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HUMAN DIGNITY AND THE ACTIO INIURIARUM: A CONSTITUTIONALISED APPROACH TO PERSONALITY INFRINGEMENTS

Thesis submitted by

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in fulfilment of the requirements for the degree

DOCTOR OF PHILOSOPHY

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Supervisor: Professor Deeksha Bhana

DECLARATION

I declare that this thesis is my own, unaided work. I further declare that this thesis has never before been submitted for any degree or examination in any university.

This thesis is up to date as of 21 June 2020 (submitted for examination on 30 June 2020).

CJ Visser
June 2020

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ABSTRACT

This thesis interrogates the constitutionalisation of the common law of personality in terms of doctrine and its underpinning ideology, both in terms of the substance and method invoked by the doctrine of subjective rights and actio iniuriarum. This interrogation is the result of the criticisms that I have levelled against the Constitutional Court in *Le Roux v Dey* 2011 (3) SA 274 (CC) as one of the most recent authoritative judgments concerning the constitutional development of the common law of personality. These criticisms include that the approach adopted by the Court creates doctrinal inconsistencies and promotes a stifling ideological conception of the human personality, which in turn limits the ability of the legal method of the common law to articulate the human personality as a composite legal interest. On this basis, with reference to the overarching transformative constitutionalism paradigm, I hypothesise that the underlying cause to these concerns is a judicial ideology ascribing to a liberal mindset which systematically limits judicial discretion. Accordingly, I advocate for the development of an alternative framework to that of the Court, which I call the 'personality framework', to constitutionalise the common law of personality in terms of doctrine, ideology, substance and method. In terms of doctrine, I illustrate that the personality framework is premised on the interplay between personality rights, constitutional values (most notably human dignity) and fundamental rights as derived from a convergence between the common law and Constitution in respect of the human personality. With further reference to the transformative constitutionalism paradigm, I illustrate how to organise these legal concepts for the ideological and methodological dimensions of the personality framework. Ideologically, I argue that these legal concepts form a broader ideological backdrop which denotes the substantive individual and collectivist dimensions of the human personality in a constitutional context based on a multi-faceted conception of human dignity. In terms of substance and method, I demonstrate that this ideological backdrop acts as a transformative tool to evaluate the common law's framework of conceptualising and adjudicating the human personality. In this regard, I affirm the liberal judicial mindset of the *Le Roux v Dey* judgment, as influenced by a conservative judicial culture, and further show that the broader judicial mindset feeds into pre-constitutional conceptions of (classical) liberalism. Consequently, I argue that the substance of the common law's actio iniuriarum and the attending legal method employed through the judicial adjudicative function realises the individual dimensions of the human personality but not its collectivist dimensions, and I suggest necessary constitutional adjustments. Finally, I contemplate the practical implications and pertinent connections between the doctrinal, ideological, substantive and methodological dimensions of the personality framework and explain how this framework will operate by applying to the personality rights to dignity, reputation and privacy. I show how this framework highlights the substance of the distinctive interests of the different personality rights and the differing dimensions of human dignity as a constitutional value, as well as a legal method that is sensitive to these dimensions and which is able to articulate the composite nature of the human personality as a legal interest through the specific entitlements created by the personality rights and corresponding fundamental rights.

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CHAPTER 1

INTRODUCTION

1.1 The constitutionalisation of the common law of personality in terms of doctrine, its underpinning ideology and resultant substance and method

> '[T]he South African common law relating to personality rights had developed so creatively and humanely that … it can … play a significant role in the task of concretizing the human image, so essential for the understanding of human dignity under the Constitution.'[1]

The Bill of Rights in Chapter Two of the Constitution[2] is horizontally applicable.[3] Thus, the common law is underscored by the constitutional mandate of doing 'public law justice in private law matters'.[4] This means that the common law must reverberate with public-law values through the application of fundamental constitutional values and rights in the relationships between private individuals.[5] This mandate relates to a systematic realisation of the substantively progressive and transformative aims of the Constitution in the private law domain.[6] Accordingly, an impervious distinction between public constitutional law and private law, or the common law of personality in this context, will be counterintuitive to the aforementioned constitutional mandate.[7]

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[1] L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 87.

[2] The Constitution of the Republic of South Africa, 1996.

[3] As per sections 8 and 39(2) of the Constitution.

[4] HL MacQueen 'Delict, contract, and the Bill of Rights: A perspective from the United Kingdom'(2004) 121 *The South African Law Journal* 359, 361; DM Chirwa 'The horizontal application of constitutional rights in a comparative perspective' (2006) 10 *Law, Democracy & Development* 21, 21–22; D Bhana 'The role of judicial method in the relinquishing of constitutional rights through contract' (2008) 24 *South African Journal on Human Rights* 300; DM Davis & KE Klare 'Transformative constitutionalism and common and customary law' (2010) 26 *South African Journal on Human Rights* 403, 408; D Bhana 'The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution' (2013) 29 *South African Journal on Human Rights* 351, 351-352.

[5] 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* 342, 359; D Bhana & M Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited' (2005) 122 *The South African Law Journal* 865, 869; DM Davis 'Developing the common law of contract in the light of poverty and illiteracy: The challenge of the Constitution' (2011) 3 *Stellenbosch Law Review* 845; D Cornell & N Friedman 'In defence of the Constitutional Court: Human rights and the South African common law' (2011) 5 *Malawi Law Journal* 1, 3.

[6] KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 156; CJ Roederer 'Post-matrix legal reasoning: Horizontality and the rule of values in South African law' (2003) 19 *South African Journal on Human Rights* 57, 62; Bhana *Judicial Method* (note 4 above) 300; Bhana *Reconciliation of Sections 8 and 39* (note 4 above) 353; DM Davis 'Where is the map to guide common-law development?' (2014) 25 *Stellenbosch Law Review* 3, 3-4.

[7] D Bhana 'The development of a basic approach for the constitutionalisation of our common law of contract' (2015) 26 *Stellenbosch Law Review* 3, 5. For an ideologically similar sentiment, see E Zitzke

What is then called for, according to Deeksha Bhana, is replacing the so-called 'impenetrable brick wall' between the public and private divide with a 'more permeable wire-mesh fence'.[8] As further explained by Bhana, the upshot of this is twofold: firstly, the 'removal of the brick wall' enables judges to begin the constitutionalisation process of the common law (of personality) by imbuing it with the values of the Constitution and then applying enumerated rights in the Bill of Rights (as a particular context may require);[9] and secondly, the replacement of the 'wall' with a 'wire-mesh fence' simultaneously enables judges to adapt constitutional concepts into a form suitable for private relationships using the common law's framework.[10]

This 'wire-mesh relationship' between the Constitution and the common law of personality is inculcated further by a close link between the common law personality rights and the fundamental rights embodied in the Bill of Rights.[11] A brief survey of the Bill of Rights will reveal that several fundamental rights aim to protect, or at the very least correspond to, the various personality rights as recognised in the common law.[12] Arguably, this overlap finds its genesis in the doctrinal basis of the law of personality, that is, the doctrine of subjective rights and the actio iniuriarum, which in turn adds a unique dimension to the constitutionalisation of this branch of private law.[13] Neethling, Potgieter and Roos introduce and explain this dimension as follows:

> 'It may be assumed that while the interpretation and application of fundamental rights have an influence on the delictual protection of personality rights, the converse will also occur. As the Bill of Rights contains many concepts which are already well-known in the law of personality, it speaks for itself that the courts will make use of these concepts in the development of fundamental (personality) rights.'[14]

In terms of doctrine, the law of personality, forming part of the broader discipline of the law of delict, provides protection to the human personality as a legal interest at the most basic level, that is, the positive common law.[15] At this level, the doctrine of

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'Constitutional heedlessness and over-excitement in the common law of delict's development' (2015) 7 *Constitutional Court Review* 259, 285-289.

[8] Bhana *Reconciliation of Sections 8 and 39* (note 4 above) 374-375; Bhana *Development of a Basic Approach* (note 7 above) 5.

[9] Bhana *Development of a Basic Approach* (note 7 above) 6.

[10] With the important caveat that the framework of the common law is subject to constitutional scrutiny and, where necessary, adjustments must be made to this framework. See Bhana *Development of a Basic Approach* (note 7 above) 6; M Flaherty 'Private Law and Its Normative Influence on Human Rights' in K Barker & D Jensen *Private Law: Key Encounters with Public Law* (2016) 207, 214-215.

[11] JM Burchell 'The Protection of Personality Rights' in R Zimmermann & D Visser (eds) *Under the Southern Cross: Civil Law and Common Law in South Africa* (1996) 639, 653

[12] J Neethling, JM Potgieter & A Roos *Neethling on Personality Rights* (2019) 17 & 75.

[13] Ibid 125.

[14] Ibid 129.

[15] Ackermann (note 1 above) 87.

subjective rights provides for the scope of personality rights recognised whereas the actio iniuriarum provides the framework for their protection.[16] More specifically, the doctrine of subjective rights conceptualises the human personality as a composite legal interest consisting of various distinctive interests in the human personality, such as bodily integrity, physical liberty, dignity, privacy, identity, feelings and reputation.[17] These interests are translated by the common law action of the actio iniuriarum into corresponding justiciable subjective rights of personality.[18] As justiciable subjective rights, corresponding legal duties are imposed on others in private relationships not to factually violate these personality rights in a wrongful and intentional manner (which depicts the three requirements of the actio iniuriarum, i.e. a factual violation, wrongfulness and intent).[19] Any individual who fails to comply with these duties will have to provide the victim of such non-compliance, as delictual liability is imposed on the former, with compensation as a form of appropriate legal redress.[20]

From a constitutional perspective, the Supreme Court of Appeal in *Dendy v University of the Witwatersrand*[21] accepted the legitimacy of the doctrinal basis of the common law of personality in recognising and protecting personality interests in a constitutional context.[22] In very general terms, the Supreme Court of Appeal accepted the scope of personality rights recognised at common law, as these overlap with fundamental rights in respect of the human personality (i.e. the fundamental rights to human dignity, freedom and security of the person and privacy), and the framework of such protection, as it cannot be assumed automatically that the common law is incapable of giving expression to constitutional concepts (as the Court held the contrary view with regard to the actio iniuriarum).[23] It would appear that the

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[16] Neethling, Potgieter and Roos (note 12 above) 59-62.
[17] WA Joubert *Grondslae van die Persoonlikheidsreg* (1953) 10; E Descheemaeker 'Protecting reputation: Defamation and negligence' (2009) 29 *Oxford Journal of Legal* Studies 603, 606.
[18] Joubert *Grondslae* (note 17 above) 11-15, 24-39; M Loubser & R Midgley (eds) *The Law of Delict in South Africa* 3rd ed (2017) 371-372.
[19] Ibid.
[20] Ibid.
[21] 2007 (8) BCLR 910 (SCA).
[22] Ibid paras 15 & 24.
[23] Ibid. In terms of scope, see B De Villiers, DJ Van Vuuren & M Wiechers *Human Rights: Documents that Paved the* Way (1992); D Van Wyk, J Dugard, B De Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1996) 171; Neethling, Potgieter & Roos (note 12 above) 16-17. Further, in terms of method, the Constitutional Court in *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* 2007 (6) SA 350 (CC) para 27 stated that:

> 'A court is required to promote the spirit, purport and objects of the Bill of Rights when "interpreting any legislation, and when developing the common law or customary law". In this[,] no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial

Supreme Court of Appeal suggested that there is a symbiosis or convergence (as two sources of law are applicable) between the common law and the Constitution both in terms of scope and the framework regarding the protection of the human personality as a legal interest.[24]

Arguably, such a symbiosis or convergence foreshadows that the constitutionalisation of the common law of personality ought to emerge from an integrated and single doctrinal framework. If that is the case, the human personality ought to retain its composite nature from the doctrine of subjective rights, and the attendant legal duties created in terms of the actio iniuriarum ought to indicate the minimum standards of conduct expected in private relationships. The contours of the actual constitutionalisation of the common law of personality will be narrowed down effectively to the specific personality rights and their corresponding legal duties (i.e. the respective positive law contexts subject to the horizontal application of the Constitution). It would seem that the constitutionalisation of the common law of personality in terms of its substance and method ought to be relatively straightforward.

