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Does PAIA enable the right to vote? An exploration of political party funding in South African democracy

by

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30 JANUARY 2017

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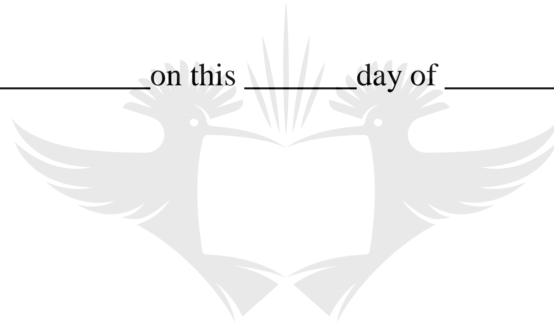

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Acknowledgements

This dissertation is dedicated to my dear friend Kisha Candasamy, thank you for reminding me how precious life is, what an honour it is to walk this earth and that we have a duty to try make it better while we are here. I look forward to seeing you again.

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Abstract

Current events have highlighted the need for better transparency in South Africa around the influence of money in politics, particularly findings of the Public Protector in her "State of Capture" report suggests a strong need for disclosure about private funding in the political arena. The need for disclosure in this context was also recently highlighted in Constitutional Court matter of *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (30 September 2015). As the majority of the court in that matter dismissed the application on other grounds, it never engaged the question of whether there is a constitutional basis for requiring the disclosure of information about private funding of political parties in South Africa. This dissertation therefore examines firstly whether this information is in fact, currently, accessible in South Africa, and, secondly, whether the Constitution requires that it should be accessible. I find that the information is in fact not currently accessible. The dissertation then shows that the principle of subsidiarity requires that reliance be placed in the circumstances on the right to vote, rather than on the right of access to information directly. Out of international law obligations and content given to the right to vote by the legislature and the Constitutional Court three strong arguments for the recognition of a right of access to information about political party funding as part of the right to vote are highlighted. The three arguments include the international law obligation to combat corruption through transparency about political party funding, the international law obligation to ensure the exercise of the right to vote is meaningful and the need to counter-balance inequality of access to politicians. The dissertation establishes that a legislative provision that would ensure access to such political party funding information would infringe on donors' and political parties' rights to privacy. However, such an infringement would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The dissertation therefore recommends that Parliament ought to be required, in line with its duties in terms of section 7(2) of the Constitution, to make the necessary amendments to the electoral legislation to give effect to the right of access to information about political party funding as part of the right to vote.

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1. Introduction

The success of the South African Constitutional project is in large part dependant on how well South Africans manage to turn the key values of transparency, accountability and participation, underlying the Constitution,[1] into real-life practice.[2] The right of access to information, and the exercise and implementation thereof are central to the achievement of these values. The Preamble to the Promotion of Access to Information Act[3] (PAIA) – the law enacted to give effect to the constitutional right of access to information – notes in particular how the secrecy and unresponsiveness of the previous system of government in South Africa led to an abuse of power and the violation of human rights. With the enactment of this law, Parliament committed South Africa to a new culture of transparency and accountability – a culture to be fostered across the board in all institutions, whether public or private. More particularly, PAIA, and the legislative framework within which it fits, has been enacted to ensure the accessibility of information that people require in order to be able to exercise and protect any other rights.[4]

That is the ideal. South Africa is, however still some way from achieving this ideal. The Access to Information Network (ATI Network) (formerly the PAIA Civil Society Network) – a South African civil society organisation advocating around the right of access to information – reports significantly low levels of compliance with PAIA.[5] For instance, the network reported in 2014 that only 37% of requests for information, that were made in terms of PAIA by network members, were responded to within the 30 day period provided for in the Act.[6] In 2013 that figure sat at just 22%, in 2011 at 25%, in 2010 at 21% and in 2009 at 12.7%.[7] While there has been some improvement over time, a failure in 63% of all instances

[1] Constitution of the Republic of South Africa, 1996.
[2] Davis "Corruption and Transparency" undated, unpublished paper written for the Open Democracy Centre (on file with author) 2 – 3.
[3] Act 2 of 2000.
[4] Preamble to PAIA (n 3).
[5] See the PAIA Civil Society Network Shadow Reports, online available at: http://foip.saha.org.za/static/paia-reports-and-submissions (6-10-2016).
[6] Kennedy "PAIA Civil Society Network Shadow Report: 2014" 2014 http://foip.saha.org.za/uploads/images/PCSN_ShadowRep2014_final_20150202.pdf (6-10-2016) 3.
[7] Kennedy "PAIA Civil Society Network (PAIA CSN) Shadow Report: 2013" 2013 http://foip.saha.org.za/uploads/images/PCSN_ShadowRep2013_final_20131029.pdf (6-10-2016) 5; O'Connor "PAIA Civil Society Network Shadow Report: 2011" 2011 http://foip.saha.org.za/uploads/images/PAIAShadowReport2011.pdf (6-10-2016) 4; PAIA Civil Society Network "PAIA Civil Society Network Shadow Report: 2010" 2010 http://foip.saha.org.za/uploads/images/PAIAShadowReport2010Final.pdf (6-10-2016) 3; and PAIA Civil

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(in 2014), to provide a timely response to formal access to information requests, seems to indicate that there is still some way to go toward achieving the goal of instilling a culture of transparency.[8]

Access to information has a crucial role to play in enhancing democracy. The relationship between the access to information and democracy is raised strongly by the question of whether individuals are entitled know about who funds political parties. Within the context of political party funding, the role of access to information in ensuring transparency, accountability and participation came before the Constitutional Court, recently, in the matter of *My Vote Counts NPC v Speaker of the National Assembly and Others*[9] (the *MVC matter*). The *MVC matter* turned on whether and how access should be granted to information about the private funding of political parties. The minority found that such information should be made accessible and that access should be granted through legislation enacted specifically for that purpose. Such legislation, the minority found, should be enacted in terms of the duty imposed on Parliament in section 32(2) of the Constitution. Section 32(2) of the Constitution requires that Parliament enact legislation that gives effect to the section 32(1) right of access to information. The majority found that Parliament had already enacted legislation in compliance with its duty under section 32(2) of the Constitution, namely, PAIA. The majority held that the legal principle of "subsidiarity", as developed by the Constitutional Court, prevented My Vote Counts (MVC) from relying directly on the right in section 32 and required this organisation instead to challenge the constitutionality of PAIA to the extent that its contention was that PAIA is not sufficient to give effect to section 32(1).[10] As such, the majority never engaged the question of whether information about the private funding of political parties should be accessible, but can be understood to suggest that – to the extent it should be accessible – PAIA must be amended to achieve this end.

In this dissertation, I will consider whether information about private funding of political parties is in fact, currently, accessible in South Africa, and if not, whether the Constitution

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Society Network "PAIA Civil Society Network Shadow Report: 2009" 2009 http://foip.saha.org.za/uploads/images/PAIACSNShadowReport2009.pdf (6-10-2016) 6.

[8] Kennedy (n 6) 3.

[9] (CCT121/14) [2015] ZACC 31 (30 September 2015).

[10] MVC is a non-profit organisation that campaigns to "improve the accountability, transparency and inclusiveness of elections and politics in South Africa" see http://www.myvotecounts.org.za/about/ (15-01-2017).

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requires that it should be accessible. To be able to answer these questions I will first have to answer a number of other questions.

I start by considering, in the first Chapter, how it is that the access to information legislative framework, underlying access to information in South Africa, works. I will demonstrate that PAIA, as the legislation enacted to give effect to the right of access to information acts as a mechanism for access to information that is recorded in some form or another. The mechanism, however, depends on the creation and accessible storage – or management – of records of information. I will then show that record-creation and record-keeping duties, arise in other, "sector specific" legislation. More specifically, I will demonstrate that legislation within the electoral legislative scheme does give indirect recognition to an access to information element to the right to vote by imposing record-creation and record-keeping duties. The legislation within the electoral legislative scheme in fact even recognises, in certain instances, a duty to ensure that recorded information proactively be made publicly accessible – that is, without the need for a formal access to information request.

Having demonstrated how the access to information legislative framework underlying access to information in South Africa works, it will become possible to turn to answering the question whether information about private funding of political parties is in fact, currently, accessible. I will indicate that, as there is no duty in the legislation within the electoral legislative scheme – the sector-specific legislation – to keep a record of information about private funding of political parties it is not possible to request such information. The information is therefore not currently accessible. The mechanism for access, PAIA, in order to ensure access, depends on a duty to create records with this information, and no such duty exists.

Once I have demonstrated that access to information about private funding of political parties is not currently accessible I will turn to answering, in the second Chapter, the question about whether the Constitution requires that information about private funding of political parties should be accessible. In order to answer this question it is necessary to first determine under which right such a duty, to make information about private funding of political parties accessible, might arise. I will show that, in line with the principle of subsidiarity, the right implicated in this question is the right to vote and not the right of access to information. I therefore suggest that the proper location for duties to create and keep, and in certain

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instances to proactively disclose, records of information related to voting (if this information is required for the exercise and protection of the right to vote) is in the legislation enacted to give effect to the right to vote.

In order to determine then, whether information about private funding of political parties is required for the exercise and protection of the right to vote I will analyse, in the second Chapter, the content given to the right to vote by international law and by the South African Constitutional Court and legislature. I will also, in light of similar constitutional protections, and as disclosure laws have for many years formed part of campaign finance regulation in the United States of America (US), briefly consider the case law of the US Supreme Court, related to disclosure and campaign finance. I will provide three arguments for the recognition of a right of access to information about private funding of political parties as part of the right to vote. The first argument relates to South Africa's obligation under article 10(b) of the African Union Convention on Preventing and Combating Corruption[11] to, in order to combat corruption, "incorporate the principle of transparency into funding of political parties." Access to information about funding makes it possible to identify instances of *quid pro quo* corruption and knowledge of potential exposure will act as a deterrent to corrupt activity. The second argument for the recognition of such a right relates to South Africa's duty, under international law, to ensure that the exercise of the right to vote is meaningful. Access to funding information about political party funding makes it possible for voters to determine what sort of pressure political parties will be under from funders with respect to issues that may affect community members. This knowledge will inform debate, which in turn will ensure meaningful exercise of the right to vote. The last argument provided relates to the recognition by the Constitutional Court of a duty to ensure that inequality of access to politicians is counter-balanced. Again, knowledge about what sort of pressure political parties will be under, from funders, with respect to issues that may affect voters provides voters with the opportunity to identify, and therefore vote for, the party that will best serve their interests.

In light of the importance of ensuring access to information about private funding of political parties (in order to combat corruption, ensure the meaningful exercise of the right to vote and ensure that inequality of access to politicians is counter-balanced) it is clear the information

[11] African Union, African Union Convention on Preventing and Combating Corruption, 1 July 2003 online available at: http://www.au.int/en/treaties/african-union-convention-preventing-and-combating-corruption accessed 24 September 2016.

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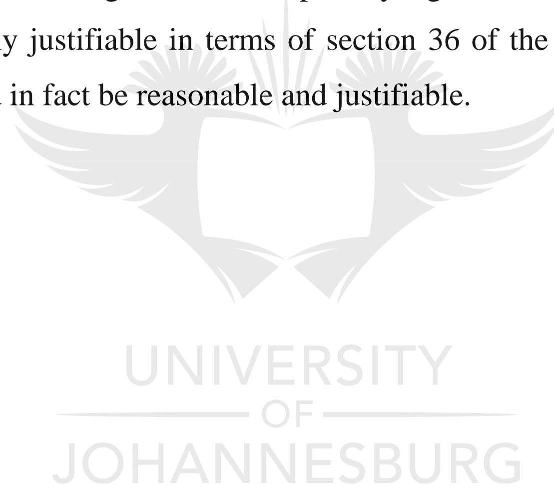
must be easily accessible. I will demonstrate that the high costs and heavy burden of access to this information using formal access to information requests taken together with the importance of access to this information necessitates a need for the information to be made proactively available. I will therefore argue that the legislature ought to create a duty within the legislation forming part of the electoral legislative scheme to record, and proactively grant access to, information about the private funding of political parties.

I will then consider, in the third Chapter, whether such a provision within the electoral legislative scheme, requiring the recording of, and proactive granting of access to, information about the private funding of political parties, may place any limits on other constitutional rights. I will show that such a provision would infringe on the privacy rights of donors (natural and juristic) as well as the privacy rights of political parties. Lastly, I will consider whether such an infringement of the privacy rights of donors and political parties would be constitutionally justifiable in terms of section 36 of the Constitution. I will show that the limitation would in fact be reasonable and justifiable.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2. Chapter One: The legislative framework underlying access to information in South Africa

2.1. Introduction

PAIA, provides access to information by focusing on the notion of "records" rather than "information". "Records" are defined in the National Archives and Record Service of South Africa Act[12] (NARSA) as "recorded information regardless of form or medium."[13] The definition in PAIA is identical except that it adds that it applies with respect to a "public body" or "private body" (terms defined in PAIA) that holds or controls such recorded information, irrespective of whether it was created by that body, or not.[14] Whereas PAIA (similar to the Unites States of America's (US) Freedom of Information Act[15]) allows for requests for records that hold information, the United Kingdom's (UK) Freedom of Information Act[16] allows requests for information – requests that require a written response. For example, if you wish to know who in the police leadership is responsible for public order policing you would, in the UK, simply ask the police department for an indication of who is responsible; in South Africa or in the US you would need to ask for a copy of a record – such as an organogram – containing that information.[17]

The downside of granting access through records is that a failure to create or keep records (or to keep them in an accessible manner) stifles the exercise of the right of access to information. This is a reality that the ATI Network has consistently highlighted, with respect to PAIA, over a number of years. The ATI Network reports that the primary reason provided, for the refusal of access to information, is that the records requested either could not be found or do not exist.[18] This problem, however, also surfaces in countries where access is granted to "information" rather than "records" as the information provided in response to access to information requests usually needs to be sourced from records.[19] The virtue of gaining access

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[12] Act 43 of 1996.
[13] Section 1 of NARSA (n 12).
[14] Section 1 of PAIA.
[15] 5 U.S. Code § 552.
[16] Act 2000 (c.36).
[17] See an example of such a request submitted by the South African History Archive Trust (SAHA): http://foip.saha.org.za/request_tracker/entry/sah-2015-sap-0013 online accessed 20161006.
[18] PAIA Civil Society Network "PAIA Civil Society Network Shadow Report: 2010" (n 7) 1; Kennedy (n 7) 5; and Kennedy (n 6) 6.
[19] See a recent media report about British politicians using encrypted messaging in order to avoid disclosure of information under access to information laws: Wilkinson "David Cameron aides using WhatsApp 'to avoid

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to the original underlying records or source documents – as opposed to simply written responses from governmental officials – is that the information provided is verifiable.[20]

PAIA recognises two forms of access to records. First, access can be gained by way of a formal request for access made either in terms of PAIA or in terms of other legislation providing for access and which is not less restrictive than, and not inconsistent with, PAIA.[21] Second, access can be gained automatically, without any need for a formal request.[22] This latter form of access is known as "proactive disclosure". Records can be made proactively available either on a voluntary basis or because of a proactive disclosure duty arising from another piece of legislation.[23] Where records are available proactively, PAIA requires that information about those records, and how they can be accessed, be published in a notice that must be made publicly accessible.[24] The "Records Management Policy Manual" – issued by the National Archivist in terms of the provisions of NARSA – notes that records and record-keeping play a critical role, not only in ensuring accountability but also in ensuring good governance and service delivery.[25]

The South African courts have also recognised the value of record-keeping. Judge Tlhapi, sitting in the High Court in Pretoria, delivered a judgement in favour of the Applicants in the matter of *Mail and Guardian Centre for Investigative Journalism and Another v Minister of*

transparency laws' over EU referendum" 2016 *The Independent Online* http://www.independent.co.uk/news/uk/politics/david-camerons-eu-remain-camp-using-whatsapp-to-avoid-transparency-laws-a7002791.html (6-10-2016).

[20] See for instance Alexander, Runciman and Maruping "South African Police Service (Saps) data on crowd incidents, a preliminary analysis" 2015 https://africacheck.org/wp-content/uploads/2015/06/South-African-Police-Service-Data-on-Crowd-Incidents-Report.pdf (6-10-2016). The report looks at data from the South African Police Service's Incident Registration Information System (IRIS), obtained by SAHA through the submission of a PAIA request (request information available online at: http://foip.saha.org.za/request_tracker/entry/sah-2014-sap-0018), and finds that the SAPS in reporting on incident data had misrepresented the data, see for instance page 58 of the report. See also Alexander, Runciman and Maruping "The use and abuse of police data in protest analysis South Africa's Incident Registration Information System (IRIS)" *SA Crime Quarterly* 2016 9.

[21] Sections 5, 11 and 50 of PAIA.

[22] Sections 15 and 52 of PAIA.

