104–1105.

V CONCLUSION

In this chapter, I have sought to demonstrate that because the Constitution entrenches a fundamental right of access to information, the South African legislature has an ongoing obligation regarding the right to information. First, PAIA, as a general access instrument, cannot on its own secure sufficient levels of access to information, the legislature must also enact specific access provisions. Second, because PAIA provides access to recorded information, the legislature needs to enact provisions requiring information holders to record and keep certain information. Lastly, the legislature must be attentive to the potential for PAIA to be used to further entrench unequal power relationships in South Africa. Thus, the legislature must periodically review PAIA (and other information access legislation) to determine whether it must be amended, strengthened or even replaced.

Additionally, I have engaged with scholarship critiquing request laws as possibility being supportive of a neo-liberal agenda. In this respect, I focused on the arguments of David Pozen and his suggestion that alternative legislative mechanisms for securing access to information—such as whistleblower protection or proactive disclosure—might secure access without similarly supporting entrenched private interests. I argued that none of the alternatives could entirely replace a request mechanism as it is important for individuals to have legal standing to enforce compliance when information holders ignore their disclosure obligations.

Reviewing and amending the legislative framework for information access and identifying unaddressed or inadequately addressed information needs involves significant effort—it is not something the legislature can undertake without support. If the legislature is to take seriously its obligation to effect the right to information in the ways I have argued it ought to, then it needs assistance from the other branches of government. Section 7 of the Constitution requires the state to collaborate in realising the rights in the Bill of Rights. Such collaborative action is necessary if the state is to ensure the right to information is made effective whilst also sensibly balanced against other rights in a reasonable and justifiable way. In the following two chapters, I examine critically the Constitutional Court, executive and fourth branch's efforts at supporting the legislature in giving effect to the right to information.

Chapter 5: Express Constitutional Recognition – Implementation Role of the South African Constitutional Court

I INTRODUCTION

In this chapter, I consider the South African Constitutional Court's role concerning section 32 of the Constitution (the right of access to information) and whether it has fulfilled its obligations. Focusing on the Court's duty to interpret and give effect to the right to information, I analyse the Court's recent decisions related to the state's failure to act on obligations arising from the right to information. I argue that while the Court professes to be evaluating the state's inaction under the general limitations clause (section 36 of the Constitution), it has actually been conducting a form of reasonableness review. Reasonableness review is a review standard initially developed by the Court for assessing state action regarding socioeconomic rights.

I contend that reasonableness review is suitable for adjudicating measures aimed at giving effect to the right to information, provided it is conducted as a second step after the determination of the scope and content of the right. Furthermore, I argue that the Court should be more explicit about the fact that it is conducting reasonableness review, which would allow it to be more purposeful in developing factors for the analysis. Drawing on socioeconomic rights jurisprudence and the values that underpin information access, I propose factors the Court could rely on in its right to information review cases.

To make these arguments, I start, in part II, by outlining the core obligations of the judiciary under the right to information. I draw on public law scholarship on the separation of powers and specifically on the concept of "comity" to identify four tasks for the judiciary regarding the right.[419] First, courts must interpret and enforce effect-giving legislation (legislation aimed at effecting the right to information). Second, courts must respect the underlying institutional choices underpinning effect-giving law. Third, courts must interpret and enforce the right itself. Finally, when appropriate, the courts must ensure that the branch best suited to do so develops effect-giving law.

[419] Kavanagh (n 30).

Next, in part III, I focus on the judiciary's obligation to interpret and enforce the right. I argue that the limitations analysis in section 36 of the Constitution is unsuitable for assessing positive state action under the right to information. Instead, I contend, the Constitutional Court should adopt an adapted form of reasonableness review (as developed for socioeconomic rights adjudication) to assess effect-giving law. I contend that, if implemented as a second step, reasonableness review is a normatively attractive review standard for positive obligations under the right to information.

Lastly, in part IV, I put forward five factors for analysing the reasonableness of laws intended to give effect to the right to information. First, courts should consider whether any law facilitates access to the relevant information interest. Second, if an effect-giving law exists, courts should consider whether that law is actually implemented. Third, courts should look at whether an effect-giving law secures a level of access commensurate with the importance of the right it makes exercisable. Fourth, courts should consider whether the level of access secured accords with how much power the information holder wields and the degree of impact they could have on the lives and rights of other people. Lastly, courts should determine whether the effect-giving law secures information access for persons with lower levels of information literacy.

To identify the five factors, I first outline the Constitutional Court's information access case law. I focus on two matters that deal with positive obligations under the right and that were heard after the effect-giving law had been enacted. Second, I draw on this case law to argue that the Court has been conducting reasonableness review in its right to information adjudication without acknowledging that is what it is doing. Specifically, I highlight a measure the Court established for determining whether effect-giving law is adequate, arguing that this measure is a review factor. Further, I draw on socioeconomic rights jurisprudence and the values that underpin information access (transparency, accountability and openness) to suggest the additional four factors.

II THE JUDICIARY'S CORE OBLIGATIONS UNDER THE RIGHT TO INFORMATION

In chapter 4, I argued that if the legislature is to take seriously its obligation to effect the right to information, then it needs assistance from the other branches of government. I further argued that section 7(2) of the Constitution requires the state to collaborate in realising the rights in the Bill of Rights. In this chapter, I turn to public law scholarship on the separation of powers—particularly the concept of "comity"—to determine how the state ought to collaborate to realise the right to information.

"Comity" refers to the regard each branch of government should have for the decisions and actions of the other branches.[420] Aileen Kavanagh argues that comity requires government institutions to provide each other with "leeway" to carry out their mandates and involves providing one another with "mutual support".[421] Further, Kavanagh contends that mutual support entails two obligations.[422] First, each branch of state ought to refrain from criticising any other in a way that would undermine the other's ability to carry out its constitutional role effectively.[423] Second, each branch must "actively support" decisions taken by any of the other branches of the state.[424]

The "active support" aspect of comity comprises four ways the branches of government should assist one another. Kavanagh identifies three such activities.[425] First, state branches must give effect to decisions taken by other state branches.[426] Second, each branch must interpret the decisions of another branch in a way that respects "the underlying substantive and institutional choices".[427] Third, if any state entity (within one branch of the state) is faced with a task for which another branch is better suited, it must allocate that task to the other branch.[428] Finally, a fourth form of active support comes from the work of Nick Barber. Barber has identified what he terms "comity of mechanism", which is the idea that each branch should use its own capacity to further a shared objective.[429] In this and the next chapter, I draw on these four aspects of the "active support" facet of comity to determine how the judiciary, executive and fourth branch of the South African government ought to support one another and the legislature in the task of (collectively) effecting the right to information.

Given the importance within the "active support" framework of each branch acting within its own capacity, it is necessary to establish the constitutional function of each branch, as set out in the South African Constitution.[430] Regarding the judicial function, section 165(2) of the Constitution provides that "[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice." Therefore, the judiciary's core function is to apply

[420] Ibid 236; Timothy Endicott, *Administrative Law* (Oxford University Press, 2011) 17.
[421] Kavanagh (n 30) 236.
[422] Ibid.
[423] Ibid.
[424] Ibid 236.
[425] Ibid 236.
[426] Ibid.
[427] Ibid.
[428] Ibid.
[429] Barber (n 166) 71.
[430] *SA Constitution* (n 5).

the Constitution and the law. Concerning the realisation of rights, this means the task the judiciary is best suited to carry out is to interpret and apply the right itself and effect-giving legislation.

Regarding the right to information, relying on the four elements of the "active support" aspect of comity, the judiciary has four central tasks. First, courts should enforce the legislation and regulations enacted to give effect to the right to information—including the *Promotion of Access to Information Act*, 2000 ("PAIA") ("first duty").[431] Second, when interpreting PAIA, and other effect-giving legislation, the courts should respect the underlying choices of the legislature that are central to the legislature's constitutional function ("second duty").

Third, the courts must interpret section 32 of the Constitution to determine whether an information interest falls within the scope of the right. If the interest does fall within the right, courts must ensure that they or another branch of government gives effect to that aspect of the right ("third duty"). This third duty could conflict with the first two. Assume, for instance, that a right holder wants to access certain information. The information the right hold seeks to access falls within the scope of section 32 and can be accessed using legislation. In such circumstances, a court could either enforce the legislation (in line with the first "active support" duty) or give effect to section 32 directly (per the third duty). The South African Constitutional Court has developed a "constitutional subsidiarity" doctrine to resolve this conflict.

Constitutional subsidiarity assists courts and litigants in determining when to apply a constitutional provision directly and when to have it play a more indirect role—it applies in two types of circumstances.[432] Firstly, subsidiarity applies if more than one fundamental right in the Bill of Rights (chapter 4 of the Constitution) is implicated in a matter. In those circumstances, the doctrine requires a court to decide the matter in terms of the most specific of the applicable rights.[433] The other right(s) will play a subsidiary role, informing the court's interpretation of the more specific right.[434]

Secondly, constitutional subsidiarity applies if a law has been adopted or enacted to give effect to a fundamental right. If legislation has been adopted (or common law created) to give effect to a fundamental right, a litigant wanting to exercise that right must rely on the effect-giving law unless

[431] *PAIA* (n 6).
[432] AJ Van der Walt, *Property and Constitution* (Pretoria University Law Press, 2012) 35.
[433] *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* (2009) 4 BCLR 312, 50; *MVC [No 1]* (n 18) 49.
[434] Stu Woolman, 'Dignity' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (Juta and Company, Second, 2013) 20–21.

they are challenging the constitutional validity of the law.[435] When the legislation is relied on to exercise a right, that right will play a subsidiary role, informing the interpretation of the effect-giving law.

The fourth and final duty under the active support aspect of comity follows from the third. If a court finds an information interest falls within the scope of the right, and no effect-giving law exists, the court must determine which branch of government is best placed to effect that aspect of the right. If the court can effect that aspect of the right by developing the common law, it should do so. However, suppose the court determines that to make that aspect of the right effective requires legislative intervention. In that case, it should allocate the task of overseeing the design and implementation of the legal instrument to the legislature ("task four").

III How the Right to Information Should Be Interpreted

In this part of the chapter, I focus on the judiciary's responsibility to interpret section 32 to determine whether information interests (in matters that come before it) fall within the scope of the right (task 3, identified in part II above). As the South African Constitution includes a limitation clause (section 36 of the Constitution), rights adjudication under the Constitution has two stages. First, a court determines whether the interest in the matter it is hearing falls within the scope and content of the right. Next, if the right protects the interest, courts will establish whether any law or conduct infringes on the right and whether the infringement is nevertheless justifiable.

A *The Value of the Two-Step Approach*

The two-step approach serves at least three essential purposes. First, if courts start by determining the content of the right, there is a standard against which the impugned state action can be measured during the second step. As Kevin Iles notes, section 36 "requires courts to take into account the extent to which [impugned state action] limits the right. One cannot define the extent of the limitation unless one already knows the scope of the right."[436]

[435] *South African National Defence Union v Minister of Defence and Others* (2007) 8 BCLR 863, 51; *MVC [No 1]* (n 18) 53.
[436] Kevin Iles, 'A Fresh Look a Limitations: Unpacking Section 36' (2007) 23(1) *South African Journal on Human Rights* 68, 73.

Second, the two-step process ensures a constitutionally guided consideration of the state's actions.[437] Because section 36 lays down a framework for the limitation analysis and specifies certain factors that must be considered, it offers some guidance to courts when they analyse the justifiability of law or action that limits a right.

Third, the two-step approach apportions onus in a just way. The Constitutional Court has accepted that the onus during the first stage of the rights adjudication enquiry is on the applicant.[438] The onus shifts to the state to justify its infringement in the second stage.[439] Thus, the applicant must make the case that their interest falls within the scope of the right; and it falls to the state to make the case that legitimate other interests (including other rights and capacity constraints) warrant an intrusion into the applicant's free exercise of their right. It is more just to expect the state to make the case that other rights or interests justify a limitation of the right than to expect the litigant to make the case that no rights or interests warrant an intrusion on the right.

B *Section 36 Limitations Analysis is Not Appropriate for Positive Obligations*

However, one might wonder whether the two-step approach is appropriate for adjudicating positive obligations, given that the two-step approach relates to the limitation enquiry in section 36. Section 36 is clearly about the *limitation* of rights. It considers situations when state action limits the full exercise of a right (a failure to adhere to a negative obligation of non-interference) rather than considering whether state action supporting a right goes far enough.

Section 36 provides:

> 1. *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-*

[437] Ibid 72; See also *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (1995) 1 SA 984, 82 In which the Court held, 'If a limitation is sought to be made at the first stage of the enquiry, it requires, at best, an uncertain, somewhat subjective and generally constitutionally unguided normative judicial judgment to be made.'
[438] Iles (n 436) 73.
[439] Ibid.

(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.

2. *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*

That section 36 is about "limitation" rather than "effect-giving" is evidenced by the fact that three of the five factors listed as relevant to a limitation enquiry deal expressly with "the limitation".[440] In addition, a fourth factor considers whether a "less restrictive" method might achieve a legitimate governmental purpose that underlies the government's limitation of the right.[441] Thus, it might seem that the two-step approach is only appropriate for negative obligations.

The Constitutional Court's failure to apply section 36 in most socioeconomic rights cases supports my contention that section 36 is unsuitable for analysing the justifiability of state actions taken in response to positive obligations.[442] Like the right to information, socioeconomic rights mostly give rise to positive obligations requiring the state to adopt and implement effect-giving measures. A comparison of the text of these provisions is illustrative.

Section 32 of the Constitution provides:

1. *Everyone has the right of access to-*

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

[440] *SA Constitution* (n 5) 36(1) (b) "the importance of the purpose of the limitation;" (c) "the nature and extent of the limitation;" and (d) "the relation between the limitation and its purpose".
[441] Ibid 36(1)(e).
[442] Katharine Young notes the Court "has declined to integrate proportionality analysis in the adjudication of economic and social rights in all but two cases." Young, 'Proportionality, Reasonableness, and Economic and Social Rights' (n 183) 259.

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 on the state.*

Whereas section 26 of the Constitution provides:

1. *Everyone has the right to have access to adequate housing.*

2. *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*

3. *No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.*

Finally, section 27 provides:

1. *Everyone has the right to have access to-*

   (a) health care services, including reproductive health care;
   (b) sufficient food and water; and
   (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

2. *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*

3. *No one may be refused emergency medical treatment.*

These rights (the right to information and the socioeconomic rights) are similar to the extent that they expressly require the state to take action to make the relevant right realisable. Section 32(2) requires the state to "enact" national legislation, whereas sections 26(2) and 27(2) require it to undertake "reasonable legislative and other measures" aimed at realising the rights.

However, despite the similarities, there is a significant distinction. While section 32(2) requires the state to enact legislation "to give effect to" the right to information, sections 26(2) and 27(2) only require measures aimed at the "progressive realisation" of socioeconomic rights. Thus, while the state only has to realise socioeconomics progressively, the right to information appears immediately realisable. This distinction would caution against quickly drawing parallels between the adjudication of the right to information and socioeconomic rights.

Nevertheless, while it is essential to remain mindful of distinctions between these rights, it can be instructive to consider the Constitutional Court's approach to judicial review in socioeconomic rights cases involving positive obligations. Additionally, information access, while immediately realisable, is never fully realisable. As discussed in chapter 4 (on the implementation role of the legislature), information access must be balanced against other rights and interests. Thus, like measures aimed at giving effect to socioeconomic rights, information access legislation must balance the interest protected in the right against other legitimate state interests and fundamental rights.

C *A Two-Step Approach for Positive Obligations*

The South African Constitutional Court has famously rejected the so-called "minimum core" approach to socioeconomics rights adjudication, developed by the United Nations Committee on Economic, Social and Cultural Rights.[443] Instead, the Court has developed the "reasonableness approach" or "reasonableness review" standard.[444]

The Constitutional Court's reasonableness approach involves an inquiry into the reasonableness of the steps the state has taken towards fulfilling a socioeconomic right. Accordingly, over time the Court has identified several factors it will consider as part of its review of the reasonableness of a measure aimed at effecting a socioeconomic right. These include, for instance, whether the state has adopted "well-directed policies and programmes".[445]

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[443] Ibid 255; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press, Kindle Edition, 2008) 183 and 214; There is a body of scholarship advocating for a minimum core or modified minimum core approach to the interpretation of socioeconomic rights in South Africa. Including, Craig Scott and Philip Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' (2000) 16(2) *South African Journal on Human Rights* 206; and Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*.

[444] Young, 'Proportionality, Reasonableness, and Economic and Social Rights' (n 183) 252; Bilchitz, 'Towards a Defensible Relationship Between the Content of Socio-Economic Rights and the Separation of Powers: Conflation or Separation?' (n 183) 63.

[445] *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169, 41–42 ('*Grootboom*').

The reasonableness approach could assist the Court in analysing the reasonableness of legal provisions aimed at giving effect to the right to information. The Court could (and, as I argue below, to some extent, has started to) develop factors that can guide its assessment of whether effect-giving laws secure reasonable levels of access to information.

However, scholars have been critical of the "reasonableness review" standard.[446] David Bilchitz, in particular, argues that the Court often conflates the scope and content question and the inquiry into the reasonableness of the constituting law or policy.[447] That is to say, how the Court has applied the reasonableness review standard collapses the two stages of rights analysis into one "context-driven enquiry".[448]

Nevertheless, as Katherine Young has argued, "there is nothing within the reasonableness assessment that prevents an open and broad statement of content before proceeding to the reasonableness inquiry."[449] Thus, the Court would not necessarily adopt a one-step approach in right to information cases if it adopted a reasonableness review standard. The Court could first determine the scope and content of the right by establishing whether the relevant information interest falls within the scope of the right. Next, the Court could, separately as a second step, assess the reasonableness of either the state's inaction or action that it has taken to effect the right.

As David Bilchitz contends in relation to socioeconomic rights understanding rights' "content is necessary in order to evaluate any reasons for the attenuation of the obligations flowing from them".[450] Bilchitz's argument echoes the first of the three purposes of the two-step approach: the right serves as the standard against which state action can be measured. Therefore, if reasonableness review were conducted in right to information cases in two stages, it would serve the first of the three purposes of the two-step approach outlined above.

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[446] Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (n 443) Chapter 5; Lisa Forman, 'Can Minimum Core Obligations Survive a Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2015) 47 *Ottawa Law Review* 561.

[447] Bilchitz, 'Towards a Defensible Relationship Between the Content of Socio-Economic Rights and the Separation of Powers: Conflation or Separation?' (n 183).

[448] Young, 'Proportionality, Reasonableness, and Economic and Social Rights' (n 183) 261–262.

[449] Ibid 263.

[450] Bilchitz, 'Towards a Defensible Relationship Between the Content of Socio-Economic Rights and the Separation of Powers: Conflation or Separation?' (n 183) 58.

An amended version of reasonableness review could also serve the other two purposes of the two-step approach. Recall that the second purpose was that the two-step approach ensures that courts' consideration of the state's actions is constitutionally guided. Katharine Young has argued that reasonableness review tends to be less structured than a limitations analysis under section 36 of the Constitution.[451] Instead, Young contends, reasonableness tends to be more of a "holistic, general question, incorporating notions of necessity, suitability and proportionality in an ad hoc method".[452]

However, there is no reason why the Court should not apply the reasonableness review standard in a more structured way. While the Constitution itself does not prescribe the structure of an enquiry into state action aimed at carrying out positive obligations, the Court has developed an open list of factors it considers in socioeconomic rights cases. The Court's list of factors is binding, given that South Africa follows the principle of *stare decisis* (in terms of which the decisions of higher courts bind lower courts). If systematically applied in every case, the Court's list of factors will provide structure to enquiries in matters related to positive rights obligations.

Similarly, an amended version of the reasonableness review standard would meet the burden of proof purpose. Young contends that when courts apply the reasonableness review standard in a way that collapses the two stages of rights adjudication into one, the burden of proof "may remain with the claimant".[453] However, if the reasonableness assessment is applied as a second step, the review approach would still allow the burden to shift at the second stage to the state to justify any inaction or the narrowness of effect-giving law. The factors the Court considers could allow the state to demonstrate that legitimate state interests (such as capacity constraints) and other rights warrant constrained positive action or even inaction.

As it satisfies the three purposes underlying two-step adjudication, reasonableness review is normatively attractive as a review standard for adjudicating positive state action undertaken to effect the right to information (provided the reasonableness assessment is done as a second step). Moreover, as I argue below, such an approach aligns with the Court's existing information access jurisprudence.

[451] Young, 'Proportionality, Reasonableness, and Economic and Social Rights' (n 183) 257 and 267.
[452] Ibid 267.
[453] Ibid 263.

IV INFORMATION RIGHT REVIEW BY THE CONSTITUTIONAL COURT

The majority of the Court's right to information cases have dealt with the application and interpretation of measures implemented by the state to give effect to the right.[454] For example, *President of the Republic of South Africa v M&G Media Ltd*[455] dealt with the interpretation and implementation of PAIA. Whereas, in *Competition Commission of South Africa v Standard Bank of South Africa Limited*,[456] the Court had to determine which of two legal instruments that facilitate access applied in the specific circumstances of the matter.[457]

However, in four decisions, the Court has dealt with the limitation of the right through the state's action or inaction. The most recent of these decisions, *Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service*,[458] is not publicly accessible at the time of the drafting of this thesis. Therefore, my analysis is limited to the three earlier decisions.[459]

First, *Brümmer v Minister for Social Development* ("*Brümmer*")[460] dealt with the limitation of the right by a provision in PAIA.[461] The impugned provision limited to just 30 days the amount of time that an information requester had to bring a court challenge against an information holder's decision not to grant access to all of some information requested. In *Brümmer*, discussed more fully in chapter 3, the Court determined, first, that the impugned provision limited the right and then, second, conducted a section 36 limitations analysis, finding that the limitation was not justifiable.[462] In other words, the Court followed a two-step approach in *Brümmer*—a matter that dealt with a challenge to state *action* that *infringed* on the right to information.

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[454] *President of the Republic of South Africa v M&G Media Ltd* (2012) 2 SA 50 ('*President v M&G*'); *PFE International Inc (BVI) v Industrial Development Corporation of South Africa Ltd* (2013) 1 BCLR 55 ('*PFE International*'); *Competition Commission of South Africa v Standard Bank of South Africa Limited* (2020) 4 BCLR 429 ('*Competition Commission v Standard Bank*'); *Helen Suzman Foundation v Judicial Service Commission* (2018) 4 SA 1 ('*HSF*').
[455] *President v M&G* (n 454).
[456] *Competition Commission v Standard Bank* (n 454).
[457] The two legal instruments were the request process in Rule 15 of the Competition Commission Rules and the rules of discovery.
[458] *Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service* (2023) 5 SA 319.
[459] This decision was handed down ten days before this thesis was submitted; the decision had not yet been published either on the Court's website or in the law reports.
[460] *Brümmer* (n 284).
[461] Ibid 1.
[462] Ibid 65–70.

In contrast with *Brümmer*, *My Vote Counts NPC v Speaker of the National Assembly* ("*MVC [*No 1*]*"),[463] and *My Vote Counts NPC v Minister of Justice and Correctional Services* ("*MVC [No 2]*")[464] dealt with state *inaction* and action that did not go far enough in effecting the right. These two cases will be the focus of this part of the chapter.

A *The My Vote Counts Matters*

Since the enactment of PAIA, the South Africa Constitutional Court has heard two significant cases in which an applicant sought to rely directly on the right to information (rather than on effect-giving law) to enforce a positive obligation. The two matters are *MVC [*No 1*]* and *MVC [No 2]*. Both *MVC [*No 1*]* and *MVC [No 2]* were brought before the Constitutional Court by My Vote Counts ("MVC"), a non-profit organisation advocating for transparency and accountability in South Africa's political processes.

Both *MVC [*No 1*]* and *MVC [No 2]* dealt with access to information about funding received by political parties and independent candidates from any person or entity other than the South African government ("private funding"). Private funding is distinguishable from state funding, which is provided under section 236 of the Constitution.

