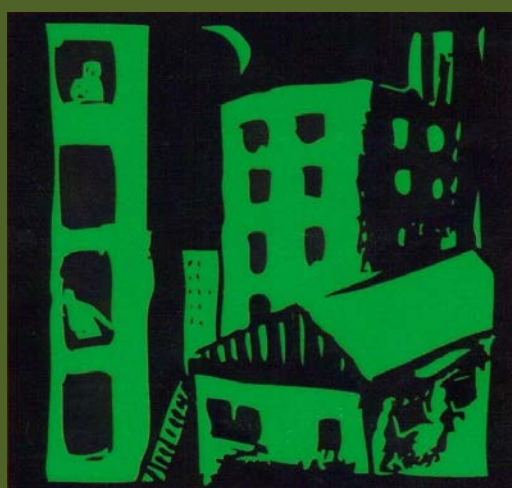


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## *My Vote Counts and the Transparency of Political Party Funding in South Africa*

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### 1 INTRODUCTION

The vision of society proclaimed by the Constitution of the Republic of South Africa, 1996 (Constitution) is an open democracy. There are a number of aspects – angles – to that openness. Paradoxically, one of them is secrecy. In the context of representative and participatory democracy, the debate over and consideration of the Protection of State Information Bill (often termed the “Secrecy” Bill or Act) up to its passage as an Act provided a true test for the post-apartheid South African democracy.<sup>1</sup> It is

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<sup>1</sup> Klaaren J, "The South African 'Secrecy Act': democracy put to the test" (2015) 48 *Verfass Recht Übersee VRÜ* 284–303. I argued that the South African parliamentary oversight was not as well implemented as the German oversight and that there were as yet clumsy modes of incorporating elements of the national debate from the provincial and local levels into the National Council of Provinces (the second legislative chamber of Parliament). I also argued that terming South Africa a dominant democracy framework (a mode of analysis in comparative constitutional law akin to the category of one-party States) was inferior to an analysis attending to the symbolic politics of transparency between the intelligence services and the media.

important to move beyond the balancing metaphor and to recognize that transparency and secrecy are not two concepts separate from each other. The insight that transparency and opacity are mutually implicated allows us to understand better how both are supported and nurtured within a constitutional democracy.

The Constitutional Court in the *My Vote Counts case* was faced with a question of what an open society might entail in practice – specifically, whether or not private funding to political parties ought to be disclosed publicly as part of implementing the right of access to information. This article thus explores one particular angle of openness -- the meaning of constitutional authority to enforce the right of access to information.

There are, of course, other angles of openness. One is the social character of openness. This quality is embodied in the concept of the open society<sup>2</sup> as well as in the concept of an open university, a concept with a tradition in South Africa stemming from an important 1957 statement.<sup>3</sup> As any contemporary observer of South African politics would be aware, this angle of openness clearly draws on the recent South African experience of the #FeesMustFall student movement. In the last three months of 2015, this student movement succeeded in obtaining a zero per cent fee increase for higher education for the following year. The movement is arguably a significant political development that will have consequences both in the higher education sector and in broader national politics. Moving beyond the open university tradition, further issues have arisen. University administrations have engaged robust private security protection in ostensibly private spaces, albeit ones which function publicly. They have also obtained interdicts that bear comparison with the negative features of SLAPP (strategic litigation against public participation) suits.<sup>4</sup> Another is a debate kicking off over the suitability of university governance and the value of academic autonomy in the context of political responsibility for transformation in the sector.<sup>5</sup> There are both risks and opportunities in the current moment. Perhaps balancing the risk that securitization may become the norm on campuses, there is an opportunity to put into place university protest policies that are both rights regarding and democracy furthering.

Another angle of openness is its character as an end, a political ideal.<sup>6</sup> This differs from an open society and presumes, at a minimum, a condition of no political capture as a precondition for democracy. This topic has become the subject of a

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<sup>2</sup> Popper K *The Open Society and Its Enemies* (London and New York: Routledge 2012); Soros G *Open Society Reforming Global Capitalism Reconsidered* (New York: PublicAffairs 2000); *Constitution* s 36(1).

