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# Revenge pornography, privacy and dignity: a constitutional analysis of South African privacy laws

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# REVENGE PORNOGRAPHY, PRIVACY AND DIGNITY: A CONSTITUTIONAL ANALYSIS OF SOUTH AFRICAN PRIVACY LAWS

*by*

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Submitted in partial fulfilment of the requirements for the degree of Master of Laws by Coursework and Research Report at the University of the Witwatersrand, Johannesburg.

# DECLARATION

I, Tough Mercy Bonongwe, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through Turnitin and have attached the report to my submission.

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This paper is dedicated to my husband Dr Phylos Bonongwe; I thank you for all the support you gave me to successfully complete this degree. To my daughter Tanyada and my son Shaun (bonda), you are so sweet.

# ABSTRACT

Privacy in the fourth industrial revolution has become a major concern. Accordingly, there are changes to how information is shared and received from one individual to another. This is the result of ever-developing information and communication technologies. These technologies have the ability to process information, which includes personal information, much easier and faster than ever before. Concomitant to these developing technologies are the threats that these entail for an individual's privacy. An example of such a threat is revenge pornography.

This research report seeks to evaluate the South African legal framework regulating revenge pornography against the Constitution of the Republic, 1996. In this regard, consideration must be given to relevant constitutional provisions and principles, the Protection of Personal Information Act 4 of 2013 ('POPIA') and the common law (as applicable sources of law). As my theoretical framework, I am using the doctrine of adjudicative subsidiarity to provide an integrated and constitutional reading of the different sources of law that apply to the regulation of revenge pornography. Furthermore, I am using the concept of informational privacy, as originating from the interaction between the common law and Constitution which implicate both the value of human dignity and the fundamental right to privacy, to act as the constitutional backdrop to discuss the interpretation and application of the POPIA. With that being said, it is important to note that POPIA provides the legal duty, cause of action and remedies regarding the adjudication of the privacy interests infringed by revenge pornography. At the end of this research report, I will provide an integrated reading and application of the abovementioned sources to the infringement of the aforementioned privacy interests by revenge pornography.

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# REVENGE PORNOGRAPHY, PRIVACY AND DIGNITY: A CONSTITUTIONAL ANALYSIS OF SOUTH AFRICAN PRIVACY LAWS

## 1. Introduction

Privacy is one the fundamental human rights that is protected by the Constitution.[1] The right to privacy in section 14 of the Constitution provides comprehensive protection to many privacy interests which include informational privacy (which does not expressly appear in the text of the Constitution).[2] Informational privacy extends protection against any unlawful means of obtaining personal information and/or the unauthorised disclosure of such information.[3] Consequently, such infringements to informational privacy interfere with an individual's autonomy associated with their private sphere of seclusion and choices related thereto.[4]

The rapid development of information and communication technologies ('ICT's') during the third and fourth industrial revolution has created various threats to informational privacy in the digital age.[5] These ICT technologies have the ability to store personal information at a greater capacity and process such information at a faster rate.[6] These developments also give rise to personal computing and communication devices and communication networks which enable the creation of user-generated content at a global scale through automated means.[7] Personal information can now be easily collected, processed and stored indefinitely and be disseminated to an unlimited number of individuals.[8] Within this context, Anneliese Roos[9] argues that these developments enable ordinary individuals to intrude in another person's private life and disclose such information on a wide-spread scale as a direct threat to an individual's informational privacy.[10] A specific example hereof is revenge pornography.

Important to note, revenge pornography has been widely defined by various authors.[11] For purposes of this research report, revenge pornography involves the non-consensual

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[1] Section 14 of the Constitutional of the Republic of South Africa, 1996.
[2] See *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) para 14.
[3] D Mcquoid –Mason 'Invasion of privacy: Common law v constitutional delict-does it make a difference? (2000) *Acta Juridica* 227, 228.
[4] Ibid.
[5] A Roos 'Privacy in the Facebook era: A South African legal perspective' (2012) 129 *South African Law Journal* 375, 377.
[6] S Sorooshian and S Panigrahi 'Impacts of the 4th industrial revolution on industries' (2020) 17(18) *Walailak Journal of Science and Technology* 903, 904-906; Roos (note 5 above) 380.
[7] Ibid 380.
[8] Roos (note 5 above) 380.
[9] A Roos 'Core principles of data protection law' (2006) 39(1) *Comparative and International Law Journal of Southern Africa* 102, 105.
[10] Ibid.
[11] For example, 'It is described as the online release of explicit photographs or videos of an individual without permission for the purpose of humiliation'. See MD Mudasir Kamal, J William and MD Newman 'Revenge Pornography: Mental Health Implications and Related Legislation' (2016) 44 *The Journal of the American Academy of Psychiatry and the Law* 359, 361. Some also see it as 'the public distribution of sexually graphic images of an

publication of private, intimate and sexually explicit materials (i.e., images or films) by the perpetrator to whom they were entrusted which will cause psychological distress to a victim.[12]

In South Africa, there have been incidences where individuals have fallen victim to revenge pornography.[13] The judgment of *KS v AM*[14] serves as a perfect example (although the court did not classify the issue explicitly as one dealing with revenge pornography but the subject matter of the case falls within the definition of revenge pornography). Here the victim and perpetrator were involved in an 'intimate relationship'.[15] This intimate relationship flourished to such an extent that the parties considered marriage.[16] However, the victim believed that the perpetrator was an unmarried man while in fact he was already married.[17] Upon discovery of this information, the victim ended the relationship with the perpetrator.[18] The perpetrator refused to accept this state of affairs. The perpetrator created a 'fraudulent Facebook account' where he posted 'certain explicit sexual video footage and photographs of the victim with the intention 'to prevent other men showing interest in' the victim.[19] The victim was unaware of this account with the mentioned materials until friends and family of the victim notified her.[20] The court found that such materials infringed the victim's interests to her privacy and dignity.[21] The court ultimately proclaimed that 'such material in the hands of the [perpetrator] remains a weapon in his hand' which causes severe humiliation to the victim and a violation the victim's sense of privacy.[22]

Since revenge pornography involves the publishing of private, intimate and sexually explicit materials without consent, the Court in *NT v Kunene*[23] noted that such materials 'involve that innermost sphere of privacy, the sexual sphere' where an individual ought to have the autonomy to decide what he or she does in this sphere.[24] Revenge pornography implicates a victim's privacy and dignity as such material violates an individual's interest in private sexual

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adult for no legitimate purpose at all'. See S Chisala-Tempelhoff & MT Kirya 'Gender, law and revenge porn in Sub Saharan Africa: a review of Malawi and Uganda' (2016) 2 *Palgrave Communications* 1, 2. 'It involves the distribution of sexually graphic images of an individual where at least one of the parties depicted did not consent to the dissemination and that sometimes these distributed images are obtained with consent but later disseminated unlawfully'. See M Musoni 'The criminalisation of "revenge porn" in South Africa' (2019) 40(1) *Obiter* 61, 62.