[23] See for instance section 25(4)(a) of the Municipal Systems Act 32 of 2000 (MSA) which provides that a municipality's Integrated Development Plan must be made publicly accessible. Section 21A of the MSA further provides that all records that municipalities are required to make available proactively must be made available at the municipality's head and satellite offices and libraries as well as on its official website. To the extent that it cannot afford a website section 21B provides that the relevant records must be provided for display, on a website sponsored by National Treasury.

[24] See sections 15 and 52 of PAIA.

[25] National Archives and Records Service of South Africa "Records Management Policy Manual" (2007) http://www.national.archives.gov.za/rms/Records_Management_Policy_Manual_October_2007.pdf (6-10-2016) 1.

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Public Works and Another.[26] The matter arose out of an access to information request, made by the Applicants in terms of PAIA (a "PAIA request"), for records related to improvements to the President's homestead, Nkandla. The court found the Respondents' arguments that there were no records with information about the decisions taken with regard to improvements at Nkandla – which decisions were made at a high level of management and with serious financial implications – to be unacceptable, holding that the:

> *"[f]ailure to keep record or a tendency to lose documents, or to hide them or to deal with government business under a cloud of secrecy where it is not justified or, like in this matter to confine disclosure to the project managers documents, in situations where a government department is taken to task or where the shoe might pinch certain officials in government, constitutes a dereliction of one of the most important obligations on a government, which is to keep proper records. Such conduct on the part of government does not advance the values espoused in our Constitution, that of a democratic, transparent and accountable government. It is in the public interest to keep record in order to give credence to the business of government itself and to those who govern."*[27]

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The Auditor-General of South Africa (AGSA) also recognises the critical role that record-keeping plays in good governance; with record-keeping being one of the criteria used by the AGSA in evaluating internal control with respect to financial and performance management. The Regulations to the Public Audit Act[28] therefore requires that institutions subject to audit by the AGSA keep "proper" and "timely" records, in order "to ensure complete, relevant and accurate information [that] is accessible and available to support financial and performance reporting."[29] Ngoepe and Ngulube report on a 2012 study by Ngoepe which analysed data from the AGSA's consolidated audit reports for the 2005/06 financial year through to the 2009/10 financial year.[30] They note that the study found that the most common cause for an

[26] (67574/12) [2014] ZAGPPHC 226 (29 April 2014).
[27] (n 26) par 35.
[28] No. 25 of 2004.
[29] Addendum A to Regulation 263 of 2014 in Government Gazette No. 37505 of 2 April 2014.
[30] Ngoepe M and Ngulube P "Contribution of record-keeping to audit opinions: an informetrics analysis of the gerenral (sic) reports on audit outcomes of the Auditor-General of South Africa" 2013 *ESCARBIA Journal* 52.

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adverse finding relating to the finance of organs of state over that period was a failure with respect to record-keeping.[31]

PAIA therefore is a mechanism for access, granting access to recorded information, whether in terms of a request or proactively. The mechanism, critically, depends on the creation and accessible storage – or management – of records. Record-creation and record-keeping duties, however, arise in other, sector specific legislation. The neologism, "sector specific legislation", denotes legislation and other forms of law aimed at giving effect to constitutional rights and designed to regulate distinct areas of social, economic and political life – from contracts, to marriage, to labour, to education, to security services and to voting rights. This terminological distinction sits at the very core of this dissertation's argument: different sectors, and the rights that govern them, require that certain information, essential within that sector, be recorded. In some instances, the public interest may require that this very important information be easily accessible – that might be, for instance, because the information is essential for the full realisation of or for the protection of the right it aims to give effect to. In such instances the sector specific legislation will usually also require that the information be automatically, or "proactively" disclosed – that is, disclosed without the need for a formal access to information request. The information required by participants in the financial sector is quite different from the information we require for oversight of our security services or our electoral system. There are also other questions which arise in addition to what information should be recorded in a particular sector: for instance, the manner in which information should be recorded, how it should be disclosed and how long it should be preserved will be different for different facets of society. The point is, yet again: neither section 32 of the Constitution – an overarching constitutional right – nor PAIA – framework legislation – could possibly serve these fine but critical distinctions. Record-creation and record-keeping duties are specific for each sector and the proper location for such duties is in the sector specific legislation rather than in the framework legislation. Said in a different way, the duties to create and keep, and in certain instances to proactively disclose, records of information, important within a specialist field arise and should be recognised within the right or legislation governing that sector.

[31] (n 30) 52.

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On a broad level, there is legislation creating overarching record-keeping duties for public bodies. On a sector specific level, there are numerous pieces of legislation that impose record-creation and / or record-keeping duties on institutions and individuals in the public and in the private sector. In the section that follows I will give an overview of what that legislative framework looks like. It is by no means an attempt at an exhaustive list of all legislation with record-creating and record-keeping duties. In fact, the Auditor General – in a 2012 presentation – estimated that there are over 800 such pieces of such legislation.[32] This attempt is instead intended to illustrate how records-related legislation fits into the access to information legal framework.

2.2.Record-creation and record-keeping duties imposed on the public sector

NARSA was enacted in part to ensure the preservation of any records, public or private, with "enduring value", proper management and care of all public records and the promotion of records management.[33] It applies to all bodies in the national sphere of government, and in so far as no provincial archive has been established within any province in the country, also to all bodies (within the provincial and local sphere of government) in that province.[34] South Africa is not the only country that locates high-level records management duties outside of access to information legislation. According to the Global Right to Information Rating[35] out of 105 countries surveyed, only 36 (34%) have – in their access to information legislation – record management (or, record-keeping) standards.[36] In South Africa, unlike those 36 countries, the high-level duty on state entities, to keep information in an accessible manner arises in NARSA, rather than in PAIA. NARSA provides for the determination, by the National Archivist, of classification systems for records, which, if complied with will ensure easy access to records. It also provides for the issuance by the National Archivist of directives and instructions for the management and care of public records.[37] Regulations issued in terms

[32] Presentation available online at: https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0ahUKEwi636rf7MjPAhXIKMAKHWl3Cs8QFghOMAg&url=http%3A%2F%2Fwww.sarmaf.org.za%2Foid%255Cdownloads%255CRecords%2520Management%2520and%2520the%2520Law.pptx&usg=AFQjCNFoJaPJwJmTVsJVY0wnuHJWkWMi6g&bvm=bv.134495766,d.d2s [accessed 20160928].

[33] Preamble to and section 3(C) of NARSA.

[34] Section 16(1) of NARSA.

[35] An online programme (founded by founded by Access Info Europe and the Centre for Law and Democracy) that compares legal frameworks for access to information from various countries access the world.

[36] Centre for Law and Democracy "Global Right to Information Rating" http://www.rti-rating.org/by-indicator/?indicator=57 (23-07-2016).

[37] Section 13(2)(i) and section 13(4) of NARSA.

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of NARSA, by the Minster of Arts, Culture, Science and Technology, are deemed a part of the Act.[38] NARSA requires that an official be designated in every public body that will be responsible for compliance, by that body, with the requirements of the Act. It is a criminal offence under NARSA to remove, destroy or erase any record, public or non-public, under the control of a public body other than in terms of processes provided for in NARSA and its Regulations [39]

One of the express objectives of PAIA is the promotion of transparency, accountability and effective governance.[40] Interestingly the Public Finance Management Act[41] (PFMA) and the Municipal Finance Management Act[42] (MFMA) have very similar express objectives of ensuring transparency and accountability – but specifically, in the management of public finance.[43] These Acts directly impose a number of record-creation duties. The MFMA, for instance, requires that authorisation to withdraw money from a municipal bank account be reduced to writing and that a report be issued on a quarterly basis on all withdrawals made out of a municipal account.[44] Annually, municipalities (in terms of provisions in the MFMA) and provinces (in terms of provisions in the PFMA) are required to create a budget.[45] Annually, municipalities are required to record, in writing, detail about investments held by them – including detail about the opening and closing balances for such investments.[46] Section 31(d) of the MFMA requires that any approval for the expenditure of funds in excess of that budgeted for a specific project be recorded in writing. The PFMA requires of every institution, to which its provisions apply, to prepare, annually, consolidated financial statements.[47] All delegations of duties, conferred on National Treasury, to a department of National Treasury and all authorisation provided by National Treasury to any provincial government for participation in a company not wholly owned by that province must be recorded in writing.[48] Within 14 days of the provision of authorisation for emergency funding, the PFMA requires that a report be created on the emergency funding.[49]

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[38] See the definition of "this Act" in section 1 of NARSA. Regulations provided for in section 13(3) of NARSA.
[39] Section 16(1) of NARSA.
[40] Section 9(e) of PAIA.
[41] Act No. 1 of 1999.
[42] Act No. 56 of 2003.
[43] Section 2 of the PFMA and section 2(a) of the MFMA.
[44] Section 11(1) and (3) and 12(4)(a) of the MFMA.
[45] Chapter 4 of the MFMA and section 18(1)(a) of the PFMA.
[46] Section 13(4)(a) of the MFMA.
[47] Sections 8 and 19(1) of the PFMA.
[48] Section 10(1)(a) and 23(2) of the PFMA.
[49] Section 16(4) of the PFMA.

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These are just a few provisions out of just three pieces of legislation that apply to the public sector, but they serve to illustrate that, while PAIA is the mechanism for access, the duty to create the records sits in the sector specific legislation – in this instance: public finance legislation. The record-keeping duties are situated, with respect to public institutions, in NARSA.

2.3. Record-creation and record-keeping duties imposed on the private sector

As is the case in the public sector, in the private sector too there is legislation that contains record-creation and record-keeping duties. To illustrate this point I will outline below just a few record-creation and record-keeping duties, arising in legislation related to the specialist areas of company law, consumer protection, communications, and labour.

2.3.1. Company law

The Companies Act[50] applies to both private and state-owned companies.[51] The Companies Act requires that Memoranda of Incorporation, company rules, securities registers and registers of disclosure with respect to "regulated companies" be kept indefinitely, and that all other information a company is required, in terms of the Act, to keep, be kept for at least seven years.[52] The Companies Act – the sector specific legislation – therefore contains record-keeping duties, not only for the state, but also for institutions in the private sector. The Act also has record-creation duties that it imposes on institutions in both the public and the private sector. The Commissioner of the Companies and Intellectual Property Commission is, for instance, required to issue registration certificates with respect to every company whose Notice of Incorporation, and every foreign company whose application, is accepted by the Commission.[53] The Act also requires of companies to annually prepare financial statements and to minute shareholders' and directors' meetings and to ensure that all resolutions taken by either shareholders or directors are recorded.[54]

[50] Act No. 71 of 2008.
[51] Section 8 of the Companies Act.
[52] Section 24(1), section 24(3)(a), section 24(4)(a) and section 56(7) of the Companies Act.
[53] Section 14(1)(b)(iii) of the Companies Act.
[54] Section 24(3)(c)(d) and (f) of the Companies Act.

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2.3.2. Consumer Protection

The Consumer Protection Act[55] (CPA) aims to promote a fair, accessible and sustainable marketplace through the introduction of a number of measures including the establishment of norms and standards for consumer protection and the improvement of standards of consumer information.[56] The Preamble to the CPA expressly notes the key role access to information plays in the achievement of this goal, and the CPA has numerous provisions that require the creation and safe retention of records. For instance, the CPA requires that consumer agreements between suppliers and consumers be recorded, if not in writing then in some other recordable form acceptable under the Act.[57] Similarly, any intermediary in any sales relationship has to keep records of their relationship both with the supplier of the goods or services and with the buyer of the goods or services.[58] Regulations to the CPA[59] require that certain information related to promotional competitions, such as the rules of the competition, the prizes offered, where the competition was marketed and acknowledgment of receipt of prizes by winners, be recorded and kept for 3 years.[60]

The National Credit Act[61] (NCA) also aims to protect, through fairness and transparency in the credit industry, the social and economic welfare of consumers. It, therefore, mandates, within the Act and Regulations certain record-creation and creates record-keeping duties.[62] The Regulations to the NCA[63] prescribe what information must be kept about consumers of credit and prescribes standards of retention: it notes, for instance, that records must be kept of identity numbers, but may not be kept of race or sexual orientation.[64] The Regulations provide for the compilation, if necessary, of a report on a consumer of credit, and also provides that a consumer can request a copy of their own report and must be able to challenge the accuracy of the information in the report.[65] The Regulations require that written reasons

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[55] Act No. 68 of 2008.
[56] Preamble to the CPA.
[57] Section 50(3) of the CPA.
[58] Section 27 of the CPA.
[59] GN R293 in GG 34180 of 1 April 2011.
[60] Regulation 11(6) (n 59).
[61] Act No. 34 of 2005.
[62] Section 3 of the NCA.
[63] GN R489 in GG 28864 of 31 May 2006.
[64] Regulation 18 (n 63).
[65] Regulations 18 and 20 (n 63).

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be provided in instances where credit is declined, that payments made with respect to credit be recorded and that such records be kept for at least 3 years.[66]

2.3.3. Communications

The Electronic Communications and Transactions Act[67] (ECTA) aims to enable and facilitate electronic communications and transactions in the public interest.[68] To this end, it requires, for instance, not only that permission be sought for the collection of personal information but that the permission be recorded and retained in writing.[69]

The Electronic Communications Act[70] (ECA) seeks to further the object of regulating electronic communication in the public interest and, in so doing, creates a number of record-creation and retention duties.[71] One such duty is the duty, placed on the Independent Communications Authority, to record and keep a "radio frequency plan" which must reflect, amongst other things, the radio frequency allocations in South Africa.[72]

2.3.4. Labour

The various pieces of legislation aimed at realising the constitutional right to fair labour practices also have key provisions providing for the recording of information.[73] In terms of section 81 of the Compensation for Occupational Injuries and Diseases Act[74] (COIDA) employers must keep record of employees' earnings and other prescribed information, for a period of at least 4 years.[75] Records "necessary for the exercise of proper control over the compensation fund" must be prepared annually.[76] In the event of a hearing with respect to a compensation claim, a record, of the proceedings, must be created.[77]

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[66] Regulation 25 (n 63).
[67] Act No. 25 of 2002.
[68] Section 2 of ECTA.
[69] Section 51 of ECTA.
[70] Act 36 of 2005.
[71] Section 2 of the ECA.
[72] Section 34 of the ECA.
[73] Section 23 of the Constitution.
[74] Act No.130 of 1993.
[75] Section 81 of COIDA.
[76] Section 20 of COIDA.
[77] Section 45(7) of COIDA.

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In furtherance of its objectives of advancing economic development, social justice, labour peace and the democratisation of the workplace, the Labour Relations Act[78] (LRA) similarly requires that certain records be created and kept in an accessible manner.[79] Section 54 of the LRA requires, for instance, that every bargaining council and every statutory council keep minutes of its meetings – for a minimum of three years.[80] All registered trade unions and employers' organisations are required to "keep book… of its income, expenditure, assets and liabilities", create and keep a list of its members, minute its meetings and retain, for at least three years from the date of a ballot, all ballot papers.[81]

2.3.5. Record-creation and record-keeping duties in relation to elections

In the *MVC matter* which will be discussed shortly in detail, the Constitutional Court was concerned with information relating to the right to vote, so the question arises: does the electoral legislative scheme also provide for record-creation and record-keeping duties? The answer is yes. Even with respect to elections there are a number of record-creation and record-keeping duties that enable access to information and, ultimately, enable the exercise and protection of the various political rights in section 19 of the Constitution – including, the right to vote. To this end, the Electoral Act[82] – specifically aimed at giving effect to constitutional declarations, guarantees and responsibilities in relation to national, provincial and local elections – requires the recording of every objection raised with respect to a specific person voting, as well as the decision on that objection.[83] Similarly, objections with respect to the counting of votes and the determination of provisional results must be recorded, in terms of section 49(7) of the Electoral Act. Record must also be kept of any irregularities and discrepancies, with respect to the counting of votes, as well as of how those issues were dealt with.[84] The Electoral Commission is required to keep a map of voting districts.[85] The fact that an individual has cast her ballot must be recorded.[86] Results of elections must be recorded (and then declared publicly).[87]

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[78] Act No. 66 of 1995.
[79] Section 1 of the LRA.
[80] Section 54 of the LRA.
[81] Sections 98 and 99 of the LRA.
[82] Act 73 of 1998.
[83] Sections 2 and 41 of the Electoral Act.
[84] Section 52(5) of the Electoral Act.
[85] Section 60 of the Electoral Act.
[86] Section 38(5) of the Electoral Act.
[87] Section 50 of the Electoral Act.