<sup>3</sup> University of Cape Town Academic Freedom Committee & University of the Witwatersrand Academic Freedom Committee *The Open Universities and Academic Freedom, 1957-1974: A Review* (Cape Town: Juta 1974).

<sup>4</sup> Murombo T "SLAPP suits: an emerging obstacle to public interest environmental litigation in South Africa" (2011), available at <http://papers.ssrn.com/abstract=1858642> (accessed 30 June 2016).

<sup>5</sup> "Council on Higher Education contradicts UCT, SAPTU on amendment bill", available at [POLITY.ORG.ZA, http://www.polity.org.za/article/council-on-higher-education-contradicts-uct-saptu-on-amendment-bill-2016-02-16](http://www.polity.org.za/article/council-on-higher-education-contradicts-uct-saptu-on-amendment-bill-2016-02-16) (last accessed 17 February 2016).

<sup>6</sup> Constitution 1.

growing literature, with works by Anthony Butler<sup>7</sup> and Pierre de Vos<sup>8</sup>, discussing the relationship between funding and the operation of political parties in a democracy. In general, this literature upholds the value of institutional independence, in particular that of the Constitutional Court, without partaking of theories viewing South Africa as a democracy dominated by a single party. This angle of openness is situated on the democratic side within the tradition of liberal-democratic constitutionalist concern about South African democracy. In a recent example, Theunis Roux offers a functionalist analysis of the consolidation role played by the Constitutional Court in the last 20 years in South Africa.<sup>9</sup> Contrasting his view with that of those pushing the Court to do more, Roux reads some significant Court decisions as safeguarding the Court's own institutional role and thereby safeguarding constitutional democracy in the long term.<sup>10</sup>

The social character of openness may be integrated with the call to arms of openness as an ideal against political capture -- in other words how these two angles of openness could be aligned. Heinz Klug has reviewed three monographs each advancing distinct fundamental theories of constitutional democracy.<sup>11</sup> The third of the three scholars he reviews is Gary Jacobsohn, whose work focusses on the question of constitutional identity.<sup>12</sup> It is intriguing that Jacobsohn's theory may allow constitutional scholarship to bring into view the identity seeking character of the 2015 South African student movements, both #FeesMustFall and #RhodesMustFall.<sup>13</sup> In this theory, it is the identity formation over the long haul of a constitution that is key. Within such an identity may also lie the quality that is fundamental to the call for avoiding political capture, thus aligning these angles of openness. On this note, I turn now to examine the Constitutional Court's decision in the *My Vote Counts case* ("MVC case").<sup>14</sup>

## 2 ANGLING FOR OPENNESS: MVC case

The MVC case concerned the implementation of the constitutional right of access to information in South Africa's democracy. In my view, the majority judgment in the MVC

<sup>7</sup> Butler A *Paying for politics: party funding and political change in South Africa and the global South* Jacana Media (2010).

<sup>8</sup> De Vos P "It's my party (and I'll do what I want to?): internal party democracy and section 19 of the South African Constitution" (2015) 31 SAJHR 30-55.

<sup>9</sup> Roux T "Constitutional courts as democratic consolidators: insights from South Africa after 20 years", (2016) 42 *J South Afr Stud* 5-18.

<sup>10</sup> Roux T "The South African Constitutional Court's democratic rights jurisprudence: a response to Samuel Issacharoff" (2013), available at <http://papers.ssrn.com/abstract=2497777> (last accessed 13 October 2014).

<sup>11</sup> Klug H "Constitutionalism, democracy and denial in post-apartheid South Africa" (2012), available at <http://papers.ssrn.com/abstract=2141310> (last accessed 13 January 2016).

<sup>12</sup> Jacobsohn G *Constitutional identity* (Cambridge: Harvard University Press 2010).

<sup>13</sup> Mbembe A "Decolonizing the university" *Africa is a country*, available at <http://africasacountry.com/2015/06/decolonizing-the-university/> (last accessed 14 January 2016).

<sup>14</sup> *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (30 September 2015).