[12] M Goudsmit *Revenge pornography: A conceptual analysis - Undressing a crime of disclosure* (unpublished MA thesis, Leiden University, 2017) 24.

[13] Musoni (note 11 above) 63.

[14] *KS v AM* 2018 (1) SACR 240 (GJ).

[15] Ibid para 7.

[16] Ibid para 8.

[17] Ibid para 9.

[18] Ibid para 10.

[19] Ibid paras 12-15.

[20] Ibid.

[21] Ibid para 63.

[22] Ibid para 52.

[23] 2017 (4) All SA 865 (GJ).

[24] Ibid para 32.

information and humiliates, degrades and robs an individual of autonomy to be exercised in respect of such intimate information.[25]

Of further importance, it must be noted that various sources of law apply to the adjudication of revenge pornography. Historically, the protection of informational privacy and dignity was based at common law.[26] With the advent of the Constitution, dignity was recognised as a fundamental right and value while privacy was only recognised as a fundamental right in the Bill of Rights.[27] More recently, the Protection of Personal Information Act 4 of 2013 ('POPIA') was enacted to regulate a range of privacy issues associated with the 'processing of personal information' (including the publication of private, sexually explicit and intimate information).[28] Each of these sources imposes various obligations in respect of informational privacy which in turn provides their own causes of action for purposes of establishing remedies.[29] An integrated reading and application of these sources is required under the constitutional doctrine of adjudicative subsidiarity which creates a hierarchy of sources in giving effect to the Constitution.[30]

Therefore, this research report seeks to constitutionally interrogate South African privacy laws applicable to revenge pornography with the purpose of providing an integrated reading and application of the Constitution, common law and POPIA to revenge pornography as premised on the doctrine of adjudicative subsidiarity. This is the basic aim and purpose of this research report. To address the aforementioned aim and purpose of this research report, I will provide a brief outline of its sections below.

Section two will focus on the doctrine of adjudicative subsidiarity which will act as my theoretical framework to provide an integrated and constitutional reading of different sources of law that apply to revenge pornography. This section will further highlight the concepts of transformative constitutionalism, the horizontal application of the Constitution and Bill of Rights and how they interlink with the doctrine of adjudicative subsidiarity. Lastly, this section will highlight my central argument that the concept of informational privacy will form a

[25] Ibid para 29. See also *KS v AM* (note 14 above) para 38.
[26] A Naude and S Papadopoulos 'Data protection in South Africa: The Protection of Personal Information Act 2013 in light of recent international developments' (2016) 79 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 51, 53.
[27] See sections 1, 10 and 14 of the Constitution.
[28] See Naude Papadopoulos (note 26 above) 51 who are explaining on how it took 40 years for South Africa to come up with a legislation that deals with protection of personal information**.** In 2013, the Protection of Personal Information Act (the POPIA) was enacted in terms of GN 912 in GG 37067. The commencement date of the POPIA is 1st of July 2020 and the enforcement date should be the 1st of July 2021. See sections 4 and 5 below where the application of POPIA to revenge pornography will be detailed.
[29] See generally Mcquoid –Mason (note 3 above) and Naude & Papadopoulos (note 26 above).
[30] K Klare 'Legal subsidiarity and constitutional rights: A reply to AJ Van Der Walt' (2008) 1 *Constitutional Court Review* 129, 134. There is a need to point out that the law in South Africa intends to criminalize revenge pornography through the enactment of the Cybercrimes and Cybersecurity Bill B6-2017. However, this research report will only deal with civil liability associated with revenge pornography.

constitutional backdrop to the interpretation and application of the POPIA (as an enacted legislation which will primarily adjudicate the interests infringed by revenge pornography).

Following this, section three will look at informational privacy which is founded on the fundamental right to privacy and the fundamental value of human dignity as supplemented by the common law. Section four will then analyse how POPIA will adjudicate the interests infringed by revenge pornography by looking at its relationship to informational privacy, its scope of application and the obligations it creates in respect of personal information for purposes of determining liability and providing remedies.

Thereafter, section five will consolidate these sections and provide an integrated reading and application of the Constitution, common law and POPIA to revenge pornography. Lastly, I will reiterate the importance and practical value of this integrated reading and application of the aforementioned sources of law in the concluding section of this research report, namely section six.

For purposes of utmost clarity, it must be further noted that sections 2 to 4 will sketch the basic principles of the aforementioned integrated reading and application. The application of these principles will take place in section 5 as part of providing and integrated reading and application of the different sources applicable to revenge pornography.

**2. The doctrine of adjudicative subsidiarity**

In the post 1994 era, parliamentary sovereignty was abolished and a system of constitutional supremacy was introduced in South Africa.[31] In terms of this system of constitutional supremacy, courts are now tasked to promote the transformative goals of the Constitution to the South African legal system as a whole.[32] In the South African context, this denotes 'transformative constitutionalism'.[33] Transformative constitutionalism has been described as 'a long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction'.[34] In order to transform such aforementioned institutions and power relationships, which include the balancing of power in the private sphere, courts are now tasked to apply foundational constitutional values and fundamental constitutional rights to these private relationships as they are no longer isolated from the transformative reach of the Constitution.[35]

[31] L Hawthorne 'Legal tradition and the transformation of orthodox contract theory: The movement from formalism to realism' (2006) 12(2) *Fundamina* 71, 130.
[32] Ibid.
[33] Ibid 131.
[34] K Klare 'Legal culture and transformative constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 146, 150.
[35] Hawthorne (note 31 above) 131.

As it will become clearer in this research report, this will entail the application of the foundational value of human dignity and the fundamental right to privacy in the context of revenge pornography. .

In order to achieve such transformation pragmatically in private relationships, the courts developed the doctrine of adjudicative subsidiarity.[36] The doctrine of adjudicative subsidiarity is a constitutional reading strategy that aims for an integrated reading of the different sources of law to realise the transformative goals of the Constitution while maintaining coherency and certainty of legal principles.[37] In other words, adjudicative subsidiarity provides principles for identifying various sources of law and how to integrate these sources to a legal dispute concerning the infringement of fundamental rights in the context of a private relationship.[38] The focus here is on the integration of various sources in pursuing a single constitutionalised system of law.[39]

Important to note, the doctrine of adjudicative subsidiarity has its roots in the horizontal application of the Constitution and Bill of Rights in achieving transformative constitutional goals in private relationships.[40] Before I discuss the more concrete principles of the doctrine of adjudicative subsidiarity, I will first provide a synoptic outline of the horizontality provisions of the Constitution.

