

The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on *Motau* and *My Vote Counts*

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I INTRODUCTION

Under the current constitutional dispensation the judiciary is not only constitutionally authorised, but also constitutionally obliged, to oversee exercises of public power; including the conduct of the executive.¹ It does so through judicial review. In judicial review proceedings, courts must follow a principled and justified approach to choosing the appropriate standards on a possible ‘continuum of constitutional accountability’ against which impugned exercises of public power should be measured. This is what is demanded by the separation-of-powers doctrine: courts ought not to invoke legal norms formalistically or arbitrarily when reviewing public power.²

In determining where on the continuum of constitutional accountability an exercise of public power should lie, we argue that subsidiarity theory plays a valuable role – particularly in the context of administrative law, where several sources of law compete with one another for application. At one end of the continuum lie the most foundational norms of accountability, such as the rule of law, a founding value in the Constitution of the Republic of South Africa, 1996.³ These foundational norms are the more general legal norms that root and create the context in which the more detailed and indirect constitutional norms

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¹ We support the approach to the separation of powers as articulated in D Moseneke ‘Oliver Schreiner Memorial Lecture: Separation of Powers, Democratic Ethos and Judicial Function’ (2008) 24 *South African Journal on Human Rights* 341, 349 where it is recognised that the courts ‘not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so’.

² We agree with R Stacey ‘Justifiability as the Animating Vision of Administrative Law’ (2007) 22 *SA Public Law* 79, 103 who states that ‘actions on the part of review courts that ignore the proper justification for judicial control of the executive might weaken the legitimacy of the judicial review mechanism’.

³ Section 1(c) of the Constitution.

find their application.⁴ Legality, a constitutional principle inherent in the rule of law, lies at this end of the continuum of accountability. Next on the continuum lie norms of accountability found in the Bill of Rights, such as those contained in the rights to just administrative action in s 33 of the Constitution. Section 33 is aimed at realising the rule of law in relation to exercises of public power that amount to administrative action. In the middle of the continuum lie the indirect constitutional norms aimed at achieving accountability, such as those contained in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The statute gives effect to and fleshes out the content of the rights to just administrative action: it is intended to provide the most immediate source and guidelines for judicial review of conduct that amounts to administrative action.⁵ Still further along the continuum lie even more specific empowering provisions in other statutes or in subordinate legislation. These empowering provisions are the most specific norms that set out standards of accountability demanded of a functionary in a particular situation, and that are appropriate to that specific exercise of power.

Legality is intended as a basis on which to review only those exercises of public power that do not amount to administrative action as ‘a backstop or safety net ... when the PAJA [is] not of application’.⁶ In other words, placing exercises of public power at their correct point on the continuum of constitutional accountability in judicial review entails applying PAJA and/or other more specific norms when they are applicable, and applying legality only if and to the extent that more specific norms are not applicable to hold the power to account.

Given the intended roles of PAJA and legality respectively, one could be forgiven for thinking, more than fifteen years after the enactment of PAJA, that it would be trite that exercises of public power amounting to ‘administrative action’ as defined in PAJA ought to be reviewed on PAJA grounds. This is all the more so in view of the endorsement of subsidiarity theory by the Constitutional Court as early as 1995.⁷ Put simply, subsidiarity requires that adjudication of substantive issues be determined with reference to more particular constitutional norms, rather than more general constitutional norms.⁸ As we illustrate in this article, applying subsidiarity theory in the administrative-law context entails that, in judicial review proceedings, the applicability of PAJA ought to be determined

⁴ We see specific norms as emerging indirectly from the Constitution, and general norms as emerging directly from the Constitution.

⁵ *Zondi v MEC for Traditional and Local Government Affairs and Others* [2004] ZACC 19, 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) at para 101; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15, 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) (‘*Bato Star*’) at para 25, where it was confirmed that the cause of action for the review of administrative action is now rooted in PAJA. See also J Klaaren & G Penfold ‘Just Administrative Action’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 63 at 63–64.

⁶ C Hoexter ‘The Enforcement of an Official Promise: Form, Substance and the Constitutional Court’ (2015) 132 *South African Law Journal* 207 (‘Enforcement’), 219.

⁷ In *S v Mhlungu and Others* 1995 ZACC 4, 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) (‘*Mhlungu*’).

⁸ *Ibid* at para 59. See further L du Plessis ‘Subsidiarity: What’s in the Name for Constitutional Interpretation and Adjudication?’ (2006) 17 *Stellenbosch Law Review* 207; and see also J de Visser ‘Institutional Subsidiarity in the South African Constitution’ (2010) 1 *Stellenbosch Law Review* 90. In this article we use the term ‘subsidiarity theory’ in the sense of ‘adjudicative subsidiarity theory’ described by Du Plessis. See also *Bato Star* (note 5 above). A more nuanced account of subsidiarity is provided below.

before resort is had to the principle of legality.⁹ However, flouting subsidiarity theory, the courts, including the Constitutional Court, often invoke legality as a basis for reviewing exercises of public power without deciding whether PAJA is applicable, even though it might be.¹⁰

In this article we reflect on the principle of subsidiarity in theory with reference to its content and origins, and also on its practical application, particularly in the context of administrative law. We focus on two recent decisions of the Constitutional Court: *Minister of Defence and Military Veterans v Motau*¹¹ and *My Vote Counts v Speaker of the National Assembly*.¹² We argue that in *Motau*, an administrative-law case, the Constitutional Court applied subsidiarity theory correctly, and gave some indication of how the courts ought to approach the threshold questions that plague them when reviewing exercises of public power. However, we argue that *Motau* did not go far enough. It did not provide the clarity that courts reviewing exercises of public power require as to how and why subsidiarity theory ought to be adopted. We argue that *My Vote Counts*, a case concerning the relationship between the Promotion of Access to Information Act 2 of 2000 (PAIA) and s 32 of the Constitution, in which the Constitutional Court resoundingly endorsed the principle of subsidiarity in constitutional adjudication, offers guidance on the invocation of the principle in other contexts, including administrative-law disputes.

Before commenting on *Motau* and *My Vote Counts*, we outline the jurisprudential context within which they were decided. This context illustrates both the inconsistent application of the principle of subsidiarity as well as the need for a coherent and principled approach to determining whether and when legality or PAJA should be invoked as the basis for reviewing exercises of public power. We do not focus on the courts' avoidance of PAJA as a result of its cumbersome definition and procedural requirements, a subject that has been dealt with extensively elsewhere.¹³ Rather, we seek to explain why subsidiarity theory

⁹ *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14, 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC) ('*New Clicks*') at para 97. See also Hoexter (note 6 above) at 221.

¹⁰ We will demonstrate that whereas in *New Clicks* (note 9 above) and *Bato Star* (note 5 above) the Court explicitly and zealously invoked the principle of subsidiarity, in *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2013] ZACC 10, 2010 (3) SA 291 (CC), 2010 (5) BCLR 391 (CC) ('*Albutt*') and *KwaZulu-Natal Joint Liaison Committee v MEC, Department of Education, KwaZulu Natal and Others* [2013] ZACC 10, 2013 (4) SA 262 (CC), 2013 (6) BCLR 615 (CC) ('*KZN JLC*') the Court failed to do so. We focus our analysis on *Albutt* as the first case in which the Constitutional Court abandoned subsidiarity in the context of administrative law, and on *KZN JLC* as a missed opportunity to apply subsidiarity theory correctly in the post-*Motau* context.

¹¹ *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18, 2014 (5) SA 69 (CC) ('*Motau*'). As Hoexter points out in 'Enforcement' (note 6 above) at 223 (references omitted): '[I]n *Motau* the Constitutional Court noted unobtrusively but explicitly that "[t]he correct order of enquiry is to consider, first, whether PAJA applies, and only if it does not, what is demanded by general constitutional principles such as the rule of law". This seems to contradict the *Albutt* approach and, with respect, to make far better sense.'

¹² *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31, 2016 (1) SA 132 (CC) ('*My Vote Counts*').