When these two matters came before the Constitutional Court in 2014 and 2018, respectively, no legislation (or common law) required political parties or candidates to create or keep a record of private funding received.[465] Therefore, as PAIA only facilitates requests for recorded information, private funding information was not requestable under PAIA.[466] Additionally, there was no legal obligation to disclose private funding information proactively (that is, without the need for a request).[467]

In what follows, I set out the background to these two matters and the facts and findings in each. Additionally, I engage with some scholarly criticism of the first of the two judgments. The detail is required to clarify how the Court has approached information right adjudication.

[463] *MVC [No 1]* (n 18).
[464] *MVC [No 2]* (n 19).
[465] Van Wyk (n 17) 109.
[466] See chapter 4, explaining that PAIA facilitates access to information by enabling right holders to request recorded information, but that record-creation and record-keeping obligations are found in other laws. See also, ibid 97–104 and 109.
[467] *MVC [No 1]* (n 18) 8.

1 *Background*

Whether and how private funding information should be made publicly accessible has been debated in South Africa's national Parliament at various points in time since 1997.[468] Following years of legislative inaction, the Institute for Democracy in South Africa ("IDSA") started a "campaign to lobby for [the] regulation of private funding to political parties."[469] In 2002 and 2003, IDASA made submissions to Parliament arguing for the inclusion in legislation of a provision that would facilitate access to private funding information.[470]

Following further inaction, IDASA submitted information requests under PAIA ("PAIA requests") to the four largest political parties represented in Parliament.[471] The PAIA requests were for information about funding above a certain amount (R50,000) received during a particular period and were all refused.[472] As a result, IDASA launched litigation in the High Court in the matter of *Institute for Democracy in South Africa v African National Congress*.[473]

The Court noted that PAIA distinguishes between "public" and "private" records,[474] holding that political parties' private funding information is "private" information.[475] Additionally, the Court observed that PAIA requires a requester seeking access to "private" information to establish that the information is required to exercise or protect another right.[476] The Court found that IDASA had failed to make the case that it needed access to the requested private funding information to exercise or protect a right and dismissed the application.[477]

Following several more years of legislative inaction regarding the regulation of private funding, in 2012, MVC wrote to Parliament.[478] In its letter to Parliament, MVC claimed the legislature was constitutionally obligated to enact a law to ensure private funding information was accessible.[479]

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[468] Ibid 10–11.
[469] *IDASA* (n 361) 73.
[470] 'Applicant's Founding Affidavit: My Vote Counts NPC v Speaker of the National Assembly (2015)', *ConCourt Collections* (Web Page, 6 December 2020) 55 <https://collections.concourt.org.za/handle/20.500.12144/3770?show=full>.
[471] *IDASA* (n 361) 11 and 18.
[472] Ibid 18.
[473] *IDASA* (n 361).
[474] Ibid 37 and 47–49.
[475] Ibid 51–52.
[476] Ibid 53.
[477] Ibid 81 and 85.
[478] *MVC [No 1]* (n 18) 16.
[479] Ibid.

Parliament responded that, in its view, it was not under a constitutional obligation to enact such legislation and that MVC should lobby the executive or a member of Parliament to promote its cause.[480] MVC then launched the first of its Constitutional Court cases, *MVC [*No 1*]*.

2 *MVC No. 1*

In *MVC No 1*, MVC pleaded for an order "requiring Parliament to enact national legislation regulating the disclosure of private funding records as a matter of continuous course, rather than once-off upon request."[481] MVC argued that for the right to vote (section 19(3) of the Constitution) to be meaningful, voters must have access to private funding information.[482] Therefore, MVC contended that private funding information falls within the scope of section 32(1)(b) of the Constitution.[483] Further, MVC argued that, as private funding information falls within the scope of the right to information and section 32(2) requires Parliament to enact legislation to make the right to information effective, section 32(2) requires Parliament to enact legislation to make private funding information accessible as a matter of continuous course.

MVC acknowledged that Parliament had enacted PAIA in response to the obligation in section 32(2) of the Constitution.[484] However, MVC argued that the form of access facilitated by PAIA (access upon request) was insufficient to ensure the meaningful exercise of the right to vote. Access by request to private funding information would be insufficient because it would require frequent requests to multiple political parties, which would be impractical. Instead, MVC argued, private funding information would have to be accessible "as a matter of continuous course" (that is, "proactive disclosure") to materially assist voters in exercising their right to vote.[485]

MVC's position was that PAIA, as a request mechanism, serves an essential function in making information accessible; thus, MVC contended it did not challenge the constitutionality of PAIA.[486] Instead, MVC argued that additional legislation—mandating proactive disclosure of private funding information—was required to secure this aspect of the right to information (the right to access private

[480] Ibid 17–18.
[481] Ibid 19.
[482] Ibid 2, 31 and 38.
[483] 'Everyone has the right of access to any information held by another person and that is required for the exercise or protection of any rights.' *SA Constitution* (n 5) 32(1)(b).
[484] *MVC [No 1]* (n 18) 85.
[485] Ibid 19 and 85–86.
[486] Ibid 80.

funding information to support the exercise of the right to vote).[487] Therefore, MVC argued that section 32(2) gives rise to an additional obligation for Parliament to enact legislation, separate from PAIA, that will make voters' right to private funding information effective.[488]

MVC approached the Constitutional Court directly (as opposed to launching its application in the High Court first). Chapter 8 of the South African Constitution establishes the judicial authority and determines the jurisdiction of the different courts; thus, Chapter 8 determines which court an applicant should approach when launching a constitutional challenge. Two provisions in Chapter 8 relating to the jurisdiction of the different courts are relevant to the MVC *[No 1]* matter—the first is section 167(4)(e), and the other is section 172(2)(a) read with section 167(5).

Both sections 167(4)(e) and 172(2)(a) establish judicial authority to determine the constitutionality of state action—section 167(4)(e) sets out the Constitutional Court's exclusive jurisdiction, and section 172(2)(a) the jurisdiction of other courts. Section 167(4)(e) provides that "[o]nly the Constitutional Court may decide that Parliament or the President has failed to fulfil a constitutional obligation". Contrastingly, section 172(2)(a) provides that "[t]he Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President…." Section 167(5) further provides that for a finding of unconstitutionality, made under section 172(2)(a), to take effect, the Constitutional Court must confirm that finding.

The Constitutional Court has previously determined that sections 167(4)(e) and 172(2)(a) must be interpreted in a way that preserves how the Constitution distributes "jurisdictional competence".[489] Thus, the Court has concluded that section 167(4)(e) must be interpreted narrowly and understood as referring *only* to obligations falling *exclusively* on the President or Parliament.[490] At the same time, section 172(2)(a) should be interpreted widely and must be understood as relating both to actions and *inactions* of the President and Parliament that infringe on rights.[491]

Therefore, a litigant wishing to enforce a constitutional obligation that rests *exclusively* on Parliament (or the President) must approach the Constitutional Court directly under section 167(4)(e). Conversely,

[487] Ibid 19.
[488] Ibid 44.
[489] *Women's Legal Centre Trust v President of the Republic of South Africa* (n 328) 11.
[490] Ibid 16.
[491] Ibid 12.

a litigant alleging that legislation (or conduct of the President) is unconstitutional and invalid for violating a constitutional provision or failing to give effect to a provision that applies to the state *generally* must approach a High Court or the Supreme Court of Appeal under section 172(2)(a).

As noted above, MVC approached the Constitutional Court directly. It did so under section 167(4)(e) of the Constitution. MVC took this route because its claim was grounded in section 32(2), which provides that "[n]ational legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state." As section 44(1)(a)(i) of the Constitution assigns the authority to enact national legislation to the national Parliament, the obligation in section 32(2) to enact national legislation falls exclusively on the national Parliament.

Thus, the reasoning behind MVC's decision to approach the Court directly was that if private funding information falls within the scope of the right to information, and legislation is required to effect that aspect of the right, then Parliament must enact that legislation. Further, if no legislation does effect that aspect of the right, then Parliament has failed to fulfil a constitutional obligation falling exclusively on it. Thus, a litigant wishing to challenge this inaction must approach the Constitutional Court directly.

(a) The Judgments

The Constitutional Court issued two judgments in *MVC [No 1]*. Seven Justices supported the majority judgment, and four Justices the minority judgment.

The majority judgment does not engage with the substantive claim—that the right to information and the right to vote together require private funding information to be accessible to voters.[492] Instead, the majority focused on the fact that the applicant grounded its claim in section 32(2) of the Constitution, bringing its action under section 167(4)(e).[493]

The majority found that by arguing that there is an aspect of the right to information not addressed through PAIA, MVC effectively argued that PAIA was unconstitutional for being deficient.[494] For the majority to conclude that MVC had effectively argued that PAIA was unconstitutionally underinclusive, it first had to find that PAIA is the only law envisioned in section 32(2) of the Constitution.

[492] *MVC [No 1]* (n 18) 124.
[493] Ibid 135.
[494] Ibid 122, 136 and 162.

The majority provided three reasons why it regards PAIA as *the* law enacted under section 32(2) of the Constitution to give effect to the right to information.[495] First, several provisions of PAIA either reflect the wording of section 32(1) of the Constitution or expressly state that PAIA was enacted to give effect to the right to information.[496] Second, several Constitutional and High Court cases have referred to PAIA as the legislation envisaged in section 32(2).[497] Third, section 32(2) of the Constitution has not lapsed.[498] The third reason originates in an interim provision in the Constitution, Item 23 of Schedule 6. Item 23 provided that if "the legislation envisaged" in section 32(2) was not adopted within three years of the Constitution coming into effect, section 32(2) would lapse.[499] Section 32(2) has not lapsed; thus, the majority reasoned that PAIA must be *the* legislation envisioned in section 32(2).[500]

Having found that PAIA is the legislation envisaged in section 32(2), the majority held that the judicially developed doctrine of constitutional subsidiarity applied.[501] Therefore, the Court concluded that to exercise its right to information, MVC had to either rely on PAIA or, if PAIA was deficient, challenge its constitutionality by bringing an application in the High Court under section 172(2)(a).[502] The majority, therefore, dismissed MVC's application.[503]

Contrastingly, the minority found that constitutional subsidiarity did not apply—the minority's reasoning proceeds in four steps. First, the minority found that voters need access to private funding information to exercise their right to vote meaningfully.[504] Thus, the minority argued that private funding information falls within the scope of section 32(1)(b) of the Constitution.[505] Recall that section 32(1)(b) of the Constitution provides that "[e]veryone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights"). Private funding information falls within the scope of the right to information because it is held by nonstate persons (political parties) and is required to exercise a right (the right to vote).

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[495] Ibid 183.
[496] Ibid 138–141.
[497] Ibid 142–147.
[498] Ibid 148.
[499] 'Sections 32 (2) and 33 (3) of the new Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect.' *SA Constitution* (n 5) Item 23(3) of Schedule 6.
[500] *MVC [No 1]* (n 18) 148.
[501] Ibid 181.
[502] Ibid 193.
[503] Ibid 195.
[504] Ibid 31–43.
[505] Ibid 94.

Second, the minority found that for information about private funding to support the right to vote meaningfully, disclosure would have to be proactive—not by request.[506] This finding—that private funding information must be proactively available to support the right to vote—is a crucial distinction between the minority and majority judgments. In this regard, the majority found that "the minority judgment violates the doctrine of separation of powers".[507] The majority judgment reasons that holding that the effect-giving legislation must provide access through proactive disclosure was telling Parliament how to legislate.[508]

Third, having found that private funding information must be proactively accessible to support voting, the minority judgment considered whether any such legislation existed, finding none did.[509] Finally, the minority argued that constitutional subsidiarity does not apply because there is no legislation to rely on or challenge. That is, no legislation purports to make private funding information proactively accessible. Accordingly, the minority would have ordered Parliament, based on section 32(2) of the Constitution, to enact (additional) legislation (over and above PAIA) to ensure private funding information is made proactively accessible.[510]

(b) Scholarly engagement with the MVC [No. 1] decision

Public law scholars writing on the right to information have been critical of the South Africa Constitutional Court's decision in *MVC [No 1]*.[511] This scholarship has critiqued two aspects of the Constitutional Court's judgment.

First, Raisa Cachalia has argued that the majority erred in finding that subsidiarity was applicable.[512] She contends subsidiarity does not apply if the legislation that purports to give effect to a right does not, in fact, give effect to an aspect of a right and if the challenge is to its "sufficiency", not "validity".[513] Additionally, Cachalia argues that even if the majority found it could not require Parliament to enact additional effect-giving legislation, it should have determined whether the Constitution requires

[506] Ibid 94–95.
[507] Ibid 122.
[508] Ibid 156.
[509] Ibid 8.
[510] Ibid 120.
[511] Van Wyk (n 17); Cachalia (n 17); Klaaren, 'My Vote Counts and the Transparency of Political Party Funding in South Africa' (n 17).
[512] Cachalia (n 17) 143–149.
[513] Ibid.

private funding information to be accessible.[514] Finally, Cachalia contends that the Court should have reached a determination given that the issue of private funding regulation had been before Parliament for some time without the democratic process securing the information access that the Constitution requires.[515]

Contrastingly, I have argued that subsidiarity does apply, but not the aspect of subsidiarity focused on in the majority judgment in *MVC [No 1]* and by Cachalia.[516] Recall that constitutional subsidiarity applies in two types of circumstances. First, suppose more than one fundamental right is implicated. In that case, subsidiarity requires a court to decide a matter under the right most directly implicated. Second, if legislation purports to give effect to a right, a right holder must rely on that legislation or challenge its constitutionality.

The Constitutional Court and Cachalia have focused on the second type of subsidiarity. I agree with Cachalia that this second aspect of subsidiarity did not apply in the *MVC [No 1]* matter. However, it would not be accurate to say that subsidiarity did not apply at all. The first aspect of subsidiarity applied—two rights were implicated in the matter, and the right more directly implicated was the right to vote.[517] The right to information should have informed the Court's interpretation of the right to vote, supporting a finding that the right to vote is a right to an informed vote.[518] Further, the state is obligated to enact law to make private funding information accessible, but this obligation arises from the duty in section 7(2) of the Constitution rather than section 32(2).[519]

Third, Jonathan Klaaren has critiqued the majority's understanding of the relationship between section 32(2) of the Constitution and Item 23 of Schedule 6 (the interim provision that required the state to comply with section 32(2) within three years). Klaaren argues that the best way to read the two provisions together is to understand that Item 23 gave rise to a "once-off duty" to enact some form of access legislation—a duty satisfied by PAIA.[520] Contrastingly, Klaaren contends, section 32(2) continues to "signal the degree of deference due to Parliament by the judiciary in reviewing

[514] Ibid 149–152.
[515] Ibid 149–151.
[516] Van Wyk (n 17).
[517] Ibid 115–117.
[518] Ibid.
[519] 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.' *SA Constitution* (n 5) 7(2).
[520] Klaaren, 'My Vote Counts and the Transparency of Political Party Funding in South Africa' (n 17) 5.

Parliament's legislative choices in enforcing the right of access to information."[521] Klaaren has previously made a similar argument,[522] which I engage with more fully in chapter 7 of the thesis.

3 *MVC No. 2*

Following the findings in the majority judgment in *MVC [No 1]*, MVC submitted PAIA requests to the political parties represented in Parliament.[523] Several of these requests were denied based on grounds for denial outlined in PAIA; none of the requests led to the release of the requested information.[524] Therefore, MVC challenged the constitutionality and validity of PAIA before the High Court in the matter of *My Vote Counts NPC v President of the Republic of South Africa*.[525]

Before the High Court, MVC argued that PAIA was unconstitutional and invalid because it did not provide for "continuous and systematic recordal [sic] and disclosure" of private funding information.[526] The High Court found PAIA unconstitutional and invalid because it did not provide access to private funding information.[527] However, the Court would not find that disclosure had to be "continuous and systematic", holding that, as per the majority judgment in *MVC [No 1]*, to do so would violate the principle of the separation of powers.[528]

(a) The Judgment

MVC applied to the Constitutional Court, in the matter of *MVC [No 2]*,[529] for a confirmation of the findings of the High Court, save for the finding regarding "continuous and systematic" disclosure, which it appealed.[530] The Constitutional Court issued two judgments—a majority judgment and a mostly concurring minority judgment. I focus in this chapter on the majority decision.

The Court confirmed the High Court's finding that PAIA was unconstitutional and invalid to the extent that it did not provide access to private funding information and dismissed the appeal. To reach this

[521] Klaaren, 'My Vote Counts and the Transparency of Political Party Funding in South Africa' (n 17).
[522] Klaaren, 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (n 29).
[523] *MVC [No 2]* (n 19) 18.
[524] Ibid.
[525] *My Vote Counts NPC v President of the Republic of South Africa* (2017) 6 SA 501.
[526] Ibid 1.
[527] Ibid 69.
[528] Ibid 1.
[529] *MVC [No 2]* (n 19).
[530] Ibid 10.

conclusion, the Court made three critical determinations.[531] First, the court outlined the scope of the right to information. The Court found that the rights to information (section 32), to vote (section 19) and to freedom of expression (section 16), together with section 7(2) of the Constitution, require the state to ensure private funding information is reasonably accessible.[532] Second, the Court determined that PAIA does not secure reasonable access to private funding information. Third, the Court held that the deficiency in PAIA is not reasonably justifiable.

(b) Giving Content to the Right

The Court found that the rights to information, vote and freedom of expression require private funding information to be recorded, preserved and made reasonably accessible.[533] Additionally, the Court held that section 7(2) of the Constitution obligates the state to adopt a legal mechanism through which private funding information will be accessible.[534]

Regarding the right to information, the court made several preliminary findings about the scope and content of section 32(1)(b) of the Constitution. First, recall that section 32(1)(b) holds that "[e]veryone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights." The Court determined that "everyone" is wide enough to include both natural and juristic persons.[535] As both natural and juristic persons can exercise the right to information, MVC is a holder of the right to information.

Additionally, the court held that "another person" refers to all nonstate persons and includes political parties and candidates.[536] Thus, political parties and candidates can be the bearers of obligations under the right to information. Further, the court found that "held" refers to control over information captured in human memory, documentation or otherwise.[537] Thus, the Court determined that the term "held" is capacious enough to encompass the concept of "recorded" information used in PAIA.[538] Furthermore, the Court held that "any information" is broad enough to include private funding information. Finally, the Court found that the term "required" is an internal qualifier that makes access

[531] Ibid 91.
[532] Ibid 44, 53–58 and 69.
[533] Ibid.
[534] Ibid.
[535] Ibid 20.
[536] Ibid.
[537] Ibid 21.
[538] Ibid.

contingent on a right holder establishing that they have a legitimate reason for seeking access to privately held information.[539]

Regarding the realisation of the right to information, the Court found that the legislature must set out the legal requirements determining when information must be recorded, preserved and disclosed.[540] However, in making such determinations, the Court held, the legislature must bear in mind that the nature and importance of certain rights and information will affect how easily accessible the information must be.[541] That is to say, while the legislature determines which information is recorded, preserved and disclosed, it must ensure that the information crucial for exercising or protecting other rights is recorded and preserved. Additionally, depending on the nature and importance of the right, some information may have to be made more easily accessible than others.

Turning to whether private funding information is required to exercise or protect another right, the Court focused on the right to vote and freedom of expression. First, regarding the right to vote, the Court found a "vital connection" between the right to information and the right to vote—the right to vote, the Court held, is a right to an informed vote.[542] Specifically, the Court held that for voters to be able to exercise their right to vote meaningfully, they need all the "information that completes the picture…[of] who [a political candidate or party] really [is] or could be influenced by, in what way and to what extent".[543] Private funding information, the Court determined, is information that can assist voters in determining who might be able to influence candidates standing for public office.[544]

Second, regarding freedom of expression, the Court found that the media, academia, other political parties and non-profit organisations need access to private funding information to exercise their freedom of expression.[545] The Court held that it is essential for the proper exercise of the right to vote that these entities—in exercising their freedom of expression—widely distribute private funding information to voters.[546]

[539] Ibid 22–23.
[540] Ibid 25.
[541] Ibid.
[542] Ibid 37.
[543] Ibid 33.
[544] Ibid 40.
[545] Ibid 55–58.
[546] Ibid 53–54.

(c) Measuring PAIA Against the Right

The Court provided three reasons why, it found, PAIA did not secure reasonable access to private funding information. First, PAIA did not apply to independent candidates and certain political parties.[547] PAIA facilitates requests to "public" and "private" bodies. At the time, PAIA defined a "private" body as:

> *(a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity;*
> *(b) a partnership which carries or has carried on any trade, business or profession; or*
> *(c) any former or existing juristic person, but excludes a public body.*

Regarding independent candidates, the court found that while they are "natural persons", they are not engaged in a trade, profession or business when raising funds for a political campaign.[548] Thus PAIA does not apply to independent candidates. Regarding political parties, the court determined that if they are incorporated under law, they are "juristic persons".[549] However, the Court found no legal requirement for a political party to be incorporated. Thus, not all political parties fall within the definition of a private body, and PAIA would not apply to them all.[550] Therefore, the Court held that PAIA was unconstitutional to the extent that it did not include independent candidates and some political parties within its ambit.[551]

Second, the Court found that while PAIA only facilitated access to recorded information, it did not obligate political parties to record or keep private funding information.[552] Thus, the Court held that PAIA was unconstitutional because it did not require funders, political parties, and candidates to record and keep private funding information.[553]

Lastly, the court determined that the PAIA process would not secure "reasonable" access to private funding information—even if that information is recorded.[554] In this respect, the Court found, firstly, that because the PAIA process is "cumbersome" and "laborious" and involves levying request fees,

[547] Ibid 61–64.
[548] Ibid 63.
[549] Ibid 64.
[550] Ibid.
[551] Ibid 63–64.
[552] Ibid 66.
[553] Ibid 91.
[554] Ibid 66–67.

access (to private funding information) under PAIA would not be reasonable.[555] Secondly, the Court found that requests for private funding information made under PAIA could be refused under at least two grounds for refusal.[556] Conversely, the court held that for private funding information to be reasonably accessible, access must be "institutionalised", not subject to discretion regarding disclosure, "free-flowing", and without levies.[557]

(d) The Reasonableness of the Failure to Facilitate Access to Private Funding Information

Lastly, in place of a limitations analysis in terms of section 36 of the Constitution, the Court stated, "no compelling reasons exist to justify these limitations."[558]

B *Reasonableness Review for the Right to Information*

The Constitutional Court's mention in *MVC [No 2]* that "no compelling reasons exist" to justify the state's failure to give adequate effect to this aspect of the right to information suggests that the Court accepts that judicial review regarding the right to information should be conducted in two steps. However, the Court's failure to attempt a proper section 36 analysis indicates that section 36 may not be the appropriate second step for reviewing positive state action concerning the right to information. In fact, in *MVC [No 2]*, the Court did do a (different) type of limitations analysis—without acknowledging that is what it was doing.

In part III, paragraph C, I argued that, if conducted as a second step, reasonableness assessment is normatively attractive as a review standard for assessing positive state action or inaction concerning the right to information. While the Court in *MVC [No 2]* purported with its statement that "no compelling reasons exist" to conduct a limitations analysis under section 36 of the Constitution, it had already done a reasonableness assessment as a second step. If the Court recognises that what it is doing is a form of reasonableness review, it could more consciously develop factors for consideration in right to information cases.

[555] Ibid 66.
[556] Ibid 67.
[557] Ibid 70–71.
[558] Ibid 68.

1 *What the Constitutional Court Did in* MVC [No 2]

I summarised the Court's findings in the MVC [No 2] matter in part IV, paragraph A. Paragraph 3(b) set out the Court's findings on the scope of the right to information related to private funding information. Paragraph 3(c) described how the Court evaluated the legislature's failure to ensure private funding information was accessible. In this section, I demonstrate that the Court made four findings regarding the scope of the right that allowed it to evaluate (in terms of its reasonableness) the legislature's failure to ensure private funding information is accessible.