*case* represents a lost opportunity to begin a respectful dialogue between the judiciary and the legislature about the shape and content of information security and disclosure laws. A majority of justices rejected the claim of the applicant that Parliament had failed to fulfil a duty in terms of section 167(4)(e) to enact legislation giving effect to the right of access to information in relation to information held by political parties regarding their receipt of funding from private sources.<sup>15</sup> The applicant's claim depended on a reading of section 32 (the right of access to information) together with a reading of section 19 (the right to vote). The majority judgment did not reach the issue of whether section 19 properly interpreted and read together with section 32(2) provide a right to information about private funding of political parties. As the majority stated: "Our approach makes it unnecessary for us to pronounce on whether information on the private funding of political parties is required for the exercise of the right to vote."<sup>16</sup>

The majority rested its rejection of the applicant's claim on two points: first, that to decide in favour of the applicant and to find such an obligation in section 167(4)(e) would violate the doctrine of the separation of powers; and secondly, in a more technical vein, that "the validity of PAIA is challenged and PAIA is the legislation envisaged in section 32(2), [so] the principle of subsidiarity applies ... [and] the applicant ought to have challenged the constitutional validity of PAIA frontally in terms of section 172 of the Constitution in the High Court".<sup>17</sup> This article concentrates on the majority's second point – the proper reasoning regarding the relationship of the validity of the Promotion of Access to Information Act 2 of 2000 (PAIA) and the interpretation of section 32(2) – and largely leaves aside general considerations of the doctrine of the separation of powers and their implications for the proper interpretation of section 167. It does so assuming that, on the first issue, a dialogic view of the doctrine of separation of powers is appropriate for the interpretation of section 32.<sup>18</sup>

In an apparently still relevant article published 20 years ago, I offered an interpretation of section 32(2) and the associated duty to pass legislation found in item 23 of the transitional Schedule to the 1996 Constitution. I argued that for

"a decisive break from the constitutional culture of the past, it is necessary to take into account the institutional and structural relations between the various organs of state in order to provide a workable and democratic model of constitutional law. The 'give effect to' clauses in the administrative justice and access to information rights are two good places to employ an institutional analysis and to allow both Parliament and the judiciary to play a role in constitutional interpretation".<sup>19</sup>

Under this kind of structural interpretive analysis, the *MVC case* is revealed as a democratic opportunity missed and the reasoning of the majority as flawed due to an incorrect implicit interpretation of the relationship of the validity of PAIA and the interpretation of section 32(2).

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<sup>15</sup> At 121–195.

<sup>16</sup> At 124.

<sup>17</sup> At 122.

<sup>18</sup> Klaaren J *Keynote address. Colloquium of the Constitutional Justice Project* (2015) (on file with author).

<sup>19</sup> Klaaren J "Constitutional authority to enforce the rights of administrative justice and access to information" (1997) 13 *SAJHR* 549 564.

For this argument, two key texts from two decades back are important starting points: the still current text of the right of access to information in the 1996 Constitution and the transitional schedule that governed the transition to this right. The text of section 32 provides as follows:

“(1) Everyone has the right of access to-(a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights. (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”

The transitional provision to be read with section 32 was in a Schedule at the back of the Constitution. In Schedule 6 to the 1996 Constitution<sup>20</sup>, Item 23 Bill of Rights provides:

“(1) National legislation envisaged in sections 9(4), 32(2) and 33(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect. ... (3) Sections 32(2) and 33 (3) of the new Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect.”

In relation to the validity of PAIA, the *MVC case* majority assumes an interpretation of section 32(2) as a clause requiring Parliament to cover the field of access to information with legislation giving effect to the right. In other words, the implicit interpretation of section 32(2) is that the content of the right (indeed, the full content of that right) must have been enacted into one comprehensive piece of legislation as part of the original function of section 32(2). The PAIA is sufficient and comprehensive. Challenges to PAIA as being under-inclusive may well be brought on the basis of section 32, but such challenges should be understood as challenges to the substantive validity of PAIA.