The horizontal application of the Constitution and the Bill of Rights are generally predicated on sections 8(1)-(3)[41] and 39(2)[42] of the Constitution.[43]

Starting with section 8, sub-section (1) will enable one to apply fundamental rights to 'all law' which includes legislation and the common law as default sources of law to private

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[36] Ibid.

[37] E Zitzke 'Constitutional heedlessness and ever-excitement in the common law of delict's development' (2015) 7 *Constitutional Court Review* 259, 286.

[38] Ibid.

[39] See *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 44.

[40] As seen in section 8(3) of the Constitution of the Republic, 1996.

[41] Section 8(1) provides that 'The Bill of Rights applies to all law, and binds the legislature, the executive and the judiciary and all organs of the state.'
Section 8(2) provides that 'a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'
Section 8(3) provides that 'when applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection 2 above , a court –

(a) in order to give effect to a right in the Bill, must apply, or if necessary, develop the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

[42] Section 39(2) provides that 'when interpreting any legislation, and when developing the common law or customary law, every court, forum or tribunal must promote the spirit, purport and objects of the Bill of Rights.'

[43] J Van Der Walt 'Progressive indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence' (2001) 17 *South African Journal on Human Rights* 341, 346.

relationships.[44] Sub-section (2) will enable one to apply fundamental rights to natural and juristic persons which unambiguously signal the horizontal application of fundamental rights between private individuals.[45] Sub-section (3) will enable one to facilitate the horizontal application of fundamental rights to private relationships and constitutional developments where necessary. [46] This also refers to the sources of law that apply in these private relationships.[47]

Section 39(2) of the Constitution also indicates that the horizontal application of fundamental rights is not only limited to fundamental rights.[48] Section 39(2) states that 'the spirit, purport and objects of the Bill of Rights must be promoted' when courts interpret and apply the law applicable between private individuals.[49] In other words, according to Deeksha Bhana, this entails the application of constitutional values (such as dignity for purposes of this research report).[50] Fundamental constitutional values must be used when considering the horizontal application of fundamental rights to private relationships (i.e. these values will guide the further interpretation and application of the default sources of law).[51]

A closer look at sections 8 and 39, according to Bhana, reveals that these sections form a 'constitutional backdrop' (i.e. the relevant values and rights in question) which aides the horizontal application of the Constitution to the law between private individuals.[52] When a fundamental right is implicated in a private relationship, the constitutional backdrop, being the relevant rights and values, will be used to interpret, apply and develop the laws pertaining to the particular private relationship.[53] As already noted in this paper, the constitutional backdrop to the regulation of revenge pornography arguably refers to the foundational value of human dignity and the fundamental right to privacy.[54]

Moving to the application of the concrete principles of the doctrine of adjudicative subsidiarity next, the first step is to identify the potential fundamental right that is implicated in a legal dispute concerning a private relationship.[55] After the applicable fundamental right has been identified, then the two central principles of adjudicative subsidiarity ought to be applied in order

[44]Ibid.
[45] D Bhana 'The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the - Constitution' (2013) 129 *South African Journal on Human Rights* 351, 364.
[46] Ibid 350.
[47] Ibid.
[48]Ibid 372-373.
[49] Van Der Walt (note 43 above).
[50] Ibid 374.
[51] Bhana (note 45 above) 372-373; *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) paras 16-17.
[52] Bhana (note 45 above) 364-365.
[53] Bhana (note 45 above) 372-373.
[54] In the immediate section below, I will discuss human dignity as a value and privacy as a fundamental right more concretely through the concept of 'informational privacy'.
[55] Zitzke (note 37 above) 286.

to determine which source of law will adjudicate the aforementioned legal dispute (in other words, which legal source will provide a cause of action together with remedies).[56]

The first principle emanated from the case *South African National Defence Union v Minister of Defence and Others*[57] which will be referred to as the '*SANDU*-principle'. In terms of this principle, the Constitutional Court held that 'if a constitutional right is alleged to have been infringed, the dispute must be resolved in accordance with legislation that has specifically been promulgated to protect the right concerned.'[58] These principles mean that if legislation 'was specifically enacted to give effect to' a particular fundamental right, the adjudication of such a right in a private relationship must take place according to such legislation and cannot be disregarded in favour of a general reliance on the Constitution as a cause of action.[59]

However, as pointed out by Emile Zitzke, the *SANDU*-principle involves more than merely determining if legislation applies to a fundamental right implicated in a private relationship.[60] The Constitutional Court in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*[61] noted that 'the provisions of a subsidiary constitutional statute must, like any other statute, be construed to promote the spirit, purport and objects of both the Bill of Rights, and the specific constitutional provision(s) to which more concrete effect is given.'[62] In other words, with reference to Bhana's idea of a constitutional backdrop, the application of legislation in terms of this principle of adjudicative subsidiarity still requires that such legislation must be interpreted, and, where necessary, developed against the applicable fundamental rights and values.[63]

As a final consideration to the *SANDU*-principle, Zitzke highlights that the only way in which applicable legislation can be circumvented, in the event that such legislation unreasonably or unjustifiably limit the fundamental right(s) in question, is to consider the constitutional validity of the provisions of legislation in terms of section 172 of the Constitution.[64] Here a court has to determine whether the limitation in question can be remedied by a purposive interpretation of the relevant provisions of legislation, and, if this is not possible, the relevant legislation or its provisions must be declared invalid.[65]

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[56] Ibid.
[57] 2007 (5) SA 400 (CC).
[58] Ibid paras 51-52.
[59] Ibid. See also M Murcott & W Van der Westhuizen 'The ebb and flow of the application of the principle of subsidiarity - Critical reflections on *Motau* and *My Vote Counts*' (2015) 7 *Constitutional Court Review* 43, 48.
[60] Zitzke (note 37 above) 287.
[61] 2007 (10) BCLR 1027 (CC).
[62] Ibid para 53.
[63] Zitzke (note 37 above) 287.
[64] Ibid. Section 172 provides that (a) that 'when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its consistency'.
[65] Ibid.