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The Electoral Commission Act[88] provides for the establishment of the Electoral Commission, created in order to "strengthen constitutional democracy and promote democratic electoral processes."[89] Any person, attending any meeting of the Commission, that holds any financial or other interest that might create a conflict of interest, that is, an interest that will prevent that person from performing functions or duties imposed on them by the Act, in a fair or impartial way, may not be present at or participate in that meeting.[90] Should any person appear to have such an interest, they are required to disclose the interest, and to allow remaining members, separately, to determine whether the interest indeed creates a conflict of interest. Every such declaration and determination must be recorded within the minutes of the meeting.[91] The Commission is required to keep records of its financial accounting.[92]

The Local Government Municipal Electoral Act[93] (LGMEA) also aims to give effect to "constitutional declarations, guarantees and responsibilities" related to municipal elections.[94] To ensure the realisation of such constitutional declarations, guarantees and responsibilities, the LGMEA requires, for instance, that lists be created, certified and kept of all parties contesting municipal elections and candidates contesting ward elections.[95] As with national elections, objections to specific voters voting, and identified and alleged irregularities and discrepancies – as well as steps taken to address those – must be recorded in writing.[96] The fact that an individual has cast her ballot must be recorded.[97] Results of elections must be recorded (and then declared publicly).[98]

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Even duties to ensure the *proactive release* of records of information related to the realisation of constitutionally-guaranteed political rights, are seated within this sector-specific legislation. For instance, the Electoral Act requires that a "national common voters' roll" be compiled, maintained *and made available for inspection at the offices of the Electoral Commission*.[99] Decisions to postpone voting at any given voting station, or an allowance for a

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[88] Act 51 of 1996.
[89] Preamble to and section 4 of the Electoral Commission Act.
[90] Section 10(1) of the Electoral Commission Act.
[91] Section 10(2) of the Electoral Commission Act.
[92] Section 12(2) of the Electoral Commission Act.
[93] Act 27 of 2000.
[94] Section 2 of the LGMEA.
[95] Sections 15 and 18 of the LGMEA.
[96] Sections 51, 58 and 62 of the LGMEA.
[97] Section 4 of the LGMEA.
[98] Section 64 of the LGMEA.
[99] Sections 5 and 16 of the Electoral Act.

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revote, must not only be made public but must be published in the media, ensuring a wide reach.[100] The lists of candidates and maps of voting districts that are required to be created must not only be available for inspection, but notice of their availability must similarly be published in the media.[101] Voting hours, other than as provided for in the Electoral Act, must also be so published.[102] Other notices that must be publicised include: notices of relocation of voting stations – in case of an emergency – and notices of routes for, and estimated stopping times of, mobile voting stations.[103] In terms of section 111 of the Electoral Act, steps must also be taken to ensure that any record, that must be proactively available in terms of the provisions of the Act, is also made available electronically.[104]

2.4. Does PAIA ensure access to information about private funding of political parties?

It is clear from the discussion in this Chapter that PAIA acts as a mechanism for gaining access to recorded information. Record-creation and record-keeping duties, and – where appropriate – duties to make records proactively available to the public are situated in sector-specific legislation. To answer the question whether PAIA ensures access to information about the private funding of political parties, we therefore first have to look more broadly to the general access-to-information scheme. With respect to voting rights, the sector specific legislation that would contain the relevant record-creation, keeping and proactive release duties are the Electoral Act, LGMEA and Electoral Commission Act. The first question is therefore whether a duty exists within the sector-specific legislation to record information about the private funding of political parties. The answer to that question is no. The access to information legislative scheme as it stands therefore does not ensure access to information about the private funding of political parties. The mechanism for access, PAIA, in order to ensure access, depends on a duty to create records with this information, and no such duty exists.

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[100] Sections 22 and 23 of the Electoral Act. See also similar provisions with respect to municipal elections in section 9 and 10 of the LGMEA.
[101] Section 29(1) and (2) and section 63(1) and (2) of the Electoral Act and sections 20 and 22 of the LGMEA.
[102] Section 36 of the Electoral Act.
[103] Sections 65 and 69 of the Electoral Act.
[104] See also, similar provisions with respect to municipal elections in section 85 of the LGMEA.

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2.5. Conclusion

It is therefore clear that Parliament chose, with the enactment of PAIA, to give effect to the right of access to information, by providing a mechanism for accessing records – records that are created and kept in terms duties imposed in other, sector-specific, legislation. The minority in the *MVC matter* in fact, in recognising that there is a "range of legislation" that gives effect to the right of access to information, seems to recognise this.[105] However, in finding that this means that all of these pieces of legislation are enacted in terms of section 32 of the Constitution, the court, with respect, erred. In fact, while record-creation and record-keeping duties clearly relate to the right of access to information and fit within the legislative scheme of access – they are sector-specific, relating to specialist fields. These record-creation and record-keeping duties are located in pieces of legislation aimed at giving effect to other fundamental rights and public interest concerns. These other rights and concerns, as I will show below with respect to the right to vote, in fact, have access to information elements. The legislation giving effect to those rights and interests must therefore – and as illustrated above usually do – contain the related record-creation and record-keeping duties. Where information must be readily accessible, in order to give full effect to a right, a duty proactively to make records of that information available should also be contained in the sector-specific legislation. It is clear from the discussion in this chapter that, with respect to political rights – and more specifically the right to vote, the duties to create and keep records are seated in the sector specific legislation, designed to give effect to those rights, and not in PAIA or in other legislation aimed specifically at granting access to information. What is more, this legislation does not contain any record-creation or record-keeping duties with respect to information about the private funding of political parties, and so, as it stands, there is no guaranteed access, under the existing access to information legislative scheme, to this information.

[105] The *MVC matter* (n 9) par 67.

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3. Chapter Two: Identifying the right more directly implicated

3.1.The role of the principle of subsidiarity

In the previous chapter, I demonstrated that Parliament's chosen model for access to information situates PAIA as a mechanism (or an instrument) for access to information – information that is, that is captured or recorded in one form or another. This model necessarily depends on duties contained in sector-specific legislation to create and preserve records of information. In some instances, there is a further duty to make the relevant information proactively available to the public – that is, without the need for a formal access to information request. In my view this model is in keeping with one of the forms of "constitutional subsidiarity". In the *MVC matter* the minority judgement noted that "constitutional subsidiarity" refers to:

> "*…a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail.*"[106]

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Van der Walt suggests that constitutional subsidiarity derives from the Constitutional Court's holding, in a number of cases, that South Africa has one system of law, derived from and shaped by the Constitution.[107] The principles of subsidiarity prevent the creation of multiple systems of law, by preventing reliance, by litigants, on the source of law that best supports their cause.[108] If litigants were free to choose to rely on whichever source of law (the Constitution directly, legislation, customary law or common law) best supported their cause then, in situations with very similar factual and legal issues, some people might choose to frame their cause of action as being a constitutional issue while others may choose to frame it as a legislative issue.[109] This is problematic because if different litigants could rely on any one of different sources of law the result would be the development of "parallel fields of law"

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[106] The *MVC matter* (n 9) par 46.
[107] Van der Walt *Property and Constitution* (2012) 20 35. See also Van der Walt "Normative pluralism and anarchy: reflections on the 2007 term" 2008 *Constitutional Court Review* 77 90 – 98.
[108] Van der Walt (n 107) 38.
[109] Van der Walt (n 107) 38.

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all dealing with the same issue in different ways.[110] Marais and Maree highlight the example of a litigant relying on their constitutional right to compensation for expropriation instead of their legislated right to have the unjust administrative action, that lead to the expropriation, set aside.[111] The court's endorsement of this action creates "parallel fields of law" making it possible for future litigants in similar circumstances to either have the unjust administrative action set aside, in terms of legislation, or to claim compensation under the Constitution.[112]

The principle of subsidiarity by contrast requires that litigants rely on the source of law (out of all the sources that have a bearing on the facts of their case) that is the most specific, concrete or detailed, and that higher norms only be invoked to give content to the more specific rules. Therefore where there is common law or legislation dealing with an issue related to a fundamental human right recognised in the Bill of Rights,[113] a litigant must, in compliance with the principle of subsidiarity, rely on the common law principle or legislation; the Constitution, and more specifically the constitutional right, will inform the interpretation of the common law principle or legislation.[114] The Constitution could still be relied on directly, if the common law principle or legislation was in conflict with the Constitution or failed to give full effect to a right in the Constitution, but only in those circumstances. Subsidiarity therefore does not require of us to ignore some sources of law, but does tell us where to start when there is more than one source of law applicable in a given situation, and what roles the different sources play.[115]

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Justice Cameron in the *MVC matter* provides detail with respect to five forms of constitutional subsidiarity that have been recognised in South African constitutional law.[116] Two of these forms of subsidiarity are relevant to this analysis, one because it was relied on by the majority in the *MVC matter* and the other because – as I will show – it should have been relied on by the court.

[110] Marais and Maree "At the Intersection between Expropriation Law and Administrative Law: Two Critical Views on the Constitutional Court's *Arun* Judgment" 2016 *Potchefstroom Electronic Law Journal* 1 19 – 20 and Van der Walt (n 107) 16 and 62 – 32.
[111] Marais (n 110 24 – 25 and 54.
[112] Marais (n 110) 20.
[113] Chapter 2 of the Constitution.
[114] Van der Walt (n 107) 85.
[115] Marais (n 110) 25.
[116] The *MVC matter* (n 9) par 47-53 and 61-63.

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The form of subsidiarity relied on by the majority in the *MVC matter*, applies in circumstances where the legislature has enacted legislation with the intention of giving effect, through that legislation, to a fundamental right in the Constitution.[117] In such circumstances, the principles of constitutional subsidiarity require of a litigant either to rely on the legislation in order to exercise or protect their right or to challenge the constitutionality of the legislation in so far as it does not provide for the exercise or protection of all aspects of that fundamental right.[118] In the *MVC matter*, the applicant argued that access to information about the private funding of political parties is required to enable the effective exercise of the right to vote.[119] On this basis the applicant wished to place reliance on the constitutional right of access to information, as contained in section 32(1) of the Constitution, in order to seek an order for the enactment of legislation, in terms of section 32(2) of the Constitution that would provide access to information about the private funding of political parties.[120] Section 32(1) of the Constitution provides that:

> "*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.*"

Section 32(2) of the Constitution requires of Parliament to enact legislation to give effect to the right contained in section 32(1) – the right of access to information.

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The applicant's case was that while PAIA had been enacted in terms of section 32(2) of the Constitution to give effect to right of access to information, PAIA was never intended to give effect to all aspects of the right of access to information. There therefore remains, so the argument goes, a duty – under section 32(2) – to enact further legislation in order to give effect to further aspects of the right of access to information.[121] The majority held that, in so far as the applicant's case was that the legislation enacted to give effect to the constitutional right of access to information – PAIA – did not enable the applicant to exercise its right of

[117] The *MVC matter* (n 9) par 53 and Van der Walt (n 107) 40.
[118] The *MVC matter* (n 9) par 53 and Van der Walt (n 107) 36.
[119] Applicant's Heads of Argument online available at http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/x/0/0/5/0 accessed 27 November 2016 par 9 and the *MVC matter* (n 9) par 127.
[120] The *MVC matter* (n 9) par 86.
[121] The *MVC matter* (n 9) par 67.

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access to information fully, the applicant ought to have, in compliance with constitutional subsidiarity, challenged the constitutionality of PAIA.[122] The majority holding, if understood as authority for the view that a litigant wishing to exercise the right in section 32(1) of the Constitution must rely on or challenge the constitutionality of the legislation expressly enacted in terms of section 32(2) of the Constitution, is in line with the form of constitutional subsidiary discussed thus far.[123] This holding is problematic, however, if understood as authority for the view that a challenge to the constitutionality of PAIA is the correct cause of action in circumstances such as those that arose in the *MVC matter*. It is problematic because of the applicability, in circumstances such as those that arose in the *MVC matter*, of another form of constitutional subsidiarity.

The other form of subsidiarity, detailed in the minority judgment in the *MVC matter*, that is relevant to this analysis, arises in circumstances where more than one right in the Bill of Rights is implicated in a factual situation.[124] In such cases, reliance must be placed on the more specific of the rights, with the more general right playing what I will call a "supportive" role.[125] The general right will assist with the determination of whether there has been a violation of the more specific right. The right to dignity often plays such a supportive role.[126] The Constitutional Court in *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*[127](*Nokotyana*) noted, with respect to the constitutional rights to housing and dignity that:

> "*Section 39 of the Constitution requires courts when interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It is incontestable that access to housing and basic services is important and relates to human dignity. It remains most appropriate though to rely directly on the right of access to*

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[122] The *MVC matter* (n 9) par 192.
[123] Van der Walt (n 107) 38.
[124] The *MVC matter* (n 9) par 49 and Marais (n 111) 27.
[125] In *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) at par 15 – 16 and 19 the Constitutional Court held that, as our Constitution has a specific right to health care, the right to life cannot be relied on directly to support a health care claim. The right to life will be taken account of, as part of the broader textual context of the right to health care, when interpreting the right to health care, but cannot be relied on directly.
[126] Woolman "Dignity" Woolman and Bishop (eds) *Constitutional Law of South Africa* (2013) 20-21.
[127] 2010 (4) BCLR 312 (CC).

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> *adequate housing, rather than on the more general right to human dignity.*"[128] (footnotes omitted)

While there are instances where the right of access to information will be the more specific right implicated, there are in fact also many instances where that right plays a supportive role. The idea that many (if not all) fundamental human rights have a facet that involves access information is not new – in fact, South Africa's recognition of access to information as a stand-alone right is fairly unique.[129] At an international level, the right of access to information is recognised as forming part of the right to freedom of expression.[130] Access to information elements have also been recognised as features of a number of other fundamental rights.[131]

In South Africa, both the legislature and the courts have repeatedly, if not very expressly, given recognition to an access to information element to other fundamental rights, including – more specifically – to the right to vote. In *President of the Republic of South Africa and Others v M & G Media Ltd*,[132] for instance, the Constitutional Court held:

> "*In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.*"[133]

From the consideration of electoral legislation in Chapter 1, it is clear that the legislature recognises an information element to the right to vote. The Electoral Act, the LGMEA and the Electoral Commission Act all create access to information duties. In fact, both the Electoral Act and the LGMEA create not only a number of record-creation and record-

[128] (n 127) par 50.
[129] Peekhaus "South Africa's Promotion of Access to Information Act: An Analysis of Relevant Jurisprudence" 570 596 570.
[130] Article 19 of the Universal Declaration of Human Rights Adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) and article 19 of the International Covenant on Civil and Political Rights adopted 16 December 1966 (entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[131] With respect to environmental law see for example Gavouneli "Access to environmental information: delimitation of a right" 2000 *Tulane Environmental Law Journal* 303 327. See also, with respect to the right to work, the UN Committee on Economic, Social and Cultural Rights' *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18 par 12, 28 and 42.
[132] 2012 (2) BCLR 181 (CC).
[133] (n 132) par 10.

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keeping duties but also some proactive release duties. One example is the duty imposed on the chief electoral officer to compile and make publicly accessible a national common "voters' roll".[134] Making the roll publicly accessible makes it possible, for instance, for adult citizens to verify that their names have been recorded on the voters' role, and recorded correctly. To the extent that individuals' determine, through access to the roll, that their names do not appear, they therefore have an opportunity to stake steps to register. Similarly, should someone discover an error in the way they are recorded on the roll, they will be able to take steps to have the error corrected.[135] Ultimately, therefore, access to the voters' roll would make it possible for such individuals to exercise their right to vote. It is clear therefore that the right to vote has an access-to-information dimension to it.

In the *MVC matter*, the applicants contended that South African citizens need access to information about the funding of political parties in order meaningfully to exercise their right to vote.[136] The applicants were therefore primarily seeking to protect and ensure full exercise and realisation of the right to vote, as contained in section 19(3)(a) of the Constitution. The principle of subsidiarity therefore required of the applicants to rely on the more specific right – the right to vote as contained in section 19(3)(a) of the Constitution – not the right of access to information. The right of access to information in section 32, while not irrelevant to the enquiry, should play a subsidiary role in determining whether Parliament's failure to ensure access to funding information violates the political rights in section 19. In my view, therefore, the majority in the *MVC matter* applied the principle of subsidiarity incorrectly. While they held, correctly in my view, that the principle did apply, they used it to find that the applicants ought to have challenged PAIA.[137] The proper location for duties to create and keep, and in certain instances to proactively disclose, records of information related to voting (if this information is required for the exercise and protection of the right to vote) is in the legislation enacted to give effect to the right to vote.

The minority, in finding that this aspect of subsidiary did not apply was correct, but was wrong in holding that subsidiarity does not apply at all – as I have demonstrated, subsidiarity

[134] Section 5 and 16 of the Electoral Act.
[135] Section 6, 9 and 15(1)(c) of the Electoral Act.
[136] The *MVC matter* (n 9) par 2 and 127. See also the Applicant's Heads of Argument online available at: http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/x/0/0/5/0 accessed 22 November 2016 par 9.
[137] The *MVC matter* (n 9) par 193.

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should in fact have been applied but in a different way.[138] The principle of subsidiarity, properly applied, required – to borrow from the language of the *Nokotyana* court – reliance "directly on the right [to vote], rather than on the more general right [of access to information]."[139] The court ought to have determined whether the information MVC was seeking to access is in fact required in order to ensure protection and full realisation of the right to vote (an enquiry the minority did in fact engage with). Parliament has the duties, in terms of section 19(3) read with section 7(2) of the Constitution to respect, protect, promote and fulfil the right to vote. Should the court therefore have determined that the information MVC was seeking to access is required to ensure full realisation of the right to vote, it ought to have ordered Parliament to amend the electoral legislation, to reflect therein a duty to record this information. Should there be a clear public interest in making the information accessible automatically, without the need for any access-to-information requests, the proper location for such a duty of proactive disclosure would similarly be in the electoral legislation and not in PAIA.