This assumed interpretation of the majority is not the best fit with the drafting history of the Constitution, as well as with the character and structure of South Africa's constitutional democracy. I have offered a different interpretation. One should best read section 32(2) in its original context read with Item 23 of Schedule 6 to provide for a once-off duty to pass information disclosure legislation of some type, and thereafter (once Item 23 has essentially fallen away) to continuously signal the degree of deference due to Parliament by the judiciary in reviewing Parliament's legislative choices in enforcing the right of access to information. In this view, with regard to the right of access to information and the right to just administrative action, the judiciary owes Parliament a degree of deference with regard to its legislative choices especially on the matter of appropriate institutional design (the enforcement mechanism) to give effect to the rights.<sup>21</sup>

For the sake of argument, let us assume that the right to vote in section 19 read with section 32 does require that voters have access to information about private funding of political parties. It may even be the case that section 32 on its own should be so interpreted. It does not necessarily follow that section 32(2) read with Item 23

<sup>20</sup> See also Item 21 which provides: “Where the new Constitution requires the enactment of national or provincial legislation, that legislation must be enacted by the relevant authority within a reasonable period of the date the new Constitution took effect.”

<sup>21</sup> Klaaren (1997).

required that Parliament enact PAIA in order to give effect to the full extent of the content of the right through a single piece of legislation comprehensively covering the content of the right, nor does it follow that section 32(2) read with section 167(4)(e) now require that PAIA be amended. Instead of imposing such a rigid obligation to legislate and cover the field of access to information, section 32(2)'s give effect to clause should be read rather to grant power to and provide for a leading institutional design role for Parliament.<sup>22</sup> As I will explore more fully below, a more flexible enforcement regime providing some place for common law doctrine and its development as well as provincial legislation and other elements is within the competence and discretion of Parliament in choosing how to implement the constitutional right of access to information.

The problems of the majority may have started with the applicant. In highlighting its understanding of the applicant's case, the majority emphasizes that the applicant distinguishes between an access to information regime of proactive disclosure of party funding and a regime of once-off disclosure upon request.<sup>23</sup> In the majority's view, PAIA does the latter and the applicant has asked for the former – a statute providing for general and continuous disclosure of private funding sources by political parties as part of a comprehensive regulatory regime. The applicant's submission cited by the majority<sup>24</sup> put its argument in the following terms:

“The applicant's founding affidavit sets out the source and substance of the constitutional obligation to enact the lacking legislation. In short, the right of access to information held by political parties, which is required for the effective exercise of the right to vote, cannot be given effect to without the enactment of the lacking legislation. Section 32(2) of the Constitution thus imposes an obligation to enact such legislation.”<sup>25</sup>

This was an overstatement and appears to have started the majority down the wrong track.

The majority opinion in the *MVC case* does not fully explore or identify the source of the duty to enact PAIA in the first three years of the final Constitution. A thought experiment was needed as to how the constitutional validity of PAIA might have been challenged on the basis of Item 23 of Schedule 6. Such an exploration can lead to three important doctrinal conclusions regarding the source of the duty to enact legislation to enforce the right of access to information, the character of the legislative scheme enforcing the right as partial or comprehensive, and the proper format and forum to challenge the existing legislative scheme. The remainder of this section discusses these three points.

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<sup>22</sup> The rigidity of the assumed interpretation may underlie an apparent degree of ambiguity regarding the exclusive jurisdiction of the Court. In para 121, the majority opinion states that it agrees that the Constitutional Court has exclusive jurisdiction over the applicant's claim (but cf para 190). This fuzziness over exclusive jurisdiction is one doctrinal location of dispute between the minority and the majority.

<sup>23</sup> *MVC case* 126 & 128.

<sup>24</sup> *MVC case* 190.

<sup>25</sup> Applicant's written argument: *My Vote Counts NPC v Speaker, National Assembly* 9 (2014) available at <http://www.constitutionalcourt.org.za/Archimages/22429.PDF> (last accessed 17 February 2016).