It must be noted that the aforementioned 'wire-mesh relationship' between the common law of personality and the Constitution, that is the horizontal application of the Constitution to the former, envisions much more than considering the overlap between these two sources of law in terms of substance and method as demarcated by the doctrines of the common law.[25] To be sure, the doctrinal dimension of the constitutionalisation of the common law of personality, as highlighted above, provides a specific and clearly defined basis for the Constitution's horizontal application to the common law of personality. However, such a doctrinal dimension, by itself, may be critically unaware of the ideological underpinnings that influenced the specific manner in which its substance and method are articulated in the positive law for purposes of applying the Constitution horizontally and the resultant adjustments that ought to ensue.[26] This speaks to the overarching transformative constitutionalism paradigm

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question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law' (footnotes omitted).

[24] Ibid.

[25] Klare (note 6 above) 150; Bhana *Judicial Method* (note 4 above) 302-303.

[26] Ibid. See also E Zitzke 'The history and politics of contemporary common-law purism' (2017) 23 *Fundamina* 185, 185-186.

animating the horizontal application of the Constitution.[27]

In broad terms, the transformative constitutionalism paradigm, as conceptualised by Karl Klare, entails 'a long-term project of constitutional enactment, interpretation and enforcement committed to transform' the fabric of South African society as a whole, its legal institutions and smaller constitute parts leading to private relationships.[28] More specifically, such enactment, interpretation and enforcement are premised on a 'post-liberal' reading of the Constitution, which involves moving private law doctrines on an ideological continuum from pre-constitutional 'classical liberalism' towards greater 'collectivism', both in terms of substance and method.[29] To clarify, such a constitutional ideological shift recognises the inherently individualistic nature of the private law, including the law of personality, and does not seek to eradicate individualism from this system of law.[30] All that is called for is the movement away 'from the [pre-constitutional] classical liberal extreme of an atomistic, individual and toward [collectivism] where the individual is more contextualised'[31] by the fundamental constitutional values of freedom, dignity and equality as underscored by constitutional imperatives related to the development of the individual and the maintenance of the greater collective.[32]

The Constitutional Court in *Khumalo v Holomisa*[33] and *Le Roux v Dey*[34] highlighted the ideological importance of human dignity as a fundamental constitutional value (and other fundamental rights such as dignity[35] and privacy[36] in the constitutionalisation of the common law of personality).[37] The Court in *Khumalo* explained the importance of these constitutional concepts as follows:

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[27] Ibid.
[28] Klare (note 6 above) 147 & 150; Davis & Klare (note 4 above) 412; D Moseneke 'Transformative constitutionalism: Its implications for the law of contract' (2009) 20 *Stellenbosch Law Review* 3, 4.
[29] Klare (note 6 above) 151-156; Bhana *Judicial Method* (note 4 above) 302; E Zitzke 'A "constitutionally wanting" *obiter* on omissions – *Minister of Safety and Security v Van Duivenboden*' (2018) 81 *Journal for Contemporary Roman-Dutch Law* 497, 509-510.
[30] D Bhana & CJ Visser 'The concurrence of breach of contract and delict in a constitutional context' (2019) 35 *South African Journal on Human Rights* 94, 107.
[31] Ibid.
[32] As per s 1(a) of the Constitution. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 28; *Dawood v Minister of Home Affairs: Shalabi v Minister of Home Affairs: Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35; Klare (note 6 above) 159; Davis & Klare (note 4 above) 404; N Friedman 'The South African common law and the Constitution: Revisiting horizontality' (2014) 30 *South African Journal on Human Rights* 63, 66-67.
[33] 2002 (5) SA 401 (CC).
[34] 2011 (3) SA 274 (CC).
[35] Section 10 of the Constitution of the Republic of South Africa, 1996.
[36] Ibid section 14.
[37] *Khumalo* (note 33 above) para 26; *Le Roux* (note 34 above) paras 141-142, 151& 154.

> 'In the context of the actio injuriarum, our common law has separated the causes of action for claims for injuries to reputation (fama) and dignitas. Dignitas concerns the individual's own sense of [self-worth], but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. 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. No sharp lines then can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution (footnotes omitted)'.[38]

In examining this statement further, the Court seems to have identified human dignity as the common denominator underlying the different aspects of human personality (despite other substantive rights being highlighted for purposes of this inquiry). This follows from the previous judgment of *Dawood v Minister of Home Affairs: Shalabi v Minister of Home Affairs: Thomas v Minister of Home Affairs*,[39] where the Constitutional Court signalled the overarching nature of human dignity which purports to underlie human personality in its entirety, that is, its physical, psychological and social aspects.[40] The Constitutional Court clearly positions human dignity as the central value to initiate the abovementioned ideological shift.[41]

In considering human dignity as a central value in this ideological shift, Anne Hughes states that human dignity encapsulates an individual's absolute inner human worth, which is at the core of such individual's being and the subsequent formation of a human personality.[42] The human personality is then deeply significant for each individual in the passage through life.[43] Specifically, an unimpeded human personality, amongst other things, enables an individual to achieve his or her full potential to lead a meaningful life in accordance with this unique and expressive

[38] *Khumalo* (note 33 above) para 27.
[39] *Dawood* (note 32 above).
[40] Ibid para 35.
[41] *Khumalo* (note 33 above) para 26.
[42] A Hughes *Human Dignity and Fundamental Rights in South Africa and Ireland* (2014) 38; See also Friedman (note 32 above) 67.
[43] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, amici curiae)* 2005 (5) SA 3 (CC) para 36; Hughes (note 42 above) 39; HE Manning *The Dignity and Rights of Labour, and Other Writings on Social Questions* (1934) 6.

personality.[44]

To fully realise this constitutional imperative, an individual will have to rely on the different facets of his or her individual personality, as foreshadowed by the different common law personality rights and overlapping fundamental rights.[45] In broad terms, these facets relate to the physical, psychological and social aspects of the human personality, which is further differentiated into various interests in the human personality (congruous to the doctrinal framework of the law of personality).[46] These interests in the human personality imbue an individual's existence with the essential characteristics of the human image, which, in turn, enable an individual to unlock his or her full potential and so realise his or her vision of a good and meaningful life.[47]

This assurance to individuals to achieve this potential requires human solidarity and interdependence from all members of society.[48] Indeed, one of the principle objectives of the Constitution is to contextualise the human personality in a democratic society by acknowledging the interdependence of individual personalities in such a society.[49] For this reason, the Constitutional Court in *Dikoko v Mokhatla*[50] noted that the human personality is grounded in both individualistic and collectivist values (namely human dignity and ubuntu)[51] as the development of an individual personality cannot be achieved in isolation.[52] Thus, the development of an individual's personality, in achieving the above mentioned constitutional imperative, is also permeated through social interactions with other individuals and the broader collective.[53] Consequently, as Robert Post argues, the involvement of the greater

[44] Hughes (note 42 above) 38-39. See also the preamble and sections 1 & 7 of the Constitution.
[45] Ackermann (note 1 above) 87-90; Neethling, Potgieter & Roos (note 12 above) 24-39 & 73-78.
[46] Ibid. See also Joubert *Grondslae* (note 17 above) 124-129, who described the various interests in the human personality in terms of the doctrinal basis of the common law which is further built upon in terms of the Constitution.
[47] See note 43 above.
[48] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 224-225; TW Bennett 'Ubuntu: An African equity' (2011) 14 *Potchefstroom Electronic Law Journal* 30, 52; Hughes (note 41 above) 39.
[49] *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 68; Bennett (note 48 above) 351: CJ Visser 'The revival of the amende honorable as applied to defamation by the media' (2011) 128 *The South African Law Journal* 327, 334-336.
[50] *Dikoko* (note 49 above).
[51] The well-known term 'ubuntu' is a contraction of the African maxim umuntu ngumuntu ngabantu, meaning 'a person is a person because of other people'. This expression articulates that ubuntu, as a rule of conduct, promotes basic respect and compassion between members of a community. See DJ Louw & A Spijker 'Family conferencing: Notes' (2007) 28 *Obiter* 101, 106; Visser (note 49 above) 334.
[52] *Dikoko* (note 49 above) para 68.
[53] *S v Makwanyane* 1995 (3) SA 391 (CC) paras 237& 307–308; S Cowen 'Can ''dignity'' guide South-Africa's equality jurisprudence' (2001) 17 *South African Journal on Human Rights* 34, 50; Visser (note 48 above) 334-335.

collective in the development of individual personalities also contributes towards the maintenance of social stability, through the social interactions mentioned previously, as a further constitutional imperative.[54]

In terms of ideology, human dignity can assist in providing a constitutional vision of the human personality that is cognisant of its own substantive individualistic and collectivist dimensions, including their interplay, for purposes of the transformative constitutionalism paradigm, as such a vision can imbue both individualistic and collectivist ideals in the substance and form of the doctrinal basis of the common law of personality.

To attain such an ideological shift concretely in the doctrinal basis of the common law of personality, Bhana argues that an integrated reading of the horizontality provisions of the Constitution is required, i.e. sections 8 and 39(2), together with an attendant mode of context-sensitive or normative legal reasoning to infuse the ideological tenets of the constitutional vision on the human personality to the doctrinal basis of the common law.[55] According to Nick Friedman, this approach can be labeled as the 'horizontality simpliciter approach' due to its integrated reading of the horizontality provisions of the Constitution together with its proposed practical measures to achieve this shift in the positive law.[56] Bhana calls these practical measures the 'scope' and 'form' legs of the horizontality simpliciter approach.[57]

In terms of the scope leg, applicable constitutional ideologies, or more specifically the constitutional vision of the human personality in this context, ought to be understood in terms of its smaller constituent parts, which are constitutional values and fundamental rights.[58] These constitutional values and fundamental rights ought to be applied to the substance and form of the doctrinal basis of the common law of personality, being the various personality rights with their attendant legal duties.[59] Bhana further argues that to facilitate such application, the underpinning ideologies of

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[54] RC Post 'The social foundations of defamation law: Reputation and the Constitution' (1986) 74 *California Law Review* 691, 711 & 716.