¹³ See, eg, Hoexter 'Enforcement' (note 6 above) at 220–221; C Hoexter 'The Rule of Law and the Principle of Legality in Administrative Law Today' in M Carnelley & S Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Matthews* (2011) 55 ('Rule of Law'); M Murcott 'Procedural Fairness as a Component of Legality: Is a Reconciliation between *Albutt* and *Masetlha* possible?' (2013) 130 *South African Law Journal* 260 ('Procedural Fairness'), 266–270.

offers a basis for solving the threshold questions of whether and when PAJA as opposed to legality ought to be invoked in judicial review proceedings. Our central contention is that courts ought to answer the threshold questions of administrative law in a coherent and principled manner that balances the values of constitutional supremacy and constitutional democracy; and that subsidiarity theory offers a basis for doing so.¹⁴

II SUBSIDIARITY THEORY

A Content and Origin

Subsidiarity theory is richly explored in German legal theory.¹⁵ It is, however, not uniquely German, nor is it primarily a legal term; rather, subsidiarity is generally considered a Roman-Catholic social doctrine.¹⁶ Put simply, subsidiarity recognises the implicit hierarchies in communities and proposes a bottom-to-top approach: the lower level of the hierarchy should in principle exhaust its capacity to contribute in a particular context before the higher level intervenes, either by taking over or providing assistance where the lower level has reached its limit.¹⁷ Viewed negatively, the higher level plays only a supportive – subsidiary – role. Viewed positively, the higher level creates the context and circumstances within which the lower level operates.¹⁸ Van Wyk argues that, in principle, subsidiarity could apply to any hierarchical relationship and in various contexts as part of so-called ‘unwritten constitutional law’.¹⁹ Du Plessis notes that subsidiarity is not inevitably confined to hierarchically arranged norms.²⁰ It can also refer to the law’s interpretative preference for the application of a particular norm over another applicable but subsidiary norm that is required to ‘step down’ in a particular context.²¹

Subsidiarity as endorsed in South African law encapsulates the notion that adjudication of substantive issues should (subject to certain provisos that we discuss below) be determined with reference to more particular, indirect constitutional norms applicable, rather than more general, direct constitutional

¹⁴ Below we endorse aspects of the views of AJ van der Walt ‘Normative Pluralism and Anarchy: Reflections on the 2007 Term’ (2008) 1 *Constitutional Court Review* 77 (‘Normative Pluralism’) to the effect that subsidiarity theory is ‘an angle of approach’ that allows courts to adopt a coherent approach to solving complex questions about which sources of law to apply in constitutional adjudication.

¹⁵ D van Wyk ‘Subsidiariteit as Waarde wat die Oop en Demokratiese Suid-Afrikaanse Gemeenskap ten Grondslag Lê’ in G Carpenter (ed) *Suprema Lex: Essays on the Constitution Presented to Marinus Wiechers* (1998) 251, 257–259 (Recognises the fundamental role that subsidiarity plays in human rights in a *Rechtsstaat*, where tension clearly exists between the individual’s self-determination and dignity and the state’s coercive powers and authority. Van Wyk’s essay is one of the few works in South African law exclusively devoted to an investigation into subsidiarity theory. While it focuses on subsidiarity theory as applied to the structure of government under the Constitution, the work is relevant here as it explains the roots of the theory).

¹⁶ *Ibid* at 254 (Notes that the theory is not peculiar to the Roman-Catholic tradition and can also be found in Protestantism).

¹⁷ *Ibid*.

¹⁸ *Ibid* at 243–255.

¹⁹ *Ibid* at 255.

²⁰ Du Plessis (note 8 above) at 208.

²¹ *Ibid*.

norms applicable.²² General, direct constitutional norms are consequently not overused, since more specific legal precepts solve the legal question.²³ As early as 1995 the Constitutional Court endorsed subsidiarity theory in the context of constitutional adjudication (adjudicative subsidiarity theory) in *S v Mhlungu*.²⁴ The Court set out the guiding principle of subsidiarity that courts should prefer an outcome, if that is justified in the particular case, which does not involve the direct determination of a constitutional issue.²⁵ In *Zantsi v Council of State, Ciskei* the court further invoked subsidiarity to justify the methodology of developing the law incrementally.²⁶

Van der Walt views the Court's development of subsidiarity theory as an 'angle of approach' that incorporates a balancing of the values of constitutional rights (or supremacy) and democracy.²⁷ In cases involving the alleged infringement of a constitutional right, he identifies two subsidiarity principles, with provisos, followed by the courts at the threshold stage to determine the source of law in terms of which the constitutional analysis should commence. The first subsidiarity principle guides the choice between the Constitution and legislation as potential sources of law in relation to an alleged infringement of a constitutional right. The second subsidiarity principle deals with the choice between the common law and legislation as potential sources of law in relation to an alleged infringement of a constitutional right. Both principles, according to Van der Walt, affirm normative pluralism: the recognition of the contingent and contested nature of legal norms and values; but by offering a basis for choosing between the norms and values, the principles avoid adopting an 'anything goes' approach, which would amount to 'normative anarchy'.²⁸

The first subsidiarity principle, based on *SANDU v Minister of Defence*,²⁹ requires a litigant to rely on legislation when enforcing a constitutional right rather than circumventing the legislation in favour of direct application of a constitutional provision; with the proviso that the constitutional provision may be invoked

²² Ibid at 215–223.

²³ Ibid at 215.

²⁴ *Mhlungu* (note 7 above) at para 59; see also Du Plessis (note 8 above) at 209, where the author describes the adjudicative subsidiarity in *Mhlungu* as a 'reading strategy'.

²⁵ *Mhlungu* (note 7 above) at para 59. See the discussion of Van der Walt below, where we address the circumstances fully.

²⁶ *Zantsi v Council of State, Ciskei and Others* [1995] ZACC 9, 1995 (4) SA 615 (CC).

²⁷ Van der Walt 'Normative Pluralism' (note 14 above) at 99. A comprehensive account of the emergence of a normative and legal pluralism falls outside the scope of this article. We reflect on Van der Walt's account only as one possible narrative to situate the development of subsidiarity theory in the Constitutional Court.

²⁸ Van der Walt 'Normative Pluralism' (note 14 above) at 78–80. For a critical analysis of Van der Walt's account of subsidiarity, see KE Klare 'Legal Subsidiarity and Constitutional Rights: A Reply to AJ Van der Walt' (2008) 1 *Constitutional Court Review* 129. For the purposes of this article, we align ourselves with Van der Walt's response to Klare in AJ van der Walt *Property and Constitution* (2012) 36 ('*Property*'). See also Woolman's critique of the indirect application of the Bill of Rights in S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762.

²⁹ *South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10, 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC) ('*SANDU*').

where such legislation is challenged for inconsistency with the supreme law.³⁰ This principle derives from s 39(2) of the Constitution, which requires the courts to give effect to legislation enacted by the legislature pursuant to, and within the limits of, its constitutional responsibilities.³¹ The principle confirms the constitutional obligation of the elected legislature to promote the spirit, purport and object of the Bill of Rights. Consequently it affirms the value of democracy by requiring that legislation be given effect by the judiciary as demanded by the separation of powers doctrine.³² The proviso, on the other hand, confirms the value of the supremacy of the Constitution and its fundamental rights by subjecting the democratic will of the legislature to the boundaries of the Constitution that the judiciary must uphold. In this way, subsidiarity in constitutional adjudication can be employed to find a *via media* between formalistic fundamentalism and an anything-goes approach, through candidly weighing and balancing the values of constitutional supremacy and democracy in each case.³³

Van der Walt's second subsidiarity principle, derived from *Bato Star*, prohibits a litigant from indirectly enforcing and protecting a constitutional right against infringement by means of the common law where legislation, which has been intended to codify the common law, gives effect to the right in question.³⁴ The right is protected by applying the legislation in conformity with the Constitution and invoking the common law only to interpret the legislation, in line with s 39(2) of the Constitution.³⁵ This principle is subject to the proviso that the common law may be invoked to protect the right only where the legislation does not give effect to the right (or simply does not cater for it), as long as the common law is not inconsistent with applicable constitutional rights or the legislative scheme, and then only where the common law cannot be developed in order to bring it in line with the Constitution.³⁶

These two principles of subsidiarity support Du Plessis's view that, even though the Constitution enjoys normative superiority to other legal sources, its

³⁰ Van der Walt *Property* (note 28 above) at 36. This proposition was similarly endorsed by the Constitutional Court in *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28, 2010 (4) SA 1 (CC), 2013 (11) BCLR 1297 (CC) at para 73 (Emphasised that litigants' causes of action should be derived from legislation that gives effect to a constitutional right instead of from the constitutional right itself, or should alternatively challenge the constitutional validity of the legislation).

³¹ Van der Walt 'Normative Pluralism' (note 14 above) at 100.

³² *Ibid* at 103.

³³ Van der Walt 'Normative Pluralism' (note 14 above) at 103. In this way Van der Walt contends subsidiarity affirms normative pluralism. This approach is supported by Du Plessis (note 8 above) at 227. He argues that because norms not contained in the Constitution itself, such as those in legislation, are required to be fundamentally aimed at giving effect to the values of the Constitution and promoting the rights in the Bill of Rights, the enforcement of these norms should be preferred where they appropriately give effect to those objectives. In constitutional adjudication where the issue is not identified as exclusively determinable by direct constitutional application, the fundamental rights and values should be enforced through the ordinary legal principles instead of applying the wider and more flexible constitutional norms directly.

³⁴ Van der Walt *Property* (note 28 above) at 36.

³⁵ Van der Walt 'Normative Pluralism' (note 14 above) at 103.