First, the Court found that the right includes right holders that are natural and juristic persons. Thus, as becomes clear from the Court's further reasoning, voters, the media, academia, non-profit organisations, and other political parties are all right holders. This finding allowed the Court to hold that the effect-giving legislation had to secure (legal) access rights for all of these (fundamental) right holders.[559]

Second, the Court determined that any information captured in some sense—even in human memory—is included in the scope of the right. Thus, the Court could hold that the state must create legal obligations to record, keep and disclose information required to exercise or protect another right.

Third, the Court found that the right to information creates duties for all nonstate persons holding information that a right holder requires to exercise or protect another right. Specifically, the Court found that political parties and candidates incur obligations under the right to information. This finding allowed the Court to determine later that the effect-giving legislation must create legal record-creation, keeping and disclosure duties for political parties and candidates.

Finally, the Court held that private funding information fell within the scope of the right to information. However, the Court also found that the horizontal aspect of the right was internally qualified (or limited) to only apply to information concerning which the holder of the right to information has established they have a legitimate reason to access. Section 32(1)(b) of the Constitution determines that only the need to exercise or protect a right amounts to a legitimate reason for accessing privately held information. Thus, the Court also considered how private funding information could support the exercise of the right to vote and freedom of expression.

[559] Ibid 53–58.

Having set out the right's scope and determined that private funding information is included and political parties and candidates are duty bearers under the right, the Court considered whether PAIA facilitated access to private funding information. In assessing PAIA, the Court repeatedly used the phrase "reasonable access".[560]

The Court goes on to describe a measure for determining the reasonableness of the level of access facilitated by an access law. Specifically, the Court found that "[t]he ease with which [particular information] is made accessible ought to depend on the nature of the right whose exercise or protection is sought to be facilitated." In the language of the two-step approach, this measure is a "factor" for consideration in the reasonableness assessment.

The factor described by the Court reflects the "availability" aspect of "transparency", as defined in chapter 2 of this thesis. Recall from that chapter that I argued that under the South African Constitution, the value of transparency should be understood regarding information *availability* and *understandability* as crucial. The understandability aspect of transparency and the other values that underpin information access—accountability and openness—could suggest additional factors for consideration in the reasonableness assessment.

2 *Establishing Additional Factors for Reasonableness Review for the Right to Information*

The Constitutional Court in *MVC [No 2]* effectively identified one factor for the review of state action and inaction as it relates to the right to information: whether the effect-giving law secures a level of access that is commensurate with the importance of the right it makes exercisable. It is possible to expand on this, adding additional factors that can form part of courts' assessment of the reasonableness of state action or inaction under the right to information. In this section, I draw on factors developed by the Court for reasonableness review in socioeconomic rights and the values underpinning information access (discussed in chapter 2) to propose an additional four factors.

(a) Deriving Review Factors from Socioeconomic Rights Jurisprudence

The Court has developed at least four factors for consideration in socioeconomic rights review cases. First, the Court will consider whether the state has "well-directed policies and programmes" in place

[560] Ibid 25, 34, 44, 66 and 69.

and whether these are actually implemented.[561] Second, the Court will consider whether the relevant state measure makes provision for persons in desperate need.[562] Third, the Court looks into whether the measure adopted by the state is "[flexible] and [responsive] to relevant scientific and social impact evidence".[563] Lastly, the Court considers whether the state meaningfully engaged "with the beneficiaries of the rights" in developing its policy or programme.[564]

At least two of these factors developed for socioeconomic rights can be adapted for the right to information. First, the factor related to whether the state has policies and programmes in place to address the relevant socioeconomic need and whether these measures are actually implemented could be modified for cases related to the right to information. Regarding the right to information, the analogous question would be whether the legislature has enacted any law to give effect to the relevant aspect of the right to information and whether that law is being implemented. Second, the socioeconomic rights factor related to whether any measure the state has adopted makes provision for persons in desperate need could also be adapted to suit cases related to the right to information. Regarding the right to information, the analogous question would be whether effect-giving legislation makes provision for the needs of people who are "vulnerable" concerning information access (for example, who are illiterate, indigent or live with a disability).

(b) Deriving Review Factors from the Values that Underpin Information Access

The values that underpin information access—transparency, accountability and openness—suggest additional factors that could form part of a reasonableness assessment of state action or inaction regarding the right to information. In chapter 2 I argued for a particular understanding of the meaning of each of these three values under the South African Constitution. First, transparency under the South African Constitution necessitates information availability (without any qualification) and understandability. Second, accountability under the South African Constitution requires *power holders* to *give an account* of the exercise of power to anyone *potentially impacted by the exercise of that power*. Lastly, openness refers to ensuring that people can *participate in and critically engage with social and political governance systems*.

[561] *Grootboom* (n 445) 41–42.
[562] Ibid 44.
[563] Frank Michelman and Sandra Liebenberg, 'Toward an Equality-Promoting Interpretation of Socio-Economic Rights in South Africa: Insights from the Egalitarian Liberal Tradition' (2015) 132(2) *South African Law Journal* 411, 414.
[564] Ibid.

In particular, “transparency” and “accountability” are helpful in developing further factors for judicial review related to the right to information. First, in line with the value of transparency, the Court might ask whether the access law ensures information is *understandable*, especially (to connect this factor to the “vulnerable persons” factor) to persons who are illiterate, indigent or live with a disability. Lastly, drawing on “accountability”, the Court might ask whether the level of accessibility facilitated by an information law is commensurate with the amount of power the information holder wields and the impact they could have on the lives and rights of other persons.

(c) Five Factors for Reviewing State Action or Inaction on the Right to Information

Drawing together all the factors discussed, when conducting a reasonableness review for the right to information, courts should consider at least the following factors (if appropriate in the circumstances of the matter). First, whether a law provides some level of access to the relevant information interest—if not, the court should either develop the common law or require the legislature to develop legislation to address the gap. Second, if there is effect-giving law, whether the law is implemented—if not, the court should require the appropriate branch of government to implement the law. Third, whether the effect-giving law secures a level of access that is commensurate with the importance of the right it makes exercisable. Fourth, the courts should ask whether the effect-giving law ensures that persons who are illiterate, indigent or live with a disability can understand the information. Lastly, the courts should determine whether the level of accessibility facilitated by the information law is commensurate with the amount of power the information holder wields and the impact they could have on the lives and rights of other persons.

V CONCLUSION

In this chapter, I have considered the Constitutional Court’s role concerning section 32 and whether it has fulfilled its obligations. Focusing on the Court’s obligation to interpret and give effect to the right to information, I argued that the Court has been conducting a type of reasonableness review. I contended that this is a normatively attractive standard for assessing the appropriateness of information access laws. However, I also argued that Court should be more explicit about what it is doing, expressly developing factors for review that are suitable for assessing measures to effect the right information; if the Court were to develop review factors explicitly, it would ensure that the Court is structured in its assessment of state action (or inaction) regarding the right to information. Additionally, these factors would guide lower courts and other branches of the state. In the next

chapter, I consider the roles of the executive and fourth branch in effecting the right to information and whether they have been fulfilling their obligations.

Chapter 6: The Implementation Role of the Executive and Fourth Branch

I INTRODUCTION

All the branches of the South African state have responsibilities related to the realisation of section 32 of the South African Constitution (the right to information).[565] The state's obligation arises from section 7(2) of the Constitution, which provides "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights". In *Women's Legal Trust*,[566] the South African Constitutional Court established that the reference in section 7(2) to "the state" is to the state as a whole.[567] That is to say, section 7(2) requires all the branches of government to "collaboratively or jointly" respect, protect, promote and fulfil every right, including the right to information.[568]

As noted in chapter 4, the legislature has the primary obligation to give effect to section 32. However, section 7(2) places the onus to realise rights on the state as a collective. Chapter 5 looked beyond the legislature, highlighting how the judiciary might coordinate its actions to contribute to the realisation of section 32. This chapter outlines the contributions that the executive and fourth branch institutions (collectively called the 'fourth branch') ought to make towards realising the right to information.

In chapter 5 I argued that the concept of "comity" developed in scholarship on the separation of powers can assist with determining how each branch of the state can contribute to the task of jointly effecting a fundamental right. "Comity" refers to the regard each branch of government should have for the decisions and actions of the other branches.[569] Particularly important, within the concept of comity is the idea that every branch of the state must "actively support" the decisions of other branches of the state (if those decisions relate to that branch's core function).

[565] *SA Constitution* (n 5).
[566] *Women's Legal Centre Trust v President of the Republic of South Africa* (n 328).
[567] Ibid 16–20.
[568] Ibid 20.
[569] Kavanagh (n 30) 236; Endicott (n 420) 17.

In chapter 5, I relied on the elements of the "active support" aspect of comity and the South African Constitution's description of the function of judiciary to determine what duties arise for the courts from section 32 read with section 7(2) of the Constitution. In this chapter, I again draw on the "active support" element of comity, this time to establish what the executive and fourth branches' obligations are regarding the right to information. Again, I do so by drawing on the Constitution's descriptions of the functions of each of these two branches.

Despite the differences between the executive and fourth branch, three similarities—taken together—make it sensible to consider their roles in giving effect to the right to information simultaneously. First, both branches are ultimately accountable to the legislature. Specifically, the Constitution provides that the cabinet—consisting of the President, Deputy President and Ministers—is accountable to and must report to Parliament.[570] Additionally, fourth branch institutions are constitutionally mandated to report annually to Parliament on "their activities and the performance of their functions".[571]

Second, both branches interact directly with members of the public or communities affected by state action, providing them with opportunities to identify information needs. The executive, or the administration on its behalf, often consults with individuals and communities affected by the laws it needs to implement.[572] This direct interaction with the public provides the administration with the opportunity to learn about the related information needs of individuals and communities. Similarly, the fourth branch institutions—particularly those that investigate complaints—also have occasion to understand how information deficits play a role in limiting the capacity of individuals to exercise or protect their rights.

Third, both branches are staffed by persons with expertise in their niche subject areas.[573] As these professionals keep abreast of developments in best practices within their specialist subject areas, they can identify advances within their discipline related to information access. This expert knowledge can in turn be relied to strengthen the legal framework meant to effect the right to information.

In this chapter, I argue that the executive and fourth branch have access to information obligations arising from section 32 of the Constitution, which includes but extends beyond just compliance with

[570] *SA Constitution* (n 5) 91 and 92.
[571] Ibid 181(5).
[572] Barber (n 166) 69; Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press, 2009) 131.
[573] Regarding expertise of officials in the executive, see Barber (n 166) 66–67; Carolan (n 572) 108–109.

existing information access law. In particular, I reason these branches have an essential contribution to make to the collective realisation of the right to information—that is to say, that they can assist the legislature in fulfilling its section 32 obligations.

To make this argument, I start in part II by clarifying which institutions I am referring to when referring to the executive and fourth branches. I then outline the constitutional functions of each of these branches. Next, I reason that considering the functions of these branches in light of the concept of comity, outlined in chapter 5, suggests three ways that these state entities can support Parliament's attempt to give effect through legislation to the right to information. First, both branches must comply with and implement existing access to information laws. Second, both have some obligation to encourage other state and non-state entities' compliance with information access laws. Third, both the executive and fourth branch must contribute towards the strengthening of existing access to information laws and the adoption of other legal provisions to facilitate access. Then, in part III, I turn to specific examples of executive and fourth branch entities engaging in activities that fall within the three categories of supportive action I have identified.

Finally, I conclude in part IV by reasoning that while there have been attempts to support the legislature's access to information work, there have also been some problems. First, the executive and fourth branch have failed to undertake these supportive activities consistently, and second, Parliament has failed to integrate the efforts of these other branches into its work. These findings suggest that Parliament, the executive, and the fourth branch underappreciate the importance of their cooperation for the realisation of the right to information.

II Defining the Scope and Role of the Executive and Fourth Branch

The term "fourth branch" represents a state function distinguishable from the classic Montesquian three-branch division of state functions between the legislature, executive and judiciary—but public law scholarship has not used the term consistently. Some public law scholarship has recognised the administrative bureaucracy as a fourth branch, given that it has increased, since the original recognition of a three-part division, in decision-making power, often exercising this power independently of the executive.[574]

[574] See for example, James C Gahan, 'The Headless Fourth Branch of Government' (1979) 64(1) *Massachusetts Law Review* 21; Peter L Strauss, 'The Place of Agencies in Government: Separation of Powers and the Fourth Branch' (1984) 84(3) *Columbia Law Review* 573.

Many scholarly works on information access referencing the "fourth branch" have the administrative bureaucracy in mind.[575] For instance, John Ackerman and Irma Sandoval-Ballesteros claim information access "laws have typically developed as a way to control the administrative state or fourth branch of government that emerged throughout the world during the 19th and 20th centuries."[576]

However, as Mark Tushnet has argued, the administration does not perform a distinct function and, additionally, is not ordinarily recognised within written constitutions as a separate branch of government.[577] The South African Constitution does devote a separate chapter to the administration.[578] However, this chapter provides that the legislature determines the administration's function and structure and that the bureaucracy must execute policies set by the executive. Additionally, the Constitution expressly provides that the executive is responsible for coordinating the functions of the administration.[579] Thus, in this chapter, I treat the administration as subordinate to the executive and not as a separate fourth branch.

In more recent years, the term "fourth branch" has been used to refer to independent institutions established to support some aspect of constitutional democracy.[580] This newer scholarship on fourth branch institutions often cites as an example the institutions established by chapter 9 of the South African Constitution. For instance, Pal states, "[c]hapter 9 of the South African Constitution creates a group of institutions to serve functions including but not limited to election administration that together constitute a fourth branch of government."[581]

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[575] See for example: Jerry L Mashaw and David Berke, 'Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience' (2018) 35(2) *Yale Journal on Regulation* 549; William P Marshall, 'Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters' (2008) 88(2) *Boston University Law Review* 505; Jessica Bulman-Pozen and Heather K Gerken, 'Uncooperative Federalism' (2008) 118(7) *Yale Law Journal* 1256; Ackerman and Sandoval-Ballesteros (n 2); Peter M Shane, 'Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information' (1992) 44(2) *Administrative Law Review* 197; Richard J Peltz-Steele, 'Access to Information in the Private Sector: African Inspiration for US FOIA Reform' (2018) 63(5) *Villanova Law Review* 907.

[576] Ackerman and Sandoval-Ballesteros (n 2) 123.

[577] Mark Tushnet, 'Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries' (2020) 70(2) *University of Toronto Law Journal* 95, 96.

[578] *SA Constitution* (n 5) Chapter 10.

[579] Ibid 85(1)(c).

[580] See for example Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press, 2021); Michael Pal, 'Electoral Management Bodies as a Fourth Branch of Government' (2016) 21(1) *Review of Constitutional Studies* 85; Heinz Klug, 'Accountability and the Role of Independent Constitutional Institutions in South Africa's Post-Apartheid Constitutions' (2015) 60(1) *New York Law School Law Review* 153; Chris Field, 'The Fourth Branch of Government: The Evolution of Integrity Agencies and Enhanced Government Accountability' (2013) 72 *Australian Institute of Administrative Law Forum* 24.

[581] Pal (n 580) 101.

The South African Constitution textually treats institutions created by chapter 9 as performing a distinct state function and provides for their independence from the other branches. Thus, in this chapter, I refer to the six institutions established by chapter 9 of the South African Constitution—the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission—as the fourth branch.

The South African Constitution outlines the functions and powers of both the executive and the fourth branch. The Constitution stipulates that the executive has the authority to implement legislation, develop and implement policy, coordinate the functions of departments in the executive and administration and prepare and initiate legislation.[582] In practice, as is well known, each department within the executive and administration specialises in a particular subject area, such as education or housing.

In contrast, each fourth branch institution is responsible for strengthening a distinct aspect of democracy.[583] Specifically, the Public Protector's role is to guard against improper influence having a bearing on the conduct of public officials and the Auditor General's is to protect public funds and resources from being misappropriated.[584] The other fourth branch institutions strengthen democracy by promoting and protecting fundamental rights. First, the South African Human Rights Commission's mandate is over fundamental rights generally.[585] Second, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is tasked with promoting and protecting communal rights.[586] Third, the Commission for Gender Equality's mandate is over the right to gender equality. Finally, the Electoral Commission is tasked with promoting and protecting the right to vote.[587]

To empower the fourth branch to carry out its democracy-strengthening functions, each institution—other than the Electoral Commission—is expressly assigned the powers of investigation and reporting

[582] *SA Constitution* (n 5) 85 (with respect to the national executive); ibid 125 (with respect to provincial executives); The Constitution does not distinguish as sharply between executive and legislative function at the municipal level. For a discussion of the merging of these functions at the municipal level of government see: Jaap de Visser, 'The Political-Administrative Interface in South African Municipalities Assessing the Quality of Local Democracies' [2010] (Special Issue) *Commonwealth Journal of Local Governance* 87.
[583] *SA Constitution* (n 5) 181(1).
[584] Ibid 182 and 188.
[585] Ibid 184.
[586] Ibid 185.
[587] Ibid 187 (regarding the CGE); ibid 190 (regarding the EC).

(as well as various additional powers).[588] The Constitution does not spell out any powers as given to the Electoral Commission. Arguably, however, the Electoral Commission's powers are implicit in its mandate to take the necessary steps to "manage elections" and "ensure" those elections are "free and fair".[589] To put it differently, ensuring elections are free and fair depends on the ability to undertake activities similar to those assigned as "powers" to the other fourth branch institutions, including monitoring, investigating, research and education.

As noted above, section 7 of the Constitution requires the state to act collaboratively to realise the fundamental rights in the Bill of Rights. Given the mandates and powers discussed above, the challenge is to determine how the executive and fourth branch can contribute to realising a right like the right to information.

Public law scholarship on access to information and the executive branch focuses primarily on compliance with access to information law.[590] The concern in that body of literature is principally with the need to ensure that information access laws, as Ann Florini puts it, effectively "deter [officials and executives] from turning public service into a means of private gain."[591] There is far less of a focus in this body of literature on a role for the executive in (to use Katharine Young's term) "constituting"—or socially instituting and making legally effective—the right.[592]

The works that do describe a constitutive right to information role for the executive that is larger than just compliance with existing information access law, tend to focus on access to information in the absence of such laws or on the policies and procedures necessary to make such laws operational.[593] For instance, Laura Neuman and Richard Calland draw attention to the fact that, if any information is to be deliverable in terms of information access law, governments need to "establish the internal systems and processes [necessary to] generate… information".[594] Additionally, Neuman and Calland reason that executive and administrative bodies ought to organise the information they hold in ways that will make it understandable and useable.[595] Along a similar vein, Adam Candeub argues that by

[588] *SA Constitution* (n 5) 182(1)(a) and (b), 184(2)(a), 185(2), 187(2) and 188(1) and (2).
[589] Ibid 190(1).
[590] See for example, Kreimer (n 97); Florini (n 82); Oberg (n 75); Adeleke (n 11).
[591] Florini (n 82) 2.
[592] Katharine G Young, *Constituting Economic and Social Rights* (Oxford University Press) 6.
[593] For example, Neuman and Calland highlight the use of presidential decrees in states that do not have ATI legislation in place. Laura Neuman and Richard Calland, 'Making the Law Work: The Challenges of Implementation' in Ann Florini (ed), *The Right to Know* (Columbia University Press, 2007) 179, 185–187.
[594] Ibid 196.
[595] Ibid 201.

setting standards across agencies for data formatting, the executive can ensure the information it discloses electronically is usable.[596] However, this literature does not consider a role for the executive in constituting the right to information when information access law does exist.

Public law scholarship on access to information has paid even less attention to the fourth branch. Several works reference the role of a national human rights commission or other independent oversight body (ombud, commission or regulator) in monitoring and enforcing compliance with request law.[597] Riegner, for example, notes, "[e]nforcement is particularly important and can involve administrative appeals, ombudspersons, judicial review or information commissioners with their own powers to release documents, which tend to be most effective."[598]

One example of an endeavour to describe additional right to information obligations for the fourth branch is Fola Adeleke's account of the South African Human Rights Commission's access to information work.[599] Adeleke notes two ways in which the South African Human Rights Commission has championed PAIA in order to further the right to information. He describes the South African Human Rights Commission's PAIA-compliance training programmes for administrative and executive department officials and community workshops and law clinics designed to encourage PAIA use.[600] Nevertheless, this literature does not consider a constitutive role for the fourth branch beyond oversight over compliance with information access laws like PAIA.

Thus, when it comes to the role of the executive and fourth branch in realising the right to information, scholarship on access to information primarily focuses on compliance with existing information access law. The focus regarding the executive is on its observance of information access law, while the emphasis regarding the fourth branch is on compliance monitoring and enforcement. Compliance with existing information access law is essential for the realisation of the right—yet the functions and powers of the executive and fourth branch, outlined in this part, suggest more opportunities for advancing the right.

In chapter 5, I argued the concept of "comity"—often discussed in public law scholarship on separation of powers—offers a helpful way of identifying how the branches of government can cooperate to

[596] Candeub (n 78) 414.
[597] See for example, Pozen (n 74) 1105; Snell and Macdonald (n 110) 692; Adeleke (n 11) 65–66 and 68–69.
[598] Riegner (n 2) 338.
[599] Adeleke (n 11).
[600] Ibid 64–65.

realise rights. Specifically, I contended that the four aspects of the "active support" facet of comity can assist in determining how a particular branch can contribute to co-constituting a right. Briefly, the four aspects of "active support" are, first, that state branches and entities must give effect to decisions taken by other state entities (if those decisions relate to that branch's core function).[601] Second, each branch must interpret the decisions of another branch in a way that respects "the underlying substantive and institutional choices".[602] Third, if any state entity is faced with a task for which another branch is better suited, it must allocate that task to the other branch.[603] Finally, each branch should use its own capacity to further a shared objective.[604]

Regarding the first aspect of active support—supporting decisions taken by another branch—both the executive and fourth branch ought to comply with legal provisions aimed at effecting the right to information. As noted in chapter 4, several laws effect the right to information. The principal access law is the *Promotion of Access to Information Act 2000* (PAIA)[605] enacted specifically to give effect to the right to information. However, PAIA is supported by other provisions that require information holders to record and keep information or to disclose them proactively. The executive and fourth branch must support the decisions of the legislature aimed at effect the right to information by complying with all the legal provisions that effect the right to information. That is to say, these branches will advance the right when they, following information access law, record and keep information, lawfully process requests and make proactive disclosures.

However, in addition to respecting information access legislation through compliance, these two branches (the executive and the fourth branch) have capabilities that they can use to advance the right further. Specifically, the executive can use its constitutional capacity to coordinate the functions of departments of state and administration to encourage various state entities to comply with information access laws. Similarly, fourth branch entities can rely on their investigative and reporting abilities to urge state and non-state entities to comply with PAIA and other information access laws. Thus, the second way these branches can advance the right to information is by prompting other entities to comply with information access laws.

[601] Kavanagh (n 30) 236.
[602] Ibid.
[603] Ibid.
[604] Barber (n 166) 71.
[605] *PAIA* (n 6).

Further, as noted above, in exercising their constitutional mandates, both the executive and the fourth branch hear directly from the public about their concerns.[606] The direct interaction provides opportunities for these entities to identify information needs related to their subject areas, including those needs inadequately addressed in law—perhaps because there is no duty to record or keep certain information or there is a need for a proactive disclosure obligation. As both these branches also account to Parliament, they have occasion to bring such lacunas in the law to the attention of lawmakers. Thus, the third way these branches can advance the right to information is by co-constituting it in law through the amendment of existing law, or the making of new law, to address gaps that make some information insufficiently accessible.