[55] D Bhana 'The role of judicial method in contract law revisited' (2015) 132 *South African Law Journal* 122, 130-131. See also E Zitzke 'A decolonial critique of private law and human rights' (2018) 34 *South African Journal on Human Rights* 492, 501.

[56] Friedman (note 32 above) 72. See also Bhana *A Reconciliation of Sections 8 and 39* (note 4 above) 373-374; I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 67; Roederer *Post-Matrix Legal Reasoning* (note 6 above) 75-81.

[57] Bhana *A Reconciliation of Sections 8 and 39* (note 4 above) 338.

[58] Ibid 355. See also Bhana *Development of a Basic Approach* (note 7 above) 7.

[59] Bhana *A Reconciliation of Sections 8 and 39* (note 4 above) 373-374. See also See also Currie & De Waal (note 56 above) 56-57; Bhana *Development of a Basic Approach* (note 7 above) 4.

the doctrinal basis of the common law of personality must be highlighted in turn and compared to the ideological dimensions of the Constitution.[60] This then speaks to the form leg of the horizontality simpliciter approach.[61]

With reference to the form leg, it must be noted that the underpinning ideologies of the common law may be articulated obliquely or implicitly.[62] Here, arguably, the role of the judiciary and its adjudicative contribution to the common law of personality will serve as the necessary reference point. What is explicit is the specific manner in which the judiciary formulates legal concepts and adjudicates these in the positive law.[63] In examining the framework of the common law as provided by the judiciary, one must take note that the specific manner in which judges interpret and adjudicate legal concepts is intrinsically linked to a particular ideological mindset which ranges from individualism to collectivism.[64] This ideological mindset is shaped further by a broader legal culture which pursues either formal or substantive justice through limiting or expanding judicial discretion, respectively.[65] These cultural views on the limits of judicial discretion may be entrenched so deeply in the ideological mindset of the judiciary that this legal constituency can become oblivious to the ideologies that influence their adjudicative role and the outcomes that they produce.[66]

Under the scope and form legs of the horizontality simpliciter approach, consideration must be afforded to the link mentioned previously that exists between legal ideology and culture, with their resultant influence on the common law's framework in constitutionalising the common law of personality.[67] To evaluate the actual constitutional development of the framework of the common law in more

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[60] Klare (note 6 above) 157; H Keep and R Midgley 'The emerging role of ubuntu-botho in developing a consensual South African legal culture' in Bruinsma F and Nelken D (eds) *Recht der Werkelijkheid* (2007) 29; Bhana *Judicial Method* (note 4 above) 303; Davis & Klare (note 4 above) 412; Bhana *Judicial Method Revisited* (note 55 above) 122; E Zitzke 'Stop the illusory nonsense! Teaching transformative delict' (2014) 46 *Acta Academia* 52, 56-57.

[61] Bhana *Reconciliation of Sections 8 and 39* (note 4 above) 374; Bhana *Development of a Basic Approach* (note 7 above) 7-8.

[62] Bhana *Role of Judicial Method* (note 4 above) 302. See also Klare (note 6 above) 152-156; E Zitzke 'Constitutional heedlessness and over-excitement in the common law of delict's development' (2015) 7 *Constitutional Court Review* 259, 289; Zitzke *Common-Law Purism* (note 26 above) 185-186.

[63] Bhana *Judicial Method Revisited* (note 5 above) 122. See also Bhana & Pieterse (note 5 above) 869.

[64] Bhana *Judicial Method* (note 4 above) 302; Bhana *Judicial Method Revisited* (note 55 above) 124-125.

[65] Ibid.

[66] Bhana *Judicial Role Revisited* (note 55 above) 124.

[67] Klare (note 6 above) 149-150 & 157; Keep & Midgley (note 60 above) 29; Bhana & Pieterse (note 5 above) 866-868; Bhana *Judicial Method* (note 4 above) 303; Davis & Klare (note 4 above) 412.

concrete terms, the common law's substance and methodology must first be interrogated in order to unveil its underpinning ideologies as embedded in certain overarching cultural views.[68] These ideologies and cultural views are then compared to those of the Constitution.[69] Consequently, if the ideologies of the common law's framework, as influenced by legal culture, are irreconcilable with those of the Constitution, for example, as being couched in extreme notions of individualism (i.e. pre-constitutional conceptions of classical liberalism), adjustments to the common law must be contemplated.[70]

In examining the common law of personality's framework, reference can be made to the most recent authoritative judgment of the Constitutional Court in *Le Roux v Dey*,[71] which provided an approach for the conceptualisation and adjudication of human dignity, the human personality and personality rights (which ostensibly also purports to align the common law with the Constitution).[72] The discussion immediately below will highlight the Court's conceptualisation of human dignity and the human personality and its adjudication of the relevant personality rights.

Starting with the facts of the *Le Roux v Dey* judgment, three high school learners, the applicants, manipulated and distributed an image which depicted their school principal (an unnamed man) and deputy principal (Dr Dey, the respondent) as two men sitting naked side by side. More specifically, the first applicant photoshopped the heads of the principal and deputy principal onto the naked figures; this image was found on a website dedicated to non-heteronormative male bodybuilders. The first applicant completed the image by placing the school's badge over the hands and genitalia of the naked figures.[73] After this picture was completed, the first applicant sent it to the second applicant via mobile phone, and it was further electronically circulated between the school children.[74] Subsequently, the third applicant printed this picture and posted it on the school's noticeboard.[75] On

[68] Ibid.
[69] Ibid.
[70] Bhana *Role of Judicial Method* (note 4 above) 302. See also Zitzke *Constitutional Heedlessness and Over-Excitement* (note 62 above) 289.
[71] *Le Roux v Dey* (note 34 above).
[72] See generally C Gowar & CJ Visser 'Distinguishing between dignity, identity and privacy: Is it really necessary? – Kumalo v Cycle Lab (Pty) Ltd' (2012) 75 *Journal of Contemporary Roman-Dutch Law* 160; C Gowar & CJ Visser 'The actio iniuriarum – One action, but only one iniuria? – Le Roux v Dey 2011 (3) SA 274 (CC)' (2013) 76 *Journal of Contemporary Roman-Dutch Law* 480.
[73] *Le Roux v Dey* (note 34 above) paras 13-14.
[74] Ibid paras 15-16.
[75] Ibid para 17.

discovery of this picture, the respondent instituted a claim for defamation and a claim for the impairment of his common law dignity against the three applicants.[76] The Court had to determine whether this depiction of the respondent infringed his personality right to reputation (i.e. the defamation claim) and/or his personality right to dignity (i.e. the common law impairment of dignity claim).[77]

In conceptualising human dignity and the human personality, the Court in recognised in principle that 'the concept of dignity has a wide meaning which covers a number of different values.'[78] More specifically, the Court was alert to the fact that human dignity has a wider meaning than the individual personality rights and thus is capable of permeating the human personality in its entirety.[79] For instance, the Court acknowledged that 'common law "dignity" has a narrower meaning' than human dignity as a constitutional concept and that the former 'is confined to the person's feelings of self-worth'.[80]

However, proceeding from this understanding of human dignity, the Court omitted to consider any further content of human dignity as a fundamental value or as a fundamental right and its actual difference to dignitas when applying it to the different personality rights. It appears that although such an analysis would be open to interpretation, the Court linked human dignity to some form of subjective feelings of dignity.[81] This is evident from the fact that the Court found that an infringement of a personality right is an 'affront to dignity' that manifests itself in some form of 'degradation', which implies some subjective feelings related to an infringement of one's self-worth.[82] Ultimately, it appears that this is the extent to which the Court engaged with the concept of human dignity as a constitutional concept.

Building on this understanding of human dignity as a constitutional concept, the Court then provided some insights into its understanding of the human personality in positive law. Most notably, the Court made the following statement regarding the overarching nature of human dignity as applied to the human personality as a legal concept:

'Traditional learning generally defines *iniuria* as the wrongful and intentional

[76] Ibid para 22.
[77] Ibid para 27.
[78] para 138.
[79] Ibid paras 138 and 141.
[80] Ibid 138.
[81] Ibid para 143. For a similar interpretation of this aspect of the judgment, see Gowar & Visser *Le Roux* (note 72 above) 496-497.
[82] *Le Roux v Dey* (note 34 above) paras 98-106, 116 and 141.

> impairment of a person's physical integrity (*corpus*), dignity (*dignitas*), or reputation (*fama*). Academic authors are in agreement, however, that although the time-honoured three-fold distinction is a useful classificatory device to highlight the different interests involved, these interests often overlap. Thus, for example, although assault is classified as an infringement of physical integrity it will also often infringe the victim's sense of dignity; malicious attachment of property will frequently carry with it an infringement of the plaintiff's reputation or dignity or both while the infringement of reputation will almost always be accompanied by an affront to dignity' (footnotes omitted).[83]

In contemplation of the overarching nature of human dignity and the Court's own perceived overlap between human dignity and the different personality rights and the overlap between the different personality rights themselves, the Court found that,

> '[i]n view of this constant overlapping of manifestations of *iniuria*, duplication of *actiones* would therefore have been expected as a matter of common occurrence, if it were allowed in principle … I am unaware of a single case where two actions for *iniuria* were allowed on the same facts' (footnotes omitted).[84]

In other words, with regard to the Court's perception of the human personality, the Court reached the conclusion that an infringement of the different personality rights is essentially an 'affront to dignity' and, as a result, the Court was unconvinced that the different personality rights are conceptually distinct from human dignity and subsequently from each other.[85]

In terms of this conception of human dignity and the human personality, the Court proceeded to adjudicate the respondent's personality rights to reputation and dignity in terms of the legal duties created by the actio iniuriarum. As noted above, in terms of the doctrinal dimensions of the common law of personality, these legal duties state that personality rights may not be factually violated in a wrongful and intentional manner.[86] This legal duty also sets out the three requirements of the actio iniuriarum, namely, a factual violation of a personality right, wrongfulness and intent (which will be briefly examined below).[87]

In terms of the factual violation requirement, the Court impliedly accepted that proving the factual violation of the personality right to reputation will also prove the infringement of the personality right to dignity.[88] In this regard, the Court stated that, in the context of the factual violation requirement:

> '[I]f a reasonable observer would agree with Dr Dey that he had been humiliated, infringement of dignity has been established. But by the same token Dr Dey would

[83] Ibid para 141.
[84] Ibid para 142.
[85] Ibids paras 141- 142.
[86] See note 18 above.
[87] Ibid.
[88] Ibid paras 138-149.

