

THE COURTS, NATIONAL SECURITY AND THE FREE FLOW OF INFORMATION

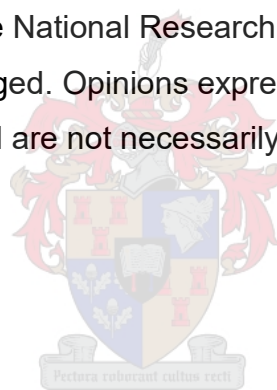
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2020 March

DECLARATION

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ABSTRACT

National Security and the free flow of information are both vital to the preservation of South Africa's open democracy. However, the two are often in tension, as the protection of National Security requires secrecy. This places it at odds with the rights to access, receive and impart information. In adjudicating this tension, the courts are hampered by the lack of a clear definition of National Security. The imprecision of this term could result in state abuse, or in leaving important security interests unprotected. Against this background, the thesis examines the constitutional rights to access, receive and impart information in view of the values that underlie them. It also explores the meaning of National Security with reference to legislation, case law, academic literature, and international and comparative law. On the basis of this study, it proposes a definition of National Security, which identifies the security interests that are to be preserved and the kinds of threats against which they must be safeguarded. Next, the thesis examines the tension between openness and secrecy within the judicial process in cases involving conflicts between the free flow of information and National Security. To that end, it considers the requirements of the constitutional principle of Open Justice with reference to case law. It examines legislative provisions which limit Open Justice in cases in which the disclosure of sensitive information in open court could compromise South Africa's National Security, analyses the constitutionality of those measures, and proposes legislative amendments which would remedy the constitutional defects. Finally, the thesis examines the capacity of the judiciary to adjudicate, in a principled manner, conflicts between the free flow of information and National Security, in view of debates about courts' institutional capacity and the perceived need for judicial deference in areas in which the executive, and not the judiciary, has special expertise. It also asks whether the procedures used to adjudicate conflicts between the free flow of information and National Security enable courts to decide these cases in a principled manner, and to avoid overstepping the bounds of the judicial function.

OPSOMMING

Nasionale veiligheid en die vrye vloei van inligting is beide noodsaaklik vir die behoud van 'n oop en demokratiese samelewing in Suid-Afrika. Die twee is egter gereeld in spanning, omdat die beskerming van nasionale veiligheid geheimhouding vereis. Dit plaas dit in stryd met die regte op toegang tot, en die ontvangs en oordra van inligting. Wanneer hoewe hierdie spanning bereg, word hul deur die gebrek aan 'n duidelike definisie van nasionale veiligheid belemmer. Die onduidelikheid van hierdie begrip kan tot misbruik deur die staat, of 'n versuim om belangrike veiligheidsbelange te beskerm, lei. Teen hierdie agtergrond ondersoek die proefskrif die grondwetlike regte op toegang, ontvangs en oordrag van inligting in die lig van die waardes wat hierdie regte onderlê. Dit ondersoek ook die betekenis van Nasionale Veiligheid met verwysing na wetgewing, regspraak, akademiese literatuur en internasionale en vergelykende reg. Op grond van hierdie studie stel dit 'n definisie van Nasionale Veiligheid voor, wat die veiligheidsbelange wat bewaar moet word, identifiseer, asook die soort bedreigings waarteen dit beskerm moet word. Vervolgens ondersoek die proefskrif die spanning tussen openheid en geheimhouding binne die regsproses in gevalle waar die vrye vloei van inligting met Nasionale Veiligheid bots. Met die oog daarop oorweeg dit die vereistes van die grondwetlike beginsel van Oop Geregtigheid (*Open Justice*) met verwysing na regspraak. Dit ondersoek wetgewende bepalings wat Oop Geregtigheid beperk in gevalle waarin die openbaarmaking van sensitiewe inligting in die ope hof Suid-Afrika se nasionale veiligheid in die gedrang kan bring. Dit ontleed ook die grondwetlikheid van daardie maatreëls en stel wetswysigings voor wat die grondwetlike gebreke sal regstel. Laastens ondersoek die proefskrif die vermoë van die regbank om botsings tussen die vrye vloei van inligting en Nasionale Veiligheid op 'n beginselvaste wyse te beoordeel, in die lig van debatte oor die institusionele vermoë van die hoewe en die waargenome behoefte aan geregtelike agting (*deference*) in gebiede waarin die uitvoerende gesag, en nie die regbank nie, spesiale kundigheid het. Daar word ook gevra of die prosedures wat gebruik word om botsings tussen die vrye vloei van inligting en Nasionale Veiligheid te bereg, die hoewe in staat stel om hierdie sake op 'n beginselvaste wyse te beslis en om te verhoed dat hulle die grense van die regterlike funksie oorskry.

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‘So when are you going to start your doctorate?’

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LIST OF ABBREVIATIONS

Agency	State Security Agency
CID	Crime Intelligence Division of the South African Police Service
CPA	Criminal Procedure Act 51 of 1977
ECHR	European Convention on Human Rights
FXI	Freedom of Expression Institute
ICCPR	International Covenant on Civil and Political Rights
JHBP	Johannesburg Principles
NA	National Assembly
NCOP	National Council of Provinces
NIA	National Intelligence Agency
NSIA	National Strategic Intelligence Act 39 of 1994
PAIA	Promotion of Access to Information Act 2 of 2000
PIA	Protection of Information Act 84 of 1982
PSI	Protection of State Information Bill B6H-2010
SANDF	South African National Defence Force
SAPS	South African Police Service
SP	Siracusa Principles
USA	United States of America
UN Charter	United Nations Charter

UK United Kingdom

UN United Nations

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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND TO THE STUDY

The advent of democracy in the Republic of South Africa has brought about a major shift in the relationship between information rights and the protection of state interests. The Constitution of the Republic of South Africa, 1996 (hereafter ‘the Constitution’) guarantees the rights to access, receive and impart information, and thus promotes the constitutional values of democratic openness, accountability and responsiveness.¹ Section 16(1) of the Constitution provides that everyone has the right to free expression, including the right to receive and impart information. Section 32 guarantees the right to access information. A general right to information was not available to persons prior to democracy.² Section 32 was fleshed out and was given effect to by the Promotion of Access to Information Act 2 of 2000 (PAIA), which sets out the scope, content and limitations of the right of access to information.³ Sections 16 and 32 of the Constitution, together with PAIA, thus aim to preserve the free flow of information.

Despite the contribution that the constitutional rights to access, receive and impart information make to open government and democracy, the unrestrained free flow of information can place the state in harm’s way.⁴ For example, publicising the location of the Republic’s defence capabilities, its critical infrastructure, or the storage site of its key economic information could allow a threat to compromise an important state interest. In fact, guaranteeing the uninhibited free flow of information could place the

¹ Constitution of the Republic of South Africa, 1996 S1(d), S16 & S32; *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 4 SA 744 (CC) [82].

² Y Burns *Communications law* 2ed (2009) 117.

³ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [83].

⁴ AL Schuller “Inimical Inceptions of Imminence - A New Approach to Anticipatory Self-Defense under the Law of Armed Conflict” (2013-2014) 18 *UCLA J. Int’l L. Foreign Aff.* 161: 177 & 178.

state in grave danger. In recognising the need to protect this state interest, the Constitution requires that:

National Security must be pursued in compliance with the law [...].⁵

To this end, sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA and sections 3 and 4 of the Protection of Information Act 84 of 1982 (PIA) authorise the state to limit the rights to access, receive and impart information, purportedly to preserve South Africa's National Security.⁶ The underlying purpose of this limitation is to reinforce and protect South Africa's constitutional democracy.⁷ If the state elects to limit the free flow of information for reasons of National Security in terms of the provisions of these acts, this decision may give rise to a legal dispute. In such instances, the South African judiciary is responsible for resolving disputes between the free flow of information and National Security. It is obligated to resolve these disputes in a manner which promotes Open Justice.⁸

There are several aspects which could affect the judiciary's ability to resolve a dispute between the free flow of information and the state's duty to preserve South Africa's National Security in terms of sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA and sections 3 and 4 of PIA.

The first difficulty is the legislature's failure to expressly define the meaning of National Security in terms of sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA and sections 3 and 4 and PIA. While the state could potentially rely on these provisions to limit the free flow of information, the imprecision of the meaning of National Security could impair the judiciary's ability to resolve these types of disputes. These provisions in

⁵ Constitution S198.

⁶ Please note that while the applicable legislation uses different terminology, the interests that they aim to protect are the same as those associated with National Security, as will be argued in clauses 2.4.2.1 and 2.4.3 below.

⁷ S Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in S Coliver, P Hoffman, J Fitzpatrick & S Bowen (eds) *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999) 11: 12.

⁸ Promotion of Access to Information Act 2 of 2000 S41(1)(a)(i) & S41(1)(a)(ii); Protection of Information 84 of 1982 Act S3 & S4.

their current form do not provide the judiciary with any firm guidance on (i) what the content of the interests are that should be protected, (ii) if it is appropriate to preserve these interests from being compromised, (iii) if it would be appropriate to preserve other security interests, and (iv) what threats these interests should be protected against. A corollary danger is that the lack of a clear definition could allow the state to conceal or engage in malfeasance. For the judiciary to be able to resolve disputes of this nature, it is necessary for the meaning of National Security to be defined.⁹

The second difficulty in disputes of this nature, is that the courts may expose the state to severe risk if they resolve these matters in a manner which promotes Open Justice.¹⁰ The judiciary must resolve these disputes in a manner which is open and transparent.¹¹ In other words, litigants have to prove their case in a public forum. At its elementary level a party exercising his information rights will have to prove he has the right to access and disseminate state-held information,¹² while the state will have to prove that it is entitled to restrict access to information for reasons of National Security in terms of PAIA or PIA.¹³ The judiciary as the independent adjudicator will have to decide if the state record should be concealed for purposes of National Security, or ventilated in an open forum.¹⁴ It is important to note that the state in its attempt to keep its information secret may have difficulty in discharging its onus. This is because the state would not rely on the content of the requested record in order to make out its case. To do so would result in the ventilation of state secrets in open court, which could compromise National Security.

Open Justice may also result in a third drawback for the judiciary when it resolves disputes of this nature. If the executive is expected to argue its case in open court and use the contested record to do so, what then is the purpose of placing a legislative

⁹ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 12.

¹⁰ PAIA S41(1)(a)(i) & S41(1)(a)(ii); PIA S3 & S4.

¹¹ S80(1), S80(3) & S82; PIA S13; Constitution S16(1)(a), S16(1)(b), S34, S35(3)(c) & S165(2).

¹² Constitution S16(1) & S32; PAIA S11.

¹³ PAIA S41(1)(a)(i) & S41(1)(a)(ii); PIA S3 & S4.

¹⁴ S80; PIA S13.

restriction on the free flow of information? It would seem that adherence to the principle of Open Justice could compromise National Security. To guard against this, sections 80(1), 80(3)(b) and 80(3)(c) of PAIA, and section 13 of PIA permit the judiciary to employ secret proceedings to resolve the dispute. In the event that the tension concerns the right to access state-information, section 80 of PAIA sets out the specific procedure that the courts must follow to resolve the dispute. This section specifically enables the judiciary to employ secrecy to resolve the dispute. Like PAIA, section 13 of PIA also provides for secret court proceedings to resolve the dispute. It is important to note that there are slight differences in these procedures.¹⁵ Notwithstanding the differences, both PAIA and PIA's secret procedures are seemingly aimed at assisting the judiciary in determining if the contested record should be protected for purposes of National Security, or released.¹⁶ There is nevertheless a danger that the procedures could possibly impair Open Justice more than necessary. While the purpose of information legislation should be to assist the judiciary in resolving the tension, the legislation may end up impeding the judiciary's ability to determine if a record should be concealed or ventilated. In view of this, sections 80(1), 80(3)(b) and 80(3)(c) of PAIA, and section 13 of PIA must be evaluated to determine whether they provide courts with an appropriate methodology to resolve the said disputes.

Lastly, the judiciary may lack the necessary operational security capacity to enable it to resolve the tension between information and security. While the judiciary's duty is to resolve disputes, the doctrine of the separation of powers recognises that the executive also plays a unique operational role in the National Security context.¹⁷ In fact, it is recognised internationally that the protection of National Security is an executive function.¹⁸ This role gives the executive unique insight into whether a state-held record should be prevented from being publicised for reasons of National Security.¹⁹ In recognition of the executive's role in security matters, the legislature has

¹⁵ PIA S13.

¹⁶ PAIA S80(1), S80(3) & S82; PIA S13.

¹⁷ Constitution S100(1)(b)(iii) & S198(d); S Seedorf & S Sibanda "Separation of Powers" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional law of South Africa* 2ed (2011) 12-1: 12-11.

¹⁸ Anonymous "Keeping secrets: Congress, the courts, and national security information" (1990) 103 *Harvard Law Review* 906: 909.

¹⁹ M Arden "Balancing human rights and National Security" (2007) 124 *SALJ* 57: 60.

authorised it to deny a request to access a state-held record in terms of sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA.²⁰ Additionally, sections 3 and 4 of PIA also enable the state to place an embargo on the free expression of state-held information for reasons of National Security.²¹ The executive jealously guards this duty. In fact, it has criticised the judiciary for becoming involved in matters which concern state security. In this view, the judiciary should refrain from participating in matters where it lacks the necessary capacity. The executive therefore submits that courts are ill suited to resolve the tension between the free flow of information and National Security.²² The inference to be drawn from this is that matters of National Security should rather be left to the expertise of the state.²³

However, it is clear that it is the function of the South African judiciary in terms of PAIA and PIA to resolve disputes between the free flow of information and National Security in a manner which promotes Open Justice and therein lies the problem. How can the judiciary resolve disputes between the free flow of information and National Security in terms of PAIA and PIA where (i) the meaning of National Security is vague, (ii) Open Justice proceedings may impair state security, (iii) secret proceedings may compromise open and transparent proceedings, (iv) the lack of judicial competence may impact the effective resolution of the dispute, and (iv) PAIA and PIA's procedures may prevent the resolution of the dispute instead of facilitating it.

1.2 RESEARCH OBJECTIVES

In light of the preceding shortcomings it is necessary to:

- i. Determine what National Security should mean in the context of sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA and sections 3 and 4 of PIA. The outcome of this examination will contribute to the judiciary's ability to determine if a

²⁰ PAIA S41(1)(a)(i) & S41(1)(a)(ii).

²¹ PIA S3 & S4.

²² WH Freivogel "Publishing National Security Secrets: The case for "Benign Indeterminacy"" (2009) 3 *J. Nat'l Sec. L. & Pol'y* 95: 98; Anonymous (1990) *Harvard Law Review* 909; M Kirby "Judicial review in a time of terrorism - business as usual" (2006) 22 *SAJHR* 21: 29; M Du Plessis "Removals, terrorism and human rights - reflections on Rashid" (2009) 25 *SAJHR* 353: 358.

²³ Freivogel (2009) *J. Nat'l Sec. L. & Pol'y* 98.

record should be concealed for reasons of security, disclosed or publicised. Additionally, it may also prevent the state from engaging in malfeasance.

- ii. Determine which of PAIA or PIA's procedures should be relied upon to enable the judiciary to resolve disputes between information and security in a manner which promotes Open Justice without placing National Security in any further danger. The outcome of this analysis will bring a measure of certainty on how openness and secrecy should be balanced in the judicial arena.
- iii. Determine if the judiciary possesses the capacity to resolve disputes between the free flow of information and National Security, and to the extent that it does, if PAIA and PIA's procedures impair the courts' ability to resolve disputes between security and information. This analysis will identify what the role of the judiciary is, and determine if the preceding statutes enable the judiciary to make a determination on the nature of the protected record.

1.3 OVERVIEW OF THE CHAPTERS

This thesis consists of 4 substantive chapters, in addition to the introduction and conclusion. Chapter 2 aims to identify the challenges the judiciary faces when resolving disputes between the free flow of information and National Security. To this end this chapter will commence by briefly analysing the role of South Africa's judiciary. It will also analyse the shift in the relationship between information rights and the protection of security interests. Thereafter it will analyse the tension between the free flow of information and National Security.

Chapter 3 commences by considering what National Security should mean in terms of sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA and sections 3 and 4 of PIA. The thrust of this analysis is aimed at identifying the content of the security interests which PAIA aims to protect, namely the 'security and defence of the Republic'.²⁴ It then continues to determine what the 'security of the Republic' should mean in terms of PIA.²⁵ Following this examination, the chapter analyses other South African and relevant international conceptions of National Security. The purpose is to determine if PAIA and PIA should preserve additional security interests so as to avoid having an under-

²⁴ PAIA S41(1)(a)(i) & S41(1)(a)(ii).

²⁵ PIA S3 & S4.

inclusive definition. To this end, the chapter aims to identify the content of the other conceptions of National Security. It then juxtaposes PAIA and PIA's notions of security against these other conceptions of National Security to identify the interests which the acts should protect. To determine how these interests should be protected by the acts, this thesis then considers if sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA and sections 3 and 4 of PIA lend themselves to an interpretation which would allow the judiciary and the state to preserve the seemingly unprotected security interests.

To enable the judiciary to effectively resolve the tension between the free flow of information and National Security, a definition of National Security should not only protect clearly identified and appropriate security interests, but it should also guard against specific threats. Following an assessment of what security interests should be protected, chapter 3 also aims to identify the threats the acts should guard against. The overarching purpose of this chapter is to use the applicable security interests, together with the threats which must be guarded against to determine what National Security should mean in terms of PAIA and PIA.

The objective of chapter 4 is to identify the appropriate procedural mechanism which would enable the judiciary to resolve disputes in a manner which promotes Open Justice without any further risk being posed to National Security. This chapter commences by examining the content of Open Justice and assessing its impact on judicial proceedings. It then shifts its focus to how sections 80(1), 80(3)(b) and 80(3)(c) of PAIA and section 13 of PIA insert secrecy into judicial proceedings. Following this assessment, the chapter will critically analyse and evaluate both of these procedures to determine where the balance between openness and secrecy should lie.

The final chapter of this thesis aims to determine if the judiciary has the capacity to resolve disputes between the free flow of information and National Security in terms of PAIA and PIA. This chapter also aims to determine if PAIA's procedure actually enables the judiciary to determine if a state record should be publicised, or protected for reasons of National Security.

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CHAPTER 2

THE JUDICIARY, FREE FLOW OF INFORMATION AND NATIONAL SECURITY IN
THE REPUBLIC OF SOUTH AFRICA

2.1 INTRODUCTION

During the Apartheid era, the state employed National Security as a defence to justify the limitation of information rights under the pretext of protecting an important state interest. However, the real intention of the Apartheid government was to protect white-minority interests and to conceal malfeasance by placing an embargo on information rights.²⁶ When National Security and information rights conflicted in the judicial arena, the courts saw it as their function to endorse the security position of the state, rather than resolve the tension between information and security in an impartial manner.²⁷

The advent of democracy resulted in a shift away from state secrecy to state transparency.²⁸ The Constitution altered the information rights regime by specifically granting all persons the rights to access and express information.²⁹ These rights allow commentators to have access to, and publicise information relating to the activities of the democratic state.

Despite the Apartheid government's misuse of National Security, this concept remains an important consideration in the constitutional era.³⁰ However, the Constitution does not expressly identify what National Security means.³¹ Disappointingly, laws aimed at limiting the free flow of information for security reasons do not expressly define the concept either. Sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA

²⁶ I Currie & J De Waal *The Bill of Rights handbook* 6ed (2013) 693; PC McDonald *The literature police: Apartheid censorship and its cultural consequences* (2009) 22.

²⁷ AS Mathews *Freedom and state security in the South African plural society* (1971) 19; *Real Printing and Publishing CO (Pty) Ltd v Minister of Justice* 1965 2 SA 782 (C) 787.

²⁸ Constitution S198.

²⁹ S7(1), S16 & S32.

³⁰ S198.

³¹ S44(2)(a), S100(1)(b)(iii), S146(2)(c)(i) & S198(a)-(d).

and sections 3 and 4 of PIA authorise the state to limit the rights to access, receive and impart information, purportedly for reasons of National Security. However, these acts do not set out with any certainty what this concept means and therein lies the danger. Coliver points out that the failure to define the meaning of National Security is the primary cause for state abuse when this concept is relied upon.³²

A problem arises when PAIA and PIA's indistinct conceptions of National Security limit the rights to access, receive and impart information.³³ While the courts are obligated to resolve disputes impartially and independently,³⁴ their ability to resolve the tension between the free flow of information and National Security is potentially hindered by the imprecise meaning of National Security in terms of PAIA and PIA.

In light of this shortcoming, this chapter will demonstrate that South Africa's judiciary can only resolve the tension between the free flow of information and National Security in a manner which promotes the values underlying an open and democratic society, if National Security has a specific meaning in terms of PAIA and PIA. To this end, this chapter will argue that the judiciary's difficulties in mediating the tension between the free flow of information and National Security is not attributable to any vagueness on account of the content of the rights to access, receive and impart state-held information. Rather it will show that the vagueness of PAIA and PIA's security interests, their potential failure to protect appropriate security interests, and their failure to identify the threats that can compromise National Security are the reasons why courts would have difficulty in resolving disputes between the free flow of information and National Security.

2.2 THE SHIFT FROM SECRECY TO AN OPEN AND DEMOCRATIC SOCIETY

Prior to democracy, the Apartheid government unjustifiably relied on National Security to limit the free flow of sensitive information. Ever since the mass dissemination of information was made possible by the printing press, governments

³² Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 12.

³³ Constitution S16(1) & S32; PAIA S11, S41(1)(a)(i) & S41(1)(a)(ii) & S82; PIA S3, S4 & S13.

³⁴ S165(2).

and other institutions of power have viewed the free flow of information as a threat to their power base and have employed a variety of measures to limit its reach.³⁵ They have relied *inter alia* on National Security in an attempt to justify restrictions on the free flow of information in the public domain.³⁶ Given the racist and authoritarian nature of the Apartheid government, its reliance on National Security as a mechanism to control the free flow of information took on a particularly sinister cast. The government invoked National Security to restrict the free flow of information under the guise of protecting some important state interests, when in reality its aim was to conceal the corrupt, racially biased and oppressive nature of the regime.³⁷ Apartheid laws favoured the white population socially, economically and politically to the detriment of the black population.³⁸ The free flow of information represented a real threat to the administration since it aimed to expose its true nature not only locally, but also internationally. The different liberation movements' advocacy of social, economic and political change posed a direct threat to the Apartheid government. The dissemination of information regarding the Apartheid government's actions, measures, plans and mechanics cast daylight onto the factual nature of the regime's inner workings,³⁹ publicising its true oppressive nature. To guard against the oppressiveness of its regime from being exposed, the Apartheid government was obsessed with cloaking the exact nature of its administration in secrecy.⁴⁰ The government feared that the publication and broad dissemination of information revealing the true nature of its regime would excite and foster dissatisfaction among the majority of the people, entrench liberal solidarity, and ultimately galvanise the majority of South Africans

³⁵ M Hildebrandt "Properties, property and appropriate of information" in M Hildebrandt & B van den Berg (eds) *Information, Freedom and Property: The Philosophy of Law Meets the Philosophy of Technology* (2016) 34: 49.

³⁶ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 11.

³⁷ Mathews *Freedom and state security in the South African plural society* 19; *Real Printing and Publishing CO (Pty) Ltd v Minister of Justice* 787.

³⁸ RB Beck *The history of South Africa* (2000) 126.

³⁹ McDonald *The literature police* 24.

⁴⁰ I Currie & J Klaaren *The Promotion of Access to Information Act Commentary* (2002) 2.

against it.⁴¹ To prevent this,⁴² the regime introduced specific methods to regulate the free flow of information,⁴³ under the auspices of protecting South Africa's National Security.⁴⁴ Yet, its true objective was to silence free thinking actors from expressing their dissatisfaction with the regime and propagating for change.⁴⁵

The Apartheid apparatus prevented state-held information that was considered sensitive from being accessed, received and disseminated. The law did not recognise a general right to access state-held information.⁴⁶ Additionally, the Apartheid government attempted to increase the scope of its information blackout through censorship.⁴⁷ Its purpose was to silence political dissent and prevent potential listeners from receiving information or ideas and disseminating it further.⁴⁸ It also aimed to prevent authors from receiving feedback from their listeners.⁴⁹ Closely linked to that, the government imposed state sanctioned silence on government activities, which if publicised, would ultimately fuel the opposition's criticism against it.⁵⁰ A variety of

⁴¹ M De Lange *The muzzled muse: Literature and censorship in South Africa* (1997) 14-16.

⁴² Mathews *Freedom and state security in the South African plural society* 19 & 20.

⁴³ M Breytenbach *The manipulation of public opinion by state censorship of the media in South Africa* DPhil thesis University of Stellenbosch (1997) 17. See also CE Merrett *A culture of censorship: Secrecy and intellectual repression in South Africa* (1994) 3 & 4.

⁴⁴ Mathews *Freedom and state security in the South African plural society* 20.

⁴⁵ Merrett *A culture of censorship: Secrecy and intellectual repression in South Africa* 197 & 198.

⁴⁶ Currie & De Waal *The Bill of Rights handbook* 693.

⁴⁷ McDonald *The literature police* 22. Information blackout is used in the context to which the state could and can contain information.

⁴⁸ De Lange *The muzzled muse* 13.

⁴⁹ *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC) [25].

⁵⁰ Breytenbach *The manipulation of public opinion* 397; Burns *Communications law* 117; Common Wealth Human Rights Initiative *Our rights, our information: Empowering people to demand rights through knowledge* (2007) 16; Merrett *A culture of censorship: Secrecy and intellectual repression in South Africa* 2; J Grogan "News control by decree - An examination of the South African government's power to control information by administrative action" (1986) 103 *SALJ* 118: 118 & 119; Currie & De Waal *The Bill of Rights handbook* 684; *Van Niekerk v Pretoria City Council* 1997 3 SA 839 (T) 841; *Joyi v Minister of Bantu Administration and Development* 1961 1 SA 210 (C) 216 & 217; C Plasket "Official information and security legislation in South Africa and Ciskei" (1986) 103 *SALJ* 343: 344. The Apartheid government used four other methods to prevent access to information. Firstly, Burns points out that the state refused to create a general right to access state information. The Common Wealth

ensorship methods were used during the Apartheid epoch to lock away information.⁵¹ Marcus partitions the different types of censorship into three main categories - self-censorship, extra-legal censorship and legal censorship. The first category of state censorship was directed at individuals and institutions that considered disseminating undesirable information. Various internal and external factors were used to pressurise individuals and institutions into voluntarily censoring themselves. Extra-legal censorship used a variety of acts and practices that resulted in censorship, but were

Human Rights Initiative posits that a right to information would have compelled the Apartheid government to be open and accountable with regard to its decisions and activities. Merrett opines that it would have acted as a direct counterweight to the regime's obsession with state secrecy. Secondly, Grogan shows that legislation conferred wide discretionary powers on the government which provided it with the authority to strategically and arbitrarily restrict access to any information. Currie and De Waal argue that the effect of permitting the state to determine which, when and if information could be accessed, reduced government openness and accountability, and consequently strengthened Apartheid. Thirdly, the courts were highly deferential to the state's information decisions. The courts played a contributory role in promoting state security and reducing state accountability. In the judicial arena, government relied on state privilege, common law privilege and statutory claims as a defence to justify its decisions to deny access to state information. Plasket shows that the state reserved for itself the discretionary authority to classify information or activities as secret. The position of the state was supported by the courts during the litigation process. In *Joyi v Minister of Bantu Administration and Development* 1961 1 SA 210 (C) the court held that administrative decisions taken by the state were binding on the courts and that it was the prerogative of government to decide which information should be accessed or classified. In this matter the court held that the discretionary decision of the Minister to institute an administrative action was final and binding even on the court. Additionally, with regard to access to information, the Minister would have the sole discretion in determining which information should enter the public domain. Finally, Grogan shows that the state avoided placing itself under any legal obligation to provide reasons for its decisions to restrict access to information.

⁵¹ Merrett *A culture of censorship: Secrecy and intellectual repression in South Africa* 203. The Apartheid government used a variety of methods to censor both the individual as well as institutions which opposed it. Bans, banishment, restrictions, detention, torture, murder, deportation and political trials were the tools used against dissidents. Other methods used were arson, bombing, burglaries and also trials. Institutions were also declared to be unlawful or restricted.

unsanctioned in terms of the law of the land. Lastly, legal censorship was implemented, enforced and controlled by the police and the judiciary.⁵²

South African courts played an instrumental role in countenancing state abuse under the pretext of protecting the Republic's National Security when information and security were found to be in tension.⁵³ Instead of fulfilling the role of an independent arbitrator, the judiciary tended to defer to the state without considering if National Security would in fact be compromised if information was accessed or expressed. The courts did not even see National Security matters as falling into its sphere of competence. In sketching the role of South African courts in matters of National Security, Diemont J in *Real Printing and Publishing Co (Pty) Ltd v Minister of Justice* held that:

“Those who are responsible for the national security must be the sole judges of what the national security requires.”⁵⁴

To put it differently, the courts' sole function in matters of National Security was to rubber-stamp the assertions of the state. This allowed the state to cloak security justifications in the dressings of judicial legitimacy.⁵⁵ The answers as to what and who represented a threat to South Africa's National Security, and if National Security was actually threatened, was left within the purview of the state.⁵⁶

The adoption of a democratic Constitution marked an attempt to break away from Apartheid's obsession with secrecy. The Constitution created a political environment

⁵² G Marcus “The wider reaches of censorship” (1985) 1 *SAJHR* 69: 70. External and internal factors such as ambition, fear, self-preservation, self-interest, and social pressure inhibited individuals and institutions from disseminating information or ideas, thus resulting in self-censorship.

⁵³ A Prior “The South African police and the counter-revolution of 1985-1987” (1989) *Acta Juridica* 189: 190.

⁵⁴ *Real Printing and Publishing CO (Pty) Ltd v Minister of Justice* 787. The Apartheid apparatus understood and accepted that its regime could only be preserved if legal, judicial, military and police coercion was used to keep the disgruntled masses in check.

⁵⁵ RM Chesney “National Security Fact Deference” (2009) 95 *Virginia Law Review* 1361: 1378.

⁵⁶ J Dugard “A triumph for executive power - An examination of the Rabie Report and the Internal Security Act 74 of 1982” (1982) 99 *SALJ* 589: 590, 591 & 603.

in which government must be open, responsive and accountable.⁵⁷ For the first time in South Africa's history, the rights to access and express information were guaranteed in the Bill of Rights to create and foster a constitutional democracy.⁵⁸

Despite these important democratic changes, the Constitution still deemed it necessary to protect South Africa's National Security. On closer analysis of the constitutional text it is strange that this concept is not defined in light of the many abuses that have occurred in its name.⁵⁹ Nevertheless, as a matter of logic and in light of South Africa's new democratic dispensation, National Security cannot carry the same meaning it did under Apartheid, or be used to achieve the same purpose.⁶⁰

An additional change is that the Constitution requires South African courts to be:

"[...] independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice".⁶¹

In the context of disputes concerning National Security, the judiciary is no longer expected to be deferential in favour of the executive. If the free flow of information and National Security are in conflict, it is the duty of the courts to resolve the conflict in a manner which promotes freedom, equality and human dignity,⁶² and to do so in an independent and impartial fashion.⁶³ Notwithstanding that the Constitution has fundamental implications for the role of the judiciary, the nature of information rights and National Security, it is not immediately clear exactly how the judiciary should resolve the tension between information and security in cases in which they are in conflict with each other.

⁵⁷ Constitution S1(d).

⁵⁸ *S v Mamabolo* 2001 1 SACR 686 (CC) [37].

⁵⁹ Constitution S198.

⁶⁰ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 12.

⁶¹ Constitution S165(2).

⁶² S36.

⁶³ S165(2).

2.3 THE JUDICIARY AND FREE FLOW OF INFORMATION IN SOUTH AFRICA

2.3.1 THE RIGHT TO FREE EXPRESSION

The first port of call for South Africa's judiciary when mediating the tension between free flow of information and National Security is to determine the content of the information right. Following this examination the judiciary must determine if the right authorises actors to express state-held information. It is important to note that South Africa's Constitution does not specifically refer to a right to the free flow of information.⁶⁴ Notwithstanding this, the Constitution provides for the free flow of information by granting everyone the rights to access and express information in terms of sections 16 and 32 of the Constitution. These two constitutional rights form the foundation of the free flow of information, by empowering any person to access, receive and disseminate information.⁶⁵ These rights are inextricably linked, since the efficacy of one is dependent on the activation of the other. This thesis therefore uses the phrase free flow of information to refer either to an event where the rights to access and express information operate in unison, or to the broad circulation of information as a corollary effect of the right/s operating singularly or together, as the context may indicate.

The right to free expression is partitioned into two sections in the Constitution. The first part, section 16(1), identifies certain forms of expressions that are constitutionally protected. It holds that:

“Everyone has the right to freedom of expression, which includes:-

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and

⁶⁴ Constitution S7(1), S16 & S32.

⁶⁵ J Ramages *Tell it like we tell you, or don't tell it at all! A consideration of the protection of state information in a constitutional democracy that guarantees freedom of expression* LLM thesis University of Stellenbosch (2011) unpublished.

(d) academic freedom and freedom of scientific research.”

The freedoms listed in section 16(1) are an illustration, not a closed list of protected freedoms. Other forms of expression, although not specifically listed in the provision, will also receive constitutional protection.⁶⁶ The term ‘expression’ is often used interchangeably with the term ‘speech’.⁶⁷ However, the meaning of the former term is more nuanced than the latter. ‘Expression’ refers to any speech or act which conveys a thought, idea, opinion, message, viewpoint, belief, desire or grievance.⁶⁸ Speech is a human vocal activity that is used to convey a message,⁶⁹ but expression is elastic enough to include not only verbal, but also non-verbal activities that convey a message.⁷⁰ In South Africa, free expression is an umbrella concept that includes speech, the right to receive and impart information and ideas, and other expressive acts.⁷¹

The right to free expression does not only allow persons to articulate themselves in a variety of ways, but also permits others to receive and impart their information and ideas.⁷² This thesis will specifically focus on the right as set out under section 16(1)(b) of the Constitution, i.e. the right to receive and impart information. In stark contrast to the Apartheid dispensation, individuals *inter alia* now have a constitutional right to convey their expressions and to receive feedback from listeners or interested parties. The feedback from the receivers could reinforce their opinions, prompt them to manicure the rough edges of their viewpoints, or encourage them to make substantive changes to their perspectives. On the other hand, listeners (or readers) may not be

⁶⁶ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC) [34]; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) [47]. In the *De Reuck* decision the Constitutional Court endorsed the interpretation found in the *Islamic Unity* decision.

⁶⁷ L Alexander *Is there a right of freedom of expression* (2005) 7 & 8.

⁶⁸ Currie & De Waal *The Bill of Rights handbook* 363; WA Davis *Meaning, expression and thought* (2003) 1.

⁶⁹ D Meyerson *Rights limited: Freedom of expression, religion and the South African Constitution* 1ed (1997) 67.

⁷⁰ J De Waal, I Currie & G Erasmus *The Bill of Rights handbook* 4ed (2003) 283.

⁷¹ D Milo, G Penfold & A Stein “Freedom of expression” in S Woolman, M Bishop & J Brickhill (eds) *Constitutional law of South Africa* 2ed (2011) 42-1: 42-31 & 42-32.

⁷² Constitution S16(1)(b).

prohibited from receiving or being exposed to an author's ideas or information. The receivers can now procure information irrespective of whether the information will reinforce, influence, or contradict their personal viewpoints,⁷³ or whether it reflects mainstream, peripheral or marginalised perspectives.⁷⁴ Naturally, they should also not be prohibited from responding to the ideas or information of proponents. This exchange of information contributes to enhancing the robustness of South Africa's democracy, by fostering political activity.⁷⁵ Any state or private act that impairs the right to express and receive information or ideas vitiates the right of proponents and receivers of information.⁷⁶

The second part of the right to free expression is an internal modifier, which reduces the scope of the right to free expression.⁷⁷ Section 16(2) lists several types of expression that are not constitutionally protected. The provision reads:

“The right in subsection (1) does not extend to:-

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

These types of expressions were deliberately excluded from the ambit of protection since they have the potential of destroying the type of society that the Constitution aims to build.⁷⁸ The courts have held that the second part of the provision sets out a closed list of excluded expressions. No further exclusions may be added to this list. Unless an expression falls within one of the specific categories of the closed list, it will

⁷³ *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* [25].

⁷⁴ *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* [49]. If an expression is specifically prohibited by S16(2)'s internal modifiers, it can be prohibited from being disseminated.

⁷⁵ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 1 SA 523 (CC) [28].

⁷⁶ *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* [25].

⁷⁷ Milo et al “Freedom of expression” in *Constitutional law of South Africa* 42-12.

⁷⁸ *Islamic Unity Convention v Independent Broadcasting Authority* [33].

receive constitutional protection.⁷⁹ Since the types of expression listed in section 16(2) are not constitutionally protected, the courts can restrict expressions of this nature. It is also important to note that such limitations are not subject to the proportionality test in terms of the general limitation clause of the Constitution.⁸⁰ In light of the above, the meaning of the right to receive and impart information and the information which cannot be protected under the right seems to be sufficiently clear in South African law. The content and meaning of the rights to receive and impart information should not cause the judiciary major interpretational difficulties when resolving disputes between information and security.

The burden of showing that the receipt and dissemination of security information falls within the ambit of the right to free expression, will be on the party who challenges restrictions on the free flow of information.⁸¹ The Constitutional Court expressly stated that:

“[...] any expression that is not specifically excluded by S16(2) enjoys the protection of the right.”⁸²

Section 16(2) of the Constitution does not exclude the receipt and dissemination of information that may compromise National Security from the ambit of the right. The expression of such information is therefore protected in terms of section 16(1). That is the case regardless of the way in which access was gained to state-protected information (for example, by receiving it from a whistle-blower or activist,⁸³ or by accessing it directly or indirectly before deciding to disseminate it).⁸⁴

However, the right to receive and impart information is not absolute. Even if the reception and dissemination of security information falls within the purview of section 16(1)'s protection, this is not the end of the matter. Section 36 of the Constitution

⁷⁹ [31]. See also Milo et al “Freedom of expression” in *Constitutional law of South Africa* 42-7.

⁸⁰ Constitution S16(2).

⁸¹ *Pillay v Krishna* 1946 AD 946 952-953.

⁸² *De Reuck v Director of Public Prosecutions* 2004 1 SA 406 (CC) [47].

⁸³ The relationship which existed between WikiLeaks, Bradley Manning and Julian Assange is an example of such an event. See also J Klaaren “National Information Insecurity - Constitutional Issues regarding the Protection and Disclosure of Information by Public Officials” (2002) 119 *SALJ* 721: 721.

⁸⁴ The matter concerning Edward Snowden is an example of such an event.

permits the limitation of the right to free expression, if such limitation is reasonable and justifiable in an open and democratic society based on freedom, equality and human dignity. Unlike during Apartheid, the Constitution prohibits the state from limiting these rights arbitrarily. The state will have to show why the expression of the information must be limited for purposes of National Security.⁸⁵ A key consideration for the judiciary in resolving such disputes is to determine if the information's publicity could actually compromise South Africa's National Security.⁸⁶

In view of the above it should be clear that the constitutional right to receive and impart information makes a radical break from the Apartheid dispensation in several ways. Firstly, the right allows any actor the right to freely express any information, including state-held information. Secondly, the right is defined with sufficient clarity that actors are aware of what their rights are and lastly, an actor's right to free expression cannot just be unjustifiably censored in a court of law. In South Africa's new democracy, the state will only be able to limit the right to free expression if it can convince the judiciary that the restriction of the information is reasonably justified in an open and democratic society based on freedom, equality and human dignity.

2.3.1.1 THE VALUES UNDERPINNING THE RIGHT TO FREE EXPRESSION

The rights in the Bill of Rights must be interpreted in view of the constitutional values underpinning them. Section 39(1)(a) provides that:

“(1) When interpreting the Bill of Rights, a court, tribunal or forum:-

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”.

The right to free expression ensures that specific values are introduced into and permeate through the South African society, in addition to the promotion of the general values of freedom, equality and human dignity.⁸⁷ The Constitutional Court in *South African National Defence Union v Minister of Defence* set out the values that

⁸⁵ Constitution S36.

⁸⁶ PAIA S41(1)(a)(i) & S41(1)(a)(ii).

⁸⁷ Constitution S7(1).

specifically inform the right to free expression. Writing for the majority, O' Regan J penned that:

“Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.”⁸⁸

The founders of South Africa's Constitution envisaged a society in which free expression would ensure that the truth would not be suppressed, the full potential of each individual could be realised and government rests in the hands of the people. These are the values that are widely believed to underpin free expression, and that must guide the interpretation of section 16(1) of the Constitution.⁸⁹

Spitz opines that the new democratic South Africa allows information to enter the public domain in order for the people to test ideas, norms and values against opposing ones.⁹⁰ He goes on to argue that the meeting and competing of these different narratives result in a collision of opposing ideas and norms, which ultimately brings about the truth.⁹¹ To put it differently, the free receipt and dissemination of diverse types of information and the expression of conflicting ideas will establish what truth or error is.⁹² The search for truth is an on-going process. Information, norms, values and ideas are continually running the gauntlet of opposing ones in order to identify the truth. Unlike under the Apartheid dispensation, South Africans are now free to debate the public values on which South Africa is based, and redefine its commitments through dialogue and contestation.⁹³ The search for truth has several other benefits.

⁸⁸ *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) [7].

⁸⁹ E Barendt *Freedom of speech* 2ed (2007) 4. See also Constitution S16 & S39.

⁹⁰ D Spitz “Eschewing silence coerced by law: The political core and protected periphery of freedom of expression” (1994) 10 *SAJHR* 301: 305. See also Ramages *Tell it like we tell you, or don't tell it at all!* 10.

⁹¹ Spitz (1994) *SAJHR* 305.

⁹² A Sethi “Freedom of speech and the question of censorship” in R Bhargava & A Acharya (eds) *Political theory: An introduction* (2008) 308: 311.

⁹³ Ramages *Tell it like we tell you, or don't tell it at all!* 10.

This process of introducing new ideas and challenging old norms in the interests of finding the truth ensures that society is continually developing. Additionally, it also prevents dogma from controlling the lives of the people.⁹⁴

The right to free expression also seeks to ensure that all people have the opportunity to reach their full potential and determine their own destiny. This represents a sharp break with the Apartheid legal order, which expressly denied the majority of the population the freedom of self-actualisation.⁹⁵ O' Regan J in *Khumalo v Holomisa* stated that free expression is constitutive of individual self-autonomy.⁹⁶ It plays a central role in unlocking the true potential of all individuals.⁹⁷ It is human to think, learn, challenge, debate and grow intellectually.⁹⁸ Free expression is what permits individuals to shape and solidify their personalities.⁹⁹ An individual's exposure to a multiplicity of thoughts, dogmas, ideas, morals and cultures will ultimately determine the choices the person makes concerning their identity.¹⁰⁰ The free receipt and dissemination of information and ideas¹⁰¹ also allows individuals, should they deem it necessary, to transform into a different version of themselves.¹⁰²

Free expression in a democracy also protects the right of the people to self-government.¹⁰³ Sovereign power lies with the people in a democracy. They may choose to exercise their power directly or through the medium of representative government.¹⁰⁴ Regardless of the system of government – representative or direct – the people will only be able to participate effectively in a democracy if information is

⁹⁴ Spitz (1994) *SAJHR* 305.

⁹⁵ 305 & 306.

⁹⁶ *Khumalo v Holomisa* 2002 5 SA 401 (CC) [21].

⁹⁷ Milo et al "Freedom of expression" in *Constitutional law of South Africa* 42-27.

⁹⁸ E Daly *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (2013) 94.

⁹⁹ 95.

¹⁰⁰ EA Taiwo & M Adigun "The Judiciary and the Rule of Law" in JA Ayoade, AA Akinsanya & OJB Ojo (eds) *The Jonathan Presidency: The First Year* (2013) 137: 153; Daly *Dignity Rights* 94.

¹⁰¹ Constitution S16(1)(b).

¹⁰² A Hughes *Human dignity and fundamental rights in South Africa and Ireland* (2014) 274.

¹⁰³ G Marcus & D Spitz "Expression" in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional law of South Africa* 1ed (1996) 20-1: 20-8.

¹⁰⁴ A Meiklejohn *Free speech and its relation to self-government* (1948) 3.

readily available. Protecting the right to free expression overcomes this difficulty. It ensures that available information on government policies, decisions, ideas and performance can enter into and permeate through the public domain. It also ensures that this information can be the subject of robust political debate, thereby enabling the people to make informed decisions on how they would like to be governed.¹⁰⁵

State censorship employed for purposes of National Security not only limits the constitutional right to receive and impart information, but also the values which the right ensconces. Censorship effectively removes information and ideas from the public domain. In doing so, it impedes the discovery of truth and undermines the fostering of individual autonomy and self-government,¹⁰⁶ thereby seemingly undoing the very society that the Constitution aims to protect.¹⁰⁷

Conversely, Coliver points out that limiting the free flow of information in the interests of National Security could have the effect of preserving the very society which the state aims to protect.¹⁰⁸ Providing unlimited protection to the free flow of information could endanger the nature of the Republic as an open and democratic society based on human dignity, equality and freedom.¹⁰⁹

The power to limit free expression in the interests of National Security is however a double-edged sword. Instead of using their authority to bring about security, states can and have often used this power in ways that are inconsistent with the public interest.¹¹⁰ This happens when they invoke National Security to cover up malfeasance instead of protecting some fundamental state interest.¹¹¹ There are also fairly recent examples

¹⁰⁵ Barendt *Freedom of speech* 18.

¹⁰⁶ De Lange *The muzzled muse* 13; *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* [25].

¹⁰⁷ *South African National Defence Union v Minister of Defence* [7].

¹⁰⁸ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 12.

¹⁰⁹ Schuller (2013-2014) *UCLA J. Int'l L. Foreign Aff.* 177 & 178.

¹¹⁰ M Papandrea "Under attack: The public's right to know and the war on terror" (2005) 25 *B.C. Third World L.J.* 35: 76; Mathews *Freedom and state security in the South African plural society* 21.

¹¹¹ Ramages *Tell it like we tell you, or don't tell it at all* 7-50.

where the South African government relied on National Security in an attempt to place unjustifiable limits on the free flow of information.¹¹² Such appeals to National Security afford states the opportunity to conceal any form of malfeasance under the pretext of security,¹¹³ and to make it appear as if their actions were necessary. National Security gives states the opportunity to put forward a positive explanation for security activity, including in instances where there is a cover up.¹¹⁴ The effect of this is the suppression of truth, the impairment of individual self-actualisation, massive inroads into democracy and the unjustified limitation of the rights to receive and impart information.

The text of section 16(1), and the values that underpin it, provide the judiciary with a sufficiently clear understanding of the scope and content of freedom of expression. The point is not that there will never be disagreement about the meaning of the right, as there are certainly instances in which reasonable people could disagree about whether or not a particular type of expression falls within the scope of section 16(1)'s protection, or within the categories of expression listed in section 16(2). The point is rather that the constitutional text is clear enough to enable courts to establish, in a principled manner, whether an expression falls within the realm of its protection, and whether a limitation is reasonable and justifiable in terms of section 36.

¹¹² *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa; Right2Know Campaign v Minister of Police* 2014 ZAGPJHC 343 (GSJ); *Mandag Centre For Investigative Journalism v Minister of Public Works* [2014] ZAGPPHC 226 (GJ).

¹¹³ T Mendel "National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles" in Campbell Public Affairs Institute (ed) *National Security and Open Government: Striking the right balance* 1ed (2003) 1: 2. See also PJ Fourie "External media regulation in South Africa" in PJ Fourie (ed) *Media studies; Policy management and media representation* Vol2 (2010) 30: 37 & 38.

¹¹⁴ Fourie "External media regulation in South Africa" in *Media studies; Policy management and media representation* 37 & 38.

2.3.2 THE RIGHT TO ACCESS INFORMATION

2.3.2.1 THE CONSTITUTIONAL RIGHT TO ACCESS STATE-HELD INFORMATION

The right of access to information was granted to everyone in South Africa at the close of the 20th century.¹¹⁵ Notwithstanding its fairly recent enactment in the Republic, the provenance of the right to information can be traced back to the East, specifically to the Ch'ing dynasty.¹¹⁶ The Finnish statesman and clergyman, Anders Chydenius,¹¹⁷ who lived in the 18th century, was the progenitor of the right to access information in the West. His conception of the right to access information was heavily influenced by the Chinese. Two of their practices caught his attention. The first was the obligation placed on Chinese emperors to admit and acknowledge their flaws as evidence of their love for the truth and the spurning of ignorance. Secondly, the primary objective of the Imperial Censorate was to scrutinise government and its officials with the intention of exposing state corruption, malfeasance, inefficiency and mismanagement. Sweden was the first country to grant the public a right to access information in 1766.¹¹⁸ Despite these early origins, the right to access state-held information was introduced only recently in other jurisdictions.¹¹⁹

The right to access information is guaranteed under section 32 of the Constitution. Section 32 of the Constitution expressly states that:

“(1) Everyone has the right of access to:-

¹¹⁵ Constitution S32. See also I Currie & J De Waal *The Bill of Rights handbook* 5ed (2005) 691; Constitution of the Republic of South Africa Act 200 of 1993 S23.

¹¹⁶ JM Ackerman & IE Sandoval-Ballesteros “The global explosion of freedom of information laws” (2006) 58 *Admin. L. Rev.* 85: 88.

¹¹⁷ MC Skuncke “Freedom of the press and social equality in Sweden, 1766-1772” in P Ihalainen, M Bregnsbo, K Sennfelt & P Winton (eds) *Scandinavia in the age of revolution: Nordic political cultures, 1740-1820* (2011) 133: 137.

¹¹⁸ Ackerman & Sandoval-Ballesteros (2006) 58 *Admin. L. Rev.* 88.

¹¹⁹ NS Marsh *Public access to government held information: A comparative symposium* (1987) 292; C Darch & PG Underwood *Freedom of Information and the Developing World: The Citizen, the State and Models of Openness* (2009) 71.

(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 right to access information is viewed as an independent constitutional right. It is not a right which just reinforces other fundamental rights.¹²⁰ The intention of the constitutional drafters, by including this right in the Bill of Rights, is to ensure substantive openness and accountability in government, by permitting everyone to access state-held and, in some instances, privately held information.¹²¹ Although the right to information was included as an independent constitutional right, Parliament was given the authority and duty by section 32(2) of the supreme law to give effect to the right to access information by passing national legislation.

Consequently, Parliament enacted PAIA to give effect to the constitutional right of access to information.¹²² It is important to note that the operation of section 32 of the Constitution was suspended until Parliament passed national information legislation, or until a period of three years after the passing of the Final Constitution had expired.¹²³ This meant that although the Final Constitution empowered everyone at a textual level to access information, the right as set out in section 32 would only become operational once PAIA came into effect. PAIA was promulgated on the 2nd of February 2000, but only became operational on the 9th of March 2001.¹²⁴ It thus seemingly left a gap in the enforceability of the right to access information between the passing of the Final Constitution and the legal enforceability of the right in terms of PAIA. However, during this interim period, the right to access information was governed by a transitional provision. The Final Constitution was passed with two rights to access

¹²⁰ J Klaaren & G Penfold “Access to information” in S Woolman, M Bishop & J Brickhill (eds) *Constitutional law of South Africa* 2ed (2011) 62-1: 62-2.

¹²¹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [82].

¹²² PAIA 2 of 2000.

¹²³ Constitution Schedule 6 S23(1) & S23(2).

¹²⁴ *Trustees, Biowatch Trust v Registrar: Genetic Resources* 2005 4 SA 111 (T) 112 & 113.

information, namely a transitional provision found in section 23(2)(a) of Schedule 6, and the primary provision contained in section 32.

The text of the transitional right to access information under the Final Constitution reads:

“Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.”¹²⁵

This transitional right to information is very different from the right to access information as set out in section 32. First, it only applies to state-held information. Secondly, access would only be granted if requesters could show that they required the information in order to exercise or protect their rights. Requests would be refused if access were sought for any other reason.¹²⁶ The wording of the transitional provision, save for a few small differences, is identical to the wording of the Interim Constitution’s right to access information.¹²⁷ There is no substantive difference between the two rights, but the changes in the transitional provision were made for two reasons. Firstly, to ensure that the transitional provision reflected the plain language drafting conventions of the Final Constitution, and secondly to ensure consistency with the term ‘spheres’ which appears in the Final Constitution’s text.¹²⁸ Consequently, the right to access information as set out in the Interim Constitution continued to govern the right to access information, under the auspices of the transitional provision, until PAIA was enacted by Parliament.¹²⁹

As pointed out earlier, section 32(2) of the Constitution instructed Parliament to create national legislation to give effect to the Constitution’s right to access

¹²⁵ Constitution Schedule 6 S23.

¹²⁶ De Waal et al *The Bill of Rights handbook* 442.

¹²⁷ Constitution of the Republic of South Africa Act 200 of 1993 S23. Compare this provision with the Constitution Schedule 6 S23(2)(a)(1). Access to Information – “Every person has the right to access all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights”.

¹²⁸ Currie & Klaaren *The Promotion of Access to Information Act commentary* 5.

¹²⁹ De Waal et al *The Bill of Rights handbook* 438.

information. The phrase ‘give effect to’ means that Parliament was to determine the scope, nature and limits of the right to information.¹³⁰ Parliament fulfilled this constitutional duty by enacting PAIA.¹³¹ This act gives effect to the constitutional right by creating the necessary legal mechanisms for everyone to access state and privately held information.¹³² The act also contains a number of textual indicators – in the long title, preamble and section 9 – which expressly acknowledge that PAIA was created to give effect to the constitutional right.¹³³

With the introduction of PAIA, the transitional provision fell away and can no longer be used to request access to information.¹³⁴ The right to information is governed by the provisions of PAIA.¹³⁵ South African courts are now obligated in terms of PAIA to resolve any disputes between an actor’s right to access state-held information and the state’s denial of a request to access state-held information for National Security purposes in terms of this act.¹³⁶

2.3.2.2 THE RIGHT TO ACCESS STATE-HELD INFORMATION IN TERMS OF THE PROMOTION OF ACCESS TO INFORMATION ACT

In terms of PAIA, before courts can adjudicate on a dispute between an information requester and the state, requesters are required to exhaust all of the act’s procedural

¹³⁰ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 [83].

¹³¹ PAIA 2000 S11.

¹³² Part 2, Part 3; Klaaren & Penfold “Access to information” in *Constitutional law of South Africa* 62-4.

¹³³ Currie & Klaaren *The Promotion of Access to Information Act commentary* 12; *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 [83]. If Parliament had failed in its duty to pass the necessary legislation within the time frame set out in the Constitution, the Constitutional Court’s interpretation was that the right to information would have applied as a self-standing provision which would have governed access to information. Section 32(1) would have applied directly and section 32(2) would have become obsolete.

¹³⁴ Constitution Schedule 6 S23(2).

¹³⁵ Currie & Klaaren *The Promotion of Access to Information Act commentary* 5.

¹³⁶ PAIA S78(1).

requirements. They should first aim to procure the information directly from the state before they apply to the courts for relief.¹³⁷

A requester's right to access state-held information is governed by section 11 of PAIA. This section allows a person to request access to any information in the possession of a public body. The provision reads:

"A requester must be given access to a record of a public body if-

(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part."

An initial request must be made to the relevant information officer of a public body, who must decide in terms of PAIA whether to grant the request.¹³⁸ If the official refuses access, the official is legally compelled to provide reasons, with reference to the provisions of the act relied on.¹³⁹ The state is only authorised to grant access to state-held information if a requester has satisfied all of the procedural requirements of PAIA and no reasons exist which justify the state's decision to deny a request for access to information.¹⁴⁰

It is important to note that PAIA does not require requesters to provide reasons to support their request for access to state-held information. Neither is the state permitted to deny access to information on the grounds that requesters lack reasons, or that the reasons disclosed do not justify access.¹⁴¹ Hence, a request made in terms of PAIA, subject to certain limitations,¹⁴² will permit requesters to procure access to all state information, explanations, decisions or preparatory work which formed the foundations

¹³⁷ S78(1).

¹³⁸ S25(1)(a).

¹³⁹ S25(3)(a).

¹⁴⁰ S3, S9(a)(i) & S11.

¹⁴¹ S11(3).

¹⁴² Constitution S36; PAIA. Both legal instruments permit for the limitation of the right to access information under certain circumstances.

of their decisions,¹⁴³ provided that such information is recorded,¹⁴⁴ and that the requested information is in the possession or control of the public body.¹⁴⁵ Recorded information is a defined term. PAIA states that this word means:

“[...] any recorded information-

- (a) regardless of form or medium;
- (b) in the possession or under the control of that public or private body, respectively; and
- (c) whether or not it was created by that public or private body, respectively”.¹⁴⁶

Requesters are only permitted to procure access to state information from an entity, if the requester can demonstrate that it is a public body. If a requester cannot prove that the petitioned entity is a public body then the entity may deny the request for information. Additionally, the judiciary may also deny a request for information if the requester is unable to demonstrate that the entity it is requesting information from is a public entity when called upon to resolve a dispute. Proving that an actor is a public body can be a difficult task in certain instances.

The first difficulty is caused by the difference in the terminology used by the Constitution and PAIA, which creates uncertainty as to the meaning of ‘public body’. PAIA allows requesters to procure information from public bodies,¹⁴⁷ while the Constitution makes provision for requesters to access state-held information. The term ‘public body’ does not appear in section 32 of the Constitution. Notwithstanding the variance in terminology, this difference should not be a cause for concern. The legislature has effectively developed the meaning of the term ‘state-held information’ to include information in the possession of any ‘public body’. PAIA’s definition of the

¹⁴³ De Waal et al *The Bill of Rights handbook* 437 & 438.

¹⁴⁴ PAIA S1 “record”. On analysis of the provision, it is important to note that a requester is only entitled to be granted access to recorded information irrespective of its form and whether it was created by a public body or not.

¹⁴⁵ PAIA S1 “record” (b).

¹⁴⁶ S1 “record”.

¹⁴⁷ S11(1).

term public body is essentially the same as the Constitution's definition of an organ of state.¹⁴⁸

The second difficulty lies in actually identifying if an institution qualifies as a public body. According to section 1 of PAIA, a public body is:

“(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) any other functionary or institution when -

(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation”.

Identifying if an institution is a public body in terms of sections 1(a) and 1(b)(i) of PAIA's definition is fairly unproblematic. The problem arises when section 1(b)(ii) is used to determine if an actor is a public body. It is not always clear which bodies are public or not in terms of this section. The solution to this problem is found in the courts' jurisprudence. Two methods were developed by the courts to determine if an entity qualifies as a 'public body', namely the functional and control tests. Since PAIA's definition of a 'public body' is identical to the Constitution's definition of an 'organ of state', save for several literary differences, the interpretation given by our courts to the term 'organ of state' originally under the Interim Constitution and again under the Final Constitution is of importance when interpreting the meaning of 'public body' in terms of PAIA. The Supreme Court of Appeal (SCA) captured this interpretational approach the best when it stated that:

¹⁴⁸ *Mittalsteel South Africa Ltd v Hlatshwayo* 2007 1 SA 66 (SCA) [8]; PAIA Definition S1 Public Body; Constitution S239. The only difference is that the term public body under PAIA does not exclude a court or judicial officer like its constitutional counterpart.

“Decisions on the meaning of 'organ of state' in the interim Constitution and the Constitution, of which there are several, are therefore of considerable assistance in determining what the legislature had in mind when it referred to 'public body'.”¹⁴⁹

Mdumbe, in his analysis of the relevant provision in the Constitution, argues that a two part test must be used to determine if an entity qualifies as an ‘organ of state’. Firstly, it must be determined if the power or function is exercised in terms of legislation. Secondly, it must be established if the power or function is of a public nature. The Constitution itself does not define the term ‘public power’ or ‘public function’.¹⁵⁰ Mdumbe opines that these terms refer to powers or functions which affect the members of the public, and which are exercised by an entity whose authority to perform those acts can be traced back to legislation.¹⁵¹ The SCA has labelled this the functional test,¹⁵² and has applied this test in *Minister of Education, Western Cape v Governing Body, Mikro Primary School*.¹⁵³

However, it is not always that easy to determine if a body exercises public powers or performs public functions. It is perhaps for this reason that the courts have also developed a control test to assist in determining if an entity is a public body or not. The control test was first used under the Interim Constitution. The court in *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting*, using the control test, held that the term ‘organ of state’ included two types of institutions only, namely entities which are intrinsically part of government and those institutions which fall outside of the realm of public service, but are controlled by the state.¹⁵⁴ State control could be exercised in several ways. The state could wholly own

¹⁴⁹ [8]. “The only difference between the two is that a ‘public body’ does not exclude a court or judicial officer”.

¹⁵⁰ MF Mdumbe *The meaning of organ of state in South African law* LLM thesis University of South Africa (2003) 56 & 57.

¹⁵¹ 68.

¹⁵² *Mittalsteel South Africa Ltd v Hlatshwayo* [18] & [19].

¹⁵³ *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 1 SA 1 (SCA) [20].