³⁶ Van der Walt *Property* (note 28 above) at 36. Van der Walt 'Normative Pluralism' at 103 (Contends that the second subsidiarity principle and proviso affirm normative pluralism and reject the development of a system of law alternative to the Constitution).

existence does not displace ordinary legal principles.³⁷ Where a constitutional norm is consistent in its function and objectives with more particular norms not contained in the Constitution itself ('non-constitutional norms'), subsidiarity theory supports the application of the latter.³⁸ The provisos recognise the fact that, where the more particular norm is inconsistent with the subsidiary general norm, the legal authority of the constitutional norm cannot be conferred on the non-constitutional norm. Accordingly, the impugned non-constitutional norm must be invalidated unless the norm can be developed in the light of the constitutional norm to assume its lawful position in the subsidiarity relationship.³⁹ This approach harmonises the myriad non-constitutional legal principles with the spirit, purport and objects of the Bill of Rights and the Constitution,⁴⁰ which in turn supports the notion of a single system of law as endorsed by the Constitutional Court in *Pharmaceutical Manufacturers*.⁴¹

B Applying Subsidiarity Theory to Administrative Law

Arguing that a subsidiarity approach should be adopted to the threshold determination of whether PAJA or the principle of legality is to be invoked as the source of law in judicial review proceedings, Hoexter states that in line with the precedent in *New Clicks*, 'PAJA must be applied where it is applicable'.⁴² Read in isolation, this statement presents a *prima facie* logical fallacy of circular reasoning: it states its own conclusion. It is for this reason that the question may be posed: when is PAJA applicable? This seems to be a pre-threshold question to determine whether PAJA and the principle of legality are indeed competing for application in a particular dispute. We contend that

an 'administrative-law case' should be conceived broadly, as one in which the conduct in question *might* (but does not necessarily) amount to 'administrative action' in terms of s 1 of the PAJA, alternatively s 33 of the Constitution.⁴³

This conception of a broader 'administrative-law case' is premised on the proposition that the relationship between PAJA and the principle of legality is one of subsidiarity and one that recognises the continuum of constitutional accountability. While the main contenders as sources of law during judicial review proceedings are the principle of legality and PAJA, they are in fact the particular precepts of two broader constitutional norms of accountability. Legality is an instance of the rule of law, the foundational value enshrined in s 1(c) of the Constitution. PAJA, on the other hand, is the constitutional legislation mandated by s 33(3) to give effect to the constitutional rights to just administrative action,

³⁷ Du Plessis (note 8 above) at 226. According to Du Plessis, 'adjudicative subsidiarity [provides opportunities] to de-absolutise the power of the Constitution'.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('*Pharmaceutical Manufacturers*') at para 45.

⁴² C Hoexter *Administrative Law in South Africa* (2nd Edition, 2012) ('*Administrative Law*') at 134.

⁴³ Murcott 'Procedural Fairness' (note 13 above) at 268.

and is the conduit for the indirect application of the s 33 rights. Therefore, at a fundamental level, the primary (direct) norms of accountability that are competing for application are the rule of law as a founding value of the Constitution, and the rights to just administrative action enshrined in s 33. The constitutional analysis must accordingly take into account these underlying norms to construct a complete picture of the relationship between PAJA and the principle of legality at the threshold stage of the analysis.⁴⁴

The subsidiary norm in this relationship is the rule of law, whereas the more specific norm is s 33 of the Constitution, and the most specific norm is PAJA, giving effect to s 33.⁴⁵ The textual setting of the rule of law is key to understanding the nature of the norm and why it indeed constitutes the subsidiary norm, and its consequent place on our continuum of accountability in relation to exercises of public power. Since the rule of law is enshrined as a founding value of the Constitution, its normative relevance differs from that of a substantive right in Chapter 2 of the Constitution. Even though conduct inconsistent with the founding values is considered unlawful, the values are used primarily to inform the interpretation of the Constitution and of legislation and to drive the development of the common law, thus infusing the normative edifice of democracy.⁴⁶ For this reason, the constitutional design envisages that the abstract founding values on the one end of the continuum of accountability should shape the development of the other provisions of the Constitution and the ordinary law lying towards the other end of the continuum.⁴⁷ The values must be applied directly only where the other particular legal precepts have been exhausted. This approach to adjudication thus requires the more particular precept to be applied first, before resort is had to the more general value.

Whereas the rule of law generally requires the state to exercise its powers in accordance with the law,⁴⁸ the principle of legality has developed as a justiciable instance of the rule of law that imposes standards for the exercise of all public power.⁴⁹ The principle of legality is thus a general norm of constitutional law, and in adjudication this character must be taken into account at the threshold stage when considering its possible application to the case at hand.

The rights to administrative justice in s 33 of the Constitution constitute justiciable fundamental rights. This section of the Constitution has constitutionalised administrative law⁵⁰ and imposes particular standards of

⁴⁴ For us the continuum of accountability is a helpful way to construct the complete picture as it reflects the range of norms of accountability from the most general (subsidiary) norms to the most specific norms.

⁴⁵ As we discuss above, there will, of course, also be empowering provisions imposing standards of accountability in respect of particular exercises of public power, which represent even more specific norms of accountability.

⁴⁶ I Currie & J de Waal *The Bill of Rights Handbook* (6th Edition, 2013) at 7–8.

⁴⁷ *Ibid* at 8. See also *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* [2004] ZACC 10, 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) ('NICRO') at para 21, discussed in Currie & De Waal (note 46 above) at 8 fn 33.

⁴⁸ Currie & De Waal (note 46 above) at 10.

⁴⁹ FI Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2010) Chapter 11 at 11–14.

⁵⁰ *Pharmaceutical Manufacturers* (note 41 above).

administrative justice where conduct amounts to administrative action, a particular subset of exercises of public power.⁵¹ Therefore, whereas the rule of law and the principle of legality generally require the state to rule under law, s 33 further develops this fundamental norm by fleshing out the legal standards required where conduct amounts to administrative action.

PAJA, in turn, is the product of the constitutional mandate in s 33(3) and is the codifying and reformative legislation that gives effect to s 33(1) and (2). The legislation is the conduit for the indirect enforcement of the rights to just administrative action in s 33 and prescribes the specific standards of administrative law. This is why litigants are not at liberty to invoke s 33 directly and must source their cause of action in PAJA when exercises of public power amount to administrative action. Its standards apply to all 'administrative action' and in turn supplement any particular rules of administrative law found in legislation or regulations. Even though the principle of legality has become known as a parallel system of administrative law, it does not constitute any particular rules of administrative law that must be applied before the supplementary application of PAJA. The principle of legality is in fact a broader norm of constitutional law that regulates all exercises of public power, and PAJA is therefore a more specific norm of this constitutional value.

For these reasons the relationship between the rule of law and the s 33 rights is one of subsidiarity. The rule of law, and in turn the principle of legality, constitutes the more general and subsidiary norm, whereas s 33 and, in particular, PAJA, contain the primary rules of administrative law. PAJA, even though it enjoys the status of constitutional legislation,⁵² is one step removed from the Constitution, since it is a statute. The principle of legality is, however, a constitutional norm. Therefore, invocation of the principle of legality amounts to a direct application of a constitutional norm, whereas the application of PAJA constitutes the application of a norm one step removed from the Constitution, and thus an indirect application of s 33 of the Constitution, and more broadly, the rule of law.

This relationship can be read in terms of the positive and negative conceptions of subsidiarity theory. The rule of law as a founding value not only supports, but creates the context within which s 33 and PAJA operate. The supportive role of the principle of legality is especially evident in its function as a safety net where conduct does not amount to administrative action and the more particular norms have been exhausted. The principle of legality accordingly ensures that exercises of public power do not escape the continuum of accountability created by the Constitution. The subsidiary relationship between PAJA and the principle of legality explains when PAJA is applicable in a particular case and why our conception of a broader 'administrative-law case' should be supported. The rule of law, in turn, is the broader constitutional value. Whenever the potential application of the demands of administrative justice is in issue, unless specialised legislation is applicable and PAJA itself assumes a supplementary role,⁵³ the point

⁵¹ Currie & De Waal (note 46 above) at 13.

⁵² Ibid at 12–13.