3.2.The scope and content of the right to vote

Given the argument thus far, I know turn to determine whether the right to vote should be understood to impose a duty to provide access to information about the private funding of political parties. It thus becomes necessary to consider the scope and content of the right to vote. The right to vote is contained in section 19(3)(a) of the Constitution, which provides as follows:

> "*Every adult citizen has the right -*
> *a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret;"*

3.2.1. Interpretive approach

Section 39(1)(a) of the Constitution, provides that "[w]hen interpreting the Bill of Rights, a court… <u>must promote the values</u> that underlie an open and democratic society based on human dignity, equality and freedom" (emphasis added). Section 39(1)(a) therefore requires

[138] The *MVC matter* (n 9) par 68.
[139] Nokotyana (n 127) par 50.

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that whenever content is given to rights in the Bill of Rights, effect must be given to the purpose of that right – that is to say, a "purposive" approach must be taken to the interpretation of rights in the Bill of Rights. In the South African constitutional law context a reference to the "purpose" of a right is a reference to purpose in a teleological sense, that is, a reference to the more objective aim of a provision rather than to the intention of the legislature at the time of enactment.[140] The purpose of a right is determined with reference to the underlying values noted in section 39(1)(a) and with reference to the historic and textual context in which that right is located.[141] In so far as the role of text goes, the Constitutional Court in *S v Makwanyane and Another*[142] made it clear that, when interpreting rights in the Bill of Rights, while due regard must be paid to the words of the text, should the text allow for more than one interpretation of a provision, the one that needs to be favoured is the more generous interpretation that best gives expression to the underlying values of the Constitution.[143] Generous interpretation has been described as "drawing the boundaries of rights as widely as the language… and the context… makes possible."[144] Rights in the Bill of Rights should therefore be interpreted generously and purposively; taking into consideration the underlying values and historical and textual context. A purposive approach to the interpretation of the right to vote therefore requires an understanding of the purpose of the right to vote.

Section 39(1)(b) of the Constitution further requires a consideration, in the interpretation of a right in the Bill of Rights, of applicable international law. While section 39(1)(c) of the Constitution allows for the consideration of comparative foreign law.

Therefore, in considering whether the right to vote, as contained in section 19(3)(a) of the Constitution, should be understood to impose a duty to provide access to information about the private funding of political parties it is necessary to take account of a number of things. Account needs to be taken of the international law position and, as both the Constitutional Court and Parliament have given some content to the right to vote, also to some of the content these branches of government have given the right. In particular the Constitutional Court's findings with respect the purpose of the right to vote will be highlighted. In light of similar

[140] Landis "A note on 'statutory interpretation'" 1930 *Harvard Law Review* 886 888 and Barak *Purposive Interpretation in Law* (2005) 171-173.
[141] Currie and De Waal *The Bill of Rights Handbook* (2013) 136 – 137, 141.
[142] *S v Makwanyane and Another* 1995 (3) SA 391 (CC).
[143] (n 142) par 9.
[144] Currie (n 141) 138.

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constitutional protections, and as disclosure laws have for many years formed part of a more extensive campaign finance regulatory regimen in the US, I also will briefly consider the case law of the US Supreme Court, related to disclosure and campaign finance.

3.2.2. International law

Section 39(1)(b) of the Constitution requires consideration of international law, in the interpretation of fundamental rights in the Bill of Rights. It is therefore necessary to consider the content given to the right to vote in international law instruments to which South Africa is a signatory.

The right to vote is recognised in article 21 of the Universal Declaration of Human Rights[145] (UDHR) and given legal effect in article 25 of the International Covenant on Civil and Political Rights[146] (ICCPR). The UDHR provides for political participation "directly or indirectly through chosen representatives" and for the expression of the will of the people through "periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."[147] The ICCPR, in very similar terms, provides for political participation as well as for a right to vote and to stand for public office.[148] With respect to the right to vote, and to stand for public office, article 25(b) of the ICCPR provides for citizens' right:

> "*To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors…*"

Section 19(3)(a) of the South African Constitution, by comparison, only provides for a right to vote, in secret. However, the Constitutional Court has held that this right, to vote, is necessarily a right to vote in "free and fair" elections.[149] The Court has also held that the founding values of the Constitution, which include commitments to equality and universal

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145 UDHR (n 130).
146 ICCPR (n 130).
147 Articles 21(1) and (3) of the UDHR.
148 Articles 25(a) and (b) of the ICCPR.
149 *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (*New National Party*) par 12.

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adult suffrage, should inform the interpretation of the right to vote.[150] The provisions with respect to the right to vote in the ICCPR and in the South African Constitution, therefore, have a fairly similar content.

At a regional level the African Charter on Human and Peoples' Rights[151] (the Banjul Charter) provides more indirectly for a citizen's:

> "*right to participate freely in the government of his country, either directly* *or through freely chosen representatives* *in accordance with the provisions of the law.*" (own emphasis)

Guidance is provided by the United Nations Committee on Human Rights (UNCHR) in its General Comment 25[152] on what article 25 of the ICCPR entails. With respect to the right to vote, the Comment notes that the right must be "guaranteed by law" only allowing for "reasonable restrictions".[153] The note specifically records that any distinction between citizens, within the national legislation of state parties, if based on grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" is prohibited.[154] Distinctions between the voting rights of citizens-by-birth and naturalised citizens may also be considered to be in conflict with article 25 of the ICCPR.[155] General Comment 25 further provides that where limitations are placed on article 25 rights, they have to be "objective and reasonable" in order to be lawful.[156] More significantly however, the Comment provides that in instances where participation by citizens is indirect, that is, through representatives, the electoral process needs to facilitate accountability.[157] To ensure accountability, elections need to be "genuine" and held at intervals, regular enough to ensure "the authority of government continues to be based on the free expression of the will of electors."[158] The right to vote also imposes a duty on states to "take effective measures to

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[150] *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) (*ACDP*) par 21. See also Roux T "Democracy" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2013) 25.
[151] Adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.
[152] CESCR, General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7 (General Comment 25).
[153] General Comment 25 (n 152) par 9 – 10.
[154] General Comment 25 (n 152) par 3.
[155] General Comment 25 (n 152) par 3.
[156] General Comment 25 (n 152) par 4.
[157] General Comment 25 (n 152) par 7.
[158] General Comment 25 (n 152) par 9.

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ensure that all persons entitled to vote are able to exercise that right."[159] These include measures aimed at enabling voting and measures aimed at limiting constraints on capacity and propensity. Enabling measures include, for instance, "registration campaigns" and measures aimed at addressing impediments related to literacy, language, poverty and limitations on movement.[160] Measures related to limiting constraints on capacity and propensity include a prohibition on the effective exclusion of homeless persons from the franchise, and a requirement that intimidation and coercion be criminalised.[161] The Comment highlights the interconnectedness of the rights to vote and to stand for election. The Comment takes note of the fact that limitations on the ability to stand for election indirectly impacts on the right to vote as it limits voters' choice.[162] The right in article 25(b) encompasses a right to independent supervision of elections and a right to measures that will ensure the integrity of vote counting.[163] It requires that a state's chosen electoral scheme ensures that "the free will of the electors" is carried out, which in turn requires that equal weight be assigned to all votes.[164] This is a right to an "effective", "secret" vote in free and fair elections.[165]

In response to an identified need for some criteria for the measurement of what would constitute "free and fair elections", the Organization for Security and Co-operation in Europe (the OSCE) issued a draft guide to international standards on democratic elections.[166] The guide outlines international best-practice examples, based on decisions by institutions of the European Union (EU).[167] South Africa is not a member of the OSCE or of the European Union and is not signatory to, nor bound by, the European Convention on Human Rights (ECHR) – the instrument primarily interpreted by the institutions of the EU.[168] Moreover the South African Constitutional Court has made it clear that it would be improper to try to formulate a once-and-for-all test for what constitutes free and fair elections in South Africa.[169] Nevertheless, the South African courts are still required by the Constitution to give

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[159] General Comment 25 (n 152) par 11.
[160] General Comment 25 (n 152) par 11 – 12.
[161] General Comment 25 (n 152) par 11.
[162] General Comment 25 (n 152) par 15.
[163] General Comment 25 (n 152) par 20.
[164] General Comment 25 (n 152) par 21 – 22. See also Goodwin-Gill *Free and Fair Elections* (2006) 115.
[165] General Comment 25 (n 152) par 19 – 20.
[166] The "International Standards and Commitments on the Right to Democratic Elections: A Practical Guide to Democratic Elections Best Practice" OSCE/ODIHR draft paper (2002) (the OSCE report) online available at http://www.osce.org/odihr/elections/16859?download=true accessed 4 August 2016.
[167] The OSCE report (n 166) 1 – 2.
[168] The OSCE has 57 member States from across Europe, Central Asia and North America. South Africa is not a member. See http://www.osce.org/states (accessed 03-08-2016).
[169] *Kham and Others v Electoral Commission and Another* 2016 (2) BCLR 157 (CC) par 91.

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some content – even if they will not formulate a once-and-for-all test – to the right to vote and to determine what specific rights and duties do in fact arise from the right.[170] A consideration of international best practice examples outlined by the OSCE is useful for an understanding of what might be included within the scope of South Africa's own right to vote. I will, however, limit this consideration to the narrow feature of the right to vote relating to disclosure of funding information.

The OSCE guide notes that, as has been the case in South Africa, the jurisprudence of the European Court of Human Rights (ECHR) on political rights, has largely been limited to a consideration of the casting of the ballot as such, and has not given much consideration to the information rights attaching to the right to vote.[171] The report suggests however that "funding disclosure" requirements are a legitimate limitation on electoral campaigning, which may even attract penalties in the form of the imposition of a fine upon failure to comply.[172] Reference in the report to "disclosure" includes disclosure about various aspects of funding and spending, such as amounts of contributions, the nature of contributions and donor / recipient identities.[173] In this respect the OSCE notes, as does the United Nations Committee on Human Rights (UNCHR) in its General Comment 25,[174] that some limitation on electoral campaigning is acceptable.[175] The OSCE recommends such disclosure as being desirable in furtherance of the international law right to universal suffrage (being an aspect of the right in article 25 of the ICCPR).[176]

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That political parties play an important role in modern democracy, is recognised in South Africa and the world over.[177] Increasingly, however, there is distrust of political parties, for a variety of reasons that includes both actual and perceived involvement in corruption.[178] A recent report notes that when campaign finance is not properly regulated both private business and organised crime take advantage.[179] The report was issued in 2016 by

[170] Section 39(1) read with sections 7 and 8 of the Constitution. See also Woolman "The amazing, vanishing bill of rights" (2007) South African Law Journal 762 794 765 and 789.
[171] The OSCE report (n 166) 13.
[172] The OSCE report (n 166) 16 and 24.
[173] The OSCE report (n 166) 24.
[174] General Comment 25 (n 152).
[175] The OSCE report (n 166) 24 and General Comment 25 (n 152) par 19.
[176] The OSCE report (n 166) 33.
[177] Briscoe and Goff *Protecting Politics: Deterring the Influence of Organized Crime on Political Parties* (2016) 7 and 11.
[178] Briscoe (n 177) 11.
[179] Briscoe (n 177) 20.

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International IDEA and the Netherlands Institute of International Relations (Clingendael Institute) and is based on the results of a number of research projects undertaken by both these organisations. Given South Africa's duties to protect its citizens from corruption and given the influence, internationally, of corruption on elections it is necessary also to consider, very briefly, South Africa's international commitments on fighting corruption in so far as they relate to the right to vote.[180]

Two international treaties, signed and ratified by South Africa, contain provisions that are relevant. In article 9 of the African Union Convention on Preventing and Combating Corruption[181] (AUCPCC) and article 4(1)(d) of the SADC Protocol against Corruption[182] (SPAC), state parties commit themselves to putting mechanisms in place that will ensure that there is access to information that will assist in the fight against corruption. Article 11(1) of the AUCPCC commits state parties to extending the fight against corruption into the private sector. Therefore, even if political parties could be regarded as entirely private – which they are not – there remains a duty, at least with respect to combatting corruption to ensure access to information held by such parties, where that information is required to combat corruption. In terms of article 12(2)(3) of the AUCPCC, civil society and the media should be enabled to play a monitoring role with respect to transparency and accountability in the management of public affairs, and in the implementation of the convention. Article 4(1)(i) of the SPAC requires of state parties to ensure that mechanisms exist that will "encourage participation by the media, civil society and non-governmental organizations in efforts" aimed at preventing corruption. But most specifically, article 10(b) of the AUCPCC commits states to "incorporat[ing] the principle of transparency into funding of political parties." Udombana expressly links this provision about transparency in the funding of political parties back to the right to vote.[183] He suggests that good governance and the eradication of corruption stand in a "symmetrical relationship" with one another, with each one being a necessary prerequisite for the other.[184] Given the central role good governance plays in the combating of corruption, Udombana suggests that it is not only proper but "makes inordinately good sense" that anti-

[180] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) par 177.
[181] African Union, African Union Convention on Preventing and Combating Corruption, 1 July 2003 online available at: http://www.au.int/en/treaties/african-union-convention-preventing-and-combating-corruption accessed 24 September 2016.
[182] Southern African Development Community. SADC Protocol Against Corruption. Blantyre: Southern African Development Community, 2001.
[183] Udombana "Fighting corruption seriously? Africa's anti-corruption convention" 2003 *Singapore Journal of International and Comparative Law* 447 482-483.
[184] Udombana (n 183) 481.

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corruption legislation would require transparency with respect to the funding of political parties.[185] He notes the important role that political rights play in ensuring good governance and the need this creates to ensure that the public has access to certain kinds of information.[186]

3.2.3. At a foreign national level

Section 39(1)(c) of the South African Constitution does not mandate consideration of foreign law, as section 39(1)(b) does in relation to international law, but it does allow for it to be considered. A brief overview of the situation, in relation to disclosure about campaign finance elsewhere, could also add to our understanding of how the right to vote should be interpreted locally. In the US, as in South Africa, constitutional protection is extended to the right to vote, the right to freedom of expression, and associational rights.[187] In light of these similar constitutional protections, and as disclosure laws have for many years formed part of a more extensive campaign finance regulatory regimen in the US, I will briefly consider the case law of the US Supreme Court, related to disclosure and campaign finance.

Forms of regulation used over the years in the USA include not only disclosure requirements but also limitations on amounts that can be donated and amounts that can be spent in support of political parties and candidates. Some of these campaign finance regulations were famously challenged in the matter of *Buckley v Valeo*.[188] The *Buckley v Valeo* court considered and made findings on the constitutionality of legislative provisions that placed limitations on the amount of money that can be given to political parties and candidates, as well as provisions that limited the amount of money that can be spent in support of such parties or candidates.[189] I will however only consider the court's findings with respect to the constitutionality of provisions that require disclosure of certain information about persons that fund political parties or candidates, or who incur expenses in support of the campaigns of political parties or candidates.

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[185] Udombana (n 183) 482.
[186] Udombana (n 183) 482 – 483.
[187] See the fifteen and first amendments to the United States Constitution and sections 19, 16 and 18 of the South African Constitution.
[188] 424 US 1 (1976).
[189] See the court's holdings in *Buckley v Valeo* (n 188) at par 21 – 23, 27 – 29, 44 – 45, 47 – 49, 51, 64, 66 – 67 and 70 – 72.

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The *Buckley v Valeo* court held that the impugned disclosure requirements were not unconstitutional under the US Constitution. In finding that the disclosure requirements were not unconstitutional the court held that there were three important interests justifying disclosure, in terms of which the infringement on rights under the US Constitution was found to be justifiable.[190] One of the three interests recognised by the court was the electorate's interest in being informed about where money in the political arena comes from and how it is being spent.[191]

The court recognised that information about where political funding comes from and how it gets spent makes it possible for "voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches."[192] The Supreme Court therefore recognised that voters have an interest in information about who provides funding to political parties and candidates. The court found that this information is important to voters because it makes it possible for them to understand better what the various political candidates (and parties) truly stand for and which interests they will support if elected into office.[193] Disclosure for this purpose, alongside the purpose of combating actual and perceived corruption and the purpose of ensuring compliance with contribution limitations (that in turn also serve to curb corruption and the perception of corruption), was found to justify infringement of the right of "privacy of association and belief".[194] Of these three interests, Briffault notes that the informational interest has, over time, proven to be the most compelling justification for disclosure requirements in the electoral context.[195]

The *Buckley v Valeo* court did note however that where contributions are made to minor parties, the government interest in disclosure is less significant, as minor parties "usually represent definite and publicized viewpoints".[196] The court also noted that if disclosure leads to reprisal and reprisal, or the threat of reprisal, in turn leads to a decrease in contributions, the harm to minor parties might be greater than for the major parties as minor parties are less

[190] (n 188) par 66.
[191] (n 188) par 66.
[192] (n 188) par 67.
[193] (n 188) par 67.
[194] (n 188) par 64, 66 – 67 and 72.
[195] Briffault R "Two Challenges for campaign finance disclosure after Citizens United and Doe v Reed" 2011 *William & Mary Bill of Rights Journal* 983 990.
[196] (n 188) par 70.