As will become clear from the illustrative examples discussed in part III below, the executive can, to some extent, use its law-making power—the issuing of regulations—to address legal lacunas. Additionally, both branches, but in particular the executive, which has the constitutional ability to prepare and initiate legislation, can put forward draft wording for additional information access laws.[607]

III Three Ways of Contributing to the Realisation of the Right to Information

Consideration of the capacities of the executive and fourth branch in light of the mutual support aspect of comity has suggested three ways in which these branches can advance the right to information. First, the entities making up these branches can respect the legislature's contribution to realising the right by complying with PAIA and other information access laws. Second, both branches can encourage other entities to comply with information access law. Lastly, the executive and the fourth branch can contribute towards the amendment of PAIA and related laws or the adoption of new information access law.

In this part of the chapter, I provide illustrative examples of executive and fourth branch entities advancing the right to information in these three ways. Additionally, I draw on my analysis of these right-advancing activities to contend that the state needs to emphasise the co-construction of the right through mutually supportive action.

[606] See the discussion in part 0 about the three similarities shared by the two branches.
[607] *SA Constitution* (n 5) 85(1)(d).

A *Obligation 1: Comply with and Implement PAIA and other Information Access Law*

As noted above, the legislature has enacted PAIA to affect section 32 and has passed several other information access provisions that support or supplement the access provided through PAIA. PAIA empowers rights holders to request access to information held by a "public" or "private" body. "Public body" is defined as meaning:

> "*(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or*
> *(b) any other functionary or institution when-*
> *(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or*
> *(ii) exercising a public power or performing a public function in terms of any legislation*".[608]

Part "(a)" of the definition covers agencies in the executive and administration, and part "(b)" includes fourth branch entities (as they are entities exercising powers and performing functions in terms of the Constitution). Thus, PAIA expressly requires compliance by both the executive and fourth branch.

Similarly, many legal provisions supporting PAIA are addressed to the executive and fourth branch. For instance, the *Public Finance Management Act 1999* (PFMA)[609] requires executive and fourth branch institutions to record and report information about their assets, income, expenditure, etcetera by creating financial statements.[610] The creation of financial statements supports PAIA because these records can then be requested in terms of PAIA. Therefore, for PAIA to be effective and, thus, for section 32 to be realised, these two branches of government must also implement provisions that support PAIA.

Over and above the obligation to comply with information requests made in terms of PAIA, the South African Human Rights Commission had (until amendments to PAIA were recently implemented)

[608] *PAIA* (n 6) 1.
[609] *Public Finance Management Act 1999* (South Africa).
[610] Ibid 40(1).

additional duties under PAIA. These duties are related to the Commission's core function of protecting and promoting fundamental rights.[611] Thus, PAIA spelt out some of the South African Human Rights Commission's protection and promotion obligations—as they relate to the right to information. For instance, section 10 of PAIA required the South African Human Rights Commission to compile and publish a guide to assist potential requesters in using PAIA. Furthermore, section 84 of PAIA required the South African Human Rights Commission to report annually to Parliament on public bodies' (self-reported) levels of compliance with PAIA—hereinafter "PAIA Compliance Reports".[612]

In 2013 the South African legislature enacted the *Protection of Personal Information Act 2013*,[613] section 39 of which established an "Information Regulator". The Act transferred many of the oversight duties carried out by the South African Human Rights Commission under PAIA to the Regulator.[614] However, these provisions only came into effect in June 2021 and the Regulator has yet to issue PAIA Compliance Report, thus I focus in this chapter on the South African Human Rights Commission's PAIA Compliance Reports.

The South African Human Rights Commission's then Acting Chief Executive Officer noted in the Commission's most recent PAIA Compliance Report that "20 years after the passage of PAIA, an unacceptable majority of public bodies remain non-compliant with PAIA."[615] This non-compliance relates to various provisions in PAIA but of particular concern in the report is levels of compliance with section 32 of PAIA. Section 32 required all public bodies to report annually to the South African Human Rights Commission on, amongst other things, the number of requests they had received and the number of times they granted access to the information requested, partly granted access or refused access. The South African Human Rights Commission, in turn, was mandated to collate these figures and include them in its annual PAIA Compliance Report to Parliament.

The figures about requests provided in the section 32 reports reveal very little, on their own, about compliance. For instance, the mere fact of high numbers of refusals of access (and part refusals)

[611] *SA Constitution* (n 5) 184(1).
[612] To facilitate the South Africa Human Rights Commission's reporting function, section 32 required all public bodies to report annually to the Commission on certain aspects of their compliance with PAIA.
[613] *Protection of Personal Information Act 2013* (South Africa).
[614] Ibid 110.
[615] South African Human Rights Commission, *The Promotion of Access to Information Act (PAIA) Annual Report 2020/2021* (Report, 2021), 7 <https://www.sahrc.org.za/index.php/sahrc-publications/paia-annual-reports>.

might indicate low levels of compliance but not do so conclusively, as there may be valid reasons for those refusals. Fluctuations in the release rate over time might be a more accurate predictor of non-compliance, but even that may not provide the full picture. For instance, a quantitative analysis of request numbers over time might suggest possible non-compliance, such as when the number of access refusals goes up significantly from one year to the next. However, there may also be alternative explanations for such downward trends—for instance, because there have been more requests for (other people's) personal information. Additionally, the South African Human Rights Commission itself notes that it cannot verify and provide assurances for the content of section 32 reports due to limited resources.[616]

There are two sets of figures in the PAIA Compliance Reports related to requests that might (if accurately reported) seem to provide some insight into state entities' levels of compliance with request provisions, the figures related to "deemed refusals" and "deemed dismissals". In fact, Alasdair Roberts notes, that the Canadian Federal "Information Commissioner uses the 'deemed refusal rate'—the proportion of an institution's caseload that exceeds the statutory deadline—as a key measure of compliance."[617]

In terms of PAIA, if a decision is not provided on a request within 30 days of its receipt (which can—under certain circumstances—be extended once by a further 30 days) it is deemed to have been refused, a "deemed refusal".[618] In addition, PAIA provides that the deemed refusals of most public bodies can be "internally" appealed. That is to say, a requester can challenge the (deemed) refusal to grant access by appealing to a higher decision-making authority within the same entity (such as the responsible minister) to overturn the refusal. If the higher decision-making authority fails to provide a decision on the appeal within 30 days (no extensions are allowed), it is deemed to have dismissed the appeal, a "deemed dismissal".[619]

However, rather than recording a deemed refusal and dismissal rate, the PAIA Compliance Reports note the number of deemed refusals *that were appealed internally* to higher decision-making authorities and the number of deemed dismissals *that were challenged in court proceedings*.

[616] Ibid 46.
[617] Alasdair S Roberts, 'Spin Control and Freedom of Information: Lessons for the United Kingdom from Canada' (2005) 83(1) *Public Administration* 1, 15.
[618] *PAIA* (n 6) 25(1) and 26(1).
[619] Ibid 77(3).

According to the figures in the PAIA Compliance Report for 2020/21, 1.3% of requests received over the reporting period resulted in internal appeals against deemed refusals and 0.8% in court challenges to deemed dismissals.[620]

Unfortunately, because the South African Human Rights Commission's PAIA Compliance Reports only record *disputed* deemed refusals and dismissals; those figures are likely to be lower than the actual deemed refusal and dismissal rates (that is, all the deemed refusals or dismissals—not just those that are challenged). There is also evidence that suggests the figures in the PAIA Compliance Reports are not representative of the deemed refusal and dismissal rates. Until 2018, a civil society collective issued an annual "Shadow Report" to the South African Human Rights Commission's PAIA Compliance Report. These shadow reports have documented deemed refusal and dismissal rates that are much higher than the PAIA Compliance Reports would suggest.

For instance, according to the PAIA Compliance Report for 2017/18, 1.3% of requests resulted in internal appeals against deemed refusals and 2.5% in court challenges to deemed dismissals.[621] However, according to the civil society Shadow Report for the same period, 35.4% of requests made by reporting civil society organisations to public bodies were deemed refused, and 29.8% of their appeals were deemed dismissed.[622] The discrepancy in figures may be partly attributable to the fact that civil society has a smaller dataset (reporting, for instance, on only 191 requests in 2017/18, whereas the South Africa Human Rights Commission reported in the same year on 39,783 requests). The disparity does make it clear that the numbers of disputed deemed refusals and dismissals recorded in the annual PAIA Compliance Reports are unlikely to provide accurate insight into state entities' levels of compliance with request provisions.

Given that it is challenging to demonstrate compliance (or non-compliance) with PAIA based on the request data provided in the PAIA Compliance Reports, I turn instead to consider the observance rates of section 32 of PAIA. As noted above, section 32 required every national and

[620] South African Human Rights Commission, 'The Promotion of Access to Information Act (PAIA) Annual Report 2020/2021' (n 615) 48-88. I used the figures provided in the report to calculate the percentages provided here.
[621] South African Human Rights Commission, *The Promotion of Access to Information Act (PAIA) Annual Report 2017/2018* (Report, 2018), 27–66 <https://www.sahrc.org.za/index.php/sahrc-publications/paia-annual-reports> I used the figures provided in the report to calculate the percentages provided here.
[622] *Access to Information Network Shadow Report* (Access to Information Network) (Report, 2018), 3 and 5 <https://cer.org.za/wp-content/uploads/2019/09/ATI-Network-Shadow-Report-2018.pdf> I calculated the percentage for deemed dismissals using the figures provided in the report.

provincial department, municipality, fourth branch institution and other state-owned or controlled entity to submit a PAIA compliance report to the South African Human Rights Commission annually. The failure to submit a report clearly demonstrates non-compliance with a PAIA provision.

The PAIA Compliance Report for the year 2020/21, reflecting on 20 years of monitoring by the South African Human Rights Commission, indicates that even at its peak, compliance with section 32 was dismal. Over the 2020/21 reporting period, only 25 out of 40 national departments (63%) submitted their section 32 reports to the Commission—the most to ever have done so in any given year was 30 (in 2011/12 and 2014/15).[623] Similarly, the Compliance Reports demonstrate that only some provincial departments submitted section 32 reports—in one province in 2020/2021, not a single department did so.[624] Observance at the local level was even worse, with only 37 out of 278 (13%) of municipalities providing reports.[625]

Fourth branch institutions demonstrated similarly low levels of compliance. The 2020/2021 Compliance Report states that "[w]ith the exception of the Auditor-General, the [Electoral Commission] and the [South African Human Rights Commission], generally, institutions supporting democracy (ISDs) were not fully compliant with PAIA."[626] Contrastingly, the report notes that compliance by state-owned entities was "satisfactory."[627]

The poor levels of compliance with section 32 demonstrate inadequate observance of PAIA and a need for the state to take steps to remedy non-compliance. The 2020/21 PAIA Compliance Report notes that the South African Human Rights Commission has specifically brought the low levels of compliance with section 32 to the attention of Parliament;[628] and, as a consequence, Parliament's Justice Portfolio Committee asked for a list of departments and municipalities that had failed to

[623] South African Human Rights Commission, 'The Promotion of Access to Information Act (PAIA) Annual Report 2020/2021' (n 615) 34–35; The annual report only lists the number of departments that submitted section 32 reports, the SA government website however lists all the departments. 'National Departments', *South African Government* (Web Page, 11 January 2022) <https://www.gov.za/about-government/government-system/national-departments>.
[624] South African Human Rights Commission, 'The Promotion of Access to Information Act (PAIA) Annual Report 2020/2021' (n 615) 36–38.
[625] Ibid 39–40 The report states 17% of municipalities complied, however it also indicates that 37 out of 278 municipalities submitted reports and this amounts to only 13%.
[626] Ibid 43.
[627] Ibid 44.
[628] Ibid 38.

comply over the preceding three years. However, Parliament took no further action after receiving the list.[629]

Likewise, the 2020/21 report records that while the South African Human Rights Commission attempted to bolster compliance at the municipal level through a strategic partnership with the South African Local Government Association,[630] compliance remained "unacceptably low".[631] Further, the Commissions' efforts to improve compliance through training for municipal officials, while successful, could not be widely implemented "on account of sparse resources."[632]

The South African Human Rights Commission's actions demonstrate an attempt at cooperating with the legislature and the executive to protect and promote the right to information through better PAIA compliance. However, Parliament's failure to coordinate its actions with that of the Commission and provide sufficient funding to support the Commission's attempts at promoting PAIA compliance, undermines these attempts.

B *Obligation 2: Promoting Compliance with PAIA and Other Information Access Law*

Not only must the executive and fourth branch comply with information access law, but they ought to also use their constitutional competencies to encourage compliance by other state and non-state entities. According to the Constitution, it is part of the executive's role to coordinate the functions of ministerial and administrative departments.[633] One of the many devices the South African government has implemented to assist it in organising and overseeing ministerial and administrative departments' operations is the Management Performance Assessment Tool (MPAT).

MPAT is a tool developed by the Department of Planning Monitoring and Evaluation to assess management practices in the national and provincial governments to improve service delivery.[634] MPAT

[629] Ibid.
[630] A non-business government enterprise in terms of *Public Finance Management Act 1999* (n 609) Schedule 3.
[631] South African Human Rights Commission, 'The Promotion of Access to Information Act (PAIA) Annual Report 2020/2021' (n 615) 40–41.
[632] Ibid 41.
[633] *SA Constitution* (n 5) 85(b) and (c) and 125(d) and(e).
[634] South African Department of Performance Monitoring and Evaluation, *Management Performance Assessment Tool (MPAT): Report on Results of Assessment Process for 2011/2012* (Report, 30 May 2012) 99, 4 <https://www.dpme.gov.za/keyfocusareas/mpatSite/Pages/MPAT-2011.aspx> ('*MPAT Report 2011/12*').

provides an example of how the executive can advance the right to information by encouraging compliance with information access law. With the South African Human Rights Commission's assistance, the Department of Planning Monitoring and Evaluation developed and adopted access to information criteria as a performance measure, at least for a while. [635] The information access criteria were all related to provisions in PAIA.[636]

The Department of Planning Monitoring and Evaluation first included information access standards in MPAT during the 2012/13 reporting period. In that fiscal year, the Department of Planning Monitoring and Evaluation reported that 73% of departments did not meet PAIA requirements that were measured.[637] However, the 2013/14 MPAT Report noted that the "application of [PAIA] is the most improved standard between 2013 and 2014".[638] The report indicated the improvement was likely because of "increased awareness of the requirements of the legislation".[639] This performance improvement suggests that the executive's attempt to pressure state entities to adhere to information access law made a positive difference, thus advancing the right to information.

Unfortunately, the 2015 MPAT report focuses on reviewing the use of the tool over the preceding three years and thus does not provide the same type of detail as in previous years.[640] Specifically, the 2015 MPAT report does not mention information access at all. In addition, the Department of Planning Monitoring and Evaluation has not published any MPAT reports on its website since 2015.[641] However, the Office of the Chief Justice has published its internal audit reports on its MPAT results for the years

[635] South African Human Rights Commission, *The Promotion of Access to Information Act (PAIA) Annual Report 2012/2013* (Report, 2013), 26–28 <https://www.sahrc.org.za/index.php/sahrc-publications/paia-annual-reports>.

[636] (1) whether they have appointed a deputy information officer, as required by section 17; (2) whether they have a manual that explains their functions and provides detail on the types of records they hold, as required by section 14; whether they have issued a notice in terms of section 15 detailing information about records they hold that are proactively available (no request required); and whether they have submitted accurate reports to the South Africa Human Rights Commission, as required by section 32.

[637] South African Department of Performance Monitoring and Evaluation, *The State of Management Practices in the Public Service 2013* (Report, 2013) 42, 10 <https://www.dpme.gov.za/keyfocusareas/mpatSite/Pages/MPAT-2013.aspx> ('*MPAT Report 2012/13*').

[638] South African Department of Performance Monitoring and Evaluation, *The Management Performance Assessment Tool and the State of Management Practices in the Public Service 2014* (Report, 2014) 27, 18 <https://www.dpme.gov.za/keyfocusareas/mpatSite/Pages/MPAT-2014.aspx> ('*MPAT Report 2013/14*').

[639] Ibid.

[640] South African Department of Performance Monitoring and Evaluation, *MPAT 2012 to 2015 Lessons and Support to the Public Service* (Report, 2015) 17 <https://www.dpme.gov.za/keyfocusareas/mpatSite/Pages/MPAT-2015.aspx> ('*MPAT Report 2015*').

[641] 'Management Performance Assessment Tool', *Department of Performance Monitoring and Evaluation* (Web Page, 25 January 2022) <https://www.dpme.gov.za/keyfocusareas/mpatSite/Pages/default.aspx>.

2016 and 2018—while information access was still listed as a key performance area in 2016, this was no longer the case by 2018.[642]

Thus, while the executive took steps to advance the right to information by encouraging compliance with information access law through MPAT, it does not appear to have maintained that action. The executive's failure to keep promoting compliance with PAIA is a failure to support the legislature in its attempt to give effect to the right to information.

The functions of the fourth branch also provide opportunities to advance the right to information by encouraging compliance. At an abstract level, the importance of information for the realisation of rights and democracy more generally (as discussed in chapter 2 of the thesis) makes information access central to the core business of the fourth branch. Mark Tushnet notes that the fourth branch's primary responsibility is to "protect one or another dimension of democratic functioning".[643] Given that information access is necessary for the proper functioning of core aspects of democracy, fourth branch institutions ought to promote compliance with laws that facilitate access to information. A concrete example of this is the South African Human Rights Commission's work concerning PAIA. The Commission saw its PAIA obligations as corresponding with its broader constitutional mandate to protect, promote and monitor all fundamental rights.[644] Thus its trinitary mandate under PAIA was to protect, promote and monitor the right of access to information.

Much of the South African Human Rights Commission's PAIA "protection" and "promotion" work can be described as encouraging compliance with that Act.[645] The Commission undertook, as part of its PAIA promotion mandate, several activities theoretically fostering compliance. These activities included training for officials tasked with processing information requests, convening and acting as

[642] 'Internal Audit Activity (IAA) Planning Memorandum: Verification of the Management Performance Assessment Tool (MPAT)', *South African Government* (Web Page, 25 January 2022) <https://www.gov.za/documents/management-performance-assessment-tool-mpat-report-results-assessment-process-20112012>; 'Internal Audit Activity (IAA) Planning Memorandum: Verification of the Management Performance Assessment Tool (MPAT)', *South African Government* (Web Page, 25 January 2022) <https://www.gov.za/documents/management-performance-assessment-tool-mpat-report-results-assessment-process-20112012>.

[643] Mark Tushnet, 'Institutions Protecting Democracy: A Preliminary Inquiry' (2018) 12(2) *Law & Ethics of Human Rights* 181, 183.

[644] South African Human Rights Commission, 'The Promotion of Access to Information Act (PAIA) Annual Report 2020/2021' (n 615) 11.

[645] Whereas its "monitoring" mandate was carried out by reporting on request statistics and levels of observation of the requirements of section 32 of PAIA (the provision requiring state entities to provide the Commission with request data). This reporting on compliance might be more properly thought of as assisting Parliament with its oversight function.

secretariate for a national coordinating committee for such officials and commemorating the International Day for Universal Access to Information.[646] The activities mentioned could encourage compliance because they are likely to create awareness about PAIA and clarify for officials some uncertainty they might have about obligations that arise under PAIA.

Similarly, the South African Human Rights Commission's work related to its protection mandate also advanced information access. The Commission carries out its broader constitutional protection mandate by receiving and investigating complaints of fundamental rights violations. The Commission's protection work concerning PAIA likewise included receiving and investigating complaints of violations of PAIA provisions.[647] To resolve such complaints, the South African Human Rights Commission either mediated the grievances or issued investigative reports in which it made findings of non-compliance and recommendations for correction.[648] The investigative reports that make recommendations for the better observance of PAIA provide an example of a fourth branch institution supporting another state entity's compliance with PAIA.

The South African Human Rights Commission's investigative reports relating to complaints or concerns about other fundamental rights (not the right to information) provide an illustration of how the fourth branch generally can promote ATI compliance. A good example is the Commission's investigative report on the matter of the *South African Human Rights Commission (On behalf of Sasolburg residents) v Metsimaholo Local Municipality* (the Sasolburg matter).[649] In the Sasolburg matter, news reports that "residents of Sasolburg in the Free State Province had been using pit latrines as toilets" prompted the South African Human Rights Commission to investigate possible human rights violations.[650]

The Commission found in its report that while many residents of informal settlements in the Sasolburg area had brick-and-mortar homes provided as part of the government's reconstruction and development project, these homes were not connected to the sewerage and water supply networks.[651] This situation amounted to possible violations of various socioeconomic rights, including the right to water. Interestingly, from an access to information perspective, the Commission also considered the

[646] South African Human Rights Commission, 'The Promotion of Access to Information Act (PAIA) Annual Report 2020/2021' (n 615) 12–17.
[647] Ibid 27.
[648] See for example South African Human Rights Commission, *Lubbe Viljoen vs University of Pretoria* (Report, 8 April 2015) <https://www.sahrc.org.za/index.php/sahrc-publications/findings>.
[649] South African Human Rights Commission, *Investigative Reports Volume 3* (Report, 2015) 2–26 <https://www.sahrc.org.za/index.php/sahrc-publications/findings>.
[650] Ibid 2.
[651] Ibid 4–7.

community's related complaints about the municipality's lack of engagement with them—and, as a result, considered associated information access provisions in and outside of PAIA.

While the respondent municipality did have a plan (as is required for the realisation of socioeconomic rights) to connect Sasolburg residents to the existing sewerage and water supply networks, it had fallen behind in delivering on the plan. Additionally, residents complained that they had not had sufficient opportunity to participate "in the design and implementation of municipal projects" and had not been updated on progress with the backlog.[652] In this respect, the Commission noted that the *Municipal Finance Management Act 2003*[653] required Metsimaholo Local Municipality to provide the community with budgetary information as part of a consultative process for developing its infrastructure development plans.[654] Similarly, the Commission observed that the *Municipal Systems Act 2000*[655] required the municipality to disclose its development plans to the community to facilitate participation.[656]

Lastly, the South African Human Rights Commission referred to complementary requirements in PAIA. Specifically, section 15 of PAIA requires every state entity to compile and publish a list of records that it holds that is available to access without the need for a request—this would include the budgetary information referred to in the *Municipal Finance Management Act 2003* and the development plans referred to in the *Municipal Systems Act 2000*. In addition, section 14 of PAIA requires every state entity to create (and update annually) a manual to facilitate access to information it holds and include a copy of the section 15 list in the manual.

The Commission found that Metsimaholo Local Municipality had failed to comply with sections 14 and 15 of PAIA for the preceding three years.[657] Accordingly, the Commission held that the municipality's failure to comply with the relevant provisions in the *Municipal Finance Management Act 2003*, *Municipal Systems Act 2000* and PAIA amounted to a violation of the right to information.[658] Furthermore, as part of its recommended corrective action, the South Africa Human Rights Commission required the municipality to implement "[e]ffective structures and platforms to ensure… dissemination of information… on the issue of water and sanitation."[659]

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[652] Ibid 3.
[653] *Municipal Financial Management Act 2003* (n 7).
[654] South African Human Rights Commission, 'Investigative Reports Volume 3' (n 649) 21.
[655] *Municipal Systems Act 2000* (South Africa).
[656] South African Human Rights Commission, 'Investigative Reports Volume 3' (n 649) 21.
[657] Ibid 21–22.
[658] Ibid 24.
[659] Ibid 25.

The Sasolburg matter highlights how fourth branch institutions can identify information needs that contribute to or compound problems falling within their mandates. Then, having identified related information needs, these institutions can identify applicable legal provisions that regulate the accessibility of that information and can require or encourage compliance with those provisions. That is to say, fourth branch institutions can advance the right to information by requiring or encouraging other state entities to comply with legal provisions that would facilitate access to information that is related to the aspect of democracy with which they are concerned.