¹⁵⁴ *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting* 1996 3 SA 800 (T) 808E-G.

and control an institution, or it could have the majority of control over an institution¹⁵⁵ or regulate the institution's operational requirements.¹⁵⁶ The control test found purchase in many decisions before finally being endorsed by the SCA in *Mittalsteel South Africa Ltd v Hlatshwayo*.¹⁵⁷ The control test is useful to examine if the functions or actions of identified entities are controlled, or governed by the state. If it is found that the state is effectively in control, its actions or functions are deemed to be of a public nature for the duration of the period for which it performs those actions or functions.¹⁵⁸ The reason for this is that a controlled entity exercises its powers or functions at the instruction of the controlling entity. If the controlling entity is a public body, by extension all of its controlled bodies are public bodies for the duration of the period for which they are controlled. To put it differently, the powers or functions of a controlled entity are really the powers and function of the controlling body.¹⁵⁹

These tests do not eradicate all of the problems associated with public bodies. An associated difficulty is determining which test to employ. If an entity performs a public power or function in terms of any law, despite being independent from the control of the state, it will qualify as an organ of state.¹⁶⁰ This is the end of the matter and it is unnecessary for information requesters or the judiciary to invoke the control test. However, things are not always that straightforward. Sometimes the entity under consideration is a private entity that is controlled by an organ of state. In such situations, the control test must be employed. If, while carrying on its business, an entity exercises a seemingly private power or function while under the control of an organ of state, the controlled entity is considered to be an organ of state.¹⁶¹

The meaning of the right to access information as contemplated by PAIA is fairly straightforward. It clearly sets out the content and procedure which must be complied

¹⁵⁵ *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 2 SA 109 (W) 113B-D.

¹⁵⁶ *Wittmann v Deutscher Schulverein, Pretoria* 1998 4 SA 423 (T) 454B.

¹⁵⁷ *Mittalsteel South Africa Ltd v Hlatshwayo* [12], [13], [14], [15] & [18].

¹⁵⁸ [19].

¹⁵⁹ [13].

¹⁶⁰ [22].

¹⁶¹ [12] & [19].

with in order for an actor to access state-held information, prior to the judiciary being called upon to resolve a dispute.¹⁶²

Requesters who have satisfied all of PAIA's procedural requirements and proved that the body they are requesting information from is a public body, can still be denied access to state-held information. PAIA has a number of exemptions which legally entitle a public body to turn down a request for information.¹⁶³ Yet, access to publicly held information can still be granted despite the fact that an initial request for access to information has been denied by an information officer.¹⁶⁴

The first instance in which this will be possible is if a requester is granted access to information on appeal to the relevant authority. A requester may lodge an internal appeal against an information officer's initial decision to restrict access to state-held information.¹⁶⁵ The relevant authority can reverse the original decision of the information officer, on appeal. It may also confirm the original decision.¹⁶⁶ In that case, the relevant authority must provide the requester with reasons for its decision to deny access to information. Additionally, it must also set out the provisions that it relied upon to justify its decision to deny access to information.¹⁶⁷ Requesters must be informed that they will have the right to appeal to the courts if they are dissatisfied with the decision taken by the relevant authority.¹⁶⁸ Only after exhausting these procedural requirements can the court be called upon to resolve a dispute in which the right to access information has been limited by the state.¹⁶⁹

Secondly, access to exempted information can be granted if it is in the interests of the public. Where the disclosure of such information is in the public's interest, an information officer, or the relevant authority as the case may be, is legally obligated to disclose such information to a requester in terms of section 46 of PAIA. However, an

¹⁶² PAIA S78.

¹⁶³ Part 2 Chapter 4.

¹⁶⁴ S25(1)(a), S25(3)(a) & Part 2 Chapter 4.

¹⁶⁵ S25(3)(a), S25(3)(c) & S74(1)(a).

¹⁶⁶ S77(2).

¹⁶⁷ S77(5)(a).

¹⁶⁸ S77(5)(c).

¹⁶⁹ S82(a).

officer/authority will only be able to make exempted information available if the public's interest in granting access to the information outweighs the harm that will ensue if the information is made available. This action by the information officer will only be legally permissible if:

“(a) the disclosure of the record would reveal evidence of-

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.”¹⁷⁰

Lastly, access to non-threatening information must be made available if the information forms part of a blended record. On analysing a requested record an information officer, the relevant authority, or the judiciary may find that a record contains two types of information, namely information which can be protected by a justifiable exemption in terms of PAIA and information which cannot be protected in terms of the act. If the record is composed of blended information, the information officer, the relevant authority, or the judiciary as the case may be, will be obligated to sever the threatening part of the information from the non-threatening part. The relevant actor will not be permitted to restrict access to the entire record by virtue of the fact that parts of the document can be protected by a justifiable exemption.¹⁷¹

Provided that National Security information is in recorded form and in the possession or under the control of the state, a requester in terms of section 11(1) of PAIA can request access to the record. While section 11(1)(b) permits the state to refuse a request for access to information in terms of Chapter 4 of Part 2 of the act, none of the statutory exemptions in PAIA empowers the state to deny a request for information expressly on the grounds of National Security. In fact, neither the act nor any of its regulations even mention the words National Security.¹⁷² Although PAIA

¹⁷⁰ S46.

¹⁷¹ S28(1)(a) & S28(1)(b).

¹⁷² PAIA; Regulations Regarding the Promotion of Access to Information GN R187 in GG 23119 (2002); Withdrawal of Government Notice No. 938 as published in Government Gazette no. 25142 dated 27

does not expressly permit the state to deny access to state-held information for purposes of National Security, sections 41(1)(a)(i) and 41(1)(a)(ii) of the act permit the state to deny access to information if its publicity will compromise the 'security or defence of the Republic'. It will be argued later in this chapter that these sections permit the state to deny access to information for reasons of National Security.¹⁷³ It will also be shown that there is uncertainty concerning the meaning of the phrase 'security or defence of the Republic'.¹⁷⁴ As a result, the meaning of National Security is vague and imprecise in terms of the act. While the content of the right to access information in terms of PAIA is fairly clear, the same cannot be said of PAIA's references to the security interests that must be protected. This could create difficulties for the courts in deciding disputes relating to access to information that have a bearing on security interests.

It is important to point out that the state has and will in the future continue to enter into relationships with private bodies to complete state work. These relationships can take on a variety of forms – contractual,¹⁷⁵ incorporated or unincorporated joint ventures, *inter alia*. In the National Security context, private bodies may be given access to records protected for purposes of National Security. PAIA permits actors to petition to gain access to such records from these private bodies. Although matters of this nature concern the tension between the right to access information and National Security, this thesis will not examine how the judiciary should resolve the tension between the free flow of information and National Security in the context of private bodies. It is however important to be aware that the right to access National Security information is not only limited to matters concerning state entities.

June 2003, and the designation of Magistrates' Courts under the definition of "court" in the Promotion of Access to Information Act, 2000 (act no. 2 of 2000) GN 585 in GG 26332 (2004); Exemptions and Determinations for Purposes of S22(8) GN R991 in GG 28107 (2005); Promotion of Access to Information Rules GN R965 in GG 32622 (2009); Exemption of Certain Private Bodies from Compiling Manual GN 1222 GG 39504 (2015).

¹⁷³ For a more comprehensive discussion on this aspect please see clause 2.4.2 hereunder.

¹⁷⁴ For a more comprehensive discussion on this aspect please refer to clause 2.4.2.1 herein.

¹⁷⁵ S50(1).

2.3.2.3 VALUES UNDERPINNING THE RIGHT TO ACCESS INFORMATION

Just as the rights to receive and impart information in terms of section 16(1)(b) of the Constitution are founded upon specific values that add further content to the meaning of these rights, the right to access information is also based on specific values.

The right of access to information was constitutionalised in order to guarantee open and accountable administration at all levels of government and to move away from the Apartheid regime's obsession with secrecy.¹⁷⁶ The right counteracts the effects of secrecy by providing for open and accountable government. To put it differently, the right prevents official secrecy from hampering South Africa's political transformation and from working against democracy.¹⁷⁷ It exposes the operations of the state to the public eye and safeguards against government corruption, aberration and incompetence.¹⁷⁸ James Madison clearly understood the importance of information in the hands of the people when he wrote that:

“Knowledge will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives.”¹⁷⁹

Information in the hands of the people gives them the power to hold their representatives to account for their actions.¹⁸⁰ Access to information is the ingredient that makes democracy effective.¹⁸¹ Conversely, secrecy makes it impossible for the people to examine state mischief carried out under the cover of obscurity.¹⁸² State representatives and government employees are susceptible to being tempted to

¹⁷⁶ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 [82]; Currie & Klaaren *The Promotion of Access to Information Act Commentary 2*.

¹⁷⁷ Currie & De Waal *The Bill of Rights handbook* 693.

¹⁷⁸ *S.P. Gupta vs President of India and Ors.* on 30 December, 1981 [65].

¹⁷⁹ JT Wren *Inventing Leadership: The Challenge of Democracy* (2007) 189; see also J Bessette & J Pitney *American government and politics: Deliberation, democracy, and citizenship* 2ed (2013) 25.

¹⁸⁰ *S.P. Gupta vs President of India and Ors.* [63].

¹⁸¹ RS Dhaka *Right to information and good governance* (2010) 5.

¹⁸² *President of the Republic of South Africa v M&G Media Ltd* 2012 2 SA 50 (CC) [10].

misuse or abuse their station. State corruption, ineptitude, abuse of authority and oppression would flourish if secrecy could always be used to conceal state mischief.¹⁸³

The right to access information has several objectives. Firstly, it specifically enjoins the public administration to be open and to foster openness in the performance of its duties. The objective of openness protects against state action that aims to conceal information in order to avoid public oversight. The values compel the state to make available information concerning its activities. In light of the right to access information, government is open if accurate information can be accessed by the public in a timely fashion.¹⁸⁴ Openness is also responsible for promoting and fostering accountability. It ensures that information concerning state activity or inactivity enters the public domain where it can be scrutinised by the people.¹⁸⁵ The Constitution specifically instructs the public administration to be accountable to the people.¹⁸⁶ It enjoins the state to have a specific relationship with the governed. All state authority is derived from the people.¹⁸⁷ The elected government's actions are seen as an expression of the people's will.¹⁸⁸ The elected representatives are expected to promote and protect the interests, values, and political positions of the people.¹⁸⁹ Therefore, where the state has exercised a particular power it must give an account of it to the people.¹⁹⁰ Accountability places two duties on the state. The state must provide an account of its decisions or activities and the exercise of these public powers must be underpinned by rational considerations. In an open and democratic society, the state must identify the decisions that it took and explain why it exercised its power.¹⁹¹

¹⁸³ *S.P. Gupta vs President of India and Ors.* [65].

¹⁸⁴ Constitution S195(1)(g). See also *Brummer v Minister for Social Development* 2009 6 SA 323 (CC) [62].

¹⁸⁵ Currie & Klaaren *The Promotion of Access to Information Act Commentary* 17.

¹⁸⁶ Constitution S195(1)(f).

¹⁸⁷ K Stearman *Freedom of information* (2011) 6.

¹⁸⁸ P Hirst *Representative democracy and its limits* (1990) 22 & 24.

¹⁸⁹ A Birch *Representation* (1971) 15 & 109.

¹⁹⁰ Stearman *Freedom of information* 6.

¹⁹¹ Currie & De Waal *The Bill of Rights handbook* 684.

Secondly, the right to access information allows for greater government transparency by combating secrecy.¹⁹² Transparency obliges government to give an account of its work.¹⁹³ This means that the state must keep records of all official decisions and actions and must make them available on request.¹⁹⁴ Consequently, this makes it more difficult to keep unlawful state actions, agreements and decisions out of the public domain.¹⁹⁵

The rationale for making state information available to citizens is simple. All state information is created, aggregated and utilised by public institutions that are publicly funded.¹⁹⁶ In a democratic polity, ownership of this information does not belong to the state, but to the public. A state generates information not for its own benefit, but to rule in the best interests of the public.¹⁹⁷ Naturally, the public must be able to examine any information that led to the exercise of public power.¹⁹⁸

Courts are therefore under an obligation to be guided by considerations of openness and transparency. These values provide the judiciary with sufficient guidance as to the meaning of the right of access to information. The rights and the values also provide the courts with sufficient clarity as to the types of information that can be procured from an organ of state.

2.3.2.4 THE APPLICABILITY OF THE CONSTITUTION'S RIGHT TO ACCESS INFORMATION FOLLOWING THE ENACTMENT OF THE PROMOTION OF ACCESS TO INFORMATION ACT

The question arises whether a freestanding constitutional right to access state information still exists. If so, two additional and interconnected questions arise. First, can a requester rely on this fundamental right directly where information and security are in tension? If the answer to this question is in the affirmative, a second question

¹⁹² P Birkinshaw *Freedom of information: The law, the practice and the ideal* (1988) 29.

¹⁹³ Ackerman & Sandoval-Ballesteros (2006) 58 *Admin. L. Rev.* 90.

¹⁹⁴ Birkinshaw *Freedom of information* 29.

¹⁹⁵ Ackerman & Sandoval-Ballesteros (2006) 58 *Admin. L. Rev.* 92.

¹⁹⁶ KM Shrivastava *The right to information: A global perspective* (2009) 1.

¹⁹⁷ Shrivastava *The right to information: A global perspective* 1.

¹⁹⁸ Currie & Klaaren *The Promotion of Access to Information Act Commentary* 17.

comes to the fore. Given that PAIA gives content to the constitutional right, does the rights provision itself lack clarity which could affect the resolution of the dispute between information and security if it is relied upon directly?

Klaaren and Penfold are of the view that fundamental rights occupy a special position in the field of law. Their constitutional entrenchment provides these rights with a status above other rights in South African law. The elevated position of a fundamental right would be subtracted from if legislation could be introduced which would alter the content of a fundamental right. This would allow fundamental rights to be relegated to the realm of ordinary rights by legislative amendment. The constitutional text does not support this type of rights substitution. It holds that national legislation must be created to give effect to the constitutional right. Parliament gave effect to the right to access information by enacting PAIA, which sets out the legal framework for the right to access information. Nowhere in the text does it indicate that national legislation must be created to replace the fundamental right. On the strength of the above reasoning, the authors conclude that the constitutional right to information has not been rendered obsolete by the enactment of PAIA, but that the right continues to exist independently.¹⁹⁹ It must be pointed out that any requester claiming that his right to access information has been infringed must first rely on PAIA to resolve the dispute. The requester will be prevented from directly relying on section 32 of the Constitution. This is known as the principle of subsidiarity. This principle entails that, where legislation has been adopted to give effect to a constitutional right, a person seeking to enforce that right must rely on the legislation in question, rather than relying directly on the constitutional right.

Notwithstanding the above, there are certain instances in which a requester can rely on section 32 of the Constitution directly. In the first place, Van der Walt points out that a constitutional right can be relied upon directly where a litigant challenges the validity of the legislation that was enacted to give effect to the right.²⁰⁰ Section 32 can thus be used to challenge any provision of PAIA which is deemed to be

¹⁹⁹ Klaaren & Penfold "Access to information" in *Constitutional law of South Africa* 62-4.

²⁰⁰ AJ Van der Walt *Constitutional Property Law* 3ed (2011) 66; *My Vote Counts NPC v Minister of Justice and Correctional Services* 2018 8 BCLR 893 (CC) [18].

unconstitutional.²⁰¹ An example of this is the apparent tension between section 32 of the Constitution and section 12 of PAIA. The Constitution holds that a requester may access any state information. Yet, PAIA ensures that the records of Cabinet, its committees, members of Parliament and of the provincial legislatures are outside of the reach of the right to access information. These bodies and members generate information using public funds for public benefit. It is hard to imagine why their records should be kept out of the public domain. In such instances, the constitutional provision could be used directly to challenge a provision of PAIA,²⁰² as confirmed by the Constitutional Court in *My Vote Counts NPC v Minister of Justice and Correctional Services*,²⁰³ in which it was called upon to determine if the Constitution entitles South Africans to know who funds their political parties.²⁰⁴

Secondly, the constitutional right can also be used to challenge any subsequent legislation which may attempt to unjustifiably limit the right of access to information.²⁰⁵ The state introduced the Protection of State Information Bill (PSI).²⁰⁶ In its earlier form, PSI posed a number of problems for the right to access information under PAIA. Its most invasive provision aimed to make this bill, rather than PAIA, the standard for access to confidential state information.²⁰⁷ If the bill were to be enacted, the constitutional text could be relied on directly to challenge the constitutionality of some of its provisions.

Thirdly, the constitutional right can be used in instances where the statutory provision does not give full effect to the right to access information.²⁰⁸ The Constitutional Court in *My Vote Counts NPC v Minister of Justice and Correctional Services* requires that the applicant first make out a case for the constitutional invalidity

²⁰¹ Klaaren & Penfold "Access to information" in *Constitutional law of South Africa* 62-4.

²⁰² Constitution S32(1); PAIA S12(a) & S12(c).

²⁰³ *My Vote Counts NPC v Minister of Justice and Correctional Services* [44]-[74].

²⁰⁴ [1]-[90]; see also R Cachalia "Botching procedure, avoiding substance: a critique of the majority judgment in *My Vote Counts*" (2017) 1 *SAJHR* 138: 138.

²⁰⁵ Klaaren & Penfold "Access to information" in *Constitutional law of South Africa* 62-4.

²⁰⁶ Protection of State Information Bill B6H-2010.

²⁰⁷ Protection of State Information Bill B6-2010 S1(4); PAIA S5.

²⁰⁸ R Cachalia (2017) 1 *SAJHR* 143.

of the legislation and if successful,²⁰⁹ the court will direct that remedial action be undertaken by Parliament to address any shortcoming in PAIA.²¹⁰ The effect of this decision is that the judiciary requires that the applicant abide by the principle of subsidiarity to resolve disputes of this nature.²¹¹

However, an argument can be made that the appropriate procedure should be for Parliament to pass additional legislation to supplement PAIA insofar as the act fails to give effect to the constitutional right. In fact this was the position of the applicants in this matter. The litigants submitted that the Constitutional Court is entitled to do so since section 167(4)(e) of the Constitution holds that:

“Only the Constitutional Court may [...] decide that Parliament or the President has failed to fulfil a constitutional obligation,”

which in the context of PAIA entitles the Court to call upon Parliament to rectify the act’s shortcoming by enacting remedial legislation.²¹² The Constitutional Court refused to adopt this position.²¹³ Cachalia has heavily criticised the judiciary’s decision. She submits that the consequence of the Court’s decision is that it effectively bars every applicant from seeking the introduction of remedial legislation in terms of section 167(4)(e) of the Constitution in instances where subsidiary legislation is in place. In the author’s view the court has inserted the principle of subsidiarity where it does not really belong and has impaired the efficacy and efficiency of our law.²¹⁴

Finally, the constitutional provision can be relied upon directly if a *lacuna* is found in PAIA.²¹⁵ PAIA only allows access to information which has been reduced to

²⁰⁹ *My Vote Counts NPC v Minister of Justice and Correctional Services* [85].

²¹⁰ [85]-[91]. Ordinarily the court would do this by suspending the legislation and providing Parliament with an opportunity to amend the legislation to address any shortcomings in the law.

²¹¹ R Cachalia (2017) *SAJHR* 143.

²¹² *My Vote Counts NPC v Minister of Justice and Correctional Services* [59].

²¹³ [1]-[91].

²¹⁴ R Cachalia (2017) *SAJHR* 152-153.

²¹⁵ DM Davis “Access to information” in MH Cheadle, DM Davis & NRL Haysom (eds) *South African constitutional law: The Bill of Rights* (2002) 575: 587; *My Vote Counts NPC v Minister of Justice and Correctional Services* [18].

recorded form.²¹⁶ Yet, the Constitution allows access to any information.²¹⁷ Additionally, section 39(2) of the supreme law provides that legislation must be read in such a way as to conform to the Bill of Rights. The effect is that the constitutional right must be used to interpret PAIA's provisions.²¹⁸ Despite PAIA's exclusion of access to unrecorded information, the constitutional right could be used to access information which is not recorded,²¹⁹ in spite of the practical difficulties that may attend such an event.

A litigant may therefore rely on section 32 directly in specific instances. It is difficult to imagine circumstances in which a requester of information will have to do so in the National Security context. However, in the event that it happens, the court will be guided by the text of section 32, together with the general and specific values which inform the right. That should provide sufficient clarity as to the meaning of the right and the information that may be accessed in terms of it. The Constitutional Court in *My Vote Counts NPC v Minister of Justice and Correctional Services* has also helped to flesh out the meaning of the right.²²⁰ However the right is not sacrosanct and can be limited in terms of section 36 of the Constitution.

2.4 NATIONAL SECURITY, THE JUDICIARY AND FREE FLOW OF INFORMATION

2.4.1 INTRODUCTION

Even the most dogmatic proponents of an open and accountable government should recognise that publicising certain information could compromise the Republic's National Security. Notwithstanding Coliver's view set out in paragraph 2.3.1.1, the counterargument is equally persuasive, namely that the limitation of the free flow of

²¹⁶ PAIA S3.

²¹⁷ Constitution S32.

²¹⁸ Davis "Access to information" in *South African constitutional law: The Bill of Rights* 587.

²¹⁹ Klaaren & Penfold "Access to information" in *Constitutional law of South Africa* 62-6.

²²⁰ *My Vote Counts NPC v Minister of Justice and Correctional Services* [19]–[25].

information in circumstances where its publicity will compromise National Security, does not impair democracy, but rather serves to reinforce and protect it.²²¹

National Security is ultimately a defence raised by the state to limit the free flow of information, to ensure national survival. Mandelbaum points out that states have always borne the responsibility of protecting their National Security.²²² History shows that states limit individual and collective rights to preserve National Security.²²³ More specifically, states restrict the ability of actors to access, receive and impart information in the interests of National Security.²²⁴ In fact, it is universally accepted that states are justified in limiting the free flow of information to preserve their National Security.²²⁵

While South African law protects the rights to access, receive and impart state-held information, it also requires South Africa's National Security to be protected,²²⁶ and places this duty firmly in the hands of the state.²²⁷ Sections 198(c) and 198(d) of the Constitution states that:

“(c) National security must be pursued in compliance with the law, including international law.

(d) National security is subject to the authority of Parliament and the national executive.”

Thus, the state may limit the free flow of information for reasons of National Security. There is clearly a tension between the rights to access, receive and impart information, and the state's duty to protect National Security. The courts, which are

²²¹ Coliver “Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information” in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 12.

²²² M Mandelbaum *The Fate of Nations: The Search for National Security in the Nineteenth and Twentieth Centuries* (1988) 1; Constitution S198.

²²³ B Buzan *People, states and fear: The National Security problem in International Relations* (1991) 9.

²²⁴ Constitution S16(1), S36 & S198(d); PAIA S41(1)(a)(i) & S41(1)(a)(ii).

²²⁵ Mendel “National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles” in *National Security and Open Government: Striking the right balance* 4.

²²⁶ Constitution S198(c).

²²⁷ S198(c) & S198(d).

regarded as the appropriate forum in which these disputes must be resolved,²²⁸ must do so in terms of applicable law and in a manner which promotes Open Justice.²²⁹ The judiciary should protect such sensitive information from being accessed and/or expressed by limiting these rights in the interests of National Security.²³⁰ PAIA and PIA are the two acts that permit the state to limit an information actor's rights to access, receive and impart information, ostensibly for reasons of National Security.²³¹

2.4.2 NATIONAL SECURITY AND THE RIGHT TO ACCESS STATE-HELD INFORMATION IN TERMS OF THE PROMOTION OF ACCESS TO INFORMATION ACT

While PAIA guarantees the right to access state-held information, it also permits the state to deny access to the requested record in specific instances.²³² If the requester contests the decision of the state to withhold the requested record and provided that all of PAIA's procedural requirements have been satisfied,²³³ the courts can be called upon²³⁴ to resolve the tension between a requester's right to access state-held information and the state's limitation thereof.²³⁵

Sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA grant the state the authority to limit a requester's right to access state-held information, presumably for purposes of National Security. Sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA authorise an information officer

²²⁸ Constitution S16(1)(a), S16(1)(b), S34 & S35(3)(c).

²²⁹ S36 & S165; *Johncom Media Investments Ltd v M* 2009 4 SA 7 (CC) [29]; Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 11.

²³⁰ E Mureinik "A bridge to where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31.

²³¹ PAIA S41(1)(a)(i) & S41(1)(a)(ii); BT Balule "Good v the Attorney General (2): Some Reflections on the National Security Dilemma in Botswana" (2008) 7 *U. Botswana L.J.* 153; PIA S3 & S4; J Klaaren "Open Justice and Beyond: *Independent Newspapers v Minister for Intelligence Services in re Masetlha*" (2009) 126 *SALJ* 24: 721.

²³² PAIA Part 2 Chapter 4.

²³³ S11(1).

²³⁴ S78(1).

²³⁵ S78(1).

of any public body to deny a request for information if it is reasonably expected that making a record publicly available could prejudice:

“(i) the defence of the Republic; or

(ii) the security of the Republic; [...]”²³⁶

Additionally, in order to assist the state in its protection of the ‘security and defence of the Republic’, section 41(2) of PAIA identifies specific information which, if publicised, may compromise these interests. The state may deny a request for access to a record containing such information if there is a reasonable expectation that the publicity of the record would compromise the ‘security or defence of the Republic’ or put it at risk.²³⁷ In terms of section 41(2), it is important to note that the publication of specific state-held information will not automatically compromise the Republic’s ‘security or defence’. Rather, the act requires the state to apply its mind to determine if it can be reasonably expected that the publicity of the information will lead to the prejudice of the security or defence of the state. It is only when the state reaches that conclusion, based on its assessment of the record, that it should deny a request to access state-held information, provided that mandatory disclosure is not required in terms of section 46 of PAIA.

Naturally, this limitation places the preservation of the ‘security or defence of the Republic’ at odds with everyone’s right to access any state-held information.²³⁸ Provided that all of PAIA’s procedural requirements have been satisfied,²³⁹ the courts can be called upon to resolve the tension between a requester’s right to access state-held information and the state’s limitation thereof.²⁴⁰ The act authorises the court to make any order that is just and equitable, including confirming, amending or setting aside the state’s decision to deny a request for access to information.²⁴¹ The judiciary

²³⁶ S41(1)(a)(i) & S41(1)(a)(ii).

²³⁷ S41(2).

²³⁸ S11(1), S41(1)(a)(i) & S41(1)(a)(ii).

²³⁹ S11(1).

²⁴⁰ S78(1).

²⁴¹ S41(1) & S82(a).

in its resolution of the dispute must determine if the state's limitation of an actor's right to access state-held information for reasons of National Security is justified.²⁴²

As mentioned earlier in this chapter, the right to access state-held information and the values which underscore it are defined with a sufficient degree of clarity. They should therefore not prevent courts from deciding cases on a principled basis. The difficulty for the judiciary in resolving disputes between access to state-held information and security is caused, rather, by PAIA's failure i) to specifically define the content of the security interests it aims to preserve, i.e. the meaning of 'security and defence'; ii) to identify the threats which the act aims to guard against; and iii) to protect the appropriate security interests. Each of these drawbacks will be considered below.

2.4.2.1 VAGUE MEANINGS: SECURITY AND DEFENCE OF THE REPUBLIC

Sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA empower the information officer of a public body to deny a request to access state-held information if its disclosure could reasonably be expected to compromise the defence of the Republic or the security of the Republic.²⁴³ These provisions do not expressly refer to National Security. As mentioned earlier in this chapter, neither PAIA nor its regulations mention the words National Security.²⁴⁴ *CCII Systems (Pty) Ltd v Fakie NNO* – the first matter to be decided in terms of these provisions – did not even consider whether National Security and the 'security or defence of the Republic' are synonymous concepts.²⁴⁵ It nevertheless appears as if sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA are aimed at preserving South Africa's National Security. This is so in view of (i) the historical context of National Security, (ii) the general scheme of PAIA, and (iii) the views expressed by academics and courts.

²⁴² Constitution S165; *Johncom Media Investments Ltd v M* [29]; Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 11.

²⁴³ PAIA S41(1) & S82(a).

²⁴⁴ PAIA; GN R187 in GG 23119 (2002); (act no. 2 of 2000) GN 585 in GG 26332 (2004); S22(8) GN R991 in GG 28107 (2005); GN R965 in GG 32622 (2009); 1222 GG 39504 (2015).

²⁴⁵ *CCII Systems (Pty) Ltd v Fakie NNO* 2003 2 SA 325 (T).

First of all, sections 41(1)(a)(i) and 41(1)(a)(ii) seek to prevent prejudice to the defence and security of the Republic. Section 41(2) makes it clear that the protection of these interests extends to records containing information relating to, inter alia, military tactics and strategy, the deployment of weapons, or the deployment of a military force or unit. It also refers to information related to military and other forms of intelligence, and information that constitutes diplomatic correspondence with other states or international organisations.

These interests correspond closely to Cold War conceptions of National Security. During the Cold War, National Security was associated with a state's capacity to use force to deter military aggressors²⁴⁶ and to protect itself from violent threats.²⁴⁷ It was further concerned with the capacity of the state's intelligence apparatus to identify and assess security threats,²⁴⁸ to measure the ability, limitations and motives of foreign states,²⁴⁹ and to help enable the military to counteract threats.²⁵⁰ In addition, National Security was also linked to foreign policy. The principal aim of a state's foreign policy was to protect its independence and preserve and promote its political, social and economic policies.²⁵¹ In times of crisis, foreign policy negotiations were used in an attempt to counteract a threat to a state's National Security.²⁵² The intelligence

²⁴⁶ GP Herd & P Dunay "International security, great powers and world order" in GP Herd (ed) *Great powers and strategic stability in the 21st century: Competing visions of world order* (2010) 3: 11.

²⁴⁷ B Buzan, O Waever & J De Wilde *Security: A new framework for analysis* (1998) 50.

²⁴⁸ M Sherwin "Scientists, arms control, and National Security" in N Graebner (ed) *The National Security its theory and practice 1945-1960* (1986) 105: 111; T Quiggin *Seeing the invisible National Security intelligence in an uncertain age* (2007) 229.

²⁴⁹ MM Aid & C Wiebes "Introduction: The importance of signals intelligence in the Cold War" in MM Aid & C Wiebes (eds) *Secrets of signals intelligence during the Cold War and beyond* (2001) 1: 2-4.

²⁵⁰ J Prados "Cold War intelligence history" in RH Immerman & P Goedde (eds) *The Oxford Handbook of the Cold War* (2013) 414: 417; Aid & Wiebes "Introduction: The importance of signals intelligence in the Cold War" in Aid & Wiebes (eds) *Secrets of signals intelligence during the Cold War and beyond* 1: 7-9.

²⁵¹ A Van Nieuwkerk "South Africa's national interest" (2004) 13 *African Security Review* 89: 95.

²⁵² Sherwin "Scientists, arms control, and National Security" in N Graebner (ed) *The National Security its theory and practice 1945-1960* 105: 106-109.

apparatus had a direct impact on the tenor of foreign policy during the Cold War.²⁵³ It furnished state diplomats with essential information which influenced security negotiations significantly.²⁵⁴ Diplomats could show their enemies the vast losses they could suffer if they decided to engage in all-out war as a result of a state's powerful military force and its strategic intelligence in an attempt to dissuade any aggressor from using force as an instrument to resolve disputes.²⁵⁵

The references in section 41(2) to information relating to sensitive military, intelligence and diplomatic (foreign policy) matters are a clear indication that the terms defence and security of the Republic, as referred to in sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA, encompass state interests that have been associated with National Security since the Cold War epoch. Even though these sections do not specifically mention National Security, the interests which they aims to preserve have long been considered to form part of the Traditional conception (which will be discussed more comprehensively in the following section) of National Security. For this reason, it is submitted that National Security and the 'security and defence of the Republic' are interchangeable concepts.

Secondly, this interpretation is supported by the general scheme of the legislation. Section 11 of PAIA provides that a requester must be given access to a record held by a public body if the requester has complied with the procedural requirements of the act, and if access to the record is not refused in terms of any of the grounds of refusal as set out in the act. Sections 41(1)(a)(i) and 41(1)(a)(ii) are the only provisions in the act which can conceivably be raised to deny access to information for reasons of National Security. No other provision of PAIA provides the state with an exemption to deny a request for information on these grounds. To argue that these provisions do not extend to the interests traditionally protected by National Security just because

²⁵³ Prados "Cold War intelligence history" in Immerman & Goedde (eds) *The Oxford Handbook of the Cold War* 414: 414.

²⁵⁴ 417.

²⁵⁵ R Price & N Tannenwald "Norms and deterrence: The nuclear and chemical weapons taboos" in P Katzenstein (ed) *The culture of National Security norms and identity in world politics* (1996) 114: 116.

they do not include the latter term, would ignore the substance of the provisions and defeat their clearly expressed purpose.

Thirdly, this view has also found academic and judicial support. Balule argues that sections 41(1)(a)(i) and 41(1)(a)(ii) have to do with South Africa's National Security.²⁵⁶ Moreover, it is submitted that the High Court in *Right2Know Campaign v Minister of Police* recognised that the meaning of 'defence and security of the Republic', as contemplated in terms of sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA, is synonymous with National Security. The court stated:

"[...] disclosure could reasonably be expected to endanger' anyone, or was 'likely to prejudice or impair' any security measure of a building or a person, or to use the language of section 41, disclosure 'could reasonably be expected to cause prejudice' to the state's security."²⁵⁷

Even though the court used the term 'state's security', it has long been held that 'National Security' and 'state security' are identical concepts.²⁵⁸ The judgment thus confirms that sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA are concerned with South Africa's National Security.

While sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA are aimed at preserving National Security, the concept is still vague and open to abuse. One problem concerns the relationship between the security and defence of the Republic. These terms should ideally be interpreted in a way which does not make either of them tautologous or superfluous.²⁵⁹ However, it is not clear how they differ in meaning. Security can be understood to mean the offensive and defensive abilities of the state, while defence seems to hold the same meaning.²⁶⁰ There thus seems to be considerable overlap between the two terms. Regrettably, neither PAIA nor applicable case law defines

²⁵⁶ Balule (2008) *U. Botswana L.J.* 167.

²⁵⁷ *Right2Know Campaign v Minister of Police* 2014 [36].

²⁵⁸ AE Hillal Dessouki "Dilemmas of Security and Development in the Arab World: Aspects of the Linkage" in B Korany, P Noble, T Shaw & R Brynen (eds) *The many faces of National Security in the Arab World* (2016) 76: 77.

²⁵⁹ *Wellworths Bazaars Ltd v Chandler's Ltd* 1947 2 SA 37 (A) 43.

²⁶⁰ I Cameron *National Security and the European Convention on Human Rights* (2000) 41 & 42.

these terms or indicates how they differ.²⁶¹ The net effect is that there is considerable uncertainty over the meaning of ‘security and defence’, and it is unclear what important security interests need to be preserved through an information blackout.

The vagueness surrounding PAIA’s conception of National Security is cause for concern. There is a danger that the judiciary in resolving a dispute, or the state in deciding on an information request may unjustifiably limit the fundamental right of access to information to protect a vaguely defined state interest. Reference has already been made in the introductory chapter of this thesis to Coliver’s view that some of the worst human rights violations, attacks on democracy and threats to peace for the last 60 years have been a direct result of states’ reliance on vague conceptions of National Security to cloak their negative actions in secrecy.²⁶² Romm hypothesises that states deliberately preserve the ambiguity of the term. He argues that its imprecision allows states to continue to execute specific actions without having to worry about or be burdened by public scrutiny of their activities.²⁶³

If the judiciary is to guard against this state of affairs in terms of PAIA and satisfy the constitutional requirement set out in section 198(c) of the Constitution, the meaning of National Security (i.e. security and defence) must be clear. This is especially important since the South African executive has already attempted to rely on vague notions of National Security in the democratic epoch in an attempt to limit the free flow of information. This is clear from cases like *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* (the Masetlha decision),²⁶⁴ *Right2Know Campaign v Minister of Police*²⁶⁵ and *Mandag Centre For Investigative Journalism v*

²⁶¹ *CCII Systems (Pty) Ltd v Fakie NNO*.

²⁶² Coliver “Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information” in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 11.

²⁶³ J Romm *Defining National Security: The nonmilitary aspects* (1993) 4.

²⁶⁴ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa*. This case will be discussed comprehensively in the following chapter.

²⁶⁵ *Right2Know Campaign v Minister of Police*. This case will be discussed comprehensively in chapter 3.

Minister of Public Works.²⁶⁶ If South Africa is to avoid slipping back into its old habit of unjustifiably limiting the free flow of information to conceal malfeasance, Coliver and Romm's warnings must be heeded. Failure to address these shortcomings could result in the unjustified restriction of rights that are directly responsible for fostering democracy.²⁶⁷

A corollary drawback of PAIA's imprecise definition is that it enables the state to continue misusing its National Security powers. Vague notions of National Security have enabled states to keep their actions secret²⁶⁸ and to make it appear as if their actions were legitimate and necessary. As pointed out earlier, many states, including South Africa, have misused their National Security powers in this fashion.²⁶⁹ Naturally this needs to be avoided. Clarifying the meaning of National Security may contribute to the reduction of the abuse of this term by the state since what needs to be protected will be clearly recorded within the law.

2.4.2.2 THE FAILURE TO IDENTIFY AND DEFINE NATIONAL SECURITY THREATS

The second obstacle which could impair the judiciary's ability to resolve the tension between the right to access information and National Security, is the failure of sections 41(1)(a)(i) and 41(1)(a)(ii) to identify the threats that the courts must guard against when denying access to a request for information. Section 41(1), read together with section 82 of PAIA, permits the judiciary to deny a request for access to state-held information if the record's disclosure could reasonably be expected to cause prejudice to the Republic of South Africa's security and/or defence.

²⁶⁶ *Mandag Centre For Investigative Journalism v Minister of Public Works*. This case will be discussed comprehensively in chapter 3.

²⁶⁷ D Beetham *Democracy and Human rights* (1999) 34.

²⁶⁸ Mendel "National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles" in *National Security and Open Government: Striking the right balance 2*. See also Fourie "External media regulation in South Africa" in *Media studies; Policy management and media representation* 37 & 38.

²⁶⁹ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 13; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa*.

The purpose of the limitation is to prevent a threat from compromising National Security. The problem with the current provision is that not every publication of information that is reasonably expected to compromise National Security, should be concealed by the judiciary. There are threats which will compromise National Security, but which do not necessitate the limitation of an actor's right to access state-held information. The reason for this is that, notwithstanding the limitation on the free flow of information, the threat will still compromise the target - i.e. National Security.²⁷⁰ This is best explained by providing a short analysis of National Security threats and several examples highlighting the need of PAIA to only protect against certain threats.

During the Cold War, conceptions of National Security were concerned only with military threats. This approach was known as the 'Traditional' conception of National Security.²⁷¹ At the close of the Cold War, a variety of actors became dissatisfied with this narrow conception of National Security. They noted that it did not extend to a number of emerging threats, and still viewed military security as dominant. They started to challenge the 'Traditional' conception of National Security and proposed expanding the concept to include other issues.²⁷² The kernel of their argument was that new emerging issues of a non-military nature, could also threaten the National Security of a state.²⁷³ This post-Cold War debate, which inquired into what other issues should be identified as National Security threats, is known as the 'Wide' debate.²⁷⁴ 'Wideners' have argued for the securitisation of a number of different issues including, but not restricted to food security, mass migration, human rights issues,²⁷⁵

²⁷⁰ J Kleinig "Liberty and Security in an era of Terrorism" in B Forst, JR Greene & JP Lynch (eds) *Criminologists on Terrorism and Homeland Security* (2011) 357: 367.

²⁷¹ Buzan, Waever & De Wilde *Security: A new framework for analysis* 2.

²⁷² 2 & 3. Buzan et al submit that different issues that also could be classed as National Security threats were not recognised as such during the Cold War; J Huysmans *The politics of insecurity: Fear, migration and asylum in the EU* (2006) 17. Huysmans argues that the end of the Cold War dissolved the tension between the west and the east. Consequently, the end of the war also reduced the prominence of the military in security too.

²⁷³ Buzan, Waever & De Wilde *Security: A new framework for analysis* 2.

²⁷⁴ Huysmans *The politics of insecurity: Fear, migration and asylum in the EU* 16.

²⁷⁵ P Katzenstein "Conclusion: National Security in a changing world" in P Katzenstein (ed) *The culture of National Security norms and identity in world politics* (1996) 498: 523.

transportation, technology, terrorism,²⁷⁶ cyber-terrorism, transnational organised crime,²⁷⁷ market forces,²⁷⁸ free flow of information,²⁷⁹ narcotics, arms trading, money laundering²⁸⁰ and political posturing by other countries.²⁸¹ Notwithstanding these debates, military security remains a key part of their notion of National Security.²⁸²

If National Security is given such a wider meaning and if the term is understood *inter alia* to protect the people of a particular state, on such an understanding, it could be argued that the lack of water due to drought, threats to food security due to an insect invasion, and mass migration into a country are all threats which can compromise the lives of the people, and thus National Security. The wording of section 41(1) of PAIA nevertheless suggests that the judiciary during proceedings and the state when considering information requests would not be permitted to deny access to state-held information in the above circumstances, as the containment of information will not prevent the security threats from compromising National Security. In these cases, the limitation of the right to information will not prevent the 'Wide' threats from compromising the target, i.e. the people.²⁸³ By contrast, National Security would be protected if the judiciary denied access to an information request by a hostile foreign army that would reveal the location of the state's ballistic missiles. The same would apply if the courts prevented access to records on the state's strategic defence protocols where an air raid by a hostile state is imminent, since the publicity of this information would allow potential or existing threats to compromise National Security.

²⁷⁶ Quiggin *Seeing the invisible National Security intelligence in an uncertain age* 14.

²⁷⁷ 17.

²⁷⁸ 22.

²⁷⁹ M Supperstone *Brownlie's Law of public order and National Security* 2ed (1981) 288.

²⁸⁰ Van Nieuwkerk (2004) *African Security Review* 92.

²⁸¹ P Katzenstein "Introduction: Alternative perspectives on National Security" in Katzenstein P (ed) *The culture of National Security norms and identity in world politics* (1996) 11-19.

²⁸² Romm *Defining National Security: The nonmilitary aspects* 1.

²⁸³ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [164.] Sachs J submits that security laws must have the demonstrable effect of ensuring that National Security is not compromised by threats.

In other words, there are only certain threats that necessitate that information be embargoed to preserve National Security. However, section 41(1) of PAIA does not identify what those threats are, or should be. All that this provision aims to do is to contain information where it is reasonable to expect that its publication can cause prejudice to National Security. There is unfortunately no clarity on the prejudice that needs to be avoided. Unsurprisingly, the state argued in *Right2Know Campaign v Minister of Police* that state-held information should be contained where there are 'dark forces' which can put the Republic at risk despite the vagueness and remoteness of the threat.²⁸⁴ If the courts are to resolve the tension correctly, it should have clarity on the types of threats it must neutralise by limiting the right to access state-held information. The rejection of a request to access information cannot be permitted to stand on account that a disclosure is reasonably expected to result in some mysterious prejudice to the state. Only once there is clarity on the nature of the threat will a decision maker be able to assess if a disclosure of state-held information can reasonably be expected to compromise National Security.²⁸⁵ Failing to identify National Security threats with sufficient specificity, could lead to judicial error or abuse. Additionally, the act in its current form preserves the state's opportunity to misuse National Security by either over-protecting National Security or concealing state abuse.

2.4.2.3 THE FAILURE TO PROTECT APPROPRIATE SECURITY INTERESTS

The final drawback that could impair the judiciary in its ability to resolve the dispute, is the potential failure of PAIA to protect appropriate security interests.

As mentioned earlier, sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA only protect the 'security or defence of the Republic'. There are however several other conceptions of National Security in South African law that protect security interests that are on the face of it different from those which PAIA aims to preserve.²⁸⁶ It may be appropriate

²⁸⁴ *Right2Know Campaign v Minister of Police* [7].

²⁸⁵ PAIA S41(1).

²⁸⁶ The different conceptions of National Security will be discussed more comprehensively in chapter 3 herein.

for PAIA to protect these interests. The former DCJ Moseneke in the Masetlha decision described National Security as:

“[...] our collective safety and security.”²⁸⁷

Yacoob J, on the other hand, viewed National Security as a state interest targeted at benefiting the people.²⁸⁸ Van der Westhuizen J stated that National Security is aimed at protecting the people, the Republic’s democratic order and state sovereignty.²⁸⁹ The 2013 amendment to the National Strategic Intelligence Act 39 of 1994 (NSIA) recorded that National Security includes the protection of the Republic’s people, its constitutional order and its territorial integrity.²⁹⁰

There are also international instruments which protect and give content to security interests that are seemingly different from those embedded in PAIA. The act does not seem to take cognisance of these established conceptions of National Security. The Siracusa Principles (SP) and the Johannesburg Principles (JHBP) are the most notable examples. Admittedly, a number of commentators have pointed out that a universally accepted definition of National Security does not exist.²⁹¹ Be that as it may, the SP and the JHBP are non-binding international instruments that should be used as a mechanism to determine if PAIA protects the appropriate security interests. The rationale for this view will be set out below.²⁹²

²⁸⁷ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [62].

²⁸⁸ [85].

²⁸⁹ [174].

²⁹⁰ General Intelligence Laws Amendment Act 11 of 2013; National Strategic Intelligence Act 39 of 1994 S1 “national security”.

²⁹¹ JJ Richardson, W Mason & R Peters “Promoting Science and Technology to serve National Security” in AD James (ed) *Science and Technology Policies for the Anti-terrorism Era* (2006) 23: 34. See also El Ouali *Territorial Integrity in a Globalizing World: International Law and States’ Quest for Survival* 1-8.

²⁹² These conceptions of National Security will be discussed more comprehensively in the following chapter.

The Constitution requires that National Security be pursued in terms of international law.²⁹³ In an attempt to determine what National Security should mean, guidance must be sought from international treaties and customary international law.²⁹⁴ A number of international human rights treaties deal with the tension between information and National Security. These include the International Covenant on Civil and Political Rights (ICCPR),²⁹⁵ the African Charter on Human and Peoples' Rights,²⁹⁶ both of

²⁹³ Constitution S198(c).

²⁹⁴ JC van den Boogaart "Fighting by the principles: Principles as a source of International Humanitarian Law" in M Matthee, B Toebe & M Brus (eds) *Armed Conflict and International Law: In Search of the Human Face* (2013) 3: 13; Constitution S198(c).

²⁹⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 19; E Evatt "The International Covenant on Civil and Political Rights: Freedom of expression and State security" in S Coliver, P Hoffman, J Fitzpatrick & S Bowen (eds) *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999) 83: 83-106; AF Bayefsky *How to Complain to the UN Human Rights Treaty System* (2002) 10; N Jayawickrama *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (2002) 193 & 194; L Feng "The appeal mechanism under the National Security Bill: A proper balance between Fundamental human rights and National Security?" in H Fu, CJ Petersen & SNM Young (eds) *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (2005) 331: 357 & 358; R Perruchoud "State Sovereignty and Freedom of movement" in B Opeskin, R Perruchoud & J Redpath-Cross (eds) *Foundations of International Migration Law* (2012) 123: 137. The tension between National Security and the free flow of information is captured in the text of the International Covenant on Civil and Political Rights. Evatt shows that even though National Security is a valid defence which justifies limiting the right to free flow of information in terms of the treaty, the Covenant leaves interested parties in the dark as to what the concept means. Bayefsky, Jayawickrama, Evatt, Feng and Perruchoud have all analysed the provisions which allow for rights to be limited in the interests of National Security. However, none of these commentators specifically identify what it is either or substantively unpack the concept.

²⁹⁶ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (ACHPR) Art 11 & Art 12.2; *Alhassan Abubakar v Ghana* Communication no. 103/93 (1996); *Article 19 v Eritrea* Communication no. 275/2003 (2007); *Media Rights Agenda v Nigeria* Communication no. 224/98 (2000); *Kenneth Good v Republic of Botswana* Communication no. 313/05 (2010). The Banjul Charter does not expressly provide a definition for National Security. The Banjul Charter does however specifically allow several rights to be limited in the interests of National Security. The Commission has not yet been called upon to deal with any matter concerning any of these specific articles. Thus, with respect to these provisions, nothing can be learnt about National Security by examining the decisions of the Commission. There have been instances in which states have raised National Security to justify their derogation from the

which have been ratified by South Africa,²⁹⁷ the European Convention on Human Rights²⁹⁸ and the American Convention on Human Rights²⁹⁹ which have no application

Charter. However, none of these matters provides any information clarifying the meaning of this concept. In the *Alhassan Abubakar* matter, National Security was raised but no decision was made on the meaning of the concept. The respondent state in *Article 19 v Eritrea* raised National Security *inter alia* to justify its actions, but no attempt was made to unearth the meaning of this concept. National Security was also the motivation for the responding state's actions in the *Media Rights Agenda* matter, but nowhere in this case is the nature of this concept clarified. The respondent State in the *Kenneth Good* case placed great emphasis on the fact that its actions were motivated by National Security concerns, but nowhere in this matter is the meaning of this concept identified.

²⁹⁷ E de Wet "South Africa" in D Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (2011) 567: 578; African Commission on Human and Peoples' Rights "Ratification Table: African Charter on Human and Peoples' Rights" (2015) *African Commission on Human and Peoples' Rights* <<http://www.achpr.org/instruments/achpr/ratification/>> (accessed 15-01-2016).

²⁹⁸ European Convention on Human Rights (entered into force 3 September 1953) 213 UNTS 222 (ECHR) as amended by Protocols Nos. 11 and 14 (1950) ETS 5; 213 UNTS 221 Art 10(1) & Art 10(2); Cameron *National Security and the European Convention on Human Rights* 50; *Esbester v United Kingdom* (1994) 18 EHRR CD72; European Court of Human Rights Research Division "National Security and European case-law" (2013) *European Court of Human Rights* <[http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/Jurisprudence%20CEDH_En%20\(final\).pdf](http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/Jurisprudence%20CEDH_En%20(final).pdf)> (accessed 15-01-2016) 4; *Janowiec v Russia*, Application No. 55508/07 and 29520/09, (21 October 2013). The European Convention on Human Rights does not define this term, despite specifically mentioning that states are permitted to derogate from the right to free expression where their National Security is at stake. Cameron argues that any attempt to distil the meaning from the Convention's *travaux préparatoires* is also superfluous. It does not draw one close to the meaning of this term. The European Commission of Human Rights in the *Esbester* decision was of the viewpoint that National Security could not be comprehensively defined. Although the Commission's decision was made in 1994, the European Court of Human Rights Research Division argues that its holding still has purchase. Currently the meaning of National Security under the European Convention on Human Rights is still imprecise and vague. The European Court of Human Rights in the *Janowiec* decision has even gone as far as to hold that it will not question a state's defence of National Security on the grounds that it does not occupy a seat of competence which allows it to accurately test it.

²⁹⁹ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) Art 13(1); J Kish & D Turns *International Law and Espionage* (1995) 36; EB Rodrigues Jr. *The General Exception Clauses of the TRIPS Agreement: Promoting Sustainable Development* (2012) 53; D Shelton & PG Carozza *Regional Protection of Human Rights Pack 2ed* (2013) 573; V Krsticevic, JM Vivanco, JE Méndez & D Porter "The Inter-American system of Human Rights Protection: Freedom of Expression, "National Security doctrines" and the transition to elected

in South Africa, but provide examples of how other regions resolve this tension.³⁰⁰ Unfortunately, none of these international instruments shed light on the meaning of National Security. The same applies to customary international law.³⁰¹

governments” in S Coliver, P Hoffman, J Fitzpatrick & S Bowen (eds) *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999) 161: 168 & 169. Kish and Turns point out that free flow of information can be limited for purposes of National Security in terms of the American Convention on Human Rights. Shelton and Carozza show that the need to protect National Security must outweigh the social need for free expression when the right is limited. Rodrigues Jr notes that the limitation of free flow of information must result in the protection of National Security and should only restrict the right as far as what is necessary to protect this important social interest. The Convention does not set down a meaning for National Security. However Krsticevic, Vivanco, Méndez and Porter show that the Convention does require that the defence of National Security be captured in national law and that National Security be defined by the states national law. Since National Security will be defined by individual states and these states will identify different interests which need protection, a fixed and universally accepted definition for National Security cannot be established under the American Convention on Human Rights.

³⁰⁰ P Mahoney & L Early “Freedom of Expression and National Security: Judicial and Policy approaches under the European Convention on Human Rights and other Council of Europe Instruments” in S Coliver, P Hoffman, J Fitzpatrick & S Bowen (eds) *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (1999) 109: 109; Krsticevic et al “The Inter-American system of Human Rights Protection: Freedom of Expression, “National Security doctrines” and the transition to elected governments” in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 161-164.

³⁰¹ S Rose-Ackerman & B Billa “Treaties and National Security” (2007-2008) 40 *N.Y.U. J. Int'l L. & Pol.* 437: 443-445, 449 & 450; UNCTAD *The Protection of National Security in IIAs* (2009) 34. Rose-Ackerman and Billa opine that no specific National Security exception exists in customary international law. In support of their perspective the authors identify the Vienna Convention on the Law of Treaties (Vienna Convention) and the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) as customary international law before demonstrating that neither of these legal instruments includes a specific National Security exception. Irrespective of this, Rose-Ackerman and Billa argue that National Security can still be protected by customary international law, but it must be protected under the auspices of one of the law's existing exceptions. The four exceptions are the law of reprisal, self-defence, the doctrine of necessity and the *clausula rebus sic stantibus* principle. The law of reprisal and the *clausula rebus sic stantibus* principle are codified in the Vienna Convention while the balance of the exceptions are recognised by the ILC Articles. The authors argue that irrespective of the fact that none of the exceptions embedded within the aforementioned covenants expressly mentions National Security, or the interests that it protects, these customary international law exceptions are crafted broadly enough so that they can be used to protect any state

As a consequence of the lack of a fixed definition in the ICCPR and other international human rights treaties, international law experts came together on two separate occasions to define what National Security means.³⁰² The first took place in 1984. A symposium was convened by the International Commission of Jurists, the International Association of Penal Law, and interest groups.³⁰³ What was eventually produced was the SP.³⁰⁴ The purpose of the SP is to provide uniform interpretations of limitations on the rights in the ICCPR.³⁰⁵ One such interpretation provided by the SP is a definition of National Security. The SP takes the position that National Security protects three interests, namely a 'state's political independence', its 'territorial integrity' and the 'existence of the nation'.³⁰⁶ In terms of the Covenant, states are thus permitted to derogate from their duty to protect the free flow of information if it will compromise any of these interests. The SP are not binding on states. Nevertheless,

whose National Security is at risk. The United Nations Conference on Trade and Development (UNCTAD) support Rose-Ackerman and Billa's line of reasoning. UNCTAD penned that states are well within their rights if they derogate from their duties on the grounds of customary international law provided that a treaty does not include a National Security exception. Like the aforementioned authors UNCTAD takes the position that customary international law's exceptions should be relied on in matters of National Security. Only the existing exceptions can be engaged to release a state from its duties where a state's National Security is threatened. The requirements of the exceptions must be subscribed to when keeping the integrity of a state's National Security intact. Additionally the authors submit that several other universal exceptions may also be engaged in an attempt to protect a state's National Security, namely the doctrines of distress, impossibility, and *force majeure*. Yet, National Security must still be protected by invoking the universal exceptions. The obligation on states to utilise either customary international law exceptions or the universal exceptions in matters of National Security points to the fact that no implicit, independent and broad based National Security exception exists. Although customary international law is capable of protecting National Security, it does not shed any light on what National Security is, the state interests on which the concept is constructed, the nature of threats or what requirements must be present in order to conclude that a threat exists.

³⁰² Balule (2008) *U. Botswana L.J.* 162.

³⁰³ A Domrin *The Limits of Russian Democratisation: Emergency Powers and States of Emergency* (2006) 51.

³⁰⁴ O Gross & F Aoláin "To Know where we are going, we need to know where we are: Revisiting States of Emergency" in A Hegarty & S Leonard (eds) *Human Rights: An Agenda for the 21st Century* (1999) 79: 88.

³⁰⁵ Balule (2008) *U. Botswana L.J.* 162.

³⁰⁶ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984) Principle 29.

they have been endorsed by the United Nations (UN).³⁰⁷ If a new conception of National Security is to be developed, or if the appropriateness of a conception of National Security needs to be tested, cognisance should be taken of these principles for two reasons. Firstly, the meaning of this conception of National Security was the product of expert contributions that drew from a variety of experiences.³⁰⁸ Secondly, the UN endorses the definition and thus recognises its value on an international level.³⁰⁹

The second attempt to identify what National Security means at an international level was undertaken at the behest of Article 19, the International Centre against Censorship. Their endeavours resulted in the adoption of the JHBP in 1996.³¹⁰ The purpose of the JHBP was to provide a set of guidelines that gives adequate protection to both the right to the free flow of information and the state's obligation to protect National Security.³¹¹ The JHBP was meant to fill an important gap despite the fact that international law permits the right to free flow of information to be limited in the interests of National Security.³¹² However, National Security is not defined in international treaties.³¹³ The inspiration for these principles was drawn from various sources of international and comparative law.³¹⁴ One of the aims in crafting these principles was

³⁰⁷ Balule (2008) *U. Botswana L.J.* 165.

³⁰⁸ Domrin *The Limits of Russian Democratisation* 51.

³⁰⁹ Balule (2008) *U. Botswana L.J.* 165.

³¹⁰ Article 19 "The Johannesburg Principles on National Security, Freedom of Expression and Access to Information" (1996) *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* <<http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>> (accessed 15-01-2016); Balule (2008) *U. Botswana L.J.* 164; Article 19 "Defending Liberty" (2015) *Article 19* <<http://www.article19.org/index.php?lang=en>> (accessed 15-01-2016). Article 19 is a London based charitable company that focuses on ensuring that all people have the right to express themselves, have access to information and buttress press freedom.

³¹¹ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 13.

³¹² Mendel "National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles" in *National Security and Open Government: Striking the right balance* 8.

³¹³ Balule (2008) *U. Botswana L.J.* 162.

³¹⁴ Mendel "National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles" in *National Security and Open Government: Striking the right balance* 9.

to set the benchmark on how international law should develop in light of the tension between the free flow of information and National Security.³¹⁵ Nevertheless, like the SP, the JHBP, despite being endorsed by the UN, does not have any binding effect on states, but can and should act as a guideline to be used to construct, or test the appropriateness of a South African definition of National Security. The reason for this is that these documents have become soft law. The endorsements of the JHBP and the SP came through reports by the special rapporteurs of the UN.³¹⁶ Often the special rapporteurs' reports set the standards and norms on specific matters.³¹⁷ These reports are considered to be secondary soft law and can be used to assist in determining the meaning of National Security.³¹⁸

The Tshwane Principles is another instrument which is concerned with National Security and the free flow of information. On the 12th of June 2013, The Global Principles on National Security and the Right to Information, which for the remainder of this thesis will be referred to as the Tshwane Principles, were created. The purpose of this document is to set out norms for states engaged in the process of enacting laws which would enable them to withhold information on the grounds of National Security. The Tshwane Principles is based on international law, national law, expert contributions, and applicable norms and standards. This document is the product of contributions by 22 organisations and academic centres, 70 countries around the world, 500 experts, four special rapporteurs on freedom of expression and media freedom and the special rapporteur on counter-terrorism and human rights.³¹⁹ Two additional objectives of the Tshwane Principles were to produce a document which

³¹⁵ Mendel "National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles" in *National Security and Open Government: Striking the right balance* 9.

³¹⁶ UN Special Rapporteur on Freedom of Expression and Opinion's 1995 Report, TN Doc. E/CN.4/1995/32 para. 48 (14 December 1994) for the JHBP; ITN Sub-Commission Special Rapporteurs, Mssrs. Danilo Turk and Louise Joinet in: 'The Right to Freedom of Opinion and Expression: Final Report', UN Doc. E/CN.4/Sub.2/1992/9 (14 July 1992) for the SP; see also Balule (2008) *U. Botswana L.J.* 165.

³¹⁷ S Subedi "The UN Human Rights Special Rapporteurs and the Impact of their Work: Some Reflections of the UN Special Rapporteur for Cambodia (2016) 6 *AsianJIL* 1: 3.

³¹⁸ D Shelton "Compliance with International Human Rights Soft Law" (1997) 29 *Stud. Transnat'l Legal Pol'y* 119: 122-124.

³¹⁹ Unknown *The Global Principles on National Security and the Right to Information* (2013) 5.

would guide states when employing National Security as a defence and to guard against state abuse when employing this concept in the information context.³²⁰ One would have expected that, in order to achieve these objectives, the Tshwane Principles would at the very least put forward a definition of National Security. However, the Tshwane Principles' sole contribution to debates on the meaning of National Security is found in Principle 2(c) which states that:

“It is good practice for national security, where used to limit the right to information, to be defined precisely in a country's legal framework in a manner consistent with a democratic society.”³²¹

Disappointingly the Tshwane Principles does not indicate what National Security means, or should mean, and does not assist decision-makers in defining the term in the South African context.

Sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA do not expressly refer to some of the state interests that are referred to in the above definitions of National Security. They do not explicitly authorise the executive or judiciary to limit a requester's right to access information if the information's publicity will compromise our collective safety and security, the people, the Republic's democratic order, territorial integrity, state sovereignty, the state's political independence, the existence of the nation or the country's existence.

The omission of potentially important security interests from PAIA's conception of National Security could have adverse consequences for the protection of National Security.³²² The failure to protect the appropriate interests also leads to several additional problems. Firstly, no clarity exists as to what a state should protect when it limits the right to access state-held information. Secondly, it impairs the ability of states to identify threats accurately. National Security threats only exist if there is a target. Targets therefore need to be identified to determine which threats can compromise them.³²³ Thirdly, a corollary problem is that the state cannot focus its actions on

³²⁰ *The Global Principles on National Security and the Right to Information* 6.

³²¹ 12 & 14.