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likely to be financially robust.[197] The court therefore found that there may be situations in which the application of disclosure requirements to funders of a specific political party, candidate or cause would be unconstitutional and that exemption from disclosure would be appropriate in those circumstances.[198] The court noted however that an exemption would only be granted if evidence is provided showing that there is a "reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."[199]

More recently the Supreme Court again considered disclosure requirements in *McConnell v. Federal Election Commission*[200] (*McConnell*), *Citizens United v. Federal Election Commission*[201] (*Citizens United*) and in *John Doe No. 1 v. Reed*[202] (*Doe v Reed*). In *McConnell* the Supreme Court considered the constitutionality of new legislative provisions that had similar disclosure requirements to those considered in *Buckley v Valeo*. The *McConnell* court found that the same three interests that the *Buckley v Valeo* court had found justified the disclosure of information about funders applied with respect to the new legislation.[203] The court therefore confirmed that litigants wishing to escape the disclosure requirements of the new legislation would have to apply for an exception based on the fact that special circumstances existed, in which the application of the disclosure requirements would be unconstitutional.[204] On the specific facts of the *McConnell* matter, the court found that the litigants had not established that there was a probability of the harm identified in *Buckley v Valeo* and so were not entitled to an exception from the disclosure requirements.[205] The court also noted that disclosure requirements do not actually prevent speech, but do serve the important function of ensuring the public is aware, when they go the polls, who the supporters are of the various parties and candidates.[206]

In *Citizens United* the challenge related to legislative requirements in terms of which the non-profit corporation "Citizens United" was required to disclose certain information in a motion

[197] (n 188) par 71.
[198] (n 188) par 71.
[199] (n 188) par 71 - 74.
[200] 540 US 93 - Supreme Court 2003.
[201] 130 S. Ct. 876 - Supreme Court 2010.
[202] 130 S. Ct. 2811 - Supreme Court 2010.
[203] *McConnell* (n 200) at 196.
[204] *McConnell* (n 200) at 197 – 199.
[205] *McConnell* (n 200) at 199.
[206] *McConnell* (n 200) at 201.

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picture film (movie) it had produced, as well as in advertising for the movie.[207] The movie was about then-Senator Hillary Clinton and was aimed at encouraging voters not to vote for Hillary Clinton in the 2008 presidential elections.[208] The impugned legislation required among other things that Citizens United disclose in the movie, and the advertising for the movie, that it was responsible for the content of those productions.[209]

The *Citizens United* court noted that the disclosure requirements served the important function of ensuring that voters were made aware of "who is speaking".[210] The court noted that it had confirmed the constitutionality of the disclosure provisions of the relevant legislation in *McConnell* and that it would therefore "adhere to [the *McConnell*] decision as it pertains to the disclosure provisions [of the legislation]."[211] The court also found that "disclosure is a less restrictive alternative to more comprehensive regulations of speech."[212] The court in fact found that voters' interest in the information was on its own adequate justification for the application of the disclosure provisions to advertisements such as those before the court.[213] The court also found, as it had done in *Buckley v Valeo* and *McConnell*, that Citizens United had failed, on the specific facts before the court, to tender evidence of probability of the harm identified in *Buckley v Valeo*. Citizens United was therefore not entitled to an exception from the disclosure requirements.[214] The court noted that:

> "*With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "`in the pocket' of so-called moneyed interests." The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed*

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[207] *Citizens United* (n 201) at 914.
[208] *Citizens United* (n 201) at 890.
[209] *Citizens United* (n 201) at 914.
[210] *Citizens United* (n 201) at 915.
[211] *Citizens United* (n 201) at 915.
[212] *Citizens United* (n 201) at 915.
[213] *Citizens United* (n 201) at 915 – 916.
[214] *Citizens United* (n 201) at 916.

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decisions and give proper weight to different speakers and messages." (own emphasis, internal references omitted)

In *Doe v Reed* the constitutionality of certain legislation, that allowed access to information (including names and addresses) about persons that had signed petitions calling for referendums on legislation enacted by the legislature, was challenged.[215] Over and above the general challenge to the disclosure provisions, the Plaintiffs also sought to argue that, on the facts of their specific matter, they should be granted an exemption from the provisions of the impugned legislation. On the facts of their matter, if they were not allowed an exemption, access could be granted to information about the signatories to a petition that called for a referendum on legislation that extended the rights and responsibilities of registered "domestic partners, including same-sex partners."[216] The Plaintiffs contended that in this specific case there was a reasonable probability that the signatories to that petition would suffer the harms highlighted by the *Buckley v Valeo* court (threats, harassment and reprisals).[217]

The court confirmed that the signing of a petition for a referendum was a form of expression of opinion.[218] The court also, again, confirmed its previous holdings that a disclosure requirement does not act as a bar to speech and that, in the electoral context, disclosure requirements would be constitutional if there is a substantial relation between the disclosure requirement and a sufficiently important government interest.[219] The court found disclosure of information about persons that sign petitions for referendums serves the important dual purpose of preserving the integrity of, and ensuring transparency and accountability in, the electoral process. Finding that this is a sufficiently important government interest and that it is related substantially to disclosure requirements, the court held that the disclosure requirements were not unconstitutional.[220]

As noted above, the Supreme Court in *Buckley v Valeo*, *McConnell* and *Citizens United* also expressly recognised the informational interest in information about funding in politics. In *Doe v Reed* however the court found it unnecessary to consider the informational interest justification, given that it had been able to make a finding just on the dual purpose of

[215] *Doe v Reed* (n 202) at 2815.
[216] *Doe v Reed* (n 202) at 2816 and 2817.
[217] *Doe v Reed* (n 202) at 2817.
[218] *Doe v Reed* (n 202) at 2817 – 2818.
[219] *Doe v Reed* (n 202) at 2818 – 2820.
[220] *Doe v Reed* (n 202) at 2819.

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preserving the integrity of, and ensuring transparency and accountability in, the electoral process.[221] Briffault suggests however that the court's finding that access to information about petition signatories is necessary in order to ensure transparency and accountability in the electoral process actually supports the informational interest justification.[222] Citizens that have access to information of this kind are able to monitor the electoral process and to ensure participants in the process are held to account, they therefore have an informational interest precisely because of the interest in transparency and accountability in the electoral process. The court found that the Plaintiffs failed to provide evidence that disclosure of information about persons that sign petitions for referendums will generally lead to the harms contemplated in *Buckley v Valeo*.[223] The court left it to a lower court to determine whether, in this specific instance, there was a reasonable probability that the signatories to the petition for a referendum on the legislation extending more rights to same-sex partners could lead to the harms contemplated in *Buckley v Valeo*.[224]

3.2.4. South African legal framework and developments

Both the South African courts and the legislature have contributed to the delineation of the scope and content of the constitutional right to vote; in what follows, therefore, I try to take account of how these two arms of government have given content to the right.

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3.2.4.1. Purpose of the right to vote

In the following, often quoted passage out of *August and Another v Electoral Commission and Others*[225] (*August*), Justice Albie Sachs laid out the purpose of the right to vote:

> "*Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of*

[221] *Doe v Reed* (n 202) at 2819.
[222] Briffault (n 195) 997.
[223] *Doe v Reed* (n 202) at 2821.
[224] *Doe v Reed* (n 202) at 2815 and 2821.
[225] 1999 (3) SA 1

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each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity."[226] (own emphasis)

The history (and continued legacy) of disenfranchisement and inequality in South Africa – and the indignity that that entailed – therefore plays a key role in the underlying purpose, in South Africa, for the right to vote.[227] The purpose also is also clearly linked to the foundational values of the South African democracy, laid out in section 1(d) of the Constitution. Section 1(d) of the Constitution highlights the values of "[u]niversal adult suffrage, a national common voters roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness." The court in *AParty and Another v The Minister for Home Affairs and Others, Moloko and Others v The Minister for Home Affairs and Another*[228] (*AParty*) held that the political rights in section 19 aim to give effect to these values.[229]

3.2.4.2.Free and fair elections

The Constitutional Court has determined that the right to vote attaches to every South African adult citizen.[230] It is a right to vote in free and fair elections.[231] Section 19(2) of the Constitution, providing for "free and fair elections" therefore helps give content and meaning to section 19(3)(a) of the Constitution, providing for the right to vote. As the Constitutional Court held in *New National Party v Government of the Republic of South Africa and Others*[232] (New National Party) "…the requirement that every election should be free and fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised."[233]

[226] *August* (n 225) par 17.
[227] See also *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC) par 64.
[228] 2009 (3) SA 649 (CC).
[229] (n 228) par 5.
[230] *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) (*DA v ANC*) par 42.
[231] *New National Party* (n 149) par 12.
[232] *New National Party* (n 149).
[233] *New National Party* (n 149) par 12.

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The Constitutional Court has noted that there is no internationally-accepted definition for the term "free and fair elections" and has itself declined to develop a test to determine whether elections have in fact been "free and fair" – holding that it would be "undesirable" to do so.[234] The Court has, however, found that the achievement of "free and fair elections" will necessarily involve the regulation of elections through national legislation that is compliant with the provisions of the Constitution.[235] The court also found that, in giving effect to the right to vote, Parliament can require of citizens, eligible to and wanting to vote, to take prescribed steps before they can exercise the right.[236] The outcome of any regulation of the right, however, must be that if reasonable steps are taken by such a person, they will be able to exercise their right.[237] Along a similar vein, but in relation to political parties, Justice Skweyiya, in the minority dissenting judgment in *African Christian Democratic Party v Electoral Commission and Others* 2006[238] (*ACDP*), highlights the fact that political parties necessarily have to "bear their share" with respect to the constitutional commitment to free and fair elections.[239] The legislature in fact has recognised a number of positive duties arising for political parties from the right to free and fair elections and the right to vote, including for instance, a duty to state, publicly, that political beliefs and opinions should be challenged and debated.[240]

3.2.4.3.Democratic values

The courts have recognised that political rights, and, in particular, citizens' rights to free and fair elections, are fundamental to democracy.[241] The right to vote in fact has been held to be essential for the existence of democracy, at least the particular form of democracy envisioned by our Constitution.[242] In Schedule 2 to the Electoral Act, the legislature recognises as part and parcel of free and fair elections "open public debate" – tying in with the kind of

[234] *Kham* (n 169) par 34 and 91.
[235] *New National Party* (n 149) par 14. See also *AParty* (n 228) par 6 and 7.
[236] *New National Party* (n 149) par 21 and *AParty* (n 228) par 68. See also *August* (n 225) par 16.
[237] *New National Party* (n 149) par 19 and 21.
[238] *ACDP* (n 150).
[239] *ACDP* (n 150) par 48.
[240] Item 4(1)(a)(ii) of Schedule 2 to the Electoral Act.
[241] *New National Party* (n 149) par 2 and *ACDP* (n 150) par 19.
[242] *New National Party* (n 149) para 11 and 122. See also *Richter v The Minister for Home Affairs and Others* 2009 (3) SA 615 (CC) par 53 and Roux (n 150) 62-77.

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democracy our Constitution envisages: a democracy with participative elements and that embraces transparency.[243]

The system of government in South Africa is a particular form of democracy: a "representative democracy." This means that while South African adult citizens govern themselves, so to speak, they do not ordinarily partake directly in decision making of government; they elect officials that participate, on their behalf, in such decision making.[244] A key feature of a representative democracy is accountability – meaning that elected officials are answerable to the voters that elected them to office.[245] There are various ways in which the electorate holds their elected representatives accountable, including through their future votes for (or against) representatives that have spoken for (or failed to speak for) them in the governing of the state.[246] The South African Constitution does not dictate the form of democracy that South Africa should take on, but does lay down certain key features it must have. Roux notes that the Constitution uses the following three terms to describe the characteristics of the type of democracy envisioned by it: "'representative', 'participatory', 'constitutional' and 'multiparty'".[247]

"Participatory" refers to the involvement, through active engagement, of citizens in certain decisions of government – particularly through deliberation.[248] The Constitutional Court's consideration of the scope and meaning of the participatory characteristics of the South African democracy in *Doctors for Life International v Speaker of the National Assembly and Others*[249] (*Doctors for Life*) and *Matatiele Municipality and Others v President of the Republic of South Africa and Others*[250] (*Matatiele*) is particularly instructive.

In *Doctors for Life,* Doctors for Life International, a non-governmental, non-profit organisation, brought an application before the Constitutional Court. Doctors for Life International alleged that the National Council of Provinces' and provincial legislatures'

[243] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) par 111, 115-116 and 121.
[244] See sections 57(1)(b), 70(1)(b), 116(1)(b) of the Constitution and Roux (n 150) 2.
[245] General Comment 25 (n 152) par 7 and Yigit "Democracy in the European Union from the perspective of representative democracy" 2010 *Review of International Law and Politics* 119 123 and 126 – 127. See also Pitkin *The Concept of Representation* (1967) 56 – 57.
[246] Section 1(d), 57(1)(b), 70(1)(b), 116(1)(b) of the Constitution and Roux (n 150) 10 – 11.
[247] Roux (n 150) 2.
[248] Roux (n 150) 14 – 16.
[249] *Doctors for Life* (n 243).
[250] 2007 (1) BCLR 47 (CC).

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failure to "invite written submissions and conduct public hearings" prior to their passing of certain bills was unconstitutional, as it amounted to a failure to ensure "participation".[251] The alleged failure was a failure to enable "participation" as provided for in the Constitution.

In order to determine whether there had indeed been a failure in this regard, the court considered the nature and scope of the constitutional duty to facilitate public participation. The court noted that, under international law, this duty is regarded as a fundamental human right, consisting both of "a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected."[252] Crucially the court noted that this right confers on state parties, not only negative obligations not to interfere in the exercise of the right by citizens, but also certain positive duties. One of the positive obligations the court recognised the right does confer on states is an obligation to ensure that opportunities are created for the exercise of participation rights.[253]

The court noted that the political rights in article 25 of the ICCPR must be understood in light of article 19 of the ICCPR. Article 19 of the ICCPR provides for a right to "freedom of expression" which "shall include freedom to seek, receive and impart information and ideas of all kinds…" The court found that article 25, so understood, places a positive obligation on states to take steps to ensure that information required to enable the exercise of the right to political participation is accessible.[254] The South African government therefore has a positive duty to, under international law, ensure that the South African electorate has access to the information required to ensure meaningful participation in the electoral and law-making processes. In particular the court held:

> "*While the right to political participation in international law can be achieved in multiple ways, it is clear that this right does not require less of a government than provision for meaningful exercise of choice in some form of electoral process and public participation in the law-making process by permitting public debate and dialogue with elected representatives. In addition, this right is supported by the right to freedom of expression which*

[251] *Doctors for Life* (n 249) par 2 and 7.
[252] *Doctors for Life* (n 249) par 90 and 105.
[253] *Doctors for Life* (n 249) par 91 – 93 and 105 – 106.
[254] *Doctors for Life* (n 249) par 91 – 93 and 105 – 106.

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includes the freedom to seek, receive and impart information."[255] (own emphasis)

The *Doctors for Life* court noted that democracy in South Africa "must be understood in the context of our history."[256] The court noted further that under apartheid the majority of South Africans were denied any opportunity to participate in the law-making process and that the concept of "people's power" developed, as part of the struggle against apartheid, as an alternative to this exclusionary form of governance. This concept of people's power involved actual participation by members of the anti-apartheid movement in the governance structures of the movement. Not only was people's power seen as a preferential alternative for the governance of the anti-apartheid movement, however, it was in fact also seen a blue print for an alternative future "participatory democracy".[257] The court found that the exercise of the right to vote "would be meaningless without massive participation by the voters" and then went on to hold that:

> "*...because of its open and public character [participation] acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.*"[258] (own emphasis)

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The *Doctors for Life* court went on ultimately to find that the National Council of Provinces was under an obligation, in terms of the participatory provisions of our Constitution, to take reasonable steps to *facilitate* participation in law making.[259] The court's ultimate holding was therefore related to the participation rights of South Africans in relation to the law- making process, but the court's findings with respect to such participation is however as relevant to meaningful participation in other aspects of the electoral process. In particular the courts findings with respect to the fact that there must be "meaningful exercise of choice" within the electoral process, that information required to exercise political rights must be accessible and

[255] *Doctors for Life* (n 249) par 106.
[256] *Doctors for Life* (n 249) par 112.
[257] *Doctors for Life* (n 249) par 112.
[258] *Doctors for Life* (n 249) par 115.
[259] *Doctors for Life* (n 249) par 129, 132 and 145- 146.

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that participatory democracy plays a role in counterbalancing inequality of wealth and influence has implications for the right to vote.