## 2.1 The Source of the Duty to Enact Legislation Enforcing the Right

At the time of PAIA's passage, the source of the duty for its passage was Item 23(1) of Schedule 6 read with section 32. The source was not section 32(2) on its own. Read with Parliament's obligation to comply with constitutional duties placed on it, this indeed was a duty on Parliament. Parliament satisfied that duty two decades ago by passing PAIA within Item 23's required timeline -- albeit just in time. A procedural test was appropriate for judging compliance with this duty and Parliament's action in enacting PAIA passes that test. The PAIA is the legislation envisaged in Item 23(1) of Schedule 6 read with section 32.<sup>26</sup> The majority rightly contends that it is incorrect -- in its terms "ludicrous" -- to contend that PAIA is not the legislation envisioned in section 32(2) and enacted within three years of the passage of the 1996 Constitution.

## 2.2 The character of the legislative scheme enforcing the right as partial or comprehensive

However, in the majority's implicit interpretation of section 32(2) read with the principle of subsidiarity, there is only one relevant piece of legislation, PAIA, for enforcement of the right of access to information. This interpretation of section 32(2) as requiring comprehensive legislation is incorrect. The PAIA is national legislation envisaged in section 32(2). However, it is not the only legislation envisaged in section 32(2). On a proper interpretation, PAIA is one of what one can regard as a number of openness-enforcing statutes. As PAIA itself recognizes, statutes other than PAIA give effect to and may be measured against the content of the section 32 right of access to information.

A substantial part of the *MVC case* majority's reasoning that PAIA is comprehensive legislation giving effect to section 32 is by analogy with the Promotion of Administrative Justice Act 3 of 2000 (PAJA).<sup>27</sup> There is however a much stronger argument for the exclusivity and comprehensiveness of PAJA than there is for PAIA. Both PAJA and PAIA are statutes that provide enforcement mechanisms for a constitutional right. Still, neither the enforcement mechanisms chosen by Parliament nor the constitutional structures within which those enforcement mechanisms operate are the same.

The PAJA provides -- in section 6 of that Act -- for judicial review as its central enforcement mechanism. The PAJA also lays down some other rules of procedural fairness addressed, it would seem, to a bureaucratic and executive audience as well as to the public at large. The PAIA provides for its central enforcement mechanisms in the shape of a request for records made to an organ of state in most cases. The PAIA also lays down some other rules of disclosure/non-disclosure such as, proactive publication requirements and an interim duty of confidentiality pending the enactment of privacy legislation. The similarity between PAJA and PAIA is in their character as rights enforcing statutes and in the Parliamentary provision of a specific central remedial

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<sup>26</sup> Klaaren (1997).

<sup>27</sup> *MVC case* 136-149.

mechanism to each of those pieces of legislation -- judicial review in PAJA and a regime of disclosure upon request in PAIA. Yet these enforcement mechanisms are clearly different. Judicial review depends upon an existing institution – the courts – and lends itself more towards an interpretation as comprehensive and covering its field than does the enforcement mechanism of a request between parties for access to information.

Beyond the difference in central enforcement mechanisms, there is a further significant difference between PAJA and PAIA -- the constitutional structure alongside which these enforcement mechanisms operate. While PAJA has an associated constitutional structure, PAIA does not. The constitutional mandate that there be one system of law and courts for judicial review<sup>28</sup> arguably leads directly to the jurisprudence requiring PAJA to be used in priority over the principle of legality.<sup>29</sup> By contrast, the Constitution prescribes no integrated institutional system for enforcement of the right of access to information.<sup>30</sup>

### **2.3 What are the proper format and forum for a challenge to existing legislation enforcing the right?**

Since the Court is clear and correct in noting that the procedural step of timely enactment of legislation enforcing the right of access to information was validly taken two decades ago, it is apparently a substantive test of validity that the majority is imagining will take place in the High Court in terms of the case that it says the applicant should have brought. As the majority puts it in its conclusion:

“Although the application falls under this Court’s exclusive jurisdiction, PAIA is the legislation envisaged in section 32(2) of the Constitution. The applicant has not challenged it frontally for being constitutionally invalid. In accordance with the principle of subsidiarity, it ought to have done so as that principle is applicable to this application. The application must fail.”<sup>31</sup>

The majority thus appears to be looking towards a constitutional challenge to PAIA for unduly restricting the exercise of the right in that PAIA has enacted a request mechanism. If so, that is a challenge to the constitutional validity of PAIA that encompasses an interpretation of section 32(2). There are a number of avenues such a challenge could take – the variety and assessment of which lie beyond the scope of this article. For instance, is the request limitation constitutional or not?<sup>32</sup>

<sup>28</sup> *Pharmaceutical Manufacturers Association of South Africa and another: In re Ex parte President of the Republic of South Africa and others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000).