The second principle of adjudicative subsidiarity emanated from the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[66] which will be referred to as the '*Bato Star* principle'. In terms of this principle, the Constitutional Court held that 'if a constitutional right is alleged to have been infringed, the dispute must be resolved in accordance with legislation that has specifically been promulgated to protect the right concerned and existing legislation cannot be thoughtlessly circumvented in favour of sole reliance on common law'.[67] In other words, if legislation is applicable to a dispute concerning a fundamental right in a private relationship, such legislation excludes the direct application of the common law.[68]

However, as further stated by the Constitutional Court, this principle is 'subject to the proviso that if legislation does not cover the dispute in question', the common law acts as a legal safety net 'to provide rules and principles to regulate the matter'.[69] As such, if legislation is not applicable, then common law or customary law will adjudicate the dispute concerning a fundamental right in the context of a private relationship.[70]

In addition, according to CJ Visser, it must be kept in mind that the common law can still be consulted when legislation is applicable, albeit to a limited extent, especially if the common law can give content to, and assist with the interpretation and application of concepts to be found in the relevant provisions of legislation.[71] Here, I allude to the fact that the concept of informational privacy has received extensive consideration in the common law and may be useful for purposes of interpreting and applying POPIA.[72]

Upon further reflection on the doctrine of adjudicative subsidiarity, this doctrine clearly creates a hierarchy of sources when a fundamental right is implicated in a dispute between private individuals. The adjudication of a fundamental right will first be located in legislation and thereafter in the common law if legislation is not applicable. However, locating a dispute concerning a fundamental right in the aforementioned sources of law still requires consideration of both fundamental rights and values. This refers to Bhana's idea of a constitutional backdrop which provides context for the operation of the principles of the doctrine adjudicative subsidiarity. What is more, the creation of a hierarchy of sources in terms of the doctrine of adjudicative subsidiarity does not exclude the common law considering the potential interplay between them.

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[66] 2004 (7) BCLR 687 (CC) para 25.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Zitzke (note 37 above) 288.
[71] CJ Visser 'Revisiting the constitutionalisation of the common law of personality: Transformative constitutionalism and *Le Roux v Dey*' (2021) 37 *South African Journal on Human Rights* 1, 4.
[72] However, this particular argument will receive greater consideration and clarification in section 3 of this paper.

For purposes of this paper, this probably means that the adjudication of privacy interests implicated by revenge pornography will be located in the POPIA. The aforementioned constitutional backdrop will find expression in the concept of informational privacy which is predicated on the fundamental right to privacy and the foundational value of human dignity (as supplemented by the common law where this concept originated for purposes of South African law).[73] In the next section of this paper I will canvass the concept of informational privacy as the constitutional backdrop to the interpretation and application of POPIA.

**3. The Constitution and the common law: Delineating the concept of informational privacy**

This section will discuss the concept of informational privacy as derived from the interplay between the Constitution and common law.[74] I will use informational privacy as the constitutional backdrop to discuss the interpretation and application of POPIA in section five below.

Starting with the constitution, section 14 states that:

'Everyone has a right to privacy, which includes the right not to have-
(a) their person or home searched;
(b) their property searched;
(c) their possession seized; or
(d) the privacy of their communications infringed.'

The right to privacy in section 14 however is not exhaustive as it has extended its protection to also cover any unlawful means of obtaining information and the making of unauthorised disclosures which may interfere with one's autonomy in their sphere of private intimacy.[75] This right to privacy as covered in section 14 arguably includes informational privacy which is based on the concept of autonomy which is rooted in the concept of dignity.[76] According to Neethling, informational privacy is:

> 'a condition of human life characterized by seclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has determined to be excluded from the knowledge of outsiders and in respect of which he or she has the will that they be kept private.'[77]

Informational privacy can be viewed as 'informational self-determination' which entails the right to determine who can assess one's personal information.[78] Informational privacy also

[73] D Mcquoid (note 3 above) 228.
[74] Ibid 227-228.
[75] Ibid 227.
[76] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2001 (1) SA 545 (CC) para 16.
[77] J Neethling, JM Potgieter and PJ Visser *Neethling's Law of Personality* 2ed (2005) 371. See also D Millard and EG Basceranco 'Employers' Statutory Vicarious Liability in Terms of the Protection of Personal Information Act' (2016) 19 *Potchefstroom Electronic Law Journal* 1, 5.
[78] P Nyoni and M Velempini 'Data protection laws and privacy on Facebook' (2015) 17(1) *South African Journal of Information Management* 1, 2.

restrict the way a person's information is disseminated (especially) without their prior consent.[79] The concept of informational privacy has received extensive consideration under the common law to the effect that it has been argued that there is somewhat of an overlap between constitutional privacy and common law privacy in this respect.[80]

The constitutional concept of informational privacy has embedded in it the notion of a legitimate expectation of privacy. Important to note, the common law idea of informational privacy follows the same pattern.[81] First, this notion of a legitimate expectation of privacy has a subjective component which is determined by the individual him/herself. [82] Here, the individual decides which part of his/her life he/she wishes to keep private.[83] If he/she decides to disclose any of the information, he/she has to decide how much of the information he/she wants to disclose. [84]Then the notion of a legitimate expectation of privacy has an objective component which must be recognised as reasonable by the society.[85] Here, the courts look at the continuum of privacy construct to determine whether this subjective expectation of privacy is objectively reasonable.[86] The idea of continuum of privacy brings about expectations which are regarded as either high or low depending on the level that an individual finds him-or herself, be it the private or the public sphere.[87] The 'public interest' also plays a role here as 'it sets objective limits to privacy expectations'.[88]

Continuing with the objective component of the legitimate expectation of privacy construct, it is also important to note that the society needs to accept the disclosed facts as being legally private hence worthy of protection. The court needs to decide whether juridical protection has be afforded to the individual who is claiming that his/her subjective legitimate expectation has been compromised.[89] In using the idea of the continuum of privacy, the Constitutional Court has taken the view that where an individual is acting within the inner self, protection should be afforded.[90] Where the individual is acting within the public realm, less protection should be afforded.[91] This has followed the court's ruling in the *Bernstein v Bester* case where it was stated that:

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[79] *National Media Ltd v Jooste* 1996 (3) SA 262 (A) 271-272.
[80] *NM v Smith* 2007 (7) BCLR 751 (CC) paras 33, 41-45.
[81] Ibid. Where the court was quick to note that the common law informational privacy and the constitutional privacy both afford protection to privacy by means of legitimate expectation of privacy construct.
[82] *Bernstein v Bester* 1996 (2) SA 751 (CC) para 75.
[83] Ibid.
[84] *National Media Ltd v Jooste* (note 79 above).
[85] *Bernstein v Bester* (note 82 above) paras 74-79.
[86] Ibid at para 75.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* (note 76 above) para 18.
[91] Ibid.