> have been humiliated in the eyes of a reasonable observer to whom the statement had been communicated, which means that defamation had been established as well. If, on the other hand, the reasonable observer did not find the picture humiliating of Dr Dey, defamation would not have been established, but neither would infringement of dignity.'[89]

Regarding the wrongfulness requirement, the Court treated the personality rights to reputation and dignity differently. Specifically, the Court recognised that the factual violation of the personality right to reputation is considered to be prima facie wrongful while the violation of the personality right to dignity is not.[90] However, the Court did not consider this differential treatment any further. For the same reasons as given above, the Court accepted impliedly that proving the factual violation of the personality right to reputation does not only prove the factual violation of dignity, it similarly proves wrongfulness of the personality right to dignity, obviating the need for the separate application of the factual violation and wrongfulness requirements to dignity.[91]

Lastly, with regard to the requirement of intent, the Court formulated and applied the standard legal test for this form of fault.[92] However, notably the Court did not consider the influence of human dignity in this regard. As such, the Court did not contemplate the introduction of negligence-based liability to personality infringements, despite the ongoing call of some academic commentators and courts for the introduction of this type of liability in a constitutional context.[93]

Consequently, the Court found that the respondent had a claim for the infringement of his reputation but not for his dignity, for the reasons highlighted above.[94]

In considering the Constitutional Court's approach to the substance and method of the common law of personality, it seems that the Court equated human dignity to subjective feelings of self-respect, although in principle it recognised that human dignity ought to have a broader meaning. In addition, the Court made a stronger pronouncement on the different personality rights, namely that all of these

[89] Ibid para 149.
[90] Ibid paras 85 and 138-152.
[91] Ibid paras 85 & 144-146.
[92] The standard legal test formulates that intention consists out of two components, i.e. direction of will to achieve harm and the knowledge that affecting such harm is wrongful. *Le Roux v Dey* (note 34 above) para 130.
[93] *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) 1214-1215; *Marais v Groenewald* 2001 (1) SA 634 (T) 644-646; *Heyns v Venter* 2004 (3) SA 200 (T*)* para 14; JC Knobel 'Thoughts on intention, consciousness of wrongfulness and negligence in delict' 75 (2012) *Journal of Contemporary Roman-Dutch Law* 484, 487-490.
[94] *Le Roux v Dey* (note 34 above) paras 149-151.

rights are rooted deeply in the value of human dignity, with the result that the distinctive nature of the different common law personality rights are not unassailable conceptually. With regard to the adjudication of the different personality rights, it appears that the Court impliedly used the requirements of the actio iniuriarum to endorse its conceptualisation of human dignity and the human personality, e.g. by not applying the different requirements of the actio iniuriarum separately between the different personality rights (as well as maintaining intention-based liability). Ultimately, with this particular approach, the *Le Roux v Dey* judgment sets the stage for the 'post-liberal'[95] constitutional development of the common law of personality in South Africa as one of the most recent authoritative sources in this area of law.

However, on a closer analysis of this approach adopted by the Constitutional Court in light of the preceding discussion, I argue that it creates doctrinal inconsistencies and presents an ambiguous conception of human dignity and the human personality, which further seems to affect the framework of the common law of personality in such a pervasive manner that it diminishes the composite nature of the human personality as a legal interest. Each of these concerns about the Constitutional Court's ostensible approach towards aligning the common law with the Constitution in terms of doctrine, ideology and the current framework of the common law (as influenced by the judiciary) require further investigation.

In terms of the doctrinal basis for the protection of the human personality, fundamentally, the Constitutional Court's approach is inconsistent with that of the positive law. More specifically, from a purely common law perspective, according to Willem Joubert, the doctrine of subjective rights and actio iniuriarum conceive and protect the human personality as a composite interest consisting out of different personality rights and not as a general, all-encompassing subjective right.[96] Joubert asserts that a generalisation of the human personality as a legal interest undermines its ability to be articulated concretely in terms of the positive law – it collapses the human personality into a vague concept that affords little pragmatic protection to the various interests in the human personality.[97]

Considering this doctrinal basis from a constitutional perspective next, academic commentators such as Anton Fagan and Johann Neethling argue that the

[95] With reference to notes 28-32 above, this term attempts to invoke the ideological shift necessitated by the transformative constitutionalism paradigm.
[96] Joubert *Grondslae* (note 17 above) 124-129.
[97] Ibid.

value of human dignity does not provide 'the glue that cements the divergent [personality rights] into a single kind', even if the personality rights are aimed at protecting people's constitutional interests in being treated with dignity.[98] Although the different personality rights aim to promote the value of human dignity, they also seek to protect distinct interests and essential characteristics of the human image (namely the human personality) that extend beyond the notion of subjective feelings of common law dignity.[99] Adding to the confusion, the Court gave no consideration to the overlap between fundamental rights and personality rights as highlighted by the Supreme Court of Appeal in *Dendy v University of the Witwatersrand*.[100] Thus, it appears that the Court struggled to navigate the interplay between constitutional values, fundamental values and personality rights in constitutionalising the common law of personality.

When contemplating the ideological shift mandated by the transformative constitutionalism paradigm, the Constitutional Court did not engage meaningfully with human dignity. Specifically, the Court attributed no meaningful content to human dignity, either as a fundamental value or fundamental right (and the attendant interplay between them), and subsequently provided a thin constitutional conception of human dignity. The Court simply viewed human dignity as subjective (understood as individual) feelings of self-worth without being conscious of any further dimensions.[101] In addition, the Court did not consider other constitutional values such as equality, freedom and ubuntu. From a very rudimentary analysis, it seems that the Court focused on the individual dimensions of the human personality and not necessarily its collectivist dimensions, which are clearly at odds with this ideological shift. Consequently, the Court's approach provides no meaningful insight, if not further ambiguity, towards the ideological issues prevalent to the common law of personality. Specifically, by condensing the doctrinal compositeness of the human personality into a particular view on human dignity, namely that of subjective feelings of self-worth,[102] obtaining a multi-faceted conception of the human personality which

[98] A Fagan 'Dignity and the political right to freedom' in AJ Barnard-Naude, D Cornell & F Du Bois (eds*) Dignity, Freedom and the Post-Apartheid Legal Order: The Critical Jurisprudence of Laurie Ackermann* (2008) 177,180-181; J Neethling 'Die betekenis en beskerming van eer, *dignitas* en menswaardigheid in gemeenregtelike en grondwetlike sin' in Chris Nagel (ed) *Gedenkbundel vir JMT Labuschange* (2006) 85, 94-99.
[99] Ibid.
[100] *Dendy v University of the Witwatersrand* (note 21 above).
[101] *Le Roux* (note 34 above) paras 141-142, 151 & 154.
[102] Ibid.

is linked to constitutional imperatives related to the individual and the collective, seems implausible in the common law of personality.

This ambiguous and thin conception of human dignity and the human personality also seemed to influence the framework of the law of personality as it realised this narrow construction in positive law. Most notably, in terms of method, this was achieved through the Court's unwillingness to apply separately the factual violation and wrongfulness requirements to the different personality rights (which are necessary to articulate the various interests in the human personality). In addition, when viewed through the lens of the link between legal ideology and culture with its resultant effect on the common law's framework, the Court's focus on the individual dimensions of the human personality seems to suggest that the Court's thin conception of human dignity, the human personality and attendant adjudicative framework are underpinned by liberal ideologies alone.[103] This may provide some insight into the Court's maintenance of intention-based liability, as this standard of fault is associated more closely with individualistic values than collectivist ones.[104] This may also explain why the court limited its discretion with regard to the development of the fault requirement to include negligence-based liability, or omitted to reconsider the differential application of the prima facie mechanism to the different personality rights. Even so, if the doctrines of the common law of personality (as articulated both in terms of substance and method) lean towards a more liberalistic ideology which reduces judicial discretion, i.e. a pre-constitutional conception of (classical) liberalism, this can have an inhibitory effect on the multi-faceted nature of human dignity and its ability to imbue the human personality with both individualistic and collectivist dimensions in the common law's framework for purposes of a transformative constitutionalism paradigm.[105]

Given the areas of concern created by the Constitutional Court's approach, in this thesis I argue that the constitutionalisation of the common law of personality is ambivalent and that an alternative approach must be contemplated. More specifically, the ostensible constitutionalisation of the common law of personality by the judiciary should be revisited in terms of doctrine, ideology and the resultant framework created. In doing so, I plan to develop an approach to facilitate the actual

[103] JC Van der Walt & JR Midgley *Principles of Delict* 4th ed (2016) § 27.
[104] Ibid § 26 &148.
[105] See for instance Zitzke *Transformative Delict* (note 60 above) 64-67 who made a similar argument in respect of the law of delict as a whole.

constitutionalisation of the common law of personality as an alternative to that of the Constitutional Court.

1.2 The basic aims, premises, outline, research question and limitations of this thesis

1.2.1 The basic aims, premises and outline of this thesis

Broadly, this thesis interrogates the constitutionalisation of the common law of personality in terms of doctrine and its underpinning ideology, concerning both the substance and method as invoked by the doctrine of subjective rights and actio iniuriarum. This is based on my central argument that the approach promoted by the Constitutional Court in *Le Roux v Dey*[106] creates doctrinal inconsistences, promotes a stifling ideological conception of human dignity and the human personality, which uses the framework of the common law of personality effectively to articulate these conceptions in the positive law. In addition, I hypothesise that this approach appears to be strongly rooted in a pre-constitutional notion of (classical) liberalism which is counterintuitive to the ideological shift contemplated by the transformative constitutionalism paradigm. I further argue that the gravity of these concerns necessitates the development of an alternative approach or framework to that of the Constitutional Court. In more concrete terms, these considerations in terms of doctrine, ideology, the common law's current framework (as influenced by the judiciary) and the development of an alternative approach constitute the specific research aims of this thesis. However, before I explore these specific research aims in greater detail, some elucidation must be provided on the essential premise of this thesis.

I proceed from the essential premise that human dignity, as a constitutional value (cognisant of its interrelationship with other constitutional values), is and ought to be the central axis in the constitutionalisation and development of a modern law of personality. Specifically, as a value, human dignity can assist in the articulation of the Constitution's vision of the human personality in the positive law by initiating an ideological shift in the doctrines of the common law of personality as expressed

[106] *Le Roux* (note 34 above).

concretely in its substance and method. This premise underlies the research aims specified above.

Turning to the doctrinal dimensions of this thesis, I want to revisit the doctrinal basis of the positive law in protecting the human personality as a legal interest, given the initial recognition afforded to the convergence between the common law of personality and the Constitution. In particular, I want to interrogate more circumspectly the actual overlap between personality rights and fundamental rights with regard to the human personality. In doing so, I hope to illustrate that there is indeed congruity between the common law of personality and the Constitution on the composite nature of the human personality as a legal interest and its attendant method of legal protection. For this reason, I want to establish whether this overlap between the common law and Constitution can create a single and integrated doctrinal framework. If this is the case, I imagine that such a framework will provide the groundwork for the development of an alternative approach.