In *Matatiele* too, the matter before the court related to the right to participate in the law-making process, and in that matter, decided the day after *Doctors for Life*, the court articulated the underlying reason for such participation even more clearly. The *Matatiele* court noted that the reason for "permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers."[260] This is significant for the right to vote as well, in light of the court's findings in *Doctors for Life* regarding the counter balancing of inequality of wealth and influence. Politicians grant access to those who fund them.[261] Those who have access will have opportunity to attempt to influence law making because where legislation that may affect them comes before Parliament they are able to make a case for a vote on that legislation that will favour them.[262] In a country with great wealth inequality this means that many people will never have the option of choosing to fund political parties, certainly not in significant enough amounts to gain access to politicians and influence law-making decisions. Yet the South African Constitutional Court has recognised that a key aspect of the South African democracy is permitting participation in law-making, and more than that, counterbalancing inequality of wealth and influence in the electoral and law-making processes.

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3.2.4.4.Duties for political parties

Before considering some of the duties that arise for political parties from the constitutional right to vote, I will first, briefly, look at how the Constitutional Court has determined political parties should be classified. This is something that was dealt with fairly comprehensively by the Constitutional Court in *Ramakatsa and Others v Magashule and Others*[263] (*Ramakatsa*).

The *Ramakatsa* matter turned on whether a failure by a political party to adhere to the provisions of its own constitution amounted to an infringement of the rights of members of that party to participate in the activities of a political party, as protected by section 19 of the

[260] *Matatiele* (n 250) par 97.
[261] *McConnell* (n 200) at 129 referring to the finding so of a 1998 US Senate Committee on Governmental Affairs report on an investigation into the 1996 US federal elections.
[262] Garrett "Voting with cues" 2003 *University of Richmond Law Review* 1011 1029.
[263] 2013 (2) BCLR 202 (CC).

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Constitution.[264] In finding that certain of the failures of the political party were indeed a violation of party members' political rights the court made key findings regarding the nature, under the Constitution, of political parties.[265] The court held that citizens' right to participate in the activities of political parties creates a duty for political parties to ensure that they act lawfully and that they comply with their own constitutions.[266] The court noted that political parties, rather than individual candidates, generally contest elections, and political parties determine which of their candidates get elected to legislative bodies.[267] Therefore, not only do South Africans not, generally, partake directly in the decision making of the legislature, the representatives they elect, they only elect indirectly.[268] The court further noted that the Constitution accords special recognition to political parties as "veritable vehicles… chosen for facilitating and entrenching democracy", when it provides for public funding of political parties.[269] The court therefore determined that political parties are "indispensible (sic) conduits for the enjoyment of the right given by section 19(3)(a) to vote in elections."[270] The *Ramakatsa* court's finding makes it clear that while not state organs, political parties are something more than just private entities.

Given the unique nature and important role of political parties under the South African Constitution, it is no surprise that both the legislature and the courts have recognised that a number of duties arise for political parties, out of the right to vote. The Electoral Act, LGMEA and Electoral Commission Act were enacted to give effect to the political rights in section 19 of the Constitution, and specifically to give substantive content to the rights to free and fair elections and to vote.[271] It is therefore important, when determining the content of the right to vote, to give consideration to Parliament's determination of that content. Such an exercise does, however, require that the provisions of the relevant legislation be interpreted in light of the foundational values of the Constitution.[272] This includes the value of a multi-party

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[264] *Ramakatsa* (n 263) par 6, 9 and 10.
[265] *Ramakatsa* (n 263) par 61, 110 and 118.
[266] *Ramakatsa* (n 263) par 16.
[267] *Ramakatsa* (n 263) par 66.
[268] *Ramakatsa* (n 263) par 68.
[269] *Ramakatsa* (n 263) par 67.
[270] *Ramakatsa* (n 263) par 68.
[271] *New National Party* (n 149) par 13 and 14, *ACDP* (n 150) par 16 and *DA v ANC* (n 230) par 21 and 34. See also section 2(a) of the LGMEA and section 2(a) of the Electoral Act.
[272] *ACDP* (n 150) par 21. See also Roux (n 150) 25.

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system of democratic government aimed at the achievement of accountability, responsiveness and openness.[273]

On the question of whether non-state entities can be required, in terms of duties conferred on them by fundamental rights, to take some steps to ensure the realisation of those rights, it is clear that the Bill of Rights does bind them to some extent. Section 8(2) of the Constitution provides that provisions in the Bill of Rights will bind both natural and juristic (non-state) entities "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." In fact, specifically in relation to an access to information element attaching to a fundamental right, in *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance*[274] (*VEJA*) the Supreme Court of Appeal held that, with respect to the environment, even private corporations must operate transparently.[275] It is clear therefore that the duty to act transparently, at least to some extent, extends all the way into the private sector and would definitely also include political parties – entities with a largely public role. The legislature too has made it clear that transparency and accountability are values that must be realised in both public and private spheres.[276]

Section 32(1)(b) of the Constitution is fairly progressive internationally, as far as the right of access to information goes, in that it extends the right to include a right of access to information held by non-state entities. Both in section 32 of the Constitution and in PAIA however, the right is qualified, in that it only applies where the information sought is required for the exercise or protection of another right.[277] Section 1 of PAIA defines "public body" as:

> "*(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*

[273] Section 1(d) of the Constitution and *AParty* (n 228) par 5.
[274] 2015 (1) SA 515 (SCA).
[275] (n 274) par 82.
[276] See the Preamble to PAIA which provides that PAIA was in part enacted to "foster a culture of transparency and accountability in public and private bodies" (own emphasis).
[277] Section 50 of PAIA. See also the definition for "private body" in section 1 of PAIA.

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> (ii) *exercising a public power or performing a public function in terms of any legislation*"[278]

While political parties clearly do not fall within part "(a)" of the definition for "public body", they also do not easily fit within part "(b)" of the definition.[279] However, as all juristic persons that are not "public bodies" are "private bodies" for the purposes of PAIA, political parties will ordinarily, for the purposes of PAIA, be "private bodies".[280] As political parties are private bodies for the purposes of PAIA, therefore, requests for information made in terms of PAIA to political parties must meet the threshold requirement of a need for the information requested to be *in order to exercise or protect another right*.

There is, however, one exception to this threshold requirement, contained in section 8 of PAIA. Section 8 of PAIA allows for access to records held by non-state entities as if they are state or "public" entities – that is, irrespective of the reasons, if any, for access. Section 8 applies whenever access is sought to information that relates to a public function performed by a private body. One might well think, given the key role political parties play in the South African democracy, that this exception applies to information held by political parties. The Western Cape High Court in *Institute for Democracy in South Africa and Others v African National Congress and Others*[281] (*IDASA*), however, held that political parties, *when fundraising*, are in fact performing a private function.[282] This, the court found, was because when raising funds political parties are exercising common law powers, not performing a public function in terms of legislation.[283]

Arguably the court erred in failing to take a more purposive approach to the determination of the nature of the requested records (records of information about private funding received by

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[278] Section 1 of PAIA.
[279] The definition for "public body" in section 1 of PAIA tracks fairly closely the definition of "organ of state" in the Constitution, as noted by Justice Cameron at par 103 in his minority judgement in MVC. It could be argued that there are certain functions performed by political parties that can be regarded as the performance of a public function in terms of legislation. For support for this view see generally: Thornton "The constitutional right to just administrative action – are political parties bound?" 1999 *South African Journal on Human Rights* 351.
[280] See the definition for "private body" in section 1 of PAIA.
[281] 2005 (5) SA 39 (C).
[282] (n 281) par 51 and 52.
[283] (n 281) par 51.

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political parties), for the purposes of section 8 of PAIA.[284] Bosch argues that funding, raised by political parties, can, especially in circumstances where a party is elected to positions from which they exercise power, be applied to functions that would more clearly fall within the ambit of section 8 of PAIA. Bosch suggests that funding records are therefore "hybrid" records, and that the "good governance" and "open democracy" purposes of PAIA lead to a conclusion that such "hybrid" records should be regarded as related to a public function for the purposes of section 8 of PAIA.[285]

As long as the *IDASA* decision stands however, and unless the legislature enacts legislation that requires that records of information about private funding be made proactively available to the public, records of this nature will have to be requested in terms of PAIA. What is more, any persons interested in getting an idea of the funding landscape in the political arena would have to make a request to every political party, and would with every request have to demonstrate that the information is required in order to exercise or protect another right (such as the right to vote).

3.2.5. The right to vote and access to political party funding information

Drawing together the above examination of relevant international law, US case law related to disclosure provisions in campaign finance regulation as well as South African case law and legislation I now provide three arguments for access to information about private funding of political parties in South African.

3.2.5.1.Combating corruption

In line with South African case law and legislation, the right to vote, in South Africa, must be understood as a right to vote in "free and fair elections". While there is no internationally accepted or locally developed definition for the term "free and fair elections", the concept has been recognised to have implications for how voting is regulated.[286]

[284] Bosch "IDASA v ANC – an opportunity lost for truly promoting access to information" 2006 *South African Law Journal* 615 618 – 620.
[285] Bosch (n 284) par 619 – 622 and 624 – 625.
[286] *New National Party* (n 149) par 14. See also *AParty* (n 228) par 6 and 7.

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The right must also be understood in a manner that enhances democracy and the values – particularly the values of accountability, responsiveness and openness – that underlie the South African democracy.[287] South Africa experiences particularly high levels of corruption,[288] something that, rather than enhancing democracy in South Africa undermines it.[289]

International research shows that both the private business sector and organised criminals use gaps in the regulation of political party funding to exert influence.[290] It is not surprising therefore that the AUCPCC commits state parties, including South Africa who has signed and ratified the convention,[291] to "incorporat[ing] the principle of transparency into funding of political parties."[292]

Transparency with respect to the funding of political parties will expose corruption by ensuring that the public becomes aware of any "post-election special favours".[293] More than that, the knowledge that information about funding will become public should in fact deter corruption, as knowledge of potential exposure is likely to deter engagement in corrupt practices.[294]

The general public is, however unlikely to be inclined to trawl through masses of funding data, and not all members of the public will have the skills and expertise to make sense of the data.[295] Civil society and the media play an important role in this respect, looking through the data for connections that would interest the general public, bringing attention to those connections and exposing corruption.[296] That civil society and the media in South Africa do

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[287] See section 3.2.4.3 above. See also sections 1 and 39 of the Constitution.
[288] Transparency International ranks South Africa as the 61st most corrupt country out of 167 and gives it a score of 44 out of 100 – scores below 50 are regarded as indicating high levels of corruption. Online available at http://www.transparency.org/cpi2015 accessed 18 November 2016.
[289] *Glenister* (n 180) par 57 and 166.
[290] Briscoe (n 177) 20 and 75.
[291] See the "Status List" of the convention, available online at: https://www.au.int/en/treaties/african-union-convention-preventing-and-combating-corruption accessed 24 September 2016.
[292] Article 10(b) of the AUCPCC.
[293] *Buckley v Valeo* (n188) par 66 – 67.
[294] Hasen "Chill out: a qualified defense of campaign finance disclosure laws in the internet age" 2012 *Journal of Law & Politics* 557 568 – 569 and 572.
[295] Mayer "Disclosures about disclosure" 2011 *Indiana Law Review* 255 261.
[296] Udombana (n 183) 484 and 486, Garrett (n 262) 1025, 1031 and 1045, Hasen (n 294) 567 – 569 and Griffis "Ending a peculiar evil: the constitution, campaign finance reform, and the need for a change in focus after Citizens United v. FEC" 2011 *John Marshall Law Review* 773 798.

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in fact play a key role in the protection of fundamental rights, as has been recognised by the Supreme Court of Appeal in *VEJA*.[297]

For South Africa to be able to honour its international commitment to enabling the participation of civil society and the media in the fight against corruption, South Africa will necessarily need to ensure that these groups have access to information about the private funding of political parties.[298] The disclosure of this information will make it easier for the media and civil society (and even committed members of the general public) to identify instances of private funding leading to undue influence over decision making by politicians.

Media reports about improper influence that a wealthy family, the Gupta family, appears to have over South African politics recently led to an investigation into these allegations by the South African Public Protector.[299] The office of the Public Protector is one of six bodies established by Chapter 9 of the Constitution, to support and strengthen South Africa's constitutional democracy.[300] The Public Protector is mandated by the Constitution to investigate, report on and take remedial action in response to "conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice".[301] The Public Protector's report makes no findings of any violations of ethics codes or anti-corruption laws, citing a lack of funding and a resultant inability to properly investigate the allegations as the reason for not being able to make concrete findings in this respect.[302] The report does however make several findings of fact that strongly suggest potential violations and orders remedial action in the form of further investigation.[303] Some of the more significant findings in the report include evidence placing Minister Des van Rooyen, alleged to have been appointed Minister of Finance on the say-so of the Gupta family, in the vicinity of the Gupta family home several times prior to the appointment, including on the day of the appointment.[304] While a lack of disclosure laws in South Africa makes it difficult to draw a link between any political party funding provided and the activities of the Gupta family, the findings in Public Protector's report does suggest

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[297] *VEJA* (n 274) par 71, 80 and 82.
[298] Davis, D "Corruption and Transparency" 4.
[299] Madonsela "State of capture" 2016 *Public Protector South Africa* http://www.pprotect.org/library/investigation_report/investigation_report.asp (2-11-2016) 5.
[300] Section 181 of the Constitution.
[301] Section 182 of the Constitution.
[302] Madonsela (n 299) 24.
[303] Madonsela (n 299) 24 – 26.
[304] Madonsela (n 299) 14 – 15.

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that the wealthy Gupta family has had opportunity to improperly influence a number of political decisions.[305]

The Gupta-matter provides an example of the kinds of relationships between politicians and wealthy individuals, families and corporations that disclosure provisions might bring to light. The Constitutional Court has recognised that political parties play a critical role in ensuring a democratic South Africa – due to the unique role the Constitution accords them as "veritable vehicles… chosen for facilitating and entrenching democracy".[306] South Africa has made international commitments to ensuring access to information about the funding of political parties, and access to information that may be required to combat corruption. Putting these commitments together, especially against backdrop of the Public Protector's findings in relation to the Gupta family, provides a strong argument for why the right to vote, requires that there be access to information about the private funding of political parties.

3.2.5.2.Meaningful exercise of the right to vote

While combating corruption is one important reason for ensuring transparency about the financing of politics, and while South Africa is under an international obligation to do so, this is not the only reason that such transparency is important. It would be foolish to limit reasons for transparency to the combat of corruption, as understood in international law, as this could arguably limit transparency requirements to relatively narrow circumstances.[307] A legislative provision enacted to create a duty to disclose information about private funding received by political parties, if created only to combat corruption in compliance with international law, may be narrowly formulated. Such a narrow formulation would arise from the fact that "corruption" at the international level could be understood to have a narrow meaning, relating only to so-called *quid pro quo* corruption. If corruption is so understood, then disclosure requirements will accordingly only apply in relation to a narrow band of information.

Makinson notes that where funding is provided to a political entity, in *exchange for* a particular favour – say a vote in Parliament to pass legislation that will allow fracking in the Karoo – that would amount to bribery (*quid pro quo* corruption). He points out, however, that

[305] Madonsela (n 299) 14 – 24.
[306] *Ramakatsa* (n 263) par 67.
[307] Tham "My vote counts: international standards and transparency of political party funding" 2016 *Constitutional Court Review* draft of conference paper, 8 December 2016 (manuscript on file with author).

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those are not the only undesirable political-funding situations: another example would be where funding is legitimately provided in support of a party that has *indicated* that they would support the legislation that will allow fracking in the Karoo. The political party in this second example would not be under any obligation to vote in favour of the legislation allowing for fracking – they would be entitled to vote differently if, for whatever reason, their position on the proposed legislation has changed – but there would be some pressure on them to vote as professed or they may lose future funding from this funder.[308] Moreover, not only might they lose this particular funder's support, the funder may in fact in future back their opposition instead.[309]

One could also imagine that such a party might also lose other funders who may feel that they would rather put their money with someone that sticks to their professed positions.[310] So, taking the hypothetical example of fracking in the Karoo further, let us imagine that there is such proposed legislation before Parliament. Let us suppose further that, in compliance with the participatory duties imposed on it by the Constitution, Parliament invites verbal and / or written submissions from affected communities. In such circumstances, even if some of the concerns raised and / or potential solutions suggested by affected communities are persuasive, there may still be pressure on candidates from parties that received funding for certain positions to vote in line with those professed positions. This means that the community's voice is undercut. The Constitutional Court has found that South African's have a right to "meaningful exercise of choice" and to access to information that will ensure the "effective exercise of the right to vote".[311] Members of a political community should therefore be informed, when they cast their ballot to choose representatives for Parliament, which funders are giving donations to the various parties, and therefore, what sort of pressure those parties will be under from funders with respect to issues that may affect community members. Access to this information should inform public debate in the run-up to elections, ensuring realisation of the wider political rights in section 19 of the Constitution as well as related rights including the right to freedom of expression. In order to ensure the

[308] Makinson "Interest Groups What Money Buys" in Nelson CJ, Dulio DA and Medvic SK (eds) *Shades of Gray: Perspectives on Campaign Ethics* (2004) 171 175.
[309] Makinson (n 308) 176.
[310] Grossman and Helpman "Electoral Competition and Special Interest Politics" 1996 *The Review of Economic Studies* 265 266 and 271.
[311] *Doctors for Life* (n 249) par 106 and *President of the Republic of South Africa and Others v M & G Media Ltd* (n 132) par 10.