⁵³ I Currie *The Promotion of Administrative Justice Act: A Commentary* (2nd Edition, 2007) ('*Commentary*') at para 1.4.

of departure ought to be PAJA. If it were not for this inquiry, ‘only supernatural perspicacity on the part of the court would allow it to know in advance that there is no reason to “reach” the PAJA.’⁵⁴ As Hoexter puts it:

The first question in any administrative-law case ought surely to be whether the most specific and most detailed norm, the PAJA, is applicable, and not whether the problem is capable of being solved by the rule of law, a far more general and abstract constitutional doctrine.⁵⁵

Since the principle of legality is subsidiary to PAJA in the broader administrative-law case, the *SANDU* subsidiarity principle and proviso should be applied. The principle requires a litigant to source her cause of action in legislation when enforcing a constitutional right. As the court confirmed in *New Clicks*, the litigant must rely directly on PAJA.⁵⁶ The court must first apply the threshold provisions of PAJA in order to determine whether the conduct in question amounts to administrative action.⁵⁷ This means that the litigant cannot rely directly on s 33, the more general constitutional norm from which PAJA is derived and to which the legislation gives effect. Furthermore, following the reasoning in *NICRO*, a litigant ought not to rely directly on the rule of law before determining whether the more particular norms (such as s 33, and by virtue of s 33(3), the PAJA) are applicable.⁵⁸ Accordingly, the Constitution is appropriately applied indirectly through the ordinary legal provisions. In the language of subsidiarity, the more particular norms must first be exhausted before resort is had to the more general norms. What subsidiarity teaches us in this process is that the supremacy of the Constitution must be upheld, and since PAJA is constitutional legislation, a purposive interpretation of PAJA must be applied.⁵⁹

The proviso to the *SANDU* principle is that the right to which the legislation gives effect can be invoked directly when attacking the constitutional validity of the legislation. This proviso is confirmed by *New Clicks*,⁶⁰ and it is accordingly open to the litigant to invoke s 33 directly when the constitutional validity of PAJA is called into question. Where the conduct in question does not amount to administrative action and PAJA is construed and deemed consistent with s 33 of the Constitution, the more particular norm of administrative justice has clearly been exhausted. Since s 33 and PAJA flesh out the more general norm of the rule of law, the threshold requirement that conduct must amount to administrative action serves to limit the exercises of power that are subject to the more rigorous precepts of administrative justice.⁶¹ Therefore, subsidiarity permits the more general norm to intervene and take over where the particular norms have run out. It is following this approach that the court in *New Clicks* endorsed the

⁵⁴ Hoexter ‘Enforcement’ (note 6 above) at 222.

⁵⁵ Hoexter *Administrative Law* (note 42 above) at 134.

⁵⁶ *New Clicks* (note 9 above) at paras 96–97.

⁵⁷ Murcott ‘Procedural Fairness’ (note 13 above) at 269.

⁵⁸ *NICRO* (note 47 above) at paras 20–25; Currie & De Waal (note 46 above) at 8 & 13.

⁵⁹ Currie *Commentary* (note 53 above) at 2.1.

⁶⁰ *New Clicks* (note 9 above) at para 97.

⁶¹ Hoexter *Administrative Law* (note 42 above) at 120. Although legality has begun to mirror PAJA’s standards, this is, in part, due to the incorrect application of subsidiarity. Moreover, legality’s standards of accountability remain more flexible and thus more uncertain than those of PAJA.

safety-net function of the principle of legality.⁶² When the particular conduct in question does not amount to administrative action (for example, when it amounts to executive action), the principle of legality serves its subsidiary function by providing a safety net that imposes standards of constitutional accountability further along the continuum of accountability.⁶³ The more general norm of the rule of law takes over where the more specific norm of administrative justice has run out.

The invocation of the principle of legality can also be seen as filling an intentional gap in PAJA. As Van der Walt argues, such a gap indeed exists in PAJA with the effect that the review of conduct that does not amount to administrative action takes place by direct reliance on the constitutional principle of legality (as a safety net).⁶⁴ Regrettably, post-*New Clicks*, legality has not always played this safety-net function. The judicial appreciation for subsidiarity theory has ebbed. In the next part of this article we comment on the ebb of subsidiarity theory with reference to *Albutt*⁶⁵ and *KZN JLC*.⁶⁶ We then consider the revival of subsidiarity theory in the Constitutional Court's jurisprudence in 2015, first in *Motau*,⁶⁷ an administrative-law case, and later in *My Vote Counts*,⁶⁸ a case concerning the relationship between the constitutional right to access to information and the statute giving effect to that right.

III SUBSIDIARITY IN PRACTICE

A The Ebb of Subsidiarity Theory: *Albutt* and *KZN JLC*

Although the Constitutional Court confirmed as early as 2004 that the cause of action for the review of administrative action is now rooted in PAJA,⁶⁹ Hoexter points out that

[f]rom the PAJA's inception there was widespread resistance to the statute, or more accurately to its overly elaborate definition of administrative action, and the courts frequently indulged applicants who preferred not to engage with it. Sometimes the court noted that the principle of legality was capable of resolving the matter at hand, while in other instances the PAJA was simply ignored without explanation. This pattern of avoidance culminated in the extraordinary judgment of the Constitutional Court in *Albutt*.⁷⁰

In *Albutt* the Constitutional Court found conduct of the President to be irrational through application of the principle of legality.⁷¹ The court criticised the High Court for considering and applying the provisions of PAJA, and found it

⁶² *New Clicks* (note 9 above) at para 97.

⁶³ Murcott 'Procedural Fairness' (note 13 above) at 270.

⁶⁴ Van der Walt 'Normative Pluralism' (note 14 above) at 106.

⁶⁵ *Albutt* (note 10 above).

⁶⁶ *KZN JLC* (note 10 above).

⁶⁷ *Motau* (note 11 above).

⁶⁸ *My Vote Counts* (note 12 above).

⁶⁹ *Bato Star* (note 5 above) at para 25.

⁷⁰ Hoexter 'Enforcement' (note 6 above) at 221.

⁷¹ *Albutt* (note 10 above) at para 74.

unnecessary to apply PAJA itself.⁷² In considering the possible application of PAJA the court first expressed the opinion that, in light of its prior jurisprudence, the conduct of the President was ‘unlikely’ to amount to administrative action.⁷³ This important preliminary conclusion was not reached by applying PAJA’s definition of administrative action, however. The court pointed out that, should the power amount to administrative action under PAJA, a number of ‘complex questions’ would have to be answered which it found ‘unnecessary’ to address.⁷⁴ Rejecting an inquiry into the applicability of PAJA by invoking judicial minimalism or avoidance, Ngcobo J found that:

Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. ... At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation. ... There may well be cases, and they are very rare, when it may be necessary to decide an ancillary issue in the public interest. This is not such a case.⁷⁵

The *Albutt* approach to determining administrative law’s threshold questions has, on the one hand, been followed in countless subsequent administrative-law cases,⁷⁶ and on the other, been severely criticised amongst legal scholars precisely because the approach flies in the face of subsidiarity theory.⁷⁷ The *Albutt* approach flouts that theory because it countenances the invocation of a general norm (legality) even where a norm of greater specificity (PAJA) might be applicable.

The consequences of the rejection of subsidiarity in *Albutt* are threefold. First, the court’s minimalist approach resulted in a failure to adopt a principled and justified approach to choosing the appropriate standards on the possible continuum of accountability against which the President’s conduct ought to have been tested. The court’s choice of legality rather than PAJA as a basis for reviewing the President’s conduct appears arbitrary. Secondly, the *Albutt* approach undermined the principle of democracy and the separation of powers. This is because the legislature has, in PAJA, articulated the standards of natural justice required when the President’s exercises of public power do amount to administrative action. By failing to consider whether those standards were applicable, the court disregarded the legitimate role of the legislature in setting those standards. Moreover, the court’s failure to justify, properly, on substantive grounds, the basis upon which it would not apply PAJA, undermined the separation of powers. Finally, the court detracted from constitutional supremacy, in that PAJA is the constitutionally mandated legislation that gives effect to s 33 of the Constitution which courts *must* invoke when reviewing exercises of public power that amount to administrative action.

⁷² Ibid at para 76.

⁷³ Ibid at para 80.

⁷⁴ Ibid at para 81.

⁷⁵ Ibid at para 82.

⁷⁶ See, eg, the cases discussed in D Brand & M Murcott ‘Administrative Law’ 2013 *Annual Survey of South African Law* 61, 61–69.

⁷⁷ See, eg, Hoexter *Administrative Law* (note 42 above) at 131, Murcott ‘Procedural Fairness’ (note 13 above) at 269–270 and Hoexter ‘Enforcement’ (note 6 above) at 221–223.

In *Valuline CC v Minister of Labour*, the Minister of Labour exercised her power in terms of the Labour Relations Act 66 of 1995 to extend a collective agreement to non-signatories in the clothing manufacturing industry.⁷⁸ The litigants challenged the Minister's decision on the bases of both the principle of legality and PAJA.⁷⁹ Koen J, however, found it 'irrelevant' to determine whether the conduct in question amounted to administrative action, and consequently whether PAJA was applicable, since the conduct fell to be reviewed under the principle of legality.⁸⁰ In following the *Albutt* approach, Koen J's selection of legality as a basis to review the Minister's conduct disregarded the legitimate role of the legislature in enacting PAJA so as to give effect to s 33 of the Constitution.