For instance, the Public Protector can consider whether provisions in the *Companies Act 2008* requiring information to be recorded or disclosed might apply to allegations of impropriety or prejudice in the conduct of state affairs it is investigating. Similar arguments can be made for each of the fourth branch institutions recognised in the South African Constitution. Each fourth branch institution is tasked with protecting some aspect of democracy, information is important for democracy (as discussed in chapter 2 of the thesis), and many laws governing these aspects of democracy include provisions that support or facilitate access. Thus, both the executive and the fourth branch have opportunities to advance information access by encouraging other entities to comply with information access law in the execution of their mandates.

C *Obligation 3: Recommend Changes to PAIA and Other Information Access Law*

In chapter 4, dealing with the legislature's right to information obligations, I argued that information access can never be "achieved" and that PAIA and the information access provisions that supplement and support it should be regularly updated. However, while Parliament ought to ensure information access laws are routinely revised (and thus to "constitute" the right in law), the legislature's core functions do not lead it to keep abreast of the changing information landscape. Instead, it is the executive and fourth branch that hear directly from members of the public about their information needs and that are attuned to international best practices regarding access to information.

The executive's law-making function—the issuance of regulations—is used to provide the more "detailed, technical, rules" needed to supplement often broader, less specific legislative provisions.[660] As part of the process for developing these more detailed, technical rules, the executive, or the administration on its behalf, will consult with and take complaints from individuals and communities

[660] Barber (n 166) 69.

affected by the relevant law.[661] This direct interaction with the public allows the executive to learn about the information needs of individuals and communities related to the issue that the relevant legislation governs.

Similarly, fourth branch institutions—particularly those that investigate complaints—also have occasion to understand how information deficits play a role in limiting the capacity of individuals to exercise or protect their rights. Additionally, both branches are staffed by persons with expertise in their particular subject area.[662] As these professionals keep abreast of developments in best practices within their specialist subject areas, they can identify advances within their disciplines related to information access.

The Sasolburg matter discussed in sub-section B above illustrates that fourth branch institutions can identify information deficits that limit individuals' or communities' capacity to exercise or protect their rights and insist on compliance with legal provisions that would facilitate that access. The executive's similar engagement with communities likewise provides it with opportunities to identify information needs. However, not all shortfalls in information access can be resolved in the way it was in the Sasolburg matter. Sometimes, no existing legal provision would facilitate access to the relevant information, and new legal provisions will have to be created—as would be the case if no law requires specific information to be recorded.

If these branches identify information needs that must be addressed by adopting new law, there are two ways they assist Parliament with that task. That is to say, there are two ways that the executive and fourth branch can co-constitute the right in law along with the legislature. First, in some instances, the executive can use its law-making power to create the law required to address the legal lacuna. Second, both branches can recommend to Parliament that it must amend PAIA or other information access law or adopt additional legislation.

To the extent an information need that can only be addressed through the adoption of new law falls within the scope of a statute that authorises the executive to issue regulations, the executive ought to use that power to create such new law. The National Treasury's public-private partnership Regulations,

[661] Ibid; Carolan (n 572) 131.

[662] Regarding the expertise of officials in the executive, see Barber (n 166) 66–67; and Carolan (n 572) 108–109; Regarding the expertise of fourth branch institutions, see Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (n 580) 56 and 60; and Tarunabh Khaitan, 'Guarantor Institutions' [2021] *Asian Journal of Comparative Law* 1, 5–6 and 19.

issued in terms of the *Public Finance Management Act 1999*[663] provide an example.[664] The public-private partnership regulations include provisions requiring state institutions to create written records of the partnership projects they have considered and the factors they deliberated on to determine the feasibility of potential projects.[665] These information provisions support PAIA because they make it possible to request records of information related to public-private partnerships, many of which are central to the government's plan for realising socioeconomic rights.

In its 2021 budget, the National Treasury noted that South Africa plans to rely on public-private partnerships to deliver on several socioeconomic projects aimed at meeting goals in the state's "National Development Plan".[666] The National Development Plan is the South African government's plan for addressing poverty and inequality,[667] a plan that overlaps to a large extent with the state's socioeconomic and equality rights obligations.[668] Thus, information about some public-private partnerships will be information about how the state plans to deliver on socioeconomic rights and is, therefore, vital for realising those rights.

Regarding recommendations for amending PAIA, section 83(3)(a) of PAIA provided (until 30 June 2021, whereafter a similar provision relates to the Information Regulator rather than the South Africa Human Rights Commission) that the Commission may:

> *make recommendations for-*
>
> > *(i) the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively; and*
> >
> > *(ii) procedures in terms of which public and private bodies make information electronically available;*

Thus, recommendations for improving PAIA itself rested, until 2021, primarily with the South Africa Human Rights Commission and now with the Information Regulator.

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[663] *Public Finance Management Act 1999* (n 609).
[664] *Treasury Regulation 16 (Public Private Partnerships) 2003* (South Africa) 16.
[665] Ibid 16.3 and 16.4.
[666] *Budget Review 2021* (Budget Review, National Treasury, Republic of South Africa, 24 February 2021) Annexure E <http://www.treasury.gov.za/documents/National%20Budget/2021/default.aspx>.
[667] *National Development Plan 2030: Our Future-Make It Work* (Planning Document, National Planning Commission, Republic of South Africa, 15 August 2012) 1.
[668] Michelman and Liebenberg (n 563) 412.

The South Africa Human Rights Commission has included several recommendations for improving and strengthening PAIA in its annual PAIA Compliance Reports in fulfilment of this section 83 obligation. Many of the Commission's recommendations were based on consultations with individuals who work with or regularly use PAIA and on international and regional best practices.[669] However, the government has rarely ever acted on any of the Commission's recommendations.[670] To illustrate, the 2015-17 PAIA Compliance Report lists all the recommendations the Commission had, up to that date, made regarding PAIA along with a note on progress with implementation.[671] Out of the 16 recommendations listed, no action was taken on ten; these entailed eight that proposed legislative reform and two that recommended the adoption of regulations.

While the obligation to make recommendations for improving PAIA will primarily rest with the Information Regulator going forward, other fourth branch institutions have opportunities to make recommendations regarding the amendment of information access laws. As noted above, sometimes, the fourth branch will identify an information need and determine that it can only be addressed by adopting a new law. Similarly, the executive might identify a legal lacuna related to information access that it cannot address using its ability to make law through regulations. In the circumstances of such shortfalls in the law, these branches ought to recommend that Parliament adopt new legislation to remedy the shortfall.

For example, while the Constitutional Court has confirmed that the right to vote encompasses a right to an *informed* vote,[672] currently, no South African law requires political parties to make their constituting documents publicly accessible, and some parties do not publish them.[673] Thus, if access to the founding documents of political parties is necessary for an informed vote, then this is a lacuna in the law that ought to be addressed.

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[669] South African Human Rights Commission, 'The Promotion of Access to Information Act (PAIA) Annual Report 2020/2021' (n 615) 18; South African Human Rights Commission, *The Promotion of Access to Information Act (PAIA) Annual Report 2015-17* (Report, 2017), 12 <https://www.sahrc.org.za/index.php/sahrc-publications/paia-annual-reports>.

[670] South African Human Rights Commission, *The Promotion of Access to Information Act (PAIA) Annual Report 2019/2020* (Report, 2020), 2 <https://www.sahrc.org.za/index.php/sahrc-publications/paia-annual-reports>.

[671] South African Human Rights Commission, 'The Promotion of Access to Information Act (PAIA) Annual Report 2015-17' (n 669) 23–34.

[672] *MVC [No 2]* (n 19) 33–39.

[673] The African Commission on Human and Peoples' Rights, *Proactive Disclosure of Information and Elections in South Africa: An Assessment of South Africa's Compliance with the Guidelines on Access to Information and Elections in Africa* (Report, 2020), 39 <https://www.chr.up.ac.za/images/researchunits/dgdr/documents/reports/Proactive_Disclosure_of_Information_and_Elections_in_South_Africa.pdf>.

The Constitutional Court has not considered whether access to political party constitutions is necessary for an informed vote. However, the African Union Commission, in its *Guidelines on Access to Information and Elections in Africa* (the AU Guidelines), recommends that party constitutions be made publicly available to facilitate the exercise of the right to vote.[674] Additionally, the University of Pretoria's Centre for Human Rights, in its review of South Africa's compliance with the AU Guidelines, calls on the Electoral Commission to consider whether legislative reform is required to address this information gap.[675]

As the fourth branch institution responsible for ensuring elections are free and fair, the Electoral Commission is well-positioned to consider the importance of political party constitutions for the right to vote. Further, the Electoral Commission has the capacity to communicate with Parliament about the fact that no legal provision requires public disclosure of constituting documents.[676] In fact, in its 2021 annual report, the Electoral Commission notes how it has given input into potential and actual legislative changes. First, the Electoral Commission indicated that the Covid-19 pandemic "introduced an added health dimension" to the management of the local government elections conducted that year that required legislative and policy changes. Accordingly, it noted, the Electoral Commission was prepared to provide input into debates around the required legislative and policy changes. Similarly, the Electoral Commission recorded that it drafted the *Electoral Laws Amendment Bill* to address various issues, including voters' privacy rights. However, the Electoral Commission did not note any recommendations related to information access.

Other fourth branch institutions can also use their reporting function to recommend legislative change and make themselves available to assist or advise on such change or draft proposed legislation. Similarly, the executive has the capacity to prepare and initiate legislation—thus, it too can bring proposed legislative change before Parliament for it to consider and debate.[677] Should these branches propose a legislative change that might advance the right to information, they would be working with Parliament to co-constitute the right.

[674] African Commission on Human and Peoples' Rights, *Guidelines on Access to Information and Elections in Africa* (Regional Guidelines, African Commission on Human and Peoples' Rights, 15 November 2017) 19 <https://www.achpr.org/legalinstruments/>.
[675] The African Commission on Human and Peoples' Rights (n 673) 57.
[676] *SA Constitution* (n 5) 181(5).
[677] Ibid 185(1)(d).

IV CONCLUSION

With this chapter, I have attempted to outline the contribution that the executive and fourth branch can, and have, made to realising the right to information. I argued that considering the functions of these branches in light of the concept of comity suggests three ways that these state entities can support Parliament's attempt to give effect through legislation to the right to information.

Firstly, I have suggested that it is essential that these institutions comply with PAIA and other information access laws. Given that Parliament has enacted PAIA as the principal piece of legislation facilitating access to information, compliance with PAIA is necessary for realising the right to information. Thus, these two branches of government need to, at least, comply with PAIA and the legal provisions that make it possible for PAIA to function optimally (record-creation and keeping provisions).

Unfortunately, the data from the South Africa Human Rights Commission's annual PAIA Compliance Reports suggests that both the executive and fourth branch are failing to fully implement PAIA. Additionally, the South Africa Human Rights Commission reports that Parliament has failed to take significant action regarding the abysmal PAIA compliance statistics, even when the Commission raised specific concerns. The legislature's inaction suggests a failure to take seriously the need to work with other branches to realise the right to information.

Second, I have reasoned that both the executive and fourth branch ought to encourage other institutions to comply with PAIA and related information access laws. Both these branches have opportunities to do so. The executive has the chance to encourage PAIA compliance as it carries out its obligation to coordinate the functions of departments in the executive and administration. At the same time, the fourth branch has occasion to promote the observance of information access law when it offers training and acts as an intermediary in disputes or issues recommendations.

Both branches have made some attempts to advance PAIA, demonstrating some support for the legislature's attempts to realise the right to information. The South Africa Human Rights Commission's recommendations requiring compliance with legal provisions that supplement and support PAIA—as in the Sasolburg matter—illustrate how other fourth branch institutions might also offer this type of support to the legislature. The executive's seemingly successful attempt at promoting PAIA by including it as a key performance area for department managers is laudable but must be sustained.

Third, both these branches ought to assist the legislature with strengthening PAIA and related legal provisions by making recommendations for their amendment or the adoption of new laws. Both have opportunities to learn of information needs and gaps as they consult with persons and groups whose rights and interests are affected by the law or government, or private, action. Additionally, both branches employ professional staff who will have occasion to learn about best practice standards related to information access within their areas of speciality and bring these developments to the legislature's attention. Additionally, the executive can strengthen PAIA by including record-creation and record-keeping obligations in the regulations it issues. However, some information needs will have to be addressed through legislative amendment.

Until the issuance of its 2021 PAIA Compliance Report to Parliament, the South Africa Human Rights Commission was primarily responsible for making recommendations to the legislature on ways to strengthen the right to information by amending PAIA. From 2022 the reporting obligation falls on the Information Regulator. However, if recommendations to Parliament regarding amendments to PAIA are to advance the right to information, the legislature will have to take some action concerning those recommendations. Some of the recommendations from the fourth branch may involve balancing decisions by Parliament—may require the legislature to rebalance access against another right or interest. While the legislature has the prerogative and obligation to undertake those balancing exercises and make those decisions, it ought to engage at least with relevant recommendations coming from the fourth branch. A failure to reason at a minimum about the fourth branch's proposals amounts to a failure to recognise the fourth branch's role in co-constituting the right with the legislature.

My analysis of the three ways the executive and fourth branch have attempted to advance the right to information provides three key insights. First, the illustrative examples demonstrate that these two branches can do more than simply comply with information access law—they can co-constitute the right with Parliament. Second, both branches have evidenced a willingness, at least to some degree, to contribute to advancing the right to information. The executive and the fourth branch have at different times and in various ways coordinated their actions to support PAIA and thus to aid Parliament's work in advancing the right. Third, however, some inaction or regressive action (like the Department of Planning Monitoring and Evaluation seemingly removing access to information as a key performance indicator) suggests there is a lack of understanding of the need for cooperation between the branches to realise this right. Likewise, Parliament's failure to engage seriously with recommendations made by other branches suggests a lack of comity.

Overall, to some extent, the executive, fourth branch and legislature have all neglected aspects of the mutual support element of comity (the requirement that each branch respect the others' decisions and integrate its actions with those of the other branches). When the realisation of rights depends on that comity, a failure by the branches of the state to respect each other's actions and reciprocate will undermine the right.

CHAPTER 7: INSIGHTS

I INTRODUCTION

Chapter 2 outlined three core values recognised in scholarship as underpinning legal and constitutional guarantees of information access: transparency, accountability and openness. Additionally, it set out four theoretical justifications offered in scholarship for the recognition of a fundamental right of access to information. I concluded that chapter by arguing that the most compelling justifications for an express right of access to information are those anchored in democracy and fundamental rights, given that they are firmly grounded in the values that underpin information accessibility.

In chapter 3, I outlined three common forms of recognition of a right to information in constitutional democracies—legal protection by statute alone (what I have termed "mere legal recognition"), derived constitutional recognition and express constitutional recognition. I argued that the optimal way to secure access to the information required to engage meaningfully in democratic processes and protect and realise other fundamental rights is through the express constitutional recognition of a right of access to information. Building on this argument, in chapters 4 through 6, I analysed the various attempts of the different branches of the South African government to give effect to the express constitutional right to information found in section 32 of South Africa's Constitution.

In this chapter, I apply the tentative conclusions from the preceding three chapters to respond to the thesis' central question: What insights can be gathered from the South African experience of having an express right to information in the Constitution? My analysis of the South African experience suggests four insights about the conditions necessary for an express right to information to be effective. As I note throughout this chapter, these four insights relate to facets of the South African experience that may not be shared elsewhere; including unique aspects of the constitutional text and a constitutional obligation to develop the common law to give effect to fundamental rights. Nevertheless, these insights might be adaptable to other jurisdictions and, thus, could serve as valuable points of reflection for other states that want to consider including express constitutional rights to information in their constitutions.

First, to secure an adequate level of access to information, a framework of information access law is required—rather than one general instrument focused on making information accessible. That is to say, to make accessible all the information required to partake in democratic processes and exercise and protect fundamental rights requires multiple legal provisions that facilitate information access. Such a framework would include at least two types of access legislation incorporating two mechanisms for making information accessible. Firstly, regarding the types of access law, making information accessible requires both a "general access law" and "specific access provisions". By "general access law", I mean legislation principally focused on facilitating access to information. Contrastingly, "specific access provisions" refers to legal provisions that facilitate access to information but that can be found inside laws that regulate some other issue. Secondly, regarding mechanisms for making information accessible, legislation that facilitates access to information ordinarily does so either by facilitating requests for information or requiring information holders to publish relevant information proactively. Both mechanisms are necessary to facilitate access to information adequately.

Second, for a right to information to secure a framework of information access law, it must be regarded as giving rise to multiple obligations. In other words, the right must require the state to enact all the legislation identified above as necessary to effect the right adequately. Additionally, the right must necessitate the enactment of additional provisions should new information needs arise over time.

Third, effectively carrying out the multiple duties that arise from a right to information requires active contributions from all the branches of the state. That is to say, the branches of the state must work cooperatively to identify information needs that need to be addressed in law and to design and implement such laws.

The fourth insight is that the judicial enforcement of a right to information hinges on whether the constitutional provisions that deal with the scope and application of fundamental rights are suited to facilitate the enforcement of positive obligations. Thus, either textually or through interpretation, the constitutional provisions that facilitate judicial review must provide for the review of inaction on positive duties arising from fundamental rights.

To derive the four insights from the South African experience, I begin in part II by analysing the learning from the preceding chapters related to the realisation of the right through legislation. In this part, I contend that establishing and maintaining a legal framework that can facilitate information access requires ongoing legislative engagement and the cooperation of all the branches of the state. Ongoing

legislative involvement is essential for three reasons. First, making information adequately accessible requires a range of legislative instruments (general access laws and specific access provisions) and access mechanisms (request mechanisms and proactive disclosure requirements). Second, securing information access through legislation requires the periodic review of existing laws to determine whether and how to strengthen or replace them. Third, occasionally, societal changes give rise to new information needs, which may have to be addressed through new legislation or the revision of existing legislation.

Next, in part III, I analyse the findings from the preceding chapters regarding the enforcement of the right. I argue that express constitutional recognition ensures right holders have access to multiple forums in which to advocate for access legislation. For instance, right holders can rely on their right to advocate for legislation to give effect to an aspect of the right to information before the legislature, in a court or before a fourth branch institution. Additionally, in states like South Africa, where the judiciary has an accepted role in realising constitutional provisions through the development of the common law, a right to information provides opportunities for the judiciary to contribute to the development of the legal information access framework. However, as the right is never fully realisable, I argue it must be seen as giving rise to multiple ongoing obligations to realise the right in law. Additionally, I contend that effective judicial enforcement is contingent on the constitutional provisions facilitating judicial review being suited to the enforcement of positive obligations.

Finally, I conclude in part IV by combining the analysis in parts II and III to identify the four insights about conditions necessary for an express right to information to be effective.

II Effecting the Right Through Legislation

In this section, I argue that we can extract at least two understandings from the South African experience with seeking to give effect to a constitutional right to information through legislation.

First, ongoing legislative involvement is needed to make accessible the information required to partake in democratic processes and to ensure the continued protection and realisation of such rights. In short, a once-off law is insufficient, and the law may need to be amended from time to time.

As outlined in chapter 3 of the thesis, by “general access legislation” I mean legal instruments intended to provide a mechanism for accessing information in general. General access legislation can be

contrasted with "specific access provisions" which are information access provisions inside laws that are principally concerned with regulating some other issue. Whereas general access legislation secures access to information in general, specific access provisions facilitate access for a particular purpose (a purpose related to the issue regulated by the relevant law).

For example, South Africa's *Promotion of Access to Information Act 2000* ("*PAIA*") is "general access legislation" because it is principally focused on facilitating access to information (which it does by enabling information requests). Contrastingly, section 35 of the South African *Uniform Rules of Court Act 1959* ("*Uniform Rules*")[678] is an example of a specific access provision. Although the *Uniform Rules* are principally concerned with regulating the conduct of court proceedings, section 35 provides for the disclosure of information. That section requires parties to a litigated dispute to notify each other at a particular point in the proceedings of any recorded information they hold that is relevant to the dispute. In addition, the *Uniform Rules* provide for copies of that information to be made accessible to the other party if requested or for the information holder to object to the disclosure on valid grounds.

Because no particular information interests are contemplated when crafting or adopting general access laws, the interest in information access is balanced, in the abstract, against other rights and interests. Contrastingly, because specific access provisions relate to an identified information interest, the law-maker has a concrete understanding of the information need that is being balanced against other rights and interests. In this part, I argue that information access requires a broad range of legislative instruments (both general and specific). Additionally, I contend that some of these instruments will have to be request mechanisms while others must provide for proactive disclosure.

Second, the South African case study demonstrates that, given the broad range of laws required to effect the right, realising the right necessitates inter-branch cooperation. To identify effectively information needs that fall within the scope of the right that needs to be realised and to craft appropriate provisions, the state requires input from all the branches of government.

A *Effective Access Requires the Legislature's Ongoing Involvement*

As observed, the first understanding from the South African experience with an express constitutional right to information is that ongoing legislative involvement is required to make accessible the

[678] *Uniform Rules of Court Act 1959* (n 207).

information required to partake in democratic processes and protect and realise rights. There are at least three reasons why the legislature must continuously create and update information access laws to give adequate effect to the right to information. First, multiple legal instruments are required to secure access to the information needed to support the ends recognised in the underlying justifications for a right to information. Second, as information holders find and exploit loopholes in access laws, these points of vulnerability will need to be addressed. Third, new information needs arise as societies change. For a right to information to remain meaningful, legal instruments must adapt to changing needs and address the new types of information that may come to fall within the scope of the existing right.

1 *Multiple Legal Instruments Are Required*

My analysis in the preceding three chapters of South Africa's experience has demonstrated that information access requires many legislative instruments—a general access instrument cannot adequately facilitate access to information on its own. There are at least two reasons why a general access instrument on its own is insufficient. The first relates to how information interests are balanced against other rights and interests. The second relates to the degree of ease when accessing information.

First, as I argued in chapters 3 and 4, different information needs must be balanced differently against other rights and interests. The tipping point will shift depending on the nature of the right or interest that information could support. Some information more directly supports the ends recognised in the underlying justifications for the recognition of a right to information—such as information that supports democratic participation or the exercise of fundamental rights. Information that directly supports the ends recognised in the underlying justifications for recognising a right to information should be accorded more weight when balanced against other rights and interests.

While specific access provisions are necessary to secure access to some information, they also are not sufficient on their own. As I argued in chapter 3 of the thesis, it would be unreasonable to expect the legislature to anticipate every possible information interest that might arise. Thus, specific access provisions cannot cover all information interests, and a general access law is also necessary.

Additionally, regarding general access laws, I argued in chapter 4 that while a proactive disclosure mechanism could likely address some of the concerns with request laws, a request mechanism is still

necessary. Specifically, I argued that proactive disclosure would not address the problem of information holders ignoring or evading their obligations under the law. For example, when information holders evade obligations under a request law, a requester has legal standing to enforce compliance. By contrast, a proactive disclosure obligation is not generally connected to an enforceable legal right; thus, no one can demand compliance.

Second, different information needs may require varying degrees of access. The South African Constitutional Court found in *My Vote Counts NPC v Minister of Justice and Correctional Services* ("*MVC [No 2]*"),[679] as discussed in chapter 5, that "the nature, importance and purpose of certain constitutional rights or information that relates to them" will affect how easily accessible the information must be.[680] For example, concerning political parties' private funding information (the information need at issue in the *MVC [No 2]* judgment), the Court determined that the request process was too "laborious" and expensive to secure a reasonable level of access.[681] Thus, the Court found that even if private funding information could be accessed by request, that was not a sufficiently simple method of access given the important nature of the information (private funding information) and the fundamental democratic right it supports (the right to vote). This contention relates to whether information is disclosable by request or proactively. And, in cases of proactive disclosure, it extends to how widely the information is shared (for instance, just on a departmental website or on prominent social media sites as well).

These two understandings suggest a key learning for South Africa and section 32 of the Constitution: PAIA, while necessary, is not sufficient on its own to ensure adequate levels of information access. PAIA must be supplemented with specific access provisions in at least two sets of circumstances. First, if the balance struck in PAIA between information access and other rights and interest is inadequate, given the weight of the information interest, the state ought to enact a specific access provision. Second, if the relevant information serves a particularly important purpose (such as the right to vote) or is required by disadvantaged communities or persons, access by request under PAIA is inadequate. Instead, the state must adopt legal provisions that will facilitate easier access to information that serves a particularly important purpose or is required by disadvantaged communities or persons.