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"meaningful" exercise of choice within the electoral process therefore, information about private funding received by political parties clearly must be accessible to voters.[312]

One could argue that community members will likely not access funding information, even if that information becomes accessible. There will therefore be no conclusions drawn by them about the influence of donors on various parties contesting the election on particular issues that affect them. However, as noted above, the media and civil society would arguably play a big role in this respect.[313] On topics, such as fracking in the Karoo, the media would be likely to draw attention to the fact that certain interest groups or companies are funding particular parties. Similarly civil society groups with particular interests, such as in the environment, or health issues, would be more likely to be monitoring which funders (with agendas different from their own) are supporting which parties and to make affected communities aware of this. The Supreme Court in the United States of America, in the famous *Buckley v Valeo*[314] decision, put it this way:

> "… *disclosure* [of information about funding in politics] *provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office. It allows the voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.*"[315]

The South African Constitutional Court's holding in *Doctors for Life* that, under international law, South Africans have a right to meaningful exercise of the right to vote is therefore fairly similar to the information interest recognised by the US Supreme Court in *Buckley v Valeo* and subsequent cases.

[312] Garrett (n 262) 1026 – 1031 and Hasen (n 294) 570 – 571.
[313] Traugott "The Citizenry: The Electorate's Responsibilities" in Nelson CJ, Dulio DA and Medvic SK (eds) *Shades of Gray: Perspectives on Campaign Ethics* (2004) 225 235.
[314] Udombana (n 183) 484 and 486, Garrett (n 262) 1025, 1031 and 1045, Hasen (n 294) 567 – 569 and Griffis (n 296) 798.
[315] *Buckley v Valeo* (n188) par 66 – 67.

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3.2.5.3.A counterweight to secret lobbying and influence peddling

Another important reason for ensuring access to funding information has to do with the creation of access to members of Parliament, providing – in turn – opportunities for the influencing of decision making of members of Parliament. There is a practice, amongst some funders, of contributing to all contenders in an election – irrespective of their policy positions.[316] It is accepted that this practice of "double-dipping" is aimed at ensuring the funder has access to elected representatives – irrespective of who that may be. This access is in turn sought so that the person / organisation that provided the funding can attempt to influence the decision-making of elected officials by presenting to those officials their views on issues that are up for debate and decision by the legislature.[317] Many interest groups in US in fact, provide funding to political figures in order to ensure that they will have an audience with members of the legislature should legislation, which impacts on issues that will have consequences for them and their interests, come before it.[318] It is not inconceivable that such advantages of access to members of Parliament – in order to ensure opportunities to raise views and concerns with them – is a big driver for funders of political parties in South Africa as well.

If funders are, because of the provision of funding, gaining access to, and an audience with, members of Parliament, those funders have an opportunity to influence law-making and policy decisions. Those who do not have the means to contribute, and therefore gain the same access, should at least know about who is funding the parties that they have an opportunity to vote for and therefore whose interests are likely to be advanced by those parties. This would seem to be particularly important in a country with one of the highest levels of inequality in the world.[319]

As pointed out by the Constitutional Court in *Doctors for Life*, South Africa is an extremely unequal society. With the introduction of a constitutional democracy however, we have prioritised key values that go some way to counterbalancing some of this inequality – these include the values of "openness" and "participation". In finding, in *Doctors for Life* that

[316] Garrett (n 262) 1029.
[317] Thurber "Interest Groups: From Campaigning to Lobbying" in in Nelson CJ, Dulio DA and Medvic SK (eds) *Shades of Gray: Perspectives on Campaign Ethics* (2004) 151 155 – 156. See also Traugott (n 313) 235.
[318] Traugott (n 313) 235.
[319] O'Regan "Text matters: some reflections on the forging of a new constitutional jurisprudence in South Africa" 2012 *The Modern Law Review* 1 4.

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participation, by affected communities, in the law making process is required by the Constitution, the court noted that participation has the important purpose of acting "as a counterweight to secret lobbying and influence peddling."[320] This purpose, of counterbalancing secret lobbying and influence peddling, in the context of the right to vote is as important. While ensuring that voters have access to information about who is funding political parties will not ensure equal access, it will ensure that voters will at least be aware who will have access to representatives of political parties, on the ballot. As Hasen puts it: "[i]f voters know who puts their money where their mouth is, they will be able to make more intelligent estimates about the policy positions of candidates."[321]

3.2.6. The right to vote guarantees access to information about funding in politics

There is clearly an information aspect to the right to vote. It is also clear from the discussion in this Chapter that information about private funding provided to political parties is required to be accessible in order to ensure that corruption is combated, the exercise of the right to vote is meaningful and inequality of access to politicians is counter-balanced. In order to give effect to this aspect of the right to vote, the legislature ought to include in electoral legislation, a duty, on all parties intending to contest elections for any legislative body established in terms of the Constitution, to record information about private funding they receive. In line with international best practice, this ought to include information about the kind of funding, the size of the funding and the identity of the funder.

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3.2.7. Automatic access to the information (proactive disclosure)

The next question is whether such information should be proactively available, that is, without the need for a formal request in terms of PAIA. As noted by the minority in the *MVC matter*, the PAIA request process involves one person or institution making one request to each entity holding the information it seeks to access.[322] There are cost implications, as the Regulations to PAIA[323] allow for the levying of a so called "request" fee as well as an "access" fee.[324] As the *IDASA* court held that political parties are, in relation to requests about

[320] *Doctors for Life* (n 249) par 115.
[321] Hasen (n 294) 571.
[322] The *MVC matter* (n 9) par 95.
[323] Regulation 223 of 2001 in Government Gazette No. 22125 of 19 March 2001.
[324] See also section 22 and 54 of PAIA.

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private funding, "private bodies", the applicable request fee is therefore R55 per request.[325] The access fee is calculated for each request and depends on the amount of time spent searching for the records and the manner in which access is granted. Requesters can be charged R30 per hour, or part hour, reasonably spent searching for a record and R1,10 per page for photocopies. There are further prescribed costs for access in the form of a compact disc (R70), or copy of an audio recording (R30) or copies of visual images (R60 each) etcetera. It is clear that it would be both costly and time consuming to request funding information from every political party contesting elections at every level of government. It is also not inconceivable that some of these requests may be actively refused, or ignored and therefore deemed refused in terms of PAIA.[326]

In circumstances where an access to information request made in terms of PAIA is either actively refused or deemed refused by a "private body", a requester wishing to challenge the refusal will have to apply to court to have the decision overturned.[327] The high costs associated with litigation are likely to prevent many requesters from challenging a bad decision.

Even should one requester gain all this information, they may not necessarily publish the information. Therefore, every voter wishing to exercise their right to vote effectively and every civil society organisation and media house wishing to play a role in the protection and monitoring of the fundamental right to vote in free and fair elections will need to go through the same time-consuming, costly exercise.

As demonstrated above, there is a clear public interest in access to information about private funding provided to political parties – as it is required to combat corruption, ensure meaningful exercise of the right to vote and to counterbalance the unequal access funders have to politicians. Given the clear public interest in access to this information and given the constraints that the request process will place on gaining access to all the relevant information individually from each of the many parties that will contest elections, it is clear that the duty should be constructed in such a manner that this information must necessarily be made proactively available.

[325] *IDASA* (n 281) par 51 and 52.
[326] See section 27 of PAIA.
[327] Section 78(2)(d) of PAIA.

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It is worth noting at this stage that there are many varying options with respect to disclosure regulations, such as limiting disclosure to amounts that meet a minimum threshold.[328] The International IDEA and Clingendael Institute warn that their research shows that regulation of campaign finance can have undesirable consequences if not carefully thought through and adapted to suit the specific circumstances of a country.[329] It would therefore be prudent for Parliament to become involved in giving effect to this critical aspect to the right to vote, as Parliament will be able to properly investigate the different options and to consider their effect in the South African context.

3.3.Conclusion

In this Chapter, I have shown that there is a constitutional obligation, within the right to vote, to ensure transparency with respect to the private funding of political parties. I highlight three reasons, arising out of obligations under international law and from specific content given to political rights by the Constitutional Court and the legislature, for such a duty. The first reason relates to South Africa's obligation under article 10(b) of the AUCPCC to "incorporate the principle of transparency into funding of political parties." Access to information about funding makes it possible to identify instances of *quid pro quo* corruption and knowledge of potential exposure will act as a deterrent to corrupt activity. The second reason for the recognition of such a right is South Africa's duty, under international law, to the exercise of the right to vote is meaningful. Access to funding information about political party funding makes it possible for voters to determine what sort of pressure political parties will be under from funders with respect to issues that may affect community members. This knowledge will inform debate, which in turn will ensure meaningful exercise of the right to vote. The last reason provided relates to the recognition by the Constitutional Court of duty to ensure that inequality of access to politicians is counter-balanced. Again, knowledge about what sort of pressure political parties will be under from funders with respect to issues that may affect community members provides voters with the opportunity to identify and therefore vote for, the party that will best serve their interests.

[328] Clift and Fisher "Comparative Party Finance Reform" 2004 *Party Politics* 677 685.
[329] Briscoe (n 177) 77.

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I have shown that this aspect of the right to vote should be given legislative effect within the electoral legislative scheme, that is, within the Electoral Act, the LGMEA or the Electoral Commission Act. I have also shown that Parliament ought to be required, in line with its duties in terms of section 7(2) of the Constitution, to make the necessary amendments to the electoral legislation to give effect to this duty.

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4. Chapter Three: Justifying the limitations access to information about private funding of political parties may place on other constitutional rights

The South African Constitution recognises no hierarchy of rights. All rights are subject to limitation, provided the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and that such limits are created by laws of general application.[330] Neither the right to vote nor the right of access to information is exempt from such limitation. With respect to the right of access to information, the legislature has made provision for such limitation within PAIA. Chapter 4 of PAIA (in Part 2 of the Act in relation to information held by public bodies and in Part 3 of the Act in relation to private bodies) lays out the reasonable and acceptable limitations on the right of access to information.

I have established that the right to vote does have an access to information element. I have shown that this right requires – in compliance with international law obligations and in order to ensure a counterbalancing of inequality of access to politicians – that access be provided, proactively, to information about the private funding of political parties. I have also shown that this right should be given effect to within the electoral legislative scheme. It now becomes necessary to consider whether such a provision within the electoral legislative scheme may place limits on other constitutional rights, and if so whether these limitations would be constitutionally justifiable. Disclosure of information about private funding received by political parties may in fact impact both on the funder, who may be a natural or a juristic person, and on the political party – a juristic person. I will therefore consider potential limitations both from the point of view of natural persons as donors and from the point of view of juristic persons, as donors and as receivers of donations.

In the US, the Supreme Court in *Buckley v Valeo* held that disclosure requirements can "seriously infringe on privacy of association and belief guaranteed by the First Amendment".[331] The court went on to recognise that information about the financial transactions that a person has entered into discloses much about that person's "activities, associations, and beliefs."[332] Should information about peoples' activities, associations and

[330] Section 36 of the Constitution.
[331] *Buckley v Valeo* (n 188) par 64.
[332] *Buckley v Valeo* (n 188) par 66.

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beliefs become public knowledge this may lead to "harassment or retaliation."[333] Knowing that this information will become public knowledge may therefore also deter some people from making contributions in the first place – this would obviously affect both their ability fully to participate in political associations and the political associations' ability to carry out all their activities, or in some cases even to exist at all (due to a lack of funds).[334] The court, however, noted that there are some interests that could outweigh these rights to privacy of association and belief, on the basis of which the infringement could therefore be justified. The court recognised that, in relation to disclosure about campaign financing, the legislature had reasoned that there were three such weighty interests. The first was the fact that the information would enable voters to better understand what positions the recipients of the funding might take on certain specific issues, once in office.[335] The second was the fact that disclosure of the information would "deter actual corruption and avoid the appearance of corruption".[336] The third was the fact that disclosure of information about funding contributions would make it possible to detect violations of legal provisions placing a cap on the amount of money that can be contributed to political parties or candidates.[337] The court, in weighing up the three government interests in disclosure, against the harms of harassment or retaliation and deterrence noted that while the harms are not insignificant, disclosure was the least restrictive means of achieving the legitimate government interests.[338] The court therefore held that the interests sought to be protected through the disclosure requirements outweighed the potential harms.[339]

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Within the South African context there are several rights that may potentially be infringed by legislation mandating the disclosure of information about private funding provided to political parties. From the point of view of the donor, such provisions may affect the right to freedom of expression (section 16 of the Constitution) of the donor, in so far as making a donation is a symbolic expression of support. Similarly the donor's right to freedom of association (section 18 of the Constitution) may be affected if disclosure provisions will have the effect of deterring the making of donations. Lastly, from both the point of view of the donor as well as the political party, the right to privacy (section 14 of the Constitution) may

[333] *Buckley v Valeo* (n 188) par 68.
[334] *Buckley v Valeo* (n 188) par 68 and 71.
[335] *Buckley v Valeo* (n 188) par 66 – 67.
[336] *Buckley v Valeo* (n 188) par 67.
[337] *Buckley v Valeo* (n 188) par 68.
[338] *Buckley v Valeo* (n 188) par 68.
[339] *Buckley v Valeo* (n 188) par 72.

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be infringed by the envisioned provisions. In this context however, concerns about the infringement of the rights of freedom of expression and association are related to privacy in so far as what is affected is an individual's ability to express their very personal views, and, more indirectly, to partake in activities that relate to those views. I will therefore focus my analysis on the possible infringement of the right to privacy, considering also whether and to what extent such an infringement would be constitutionally justifiable.

Under PAIA, limitations on the right of access to information are recognised, if access to a record may lead to unreasonable disclosure of personal information about a natural person (including a deceased person – for up to 20 years after their death). While the right to privacy in the Constitution – contained in section 14 – extends also to juristic persons, "personal information" in PAIA is limited, to information about natural persons.[340] While the personal information of juristic persons is not protected, as such, in PAIA, certain limited aspects of the privacy of juristic persons are protected in the Act. Some of the aspects of privacy of juristic persons that are protected in PAIA include certain commercial information, such as trade secrets, and research conducted by or on behalf of a juristic person.[341]

This limited protection of the privacy of juristic persons is in line with the Constitutional Court's interpretation of the right to privacy. In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*[342] (*Hyundai*) the Constitutional Court had to consider whether legislative provisions, that enabled certain members of the office of the National Director of Public Prosecutions to search and seize property as part of investigations into certain offences, unreasonably and unjustifiably infringed on the right to privacy and were therefore unconstitutional.[343] In finding that the limitation was in fact reasonable and justifiable and the provisions therefore not unconstitutional, the court considered the meaning and scope of the right to privacy.[344] The court held that the right to privacy is "more intense" the more it relates to "the intimate personal sphere of the life of human beings, and less intense the more it moves away from

[340] Section 34 and 63 of PAIA and the definition for "personal information" in section 1 of PAIA.
[341] Sections 36, 43, 64, 68 and 69 of PAIA.
[342] 2001 (1) SA 545 (CC).
[343] (n 342) par 1 and 3.
[344] (n 342) par 55 and 58.

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that core."[345] The court further noted that the right to privacy flows from human dignity, and held that, while juristic persons have some right to privacy, they have no "human dignity" and, therefore, juristic persons' right to privacy will always be "less intense" than natural persons' rights to privacy. The recognition of the privacy rights of juristic persons is based, not on human dignity directly, but on the fact that absolutely no recognition may lead to state action that would cause "grave disruptions and would undermine the very fabric of our democratic state."[346]

4.1.Personal information of natural persons

As already noted above, the right to privacy is protected by section 14 of the Constitution. The Protection of Personal Information Act[347] (POPIA) has been enacted to give effect to the constitutional right to privacy.[348] As at the date of writing, most provisions of POPIA have not commenced. The definition of "personal information" in POPIA however, closely echoes that in PAIA and therefore protects personal information rights in relation to similar kinds of information that would be protected from disclosure under PAIA.[349] I will therefore consider the right as provided for in PAIA.

Information about funding, provided by natural persons to political parties, would include information about "financial transactions" that that person has been involved in. Information about financial transactions an individual has been involved in may – as the *Buckley v Valeo* court held – lead in turn to disclosure information about that person's "personal opinions, views or preferences". Information about the financial transactions that a person has been involved in and information about their personal opinions, views or preference are all types of information recognised, in the definition of "personal information" in section 1 of PAIA, as personal information. Disclosure of information about funding provided by natural persons to political parties would therefore infringe on the privacy rights of those natural persons.