Given cases such as *Valuline*, one would think that the Constitutional Court would seek to clarify the relationship between PAJA and legality.⁸¹ Instead of doing so, in *KZN JLC* the court further muddied the judicial waters. In *KZN JLC* the Constitutional Court invoked rationality as an aspect of the rule of law (legality) as the basis upon which to review the revocation of an official promise by the provincial Department of Education to pay subsidies to independent schools.⁸² As Hoexter has argued, in *KZN JLC* public law was 'permitted to come to the rescue notwithstanding the applicant's non-reliance on the PAJA'.⁸³

During 2008, the Department promised that independent schools in the province would be paid subsidies in 2009–2010. In 2009, however, the department sought to revoke its official promise and reduce the subsidies.⁸⁴ The schools sought to enforce the department's promise, but in doing so, expressly disavowed reliance upon public law.⁸⁵ Accordingly, the Constitutional Court was not, on an explicit reading of the pleadings before it, confronted with a choice of reviewing the department's conduct on the basis of either PAJA or legality. When asked by the *amicus* (who was not party to the proceedings until the matter was brought to the Constitutional Court) to hold the department's conduct to account in terms of PAJA, the court declined to do so on the basis that the record of the department's decision was not before it as it would have been had a review application been

⁷⁸ *Valuline CC and Others v Minister of Labour and Others* [2013] ZAKZPHC 9, 2013 (4) SA 326 (KZP) ('*Valuline*'). Another pre-*Motau* example of the application of the *Albutt* approach is *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* [2012] ZAGPPHC 61, 2012 (10) BCLR 1089 (GNP) at para 18, noted in Hoexter 'Enforcement' (note 6 above) at 222.

⁷⁹ *Valuline* (note 78 above) at para 7.

⁸⁰ *Ibid.*

⁸¹ See Brand & Murcott (note 76 above) at 61–69 where they illustrate a need for clarity on whether and when to apply PAJA or legality in cases concerning the review of exercises of public power that might amount to administrative action.

⁸² *KZN JLC* (note 10 above) at para 71. See further Hoexter 'Enforcement' (note 6 above); M Murcott 'A Future for the Doctrine of Substantive Legitimate Expectation? The Implications of *Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal*' (2015) 18 *Potchefstroom Electronic Law Journal* ('Substantive Legitimate Expectation') 3133.

⁸³ Hoexter 'Enforcement' (note 6 above) at 219.

⁸⁴ *KZN JLC* (note 10 above) at paras 2–8.

⁸⁵ *Ibid.* at para 31.

brought in terms of PAJA.⁸⁶ Instead the Court offered the schools a ‘public-law lifeline’ through the application of broad, general constitutional-law norms.⁸⁷

The court’s reasoning in relation to the rejection of PAJA as a basis for review is thin, for the absence of a record is not (despite the court’s contentions to the contrary) a principled reason on which to select the basis for holding the conduct of the executive branch to account.⁸⁸ Rather than apply PAJA, the court invoked broad principles of public law as the bases upon which to hold the department to account and compel the department to fulfil its publicly promulgated promise to pay the schools. These principles were reliance, accountability and rationality.⁸⁹ While we do not fault the court for invoking *a* basis upon which to hold government to account, we do find it problematic that the court selected broad principles under the rule of law without canvassing *substantive reasons* why PAJA ought or ought not to apply.

The court held that sufficient facts had been pleaded to found a remedy in public law,⁹⁰ but other than the absence of a record, did not make it clear why that public-law remedy could not arise from PAJA rather than broad principles. The effect of failing to determine whether the more specific statutory provisions under PAJA were applicable was again to disregard the legitimate role of the legislature in enacting those provisions. Thus the court undermined the principle of democracy and the separation of powers. In doing so, the court resorted to legality without adequately justifying why PAJA could be circumvented – even though the conduct bore ‘all the hallmarks of administrative action’ under PAJA.⁹¹ In this way the *KZN JLC* Court implicitly endorsed the *Albutt* approach in that it saw no need to justify, on substantive grounds, why PAJA could be overlooked.

Although *KZN JLC* is somewhat anomalous in the manner it was pleaded and argued, like *Albutt* it illustrates a failure by the Constitutional Court to appreciate the need to adopt a coherent and principled approach in selecting a basis to review exercises of public power and hold government to account when conduct might amount to administrative action in terms of PAJA. It is in this jurisprudential context that the tide was due for a change when *Motau* was decided towards the end of 2014.

B The Flow of Subsidiarity Theory: *Motau* and My Vote Counts

Motau concerned the review of a decision by the Minister of Defence and Military Veterans (the Minister) to remove the Chair, General Motau, and the Deputy Chair, Ms Mokoena, (the respondents) from the Board of Directors of the Armaments Corporation of South Africa (SOC) Ltd (Armcor).⁹² Armcor is a wholly state-owned entity regulated by the Armaments Corporation of South Africa Limited

⁸⁶ Ibid at para 32.

⁸⁷ Hoexter ‘Enforcement’ (note 6 above) at 219.

⁸⁸ See ibid and at 224, where Hoexter points out that the court was ‘patently uninhibited by the absence of the record when it reasoned on broader and more abstract constitutional lines’. See also Murcott ‘Substantive Legitimate Expectation’ (note 82 above) at 3142–3143 and 3146.

⁸⁹ *KZN JLC* (note 10 above) at para 63.

⁹⁰ Ibid at para 70.

⁹¹ Murcott ‘Substantive Legitimate Expectation’ (note 82 above) at 3135.

⁹² *Motau* (note 11 above) at para 1.

Act 51 of 2003 (Armscor Act) over which the state exercises ownership control through the Minister. The affairs of Armscor are managed and controlled by the board, comprising nine executive and two non-executive members. Section 7(1) and (2) of the Armscor Act empower the Minister to appoint the non-executive members of the board and to designate two of these members as the Chair and Deputy Chair of the board. The Minister is in turn empowered by s 8(c) of the Armscor Act to remove the non-executive members from office. It provides that '[a] member of the Board must vacate office if his or her services are terminated by the Minister on good cause shown'.⁹³

Acting pursuant to these provisions, the Minister terminated the services of the respondents on various grounds,⁹⁴ arguing that her decision did not involve a 'legal matter' but rather a 'political matter ... informed by [her] experience'.⁹⁵ Dissatisfied with the Minister's decision, the respondents approached the High Court and sought to have her decision set aside as unlawful, unconstitutional and invalid.⁹⁶ The High Court agreed with the respondents' contentions. It found that the Minister's decision amounted to administrative rather than executive action and ruled that the Minister had, amongst other things, made an error of law and failed to afford the respondents due procedural fairness.⁹⁷ The court accordingly set aside the decision for failing to comply with the standards of accountability envisaged by the PAJA. Apart from ruling that the decision of the Minister was unlawful, the court also held that the Minister had failed to show the good cause for removal required by s 8(c) of the Armscor Act. By failing to identify the particular lapses for which the respondents could be held liable, she had unfairly singled out the respondents in light of the board's collective responsibility for managing the affairs of Armscor.⁹⁸

The Constitutional Court's approach to reviewing the Minister's decision is significant. In the first paragraph of the judgment, Khampepe J made it clear that the case turned on accountability and that the Court was required to determine the standards against which it ought to hold the Minister to account in exercising her powers of oversight in respect of the board of Armscor.⁹⁹ The Court thus made it clear at the threshold stage of the constitutional analysis that it was vitally important to determine which legal norms on the continuum of accountability should be invoked in order to hold the Minister to account.

The Court in *Motau* adopted subsidiarity theory in its approach to determining the appropriate standards of accountability by first ascertaining whether the conduct amounted to administrative action in order to determine whether the PAJA was applicable. The Court's reliance on subsidiarity theory is evident in the following passage found in its threshold analysis of the legal problem:

⁹³ Section 8(c) of the Armscor Act.

⁹⁴ See *Motau* (note 11 above) at paras 9–16.

⁹⁵ *Ibid* at para 15.

⁹⁶ *Ibid* at para 16: *Motau and Another v Minister of Defence and Military Veterans and Another* (GNP case no 51258/13).

⁹⁷ See *Motau* (note 11 above) at paras 18–19.

⁹⁸ *Ibid* at para 20.

⁹⁹ *Ibid* at para 1.