³²² Schuller (2013-2014) *UCLA J. Int'l L. Foreign Aff* 177 & 178.

³²³ P Paleri *National security: Imperatives and challenges* (2008) 89.

counteracting National Security threats from compromising the targets since these objects are not clearly defined.

It could nevertheless be argued that the terms ‘security or defence of the Republic’, as referred to in sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA, can and should be interpreted to include the other security interests embedded within the other South African and international conceptions of National Security. Conversely, if the act is not reasonably capable of being interpreted in this fashion, it should be assessed if the security interests are of such importance that it warrants amending the act in order to protect them.

It is therefore necessary to consider what security interests PAIA should protect in view of the different local and international conceptions of National Security and the uncertainty of the meaning of the term ‘security and the defence of the Republic’.

2.4.2.3.1 FOREIGN CONCEPTIONS OF NATIONAL SECURITY

In addition to the South African and international conceptions of National Security referred to above, foreign law may shed further light on the possible meanings of National Security. The United Kingdom (UK) and the (USA) are two foreign jurisdictions which have developed various strategies for the preservation of their National Security.³²⁴ In order to determine if PAIA’s conception of National Security protects the appropriate security interests, the UK and the USA’s conceptions of National Security will be examined to determine if there are any additional security interests which the act should preserve.

2.4.2.3.1.1 THE UNITED KINGDOM

National Security has never been defined in the legislation of the UK.³²⁵ The European Convention of Human Rights (ECHR), which has been incorporated into the

³²⁴ PF Scott *The National Security Constitution* (2018) 1-36; CA Watson *U.S. National Security: A Reference Handbook* (2008) 1-14.

³²⁵ J Wadham & K Modi “*National Security and Open Government in the United Kingdom*” in The Maxwell School of Syracuse University (ed) *National Security and Open Government: Striking the Right*

UK's domestic law, does not define this term either.³²⁶ Despite this, the English courts did start to define National Security in *Secretary of State for the Home Department v Rehman*. In this matter the House of Lords was called upon to hear an appeal against a decision by the Special Immigration Appeals Commission, which held that Mr Rehman, a Pakistani National who had stayed in the UK since 9 February 1993, should not be deported on the basis that his continued presence represented a threat to the UK's National Security.³²⁷ The appeal was heard by Lord Slynn of Hadley, Lord Steyn, Lord Hoffmann, Lord Clyde and Lord Hutton. The appeal was unanimously dismissed by all of the Lords. Of the five judges, only Lord Slynn of Hadley and Lord Hoffman engaged with the meaning of National Security.

Lord Slynn of Hadley was of the view that National Security should not be limited to protecting the U.K, its people and its system of government,³²⁸ but was a far broader concept which included the protection of foreign states which, if overthrown, could result in reprisals against the United Kingdom.³²⁹ Scott argues that Lord Slynn of Hadley incorporated international security under National Security.³³⁰ He took a very broad view by holding that the meaning of National Security should not be limited to specific state interests only, but should also extend to international security.³³¹

Conversely Lord Hoffman took a much narrower view of the meaning of National Security. He stated that:

“But there is no difficulty about what "national security" means. It is the security of the United Kingdom and its people.”³³²

Balance (2003) 75:78; see also L Nomikos “Are We Sleepwalking into a Surveillance Society” (2017) vol 4 BLR 111: 113.

³²⁶ Wadham & Modi “*National Security and Open Government in the United Kingdom*” in The Maxwell School of Syracuse University (ed) *National Security and Open Government: Striking the Right Balance* 75:78.

³²⁷ *Secretary of State for the Home Department v Rehman* (AP) [2001] UKHL 47 [1].

³²⁸ [15].

³²⁹ [16].

³³⁰ Scott *The National Security Constitution* 282.

³³¹ *Secretary of State for the Home Department v Rehman* [16].

³³² [50].

Lord Hoffman did not indicate in his judgement if the concept was open to a broader interpretation.³³³ He agreed with Lord Slynn of Hadley that National Security concerned the protection of the UK and its people, but there was no consensus on whether the protection of the government was a state interest worthy of protection, or whether international security formed part of the UK's conception of National Security.

Despite the indistinct meaning of National Security in the UK,³³⁴ it is clear from the analysis of Lord Slynn of Hadley and Lord Hoffmann that the English conception of National Security includes, at a minimum, the UK and its people. In this, it overlaps with some of the South African conceptions of National Security referred to above. For example, Moseneke DCJ, Yacoob J, Van der Westhuizen J and NSIA all acknowledge that the people of South Africa are among the interests to be protected under National Security. Moreover, even though it is not immediately apparent what exactly the UK encompasses in this context, it appears to include its territorial integrity. NSIA also recognises that South Africa's territorial integrity must be preserved. However, the identification of these protectable interests does not really take matters forward in the South African context, as they are formulated at a high level of generality, without unpacking the different meanings of these terms, and as they stand they do not really add anything new to the South African conceptions of National Security referred to above.

2.4.2.3.2 THE UNITED STATES

Despite the importance attached to National Security in the USA, there is sharp disagreement on what it means.³³⁵ The USA does not have a nationally accepted definition of National Security. Sarkesian, Williams and Cimbala have attempted to close this gap by providing a definition for this term. They submit that the concept should be defined as the ability of the US' institutions to prevent harm to Americans,

³³³ [33]-[62].

³³⁴ Nomikos (2017) *BLR* 117. The waters are muddied even further by National Security rhetoric in the UK. The Prime Minister, Theresa May, has used the term arbitrarily, and has even labelled the leader of the Labour Party a threat to National Security.

³³⁵ Richardson, Mason & Peters "Promoting Science and Technology to serve National Security" in AD James (ed) *Science and Technology Policies for the Anti-terrorism Era* 23: 34. See also El Ouali *Territorial Integrity in a Globalizing World: International Law and States' Quest for Survival* 1-8.

their national interests and their confidence.³³⁶ However, this definition is not uncontroversial. Jordan, Taylor Jr., Meese and Nielsen opine that National Security means the preservation of the people, their way of life and the territory.³³⁷ Contrary to both views, Watson argues that the concept will never have a fixed meaning, and that its interpretation will fluctuate over time.³³⁸ In contradistinction to these authors, Ibrahim defines National Security as the national defence, economic interests, or foreign relations of the United States.³³⁹

The failure to define what National Security means in the US will give rise to all of the problems which Coliver cautions against. Due to the inconsistent definitions of National Security, the lack of a fixed definition and the fluidity of the term, US conceptions of National Security are of limited use in assisting with what National Security should mean in the South African context.

2.4.3 NATIONAL SECURITY AND THE RIGHT TO RECEIVE AND IMPART STATE-HELD INFORMATION IN TERMS OF THE PROTECTION OF INFORMATION ACT

PIA is one of the primary pieces of legislation that permits the state to protect sensitive information by restricting its receipt or dissemination. PIA was enacted to replace the Official Secrets Act 16 of 1956.³⁴⁰ Notwithstanding that both PAIA and PIA allow for the limitation of the free flow of information for security reasons, the two pieces of legislation are products of different time periods in South Africa's history. Additionally, they are also considered to have different statuses.

The introduction of PAIA into South Africa's constitutional democracy was geared towards promoting a transparent constitutional democracy without compromising South Africa's security interests.³⁴¹ As set out earlier in this thesis it was enacted to

³³⁶ SC Sarkesian, JA Williams & J Cimbala *US National Security: Policymakers, Processes & Politics* 4ed (2008) 4.

³³⁷ AA Jordan, WJ Taylor, Jr., MJ Meese & SC Nielsen *American National Security* 6ed (2008) 3 & 4.

³³⁸ Watson *U.S. National Security: A Reference Handbook* 5-8.

³³⁹ N Ibrahim "The origins of Muslim racialization in U.S Law" 7 *UCLA J. Islamic & Near E.L* 121: 139 & 140.

³⁴⁰ Klaaren (2002) *SALJ* 722.

³⁴¹ L Johannessen, J Klaaren & J White "A motivation for legislation on the access to information" (1995) 112 *SALJ* 45: 45.

give effect to the constitutional right to access information.³⁴² Prior to PAIA's enactment Johannessen, Klaaren and White opined that this act should bring about two important additions to South Africa's law in the information and security context. Firstly, the act ought to ensure that government store and preserve its information, and secondly, it should prevent the South African government from relying on secrecy laws to the detriment of individuals.³⁴³ Following the enactment of PAIA, the act gave effect to both of the above suggestions. PAIA obligated the state to provide access to all of its recorded information³⁴⁴ and additionally ensured that the state could deny access to state-held information if it would impair the Republic of South Africa's security interests.³⁴⁵ Most importantly PAIA is constitutional.

It is unusual that one of the central legislative documents used to restrict the expression of sensitive information originated from the Apartheid era.³⁴⁶ Originally, PIA was used by an undemocratic and oppressive government which saw threats to its powers coming from the different liberation movements.³⁴⁷ The act was employed

³⁴² Constitution S32 and PAIA Preamble.

³⁴³ Johannessen, Klaaren & White (1995) *SALJ* 53.

³⁴⁴ PAIA S1 "record" & S11.

³⁴⁵ S41(1)(a)(i) & S41(1)(a)(ii).

³⁴⁶ Milo et al "Freedom of expression" in *Constitutional law of South Africa* 42-173.

³⁴⁷ R Ross *A concise history of South Africa* (2008) 132. The laws of Apartheid favoured the white population of South Africa in every facet of life; N Gordimer *Writing and being* (1995) 127. The struggle for change in South Africa was advocated for by the domestic liberation movements which were banned by the Apartheid regime; MK Asante *The history of Africa: The quest for eternal harmony* (2012) 274. The original objective of the liberation struggle was to use peaceful measures to bring about social, political and economic change. In the wake of the violent and oppressive measures adopted by the Apartheid establishment the movement started to use more forceful and sophisticated methods to fight for change. The movement utilised political and offensive measures to try and force change within the state. The offensive measures originated from within and outside of the borders of South Africa; S Ellis & T Sechaba *Comrades against Apartheid: The ANC and the South African Communist Party in exile* (1992) 124 & 125. States on the border of South Africa provided strategic points from which the movement could launch their offensive measures. Yet, these measures could only be executed with the approval of these frontline states. To counteract the assistance rendered by the frontline states and the efforts of the foreign based liberation movement, the Apartheid regime embarked on a project of destabilisation in an attempt to force the frontline states to expel the liberation movements from them; RA Schroeder *Africa after Apartheid: South Africa, race, and nation in Tanzania* (2012) 3. The Apartheid government's attempt to protect National Security by undermining the liberation movement's armed

to manage internal security information and ensure that it was not disseminated. PIA was specifically employed to maintain the Apartheid government's control over race relations.³⁴⁸ Klaaren argues that, in its current form, PIA provides the South African government with very broad powers in pursuit of security.³⁴⁹ These powers are so broad that Currie states that the act is a throwback to the Apartheid era and there have been many calls for it to be completely repealed.³⁵⁰ The reason for this is that PIA is considered to be unconstitutional. Despite the above criticisms of PIA, the act is still on South Africa's statute books and can be utilised by the state to prevent the free flow of information, for reasons of National Security. The High Court in *Mandag Centre For Investigative Journalism v Minister of Public Works* recognised that PIA can be used to deny access to state information on the grounds of National Security. However, the court failed to set out which specific provisions of the act allow for this.³⁵¹ Despite this, it is submitted that the primary provisions which allow for the limitation of information for National Security reasons can be found in sections 3 and 4 of the act.

Section 3 of PIA aims to criminalise the receipt of information from or relating to any prohibited place, armaments, the defence of the Republic, any military matter, any security matter, the prevention or combating of terrorism, or any other matter or article,

struggle by embarking on a project of destabilisation of bordering neighbour states, resulted in the formation of strategic alliances between newly independent African states whose objective it was - throughout Africa - to end white domination. Pressure for change came from the domestic movements, the foreign based movements and foreign states; PIA S3 & S10(1). PIA therefore could be used by the Apartheid government to sanction any person who accessed or received information protected by virtue of its importance to National Security, provided it was procured with the intention of disclosing it to the Apartheid regime's enemies. To make matters worse for an accused. PIA creates a presumption which holds that any person who accessed or received such information will be presumed to have done so with the intention of prejudicing the National Security of the Republic of South Africa.

³⁴⁸ NA Mhiripiri & T Chari *Media Law, Ethics, and Policy in the Digital Age* (2017) 253.

³⁴⁹ J Klaaren (2002) SALJ 722.

³⁵⁰ I Currie "Freedom of Information: Controversies and Reforms" in V Federico, H Corder, R Orrù (eds) *The Quest for Constitutionalism: South Africa since 1994* (2014) 169: 174.

³⁵¹ *Mandag Centre For Investigative Journalism v Minister of Public Works* [24].

which was procured for the purpose of dissemination to hostile states and actors, as the publicity of the information would compromise the 'security of the Republic'.³⁵²

Section 4(1) of PIA aims to prevent the publicity of sensitive information to specific actors, while section 4(2) criminalises the receipt of the same information. Klaaren opines that section 4 of PIA makes no distinction between information that, by virtue of its importance, should not be published or disseminated on the grounds of National Security, and information that should not be published or disclosed on any other grounds. He is nevertheless of the view that section 4 of PIA can be invoked by the state to restrict the publication of information that could compromise the Republic's National Security.³⁵³ Ultimately, sections 3 and 4 of PIA permit the state to limit an actor's right to free expression to protect the 'security of the Republic'.³⁵⁴

While the judiciary is entitled to limit an actor's right to receive and impart state-held information in terms of PIA,³⁵⁵ the courts will have difficulty resolving disputes between information and security for the same reasons as set out in paragraph 2.4.2 above. The first difficulty is caused by the indistinctness of the security interest that PIA aims to protect. Sections 3 and 4 of PIA empower the judiciary to limit the rights to receive and impart information if doing so would preserve the 'security of the Republic'. It is not immediately clear what the meaning of 'security' of the Republic means.³⁵⁶ As pointed out above, this uncertainty may lead to state abuse, and may impede the courts in their attempts to resolve the tension between the rights to receive and impart state-held information and National Security in a principled manner. In addition, the

³⁵² It is important to note that section 3 of PIA creates a nexus between information procured from or relating to prohibited places, armaments, the defence of the Republic, any military matter, any security matter, or the prevention or combating of terrorism, or any other matter or article, and National Security. The publication of the preceding information in and of itself, will not compromise National Security. In order to be guilty of a crime in terms of section 3 of PIA the publication of the information received must lead to impairing of South Africa's National Security.

³⁵³ Klaaren (2002) *SALJ* 722 & 723.

³⁵⁴ PIA S3, S4 & S10. Section 4 does not expressly state so, but the provision is wide enough to be interpreted in this fashion. If one reads section 4 together with section 10 of the Act, it is clear that this was the legislator's intention.

³⁵⁵ Constitution S165(2).

³⁵⁶ Balule (2008) *U. Botswana L.J.* 153; PIA S3 & S4.

act was adopted to protect the parochial interests of the Apartheid government.³⁵⁷ Today, however, its provisions must be interpreted to promote the values underlying an open and democratic society based on human dignity, equality and freedom.³⁵⁸

Like PAIA, PIA does not use the term National Security, nor do its provisions or relevant case law expressly indicate that the 'security of the Republic' and National Security are identical concepts. Additionally, PIA also does not contain an express definition of National Security or 'security of the Republic'.³⁵⁹ Klaaren nevertheless argues that the relevant provisions of PIA are geared to assist the state in protecting South Africa's National Security.³⁶⁰ The judiciary and the state can therefore rely on sections 3 and 4 of PIA to freeze the receipt and dissemination of state-held information for purposes of National Security.³⁶¹ His view is borne out by the history of the concept of National Security, as referred to above. Historically, the use of this concept was linked closely to a state's military capacity, intelligence and foreign relations. The term 'security of the Republic, as used in PIA, seems closely aligned to these interests. For instance, the state can rely on these sections to prevent the publication of information concerning the intelligence operations of the state.

The second difficulty is caused by PIA's failure to identify the threats that it aims to guard against. Sections 3 and 4 of PIA contemplate that the state can limit the rights to receive and impart information, if it can show that there is a reasonable apprehension that the publicity of information will cause irreparable harm to the Republic's National Security. However, PIA does not identify the threats that the state should protect against.³⁶² If the courts are to resolve the tension correctly, they should

³⁵⁷ Mhiripiri & Chari *Media Law, Ethics, and Policy in the Digital Age* 253.

³⁵⁸ Constitution S39(2).

³⁵⁹ PIA S3 & S4; *Council of Review, South African Defence Force v Mönning* 1992 3 SA 482 (A).

³⁶⁰ Klaaren (2002) SALJ 723.

³⁶¹ Balule (2008) *U. Botswana L.J.* 167.

³⁶² S Pete, D Hulme, M Du Plessis, R Palmer & O Sibanda *Civil Procedure: A practical guide* 2ed (2011) 406; PIA S3 & S4. For the state to procure a prohibitory interdict on an urgent basis from the courts it has to show that if the information is not embargoed the state's National Security will be compromised. The state in terms of PIA will have to show that some threat aims to compromise South Africa's National Security and the Republic's courts will only countenance the limitation if the state can show on a reasonable basis that a specific threat will compromise the target. However, PIA does not identify what

clarify the types of threats it must neutralise by limiting the right to receive and impart state-held information. The failure to identify National Security threats with sufficient specificity, could lead to judicial error or abuse as demonstrated earlier under paragraph 2.4.2.2. It has been shown under PAIA that not every threat to National Security is a National Security threat which requires that the free flow of information be limited in order to prevent a threat from compromising a target.³⁶³ This statement also rings true in PIA's context. The reason for this is that PIA, like PAIA, does not list the specific threats to be warded off by limiting the free flow of information, nor does it set out those threats at a high level of generality. The act indirectly recognises that the purpose of the limitation of the right to receive and impart state-held information is to prevent a threat from compromising an interest, but what those threats are, is unclear.³⁶⁴ Consequently, for the courts to be able to resolve disputes between information and security and to prevent state abuse, PIA must identify the threats it aims to guard against.

The final obstacle is PIA's potential failure to protect appropriate security interests. Presently, PIA only refers to the 'security of the Republic'. Like PAIA, the act seemingly fails to protect other important security interests, as referred to in paragraph 2.4.2.3 above. On a superficial reading of sections 3 and 4 of the act, the judiciary and the state may not be able to rely on PIA to limit the right to receive and impart information if the defence of the Republic, or the interests identified in the *Masetlha* decision, the SP, JHBP or NSIA are at risk of being compromised. If PIA does not protect the appropriate security interests, the danger is that the judiciary could be restricted from protecting interests which must be preserved.

that threat or threats are. It is necessary to determine what the nature of those threats should be to assist the state to justifiably limit the free flow of information and the courts in its mediation of the tension for purposes of National Security. It is really sections 3, 4(1)(a)(i)(bb) and 4(1)(b)(i)(bb) of PIA which enable the state to limit the rights to express information for reasons of National Security. The reasoning informing this interpretation is substantively addressed in paragraph 3.3 of this thesis.

³⁶³ Kleinig "Liberty and Security in an era of Terrorism" in *Criminologists on Terrorism and Homeland Security* 367.

³⁶⁴ PIA S3 & S4.

Additionally, all of the drawbacks for the state as adumbrated under paragraph 2.4.2.3 of this chapter will also arise. However, it could be argued that the term 'security of the Republic', as referred to in sections 3 and 4 of the act, can and should be interpreted to preserve the other security interests embedded within the other South African and international conceptions of National Security. Conversely, if the act cannot be interpreted in this fashion, it should be assessed if the security interests are of such importance that it warrants amending the act in order to protect them. As in the case of PAIA, it is therefore necessary to consider what security interests PIA should protect in light of the different local and international conceptions of National Security and the uncertainty over the meaning of the 'security of the Republic'.

2.5 CONCLUSION

South Africa's courts can only resolve the tension between free flow of information and National Security in a manner that does not put the state at risk, if the meaning of National Security as contemplated by sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA, and sections 3 and 4 of PIA, is specific.

The courts, in resolving disputes between information and security, should not have major difficulties in giving content to the information rights. The rights to access, receive and impart information and the values which inform them are set out with sufficient clarity. These rights grant actors the rights to access, receive and disseminate state-held information. They can, however, be limited in terms of sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA, and sections 3 and 4 of PIA, for purposes of National Security, provided that these limitations are justifiable in terms of section 36 of the Constitution.

Despite the importance of granting the state the power to limit the free flow of information for reasons of National Security in terms of PAIA and PIA, the said acts fail to identify the content of the protected security interests. They also potentially fail to include certain important security interests, and to identify the threats that they aim to guard against. This makes it unlikely that National Security will receive adequate protection in cases involving limitations of the free flow of information. In addition, vague conceptions of National Security can also open the door to state abuse. If National Security is not adequately defined, these risks will be locked in place. South

Africa needs to avoid settling into the habit of unjustifiably limiting the free flow of information. There is therefore a need to determine what National Security means in terms of both PAIA and PIA. The following chapter will aim to provide such a definition.

oooOooo

CHAPTER 3

DEFINING NATIONAL SECURITY

3.1 INTRODUCTION

The notion of National Security is said to be as old as the nation state itself.³⁶⁵ The first recorded use of the term was in a debate by Yale undergraduates in 1790 who aimed to answer the question: ‘does the National Security depend on fostering Domestic industries’.³⁶⁶ Yet, its use as an established term in the English language is a fairly recent phenomenon. The original term used to describe National Security, was national defence. The term was altered just prior to the start of the Cold War between the United States of America (USA), the Union of Soviet Socialist Republics and their respective allies.³⁶⁷ The National Security Act, passed by the USA in 1947, was the first piece of legislation that contained the term National Security.³⁶⁸ This concept came to be the vogue just prior to the end of the first half of the 20th century.³⁶⁹ Despite being the first country to use the term in its laws, the USA failed to set down a fixed definition for this concept.³⁷⁰ Since then, there have been many attempts to identify the meaning of National Security. However, a universally accepted definition of

³⁶⁵ BA Boczek *International law: A dictionary* (2005) 36. The Peace of Westphalia created Europe’s territorial states in 1648. Although state sovereignty did exist prior to 1648, the treaty was important for international law for several reasons. Firstly, a provision of the treaty granted any member of the Holy Roman Empire the right to enter into international agreements with foreign powers and to engage in war. Secondly, it provided for religious tolerance; S MacFarlane & Y Khong *Human security and the UN: A critical history* (2006) 19. A further invention of the Westphalian period was the notion that it is the state’s duty to protect persons residing within its borders; Cameron *National Security and the European Convention on Human Rights* 39. Cameron’s analysis of the origin of the concept ‘National Security’ also finds its roots in the Westphalian period.

³⁶⁶ Romm *Defining National Security: The nonmilitary aspects* 2.

³⁶⁷ JR Arnold & R Wiener *Cold War: The essential reference guide* (2012) xxx.

³⁶⁸ xxx; Cameron *National Security and the European Convention on Human Rights* 39.

³⁶⁹ Cameron 39.

³⁷⁰ GD Foster “The intellectual legacy of our Constitution” in HE Shuman & WR Thomas (eds) *The Constitution and National Security* (2002) 13: 24. For a more comprehensive discussion of this aspect please see clause 2.4.2.3.1.

National Security does not exist.³⁷¹ What is universally accepted is that states are justified in limiting the free flow of information to preserve their National Security.³⁷² This state defence does create problems, the most prominent of which is the significant state abuse of the concept for the last six decades.³⁷³

As indicated in the previous chapter, sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA authorise the limitation of the right to access state-held information in order to protect the 'defence and security of the Republic', while sections 3 and 4 of PIA enable the limitation of the rights to receive and impart state-held information in order to preserve the 'security of the Republic'. It was submitted in chapter 2 that the terms 'defence of the Republic' and 'security of the Republic' bear the same meaning as National Security.³⁷⁴ It was further argued that both acts fail to define the meaning of these terms. As argued in the previous chapter, the acts are unclear as to (i) the appropriate security interests that they should protect, (ii) the content of the security interests, and (iii) the threats that they are to guard against.³⁷⁵ The lack of a clear and established definition leads to several problems. First, it could leave the Republic with inadequate protection and could put the state in harm's way.³⁷⁶ Secondly, it could open the door for the South African government to conceal malfeasance, unjustifiably limit the free flow of information and undermine democracy. Thirdly, it makes it difficult for the

³⁷¹ Richardson et al "Promoting Science and Technology to serve National Security" in *Science and Technology Policies for the Anti-terrorism Era* 34. See also El Ouali *Territorial Integrity in a Globalizing World: International Law and States' Quest for Survival* 1-8. For a more comprehensive discussion of this aspect please see clause 2.4.2.3.

³⁷² Mendel "National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles" in *National Security and Open Government: Striking the right balance* 4.

³⁷³ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 11.

³⁷⁴ See 2.4.2.1 and 2.4.3 above.

³⁷⁵ For a more comprehensive discussion of this aspect please see clauses 2.4.2.

³⁷⁶ Schuller (2013-2014) *UCLA J. Int'l L. Foreign Aff* 177 & 178.

judiciary to resolve the tension between the free flow of information and National Security in a principled manner.³⁷⁷

Consequently, the purpose of this chapter is to determine what National Security should mean in terms of PAIA and PIA. Such a definition could help guide the state in protecting National Security when limiting the free flow of information in terms of these acts, and enable the South African judiciary to resolve disputes between the free flow of information and National Security in a manner that promotes Open Justice when proceedings have been instituted.

To this end, this chapter will firstly analyse the security interests protected in terms of sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA and sections 3 and 4 of PIA, to determine if they are or can be defined with sufficient clarity. Secondly, the chapter will examine other relevant South African and international conceptions of National Security to determine what this concept means. Thereafter it will juxtapose the security interests protected in terms of PAIA and PIA against the security interests covered by those other conceptions of National Security to determine whether there are additional interests that PAIA and PIA should protect. Thirdly, PAIA and PIA will be re-examined to determine if the security interests of the acts lend themselves to an interpretation which could accommodate the other security interests which have been identified as appropriate to protect. Fourthly, this chapter will identify the types of National Security threats that warrant limiting the free flow of information in terms of PAIA and PIA. Fifthly, the chapter will seek to construct an appropriate statutory definition of National Security, which can be utilised to resolve disputes between information and security under PAIA and PIA. Lastly, this chapter will consider if such a statutory definition is necessary in light of the judiciary's ability to determine what this concept means by rigorously engaging with the applicable security provisions of PAIA and PIA.

³⁷⁷ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 11.

3.2 THE PROMOTION OF ACCESS TO INFORMATION ACT

3.2.1 THE MEANING OF DEFENCE OF THE REPUBLIC

Despite the legislature's and judiciary's failure to give content to the meaning of the term 'defence of the Republic' as recorded under section 41(1)(a)(i) of PAIA, guidance can be sought from the Constitution to establish its meaning. Chapter 11 of the Constitution identifies South Africa's security services and lays down the principles that govern National Security in the Republic. The Constitution places the protection of South Africa's National Security in the hands of Parliament and the Executive.³⁷⁸ Section 201(2)(b) of the Constitution provides that:

“Only the President, as head of the national executive, may authorise the employment of the defence force [...] in defence of the Republic.”

The Constitution makes it clear that the South African National Defence Force (SANDF) must be employed in 'defence of the Republic'. This is confirmed by section 200(2) of the Constitution, which states that:

“The primary object of the defence force is to defend [...] the Republic [...].”

Ever since the conclusion of the peace of Westphalia states have engaged their military might against looming threats to defend their National Security.³⁷⁹ This conception of state defence persisted during the Cold War era where states feared that conquering forces would take away their independence.³⁸⁰ States engaged their military forces to neutralise or destroy any imminent or looming threat.³⁸¹ They used their military might, in conjunction with their intelligence and foreign policy, to combat security threats.³⁸² The objective of the military was to protect the state against any violent threats, irrespective of whether they originated from within its borders, or

³⁷⁸ Constitution S198(d).

³⁷⁹ Boczek *International law: A dictionary* 36; MacFarlane & Khong *Human security and the UN* 19; Cameron *National security and the European Convention on Human Rights* 39.

³⁸⁰ H Lasswell *National Security and individual freedom* (1950) 23.

³⁸¹ 23.

³⁸² Sherwin “Scientists, arms control, and National Security” in N Graebner (ed) *The National Security its theory and practice 1945-1960* 105: 111.

extraterritorially.³⁸³ Different measures were employed to neutralise or destroy an enemy.³⁸⁴ As an example, if a threat emanated from within the state, the primary objective of the military in preserving National Security was to protect the state's territory, its civil peace and, if the people mobilised against the government, to protect the state itself.³⁸⁵ If the threat was extraterritorial, the military force would either take an armed offensive or defensive stance against the threat.³⁸⁶ During the Cold War, states effectively employed their military in preparation for an attack and, if necessary, defended themselves *via* military action.³⁸⁷

On the strength of this history, 'defence' can take on three meanings. Firstly, it could mean the state's ability to defend itself. Secondly, it could refer to the activation of the state's security services to actively defend against any hostilities. Thirdly, defence can also refer to the military's resources available to protect the state.

These interpretations of defence are consistent with section 41(2) of PAIA's notion of defence. This section, read together with section 41(1)(a)(i) of the same act, authorises the state to deny access to records that contain information relating to the military's ability to defend the Republic, military operations, or the resources of the military, if access to the information is reasonably expected to compromise South Africa's National Security.³⁸⁸ Sections 41(2)(a), 41(2)(b)(i), 41(2)(b)(ii), 41(2)(c)(i),

³⁸³ Buzan et al *Security: A new framework for analysis* 50.

³⁸⁴ Lasswell *National Security and individual freedom* 8.

³⁸⁵ Buzan et al *Security: A new framework for analysis* 50.

³⁸⁶ Prados "Cold War intelligence history" in Immerman & Goedde (eds) *The Oxford Handbook of the Cold War* 414: 417.

³⁸⁷ Lasswell *National security and individual freedom* 23.

³⁸⁸ PAIA S41(2). "A record contemplated in subsection (1), without limiting the generality of that subsection, includes a record containing information - (a) relating to military tactics or strategy or military exercises or operations undertaken in preparation of hostilities or in connection with the detection, prevention, suppression or curtailment of subversive or hostile activities; (b) relating to the quantity, characteristics, capabilities, vulnerabilities or deployment of (i) weapons or any other equipment used for the detection, prevention, suppression or curtailment of subversive or hostile activities; or (ii) anything being designed, developed, produced or considered for use as weapons or such other equipment; (c) relating to the characteristics, capabilities, vulnerabilities, performance, potential, deployment or functions of - (i) any military force, unit or personnel; or (ii) anybody or person responsible for the detection, prevention, suppression or curtailment of subversive or hostile activities; (d) held for

41(2)(c)(ii), 41(2)(d)(i), 41(2)(d)(ii), 41(2)(e) and 41(2)(f) aim to protect information of a military nature. One of the purposes of section 41(2) is to empower state officials to deny access to information if its publicity will prejudice the military in its ability to defend South Africa in specific instances. The phrase ‘defence of the Republic’ as recorded in section 41(1)(a)(i) of PAIA therefore seems to refer to the SANDF’s ability to defend the Republic.

However, the meaning of this section should not only be limited to the SANDF’s ability to defend the Republic. The meaning of ‘defence of the Republic’ should also include the ability of the South African Police Service (SAPS) and/or the SANDF to combat terrorism in specific instances. Even though SAPS is not entrusted with protecting the ‘defence of the Republic’ in terms of the Constitution,³⁸⁹ it is the duty of SAPS to combat terrorism.³⁹⁰ Sections 41(2)(b)(i), 41(2)(c)(ii) and 41(2)(d)(ii) of PAIA make it clear that the state may deny access to specific information concerning ‘subversive or hostile activities’, if a reasonable expectation exists that its publication will compromise the ‘defence of the Republic’. ‘Subversive or hostile activities’ is defined in the act to include ‘terrorism [...] whether inside or outside the Republic.’³⁹¹

Given that the obligation to combat terrorism falls in the domain of SAPS, sections 41(1)(a)(i), 41(2)(a), 41(2)(b)(i), 41(2)(c)(ii) and 41(2)(d)(ii) of PAIA contemplate denying access to information to ensure that SAPS’ ability to combat terrorism is not

the purpose of intelligence relating to - (i) the defence of the Republic; (ii) the detection, prevention, suppression or curtailment of subversive or hostile activities; or (iii) another state or an international organisation used by or on behalf of the Republic in the process of deliberation and consultation in the conduct of international affairs; (e) on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (d); (f) on the identity of a confidential source and any other source of information referred to in paragraph (d); (g) on the positions adopted or to be adopted by the Republic, another state or an international organisation for the purpose of present or future international negotiations; or (h) that constitutes diplomatic correspondence exchanged with another state or an international organisation or official correspondence exchanged with diplomatic missions or consular posts of the Republic”.

³⁸⁹ Constitution S205(3).

³⁹⁰ S205(3); Criminal Procedure Act 51 of 1977; Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.

³⁹¹ PAIA S1 “subversive or hostile activities”, 41(1)(a)(i), 41(2)(a), 41(2)(b)(i), 41(2)(c)(ii) & 41(2)(d)(ii).

impaired in instances where there is a reasonable expectation that the ventilation of the information on such activities will compromise the 'defence of the Republic'. However, SAPS may in certain instances be assisted by the SANDF in its fight against terrorism. Section 201(2)(a) of the Constitution provides in this regard that the President may:

“authorise the employment of the defence force in co-operation with the police service.”

Against this background, it would be possible to restrict access to state-held information in order to preserve the ability of SAPS, in co-operation with the SANDF, to combat terrorism. It is important to note that in these cases a reasonable expectation must exist that the publicity of information concerning their activities would compromise National Security.³⁹² Therefore the 'defence of the Republic' in terms of section 41(1)(a)(i) of PAIA aims not only to protect the ability of the SANDF to protect the Republic of South Africa, but also the ability of SAPS, or, in certain circumstances, SAPS together with the SANDF, to combat terrorism.

Military defence has always been a central interest of states in the context of National Security.³⁹³ Granting the South African government the power to suppress information so that it may successfully defend the Republic is therefore critical. Failing to provide this authority to the state could potentially lead to the damage, invasion or occupation of the state.³⁹⁴ Additionally, impairing the ability of the state to take measures against terrorism in South Africa could also have grave consequences.³⁹⁵

Parliament's decision to protect these security interests in terms of PAIA seems uncontroversial. The defence of a country is historically seen as an interest worthy of

³⁹² Constitution S201(2)(a) & S205(3); Criminal Procedure Act; Protection of Constitutional Democracy against Terrorist and Related Activities Act; PAIA S1 “subversive or hostile activities”, 41(1)(a)(i), 41(2)(a), 41(2)(b)(i), 41(2)(c)(ii) & 41(2)(d)(ii).

³⁹³ Herd & Dunay “International security, great powers and world order” in GP Herd (ed) *Great powers and strategic stability in the 21st century: Competing visions of world order* 3: 11.

³⁹⁴ Mathews *Freedom and State Security in the South African Plural Society* 1.

³⁹⁵ Constitution S201(2)(a) & S205(3); Criminal Procedure Act; Protection of Constitutional Democracy against Terrorist and Related Activities Act; PAIA S1 “subversive or hostile activities”, 41(1)(a)(i), 41(2)(a), 41(2)(b)(i), 41(2)(c)(ii) & 41(2)(d)(ii).

protection. That has been the case since the conclusion of the peace of Westphalia.³⁹⁶ The importance of state defence has been emphasised inter alia during the Cold War,³⁹⁷ in the ‘Traditional’ and ‘Wide’ debate around National Security,³⁹⁸ and in international thinking around National Security.³⁹⁹ It is commonly accepted that terrorism represents a threat to a country’s National Security. The failure to protect against it will surely compromise South Africa’s National Security.

In view of this, the state may deny a request for access to a record in terms of PAIA if preventing access to it would protect the SANDF’s ability to protect the Republic of South Africa, or in specific instances the ability of SAPS in cooperation with the SANDF to combat terrorism.⁴⁰⁰

3.2.2 THE MEANING OF SECURITY OF THE REPUBLIC

Section 41(1)(a)(ii) of the act does not specify what the phrase ‘security of the Republic’ means. The rest of the act does not provide clarity on the meaning of the phrase either. Regrettably, the courts have not been called upon to determine what the phrase means.

Despite the failure to define what ‘security of the Republic’ means, section 41(2)(d)(ii), read together with section 41(1)(a)(ii) of PAIA, does provide some insight

³⁹⁶ Boczek *International law: A dictionary* 36; MacFarlane & Khong *Human security and the UN* 19; Cameron *National security and the European Convention on Human Rights* 39.

³⁹⁷ Buzan et al *Security: A new framework for analysis* 50; Boczek *International law: A dictionary* 36; MacFarlane & Khong *Human security and the UN* 19; Cameron 39; Lasswell *National Security and individual freedom* 23.

³⁹⁸ Huysmans *The politics of insecurity: Fear, migration and asylum in the EU* 16, 17 & 28; Buzan et al *Security: A new framework for analysis* 1, 2 & 3; Romm *Defining National Security: The nonmilitary aspects* 1.

³⁹⁹ Article 19 The Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

⁴⁰⁰ Constitution S200(2), S201(2)(a) & S205(3); Criminal Procedure Act; Protection of Constitutional Democracy against Terrorist and Related Activities Act; PAIA S1 “subversive or hostile activities”, 41(1)(a)(i), 41(2)(a), 41(2)(b)(i), 41(2)(c)(ii) & 41(2)(d)(ii).

into the meaning of the phrase. Read together, these sections enable the state to deny access to state-held records:

“(d) held for the purpose of intelligence relating to-

- (ii) the detection, prevention, suppression or curtailment of subversive or hostile activities;”⁴⁰¹

if the reasonable expectation exists that the publicity of the intelligence record could compromise the ‘security of South Africa’.⁴⁰² Section 41(2)(d)(ii) clearly contemplates protecting information which is of importance to the South African intelligence services. Given the intelligence services’ role in protecting the ‘security of the Republic’, their intelligence should not be leaked if the reasonable prospect exists that its ventilation will compromise the intelligence services’ ability to protect the state. Therefore, the ‘security of the Republic’ seems to be concerned with preserving the intelligence services’ ability to protect South Africa’s security.

The purpose of the intelligence services in South Africa seems to support the above interpretation. The Constitution provides that the security services consist of:

“[...] a single defence force, a single police service and any intelligence services [...]”⁴⁰³

The South African Intelligence Service is made up of three bodies namely, the State Security Agency (Agency), the military intelligence division of the SANDF, and the Crime Intelligence Division of the South African Police Service (CID).⁴⁰⁴ The military intelligence division of the SANDF and the CID are autonomous organs of state, which fall under the control of the Department of Defence and the Police Service respectively,⁴⁰⁵ while the Agency is governed by the Intelligence Services Act.⁴⁰⁶

⁴⁰¹ PAIA S41(2)(d).

⁴⁰² S41(1)(a)(ii) & S41(2)(d).

⁴⁰³ Constitution S198(1).

⁴⁰⁴ National Strategic Intelligence Act S1 “National Intelligence Structures”.

⁴⁰⁵ S Woolman “Security services” in S Woolman, M Bishop & J Brickhill (eds) *Constitutional law of South Africa* 2ed (2011) 23B-1: 23B-55 & 23B-56.

⁴⁰⁶ Intelligence Services Act 65 of 2002 S3(1).

Collectively, all of the abovementioned entities are referred to as the National Intelligence Structures and are governed by NSIA.⁴⁰⁷

Historically, states employed their intelligence services to identify and assess threats to their safety and security.⁴⁰⁸ The intelligence apparatuses are used covertly to measure the ability, limitations and purposes of foreign states⁴⁰⁹ and to assess their personal exposure to threats.⁴¹⁰ In the same vein, Parliament tasked the Agency in terms of section 2(1)(b) of NSIA to execute its national counterintelligence responsibilities by identifying:

“[...] any threat or potential threat to the security of the Republic [...]”

and in terms of its additional functions under section 2(2)(a)(i) of NSIA:

“to gather, correlate, evaluate and analyse foreign intelligence excluding foreign military intelligence, in order to – (i) identify any threat or potential threat to the security of the Republic [...]”

NSIA thus clearly states that the Agency is responsible for providing the Republic of South Africa with ‘security’ and how this function is to be executed. The functions of the intelligence services as set out in NSIA reinforces the view that, for purposes of PAIA, the ‘security of the Republic’ is concerned with preserving the intelligence services’ ability to protect South Africa’s security. In order to effectively execute this function, PAIA provides the Agency with the authority to deny access to information which would impair its ability to execute its duty in terms of NSIA. It is submitted that the object of these acts is geared towards preserving the same interests, i.e. the security of the Republic.

It is important to note that the Agency is not the only intelligence service which provides security to South Africa. Section 3(1)(b) of NSIA specifically contemplates

⁴⁰⁷ National Strategic Intelligence Act S1 ‘relevant members of the National Intelligence Structures’ (a)-(c).

⁴⁰⁸ Quiggin *Seeing the invisible National Security intelligence in an uncertain age* 229.

⁴⁰⁹ Aid & Wiebes “Introduction: The importance of signals intelligence in the Cold War” in Aid & Wiebes (eds) *Secrets of signals intelligence during the Cold War and beyond* 1: 2-4.

⁴¹⁰ Quiggin *Seeing the invisible National Security intelligence in an uncertain age* 63 & 82.

that SAPS can execute functions aimed at preserving the 'security of the Republic'. This is also recognised by section 41(2)(d)(ii) of PAIA. This section, read together with section 41(1)(a)(ii), clearly empowers the state to deny access to intelligence related to 'subversive or hostile activities', if its publication is reasonably expected to compromise the state's security. As illustrated in paragraph 3.2.1 of this chapter, the definition of 'subversive or hostile activities' includes acts of terror which SAPS must guard against. The state must therefore deny access to intelligence records if its publicity is reasonably expected to compromise SAPS' ability to preserve the 'security of the Republic'.

The SANDF is also responsible for providing security to the Republic of South Africa. Sections 41(1)(a)(ii) and 41(2)(d)(ii) of PAIA, read together with the definition of 'subversive or hostile activities' as embedded in section 1 of the act, entitles the state to deny access to intelligence:

"relating to - the detection, prevention, suppression or curtailment of subversive or hostile activities."

Included in the definition of 'subversive or hostile activities' are acts of aggression aimed at South Africa. Thus, the state is entitled in terms of the previous sections to deny access to an intelligence record which includes information concerning the 'detection, prevention, suppression or curtailment' of acts of aggression against the Republic.⁴¹¹ Aggression is defined in terms of general resolution 29/3314 of the General Assembly as:

"[...] armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."⁴¹²

The defence against these types of attacks falls in the realm of expertise of the SANDF. Additionally, intelligence related to these types of threats must also fall within

⁴¹¹ PAIA S1 'subversive or hostile activities', S41(1)(a)(ii) & S41(2)(d)(ii).

⁴¹² General Assembly resolution 29/3314, *Definition of Aggression*, A/RES/29/3314 (14 December 1974) available from undocs.org/A/RES/29/3314.

the domain of the SANDF. Therefore, the South African military is also concerned with preserving the ‘security of the Republic’ from an intelligence perspective.⁴¹³

In the context of the above, preserving the ‘security of the Republic’ is essentially concerned with protecting the security capacity of the intelligence services (i.e. the Agency, SAPS and the SANDF) of South Africa.⁴¹⁴

While sections 41(1)(a)(ii) and 41(2)(d)(ii) of PAIA allow the state to deny access to information in matters which concern the intelligence services, the act also recognises that there may be intelligence which should be protected by other branches of government. This view seems to be aligned with NSIA. Section 3(1) of NSIA specifically provides that any other department of state may be required in terms of applicable law to perform any function or engage in activity to counteract any threat to the ‘security of Republic’. Section 3(1) states that:

“[...] such law shall be deemed to empower such department to gather departmental intelligence, and to evaluate, correlate and interpret such intelligence for the purpose of discharging such function [...].”

NSIA also makes it clear that the activities of these other departments of state in protecting South Africa’s security must not conflict with the SANDF’s and SAPS’ duties.⁴¹⁵ If one reads section 3(1) of NSIA together with sections 41(1)(a)(ii) and 41(2) of PAIA, the provisions of the latter act permit the state to deny access to the

⁴¹³ If the military is concerned with preserving the defence of the Republic, but is also concerned with preserving the security of the Republic, the question arises if there is any real difference between the meaning of security and defence in terms of sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA. The technical difference between the security interests concerns the functions in which the military is involved in. If the military is acting in defence of the country it is concerned with three matters. Firstly, it could be concerned with the military’s ability to defend itself. Secondly, it could refer to the activation of the state’s security services to actively defend against any hostilities. Thirdly, defence could be concerned with the military’s resources to protect the state. Conversely when it is acting in the security of the country it is concerned with matters of intelligence, namely the ‘detection, prevention, suppression or curtailment of subversive or hostile activities’.

⁴¹⁴ By denying access to intelligence records which if publicised, will impair the entities in being able to perform their duties effectively.

⁴¹⁵ National Strategic Intelligence Act S3(1).

intelligence records of these other departments of state if a reasonable risk exists that their publication will compromise the 'security of the Republic'. Ultimately, section 3(1) of NSIA and sections 41(1)(a)(ii) and 41(2) (d)(ii) of PAIA are geared towards preserving the ability of other departments of state to protect the 'security of the Republic'.

The 'security of the Republic' as recorded in terms of section 41(1)(a)(ii) of PAIA is therefore concerned with protecting the security capacity of the intelligence services of South Africa (i.e. the Agency, SAPS and the SANDF) and the capacity of other department of states – authorised in terms of applicable law – to provide 'security to the Republic'.

3.3 THE PROTECTION OF INFORMATION ACT

As indicated in the previous chapter, sections 3 and 4 of PIA enable the judiciary to limit the right to express state-held information in order to preserve the 'security of the Republic'. The rub is that the meaning of 'security of the Republic' is unclear in terms of this act.

Section 3 of PIA aims to criminalise the receipt of information from or relating to any prohibited place. Section 1 of the act provides that a prohibited place means:

“(a) any work of defence belonging to or occupied or used by or on behalf of the Government, including -

- (i) any arsenal, military establishment or station, factory, dockyard, camp, ship, vessel or aircraft;
- (ii) any telegraph, telephone, radio or signal station or office; and
- (iii) any place used for building, repairing, making, keeping or obtaining armaments or any model or document relating thereto”

Section 3 further aims to criminalise the receipt of any information originating from or concerning armaments, the defence of the Republic, any military matter, any security matter, any information concerning the prevention or combating of terrorism, and any other matter or article, as the disclosure of these types of information can compromise the 'security of the Republic'. Since all of the information which needs to be protected from being publicised concerns military matters – save for terrorism – it

is submitted that the purpose of freezing the information is to ensure that the state's ability to defend itself, the activation of the state's security services to actively defend against any hostilities and the state's resources available to protect itself are not compromised by the publication of information. It therefore seems that section 3 of PIA, which aims to preserve the 'security of the Republic', is concerned with protecting the SANDF's ability to protect the Republic of South Africa.

Section 3(b)(ii) of PIA is also concerned with preserving the intelligence capacity of the Agency. This section provides that:

“Any person who, for purposes of the disclosure thereof to any foreign State or to any agent, or to any employee or inhabitant of, or any organization, party, institution, body or movement in, any foreign State, or to any hostile organization or to any office-bearer, officer, member or active supporter of any hostile organization –

(b) prepares, compiles, makes, obtains or receives any document, model, article or information relating to –

(ii) [...] any security matter [...],”

which for reasons of state security should not be ventilated, shall be guilty of an offence. The term 'security matter' is defined in section 1 of PIA to include:

“any matter which is dealt with by (a) the Agency as defined in section 1 of the Intelligence Services Act, 2002 (Act No. 65 of 2002) [...] or which relates to the functions of the Agency [...].”

Sections 2(1) and 2(2) of NSIA set out the functions of the Agency. Its duties involve providing the state with security by fulfilling its intelligence functions as required by this act. Consequently, if information relating to the Agency's functions are ventilated, the state can be placed in grave danger. It therefore seems reasonable that section 3(b)(ii) of PIA, in aiming to preserve the ability of the Agency to perform its security functions, does so in order to preserve the 'security of the Republic'. Put differently, the 'security of the Republic' as referred to in section 3(b)(ii) of PIA is concerned with preserving the intelligence capacity of the Agency.

PIA, like PAIA, also contemplates that the 'security of the Republic' can be compromised if the SAPS, or the SANDF employed in co-operation with SAPS, is

prohibited from preventing and combating terrorism. Section 3 of PIA acknowledges that if state-held information recording the manner in which these organs of state execute their duties is publically ventilated, it could compromise their ability to keep the state secure against terrorism. Section 3 therefore aims to preserve these institutions' ability to preserve the 'security of the Republic', by criminalising the receipt of information that concerns the prevention or combating of terrorism. While the exact wording of section 41(1)(a)(i) of PAIA and section 3 of PIA are different, both acts aim to protect the same security interests. Section 3 of PIA, like section 41(1)(a)(i) of PAIA, aims to protect the SANDF's ability to protect the Republic of South Africa, as well as the ability of SAPS, acting alone or together with the SANDF, to combat terrorism.⁴¹⁶

It is important to note that, while sections 3(b)(ii) and 4(1)(b)(i) of PIA aim to protect the 'security of the Republic' by aiming to preserve the intelligence capabilities of the Agency, the act does not protect the intelligence capacity of SAPS, the SANDF or other department of states. Since the intelligence services provided by SAPS, the SANDF and other department of states are clearly necessary as pointed out in NSIA and PAIA, it would seem prudent that PIA's security interest be aligned with PAIA's.

Section 4(1) of PIA aims to prevent the disclosure of sensitive information to specific actors. Section 4(1)(a)(i)(bb) provides that:

"Any person who has in his possession or under his control or at his disposal -

- (a) any secret official code or password;
- (i) which he knows or reasonably should know is kept, used, made or obtained in a prohibited place or relates to a prohibited place, anything in a prohibited place, armaments, the defence of the republic, a military matter, a security matter or the prevention or combating of terrorism;
- (bb) publishes or uses such code, password, document, model, article or information in any manner or for any purpose which is prejudicial to the security or interests of the Republic;"

⁴¹⁶ It is important to note that, while both section 3 of PIA and section 41(1)(a)(ii) of PAIA aim to preserve the 'security of the Republic', the meaning of this term may differ in the respective acts.

shall be guilty of committing an offence in South Africa.⁴¹⁷ Additionally section 4(1)(b)(i)(bb) holds that:

“Any person who has in his possession or under his control or at his disposal -

- (b) any document, model, article or information;
- (ii) which he knows or reasonably should know is kept, used, made or obtained in a prohibited place or relates to a prohibited place, anything in a prohibited place, armaments, the defence of the republic, a military matter, a security matter or the prevention or combating of terrorism;
- (bb) publishes or uses such code, password, document, model, article or information in any manner or for any purpose which is prejudicial to the security or interests of the Republic;”

shall also be guilty of committing an offence. Ultimately, both sections criminalise the possession and use or dissemination of sensitive information – any secret official code or password in the case of section 4(1)(a)(i)(bb), and any document, model, article or information in the case of section 4(1)(b)(i)(bb) – in a manner which is prejudicial to the ‘security of the Republic’. In other words, sections 4(1)(a)(i)(bb) and 4(1)(b)(i)(bb) of PIA aim to conceal information which, if expressed, could compromise South Africa’s National Security.

While it is clear that sections 4(1)(a)(i)(bb) and 4(1)(b)(i)(bb) of PIA contemplate freezing the free flow of information for reasons of National Security, this does not draw us closer to determining what the concept means. The sensitive information which may not be possessed, used or disseminated relates to prohibited places, armaments, the defence of the Republic, military matters, security matters and the prevention or combating of terrorism. As demonstrated above in the context of section 3, all of the preceding information concerns military matters – save for terrorism and the preservation of the Agency’s intelligence functions. It is submitted that the purpose of prohibiting the control and use, or the control and dissemination, of the information in terms of sections 4(1)(a)(i)(bb) and 4(1)(b)(i)(bb) of PIA is to protect the state’s ability to defend itself. Like section 3, sections 4(1)(a)(i)(bb) and 4(1)(b)(i)(bb) of PIA seem

⁴¹⁷ PIA S4(1)(a)(i)(bb).

geared towards protecting the SANDF's and the Agency's ability to protect the Republic. Additionally, and as pointed out earlier, sections 4(1)(a)(i)(bb) and 4(1)(b)(i)(bb) of PIA also criminalise the possession and use or dissemination of sensitive information which relates to the prevention and combating of terrorism. As argued earlier, the possession and use or dissemination of sensitive information relating to the prevention and combating of terrorism ultimately compromises the ability of SAPS, or SAPS in cooperation with the SANDF, to prevent and combat terrorism.

While sections 4(1)(a)(i)(bb) and 4(1)(b)(i)(bb) of the act make it an offense to possess and use or disseminate sensitive information, section 4(2) of PIA acts as a catch all provision which prohibits the receipt of this genre of information. Although this provision does not explicitly state that the receipt of this type of sensitive information is a criminal activity due to National Security considerations, section 4(2), when read in conjunction with sections 4(1)(a)(i)(bb) and 4(1)(b)(i)(bb), is broad enough to criminalise the receipt of sensitive information which can compromise the 'security of the Republic'. Naturally, National Security in terms of section 4(2) would carry the same meaning as set out in sections 4(1)(a)(i)(bb) and 4(1)(b)(i)(bb). It is important to note that section 4(2) suffers from a number of inherent problems, in that it is overbroad and possibly unconstitutional in certain respects. However, this analysis is beyond the scope of this thesis.

In summary, sections 3, 4(1)(a)(i)(bb), 4(1)(b)(i)(bb) and 4(2) of PIA are aimed at protecting security interests such as (i) the SANDF's ability to protect the Republic of South Africa in relation to military matters, (ii) the Agency's intelligence capacity and (iii) the ability of SAPS, or SAPS in co-operation with the SANDF, to guard against terrorism.

3.4 TOWARDS PROTECTING APPROPRIATE NATIONAL SECURITY INTERESTS

3.4.1 INTRODUCTION

It could be asked whether PAIA and PIA afford adequate protection to National Security, or whether there are National Security interests that they fail to protect. As indicated in the previous chapter, there are understandings of National Security which

are, on the face of it, not incorporated into PAIA and PIA. For ease of reference they are repeated again. National Security in South Africa was viewed by Moseneke DCJ as ‘collective safety and security’,⁴¹⁸ by Yacoob J as ‘protecting the people’,⁴¹⁹ by Van der Westhuizen J as protecting the ‘democratic order’, ‘the people’, and ‘state sovereignty’⁴²⁰ and by NSIA as protecting ‘the people’, the ‘constitutional order’ and the ‘territorial integrity’ of the Republic of South Africa.⁴²¹ The SP, the first of the relevant international instruments relating to National Security, aims to protect a ‘state’s political independence’, its ‘territorial integrity’ and the ‘existence of the nation’,⁴²² while the second, namely the JHBP, aims to protect a ‘country’s existence’, a ‘state’s capacity to defend itself’ and its ‘territorial integrity’.⁴²³

As argued in the previous chapter, PAIA and PIA do not explicitly authorise limitations of the rights to access, receive and impart information, if its disclosure will compromise South Africa’s ‘collective safety and security’, its ‘people’, the ‘Republic’s democratic order’, ‘territorial integrity’, ‘state sovereignty’, the ‘state’s political independence’, the ‘existence of the nation’ and the ‘country’s existence’. The danger is that the acts may provide the Republic with inadequate protection if they fail to preserve the appropriate security interests. The question is therefore whether the acts’ conception of National Security is not under-inclusive. There is also a danger that the judiciary will not be in a proper position to resolve disputes between the free flow of information and National Security in terms of PAIA and PIA, if the acts do not preserve the appropriate security interests.

It is therefore necessary to examine these other (South African and international) conceptions of National Security, and to determine whether they are capable of being clearly defined. It is also necessary to juxtapose these definitions against PAIA and

⁴¹⁸ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [62].

⁴¹⁹ [85].

⁴²⁰ [174].

⁴²¹ General Intelligence Laws 11 of 2013; National Strategic Intelligence Act S1 “national security”.

⁴²² Siracusa Principles (1984) Principle 29.

⁴²³ Mendel “National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles” in *National Security and Open Government: Striking the right balance* 11.

PIA's conceptions of National Security. This must be done in order to establish whether PAIA and PIA's conceptions of National Security are under-inclusive, and if so, to determine which other security interests should be incorporated into their conceptions of National Security.

3.4.2 SOUTH AFRICAN CONCEPTIONS OF NATIONAL SECURITY

3.4.2.1 VAN DER WESTHUIZEN'S CONCEPTION OF NATIONAL SECURITY

In his dissenting judgment in the *Masetlha* decision, Van der Westhuizen J opined that National Security must be construed to protect South Africa's 'people', 'the Republic's democratic order' and 'state sovereignty'. Judge Van der Westhuizen's understanding of National Security is firmly grounded in the Constitution's rights and values.⁴²⁴ Although, he probably did not intend to provide a comprehensive definition for National Security, he did identify the security interests that National Security should protect. Unfortunately, that was the full extent of his comments on the meaning of National Security in South Africa. In order to determine if PAIA and PIA's conceptions of National Security should include the security interests identified by Van der Westhuizen, an analysis of these security interests needs to be undertaken. The following paragraphs will analyse the terms sequentially.

3.4.2.1.1 THE REPUBLIC'S DEMOCRATIC ORDER

Although the meaning of democracy is a deeply contested issue,⁴²⁵ the 'democratic order' can be defined with a fair degree of specificity for National Security purposes. South Africa's democratic order can be divided into two parts. The first can be classified as institutional democracy, and involves basic structures and institutions which operationalise democracy. The second breathes life into formal democratic

⁴²⁴ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa*. [174].

⁴²⁵ M Light "Exporting democracy" in KE Smith & M Light (eds) *Ethics and Foreign Policy* (2001) 75: 80.

institutions and is referred to as non-institutional democracy.⁴²⁶ Collectively, these conceptions of democracy constitute South Africa's democratic order.

Malan posits that democracy exists if certain operational institutions, or what he calls *essentialia*, are in place. These *essentialia* are: the universality of the franchise, multiparty participation in regular elections that are free and fair, the control of political decision makers by the general public and majority rule.⁴²⁷ South Africa's democratic structure includes all of these *essentialia*.⁴²⁸ The first three of these institutional structures are provided for in section 1(d) and are operationalised by section 19 of the supreme law.⁴²⁹ The institutional structure is fleshed out further in the Republic's electoral legislation, which makes room for majority rule.⁴³⁰

In addition to these *essentialia*, the Constitution also makes provision for other institutional structures. These mechanisms compel Parliament and the provincial legislatures to conduct their functions in accordance with representative democracy,⁴³¹

⁴²⁶ D Brand "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa" (2011) 22 *STLR* 614: 624. Brand contends that institutional democracy only provides the infrastructure in which substantive democracy can operate. The existence of democratic institutions does not mean that democracy exists, it only means that the state has fulfilled its essential duties to assist in the development of a democratic society.

⁴²⁷ K Malan "Faction rule, (natural) justice and democracy" (2006) 21 *SAPL* 142: 144 & 145.

⁴²⁸ Constitution S1(d), S16, S32, S19, S42(3), S42(4), S57(1) (b), S70(1)(b) & 116(1)(b).

⁴²⁹ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 3 SA 280 (CC) [21]. The Constitutional Court made it clear that the values – rooted in S1(d) – inform and add substance to every constitutional provision, but are not directly enforceable.

⁴³⁰ Electoral Act 73 of 1998 S57(1).

⁴³¹ *Matatiele Municipality v President of the Republic of South Africa* 2006 5 SA 47 (CC) [109]; Constitution S42(3), S42(4), S57(1) (b), S70(1)(b) & 116(1)(b); T Roux "Democracy" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional law of South Africa* 2ed (2011) 10-1: 10-39 & 10-40. Sachs J in the *Matatiele* decision remarked that Parliament, democratically elected by the nation, is the engine-house of South Africa's democracy. The National Assembly (NA) represents the people, while the National Council of Provinces (NCOP) represents provincial interests. The Constitution specifically enjoins the NA, the NCOP and the provincial legislatures to conduct their business with due regard for representative democracy. Roux submits that the constitutional provisions ensure that Parliament and the provincial legislatures may not perform their functions in such a way as to frustrate representative democracy.

to foster participatory democracy,⁴³² to promote public and media access⁴³³ and to create a number of state institutions to support South Africa's constitutional democracy.⁴³⁴

Despite the valuable contribution that institutional democracy makes to South Africa's democratic order, it is really non-institutional democracy that gives life to it. Institutional democracy is an empty shell without non-institutional democracy.⁴³⁵ At its most basic level, the common denominator in all conceptions of democracy is that democratic rule originates from the people, in the interests of the people.⁴³⁶ It is this activity of the people that breathes life into democracies' institutional structures. Essentially, the institutional structures are created to convert the wishes of the people into tangible results. Brand opines that non-institutional democracy is the social activity

⁴³² *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) [116]; Constitution S57(1) (b), S70(1)(b) & 116(1)(b); Roux "Democracy" in *Constitutional law of South Africa* 10-43. The Constitutional Court in the *Doctors for Life International* case made it clear that participatory democracy is an indispensable part of South Africa's democracy. The Constitution directs the NA, the NCOP and the provincial legislatures to conduct their business with due regard for participative democracy. Roux opines that these provisions seek to enhance the legitimacy and efficacy of political decision making.