345 (n 342) par 18.
346 (n 342) par 18.
347 Act No. 4 of 2013
348 Section 2 of POPIA.
349 There are only two significant differences. The definition of "personal information", in POPIA, specifically includes juristic persons, whereas the definition in PAIA does not. The definition of "personal information", in PAIA on the other hand, includes information about deceased individuals – for up to 20 years after their death – whereas POPIA limits its definition, in relation to natural persons, to living persons. These differences are not material to this discussion because the protection of the privacy rights of juristic persons will be considered separately, and with respect to natural persons we are here considering the more expansive of the two definitions.

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4.2. Certain personal information of juristic persons

4.2.1. The rights of juristic persons as funders

Despite PAIA not protecting the "personal information" of juristic persons, as such, it does in fact also protect against the disclosure of financial information of a juristic person, in certain circumstances. PAIA prohibits disclosure of financial information of other juristic persons, by state or private entities, and allows for refusal of access by a juristic person to its own financial information, if such disclosure "would be likely to cause harm to the commercial or financial interests" of that juristic person.[350] Disclosure of information about funding provided by juristic persons to political parties would disclose financial information of that juristic person. Again, the reasoning in *Buckley v Valeo* would seem to apply here too in that, if there is in fact a real possibility that disclosure of this information may lead to harassment or retaliation, then there is a risk to the commercial or financial interests of that entity. It does seem plausible to imagine that there might be some harassment or retaliation in such circumstances – one might imagine, for example, that some people will cease to do business with an entity, should they learn of that entity's support for a particular political party.[351] Disclosure of information about funding provided by juristic persons to political parties would therefore infringe on this aspect of the privacy rights of juristic persons that are protected in PAIA.

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4.2.2. The rights of political parties

Disclosure of information about funding received by a political party would similarly amount to disclosure of financial information of that political party. Once again, the reasoning in *Buckley v Valeo* would seem to apply here too in that the disclosure of information may have the suggested harassment and retaliation consequences for funders, noted above, and this may lead to some funders withdrawing their financial support from the political party. A withdrawal of financial support would likely cause harm to the financial interests of the political party; emptying out their coffers to the point that they may have to limit their activities, or perhaps even cease to exist entirely. Disclosure of information about funding received by political parties would therefore infringe on this aspect of the privacy rights of political parties, protected in PAIA.

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[350] Sections 36(1)(b), 64(1)(b) and 68(1)(b) of PAIA.

[351] As has indeed been the case elsewhere, see for example Hasen (n 294) 556.

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4.3. The justification for limitation

The question arises whether the infringement of these privacy rights would be justifiable. If proactive release is required, as I have suggested, it should be required in terms of the provisions of an Act falling within the electoral legislative scheme; the limitation would therefore be in terms of a law of general application. As such it would meet the threshold requirement for the limitation of a constitutional right, in terms of section 36 of the Constitution. To further pass the test for justification, the limitation would have to be:

> "*…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.*"[352]

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I now turn to considering, in turn, each part of this test.

4.3.1. The nature of the right

The right to privacy is an important right, flowing, as it does, from the "value placed on human dignity by the Constitution."[353] It is also however, as noted above, a right that varies in intensity, depending on how close it comes to the most intimate spheres of the lives of natural persons.

With respect to natural persons and information about their funding of political parties, funding is a form of political activity, an activity that takes place quite far outside the most intimate spheres of the lives of natural persons. The weight of the right is therefore, with respect to natural persons and in relation to information about their funding of political

[352] Section 36(1) of the Constitution.
[353] *Hyundai* (n 342) par 18.

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parties of a relatively low intensity. The exception might be circumstances in which only a very small amount is given, in such cases, as noted by Mayer and Hasen, the act of giving is more a symbolic act of support and therefore should be regarded as a more private act.[354] The weight of the privacy right, when what is given is a very large sum, say one million Rand, is therefore heftier than if what is given is just a small amount, say R50.

In relation to juristic persons, the right can never be as intense as it can be for natural persons.[355] The provision of funding will also not ordinarily be directly within the scope of the business of a juristic person – a juristic person that provides funding is usually primarily concerned either with an economic activity or with campaigning for a particular cause.[356] The right is therefore also, in relation to information about the funding of political parties by juristic persons less intense.

As already noted, the Constitutional Court in *Ramakatsa* noted that the Constitution accords special recognition to political parties as "veritable vehicles… chosen for facilitating and entrenching democracy" when it provides for public funding of political parties.[357] The court therefore determined that political parties are "indispensible (sic) conduits for the enjoyment of the right given by section 19(3)(a) to vote in elections."[358] Information about funding received by political parties therefore relates to a constitutional duty on political parties to ensure they act lawfully, in line with their own constitution and in a manner that ensures that, through them, citizens are able to exercise their right to vote. This right is therefore, with respect to political parties, and in relation to information about funding that these political parties have received, even less intense and almost remote.

4.3.2. The importance of the purpose of the limitation

Turning to the purpose of the limitation, as noted in Chapter 2, disclosure requirements would be aimed at ensuring that corruption is combated, the exercise of the right to vote is meaningful and that inequality of access to politicians is counter-balanced. These are very

[354] Mayer (n 295) 282 and Hasen (n 294) 566.
[355] *Hyundai* (n 342) par 18.
[356] Garrett (n 262) 1027 – 1033.
[357] *Ramakatsa* (n 263) par 67.
[358] *Ramakatsa* (n 263) par 68.

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important interests as they are aimed at the protection of the key aspects of South Africa's constitutional democracy.

4.3.3. The nature and extent of the limitation

The limitation comes in the form of a legislative provision requiring that information about funding provided by private persons (natural or juristic) to political parties be recorded and made publicly accessible. In other words, the legislative provision will mandate the disclosure of certain financial information related to donors and political parties. The disclosure, and therefore limitation, is however limited to disclosure of financial information about the funding of political parties. The limitation would therefore be narrow in that it would only relate to one aspect of the financial information of the affected persons.

4.3.4. The relationship between the limitation and its purpose

It seems plausible to imagine that access to information about the private funding – in large amounts – of political parties would, as the US Court held in *Buckley v Valeo*, make it more likely that "post-election special favours" (*quid pro quo* corruption) will be identified. This means that disclosure provisions would have the effect of exposing or even preventing corruption – serving the first of the purposes for the limitation. Smaller contributions however will not attract any favours and so disclosure in the instance of a R50 donation, for instance, would not serve the anti-corruption purpose, whereas disclosure in the instance of a one million Rand donation probably would.[359]

Information about the makers of large contributions will similarly ensure that voters are better informed about the influences under which the parties they are able to vote for will operate if elected. Persons that are able to make large contributions are usually known to the public, or connected with a person or entity that is known to the public or whose interests can be easily established. Voters are therefore able to make certain judgments about the position a political party is likely to take on an issue that affects them.[360] Garret suggests for instance that knowing that a teachers union funds a certain political party will signify to voters the

[359] Hasen (n 294) 566, Garrett (n 262) 1015 and Mayer (n 295) 282 – 283. See also Briffault (n 195) 990.
[360] Garrett (n 262) at 1027 notes that this is not always the case and identifies three conditions that must be met in order for voters to be able to make the kind of judgment suggested here, based on the information I am arguing should be disclosed.

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kinds of positions they can expect that party to take on education reforms.[361] Disclosure, in the instance of a large donation, such as one million Rand for instance, would therefore ensure that voters are better informed – serving the purpose of ensuring that the exercise of the right to vote is meaningful. Smaller donation however, for instance a donation of just R50, are less likely to come from someone wealthy, powerful and politically connected about which the public would be able to make educated assumptions if they knew of the donation and the donor. Smaller amounts are also less likely to ensure any access to politicians and so even should a smaller donation come from someone with a public profile, knowing of the donation and knowing the identity of the donor would not provide voters with information that will ensure that the exercise of the right to vote is meaningful.

For the same reasons discussed in relation to the purpose of ensuring that the exercise of the right to vote is meaningful, disclosure of information about large donations would serve the purpose of counter-balancing inequality. The makers of large donations are likely to gain access to politicians, their wealth securing them such access. The public is however also likely to know more about the economic or ideological interests of the maker of a large donation, and therefore of the interests they will be attempting to protect. Knowing what the interests are that the various political parties are likely to strive to protect will therefore go some way to ensuring that some of the inequality of influence is counterbalanced. Again however, disclosure of information about a one million Rand donation would likely serve this purpose, whereas disclosure of information about a R50 donation is significantly less likely to serve the purpose.

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4.3.5. Less restrictive means to achieve the purpose

All three of the underlying purposes could be achieved, to some degree, by a total ban on direct private funding, and the introduction of a system whereby tax payers can elect the parties to which they wish a portion of their taxes to be allocated.[362] This would, however, limit significantly the funding available to political parties and would conceivably also therefore significantly limit their activities. Given the critical role political parties play in our democracy this would be a very severe limitation. The disclosure requirements envisioned in

[361] Garrett (n 262) 1028.
[362] This is a variation on a proposal put before the *Buckley v Valeo* court, (n 314) see fn 125.

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this dissertation would be less restrictive than this alternative proposal, provided they are limited to disclosure in relation to large donations.[363]

Another alternative might be the channelling of donations through a blind trust or government entity, a suggestion first made by Ackerman and Ayres in their book *Voting with Dollars*.[364] Such a model would have donors make the donations to an intermediary who would pass the donation onto the political party without revealing who the donor was, there would be no way for the political party to verify that someone claiming to be the donor really is the donor; this would serve the anti-corruption purpose.[365] Similarly the purpose of ensuring that inequality of access to politicians is counter-balanced would be achieved because if political parties cannot verify who the bigger donors are there will be no granting of access on the basis of donations. However, unless the intermediary also collects and discloses some information about the donors and their interest there will be no information benefit for voter – voters will not for instance know that businesses in the petroleum industry favour a particular political party.[366] This in turn will mean that the purpose of ensuring that the exercise of the right to vote is meaningful will not be achieved. Should the intermediary also be mandated to collect and distribute non-identifying aggregate data about donations however this would create a significant administrative and therefore cost burden for the intermediary. It is not likely that South Africa will be able to afford such a sophisticated alternative model at this stage. I therefore suggest that a disclosure regimen, such as the one suggested in this dissertation, if limited to disclosures about large donations, is the least restrictive, most effective means of achieving the purpose identified.

4.3.6. Reasonable and justifiable in an open and democratic society

On the other hand, the disclosure provisions proposed in this dissertation would be an affordable solution. The proposed provisions would be aimed at ensuring protection of one of the key aspects of South Africa's constitutional democracy, and while they would infringe on the very important right of privacy, they would do so in circumstances in which that right would not be severely affected. The limitation is not very extensive, in that the disclosure

[363] Determination of a threshold amount for donations that are "large enough" to warrant disclosure falls outside the scope of this dissertation.
[364] Ackerman and Ayres *Voting with Dollars: A New Paradigm for Campaign Finance* (2004).
[365] Noveck "Campaign finance disclosure and the legislative process" (2010) *Harvard Journal on Legislation* 75 105.
[366] Noveck (n 365) 106 – 114.

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requirements relate only to funding aspects of the finances of funders and political parties. The limitation – provided the provisions are tailored to only apply to very large donations – is likely to achieve its purposes of ensuring democracy is strengthened through diminishing corruption, the meaningful exercise of the right to vote and through its role as a counter-balance to the inequality of access to politicians. There is no less restrictive means of achieving the purposes of the infringement to a similar degree. The limitation is therefore likely to be regarded by the courts as being reasonable and justifiable in terms of section 36 of the Constitution.

4.4. Conclusion

Provisions, enacted to give effect to the right of access to information about private funding of political parties would infringe the privacy rights of funders (whether natural or juristic) and political parties alike. The limitation, however, plays a very important role in circumstances in which the right to privacy has a relatively limited weight despite its importance generally. I have also shown that the infringement – provided the provisions are tailored to only apply to very large donations – would be reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.

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5. Final Conclusion

Current events have highlighted the need for better transparency in South Africa around the influence of money in politics. A recent report by the Public Protector found that certain contracts entered into by Eskom – the state-owned electricity utility – appear to solely benefit a company majority-owned by the wealthy Gupta family.[367] This appears to suggest that the political machinery in South Africa was being used to benefit the Gupta family, and the question is why. Some the answers may lie in information about the political funding activities of this wealthy family. The role of access to information in ensuring transparency, accountability and participation in politics recently came before the Constitutional Court, in the *MVC matter*. In that matter the applicants had sought to argue that legislation should be enacted, in terms of the provisions of section 32(2) of the Constitution, to provide for the recording and automatic disclosure of information about the private funding of political parties. The majority of the court dismissed the application, holding that the principle of subsidiarity prevents the applicants from relying directly on section 32(2) of the Constitution, in light of the fact that PAIA had been enacted in fulfilment of the obligations arising out of that section.

The outcome of this case raises certain questions that I have attempted to answer in this dissertation. First, I laid out, in the first Chapter, how it is that the access to information legislative framework, underlying access to information in South Africa, works. I then demonstrate that PAIA, as the legislation enacted to give effect to the right of access to information acts as a mechanism for access to information that is recorded in some form or another. I then showed, through an extensive consideration of a number of pieces of legislation, that record-creation and record-keeping duties, arise in other, "sector specific" legislation. More specifically, I demonstrated that legislation within the electoral legislative scheme gives indirect recognition to an access to information element to the right to vote by imposing record-creation and record-keeping duties.

Having demonstrated how the access to information legislative framework underlying access to information in South Africa works, I then turned to answering the question whether information about private funding of political parties is in fact, currently, accessible. I found that there is no duty in the legislation within the electoral legislative scheme to keep a record

[367] Madonsela (n 299) 19 – 20.

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of this information. As the mechanism for access, PAIA, in order to ensure access, depends on a duty to create records with this information, and no such duty exists, I therefore found that the information is in fact not currently accessible.

I then moved on to answering, in the second Chapter, the question about whether the Constitution requires that information about private funding of political parties should be accessible. In order to be able answer this question I first established that, as the right ultimately sought to be protected and exercised meaningfully is the right to vote, the principle of subsidiarity requires reliance on that right, rather than on the right of access to information directly. I therefore found that the proper location for duties to create and keep, and in certain instances to proactively disclose, records of information related to voting is in the legislation enacted to give effect to the right to vote.

In order to determine whether information about private funding of political parties is required for the exercise and protection of the right to vote I analysed, in the second Chapter, the content given to the right to vote under international law and by the South African Constitutional Court and legislature. I also, in light of similar constitutional protections, and as disclosure laws have for many years formed part of campaign finance regulation in the US, briefly considered the case law of the US Supreme Court, related to disclosure and campaign finance. Out of this analysis I put forward three arguments for the recognition of a right of access to information about private funding of political parties as part of the right to vote. The first argument relates to South Africa's obligation under article 10(b) of the AUCPCC to, in order to combat corruption, "incorporate the principle of transparency into funding of political parties." Access to information about funding makes it possible to identify instances of *quid pro quo* corruption and knowledge of potential exposure will act as a deterrent to corrupt activity. The second argument for the recognition of such a right relates to South Africa's duty, under international law, to ensure that the exercise of the right to vote is meaningful. Access to information about political party funding makes it possible for voters to determine what sort of pressure political parties will be under from funders with respect to issues that may affect their communities. This knowledge will inform debate, which in turn will ensure meaningful exercise of the right to vote. The last argument provided relates to the recognition by the Constitutional Court of a duty to ensure that inequality of access to politicians is counter-balanced. Again, knowledge about what sort of pressure political parties will be under, from funders, with respect to issues that may affect voters and their

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communities provides voters with the opportunity to identify, and therefore vote for, the party that will best serve their interests.

I then demonstrated the high costs and heavy burden of access to this information using formal access to information requests. I found that, taken together with the importance of access to this information, this high cost and heavy burden necessitates a need for the information to be made proactively available. I therefore conclude that the legislature ought to create a duty within the legislation forming part of the electoral legislative scheme to record, and proactively grant access to, information about the private funding of political parties.

Lastly, I considered, in the third Chapter, whether such a provision within the electoral legislative scheme would place any limits on other constitutional rights. I demonstrated that such a provision would indeed infringe on the privacy rights of donors (natural and juristic) as well as the privacy rights of political parties, as it would amount to a disclosure of financial information of those persons. I therefore considered whether such an infringement of the privacy rights of donors and political parties would be constitutionally justifiable in terms of section 36 of the Constitution. I showed that the limitation would meet the threshold requirement for justification as it would be imposed in terms of legislation of general application. I further showed that while privacy generally is a very strong right, in these specific circumstances the right would be less intense in relation to donors that are natural persons, even less intense with respect to donors that are juristic persons and with respect to political parties almost remote. I showed that the limitation would serve the important purposes of combatting corruption, ensuring the exercise of the right to vote is meaningful and ensuring that inequality of access to politicians is counter-balanced. I also showed that the limitation is not excessive in that it would be limited disclosure about financial information related to political party funding only. I demonstrated how the limiting provisions are likely to achieve their purposes and that the suggested legislative provision would be the least restrictive and most effective means of achieving the purposes of the infringement. I therefore conclude that the limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

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