> 'The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.'[92]

Another important thing to bear in mind is that when it comes to informational privacy, the right to privacy is closely linked to the constitutional value of human dignity. This was held in judgment of Khumalo *v Holomisa*[93] where it was stated that:

> 'it should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity.'[94]

This link between informational privacy and human dignity, as seen from the above quotation, lies in an individual's autonomy.[95] Autonomy in this regard entails a lot of things. First, it allows a person to make a choice about how he/she want to live his/her life.[96] Secondly and closely related to the first idea regarding autonomy, autonomy enables individuals to undergo a process of self-reflection which entails decisions on the extent to which individuals interact with the outside world.[97] Lastly, especially in the context of informational privacy, Robert Post argues that the norms and values associated with the autonomy embedded in an individual's informational privacy are further influenced by broader social considerations.[98] Specifically, Edward Eberle argues that a balance needs to be struck between the individual's need for self-reflection and society's need to maintain social order and security which, in appropriate circumstances through the public interest construct, may justify an intrusion into this private space afforded by informational privacy[99] As it was previously explained in section one of this research report, the third and fourth industrial revolutions brought massive technological changes that may pose direct threats to an individual's informational privacy.[100]

Moving from the conceptual to the more practical dimensions of informational privacy, informational privacy in general imposes a legal duty on individuals not to acquire or/and disclose information of another person's private life in an unjustifiable manner against the

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[92] *Bernstein v Bester* (note 82 above) para 67.
[93] 2002 (5) SA 401 (CC).
[94] Ibid para 27.
[95] Ibid.
[96] *NM v Smith* (note 80 above) para 131.
[97] *Bernstein v Bester* (note 82 above) para 65.
[98] RC Post 'Three concepts of privacy (2000-2001) 89 *Georgetown Law Review* 2087, 2092.
[99] EJ Eberle 'Human dignity, privacy, and personality in German and American constitutional law' (1997) 4 *Utah Law Review* 963, 980.
[100] Ibid 1000-1001.

latter's expectation of privacy.[101] The most common way that infringement of informational privacy normally happens is by intrusion or disclosure.[102] Under intrusion, the private facts of an individual are acquired unlawfully by an outsider.[103] In other words, private facts are acquired against the legitimate expectation of the holder of informational privacy. Under disclosure, the private facts of an individual are published against the legitimate expectation of the holder of informational privacy.[104] Here, the private facts may be acquired unlawfully by an outsider and subsequently published, or the private facts may be acquired lawfully through consent but the disclosure itself goes against the wishes of the holder of informational privacy as to the extent and conditions under which these private facts may be disclosed.[105]

In summation, informational privacy provides an individual with the ability to determine who can assess his/her personal information, but it also provides him/her with the right to restrict the way his/her information is published. However, this is also driven by the notion of a legitimate expectation of privacy as provided by both the Constitution and the common law which has a subjective and objective component. The subjective component of this legitimate expectation of privacy allows an individual to decide which part of his/her life he/she wants to keep private while the objective component requires that the society should accept the facts that have been disclosed as being legally private. The courts too have a role to play here as they have to decide whether to afford juridical protection to an aggrieved individual or not. The angle that the courts have taken so far is to afford protection where an individual is acting in their personal realm but limits protection if the individual is acting in the public realm.

Informational privacy will be used as the constitutional backdrop to interpret and discuss the POPIA. The general duty that this informational privacy imposes will lie in the POPIA as it will afford the practical considerations in adjudicating revenge pornography and provide both the cause of action and remedies.

## 4 The Protection of Personal Information Act 4 of 2013

### 4.1 Scope and application

The discussion on the doctrine of adjudicative subsidiarity in section two of this paper introduced the guideline that if a fundamental human right in a dispute between private individuals, 'legislation that has been specifically enacted to protect the right concerned' must

[101] *Bernstein v Bester* (note 82 above) paras 67-68.
[102] Neethling, Potgieter and Visser (note 77 above) 226.
[103] Ibid at 222.
[104] Ibid at 226.
[105] Ibid.

adjudicate the dispute.[106] In this research report, I argue that the POPIA will provide the cause of action and remedies in adjudicating the privacy concerns implicated by revenge pornography. This section will look carefully at how POPIA relates to privacy, its scope of application, supplements and concretises the legal duty imposed by informational privacy (in providing a cause of action), the subsequent remedies that it provides and any special provisions relevant for revenge pornography.

The right to privacy according to the POPIA 'includes a right to protection against the unlawful collection, retention, dissemination and use of personal information.'[107] It is clear here that the POPIA does not deal with the broader conception of privacy, but with a specific conception of it, namely informational privacy.

With this in mind the purpose of POPIA is:

> 'to give effect to the constitutional right to privacy by safeguarding personal information that is being processed whilst on the other hand trying to balance the competing rights i.e. rights to privacy and access to information, regulate the manner in which personal information may be processed subject to certain conditions of lawful processing, provide persons with rights and remedies to protect their personal information from unlawful processing'.[108]

In giving practical effect to its purpose, the POPIA applies to the 'processing of personal information of a data subject' that a 'responsible party enters' into a 'record through automated or non-automated means'.[109] The Act further requires that the 'responsible party must be domiciled in South Africa', and if this is not the case, such responsible party must then process personal information in South Africa.[110]

Of further practical relevance, is that the Act clearly states that the 'processing of personal information by a responsible party' has to prescribe to the 'minimum threshold' conditions for the 'lawful processing of personal information'.[111] According to section 4 of the Act, these conditions relate to 'accountability', 'processing limitation', 'purpose specification', 'further processing limitation', 'information quality', 'openness', 'security safeguards', and 'data subject participation' (each of which will be discussed in greater detail below).

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[106] See the '*Bato Star'* principle as discussed in section 2 above.
[107] See the Preamble.
[108] See section 2.
[109] 'Personal information' refers to information of an identifiable natural person who is alive and it includes but is not limited to the specified list under section 1.
A 'responsible party' is referred to as a public or private body or any other person which, alone or in conjunction with others, determines the purpose of or means for processing personal information
'Processing' according to section 1 means any activity or operation concerning personal information which is done either automatically or if not, it is transmitted, distributed, or made available in any form.
'Automated' according to section 3(4) means any equipment capable of operating automatically in response to instructions given for the purpose of processing information of a data subject.
'Data subject' is defined in section 1 as a person to whom personal information relates.
[110] See section 3(1) (b).
[111] Sections 2(b) and 5.

I argue that the conditions for the lawful processing of personal information provides both the cause of action and the more detailed and concretised legal duty for purposes of the infringement of the privacy interests implicated by revenge pornography. The failure of a responsible party to comply with these conditions for lawful processing will provide a data subject with legal recourse primarily in the form of legal remedies (which will be discussed in greater detail below).[112] As a final point to consider regarding the conditions for lawful processing of personal information, according to section 3(2)(b) of the Act, it must be always kept in mind that if there is any other legislation which sets out conditions of lawful processing 'that are more extensive than' the ones set out in the POPIA, the conditions in the former will prevail.