⁴³³ Constitution S59(2), S72(2) & S118(2); Roux "Democracy" in *Constitutional law of South Africa* 10-44. The supreme law enjoins Parliament and the provincial legislatures to allow the public and/or the media to sit in on their committees. The Constitution - subject to limitations - prohibits these bodies from stifling public and media participation. These provisions permit the public access to information and the workings of government, as opposed to granting them the power to participate in legislative decision-making. Opening up these committees to public scrutiny enhances the effectiveness of non-institutional democracy. Once aware of state information, the public and/or the media can make the people aware of important issues which concern them by disseminating the topical information.

⁴³⁴ Constitution Chapter 9; Roux "Democracy" in *Constitutional law of South Africa* 10-47. Roux argues that the reason that these institutions exist is to support and protect a thick conception of democracy.

⁴³⁵ Brand (2011) *STLR* 624. Brands contends that institutional democracy only provides the infrastructure in which substantive democracy can operate. The existence of democratic institutions does not mean that democracy exists, it only means that the state has fulfilled its essential duties to assist in the development of a democratic society.

⁴³⁶ D Schultz "Democracy on trial: Terrorism, crime, and National Security policy in a post 9-11 world" (2007-2008) 38 *Golden Gate U. L. Rev.* 195: 198.

occurring in communities, streets, papers, homes, churches and at work.⁴³⁷ This conception of democracy is firmly entrenched in and protected by the Bill of Rights.⁴³⁸ Roux argues that the rights in the Bill of Rights constitute and provide shape to South Africa's democracy.⁴³⁹ Since Van der Westhuizen's democratic order is defined with sufficient clarity, the court will be well placed to resolve the dispute between the free flow of information and National Security in a manner which promotes Open Justice.

3.4.2.1.2 THE PEOPLE

Engaging the defence of National Security to protect 'the people', as Van der Westhuizen's conception of National Security permits, is not a novel idea. The duty of states to protect persons residing within their borders is fundamental to the Westphalian conception of statehood.⁴⁴⁰ The underlying philosophy of the social contract is for states to protect citizens residing within their borders.⁴⁴¹ Guarnizo pointed out that:

"The 1648 Westphalian model of political organisation presupposes a unified, dominant and central political model that exercises supreme and autonomous governing power over a specific population within the borders of a clearly demarcated national territory."⁴⁴²

Currently, states are still responsible for protecting the physical safety and lives of the citizens who reside within their borders against violence.⁴⁴³ Violence aimed against

⁴³⁷ Brand (2011) *STLR* 622 & 623. See also D Brand "Writing the law democratically" in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 97: 97-111.

⁴³⁸ Constitution S7(1).

⁴³⁹ A comprehensive analysis of the contribution made by each right to South Africa's notion of democracy cannot be undertaken within the confines of this section.

⁴⁴⁰ MacFarlane & Khong Human security and the UN 19.

⁴⁴¹ M Bradley *Protecting Civilians in War: The ICRC, UNHCR, and Their Limitations in Internal Armed Conflicts* (2016) 130.

⁴⁴² LE Guarnizo "The Fluid, Multi-scalar, and Contradictory construction of citizenship" in MP Smith & M MacQuarrie (eds) *Remaking Urban Citizenship: Organizations, Institutions, and the Right to the City* (2012) 11: 20.

⁴⁴³ Bradley *Protecting Civilians in War* 130.

persons may be manifested in war, terrorism or similar attacks. Such violence can result in the death or injury of citizens within a state.⁴⁴⁴

In the information context, the limitation of the free flow of information for purposes of National Security is geared towards protecting the physical security and lives of the people. However, neither NSIA nor the judgment in *the Masetlha* decision which both aim to protect the people, identify who the people in need of protection are.⁴⁴⁵ Do the people, in this context, refer only to citizens, or to everyone within South Africa's borders?⁴⁴⁶

According to Van der Westhuizen, National Security is aimed at protecting the fundamental rights of the people, not just citizens.⁴⁴⁷ The Constitution provides that everyone within the Republic's borders has the right to life, irrespective of their citizenship.⁴⁴⁸ The importance of this right cannot be overlooked. If a person's right to life is taken away, all other rights to which he/she is constitutionally entitled cease immediately.⁴⁴⁹ Section 12(1)(c) of the Constitution also requires the state to protect all persons from all forms of violence, irrespective of whether the violence is of a private or public nature.⁴⁵⁰ It is also important to note that section 7(1) of the Constitution provides that the Bill of Rights 'enshrines the rights of all people' in South Africa. Since Van der Westhuizen contemplates that the purpose of National Security is to counteract threats which will compromise the people's rights to life and security of the person, and since the state is constitutionally obliged to take active steps to protect everyone's right to life and physical security and the Bill of Rights enshrines

⁴⁴⁴ A Staniforth "Securing the state: Strategic responses for an Independent world" in B Akhgar & S Yates (eds) *Strategic Intelligence Management* (2013) 10:11.

⁴⁴⁵ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa*.

⁴⁴⁶ *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 SA 984 (CC) [171].

⁴⁴⁷ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [174].

⁴⁴⁸ *Mohamed v President of the Republic of South Africa* 2001 3 SA 893 (CC).

⁴⁴⁹ *S v Makwanyane* 1995 (3) SA 391 (CC) [84].

⁴⁵⁰ *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, As Amicus Curiae)* 2003 1 SA 389 (SCA) [13].

the rights of the people of South Africa,⁴⁵¹ the people that Van der Westhuizen's conception of National Security aims to protect, includes everyone within the territory of South Africa.⁴⁵² On account that section 2 of the Constitution requires that all of the laws of the Republic must be read in a manner that is consistent with the supreme law, the people which NSIA and the judges aim to protect are the same people which the Constitution and Van der Westhuizen aim to protect. Thus, Van der Westhuizen's conception of the people is adequately identified for purposes of National Security.

3.4.2.1.3 STATE SOVEREIGNTY

The idea that a state is sovereign and can engage in war to protect its territory originated at the beginning of the Westphalian period.⁴⁵³ The rationale informing this idea, is that in times of war all that a state can do is defend itself.⁴⁵⁴ Sovereignty is the supreme authority which a state exercises within its borders (or within its territory) and the recognition of this absolute power by foreign states.⁴⁵⁵ It can be divided into two components, namely internal and external sovereignty.⁴⁵⁶ That is not to suggest that two clinically divided aspects of sovereignty exist. On the contrary, these elements co-exist and are complementary. Partitioning sovereignty into two facets simply makes it easier to discuss.⁴⁵⁷

Internal sovereignty is the authority to control everything that falls within a state's territory.⁴⁵⁸ On the other hand, external sovereignty – acknowledged by the

⁴⁵¹ Constitution S7(2); *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [174].

⁴⁵² S7(1).

⁴⁵³ L Neack *Elusive Security: States First, People Last* (2007) 20.

⁴⁵⁴ 22.

⁴⁵⁵ D Philpott "Ideas and the evolution of Sovereignty" in SH Hashmi (ed) *State Sovereignty: Change and persistence in international relations* (1997) 15: 18 & 20.

⁴⁵⁶ TJ Biersteker & C Weber "The social construction of State Sovereignty" in TJ Biersteker & C Weber (eds) *State Sovereignty as social construct* (1996) 1: 2.

⁴⁵⁷ Philpott "Ideas and Evolution of Sovereignty" in *State Sovereignty: Change and persistence in international relations* 20.

⁴⁵⁸ R Jackson *Sovereignty: The evolution of an idea* (2007) 12.

Constitution's Preamble – is a legal barrier that prohibits foreign actors from interfering with the authority of the sovereign.⁴⁵⁹

South Africa's government has absolute authority in its territory.⁴⁶⁰ Its authority stretches over all of the people - citizens and non-citizens - found within the confines of its territory⁴⁶¹ and over property falling within the scope of its jurisdiction.⁴⁶² Sovereignty over property in the Republic is exercised for the benefit of the people.⁴⁶³ The Republic's absolute authority expands over its land, its airspace, its territorial waters,⁴⁶⁴ its aircrafts flying over the high seas or foreign territory and its ships on the high seas.⁴⁶⁵ In some instances, outer space may also fall under a state's exclusive jurisdiction.⁴⁶⁶ Any act which aims to impair an object over which the Republic has ultimate control will constitute a threat to South Africa's sovereignty and ultimately its National Security.⁴⁶⁷ The state will thus be justified in limiting the free flow of information to protect any of the previous objects.⁴⁶⁸

⁴⁵⁹ Philpott "Ideas and Evolution of Sovereignty" in *State Sovereignty: Change and persistence in international relations* 20. See also JD Montgomery "Sovereignty in transition" in JD Montgomery & N Glazer (eds) *How governments respond: Sovereignty under challenge* (2002) 3: 3; MR Fowler & JM Bunck *Law, Power, and the Sovereign State: The evolution and application of the concept of Sovereignty* (1995) 16.

⁴⁶⁰ Biersteker & Weber "The social construction of State Sovereignty" in *State Sovereignty as social construct* 2.

⁴⁶¹ AA Jordan, WJ Taylor, MJ Meese & SC Nielsen *American National Security* 6ed (2011) 11.

⁴⁶² T Meisels *Territorial rights* 2ed (2009) 6.

⁴⁶³ KR Merrill *Public lands and political meaning: Ranchers, the government, and the property between them* (2002) 65.

⁴⁶⁴ J Dugard *International Law: A South African Perspective* 4ed (2011) 394.

⁴⁶⁵ 149.

⁴⁶⁶ 125.

⁴⁶⁷ J Richards *A guide to National Security: Threats, responses and strategies* (2012) 71. A state's territory is not always limited to a fixed land mass; it may also be sovereign in a dependent territory. An example of this is Britain and the Falkland Islands. However, South Africa does not have any dependent territories.

⁴⁶⁸ Whether an act will constitute a threat to National Security is dependent on the nature and scale of the threat. Both of these concepts will be discussed later on in this thesis.

State sovereignty will also be threatened if the Republic's property in another state is targeted by hostile actors.⁴⁶⁹ South Africa has embassies and consulates in other states all over the world.⁴⁷⁰ Diplomatic institutions have a number of functions. They are responsible for representing the state, cultivating and fostering friendly relations, negotiating with foreign states, providing feedback on the conditions in the receiving state and protecting the interests of the sending state and its nationals.⁴⁷¹ Even though the physical structures are owned by them, these diplomatic missions still fall under the jurisdiction of the receiving state.⁴⁷² A sending state's mission must not be prohibited from performing its functions. Although the inviolability of South Africa's diplomatic institutions is not rooted in extraterritoriality, but in functional necessity, a threat to these missions will be interpreted as a threat to its sovereignty.⁴⁷³

South Africa's external authority on the other hand is the recognition by foreign states of its sovereignty.⁴⁷⁴ External sovereignty prohibits foreign states from exercising any kind of authority in South Africa's jurisdiction.⁴⁷⁵ Foreign intervention may be interpreted as a threat to state sovereignty.

At a conceptual level, state sovereignty does however create a number of problems in the National Security context. Is it a part of the state? If so, is it located at a specific place so that it can be impaired? Does it form part of the people, state institutions, administration or the bureaucracy? If so, does threatening any of the previous objects aim to compromise sovereignty? Is sovereignty part of the DNA of every object falling under the authority of a state and therefore by threatening it, can National Security be put at risk?⁴⁷⁶

⁴⁶⁹ Dugard *International Law: A South African Perspective* 146.

⁴⁷⁰ Meisels *Territorial rights* 6 & 7.

⁴⁷¹ Dugard *International Law: A South African Perspective* 261.

⁴⁷² Meisels *Territorial rights* 6 & 7.

⁴⁷³ Dugard *International Law: A South African Perspective* 263.

⁴⁷⁴ Biersteker & Weber "The social construction of State Sovereignty" in *State Sovereignty as social construct* 2.

⁴⁷⁵ Philpott "Ideas and Evolution of Sovereignty" in *State Sovereignty: Change and persistence in international relations* 20.

⁴⁷⁶ Buzan *People, States and fear: The National Security problem in International Relations* 41 & 42.

The imprecision surrounding the meaning of state sovereignty is a cause for concern. Sovereignty cannot be defined with mathematical certainty and therefore states may use this as an opportunity to unlawfully limit the right to free flow of information in the interests of National Security,⁴⁷⁷ when state sovereignty is not at risk. Despite the uncertainty surrounding the meaning of sovereignty, the question whether a state's sovereignty is at risk is factual in nature. What will constitute a threat to it is perhaps best explained with reference to examples, rather than by attempting to come up with a comprehensive definition.

There were several Latin American states which in the 1970's and 1980's identified a number of social clubs, one of which was the Rotary Club, as a threat to their state sovereignty. In an attempt to stay in power and under the auspices of protecting their National Security, these military governments attacked peaceful groups, individuals and violent opponents to discourage political opposition.⁴⁷⁸ State sovereignty was clearly not at risk of being compromised in this instance.⁴⁷⁹

An extreme example of the invasion of a state's sovereignty occurred when Iraq was invaded by the USA in 2003. Following the invasion, the USA not only handpicked Iraq's interim government, but crafted and put in place the legal framework under which sovereignty would be restored to Iraq. Neack records that:

"[...] sovereignty as an ideal envisions no right of other states to determine the internal policy structure, leadership and laws of another sovereign state. Sovereignty as an ideal envisions no right of others to take away and give back one's sovereignty."⁴⁸⁰

In the earlier example, it is clear that the USA violated Iraq's sovereignty.

⁴⁷⁷ TJ Biersteker "State, Sovereignty and Territory" in W Carlsnaes, T Risse & BA Simmons (eds) *Handbook of international relations* 2ed (2012) 245: 245.

⁴⁷⁸ DL DeLaet *The Global Struggle for Human Rights: Universal Principles in World Politics* 2ed (2014) 65.

⁴⁷⁹ Furthermore, the theoretical debate around state sovereignty does not arise either, since the sovereignty of these Latin American states was not at risk.

⁴⁸⁰ Neack *Elusive Security: States First, People Last* 18.

Another factual example of an invasion of state sovereignty occurred when the USA and Israel, in an attempt to impair and setback Iran's nuclear capabilities, successfully released the STUXNET virus, which infiltrated the computer systems of the Iranians.⁴⁸¹ Furthermore, the USA and Israel threatened to engage in further cyber-attacks, which would continue to impair Iran's nuclear program if it would not cease to develop its nuclear capabilities.⁴⁸² This example reinforces the argument that a risk to a state's sovereignty is a factual one.

Due to the nature of Van der Westhuizen's conception of sovereignty, the courts must determine if South Africa's sovereignty is at risk of being compromised.

3.4.2.2 THE NATIONAL STRATEGIC INTELLIGENCE ACT'S CONCEPTION OF NATIONAL SECURITY

Parliament for the first time provided a partial definition of National Security in 2013 when it amended NSIA.⁴⁸³ Section 1 of NSIA sets out that:

“national security” includes the protection of the people of the Republic and the territorial integrity of the Republic [...].”

The word 'includes' indicates that Parliament did not aim to create a closed list of security interests, but envisages that other interests can also be safeguarded for reasons of National Security. Section 1's definition of 'national security' further provides that NSIA aims to protect the Republic's people and its territorial integrity from *inter alia* the following threats:

- “(i) Hostile acts of foreign intervention directed at undermining the constitutional order of the Republic;
- (ii) terrorism or terrorist-related activities;
- (iii) espionage;

⁴⁸¹ M Newton & L May *Proportionality in International Law* (2014) 279.

⁴⁸² 279.

⁴⁸³ General Intelligence Laws 11 of 2013 S1(g).

- (iv) exposure of a state security matter with the intention of undermining the constitutional order of the Republic;
- (v) exposure of economic, scientific or technological secrets vital to the Republic;
- (vi) sabotage; and
- (vii) serious violence directed at overthrowing the constitutional order of the Republic.”

While the act recognises that the South African public and its territorial integrity must be protected from the preceding threats, these security interests are not directly at stake in the case of the threats referred to under paragraphs (i), (iv) and (vii) of the definition. In these instances, the objective of NSIA is to protect the ‘constitutional order’ of the Republic, not the people or its territorial integrity. It is strange that the legislature identified South Africa’s National Security interests in such an unclear manner. Notwithstanding the strange drafting, NSIA does permit the ‘constitutional order’ of the Republic to be recognised as a protectable interest.⁴⁸⁴

NSIA’s non-exhaustive list is a doubled edged sword. Its open-ended conception of National Security allows for the protection of interests not specifically set out in the legislation. Naturally, this creates the opportunity for abuse, since courts and/or the

⁴⁸⁴ Under paragraph 3.2.2 above it is argued that the phrase ‘security of the Republic’ recorded under section 2(2)(a)(i) of NSIA is an interest that is protected for purposes of National Security (its protectable interests are the people and the state’s interests). Under paragraph 3.4.2.2 below it is showed that NSIA’s definition of National Security is not a closed definition. This begs the question, if NSIA’s definition is not a closed definition, and section 2(2)(a)(i) of NSIA’s phrase ‘security of the Republic’ is concerned with National Security, should section 2(2)(a)(i) not be included as part of NSIA’s definition of National Security? While, this is a clever question, the answer is no. The reason for this is that section 2(2)(a)(i) of NSIA’s interests are already protected by NSIA’s definition of National Security. The phrase (‘security of the Republic’) under section 2(2)(a)(i) of NSIA only aims to protect the people of the Republic, for the meaning of the term, state interests, is extremely vague and should not be utilised for National Security. NSIA’s conception of National Security aims to protect the state’s territorial integrity, its people and constitutional order. The meaning of the people under NSIA’s definition of National Security and section 2(2)(a)(i) of NSIA’s conception of the people are identical as shown under paragraph 3.4.2.1.2 of Chapter 3. Essentially they protect the same interest. For this reason it is not necessary to include NSIA’s ‘security of the Republic’ as a separate protectable interest under its definition of National Security.

state are provided with the opportunity to protect interests which do not need to be protected, or to cover up malfeasance under the auspices of protecting a security interest. Consequently, NSIA permits the courts and the state to over-protect National Security. It thus opens the door to all of the dangers that may arise when courts and/or the state rely on a vague conception of National Security to limit the free flow of information, as set out in the former chapter.⁴⁸⁵ If the judiciary and the state are to provide adequate protection to National Security and to prevent the unjustifiable limitation of the free flow of information, it is important to identify the state's security interests in unequivocal terms. Essentially, this is the purpose of defining National Security.

Despite this inherent shortcoming in NSIA's conception of National Security, the legislature does not seem intent on adjusting its thinking around this concept. The potential enactment of a particular security law provides evidence of this. Coined the 'Secrecy Bill' by the media, PSI,⁴⁸⁶ originally gazetted as the Protection of Information Bill,⁴⁸⁷ was created to replace PIA as the legislation that would control the free flow of information in the interests of National Security in South Africa.⁴⁸⁸ However, since its formation it has been unable to shake off the scathing criticisms that have been levelled against it.⁴⁸⁹ Several versions of PSI have been released in an effort to allay the fears of the critics of the bill.⁴⁹⁰ The bill uses several methods that empower the state to protect National Security.⁴⁹¹ Firstly, PSI allows authorised persons to classify information, and secondly, it allows the state to impose criminal sanctions on any person who unlawfully accesses, receives or disseminates it. It thus allows for the regulation of the free flow of information in the interests of National Security in two

⁴⁸⁵ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 11.

⁴⁸⁶ Protection of State Information Bill B6H (2010).

⁴⁸⁷ Protection of Information Bill B6 (2010).

⁴⁸⁸ Milo et al "Freedom of expression" in *Constitutional law of South Africa* 42-173.

⁴⁸⁹ J Grant "Defences under the Protection of State Information Bill: Justifications and the demands of certainty" (2012) 28 *SAJHR* 328: 328.

⁴⁹⁰ Protection of Information Bill B6 (2010); Protection of State Information Bill B6B (2010), Protection of State Information Bill B6D (2010) & Protection of State Information Bill B6H (2010).

⁴⁹¹ PSI B6H-2010.

ways: through classification and criminal liability in instances of contravention.⁴⁹² Classification can only be used by the state as an exceptional measure. A demonstrable need to protect information must exist before sensitive information can be classified.⁴⁹³ The right to conceal information falls in the sole domain of Cabinet, the Republic's Security Services and their oversight committees.⁴⁹⁴ There is an exception to this rule: any head of any organ of state – or a person to whom a head has delegated their authority – can also classify information provided that this power is conferred on them by the Minister of State Security who has shown that good reasons exist to provide a head of an organ of state with classification authority. Yet, before the classification power will become operational, the Minister's reasons for granting authority must first be approved by Parliament and the Minister must subsequently publish the reasons for granting this authority in the Government Gazette.⁴⁹⁵ Once classified, PSI makes it unlawful for any person to access, disseminate or receive such information.⁴⁹⁶

Like NSIA, PSI makes it clear that one of its primary objectives is to protect South Africa's National Security, and its conception of this term is identical to NSIA's definition. In fact the entire definition is identical, not just the security interests.⁴⁹⁷ Consequently, PSI entrenches the current legislative thinking around National Security. It is important to note that if this bill is enacted, the same danger will arise,

⁴⁹² PSI B6H-2010 S11.

⁴⁹³ S8(2)(c) & S8(2)(d)(ii).

⁴⁹⁴ S3(1) (a).

⁴⁹⁵ S1(1) "Minister", S3(1)(b) & S12; Constitution S209(2). The Constitution's text clarifies which Minister can delegate classifying power.

⁴⁹⁶ S34(1)(b), S34(2)(b), S34(3)(b), S34(1)(a), S34(2)(a), S34(3)(a), S35(1), S35(2), S35(3), S36(1)(a), S36(2)(a), S36(3)(a), S36(1)(b), S36(2)(b) & S36(3)(b). It specifically prohibits the unauthorised access of classified information which will directly or indirectly benefit a foreign state or hostile non-state actors. The bill makes it unlawful to disseminate classified information to a foreign state or to hostile non-state actors. PSI also makes it unlawful to receive classified information which will directly or indirectly benefit a foreign state.

⁴⁹⁷ Preamble; National Strategic Intelligence Act S1 "national security"; PSI B6H-2010 S1 "national security".

that is, its non-exhaustive protection of interests could lead to over-protection and abuse by the judiciary and the state in the name of National Security.

Despite this drawback, an examination of the specific security interests identified in NSIA could bring us closer to determining what National Security should mean in the Republic of South Africa.

3.4.2.2.1 THE MEANING OF TERRITORIAL INTEGRITY IN TERMS OF THE NATIONAL STRATEGIC INTELLIGENCE ACT

Section 103 of the Constitution sets out the land territory of South Africa. Vrancken argues that if this section is read in conjunction with section 232 of the Constitution, it makes South Africa's territorial sea also part of the Republic's territory.⁴⁹⁸ Section 232 states that:

“Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

It is a principle of customary international law that the waters of a coastal state form part of the state.⁴⁹⁹ The Republic's territory thus comprises both its land territory and territorial waters.⁵⁰⁰ The government therefore has a direct interest in protecting the Republic's territorial integrity against damage, invasion, occupation, annexation and threats from internal or external forces.⁵⁰¹

Section 2 of the Constitution provides that:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

The effect of this provision is that the Constitution prevails over any other law in instances of conflict. In view of this, and in view of the fact that NSIA does not define the term, territorial integrity in terms of NSIA should be given the same meaning as

⁴⁹⁸ PHG Vrancken *South Africa and the Law of the Sea* (2011) 33.

⁴⁹⁹ 26.

⁵⁰⁰ Constitution S232; See also Vrancken *South Africa and the Law of the Sea* 26.

⁵⁰¹ Buzan *People, States and Fear: The National Security problem in International Relations* 62.

under the Constitution. This will add to the clarity of what needs to be preserved from a National Security perspective.

3.4.2.2.2 THE MEANING OF THE CONSTITUTIONAL ORDER OF THE REPUBLIC IN TERMS OF THE NATIONAL STRATEGIC INTELLIGENCE ACT

While NSIA is aimed at preserving the constitutional order of South Africa for purposes of National Security, the meaning of this concept has not been set out in the act or applicable case law.⁵⁰² However, guidance could possibly be found in the German constitutional literature. This is because the German Basic Law includes provisions aimed at protecting the constitutional order or the free democratic order. For example, article 9(2) provides for the banning of associations that are directed against the constitutional order, while article 21(2) authorises the prohibition of political parties that seek to undermine or abolish the free democratic basic order. These provisions are a direct response to Germany's Nazi past, and are aimed at preventing anti-democratic movements and parties from exploiting constitutional freedoms in order to undermine or destroy the democratic constitutional order.⁵⁰³ The underlying idea that Germany's constitutional order should be protected against anti-democratic threats has been coined militant democracy.⁵⁰⁴ The provisions in question have been interpreted by the German Federal Constitutional Court in a number of cases. Commenting on these judgments, Niesen points out that the Court took the position that the constitutional order is government:

“[...] characterized by the absence of violent or arbitrary government.”⁵⁰⁵

⁵⁰² According to J Lane *Constitutions and Political Theory* (1996) 136.

“The constitutional order [...] consists of rules which have been institutionalised, meaning that they have been upheld by a system of sanctions.”

However, this definition is not very helpful from a National Security perspective, as it does not specifically identify the security interest which must be preserved.

⁵⁰³ DP Kommers & RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) 285.

⁵⁰⁴ 285.

⁵⁰⁵ P Niesen “Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties” (2002) 3 *German Law Journal* 7: [10].

In addition, the constitutional order is:

"[...] a basic order that satisfies the following necessary conditions: "respect for human rights as laid down in the Basic Law - especially every person's right to life and free development -, respect for popular sovereignty, separation of powers, responsible government, an administration governed by the rule of law, independent courts, multiple and equal political parties, including the constitutional right to the establishment and operation of an opposition."⁵⁰⁶

Niesen argues that the Basic Law and the jurisprudence of the German Federal Constitutional Court recognise that the constitutional order, which is based on rights, values, principles and institutions, is at risk of being compromised.⁵⁰⁷ Moreover, any threat aimed at compromising the constitutional order should be dealt with on the basis that it represents a threat to the state.⁵⁰⁸

Like the German Basic Law, the Constitution is a direct reaction to the injustices of the past. The objective of transitioning to a constitutional democracy, was to move away from a '[...] deeply divided society characterized by strife, conflict, untold suffering and injustice [...]', and to ensure that South Africa is not forced to return across the bridge back to the Apartheid system or another oppressive system of governance which is not democratically authored or embraced by the majority of South Africans, as the late Professor Mureinik noted.⁵⁰⁹

It is submitted that South Africa's constitutional order is founded on the following six security interests. The first is democracy. For the first time in the history of the Republic, the franchise was granted to every adult South African irrespective of colour, creed, racial origin or religious beliefs, thus enabling them to support and vote for the political party of their choice.⁵¹⁰

⁵⁰⁶ [10].

⁵⁰⁷ [15].

⁵⁰⁸ [18].

⁵⁰⁹ Mureinik (1994) *SAJHR* 31.

⁵¹⁰ Constitution S1(d) & S19(3)(a).

Secondly, the Constitution aims to safeguard a number of fundamental rights.⁵¹¹ These rights promote the values of human dignity, equality and freedom.⁵¹²

Thirdly, a system of government was instituted to ensure democratic rule. Constitutional supremacy and the rule of law were introduced to act as constraints on the exercise of all public power.⁵¹³ Additionally, the state must act in a manner which is open and accountable.⁵¹⁴ Parliamentary sovereignty was done away with, and the exercise of public power must be authorised by applicable law.⁵¹⁵

Fourthly, the Constitution ensured that specific areas of competence were reserved for the executive, legislature and judiciary.⁵¹⁶

Fifthly, the supreme law reserved the duty to protect the Republic from threats to its constitutional order, for the security services. The Constitution tasks the security institutions with the responsibility of protecting and preserving the Republic's constitutional democracy.⁵¹⁷

Lastly, it created specific chapter 9 institutions to ensure that democracy would be enforced and maintained in the Republic.⁵¹⁸

These features of South Africa's constitutional order are at risk of being compromised in a number of ways. Hostile entities and actors could attempt to compromise this security interest by aiming threats against clearly defined groups in the state. They could capture and threaten the democratic institutions which are to uphold the Republic's democracy. They could through force drive out persons residing

⁵¹¹ Constitution Chapter 2.

⁵¹² S7(1).

⁵¹³ D Dyzenhaus "The pasts and future of the rule of law in South Africa" (2007) 124 *SALJ* 734: 736.

⁵¹⁴ Klaaren & Penfold "Access to information" in *Constitutional law of South Africa* 62-2; *Qozeleni v Minister of Law and Order* 1994 2 SACR 340 (E) 344; *Khala v Minister of Safety and Security* 1994 2 SACR 361 (W) 367.

⁵¹⁵ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) 678.

⁵¹⁶ Constitution Chapter 3-8.

⁵¹⁷ Chapter 11.

⁵¹⁸ Chapter 9.

in an area in South Africa and partition this area off for right wing residents only. Furthermore, they could furnish this area with their political nomenclature.⁵¹⁹ Ultimately, this would result in an environment in which freedom, equality and human dignity cannot thrive or exist. If South Africa's constitutional order is overhauled it will no longer represent a system of laws geared towards creating and preserving the central features of South Africa's constitutional democracy. Any attempt to overthrow or change the constitutional order, or key aspects of it, through non-constitutional means, would endanger this interest.

3.4.2.2.3 THE MEANING OF THE PEOPLE OF THE REPUBLIC IN TERMS OF THE NATIONAL STRATEGIC INTELLIGENCE ACT

Who the people are has been examined under Van der Westhuizen's conception of National Security. The same meaning should be given to the people for purposes of NSIA.

3.4.3 INTERNATIONAL CONCEPTIONS OF NATIONAL SECURITY

3.4.3.1 THE PROMOTION OF ACCESS TO INFORMATION ACT, THE PROTECTION OF INFORMATION ACT AND INTERNATIONAL CONCEPTIONS OF NATIONAL SECURITY

PAIA and PIA at first glance do not seem to expressly protect the established National Security interests as set out by specific international instruments, such as the SP and the JHBP.⁵²⁰ As mentioned before, the SP are concerned with protecting a state's 'political independence', its 'territorial integrity' and the 'existence of the nation',⁵²¹ while the JHBP are concerned with safeguarding a 'country's existence', a 'state's capacity to defend itself' and 'territorial integrity'.⁵²² The interests that the SP

⁵¹⁹ Niesen (2002) *German Law Journal* [34].

⁵²⁰ Mendel "National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles" in *National Security and Open Government: Striking the right balance* 11; Siracusa Principles (1984) Principle 29.

⁵²¹ Siracusa Principles (1984) Principle 29.

⁵²² Mendel "National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles" in *National Security and Open Government: Striking the right balance* 11.

and the JHBP conceptions of National Security aim to safeguard appear to be different from those mentioned in PAIA and PIA, as well as from the interests protected in terms of NSIA and Van der Westhuizen's notions of security.⁵²³

However, there are overlaps between the interests which the SP and JHBP aim to protect and the other conceptions of National Security.⁵²⁴ Although caution should be exercised when relying on international conceptions of National Security, since this concept is a product of a state's history,⁵²⁵ the SP and the JHBP conceptions of National Security could potentially assist us in determining what National Security should mean in terms of PAIA and PIA on the strength of the reasoning set out in the previous chapter. A failure to protect these interests may also result in under protection of South Africa's National Security. It is thus necessary to analyse the content of the security interests protected in terms of these conceptions of National Security to determine what they mean, before determining if it is necessary for PAIA and PIA to preserve them from being compromised.

3.4.3.2 THE SIRACUSA PRINCIPLES

3.4.3.2.1 POLITICAL INDEPENDENCE

Political independence does not have a fixed meaning.⁵²⁶ Bourne opines that it includes the powers to create, alter and maintain governments and constitutions, create and foster political alliances, conclude treaties and develop relationships with

⁵²³ General Intelligence Laws 11 of 2013; National Strategic Intelligence Act S1 "national security"; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [62], [85] & [174]; PAIA S41(1)(a)(i) & S41(1)(a)(ii); PIA S3 & S4.

⁵²⁴ General Intelligence Laws 11 of 2013; National Strategic Intelligence Act S1 "national security"; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [62], [85] & [174]; PAIA S41(1)(a)(i) & S41(1)(a)(ii); PIA S3 & S4; Mendel "National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles" in *National Security and Open Government: Striking the right balance* 11; Siracusa Principles (1984) Principle 29.

⁵²⁵ Van Nieuwkerk (2004) *African Security Review* 91.

⁵²⁶ CB Bourne *International Water Law: Selected Writings of Professor Charles B. Bourne* (1997) 228.

other members of the international community.⁵²⁷ This concept is generally concerned with protecting a state's ability to control matters that fall within its powers.⁵²⁸ According to McDougal and Feliciano, political independence is impaired when the decision-making ability of a state to regulate and control its matters is totally surrendered to or considerably reduced by another state or states. The attack on a state's political independence may manifest itself in the form of an attempt by unconstitutional means to alter the composition of government, to disempower it, to replace it or alter the manner in which decisions are reached within a state.⁵²⁹

3.4.3.2.2 TERRITORIAL INTEGRITY

Territorial integrity is not specifically defined in international law.⁵³⁰ Despite the lack of a fixed definition, El Ouali submits that it refers to a state's sovereign right to exist within a defined territory.⁵³¹ McDougal and Feliciano have a different perspective. Instead of focusing on the state's right to existence, the two authors posit that territorial integrity is concerned with the control that the state has over a geographical area and the people who reside therein.⁵³² Helpful as these viewpoints are, it seems that the concept is still contested and not many commentators have identified what it means.⁵³³ Naturally the danger is that this term opens up the occasion for state abuse.

3.4.3.2.3 THE EXISTENCE OF THE NATION

It is also uncertain what the SP definition aims to protect where it refers to the 'existence of the nation'. There are two reasons for this uncertainty. The first reason is that the concept is defined so broadly that any number of things could potentially be

⁵²⁷ DW Bowett *Self-defense in International Law* (1958) 43.

⁵²⁸ J Willis *State responsibility for technological damage in International Law* (1987) 44.

⁵²⁹ MS McDougal & FP Feliciano "Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective" (1959) 68 *Yale Law Journal* 1057: 1101.

⁵³⁰ El Ouali *Territorial Integrity in a Globalizing World: International Law and States' Quest for Survival* 2.

⁵³¹ 1-8.

⁵³² McDougal & Feliciano (1959) *Yale Law Journal* 1101.

⁵³³ El Ouali *Territorial Integrity in a Globalizing World: International Law and States' Quest for Survival* 1-8.

compromised when a threat or attack is aimed at the ‘existence of a nation’. On one view to threaten the ‘existence of the nation’ is the same as ‘threatening the life of the nation’.⁵³⁴ The SP defines the latter concept. It holds that to ‘threaten the life of the nation’ can mean one of several things. It could mean that the political independence or territorial integrity of the state is at risk. This is somewhat surprising as political independence and territorial integrity are the two other security interests safeguarded by the SP definition of National Security, as discussed above in paragraphs 3.4.3.2.1 and 3.4.3.2.2, respectively. It seems strange that the drafters deemed it necessary to include the before mentioned security interests expressly, but then allowed for these interests to be protected again under the ‘existence of a nation’. Additionally, it can also mean that the whole of the population, the whole or part of the territory of the state, the physical integrity of the population or the existence or the basic functioning of institutions to ensure and protect the rights recognised in the covenant are threatened.⁵³⁵ In summary, the concept and the objects that it aims to protect causes considerable confusion.

The second reason is that the word ‘nation’ is fraught with difficulties, and that employing National Security to protect it has often led to abuse.⁵³⁶ Buzan argues that the object that needs security is the nation. He defines nation as:

“[...] a large group of people sharing the same culture and possibly the same racial heritage and normally living in one area.”⁵³⁷

However, Cameron’s conception of the nation shows that Buzan’s solution is problematic. Evidence suggests that states in the past abused the term to justify

⁵³⁴ Domrin *The Limits of Russian Democratisation* 51.

⁵³⁵ Siracusa Principles (1984) Principle 39.

⁵³⁶ Coliver “Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information” in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 19 & 20.

⁵³⁷ B Buzan “The idea of the state and National Security” in R Little & M Smith (eds) *Perspectives on world politics* 3ed (2006) 29: 29 & 30.

security activity aimed at protecting parochial interests.⁵³⁸ Cameron notes that the word 'nation' can be interpreted to refer to cultural, racial and ethnic groupings within a state. The socio-political cohesion between the groups may be weak or even non-existent. The ideology of one group of people in a state might be totally different and stand in stark opposition to a state's institutionalised ideology.⁵³⁹ Neack shows how cultural groups subscribing to different ideologies can result in tension, and be the cause of disloyalty towards a state. In the South African context, the majority of the population's political ideology was different from and opposed to the Apartheid government's creed.⁵⁴⁰ Thus, when the state employed National Security action to protect the nation in which there was weak socio-political cohesion, it was not protecting the entire population of the state, but rather partisan or elitist interests.⁵⁴¹ Buzan's proposed conception of National Security would only seem to have purchase in very homogenous societies. If National Security is aimed at protecting the nation, who they are is more nuanced, as Cameron appreciates. It is therefore not certain what the word 'nation' means in the National Security context.⁵⁴²

Although the attempt to define the interests that are in need of protection is to be welcomed, the majority of the SP interests are vaguely defined and open to different interpretations. The SP contribution in the context of the mediation of security and information seems to be very little, if any.

⁵³⁸ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 19 & 20.

⁵³⁹ Cameron *National Security and the European Convention on Human Rights* 40 & 41.

⁵⁴⁰ Neack *Elusive security: States first, people last* 28.

⁵⁴¹ Cameron *National Security and the European Convention on Human Rights* 40 & 41.

⁵⁴² Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 28.

3.4.3.3 THE JOHANNESBURG PRINCIPLES

Like the SP, the JHBP also defines National Security.⁵⁴³ The JHBP expressly protects the rights to access, receive and impart information. It also recognises that states may limit these rights in order to protect National Security,⁵⁴⁴ but takes care to specify what National Security entails. Inspired in part by the National Security definition of the SP, the JHBP hold that National Security must 'protect a country's existence', its 'territorial integrity' and 'the ability of the state to defend itself'.⁵⁴⁵

Despite being partly inspired by the SP, the JHBP's definition is different in several respects. Firstly, the JHBP does not specifically identify a state's 'political independence' as a protectable interest. Secondly, the JHBP identifies a 'country's existence' as one of its primary objects of protection, as opposed to a 'nation's existence' as set out by the SP. This was motivated by the fact that states had in the past abused the term to justify state activity aimed at protecting parochial interests.⁵⁴⁶ Thus, the authors of the JHBP wanted to make a break from this kind of arbitrary use of National Security. In terms of the JHBP, 'a country's existence' refers to the entire country. Although the phrase implies the protection of a territory, it is aimed at safeguarding the population within a defined territory, not the territory itself, which is protected separately by the JHBP as an independent interest. Thus, only threats which pose a risk to the 'entire country as a whole', i.e. the entire population within a state, can impair National Security.⁵⁴⁷ Lastly, the JHBP recognises that a state's National Security can be compromised if its capacity to defend itself is impaired. It thus

⁵⁴³ UN Special Rapporteur (14 December 1994) for the JHBP; I Special Rapporteurs (14 July' 1992) for the SP for the SP; see also Balule (2008) *U. Botswana L.J.* 165.

⁵⁴⁴ Article 19 The Johannesburg Principles on National Security, Freedom of Expression and Access to Information Principle 2(a) & Principle 11.

⁵⁴⁵ Mendel "National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles" in *National Security and Open Government: Striking the right balance* 11.

⁵⁴⁶ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 19 & 20.

⁵⁴⁷ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 19 & 20.

specifically recognises the need to protect the ability of a state to defend itself.⁵⁴⁸ The rationale for including this protectable interest in its definition is to permit states to deny access to or suppress any information that would reveal details of its troop movements, weapons caches, or offensive and defensive abilities.

The SP and the JHBP both identify territorial integrity as a protectable interest which needs to be protected for purposes of National Security. However, the inclusion of this interest was not inspired by the SP, but rather derived from the ECHR, which recognises that territorial integrity is a protectable interest that is inextricably linked to National Security.⁵⁴⁹ Conte shows that the European Court of Human Rights also treats territorial integrity as a concept closely linked to National Security.⁵⁵⁰ Coliver argues that this is also tacitly recognised by all of the seminal human rights treaties.⁵⁵¹ Unfortunately, a generally accepted universal definition, which crystallises the meaning of this concept, has not been established.⁵⁵² Although the motivation for the inclusion of this concept is derived from the ECHR, commentators and jurisprudence do not identify what this concept means.⁵⁵³ The imprecision surrounding the meaning

⁵⁴⁸ Article 19 The Johannesburg Principles on National Security, Freedom of Expression and Access to Information Principle 2(a); PSI B6H-2010 S1(1) “national security” (c).

⁵⁴⁹ Coliver “Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information” in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 20.

⁵⁵⁰ *Zana v Turkey* (1997) ECHR (69/1996/688/880) n80; A Conte *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* (2010) 303.

⁵⁵¹ Coliver “Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information” in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 20.

⁵⁵² El Ouali *Territorial Integrity in a Globalizing World: International Law and States’ Quest for Survival* 1-8.

⁵⁵³ See E Wicks, B Rainey & C Ovey *The European Convention on Human Rights* 6ed (2014) 317; A Moucheboeuf *Minority Rights Jurisprudence Digest* (2006) 617; P Thornberry & MAM Estébanes *Minority Rights in Europe: A Review of the Work and Standards of the Council of Europe* (2004) 40; Conte *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* 303; T Marauhn “Freedom of Expression, Freedom of Assembly and Association” in D Ehlers (ed) *European Fundamental Rights and Freedoms* (2007) 97: 109.

of territorial integrity continues to exist under the JHBP. Additionally, the same risk of abuse under the SP continues under the JHBP too. The free flow of information runs the risk of being arbitrarily limited by states because both instruments allow for the protection of imprecise security interests.

3.4.4 TOWARDS PROTECTING THE APPROPRIATE SECURITY INTERESTS IN TERMS OF THE PROMOTION OF ACCESS TO INFORMATION ACT AND THE PROTECTION OF INFORMATION ACT

From the above analysis it is clear that there are overlaps between some of the security interests that PAIA and PIA aim to protect, and the security interests which the other notions of National Security aim to preserve. The difficulty is determining which security interests should be protected by these two acts. It is therefore important to determine which conceptions of National Security will provide South Africa with the necessary protection, without risking serious violations of the rights to access, receive or impart information. To this end, this section will juxtapose PAIA and PIA's notions of National Security against the security interests of the other conceptions of National Security that were discussed above.

It has been argued above that section 41(1)(a)(i) of PAIA, in aiming to preserve the 'defence of the Republic' from being compromised, is concerned with protecting the SANDF's ability to safeguard the Republic of South Africa, and the ability of the SAPS, acting alone or together with the SANDF, to combat terrorism. Additionally, it has been argued that sections 3, 4(1)(a)(i)(bb), 4(1)(b)(i)(bb) and 4(2) of PIA, which aim to preserve the 'security of the Republic', are concerned with protecting the same interests as those set out in section 41(1)(a)(i) PAIA. The JHBP, like PAIA and PIA, recognises the need to protect the defence of the state. While there is an overlap between the security interests which PAIA and PIA aim to protect and which the JHBP aim to preserve, the acts aim to provide much broader protection than the JHBP. While the JHBP is concerned with preserving the defence of the country, the acts, in addition to protecting this interest, aim to guard against impairing the ability of SAPS, or SAPS together with the SANDF, to combat terrorism. In view of the importance of the preservation of the defence of the state and the state's duty to guard against terrorism, it is submitted that it is more appropriate to protect PAIA and PIA's conception of this security interest as opposed to the JHBP's.

As argued earlier, section 41(1)(a)(ii) of PAIA refers to the ‘security of the Republic’, which is ultimately concerned with preserving the security capacity of the intelligence services of South Africa (i.e. the Agency, SAPS and the SANDF) and the capacity of other department of states - authorised in terms of applicable law - to provide ‘security to the Republic’. The intelligence services and other departments of state which have specific authority to act in the intelligence cluster, are instrumental to South Africa’s safety. Since this security interest is defined with sufficient specificity and is of fundamental importance, PAIA should continue to protect it. Sections 3 and 4 of PIA also aims to preserve the intelligence capacity of the Agency. However this act does not seem concerned with preserving the intelligence capacity of SAPS, the SANDF and the capacity of other department of states - authorised in terms of applicable law. The danger is that PIA does not provide South Africa with sufficient protection. For this reason, PAIA’s conception of the ‘security of the Republic’ seems preferable.

Whereas Van der Westhuizen, Yacoob, Moseneke and NSIA refer to ‘the people’, the SP refers to ‘the existence of the nation’, while the JHBP aims to protect ‘a country’s existence’.⁵⁵⁴ As pointed above, the SP’s formulation is problematic for two reasons. Firstly, the term ‘existence of the nation’ does not specifically have as its objective the protection of the people. The term is a misnomer, which refers to many objects, most of which do not directly concern the protection of the people, as demonstrated in paragraph 3.4.3.2.3.⁵⁵⁵ Incorporating SP’s ambiguous notion of the people into PAIA will cause confusion and create uncertainty as to what the purpose of the security action is. It will countenance arbitrary state action, and most importantly, it will fail to provide adequate protection to the most important protectable interest of National Security. Secondly, including the SP’s notion of the ‘nation’ into the act may permit the state to protect parochial interests as opposed to protecting all South Africans. Although the ‘nation’ as contemplated by the SP arguably refers to the nation

⁵⁵⁴ General Intelligence Laws 11 of 2013; National Strategic Intelligence Act S1 “national security”; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [62], [85] & [174]; PAIA S41(1)(a)(i) & S41(1)(a)(ii); PIA S3 & S4; Mendel “National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles” in *National Security and Open Government: Striking the right balance* 11; Siracusa Principles (1984) Principle 29.

⁵⁵⁵ Domrin *The Limits of Russian Democratisation* 51; Siracusa Principles Principle 39.

as a whole, there have been too many historical instances where states have invoked the protection of the nation to protect parochial interests. Since the 'nation' is sometimes identified with partisan interests, the use of the term could enable the state to limit the free flow of information in order to protect the interests of elites.

Conversely, the JHBP clearly aims to protect all of the people within a state's boundaries.⁵⁵⁶ The views of Van der Westhuizen, Yacoob, Moseneke and NSIA (collectively 'the South African definitions')⁵⁵⁷ similarly are geared towards protecting the lives and physical security of everyone in the state.⁵⁵⁸ The JHBP's notion is drawn from various sources of international and comparative law,⁵⁵⁹ while the South African definitions' conception is linked to South Africa's Bill of Rights. Since the South African definitions and the JHBP are concerned with protecting the same interests and are clear on the content and meaning of 'the people', PAIA and PIA could include either of these notions of the people in its conception of National Security. However, since the meaning of the people as contemplated by South African laws is closely aligned to South Africa's Bill of Rights, it is preferable if the acts refer to the people rather than to the country's existence. The people are the single most important protectable interest to any country. All state power originates from the people, government is established for their wellbeing,⁵⁶⁰ the people create industries, provide the funds and labour to construct the state, and debate on and design the future of the state. Without people the need for democracy, sovereignty, territorial integrity and state defence are superfluous. In fact, the existence of the people is a precondition for the protection of National Security.⁵⁶¹ For these reasons, PAIA and PIA should refer expressly to the

⁵⁵⁶ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 19 & 20.

⁵⁵⁷ General Intelligence Laws Amendment National Strategic Intelligence S1 "national security"; *Independent Newspapers (Pty) Ltd* [62], [85] & [174]; PAIA S41(1)(a)(i) & S41(1)(a)(ii); PIA S3 & S4.

⁵⁵⁸ Mendel "National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles" in *National Security and Open Government: Striking the right balance* 11.

⁵⁵⁹ 9.

⁵⁶⁰ L Elison & F Snyder *The Montana State Constitution* (2011) 36.

⁵⁶¹ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [174].

people as a security interest that must be safeguarded for purposes of National Security.

Presently PAIA and PIA do not expressly refer to the remainder of the security interests which the other South African and international conceptions of National Security aim to preserve. They do not refer to a state's democratic order, sovereignty (protected by Van der Westhuizen's notion of security), constitutional order (protected by NSIA), territorial integrity (protected by NSIA, SP and JHBP) and political independence (protected by SP). PAIA and PIA's failure to protect these interests may under-protect the Republic's National Security where information rights and security interests come to a head. There are overlaps between Van der Westhuizen's democratic order and NSIA's constitutional order, and between Van der Westhuizen's sovereignty, the SP's political independence, and territorial integrity, as referred to by NSIA, SP and the JHBP. Thus, it is necessary to determine if these interests should be safeguarded by PAIA and PIA.

On an initial reading, it is unclear whether and to what extent NSIA's constitutional order is different from Van der Westhuizen's democratic order. However, NSIA's constitutional order seems broader. Van der Westhuizen's democratic order includes institutional democracy, which is grounded in sections 1(d) and 19 of South Africa's Constitution and electoral legislation, and other institutional structures designed to protect South Africa's democracy. It also includes non-institutional democracy, which refers to those activities which give life to the institutional structures. NSIA's notion of constitutional democracy is broad enough to include institutional and non-institutional democracy. But it also includes other important aspects of South Africa's constitutional architecture. These interests are the recognition of the different spheres of government,⁵⁶² the formation of independent and impartial entities aimed at promoting constitutional democracy,⁵⁶³ the recognition and empowerment of the security institutions tasked with protecting and preserving the Republic,⁵⁶⁴ the recognition and preservation of traditional leaders⁵⁶⁵ and a democratically authored government which

⁵⁶² Constitution Chapter 3-8.

⁵⁶³ S181.

⁵⁶⁴ Chapter 11.

⁵⁶⁵ Chapter 12 & 13.

is embraced by the majority of South Africans.⁵⁶⁶ Due to the increased protection that the constitutional order would provide, PAIA and PIA should preserve this security interest.

Territorial integrity is the only protectable interest that is safeguarded by different conceptions of National Security under an identical name, specifically under NSIA, the SP and JHBP. Although the meaning of territorial integrity under the JHBP and the SP is inexact, it is ultimately the physical base of a state that is protected, although its size, terrain, configuration, level and shape are also considered for protection purposes, depending on the state being analysed.⁵⁶⁷ The problem is that a state's territory is not always precisely defined. A state's territory may not be recognised by other states, its boundaries could be disputed or poorly defined, or the area which it controls may change over the course of time.⁵⁶⁸ Irrespective of the fact that territorial integrity has an imprecise meaning under the JHBP and SP, the protectable interest is specific enough in South Africa. Due to the specificity of the Republic's notion of territorial integrity, PAIA and PIA's conception of National Security should preserve South Africa's conception of territorial integrity as a security interest.

The SP identifies sovereignty as 'political independence', while Van der Westhuizen calls it 'state sovereignty'. The people of all states have a direct interest in ensuring that their government uses its sovereignty for the nation's wellbeing. A state wielding its sovereign authority creates the conditions for liberty, security, wealth and solidarity. It also uses its powers to put in place a rules based framework and consolidates it through enforcement to create order in society.⁵⁶⁹ Even though neither the SP nor Van der Westhuizen's conception of sovereignty can be defined with scientific precision,⁵⁷⁰ both definitions of National Security are concerned with protecting a state's internal

⁵⁶⁶ Mureinik (1994) *SAJHR* 31.

⁵⁶⁷ Buzan *People, States and Fear: The National Security problem in International Relations* 62.

⁵⁶⁸ 62 & 64.

⁵⁶⁹ D Chalmers "European restatements of Sovereignty" in R Rawlings, P Leyland & A Young (eds) *Sovereignty and the Law: Domestic, European and International Perspectives* (2013) 186: 190.

⁵⁷⁰ Biersteker "State, Sovereignty and Territory" in *Handbook of international relations* 245.

and external sovereignty.⁵⁷¹ To relinquish its state sovereignty to another actor would mean that the national and international destiny of South Africa will be designed and controlled by another state which does not have the Republic's interests at heart. Ultimately, it will be undemocratic. Thus, PAIA and PIA's notion of National Security must have as its objective the protection of the Republic's sovereignty. Since the SP and Van der Westhuizen's conception of sovereignty both ultimately aim to protect a state's internal and external sovereignty, PAIA and PIA's notion of National Security can protect either of the definitions' conceptions of sovereignty.

In light of the foregoing examination and in summary, PAIA and PIA, insofar as they seek to safeguard National Security, should aim to protect the defence, intelligence capacity, the people, the constitutional order, the sovereignty and territorial integrity of the Republic of South Africa from being compromised. These interests are specific and are sufficiently clear as to what will fall within the realm of their protection. They will thus assist the courts in their resolution of disputes between information and security.

Requiring PAIA and PIA to protect these security interests would have two advantages. Firstly, and most importantly, it would make it more difficult for the state to abuse National Security in order to suppress sensitive information. In the case of a dispute, the courts will have clarity as to the National Security interests that could be invoked to limit the rights to access, receive and impart information. The imprecise meaning of National Security will no longer be a barrier to the principled resolution of such disputes. Secondly, the precision added to the meaning of National Security should ensure that the state is adequately protected against threats to its security. Articulating what needs to be protected allows the judiciary and the state to protect South Africa's National Security, should the free flow of information and National Security come to a head.

There are significant overlaps between the different security interests discussed above. For example, both the 'constitutional order' and the 'people' are concerned with preserving the life and safety of all people in South Africa. Similarly, the 'constitutional

⁵⁷¹ Philpott "Ideas and Evolution of Sovereignty" in *State Sovereignty: Change and persistence in international relations* 20; Bowett *Self-defense in International Law* 43.

order' aims to ensure that the security services preserve the Republic of South Africa, while also protecting the 'defence of the country'. Moreover, state 'sovereignty' is a precondition for preserving the landscape, airspace and sea from being compromised, and thus overlaps with 'territorial integrity'. Due to the overlap in security interests, the argument can be made that if the 'constitutional order' already aims to protect the lives of the people and to ensure the defence of the country, and state 'sovereignty' already preserves the 'territorial integrity' of the state, there is no need for PAIA and PIA to separately safeguard 'the people', the 'defence' and 'territorial integrity' of the Republic of South Africa.

However, on closer scrutiny this argument does not hold much weight. Despite similarities between the security interests, a threat aimed at compromising 'the people' or the 'defence of the Republic' will not automatically compromise the 'constitutional order' of the Republic. This statement is best explained by way of two examples. Firstly, violent acts of terror targeting a particular part of society aim to compromise the life and safety of those people. While these violent attacks target the people, they may not necessarily be aimed at compromising the 'constitutional order' of the Republic. The security interest in need of protection in this example are the 'people', not the 'constitutional order' of the state. However, should the violent acts of terror aimed at harming 'the people' be executed with the purpose of overthrowing the state, the threat is aimed at the 'constitutional order' of the state, as opposed to the 'people'. Secondly, if South Africa has constructed specialised weaponry to defend itself in times of war and the USA threatens war if South Africa does not dismantle the weaponry, such a threat is aimed at the defensive capability of the SANDF. If the South African media publishes the location of the specialised defence systems notwithstanding the threat and the USA carries out strategic attacks to neutralise this defence system, they have essentially impaired the defence capabilities of the state. The aim of the attack by the USA was not to overthrow the 'constitutional order' of South Africa. Its goal was to neutralise South Africa's defence capabilities. Therefore, although the 'constitutional order' aims to preserve the security services, the attack perpetrated by the USA is not aimed at overhauling South Africa's constitutional democracy. However, if the USA invaded South Africa for its mineral resources under the auspices of bringing true democracy to South Africa, this threat would be aimed at undoing South Africa's 'constitutional order'.

It is also important to note that compromising the 'territorial integrity' of the Republic will not automatically compromise the 'sovereignty' of the Republic. For example, if a group of radicals occupy and retain large tracts of state land through violence, these threats are aimed at compromising South Africa's 'territorial integrity'. However, if Zimbabwe annexes Tshwane, this action could be seen as an attack on the sovereignty of the state. On the other hand, certain activities may compromise both 'territorial integrity' and its sovereignty.

3.4.5 TOWARDS A MORE NUANCED INTERPRETATION: THE OTHER SECURITY INTERESTS AND THE PROMOTION OF ACCESS TO INFORMATION ACT AND THE PROTECTION OF INFORMATION ACT

3.4.5.1 INTRODUCTION

As indicated above, sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA and sections 3 and 4 of PIA do not expressly refer to the constitutional order, territorial integrity, state sovereignty and the people of the Republic. It may nevertheless be asked whether these sections could be interpreted to include these interests under terms like the security and/or defence of the Republic.

3.4.5.2 PROTECTING THE OTHER SECURITY INTERESTS: THE PROMOTION OF ACCESS TO INFORMATION ACT

Sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA enable the state to deny access to information if the reasonable expectation is that its publicity will compromise the 'security and/or the defence' of the Republic. More specifically, these sections, read in conjunction with sections 41(2)(a), 41(2)(b)(i), 41(2)(c)(ii) and 41(2)(d)(ii), enable the state to deny access to state records containing information on 'subversive or hostile activities'.

The phrase 'subversive or hostile activities', as defined in section 1 of PAIA, is concerned with state records which contain information on acts of 'aggression against the Republic', acts of terror 'aimed at the people of the Republic', and the use of force or violence against the 'constitutional order' of the Republic. It is interesting to note that the information referred to in the definition of section 1 recognises the importance

of the other security interests, namely, sovereignty, territorial integrity, the people and the 'constitutional order' of the Republic. However, section 1's definition of 'subversive or hostile activities' does not expressly refer to state sovereignty and the territorial integrity of the Republic, but refers to 'aggression against the Republic'. The phrase 'aggression against the Republic' means acts of violence aimed at the sovereignty and territorial integrity of a state.⁵⁷²

These sections do not obligate the state to deny access to information concerning acts of 'aggression against the Republic', acts of terror 'aimed at the people of the Republic', or the use of force or violence aimed at the 'constitutional order' of the Republic.⁵⁷³ The state may only restrict access to this type of information if its ventilation is reasonably expected to compromise South Africa's defence or security.⁵⁷⁴ This seems to imply that, although records which contain information on 'subversive or hostile activities' are concerned with matters which clearly threaten important security interests, the executive or the courts may still elect to ventilate it on the grounds that there is no reasonable expectation that the security and/or defence of the Republic will be compromised. This interpretation raises the concern that the state could be placed in serious danger if information relating to the detection, prevention, suppression or curtailment of subversive or hostile activities is released.

It is however submitted that sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA can and should be interpreted to include the interests identified above within the meaning of the defence and security of the Republic. This is because it is difficult to imagine a scenario in which the ventilation of information would threaten the constitutional order, territorial integrity, state sovereignty or the people without also compromising the security and defence of the Republic. For this reason, it is not necessary to amend sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA. However, for PAIA's conception of National Security to be truly effective, the content of its security interests should be aligned to the meanings ascribed to them in 3.4.4 above.

⁵⁷² General Assembly resolution 29/3314, *Definition of Aggression*, A/RES/29/3314 (14 December 1974) available from undocs.org/A/RES/29/3314.

⁵⁷³ PAIA S1 "subversive or hostile activities".

⁵⁷⁴ S41(1)(a)(i), S41(1)(a)(ii), S41(2)(a), S41(2)(b)(i), S41(2)(c)(ii) & S41(2)(d)(ii).

3.4.5.3 PROTECTING THE OTHER SECURITY INTERESTS: THE PROTECTION OF INFORMATION ACT

Sections 3 and 4 of PIA also seem to be capable of an interpretation which could preserve the other security interests. As submitted earlier the act empowers state entities to conceal information which, if publicised, could compromise the 'security of the Republic'. In addition, section 3 of PIA also contemplates freezing information which, if ventilated, would compromise the 'Republic's interests'. PIA does not define what the 'interests of the Republic' means, neither does any case law. However, as a consequence of the legislature's view of National Security, as articulated in NSIA and PSI, it would be really surprising if the courts held the view that the 'constitutional order', territorial integrity, the sovereignty and the people of the Republic would not qualify as interests of the Republic worthy of protection. Therefore, section 3 of PIA does enable the state to conceal information which, if publicised, would compromise the other security interests.

However, it must be kept in mind that the meaning of the 'Republic's interest' is a deeply contested issue.⁵⁷⁵ The criticism of National Security has always been that it is an indistinct concept, and that its vagueness has enabled states to engage in and conceal their malfeasance. Despite the earlier interpretation of the 'Republic's interest', it is submitted that it would be more appropriate if PIA clearly sets out the

⁵⁷⁵ SD Krasner *Defending the National Interest: Raw Materials Investments and U.S. Foreign Policy* (1978); Van Nieuwkerk (2004) *African Security Review* 89 & 90. There is uncertainty surrounding the substantive meaning of the term national interest, which is evidenced by the two following examples. In 1978 Stephen Krasner, in his book titled '*Defending the national interest*,' used the term to refer to the preferences of a nation's leaders, or the goals that are sought by the state. He further specified that such preferences, or set of objectives, must be related to general societal goals, which persist over time, and have a consistent ranking of importance in order to justify using the term. Conversely, Van Nieuwkerk opines that national interest is what a majority, after discussion and debate and through a representative Parliament, decides are its legitimate long-term shared interests. The difference in the two views really turns on whether a top down or a bottom up approach is used to determine what is in the national interest. While these two authors are not aligned as to what is in the national interest, they do not definitively explain what the content of this term is either. Their conceptions of national interest are formulated at a high level of generality.

security interests which it aims to preserve in order to avoid abuse or misuse.⁵⁷⁶ It is submitted that the act should be amended to preserve the relevant security interests. The risk in failing to do so is that the imprecision surrounding the meaning of this concept could allow the state to unjustifiably limit the free flow of information. However, even if the legislature fails to amend PIA, section 3 can be interpreted in a manner which would preserve the other security interests.