However, such congruity alone cannot lay the groundwork for the development of an alternative approach. Indeed, as illustrated above in general and with reference to *Le Roux v Dey*, the doctrinal basis of the common law of personality seems to be unaware of its own ideological underpinnings. Therefore, as this doctrinal basis may lay the groundwork for the development of an alternative approach, it further needs to be contextualised in the light of the previously mentioned transformative constitutionalism paradigm. For this reason, I want to explore this paradigm in more concrete terms, which requires an ideological shift in the doctrines of the common law. To attain such a shift concretely, reference must be made to the horizontality simpliciter approach that emerged from this paradigm, especially its practical measures being its scope and form legs.[107] More specifically, in terms of its scope leg, I want to seek greater clarification on the interplay between personality rights, constitutional values and fundamental rights, as these are the constituent parts of applicable constitutional ideologies for purposes of developing the common law. In addition, with reference to the form leg, I want to examine the link that exists between legal ideology and culture, with its influence on the common law's framework, more comprehensively, as I plan to unveil and compare constitutional and common law

[107] See generally Bhana *A Reconciliation of Section 8 and 39* (note 4 above); Friedman (note 32 above).

ideologies in terms of the transformative constitutionalism paradigm.[108] In doing so, I will seek further guidance from the horizontality simpliciter approach on how to apply constitutional ideologies to the substance and method of the common law and how to effect constitutional adjustments to the common law framework, if necessary. Therefore, as part of the doctrinal inquiry of this thesis, I want to interrogate the transformative constitutionalism paradigm with reference to the horizontality simpliciter approach, to demarcate the basic ideological, substantive and methodological dimensions of the abovementioned alternative approach.[109]

Considering the ideological dimensions of this thesis next, I want to investigate the conceptual dimensions of human dignity further as a central value to the previously discussed ideological shift. Primarily, I will examine post-apartheid South African human dignity discourse (but not to the exclusion of other intellectual traditions). More specifically, in terms of such an examination, I assume that the various dimensions of human dignity as a fundamental value will become apparent.[110] However, human dignity in this particular context also needs to be contextualised further with respect to the other constitutional values of equality, freedom and ubuntu as mandated by the transformative constitutionalism paradigm.[111] Therefore, I argue that from these values and their various dimensions, a constitutional vision of the personality will arise. Such a constitutional vision will serve as the ideological basis to constitutionalise the common law of personality and subsequently form the ideological dimensions to the proposed alternative approach.

Moving to the framework of the common law itself, I will further presume that a constitutional vision on the human personality will also influence the conceptualisation of the human personality and corresponding methodology to be employed in the actual constitutionalisation of the common law of personality. Therefore, I also propose to investigate concretely the specific manner in which the judiciary conceptualises and adjudicates human dignity, the human personality and the attendant personality rights by using the common law's frameworks.

On this basis, I will interrogate the Constitutional Court's conception of human

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[108] Bhana *Judicial Method* (note 4 above) 303.

[109] Bhana *A Reconciliation of Sections 8 and 39* (note 4 above) 373-374; A Price 'The influence of human rights on private common law' (2012) 129 *The South African Law Journal* 330, 331: Currie & De Waal (note 56 above) 49.

[110] See generally S Woolman 'Dignity' in S Woolman, M Bishop & J Brickhill et al (eds) *Constitutional Law of South Africa* 2ed (2008 Revision Service 4, 2012) Chapter 36.

[111] This specifically refers to section 39(2) of the Constitution. See also Bhana *A Reconciliation of Sections 8 and 39* (note 4 above) 372-373; Roederer *Post-Matrix Legal Reasoning* (note 6 above) 71.

dignity and the human personality, in *Le Roux v Dey*, to determine conclusively where it falls on the ideological continuum that ranges from liberalism to collectivism (which appears at this stage to lean towards the liberalism axis). I will also expand my scope of enquiry to the general approach of the judiciary, to determine if the *Le Roux v Dey* judgment is an isolated case of classical liberalism or whether the broader judicial mindset feeds into this ideological basis with its overarching cultural beliefs. This will also entail examining the legal method provided by the three requirements of the actio iniuriarum, i.e. a factual violation of a personality right in a wrongful and intentional manner, and how this is applied by the courts. The link between legal ideology, culture and method (in terms of the transformative constitutionalism paradigm) will frame this enquiry. With consideration of this link, I will also provide an analysis of these three requirements and compare them to the constitutional vision of the human personality. Such a comparison, I argue, can potentially show how the current legal methodology employed by the actio iniuriarum may frustrate the constitutionalisation of the common law of personality and which aspects of the general requirements of the actio iniuriarum may require constitutional adjustment.[112] As a result, these considerations will form the substantive and methodological dimensions of the proposed alternative approach.

As my final research aim, I will attempt to consolidate the doctrinal, ideological, substantive and methodological dimensions of this thesis and consider their practical implication for the development of an alternative framework to that of the Constitutional Court. I imagine that the interplay between the distinct common law personality rights, human dignity (as a fundamental value together with other constitutional values as indicated above) and fundamental rights related to the human personality will provide the scaffolding for such an alternative framework. This will culminate in the constitutional vision of the human personality which ought to be applied to the substance and method of the common law of personality. Furthermore, to facilitate the development of this alternative framework in terms of methodology, I will contemplate what constitutional adjustments are required to the common law of personality.

Lastly, to illustrate the actual operation of this alternative framework, I will apply it to three personality rights, namely dignity, reputation and privacy, considering that

[112] See generally Woolman (note 110) above.

the Constitutional Court questioned the independent constitutional development of these rights.[113] Specifically, with the proposed framework I aim to show how these respective personality rights indicate a distinct interest or quality of the human personality, implicate different dimensions of human dignity and, together with applicable fundamental rights, shape legal duties appropriate for private relationships.

At this point, after explaining the basic research aims of this thesis and their relationship to one another, it is also important to highlight that these specific research aims will constitute the chapters of this thesis. For convenience and clarity, I will provide a brief outline of these ensuing chapters here. First, the doctrinal considerations in terms of the doctrine of subjective rights and actio iniuriarum, together with the transformative constitutionalism paradigm and horizontality simpliciter approach, will form chapter two. Secondly, the ideological considerations in the investigation of the multi-faceted nature of human dignity as a value, and the attendant development of a constitutional vision on the human personality, will form chapter three. Thirdly, the common law's framework regarding the judiciary's conceptualisation of human dignity and the human personality, together with its approach to adjudicating personality rights through the actio iniuriarum, will constitute chapter four. Fourthly, chapter five will comprise the development of an alternative framework to the approach of the Constitutional Court, and its operation will be demonstrated by applying it to the specific mentioned personality rights. Lastly, I will reiterate the need for an alternative framework for the constitutionalisation of the law of personality and illustrate how the findings of this thesis can assist the broader constitutional development of the law of personality in the concluding chapter six of this thesis.

1.2.2 The basic research question of this thesis

In the light of the above, my basic research question relates to the manner in which the fundamental value of human dignity should be invoked and given content in relation to the constitutionalisation of the common law of personality, which is dependent on its interplay with common law personality rights and fundamental rights. This will be considered ideologically in terms of the overarching transformative constitutionalism paradigm and practically in terms of the horizontality simpliciter

[113] See *Khumalo* (note 33 above); *Le Roux* (note 34 above).

approach. It also relates to an appropriate framework that ought to be employed in the constitutionalisation of the common law of personality, which will inevitably entail the constitutional expansion of the different personality rights and reconfiguration of the requirements of the actio iniuriarum. As a result, a constitutional vision of the human personality and legal method sensitive to this vision will arise.

1.2.3 The limitations of this thesis

Having established the basic research premises, aims, outline and research question of this thesis, it is equally important to indicate the primary parameters of its scope of enquiry, namely, its limitations. The limitations of this thesis relate to the transformative constitutionalism paradigm, its overall relationship to the law of delict and within the law of personality itself. Each of these will be briefly outlined below.

As this thesis relies on the transformative constitutionalism paradigm with reference to the horizontality 'simpliciter' approach, and given its unique South African dimension with reference to the horizontality provisions of the Constitution, a comparative analysis with other jurisdictions falls beyond its scope. Furthermore, as this thesis contemplates the constitutionalisation of the common law of personality within its own framework (subject to constitutional scrutiny), it will not grapple with the prospects of legislative intervention. Lastly, as this thesis accepts that the transformative constitutionalism paradigm is legitimate, given the supremacy of the Constitution and the doctrine of legal precedent, it will not explore the criticisms levelled against this paradigm.[114]

Moving to the limitations in respect of the law of delict, it must be noted that this thesis does not contemplate its general constitutionalisation. It only considers the constitutionalisation of the law of personality which, in positive law, is grounded in the doctrine of subjective rights and the actio iniuriarum. For this reason, the law of personality, as a sub-discipline of the law of delict, uses delictual concepts to determine liability for a personality infringement, but in the process, these delictual concepts are adjusted and modified to fit the context of a personality infringement.[115]

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[114] See for instance Zitzke *A Decolonial Critique* (note 55 above) who examines these criticisms in terms of the transformative constitutionalism and conceptual decolonialisation paradigms. In addition, this thesis will not primarily explore the customary law of personality infringements.

[115] Neethling, Potgieter & Roos (note 12 above) 29-31; Van der Walt & Midgley (note 103 above) § 26. These broadly refer to the generalising approach and secondary characteristics of the law of delict as noted in section 1.2.1 above. However, in this thesis I will mainly focus on the secondary characteristics in respect of a personality infringement.

Therefore, with regard to the primary framework that needs to be investigated, I argue that the constitutionalisation of the law of personality is directly linked to the requirements of the actio iniuriarum, with its nuanced application of delictual concepts, and not the law of delict per se in the abstract.[116]

Finally, considering the limitations in respect of the law of personality itself, this thesis accepts that the adjudication of a personality infringement occurs in three stages: the prima facie stage (where the onus rests on the plaintiff to establish, with prima facie evidence, the elements of an iniuria which gives rise to various presumptions), the justification stage (where the onus rests on the defendant to rebut the prima facie case of a personality infringement with recognised legal defences negating the aforementioned presumptions) and the remedy stage (where the court has to determine the appropriateness of the remedy claimed and the content or extent of it, i.e. the amount of damages claimable when liability for a personality infringement was established).[117] Although these stages are interconnected with one another, this thesis will only examine the most fundamental stage of this adjudication process, namely the prima facie stage. More specifically, as the development of a multi-faceted conception of human dignity and a constitutionally adjusted framework will arise from this stage, it will, in turn, serve as the ideological, substantive and methodological basis for the further constitutionalisation of the justification and remedy stages.[118]

[116] This particular argument will be developed more fully in Chapter 4.
[117] Loubser & Midgley (note 18 above) 412-413 & 433-434.
[118] This particular limitation will be further developed and concretised in Chapter 6. For now, I will operate from the premise that the defence and remedy stages follow sequentially on the prima facie stages both in terms of substance and method. In other words, the defences and remedy stages build upon the prima facie stage. For this reason, I will not consider substantive issues pertinent to the defences and remedy stages that will influence their constitutionalisation.