## 4.2 The legal duty imposed by the Protection of Personal Information Act: The conditions for lawful processing[113]

### 4.2.1 Accountability [114]

This condition requires that when the responsible party is processing personal information of a data subject, such a party must comply with all the conditions for lawful processing as stipulated in the Act.[115] This implies that a responsible party must further comply with all the different measures imposed by the different conditions for lawful process in order to be compliant with the Act.[116] In this regard Roos notes that non-compliance by a responsible party entitles a data subject to remedies.[117]

### 4.2.2 Processing limitation[118]

Under this condition, the Act requires that the processing of personal information must be done 'in accordance with the law and in a manner' which does not infringe the data subject's rights.[119]

The responsible party must be 'justified' to collect and process the personal information in question.[120] A responsible party is justified to do so when; the data subject has provided the

[112] Section 5.
[113] See Chapter 3. For a general critique on the legislative framing of these conditions see A Roos 'Protection of Personal Information' in Neethling et al *Neethling on Personality Rights* (2019) 365 and P Govan ''Dentists and Protection of Personal Information Act, 2013 ("Popi"): Communication' (2014) 69(2) *South African Dental Journal* 78.
[114] Section 8.
[115] Roos (note 113) 381.
[116] Ibid.
[117] Roos (note 9 above) 127.
[118] Sections 9-12 of the Act.
[119] See section 9 (a) and (b).
[120] Govan (note 113 above) 78,79.

necessary consent,[121] the processing of personal information 'is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party',[122] the processing of personal information 'complies with an obligation imposed by law on the responsible party',[123] the processing of personal information 'protects a legitimate interest of the data subject',[124] the process of personal information 'is necessary for the proper performance of a public law duty by a public body',[125] and the processing of personal information 'is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied'.[126] Of further importance, this also justifies a data subject to withdraw his/her consent or may object to the processing of personal information on these justifications provided that such objection complies with the Act.[127]

In addition, the collection of personal information, under this condition, must be 'minimal' in the sense that it is restricted and suited to the original purpose for which it was collected.[128] According to Roos, this is to ensure that personal information that has been collected should not be processed for purposes that extend beyond the 'original purpose for which such information was collected for'.[129]

Lastly, the personal information must be collected directly from a data subject unless the Act provides exemption to this additional measure for purposes of this condition.[130]

### 4.2.3 Purpose specification[131]

In terms of this condition, the Act requires that personal information should only be processed for a specified, legitimate and clearly defined purpose.[132] The data subject must be informed of this purpose.[133] This condition also places further measures on responsible parties in terms of the retention, restriction and destruction of records containing personal information collected by this

[121] Section 11(1)(a).
[122] Section 11(1)(b).
[123] Section 11(1)(c).
[124] Section 11(1)(d).
[125] Section 11(1)(e).
[126] Section 11(1)(f).
[127] Section 11(2)-(4).
[128] See section 10.
[129] Roos (note 113 above) 382.
[130] Section 12. Even though this is not usually the case especially where 'the information is contained in a public record; if the patient has consented to its collection from another source; if collection from another source is necessary in the interests of law and order, national security, tax collection or to maintain the 'legitimate interests' of the party to whom it is supplied; if compliance would 'prejudice a lawful purpose of the collection'; or if 'compliance is not reasonably practicable'.
[130] See section 10.
[131] Section 13-14 of the Act.
[132] See section 13.
[133] Ibid.

party.[134] In broad terms, According to Roos, this condition places restrictions on the period of which a responsible party may keep the aforementioned records and subsequent measures to restrict or destroy the records where appropriate.[135]

### 4.2.4 Further processing limitation[136]

This condition requires that the responsible party may not process personal information in a manner that is contrary to the original purpose for which the information was collected.[137] However, when a responsible party wants to process the personal information further than the original purpose it was collected for, this condition allows such further processing subject to the stipulations and exclusions in the Act.[138]

### 4.2.5 Information quality[139]

Under this condition, the Act requires from responsible parties that the information they collected and processed from data subjects are 'complete, accurate, not misleading and updated where necessary.'[140] In other words, personal information is 'complete' and 'accurate' when such information is 'not misleading and up-to-date' as required by the purpose for which the information was collected.[141]

### 4.2.6 Openness[142]

As explained by Roos in general terms, this condition necessitates that the processing of personal information is 'transparent' to data subjects and 'not done in secret'.[143] In more practical terms, a responsible party needs to inform data subjects that their personal information is processed, maintained and documentation is kept regarding the processing of personal information (subject to certain exclusions).[144] As further explained by Roos, the openness condition ensures that data subjects have knowledge of their rights under the Act which will enable them to enforce these rights.[145]

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[134] See section 14 in general.
[135] See section 14(2)-(8) for further details on the measures imposed by this condition. Also see Roos (note 91 above) 384.
[136] Section 15 of the Act.
[137] Govan (note 113 above).
[138] See Roos (note 113) 385 for further detail.
[139] Section 16.
[140] Ibid.
[141] Roos (note 113 above) 386.
[142] Sections 17-18.
[143] Roos (note 113 above) 386.
[144] Ibid.
[145] Roos (note 9 above) 119.

### 4.2.7 Security safeguards[146]

As stated by Roos, this condition deals with measures imposed on the responsible party to ensure the 'integrity and confidentiality of the personal information'.[147] In other words, the Act requires from a responsible party to reasonably prevent unlawful access to a data subject's personal information and to prevent the unlawful destruction of personal information.[148] As further explained by Roos, this entails that the responsible party 'must implement security measures to secure the integrity and confidentiality of personal information', ensuring that individuals acting on behalf of the responsible party are informed and authorised to process personal information, and inform relevant regulatory bodies of 'unauthorised access or acquisition of personal information'.[149]

### 4.2.8 Data subject participation[150]

In terms of this final condition for the lawful processing of personal information, Roos remarks that this condition relates to the ability of data subjects to participate in the process regarding the processing of their personal information.[151] In order to enable data subjects this measure of participation, responsible parties are required to allow data subjects to access their personal information where they will be further allowed to ask for correction and deletion of the personal information where necessary (subject to further technical measures).[152] In general terms, this measure of participation provides data subjects with 'some measure of control over their personal information' that is being processed.[153]

## 4.3 Remedies

The Act provides for civil remedies when the responsible party does not comply with the conditions for lawful processing of personal information.[154] This includes 'payment of damages as compensation for patrimonial and non-patrimonial loss' that a data subject suffers as the result of the breach of any provision of the Act[155] and shall also include aggravated damages that are

[146] Sections 19-24 of the Act.
[147] Roos (note 113 above) 388. See also section 19(1).
[148] See section 19 (1)(a)-(b).
[149] Roos (note 113 above) 388-389.
[150] Sections 23-25 of the Act.
[151] Roos (note 9 above) 119.
[152] Sections 24-25. See also Roos (note 111 above) 390-391.
[153] Govan (note 113 above) 80.
[154] See sections 73 and 99(1).
[155] See section 99(3) (a).

determined in the discretion of the court.[156] The amount is ultimately determined by the court according to its notion of what is just and equitable under the specific circumstances.[157]