Section 4(1) of PIA, like section 3 of the act, is also capable of being interpreted in a manner which permits the state to contain the free flow of information to protect the other security interests. The broadness of the provisions enables the courts and the state to limit the publicity of information which could compromise the 'constitutional order', 'territorial integrity', 'state sovereignty' and the 'people' of the Republic of South Africa. The same applies to section 4(2) of PIA.⁵⁷⁷

⁵⁷⁶ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 11.

⁵⁷⁷ PIA S4(2); *Council of Review, South African Defence Force v Mönning* 488 & 489; Klaaren (2002) SALJ 723. However, section 4(1) can also accommodate an interpretation which specifically punishes any person who receives information for a reason other than National Security. This view seems to be correct in the context of the criminalisation of the dissemination of sensitive information protected on grounds other than National Security. In *Council of Review, South African Defence Force v Mönning* the Appellate Division set aside a decision of a military tribunal, since it found that the tribunal should have recused itself from hearing the matter, as reasonable grounds existed for believing that there was a likelihood that the forum was biased, or was suspected of being biased. Of importance for this thesis is Corbett CJ's *obiter dicta* in his analyses of the facts. Following his examination of section 4(1)(b) of PIA, he pointed out that it is an offence to disseminate specific information relating to military matters to any unauthorised person. The three accused in this matter were convicted by the tribunal for possessing military information which they intended to disseminate to expose military malfeasance. Yet, the type of military information which they possessed was not of the kind which threatened National Security. Although it has not been authoritatively decided by the judiciary whether an actor would commit an offence for disseminating information contrary to the dictates of National Security, section 4(1) of PIA is crafted broadly enough that the state may prevent an actor from disseminating information on the grounds of National Security. By extension section 4(2) of the act is also capable of the same broad interpretation.

As argued earlier, it would be more appropriate if PIA clearly sets out the security interests which it aims to preserve.⁵⁷⁸ This can be achieved by amending the act to specify in section 1 that ‘interests of the Republic’ means the preservation of South Africa’s constitutional order, territorial integrity, state sovereignty and people. These terms should be given the meanings ascribed to them in paragraph 3.4.4 of this thesis.

3.5 THREATS TO NATIONAL SECURITY

3.5.1 BACKGROUND

The purpose of defining the content of PAIA and PIA’s security interests is to reduce the extent to which the state could misuse National Security in disputes between information and security. However, the opportunity for abuse can be reduced even further if section 41(1)(a) of PAIA and sections 3 and 4 of PIA identified the nature of the threats which they aim to guard against by containing information.

As pointed out in chapter 2, section 41(1)(a) of PAIA enables the state to deny access to state-held information, if it is reasonable to expect that the publicity of the information will compromise South Africa’s National Security – except in very specific instances which will be addressed in this paragraph below. Sections 3 and 4 of PIA also contemplate that the state can limit a person’s rights to receive and impart information in terms of the act, if it can show that there is a reasonable apprehension that the publicity of the information will cause irreparable harm to the Republic’s National Security.⁵⁷⁹ The failure to identify the National Security threats with sufficient

⁵⁷⁸ Coliver “Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information” in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 11.

⁵⁷⁹ Pete et al *Civil Procedure: A practical guide* 406. For the state to procure a prohibitory interdict on an urgent basis from the courts it has to show that if the information is not embargoed the state’s National Security will be compromised. The state in terms of PIA will have to show that some threat aims to compromise South Africa’s National Security and the Republic’s courts will only countenance the limitation if the state can show on a reasonable basis that a specific threat will compromise the target. However, PIA does not identify what that threat or threats are. It is necessary to determine what the nature of those threats should be to assist the state to justifiably limit the free flow of information and the courts in its mediation of the tension for purposes of National Security. It is really f which enables

specificity, could lead to judicial and/or state error or abuse in terms of PAIA, as already demonstrated in paragraph 2.4.2.2 of this thesis. The same risk of error or abuse could occur in terms of PIA, since this act fails to identify the types of threats it aims to guard against, as pointed out above in paragraph 2.4.3.

If the judiciary is to resolve the tension effectively, PAIA and PIA should expressly identify the threats it aims to neutralise when limiting the free flow of information. The solution could possibly be found in the two threat conceptions that are commonly found in the National Security context, namely force and imminence. Unlike PIA, NSIA and PSI expressly identify the National Security threats that can compromise their conceptions of National Security. Both the act and the bill aim to protect security interests from the use of force or the threat thereof, and from specific threats, namely hostile acts of foreign intervention, terrorism or terrorist related activities, espionage, exposure of economic, scientific or technological secrets vital to the Republic, sabotage and serious violence.⁵⁸⁰

While section 41(1)(a) of PAIA does not identify the threats it aims to guard against through the embargo of information, the act does seem to have a preference at a specific level for the threats it aims to guard against. Section 41(2), read in conjunction with section 41(1)(a) of PAIA, aims to enable the state to deny access to a record if it firstly includes information which contains evidence of material relating to ‘subversive or hostile activities’;⁵⁸¹ and secondly if the ventilation of the information could reasonably be expected to compromise National Security.

Section 1 of PAIA defines the phrase ‘subversive or hostile’ activities as meaning *inter alia*:

“(a) aggression against the Republic;

(b) sabotage or terrorism aimed at the people of the Republic or a strategic asset of the Republic, whether inside or outside the Republic;

the state to limit the rights to express information for reasons of National Security. The reasoning informing this interpretation is substantively addressed in paragraph 3.3 of this thesis.

⁵⁸⁰ National Strategic Intelligence Act S1 “national security”; PSI B6H-2010 S1(1) “national security” (b).

⁵⁸¹ PAIA S41(1)(a), S41(2)(a), S41(2)(b)(i), S41(2)(c)(ii) & S41(2)(d)(ii).

(c) an activity aimed at changing the constitutional order of the Republic by the use of force or violence;”

While section 41(1)(a) of PAIA may not generally aim to counteract forceful threats, the state is empowered to deny a request for access to information if it is reasonably expected that the ventilation of information relating to the detection, prevention, suppression or curtailment of ‘subversive or hostile’ activities will compromise National Security. The reason for this is that, although the use of force and aggression are aimed at different targets, the ventilation of the information could reasonably be expected to compromise the ‘security or defence of the Republic’ if it were to enter into the public domain.

Keeping the above in mind, it seems as if the legislature has already indicated its preference in NSIA, PSI and PAIA – in limited instances – for the use of force or the threat thereof. However, no clarity exists as to which of the two threat conceptions (imminence or force) best protects PAIA and PIA’s conception of National Security.⁵⁸²

There are stark differences between the two threat conceptions, which could ultimately affect the outcome of an information embargo for purposes of National Security.⁵⁸³ Therefore, this chapter will examine which of these threat conceptions should be incorporated into PAIA and PIA. But first it is necessary to examine the content of the different threat conceptions and the manner in which they apply.

3.5.2 IMMINENT THREATS

Imminence in the National Security context finds its origins in customary international law. States possess an inherent right to defend themselves in the National Security context against imminent threats,⁵⁸⁴ but they have to do this under

⁵⁸² National Strategic Intelligence Act S1 “national security”; PSI B6H-2010 S1(1) “national security” (b).

⁵⁸³ The reason for this is that each of the different threat constructions have different standards which determine when a threat is a National Security threat. To use the threat constructions in the alternative will lead to confusion.

⁵⁸⁴ D Svarc “Redefining Imminence: The Use of Force against Threats and Armed Attacks in the Twenty-First Century” (2006-2007) 13 *ILSA J. Int'l & Comp. L.* 171: 178.

an existing exception to all treaties, one of which is the right to self-defence.⁵⁸⁵ Currently, a state's right to self-defence against an imminent threat is captured in article 51 of the United Nations Charter (UN Charter)⁵⁸⁶ which is a codification of customary international law's right to self-defence.⁵⁸⁷ The text of the UN Charter does not expressly use the words 'imminent threat' in relation to a state's right to self-defence. However, post-UN Charter scholarship is of the view that states have the right to defend themselves against imminent threats in terms of the aforementioned provision.⁵⁸⁸ Naturally, a state can use force to protect its National Security from imminent threats in terms of article 51 of the UN Charter.⁵⁸⁹ Imminence does not narrow down with sufficient specificity which threats a state can protect itself against by placing an embargo on information.

Svarc posits that a threat will only be imminent if it amounts to an armed attack.⁵⁹⁰ What an 'armed attack' is, is a deeply contested issue and not even the UN Charter provides clarity on the meaning of this concept.⁵⁹¹ What is certain is that an armed attack includes attacks from hostile states, state sponsored actors and non-state actors.⁵⁹² There is no reason why international law's conception of imminence cannot be adapted to suit South Africa's information and security needs. In international law, states are permitted to employ a security action – i.e. an act of force – to prevent an

⁵⁸⁵ Rose-Ackerman & Billa (2007-2008) *N.Y.U. J. Int'l L. & Pol.* 443 & 444. The law of reprisal and the *clausula rebus sic stantibus* principle are codified in the Vienna Convention while the balance of the exceptions are recognised by the ILC Articles which has achieved the status of customary international law.

⁵⁸⁶ Svarc (2006-2007) *ILSA J. Int'l & Comp. L.* 177.

⁵⁸⁷ J Green *The International Court of Justice and Self-Defence in International Law* (2009) 2. There are central legal criteria that appear in customary international laws right of self-defence namely necessity and proportionality which is not framed in Article 51 of the UN Charter.

⁵⁸⁸ Svarc (2006-2007) *ILSA J. Int'l & Comp. L.* 180.

⁵⁸⁹ 176 & 177. Since it represents a codification of customary international law as pointed out already earlier in this chapter.

⁵⁹⁰ 177.

⁵⁹¹ 177 & 178.

⁵⁹² 178. See also Schuller (2013-2014) *UCLA J. Int'l L. Foreign Aff* 170; D Bethlehem "Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors" (2012) 106 *Am. J. Int'l L.* 770: 773.

imminent threat from compromising their National Security.⁵⁹³ In other words, the employment of a security action is necessary to prevent an imminent threat from compromising a state's National Security. An adaptation of international law's notion of imminence can apply with a slight difference in the South African National Security and information context. Instead of a physical act of force being utilised, the state could limit the free flow of information if it is reasonably expected that the publicity of the relevant information would pose an imminent threat to National Security in terms of PAIA and PIA.⁵⁹⁴ Imminence provides the judiciary and the state with guidelines as to when it is reasonable to contain information in terms of the acts.

While this is useful in the resolution of a dispute between information and security, it is important to note that there are two conceptions of imminence which the Republic could use to protect its security interests by placing an embargo on information. Firstly, the South African government could rely on a temporal conception of imminence and only limit the free flow of information if the threat is currently on the verge of occurring.⁵⁹⁵ This traditional conception of imminence has its roots in the Caroline incident.⁵⁹⁶ It carries a meaning synonymous with immediate.⁵⁹⁷ Only activities which are ripe and on the verge of being executed are classified as imminent threats in terms of this notion of imminence. In the information context, the judiciary and the state would only be permitted to limit the free flow of information if it is reasonably expected that it would prevent an imminent threat from compromising South Africa's National Security. Although using this conception of imminence as an indicator to identify when it would be reasonable to conceal information is of assistance at a conceptual level, practically states will only be permitted to embargo information once attacks have been launched with the intent to harm or where they have been executed, but have not reached their targets yet.⁵⁹⁸ The primary weakness of the classic notion of imminence is that modern

⁵⁹³ Svarc (2006-2007) *ILSA J. Int'l & Comp. L.* 176 & 177.

⁵⁹⁴ PAIA S41(1)(a)(i) & S41(1)(a)(ii); PIA S3 & S4.

⁵⁹⁵ Schuller (2013-2014) *UCLA J. Int'l L. Foreign Aff* 170.

⁵⁹⁶ ML Rockefeller "The Imminent Threat Requirement for the Use of Preemptive Military Force: Is It Time for a Non-Temporal Standard" (2004-2005) 33 *Denv. J. Int'l L. & Pol'y* 131: 133.

⁵⁹⁷ Rockefeller (2004-2005) *Denv. J. Int'l L. & Pol'y* 131.

⁵⁹⁸ Svarc (2006-2007) *ILSA J. Int'l & Comp. L.* 183.

warfare can render an embargo of sensitive information superfluous.⁵⁹⁹ The Caroline conception of imminence, crafted in 1837, was applicable in an age of horseback riders, muskets, line infantry and militias.⁶⁰⁰ In the modern era, Weapons of Mass Destruction, biological weapons and ballistic missiles can cripple a country in seconds. To expect a state to protect information only when a threat is underway seems ludicrous.⁶⁰¹ If states must wait until a threat is imminent, it may already be too late to take countermeasures, let alone prevent it by putting an embargo on information.⁶⁰² Using this conception of imminence is likely to lead to unreasonable risk to the Republic's National Security in terms of PAIA and PIA's conceptions of National Security.

Secondly, the Republic could rely on the non-temporal conception of imminence in its endeavour to protect National Security. This notion of imminence and self-defence developed in the context of President Bush's response to the 9/11 attacks.⁶⁰³ This approach represents a definitive step away from the temporal understanding of imminence and embraces a far more aggressive style of self-defence.⁶⁰⁴ It is premised on the idea that, since technology and instruments of war have advanced to such a level that it may take mere seconds for a threat to transform itself from non-existent to existential, it would be national suicide to wait until the threat is manifest before a state engages National Security actions. States should defend themselves despite not knowing the time or place of an attack.⁶⁰⁵ The danger of relying on the non-temporal understanding of imminence to determine if information should be suppressed, is that it may empower the state to engage in arbitrary security action. Ultimately, the state can limit the free flow of information even though it is uncertain about the true nature of the threat.⁶⁰⁶ Granting the Republic such unbridled power in matters of security is

⁵⁹⁹ Rockefeller (2004-2005) *Denv. J. Int'l L. & Pol'y* 141.

⁶⁰⁰ 140.

⁶⁰¹ Svarc (2006-2007) *ILSA J. Int'l & Comp. L.* 183.

⁶⁰² Schuller (2013-2014) *UCLA J. Int'l L. Foreign Aff* 169.

⁶⁰³ 177.

⁶⁰⁴ 179. Some authors have argued that the Bush doctrine does not deal with imminence at all.

⁶⁰⁵ 177 & 178.

⁶⁰⁶ Rockefeller (2004-2005) *Denv. J. Int'l L. & Pol'y* 145.

unwise in light of the state's history of engaging in arbitrary security actions,⁶⁰⁷ and it would be unreasonable to allow the state to limit the free flow of information under such circumstances.

3.5.3 FORCE OR THE THREAT OF FORCE

The idea that a state's security interests must be defended against 'force or the threat of force' has its roots in the SP and JHBP. Principle 29 of the SP provides that:

"National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation, its territorial integrity or political independence against force or threat of force,"⁶⁰⁸

while Principle 2(a) of the JHBP states that:

"A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government."⁶⁰⁹

If 'force or the threat thereof' is used in PAIA and PIA, the state will only be able to justifiably embargo information if it is reasonably expected that the containment of the information will prevent an act of 'force or a threat of force' from compromising South Africa's National Security.⁶¹⁰ As mentioned earlier, South Africa's legislature's view of threats seems to be consistent with that of the authors of the JHBP and SP. NSIA and

⁶⁰⁷ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa*. See also *S v Geiges* 2007 2 SACR 507 (T); *Right2Know Campaign v Minister of Police*.

⁶⁰⁸ Siracusa Principles (1984) Principle 29.

⁶⁰⁹ Article 19 The Johannesburg Principles on National Security, Freedom of Expression and Access to Information Principle 2(a).

⁶¹⁰ Principle 2(a); Siracusa Principles (1984) Principle 29.

PSI have been crafted to prevent South Africa's security interests from being compromised by acts of force or the threat thereof. The relevant provisions read:

““national security” includes the protection of the people of the Republic and the territorial integrity of the Republic against —

(a) the threat of use of force or the use of force;”⁶¹¹

While SP, JHBP, NSIA, PSI and PAIA - in very specific instances - are clear as to the threats they aim to counteract, none of these instruments identifies which activities amount to ‘force or the threat thereof’.⁶¹² Nevertheless, this phrase does have a specific meaning in terms of the UN Charter. In 1987 the General Assembly of the UN approved the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, which defines what aggression means.⁶¹³ The meaning of ‘force’ falls within the meaning of the act of aggression.⁶¹⁴ The purpose of this declaration was to crystallise the meaning of aggression⁶¹⁵ and dispute, an earlier definition of ‘force’ constructed by the General Assembly in 1970.⁶¹⁶ The meaning of the UN’s notion of ‘force’, although not authoritative, does provide an indication of which activities will amount to ‘force’ in terms of the Charter.⁶¹⁷

Force under the UN Charter refers to ‘armed force’. More specifically, it is the intentional determination by one state to take military action against another state. An act of ‘force’ can present itself in one of two ways. Firstly, it may be a direct attack where one state engages its regular armed forces against another state. Secondly, a state’s activities will still qualify as forceful activity should state sponsored, but irregular

⁶¹¹ National Strategic Intelligence Act S1 “national security”; PSI B6H-2010 S1(1) “national security”.

⁶¹² Coliver “Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information” in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 21; Protection of State Information Bill B6H (2010).

⁶¹³ W Slomanson *Fundamental Perspectives on International Law* 6ed (2010) 463. See also UNGA Res 42/22 (18 November 1987) UN Doc A/RES/42/22.

⁶¹⁴ M Roscini *Cyber Operations and the Use of Force in International Law* (2014) 45.

⁶¹⁵ Slomanson *Fundamental Perspectives on International Law* 463.

⁶¹⁶ 462.

⁶¹⁷ 463.

forces mount an armed attack against another state. To put the above into perspective, non-military action that is not directly engaged in by the state and is not state sponsored will not count as an act of 'force'.⁶¹⁸ Even the *travaux préparatoires* reveals that the concept of 'force' was not meant to cover other conceptions of coercion such as economic or political pressure.⁶¹⁹

It is far more complicated to determine what constitutes a 'threat of force'.⁶²⁰ Brownlie opines that an express or implied declaration by any state to engage in forceful activity amounts to a 'threat of force',⁶²¹ while Green and Grimal argue that military posturing or demonstrations constitute a 'threat of force'.⁶²² Sadurska puts it most forcefully by stating that:

“In the international arena, a threat of force is a message, explicit or implicit, formulated by a decision maker and directed to the target audience, indicating that force will be used if a rule or demand is not complied with.”⁶²³

If the UN Charter's conception of a 'threat of force or force' is relied upon in the proposed definition of National Security, the state will only be permitted to place an embargo on information in terms of PAIA and/or PIA if the reasonable expectation exists that the containment of information will prevent a threat of or an armed attack by a state or by state sponsored actors from compromising South Africa's National Security. Helpful as this threat construction may be, the UN's conception of 'force or the threat thereof' will not sufficiently protect National Security in South Africa for a number of reasons. Firstly, it does not recognise that the National Security of a state can be impaired by non-affiliated hostile actors. Asymmetrical warfare can compromise National Security, even if it is not state sponsored and does not originate from a specific state.⁶²⁴ The Charter's conception of 'force or the threat thereof' stands

⁶¹⁸ CC Joyner *International Law in the 21st Century: Rules for Global Governance* (2005) 166.

⁶¹⁹ Roscini *Cyber Operations and the Use of Force in International Law* 45.

⁶²⁰ JA Green & F Grimal "The Threat of Force as an Action in Self-Defense Under International Law" (2011) 44 *Vanderbilt Journal of Transnational Law* 285: 296 & 298.

⁶²¹ I Brownlie *International Law and The Use of Force by States* (1963) 361.

⁶²² Green & Grimal (2011) *Vanderbilt Journal of Transnational Law* 296 & 297.

⁶²³ R Sadurska "Threats of force" (1988) 82 *Am. J. Int'l L.* 239: 242. (footnotes omitted).

⁶²⁴ Schuller (2013-2014) *UCLA J. Int'l L. Foreign Aff* 140.

in stark contrast to imminence, which recognises that hostile states,⁶²⁵ state sponsored actors⁶²⁶ and non-state actors⁶²⁷ can compromise a state's National Security.

Secondly, cyber-operations will not qualify as an act of 'force', despite the fact that they can compromise National Security in the same manner as a military attack. Cyber-operations threaten states' National Security in a manner that the drafters of the instrument could not have foreseen.⁶²⁸ One of the oldest examples of the manner in which cyber-operations can qualify as an armed attack is where the Central Intelligence Agency in 1982 allegedly inserted a logic bomb into a Russian controlled computer system which resulted in an explosion of a Siberian gas line.⁶²⁹ The point here is not that a single explosion of a gas line compromises National Security, but that the use of modern technology can compromise a state's National Security in the same way that an armed military or paramilitary attack can.

3.5.4 IMMINENCE VS. FORCE

Despite suffering from its own ailments, 'force or the threat of force' is a better threat conception than 'imminence' to determine if the disclosure of state-held information is reasonably expected to compromise PAIA and PIA's conceptions of National Security, provided that the threat conception is adjusted to include force or threats of force from non-state actors and cyber-operations. Unlike imminence's armed attack, the adjusted conception of 'force or the threat thereof' will leave the state under no illusions as to when there are threats to South Africa's National Security in terms of PAIA and PIA. More importantly, using 'force or the threat of force' as an indicator will limit the risk the Republic may be exposed to if it relies on the temporal conception of imminence to determine if the limitation of the free flow of information could be reasonably expected to compromise National Security. Employing 'force or the threat of force', instead of imminence, will also counteract any arbitrary state action that would be permissible if the non-temporal notion of imminence was relied upon.

In terms of section 41(1)(a)(i) and 41(1)(a)(ii) of PAIA and sections 3 and 4 of PIA, the state should only be entitled to deny access to state-held information or limit the

⁶²⁵ 170.

publication thereof on the condition that it is reasonably expected that the containment of the information would prevent National Security from being compromised by an act of 'force or the threat of force'. To put it differently, if government is aware that a hostile actor poses a 'forceful threat' to its National Security, it will be reasonable to embargo any information that can be used by the hostile actor to compromise the Republic's targets. The state will not be compelled to wait until a hostile actor has attacked its National Security – like the temporal conception of imminence requires – before it decides to blackout information. Additionally, it also guarantees that the state will not restrict any information until it possesses a clear understanding of a hostile actor's intentions, a practice which stands in opposition to the demands of the non-temporal notion of imminence. Thus 'force or the threat thereof' seems to lie between the polar extremes of the temporal and non-temporal conceptions of imminence.

In order to provide greater protection to South Africa's National Security and the free flow of information, PAIA and PIA could also include more specific threats that are the same as, or similar to those listed under NSIA and PSI's definition of state security, since the act and the bill give us insights into how the legislature aims to restrict the executive's power, as mentioned under paragraph 3.5.1.⁶³⁰

In light of the above, the provisions of PAIA and PIA should be amended to permit the state to limit the free flow of information only if it is reasonable to expect that the information blackout will prevent an act of 'force or the threat of force' from compromising National Security. This will also ensure that the courts can resolve the tension between the free flow of information and National Security effectively.

3.6 CONSTRUCTING A DEFINITION OF NATIONAL SECURITY FOR THE PROMOTION OF ACCESS TO INFORMATION ACT AND THE PROTECTION OF INFORMATION ACT

⁶²⁶ Svarc (2006-2007) *ILSA J. Int'l & Comp. L.* 178.

⁶²⁷ Bethlehem (2012) *Am. J. Int'l L.* 773.

⁶²⁸ Schuller (2013-2014) *UCLA J. Int'l L. Foreign Aff* 191.

⁶²⁹ Roscini *Cyber Operations and the Use of Force in International Law* 53.

⁶³⁰ National Strategic Intelligence Act S1 "national security"; PSI B6H-2010 S1(1) "national security".

If the courts are to limit the free flow of information in a manner which does not lead to the abuse of National Security, and will not put the state unnecessarily at risk, PAIA and PIA should take the following stance towards National Security in South Africa. Firstly, both acts should continue to preserve the security interests that PAIA and PIA aim to protect, provided that the content of each of the security interests align with the meanings ascribed to them in paragraphs 3.2 and 3.4.5.3 of this chapter. Secondly, PAIA should be interpreted in a manner which permits the judiciary to protect the 'constitutional order', 'state sovereignty', the 'people' and the 'territorial integrity' of the state. Enabling these security interests to be protected in terms of PAIA will ensure that the state is not exposed to grave danger. Furthermore, the meaning assigned to each concept must be consistent with the meaning ascribed to it as set out above in this chapter. Thirdly, although PIA can be interpreted in a manner which protects the other security interests, the risk is that the provisions of sections 3 and 4 of the act are so broad that they open up the opportunity for state abuse. It is submitted that to avoid possible state abuse, a definition of the security of the Republic must be inserted which includes the other security interests. Lastly, PAIA and PIA should only enable the judiciary to contain the exposure of a record, if it is reasonably expected that its publicity will cause 'force or the threat thereof' to compromise the acts' conception of National Security. A corollary effect of the aforementioned changes is that the state's opportunity to misuse National Security will also be reduced. Additionally, the changes will ensure that it could limit the free flow of information to protect the appropriate security interests.

National Security in the context of PAIA and PIA should therefore mean the protection of the defence, security, constitutional order, sovereignty, the people and territorial integrity of the Republic of South Africa against acts of force, or the threat thereof. Therefore state-held information should only be prevented from entering the public domain, if it is reasonably expected that the publicity of the information would allow an act of force or the threat thereof to compromise one or more of these security interests.

If National Security is interpreted in PAIA and PIA in the manner set out above, the judiciary would be able to resolve disputes between the free flow of information and National Security in a manner which promotes the values underlying an open and democratic society. This is because sufficient clarity will be provided which would enable the courts to establish what needs to be preserved.

3.7 DETERMINING THE NECESSITY OF A STATUTORY DEFINITION OF NATIONAL SECURITY

While it is submitted that the proposed definition does provide much needed clarity, the proposition that PAIA and PIA should be amended to provide clarity on the meaning of National Security is based on the assumption that the judiciary requires a statutory definition to resolve disputes between the free flow of information and National Security. This assumption can be challenged, based on the idea that the judiciary is appropriately placed to determine the meaning of National Security. In fact, Klaaren argues that the judiciary has already started to define this concept.⁶³¹

To date, the South African judiciary has had two opportunities to determine the meaning of National Security in the context of PAIA and PIA and on both occasions the judiciary failed to provide much needed clarity to an indistinct concept. The first instance in which a court could determine the meaning of National Security was in *Right2Know Campaign v Minister of Police*.⁶³² In this matter, the court was called upon to determine if South Africans should know which places qualify as national key points in terms of the National Key Points Act 102 of 1980.⁶³³ Section 11, read together with section 18(1) of PAIA, was relied upon by the second applicant in an attempt to compel the state to disclose the location of its national key points.

However this request for information was refused by the state. At the initial stage, the state relied on sections 38(a) and 38(b)(i)(aa) of PAIA to justify its decision to deny the request for information. The first of these provisions states that:

⁶³¹ J Klaaren "The Judicial Role in Defining National Security and Access to Information in South Africa" (2015) 11 *Democracy and Security* 275: 275-297.

⁶³² *Right2Know Campaign v Minister of Police*.

⁶³³ *Right2Know Campaign v Minister of Police* [1].

“The information officer of a public body-

(a) must refuse a request for access to a record of the body if its disclosure could reasonably be expected to endanger the life or physical safety of an individual; [...].”

The second provision provides that an:

“[...] information officer of a public body-

(b) may refuse a request for access to a record of the body if its disclosure would be likely to prejudice or impair-

(i) the security of-

(aa) a building, structure or system, including, but not limited to, a computer or communication system; [...].”

The state’s reasons for denying access to the requested information were that:

“To provide access to the requested records will impact negatively on and jeopardize the operational strategy and tactics used to ensure security at the relevant property or safety of an individual (eg if a person plans, intends or tries to harm the relevant individual or to prejudice or impair the security of the building, access to this information may prejudice the effectiveness of those methods, techniques or procedures used to ensure the safety of such individuals and/or the building - a person who intends to harm the relevant individual may with ease harm the individual if he or she has access to such information, or he or she may with ease determine the strategies and tactics used for such protection and then use the information to do such harm.”⁶³⁴

The requester then launched an internal appeal against the state’s decision. The internal appeal was unsuccessful. The outcome was based on the same legal provisions and reasoning set out by the information officer at the initial request, save for one difference. The state also argued that, since the majority of key points are privately owned, the name of the place constituted private information. Section 34 of PAIA compelled the state to protect the information of a natural person, and thus it was prohibited from disclosing the information.⁶³⁵

⁶³⁴ [11].

⁶³⁵ [13].

The requester next launched an application in the High Court. The court found that the state had failed to demonstrate that the records which it aimed to preserve actually fell within the ambit of the provisions relied upon in terms of PAIA. Therefore no grounds existed which legally allowed the state to deny access to the requested information.⁶³⁶ The court further held that the safety of the country was not a concern when the state decided to deny the request for information.⁶³⁷ The reason for this is that the state did not actually raise National Security as a consideration which would enable it to preserve the ventilation of information. The court thus resolved the dispute on the basis of sections 38(a) and 38(b)(i)(aa) of PAIA and the sufficiency of evidence, not on National Security grounds.

Despite the above, the court did consider if National Security should be taken into consideration in this matter. The reason for this was that the state's answering affidavit referred repeatedly to National Security, although the applicable provision which deals with this aspect - i.e. section 41 of PAIA - was not relied upon by the state.⁶³⁸ The court took the view that it is unnecessary to make a determination on this aspect since the state did not provide evidence to support its allegations that state security was threatened.⁶³⁹ The court could have relied on its powers as set out in PAIA to determine what this concept means, yet it failed to do so. Neither did it add any content to the meaning of the concept.⁶⁴⁰ The closest the court came to grappling with this concept is that it referred to it as obscure.⁶⁴¹

The second opportunity that the judiciary had to add content to the meaning of National Security was in *Mandag Centre For Investigative Journalism v Minister of Public Works*. This time the opportunity presented itself in the context of both PAIA and PIA. On 6 July 2012 a media house made a request in terms of PAIA to procure access to information providing evidence on the upgrades made at Nkandla Estate – the dwelling of the erstwhile President of South Africa Mr Jacob Gedleyihlekisa

⁶³⁶ [16].

⁶³⁷ [12].

⁶³⁸ [33].

⁶³⁹ [34].

⁶⁴⁰ [36].

⁶⁴¹ [22].

Zuma.⁶⁴² To avoid having to provide access to the requested information, the Acting Director-General, Ms Mandisa Fatyela-Linde in a letter dated 13 August 2012, refused the request:

“on grounds that information on the Nkandla Estate was protected under the ‘National Key Point Act 102 of 1980 (‘the NKP Act’), the Protection of Information Act 84 of 1982 (‘the PI Act’), the Minimum Information Security Standards, (‘the MISS’) and other relevant security prescripts of the State Security Agency’.”⁶⁴³

The applicants believed that the exceptions raised by the state are not permissible in terms of PAIA,⁶⁴⁴ and launched an internal appeal to procure the requested information. The state failed to respond in the appropriate time-frames permitted by PAIA. The Minister was therefore considered to have dismissed the appeal which led to the institution of proceedings.⁶⁴⁵ Prior to the matter being resolved the parties continued to engage with each other through correspondence, which resulted in the state releasing information which it considered to be innocuous from a security perspective.⁶⁴⁶ While this matter had National Security considerations, the judiciary steered away from determining what this concept means in terms of PAIA, PIA or the other applicable legislation. The reason for this is that the state abandoned its reliance on the defence of National Security during the course of the dispute.⁶⁴⁷ Consequently, there was no real reason for the court to interrogate the meaning of this concept.

Despite the preceding failures Klaaren submits that the judiciary in several cases, has started to determine what the concept should mean. In support of this view, he relies on two cases namely *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services*; *Freedom of Expression Institute In re: Masetlha v President of*

⁶⁴² *Mandag Centre For Investigative Journalism v Minister of Public Works* [3].

⁶⁴³ [4].

⁶⁴⁴ [5].

⁶⁴⁵ [6].

⁶⁴⁶ [11] & [12].

⁶⁴⁷ [27].

*the Republic of South Africa*⁶⁴⁸ and *M&G Limited v President of the Republic of South Africa*.⁶⁴⁹

The first matter concerns a dispute between the previous Director-General of the National Intelligence Agency (NIA) and the then President of the Republic of South Africa.⁶⁵⁰ In order to impugn his suspension in a labour dispute the erstwhile Director-General filed two applications which were supported by two affidavits. He distinguished between the two in the following manner:

“The one he styled an “open court founding affidavit” and the other carried the heading “in camera founding affidavit”.”⁶⁵¹

Due to the nature of the *in camera* affidavit the court informally directed that it be kept out of the public domain as an interim precaution.⁶⁵² Prior to the commencement of proceedings, a journalist aimed to procure access to the record. On account of his failure to do so, he brought an application in an attempt to obtain access.⁶⁵³ Naturally the Minister of Intelligence opposed the application on National Security grounds.⁶⁵⁴ The matter triggered many legal issues, one of which was:

“Does the Minister’s objection premised on national security constitute adequate justification.”⁶⁵⁵

As demonstrated in the previous chapter, several judges (namely Moseneke DCJ – writing for the majority - Van der Westhuizen J and Yacoob J) considered the meaning of National Security. However, they could not agree on (i) the security interests which should be protected by National Security, or (ii) the types of threats

⁶⁴⁸ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa*.

⁶⁴⁹ *M&G Limited v President of the Republic of South Africa* 2010 ZAGPPHC 43 (GNP).

⁶⁵⁰ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [2].

⁶⁵¹ [3].

⁶⁵² [6].

⁶⁵³ [7].

⁶⁵⁴ [8].

⁶⁵⁵ [15].

that could compromise these security interests.⁶⁵⁶ This casts doubt on Klaaren's assertion that the court in this case has started to develop the concept of National Security. In fact, it could be argued that the judgments have not contributed to the development of the concept, but have rather added to the confusion.⁶⁵⁷

The second matter in which Klaaren argues that the judiciary added content to the meaning of National Security dates back to 2010, namely *M&G Limited v President of the Republic of South Africa*. Subsequent to the High Court hearing, this matter was heard in the SCA,⁶⁵⁸ then the Constitutional Court,⁶⁵⁹ and then it was referred back to the court of first instance⁶⁶⁰ before it was heard by the SCA for the second time.⁶⁶¹ The material facts of this case are as follows. President Mbeki aiming to procure a report on the nature of the general elections in Zimbabwe dispatched two sitting judges to the country.⁶⁶² On completion, the judges provided the President with the report. The Mail and Guardian newspaper aimed to procure access to the report through PAIA. After their request was turned down, the newspaper approached the court. It was accordingly called upon to determine if the Mail & Guardian should be granted access to the record in terms of PAIA. The state in all of these matters refused to grant access to the information requested and relied on sections 41(1)(b)(i) and 44(1)(a) of PAIA, to deny access to same.⁶⁶³ Only section 41(1)(b)(i) is important from a security perspective and provides that:

“(1) The information officer of a public body may refuse a request for access to a record of the body if its disclosure - (b) would reveal information- (i) supplied in confidence by or on behalf of another state or an international organisation;”

Although section 41(1)(b)(i) is related to National Security, it is important to note that in none of the cases listed above did the court consider (i) what National Security

⁶⁵⁶ [62], [85] & [174].

⁶⁵⁷ [62], [85] & [194].

⁶⁵⁸ *President of RSA v M&G Media Ltd* 2011 3 All SA 56 (SCA).

⁶⁵⁹ *President of the Republic of South Africa v M&G Media Ltd* (CC).

⁶⁶⁰ *M&G Media Ltd v President of the Republic of South Africa* 2013 3 SA 591 (GNP).

⁶⁶¹ *President of the Republic of South Africa v M & G Media Limited* 2015 1 SA 92 (SCA).

⁶⁶² *M&G Limited v President of the Republic of South Africa* 5 & 10.

⁶⁶³ *President of the Republic of South Africa v M & G Media Limited* 2015 1 SA 92 (SCA) [6].

means, (ii) which interests the concept aims to preserve from being compromised, (iii) what the content of those interests should be, or (iv) which threats the concept is to guard against. The manner in which the courts resolved this dispute was to (i) determine if the state provided sufficient evidence in order to justify its decision to deny access to information, and (ii) to the extent that it could not, if the ‘Judicial Peek’ could be invoked and (iii) if the actual evidence analysed by the court following the ‘Judicial Peek’ actually fell within the ambit of the applicable provision.⁶⁶⁴

Despite this, Klaaren submits that in these cases:

“the law on the national security ground, [...], had been made, tested, and confirmed.”⁶⁶⁵

Contrary to what he states,⁶⁶⁶ the courts neither identified what National Security means nor fleshed out the security interests to be protected.⁶⁶⁷

While it is true that the judiciary could develop the meaning of National Security in the absence of a statutory definition, it has up to now failed to give content to National Security in the context of PAIA and PIA. The two cases referred to above provided the courts with the opportunity to do so, but they failed to remove the mystery surrounding this concept. Since the judiciary’s ability to pronounce on specific considerations is limited to proceedings that have been launched, it is uncertain when the courts will be called upon again to address this issue. In the interim, National Security may continue to be a vague concept in Republic of South Africa. To avoid having to wait for judicial proceedings to bring about the much needed changes, adopting the definition of National Security proposed in this chapter could guard against the negative effects

⁶⁶⁴ *M & G Limited v President of the Republic of South Africa; President of RSA v M&G Media Ltd* (SCA); *President of the Republic of South Africa v M&G Media Ltd* (CC); *M&G Media Ltd v President of the Republic of South Africa* 2013; *President of the Republic of South Africa v M & G Media Limited* 2015 1 SA 92 (SCA).

⁶⁶⁵ Klaaren *Democracy and Security* 275-291.

⁶⁶⁶ 275-297.

⁶⁶⁷ *M & G Limited v President of the Republic of South Africa; President of RSA v M&G Media Ltd* (SCA); *President of the Republic of South Africa v M&G Media Ltd* (CC); *M&G Media Ltd v President of the Republic of South Africa* 2013; *President of the Republic of South Africa v M & G Media Limited* 2015 1 SA 92 (SCA).

which can flow from relying on a vague conception of security. The advantage for the judiciary of having this definition of National Security in place is that it provides a starting point to determine (i) what needs to be preserved, (ii) the content of the applicable security interests, (iii) and the threats which can compromise these interests.

3.8 CONCLUSION

For the judiciary to be able to resolve the tension between the free flow of information and National Security in a manner which promotes the values underlying an open and democratic society in terms of PAIA and PIA, National Security should be understood to mean the protection of the defence, security, constitutional order, sovereignty, the people and territorial integrity of the Republic of South Africa from acts of force, or the threat thereof in terms of these acts.

PAIA and PIA can be interpreted in a manner which should protect the preceding security interests. That is because the 'security and defence of the Republic' are already afforded protection in terms of sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA and sections 3 and 4 of PIA, and since these provisions also lend themselves to an interpretation which would allow these acts to protect the other security interests which are appropriate to protect from being compromised.

However, with respect to the nature of threats which should be guarded against by the acts, PAIA and PIA should be amended to permit the state to limit the free flow of information only if it is reasonable to expect that the information blackout will prevent an act of 'force or the threat of force' from compromising National Security. This will also ensure that the courts can resolve the tension between the free flow of information and National Security effectively.

Provided that the security interests identified above carry the same meaning as set out in this chapter and the acts guard against the specific threat conception set out in the previous paragraph, the state's opportunity to misuse PAIA and PIA's conception of National Security will be reduced, and the possibility of judicial errors will be limited. Additionally, the security of the state will not be exposed to undue risk.

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CHAPTER 4

OPEN JUSTICE, AND SECRET JUDICIAL PROCEEDINGS IN THE INTERESTS
OF NATIONAL SECURITY

4.1 INTRODUCTION

If National Security is interpreted in the manner as proposed in chapter 3 of this thesis, the courts' ability to resolve the tension between information and security in terms of PAIA and PIA in a principled manner will be enhanced significantly. Courts are required by the Constitution to resolve judicial disputes in a manner which promotes Open Justice.⁶⁶⁸ This principle ensures that justice is meted out in a manner which promotes transparency and fairness.⁶⁶⁹

However, in certain cases the judiciary's duty to resolve disputes in an open fashion could put the state in danger. That would be the case where open proceedings would result in the disclosure of information which could compromise South Africa's National Security. That could endanger the very open and democratic Republic which Open Justice aims to foster and preserve.⁶⁷⁰ In such instances, it would be more appropriate to resolve disputes in secret. For that reason, Parliament has enabled the judiciary to employ secret proceedings when mediating disputes between the free flow of information and National Security in terms of sections 80(1), 80(3)(b) and 80(3)(c) of PAIA and section 13 of PIA.

However, using secret proceedings to resolve a dispute between the free flow of information and National Security can be problematic. The danger is that the courts could deliver judgments which are unfair and inimical to the objectives of South Africa's constitutional democracy. It also provides the state with an opportunity to conceal its

⁶⁶⁸ The Constitutional Court derived the principle of Open Justice from the following provisions in the Constitution: S16(1)(a), S16(1)(b), S34 & S35(3)(c). See *Johncom Media Investments Ltd v M* [29] and Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 11.

⁶⁶⁹ Constitution S16(1)(a), S16(1)(b), S34 & S35(3)(c).

⁶⁷⁰ A Barak *The Judge in a Democracy* (2009) 291.

malfeasance under the pretext that justice has been done. The employment of secret proceedings by the judiciary in terms of PAIA and PIA opens the judiciary up to the criticism that, instead of upholding transparency, it becomes complicit in state secrecy and injustice. The difference between PAIA and PIA's secret proceedings (which will be examined hereunder) also raises the concern that Open Justice may be unjustifiably limited or that National Security may be under protected.

Against this background,⁶⁷¹ this chapter aims to identify the most appropriate procedural mechanism which South African courts should employ to promote Open Justice and protect National Security in disputes between information and security. To this end, this chapter will firstly analyse Open Justice to identify its content and impact on judicial proceedings. Secondly, it will examine the extent to which PAIA gives effect to and subtracts from Open Justice during the resolution of disputes. Thirdly it will assess if the courts' discovery procedures nullify PAIA's procedure in resolving the tension between information and security, rendering it permanently ineffective. Fourthly, this chapter will examine the extent to which PIA gives effect to and subtracts from Open Justice. Fifthly, the chapter will determine which of PAIA or PIA's procedure is better suited to resolve the tension between the free flow of information and National Security in a manner which best promotes Open Justice. Finally, it will determine the constitutionality of the limitation of Open Justice in terms of PAIA and PIA in order to protect South Africa's National Security.

4.2 OPEN JUSTICE: ITS CONTENT, EFFECTS AND IMPACT ON JUDICIAL PROCEEDINGS

The South African judiciary is obligated to conduct its activities and resolve disputes between litigating parties in an open fashion, irrespective of whether the proceedings are civil, criminal or constitutional in nature.⁶⁷² More specifically in the information and security context, South African courts are obligated to resolve the tension between the

⁶⁷¹ In light of the obligation to employ Open Justice in proceedings, the need for secrecy and the differences in PAIA and PIA's procedures in disputes between information and security, the following analysis is undertaken.

⁶⁷² Constitution S16(1)(a), S16(1)(b), S34 & S35(3)(c). See also J Mackay "The role of the Judge in a Democracy" (1992) 18 *Commw. L. Bull.* 1256: 1258.

rights to access, receive and impart information and National Security in a manner which promotes Open Justice.⁶⁷³

The term Open Justice does not appear in the text of South Africa's supreme law. Despite this, the Constitutional Court has held that courts are constitutionally obliged to resolve judicial disputes in a manner which promotes Open Justice. The concept was developed by the Constitutional Court in several cases roughly over the last two decades⁶⁷⁴ – namely *South African Broadcasting Corporation Limited v National Director of Public Prosecutions*,⁶⁷⁵ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa*⁶⁷⁶ and *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development*.⁶⁷⁷ The term cannot be narrowed down to a single provision in the Bill of Rights, but is founded on three fundamental rights which, taken together, form the contours and set the boundaries for the meaning of Open Justice.⁶⁷⁸ The first is section 34 of the Constitution which provides that:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

The second right is found in section 35(3)(c) which proclaims that:

“Every accused person has a right to a fair trial, which includes the right –

(c) to a public trial before an ordinary court.”

These provisions refer to a public hearing and a public trial, respectively, thus indicating that access must be provided to the public and the media when courts are

⁶⁷³ Mackay (1992) *Commw. L. Bull.* 1258.

⁶⁷⁴ C Hoexter *Administrative law in South Africa* 2ed (2012) 102.

⁶⁷⁵ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions*.

⁶⁷⁶ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa*.

⁶⁷⁷ *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 4 SA 222 (CC).

⁶⁷⁸ Klaaren (2002) SALJ 37.

resolving disputes.⁶⁷⁹ Thus, irrespective of whether a trial before a South African court is civil or criminal in nature, it must as a general rule be open to both the public and the media.⁶⁸⁰ Thirdly, sections 16(1)(a) and 16(1)(b), which guarantee freedom of the press and other media, and freedom to receive or impart information or ideas, are also seen as central to the idea of Open Justice.

This approach to court proceedings is a welcome change, considering that prior to the advent of democracy, courts frequently meted out justice under the cover of secrecy and in an unfair manner, as documented and commented on by authors like Dugard, Forsyth, Mathews and Marcus.⁶⁸¹ During this era, the judicial process in the area of security was characterised by proceedings launched on the strength of forced confessions,⁶⁸² the conviction of accused persons of broadly defined security offences,⁶⁸³ the failure to provide an accused with the right to a fair trial,⁶⁸⁴ the failure by the judiciary to interrogate the state's security averments,⁶⁸⁵ the shifting of the onus of proof onto the accused in security matters⁶⁸⁶ and conducting proceedings in secret

⁶⁷⁹ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [50].

⁶⁸⁰ [31].

⁶⁸¹ J Dugard *Human Rights and the South African Legal Order* (2015) 303 – 360; C Forsyth “The Judiciary under Apartheid” in Hoexter C & Olivier M (eds) *The Judiciary in South Africa* (2014) 26: 54; AS Mathews “The South African judiciary and security system” (1985) 1 *SAJHR* 199: 200; Marcus 1 (1985) *SAJHR* 69: 71; RJ Danay & J Foster “The sins of the media: the SABC decision and the erosion of free press rights” (2006) 22 *SAJHR* 563: 572.

⁶⁸² Mathews (1985) *SAJHR* 200; see also Forsyth “The Judiciary under Apartheid” in Hoexter & Olivier (eds) *The Judiciary in South Africa* 26: 54.

⁶⁸³ Mathews (1985) *SAJHR* 200.

⁶⁸⁴ *Rossouw v Sachs* 1964 2 SA 551 (A); *Scherbrucker v Klindt NO* 1965 4 SA 606 (A); *Goldberg v Minister of Prisons* 1979 1 SA 14 (A); *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 263 (A); *S v Meer* 1981 4 SA 604 (A); *Gumede v Minister of Justice* 1985 2 SA 529 (N).

⁶⁸⁵ C Forsyth “The Judiciary under Apartheid” in C Hoexter & M Olivier (eds) *The Judiciary in South Africa* (2014): 54.

⁶⁸⁶ 56.

in some cases.⁶⁸⁷ In addition, the Apartheid government also relied on ouster clauses to prevent the judiciary from scrutinising the executive's abuses.⁶⁸⁸

A famous example in which secrecy and unfair judicial process occurred was in the Rivonia trials. In this matter 10 high ranking ANC officials were charged with sabotage among others. 8 of the 10 charged were later found guilty of this crime. The accused were denied access to their legal counsel on account of the 90 day detention rule. Additionally, they had limited time to see the evidence against them and only had a month in which to prepare a defence in a case in which they were at risk of being put to death.⁶⁸⁹ While the trial was very well publicised, the state relied on the evidence of 173 witnesses who gave their evidence in camera on account of the 'risk to their safety'.⁶⁹⁰ Such secret proceedings are a far cry from what Open Justice requires. Today, the Constitution guarantees every person's right to publically challenge oppressive laws or state conduct before an independent adjudicatory body.⁶⁹¹ The value and role of sections 34 and 35(3)(c) of our supreme law to South Africa's democracy is captured best in the words of the erstwhile Pius Langa CJ in *South African Broadcasting Corporation v National Director of Public Prosecutions*:

"It is not surprising then that section 35(3)(c) of the Constitution includes as one of the aspects of the right to a fair trial, the right to "a public trial before an ordinary court". Similarly, section 34 of the Constitution entrenches the right to have disputes resolved "in a fair public hearing before a court". Far from being intrinsically inimical to a fair trial, Open Justice is an important part of that right and serves as a great bulwark against abuse."⁶⁹²

Open Justice ensures that the court's doors are open throughout proceedings to any person,⁶⁹³ including in instances where the free flow of information and the state's duty to protect National Security are in tension with each other.

⁶⁸⁷ T Giannini, S Farbstein, S Bent & M Jackson *Prosecuting Apartheid-Era Crimes?* (2009) 24.

⁶⁸⁸ J Brickhill & A Friedman "Access to Courts" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa 2ed* (2011) 59-1: 59-3. Persons is used in the natural or juristic sense.

⁶⁸⁹ N Mandela *Long Walk To Freedom* (2009) Chapter 56.

⁶⁹⁰ J Buthelezi *Rolihlahla Dalibhunga Nelson Mandela* (2006) 225.

⁶⁹¹ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [30] & [31].

⁶⁹² [30].

⁶⁹³ [30] & [31].

While sections 34 and 35(3)(c) provide the public, including the media, with access to civil or criminal proceedings, sections 16(1)(a) and 16(1)(b) allow these actors to receive any information which has been presented in open court. The public are the primary beneficiaries of the right to receive information. Moreover, the media has a vital role to play in promoting South Africa's open democracy.⁶⁹⁴ Once these actors have received information during court proceedings, the constitutional right also permits them to disseminate it in any way they may choose.⁶⁹⁵ The right to attend and report on proceedings allows information on the dispute to be made available during the matter in order for the rights to receive and disseminate information to be functional. In commenting on the connection between access to court proceedings, the availability of information in the judicial arena, and the right of the public and/or the media to receive and disseminate information, Danay and Foster correctly assert that:

"In our view, this aspect of the majority judgment [in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 1 SA 523 (CC)] misconstrues the Open Justice principle as merely providing a 'right of access' rather than a 'right to information.' As mentioned above, the majority had earlier defined the Open Justice principle as the right of the public to 'know and understand' the judiciary. Thus, what is most relevant in assessing fidelity to the Open Justice principle is the actual ability of the public to receive information about the trial, rather than a hypothetical ability to attend the trial in person."⁶⁹⁶

The principle of Open Justice serves a number of functions when the judiciary is called upon to resolve disputes between the free flow of information and National Security. Firstly, it ensures that the public and the media can be physically present at any trial irrespective of its nature. This can help to ensure that the fairness of a trial is not compromised.⁶⁹⁷ Secondly, the public are afforded the opportunity to observe, familiarise themselves with and understand the *modus operandi* of the judicial system.⁶⁹⁸ Thirdly, Open Justice ensures that judicial excellence is fostered.⁶⁹⁹ Since

⁶⁹⁴ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [31].

⁶⁹⁵ [42].

⁶⁹⁶ Danay & Foster (2006) *SAJHR* 574 & 575.

⁶⁹⁷ Constitution S16(1)(a), S16(1)(b), S34 & S35(3)(c). See also *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [30].

⁶⁹⁸ Danay & Foster (2006) *SAJHR* 567.

⁶⁹⁹ 572.

Open Justice requires all courts to deliberate in public,⁷⁰⁰ the public is afforded the opportunity to examine the fairness of judicial proceedings and the court's decisions.⁷⁰¹ Open courtrooms counteract high-handed and arbitrary judicial action, which is associated with judicial secrecy rather than Open Justice.⁷⁰² Moreover, by permitting judicial activity to be discussed, endorsed or opposed, judicial excellence is bred and fostered.⁷⁰³

Lastly, Open Justice guarantees the free expression of any information received or disseminated in the judicial arena, consequently contributing to the efficacy of the Republic's democracy.⁷⁰⁴ Open Justice plays an instrumental role in encouraging debate, discussion, rejection or acceptance of the courts' decisions and processes,⁷⁰⁵ amongst the litigants, the media and the walk-in-public. It enables the media to form views on judicial proceedings,⁷⁰⁶ and permits it to communicate these views to the public.⁷⁰⁷ This is not to deny that litigants at a trial or the general public in attendance could also play a role in disseminating information and stimulating debate about judicial proceedings.⁷⁰⁸ However, the media seems to be better situated to keeping the general public up to date on how judicial proceedings are unfolding.⁷⁰⁹ Additionally, the mass dissemination of information can also enhance judicial legitimacy if the broader public sees that justice is done.⁷¹⁰ In all fairness, it is also possible that mass

⁷⁰⁰ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [39].

⁷⁰¹ Danay & Foster (2006) *SAJHR* 567.

⁷⁰² *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [30].

⁷⁰³ *Shinga v The State; S v O'Connell* 2007 2 *SACR* 28 (CC) [26].

⁷⁰⁴ Constitution S16(1).

⁷⁰⁵ Danay & Foster (2006) *SAJHR* 573.

⁷⁰⁶ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [39].

⁷⁰⁷ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [30] & [31]. This observation does not discredit the notion that social media can do exactly the same thing.

⁷⁰⁸ *Shinga v The State; S v O'Connell* [26]. However, this perspective does not presume to discount the massive role that social media can play in disseminating information or affecting public opinion.

⁷⁰⁹ W De Klerk "The right of the media to report on sexual offences" (2012) 129 *SALJ* 41: 41 & 42.

⁷¹⁰ *Shinga v The State; S v O'Connell* [26].

dissemination may actually have the converse effect and bring the judiciary into disrepute.

To put the above succinctly, Open Justice requires the judiciary to ensure that court rooms are open spaces which allow for the maximum amount of information to flow freely through them, irrespective of the nature of the disputes involved.⁷¹¹ It must also be mentioned that while Open Justice is a recognised constitutional principle in South African law, there are instances where it can be 'limited'. However it is important to note that what is being limited is not the principle itself, but the rights (i.e. sections 16(1)(a), 16(1)(b), 34 and/or 35(3)(c) of the Constitution) which underscore it. This aspect will be discussed more comprehensively under paragraph 4.7.1 below.

4.3 PROMOTION OF ACCESS TO INFORMATION ACT AND OPEN JUSTICE: THE RIGHT TO ACCESS INFORMATION, OPEN JUSTICE AND ITS LIMITATION

The extent to which South African courts must promote Open Justice in disputes in which the right to access information and National Security are in tension, is directly affected by the provisions of PAIA. The legislature has recognised that to allow a security matter to be resolved in open court could result in National Security being compromised.⁷¹² It is important to note that the extent to which PAIA's provisions authorise the courts to limit Open Justice is directly dependent on the procedure which the courts decide to employ to resolve the dispute. The manner in which the judiciary can resolve the dispute between information and National Security can be divided into two parts. Initially the judiciary will always attempt to resolve the dispute in a manner which promotes Open Justice by hearing the entire dispute in the open. However, if this is not possible, section 80 of PAIA, read together with sections 41(1)(a)(i) and 41(1)(a)(ii) of the act, permits courts to employ clandestine procedures to resolve the dispute in order to preserve South Africa's National Security.⁷¹³

⁷¹¹ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [31].

⁷¹² PAIA S25(3)(b), S41(1)(a)(i), 41(1)(a)(ii) S77(5)(b), S80(1) & S80(2); see also Barak *The Judge in a Democracy* 291.

⁷¹³ PAIA S78(1), S80(1), S80(3) & S82.

At the outset of any dispute between the right to access state-held information and the state's refusal to grant access to the record for reasons of National Security in terms of the act, the courts must resolve the dispute in a manner which promotes Open Justice. Provided that all of PAIA's internal appeal procedures have been satisfied as contemplated by section 78(1) of the act,⁷¹⁴ a requester may apply to a court for appropriate relief in instances where the state invokes its powers conferred on it by sections 41(1)(a)(i) and/or 41(1)(a)(ii) of PAIA, to deny a request for information for reasons of National Security.⁷¹⁵ Section 78(2)(a) of PAIA permits an aggrieved requester to apply to a court of law for relief should the requester be unsuccessful at the administrative stage of the proceedings.⁷¹⁶ The judiciary, in resolving such a dispute between a requester's right and the state's duty, is not restricted to just reviewing the state's administrative decision. Rather, its responsibility is to decide the matter *de novo*.⁷¹⁷ In resolving the dispute, the courts possess the authority, *inter alia*, to grant or deny access to the contested record.⁷¹⁸

At this stage of the proceedings the applicant will have to show that he or she has a right to access state information. If the applicant can also prove that a request for a state record has been denied by a public body, the burden of proof will shift onto the state to justify its decision to deny access to information for purposes of National Security.⁷¹⁹

In order for the state to justify its decision to deny access to information on the grounds of National Security, it must specifically reference sections 41(1)(a)(i) and/or 41(1)(a)(ii) of PAIA as the authorising law enabling the state to deny a request for information.⁷²⁰ Additionally, the state must also justify its decision to deny a requester's

⁷¹⁴ South African courts are only permitted to hear such disputes if requesters have satisfied all of PAIA's internal appeal procedures before approaching the courts.

⁷¹⁵ PAIA S78(1).

⁷¹⁶ S78(2)(a).

⁷¹⁷ *President of the Republic of South Africa v M&G Media Ltd* (CC) [14].

⁷¹⁸ PAIA S80.

⁷¹⁹ *President of RSA v M&G Media Ltd* (SCA) [11]; *President of the Republic of South Africa v M&G Media Ltd* (CC) [68]-[72]. The SCA's decision has been set aside a year later by the Constitutional Court. However, the manner in which the applicant must discharge their onus still applies.

⁷²⁰ PAIA S81(3)(a).

right to access information for reasons of National Security. The Constitutional Court has held that, due to the nature of information cases, the state must place sufficient evidence before the court to justify its decision to deny access to information.⁷²¹ It is important to point out that, while the state must set before the court sufficient evidence to justify its use of the security exemption, sections 25(3)(b) and 77(5)(b) of PAIA prohibit the state from referring to the content of the contested record when persuading the court that it is justified in denying access to information for reasons of National Security. In other words, the requested information will never be ventilated in open court during the resolution of the dispute. The purpose of these sections is to prevent National Security from being compromised during judicial proceedings.⁷²² The state must discharge its onus on a balance of probabilities.⁷²³

Therefore, if the state places sufficient evidence before a court of law so that it may conclude on a preponderance of probabilities that the requested information falls under the purview of the security exemption, as contemplated by sections 41(1)(a)(i) and/or 41(1)(a)(ii), then it has discharged its onus.⁷²⁴ The reason for placing the burden of proof on the state is perfectly logical. Since the state is the only party to the proceedings which has access to the contested record, it is responsible for its protection, and has had sight of it, it is easy for it to determine if the record should or should not be protected by PAIA's National Security provisions. To place the burden of proving that the record cannot be protected by PAIA's security provisions on the applicant, will not only be contrary to the right to access information, but will also be patently unfair. This is because the applicant has never had access to the contested record and thus has no way of determining if it has been legitimately protected or not.⁷²⁵

It is important to note that, while the onus of proving that the contested record should be prevented from being accessed for reasons of National Security falls squarely on the state's shoulders, sections 41(1)(a)(i) and/or 41(1)(a)(ii) of PAIA could limit the

⁷²¹ *President of the Republic of South Africa v M&G Media Ltd* (CC) [25].

⁷²² PAIA S41(1)(a)(i) & S41(1)(a)(ii).

⁷²³ *President of the Republic of South Africa v M&G Media Ltd* (CC) [14] & [15].

⁷²⁴ [23].

⁷²⁵ *President of the Republic of South Africa v M&G Media Ltd* (CC) [15].

extent to which the state can protect National Security. Put differently, although compromising the Republic's constitutional order, state sovereignty, the people or territorial integrity clearly trigger National Security concerns, a literalist reading of PAIA's wording may prevent the state from denying access to state-held information if its publicity will impair the above security interests. Additionally the act in its current form also allows the state to deny access to information on a whim, since PAIA does not determine which threats South Africa's National Security should guard against. Adherence to the interpretation of PAIA's conception of National Security that was argued for in chapter 3 will neutralise both of these problems.⁷²⁶

It seems as if the state will always be the strongest litigant in the foregoing proceedings, since it is the only party to the dispute which has access to the contested record.⁷²⁷ If the applicant produces no evidence which can cast doubt on the state's case, the only available option for an applicant is to resort to a bare denial of the facts put forward by the public body.⁷²⁸ Regrettably, these assertions are insufficient to raise a real dispute of fact.⁷²⁹ As it happens, genuine disputes of fact will hardly ever arise because the state will be the only party to the proceedings who will have actual knowledge of the content of the contested record.⁷³⁰ Since a bare denial by an applicant of the facts advanced by the state is insufficient to raise a genuine dispute of fact, the Plascon-Evans rule requires that the courts decide the application on the state's factual allegations.⁷³¹ Therefore, if an applicant is unable to challenge the state's case after it has discharged its onus, the courts will decide in favour of the state.⁷³² At this stage of the proceedings the courts will make such a decision without actually examining the protected record.⁷³³

⁷²⁶ PAIA S41(1)(a)(i) & S41(1)(a)(ii).

⁷²⁷ *M&G Media Ltd v President of the Republic of South Africa* [23].