Does the Minister's decision amount to administrative or executive action? Answering this question is important. If it amounts to administrative action, it is subject to a higher level of scrutiny in terms of PAJA. If it is executive action, it is subject to the less exacting constraints imposed by the principle of legality.¹⁰⁰

Importantly, the Court relied on the subsidiarity principle identified in *SANDU* as the basis for choosing the appropriate standard of accountability.¹⁰¹ In the footnote to the quotation above, the Court quoted O'Regan J's statement in *SANDU* that 'a litigant who seeks to assert [a constitutional right] should in the first place base his or her case on any legislation enacted to regulate the right, not [the Constitution]'.¹⁰²

Having answered the threshold question on the basis of subsidiarity theory, the Court subsequently embarked on the administrative action analysis in order to determine whether PAJA, identified as the potential standard of accountability, was in fact applicable. The Court concluded that the decision of the Minister amounted to executive rather than administrative action. This finding was primarily based on the fact that the Minister's decision involved the formulation of policy in respect of Armscor in the broad sense rather than the implementation of policy in the narrow sense.¹⁰³ Having satisfied itself that the standards of accountability encompassed by PAJA were not applicable, the Court invoked the rationality standard imposed by the principle of legality as a safety net, and found that the Minister's conduct had indeed been rational.¹⁰⁴

In answering the question whether there were any procedural restraints on the Minister's exercise of her power to remove the respondents from the board, the Court first considered whether the accountability standards contained in s 71(1) and (2) of the Companies Act 71 of 2008 were applicable. This provision imposes procedural requirements on the removal of a director from the board by a company's shareholders.¹⁰⁵ The Court found that s 8(c) of the Armscor Act had to be read together with s 71(1) and (2) of the Companies Act, and concluded that the Minister acted unlawfully in failing to afford the respondents the procedural fairness dictated by the legislation.¹⁰⁶ In its *obiter* remarks, the Court inquired whether in the absence of s 71 the principle of legality would impose procedural restraints on the exercise of the Minister's powers. After briefly examining the contentious cases of *Masetlba*¹⁰⁷ and *Albutt*,¹⁰⁸ which dealt with the question of whether legality encompasses a procedural component, the Court concluded, consistent with subsidiarity theory, that this question 'does not, in the light of the applicability of the Companies Act, need to be decided here'.¹⁰⁹

¹⁰⁰ Ibid at para 27.

¹⁰¹ Ibid at para 27 fn 28.

¹⁰² *SANDU* (note 29 above) at para 52.

¹⁰³ *Motau* (note 11 above) at paras 44 and 51.

¹⁰⁴ Ibid at paras 69–71.

¹⁰⁵ Ibid at paras 72–73.

¹⁰⁶ Ibid at paras 74–80.

¹⁰⁷ *Masetlba v President of the Republic of South Africa and Another* [2007] ZACC 20, 2008 (1) SA 566 (CC), 2008 (1) BCLR 1 (CC) ('*Masetlba*').

¹⁰⁸ *Albutt* (note 10 above).

¹⁰⁹ *Motau* (note 11 above) at para 83.

The court in *Motau* therefore approached not only the relationship between PAJA and the principle of legality on the basis of subsidiarity theory, but also the relationship between the Companies Act and the principle of legality. As Hoexter notes, even though natural justice or procedural fairness is undoubtedly part of the rule of law, it has been uncertain whether it is a requirement of the principle of legality.¹¹⁰ In contrast with the *Albutt* approach, the court's subsidiarity approach to the question whether the Minister was constrained by procedural fairness standards in *Motau* is a sound exercise in judicious avoidance.¹¹¹ By recognising that the more specific norm, the Companies Act, fleshes out the procedural fairness requirements of the more general norm, the rule of law, the Court avoided the overuse of a direct constitutional norm and the further extension of the principle of legality. It appropriately upheld the principle of democracy, affirming that the legislature's expression of the standards of procedural fairness required in the particular case of shareholders removing directors from a board of a company should be exhausted before resort is had to the constitutional principle of legality. The rule of law creates the context in which the detailed legislative norms can more appropriately provide nuanced standards of accountability in particular circumstances. The legislature has greater capacity to determine what natural justice demands in specialised situations such as the removal of a director in company law.

The approach of the Court in *Motau* should be lauded for its correct application of subsidiarity theory in answering the threshold question of determining the standards on the continuum of accountability against which the impugned exercise of public power ought to be measured. However, the Constitutional Court could have gone further than adopting subsidiarity theory implicitly and merely referring to the authority for its approach in a footnote. As was argued above, the jurisprudence reveals that the courts have failed to follow a consistent approach to determining which standards of accountability ought to be applied in judicial review proceedings, resulting not only in confusing but also in arbitrary decision-making. The Constitutional Court thus missed a valuable opportunity to revisit its reasoning in *Albutt* and expound further on a principled application of the subsidiarity theory that underpinned its reasoning.

However, soon afterwards the Constitutional Court handed down judgment in a case that will likely become the *locus classicus* of constitutional subsidiarity theory, and that can perhaps make up for the Court's failures in *Motau*. In *My Vote Counts* the Court resoundingly endorsed subsidiarity theory in the context of the relationship between the right to access to information in s 32 of the Constitution and the legislation giving effect to that right, PAIA.¹¹² Although *My Vote Counts*

¹¹⁰ Hoexter *Administrative Law* (note 42 above) at 418. See further Hoexter's discussion of the contentious cases of *Albutt* (note 10 above) and *Masetlha* (note 107 above) at 418–420 regarding the question whether the principle of legality demands procedural fairness.

¹¹¹ See I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 147. The Court appropriately left open the question when legality might demand the application of procedural-fairness standards, as it relied instead on the more specific rules contained in the Companies Act. The court thus placed the exercise of the power at the appropriate point on the continuum of accountability by relying on the most specific norms available.

¹¹² *My Vote Counts* (note 12 above).

was not an administrative-law case, it should illustrate to courts and litigants that it offers a sound approach for resolving the threshold questions of administrative law.

My Vote Counts concerned a non-profit organisation that promoted accountability, transparency and inclusiveness in the South African political system. Concerned with the prominent and largely unregulated role afforded to political parties under the Constitution, the applicant, *inter alia*, campaigned for law reform regarding the funding of political parties. In an attempt to achieve such reform, it resorted to the courts. Relying on the constitutional right of access to information, the applicant applied directly to the Constitutional Court, seeking an order to compel the legislature to enact legislation requiring ‘systematic and proactive disclosure of private funding of political parties’.¹¹³

The nub of the applicant’s case depended on a direct application of s 32 of the Constitution.¹¹⁴ This section is divided into two parts. The first part guarantees the right to access any information held by the state and private persons. Whereas the right to access state information is expressed in unconditional language, the right to access private information vests only if such information is required for the exercise or protection of any rights. The second part mandates the legislature, in peremptory terms similar to s 33(3) of the Constitution, to enact national legislation to give effect to this right. Accordingly, PAIA, the constitutional legislation that a party must now ordinarily rely on to enforce the right of access to information, was enacted.¹¹⁵

Critically, instead of sourcing its cause of action in PAIA, the applicant in *My Vote Counts* relied directly on s 32. According to the applicant, voters had the right to access information on private funding of political parties because such information is necessary for the exercise and protection of the right to vote guaranteed in s 19(3) of the Constitution.¹¹⁶ Furthermore, the legislature was required to enact national legislation to give effect to the right of access to information in s 32(1). However, because neither PAIA nor any other legislative provision required the systematic disclosure of information relating to party political funding, the legislature had failed to comply with its constitutional obligation fully to give effect to the right, and should therefore be ordered to enact legislation regulating the continuous disclosure of such funding.¹¹⁷

¹¹³ *Ibid* at para 8.

¹¹⁴ Section 32 of the Constitution provides: ‘(1) Everyone has the right of access to— (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights. (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.’

¹¹⁵ Hoexter *Administrative Law* (note 42 above) at 97. This rule is based on the principle of adjudicative subsidiarity.

¹¹⁶ *My Vote Counts* (note 12 above) at para 19. Political parties had been characterised as private bodies in *Institute for Democracy in South Africa and Others v African National Congress and Others* [2005] ZAWCHC 30, 2005 (5) SA 39 (C). In order to satisfy the condition in s 32(1)(b), the applicant therefore argued that the information on private funding was necessary for the enforcement and protection of the right to vote.

¹¹⁷ *My Vote Counts* (note 12 above) at para 19.

In response, counsel for the legislature argued that the applicant's approach flouted the principle of subsidiarity. Applying this principle, the applicant was not entitled to circumvent PAIA and rely directly on s 32.¹¹⁸ Instead, because PAIA is the more specific norm that gives effect to s 32, the applicant ought to have enforced its right through the legislation. On the other hand, had the applicant contended that PAIA failed to give full effect to the constitutional right of access to information, the correct approach according to the principles of jurisdiction would have been to challenge the constitutionality of PAIA 'frontally' in the High Court.¹¹⁹ As a result, the applicant was caught in what the Court termed a 'logical trap': whether or not PAIA fully gave effect to its right of access to information, the application had to be dismissed.¹²⁰

The Court split 7-4 against the applicant. The crucial difference between the majority and the minority judgments was whether the principle of subsidiarity applied to the facts of the case: the majority dismissed the application on the basis that it did. The judgment commences with the dissent in which Cameron J provided a lucid historical account of the application and importance of the principle of subsidiarity in South African jurisprudence.¹²¹ Significantly, the majority of the Court concurred in Cameron J's exposition,¹²² thereby providing definitive full-court confirmation of the prominence of subsidiarity as a principle of South African constitutional law. After considering a number of the various applications of the broader concept of legal subsidiarity, the minority focused on the form of the principle of subsidiarity most applicable to the facts, namely adjudicative subsidiarity as expounded in this article. According to Cameron J, this form of subsidiarity has frequently been invoked to 'describe the principle that limits the way in which litigants may invoke the Constitution to secure enforcement of a right'.¹²³ Although all law and conduct derive their validity from the supreme Constitution, the Constitution's influence is ordinarily exerted indirectly through legislation and the common law.¹²⁴ Accordingly, the Court in *SANDU* confirmed the adjudicative subsidiarity principle and proviso that, where legislation is enacted to give effect to a constitutional right, a litigant may not invoke the Constitution 'without first relying on, or attacking the constitutionality of' such legislation.¹²⁵ Cameron J then cited a number of cases in which the courts have unequivocally applied the *SANDU* principle and proviso, including the *New Clicks* ruling that a litigant may not circumvent the PAJA in favour of the common law or the s 33 rights.¹²⁶

¹¹⁸ Ibid at paras 44–46.