<sup>29</sup> *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* (641/2015) [2016] ZASCA 143; [2016] 4 All SA 842 (SCA) (30 September 2016).

<sup>30</sup> Klaaren J "Structures of government in the 1996 South African Constitution: putting democracy back into human rights" (1997) 13 *SAJHR* 3–27.

<sup>31</sup> *MVC case* 193.

<sup>32</sup> Currie I & Klaaren J *The Promotion of Access to Information Act Commentary* (Cape Town: SiberInk 2002). Such a challenge to the enforcement mechanism chosen by Parliament in PAIA is quite different to a challenge that says the enforcement mechanism chosen should be extended to a category of information held by particular legal persons. This scope challenge falls somewhat in-between the clear realms of a enforcement mechanism and the content of the right. While opinions might differ on this point, Currie and I have termed such a challenge effectively a challenge to the content of the right. Thus, Parliament would receive no special deference in such a case.



The majority's requirement for the applicants to go to court and start in the High Court and its interpretation of the give effect to clause in section 32 both do little to promote institutional dialogue nor to invite Parliament into a discussion with the judiciary over the policy area of information disclosure. The development of South Africa's regime regarding political party funding would not be well served by an approach to the High Court with some sort of mini-certification claim against the substantive validity of PAIA as suggested by the majority. More helpful would be reasoning regarding section 19 read with section 32. With the content of the right outlined and with the understanding of PAIA as the central but non-exclusive legislation in the legislative scheme giving effect to the right of access to information, Parliament and other institutions of South Africa's constitutional democracy could work on further giving effect to that right. Indeed, during the writing and publishing of this article, Parliament has begun consideration of legislation reforming party funding.

### 3 THE (OPEN AND DEMOCRATIC) WAY FORWARD

In the Part above, I have claimed that the *MVC case* majority was incorrect in too quickly adopting an interpretation of section 32(2) as mandating the passage and maintenance of a field-covering and exclusive piece of national legislation in order to give effect to the right. In this, the majority possibly understandably reasoned from PAJA jurisprudence. While such a choice may be appropriate with respect to the mandated exclusive judicial review mechanism of PAJA in part for reasons of constitutional structure, such a choice would not be appropriate in the field of access to information where Parliament has made a different choice. It does not make good institutional and pragmatic sense that disclosure of information occurs only through a request for information made in terms of PAIA; and the Constitution mandates no structure – such as the courts – to underpin such a rule.

The constitutional regime around enforcing the right of access to information is actually more nuanced and flexible than the majority gives it credit in this case. Given its importance as a precondition for democracy, it is worth elaborating these flexibilities, which this Part attempts to do. The same is true for the principle of subsidiarity, although even an outline of its nuances and flexibilities must wait for a revision and may be beyond the scope of this article, which focusses on the political context for giving effect to the right to information as a precondition for democracy.<sup>33</sup> There are at least two other avenues that could satisfy section 32(2) without placing the contended for duty on Parliament, even assuming that the right to vote does require that voters have access to information about private funding of political parties. One avenue is that of horizontal application. The other avenue is that of enforcement of the right through provincial legislation.

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<sup>33</sup> Klare K "Legal subsidiarity and constitutional rights: a reply to AJ van der Walt" 1 *Cons. Court Rev* 129–154 (2008); Michelman F "Expropriation, eviction, and the dignity of the common law" (2012), available at <http://papers.ssrn.com/abstract=2116643> (last accessed 17 February 2016); Van der Walt, AJ "Normative pluralism and anarchy: reflections on the 2007 Term" 1 *Const Court Rev* 77–128 (2008).