⁷²⁸ *President of the Republic of South Africa v M&G Media Ltd* (CC) [34].

⁷²⁹ *M&G Media Ltd v President of the Republic of South Africa* [22].

⁷³⁰ *President of Republic of South Africa v M&G Media Ltd* (SCA) [15].

⁷³¹ *President of the Republic of South Africa v M&G Media Ltd* (CC) [34]. See also *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A) 634G – 635D.

⁷³² Constitution S36.

⁷³³ *President of the Republic of South Africa v M&G Media Ltd* (CC) [25].

On one view, the entire proceedings as described above is purportedly done in a manner which promotes Open Justice. This constitutional principle is adhered to if the courts resolve the conflict between information and security without even examining the contested record, as the entire proceedings take place in the open. Since actors present in the matter are able to observe the processes of the court and are able to disseminate all information made available in court, judicial legitimacy, fairness and excellence are entrenched. Democracy is also enhanced.

However on a different interpretation, the state's failure to refer to the content of the protected information in presenting and defending its case is a breach of Open Justice. This interpretation is unconvincing. Open Justice does not place an obligation on the state to place secret information before a court of law. Any litigant to a matter can decide on the evidence it will advance to discharge its onus. Additionally, as a matter of course, PAIA contains a statutory prohibition restricting the type of evidence which can be used by the state to discharge its onus. There is a very good reason why this statutory duty exists. The objective is to protect National Security.⁷³⁴ This state interest would be given inadequate protection and be unnecessarily placed in harm's way, if any requester aggrieved by the state's decision at an administrative level could gain access to the information by just taking the matter to trial.⁷³⁵ While it is unusual that the court can decide such an important dispute without having sight of the record, the failure by the state to produce the record, will not in and of itself contravene Open Justice. To deny a requester access to state-held information for reasons of National Security, where the requester has not produced any evidence of state impropriety following the state's discharge of its onus, will hardly be unfair.⁷³⁶ In the words of Moseneke DCJ:

⁷³⁴ PAIA S25(3)(b) & S77(5)(b). See also *M&G Media Ltd v President of the Republic of South Africa* [22].

⁷³⁵ *President of the Republic of South Africa v M&G Media Ltd* (CC) [14], [15] & [25].

⁷³⁶ *President of the Republic of South Africa v M&G Media Ltd* (CC) [14], [15] & [25].

“The party must display more than inquisitiveness or a desire to embark upon a fishing expedition. It must point to a lack or abuse of authority or other unlawfulness or impropriety on the part of the official who asserts confidentiality over the sealed documents or other information.”⁷³⁷

PAIA essentially bars requesters from going on fishing expeditions which could compromise the Republic’s National Security. The resolution of disputes in this fashion actually ensures the fairness of the trial without the risk of compromising South Africa’s National Security.⁷³⁸

Conflicts between the right to access information and National Security will as a general rule be resolved by the judiciary in terms of PAIA in the manner outlined above. However, if the judiciary is unable to resolve the tension in this manner, section 80 of PAIA can be used to resolve the dispute in a manner which limits Open Justice.⁷³⁹ Section 80(1) of PAIA holds that:

“Despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds.”⁷⁴⁰

The courts have referred to this as the power to take a Judicial Peek.⁷⁴¹ This provision entitles the court to compel the state to place the denied information before it in order to resolve the dispute. Once the document has been placed before it, the court will adjourn to examine the record.⁷⁴² In the event that a court decides to invoke the Judicial Peek to assist it in the adjudication of a dispute between the right to access information and the state’s duty to preserve National Security, it does so in the public interest. The Constitutional Court held that the public has a direct interest in containing information which should be protected in terms of PAIA from permeating through the

⁷³⁷ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [29].

⁷³⁸ Constitution S34.

⁷³⁹ PAIA S80.

⁷⁴⁰ S80(1).

⁷⁴¹ *President of Republic of South Africa v M&G Media Ltd* (SCA) [52]; *President of the Republic of South Africa v M&G Media Ltd* (CC).

⁷⁴² *M&G Media Ltd v President of the Republic of South Africa* [6].

public sphere. Thus the public has an interest in ensuring that sensitive information is not publicised while the court takes a Judicial Peek in order to protect the Republic's National Security.⁷⁴³ The Judicial Peek is conducted in secret and all parties to the proceedings are excluded.⁷⁴⁴ Naturally this prohibition will not apply to the state. Consequently, only the judiciary and the state will have access to the information denied for reasons of National Security.⁷⁴⁵ The Judicial Peek is useful to invoke where the courts lack the necessary information to decide if a record is legitimately protected by PAIA's security exemption.⁷⁴⁶ Essentially, the Judicial Peek permits the South African judiciary to test the legitimacy of the state's decision to deny a request for access to state information for purposes of National Security. The courts will use the record to test the legality and the merits of the state's refusal.⁷⁴⁷

It is important to note that the Judicial Peek is a discretionary power granted to the courts and has been included in PAIA to guard against injustice.⁷⁴⁸ It is not clear from the text of the act when the courts should engage this statutory power. This problem was considered by the Constitutional Court in *President of the Republic of South Africa v M&G Media Ltd*. Former Chief Justice Ngcobo, writing for the majority, concluded that the interests of justice is the deciding factor which determines if the Judicial Peek should be invoked.⁷⁴⁹ The judge did not deem it necessary to identify every event which would require the court to resort to using the Judicial Peek in the interests of justice.⁷⁵⁰ He nevertheless set out several circumstances in which the court may deem it necessary to exercise its discretionary power.

The first instance in which the court can rely on this power is where doubt exists as to whether the exemption is rightly claimed by the state. As mentioned earlier, PAIA places the state under a unique limitation when discharging its onus. The state may

⁷⁴³ *President of the Republic of South Africa v M&G Media Ltd* (CC) [50].

⁷⁴⁴ *Right2Know Campaign v Minister of Police* 2015 1 All SA 367 (GJ) [124].

⁷⁴⁵ *M&G Media Ltd v President of the Republic of South Africa* [14].

⁷⁴⁶ *President of the Republic of South Africa v M&G Media Ltd* (CC) [41].

⁷⁴⁷ [52].

⁷⁴⁸ [45].

⁷⁴⁹ *President of the Republic of South Africa v M&G Media Ltd* (CC) [45].

⁷⁵⁰ *President of the Republic of South Africa v M&G Media Ltd* [46].

have difficulty in presenting evidence because it cannot refer to the content of the contested record.⁷⁵¹ Consequently, doubt can arise whether an exemption is rightly relied on if the state, as a result of PAIA's limitation, cannot place sufficient evidence before the court for it to determine that the claim for the exemption is valid. Doubt can also exist, where the legitimacy of the exemption can only be examined by having access to the record.⁷⁵² However, if the state decides to deny access to information to preserve the Republic's constitutional order, state sovereignty, the people or territorial integrity, much will hinge on the court's interpretation of sections 41(1)(a)(i) and/or 41(1)(a)(ii) of PAIA, as discussed in chapter 3 above.⁷⁵³

Secondly, the court may take a Judicial Peek at the contested record where it is doubtful of the state's representations. This will allow the court to examine the accuracy of the state's exemptions while also restoring, to some extent, the adversarial nature of the matter before it.⁷⁵⁴

Thirdly, it may also be necessary to invoke the Judicial Peek if the probabilities are evenly balanced. Generally, the rules of civil procedure dictate that, where the probabilities are evenly balanced, the judiciary must decide in favour of the applicant, since the state bears the burden of proof. However, if the balance in probabilities is a direct consequence of the limitations placed on litigants to present and refute evidence, a court should invoke the Judicial Peek and use the record to decide a matter's merits.⁷⁵⁵

⁷⁵¹ [43]; PAIA S25(3)(b) & S77(5)(b).

⁷⁵² [46].

⁷⁵³ General Intelligence Laws Amendment National Strategic Intelligence S1 "national security"; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [62], [85] & [174]; PAIA S41(1)(a)(i) & S41(1)(a)(ii); PIA S3 & S4; Mendel "National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles" in *National Security and Open Government: Striking the right balance* 11; Siracusa Principles (1984) Principle 29.

⁷⁵⁴ *President of the Republic of South Africa v M&G Media Ltd* (CC) [51].

⁷⁵⁵ [47].

Fourthly, it may be necessary to utilise this instrument to resolve a material dispute of fact which is connected to whether or not the contested record falls under the protection of an exemption.

Lastly, the Judicial Peek can also be used to determine if the contested record contains information which does not fall under the protection of an exemption and thus must be segregated from the record.⁷⁵⁶

Therefore, if it is in the interests of justice, the court can take a Judicial Peek at the record in an attempt to resolve the dispute. The court's discretionary power to invoke the Judicial Peek does not absolve the state of its duty to make out a case justifying its refusal on security grounds.⁷⁵⁷ The courts will only resort to a Judicial Peek once government has made out a plausible case, but the interests of justice dictate that the court should test the state's argument.⁷⁵⁸ The court's function is not to sift through the state's records to determine what information can be protected by PAIA for National Security reasons.⁷⁵⁹ Thus when a court calls for a restricted record to be placed before it, the criticism cannot be made that the court is making the state's case for it.⁷⁶⁰

The engagement by the courts of PAIA's Judicial Peek to resolve the dispute limits Open Justice. If the court reaches a conclusion on the nature of the record in a clandestine fashion it is worrying for several reasons.⁷⁶¹ Firstly, altering the public nature of trials before an ordinary court⁷⁶² allows the state to circumvent its duty to be open and accountable.⁷⁶³ Secondly, secrecy permits malfeasance to possibly creep in.⁷⁶⁴ Thirdly, judicial excellence is put at risk since PAIA permits the judiciary to

⁷⁵⁶ [51].

⁷⁵⁷ [48].

⁷⁵⁸ *Right2Know Campaign v Minister of Police* [127].

⁷⁵⁹ [20].

⁷⁶⁰ *President of the Republic of South Africa v M&G Media Ltd* (CC) [50].

⁷⁶¹ C Theophilopoulos "State privilege, protection of information and legal proceedings" (2012) 129 *SALJ* 637: 642.

⁷⁶² Theophilopoulos (2012) *SALJ* 642.

⁷⁶³ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [32].

⁷⁶⁴ Papandrea (2005) *B.C. Third World L.J.* 75.

deliberate in secret.⁷⁶⁵ The counterweight of public scrutiny which usually warrants against the judiciary behaving in an arbitrary fashion is neutralised by secrecy.⁷⁶⁶ Lastly, the democratic vitality of debate is weakened⁷⁶⁷ since the information necessary for public debate never enters the public arena.⁷⁶⁸

Following a Judicial Peek by the courts and provided that the court has not resolved the dispute at this point of the proceedings,⁷⁶⁹ section 80(3) of PAIA permits courts to use the following processes to resolve a dispute in which the right to access information is in conflict with National Security:

“(a) receive representations *ex parte*;

(b) conduct hearings *in camera*; and

(c) prohibit the publication of such information in relation to the proceedings as the court determines, including information in relation to the parties to the proceedings and the contents of orders made by the court in the proceedings.”

Thus, if a court has not decided on the outcome of a dispute following its examination of the record in question, it is vested with the discretion to decide if the state has legitimately protected the information⁷⁷⁰ by receiving *ex parte* representations⁷⁷¹ or resolving the dispute *in camera*.⁷⁷² The court must exercise this discretion judiciously,⁷⁷³ taking cognisance of the nature of the exemption and the

⁷⁶⁵ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [39].

⁷⁶⁶ Danay & Foster (2006) SAJHR 567; *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [30].

⁷⁶⁷ 573.

⁷⁶⁸ Milo et al “Freedom of expression” in *Constitutional law of South Africa* 42-184. See also *Director of Public Prosecutions v Midi Television (Pty) Ltd t/a E TV* 2006 3 SA 92 (C) [26].

⁷⁶⁹ PAIA S80(3). The provision records that “Any court contemplated in subsection (1) may”, the use of the word may emphasis the discretion of the court.

⁷⁷⁰ *M&G Media Ltd v President of the Republic of South Africa* [7].

⁷⁷¹ PAIA S80(3)(a).

⁷⁷² S80(3)(b).

⁷⁷³ *M&G Media Ltd v President of the Republic of South Africa* [9].

category of the record sought.⁷⁷⁴ Save for section 80(3)(a), if the court relies on any of the balance of the procedures, the net effect will also be a limitation of Open Justice.

Following its Judicial Peek the court can elect to limit Open Justice more extensively by choosing to resolve the dispute *in camera*. South Africa's law relating to *in camera* proceedings is rooted in English law. Originally English common law criminal trials were conducted in public. Simpson states that these trials – dating as far back as the 13th century⁷⁷⁵ – were not only public in nature, but also theatrical.⁷⁷⁶ However, during this epoch the English system also allowed for secret proceedings. Closed proceedings were prevalent during the Star Chamber trials. These proceedings were used to deal with political enemies outside of the general court proceedings.⁷⁷⁷ Nevertheless, Herman opines that the Star Chamber proceedings did not change the public nature of English common law trials.⁷⁷⁸ The Star Chamber would eventually be abolished in 1641.⁷⁷⁹ The general format of criminal trials was open thereafter. However, it was during the 20th century that the openness of criminal trials began to wane again. Secret proceedings had a very negative connotation attached to them. They were connected with institutions like the Star Chamber. Nevertheless, Simpson points out that specific laws authorised the state to conduct *in camera* proceedings as far back as the beginning of the 20th century.⁷⁸⁰

The case of *Scott v Scott*, which was decided in 1913, is the premier judgment that pointed out that judicial proceedings must be conducted in the open, but also specifically identified instances where *in camera* proceedings are permissible. Lords Haldane and Loreburn extended the ability of courts to conduct secret trials, by

⁷⁷⁴ [8].

⁷⁷⁵ T Gardner & T Anderson *Criminal Evidence: Principles and Cases* 9th ed (2015) 175.

⁷⁷⁶ AWB Simpson "The invention of trial in camera in security cases" in RA Melikan (ed) *The Trial in History: Domestic and international trials, 1200-1700* vol2 (2003) 76: 76.

⁷⁷⁷ Gardner & Anderson *Criminal Evidence* 175.

⁷⁷⁸ SN Herman *The Right to a Speedy and Public Trial: A Reference Guide to the United States Constitution* (2006) 12.

⁷⁷⁹ A Esmein *A History of Continental Criminal Procedure: With Special Reference to France* (2000) 341.

⁷⁸⁰ Simpson "The invention of trial in camera in security cases" in *The Trial in History: Domestic and international trials* 77.

providing that if *in camera* proceedings are necessary to achieve justice, then trials may be held behind closed doors.⁷⁸¹ The first state security matter in England where *in camera* proceedings were applied occurred in 1914. The accused in the matter, Carl Hans Lody, or Charles Inglis as his alias was known, was charged with espionage.⁷⁸²

Ackermann J in *S v Leepile* shows that the Republic of South Africa's common law concerning the conduct of criminal trials stems from English law.⁷⁸³ He identifies the *Scott* case as the seminal judgement concerning criminal proceedings from which the public can be excluded.⁷⁸⁴ He also points out that several other South African cases have cited the English decision with approval.⁷⁸⁵ As mentioned earlier, the test used in English law to decide if *in camera* proceedings are necessary, is to determine if the matter will result in justice in a contest between litigants.⁷⁸⁶ Ackermann J, influenced by the decision in the *Scott* case, took the view that the test is no different in South African law. In South African law, proceedings should only be closed if openness will render the administration of justice impractical either because the matter is incapable of being effectively tried in the open, or the litigants in the matter will be loath to seek justice in open proceedings.⁷⁸⁷

In the context of PAIA, the courts do not have to rely on their common law powers to engage in closed proceedings where the right to access information is in tension with National Security. Section 80(3)(b) of PAIA specifically grants the courts the statutory authority to use *in camera* proceedings.⁷⁸⁸ The rationale under PAIA is identical to that in terms of the common law. The purpose is to guarantee the proper

⁷⁸¹ 78. See also *S v Leepile* 338.

⁷⁸² 80 & 81. The military tribunal, though not legally a general court martial, behaved exactly as if it was one. It was presided over by a retired Major General, Lord Cheylesmore, sitting with eight other officers; he would preside over all courts martial for spies held in Britain during the war. There was no concealment of the name of the accused, nor the fact that he was on trial, and only part of the trial was held *in camera*. The request came from the prosecution, handled by Archibald H. Bodkin.

⁷⁸³ *S v Leepile* 337.

⁷⁸⁴ 338.

⁷⁸⁵ 337.

⁷⁸⁶ 338.

⁷⁸⁷ *S v Leepile* 338 & 339.

⁷⁸⁸ J Jaconelli *Open Justice: A Critique of the Public Trial* (2002) 72.

administration of justice. *In camera* proceedings enable the courts to determine if the government is justified in using PAIA's National Security exemption to deny a request to access state information.⁷⁸⁹

The presence of applicants and their legal counsel could be beneficial during *in camera* proceedings. Granting access to the applicants will allow them to effectively challenge the legality and the merits of the state's submissions,⁷⁹⁰ consequently enriching the quality of the adversarial process.⁷⁹¹ However, allowing these parties access to the proceedings may do more harm than good – as will be shown shortly.⁷⁹² It is submitted that when the courts conduct *in camera* proceedings in terms of the act, only the judicial officer and the state should be present at such proceedings. There are two reasons for this interpretation.

The first is that this interpretation is in line with the text of PAIA. The act provides in no uncertain terms that a court choosing to utilise *in camera* proceedings is prohibited from disclosing the content of the requested record to any person during proceedings.⁷⁹³ By excluding any person from *in camera* proceedings the judiciary will ensure that it can satisfy this obligation. The High Court in *M&G Media Ltd v President of the Republic of South Africa* interpreted the meaning of the word 'person' to include applicants and their attorneys.⁷⁹⁴ Naturally excluding these parties will permit the court to meet PAIA's requirement for non-disclosure. It would place National Security at grave risk should the court allow persons to access protected information without the necessary security clearance.⁷⁹⁵

Secondly, denying the applicant and his or her counsel the right to be present at these proceedings is helpful in that it anticipates that the court can, at the conclusion of the trial, deny access to the contested record, on the ground that the publicity of the

⁷⁸⁹ *M&G Media Ltd v President of the Republic of South Africa* [2].

⁷⁹⁰ [10].

⁷⁹¹ *Hayden v National Security Agency* 608 F 2d 1381: 1386.

⁷⁹² This matter is dealt with in more depth under the section dealing with Open Justice and PIA.

⁷⁹³ PAIA S80(2)(a).

⁷⁹⁴ *M&G Media Ltd v President of the Republic of South Africa* 2013 [14].

⁷⁹⁵ *Hayden v National Security Agency* 1387.

information will compromise the Republic's National Security.⁷⁹⁶ To grant an applicant and his/her counsel access to the record at this stage of proceedings will render the application for access to information superfluous.⁷⁹⁷

The operation of *in camera* proceedings in terms of PAIA detracts from the principle of Open Justice.⁷⁹⁸ The greater public will be unable to determine if Open Justice was reasonably and justifiably limited. They will also not be able to assess the appropriateness of the court's processes or its decisions in such circumstances.⁷⁹⁹ It also raises concerns about the fairness of proceedings since the applicant and his or her attorney will be excluded from the courts proceedings.⁸⁰⁰ However, Brickhill and Friedman opine that secret judicial hearings may be the only alternative when trying to protect South Africa's National Security.⁸⁰¹

It should be clear from the text of section 80(3)(c), as set out earlier, that the courts are empowered to limit Open Justice again by limiting the free flow of information relating to court proceedings following a Judicial Peek.⁸⁰² The court to date has not considered the meaning of section 80(3)(c) of PAIA. Nevertheless, it seems that the legislature granted this power to the courts to protect National Security specifically – and other interests generally – by authorising the judiciary to limit the right to access information which may come to light during trial proceedings, or sensitive information which has come to light after it has examined the contested record, and which will lead to the impairment of the security of the state. PAIA's provision seems to be a legal contingency, created for the benefit of a protectable interest, which in this instance is National Security.⁸⁰³ In other words, if a court, subsequent to taking a Judicial Peek of

⁷⁹⁶ *M&G Media Ltd v President of the Republic of South Africa* [15].

⁷⁹⁷ [11].

⁷⁹⁸ PAIA S80(3)(c).

⁷⁹⁹ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [32].

⁸⁰⁰ Constitution S34.

⁸⁰¹ Brickhill & Friedman "Access to Courts" in *Constitutional law of South Africa* 59-86.

⁸⁰² See also *M&G Media Ltd v President of the Republic of South Africa* [7].

⁸⁰³ PAIA S41(1)(a)(i), S41(1)(a)(ii), Part 2 Chapter 4 & Part 3 Chapter 4. The provision also allows for the protection of other general interests found under PAIA.

a contested record and irrespective of the procedure the court aims to use,⁸⁰⁴ determines that it is necessary to protect any information, other than the contested record, the act grants the court the power to protect such information through secrecy, provided that it is in the interests of National Security (or some other interest that is protected under the act) to do so. In the event that the court elects to exercise this power, it will be a direct limitation of Open Justice.

In summary, PAIA requires the judiciary to resolve the tension between a requester's right to access state-held information and the state's duty to preserve National Security in a manner which promotes Open Justice, but allows for the limitation of this principle if the interests of justice require the dispute to be resolved in secrecy. The question is whether these limitations of Open Justice are constitutional.

4.4 PROMOTION OF ACCESS TO INFORMATION ACT VS. DISCOVERY PROCEDURES

Prior to assessing which procedural mechanism will best promote Open Justice and promote National Security, it is important to note that PAIA's entire proceedings as contemplated in sections 25(3)(b), 77(5)(b), 80(1) and 80(3) could be neutralised if an information requester intends to resolve the dispute by relying on the courts' discovery proceedings before the dispute is heard during court proceedings. Additionally, if an information requester successfully relies on the discovery procedures, the importance of identifying the most appropriate mechanism to resolve a dispute between information and security in terms of PAIA and PIA will be superfluous. Therefore, before identifying the appropriate procedural mechanism to resolve the dispute and the constitutionality thereof, it must first be established if PAIA's procedure eclipses or operates concurrently with the discovery procedures in such cases.

Before the substance of disputes between access to information and National Security can be heard in terms of PAIA, the discovery procedures of the various courts permit applicants to request access to the record protected by the state in terms of

⁸⁰⁴ *President of the Republic of South Africa v M&G Media Ltd (CC)* [45]; *M&G Media Ltd v President of the Republic of South Africa* [7].

sections 41(1)(a)(i) and/or 41(1)(a)(ii) of PAIA.⁸⁰⁵ An applicant aiming to procure access to the protected record in the possession of the state in terms of the court's discovery procedures, will have to do so in terms of the Uniform Rules of Court or the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa,⁸⁰⁶ depending on the forum in which the dispute will be resolved.⁸⁰⁷

Prior to the actual trial in terms of PAIA, the courts' discovery procedures permit applicants to procure documents which may be relevant to their matter from the opposing party. The party desiring access to the protected document must serve notice on the state requesting that they make the protected record in their possession or control available.⁸⁰⁸ Ordinarily, access to a requested record would allow parties to a dispute to prepare fully for trial proceedings. Moreover, it prevents the party from

⁸⁰⁵ GG 32622 (2009) S3(1); Uniform Rules of Court 2009 S35(1); Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa (2010) S23(1)(a).

⁸⁰⁶ Uniform Rules of Court 2009; Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa.

⁸⁰⁷ Uniform Rules of Court 2009 "Rules of Court General"; Supreme Court Act 59 of 1959 S43(2)(a); Rules Board for Courts of Law Act 107 of 1985 S6; Extension of Security of Tenure Act 62 of 1997 S17(3); Department: Justice and Constitutional Development Republic of South Africa "Rules Board for Courts of Law" *The DOJ & CD* <http://www.justice.gov.za/rules_board/rules_board.htm> (accessed 15-01-2016); Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa; Hoexter *Administrative law in South Africa* 76. The Uniform Rules of Court came into effect on the 15th of January 1965. Originally and subject to the approval of the state President of South Africa, the Chief Justice following consultations with the various judge presidents of the different divisions of the Supreme Court, created the rules in terms of section 43(2) of the Supreme Court Act. This authority was later repealed by section 11 of the Rules Board for Courts of Law Act, effective from 20 February 1987. This act also conferred the authority to create rules which will govern the procedure in the magistrate's courts, High Courts and the SCA on the Rules Board for Courts of Law, a statutory body created by section 2 of the act. However in this instance the approval for these rules would come from the Minister of Justice. It must be pointed out that any rules created by the Chief Justice in terms of the Supreme Court Act will remain in force unless the preceding statutory body in terms of section 6 of the Rules Board for Courts of Law Act amends or repeals the rules. The Rules Board for Courts of Law in terms of section 6 of the act, with the approval of the Minister, also created rules regulating proceedings in the magistrates' courts.

⁸⁰⁸ Uniform Rules of Court 2009 R35(1); Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa R23(1); Kelbrick *Civil Procedure in South Africa* 68 & 69.

being surprised during the hearing of a matter.⁸⁰⁹ Notwithstanding a party's request in terms of the courts' discovery procedures, National Security may require that an embargo be placed on the record due to the grave dangers that may manifest if the record is made public. As in PAIA, the courts' discovery procedures recognise that certain information should not be provided to a party requesting access to it, and duly authorises the respondent to raise privilege to deny access to the information. A list of exhaustive grounds which permit a litigant to turn down a request for information does not exist. Nevertheless, National Security can be invoked to turn down a request for information, but the respondent must state reasons for turning down a request. Should the requester be dissatisfied with the denial, the requester can approach the court for relief.⁸¹⁰ The court will then be compelled to determine if access should be granted or privilege upheld,⁸¹¹ and herein lies the rub.

The problem is that the judiciary, when called upon to resolve a dispute between a request to provide access to the record in terms of the courts' discovery procedures and the state's defence of privilege on the grounds of National Security, can prevent the dispute from being heard in terms of PAIA's proceedings. This will occur if the court decides the dispute in favour of the requester. The effect of this power is that requesters aiming to access the record by relying on the courts' discovery procedures could render PAIA's entire procedure moot.

Dikgang Moseneke DCJ, writing for the majority of the Constitutional Court, pointed out that considerable judicial debate has revolved around whether PAIA's procedure eclipses or operates concurrently with the discovery procedures regulated by rules of different courts. Unfortunately this debate has not yielded any definite answers.⁸¹² Uncertainty still exists as to whether PAIA's proceedings can be circumvented by using

⁸⁰⁹ *Governing Body, Hoërskool Fochville v Centre For Child Law* 2014 (6) SA 561 (GJ) [22]; Kelbrick *Civil Procedure in South Africa* 68.

⁸¹⁰ Uniform Rules of Court 2009 R35; Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa R23(11)(a); *Centre for Child Law v The Governing Body of Hoerskool Fochville* (2015) 4 All SA 571 (SCA) [18]; Kelbrick *Civil Procedure in South Africa* 69.

⁸¹¹ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 2 SA 279 (T) 289 & 301.

⁸¹² *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [23].

the courts' discovery procedures in instances where the court is called upon to adjudicate conflicts between the right to access state information and National Security. Since no clarity exists on this matter, it is seemingly possible for a requester to attempt to gain access to the state's security information before a court hears the actual dispute in terms of the act. It is a curious fact that neither PAIA, nor the Promotion of Access to Information Rules explicitly prevent requesters from using the discovery procedures of a relevant court to acquire access to protected information after the state has denied the request at the administrative level, but before the substance of the tension is set down to be adjudicated in terms of PAIA's procedure.⁸¹³ If this were the case, the manner in which the judiciary is obligated to promote Open Justice and use secrecy to resolve a dispute would be nullified.

The Uniform Rules of Court and the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa do not direct the judiciary as to what procedure it should use in instances where a dispute can be resolved by way of the rules or PAIA. It is submitted that the judiciary should apply PAIA's procedure to the exclusion of the different courts' discovery procedures for the following reasons if the request aims to procure the contested record.

Firstly, PAIA trumps the courts' discovery procedures in instances where a requester originally relied on PAIA to access information.⁸¹⁴ Section 32(2) of the Constitution places the authority squarely on the shoulders of Parliament to create national legislation to give effect to the constitutional right to access information. In executing its constitutional mandate, Parliament passed PAIA. The Uniform Rules of Courts were created by the judiciary in terms of the Supreme Court Act⁸¹⁵ and the

⁸¹³ PAIA S79(1) & S79(2); GG 32622 (2009). The legislature tasked the Rules Board for Courts of Law, with the duty of creating and subsequently implementing the Promotion of Access to Information Rules ('Rules') when applications are made in terms of S78. The 'Rules' set out the procedure that an aggrieved requester must follow when making an application to the courts for relief. Up until this procedure was instituted, requesters were obligated by PAIA to apply to the High Court for relief. However, since the introduction of the 'Rules', the Magistrate Courts must now be the court of first instance.

⁸¹⁴ L du Plessis *Re-interpretation of Statutes* (2002) 25.

⁸¹⁵ Uniform Rules of Court 2009 "Rules of Court General"; Supreme Court Act S43(2)(a).

Rules Board for Courts of Law Act,⁸¹⁶ while the rules regulating proceedings in the magistrates' courts were created by the Rules Board for Courts of Law.⁸¹⁷ The Supreme Court Act has been repealed by the Superior Courts Act.⁸¹⁸ Currently, all the rules for courts are governed by the Rules Board for Courts of Law Act.⁸¹⁹ PAIA is original legislation expressly mandated by the Constitution, whereas these rules qualify as subordinate legislation.⁸²⁰ If the discovery procedures of the various courts always were to be applied first, before the procedure in terms of PAIA, the latter would be rendered redundant. That would be highly problematic, given that Parliament enacted PAIA in pursuance of its express constitutional mandate to adopt legislation to give effect to a constitutional right, and given Parliament's choice to craft a specific procedure in the act itself to regulate the tension between access to information and National Security. It would disregard Parliament's constitutional duty and the manner in which it determined was best to resolve the tension between competing interests.⁸²¹ In terms of the hierarchy of legislation in South Africa, the Constitution sits alone at the top. Therefore it is of a higher status than the courts' discovery procedures. The effect of this is that, when a matter has originally been instituted in terms of PAIA, the latter act must take precedence. The reason for this is succinctly set out by Du Plessis who points out that:

⁸¹⁶ Uniform Rules of Court 2009 "Rules of Court General"; Rules Board for Courts of Law Act S6; Extension of Security of Tenure Act S17(3); Department: Justice and Constitutional Development Republic of South Africa "Rules Board for Courts of Law" *The DOJ & CD*.

⁸¹⁷ Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa; Hoexter *Administrative law in South Africa* 76.

⁸¹⁸ Superior Courts Act 10 of 2013 S55(1)(a).

⁸¹⁹ Rules Board for Courts of Law Act S6; Jurisdiction of Regional Courts Amendment Act 31 of 2008.

⁸²⁰ Uniform Rules of Court 2009; Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa; Hoexter *Administrative law in South Africa* 76.

⁸²¹ Constitution S32.

“Superordinate legislation always takes precedence over subordinate legislation in *pari materia*.”⁸²²

In other words, where PAIA and the discovery procedures share a common purpose, the purpose must be met in terms of the superordinate law. This seems to be the case here. As Theophilopoulos points out, the objective of both PAIA and the courts’ discovery procedures is to find a balance between National Security and the free flow of information.⁸²³ Additionally, in light of the unwelcome effects caused by the co-existence of these different procedures, it is not unreasonable to presume that the legislature would categorically prohibit the various discovery procedures of the courts from operating in conjunction with PAIA if it were to apply its mind to this matter.

Secondly, using PAIA as the principal vehicle to resolve the tension ensures that the objective of the various courts’ discovery procedures is not altered and used for the primary purpose of settling a substantive dispute. The purpose of the discovery procedures in the different courts is to place documents, which contain information which can directly or indirectly enhance a requester’s case or alternatively damage his opponent’s case, in the petitioner’s hands.⁸²⁴ It assists litigants by permitting them to procure pertinent information which will be used to resolve a substantive dispute. If a requester utilises a relevant court’s discovery procedure subsequent to making an application to the court in terms of PAIA, the tension will have to be resolved at the discovery stage of proceedings. The decision of the court under these circumstances will not be concerned with making available or denying access to incidental

⁸²² Du Plessis *Re-interpretation of Statutes* 37. The position here is distinguishable from instances where there are two pieces of legislation which do not cover the same aspect of law. For example, in *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC), the Constitutional Court held that a legal entity was obligated to procure the requisite zoning authorisations in terms of the Land Use Planning Ordinance 15 of 1985, even where it had already procured the right to mine the applicable land in terms of section 23(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 and the mining permit issued in terms of section 27 of the same Act. That is because the national legislation and the provincial ordinance regulate different aspects and serve different purposes. Accordingly, each of these laws had to be complied with. That is different from the relationship between PAIA and the courts’ discovery procedures, which are *pari materia*, and where the application of the subordinate legislation would effectively exclude the application of the superordinate legislation.

⁸²³ Theophilopoulos (2012) SALJ 640-645.

⁸²⁴ *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 1 SA 556 (N) 565.

information, but its primary purpose would be to ultimately settle the substantive dispute between parties. A decision to grant access to requested documents to one of the parties will nullify the purpose for which a requester institutes an application in terms of PAIA,⁸²⁵ while also altering the purpose of the discovery procedures of different courts. Ensuring that the procedures do not co-exist prevents the previous state of affairs.

Finally, employing PAIA's procedure, instead of the discovery procedures, will ensure that the nature of an interlocutory application will not change. If the state raises the National Security exemption to deny a requester access to information at the administrative stage of PAIA, one can assume with reasonable certainty that the state will also raise state privilege to counteract a notice instituted by a requester to discover protected information after the party has applied to the courts for relief in terms of PAIA.⁸²⁶ It is important for the state to identify the grounds on which it raises privilege.⁸²⁷ Kelbrick submits that the state can raise the defence of privilege to avoid having to produce documents which provide information on the communications between client and legal counsel, witness statements recorded for purposes of proceedings, affidavits, notices in an action and pleadings. This list is by no means exhaustive. Provided that the state gives reasons, it can avoid having to discover documents over which it has raised privilege.⁸²⁸ The state can, and in this instance will, utilise the defence of privilege to avoid having to produce information protected in

⁸²⁵ *M&G Media Ltd v President of the Republic of South Africa* [11].

⁸²⁶ Uniform Rules of Court 2009 S35(2)(b); Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa S23(2)(a)(ii).

⁸²⁷ Pete et al *Civil Procedure: A practical guide* 230.

⁸²⁸ Kelbrick *Civil Procedure in South Africa* 69.

the interests of National Security.⁸²⁹ Should this stance be adopted by the state in response to a notice, a requester can call on the courts to compel the state to make the protected record available.⁸³⁰ The court will commence with its duty of mediating this tension once a requester's interlocutory application has been enrolled.⁸³¹ Interlocutory applications are different from normal applications which are not incidental to other proceedings, but stand on their own as the main legal vehicle for obtaining relief in a particular matter.⁸³² If a requester utilises an interlocutory application in an attempt to procure access to information after they have instituted an application to the courts in terms of PAIA, the applicant will change the incidental nature of this application into the main vehicle for obtaining relief. Since the court will resolve the main thrust of the dispute at the discovery stage of proceedings, the further engagement of PAIA's procedures is unnecessary. It could not have been the intention of the legislature to change the entire nature of an interlocutory application by allowing the two procedures to co-exist.

Since the courts' discovery procedures should not be able to render the applicability of PAIA redundant, it will also not influence PAIA's effects on Open Justice.

⁸²⁹ Theophilopoulos (2012) *SALJ* 638-642. Common law state privilege was codified in terms of S66 of the Internal Security Act 72 of 1982. The aforementioned provision regarding privilege has been repealed by the Safety Matters Rationalisation Act 90 of 1996, while the Protection of Constitutional Democracy against Terrorist and Related Activities Act was responsible for repealing the entire act. Both legal instruments are responsible for creating a lacuna by not providing a definition for privilege. To fill the gap two approaches have been developed to explain state privilege, namely the common law and constitutional approach. Both approaches recognise National Security as a state privilege. The common law exempted the state from producing information if it would harm state security. The constitutional approach also recognises that the state has a duty to protect the Republic's National Security.

⁸³⁰ Uniform Rules of Court 2009 S35(7); Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa S23(8).

⁸³¹ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 289 & 301.

⁸³² Pete et al *Civil Procedure: A practical guide* 120.

4.5 PROTECTION OF INFORMATION ACT AND OPEN JUSTICE

Disputes in which the right to receive and impart state-held information clashes with the state's duty to protect the Republic's National Security in terms of PIA must also be decided by the judiciary in a manner which upholds and promotes Open Justice.

Section 13 of PIA lays down the procedure which must be followed by the courts in disputes where an individual's rights to receive and impart state-held information, is in tension with the state's duty to protect South Africa's National Security by preventing the publication of sensitive state information. The provision reads:

"Any court may, if it appears to that court to be necessary for considerations of the security or the other interests of the Republic, direct that any trial or preparatory examination in respect of an offence under this Act, shall take place behind closed doors or that the general public or any section thereof shall not be present thereat, and if the court issues any such direction, the court shall have the same powers as those conferred upon a court by section 154 (1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and the provisions of subsections (1), (4) and (5) of the said section 154 shall apply mutatis mutandis."

It is submitted that this provision implicitly requires the judiciary in the ordinary course of events to resolve the tension between the rights to receive and impart state-held information and National Security in a manner which promotes Open Justice.⁸³³ However, it expressly authorises the judiciary to direct that any preparatory examination or the trial itself be held *in camera* when it is in the interests of the Republic's National Security.⁸³⁴ This power is discretionary, since the provision specifically holds that the court 'may' hold *in camera* proceedings.⁸³⁵ Should a court deem it necessary to exercise its discretion, it may direct that proceedings be held behind closed doors.⁸³⁶ Alternatively, the court may order that the general public or a section of them be excluded from the proceedings.⁸³⁷

⁸³³ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [32]. See also Criminal Procedure Act S152.

⁸³⁴ PIA 84 of 1982 S13.

⁸³⁵ *S v Leepile* 337.

⁸³⁶ PIA S13.

⁸³⁷ S13.

It is important to note that a court can only direct that such measures be taken if it 'appears to the court to be necessary' for purposes of National Security. In order for the court to reach such a conclusion the state must make out its case before the court to show the drawbacks that may ensue if the court does not exercise its discretion. In instances where the accused has had sight of the sensitive information, it would seem appropriate for the court to exercise its discretion by resolving the dispute behind closed doors. The risk in these instances is that the accused may ventilate what he knows in open court.⁸³⁸ Put differently, to resolve the matter in open court could compromise National Security. In these instances, should the state deem that compelling reasons exist to conduct the trial or part thereof *in camera*, it must make an interlocutory application supported by evidence to the court to conduct the trial behind closed doors.⁸³⁹ The state bears the onus of providing the necessary evidence in support of its application to have the proceedings heard *in camera*.⁸⁴⁰ As the act currently stands, the state will only be permitted to make an interlocutory application for *in camera* proceedings if the ventilation of the record would place the state's defence or intelligence capacity at risk of being compromised. PIA, unlike PAIA, does not permit the state to deny access to information if South Africa's constitutional order, state sovereignty, the people or the territorial integrity of the Republic is at risk of being compromised.⁸⁴¹

Interlocutory applications are distinct from and subordinate to main applications.⁸⁴² Generally the former type of applications are to be heard in open court, but should the state only be able to make the application by relying on protected information, the application itself can be heard behind closed doors.⁸⁴³ If the court grants the state's application, the court's order is in and of itself interlocutory in nature.⁸⁴⁴ These types of applications may be corrected, set aside or altered by the court prior to its final

⁸³⁸ S3 & S4.

⁸³⁹ *S v Geiges* [81].

⁸⁴⁰ [67].

⁸⁴¹ PIA S3, S4 & S13.

⁸⁴² Kelbrick *Civil Procedure in South Africa* 93.

⁸⁴³ *S v Geiges* [81].

⁸⁴⁴ [80].

ruling.⁸⁴⁵ Thus should the court conclude that oral arguments, information or evidence placed before it is not of a protected character, it may reverse its interlocutory order and make such information public.⁸⁴⁶ Conducting the proceedings in this fashion is valuable for several reasons. Firstly, in line with the notion of severability, the court will ensure that innocuous information will be released and sensitive information protected when necessary.⁸⁴⁷ Secondly, litigants will be given the most effective way to resolve the tension, while at the same time giving effect to Open Justice. The alternative is to employ full *in camera* proceedings which will totally decimate Open Justice.⁸⁴⁸

Open Justice will be adhered to at the mediation of the dispute. However, should the state deem it necessary that the interlocutory application be heard in secrecy, only the state and the judiciary will have access to the information. The accused and the public will be totally excluded from having access to the information which results in the institution of *in camera* or partially closed off proceedings.⁸⁴⁹

In the event that the court, following an interlocutory application made by the state, deems it necessary to resolve the dispute *in camera*, the state will be permitted to lead evidence or present testimony of a sensitive nature in order to discharge its burden of proving the unlawful receipt or dissemination of protected information in contravention of section 3 and/or section 4 of PIA, without having to fear that the Republic's National Security will be compromised.⁸⁵⁰ Although the structure of section 13 gives the impression that the entire trial could be held *in camera* if it is in the interests of National Security,⁸⁵¹ it is highly unlikely that a court will conduct a trial in this fashion in our

⁸⁴⁵ *S v Leepile* 349.

⁸⁴⁶ 351. See also *S v Geiges* [80].

⁸⁴⁷ *President of the Republic of South Africa v M&G Media Ltd* (CC) [51]. The concept of severability and its application has been discussed under paragraph 2.3.2.2.

⁸⁴⁸ *Shinga v The State; S v O'Connell* [25].

⁸⁴⁹ PIA S3, S4 & S13; Criminal Procedure Act S154(1).

⁸⁵⁰ *S v Geiges* [68], [70], [80] & [81].

⁸⁵¹ PIA S13.

constitutional democracy.⁸⁵² The correct approach is to conduct proceedings in the open until it is necessary to engage in secret proceedings.⁸⁵³

S v Geiges illustrates this point. In this matter the state applied to the court to have seven of the ten charges brought against an accused for nuclear proliferation to be heard *in camera*. The state relied on sections 152(1), 152(2) and 154(1) of the Criminal Procedure Act 51 of 1977 (CPA), section 52(1) of the Nuclear Energy Act 46 of 1999 and section 21(2)(b) of the Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993.⁸⁵⁴ In support of its application it made out a very strong case on the papers.⁸⁵⁵ The relief that the state applied for aimed to make significant incursions into Open Justice.⁸⁵⁶ The state requested that the court exclude all of the public and media from attending the trial. It sought to limit the amount of people that could attend the proceedings. It also requested the court to prohibit the disclosure of the trial's evidentiary record and the publicity of the identity of or information concerning its technical expert witnesses.⁸⁵⁷ It further required the court to limit access to the transcript of the secret proceedings and the evidence led during the trial. It also sought to prevent the publicity of information of the names, identities and other identifying materials, such as photographic or other images, of all witnesses whose names and addresses have been withheld.⁸⁵⁸ Despite the risk that the publication of the information could have for the proliferation of nuclear weapons which could result in a threat to South Africa's National Security as well as international security, the court was still loath to totally close proceedings.⁸⁵⁹ It did however acknowledge that the court will have to be cleared in certain instances.⁸⁶⁰ The rationale for the court's decision is that Open Justice and not secrecy is the general rule.⁸⁶¹ In accordance with the

⁸⁵² S13.

⁸⁵³ *S v Geiges* [80].

⁸⁵⁴ [2].

⁸⁵⁵ [4].

⁸⁵⁶ [67].

⁸⁵⁷ [1], [1.1], [1.2] & [1.3].

⁸⁵⁸ [3], [3](i), [3](ii) & [3](iii).

⁸⁵⁹ *S v Geiges*.

⁸⁶⁰ [81].

⁸⁶¹ [80].

dictates of the Constitution's requirement for openness and transparency, the court ruled that trial proceedings would be conducted in open court unless a situation arose that necessitated that a matter be heard *in camera*.⁸⁶² If the court ordered that proceedings be conducted completely *in camera*, the general public or part thereof would be totally excluded from proceedings and Open Justice would be extensively impaired. Thus, even where the publicity of sensitive information during a trial could lead to the proliferation of nuclear weapons, the court still did not choose to totally close down proceedings.

Section 13 of PIA, read together with section 154(1) of the CPA and applicable case law, does not indicate who the general public or part thereof is. However, it would appear that the general public refers to the public at large. Moreover, the phrase 'or any section thereof' seems to indicate that the court may exclude any person or group of persons from judicial proceedings for purposes of protecting the Republic's National Security. On this interpretation, the court has the power to exclude the accused and his legal counsel from *in camera* proceedings, notwithstanding the accused's constitutional rights to a fair trial and to be assisted by legal counsel.

The wording of the act seems to contemplate two instances in which the court can exercise this power. In the first instance, the judiciary is permitted to preclude an accused together with his/her legal counsel from participating in *in camera* proceedings. The court is most likely to make such a ruling if it is reasonably convinced that the accused has not seen the content of the record provided to him/her or disseminated by him/her.⁸⁶³ The extent to which Open Justice will be limited by the court in this instance is identical to the manner in which PAIA limits it under the same circumstances. The reason for this is to prevent the accused from procuring access to and ventilating information which is protected in terms of South African law.

In the second instance, if the court is of the view that the accused has viewed the protected information, albeit cursorily, it would be logical for the court to permit the accused to participate in the proceedings, so that this party may effectively challenge

⁸⁶² [81].

⁸⁶³ Constitution S35(3)(c) & S35(3)(f); PIA S3, S4 & S13; Criminal Procedure Act S154(1).

the state's submissions.⁸⁶⁴ This interpretation of section 13 of PIA is also supported when read together with section 154(1) of the CPA. Under these circumstances, the extent to which Open Justice can be limited does not seem to be as extensive as in the first instance. The rationale behind this interpretation is that, although the proceedings are secret, the accused can still procure a fair outcome since he or she is present to make out a case.

Yet, to exclude an accused and his or her legal representative from proceedings would have serious consequences for the right to a fair trial. The Constitution is clear that an accused has the right to be present when being tried and to legal counsel during criminal proceedings.⁸⁶⁵ Permitting an accused's legal counsel to attend the closed proceedings would ensure that the alleged transgressor will be able to effectively challenge the state's case. As pointed out earlier under the paragraph dealing with PAIA, having both litigants and their counsel present during *in camera* proceedings will help to ensure the fairness of the adversarial system of justice.⁸⁶⁶ It will also promote Open Justice.

Nevertheless, it would be reckless to fail to notice that, making protected information available during secret proceedings to an accused's legal counsel who does not have the necessary security clearance, could place the Republic's National Security at risk.⁸⁶⁷ The tension between an accused's right to a fair trial and the state's duty to protect National Security presents a court with difficult choices. The court may decide in favour of the accused that his or her legal counsel must be present during *in camera* proceedings, thus effectively trumping National Security's need for maximum secrecy in instances where the accused has not had access to information.⁸⁶⁸ Alternatively, the court may take the position that National Security will be exposed to grave danger

⁸⁶⁴ *M&G Media Ltd v President of the Republic of South Africa* [10].

⁸⁶⁵ Constitution S35(3)(e) and (f).

⁸⁶⁶ *M&G Media Ltd v President of the Republic of South Africa* [10]; *Hayden v National Security Agency* 1386.

⁸⁶⁷ 1387.

⁸⁶⁸ Beetham *Democracy and Human rights* 34.

should the accused's counsel be present during proceedings, and consequently limit the alleged transgressor's constitutional right to a fair trial.

There seems to be two possible solutions to this problem, which will both protect South Africa's National Security during *in camera* proceedings while ensuring the accused's right to a fair trial. The first possibility is to provide the accused with a government security cleared counsel to act on his or her behalf during *in camera* proceedings.⁸⁶⁹ This is not currently provided for in South African law. Alternatively, the accused's counsel could continue to act for him or her during *in camera* proceedings on the condition that the representative will not reveal anything concerning the content of proceedings. This is made possible by sections 154(1) and 154(5) of the Criminal Procedure Act.

PIA also gives the courts additional powers to limit Open Justice. In addition to authorising the court to engage in *in camera* proceedings, section 13 of PIA prevents the content of the secret proceedings from being publicised. Section 13 of PIA provides that a court which engages in *in camera* proceedings, will have the same powers as set out in sections 154(1), 154(4) and 154(5) of the CPA.⁸⁷⁰ Only sections 154(1) and 154(5) are relevant for present purposes. Section 154(1) prohibits the publication of any information in any form concerning closed proceedings where the court has directed that the public may not be present or has excluded them from part of the proceedings. Should any actor attempt to engage in activity contrary to the court's directions under section 154(1) of the CPA, section 154(5) grants the court the authority to fine or imprison such a person or subject him or her to both these penalties.

The court's ability to engage in *in camera* proceedings, potentially prohibiting the accused and their legal counsel from participating in proceedings, and prohibiting the general public from attending and/or the media from having access to such proceedings, is a direct limitation of the rights underpinning Open Justice. Ultimately section 13 ensures that the information necessary to prove the transgression of section 3 and/or section 4 of PIA will be wrapped up in secrecy.

⁸⁶⁹ *Chahal v The United Kingdom* (1996) 23 EHRR 413 [144].

⁸⁷⁰ PIA S13.

4.6 THE BEST PROCEDURE TO PROMOTE OPEN JUSTICE WHILE PROTECTING THE REPUBLIC'S NATIONAL SECURITY

As stated earlier, the regulatory regime which affects Open Justice in disputes in which the judiciary aims to resolve the tension between the free flow of information and National Security is as follows. On the one hand, PAIA permits courts to resolve disputes between the right to access information and National Security in a manner which promotes Open Justice, but also permits them to limit the rights that underpin this principle by taking a Judicial Peek at a state-protected record.⁸⁷¹ Following its perusal and consideration of the record, the court can decide to limit Open Justice even further by engaging in *in camera* proceedings, and/or prohibiting the publication of information relating to court proceedings.⁸⁷²

On the other hand, PIA authorises the judiciary to limit Open Justice from the outset by employing *in camera* proceedings if the Republic's National Security is at risk of being compromised in disputes which concern the right to receive and impart information. The judiciary may also resolve to exclude the general public or part thereof from proceedings, which will also limit Open Justice. Additionally, it may also direct that the publication of any information in any form concerning closed proceedings is prohibited, which would again impair Open Justice.⁸⁷³

Ultimately, the primary difference between the two pieces of legislation in the mediation of security disputes, is that PIA does not authorise the judiciary to employ a Judicial Peek.⁸⁷⁴ Nor does the act permit the court to receive *ex parte* representations following the court's consideration of the record in secret. PIA also does not permit the

⁸⁷¹ PAIA S80(1).

⁸⁷² S80(3)(a) & S80(3)(b).

⁸⁷³ PIA S13; Criminal Procedure Act S154(1).

⁸⁷⁴ PIA also does not prohibit the state from referring to the content of the record when discharging its onus in terms of the act. Naturally this is very different from sections 25(3)(b) and 77(5)(b) of PAIA which prevent the state from doing so. However, as a matter of logic if the state charges an accused for contravening section 3 and 4 of PIA, it is really aiming to freeze the flow of information. It is extremely unlikely that it would refer to the content of the protected record to discharge its onus. This would ultimately undo its attempt to protect South Africa's National Security by limiting the free expression of sensitive security information.

judiciary to freeze the free flow of information once it has realised that the publication of information actually compromises, or threatens to compromise National Security following a Judicial Peek.⁸⁷⁵ The commonality between the two pieces of legislation is that they both grant the judiciary the discretion to employ *in camera* proceedings, and permit the courts to prohibit the publication of information concerning the content of proceedings.⁸⁷⁶

As it stands, PIA permits the courts to make greater inroads into Open Justice than PAIA does in disputes between information and security. A possible argument in support of PIA's severe limitation of Open Justice is that, because an accused in disputes of this nature would presumably have knowledge of the content of the record, there is greater risk that protected information can be intentionally or inadvertently ventilated in proceedings which would result in compromising South Africa's National Security. Another possible reason for this serious incursion into Open Justice is that the act is a throwback to the Apartheid era.⁸⁷⁷

However, Open Justice would be promoted better in terms of PIA, without placing National Security at any greater risk, if the courts were first allowed to take a Judicial Peek at the record, and thereafter to resolve the dispute by receiving *ex parte* representations, if necessary. Additionally, since the accused is presumed to have knowledge of the information, more meaningful submissions could be made in defence of the accused's right to receive and impart information.

In view of the above, PIA's procedural mechanisms to resolve a dispute between information and National Security should be brought in line with PAIA's procedure. In this way the courts could promote Open Justice without increasing the exposure of South Africa's National Security.

⁸⁷⁵ PIA S13.

⁸⁷⁶ S13; PAIA S80(3)(a) & S80(3)(b).

⁸⁷⁷ Danay & Foster (2006) SAJHR 572; *Real Printing and Publishing CO (Pty) Ltd v Minister of Justice* 787.

4.7 THE CONSTITUTIONALITY OF THE PROCEDURES UTILISED TO RESOLVE THE TENSION BETWEEN THE FREE FLOW OF INFORMATION AND NATIONAL SECURITY

4.7.1 THE LIMITATION CLAUSE

Even if Parliament were to amend PIA's procedure to bring it in line with the position under PAIA, as argued for in the previous section, there may still be questions about the constitutionality of the relevant provisions. The danger is that secret proceedings would allow the courts to unjustifiably limit Open Justice under the pretext of protecting the Republic's National Security. While section 36 can be employed to evaluate the constitutionality of the limitation, it is not the principle of Open Justice that is limited, but the rights which underscore it. In other words, the question is whether the limitation of sections 16(1)(a), 16(1)(b), 34 and/or 35(3)(c) of the Constitution is constitutional. Before examining whether sections 80(1) and 80(3) of PAIA and section 13 of PIA constitute justifiable limitations of these rights, it is first necessary to analyse section 36 of the Constitution.

Section 36 reads:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

In view of this, the courts can only limit sections 16(1)(a), 16(1)(b), 34 and 35(3)(c) of the Constitution if a law of general application countenances secret proceedings. If no law of general application exists which allows for the limitation of the rights which make up Open Justice, then the limitation will be unconstitutional.

The first step is to identify if a law is in existence which allows for this type of action. Every act of state power must have its provenance in law. If no law exists, it would be

superfluous to move on to the next step which focuses on determining if the law qualifies as a law of general application.⁸⁷⁸ Ultimately state action unauthorised by law is unconstitutional.⁸⁷⁹ In the event that the legislature has enacted a law authorising specific activities, the court must then determine if such law qualifies as a law of general application.⁸⁸⁰ Only laws which possess four formal attributes will qualify as a law of general application.⁸⁸¹ These are parity of treatment, non-arbitrariness, accessibility or public availability and precision or clarity.⁸⁸²

Parity as a hallmark of the rule of law⁸⁸³ necessitates that the law which permits activities do two things.⁸⁸⁴ Firstly, it must have the effect of treating persons in similar situations identically.⁸⁸⁵ Additionally, it also means that the governors and the governed are subject to the same treatment under the law.⁸⁸⁶

Non-arbitrariness necessitates that state action be implemented in accordance with a fixed standard.⁸⁸⁷ The Constitutional Court has held that where a vague legal provision gives the state the discretion to limit a right in the Bill of Rights and no guidelines exist to limit the government's discretion, the provision must be declared unconstitutional.⁸⁸⁸ The objective is to ensure that the courts do not rely on poorly

⁸⁷⁸ *Popcru v Sacoswu* 2019 1 SA 73 (CC) [71]; S Woolman & H Botha "Limitations" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional law of South Africa* 2ed (2011) 34-1: 34-7, 34-8 & 34-57.

⁸⁷⁹ [71]; *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) [82]. See also *De Lille v Speaker of the National Assembly* 1998 3 SA 430 (C) [37].

⁸⁸⁰ *De Lille v Speaker of the National Assembly* [37]; Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34-62.

⁸⁸¹ Currie & De Waal *The Bill of Rights Handbook* 153. See also *Pharmaceutical Manufacturers Association of South Africa In re Ex Parte President of the Republic of South Africa* [40].

⁸⁸² Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34-62.

⁸⁸³ Currie & De Waal *The Bill of Rights Handbook* 153.

⁸⁸⁴ *S v Makwanyane* [153].

⁸⁸⁵ Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34-62.

⁸⁸⁶ 34-63.

⁸⁸⁷ *Janse van Rensburg v Minister of Trade and Industry* 2001 1 SA 29 (CC) [25].

⁸⁸⁸ *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) [61]; *Janse van Rensburg v Minister of Trade and Industry* [28].

constructed security laws, which will lead to arbitrary consequences and state abuse.⁸⁸⁹

Precision on the other hand necessitates that the law must be so clear that persons are capable of fashioning their behaviour according to the dictates of the law.⁸⁹⁰

The final attribute that a law must possess in order to qualify as a law of general application is that it must be accessible.⁸⁹¹ Put differently, the law must be available in the public sphere.⁸⁹² Botha and Woolman opine that a law is generally accessible if the reach of a law is widely known by persons and they can fashion their behaviour according to its dictates. Additionally, a law is also accessible if individuals can determine the consequences of an action.⁸⁹³ Laws which comply with all four criteria will qualify as a law of general application in terms of section 36(1) of the Constitution.

Even if PAIA's procedure and PIA's proposed amendment were to qualify as a law of general application, their limitation of sections 16(1)(a), 16(1)(b), 34 and/or 35(3)(c) of the Constitution, must still qualify as reasonable and justifiable in an open and democratic society founded on dignity, equality and freedom before the courts will be able to justifiably limit the applicable rights. Section 36(1) sets out five factors which the courts must use to determine if a limitation will be constitutional.

The first factor is to examine the nature of the right (in this case the rights underpinning the principle of Open Justice).⁸⁹⁴ This analysis forms part of the court's broader proportionality examination.⁸⁹⁵ The analysis of this factor must not simply be

⁸⁸⁹ Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34-64.

⁸⁹⁰ 34-65.

⁸⁹¹ *Dawood v Minister of Home Affairs* [47].

⁸⁹² Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34-66.

⁸⁹³ 34-66. See also Currie & De Waal *The Bill of Rights Handbook* 156.

⁸⁹⁴ Constitution S36(1)(a).

⁸⁹⁵ *South African National Defence Union v Minister of Defence* [7]; *Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC) [22]; Currie & De Waal *The Bill of Rights Handbook* 164.

a duplication of the examination conducted during the first stage of the enquiry, in terms of section 39 of the Constitution.⁸⁹⁶

Secondly, the courts will have to examine the purpose of PAIA and PIA's secret proceedings and appraise its importance.⁸⁹⁷ The purpose of a limitation is not always self-evident. A court may have to analyse an act's objective, the history of its provisions, and the mischief it aims to correct, in order to identify its purpose.⁸⁹⁸ The objective of a limitation must not run contrary to the values underpinning the Constitution. If the purpose is to protect South Africa's security interests, it will be considered to be of sufficient importance to satisfy this second factor.⁸⁹⁹

The third factor requires the judiciary to examine the manner in which PAIA and PIA's secret proceedings will limit sections 16(1)(a), 16(1)(b), 34 and/or 35(3)(c) of the Constitution.⁹⁰⁰ The courts must determine the extent of the limitation on a fundamental right. Is the limitation fairly minor or does it severely impair the right?⁹⁰¹ This factor invites the court to engage in balancing and a proportionality analysis.

Rationality review - the penultimate factor - enables the court to establish if a substantive connection exists between means and ends.⁹⁰² Here, the question would be whether the employment of secret proceedings would result in the protection of

⁸⁹⁶ *Beinash v Ernst & Young* 1999 2 SA 116 (CC) [17]; Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34-71.

⁸⁹⁷ Constitution S36(1)(b).

⁸⁹⁸ Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34:75.

⁸⁹⁹ Woolman & Botha "Limitations" in *Constitutional law of South Africa* 34-75.

⁹⁰⁰ Constitution S36(1)(c).

⁹⁰¹ Currie & De Waal *The Bill of Rights Handbook* 168.

⁹⁰² Constitution S36(1)(d); C Curtis "Rationality, reasonableness, proportionality: testing the use of standards of scrutiny in the constitutional review of legislation" (2011) 4 *Constitutional Court Review* 31: 32.

National Security. The judiciary must conduct an objective enquiry to determine if the limitation is rationally linked to its purpose.⁹⁰³ If not, the limitation is arbitrary.⁹⁰⁴

The final criterion is whether a less restrictive mechanism exists to achieve the purpose of PAIA and PIA's security provisions.⁹⁰⁵ The limitation must be tailored narrowly so that it does not limit a fundamental right more than necessary. If the limitation is more restrictive than necessary to achieve the provision's purpose, the provision will be overbroad.⁹⁰⁶

After considering the previous factors the courts have to engage in a proportionality test to ensure that PIA and PAIA's limitation of sections 16(1)(a), 16(1)(b), 34 and/or 35(3)(c) of the Constitution are both reasonable and justifiable in South Africa's constitutional democracy. Ultimately PAIA and PIA's secrecy provisions must not limit Open Justice more than necessary to achieve its purpose.⁹⁰⁷ To guarantee proportionality between an infringed right and the act or conduct, the courts must weigh up all of the factors.⁹⁰⁸ The court will assign weightings to each of the considerations to determine how the scales will fall.⁹⁰⁹ The greater the inroads that are made into the rights enshrined in the Bill of Rights, the greater the need to ensure that the limitation is indeed necessary to achieve its purpose.⁹¹⁰

⁹⁰³ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [86].

⁹⁰⁴ G Barrie "The application of the doctrine of proportionality in South African courts" (2013) 28 *SAPL* 40: 47; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [85].