¹¹⁹ Ibid at paras 122, 178 and 193. Section 172(2)(a) of the Constitution provides: 'The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a Provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.'

¹²⁰ *My Vote Counts* (note 12 above) at para 45.

¹²¹ Ibid at paras 47–64.

¹²² Ibid at para 121.

¹²³ Ibid at para 50.

¹²⁴ Ibid at para 52.

¹²⁵ Ibid at para 53.

¹²⁶ *New Clicks* (note 9 above) at para 96.

Moreover, both the minority and majority judgments made it clear that the principle of subsidiarity is not merely a formalistic tool or instrumentality invoked when determining threshold issues in constitutional adjudication. Summarising the minority's reasoning, the majority held that there are at least three important reasons for a subsidiarity approach to the application of the Constitution:

First, allowing a litigant to rely directly on a fundamental right contained in the Constitution, rather than on legislation enacted in terms of the Constitution to give effect to that right, 'would defeat the purpose of the Constitution in requiring the right to be given effect by means of national legislation'. Second, comity between the arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights. Third, 'allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of "two parallel systems" of law'.¹²⁷

These reasons emphasise the important value of subsidiarity: it promotes a principled method for determining when the Constitution should be applied directly or indirectly. Subsidiarity permits a substantive approach to applying legal norms, encouraging the adjudicator to recognise the values that underlie them. As Van der Walt argues, the *SANDU* principle and proviso emphasise that when legislation has been enacted giving effect to a right, the values of constitutional supremacy and democracy are subject to each other: to ignore legislation in favour of the direct application of a constitutional right where it exists 'would be to fail to recognise the important task conferred upon the Legislature by the Constitution to respect, protect, promote and fulfill the rights in the Bill of Rights'.¹²⁸ In turn, as evidenced by the majority judgment in *My Vote Counts*, this approach forced the Court candidly to reflect on the separation-of-powers implications of judicial review, thereby promoting principled and substantive judicial reasoning.

On the facts, the minority ultimately found that the principle of subsidiarity was not applicable. According to the Cameron J, the principle of subsidiarity did not find application owing to the manner in which the applicant pleaded its case. Rather than challenging the constitutional validity of PAIA, the applicant contended that the legislature had failed in its s 32(2) obligation to give effect to the right of access to information.¹²⁹ Because of the restricted ambit of PAIA, which fails to include a mechanism for systematic access to information on the funding of political parties, the legislature had failed to give proper effect to the right. Consequently, the applicant did not seek to circumvent PAIA in favour of the constitutional right and in violation of subsidiarity. Instead, 'the applicant confronted [PAIA] head-on, and invoked the Constitution only as a means to show that PAIA's reach falls short of fulfilling the obligations of Parliament under s 32(2)'.¹³⁰ As explained below, this should be viewed as an example of what Van der Walt calls a gap in legislation: where such a gap exists on a particular

¹²⁷ *My Vote Counts* (note 12 above) at para 160.

¹²⁸ *SANDU* (note 29 above) at para 52, quoted with approval in *My Vote Counts* (note 12 above) at para 163.

¹²⁹ *My Vote Counts* (note 12 above) at para 67.

¹³⁰ *Ibid* at para 74.

point, the subsidiarity principles ought not to apply and the litigant may resort directly to either the Constitution or the common law.¹³¹

The majority of the court, however, found this reasoning unconvincing based on the following approach. First, in terms of the case law and on an interpretation of the preamble, long title and objects of the Act, PAIA was the legislation intended to give effect to s 32 of the Constitution, notwithstanding the fact that there might be other legislative provisions also providing for access to information.¹³² Secondly, the crux of the applicant's objection was the manner in which the legislature had exercised its legislative powers. It argued that the legislature had failed in its duty to give effect to the right of access to information in that PAIA did not provide for the systematic disclosure of political parties' private funding. However, the majority held that in the absence of a constitutional challenge to PAIA, the separation-of-powers doctrine prevented a litigant from asking the court to prescribe to the legislature how to fulfil its legislative function.¹³³ In the circumstances, the applicant's argument amounted to nothing more than stating that PAIA was unconstitutional to the extent that it failed to give full effect to the right of access to information.¹³⁴ Accordingly, on an application of the proviso to the *SANDU* principle, subsidiarity required the litigant to challenge the constitutionality of PAIA frontally for its alleged shortcomings and deficiencies. Subsidiarity thus sounded the death-knell for the applicant's case. As the majority explained:

[W]e cannot bring ourselves to hold that there has been non-compliance with a constitutional obligation in circumstances where the shortcomings complained of by the applicant – and amplified by the minority judgment – may well prove to be constitutionally compliant. The issue is not whether they are indeed compliant. Whether they are, is something that may be tested properly in what we have tagged a frontal challenge. Therein lies the jurisprudential value of the principle of subsidiarity.

...

On the procedure resorted to by the applicant and the approach adopted by the minority judgment, the usual procedural hoops in a frontal challenge that invokes inconsistency with a right in the Bill of Rights are bypassed. It may well be that Parliament might have been able to demonstrate that what shortcomings there may be are justified in terms of s 36(1) of the Constitution. How do we then reach a conclusion that Parliament has failed to comply with a constitutional obligation? Or, do we simply say, quite plainly, Parliament could never have been able to show justification? How can we say that when – as we seek to demonstrate below – that was not a case that Parliament had to meet and, therefore, not an issue before us? That cannot be so.¹³⁵

In our view, the minority was correct in ruling that the principle of subsidiarity was not applicable to the facts of the case. The *SANDU* principle and proviso are aimed at preventing a litigant from circumventing legislation and relying directly on a constitutional right, thereby undermining the constitutionally enshrined role of the legislature. In this case the applicant did not seek to circumvent PAIA or to

¹³¹ Van der Walt 'Normative Pluralism' (note 14 above) at 106–107.

¹³² *My Vote Counts* (note 12 above) at paras 136–149.

¹³³ *Ibid* at paras 155–156.

¹³⁴ *Ibid* at para 162.

¹³⁵ *Ibid* at paras 174–175, footnotes omitted.

undermine the value of constitutional democracy. Instead, the applicant sought to hold the legislature to account for failing to give adequate effect to the right to access to information. In Van der Walt's language, this is the type of case in which the legislature, whether intentionally or by mistake, left a gap in the legislation:

SANDU and *Bato Star* must therefore be applied flexibly; even supposedly codifying legislation will leave gaps and, if the Constitution or the common law provides for such a gap, the next step could be to turn to the Constitution or the common law to fill that gap rather than challenge the legislation. Shifting the problem up to the Constitution or down to the common law before reverting to a constitutional challenge makes sense if a gap in the legislation means that the specific aspect is not covered by the legislative scheme, which means that the subsidiarity principles do not apply and the gap can be filled by application of constitutional provisions or the common law, as illustrated by constitutional review of legislative, executive or judicial acts and by judicial review of administrative action in cases where private bodies exercise public power.¹³⁶

In the circumstances, the minority in *My Vote Counts* correctly held that the principle of subsidiarity was not applicable to the facts of the case because 'the validity of [PAIA] is not at issue'.¹³⁷

In our view, the majority ruling in *My Vote Counts* should be viewed as an extension of the classic *SANDU* proviso based on the doctrine of separation of powers: when a litigant challenges the legislative branch for failing in its constitutional obligation to give effect to a right in the Bill of Rights, subsidiarity and the doctrine of separation of powers demand that a litigant launch a frontal challenge to the validity of the legislation. However, this extension of the *SANDU* proviso could lead to the undesirable situation where the legislature becomes the final arbiter on the boundaries of constitutional rights. The majority's reliance on the doctrine of separation of powers to extend the *SANDU* proviso misconceives the nature of the applicant's case. As mentioned above, instead of impugning the validity of PAIA, the applicant argued that the legislature had failed to fulfil a constitutional obligation. To the extent that this amounts to an infringement of the doctrine of separation of powers, such an infringement is constitutionally sanctioned in s 167(4)(e), which confers exclusive jurisdiction on the Constitutional Court to determine whether the legislature has failed to fulfil a constitutional obligation. As Klare notes, it would be 'paradoxical to entrench judicially enforceable rights in a supreme constitution — a constitution meant to constrain the legislature — and then leave it to the legislature effectively to determine how those rights are to be protected and enforced, subject only to highly deferential judicial review'.¹³⁸

Notwithstanding the differences between the majority and minority regarding the applicability of subsidiarity to the facts of the case, the two judgments constitute an unequivocal confirmation of the constitutional principle of subsidiarity. The *SANDU* principle and proviso, as recognised in *My Vote Counts*, apply equally to other constitutional provisions where the legislature is mandated

¹³⁶ Van der Walt 'Normative Pluralism' (note 14 above) at 109.