Let us explore the first avenue of horizontal application. To do so takes us back to the days of certification when it was a commonplace to note that section 32 was a chief textual location confirming the horizontal application of rights in the Bill of Rights. To do so also conforms with a sense of the moral force of the argument in favour of disclosure – in order to make a political choice some information about one legal person – a political party -- needs to be disclosed to another legal person -- an individual voter. Understanding the obligation as horizontal might allow for development of some legal doctrines facilitating disclosure of sources of political party funding. For instance, assume that a political party voluntarily discloses its sources of funding, even where such funding has been made the subject of a confidentiality agreement. The horizontal obligation in terms of section 32 (2) might be raised as a defence against a contractual or delictual action for breach of confidence.

Of course, this horizontal application avenue could also lead by a direct route to a scenario quite close to that envisioned by the majority as the next step. A PAIA application to a political party refused by that political party on the grounds that there was no right to be exercised between the applicant and that political party (a provision of PAIA distinct from the substantive grounds for refusals, such as privacy, commercial confidentiality, etc.) can be taken on review to the High Court on the grounds that section 19 read with section 32 properly interpreted does contain such a right. This scenario would present a frontal challenge not to PAIA but to the category of denials made by political parties to PAIA requests and thus to the parties' interpretation of PAIA. One can imagine how this might even be the subject of a class action.

Let us next explore a second avenue of enforcement of a constitutional obligation to disclose private funding of political parties: enforcement through provincial legislation. South Africa already has legislation in various provinces that comes very close to, if not falling squarely within, this avenue. As of 2014, it appeared that six provinces had followed the lead of the Gauteng Provincial Legislature, which first passed legislation authorizing allocation of provincial funds to political parties in its Gauteng Political Party Fund Act 3 of 2007.<sup>34</sup> The Western Cape has not passed such legislation while the Eastern Cape did so but has since repealed its law. These seven provincial laws currently funnel some R250m to political parties, about twice as much as is allocated under the national legislation. Doubts have been voiced regarding the constitutionality of these laws, but none has yet been challenged in court. So why not condition the provincial funding of political parties on the disclosure of private sources of party funding? There would seem to be no constitutional impediment to a provincial legislature requiring such disclosure. Indeed, should such a condition be constitutionally challenged as beyond its competence, section 32(2) would provide a substantive defence. In a constitutional democracy, a provincial legislature can and should pass legislation to facilitate the enforcement of constitutional rights and section

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<sup>34</sup> Solik G "Resources: State and Private -- Use or Abuse? Unregulated Private Funding of Political Parties: Linking Money, Power, and Corruption, Electoral Institute for Sustainable Democracy in Africa: South African Election Updates: Issue Five" (2014), available at <https://www.eisa.org.za/eu/2014eu5editorial.htm> (last accessed 22 February 2016).

32(2) is an explicit invitation to do so, while leaving a variety of institutional choices to that legislature.

#### 4 CONCLUSION

In a well-written and perceptive article that came to light after this article was accepted for publication, Raisa Cachalia has argued that the *MVC case* was an instance where the Constitutional Court as her title argues, “botched procedure and avoided substance”. In her view, the Court should have reached the question of whether the Constitution gives South African citizens a right to know who funds our political parties.<sup>35</sup> She persuasively argues that properly interpreted the subsidiarity principle did not apply to this case and that the Court should have reached the substantive issues. Her article further addresses specifically the issue of section 167 and the separation of powers, which this article has largely left aside.

The *MVC case* may be counted as a democratic opportunity missed. The majority was incorrect to reason as it did with respect to the validity of PAIA and its relationship to section 32(2). What is required are more creative arguments and thinking about how we deepen the character of the political conversation in our constitutional democracy, paying attention to institutional as well as adjudicative aspects. We should retrieve the opportunity for a more limited but nonetheless significant dialogue involving the judiciary and legislature about the place of political parties in the South African democracy.

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<sup>35</sup> Cachalia R, "Botching procedure, avoiding substance: a critique of the majority judgment in *My Vote Counts*" (2017) 33(1) *SAJHR* 138-153.