As pointed out by Millard and Basceranco further, the common law remedy of an interdict has also been incorporated in the POPIA.[158] The Act provides that a responsible governing authority may serve an enforcement notice, akin to the common law interdict, on a responsible party who unlawfully processes personal information.[159] The enforcement notice may require from a responsible party to take steps or refraining from such steps regarding the processing of personal information or to refrain from the processing of personal information altogether.[160]

### 4.4 Special provisions relating to personal information of a private, intimate and sexually explicit nature

Another important thing to bear in mind for the purposes of this research report is whether the Act provides further provisions regarding the adjudication of revenge pornography that is the non-consensual publication of private, intimate and sexually explicit materials as a special category of personal information. In this regard note must be taken of section 26 of the Act. According to this section, personal information relating to religion, race, sex life, gender, medical history, a person's address and sexual orientation is regarded as 'special personal information'.[161] Arguably, the publication of private, intimate and sexually explicit materials will be regarded as special personal information (which will be discussed in greater detailed in section five below). According to Neethling et al, the processing of this information ought to be treated as sensitive because it is assumed that once it is processed, it creates a negative effect on the fundamental rights of a data subject.[162]

In general, in terms of section 27, a general prohibition is placed on responsible parties to process special personal information. The only way sensitive information can be allowed to be processed is when the data subject gives consent, 'where it is necessary to comply with an obligation of international law', or 'establishing, exercising or defending a right', where the processing of such information has been made public by the data subject deliberately. Furthermore, subject to section 32 of the Act, if the special personal information relates to a data subject's sex life, the Act requires that a responsible party treats that information as confidential

[156] See section 99(3) (b).
[157] See section 99(3).
[158] Millard and Basceranco (note 77 above) footnote 36 at 7.
[159] See section 95(1).
[160] See section 95(1) (a) and (b).
[161] See section 26(a).
[162] Roos (note 113 above) 391.

unless they are required by law or in connection with their duties to communicate that information.

However, apart from the remedies provided in section 99 of the Act as discussed above, the Act remains silent on any further legal recourse regarding the processing of special personal information. Arguably, the processing of special information of private, intimate and sexually explicit nature may warrant an award of aggravated damages.

### 4.5 Concluding thoughts

In summary, POPIA has been enacted to give effect to the right of privacy as enshrined in section 14 the Constitution. The right to privacy, according to the POPIA, includes protection from 'the unlawful collection, retention, dissemination and use of personal information'.[163] As such, POPIA does not deal with a broad conception of privacy but rather with informational privacy.

The Act specifically applies to personal information that is processed by private or public bodies. In doing so, the Act further requires that personal information has to be processed in a fair and lawful manner. For the processing of person information to be lawful, a responsible party must comply with the eight conditions for lawful processing. Non-compliance with these conditions for lawful processing constitutes a privacy infringement which will afford a data subject with remedies. When dealing with sexual information, as a special category of personal information, the Act places further stringent conditions on the responsible party.

Ultimately, the adjudication of the privacy interests infringed by revenge pornography will be adjudicated by POPIA (according to the doctrine of adjudicative subsidiarity) as this source of law provides the legal duty and cause of action through the conditions for lawful processing and the resultant remedies.

## 5. The development of an integrated reading and application of the privacy laws applicable to revenge pornography

The basic aim of this research is to provide a basis for the integrated reading and application of the Constitution, common law and POPIA to privacy infringements caused by revenge pornography. To facilitate this, in this section, I will briefly highlight the main points of the previous sections and demonstrate the connections between them for purposes of developing the aforementioned integrated reading and application of the implicated privacy laws. First, I will

[163] L Swales 'Protection of personal information: South Africa's answer to the global phenomenon in the context of unsolicited electronic messages (spam)' (2016) 28(1) *South African Mercantile Law Journal* 49.

provide a synoptic outline of the different sections (setting out the basic principles). Thereafter, I will apply these principles to revenge pornography as a privacy concern.

In section one, I defined revenge pornography as the non-consensual publication of private, intimate, sexually explicit materials. I further contextualised revenge pornography in the context of the third and fourth industrial revolution with reference to information and communication technologies that allow for the increased processing and publication of personal information. I stated that this implicates the right to privacy (which is interlinked with the constitutional value of dignity).

In section two, I provided a broad outline on how to provide an integrated reading of different privacy laws that apply to revenge pornography through the use of the doctrine of adjudicative subsidiarity. With reference to the principles of this doctrine, I found that the adjudication of privacy interests implicated by revenge pornography will be located in the POPIA as this source of law provides the necessary cause of action, legal duty and remedies. The concept of informational privacy, which is predicated on the fundamental right to privacy and the foundational value of human dignity as supplemented by the common law, will provide the constitutional backdrop to the interpretation and application of POPIA.

In section three and four, I explored the concept of informational privacy and the POPIA further. In very broad terms I found that informational privacy provides an individual the autonomy to determine the ambit and extent to which outsiders may gain access to this individual's personal information and publish such information. Following from this, informational privacy imposes a general legal duty on all individuals not to unjustifiably infringe the privacy interests of another with reference to the legitimate expectation of privacy concept. Moving then to POPIA, the Act concretises this duty further with reference to the conditions for the lawful processing of personal information. I argued that these conditions provide the cause of action for the adjudication of privacy infringements through revenge pornography with remedies.

Against this outline, I will provide an integrated application of informational privacy and POPIA to revenge pornography as contemplated in this research report, and the interconnection between them.

Starting with the application of informational privacy, revenge pornography involves the disclosure of a victim's private information which denigrates an individual's legitimate expectation of privacy. In this particular context, the victims of revenge pornography has the autonomy to take intimate pictures of themselves freely, if desired, and further determine who may access this information.[164] Another point to bear in mind is that the victim has the autonomy

[164] *KS v AM* (note 14 above) para 38.

to determine when this information may be disclosed and under what circumstances.[165] In terms of the subject component of the legitimate expectation of privacy construct, the unauthorised and non-consensual access and/or disclosure of private, intimate and sexually explicit information or materials defeat this component clearly.

Moving to the objective component of the legitimate expectation of privacy construct, courts must determine, with reference to the boni mores as influenced by the Constitution, whether this subjective expectation of privacy is objectively reasonable. In this regard, it is worth mentioning that the Constitutional Court in *NM and Others v Smith and Others*[166] provides that 'the protection of privacy raises in every individual an expectation that they will not be interfered with and that only where there is a pressing social need this expectation can be violated and their privacy rights be interfered with.'[167] In this regard, the Courts adopted the position that private information of a private and sexually intimate nature will receive maximum protection under the law and subsequent non-consensual access and publication will be regarded as unlawful and will only be justified in exceptional circumstances.[168] Therefore, notwithstanding the further consideration of justifications,[169] the private information implicated by revenge pornography will attract maximum protection and the non-consensual and unauthorised access and/or publication will be regarded as unlawful in terms of the legitimate expectation of privacy construct under informational privacy.