CHAPTER 2

THE TRANSFORMATIVE PARADIGM AND DOCTRINE

2.1 Introduction

> 'Even in its critical form, [the transformative paradigm] should be concerned with legal doctrine – and not just the impact and societal consequences of law … [which requires] an examination of that doctrine in a way that goes beyond the formalist view of law and legal theory as being exclusively the product of legal institutions which are portrayed as isolated, self-sustaining and functioning mechanically (footnotes omitted).'[1]

In terms of the plethora of jurisprudence available on the transformative constitutionalism paradigm, for purposes of aligning the common private law with the Constitution, I begin this chapter by articulating a few general propositions constituting this paradigm (as applicable to the common law of personality). These propositions will also inform this chapter's research inquiry into the doctrinal basis of the common law of personality and its attendant (and desired) interplay with the Constitution. These propositions draw inspiration from certain judgments of the Constitutional Court and the works of Deeksha Bhana and Emile Zitzke who contextualised the transformative paradigm in the context of the law of obligations (that is, the private law branches of contract and delict, which the law of personality forms part of).[2]

First, according to the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*,[3] the transformative constitutionalism paradigm envisions 'a single system of law' where the common law is not treated as a 'separate' or 'distinct body of law' to that of

[1] J Modiri 'Transformation, tension and transgression: Reflections on the culture and ideology of South African legal education' (2013) 24 *Stellenbosch Law Review* 455, 473-474.

[2] See generally D Bhana 'The role of judicial method in the relinquishing of constitutional rights through contract' (2008) 24 *South African Journal on Human Rights* 300; D Bhana 'The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution' (2013) 29 *South African Journal on Human Rights* 351; E Zitzke 'Stop the illusionary nonsense! Teaching transformative delict' (2014) 46 *Acta Academia* 52; D Bhana 'The development of a basic approach for the constitutionalisation of our common law of contract' (2015) 26 *Stellenbosch Law Review* 3; D Bhana 'The role of judicial method in contract law revisited' (2015) 132 *South African Law Journal* 122. E Zitzke 'Constitutional heedlessness and over-excitement in the common law of delict's development' (2015) 7 *Constitutional Court Review* 259; E Zitzke 'The history and politics of contemporary common-law purism' (2017) 23 *Fundamia* 185; E Zitzke 'A decolonial critique of private law and human rights' (2018) 34 *South African Journal on Human Rights* 493. In turn, these authors draw further inspiration from the works, among others, of the following academic commentators: D Kennedy 'Form and substance in private law adjudication' (1976) 89 *Harvard Law Review* 1685 and KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

[3] 2000 (2) SA 647 (CC).

the Constitution.[4] Within this single system of law, the common law 'derives its force from the Constitution and is subject to constitutional control' so that it can give effect to the transformative aspirations of the Constitution.[5] As a result, when regulating private relationships, a single and integrated body of constitutionalised private law should emerge from the transformative paradigm.[6]

Secondly, within this single system of constitutionalised private law, the Constitutional Court in *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another*[7] highlighted the importance of the doctrines of the common law within this paradigm.[8] As explained by the Constitutional Court in *Gcaba v Minister for Safety and Security*,[9] the 'Constitution recognises the need for specificity and specialisation in a modern and complex society' which ought to be found in the respective areas of law, including private law.[10] In other words, as the Constitution contains transformative aspirations, in the form of broad constitutional values and fundamental rights that provide private law with its operative force, the former on the other hand provides this specificity and specialisation in its frameworks regarding the regulation of private relationships.[11] In addition, in certain respects, the Constitutional Court found that the 'lessons gained' from the doctrines of the common law 'are timeless and have passed the logical and moral tests of time', making them suitable for regulating the private relationships of a post-Apartheid South African society.[12]

Thirdly, as already outlined in chapter one of this thesis, it must be kept in mind that the doctrines of the private law have their inherent limitations.[13] For one thing, from a critical legal history perspective, as adjacent to the transformative paradigm,[14] the doctrines of South African private law 'evolved from an ancient society' which organised itself 'through centuries of feudalism, colonialism, … exploitation' and, more

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[4] Ibid para 44.
[5] Ibid. See also *Bhana A Reconciliation of Sections 8 and 39* (note 2 above) 353.
[6] Zitzke *Constitutional Heedlness* (note 2 above) 286.
[7] 2016 (1) SA 621 (CC).
[8] Ibid para 37.
[9] 2010 (1) SA 238 (CC).
[10] Ibid para 56.
[11] Ibid. See also *Dendy v University of the Witwatersrand* 2007 (8) BCLR 910 (SCA) paras 15 & 24.
[12] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum* (note 7 above) para 37. See also Zitzke *Transformative Delict* (note 2 above) 60; Zitzke *Constitutional Heedlessness* (note 2 above) 269-270.
[13] See section 1.1 of chapter one.
[14] Zitzke *Transformative Delict* (note 2) 67-69. See generally Zitzke *Common-Law Purism* (note 2 above).

recently, according to the influences of Apartheid in the South African context.[15] However, according to Jeremy Waldron, one also has to take note of the 'universalisation' of human dignity during the eighteenth and nineteenth centuries, which gradually recognised the human autonomy, personality and agency of larger segments of society (although a claim for a full egalitarianism cannot be made),[16] and even infiltrated private law doctrines, more specifically the law of personality, to some extent, during the apartheid era.[17] As a result, according to Waldren, societies were incrementally and gradually organised according to this new-found sense of dignity, but this dignity was linked to high social status and not to the unconditional inner worth of all individuals.[18] This inevitably gave way to imbalanced power dynamics between private individuals, which obscured the attainment of social justice on this level.[19] Consequently, the liberty experienced during this period of universalisation, in the basic pursuit of attaining 'the good life,' was ideologically couched in pre-constitutional notions of (classical) liberalism.[20]

With (classical) liberalism, the basic pursuit of 'the good life' is characterised by dominant values such as self-interest, self-reliance and self-determination, which frame individuals as 'atomistic units' whose 'personal autonomy' competes with that of others.[21] As an organising ideology in private law, classical liberalism only requires from individuals to respect these lines of individual liberty, without requiring from them to share or sacrifice the pursuit of their own interests or to protect the interests of others.[22] On a macro level, this pursuit of the good life operates in a laissez-faire market economy which commodifies the human experience according to stagnant social strata and disparate financial wealth, and places a low premium on the unconditional absolute inner human worth of individuals and their interconnectedness to one another.[23] Arguably, classical liberalism, as a constitutive private law ideology,

[15] *Mighty Solutions v Engen Petroleum* (note 6 above) para 36.
[16] J Waldron 'Lecture 1: Dignity and Rank' in M Dan-Cohen (ed) *Dignity, Rank & Rights* (2016) 13, 34-36. See for instance
[17] L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 87-88. Concrete examples hereof would include *Purshotam Dagee v Durban Corporation* (1908) 29 NLR 391; *Mhlongo v Bailey* 1958 (1) SA 370 (W); *Simonlanga v Masinga* 1976 (2) SA 732 (W); *Jacobs v Waks* 1992 (1) SA 521 (A).
[18] Waldron *Dignity and Rank* (note 2 above) 34-36.
[19] Ibid. See also M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SA Public Law* 155, 160-161.
[20] Bhana *Judicial Method* (note2 above) 302.
[21] Kennedy (note 2 above) 1713; Bhana *Judicial Role Revisited* (note 2 above) 124.
[22] Ibid. See also Zitzke *Transformative* Delict (note 2 above) 57.
[23] Zitzke *Transformative Delict* (note 2 above) 64-67.

has a propensity to entrench the status quo in the private realm, with a resultant weak focus on its substantive transformation and the need for state intervention.[24]

Fourthly and closely associated to the third proposition, the underpinning ideologies of the private law, such as those pertaining to pre-constitutional notions of (classical) liberalism, are effectively concealed through its underlying legal culture.[25] In general, legal culture refers to a system of beliefs held by the legal fraternity about the ideological nature of the legal reasoning process, i.e. the extent to which 'extra-legal factors' such as 'personal and/or political ideologies, values and sensibilities' of legal decision-makers influence the legal reasoning process, among others.[26] These ideologies, for purposes of law, range from individualism to collectivism.[27] In pre-constitutional South African legal culture, the legal phenomenon existed that judicial and legal decision-makers believed that the frameworks of the private law (i.e. the manner in which legal concepts are articulated and adjudicated in the positive law) were 'value-neutral', despite their liberal underpinnings.[28] The reasoning behind this, according to Zitzke (with reference to Karl Klare), is that the South African legal mindset firmly believed in the certainty and determinacy of law, as this worldview was politically contextualised in an atmosphere of conquest and imposition rather than one of consensus building and justification.[29] This speaks to a conservative legal culture.[30]

What is more perplexing, however, is that South African legal culture, with and after the advent of the Constitution, still believes in the 'neutrality' of the private law frameworks.[31] According to Bhana and Zitzke, the underpinning pre-constitutional (liberal) ideologies of the private law frameworks became so 'naturalised' that judicial and legal decision-makers are unaware of the ideologies underpinning their reasoning processes.[32] The net result of this lack of ideological awareness, as cautioned by Zitzke, is that, inadvertently, current reasoning processes may promote the classical

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[24] Zitzke *Common-Law Purism* (note 2 above) 186-187.
[25] Bhana *Judicial Method* (note 2 above) 302; Bhana *Judicial Method Revisited* (note 2 above) 128; Zitzke *Transformative Delict* (note 2 above) 57; Zitzke *Common-Law Purism* (note 2 above) 186.
[26] Bhana *Judicial Method* (note 2 above) 302; Zitzke *Common-Law Purism* (note 2 above) 186.
[27] Zitzke *Common-Law Purism* (note 2 above) 188. These ideologies will be examined in greater detail below at section 2.3.2.
[28] Bhana *Judicial Method* (note 2 above) 302; Zitzke *Common-Law Purism* (note 2 above) 186.
[29] Zitzke *Transformative Delict* (note 2 above) 61.
[30] Ibid. The concept of legal cuture will be examined in further detail below at section 2.3.2.
[31] Ibid 57-61. See also Bhana *Judicial Method* (note 2 above) 310.
[32] Bhana *Judicial Method* (note 2 above) 302, Zitzke *Transformative Delict* (note 2 above) 61; Bhana *Judicial Method Revisited* (note 2 above) 128; Zitzke *Common-Law Purism* (note 2 above) 186.

liberal tendencies of the private law frameworks, even if judicial and legal decision-makers are 'committed to the transformative potential of the Constitution'.[33]

With these limitations of the private law doctrines in mind, i.e. its underpinning liberal nature and the concealment of it through legal culture, the transformative constitutionalism paradigm will require a fundamental shift in terms of its underpinning ideologies and the legal fraternity's lack of awareness of how ideology (together with legal culture) influences private law frameworks.[34] However, in creating a single system of law, the transformative paradigm will also rely on the specialisation provided by the private law frameworks. These considerations in terms of ideology, the lack of ideological awareness and the specialisation provided by the private law frameworks, will be discussed in turn.