⁹⁰⁵ Constitution S36(1)(e).

⁹⁰⁶ Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34-87.

⁹⁰⁷ *S v Makwanyane* [109]; Barrie (2013) *SAPL* 40 & 52..

⁹⁰⁸ *S v Makwanyane* [109]; Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34-70.

⁹⁰⁹ I Currie "Balancing and the limitation of rights in the South African Constitution" (2010) 25 *SAPL* 408: 422.

⁹¹⁰ D Bilchitz "Does balancing adequately capture the nature of rights?" (2010) 25 *SAPL* 423: 427.

4.7.2 THE CONSTITUTIONALITY OF SECRET PROCEEDINGS UNDER THE PROMOTION OF ACCESS TO INFORMATION ACT

As mentioned above, sections 80(1), 80(3)(b) and 80(3)(c) of PAIA authorise the judiciary to employ secret proceedings in disputes between a requester's right to access state-held information and the state's denial of the request on the grounds of National Security. The judiciary is authorised by the act to take a Judicial Peek, engage in *in camera* proceedings and restrict the dissemination of information.⁹¹¹ To determine whether these powers constitute justifiable limitations of sections 16(1)(a), 16(1)(b), and 34 of the Constitution (i.e. Open Justice in a civil matter), they must be measured against section 36(1) of the Constitution.

In terms of section 36(1) fundamental rights can only be limited in terms of laws of general application. Sections 80(1), 80(3)(b) and 80(3)(c) of PAIA qualify as laws.⁹¹² Additionally these provisions also satisfy all four formal requirements which a law must meet in order to qualify as a law of general application.⁹¹³ Firstly, sections 80(1), 80(3)(b) and 80(3)(c) of PAIA satisfy the requirement of parity. That is because a court will limit a requester's and the public's rights to access proceedings (i.e. section 34 of the Constitution) and their ability to report thereon (i.e. sections 16(1)(a) and 16(1)(b) of the Constitution) in all instances in which a dispute between the right to access state information and the state's duty to protect National Security can only be settled through recourse to secret proceedings in terms of the act.⁹¹⁴

Secondly, PAIA's secret provisions meet the requirement of non-arbitrariness. The courts are not allowed to employ the Judicial Peek or secret proceedings haphazardly. The Constitutional Court made it clear that courts will be able to engage the Judicial

⁹¹¹ PAIA S80(1) & S80(3).

⁹¹² As pointed out in the second chapter of this treatise, PAIA was promulgated on the 2nd of February 2000, and became operational on the 9th of March 2001. PAIA then meets the first test in that an enacted law allows the courts to engage in secret security proceedings.

⁹¹³ Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34-62.

⁹¹⁴ Theophilopoulos (2012) *SALJ* 642; PAIA S41(1)(a)(i), S41(1)(a)(ii), S80(1) & S80(3). Although the degree of infringement is different since the procedures a court can use are different. The rights to free expression, access to courts and the right to a public hearing of requesters will always be limited.

Peek only if the interests of justice require it.⁹¹⁵ Subsequent to the court's examination of the protected record, it has the discretion to decide if the state has legitimately protected information⁹¹⁶ by (i) receiving *ex parte* representations (i.e. section 80(3)(a) of PAIA) or (ii) hearing proceedings *in camera* (i.e. section 80(3)(b) of PAIA), provided that it has not already made its determination following the Judicial Peek. A court must exercise this discretion judiciously,⁹¹⁷ taking cognisance of the nature of the exemption and the category of the record sought.⁹¹⁸ Additionally, the judiciary may also elect to exercise the powers conferred on it in terms of section 80(3)(c) of PAIA. However, it is unclear what the content of this power really is - as mentioned earlier in this chapter.⁹¹⁹ This provision is capable of two interpretations. One interpretation of this provision is that the applicable law allows the South African judiciary to prevent the dissemination of information concerning the content of the record following its consideration of it in terms of the Judicial Peek. It is submitted that this interpretation is not correct. As a matter of logic, the only reason the judiciary relies on its statutory powers to analyse a contested record in secret in order to resolve the dispute without placing the security interests of the state at risk is because the information is not available in the public domain.⁹²⁰ The more plausible interpretation is that following the court's Judicial Peek it has recognised that information ventilated during proceedings prior to the Judicial Peek can compromise the Republic's National Security. Consequently, it may deem it in the interests of National Security to freeze this information. Against the background of the courts powers in terms of PAIA, it is important to point out that the court may only resort to such decisions in very specific

⁹¹⁵ *President of the Republic of South Africa v M&G Media Ltd* (CC) [45], [46], [47] & [51]. As pointed out earlier there are several instances in which the court can engage the Judicial Peek. The court can utilise the Judicial Peek proceedings if doubt exists as to whether the exemption is rightly claimed, where the bench is doubtful of the state's representations, if the probabilities are evenly balanced, to resolve a material dispute of fact, or to determine if information in the contested record should be publicised.

⁹¹⁶ *M&G Media Ltd v President of the Republic of South Africa* [7].

⁹¹⁷ *M&G Media Ltd v President of the Republic of South Africa* [9].

⁹¹⁸ [8].

⁹¹⁹ For a more comprehensive discussion of this aspect please refer to clause 4.3 herein.

⁹²⁰ PAIA S25(3)(b), S41(1)(a)(i), S41(1)(a) (ii) S77(5)(b) & S80.

instances. The legislation does not contemplate the arbitrary application of the law. Specific standards must be adhered to before taking such a decisions.⁹²¹

Thirdly, PAIA's provisions relating to secret court proceedings are precise. During the Judicial Peek, requesters will never be permitted to gain access to state-held information,⁹²² neither will they ever be able to gain access to it during the *ex parte*⁹²³ or *in camera* proceedings. On the strength of the above interpretation of section 80(3), the exception to this rule concerns instances where the public during general trial proceedings have already gained access to sensitive information prior to the court taking a Judicial Peek. Subsequent to the judiciary's examination of the record, the court may find that information publicised in the court room before the Judicial Peek was invoked should actually be protected for reasons of National Security. The act seems to grant the courts the authority to cloak this information in secrecy after establishing its true nature.⁹²⁴ In the context of what has been submitted earlier, PAIA's provisions relating to secret proceedings are sufficiently clear to enable litigants to know how to comply with the act's requirements.⁹²⁵

Finally, PAIA's provisions governing secret procedures also meet the criterion of accessibility. PAIA is freely available in the public sphere.⁹²⁶ Additionally, PAIA's secrecy provisions, together with the standards laid down by the Constitutional Court, clearly set out when and the manner in which sections 16(1)(a), 16(1)(b), and 34 of the Constitution can be limited.⁹²⁷ In fact it is clear enough so that a requester can

⁹²¹ PAIA S80(3)(c).

⁹²² *Right2Know Campaign v Minister of Police* [124].

⁹²³ *M&G Media Ltd v President of the Republic of South Africa* [16].

⁹²⁴ PAIA S80(3)(b).

⁹²⁵ Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34-64.

⁹²⁶ 34-66.

⁹²⁷ *President of the Republic of South Africa v M&G Media Ltd* (CC) [45], [46], [47] & [51]; PAIA S80(1) & S80(3).

easily comply with a court's decision to engage in secret proceedings and foresee the effects of a court's decision.⁹²⁸

Next, it must be determined whether the limitations of sections 16(1)(a), 16(1)(b), and 34 of the Constitution by sections 80(1), 80(3)(b) and 80(3)(c) of PAIA are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The first factor to be considered here is the nature of the rights underpinning Open Justice. The nature of Open Justice has been set out extensively at the beginning of this chapter in paragraph 4.2. Given the fundamental importance of this principle and the rights underpinning it, both for South Africa's democracy and the judiciary, the rights to access court proceedings (i.e. section 34 of the Constitution) and to comment on material ventilated in the judicial arena (i.e. sections 16(1)(a) and 16(1)(b) of the Constitution) must apply as the golden standard in resolving conflicts between the free flow of information and National Security.⁹²⁹ Any justification set forward for its limitation needs to be extremely convincing.⁹³⁰

While the value of Open Justice is of fundamental importance, its limitation in terms of sections 80(1), 80(3)(b) and 80(3)(c) of PAIA, read in conjunction with sections 41(1)(a)(i) and 41(1)(a)(ii), serves an important purpose. The Constitution recognises both the importance of National Security to our constitutional democracy and the authority of Parliament in relation to National Security.⁹³¹ In fulfilling its duty to protect National Security, Parliament has provided the courts with the authority in terms of PAIA to engage in secret proceedings.⁹³² These proceedings were designed by the

⁹²⁸ Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34-66.

⁹²⁹ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [32].

⁹³⁰ Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34-72.

⁹³¹ Constitution S198(d). The same principles also make National Security subject to the authority of the national executive.

⁹³² PAIA S41(1)(a)(i), S41(1)(a)(ii) & S80.

legislature to protect fundamental state interests.⁹³³ Thus the importance of this limitation cannot be disputed.

The extent to which sections 16(1)(a), 16(1)(b), and 34 can be limited by PAIA's secret proceedings varies, depending on the proceedings which the court chooses to engage after the Judicial Peek.⁹³⁴ If the court should choose to engage *ex parte* proceedings, part of the matter will be heard in open court.⁹³⁵ Consequently, the extent to which section 34 of the supreme law will be impaired will be limited. However, if it chooses to engage in *in camera* proceedings there will be a total information blackout which is a more severe impairment of section 34 of the Constitution.⁹³⁶ Additionally, should the court choose to further limit sections 16(1)(a) and 16(1)(b) of the Constitution in terms of section 80(3)(c) of PAIA, the extent to which information will be limited would likewise be far greater under the *in camera* proceedings than under the *ex parte* proceedings. In other words Open Justice will be impaired, but the extent of the limitation will vary. However, there are commonalities which will appear in all of the different types of secret proceedings in which Open Justice is limited in the interests of National Security. Firstly, the limitation will affect the core values underlying Open Justice.⁹³⁷ Participants to a trial will not be able to access or freely receive and disseminate protected information at a trial.⁹³⁸ Neither will courts be open, transparent or accountable when they engage in secret proceedings.⁹³⁹ Secondly, any opportunity a requester will have to effectively challenge the legality and the merits of the state's submissions is lost during secret proceedings.⁹⁴⁰ Nevertheless, PAIA's limitation is not permanent, nor does it totally destroy Open Justice. Rather secrecy

⁹³³ *Paleri National Security: Imperatives and challenges* 94. See also *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [164].

⁹³⁴ PAIA S80(3). See also *M&G Media Ltd v President of the Republic of South Africa* [7].

⁹³⁵ *M&G Media Ltd v President of the Republic of South Africa*.

⁹³⁶ PAIA S80(3)(a) & S80(3)(b).

⁹³⁷ Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34-80.

⁹³⁸ *South African National Defence Union v Minister of Defence* [7].

⁹³⁹ K Iles "Access to courts" in I Currie & J De Waal (eds) *The Bill of Rights Handbook* 6ed (2013) 710: 742.

⁹⁴⁰ *M&G Media Ltd v President of the Republic of South Africa* [10].

limits sections 16(1)(a), 16(1)(b), and 34 of the Constitution as far as it is necessary to protect National Security.⁹⁴¹ If the courts find that certain information does not threaten National Security, it will publicise the information.⁹⁴²

It seems obvious that sections 80(1) and 80(3)(b), read together with sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA, enable the courts to engage in secret proceedings in order to prevent compromising National Security in judicial disputes between the right to access information and National Security. In other words there is a direct relationship between means and ends.⁹⁴³ To put it differently, the employment of PAIA's secret proceedings must result in the preservation of South Africa's National Security.⁹⁴⁴ This raises the question: if the outcome of the proceedings is a finding that the record was unjustifiably protected by the state, would that mean that the court's employment of sections 80(1) and 80(3)(b) of PAIA was irrational? The answer is no. The court will only employ PAIA's secret proceedings if the state shows that it is in the interests of justice to do so. It would be irresponsible in these circumstances to hear the dispute in open court and run the risk of compromising South Africa's National Security. Also if the court at any time finds that the information is incorrectly embargoed, it must release it. In these instances there is a clear relationship between means and ends.

However, there does not seem to be a rational relationship between means and ends if a court relies on section 80(3)(c) of PAIA following its Judicial Peek of the contested record. While section 80(3)(c) of PAIA arms the court with the power to prevent the publication of information already in the public domain, it is highly unlikely that its limitation of the dissemination of information will practically prevent a threat from compromising the Republic's National Security. The reason for this is simple. In the era of technology it is almost impossible to suppress information which has been disclosed in the judicial arena prior to the court conducting its Judicial Peek. If the disclosed information compromises National Security, court censorship will not be able

⁹⁴¹ Woolman & Botha "Limitations" in Woolman, Bishop & Brickhill (eds) *Constitutional law of South Africa* 34-1: 34-83.

⁹⁴² PAIA S28. See also *President of the Republic of South Africa v M&G Media Ltd* (CC) [55].

⁹⁴³ Courtis (2011) *Constitutional Court Review* 32.

⁹⁴⁴ Constitution S36(1)(d).

to effectively counteract any threats. The state will have to employ alternative methods to counteract a threat. Secrecy will no longer be an effective tool for the protection of National Security.⁹⁴⁵ Conversely, if the publicity of information does not compromise National Security, this is the litmus test. The publicity of the information will positively determine if the information really poses a threat to National Security, or not. WikiLeaks provides the best example of this. It released thousands of classified secrets which states claimed would compromise their National Security,⁹⁴⁶ and yet this did not actually compromise these states' National Security.⁹⁴⁷ Ultimately the judiciary, by invoking its authority to deny the dissemination of information following a Judicial Peek of the record, is just trying to close the stable door after the horse has bolted. This provision does not have much value and there is no relationship between freezing information which has already been publicised and protecting National Security as contemplated by section 36(1)(d) of the Constitution.⁹⁴⁸ To put it differently, if the courts employ this power it will unjustifiably limit Open Justice. Consequently, the legislature should repeal this provision since it is unconstitutional.⁹⁴⁹

It is hard to contemplate of a less restrictive manner in which to resolve a dispute between the right to access information and National Security than PAIA's procedure. PAIA's secret provisions do seem to be narrowly tailored. If sections 41(1)(a)(i) and

⁹⁴⁵ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [182]. The state will employ countermeasures. Additionally enemies of the state may change their methods of attack in order to ensure that their threats are effective when they are carried out after learning of the Republics countermeasures. In the long run this may result in a more effective threat being posed to South Africa's National Security. It will thus be costly to change the manner of protection to ensure the effective defence of the Republic.

⁹⁴⁶ A Pekoe "Uneasy Lies the Hand That Clicks the Mouse: Presidential Power and WikiLeaks" (2011-2012) 7 *Fla. A & M U. L. Rev.* 95: 100.

⁹⁴⁷ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [165].

⁹⁴⁸ Courtis (2011) *Constitutional Court Review* 32; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [86]; Constitution S36(1)(d).

⁹⁴⁹ PAIA S80(3); GM Lusins "Spycatcher, Ex-spies and Publication: A Comparison of Two Governments' Responses to the Release of Confidential Information" (1989-1990) 14 *Colum.-VLA J.L. & Arts* 233: 234.

41(1)(a)(ii) are read in conjunction with sections 80(1) and 80(3)(b) of PAIA, it is clear that the court's decision to conduct secret proceedings is designed and has the effect of protecting National Security. It must also be borne in mind that the Constitutional Court has added a specific procedural safeguard to ensure that the courts will only conduct secret proceedings if it is in the interests of justice to do so.⁹⁵⁰ To determine the nature of the record in open court will compromise National Security. The courts are only entitled to limit Open Justice to the extent necessary to avoid putting the state's National Security at risk. There does not seem to be another viable option available to the courts, but to use secrecy to resolve the tension in a way that does not put South Africa's society in grave danger.⁹⁵¹

While Open Justice preserves transparency, free flow of information and fairness in the judicial arena,⁹⁵² the above analysis shows that sections 80(1) and 80(3)(b) of PAIA, which meet the requirements of a law of general application,⁹⁵³ only aim to empower the judiciary to detract from the transparency of the proceedings insofar as it is necessary to preserve the National Security of the Republic. The failure to resolve the dispute in this manner could result in the publication of security information, which could trigger a threat that could compromise National Security, and place the open and democratic society envisaged by the Constitution at risk. Sections 80(1) and 80(3)(b) of PAIA therefore aim to allow the courts to resolve the tension between information and security in a manner which preserves the fairness and transparency of the trial without compromising National Security. Therefore the limitation of Open Justice in terms of sections 80(1) and 80(3)(b) is reasonable and justifiable.⁹⁵⁴

In view of the above, it is submitted that the judiciary's limitation of sections 16(1)(a), 16(1)(b), and 34 of the Constitution to preserve National Security in terms of PAIA is constitutional. However, section 41(1)(a) in its current form, read in conjunction with sections 80(1) and 80(3)(b) of PAIA, does not expressly authorise the limitation of Open Justice in instances where the publication of the information could compromise

⁹⁵⁰ *President of the Republic of South Africa v M&G Media Ltd* (CC) [45]-[47] & [51].

⁹⁵¹ *S v Makwanyane* [106].

⁹⁵² Constitution S16(1)(a), S16(1)(b), S34 & S35(3)(c).

⁹⁵³ S36(1).

⁹⁵⁴ S16(1)(a), S16(1)(b), S31(1), S34 & S35(3)(c); PAIA S41(1)(a)(i), S41(1)(a)(ii), S80(1) & S80(3)(b).

the constitutional order, state sovereignty, the people, or territorial integrity of the Republic. If these interests are not preserved from being compromised in terms of the applicable statutory framework, the state could be put at serious risk. For this reason, it is submitted that the courts should interpret PAIA's conception of National Security in the same manner as proposed in the previous chapter. Should the judiciary rely on the definition proposed in chapter 3, the courts will not only be able to constitutionally limit Open Justice, but will also be able to preserve the appropriate security interests from being compromised by defined threats.

4.7.3 THE CONSTITUTIONALITY OF THE PROPOSED AMENDMENT OF THE PROTECTION OF INFORMATION ACT

As argued previously, PIA will promote Open Justice more effectively without any further risk to South Africa's National Security, if it is amended to bring it into line with sections 80(1) and 80(3)(a) of PAIA. To put it plainly, PIA should include a Judicial Peek and the court should be granted the discretion to call for *ex parte* representations. If these proposed amendments are to be incorporated into PIA the courts' authority to resort to secret judicial proceedings would be constitutional for the same reasons as argued above (save for the provision that permits the courts to freeze publicised information once it has established after it has taken a Judicial Peek that it threatens National Security). It must be mentioned that, since disputes arising under PIA will often involve criminal aspects, section 35(3)(c) of the Constitution will also come into play.⁹⁵⁵ However, this should not have a substantial impact on the limitation analysis to be performed under section 36.

The proposed amendment to PIA would also have a number of additional benefits in matters where one party's right to receive and impart information stands in opposition to the state's duty to protect National Security. Firstly, the accused would be able to assert his or her rights more aggressively. As pointed out earlier in this thesis, the accused in PIA's proceedings may have already had sight of the protected record. This would give an accused in a dispute between the rights to receive and impart information and National Security, a significant advantage over his information counterpart under PAIA's proceedings. This advantage would also permit the accused

⁹⁵⁵ S16(1)(a), S16(1)(b) & S35(3)(c).

to make out a stronger case on why the information held by the state should not be protected.

Secondly, it would improve the efficacy of the courts' decisions to engage in secret proceedings. Prior to the implementation of the Judicial Peek, a requester could demonstrate that the state is overstating the necessity to engage in secret proceedings. In any *ex parte* representations following the Judicial Peek, the accused could make more meaningful submissions.

While PAIA's procedure does not provide unlimited protection to Open Justice, it allows the judiciary to resolve disputes in a manner which is fair, without running the risk of compromising South Africa's National Security. The same applies to PIA, provided that it is amended as proposed in this chapter to incorporate some of the procedures provided for under PAIA, and provided that National Security is interpreted as proposed in chapter 3. The failure to do so could expose the state to danger and open the door for state abuse.

4.8 CONCLUSION

The powers granted to courts in sections 80(1) and 80(3)(b) of PAIA in cases in which the state has denied an application for access to information for reasons of National Security, constitute a justifiable limitation of the rights underpinning Open Justice, guaranteed in sections 16(1)(a), 16(1)(b), 34 and/or 35(3)(c) of the Constitution.⁹⁵⁶ Where the interests of justice demand, the courts must invoke the Judicial Peek to resolve the dispute between security and information.⁹⁵⁷ Following its examination of the record and provided that it has not decided on the outcome of the dispute after its Judicial Peek,⁹⁵⁸ a court must exercise its discretion judiciously,⁹⁵⁹ taking cognisance of the nature of the security exemption and the category of the record sought⁹⁶⁰ when deciding if the litigants to the proceedings should make *ex parte*

⁹⁵⁶ S16(1)(a), S16(1)(b), S34 & S35(3)(c).

⁹⁵⁷ *President of the Republic of South Africa v M&G Media Ltd* (CC) [45].

⁹⁵⁸ PAIA S80(1).

⁹⁵⁹ *M&G Media Ltd v President of the Republic of South Africa* [9].

⁹⁶⁰ [8].

representations, or if the dispute should be resolved *in camera*.⁹⁶¹ Reliance on the Judicial Peek, and the decision to receive representations *ex parte*, or to resolve the dispute *in camera* are reasonable and justifiable limitations of the fundamental rights underpinning Open Justice. In addition to the above actions, section 80(3)(c) of PAIA also allows the judiciary to prevent the publication of information already in the public domain, which should have been protected for purposes of National Security. The employment of this power by the courts would be an unjustified limitation of Open Justice and the legislature should strike this provision from PAIA since it is unconstitutional.⁹⁶²

The courts' discovery procedures could possibly be employed to gain access to sensitive information in cases where the right to access information comes into conflict with National Security. The danger is that this may neutralise the employment of PAIA's procedure for the resolution of disputes between information and security. PAIA should be employed to the exclusion of the courts' discovery procedures to resolve the dispute for the reasons adumbrated earlier.

To ensure that PIA can better promote Open Justice without placing the Republic's National Security in any further danger, it should be amended to bring it in line with PAIA's procedural mechanisms, save for section 80(3)(c). PIA should thus provide for a Judicial Peek, and grant the court the discretion to call for *ex parte* representations. Parliament should also consider redrafting the provision to permit the accused to be assisted by a security cleared legal representative, or his own counsel subject to certain legal sanctions being in place, to add to the fairness of the trial during *in camera* proceedings. If these changes are made, section 13 of PIA's limitation of Open Justice will be constitutional.

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⁹⁶¹ PAIA S80(3).

⁹⁶² Lusins (1989-1990) *Colum.-VLA J.L. & Arts* 234.

CHAPTER 5

THE JUDICIARY'S CAPACITY TO RESOLVE THE TENSION BETWEEN THE
FREE FLOW OF INFORMATION AND NATIONAL SECURITY

5.1 INTRODUCTION

Conflicts between the free flow of information and National Security in the judicial arena turn to a significant extent on the question whether the ventilation of a contested record will compromise National Security. The South African judiciary is the designated forum to resolve such conflicts in terms of applicable law.⁹⁶³ In terms of section 82(a) of PAIA the judiciary is entitled to confirm, amend or set aside any decisions made by the state in terms of sections 41(1)(a)(i) and/or 41(1)(a)(ii) of the act. Additionally, the judiciary is also responsible for determining if sections 3 and 4 of PIA have been contravened.⁹⁶⁴

However, the capability of the South African judiciary to resolve disputes of this nature and the proposed process (as set out in chapter 4) which it should rely on to resolve these types of disputes are not uncontroversial for the following reasons. Firstly, the executive often opposes judicial intervention in these types of disputes.⁹⁶⁵ In their view, only the executive and not the judiciary possesses the institutional expertise and resources to determine if information should be protected for purposes of National Security.⁹⁶⁶ This line of argument is not without merit, as courts generally lack the operational capacity to decide what measures the executive should employ to protect National Security.⁹⁶⁷ Accordingly it may be appropriate for the judiciary to defer to the state in matters of National Security.

⁹⁶³ S165(2).

⁹⁶⁴ PIA S3, S4 & S13.

⁹⁶⁵ Freivogel (2009) *J. Nat'l Sec. L. & Pol'y* 98; Anonymous (1990) *Harvard Law Review* 909; Kirby (2006) *SAJHR* 29; Du Plessis (2009) *SAJHR* 358.

⁹⁶⁶ A Barak "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 *Harvard LR* 19: 158.

⁹⁶⁷ Constitution S198(d); Arden (2007) *SALJ* 66; Freivogel (2009) *J. Nat'l Sec. L. & Pol'y* 98; Anonymous (1990) *Harvard Law Review* 909; Kirby (2006) *SAJHR* 29; Du Plessis (2009) *SAJHR* 358.

Secondly, even if the judiciary is found to possess the requisite security capacity to resolve disputes of this nature, the procedures which are to be applied in terms of the applicable legislation may hamper the judiciary's ability to determine if a record should be contained for purposes of National Security. Chapter 4 has proposed an amendment of PIA to align it with PAIA's procedure in order to promote Open Justice without putting National Security at any greater risk. However, it will be argued in this chapter that the two-step approach followed under PAIA is itself problematic, and may require some revision.

Against this background, this chapter aims to determine (i) if the judiciary has the institutional capacity to resolve disputes between the free flow of information and National Security in terms of the acts, (ii) if it is appropriate for the judiciary to defer to the state in these matters, and (iii) if the procedures provided for under PAIA enable the judiciary to resolve this dispute effectively.

To achieve these outcomes, this chapter will commence by firstly considering the roles of the legislature, the executive and the judiciary as envisaged by the doctrine of the separation of powers in the context of National Security. In this regard, consideration will be given to securocrats' criticisms of judicial intervention and their call for judicial deference.⁹⁶⁸ Secondly, it will analyse the role of the South African judiciary and the methodology it employs to resolve disputes between the free flow of information and National Security in terms of PAIA and PIA. The purpose of this analysis is to determine if the South African judiciary can resolve disputes between information and security in a principled manner. Thirdly, this chapter aims to analyse judicial and academic conceptions of deference to determine if the judiciary should defer to the state where security and information are in conflict in terms of PAIA. Lastly, the chapter aims to identify the legal mechanism which would enable the judiciary to

⁹⁶⁸ KA O' Brien *The South African intelligence services: From Apartheid to democracy, 1948-2005* (2010); J Duncan *The Rise of the Securocrats: The Case of South Africa* (2014). The term 'securocrats' is often used to refer to the security apparatus of the state that is responsible for preserving National Security. It can also be used to refer to politicians or officials who favour strong measures to protect state security.

effectively resolve the dispute between the free flow of information and National Security.

5.2 THE SEPARATION OF POWERS AND THE TENSION BETWEEN THE FREE FLOW OF INFORMATION AND NATIONAL SECURITY

The doctrine of the separation of powers calls for state power to be divided between different state institutions. This doctrine originated in seventeenth-century Europe, during the age of Enlightenment. During this epoch, political actors questioned the absolute authority of monarchs and the arbitrary manner in which their powers were applied.⁹⁶⁹ Montesquieu, a French lawyer and political theoretician,⁹⁷⁰ proposed that state power be divided between three distinct institutions.⁹⁷¹ In its most elementary form, the doctrine is based on three principles. The first is that state power must be divided between the executive, legislature and the judiciary, and that no control or influence should be exerted by one institution over the other. Secondly, the functions of these institutions must be distinct and lastly, the institutions' personnel must be separate.⁹⁷²

It is worth noting that no universally accepted conception of the doctrine of separation of powers exists.⁹⁷³ The Republic of South Africa has its own specific model of the doctrine of the separation of powers.⁹⁷⁴ South Africa's conception of separation of powers acknowledges that state power is divided between three branches of government which perform distinct functions.⁹⁷⁵

⁹⁶⁹ Seedorf & Sibanda "Separation of Powers" in *Constitutional law of South Africa* 12-4.

⁹⁷⁰ N Gilje & G Skirbekk *A History of Western Thought: From Ancient Greece to the Twentieth Century* (2013) 246.

⁹⁷¹ Seedorf & Sibanda "Separation of Powers" in *Constitutional law of South Africa* 12-7.

⁹⁷² 12-11.

⁹⁷³ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [108].

⁹⁷⁴ D Moseneke "Oliver Schreiner Memorial Lecture: Separation of Powers, Democratic Ethos and Judicial Function" (2008) 24 *SAJHR* 341: 348.

⁹⁷⁵ P Langa "The Separation of Powers in the South African Constitution" (2006) 22 *SAJHR* 2: 4.

The first institution in which state power is vested, is the South African legislature. The Constitution grants the legislature this power. The supreme law permits the two institutions which make up the national legislature – namely the National Assembly (NA) and the National Council of Provinces (NCOP) – to amend the Constitution, and pass laws with regard to their respective spheres of competence. The NCOP is also vested with the authority to consider particular legislation passed by the NA. The NA is permitted to delegate its legislative authority, save for the authority to amend the Constitution.⁹⁷⁶ The Constitution expressly places the authority to draft laws to protect South Africa's National Security in the hands of Parliament, and makes National Security subject to its authority.⁹⁷⁷

The second institution in which state authority is vested, is the executive. The Constitution places executive authority in the hands of the President of the Republic of South Africa.⁹⁷⁸ Executive authority is exercised by the President together with the members of his/her Cabinet.⁹⁷⁹ The function of the executive is to create and implement national policy and legislation. It must also exercise control over executive departments and the administration which must implement the laws and policy.⁹⁸⁰ For purposes of this chapter, the term executive includes the executive, its departments, the state in criminal disputes or the administration as the context may indicate. The Constitution also specifically authorises the executive to protect the Republic's National Security.⁹⁸¹ As mentioned earlier, but in a different context, Parliament, by enacting PAIA, has granted the executive the authority to deny any request for access to state-held information if its publicity will compromise the Republic's National Security in terms of sections 41(1)(a)(i) and/or 41(1)(a)(ii) of the act. PAIA also allows the executive to take steps to prohibit the dissemination of state-held information in the interests of National Security.⁹⁸² These enactments provide the executive with the

⁹⁷⁶ Constitution S44(1).

⁹⁷⁷ S44(1), S44(2) (a), S146(2)(c)(i) & S198(d).

⁹⁷⁸ S85(1).

⁹⁷⁹ 1996 S85(2).

⁹⁸⁰ Seedorf & Sibanda "Separation of Powers" in *Constitutional law of South Africa* 12-23.

⁹⁸¹ Constitution S100(1)(b)(iii) & S198(d).

⁹⁸² PAIA S3 & S4; Criminal Procedure Act S20(a), S20(b) & S20(c); R Brand *Media Law in South Africa* (2011) 37.

necessary tools to limit the free flow of information in order to preserve the Republic's National Security.

The final institution in which state authority is vested, is the judiciary.⁹⁸³ A crucial aspect of the separation of powers is that the judiciary must be independent from the other branches of government who are also bearers of state authority, and that it should apply the law impartially.⁹⁸⁴ Effectively, South African courts bear the obligation of resolving disputes where the free flow of information and National Security are in tension in terms of PAIA and PIA.⁹⁸⁵

5.2.1 THE FUNCTION OF THE EXECUTIVE IN MATTERS OF NATIONAL SECURITY

Legislation typically confers a broad range of powers on the executive to enable it to ward off threats against National Security.⁹⁸⁶ According to Lumina, these powers may include the power to detain suspects, restrict their access to legal representation, declare a state of emergency, procure property and limit the free flow of information.⁹⁸⁷ Historically, the executive bore the responsibility of determining which state-held information should be publicised or concealed.⁹⁸⁸ This judgement call by the executive had to be respected by the courts. Arden argues that:

“If the democratically elected legislature confers specific powers on the executive to deal with terrorism, and those powers normally infringe an individual's human rights, the courts must pay respect to the view of the legislature that such powers were needed.”⁹⁸⁹

Whether and to what extent judges should defer to the decisions of the executive in cases involving conflicts between human rights and National Security is, of course,

⁹⁸³ Constitution S165(1).

⁹⁸⁴ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [123].

⁹⁸⁵ PAIA S41(1)(a)(i) & S41(1)(a)(ii); PIA S3 & S4.

⁹⁸⁶ C Lumina “Terror in the backyard: Domestic terrorism in Africa and its impact on human rights” (2008) 17 *African Security Review* 112: 115.

⁹⁸⁷ 120.

⁹⁸⁸ Anonymous (1990) *Harvard Law Review* 906.

⁹⁸⁹ Arden (2007) *SALJ* 60.

a contentious issue. However, South African courts cannot ignore the fact that the duty to protect the Republic's National Security through the containment of information legally falls within the scope of the executive's authority.⁹⁹⁰ Sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA⁹⁹¹ and sections 3 and 4 of PIA firmly establish this.⁹⁹²

To preserve their realm of competence in disputes concerning National Security, securocrats support the idea of limited judicial participation in matters of National Security. In their view, the courts are ill suited to resolve the tension between the free flow of information and National Security. In support of their view they have levelled a number of criticisms against judicial intervention. Their purpose is to highlight the deficiencies in the resolution of information and security. Their underlying intention seems to be to exclude the judiciary from pronouncing on the executive's security actions and activities.

The first and most prominent criticism in this context is that the judiciary lacks the necessary understanding concerning matters of National Security. This argument is founded on the idea that the judiciary lacks the necessary training and expertise in matters of National Security. On this view, the judiciary's lack of ability disqualifies it from making pronouncements on security matters. This argument in the information and security context strongly suggests that the executive, which is the expert in the security field, should have the final say as to what information should be publicised or concealed.⁹⁹³

Secondly, securocrats argue that the courts' lack of operational capacity impairs their ability to resolve matters of National Security. One commentator has argued that the judiciary not only lacks the aptitude, but also the facilities to evaluate the efficacy of the executive's security actions.⁹⁹⁴

⁹⁹⁰ 60.

⁹⁹¹ PAIA S41(1)(a)(i) & S41(1)(a)(ii).

⁹⁹² PIA S3 & S4.

⁹⁹³ Freivogel (2009) *J. Nat'l Sec. L. & Pol'y* 98; Anonymous (1990) *Harvard Law Review* 906 & 909; Kirby (2006) *SAJHR* 29; Du Plessis (2009) *SAJHR* 358.

⁹⁹⁴ Anonymous (1990) *Harvard Law Review* 906.

The final criticism is related to the previous two. The securocrats are of the view that the judiciary's inherent limitations in matters of National Security hamper the executive from taking clinical security action. Kirby points out that:

“Officials commonly believe that external scrutiny by ‘non-experts’ is slow, technical and needlessly suspicious, involving an unwarranted intrusion into the resolute action necessary to respond to urgent modern perils.”⁹⁹⁵

In fact commentators have gone as far as to aver that the judiciary restricts the security apparatus from being able to ‘confront and defeat its enemies’.⁹⁹⁶ More scathingly, others have argued that the judiciary is responsible for allowing future threats to occur.⁹⁹⁷ In light of this, the executive has taken measures to avoid judicial scrutiny of their security actions in some instances. Kirby points out that:

“[...] the high importance of intelligence gathering and sharing and the urgency of action in some circumstances involving suspected terrorists, have led Executive authorities - especially security agencies but also the military and police – to resist moves to subject their conduct to prompt and repeated external examination by independent judges [...]”⁹⁹⁸

In light of the above, securocrats hold the view that the judiciary lacks the capacity to resolve disputes between the free flow of information and National Security on account that (i) it lacks the necessary training and expertise in security matters, (ii) it lacks the aptitude and facilities to consider matters of National Security, and (iii) the absence of judicial training, expertise, aptitude and facilities not only hinders the executive in being able to protect National Security when a dispute arises, but contributes to putting the state in harm's way. To put it differently, on the executive's view, only it possesses the ability to analyse and determine if information should be contained for reasons of National Security.⁹⁹⁹ In light of the judiciary's lack of capacity in matters of National Security, the executive holds the position when disputes between information and National Security enters the judicial arena, that the judiciary

⁹⁹⁵ Kirby (2006) *SAJHR* 29.

⁹⁹⁶ Du Plessis (2009) *SAJHR* 358.

⁹⁹⁷ 358.

⁹⁹⁸ Kirby (2006) *SAJHR* 29.

⁹⁹⁹ Arden (2007) *SALJ* 65.

should rather defer to the executive's 'unique insights' since only it can truly appreciate the effect of publicising state-held information.¹⁰⁰⁰

5.2.2 THE SECUROCRATS' CONCEPTION OF DEFERENCE: LIMITING THE ROLE OF THE JUDICIARY

In its most basic form, deference is a principle which requires the judiciary to decline to make a ruling on a specific matter out of respect for the legislature or the executive.¹⁰⁰¹ In the National Security context this principle would require the courts to avoid replacing the executive's decision with one of its own.¹⁰⁰²

However, securocrats sometimes go further than just asking the courts to defer to the executive in security matters. Instead, they seem to demand a 'zone of executive immunity'.¹⁰⁰³ They base this demand on the fact that they are the specialists in this area.¹⁰⁰⁴ On this view, only the executive should make the final decisions on complex National Security issues,¹⁰⁰⁵ since only it has the necessary resources, experience and knowledge in these areas.¹⁰⁰⁶ Therefore it is not the function of the court in matters of National Security to make pronouncements on what needs to be protected, how it should be protected and what security threats should be protected against.¹⁰⁰⁷ Where a dispute arises between the free flow of information and National Security, the courts' function seems to be restricted to that of an observer. This view seems to want to totally oust the jurisdiction of the court in matters of National Security.

While this approach to National Security seems to ignore that the function of the judiciary is to resolve disputes, a common trend amongst courts across the globe in the National Security context has been to defer to the state in matters of National Security. Additionally, the security laws of various states actually embrace this

¹⁰⁰⁰ Anonymous (1990) *Harvard Law Review* 909.

¹⁰⁰¹ R Clayton "Principles for judicial deference" (2006) *Judicial Review* 109: 109.

¹⁰⁰² 110.

¹⁰⁰³ 115.

¹⁰⁰⁴ KS McLean *Constitutional Deference, Courts and Socio-economic Rights in South Africa* (2009) 72.

¹⁰⁰⁵ 73.

¹⁰⁰⁶ 72.

¹⁰⁰⁷ Barak (2002) *Harvard LR* 157.

conception of deference by relaxing ordinary rules of evidence and due process once the state has barely shown that its security is at risk.¹⁰⁰⁸ Not surprisingly, the Apartheid government favoured this conception of judicial deference.¹⁰⁰⁹

On this view, courts are to rely solely on the predictions of the state in matters concerning National Security.¹⁰¹⁰ The judiciary is never to second guess the wisdom of the state.¹⁰¹¹ Since the judiciary lacks the necessary capacity to resolve disputes concerning National Security, all it can and should do is to defer to the wisdom of the security experts – the executive. Therefore, the court’s sole function is to rubber stamp the decision of the state, consequently giving the state’s decision the dressings of judicial legitimacy.¹⁰¹² Ultimately, a court subscribing to this conception of deference allows the government’s power to go unchecked.¹⁰¹³

5.3 THE FUNCTION OF THE JUDICIARY IN MATTERS OF NATIONAL SECURITY

5.3.1 INTRODUCTION

In South Africa the judiciary’s duty in matters of National Security stands in stark contrast to that of the executive. At a constitutional level this branch of government is vested with all judicial authority and in execution of this duty the courts are:¹⁰¹⁴

“[...] independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”¹⁰¹⁵

¹⁰⁰⁸ Coliver “Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information” in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 13.

¹⁰⁰⁹ *Real Printing and Publishing CO (Pty) Ltd v Minister of Justice* 787. The Apartheid apparatus understood and accepted that its regime could only be preserved if legal, judicial, military and police coercion was used to keep the disgruntled masses in check.

¹⁰¹⁰ Chesney (2009) *Virginia Law Review* 1376.

¹⁰¹¹ 1379.

¹⁰¹² 1378.

¹⁰¹³ 1377.

¹⁰¹⁴ Constitution S165(1).

¹⁰¹⁵ S165(2).

The authority of the judiciary to review the constitutionality of all law and conduct makes it an important check on the other branches of government.¹⁰¹⁶ Consequently the judiciary possesses the authority to restrain the power of the legislature and the executive. As pointed out by the Constitutional Court in *Glenister v President of the Republic of South Africa*:

“[...] the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so.”¹⁰¹⁷

It is important to note that Parliament, in executing its duty to protect South Africa’s National Security¹⁰¹⁸ and in recognition of the station which the judiciary occupies in the Republic’s constitutional democracy, has vested the courts with the authority to resolve disputes between information and security.¹⁰¹⁹ More specifically, PAIA and PIA identify the judiciary as the forum to resolve disputes between the free flow of information and National Security.¹⁰²⁰

5.3.2 THE ROLE OF THE JUDICIARY IN TERMS OF THE PROMOTION OF ACCESS TO INFORMATION ACT

Section 82(a) of PAIA enables a court to confirm the executive’s original decision and deny the application to access state-held information in terms of sections 41(1)(a)(i) and/or 41(1)(a)(ii) of PAIA. Alternatively, it may set aside the decision of the executive on the basis that its embargo of information was not executed to preserve South Africa’s National Security. When disputes between the free flow of information and National Security enter the judicial arena to be decided in terms of PAIA, section 81(3)(a) read together with sections 41(1)(a)(i) and 41(1)(a)(ii) requires the executive to prove that its decision to restrict access to state-held information is to preserve South Africa’s National Security. In the context of chapter 3’s proposed conception of National Security, the executive would have to demonstrate that a specific security

¹⁰¹⁶ S170.

¹⁰¹⁷ *Glenister v President of the Republic of South Africa* 2009 1 SA 287 (CC) [33]. Footnote omitted.

¹⁰¹⁸ Constitution S44(2)(a) & S198(d).

¹⁰¹⁹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [123].

¹⁰²⁰ PAIA S41(1)(a)(i), S41(1)(a)(ii), S74, S78(1) & S82; PIA S3, S4 & S13.

interest (defence, security, constitutional order, sovereignty, the people or territorial integrity of the Republic of South Africa) is at risk of being compromised by an act of force, or the threat thereof which necessitates the restriction of the free flow of information. The executive must provide the judiciary with sufficient information to demonstrate that the security exemption is rightly claimed in terms of the act.¹⁰²¹ In this regard the Constitutional Court held that:

“The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed.”¹⁰²²

If the executive manages to do so, it will have satisfied its duty as contemplated by section 81(3)(a) of PAIA.¹⁰²³ In light of the above and following the state’s oral submissions and presentation of evidence, the judiciary must determine if it will confirm, or deny the embargoing of state-held information for purposes of National Security on the strength of the evidence put before it. To this end, the judiciary will engage in a *de novo* consideration of the matter to resolve the dispute.¹⁰²⁴ In the words of the Constitutional Court:

“In proceedings under PAIA, a court is not limited to reviewing the decisions of the information officer or the officer who undertook the internal appeal. It decides the claim of exemption from disclosure afresh, engaging in a *de novo* reconsideration of the merits. The evidentiary burden borne by the state pursuant to s 81(3) must be discharged as in any civil proceedings, on a balance of probabilities.”¹⁰²⁵

The judiciary follows a three step process before resolving any dispute between the free flow of information and National Security in terms of section 82(a) of PAIA. Firstly, it will hear the state’s oral submissions in the context of PAIA’s National Security exemption. Secondly, it will examine the evidence placed before it by the state (voluntarily, or in terms of the Judicial Peek) to determine if the executive has provided

¹⁰²¹ *President of the Republic of South Africa v M&G Media (CC)* [24].

¹⁰²² [25].

¹⁰²³ [25].

¹⁰²⁴ [39].

¹⁰²⁵ [14].

sufficient evidence so that the judiciary may assess if the ventilation of the state-held information will compromise sections 41(1)(a)(i) and/or 41(1)(a)(ii) of PAIA. Lastly, in light of the evidence and oral submissions made, the judiciary will determine to support, or set-aside the state's decision to embargo information for purposes of National Security.

The court followed this approach in *Right2Know Campaign v Minister of Police*. In support of its position to deny access to state-held information the state submitted *inter alia*, that if this information were disclosed the 'security and defence' of the Republic of South Africa would be compromised.¹⁰²⁶ The state submitted that 'dark forces' represented a risk to the state.¹⁰²⁷ In support of this view the state contended that its predicament:

"was illustrated by the experiences of that well known gentleman adventurer and upholder of noble causes, James Bond, who [...] with his customary charm and grace, declined to disclose a fact to a questioner, because were he to do so, he would have to kill him."¹⁰²⁸

However, the High Court rejected the state's position. Firstly, the court considered the state's submissions in the context of the exemption claimed. It is important to note that the courts specifically recognised that the National Security exemption can be employed to test the state's claim for secrecy.¹⁰²⁹ Secondly, the court considered if the state provided sufficient evidence so that it could determine if the contested record fell within the exemption claimed. Ultimately, the court considered if sufficient information was furnished so as to enable it to determine if the executive has satisfied the requirements of section 81(3)(a) of PAIA.¹⁰³⁰ Lastly, following its examination of the oral submissions and evidence the court concluded that the state failed to provide sufficient evidence so that it could determine if the information should be concealed for purposes of National Security.¹⁰³¹

¹⁰²⁶ [7].

¹⁰²⁷ [7].

¹⁰²⁸ [17].

¹⁰²⁹ [16].

¹⁰³⁰ [23].

¹⁰³¹ [17].

The Constitutional Court also followed this approach when the free flow of information and National Security came to a head in the *Masetlha* decision. While this matter was not decided in terms of PAIA, it does provide insight into the manner in which the judiciary will resolve a dispute between the free flow of information and National Security.¹⁰³² In an attempt to ensure that the state record did not enter the public domain, the Minister of Intelligence firstly argued that it was duly authorised in terms of applicable law to conceal state-held information and that once this was done, the courts had no authority to undo the concealment.¹⁰³³ Secondly, the state argued that it had not exercised its concealing powers improperly and that the appellant had not impugned the manner in which it exercised this authority. Lastly, in the context of the separation of powers doctrine, the state argued that the courts cannot arrogate to themselves the right to undo a legitimate security classification which prevents a record from being publicised.¹⁰³⁴ In the alternative the state submitted that if the South African courts took the position that they can undo a state classification, they should give proper weight to the National Security considerations.¹⁰³⁵

The court relied upon the record to determine whether it should be disclosed for purposes of National Security.¹⁰³⁶ It concluded that only certain information should be concealed for purposes of National Security,¹⁰³⁷ while in other instances it regarded the state-held information to be innocuous and permitted it to enter the public domain.¹⁰³⁸

In attempting to contain the ventilation of state-held information in these two cases, the executive falls back on its institutional argument. Ultimately, the executive's position is that due to the judiciary's lack of proficiency in matters of National Security it should be completely deferential in favour of the state. Nevertheless, PAIA clearly

¹⁰³² *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [1].

¹⁰³³ [48].

¹⁰³⁴ [50].

¹⁰³⁵ [52].

¹⁰³⁶ [60]-[73].

¹⁰³⁷ [61]-[64] & [70]-[73].

¹⁰³⁸ [65]-[69].

contemplates that the judiciary can interrogate the executive's National Security assertions from a legal point of view. In both *Right2Know Campaign v Minister of Police* and the *Masetlha* decision, the court correctly concluded that the information which the state aimed to protect for purposes of National Security should not be embargoed.¹⁰³⁹

5.3.3 THE ROLE OF THE JUDICIARY IN TERMS OF THE PROTECTION OF INFORMATION ACT

Anyone who expresses state-held information in contravention of sections 3 and 4 of PIA will be guilty of committing a criminal offence.¹⁰⁴⁰ This has implications for the role of the court in such cases. Given the possibility of a criminal record and the restriction of personal freedom through imprisonment, it is important that persons who are convicted of such a crime should be clear on the reasons why they are losing their freedom.¹⁰⁴¹ For these reasons, the state must prove beyond reasonable doubt that the accused has committed a crime.¹⁰⁴² As Nugent J stated in *S v Van der Meyden*:

“The *onus* of proof in a criminal case is discharged by the state if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent.”¹⁰⁴³

The state's onus is no different in matters where an accused is charged with unlawfully receiving, or disseminating state-held information in contravention of sections 3 or 4 of PIA.¹⁰⁴⁴ The state must place the evidence necessary to discharge its onus in front of the judiciary.¹⁰⁴⁵ The reason for this is that South African courts are

¹⁰³⁹ *Right2Know Campaign v Minister of Police; Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa*.

¹⁰⁴⁰ PIA S2, S3 & S4.

¹⁰⁴¹ *S v Mathebula* 1997 1 SACR 10 (W) 35 & 36.

¹⁰⁴² PJ Schwikkard & SE van der Merwe “The standard and burden of proof and evidential duties in criminal trials” in *Principles of Evidence* 3ed (2009) 558: 559.

¹⁰⁴³ *S v Van der Meyden* 1999 1 SACR 447 (W) 449.

¹⁰⁴⁴ PIA S3 & S4.

¹⁰⁴⁵ Schwikkard & Van der Merwe “The standard and burden of proof and evidential duties in criminal trials” in *Principles of Evidence* 560.

obligated to examine the state's evidence in addition to its oral submissions to determine if the publicity of state-held information will compromise National Security in criminal cases.¹⁰⁴⁶ If the state's representations and its evidence do not prove that the information's publicity will compromise National Security, or if the facts do not fit together so that the court can conclude that National Security is threatened, then no weight can be assigned to the executive's assertions.¹⁰⁴⁷ South African courts will not incarcerate an accused simply on the state's security assertions.

A court will not be able to conclude that the publicity of the information will compromise National Security unless it actually knows what the content of the document is.¹⁰⁴⁸ The court needs to be convinced by the evidence placed before it that the publicity of the information presents a real threat to National Security before it convicts an accused.¹⁰⁴⁹ Notwithstanding the difference in the standards of proof in information and security disputes decided in terms of PAIA and PIA, there does not seem to be much difference at a principled level in the approach the courts adopt in terms of PIA, when determining if the ventilating of state-held information will compromise South Africa's National Security. The PIA court – like the PAIA court – will (i) hear the state's oral submissions in the context of PIA's conception of National Security, (ii) examine the evidence placed before it by the state to determine if the executive has provided sufficient evidence so that the judiciary may assess if the ventilation of the state-held information is contrary to sections 3 and 4 of PIA, and (iii) in light of the evidence and oral submissions made, determine if the accused by the expression or attempted expression of state-held information has committed an offence.

¹⁰⁴⁶ *S v Van der Meyden* 449.

¹⁰⁴⁷ A Bellengere, R Palmer, C Theophilopoulos, B Whitcher, L Roberts, N Melville, E Picarra, T Illsley, M Nkutha, B Naude, A Van Der Merwe & S Reddy *The Law of Evidence in South Africa: Basic Principles* (2013) 167.

¹⁰⁴⁸ *President of the Republic of South Africa v M&G Media* (CC) [24], [30] & [88]; Chesney (2009) *Virginia Law Review* 1379.

¹⁰⁴⁹ Schwikkard & Van der Merwe "The standard and burden of proof and evidential duties in criminal trials" in *Principles of Evidence* 559.

It is difficult to imagine how the state can discharge its onus in criminal disputes by bringing a charge against an accused in terms of sections 3 and/or 4 of PIA, and then expect to procure a conviction without placing the necessary evidence before the court so that it can determine if a crime has been committed. It seems ludicrous to expect the judiciary to fail to deal with the merits of the matter on account that it lacks the institutional capacity to make decisions on National Security. It seems equally strange to expect the judiciary in these matters to defer to the wisdom of the state on account of their purported lack of competence in matters of National Security. Should the judiciary decide criminal disputes in the context of National Security in this manner, it will be a travesty of justice for several reasons.

Firstly it is doubtful whether trials of this nature will satisfy the requirements of a fair trial as contemplated by sections 34 and 35(3)(c) of the Constitution.¹⁰⁵⁰

Secondly, it would be reckless for the judiciary to abdicate its duty to resolve criminal disputes in light of the state's history of abusing the defence of National Security. History is filled with examples where states have unjustifiably relied on their National Security powers to conceal executive corruption, ineptitude, abuse of authority, oppression¹⁰⁵¹ or executive and/or personal interests.¹⁰⁵² As pointed out in chapter 2, this allows the executive to present its performance in a positive light, by concealing information which would expose the executive's failings.¹⁰⁵³ To incarcerate an individual on the say so of the state puts freedom in South Africa in grave danger and should not be permitted.

Thirdly, the judiciary's expertise lies in the interpretation and application of law and it is therefore best placed to determine if the executive's activities are consistent with the relevant security legislation, although it may lack the security dexterity to determine how best to protect National Security.¹⁰⁵⁴ It is the judiciary which must decide if specific

¹⁰⁵⁰ Constitution S34 & S35(3)(c).

¹⁰⁵¹ *S.P. Gupta vs President Of India And Ors.* [65].

¹⁰⁵² Anonymous (1990) *Harvard Law Review* 913.

¹⁰⁵³ NS Mars "Access to government-held information: An introduction" in NS Mars (ed) *Public access to government-held information: A comparative symposium* (1987) 1: 3.

¹⁰⁵⁴ Constitution S165(1).

activities fall within the sphere of protection of PIA's National Security provisions, not the executive.¹⁰⁵⁵ Its decisions on security matters bind all organs of state and the executive is obligated to comply with the courts' directions.¹⁰⁵⁶ If the judiciary could not restrain the executive in its functions, it would be near impossible to control this branch of government in matters of National Security.¹⁰⁵⁷ The judiciary has limited powers in this regard, since it will only be able to exercise this restraint on the power of the executive if the dispute between the free flow of information and National Security enters the judicial arena.

In the context of PIA, the judiciary will have to determine if the information protected by the executive should be masked in secrecy for purposes of National Security.¹⁰⁵⁸ This power of the courts originates from the Constitution. Naturally the courts' authority to resolve the tension is not subject to interference by the executive arm of government.¹⁰⁵⁹ As was mentioned earlier, the assertions of securocrats that the judiciary should not be involved in matters of National Security on account that it lacks the necessary capacity, or should defer to the executive, seem unwarranted in the context of PIA. The questions concerning judicial competence and deference do not seem to arise under PIA, and only need to be decided in the context of PAIA.

The efficacy of PIA's procedure is predicated on the supposition that the state-held information has not been comprehensively publicised prior to the court's determination whether the information should be protected or released. The judiciary will only be able to rule on an alleged contravention of sections 3 and/or 4 of PIA, while also protecting South Africa's National Security throughout a trial, if the holder of the information is censored. The danger here is that the need for the judiciary to determine if information must be protected in terms of PIA will be rendered superfluous if the state-held information is comprehensively publicised prior to the matter being set down to be

¹⁰⁵⁵ S165(2).

¹⁰⁵⁶ S165(5).

¹⁰⁵⁷ Langa (2006) *SAJHR* 4.

¹⁰⁵⁸ PAIA S41(1)(a)(i) & S41(1)(a)(ii) & S82; PIA S3, S4 & S13.

¹⁰⁵⁹ Kirby (2006) *SAJHR* 25; Constitution S165(3).

heard in terms of PIA. However, these pre-trial considerations are beyond the scope of this thesis' examination.

5.4 EVALUATING JUDICIAL CAPACITY

Granting an ill equipped bench the authority to determine if information should be concealed or publicised could place South Africa's survival in jeopardy. Based on the executive's expertise in matters of National Security, and the judiciary's apparent lack thereof, it could indeed be argued that the judiciary should rather defer to the decisions of the executive. Despite the criticisms by the executive that the judiciary lacks the capacity to resolve disputes which concern National Security,¹⁰⁶⁰ its assertions are unconvincing in the context of PAIA and the proposed definition of National Security. There are three reasons which support this view.

Firstly, the proposed definition of National Security and the information provided by the state in discharging its onus under section 81(3)(a) of PAIA should enable the judiciary to determine if an object is at risk of being compromised, to identify the threats thereto and to make determinations on the legality and rationality of the state' security action. These outcomes can be achieved by the judiciary even if lacks specific training, knowledge or resources in matters of National Security. The definition of National Security as proposed by chapter 3 clearly identifies all of the security interests and the threats which can compromise them. If the state argues that its decision to restrict access to information is for reasons of National Security, section 81(3)(a) of PAIA requires it to place sufficient evidence before the court so that the judiciary may make a decision thereon.¹⁰⁶¹ The evidence submitted by the state, and the judiciary's reliance on the proposed definition of National Security will enable courts to determine if an interest qualifies as a security interest. Additionally, evidence provided by the state and the definition will also enable the judiciary to determine if threats are aimed at any of the proposed security interests. Having sufficient evidence on the security interests, the threats posed thereto and clarity on the meaning of National Security,¹⁰⁶²

¹⁰⁶⁰ Freivogel (2009) *J. Nat'l Sec. L. & Pol'y* 98; Anonymous (1990) *Harvard Law Review* 906; Kirby (2006) *SAJHR* 29.

¹⁰⁶¹ *Right2Know Campaign v Minister of Police* [16].

¹⁰⁶² McLean *Constitutional Deference, Courts and Socio-economic Rights in South Africa* 72.

the judiciary should have no difficulty in determining if the decision to deny access to information is warranted. The judiciary would thus be able to assess if the state's actions were legally exercised in terms of sections 41(1)(a)(i) and/or 41(1)(a)(ii) of PAIA. It will also be able to determine if the blackout of information has the effect of preventing the threat from compromising the security interests, that is, whether the denial of access to information is rationally related to the purpose of protecting National Security. Therefore no further training or experience is necessary for the judiciary to fulfil its duty in terms of PAIA and no questions can be raised concerning its capacity in this regard.

Secondly, the powers granted to the judiciary in terms of section 82(a) of PAIA and the utility of the proposed definition of National Security, empower the judiciary to make clinical security decisions, instead of frustrating the state's security actions. States exaggerate the risk of publicising state-held information protected for purposes of National Security and the courts can guard against this *via* judicial interrogation.¹⁰⁶³ Executive over-classification has occurred from the time of the Pentagon Papers and the Spycatcher cases.¹⁰⁶⁴ The executive in these cases argued that there will be a serious impairment of National Security if information was publicised,¹⁰⁶⁵ or continued to be disseminated through the public domain.¹⁰⁶⁶ However, National Security was not compromised by the publicity of this information. In the modern era, WikiLeaks provides the best example of executive attempts to over-classify information when it

¹⁰⁶³ Freivogel (2009) *J. Nat'l Sec. L. & Pol'y* 95 argues that "[o]fficials routinely exaggerate the dangers of publishing secret information".

¹⁰⁶⁴ *Attorney General v Observer Ltd* [1988] 3 WLR 776 813; L Vickers *Freedom of speech and employment* (2002) 119 & 120; W Overbeck *Major principles of Media Law* (2006) 64 & 65. The Pentagon Papers and Spycatcher cases are two of the seminal legal decisions dealing with information and National Security. The court in the first matter aimed to determine if the executive could protect its National Security by way of procuring an order of prior restraint. In the latter decision the court was called upon to determine if information already in the public domain could be prevented from further dissemination. The first matter occurred in the United States of America while the second occurred in the United Kingdom.

¹⁰⁶⁵ Overbeck *Major principles of Media Law* 65.

¹⁰⁶⁶ *Attorney General v Observer Ltd* 813.

released thousands of classified secrets. And yet the relevant states' National Security was not compromised as a result.¹⁰⁶⁷

Additionally, the information used to prove these security risks are often very light in substance as has been shown over decades.¹⁰⁶⁸ States often exaggerate the threats to their National Security.¹⁰⁶⁹ To date no executive has provided substantive information proving that National Security has been seriously compromised by the publication of executive secrets.¹⁰⁷⁰ Thus to guard against this, South African courts must be able to test the executive's assertions of National Security. The proposed definition of National Security together with the judiciary's powers in terms of section 82(a) of the act, and the state's duty in terms of section 81(3)(a) of PAIA enables the judiciary to make accurate pronouncements in the National Security context. The above therefore highlights the capacity of the judiciary to resolve disputes between the free flow of information and National Security, while at the same time neutralising the criticism that the judiciary acts as an obstacle to decisive security action.

Lastly, defining what National Security means and allowing the judiciary to take action in this regard nullifies the argument that matters of National Security remain the preserve of seurocrats. Section 82(a) of PAIA clearly grants the courts the power to decide to publicise state-held information on account that it will not compromise National Security.¹⁰⁷¹ It is important to note that PAIA does not list any instances in which the courts are to forgo their decision-making ability in favour of the state.¹⁰⁷² Chapter 3's proposed definition provides the court with clear markers which will enable it to determine if National Security is at risk. It is submitted that in acknowledgment of the judiciary's duties, the proposed definition of National Security and the state's duty

¹⁰⁶⁷ Pekoe (2011-2012) *Fla. A & M U. L. Rev.* 100. See also *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [165] for a view on the South African context.

¹⁰⁶⁸ Freivogel (2009) *J. Nat'l Sec. L. & Pol'y* 95 & 96.

¹⁰⁶⁹ 112.

¹⁰⁷⁰ 98.

¹⁰⁷¹ PAIA S82(a).