In sum, ensuring the information needed to protect and exercise the democratic and fundamental rights underpinning the recognition of a right to information requires general access laws *and* specific

[679] *MVC [No 2]* (n 19).
[680] Ibid 25.
[681] Ibid 70.

access provisions. Additionally, general access laws should contain some form of request mechanism and, at a minimum, certain information must be proactively disclosed (depending on the nature of the information or the right or interest the information supports). That is to say, rather than a single legal instrument, securing access to the information that aids the objectives recognised in the justifications for the right requires a network of access laws.

2 *Closing Loopholes in Access Laws*

The second reason why effecting a right to information through legislation requires ongoing legislative involvement rather than just a once-off act is that information holders will find and exploit weaknesses in information legislation. As a result, loopholes must be identified and closed if access laws are to remain effective. An example is the criticism that information holders will sometimes interpret information requests overly narrowly.[682] Thus, if a requester fails to use the exact words to describe the record as used by the information holder, the request can be denied because the requested record (technically) does not exist.

Addressing this problem might require better oversight. By this, I mean that, in South Africa, for example, the Information Regulator or the South African Human Rights Commission could bring government entities that repeatedly narrowly interpret requests to the attention of Parliament. Parliament could, in turn, require the relevant minister to ensure their department complies with the spirit and not just the letter of the law.

However, the problem of overly narrow interpretation could also (or instead) be addressed through an amendment to existing law. For instance, information holders might be required to provide the requester with metadata (descriptions) for any records the entity holds that are similar to the record requested. The metadata will enable the requester to determine whether the information they are looking for is in these alternative records.

Another way for information holders to find loopholes is when disclosure addresses activities on one platform, and information holders avoid disclosure by using a different platform. For example, Abbey Wood and Anne Ravel have noted that political advertisers in the United States of America could avoid

[682] A practice that has, for instance, been documented by the legal anthropologist Aradhana Sharma in India. Aradhana Sharma, 'State Transparency after the Neoliberal Turn: The Politics, Limits, and Paradoxes of India's Right to Information Law' (2013) 36(2) *Political and Legal Anthropology Review* 308, 314–315.

disclosure requirements that applied to advertising in print, on television and over the radio by advertising online.[683] As a result, online political advertisements did not necessarily carry disclaimers, for instance, about who funded them.[684]

If information laws are designed to give effect to a constitutional right to information, then the imperative to close any identifiable loopholes comes from the right itself. Therefore, the right should be seen as giving rise to duties to revise and amend information access laws to ensure they remain relevant and effective. Thus, the key insight for South Africa and section 32 of the Constitution is that the government must periodically review PAIA and other information access laws to determine whether these laws need to be amended or replaced.

3 *New Information Needs*

A third reason why effecting a right to information through legislation requires ongoing legislative involvement is that new information needs will occasionally arise. As societies change, new information needs come about as a result. If these new information needs fall within the scope of a right to information and are not adequately addressed through existing access legislation, legal provisions must be adopted or amended to facilitate access.

An example of a more recent information need relates to the rise of advertising on social media platforms and how these adverts target niche audiences. In the past, advertising could, to some extent, be tailored to specific audiences—but typically, these adverts still targeted reasonably large groups.[685] Such targeted advertising in the past included placing adverts in particular newspapers, distributing flyers in specific neighbourhoods, broadcasting television adverts in only certain regions or scheduling them to run at a time when a specific demographic typically watches television. However, in recent times, advertisers can use so-called "microtargeting" services offered by social media platforms.

The microtargeting services, like targeted advertising of the past, allow advertisers to tailor their messages to particular audiences. However, unlike targeted advertising of the past, microtargeting directs advertising only at persons at the intersection of a particular set of characteristics. For example, the social media company Meta enables advertisers to target persons that are from a particular area,

[683] Abby K Wood and Ann M Ravel, 'Fool Me Once: Regulating Fake News and Other Online Advertising' (2017) 91(6) *Southern California Law Review* 1223, 1227.
[684] Ibid 1253.
[685] Ibid 1255.

fall within a specific age group and are of a particular gender or people that have interacted with certain online content.[686] As a result, advertisers can give contradictory messages to different audiences in an attempt to "divide and conquer" by reinforcing polarisation.[687] Additionally, because these adverts are only shown to a tailored audience and disappear after a time period, untargeted people are often unaware of the advertising.[688] That is to say, the practices of microtargeting and disappearing advertisements are creating an information deficit.

Abby Wood and Ann Ravel identified at least three audiences affected by the information deficit created by microtargeting and disappearing advertisements.[689] First, the information deficit makes it harder for regulators to keep track of regulated forms of advertising.[690] Second, the information deficit prevents researchers, non-profit organisations and fact-checkers from studying and possibly countering "misinformation" (or "disinformation" and "fake news") shared on social media.[691] Third, the information deficit limits the ability of political actors (candidates, parties or lobby groups) to counter messages shared with potential voters.[692]

The third category identified by Wood and Ravel can be expanded beyond purely political information. For instance, the information deficit created by microtargeting and disappearing advertisements could prevent experts from countering potentially dangerous misinformation about vaccines (for instance, during the recent Covid-19 global pandemic).

My purpose is not to propose a provision setting out disclosure obligations that might respond to these specific information needs.[693] Instead, I seek to highlight that society changes and that these changes give rise to new information needs. Another significant modern change that will continue to give rise to new information needs is the expanding use of artificial intelligence.[694] As new information needs

[686] Ibid 1230–1231; 'Ad Targeting: Options to Reach Your Audience Online', *Meta for Business* (Web Page, 21 May 2023) <https://en-gb.facebook.com/business/ads/ad-targeting>.
[687] Wood and Ravel (n 683) 1259–1260.
[688] Ibid 1232; Aimee Brownbill et al, 'How Dark Is "Dark Advertising"? We Audited Facebook, Google and Other Platforms to Find Out', *The Conversation* (online, 6 September 2022) <http://theconversation.com/how-dark-is-dark-advertising-we-audited-facebook-google-and-other-platforms-to-find-out-189310>.
[689] Wood and Ravel (n 683).
[690] Ibid 1259.
[691] Ibid 1259. By misinformation I mean information which is ultimately found to be untrue but was presented as truthful, either mistakenly or deliberately. The deliberate misrepresentation of untrue information is sometimes referred to as "disinformation", or if shared in the style of a news article as "fake news".
[692] Ibid 1259.
[693] For an example of a suggestion of a disclosure regime related to political advertising on social media platforms see ibid 1256–1265.
[694] There is, for instance, already a growing body of legal scholarship on the use and limits of "explainable artificial intelligence" systems (allowing for humans to understand how a computerised system reached a

arise, the legal framework aimed at effecting a right to information must adapt to meet these new needs.

The key learning for South Africa and section 32 of the Constitution is that new information needs will arise that will fall within the scope of section 32(1) of the Constitution. If the state is to ensure the law continues to make section 32 effective, it will have to enact additional legislation in response to new information needs that fall within the scope of section 32(1). As noted above,[695] a new information need could possibly be adequately addressed through PAIA, or it might need to be addressed through a specific access provision. Even if the new information need can be adequately addressed through PAIA, the state will have to enact other law to make it accessible because (as I established in chapter 4) information is only requestable under PAIA if it is recorded and kept. Thus, the legislature will have to enact a record-creation and keeping obligation in order to make the new information accessible under PAIA.

B *Effecting Access Requires Cooperation Between Branches of Government*

The South African example also demonstrates that intergovernmental cooperation is crucial for identifying and addressing new information needs. Underpinning this experience in South Africa is the constitutional imperative in section 7 of the South African Constitution that the state "respect, protect, promote and fulfil the rights in the Bill of Rights." As I noted in chapter 4 of the thesis, the Constitutional Court has determined that the phrase "the state" in section 7(2) refers to the state *as a whole*.[696] Specifically, the Court found that "the obligation [under section 7(2)] to enact legislation to fulfil the rights in the Bill of Rights falls [jointly] upon the national executive, organs of state, Chapter 9 institutions, Parliament and the President."[697] Therefore, as section 7(2) requires the branches of the state to work together to realise each of the fundamental rights, it gives rise to considerations related to the separation of powers.

In chapter 4 of the thesis (dealing with the legislature), I established that the primary responsibility for effecting the right to information falls on South Africa's national Parliament, given that legislation is a preferable means of securing access to information. However, section 7(2) requires all the branches of

decision). See for example, Ashley Deeks, 'The Judicial Demand for Explainable Artificial Intelligence' (2019) 119(7) *Columbia Law Review* 1829; Marco Antonio Lasmar Almada et al, 'Towards eXplainable Artificial Intelligence (XAI) in Tax Law: The Need for a Minimum Legal Standard' (2022) 14 *World tax journal*.

[695] At part II paragraph A 1.

[696] *Women's Legal Centre Trust v President of the Republic of South Africa* (n 328) 21–23.

[697] Ibid 21.

the state to work collaboratively to realise the right to information. Thus, I have drawn in this thesis (specifically in chapters 5 and 6) on public law scholarship on the separation of powers—particularly the concept of "comity"—to determine how the state ought to collaborate to realise the right to information. In those chapters, I relied on elements of comity and the description of the functions of the judiciary, executive and the fourth branch to establish what section 32 (the right to information) read with section 7(2) of the Constitution requires of each of those branches. In relation to each of those branches of the state, I identified several ways in which they could support the legislature as it attempts to effect the right through the enactment of legislation.

For instance, the analysis in chapter 5 of the *MVC [No 1]* and *MVC [No 2]* cases illustrated that judicial decisions could draw the legislature's attention to information needs that come before courts and fall within the scope of the right but are not addressed in law. Similarly, the analysis in chapter 6 illustrated how fourth branch institutions could identify information needs as part of their ordinary operations and use their reporting functions to draw the legislature's attention to these.

In chapter 6, I discussed the data in the South Africa Human Rights Commission's annual reports on compliance with the *Promotion of Access to Information Act 2000* ("PAIA").[698] I argued that poor levels of compliance with section 32 of PAIA suggest inadequate observance of PAIA overall and demonstrate a need for the state to take steps to enforce compliance. As a reminder, section 32 of PAIA (prior to recent amendments transferring this obligation to the Information Regulator) required state entities to submit a PAIA compliance report to the South Africa Human Rights Commission annually. These reports had to reflect, for instance, the number of PAIA requests received by an entity and whether access was granted in full, in part or refused. However, the South Africa Human Rights Commission noted in its annual reports to Parliament that there had been low levels of compliance by the executive and fourth branch with section 32.[699]

When enacted, South Africa's general access law, PAIA, was regarded as a "model" information access law.[700] However, PAIA has not kept up with subsequent developments in global best practice standards.[701] Moreover, the robustness of the provisions in an information law can never guarantee

[698] *PAIA* (n 6).
[699] South African Human Rights Commission, 'The Promotion of Access to Information Act (PAIA) Annual Report 2020/2021' (n 615) 7.
[700] See for example, Ackerman and Sandoval-Ballesteros (n 2) 100; Adeleke (n 11) 66.
[701] For example, the African Union's Model Law on Access to Information recommends the inclusion of a robust proactive disclosure provision which secures access to substantive agency information (not just metadata that can assist in the formulation of requests, as PAIA does). African Commission on Human and Peoples' Rights, *Model Law on Access to Information for Africa* (Model Law, African Commission on Human and Peoples' Rights,

their observance. The South Africa Human Rights Commission's report data discussed in chapter 6 suggests South Africa's PAIA is an example of a law that, while regarded as strong (at least shortly after enactment), has had implementation failures.

One argument offered in response to implementation failures is that more effective and affordable enforcement mechanisms are required. Arguments to this effect have been made in global public law scholarship and scholarship about information access in South Africa. For instance, John Ackerman and Irma Sandoval-Ballesteros argue that the "ideal" enforcement arrangement for any access law is to have an independent "special public body responsible for receiving appeals and generally enforcing the right to freedom of information."[702] Ackerman and Sandoval-Ballesteros argue that judicial enforcement is too slow and expensive to support information access adequately or inspire higher levels of compliance with the law.[703]

Similarly, commenting on information access in South Africa and the implementation and enforcement of PAIA, Fola Adeleke writes:

> *…the biggest challenge to PAIA has been the lack of a cheap, quick and effective dispute-resolution system that can facilitate a [sic] redress for infringements of the right to information. As a result, an important lesson to draw from the South African experience is to recognise that an excellent law does not suffice in the realisation of the right but equally important is a means of redress that enables members of the public to quickly and cheaply seek recourse for the realisation of their rights.*

In 2013 the South African legislature enacted the *Protection of Personal Information Act 2013*,[704] section 39 of which established an "Information Regulator". The Act transferred many of the oversight duties carried out by the South Africa Human Rights Commission under PAIA to the Regulator and created a complaints mechanism allowing quicker, more affordable challenges to decisions under PAIA.[705] However, the coming into effect of these provisions (transferring duties to the Regulator and

13 February 2013) <https://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/model_law_on_ati_in_africa/model_law_on_access_to_infomation_en.pdf>.

[702] Ackerman and Sandoval-Ballesteros (n 2) 105.

[703] Ibid.

[704] *Protection of Personal Information Act 2013* (n 613).

[705] *PAIA* (n 6) 77A; *Protection of Personal Information Act 2013* (n 613) 110.

creating a complaints mechanism) was delayed until 30 June 2021.[706] The Regulator has yet to issue any reports on PAIA compliance; thus, it is impossible to comment at this stage on the work or effect of the Regulator.

Another argument in response to the implementation failures related to PAIA is one I have made in chapter 6: There needs to be better cooperation between the legislature, the fourth branch and the executive in identifying information needs and creating and adopting effect-giving law. In particular, I noted in chapter 6 that Parliament had failed to take significant action regarding the PAIA compliance statistics reported by the South Africa Human Rights Commission, even when the Commission raised specific concerns.[707] Additionally, I noted that the government has rarely acted on the Commission's recommendations for strengthening PAIA through proposed amendments.[708] For these reasons, I argued that the legislature, executive and fourth branch need to cooperate better, implementing each other's decisions (complying with the law) and engaging seriously and in good faith with each other's recommendations.

Thus, a key insight for South Africa and section 32 has been that while the national Parliament will ordinarily be in the best position to create effect-giving law, it must draw on the other branches to carry out its obligation to do so. Specifically, Parliament ought to draw on insights from the other branches to identify weaknesses in existing access legislation or new information needs that need to be addressed. Not only is such cooperation between the branches an efficient way of realising the right to information, but the South African Constitution also mandates it in section 7(2).

On the whole, the South African example illustrates that if a right to information like section 32 of the South African Constitution is to be made effective, the different branches of government must work cooperatively to effect the right. The legislature must adopt law to make information accessible. However, it must also draw on insights from the other branches about information needs that must be addressed and how effect-giving laws can be strengthened. This insight might offer a valuable point of reflection for other countries contemplating including rights to information in their constitutions;

[706] 'Media Statement: Information Regulator to Take over PAIA Functions from the South African Human Rights Commission', *Information Regulator (South Africa)* (Web Page, 18 May 2023) <https://inforegulator.org.za/media-statements/>.
[707] South African Human Rights Commission, 'The Promotion of Access to Information Act (PAIA) Annual Report 2020/2021' (n 615) 38.
[708] South African Human Rights Commission, 'The Promotion of Access to Information Act (PAIA) Annual Report 2019/2020' (n 670) 2.

however, such states should bear in mind that, in part, the mandate to jointly realise the right to information in the South African context, arises from section 7(2) of the Constitution.

III ENFORCING OBLIGATIONS ARISING FROM THE RIGHT

In this part of the chapter, I argue that my analysis of South Africa's experience with an express constitutional right to information provides four learnings regarding the enforcement of the right. First, my analysis shows that express recognition allows right holders to advocate in forums outside the legislature. Specifically, a justiciable fundamental right to information enables judicial review of the state's inaction when it fails to enact law to effect an aspect of the right (provided the relevant constitution allows review of positive obligations). Second, constitutional recognition offers opportunities for judicial law-making when the legislature proves recalcitrant. To be clear, I am not arguing for law-making to occur outside of the legislature ordinarily. Instead, I contend that constitutional recognition allows the judiciary to effect the right when the political branches prove unwilling over time to do so. Third, the South African experience demonstrates that a right to information is never fully realisable. Fourth, a constitution that provides for the judicial enforcement of positive obligations arising from rights needs suitably adapted enforcement and jurisdictional provisions.

To make these arguments, I draw primarily on the analysis in chapter 5, which deals with the South African Constitutional Court's role in implementing section 32 of the Constitution but also selected insights from other chapters. In particular, I focus on the two decisions of the Constitutional Court related to private funding information (information about the funding provided by nonstate persons and entities to political parties and candidates). The two decisions are *My Vote Counts NPC v Speaker of the National Assembly* ("*MVC [*No 1*]*"),[709] and *My Vote Counts NPC v Minister of Justice and Correctional Services* ("*MVC [No 2]*")[710]. Having outlined the facts and findings of both matters in detail in chapter 5, in this chapter I only restate the facts, findings and reasoning relevant to the arguments I make here.

[709] *MVC [No 1]* (n 18).
[710] *MVC [No 2]* (n 19).

A *Multiple Forums for Advocating for Access Legislation*

South Africa's national Parliament adopted legislation in 2018 requiring the proactive disclosure of private funding information—21 years after first debating the possibility.[711] Section 9(1) of the *Political Party Funding Act 2018*[712] requires that all political parties disclose to the Electoral Commission information about every donation received that exceeds the amount prescribed in regulations. In addition, section 9(2) of the *Political Party Funding Act* requires the Commission to publish, every quarter, the disclosures made pursuant to section 9(1).

In the intervening 21 years, Parliament occasionally debated regulating private party funding.[713] From the evidence before the Constitutional Court and cited in the *MVC [*No 1*]* minority judgment, civil society actors participated over those 21 years in parliamentary proceedings urging the legislature to ensure private funding information is made accessible.[714] MVC, in particular, before launching litigation, implored Parliament to recognise that the disclosure of private funding information is constitutionally mandated and to act to fulfil that obligation.[715] Thus, civil society actors approached the courts only after failing to convince Parliament to act on the constitutional imperative to secure the disclosure of private funding information.

The litigation appears to have spurred Parliament into action. For example, in the High Court matter of *Institute for Democracy in South Africa v African National Congress* ("*IDASA*"), the ruling party, the African National Congress ("ANC"), urged the Court to stay the proceedings.[716] The ANC argued (along with the other three political party respondents—the four biggest parties then represented in Parliament) that the disclosure of private party funding had to be regulated but that this would be best done through legislation.[717] A stay in proceedings, the ANC contended, would "allow the political and legislative process to follow the proper course necessary for the adoption of a national policy through legislation regulating the funding of political parties".[718] However, the *IDASA* Court declined to stay the

[711] In documents filed in the Constitutional Court in 2014, the then Speaker of Parliament stated that disclosure of private funding information is 'a complex policy matter which has been discussed in Parliament since 1997'. *MVC [No 1]* (n 18) 10.
[712] *Political Party Funding Act 2018* (South Africa) ('*PPFA*').
[713] Before the Constitutional Court 2014, the then Speaker of Parliament stated that disclosure of private funding information is 'a complex policy matter which has been discussed in Parliament since 1997'. *MVC [No 1]* (n 18) 10.
[714] Ibid 11–18.
[715] Ibid 16.
[716] *IDASA* (n 361) 19.
[717] Ibid.
[718] Ibid.

proceedings.[719] Instead, it dismissed the application, finding the applicants had not demonstrated that they needed private funding information to exercise or protect another right (as required by both PAIA and section 32(1)(b) of the Constitution).[720]

While the launch of *MVC [*No 1*]* does not appear to have prompted any parliamentary action, it seems that the applicant's further litigation did. Following the decision in *MVC [No 1]* dismissing its application, My Vote Counts ("MVC") challenged the constitutionality of PAIA before the High Court in *My Vote Counts NPC v President of the Republic of South Africa*.[721] Subsequently, Parliament established an *ad hoc* committee on political party funding. The committee oversaw the drafting of the *Political Party Funding Bill 2017*,[722] later enacted as the *Political Party Funding Act 2018*.[723]

It might be coincidental that Parliament started the process of regulating political party funding shortly after MVC launched litigation in the High Court. However, it seems at least plausible that MVC's litigation put pressure on Parliament to address the issue—especially considering Parliament's initial resistance, documented in the *MVC [No 1]* matter, to regulating private party funding information.[724]

Thus, when civil society actors had unsuccessfully exhausted opportunities for raising their arguments about the disclosure of private funding information in Parliament, the right to information afforded an avenue for airing these claims before the courts. The airing of these arguments before the courts led to media publicity, fuelling public debate.[725] It is at least plausible to presume this public debate, and the understanding that the judiciary would be under pressure to offer a remedy, forced Parliament to regulate private funding information. Thus, the right offered an alternative platform for airing

[719] Ibid 85.
[720] Ibid 71 and 95; *SA Constitution* (n 5) 32(1)(b)'Everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights.'; *PAIA* (n 6) 50(1)(a)'A requester must be given access to any record of a private body if that record is required for the exercise or protection of any rights.'
[721] *My Vote Counts NPC v President of the Republic of South Africa* (n 525).
[722] Political Party Funding Bill 2017 ((South Africa)).
[723] *PPFA* (n 712).
[724] In communication with the applicant, cited in the minority judgment, the then Speaker of Parliament noted that Parliament had determined that it was 'not feasible' to adopt legislation regulating private funding information. *MVC [No 1]* (n 18) 18.
[725] See for example, 'Is an Eccentric Billionaire Funding the EFF? We'll Never Know', *The Mail & Guardian* (online, 24 March 2015) <https://mg.co.za/article/2015-03-24-is-a-jewish-billionaire-funding-the-eff-well-never-know/>; Stephen Grootes, 'Spotlight on Chancellor House after Hitachi Scandal' <https://ewn.co.za/2015/09/30/All-focus-on-Chancellor-House-following-Hitachi-scandal>; Gregory Solik, 'Op-Ed: "Application Dismissed" – a Reflection on My Vote Counts v The Speaker of Parliament, and Losing', *Daily Maverick* (online, 1 October 2015) <https://www.dailymaverick.co.za/article/2015-10-01-op-ed-application-dismissed-a-reflection-on-my-vote-counts-v-the-speaker-of-parliament-and-losing/>.

arguments for creating better information access and applied pressure to the political branches to act on a constitutional imperative.

It is worth noting, however, that the right to information could not have opened the courts as a venue in which to argue for information access legislation were it not for other features of South Africa's Constitution. Specifically, the South African Constitution provides for judicial review of positive obligations arising from fundamental rights.[726] A right to information in a constitution that does not provide for judicial review of positive duties would not similarly open up the courts as a venue in which to argue for information access legislation.

Nevertheless, courts are not the only additional venue the right provides to right holders for raising arguments for effect-giving law. In chapter 6, I argued that the executive and fourth branch both have opportunities in their interaction with the public to learn about information needs that are not addressed in existing information access laws. Additionally, I argued that both these branches of government have opportunities to assist the legislature with strengthening PAIA and related information access laws by making recommendations for their amendment or the adoption of new laws. As these branches could bring unaddressed information needs to the legislature's attention, they are additional forums in which holders of the right to information can air contentions related to the right.

However, it is again worth noting a specific feature of South Africa's Constitution that allows for some of the advocacy work. Specifically, chapter 9 of the South African Constitution establishes six institutions (the "fourth branch") that are tasked with supporting democracy and fundamental rights. A right to information in a constitution that does not establish a fourth branch would not similarly open up such institutions as venues to argue for information access legislation.