Considering the application of POPIA next, I argue that this Act applies to revenge pornography. To start off, revenge pornography fits into the Act because its subject matter, i.e. private, intimate and sexually explicit materials, relates to an identifiable living natural person (the victim) which can be regarded as personal information for purposes of the Act.[170] Revenge pornography also undoubtedly involves processing of personal information.[171] The personal information implicated by revenge pornography is entered into a record by the perpetrator using automated means (e.g.) devices like phones and/or computers in the form of images or films. Here, this perpetrator is the one who determines the purpose and the means for processing these materials (thus, exercising control of the personal information in this context). In addition, these materials are further 'processed' through publication to third parties.

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[165] Ibid.
[166] *NM v Smith* (note 80 above).
[167] Ibid para 45.
[168] *Prinsloo v RCP Media t/a Rapport* 2003 (4) SA 456 (T) 471; *Greeff v Protection 4U H/A Protection International* (2012) (6) SA 392 (GNP) para 82; *NT v Kunene* (note 23 above) paras 31-32; *KS v AM* (note 14 above) para 40.
[169] See the discussion of justifications in Visser CJ 'The protection of personal information in broadcasting: The effect of the Protection of Personal Information Bill on freedom of expression' (2011) 27 *South African Journal on Human Rights* 331- 345.
[170] See section 1 of the Act.
[171] Ibid.

Since the Act applies to revenge pornography, I further argue that the publication of such materials will not comply with the conditions for the lawful processing of personal information. In principle, this means that the non-consensual publication of private, intimate and sexually explicit material will not comply with the first and overarching condition of 'accountability'. Below I will provide further detail on how revenge pornography does not comply with the other conditions required for lawful processing.

With regard to the condition of 'processing limitation', there is no law that allows for the publication of private, intimate, and sexually explicit materials without justification. This becomes apparent when this condition is placed within the context of informational privacy. The non-consensual publication of private, intimate and sexually explicit materials denigrates the subjective and objective component of the legitimate expectation of privacy construct (as illustrated above). The publication of these materials does not serve any legitimate purpose as the aim of the perpetrator is to expose and embarrass a victim which strikes at the heart of the autonomy of an individual under the constitutional value of human dignity associated with informational privacy. Important to note, the aforementioned materials are published out of an intimate relationship which fosters a legitimate expectation of privacy which is contorted to fit an illegitimate purpose.

By implication, this also means that revenge pornography will not comply with the conditions of 'purpose specification' and 'further processing limitation', as a legitimate purpose is required for the processing or further processing of personal information. This is due to the fact that revenge pornography is non-consensual and generally unlawful as explained above.

In addition, as the perpetrator has reckless regard for the private, intimate and sexually explicit information of another, it is justifiable to reason that this will not comply with the condition of 'security safeguards'. The perpetrator gives various if not countless individuals unlawful access to the aforementioned information of the victim which in turn betrays a preceding intimate relationship between the perpetrator and the victim which harbours a legitimate expectation of privacy.

Since revenge pornography strips a victim of autonomy and any control in respect of private, intimate and sexually explicit information regarding him/her, I further argue that this will result in non-compliance with the condition of 'data subject participation'. The victim's role is most likely rendered to that of a spectator and is only an 'active participant' to the ensuing humiliation and severe intrusion into his/her private life. It must also be noted that this humiliation and intrusion results from the illegitimate purpose associated with revenge pornography and the non-consensual nature of the process.

Similarly, I argue that this also causes non-compliance with the condition of 'openness' as the victim may be unaware of the publication of private, intimate and sexually explicit information. Even if the victim is aware or even made aware before the publication of such materials, I still argue that there will be non-compliance as the processing of information emerges from an illegitimate purpose that strips the victim of any control argue that similar logic ought to comply to the condition of 'information quality'. Even if the information in question is accurate, its overall illegitimate and non-consensual nature will vitiate compliance with this condition.

The victim of revenge pornography can institute a claim for damages to receive compensation for both patrimonial and non-patrimonial loss. On awarding such damages, the following additional factors may be instructive (as originating from the common law): the intimate nature of the private information,[172] the high possibility of further dissemination of the private information, [173] and the wide circulation of the disclosed private information.[174] In addition, I argue that aggravated damages may also be considered since a higher degree of protection is afforded to special information as a specific category of personal information, which includes private, intimate and sexually explicit information.

Ending off this discussion, I argue that the application of informational privacy and POPIA to revenge pornography reveals the interaction and congruity between these aspects of privacy for purposes of providing an integrated reading and application of these different aspects (or sources). Both informational privacy and POPIA unequivocally agree on the unlawful nature of revenge pornography. Informational privacy establishes the general unlawful nature of revenge pornography by highlighting its illegitimate purpose, non-consensual and non-voluntary nature. In turn, these considerations help to interpret specific provisions of the Act. On the other hand, POPIA provides the specific details and instances of why revenge pornography is unlawful with specific consideration to the conditions for lawful processing.

Against this integrated reading and application, POPIA ultimately adjudicates the interests infringed by revenge pornography by locating a cause of action in the non-compliance of its conditions for lawful processing which makes certain remedies available to the victim.

## 6. Conclusion

Revenge pornography in this research report has been described as the non-consensual publication of private, intimate and sexually explicit materials (i.e., images or films) by the

[172] See *Jooste* v *National Media Ltd* 1994 (2) 634 (C ) 647.
[173] *Jansen Van Vuuren and Another NNO v Kruger* 1993 (4) A 842 (A) 857-858.
[174] Ibid 858.

individual to whom they were entrusted in order to cause distress or harm to the victim. In turn, I highlighted revenge pornography as a privacy concern which further implicates an individual's dignity. I further highlighted that various sources of law apply to the regulation of revenge pornography. I looked at the integrated reading and application of different sources of law that are applicable to revenge pornography as dictated by the doctrine of adjudicative subsidiarity.

In doing so, I interrogated these sources, the Constitution, the common law and POPIA, through the lens of adjudicative subsidiarity. The resulting integrated reading and application, which resulted, highlighted the interrelationship between the aforementioned sources of law in the context of revenge pornography. For instance, this integrated reading and application highlighted the importance of autonomy, i.e. how an individual should be in control of his/her personal information and be able to decide who should access this personal information, and that it is violated by revenge pornography (although autonomy is not directly referenced in POPIA). The general unlawful nature of revenge pornography was also highlighted and POPIA provided the specific details for purposes of regulating revenge pornography. Most importantly, I found that the Constitution and common law will provide the ideological dimensions while POPIA will provide the practical dimensions to the adjudication of revenge pornography.

Upon final reflection, I am of the opinion that such an integrated reading and application of the different privacy laws applicable to revenge pornography promotes legal certainty while providing practical guidelines to the application of various legal sources to a dispute where a fundamental right has been implicated between private individuals.

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