¹⁰⁷² Lord Steyn *Deference*.

in terms of section 81(3)(a), makes it difficult to think of a dispute which the judiciary cannot resolve given enough time and information.¹⁰⁷³

Allowing the courts to make this determination also avoids state abuse. The South African executive has in several instances attempted to unjustifiably limit the free flow of information with the purpose of keeping secret the true nature of its actions. The *Right2Know Campaign v Minister of Police* revealed how the executive used the National Key Point Act 102 of 1980 to justify its decision to arrest homeless persons sleeping in front of the Department of Justice. The same piece of legislation was also used to justify the executive's decision to arrest protestors outside the Rustenburg Magistrate Court and to rationalise the executive's decision when it forcibly destroyed pictures taken by journalists of a prisoner being viciously beaten by warders at Groenpunt prison.¹⁰⁷⁴ In the *Masetlha* decision the executive relied on National Security in an attempt to cover up a failed surveillance operation.¹⁰⁷⁵ In *President of the Republic of South Africa v M&G Media Ltd* the executive denied a request to access a report prepared by Justices Khampepe and Moseneke on the grounds that the report would publicise information supplied in confidence by or on behalf of another state or international organisation and that the document was prepared for the President so that he may make an executive decision.¹⁰⁷⁶ In each of the aforementioned instances, the state had the necessary experience, aptitude and resources to take decisions of state importance, but still failed to act justly.¹⁰⁷⁷ It was

¹⁰⁷³ McLean *Constitutional Deference, Courts and Socio-economic Rights in South Africa* 72.

¹⁰⁷⁴ *Right2Know Campaign v Minister of Police* [37].

¹⁰⁷⁵ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [1], [4], [8], [15], [31], [100], [160], [164] & [165].

¹⁰⁷⁶ *President of the Republic of South Africa v M&G Media Ltd* (CC) [2].

¹⁰⁷⁷ T Mbeki "Mbeki we owe no one an apology" (28-11-2014) *Mail and Guardian* <<http://m.mg.co.za/article/2014-11-27-mbeki-we-owe-no-one-an-apology>> (accessed 15-01-2016); C Benjamin "Khampepe: Zim's 2002 elections not free and fair" (14-11-2014) *Mail and Guardian* <<http://mg.co.za/article/2014-11-14-khampepe-zimbabwes-2002-elections-not-free-and-fair>> (accessed 15-01-2016); C Benjamin "Key Points no threat to National Security, says Judge" (03-12-2014) *Mail and Guardian* <<http://m.mg.co.za/article/2014-12-03-key-points-list-no-threat-to-national-security-says-judge>> (accessed 15-01-2016); S Sole & S Brümmer "Axe hangs over Spy Chiefs" (2005)

only by way of judicial intervention that the public was able to gain access to, receive and impart state-held information that revealed the true nature of the executive's actions. If not for the judiciary, South Africans would not be able to appreciate how the executive deliberately attempted to disguise the true nature of their actions by invoking secrecy.¹⁰⁷⁸ Therefore, PAIA clearly acknowledges that the judiciary has the necessary ability to resolve disputes between the free flow of information and National Security. The act together with the proposed definition enables the judiciary to decide these cases despite the criticism of the executive.

5.5 JUDICIAL CAPACITY AND DEFERENCE

The previous section has demonstrated that, contrary to the assertions of securocrats, the South African judiciary possesses the capacity to resolve the tension between information and security. The provisions of PAIA and the proposed definition will enable the judiciary to make decisions on what is at risk of being compromised, from which threat, and to assess the rationality and legality of a decision to embargo

Mail and Guardian <<http://m.mg.co.za/article/2005-10-21-Axe-hangs-over-spy-chiefs>> (accessed 02-03-2015).

¹⁰⁷⁸ *Right2Know Campaign v Minister of Police* [7], [11], [12] & [25]; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [1], [4], [8], [15], [31], [100], [160], [164] & [165]; *President of the Republic of South Africa v M&G Media Ltd (CC)* [72]; *President of the Republic of South Africa v M & G Media Limited* 2015 1 SA 92 (SCA) [12], [21] & [27]; Mbeki "Mbeki we owe no one an apology" (28-11-2014) *Mail and Guardian*. In the *Right2Know* matter the executive claimed that the publication of information concerning national key points would attract unnecessary attention from dark forces and could compromise South Africa's National Security. However the court found that the executive's decision to control information concerning NKP was misplaced. Furthermore, South Africa has not been exposed to any danger from any 'dark forces' since the publication of the NKP. The *Masetlha* decision showed that the state's true purpose in concealing information was to prevent the executive from being exposed to embarrassment, not to protect National Security. In the *Mail and Guardian* decision the Constitutional Court remitted the matter back to the High Court to be heard in terms of S80 of PAIA, since the executive failed to discharge its onus in terms of S81(3) of PAIA. Both the High Court and the SCA concluded that the executive's defence was unwarranted. Subsequent to the release of the protected report by the courts, the *Mail and Guardian* published an article concerning the contents of the document. The article revealed South Africa's deliberate attempt to subvert democracy. The purpose of the executive in this matter was to conceal evidence which would reveal that the executive endorsed Zimbabwe's elections as free and fair despite information existing to the contrary being in its possession.

state-held information. But despite the judiciary's ability to resolve disputes, one cannot discount the fact that the executive does have expertise in the National Security context. In light of the judiciary's powers and the state's sphere of competence, it is unclear if it would ever be appropriate for the court to defer to the state where a dispute arises under PAIA concerning the free flow of information and National Security.

As explained above, securocrats' conception of deference sometimes extends to a form of 'executive immunity' against judicial interference.¹⁰⁷⁹ However, South Africa subscribes to a different conception of judicial deference. In an influential contribution, Professor Cora Hoexter proposed that:

"The intensity of the court's scrutiny and its willingness to intervene in a particular case will naturally vary according to factors such as the policy content of the decision, the breadth of the discretion and the degree of expertise of the decision-maker. Other relevant factors include the impact of the decision, the degree of public participation in the decision-making process and the presence or absence of an opportunity for internal reconsideration. All of these will be likely to affect the 'margin of appreciation' given by the judge to the agency."¹⁰⁸⁰

Several years later Cameron J in *Logbro Properties CC v Bedderson NO* endorsed Hoexter's notion of deference.¹⁰⁸¹ Professor Hoexter's conception of deference was also adopted by the courts in several other decisions dealing with reasonableness review.¹⁰⁸² South Africa's highest courts have clearly illustrated how deference applies in the separation of powers context. The SCA in *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* pointed out that:

¹⁰⁷⁹ Clayton (2006) *Judicial Review* 115.

¹⁰⁸⁰ C Hoexter "The Future of Judicial Review in South African Administrative law" (2000) 117 *SALJ* 484: 503.

¹⁰⁸¹ *Logbro Properties CC v Bedderson NO* 2003 1 All SA 424 (SCA) [21].

¹⁰⁸² Hoexter *Administrative Law in South Africa* 152.

“Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary.”¹⁰⁸³

Schutz J in the same matter went on to state that:

“Judicial deference is particularly appropriate where the subject matter of an administrative action is very technical or of a kind in which a court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds.”¹⁰⁸⁴

The Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* emphasised that:

“In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution.”¹⁰⁸⁵

It would be a mistake to assume, in view of the principle of judicial deference, that the role of the courts under the Constitution is no different from their role during Apartheid where they abdicated their duty to ensure justice by deferring to the state in matters which concerned National Security. The courts’ role is far more involved in the new dispensation. O’ Regan J in the *Bato Star* case explains that the courts will not blindly follow the state’s declarations:

“A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.”¹⁰⁸⁶

Effectually, South Africa’s democratic dispensation requires courts to test the state’s assertions, proclamations or incantations and not just abide by the say so of

¹⁰⁸³ *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 2 All SA 616 (SCA) [50].

¹⁰⁸⁴ [53].

¹⁰⁸⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) [48].

¹⁰⁸⁶ [48].

the state.¹⁰⁸⁷ The proposed definition of National Security, together with the courts' duty as contemplated by section 82(a) and the state's duty in terms of section 81(3)(a) of PAIA, clearly enables the judiciary to determine if the ventilation of information will compromise South Africa's National Security. However, that is not to say that the judiciary should decide cases without giving due weight or consideration to the state's security assessments. Although the judiciary has extensive tools to resolve the tension in terms of PAIA, there are instances where it would be more appropriate for it to defer to the state when resolving these disputes. There are two instances which immediately come to mind. However, they are not intended to be an exhaustive list.

The first instance where the judiciary may be inadequately equipped to resolve disputes between the free flow of information and National Security is circumstances in which threshold problems arise. The scale of a threat will determine if a forceful threat will qualify as a National Security or a general threat. The difficult question to answer is how 'forceful or threatening' should an activity be, for it to be classed as a National Security threat. If threats are viewed on a spectrum, a minor threat will not qualify as a National Security threat, but if the same threat poses a considerable hazard to the state's interests it will transition into a National Security threat.

This is best illustrated by two examples. It is difficult to imagine that the South African government will conclude that its National Security is at risk, if it is aware that a political party intends to force one South African citizen to vote for it during the general elections, or if a single foreign religious extremist plans to murder three South Africans for ideological reasons. It is, however, highly unlikely that the government will take the same position if a million people were to be threatened by the political party to vote for it,¹⁰⁸⁸ or if attacks on South Africans were planned or carried out by Boko Haram, Al Shabaab, the Islamic State of Iraq and Syria or any other organised terrorist group. The difficulty is determining where the threshold lies. If the threshold is set too low, the judiciary can be criticised for being paranoid. Alternatively, if the risk threshold is unacceptably high, the courts could expose South Africa to serious security

¹⁰⁸⁷ Chesney (2009) *Virginia Law Review* 1378; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [48].

¹⁰⁸⁸ TR Mwanaka *Zimbabwe: The Blame Game* (2013) 78.

threats.¹⁰⁸⁹ The problem with the scale is that determining when a forceful threat is significant enough to qualify as a National Security threat is a very subjective assessment.¹⁰⁹⁰ Hall and Chuck-A-Sang argue that the intensity of a threat will determine if it will qualify as a National Security threat. By intensity, they mean the certainty of the threat, its temporality, the probability that it will occur, its probable consequences and whether historical factors contribute to the intensification of the threat assessment. Thus, the more intense a threat is, the more likely that it will be considered a National Security threat.¹⁰⁹¹ Helpful as Hall and Chuck-A-Sang's indicators may be, it still does not change the subjective nature of a threat assessment. It does however attempt to make the threat assessment more scientific. Since the executive possesses better experience, resources and knowledge in the circumstances set out above, it would be more appropriate for the courts to defer to the wisdom of the executive in these instances.

Secondly, despite the proposed definition of National Security and an appropriate methodology enabling the judiciary to determine if the information should be cloaked in secrecy, the court may not have a genuine appreciation of the threats to South Africa's National Security in certain circumstances. Yacoob J's proposed order in his minority judgment in the *Masetlha* case provides an example.¹⁰⁹² The Minister in the matter argued for the Njenje report to remain classified on the grounds that it contained the name of a NIA operative, and that publication could possibly disclose his identity and put his life in danger,¹⁰⁹³ not to mention the risk posed to National Security. Yacoob J failed to see how the operative's life or National Security could be put at risk by the publication of the operative's name and ordered that the report be released.¹⁰⁹⁴ Yacoob J was the only member of the constitutional bench who would have disclosed

¹⁰⁸⁹ K Hall & M Chuck-A-Sang *Caribbean Community: The Struggle for Survival* (2012) 84.

¹⁰⁹⁰ BC Schmidt "The primacy of National Security" in S Smith, A Hadfield & T Dunne (eds) *Foreign Policy: Theories, Actors, Cases* (2008) 155: 157.

¹⁰⁹¹ Hall & Chuck-A-Sang *Caribbean Community: The Struggle for Survival* 84.

¹⁰⁹² 2008 5 SA 31 (CC).

¹⁰⁹³ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [115].

¹⁰⁹⁴ [116].

the name of the operative.¹⁰⁹⁵ There is no doubt that the release of classified information which contains the names of operatives tasked with protecting the Republic can have devastating effects for South Africa's National Security. Froneman J in his judgment showed the value of NIA operatives and illustrated the price the Republic would have to pay if such classified information were released. In light of this, he criticised Yacoob J's approach to National Security. Froneman J stated that Yacoob:

“[...] may underestimate the dangers potentially faced by operatives in the field when he finds it impossible to understand how a surveillance coordinator's life would be in danger if his name were to be released in view of his limited role. Surveillance coordinators are privy to highly sensitive information like names, faces and other methods of identification of undercover agents, knowledge of tactics of surveillance by the government, and knowledge of particular undercover or surveillance operations. This information could be useful to those seeking to threaten national security. Disclosing the identity of a person with access to that information and identifying him or her as someone who on at least one occasion had access to information may place them at risk. For this reason, I am of the view that redaction of the operative's name in question would have been an appropriate means of achieving the government's need to protect its operatives.”¹⁰⁹⁶

Yacoob J did not provide a source of law which authorised him to act in this fashion, nor did he provide reasons for his incursion into the executive's sphere of expertise. Thus we have no textual guidance as to why he decided to make such a holding.¹⁰⁹⁷ One line of argument is that he made this ruling based on his own conception of 'how' National Security should be protected.¹⁰⁹⁸

¹⁰⁹⁵ Klaaren (2002) SALJ: 29.

¹⁰⁹⁶ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [182].

¹⁰⁹⁷ *Mphahlele v First National Bank of SA (Ltd)* 1999 2 SA 667 (CC) [12]; *Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd* 2011 1 SA 267 (CC) [10] & [11].

¹⁰⁹⁸ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [107], [114], [116], [118] & [120]. The Njenje Report contained two types of information. The first was material protected under the pretext of National Security, although the real reason for protection was to guard against executive embarrassment. Secondly, it also contained and protected the information of a security operative who was tasked with performing action under the direction of superiors. The rationale for protecting the

In Yacoob J's defence, nothing happened since his judgment to release the sensitive information. This is because the name of the operative was not actually publicised.¹⁰⁹⁹ The JHBP clearly states that no person should be sanctioned for the publication of classified information which purportedly threatens National Security, if no threats ensue subsequent to the publicising of the information.¹¹⁰⁰ But what if publicity had the opposite effect? What if the walls of National Security came crashing down?¹¹⁰¹ How could National Security be protected if the decisions of the judiciary put South Africa's National Security in peril? What recourse is available to the executive?

names of security operatives is fairly self-evident. Publication of names could put the lives of operatives in danger, it could jeopardise an operation, and it could make them targets for information or provide the opportunity for interested actors to turn a security operative into a double agent. Naturally the executive is interested in protecting these names in the interests of National Security. However, if operatives engage in corrupt behaviour under the pretext of National Security, the public interest requires that these names be released into the public domain. The implication is that the anonymity of those persons who have not been party to such behaviour will still be protected in the interests of National Security. The behaviour of the superiors in the *Masetlha* case was found to be corrupt. Corrupt executive action will normally result in the removal of corrupt officials from employment. In this matter, the superiors also engaged other operatives to execute their corrupt tasks under a false pretext. One cannot conclude from the text of the *Masetlha* case that there was corruption on the part of this executive operative. In this instance the operative must continue to be in the employ of the state. Requiring the release of the name of an innocent security operative has no benefit for the public interest. Instead it could possibly lead to the Republic's National Security being put at risk in the future, or the officer being forced out of his vocation on the grounds that he could represent a threat to executive security since his anonymity has been compromised. Yacoob J did not follow this train of thought. Nor does he think that National Security will be compromised if such information is publicised. Thus in his judgment he decided on the 'how', a function that is reserved for the expertise of the executive. It is my view that his conclusion is informed by a problematic understanding of National Security and the respected roles of the court and executive.

¹⁰⁹⁹ [107], [114], [116], [118] & [120]. In Yacoob J's judgment he holds that the name of the operative must be released. But he does not go on to name the operative in his judgment.

¹¹⁰⁰ Article 19 The Johannesburg Principles on National Security, Freedom of Expression and Access to Information Principle 15.

¹¹⁰¹ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [165].

Florence and Gerke argue that an expedited interlocutory appeal will be useful in these instances. It will allow the government to quickly appeal the decision of the sitting court if it is unfavourable towards state security.¹¹⁰² This suggestion is unhelpful in a case in which it is the Constitutional Court itself, the highest appeal court that made the decision.¹¹⁰³ The amendment of legislation, the removal of the judge or judges from the bench, or calling the judicial dexterity of the legal officers into question in the media are measures which seem equally useless in the face of danger. There seems to be no answer to this conundrum. What is certain is that the criticism against the judiciary will not only be that it lacked judicial expertise should such circumstances arise. Rather it would be that the judiciary is directly responsible for compromising South Africa's National Security. In these instances it would be more appropriate for the judiciary to defer to the state.

Even though PAIA's provisions and the proposed definition of National Security equip the judiciary with the necessary capacity to resolve disputes between the free flow of information and National Security, there are instances where it would be more appropriate for it to defer to the executive. This does not and should not amount to an abdication of the judiciary's power to interpret the law and control government action. It is simply in recognition of the fact that there are areas in which the executive is better placed than judges to make factual determinations, and that in such matters, judges should generally be cautious not to substitute their own views for those of the executive.

5.6 JUDICIAL CAPACITY: IDENTIFYING AN APPROPRIATE METHODOLOGY

Sections 25(3)(b), 77(5)(b), 80(1), 80(3) and 81(3)(a) of PAIA are meant to assist the judiciary in determining if a contested record should be ventilated.¹¹⁰⁴ At the first step the judiciary will resolve the dispute without having sight of the record as

¹¹⁰² J Florence & M Gerke "National Security issues in civil litigation: A blueprint for reform" in B Wittes (ed) *Legislating the war on terror: An agenda for reform* (2009) 252: 268.

¹¹⁰³ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [80]-[150].

¹¹⁰⁴ PAIA S41(1)(a)(i), S41(1)(a)(ii) & S78(1); PIA S3, S4 & S13.

contemplated by sections 25(3)(b), 77(5)(b) and 81(3)(a) of the act.¹¹⁰⁵ However, if the judiciary cannot resolve the dispute at the first stage, sections 80(1) and 80(3) of PAIA can be utilised to resolve the tension if the interests of justice demand this (second step). In fact it is only during the second step, that the judiciary can determine if the contested record was properly concealed for purposes of National Security. This is because it is only at this stage of the proceedings that the judiciary will have sight of the record.¹¹⁰⁶ Effectively, PAIA's two-step approach limits the judiciary in its ability to resolve the dispute between the free flow of information and National Security in two ways. The first is that the state can be placed in grave danger if the judiciary resolves the dispute without examining the content of the record. Secondly, the judiciary may also unjustifiably limit the free flow of information at the first step of PAIA's process.¹¹⁰⁷

As a matter of logic if the state charges an accused with contravening section 3 or 4 of PIA, it is really aiming to freeze the flow of information. It is highly unlikely that it would refer to the content of the protected record to discharge its onus during proceedings. This would ultimately undo its attempt to protect South Africa's National Security by limiting the free expression of sensitive security information. Chapter 4 has argued that the procedure of section 13 of PIA should be amended and brought into line with PAIA's procedure, to enable the judiciary to decide if a record should be contained for purposes of National Security, or ventilated. While this amendment may better promote Open Justice without placing National Security at greater risk, there is still a danger that the judiciary will not rely on the Judicial Peek and the other legal mechanisms (*ex parte* or *in camera* proceedings) to resolve the dispute, and thus decide the dispute without having sight of the record. To that extent, PIA would still suffer from the same drawbacks that PAIA does.

Both the Constitutional Court and the Freedom of Expression Institute (FXI), a not-for-profit organisation, in its submissions as *amicus curiae* in the *Masetlha*

¹¹⁰⁵ *President of the Republic of South Africa v M&G Media Ltd* (CC) [35]; PAIA S25(3)(b) & S77(5)(b). The Act prevents the executive from referring to the content of the contested record.

¹¹⁰⁶ *President of the Republic of South Africa v M&G Media Ltd* (CC) [52].

¹¹⁰⁷ [74]; Chesney (2009) *Virginia Law Review* 1378.

decision,¹¹⁰⁸ created alternative dispute resolution approaches which could potentially avoid the drawbacks of PAIA's two-step approach.¹¹⁰⁹ For ease of reference these two approaches will be referred to as 'Masetlha's principled approach'¹¹¹⁰ and 'FXI's procedural approach'.¹¹¹¹

The legal mechanism which the courts rely on must enable them to decide if a contested record should be contained for purposes of National Security. To this end, it needs to be determined if PAIA's two-step approach, 'Masetlha's principled approach' or 'FXI's procedural approach' will be most effective in permitting the courts to achieve this outcome. Consequently, each of the approaches will be analysed to determine if any of them will enable the judiciary to execute its duty effectively.

5.6.1 THE JUDICIARY AND THE PROMOTION OF ACCESS TO INFORMATION ACT

5.6.1.1 THE JUDICIARY'S APPROACH PRIOR TO THE RELIANCE ON THE JUDICIAL PEEK

Once trial proceedings have commenced in terms of PAIA, all that the executive needs to do in order to ensure that the courts make a decision to deny a request for access to information, is to place sufficient information before the courts to discharge its onus in terms of sections 41(1)(a)(i) and/or 41(1)(a)(ii) of the act.¹¹¹² As mentioned before, the executive must discharge this onus without referring to the content of the record which is at the centre of the dispute.¹¹¹³ Consequently, what the executive is required to do is to place sufficient evidence before the courts to show that the content of the record is cloaked in secrecy for reasons of National Security.

¹¹⁰⁸ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [55].

¹¹⁰⁹ [14].

¹¹¹⁰ [55].

¹¹¹¹ [14].

¹¹¹² *President of the Republic of South Africa v M&G Media Ltd* (CC) [23].

¹¹¹³ PAIA S25(3)(b) & S77(5)(b). The Act prevents the executive from referring to the content of the contested record.

In discharging its onus, the executive must not labour under the impression that by merely raising the word National Security, the courts will be charmed into deciding a matter in its favour.¹¹¹⁴ Reciting the text of an act, or PAIA's National Security exemption, will never be sufficient proof that the information is protected by the exemption. Nor will the executive's *ipse dixit* affidavits or bald assertions discharge the executive's onus.¹¹¹⁵

In an attempt to discharge its onus, the executive can place a number of records before the court. The executive could place the classification rubric it used to protect the information,¹¹¹⁶ together with the legal framework which guided it in its decision to protect information, before the court.¹¹¹⁷ Additionally, it could place an outline before the court listing the type of information which the protected record forms part of and the government operation it relates to.¹¹¹⁸ The executive could also show that international protocols and agreements prohibit the dissemination of the information in the record.¹¹¹⁹ In support of the above, it could further provide evidence of the threats or potential threats which may ensue if the information is ventilated in the public domain. Furthermore, the executive could show which security interest will be compromised if the information is published. In order to discharge its onus, it could also provide evidence that shows that the purpose of the department which produced, collected and aggregated the information, is to protect South Africa's National Security.¹¹²⁰ Additionally, it could prove that the executive has the necessary skills, institutional capacity and legal authority to protect security information and to gauge

¹¹¹⁴ RP Deyling "Judicial Deference and De Novo Review in litigation over National Security information under the Freedom of Information Act" (1992) 37 *Villanova Law Review* 67: 76.

¹¹¹⁵ *President of the Republic of South Africa v M&G Media Ltd* (CC) [24] & [88]; Chesney (2009) *Virginia Law Review* 1379.

¹¹¹⁶ Minimum Information Security Standards 1996 S3.1, S3.4.1, S3.4.2, S3.4.3 & S3.4.4; Protection of Executive Information Bill B6H-2010 S11. The MISS uses a number of guidelines which operatives can employ in order to determine if a document should be classified as confidential, secret or top secret.

¹¹¹⁷ Minimum Information Security Standards 1996 Chapter 2 S3; PIA S3 & S4; Protection of Executive Information Bill B6H-2010 S11.

¹¹¹⁸ Deyling (1992) *Villanova Law Review* 73.

¹¹¹⁹ *S v Geiges*.

¹¹²⁰ Constitution Chapter 11.

the effects which the publication of information could have on executive security.¹¹²¹ The executive could also produce affidavits from relevant security personnel whose assessment of the record is that National Security will be compromised if the information is publicised. The court will only rely on such evidence if it can be proven that, due to the nature of the person's profession, the applicable person has knowledge of the record.¹¹²² Additionally, the executive can also provide affidavits from the heads of executive institutions like the Director General or the Minister,¹¹²³ provided that they can show due to their work experience and exposure to the record that the information concerns issues of National Security and that its publication could compromise South Africa's National Security.¹¹²⁴ Using such evidence other than the primary record, the executive would be able to make out a strong case on the papers. The above method is just an example of how the executive may attempt to discharge its onus in terms of PAIA. It is not meant to be a legal silver bullet when protecting information.

The courts in resolving the dispute can rely on evidence other than the state-held information to decide if the publicity of the protected record will compromise National Security, without actually having sight of the contested record.¹¹²⁵ The courts have followed this approach in the resolution of disputes in terms of PAIA. The High Court and SCA resolved a dispute at this stage of proceedings before the Constitutional Court was asked to settle the matter. These courts were tasked with the duty of ascertaining if the executive's exemptions were legitimately raised. Neither the High Court nor the Supreme Court examined the contested record, but both held that the executive failed to provide sufficient evidence to justify its invocation of the legal exemptions and consequently ordered that the information be released.¹¹²⁶ The majority of the Constitutional Court confirmed that a matter can be resolved without

¹¹²¹ Arden (2007) SALJ 66.

¹¹²² *President of the Republic of South Africa v M&G Media Ltd* (CC) [29]-[31].

¹¹²³ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa*.

¹¹²⁴ *President of the Republic of South Africa v M&G Media Ltd* (CC) [29]-[31].

¹¹²⁵ [13], [14], [23], [25], [27], [32] & [36].

¹¹²⁶ *President of the Republic of South Africa v M&G Media* (CC); *President of RSA v M&G Media Ltd* (SCA) [21]-[51] & [53]-[55]; *M&G Limited v President of the Republic of South Africa*.

the court having actual sight of the contested record at this stage of PAIA's proceedings.¹¹²⁷

While the executive can make out a strong case using evidence other than the contested record, it is nevertheless difficult to understand how a court will be able to resolve the tension between information and security properly without having sight of the actual record in order to thoroughly test the executive's security assertions.¹¹²⁸ The point here is that courts are relying on the say so of the executive,¹¹²⁹ which would mean that they are being highly deferential in favour of the executive. Relying on evidence other than the primary record only provides the illusion that a protected record contains information which, if publicised, could compromise National Security. Not even the proposed definition of National Security can remedy this, since the courts have not had sight of the record and therefore cannot compare the record against the conception of security. The usefulness of the proposed definition of National Security can only have true value under circumstances where the courts have had sight of the record.

The danger here is twofold. Resolving the dispute in this fashion could either unjustifiably limit the right to access information, or endanger the security and continued existence of the state. Only access to the contested record will determine what the effects will be, if any.¹¹³⁰ Additionally, it is submitted that the court will only be able to take a view on the legality and the merits of the matter if it has sight of the record. If a court relies on the executive's evidence, it is placing its faith in the executive's speculations dressed up and presented as factual evidence.¹¹³¹ What then is the value of judicial competence in matters of National Security if judges rely on indirect information which gives the impression that the executive's decision is

¹¹²⁷ *President of the Republic of South Africa v M&G Media Ltd* (CC) [13], [14], [23], [25], [27], [32] & [36].

¹¹²⁸ [74].

¹¹²⁹ Chesney (2009) *Virginia Law Review* 1378.

¹¹³⁰ SE van der Merwe "The standard and burden of proof and evidential duties in criminal trials" in PJ Schwikkard & SE van der Merwe (eds) *Principles of Evidence* 3ed (2009) 525: 528.

¹¹³¹ 529.

necessary?¹¹³² In fact the court is presuming that a particular fact exists based on the form of the evidence placed before it.¹¹³³ In other words the courts are just relying on the executive's security assertions.¹¹³⁴

Resolving a dispute between information and security in this manner is a throwback to the Apartheid era. It is ironic that PAIA's procedural requirements seem to have dragged part of the Apartheid era's approach to judicial deference into South Africa's open democracy.¹¹³⁵ If the executive provides sufficient evidence, the court will support the executive's assessment although neither the court nor the requester has any idea of the actual content of the contested record.¹¹³⁶ This type of deference is a far cry from the type of deference South Africa subscribes to.¹¹³⁷ A court's decision made on the strength of evidence other than the primary record, is as problematic as a decision based on the executive's bald assertions, *ipse dixit* affidavits, or verbatim recitation of the legal text. In all of these cases, the courts rely on the say so of the executive; the only difference is that persuasive evidence other than the contested record is provided. Additionally, this approach is providing the state with a 'zone of executive immunity'.¹¹³⁸

Neither PAIA's first step in its approach for the resolution of disputes between the right to access information and National Security, nor relevant case law provides the judiciary with an effective legal mechanism to determine if a record should be cloaked in secrecy, prior to the court's decision to resort to the 'Judicial Peek'.¹¹³⁹ This drawback cannot be remedied by a clear interpretation of National Security, since the act and relevant case law permit the courts to decide this dispute without having to

¹¹³² Deyling (1992) *Villanova Law Review* 77.

¹¹³³ Van der Merwe "The evaluation of evidence" in *Principles of Evidence* 539.

¹¹³⁴ Chesney (2009) *Virginia Law Review* 1378.

¹¹³⁵ This is the position prior to the institution of the Judicial Peek.

¹¹³⁶ Deyling (1992) *Villanova Law Review* 72.

¹¹³⁷ Hoexter (2000) *SALJ* 484; *Logbro Properties CC v Bedderson NO* (SCA); Hoexter *Administrative Law in South Africa* 152.

¹¹³⁸ Clayton (2006) *Judicial Review*: 115.

¹¹³⁹ *M&G Limited v President of the Republic of South Africa; President of the Republic of South Africa v M&G Media Ltd* (SCA); *President of the Republic of South Africa v M&G Media Ltd* (CC).

rigorously compare the contested record against a definition.¹¹⁴⁰ Admittedly, the proposed definition of National Security would assist the judiciary in determining which information to protect for purposes of National Security, since it identifies which security interests need to be preserved and from which threats. However, there are still a number of reasons why the court could fail to accurately determine if the information should be cloaked in secrecy. One of the reasons is that the information provided may be terse in detail. Since courts lack the necessary institutional knowledge to understand what the effects would be if the information contained in the contested record enters the public domain, they would not have the necessary skills to rule on whether the information should continue to be concealed. Moreover, the courts' lack of background knowledge on the security risks could impair their ability to make proper decisions on the nature of the record.¹¹⁴¹ The first step of PAIA's procedural mechanism does not provide the courts with an appropriate legal mechanism to decide if information should be protected for reasons of National Security.

Mediating the tension without examining the content of the record also gives rise to several additional problems. Firstly, the executive may misuse a security exemption at this stage since it need only prove its case by utilising information outside of the scope of the contested record, not the contested record itself.¹¹⁴² National Security has on many occasions been employed by the executive to conceal illegal activities, the misuse of state machinery,¹¹⁴³ human rights abuses,¹¹⁴⁴ executive corruption, and improper conduct by political parties,¹¹⁴⁵ as well as to promote corrupt interests.¹¹⁴⁶

¹¹⁴⁰ PAIA; *M&G Limited v President of the Republic of South Africa; President of RSA v M&G Media Ltd* (SCA); *President of the Republic of South Africa v M&G Media Ltd* (CC).

¹¹⁴¹ N Vasu & B Loo "National Security and Singapore" in T Chong (eds) *Management of Success: Singapore Revisited* (2010) 462: 463.

¹¹⁴² *President of the Republic of South Africa v M&G Media Ltd* (CC) [23]-[24], [26]-[28] & [43]; PAIA S25(3) (b) & S77(5) (b).

¹¹⁴³ RG Vaughn *The successes and failures of whistleblower laws* (2012) 216.

¹¹⁴⁴ Human Rights Watch Staff *Human Rights Watch World Report 1999* (1998) 155.

¹¹⁴⁵ G Misiroglu *The handy politics answer book* (2002) 167.

¹¹⁴⁶ Krsticevic et al "The Inter-American system of Human Rights Protection: Freedom of Expression, "National Security doctrines" and the transition to elected governments" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 161.

Many mistakes have also been committed in the name of security in cases where it was later found that the executive had acted on the strength of inaccurate statements, human excitement, or outlandish presumptions.¹¹⁴⁷ It could have serious implications for democracy if the free flow of information concerning these activities is inappropriately impeded.

Secondly, courts will not be able to act as an appropriate check on the executive's power. The executive will have wide powers and need only provide generated evidence of a persuasive yet indirect character to discharge its onus. The courts' rubber stamp may allow the executive to continue in its misuse of its security powers.¹¹⁴⁸

Thirdly, the executive's failure to make out its case sufficiently prior to the court having sight of it could result in the release of sensitive information which would potentially jeopardise the Republic's security. Lazy, inefficient or inept legal counsel could be the cause of the impairment of South Africa's National Security.¹¹⁴⁹

Fourthly, disposing of a matter in this fashion could unjustifiably limit the fundamental rights to access, receive and impart information if state-held information which is non-threatening is not released. The Constitutional Court in *Brümmer v Minister for Social Development* put great emphasis on the invaluable contribution that the free flow of information makes to South Africa's democracy and administrative transparency.¹¹⁵⁰ Prohibiting the publication of information without understanding its true nature will unjustifiably cut off the life source of democracy.¹¹⁵¹

Lastly, a court will not be able to accurately pronounce on the rationality, merits or legality of the executive's actions without having access to information. Such findings

¹¹⁴⁷ Kirby (2006) SAJHR 45.

¹¹⁴⁸ *President of the Republic of South Africa v M&G Media Ltd* (CC) [112].

¹¹⁴⁹ Kirby (2006) SAJHR 45.

¹¹⁵⁰ *Brummer v Minister for Social Development* [62].

¹¹⁵¹ *South African National Defence Union v Minister of Defence* [7].

will be impossible unless it can assess if exposure will result in a threat to National Security and if an action was taken in terms of the law.¹¹⁵²

The stakes are high where the right to access information and National Security are in tension.¹¹⁵³ If the court decides in favour of the requester, it could have serious implications for National Security, while if it is overly deferential in favour of the executive, South Africa's constitutional democracy will be impaired. A failure to examine the protected record could unnecessarily place either of these interests in harm's way. In light of the constitutional demands for openness and transparency, the sum of the court's analysis cannot be just reduced to accepting what the executive says without at least seeing what the executive has done. It must have some mechanism to be used in addition to the proposed definition of National Security as articulated in chapter 3 to determine if the information must be protected.

A possible solution is for the legislature to amend PAIA's provisions by always compelling the courts to take a Judicial Peek in cases involving a conflict between security and information. It is submitted that such an amendment could prevent the courts from having to resort to a type of deference reminiscent of the Apartheid era.

5.6.1.2 THE JUDICIARY'S APPROACH FOLLOWING THE JUDICIAL PEEK

If the dispute between access and security is incapable of being resolved in the manner contemplated in section 5.6.1.1 of this thesis, the Constitutional Court held that the courts can resort to a Judicial Peek in its *de novo* reconsideration of the matter if the interests of justice require this.¹¹⁵⁴ In these instances the judiciary must:

¹¹⁵² *New National Party of South Africa v Government of the Republic of South Africa* 1999 3 SA 191 (CC) [28], [29], [33]-[37] & [39]-[43].

¹¹⁵³ Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information" in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 11.

¹¹⁵⁴ *President of the Republic of South Africa v M&G Media Ltd* [45] & [52].

“[...] test the argument for non-disclosure by using the record in question to decide the merits of the exemption claimed and the legality of the refusal to disclose the record. In this sense, it facilitates, rather than obstructs, access to information.”¹¹⁵⁵

On the instruction of the Constitutional Court, the High Court in *M&G Media Ltd v President of the Republic of South Africa* applied this methodology to determine if access to a state-held record should be denied.¹¹⁵⁶ Once the contested report was handed to the bench, the court adjourned and took a Judicial Peek at the record.¹¹⁵⁷ The court in its analysis of the contested document concluded that the content of the record did not warrant protection from disclosure in terms of the relevant exemptions raised in terms of PAIA. In other words, due to the content of the record the executive was prevented from relying on PAIA’s exemptions to protect state-held information from being publicised. The judiciary reached this conclusion without deferring to the executive.¹¹⁵⁸

It is important to note that the courts will only resort to a Judicial Peek and assess the record against the ‘exemption claimed and the legality of the refusal’ if the interests of justice require this as already pointed out in the previous chapter.¹¹⁵⁹ However, the SCA rightly held that the courts must only invoke this power once the executive has set out why it aims to deny access to a request for state-held information.¹¹⁶⁰ Thus the executive must at a bare minimum make out what its case is. Once the executive fulfils this duty and provided that the interests of justice demand this, the court will require access to the record in terms of section 80(1) of PAIA so that it may decide whether the facts support the executive security exemption raised.¹¹⁶¹

If the contested record does not persuade the court that its publicity will compromise the Republic’s National Security, the court will provide the requester access to the

¹¹⁵⁵ [52].

¹¹⁵⁶ 2013 3 SA 591 (GNP).

¹¹⁵⁷ *M&G Media Ltd v President of the Republic of South Africa* [6].

¹¹⁵⁸ [59], [61] & [64].

¹¹⁵⁹ *President of the Republic of South Africa v M&G Media Ltd* (CC) [45] & [52].

¹¹⁶⁰ [46].

¹¹⁶¹ [45] & [52].

executive's information.¹¹⁶² Only once the court has taken a Judicial Peek at the record, examined it extensively and independently concluded that its publicity poses a threat to National Security, will it confirm the executive's decision and deny access to the requested record.¹¹⁶³ The degree of judicial intervention in terms of PAIA by the courts after the Judicial Peek is far greater than prior to it.¹¹⁶⁴ The court in this type of assessment will engage in a brand new examination of the facts of the case and the lawfulness of the executive's action in the context of the contested record. At no time during this examination will the court defer to the expertise of the executive.¹¹⁶⁵ The extent to which the court can test the legality and the merits of the state's case will be made more effective if used in conjunction with chapter 3's proposed definition of National Security. This will enable the courts to resolve the dispute in a manner which protects the appropriate security interests from identifiable threats.

The courts' ability to test the executive's decision to conceal information in terms of PAIA is extensive. Some may even argue that the courts are treading on the terrain of the executive. However, this perspective is lacking nuance as stated above. Additionally it is also important to note that the Constitution has given the legislature the power to protect National Security.¹¹⁶⁶ In fulfilling its constitutional duty of giving effect to the right to access information, Parliament gave the executive the authority to deny access to information that could reasonably be expected to cause prejudice to National Security.¹¹⁶⁷ It also placed a check on the executive's power by permitting courts to assess the legality and the merits of the executive's decision to protect National Security information.¹¹⁶⁸

This type of decision-making falls into the judiciary's realm of expertise. PAIA's approach after a court has taken a 'Judicial Peek' does not call for blind obedience to

¹¹⁶² Deyling (1992) *Villanova Law Review* 89; PAIA S80.

¹¹⁶³ PAIA S82(a); *President of the Republic of South Africa v M&G Media Ltd* (CC) [52].

¹¹⁶⁴ As shown above, at the probabilities stage the courts will not examine the record.

¹¹⁶⁵ Deyling (1992) *Villanova Law Review* 88.

¹¹⁶⁶ Constitution S198(d).

¹¹⁶⁷ S32(2); PAIA S41(1)(a)(i) & S41(1)(a)(ii).

¹¹⁶⁸ PAIA S80.

the executive's security assertions.¹¹⁶⁹ The court following the Judicial Peek gives proper protection to both National Security and the constitutional value of Open Justice, although it seems as if it treads on to the executive's terrain by ruling on the nature of the record. However, if it were not for this authority, the executive could use this exemption to engage in unrestrained nefarious activities.

It has been argued in the previous chapter that PIA should be amended to bring it in line with PAIA. While this legislative adjustment would provide better protection to Open Justice without putting National Security at any greater risk, the judiciary could possibly unjustifiably limit the free expression of information at the first stage of proceedings. The corollary effect of this is that the accused could be incarcerated. However, on the strength of the argument made under section 5.3.3 above, it is highly unlikely that the court would order the imprisonment of an accused on the say so of the state. In instances where uncertainty exists as to the nature of the record it is submitted that the judiciary will always take a Judicial Peek at the record. Therefore PIA's procedure should never prevent the judiciary from making a decision on the nature of the contested record.

5.6.2 TOWARDS A PREFERRED METHODOLOGY

As mentioned earlier, two other approaches have been developed in the security context which could enable the judiciary to determine if a record should be protected for reasons of National Security. The question arises whether they may be an improvement on PAIA's two-step approach as recorded in sections 25(3)(b), 77(5)(b), 80(1), 80(3) and 81(3)(a) of PAIA, in that they may better assist the courts in executing their duty.¹¹⁷⁰

The first approach was created by the Constitutional Court in the *Masetlha* decision.¹¹⁷¹ Even though this case was concerned with Open Justice and National Security, the case is still relevant in the context of the free flow of information and

¹¹⁶⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [48].

¹¹⁷⁰ *President of the Republic of South Africa v M&G Media Ltd* (CC).

¹¹⁷¹ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa*.

security, in that the judgment identifies a specific approach which the courts can employ to assist it in determining if a record should be protected for reasons of National Security.¹¹⁷² The Constitutional Court relied on section 173 of the Constitution's inherent powers provision to create this principled approach.¹¹⁷³ The section provides that:

“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”¹¹⁷⁴

Acting on the strength of this provision, the Constitutional Court created a principled approach to resolve the disputes in front of it and recorded its specifics when it held that:

“In deciding whether documents ought to be disclosed or not, a court will have regard to all germane factors which include the nature of the proceedings; the extent and character of the materials sought to be kept confidential; the connection of the information to national security; the grounds advanced for claiming disclosure or for refusing it; whether the information is already in the public domain and if so, in what circumstances it reached the public domain; for how long and to what extent it has been in the public domain; and, finally, the impact of the disclosure or non-disclosure on the ultimate fairness of the proceedings before a court.”¹¹⁷⁵

However, only the first factor (the nature of the proceedings) is of importance for purposes of this chapter. The balance of the factors is not directly relevant to this chapter's inquiry. At a high level of generality, all of the factors included in the Constitutional Court's approach are aimed at determining if the contested record should be concealed for purposes of National Security. However, it is only the first factor which needs to be assessed to determine if it enables the courts to perform their function more effectively, as opposed to obstructing their capacity like PAIA's two-step approach seems to do.¹¹⁷⁶ The second (the extent and character of the materials

¹¹⁷² [55].

¹¹⁷³ [61]-[73]; Constitution S173.

¹¹⁷⁴ Constitution S173.

¹¹⁷⁵ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [55].

¹¹⁷⁶ [55].

sought to be kept confidential) and third factors (the connection of the information to National Security) enable the judiciary to assess if information should be protected or disclosed. The second factor requires the judiciary to establish the true nature of the record. The court must thus examine the record to understand what it is looking at. The third factor is inextricably linked to the second, in that following the examination of the record by the judiciary, it must determine if the information is duly protected by the legal tenets of National Security. PAIA's two-step approach already sets out an appropriate process which the judiciary can rely on to determine if the publicity of a record will compromise the Republic's National Security. However, what must be assessed is if '*Masetlha's* principled approach' is an improvement on PAIA's two-step approach, in that it enables the courts to perform their function more effectively, as opposed to obstructing their capacity like PAIA's two-step approach seems to do.

The fourth factor also does not shed light on whether '*Masetlha's* principled approach' actually permits the judiciary to make a determination on the nature of the record.¹¹⁷⁷ The fourth factor (the grounds advanced for claiming disclosure or for refusing it) would ordinarily be helpful in the security context at a substantive level. Like PAIA, it records the grounds upon which the executive can deny access to information.¹¹⁷⁸ However, this factor is unhelpful at a principled level since it fails to address whether it enables the judiciary to make a National Security determination.

The fifth (the entry of the information in the public domain) and sixth factors (for how long and to what extent it has been in the public domain) also contribute nothing in assessing if '*Masetlha's* principled approach' improves the ability of the judiciary to make a determination on a contested record than PAIA does.

The seventh and final factor (impact of the disclosure or non-disclosure on the ultimate fairness of the proceedings before a court) is also irrelevant since it is only concerned with the fairness of proceedings in considering if the state-held information should be ventilated.

¹¹⁷⁷ *President of the Republic of South Africa v M&G Media Ltd* (CC).

¹¹⁷⁸ PAIA S41(1)(a)(i) & S41(1)(a)(ii).

As stated above only the first factor is of relevance for purposes of this section. The first factor (the nature of the proceedings) was created by the Constitutional Court to determine how to resolve a dispute between Open Justice and National Security, in instances where the judiciary already had access to the contested record.¹¹⁷⁹ As mentioned earlier the judiciary relied on the contested record to determine if National Security was at risk of being compromised by the ventilation of state-held information.¹¹⁸⁰ In fact the judiciary could only resolve this dispute since it already had access to the record. Understandably, the Constitutional Court did not consider how to resolve a dispute between Open Justice and National Security where the court did not have access to the record. Therefore we are not given any insight into whether the judiciary would be able to identify the nature of the record in instances where it had no access to it. While ‘*Masetlha*’s principled approach’ does enable the judiciary to execute its duty by determining the nature of the record in instances where the judiciary has access to information, it does not shed light on whether the judiciary would be able to determine the nature of the record in circumstances in which it did not have access to the contested record. Consequently, ‘*Masetlha*’s principled approach’ enables the judiciary to execute its duty, but does not amount to an improvement on PAIA’s two-step approach.

As pointed out earlier in this chapter, ‘FXI’s procedural approach’ was put forward in its submissions in the *Masetlha* decision.¹¹⁸¹ FXI attempted to persuade the courts to adopt a specific ‘procedural approach’ to deal with matters where a contested record already forms part of the court record, but in instances where the general public had no access thereto. Its approach is founded on the following five principles:

“(a) not compromising the legitimacy of the judicial proceedings, which is reflected in their adversarial nature; (b) facilitating the public’s interest in opposing an order to restrict access; (c) requiring that any order granted which restricts access should state the conclusions reached and be accompanied by specific findings and reasons for rejecting less drastic measures; (d) providing the

¹¹⁷⁹ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute In re: Masetlha v President of the Republic of South Africa* [51].

¹¹⁸⁰ [61]-[69] & [70]-[73].

¹¹⁸¹ [14].

prerequisites for meaningful appellate review; and (e) informing the public of an order granted which restricts access to court records.”¹¹⁸²

The court rejected this flexible principled procedure in favour of an approach which seeks to determine:

“[...] where the interests of justice lie from case to case consistently with our evolving, context-sensitive jurisprudence that is driven by justice rather than rules.”¹¹⁸³

Like ‘*Masetlha*’s principled approach’, ‘FXI’s procedural approach’ is formulated on the basis that the judiciary already has access to the contested record.¹¹⁸⁴ The primary thrust of ‘FXI’s procedural approach’ is concerned with providing the judiciary with a process which would assist it in making a finding on the nature of the record. It does not deal with instances where the judiciary does not have access to information. The reason for this is that it is presumed that because the judiciary already has access to the record, it would rely on it to resolve disputes. Therefore in substance ‘FXI’s procedural approach’ does not seem to be any different from ‘*Masetlha*’s principled approach’ or an improvement on PAIA’s two-step approach.¹¹⁸⁵

Consequently, as proposed earlier and for the reasons also set out in chapter 4 of this thesis, PAIA should be amended so that the judiciary can always take a Judicial Peek at a contested record in National Security matters.¹¹⁸⁶ Thus the judiciary would always be able to determine if the ventilation of the contested record would compromise South Africa’s National Security, if it had access to the record.

5.7 CONCLUSION

The doctrine of the separation of powers has ascribed different roles to the South African legislature, executive and judiciary in the context of National Security.

¹¹⁸² [57].

¹¹⁸³ [58].

¹¹⁸⁴ [57].

¹¹⁸⁵ [57]-[58].

¹¹⁸⁶ *President of the Republic of South Africa v M&G Media Ltd* (CC) [45] & [52].

The executive is responsible for implementing laws. The preservation of a state's National Security has ordinarily fallen within the executive's sphere of competence. The executive possesses the necessary institutional knowledge, expertise and resources to preserve National Security. In execution of its duties the executive may contain the publicity of state-held information in terms of sections 41(1)(a)(i) and/or 41(1)(a)(ii) of PAIA and sections 3 and/or 4 of PIA.

The judiciary has the authority to decide disputes which may arise between the free flow of information and National Security in terms of the preceding acts. In doing so, the judiciary is entitled to make a decision which overrules the state's decision to contain information. However, securocrats argue that the courts are ill-suited to decide these matters as they lack the necessary capacity to do so. To support this view the executive levels three criticisms against the judiciary. The first criticism is that the judiciary lacks the necessary training and expertise in matters of National Security. Secondly, securocrats argue that the courts lack the aptitude and facilities to consider matters of National Security. The final criticism is that the absence of judicial training, expertise, aptitude and facilities in security matters not only hinders the executive in being able to protect National Security, but contributes to putting the state in harm's way. Since the judiciary lacks the necessary capacity, securocrats argue that the courts should rather defer to the executive's 'unique insights' since only it can truly appreciate the effect of publicising state-held information. They thus argue for a 'zone of executive immunity'. In summary the executive requires limited judicial participation in matters of National Security.

Despite these criticisms, the judiciary possesses the capacity to resolve disputes between the free flow of information and National Security. In the context of PAIA, the judiciary follows a three-step approach. Firstly, it considers the state's submissions in the context of the security exemption claimed. Secondly, it considers if the state provided sufficient evidence so that it can determine if the contested record falls within the exemption claimed - as contemplated by its duty in terms of section 81(3)(a) of PAIA. Lastly, following its examination of the oral submissions and evidence, the judiciary determines if the state has provided sufficient evidence so that it could determine if the information should be concealed for purposes of National Security.

While the judiciary's approach to resolving disputes between information and security does not in and of itself demonstrate the judiciary's capacity, it is really the duty of the judiciary as recorded in terms of section 82(a) of PAIA, the state's obligations as set out in section 81(3)(a) of the act, and chapter 3's proposed definition of National Security interacting with each other, which enables the judiciary to resolve the dispute. There are three reasons which support this view. Firstly, the proposed definition of National Security and the information provided by the state in discharging its onus under section 81(3)(a) of PAIA enable the judiciary to determine if an object is at risk of being compromised, to identify the threats thereto and to make determinations on the legality and rationality of the state's security action. The judiciary can achieve these outcomes without having to procure any specific training, knowledge or resources in matters of National Security. Secondly, the powers granted to the judiciary in terms of section 82(a) of PAIA and the utility of the proposed definition of National Security enable the judiciary to make clinical security decisions, instead of frustrating the state's security actions. Lastly, defining what National Security means and allowing the judiciary to take action in this regard nullifies the argument that matters of National Security remain the preserve of securocrats. Thus not only legally, but from a practical point of view the courts are the appropriate forum to resolve the tension between the free flow of information and National Security in terms of PAIA.

As mentioned earlier in this chapter, despite the judiciary's ability to resolve security disputes, the expert in the National Security context is the executive. While the conception of deference proposed in this chapter does call for the interrogation of the state's averments it also acknowledges that it would be more appropriate to defer to the expertise of the state in certain instances. Although the judiciary has extensive tools to resolve the tension in terms of PAIA, there are instances where it may be more appropriate for it to defer to the state when resolving this dispute.

The approach that the judiciary relies on to resolve a dispute between the free flow of information and National Security in terms of PIA is no different from under PAIA. The PIA court – like the PAIA court – will (i) hear the state's oral submissions in the context of PIA's conception of National Security, (ii) examine the evidence placed before it by the state to determine if the executive has provided sufficient evidence so

that the judiciary may assess if the ventilation of the state-held information is contrary to sections 3 and 4 of PIA, and (iii) in light of the evidence and oral submissions made, determine if the accused by the expression or attempted expression of state-held information has committed an offence and whether incarceration of the accused is therefore warranted.

The incarceration of an accused is the most severe form of punishment. It is therefore problematic to expect the judiciary to avoid dealing with the merits of the matter on account that it lacks the institutional capacity to make decisions on National Security. It also seems problematic to expect the judiciary to defer to the state in these instances. There are three reasons for this position. Firstly it is doubtful whether trials of a criminal nature will ever satisfy the requirements of a fair trial as contemplated by sections 34 and 35(3)(c) of the Constitution, if courts are to refrain from resolving disputes on the grounds of competence. Secondly, it would be reckless for the judiciary to abdicate its duty to resolve criminal disputes especially in light of the state's history of abusing the defence of National Security. Lastly, the judiciary's expertise lies in the interpretation and application of laws and it is therefore best placed to determine if the executive's activities are consistent with the legal tenets of National Security. Since the judiciary will always resolve the disputes between the free flow of information and National Security, the question of deference and competence of the judiciary seems to be a non-factor in terms of PIA.

To put the above succinctly, the judiciary possesses the necessary capacity to resolve disputes between the free flow of information and National Security both in terms of PAIA and PIA.

PAIA requires the judiciary to follow a two-stage process to determine if a record should be concealed for purposes of National Security. In chapter 4 of this thesis it was submitted that PIA should adopt PAIA's two-stage process. The rationale for this proposal is that Open Justice would be afforded much greater protection without putting National Security at any greater risk. However, the approach does suffer from one weakness. If a court resolves a dispute at the first stage of proceedings (i.e. without examining the content of the record), it may result in one of two drawbacks. The first is that the state can be placed in grave danger if the judiciary resolves the

dispute without examining the content of the record.¹¹⁸⁷ Secondly, the judiciary may unjustifiably limit the free flow of information.

To protect South Africa's National Security, and to guard against the unjustified limitation of the free flow of information, the courts must be able to make proper decisions on whether a contested record should be concealed for purposes of National Security, or ventilated. In terms of PAIA, the solution could be to enable the judiciary to always engage in a Judicial Peek when mediating the tension. However, on the strength of the argument made under section 5.3.3 above in the context of PIA, it is highly unlikely that a court would incarcerate an accused on the say so of the state. So in instances where uncertainty exists as to the nature of the record, it is submitted that the judiciary will always take a Judicial Peek at the record. Therefore PIA's procedure should never prevent the judiciary from making a decision on the nature of the contested record.

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¹¹⁸⁷*President of the Republic of South Africa v M&G Media Ltd* (CC) [74]; Chesney (2009) *Virginia Law Review* 1378.

CHAPTER 6

CONCLUSION

This study concerns the tension between National Security and the rights to access, impart and receive information. It is particularly interested in the role of the courts in protecting the free flow of information from undue state interference, without unnecessarily putting National Security at risk. The study thus raises a number of substantive, interpretive, procedural and jurisprudential questions. These include questions about: i) the interpretation of constitutional provisions dealing with the rights to access, impart and receive information, as well as National Security; ii) the interpretation of legislative provisions regulating the relationship between the free flow of information and National Security, and the constitutionality of those provisions; iii) the meaning of National Security; iv) whether existing court procedures strike an appropriate balance between openness and the need to protect National Security; and v) whether and to what extent courts should defer to the wisdom of the executive in relation to the question whether the dissemination of information is likely to endanger National Security.

Chapter 2 examines the constitutional and legislative framework concerning the tension between the free flow of information and National Security. It starts by discussing the shift from the culture of secrecy that characterised the Apartheid era to the Constitution's emphasis on openness and democratic accountability. It then proceeds to examine the constitutional rights to access, receive and impart information in view of the values that underlie them. These values include the pursuit of truth, individual self-realisation and democratic self-government, in the case of the right to receive and impart information, and openness, accountability and transparency, in the case of the right to access information. It also examines the provisions of PAIA which give expression to the constitutional right to access state-held information in terms of section 32 of the Constitution.

Next, the chapter analyses legislative provisions which allow the state to restrict the free flow of information in order to protect National Security (referred to as the security and defence of the Republic under PAIA and as the security of the Republic under PIA). It finds that the relevant provisions in PAIA and PIA suffer from a number of

flaws. They fail to define National Security with the necessary precision; they fail to specify the kind of threats that National Security is to be protected from; and they fail to refer to a number of interests that are central to South African and international understandings of National Security. There is therefore a risk that the two acts may be used to place unreasonable restrictions on the free flow of information in the name of vaguely defined notions of National Security. On the other hand, they also create the risk that important National Security interests may be unprotected. The chapter thus concludes that the courts' ability to mediate conflicts between the free flow of information and National Security is hampered to a significant extent by uncertainty over the meaning of National Security.

Chapter 3 then explores the meaning of National Security. It starts with an analysis of the terms 'defence of the Republic' and 'security of the Republic'. It finds that, for purposes of sections 4(1)(a)(i)(bb) and 4(1)(b)(i)(bb) of PAIA, the defence of the Republic refers to the SANDF's ability to protect the Republic of South Africa, or in specific instances, the ability of SAPS, or SAPS in cooperation with the SANDF, to combat terrorism. On the other hand, the security of the Republic in terms of these sections concerns the capacity of the intelligence services of South Africa and other department of state to protect the security of the Republic. It further finds that the references to the security of the Republic in sections 3, 4(1)(a)(i)(bb), 4(1)(b)(i)(bb) and 4(2) of PIA are concerned with the SANDF's ability to protect the Republic of South Africa in relation to military matters, the ability of SAPS, or SAPS in co-operation with the SANDF, to guard against terrorism, and the State Security Agency's intelligence capacity. However, PIA, unlike PAIA, does not protect the security capacity of other intelligence services (i.e. SAPS, SANDF and other departments of state. To that extent, it is under-inclusive.

Next, the chapter compares these understandings to other South African and international conceptions of National Security. The former include conceptions of democracy derived from legislation (NSIA) and case law (the judgments of Moseneke DCJ, Yacoob J and Van der Westhuizen J in the Masetlha decision), while the latter include international instruments such as the SP and JHBP. On the basis of an analysis of the various security interests protected in terms of these other conceptions of National Security, the chapter concludes that sections 41(1)(a)(i) and 41(1)(a)(ii) of

PAIA and sections 3 and 4 of PIA should also protect the constitutional order, territorial integrity, state sovereignty and the people of the Republic. Although sections 41(1)(a)(i) and 41(1)(a)(ii) of PAIA and sections 3 and 4 of PIA are capable of being interpreted to include these security interests, it is argued that it would be more appropriate if PIA is amended to mention these security interests expressly. The chapter then examines different conceptions of the kinds of threats to National Security that would justify restrictions on the free flow of information. It argues that threat conceptions which focus on force or the threat of force are superior to those that focus on (temporal or non-temporal) understandings of imminence. In view of this, the chapter proposes that the provisions of PAIA and PIA should be amended to permit the state to limit the free flow of information only if it is reasonable to expect that the restriction will prevent an act of 'force or the threat of force' from compromising National Security.

Chapter 4 then turns to examine the tension between openness and secrecy within the judicial process in cases involving conflicts between the free flow of information and National Security. The chapter first considers the requirements of the constitutional principle of Open Justice in view of case law. In terms of this principle, courts are required to resolve judicial disputes in an open manner. Next, it examines the extent to which PAIA and PIA i) give effect to the principle of Open Justice, and ii) use mechanisms like in camera proceedings to restrict Open Justice in cases in which the disclosure of sensitive information in open court could compromise South Africa's National Security. The chapter investigates the relationship between PAIA's procedures and the courts' discovery procedures, and concludes that the use of the latter should not be allowed to frustrate PAIA's objectives. It also finds that PAIA's procedures are superior to those of PIA, to the extent that it authorises courts to take a Judicial Peek at the contested record, and proposes that PIA be amended to include this power.

In addition, the chapter examines the constitutionality of PAIA and PIA's limitations of the rights underpinning Open Justice (i.e. sections 16, 34 and 35(3)(c) of the Constitution). It finds that the limitations in terms of sections 80(1) and 80(3)(b) of PAIA, which provide for the Judicial Peek and in camera hearings respectively, are justifiable in terms of section 36(1) of the Constitution. However, section 80(3)(c),

which authorises the judiciary to prohibit the publication of information that is already in the public domain, is not rationally connected to a legitimate government objective, and is therefore unconstitutional. Moreover, if PIA is amended to provide for a Judicial Peek and for ex parte representations, it would also be constitutional.

Finally, chapter 5 examines the capacity of the judiciary to adjudicate, in a principled manner, conflicts between the free flow of information and National Security, in view of debates about courts' institutional capacity and the perceived need for judicial deference in areas in which the executive, and not the judiciary, has special expertise. To that end, it evaluates the views of securocrats who criticise judicial intervention in cases in which National Security is at stake. The chapter is not only concerned with theoretical debates about the separation of powers, institutional capacity and deference, but links those debates to questions about the procedures used by courts to adjudicate conflicts between the free flow of information and National Security. For that reason, it closely examines the procedures used by courts under PAIA and PIA to determine whether information should be released, or suppressed in the interest of National Security. On the basis of that analysis, the chapter concludes that the courts have the capacity to decide such disputes, provided that they work with an adequate definition of the relevant National Security interests and the kinds of threats that National Security must be protected against. The task of courts is not to second-guess the choices of the executive, but to consider whether the executive advanced sufficient evidence in support of its claim that particular information should fall under a National Security exemption. Judges are well-positioned to this, despite the fact that they have not undergone National Security training.

The chapter finds that the procedure followed by the courts under PAIA to determine whether an information officer justifiably restricted access to a record is consistent with this view of the judicial function, and allows courts to adjudicate disputes in a principled manner, without overstepping the bounds of the judicial function. The securocrats' criticisms are therefore misplaced. Calls for judicial deference to the executive in the context of sections 3 and 4 of PIA are similarly problematic, as it could lead to an infringement of the right of an accused person to a fair trial, and as the judiciary is well positioned to determine whether the executive's activities are consistent with PIA's provisions. Based on an analysis of the meaning of deference under South Africa's

Constitution, the chapter concludes that there are certain circumstances in which deference may be appropriate. This is premised on the idea that there are certain areas in which the executive is better placed than judges to make factual determinations, and that in such matters, judges should be cautious not to substitute their own views for those of the executive. However, this should never amount to an abdication of the judiciary's power to interpret the law and control government action.

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