¹³⁷ *My Vote Counts* (note 12 above) at para 67.

¹³⁸ Klare (note 28 above) at 143.

to enact legislation to give effect to a constitutional right. This includes the rights to administrative justice. The Constitutional Court has thus, in *My Vote Counts*, arguably foreclosed any debate about how to approach administrative law's threshold questions.

A key difference between *My Vote Counts* and *Motau* is that in the context of access to information cases our courts have not developed a justiciable principle akin to legality – that is, a principle emerging from the constitutional values by which litigants can assert a claim for access of information, and which could usurp the role of s 32 of the Constitution and PAIA as the principle of legality does in relation to s 33 and PAJA. Were such a principle to emerge, it might for instance be couched as ‘the principle of transparency’, another aspect of the rule of law. But the absence of such a principle makes a difference. In *My Vote Counts* it meant that the important role of the legislature in the scheme of separation of powers was explicitly recognised and confronted by the Court. As we discuss above, in *My Vote Counts* both the majority and the minority tested the legislation enacted to give effect to s 32 against s 32. For the majority, the absence of a frontal challenge to PAIA meant that the applicants were unsuccessful. For the minority, a gap in the legislation meant that the applicants had to succeed. In administrative-law cases, when courts flout subsidiarity and ignore the existence of a constitutional continuum of accountability, resort to the principle of legality has the effect of cutting the legislature out of the equation entirely, as PAJA's validity or otherwise is simply overlooked. This difference, for us, reveals that the correct application of subsidiarity is all the more important in administrative-law cases, if the value of democracy is to be upheld.

Further, *My Vote Counts* does what *Motau* failed to do by explicitly offering a coherent and principled method for choosing between the PAJA, s 33 and the principle of legality as potential sources of administrative review. This means that where a litigant seeks to enforce the rights to administrative justice, resort must first be had to the PAJA. Only where the validity of the PAJA (or other original legislation) is challenged may the s 33 rights be invoked directly. Moreover, only in circumstances where the conduct does not amount to administrative action, and provided the PAJA is not found to be inconsistent with s 33 of the Constitution, may resort be had to the principle of legality as a safety net to ensure that the conduct in question does not escape constitutional scrutiny.

IV CONCLUSION: TIME TO STEM THE TIDE

Recent administrative-law jurisprudence of the High Court and Supreme Court of Appeal reveal that, notwithstanding *Motau* and *My Vote Counts*, a lack of clarity persists as to how to address the threshold questions whether and when legality or PAJA should be invoked as the basis to review public power that might amount to administrative action. For instance, in *Minister of Education for the Western Cape v Beauvallon Secondary School*, Leach JA held, in judicial review proceedings concerning a decision to close a number of schools, that it was unnecessary to determine

whether PAJA was applicable.¹³⁹ Dismissing the importance of subsidiarity in one fell swoop, he made the following startling statement:

I am aware that as a rule a court considering the review of a decision of a public official should determine whether or not the proceedings are governed by PAJA. But I do not believe that rule to be rigid and inflexible, as it is indeed now well established that even in cases where PAJA is not of application, the principle of legality may be relied upon to set aside an executive decision made not in accordance with the empowering statute. And in the present case the statutory incorporation into s 33(1) of the Schools Act of a notice and comment procedure essentially the same as that envisaged by s 4(3) of PAJA renders superfluous any attempt to pigeonhole the decision to close the schools as either executive or administrative in nature.¹⁴⁰

A number of High Court judgments have followed suit. One notable example is *Aboobaker NO v Serengeti Rise Body Corporate* where Steyn J, reviewing a decision of the eThekweni Municipality to rezone a property and approve building plans for a development in Durban, failed to answer administrative law's threshold questions, bypassing PAJA and applying legality to the dispute simply because legality had not previously been 'ruled out'.¹⁴¹ In these decisions PAJA is treated as an inconvenience – something the judge need not 'dwell on'.¹⁴² As Cachalia JA observed in 2016 when writing for a majority of the Supreme Court of Appeal in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*, this is jurisprudentially unacceptable.¹⁴³ In this case the State Information Technology Agency (SITA) applied to have its decision to conclude a contract with Gijima declared unenforceable for lack of compliance with public procurement requirements. In doing so, however, SITA relied on the principle of legality rather than the PAJA, arguing that the latter does not apply when an organ of state is seeking to undo its own decisions. Cachalia JA held:

It is well established that a decision by a state entity to award a contract for services constitutes administrative action in terms of s 1 of PAJA. Once this is accepted, there is no good reason for immunising administrative decisions taken by the state from review under PAJA.¹⁴⁴

However, a minority of the Supreme Court of Appeal found the majority's insistence on applying PAJA to be unduly 'formalistic'.¹⁴⁵ For the minority,

¹³⁹ *Minister of Education, Western Cape and Another v Beauvallon Secondary School and Others* [2014] ZASCA 218, 2015 (2) SA 154 (SCA) at para 16.

¹⁴⁰ *Ibid.*

¹⁴¹ *Aboobaker NO and Others v Serengeti Rise Body Corporate and Another* [2015] ZAKZDHC 54, 2015 (6) SA 200 (KZD) at para 8. See also *Relmar Holdings (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries and Another* [2015] ZAWCHC 103, 2015 JDR 1546 (WCC) at para 73 and *Gidani (Pty) Ltd v Minister of Trade and Industry and Others* [2015] ZAGPPHC 457, 2015 JDR 1471 (GP) ('*Gidani*').

¹⁴² *Gidani* (note 141 above) at para 58. See also *Malema and Another v Chairperson, National Council of Provinces and Another* [2015] ZAWCHC 39, 2015 (4) SA 145 (WCC) at para 47.

¹⁴³ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2016] ZASCA 143, 2017 (2) SA 63 (CC) ('*Gijima*') at para 16, and see also paras 36–37. This was also acknowledged in *Comair Ltd v Minister of Public Enterprises and Others* [2015] ZAGPPHC 361, 2016 (1) SA 1 (GP) at para 22.

¹⁴⁴ *Gijima* (note 143 above) at para 16.

¹⁴⁵ *Ibid* at para 55.

notwithstanding the administrative nature of the conduct under scrutiny, legality could be invoked if this was what justice demanded.¹⁴⁶

The minority's approach in *Gijima* is problematic.¹⁴⁷ As we have illustrated above, answering administrative law's threshold questions by applying subsidiarity theory affirms the value of democracy and the separation of powers: it gives recognition to the legislature responsible for enacting PAJA. It is eminently more appropriate to test exercises of public power that amount to administrative action with reference to a statute enacted by the legislature (PAJA) than through judge-made law conceived with reference to the flexible principle of legality. At the same time, subsidiarity theory upholds constitutional supremacy. It does so first because it demands the application of a constitutionally mandated statute, PAJA, when that statute is applicable. It places that conduct on a continuum of constitutional accountability through the application of direct norms specifically intended to test public power that amounts to administrative action. Secondly, it allows exercises of power to be tested further along the continuum of accountability through the application of more general constitutional norms when PAJA is not applicable.

Thus, the judicial refusal to answer administrative law's threshold questions is significant for at least two reasons: it amounts to disdain for the legislature's legitimate role in the scheme of separation of powers and it amounts to a rejection of constitutional supremacy. These values have been recognised not only in early Constitutional Court jurisprudence such as *Mhlungu*, *Zantsi* and *New Clicks*, but also more recently in *Motau* and forcefully in *My Vote Counts*. We therefore believe that it is time to stem the tide of the judicial refusal to answer administrative law's threshold questions: subsidiarity theory offers a coherent basis upon which to do so.

¹⁴⁶ Ibid at para 58.

¹⁴⁷ For commentary on the minority's approach see Danie Brand, Melanie Murcott & Werner van der Westhuizen 'Administrative Law' 2016 (3) *Juta's Quarterly Review of South African Law* (forthcoming) at para 2.1.1.