In sum, in South Africa, the constitutional recognition of the right has provided members of the public with forums (other than just the legislature) in which to present their arguments for legal provisions that facilitate information access. To be clear, I am not suggesting that these forums are better platforms than the legislative assembly for advocating for legal provisions that facilitate information access. Instead, I contend that if the legislature fails to act, the right allows for arguments for access to be aired in other forums.

[726] Matthew Chaskalson, Gilbert Marcus and Michael Bishop, 'Constitutional Litigation' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (Juta and Company, 2nd ed, 2013) 3–3.

B *Opportunities for Judicial Law-Making*

The MVC matters also demonstrate how the right can provide opportunities for judicial law-making. Admittedly, it is preferable for the legislature to develop law to effect the right to information. The reasons for preferring legislative intervention are discussed in chapter 4 and include that judicial law-making is slower and more piecemeal.[727] Nevertheless, as Jonathan Klaaren has argued, it might be necessary for the courts to create effect-giving law when the right requires it, and the legislature has failed to enact such law.[728]

In *MVC [No 2]*, the Constitutional Court ultimately found that private funding information falls within the scope of the right to information (as read with the right to vote and freedom of expression).[729] Additionally, the Court found that private funding information was not accessible through existing legislation.[730] Accordingly, the Court determined that Parliament was obliged in terms of section 7(2) of the Constitution to enact legislation to effect this aspect of the right to information.[731]

Even while it required Parliament to remedy the defect, the Court also held that "[i]n the interim, it is open to those seeking access to information on private funding to do so in terms of section 32(1)(b) of the Constitution".[732] The Court, therefore, effectively determined that right holders could exercise this particular aspect of the right to information directly (relying on the right rather than on effect-giving legislation). However, the Court fell short of establishing a common-law principle requiring disclosure; this is regrettable as the Constitution requires the judiciary to enforce its provisions and, in relation to fundamental rights, requires courts to develop the common law to give effect to a right if necessary.[733]

[727] Pozen and Schudson (n 1) 42.
[728] Klaaren, 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (n 29) 560–561 and 563.
[729] *MVC [No 2]* (n 19) 18–58, 69 and 73.
[730] Ibid 63–67.
[731] Ibid 69, 73 and 74; *SA Constitution* (n 5)'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'
[732] *MVC [No 2]* (n 19) 88.
[733] *SA Constitution* (n 5) 165(2) provides that "[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."; ibid 8(3) provides 'When applying a provision of the Bill of Rights to a natural or juristic person... a court in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right'.

To be clear, I am not arguing that judicially crafted remedies are a better way to secure access to information falling within the scope of the right. Instead, I am arguing that when the legislature fails to act to effect an aspect of the right, the judiciary must fill the gap. The courts addressing an information need through the common law will not preclude the possibility of Parliament regulating that aspect of information access through legislation. It will remain open to Parliament to legislate to replace the relevant common law rule but not to leave the issue entirely unregulated. Potentially, as Klaaren has argued, the judiciary crafting a remedy will provide an opportunity for interinstitutional dialogue between the courts and Parliament.[734]

It is worth noting, however, that the right to information could not have allowed for judicially crafted remedies were it not for other features of South Africa's Constitution—two related characteristics of the Constitution are particularly relevant. First, as noted above, the South African Constitution provides for judicial review of positive obligations arising from fundamental rights. Second, the Constitution also endows the judiciary with broad remedial powers.[735] Thus, a right to information within a constitution without these two features may not similarly allow for judicial remedies to effect the right to information.

In sum, while the legislature is the preferred forum for adopting effect-giving law, the constitutional recognition of a right to information (in a constitution like South Africa's) allows the judiciary to create such a law when the legislature fails to act. As the legislature can replace the law developed by the courts, it is not prevented from enacting a more fitting and comprehensive law to regulate that aspect of the right. Instead, a judicial remedy offers at least temporary relief for right holders while leaving open the possibility that the legislature will adopt effect-giving law.

[734] Klaaren, 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (n 29) 563; Klaaren, 'My Vote Counts and the Transparency of Political Party Funding in South Africa' (n 17) 3–4.
[735] *SA Constitution* (n 5) 172(1)(a) Provides that 'when deciding a constitutional matter within its power, a court may make any order that is just and equitable...'

C *Never Fully Realisable*

Section 32 of the South African Constitution provides:

> 1. *Everyone has the right of access to-*
>
> *(a) any information held by the state; and*
> *(b) any information that is held by another person and that is required for the exercise or protection of any rights.*
>
> 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 on the state.*

Therefore, section 32 has two components. First, section 32(1) outlines the scope of the right to information. Second, section 32(2) prescribes action the state must take to effect the right. Several other rights in the Bill of Rights also follow this format of outlining the right and directing the state to take specific action to effect the right. Other examples include the right to equality (section 9), socioeconomic rights (sections 26 and 27) and the right to administrative justice (section 33).

For example, sections 9(3) and (4) provide that neither the state nor anyone else may discriminate unfairly against anyone based on one or more enumerated grounds (such as race or gender). Section 9(4) then goes on to provide that "[n]ational legislation must be enacted to prevent or prohibit unfair discrimination." Similarly, section 26(1) describes a right to adequate housing, and sections 27(1)(a) to (c) delineate rights to health care, food, water and social security. Correspondingly, sections 26(2) and 27(2) provide that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of…" (regarding section 26(2)) "…this right" (and, regarding section 27(2)) "…each of these rights."

Lastly, sections 33(1) and (2) outline rights to administrative action that is lawful, reasonable and procedurally fair and written reasons for administrative action that has adversely affected someone's rights. Correspondingly section 33(3) provides:

3. National legislation must be enacted to give effect to these rights, and must-

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.

There are two significant differences between the action-requiring provisions that follow the socioeconomic rights (sections 26 and 27) and those attaching to the rights to equality, information and just administrative action. First, while sections 26 and 27 talk about "legislative and other measures", sections 9, 32 and 33 refer to "national legislation" that "must be enacted". That is, sections 26 and 27 seem to anticipate multiple measures aimed at realising the rights, whereas sections 9, 32 and 33 could be understood as requiring just one legislative instrument each.

Second, whereas sections 26 and 27 refer to the "progressive realisation" of the socioeconomic rights, sections 9, 32 and 33 do not refer to "progressive realisation". Therefore, sections 9, 32 and 33 appear to be immediately realisable. The distinction between progressively and immediately realisable could explain why sections 26 and 27 anticipate multiple measures, whereas sections 9, 32 and 33 apparently only envisage one piece of effect-giving legislation. Thus, there appears to be an underlying assumption that the state must implement multiple measures over time as it gradually moves towards fully realising sections 26 and 27. On the other hand, the presumption underpinning sections 9, 32 and 33 seems to be that they can at once be (fully) realised through a single piece of legislation.

It is beyond the scope of this thesis to comment on whether it is correct to regard the rights to equality and just administrative action as immediately and fully realisable through a single legal instrument. Instead, I focus on section 32(2). First, I propose that the right to information, while not progressively realisable, can also never be fully and finally realised and, second, that the right cannot be realised through a single piece of legislation.

First, as I argued in chapter 5, while the right to information is not progressively realisable, it is also not fully realisable for at least two reasons. First, it is impractical to expect that all the information falling within the scope of the right to information could be made accessible. It is impossible, for instance, to record, store and make accessible every bit of information exchanged between and with

state employees—it is too much information. Second, it is undesirable to make all the information falling within the scope of the right to information accessible. Making some information accessible will infringe on other rights or could undermine the democratic governance of a state—thus, access is not always preferable. As I argued in previous chapters, information access must always (not just for now) be balanced against other rights and interests (whereas socioeconomic rights are—for now—only partially realised). The balance between information interests and other rights and interests may also shift over time.

Second, I turn to whether the right to information is fully realisable through a single legal instrument. Jonathan Klaaren has argued that the two pieces of legislation provided for in sections 32(2) and 33(3) should not be expected to realise the corresponding rights *fully*.[736] Klaaren made this argument before effect-giving legislation had been enacted (since then, Parliament has adopted PAIA in response to section 32(2) and the *Promotion of Administrative Justice Act 2000*[737] in response to section 33(3)).[738] At the time, a transitional provision, Item 23 of Schedule 6 of the Constitution, applied to sections 32 and 33. Item 23 provided that if the legislation contemplated in sections 32(2) and 33(3) was not enacted within three years of the Constitution taking effect, sections 32(2) and 33(3) would lapse.

Klaaren argued that determining whether Parliament had met the requirement in Item 23 could be done in one of two ways.[739] The first possibility was a substantive test, one version of which asked whether the law enacted had fully effected sections 32(1) and 33(1) and (2).[740] That is to say, under the substantive test, the effect-giving law would have met the requirement in Item 23, read in conjunction with sections 32(2) and 33(3), if the relevant law fully effected sections 32(1) and 33(1) and (2), respectively. The second possibility was a procedural test that asked whether Parliament had purported to pass legislation in compliance with Item 23, read with sections 32(2) and 33(3).[741]

Klaaren advocated for a procedural test.[742] One of the weaknesses of a substantive test, Klaaren argued, was that it assumes it is possible to enact one law that will completely cover every aspect of

[736] Klaaren, 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (n 29).
[737] *Promotion of Administrative Justice Act 2000* (South Africa).
[738] Recently he has reiterated this argument with respect to section 32 and PAIA, following the judgment in MVC [No 1], see Klaaren, 'My Vote Counts and the Transparency of Political Party Funding in South Africa' (n 17).
[739] Klaaren, 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (n 29) 557.
[740] Ibid 558.
[741] Ibid 557.
[742] Ibid.

the right.[743] Instead, Klaaren contended, "[i]t is most likely that the enacted legislation will never be complete, even after amendments."[744] My analysis in chapters 4 to 6 and this chapter supports Klaaren's contention as it relates to section 32—one general access law will not fully and finally secure information access. Specific access provisions are also required. Additionally, new information needs will arise that will need to be addressed.

Klaaren noted that if Parliament met the requirement in Item 23, sections 32(2) and 33(3) would not lapse.[745] Therefore, he argued that once the legislature had enacted the effect-giving legislation anticipated in Item 23, sections 32(2) and 33(3) would continue to give rise to corresponding duties.[746] Specifically, Klaaren contended that sections 32(2) and 33(3) would continue to oblige Parliament to "monitor and to enact supplementary legislation to give effect to the administrative justice and access to information rights."[747] My analysis in chapters 4 to 6 and in this chapter largely supports Klaaren's contention. Like Klaaren, I have argued that making effective the information that falls within the scope of section 32(1) will require continual monitoring and the amendment of existing and adoption of additional access law. In addition, however, I have argued that monitoring existing legislation and identifying information needs must be a joint inter-branch exercise.

Klaaren also argued that the judiciary could assist the legislature in making the right effective. He contended that if a court identifies an information need that Parliament has not effected through legislation, it should be "quick to enforce" that aspect of the right "directly."[748] Klaaren submitted that the judiciary crafting a remedy, and the legislature following later with legislation to regulate that same aspect of the right is constructive inter-institutional "back-and-forth"—or dialogue.[749] I have argued that the executive and fourth branch could also participate in making the right effective—essentially participating in this dialogue. Specifically, I have posited that it is impractical to expect Parliament to always be across all the information needs that might require legislative action under the right. Instead, I have contended that all the other branches should use opportunities in the exercise of their ordinary functions to identify information needs that must be addressed in law and draw the legislature's attention to these.

[743] Ibid 558.
[744] Ibid 563.
[745] Ibid.
[746] Ibid.
[747] Ibid.
[748] Ibid.
[749] Ibid 563–564.

Therefore, the obligation to continue to monitor for unaddressed information needs and to assess existing request legislation to determine whether it is securing adequate levels of access is an obligation that falls on all the branches of the state. Thus, in the South African context, it is appropriate to locate this ongoing obligation in section 7(2) of the Constitution, which requires the state to implement any necessary measures to effect each of the rights in the Bill of Rights. This ongoing obligation fits better with the language of section 7(2), which requires "the state" to act cooperatively to realise a right, rather than in section 32(2), which places an obligation on the legislature. Additionally, section 7(2) anticipates the state undertaking multiple actions to effect a right, whereas section 32(2) seems to anticipate only one piece of legislation.

It may be that even outside of the South African context, a right to information that aims to secure access to the information recognised in the justifications for a right to information (outlined in chapter 2) should be seen as giving rise to multiple ongoing obligations, however realised. I have argued that securing access to the information required to participate in social and democratic processes and exercise and protect rights requires a state to enact several effect-giving laws that must periodically be updated and supplemented. Nevertheless, when reflecting on the insights derived from the South African experience, it is essential to keep in mind the broader South African context that has shaped this experience.

D *Constitutional Text*

When South Africa's Constitutional Assembly drafted the Constitution, it noted that there was "no guiding international formulation" for a right to information.[750] The technical committee responsible for drafting the Bill of Rights observed that (at the time) under international law, information access was not regarded as a standalone right, and constitutional recognition of the right (at the national level) was rare.[751] Thus, the drafters of the Constitution had few examples to draw on in crafting a right to information.

Additionally, as is well known, the South African Constitution was, at the time, one of the first to provide expressly for judicial review of positive obligations arising from constitutional rights. With the benefit of twenty-seven years of experience, it has become apparent that the text of section 32 could

[750] *Draft Bill of Rights Volume One Explanatory Memoranda* (South African Constitutional Assembly, 9 October 1995) 199.
[751] Ibid 196–197.

have more explicitly acknowledged that multiple obligations will arise for the state from the right. Additionally, the provisions that support judicial enforcement could have been better adapted for positive obligations.

1 *Section 32*

First, regarding the text of section 32(2), a plausible reading of section 32 is that it requires the legislature to adopt just one piece of legislation. However, a better reading of section 32(2) is that it requires Parliament to ensure a general access law is in effect. Thus, by enacting PAIA, Parliament met its obligation under section 32(2). However, as section 32(2) did not fall away,[752] it continues to serve at least two functions. First, if Parliament were to repeal PAIA, it would remain obligated, according to the terms of section 32(2), to adopt a (new) general access law. Second, section 32(2) will continue to require an effective general access instrument, which might require Parliament, over time, to strengthen PAIA or replace it with legislation that will better facilitate access. Such a reading accords with section 32(2)'s apparent reference to just one legal instrument, but it also accounts for the fact that section 32(2) has not fallen away.

Reading section 32(2) as only requiring the state to ensure a general access law is in place seems to close off the possibility that the state is obligated to effect other aspects of the right not adequately facilitated through the general access law. However, section 7(2) of the Constitution requires the state as a whole to "respect, protect, promote and fulfil the rights in the Bill of Rights." Thus, to the extent that an information interest falls within the scope of the right to information, and the general access instrument does not facilitate (or adequately facilitate) access, section 7(2) requires the state to realise that aspect of the right. Reading section 32 and section 7(2) this way ensures that the right is not merely hortatory but that the state is obligated to realise it. This reading is also the one adopted by the Constitutional Court in *MVC [No 2]*.[753]

The MVC case law, analysed in chapter 5, demonstrates that it has been difficult for litigants to determine which provision gives rise to the obligation they wish to enforce—section 32(2) or

[752] As the Constitutional Court has confirmed in *MVC [No 1]* (n 18) 148.

[753] 'The consequence of all this is that political parties and independent candidates are constitutionally obliged to record, preserve and disclose information on private funding. But, because section 7(2) imposes the obligation on the State to facilitate the enjoyment of rights in the Bill of Rights, and section 32(2) requires the enactment of national legislation to essentially provide for the recordal or "holding" and disclosure of required or needed information, it thus falls on the shoulders of the State to honour its section 7(2) obligations.' *MVC [No 2]* (n 19) 74.

section 7(2). This distinction matters because, as discussed in more detail below, the Constitutional Court has jurisdiction over one obligation (section 32(2)) and the High Court over the other (section 7(2)). Beyond South Africa, the difficulties with the text of section 32 show the importance of expressly providing for the recognition of the multiple ongoing obligations required to give effect to a right to information.

Roy Peled and Yoram Rabin have proposed a model text for a fundamental right to information.[754] Peled and Rabin propose a provision (which can be adapted for local circumstances) that provides as follows:

> 1. *Administrative agencies will act under full transparency and permit the public to become familiar with their modes of operation.*
> 2. *The authorities will make available to the public, by electronic means and proximate to their creation, all internal rules and regulations guiding administrative behavior, the allocation of funds, decisions made by the agency's different divisions, and any other item of information capable of contributing to the disclosure of administrative behavior to the public.*
> 3. *Arrangements guaranteeing administrative transparency will be anchored in law.*[755]

Peled and Rabin's proposed model provision is relatively detailed in that it prescribes specific circumstances in which information must be made available. They argue that a "simple, straightforward definition" is "insufficient" and suggest that for a right to information to be meaningful, it must specify how the state must facilitate information access.[756] My analysis of the South African right to information would caution against comprehensively setting out in the right specific ways in which information ought to be made effective.

As I have argued above,[757] how humans share information changes occasionally, necessitating new legal rules that facilitate disclosure through the newly developed platforms for information exchange. Thus, a right to information that outlines how information should be made accessible could eventually become obsolete. My arguments in this chapter regarding section 32(2) of the South African

[754] Peled and Rabin (n 31) 393–401.
[755] Ibid 394.
[756] Ibid.
[757] See part III paragraph C.

Constitution are illustrative. The drafters of the South African Constitution were aware that several states (including the United States of America, Canada, Australia and New Zealand) had enacted legislation specifically to facilitate access to information by request;[758] they included a provision (section 32(2)) requiring the South African legislature to provide access similarly. However, it has become apparent that one general access law cannot adequately facilitate, on its own, access to the information falling within the scope of section 31(1).

Therefore, a right to information ought to set out straightforwardly the interest the right aims to protect (in the way that section 31(1) of the South African Constitution does) rather than specifying how the information ought to be made accessible. Suppose a right includes additional provisions requiring specific state action (such as section 32(2)). In that case, it should be clear that compliance with that provision, while necessary, will not fully satisfy all duties arising from the right. A constitutional right to information should aim to secure access over an extended period to the information required to participate and critically engage in democratic and social governance and realise rights. As such, a constitutional right to information should specify the interest protected rather than the means of protection.

2 *Provisions that Facilitate Rights Enforcement*

Second, the South African experience with section 32 of the Constitution shows that other constitutional provisions that facilitate judicial review should provide for the review of inaction on positive obligations. In chapter 5, I argued that section 36 of the South African Constitution, the limitations clause, is inadequately adapted for the purpose of reviewing inaction on positive obligations. In addition, the Constitutional Court's information access jurisprudence highlights another set of provisions that are not adequately adapted to the review of a failure to carry out positive duties—the provisions setting out the jurisdiction of the courts to hear constitutional challenges.

The provision that provides for South African courts to hear challenges to the constitutionality of state action (law or conduct) that infringes on rights (failing to comply with negative obligations) is section 172(2)(a) of the Constitution, read with section 167(5). Section 172(2)(a) of the Constitution provides that "[t]he Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed

[758] *Draft Bill of Rights Volume One Explanatory Memoranda* (n 750) 197.

by the Constitutional Court." In addition, section 167(5) provides for the Constitutional Court to confirm a finding of constitutional invalidity made by the Supreme Court of Appeal or the High Court.

Thus, the procedure for challenging state action that infringes on a fundamental right (a failure concerning a negative obligation) has two steps. First, a litigant must approach the High Court for an order finding the relevant law or conduct unconstitutional and, therefore, invalid. Second, the litigant must apply to the Constitutional Court to confirm the finding of unconstitutionality.

However, the language of section 172(2)(a) of the Constitution appears to contemplate the enforcement of negative duties arising from rights rather than positive obligations. That section 172(2)(a) contemplates negative obligations is apparent from the fact that it provides for courts to order the relevant action (law or conduct) is "invalid". Finding a law or action invalid for being unconstitutional stops the further enforcement of that law or prevents the state from continuing with conduct that infringes on a right. A finding of invalidity of *inaction* has no similar enforcement consequences.

There is a provision that, on its surface, appears to provide for enforcing positive obligations arising from rights—section 167(4)(e) of the Constitution. Section 167(4)(e) provides that "[o]nly the Constitutional Court may decide that Parliament or the President has failed to fulfil a constitutional obligation". However, the Constitutional Court has determined that the purpose of section 167(4)(e) is to reserve for the Constitutional Court's sole jurisdiction certain matters that fall exclusively on the President or Parliament and might have implications for the separation of powers.[759]

Additionally, the Court has determined that it is essential to preserve the jurisdiction of the Supreme Court of Appeal and High Court to hear matters dealing with the enforcement of fundamental rights. Specifically, the Court found that section 167(4)(e) should not be interpreted in a way that makes section 172(2)(a) meaningless.[760] The Court found the "multi-stage litigation process" provided for by sections 172(2)(a) read with section 167(5) of the Constitution has a least three benefits.[761] First, the Constitutional Court found that if it acts as a court of first instance, it deprives the litigants of an opportunity to dispute (on appeal) the reasoning underpinning the court of first instance's finding.[762] Second, when the Court acts as a Court of first instance, it does not benefit from the reasoning of other

[759] *Women's Legal Centre Trust v President of the Republic of South Africa* (n 328) 14–16 and 24.
[760] Ibid 11.
[761] Ibid 27–28.
[762] Ibid 27.

courts.[763] Third, "a multi-stage litigation process has the advantage of isolating and clarifying issues as well as bringing to the fore the evidence that is most pertinent to them."[764]

Thus, the Constitutional Court determined that section 167(4) should be interpreted narrowly and understood as referring only to duties that fall expressly and exclusively on the President or Parliament. Correspondingly, section 172(2)(a) should be interpreted broadly and understood as referring to both actions *and inactions* of the legislature and executive branches. Therefore, under the South African Constitution, to enforce a positive obligation arising from a right, a litigant must approach the High Court challenging the unconstitutionality of the state's inaction under section 172(2)(a).

The Constitutional Court has interpreted these jurisdictional provisions to facilitate the enforcement of positive obligations arising from rights even though the text of the Constitution does not expressly provide for it. However, it may be that the lack of clarity in the text of these jurisdictional provisions is part of the reason justice was delayed in the *MVC [No 1]* and *MVC [No 2]* matters. One of the questions that divided the Court in the *MVC [No 1]* matter was whether the applicant had been correct to approach the Constitutional Court directly under section 167(4).

There was a logic behind the applicant's decision to approach the Constitutional Court directly under section 167(4)(e) in *MVC [No 1]* that can be broken down into five steps. First, section 32(2) provides that "[n]ational legislation must be enacted to give effect to this right". Second, the Constitution assigns the authority to enact "national legislation" to the national Parliament (section 44(1)(a)(i)). Third, if an information need falls within the scope of the right to information (section 32(1) of the Constitution) and no law facilitates access to that information, a law must be enacted to effect that aspect of the right to information. Fourth, if a law must be enacted to give effect to an aspect of the right to information, the obligation to do so must arise from section 32(2). Lastly, to enforce an obligation to enact legislation to give effect to an aspect of the right to information, a litigant must approach the Constitutional Court directly under section 167(4)(e).

It may be that if there had been less confusion about whether the duty to make private funding information accessible lay in section 32(2) or section 7(2), the applicant would have approached the High Court first. Additionally, the applicant likely would not have approached the Constitutional Court directly if the jurisdictional provisions clearly provided that the High Court was the appropriate forum

[763] Ibid.
[764] Ibid 28.

for challenging inaction on a positive obligation. Had it been apparent to the applicant which court it had to approach, it likely would not have wasted time and resources approaching the Constitutional Court directly in the first place.

The incoherence in the South African Constitutional Court's jurisprudence on the right to information about the jurisdiction of the courts to hear constitutional challenges to state inaction on positive duties is worthy of study by other jurisdictions. In designing or amending a constitution, if a decision is taken to provide for judicial review of positive obligations arising from rights, other provisions related to judicial review should provide explicitly for the enforcement of positive obligations.