In terms of the ideologies underpinning private law doctrines, a more full-bodied conception of human dignity, connected to values of substantive equality, freedom and ubuntu devoid of extreme deficiency or excess, must permeate individuals' pursuits of 'the good life' (as opposed to the pre-constitutional disposition).[35] Arguably, this will entail an ideological shift in the doctrines of the common law from (classical) liberalism to greater collectivism in regulating private relationships (with the caveats that the individual can neither remain unfettered nor be subsumed completely into the greater collective).[36] For this reason, the pursuit of the good life must also be characterised by collectivist values such as reciprocity, solidarity and co-operation, which substitute the atomistic self with the 'unencumbered self', whose personal autonomy is not only constituted through individual abilities and achievement but also through social relationships and membership of a community.[37] A greater focus should also be placed on attaining social justice in private relationships, contextualised by a more democratic and egalitarian society.[38] Ultimately, within this transformative constitutionalism paradigm, an adequate balance must be struck between these individual and collectivist values within the frameworks

[33] Zitzke *Common-Law Purism* (note 2 above) 189-190; AJ Van Der Walt 'Legal history, legal culture and transformation in a constitutional democracy' (2006) 12 *Fundamina* 1, 17.
[34] Bhana *Judicial Method Revisited* (note 2 above) 131; Zitzke *Constitutional Heedlessness* (note 2 above) 297.
[35] Klare (note 6 above) 159.
[36] D Bhana & CJ Visser 'The concurrence of breach of contract and delict in a constitutional context' (2019) 35 *South African Journal on Human Rights* 94, 107.
[37] Kennedy (note 2 above) 1717; Bhana *Judicial Role* (note 2 above) 310.
[38] Bhana *Judicial Method* (note 2 above) 301; Bhana *Judicial Method Revisited* (note 2 above) 124.

of the private law.[39]

To attain such an adequate balance, arguably, the overarching conservative culture, with regard to the private law, also requires transformation.[40] In general terms, traditional beliefs pertaining to the 'neutrality' of the common law frameworks must be dispensed with while a more critical legal mindset must be adopted.[41] Specifically, legal decision-makers (especially the judiciary) 'can no longer camouflage' the underpinning ideologies of the adjudication process in respect of the private common law frameworks under the 'guise' of legal neutrality or certainty.[42] The judiciary must come to terms with the ideological nature of the adjudication process and that the claim of legal neutrality and/or certainty is the trepidations of a conservative legal culture (or at least in the South African context).[43] Accordingly, the judicial mindset ought to re-evaluate this conservative culture (i.e. the limits of its discretion) in the context of a transformative paradigm.[44] This is particularly because the transformative paradigm requires that substantial progress must be made towards achieving social justice in private relationships and a purely conservative (read as formalistic) reasoning process will fall short of this transformative project.[45] The judicial mindset must be more amenable to purposive adjudication which is 'policy-orientated and consequentialist' in nature.[46] Ultimately, a more progressive (judicial) legal culture must evolve which utilises a range of legal modes of reasoning suitable for transforming the private law frameworks.[47]

In transforming the private law frameworks, the judiciary must also engage with the specialisation provided by these frameworks while developing them in terms of the substantially progressive and transformative aims of the Constitution. In more concrete terms, the constitutionalisation of the common private law ought to facilitate the co-operative growth between it and the Constitution into a single, integrated and

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[39] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 40; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para 12; J Neethling & JM Potgieter *Neethling – Potgieter – Visser: Law of Delict* 7th ed (2015) 38–40; Zitzke *Transformative Delict* (note 2 above) 57–60; Bhana & Visser (note 36 above) 109-110.

[40] Bhana *Judicial Method* (note 2 above) 310; Bhana *Judicial Method Revisited* (note 2 above) 130-131; Zitzke *Transformative Delict* (note 2 above) 61.

[41] Ibid.

[42] Bhana *Judicial Method Revisited* (note 2 above) 130-131; Zitzke *Common-Law Purism* (note 2 above) 186.

[43] Ibid.

[44] Bhana *Judicial Method Revisited* (note 2 above) 130-131.

[45] Bhana *Judicial Method* (note 2 above) 302; Bhana *Judicial Method Revisited* (note 2 above) 131; Zitzke *Transformative Delict* (note 2 above) 61.

[46] Bhana *Judicial Method Revisited* (note 2 above) 130-131.

[47] These types of legal reasoning will be canvassed below at section 2.3.2

constitutionalised body of a modern law.[48] As cautioned by Zitzke, the judiciary cannot create transformed private law frameworks by solely relying on the Constitution and ignoring the former's doctrines (i.e. 'constitutional over-excitement') or by engaging cursorily with the Constitution in such a manner that it has no practical effect on the private common law (i.e. 'constitutional heedlessness').[49] According to Bhana, a 'rigorous constitutional analysis' is called for, where the common law doctrines are systematically and coherently constructed within the transformative aspirations of the Constitution.[50] In doing so, the private law frameworks can give specific content and meaning to constitutional concepts while the Constitution can adjust the substance and adjudication of the private law frameworks to fit a transformative constitutionalism paradigm.[51]

In more concrete terms and in the context of the law of personality, as highlighted in chapter one, to attain this transformation in the private law frameworks, consideration must be given to the 'horizontality simpliciter' that emerged from this paradigm.[52] More specifically, I argue that this approach can organise the doctrinal, ideological, substantive and methodological dimensions of the constitutionalisation of the common law of personality through its 'scope' and 'form' legs.[53] As further highlighted in chapter one, such organisation will pertain to the desired interplay between common law personality rights, foundational constitutional values (especially the value of human dignity) and the fundamental rights implicated by the human personality.[54] Ultimately, in examining this desired interplay, the basic groundwork will be provided to develop an alternative approach to that of the Constitutional Court

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[48] JM Burchell 'The Protection of Personality Rights' in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 639, 650 & 653.
[49] Zitzke *Constitutional Heedlessness* (note 2 above) 267-270 & 284-285.
[50] Bhana *Judicial Method* (note 2 above) 309-310; Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 360. See also C Roederer 'Founding Provisions' in S Woolman, M Bishop & J Brickhill et al (eds) *Constitutional Law of South Africa* 2ed (2008 Revision Service 4, 2012) Chapter 30, 21-22; CJ Roederer 'Working the common law pure: Developing the law of delict (tort) in light of the spirit, purport and objects of South Africa's Bill of Rights' (2009) 26 *Arizona Journal of International & Comparative Law* 427, 469-*South African Journal on Human Rights* 50, 62-64; AJ Van Der Walt *Constitutional Property Law* (2005) 433-434; S Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762, 787 & 763-764; F Du Bois 'Private Law in the Age of Rights' in E Reid & D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) chapter 2, 35-36.
[51] *Carmichele v Minister of Safety and Security* (note 39 above) para 40; *Mighty Solutions v Engen Petroleum* (note 6 above) para 36; A Van Aswegen 'The implication of a Bill of Rights for the law of contract and delict' (1995) 11 *South African Journal on Human Rights* 50, 62-63; Ackermann (note 17 above) 87.
[52] See section 1.1 of chapter one.
[53] Ibid.
[54] See section 1.1 of chapter one.

in *Le Roux v Dey*,[55] as contemplated in this thesis.[56]

In this chapter, I will explore the doctrinal dimensions of this thesis in greater detail. Starting with the next section, 2.2, I will provide an in-depth analysis of the doctrine of subjective rights and the actio iniuriarum as the doctrinal basis for the basic protection of the human personality as a legal interest in positive law. In particular, I will show how the human personality is recognised as a composite legal interest and highlight the distinct common law personality rights. The latter will be done by canvassing the recognition and functioning of various diverse personality rights. In doing so, I will also highlight the specialisation provided by the doctrine of subjective rights and the actio iniuriarum.

Section 2.2, as a precursor to the horizontal application of the Constitution and the Bill of Rights (in other words, the use of the horizontality simpliciter approach that emerged from the transformative constitutionalism paradigm), will also consider the apparent overlap between personality rights and fundamental rights and highlight that such an overlap will also implicate foundational constitutional values (especially the value to human dignity). This will be done to illustrate further that the constitutionalisation of the law of personality will be based on a single and integrated doctrinal framework.

In section 2.3, to engage with this interplay between personality rights, fundamental rights and fundamental values, I will interrogate the horizontality simpliciter approach more concretely. With reference to the transformative paradigm and specific provisions of the Constitution, I will examine the practical functioning of this approach in broad terms. This will entail investigating its scope leg (which interrogates constitutional ideologies) and its form leg (which interrogates common law frameworks against the link between legal ideology and culture). Ultimately, this will provide guidance on the interplay between constitutional and private law concepts in the context of the law of personality.

2.2 The doctrinal dimensions of protecting the human personality: The doctrine of subjective rights, the actio iniuriarum and the Constitution

The human personality (not to be confused with legal personality),[57] as a legal

[55] 2011 (3) SA 274 (CC). See also section 1.2 of chapter one.
[56] See section 1.2 of chapter one.

interest, encompasses various personality rights which collectively recognise individuals as physical and spiritual-moral beings that guarantee the enjoyment of their own existence through their unique and expressive personalities.[58] As briefly explained in chapter one,[59] the legal protection of the human personality in positive law is predicated primarily on the common law of personality.[60] Therefore, Neethling, Potgieter and Roos define the law of personality as 'the legal norms (rules and principles) aimed at protecting an individual's (or a juristic person's) personality, including the rules and principles which deal with the recognition, definition and protection of various personality rights'.[61]

Of central importance to the common law of personality is the recognition that the human personality is a 'composite legal interest'.[62] As noted by Willem Joubert and Eric Descheemaeker respectively, the notion of compositeness underlies the doctrinal basis of the common law of personality in protecting the human personality, that is, the human personality is differentiated into various subjective rights of personality (which is more commonly known as 'personality rights')[63] which seek to protect a particular interest of an individual's personality.[64] For the purpose of further doctrinal clarification, the protection of the human personality as a composite legal interest is founded on the doctrine of subjective rights and the actio iniuriarum.[65]

Primarily, the doctrine of subjective rights provides the rules and principles that deal with the recognition of various personality rights (i.e. the scope of personality

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[57] Neethling, Potgieter and Roos, with reference to Joubert, explain the difference as follows: '[t]he legal subjectivity (or personality) of a human being – the function according to which he is engaged in the law and which includes the capacity to be the bearer of subjective rights and duties – and the subjective rights themselves (associated with human personality) which he has or may acquire by virtue of his legal subjectivity, are totally distinct concepts', J Neethling, JM Potgieter & A Roos *Neethling on Personality Rights* (2019) 15. See also WA Joubert *Grondslae van die Persoonlikheidsreg* (1953) 123.

[58] Joubert *Grondslae* (note 57 above) 10, 18, 130-131; Neethling, Potgieter & Roos (note 57 above) 24; E Descheemaeker 'Protecting reputation: Defamation and negligence' (2009) 29 *Oxford Journal of Legal* Studies 603, 606-607; JH Wilkinson 'The dual lives of rights: The rhetoric and practice of rights in America' (2010) 98 *California Law Review* 277, 284; Ackermann (note 17 above) 89; CC Tilley 'Rescuing dignitary torts from the Constitution' (2012) 78 *Brooklyn Law Review* 65, 67.