IV CONCLUSION

In this part of the chapter, I combine the analysis in parts II and III to identify the four insights about conditions necessary for an express right to information to be effective. First, to secure an adequate level of access to information, a framework of information access law is required—rather than one general instrument focused on making information accessible. As I argued in part II, information can only be made adequately accessible if multiple legal instruments are enacted, and occasionally reviewed, amended and supplemented.

Second, for a right to information to secure the framework of access law required to provide an adequate level of information access, it must be regarded as giving rise to multiple obligations. As I contended in part III because a framework of access law is required to secure an adequate level of information access, a right to information must require the state to enact many access laws. Additionally, because the effect-giving legislation must occasionally be reviewed, amended and supplemented to ensure the laws remain effective, a right to information must necessitate these actions.

Third, for a state to carry out the multiple duties that arise from a right to information effectively enough to secure a legal framework capable of ensuring an adequate level of information access, all branches of the state must work cooperatively to effect the right. As I contended in part II, for the legislature to be able to address inadequacies in the legal framework facilitating access to information, it needs input from the other branches of the state. Further, as I argued in part III, aside from directly contributing to law-making by the legislature, an express right provides additional forums where right

holders can advocate for effect-giving law. Additionally, judicial enforcement of the right allows for law-making by the courts, facilitating access and collaborations between the judiciary and the legislature.

Fourth, the judicial enforceability of a right to information hinges on whether constitutional provisions for enforcing fundamental rights are adapted to facilitate the enforcement of positive obligations. Specifically, the South African experience demonstrates that provisions that allow for balancing rights and judicial jurisdiction should be adapted to provide for the enforcement of positive duties (or separate provisions adopted to do so).

These insights could serve as valuable points of reflection for other countries contemplating including an express right to information in the constitution. However, in doing so, such states should bear in mind the features of the South African constitutional context that have influenced the South African experience. At least four aspects of the South African constitutional context should be born in mind. First, the South African Constitution provides for the judicial review of positive obligations arising from fundamental rights. Second, the South African Constitution includes a constitutional imperative to develop the common law to give effect to fundamental rights. Third, it endows the judiciary with broad remedial powers. Fourth, the Constitution establishes a fourth branch mandated with strengthening democracy and promoting and protecting fundamental rights.

Chapter 8: Conclusion

I Introduction

This final chapter concludes by summarising in part II the research question and key findings of the thesis. Part III outlines the contributions to scholarship that the thesis makes. It identifies two categories of contributions relating to understanding the right to information in South Africa and the insights the South African experience offers for comparative purposes. Part IV summarises the implications of the research findings for South Africa and, more broadly. Lastly, part V sets out some of the limits of this study and suggests areas for further research.

II Answering the Research Question

This thesis set out to answer the question: What insights can be gathered from the South African experience of having an express right to information in the Constitution? My analysis of the South African experience suggests four insights about the conditions necessary for an express right to information to be effective. These four insights relate to facets of the South African experience that may not be shared elsewhere (including unique aspects of the constitutional text and a constitutional obligation to develop the common law to give effect to fundamental rights). However, as I argue in chapter 7, these insights might be adaptable to other jurisdictions and, thus, could serve as valuable points of reflection for other states that want to consider including express constitutional rights to information in their constitutions.

First, to secure an adequate level of access to information, a framework of information access law is required—rather than one general instrument focused on making information accessible. That is to say, to make accessible all the information required to partake in democratic processes and exercise and protect fundamental rights requires multiple legal provisions that facilitate information access. Such a framework would include at least two types of access legislation incorporating two mechanisms for making information accessible.

Firstly, regarding the types of access law, making information accessible requires both a “general access law” and “specific access provisions”. By “general access law” I mean legislation principally focused on

facilitating access to information. Contrastingly, "specific access provisions" refers to legal provisions that facilitate access to information but that can be found inside laws that regulate some other issue. Both types of access law are required to make information accessible. As I argued in chapter 3, a general access law is required because a state cannot anticipate and address all information needs through specific access provisions; thus, a state ought to have a legal instrument that facilitates access to information *in general*. However, as I establish in chapter 4, a general access instrument will not secure access to some information precisely because it is designed to address information needs in general.

As I argue in chapters 4 and 7, information access must be balanced against other rights and interests. When a legislature determines how to balance information access against other rights and interests within a general access law, it has no specific information in mind. As a result, a general access law will not address some particularly weighty information needs. By this, I mean some weighty information (information that is particularly important because of how vital it is for participating fully in democratic processes or exercising another fundamental right) may not be accessible through a general access law.

Illustrative of this is the example in chapter 4 regarding information about the content of food for sale in a supermarket. For various health or personal ethical reasons, some people might not want to consume certain ingredients that could be included in food products. Thus, knowing what ingredients are in food products might affect consumers' ability to exercise their fundamental right to bodily autonomy. South Africa's general access law, the *Promotion of Access to Information Act, 2000* ("PAIA"),[765] would enable a consumer to request information about the content of a particular product. However, a request under PAIA for information about the content of food sold in a supermarket could be refused because PAIA allows information holders to refuse requests for commercial information.[766] Therefore, a state also needs specific access provisions because the balance between the interest in information access and other rights and interests in a general access law will not be appropriate for some information needs.

Secondly, regarding mechanisms for making information accessible, legislation that facilitates access to information ordinarily does so either by facilitating requests for information or requiring information holders to publish relevant information proactively. As I argue in chapter 7, some information needs

[765] *PAIA* (n 6).
[766] Ibid 36, 42, 64 and 68.

can only be addressed adequately through proactive disclosure requirements because gaining access to information by request is not as straightforward as accessing proactively disclosed information. Some information, information that is particularly important for participation in democratic processes or for the exercise or protection of another fundamental right, must be easily accessible; thus, such information should be proactively disclosable.

However, as I argue in chapter 4, experience demonstrates that some information holders will (at least sometimes) avoid complying with disclosure requirements. Thus, it is necessary to ensure that when proactive disclosure requirements are avoided, people can request the relevant information. Request law correlates with an enforceable right, thus allowing the public to enforce compliance and ultimately ensure that the relevant information is made accessible.

The second insight is that for a right to information to secure a framework of information access law, it must be regarded as giving rise to multiple obligations. In other words, the right must require the state to enact all the legislation identified above as necessary to effect the right adequately. Additionally, as I demonstrate in chapter 7, new information needs will occasionally arise; thus, an information right should be regarded as continuously giving rise to new duties to respond to those new information needs.

A right that gives rise to multiple ongoing obligations can be contrasted with one formulated to set out specific actions the state must undertake (instead of just straightforwardly setting out the interest the right protects—such as "information held by" or "information needed to"). I argued in chapter 7 that if an information right only gives rise to one or more specific obligations aimed at addressing information needs that existed when the right was formulated, it risks becoming obsolete. If the right is to remain effective over time, it should be clear that it may require various state actions and necessitate different things at different times.

The third insight is that effectively carrying out the multiple duties that arise from a right to information requires active contributions from all the branches of the state. As I argue in chapter 6, the branches of the state must work cooperatively to identify information needs that need to be addressed in law and to design and implement such laws.

The fourth insight is that judicial enforcement of a right to information hinges on whether the constitutional provisions that deal with the scope and application of fundamental rights are suited to

facilitate the enforcement of positive obligations. Thus, either textually or through interpretation, the constitutional provisions that facilitate judicial review must provide for the review of inaction on positive duties arising from fundamental rights.

To arrive at these insights, I first established (drawing on the theoretical justifications for recognising a right to information) why information access matters in constitutional democracies. In chapter 2, I argued that information access is critical because of how information can support full participation in democratic processes and the realisation of fundamental rights.

Next, chapter 3 justified the focus of this thesis on an express constitutional right to information by contrasting this approach with two other prominent alternative means of guaranteeing information access. The one contrasting example relied on was Germany, the other India. Germany was used as an example of a state with no right of access to information which has nevertheless adopted information access laws. India was relied on as an example of a state with no express constitutional right to information, which nevertheless derives a constitutional right to information from another fundamental right.

As I explain in chapters 1 and 3, the comparator states were chosen because they all have "transformative" constitutions yet guarantee information access in three distinct ways. "Transformative" constitutionalism refers to a constitutional commitment to using the law to move a state's "political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."[767] "Transformative constitutions" can be contrasted with "preservative constitutions," which are constitutions that "emphasise stability" and "a less interventionist state".[768] Comparing states that all have transformative constitutional commitments is beneficial for comparative purposes because it ensures the institutions have broadly similar goals.

Additionally, the ends that transformative constitutionalism is committed to, overlap with those identified as important in the theoretical justifications for a right to information. Transformative constitutionalism is concerned with deepening and strengthening democracy, participation and equality. Relatedly, the right to information is supposed to make accessible the information required to participate in democratic and socioeconomic processes and to realise rights (including rights designed to advance equality, such as socioeconomic rights). Thus, Germany, India and South Africa

[767] Klare (n 39) 150.
[768] Dann, Riegner and Bönnemann (n 38) 21.

are the comparator states because, despite their similar transformative constitutional commitments, and the overlap between these commitments and the reasons for recognising a right to information, they guarantee information access in different ways.

I concluded chapter 3 by arguing that the optimal way to secure access to the information required to participate fully in democratic processes and protect and realise rights is express constitutional recognition of an information right. Thus, the thesis focused on South Africa as a well-known example of a state that has expressly recognised a constitutional right to information in section 32 of its Constitution and enacted a general access law—PAIA.

Next, I took a doctrinal analytical approach to studying the attempts of the different branches of the South African government at implementing the right to information. I focused in chapter 4 on the legislative branch. I argued that section 32 requires four things from South Africa's national Parliament. First, Parliament must enact (as it did when it adopted PAIA) legislation with a principal focus on making information accessible (a "general access law"). Second, the legislature must enact provisions that make PAIA functional (that is, record-creation and record-keeping duties). Third, Parliament must enact specific access provisions to address particularly weighty information interests (if the relevant information is not adequately accessible through PAIA). Fourth, Parliament must periodically review PAIA and other information access legislation to determine whether those laws must be amended, strengthened or even replaced. These obligations, taken together, suggest that South Africa's national Parliament has an ongoing duty to give effect to section 32 of the Constitution.

Chapter 5 focused on the judicial branch. This chapter takes section 7 of the South African Constitution as its starting point. Section 7 of the Constitution requires the branches of the state to collaborate to effect every fundamental right in the Constitution. Relying on the concept of "comity" developed in scholarship on the separation of powers, I argued that section 32 of the Constitution, read with section 7, requires four things of the judiciary. First, courts must interpret and enforce effect-giving legislation. Second, courts must respect the underlying institutional choices underpinning effect-giving law. Third, courts must interpret and enforce the right itself. Finally, when appropriate, the courts must ensure that the branch best suited to do so, develops effect-giving law.

Focusing further on the third duty the courts have regarding section 32 of the Constitution (interpreting and enforcing the right itself), I critically analysed recent decisions by the Constitutional Court on the right to information. I argued that the case law demonstrates that the general limitations

clause (section 36 of the South African Constitution) is concerned with state *action* limiting a right, not *inaction*. As a result, while the Court professes to assess limitations of the right to information caused by state *inaction* under the general limitations clause, it has actually adopted a form of reasonableness review (the review standard the Court developed for socioeconomic rights). Ultimately I find that, if implemented as a second step (after determining the scope and content of the right), reasonableness review is a normatively attractive review standard for positive obligations under the right to information. Thus, I argue that the Court ought to be explicit that it is conducting reasonableness review in right to information cases. Being clear about what it is doing will allow the Court to develop factors for consideration in the review process continually, which would, in turn, assist lower courts and the other branches of the state.

Chapter 6 focused on the executive and fourth branch. Again relying on the concept of "comity" developed in scholarship on the separation of powers, I argued that section 32 of the Constitution requires three things of the executive and fourth branch. First, both branches must comply with and implement existing access to information laws. Second, both have some obligation to encourage other state and non-state entities to comply with information access laws. Third, both the executive and fourth branch must contribute towards strengthening existing access to information laws and the adoption of other legal provisions to facilitate access.

To determine whether these two branches have been complying with information access laws, I analysed data from the South African Human Rights Commission's annual reports to Parliament on compliance with PAIA. I found that the data from the Commission's reports suggested that there have been low levels of compliance. Second, I considered whether these branches had encouraged other state and non-state entities to comply with information access laws. I found examples of institutions in each of these branches taking steps to promote compliance with information access laws; however, I also found that these attempts have been inconsistent. Third, I considered whether these branches have contributed to strengthening existing access to information laws and made recommendations for adopting new laws. I found and outlined some examples of the fourth branch making such legal reform recommendations; however, I also highlighted some missed opportunities.

Overall, I contend that the inconsistency with which these branches have carried out these three duties suggests they may not fully appreciate that these are constitutional obligations. Relatedly, as chapter 6 demonstrates, the legislature has failed to take significant action on, or at least fully respond to, concerns the South Africa Human Rights Commission has raised regarding low levels of compliance

with PAIA. The legislature's failures in this regard similarly suggest a lack of appreciation for the importance of inter-institutional cooperation for the realisation of the right to information.

Finally, I brought together these understandings in chapter 7. In that chapter, I argued that the findings suggest the four insights about the conditions necessary for making a right to information effective that have been outlined above.

III CONTRIBUTIONS TO SCHOLARSHIP

This thesis has made a distinctive contribution to scholarship on the right of access to information in South Africa. Other comprehensive studies of information access in South Africa have focused on PAIA.[769] Contrastingly, this thesis has focused on the right as a whole, drawing on scholarship on the separation of powers to develop a new approach to identifying duties arising from the right. In applying this approach, the thesis has established the obligations that arise for the four branches of the South African state from the fact that information access is constitutionally guaranteed. To this end, chapters 4 through 6 have set out what section 32 of the Constitution requires of each branch of the state; I have summarised those findings above in part I.

Additionally, chapter 5 makes a further significant contribution to the literature on section 32 of the South African Constitution by describing how the Constitutional Court has been conducting reviews of the state's inaction on positive obligations arising from section 32. As noted above, I demonstrate that instead of a limitations analysis under section 36 of the Constitution, the Constitutional Court has conducted a form of reasonableness review (the review standard it developed for socioeconomic rights) when assessing state inaction under the right to information.

Identifying the approach taken by the Constitutional Court in section 32 review cases also allowed me to argue for the normative desirability of the approach and to develop it further. The chapter draws on socioeconomic rights jurisprudence and the values underpinning the right to information to propose factors that could form part of a reasonableness review of inaction under section 32 of the Constitution.

[769] Currie and Klaaren (n 8); Robinson (n 8).

This thesis has also contributed to a nascent body of comparative public law scholarship focusing on the constitutional recognition of a right to information as a means to secure access to the information required to partake in democratic processes and to exercise and protect rights.[770] Previous scholarship in this regard has focused on putting forward a model information access right or a methodology for comparing legislative instruments enacted to give effect to the right to information.[771] Still other work has focused on describing the genealogy of the right to information and how it has been used in practice, particularly in the global south to realise socioeconomic rights.[772] This thesis has proposed that the South African experience suggests four insights about the conditions necessary for an express right to information to be effective. Thus, the thesis raises points of reflection that might be useful for other states that want to consider including express constitutional rights to information in their constitutions.

IV Implications of the Findings

The research in this thesis has implications for South African institutions responsible for interpreting and implementing section 32 of the Constitution. First, there are implications for the national Parliament. Parliament has in the past taken the position that it has no obligations regarding section 32 of the Constitution aside from the obligation in section 32(2) to enact legislation to give effect to the right.[773] Further, Parliament has presumed that with the enactment of PAIA, it had fulfilled any obligation arising from section 32(2) of the Constitution.[774]

Contrastingly, this research suggests that the South African national Parliament has ongoing obligations to enact law to make the right to information effective. There are various measures Parliament could implement to ensure it meets these duties that arise from section 32 of the Constitution. For instance, Parliament could establish a permanent human rights committee (as other

[770] Peled and Rabin (n 31); Calland (n 16); Riegner (n 2).
[771] Peled and Rabin (n 31) (Peled and Rabin put forward a model formulation for a right to information); Riegner (n 2) (Riegner proposes a methodology for comparing legislative instruments enacted to facilitate access to information).
[772] Calland (n 16).
[773] 'Section 32(2) in particular prescribes in clear and specific terms precisely what legislation is required of the state to give effect to the right of access to information. It does not leave any room for an inference that s 7(2) impliedly imposes greater duties on the state to legislate for access to information beyond and in addition to the requirements of s 32(2).' 'First and Second Respondents' Heads of Argument: My Vote Counts NPC v Speaker of the National Assembly (2015)', *ConCourt Collections* (Web Page, 6 December 2020) 26 <https://collections.concourt.org.za/handle/20.500.12144/3770?show=full>.
[774] '...PAIA fulfils the requirements of s 32(2) of the Constitution.' Ibid 3.

states have done) to review draft legislation for human rights compliance.[775] Concerning the right to information, the human rights committee could consider whether any draft legislation relates to unaddressed information needs that can be remedied through that particular piece of legislation. For example, if Parliament were to consider drafting legislation to regulate the use of artificial intelligence in business, it could consider whether it is necessary to include a provision requiring transparency in algorithmic decision-making.

At a minimum, however, as this thesis has argued (particularly in chapters 4 through 7), Parliament must draw on insights from the other branches of state regarding unaddressed information needs identified by those branches. The corollary is that, as I have argued in chapter 4, fourth branch institutions must use their reporting functions to make Parliament aware of unaddressed information needs that come to their attention as they carry out their functions. Similarly, when carrying out its constitutional function of drafting legislation for Parliament, the executive should ensure it identifies and remedies unaddressed information needs. As I noted in chapter 4, both these branches are staffed by persons with expertise in their niche subject areas. As these professionals keep abreast of developments in best practices within their specialist subject areas, they can identify advances within their disciplines related to information access.

The findings in this thesis regarding how section 32 of the Constitution should be interpreted also have implications for how the judiciary should enforce the right to information.[776] Specifically, the argument that section 32 gives rise to ongoing obligations to create law to make the right to information effective suggests that the judiciary must identify when legal provisions are required to effect (aspects of) the right. Additionally, as I establish in chapter 5, the judiciary must determine which branch is best suited to creating the law to effect an unaddressed aspect of the right to information. Further, as I also contend in chapter 5, for the judiciary to assess the justifiability of state inaction on the unaddressed aspects of the right to information, it must develop a review standard for the right to information.

[775] The Australian Federal Parliament has a Joint Committee on Human rights a primary function of which is to review Bills and enacted legislation "for compatibility with human rights, and to report to o both Houses of the Parliament on that issue". *Human Rights (Parliamentary Scrutiny) Act 2011* 7(a) and (b).

[776] See specifically chapter 7 where I argue in part II that making the information falling within the scope of section 32(1) accessible will require the enactment of multiple legislative instruments, and that new provisions will be required as new information needs arise. Additionally, in part III, paragraph D, I contend that if an information interest falls within the scope of the right and the information is inaccessible through PAIA (or any replacement general access law) section 7(2) of the Constitution gives rise to an obligation to create law to remedy the defect.

Lastly, the four insights highlighted in chapter 7 suggest essential considerations for other states that wish to guarantee information access through the constitutional recognition of a right to information. However, given that these suggestions arise only from the South African experience, it will also be necessary for other states to consider how their local circumstances might differ from South Africa's.

A state that would like to draw on the South African experience regarding the right to information should consider how its local constitutional context differs from at least four aspects of South Africa's. First, South Africa has a hybrid legal system which means the law is set out in legislation, Roman-Dutch civil law, common law and customary law—all of which are subject to the Constitution. The supremacy of the Constitution is a crucial aspect of the South African legal system, as is the judiciary's role in interpreting and applying the Constitution. Thus, a second significant aspect of the South African Constitution to be born in mind is that the judiciary has a wide range of remedies at its disposal, as the Constitution empowers it to "make any order that is just and equitable".[777] Third, as noted above, the South African Constitution is more "transformative" than "preservative", respecting the extent to which the state is expected to use the law to influence legal and social institutions. Fourth, South Africa's Constitution expressly establishes a fourth branch, which, in my analysis of the South African example, has or could play a significant role in realising the right.

Additionally, it is necessary to have regard to the aspects of the text of the South African Constitution that underly some of the insights derived from the South African experience with section 32. Specifically, section 7(2) of the South African Constitution requires the state as a whole to effect each of the fundamental rights in the Constitution, and section 32(2) makes legislation central to the realisation of the right to information.

Finally, other local circumstances also matter. For instance, a political sciences study into compliance with PAIA at the local level of government found "higher levels of compliance among more politically competitive municipalities."[778] Thus, factors beyond the right itself, related to the health of the democracy more generally, also influence the effectiveness of the right and the laws enacted to effect it.

[777] *SA Constitution* (n 5) 172(1)(b).
[778] Daniel Berliner, 'Sunlight or Window Dressing? Local Government Compliance with South Africa's Promotion of Access to Information Act' (2017) 30(4) *Governance* 641.

V LIMITS OF THE STUDY AND AREAS FOR FURTHER RESEARCH

This thesis is primarily doctrinal in that it has focused on analysing the attempts of the South African state at effecting section 32 of the Constitution. The purpose behind the comparative aspect of the thesis has been to illustrate variance in the level and form of constitutional protection for information access. Therefore, the comparative aspect does not consider any underlying reasons for the different approaches to guaranteeing information access. Future, more detailed, comparative research (considering contextual factors) could suggest reasons for these developments. Such research might ultimately propose other matters the drafters of constitutional provisions guaranteeing information access might need to consider.

Concerning the values that underpin information access, my purpose was to describe the range of definitions available for each of the values and to determine how they ought to be understood within the South African context. I made no claims about the normative desirability of broader or narrower definitions for any of those values regarding legal and constitutional guarantees for information access more generally. Further theoretical work on the values underpinning information access might identify the formulations that would be most useful for advancing arguments for legal and constitutional guarantees for information access.

This thesis has principally drawn on and engaged with public law scholarship on information access. However, a large body of legal research outside of public law has analysed various aspects of information access. For instance, information access is a research focus in media and international law.[779] Developments in other areas of law, as they relate to information access, could provide further fruitful avenues for research into constitutional recognition of information access.

Further, outside of the law, information access is an area of research in other disciplines, including political science.[780] Future research on the constitutional dimension of information access could draw on political and social science research methodology. Such socio-legal methods could address new

[779] Examples of research on information access in media law includes Lili Levi, 'Real Fake News and Fake Fake News Essays' (2017) 16 *First Amendment Law Review* 232; and Weiler (n 364); For an example of research on information access and international law see Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press, 2013).

[780] See for example, Stephan G Grimmelikhuijsen, Suzanne J Piotrowski and Gregg G Van Ryzin, 'Latent Transparency and Trust in Government: Unexpected Findings from Two Survey Experiments' (2020) 37(4) *Government Information Quarterly* 1; Daniel Berliner, Benjamin E Bagozzi and Brian Palmer-Rubin, 'What Information Do Citizens Want? Evidence from One Million Information Requests in Mexico' (2018) 109 *World Development* 222.

questions raised by this thesis, such as: What makes information useable and understandable to the people that need it to partake in democratic processes or realise their rights? Understanding what makes information useable and understandable will affect how a state ought to effect a constitutional right to information.

Regarding South Africa specifically, I have not proposed any legislative interventions to address the unaddressed information needs I identified in the thesis. For instance, in chapter 7, I note that microtargeting and disappearing advertisements on social media platforms have created an information deficit. These practices have had the effect that anyone not targeted by the messaging is unaware of what has been communicated to a select audience and is, therefore, unable to respond to those ideas. Further research into particular information needs could allow for suggestions for legislative interventions that could address those needs.

Lastly, I have not considered interinstitutional information access because I have focused on a fundamental right to information. By interinstitutional information access, I mean information-sharing between state institutions, which is also an aspect of information access that has constitutional implications. Further research could consider the constitutional dimensions of information-sharing between the branches of the state.

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