[59] See section 1.1 of chapter one.

[60] Neethling, Potgieter & Roos (note 57 above) 3-5; See generally Joubert *Grondslae* (note 56 above); J Neethling 'Personality Rights: A Comparative Overview' (2005) 38 *The Comparative and International Law Journal of Southern Africa* 210; JM Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 133.

[61] Which is a sub-discipline to the law of delict, see Neethling, Potgieter & Roos (note 57 above) 3.

[62] Joubert *Grondslae* (note 57 above) 10; Descheemaker (note 58 above) 606.

[63] Neethling, Potgieter & Roos (note 57 above) 3.

[64] Joubert *Grondslae* (note 57 above) 10, 23, 118-120; Descheemaker (note 58 above) 605. See also *R v Umfaan* 1908 TS 62, 68; Neethling, Potgieter & Roos (note 57 above) 11-5, 24-39; M Loubser & R Midgley (eds) *The Law of Delict in South Africa* 3rd ed (2017) 313.

[65] Joubert *Grondslae* (note 57 above) 121, 140; Neethling, Potgieter & Roos (note 57 above) 4.

rights recognised).[66] In addition, the current framework of the law of personality is based on the historic delictual action of the actio iniuriarum, which facilitates the previously mentioned expression of the different personality rights and their subsequent protection in positive law.[67] In other words, the actio iniuriarum enables the articulation and protection of the various personality rights whereas the doctrine of subjective rights provides the genesis and recognition of these various personality rights in positive law.

From a constitutional dimension, as outlined in chapter one,[68] certain fundamental rights in the Bill of Rights correspond to various common law personality rights, which seem to create an overlap between these subjective and fundamental rights in respect of the human personality. Although in *Le Roux v Dey* the Constitutional Court has indicated that the human personality gives expression primarily to human dignity as a fundamental value,[69] it is still necessary to determine the extent of this overlap between common law personality rights and fundamental rights with regard to the human personality. Specifically, the extent of this overlap can establish that the doctrinal understanding of the human personality in terms of the common law is reconcilable and translatable with the ontology of the fundamental rights in the Bill of Rights. In other words, if this overlap reveals that both the common law and Constitution doctrinally envision the human personality as a composite interest, then it is questionable whether human dignity can condense the different personality rights into a singular unit based on human dignity and absorb the doctrines of the common law. Alternative possibilities can then be contemplated, towards the use of human dignity as a fundamental value in the frameworks of the common law of personality.

In the discussion that follows, the doctrine of subjective rights, the actio iniuriarum and the fundamental rights implicated by the various personality rights will be interrogated further.

2.2.1 The doctrine of subjective rights

[66] Joubert *Grondslae* (note 57 above) 123-124; Neethling, Potgieter & Roos (note 57 above) 3 &11-14; Ackermann (note 17 above) 90-91.
[67] Joubert *Grondslae* (note 57 above) 11-12; Neethling, Potgieter & Roos (note 57 above) 2, 39-40; Neethling *Personality Rights* (note 59 above); Ackermann (note 17 above) 87.
[68] See section 1.1 of chapter one.
[69] Ibid.

As a foundational canon to South African private law theory in general,[70] the doctrine of subjective rights[71] is of particular relevance for the law of personality, as it provides the analytical scheme for the recognition and development of the human personality in positive law.[72] Historically based on natural law consciousness, in affording individuals' innate rights, the doctrine of subjective rights, through the subsequent development that took place in the continental legal systems during the nineteenth century, recognised that personality rights constitute a discrete category of legal interests necessitating protection from the positive law.[73]

The doctrine of subjective rights is premised on the object-subject relationship (i.e. the relationship between an individual and his or her interests in the human personality) and the subject-subject relationship (i.e. the relationship between individuals in respect of each other's personality interests).[74] For this reason, the object-subject and subject-subject relationships follow the Kantian model of deconstructing a personality right as a legal interest in the human personality which is to be utilised by and enforced between individuals.[75] Thus, the object-subject and the subject-subject relationships will be considered in turn, as these relationships facilitate the articulation of the various personality rights.

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[70] Joubert *Grondslae* (note 57 above) 9-10; Neethling, Potgieter & Roos (note 57 above) 10-12; Ackermann (note 17 above) 88-91. See also MG Kabba 'Political development as social intelligence in Constitutional democracy: The central place of dialogue in decolonization' (2014) 8 *African Journal of Political Science and International Relations* 104, 108.

[71] In elucidating the terminological basis of this doctrine, Cronjé and Heaton provide the following explanation (DSP Cronjé & J Heaton *The South African Law of Persons* 5th ed (2017) 1):

> 'The law can be viewed from different angles. On the one hand it is a system of norms of conduct or rules of principles posited by competent bodies to regulate relations between members of the community in a peaceful and just manner. In this sense we are concerned with the law in the objective sense … Viewing the law from another angle, it is not norms of conduct or rules that are at issue, but rather a network of legal relationships amongst legal subjects. Here we are concerned with rights or law in the subjective sense' (footnotes omitted).

[72] Joubert *Grondslae* (note 57 above) 11-12, 115 &140; Neethling, Potgieter & Roos (note 57 above) 4; Ackermann (note 17 above) 90.

[73] It must be noted that in traditional private law theory, the term subjective rights are also used – see generally WA Joubert 'Die realiteit van die subjektiewe reg en die betekenis van 'n realistiese begrip daarvan vir die privaatreg' (1958) *The Journal of Contemporary Roman-Dutch Law* 12. See further Joubert *Grondslae* (note 56 above) 10 & 13-16. See also Neethling, Potgieter & Roos (note 57 above) 5-6; Ackermann (note 17 above) 89-91. For a detailed exposition of the historical development of this doctrine, see generally Joubert *Grondslae* (note 57 above).

[74] Joubert *Grondslae* (note 57 above) 10 as translated by Ackermann (note 17 above) 89. See also *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T), 381-382; J Finnis *Natural Law and Natural Rights* (1980) 207; J Nedelsky 'Reconceiving rights as relationships' (1993) 1 *Review of Constitutional Studies* 1, 8-10; Neethling, Potgieter & Roos (note 57 above) 11-12.

[75] I Kant *The Metaphysics of Morals* (1785) (trans MR Gregor, 1996) 393-394; See also Descheemaker (note 57 above) 606; *Tommie Meyer Films* (note 74 above) 382; Joubert *Grondslae* (note 57 above) 120-121; Joubert *Realiteit van die Subjektiewe Reg* (note 73 above) 13.

Starting with the object-subject relationship, this relationship enables the concrete recognition of various distinct interests in the human personality, as this relationship indicates the specific characteristic or interest in the human personality ('the legal object') of which a legal subject is the holder.[76] Proceeding from this fundamental premise of the object-subject relationship, the human personality, as an umbrella term for various personality interests, represents the 'physical and intellectual/spiritual' integrity or wholeness of an individual.[77]

Based on this broad understanding of the human personality, Joubert states there are two broad groupings of personality rights, namely the physical-mental and the spiritual-moral grouping.[78] Whereas the physical-mental grouping relates to two distinct personality rights, namely bodily integrity[79] and physical liberty,[80] the spiritual-moral value of the human personality refers to the inborn value of an individual as the so-called 'crown of creation'.[81] In essence, the spiritual-moral value of the human personality resonates with the notion that being a human transcends the physical human body and epitomises the value of an individual as a social agent in terms of the individual-self and broader society.[82]

However, in examining the spiritual-moral value of the human personality further, it is important to note that this grouping of personality rights does not simply imply a general vague right with no discernible facets.[83] On the contrary, further concretisation and classification are possible due to the fact that this grouping of personality rights evolves and adapts to the needs of a developing culture and technology.[84] For this reason, with the attendant development of society, the mores of society started to recognise that human personality could be infringed in a variety of ways (especially in the light of developing technologies), which denoted the various interests to the human personality.[85] With these changing mores, norms and technologies, which are captured by the object-subject relationship of the doctrine of

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[76] *Tommie Meyer Films* (note 74 above) 382; Joubert *Grondslae* (note 57 above) 120-121; Joubert *Realiteit van die Subjektiewe Reg* (note 73 above) 13.
[77] Joubert *Grondslae* (note 57 above) 9; Ackermann (note 17 above) 89.
[78] Joubert *Grondslae* (note 57 above) 131; Neethling, Potgieter and Roos (note 57 above) 24.
[79] Neethling, Potgieter & Roos (note 57 above) 84.
[80] Ibid 26.
[81] Joubert *Grondslae* (note 57 above) 131.
[82] I Kant *The Metaphysics of Morals* (1785) (trans MR Gregor, 1996) 396; Joubert *Grondslae* (note 57 above) 131; Neethling, Potgieter & Roos (note 57 above) 27-28.
[83] Joubert *Grondslae* (note 57 above) 126; Neethling, Potgieter & Roos (note 57 above) 14.
[84] Joubert *Grondslae* (note 57 above) 9; Ackermann (note 17 above) 89.
[85] Joubert *Grondslae* (note 57 above) 15 & 102; Neethling, Potgieter & Roos (note 57 above) 4.

subject rights, the following personality interests to the spiritual-moral sphere of the human personality are recognised: reputation, dignity, privacy, identity and feelings.[86]

For purposes of summation and clarification, under the object-subject relationship of the doctrine of subjective rights and, as alluded to in chapter one,[87] the following personality rights are recognised: (a) under the physical-mental grouping of personality rights, the rights to bodily integrity and physical liberty[88] and (b) under the spiritual-moral grouping of personality rights, the rights to reputation, dignity, privacy, identity and feelings.[89] A broad outline of these rights will be provided below.

The right to bodily integrity refers to an individual's interest to his or her body and health, which has interconnected physical and mental aspects to it.[90] With the right to physical liberty, an individual's interest to his or her freedom and movement of the body is implicated.[91] Referring to the right to reputation, this refers to an individual's interest to his or her public estimation or the good opinion that this individual enjoys within a particular community.[92] The personality right to dignity, on the other hand, encompasses an individual's interest to his or her 'subjective feelings of dignity or self-worth or … a personal sense of self-worth'.[93] Turning to the personality right to privacy, this interest relates to those 'facets of a person's life in terms of which a certain' measure of seclusion from others is maintained.[94] Considering the personality right to identity next, this interest denotes an individual's 'uniqueness or individuality which identifies him [or her] as a particular person and thus distinguishes him [or her] from others' and manifests itself in various 'indicia' by which that individual can be recognised.[95] Lastly, with the personality right to feelings, an individual's interest to his or her feelings to morality, religion and kinship

[86] Joubert *Grondslae* (note 57 above) 113; Neethling, Potgieter & Roos (note 57 above) 25-38; Ackermann (note 17 above) 93.
[87] See section 1.1 of chapter one.
[88] See notes 79-80 above.
[89] See note 86 above.
[90] *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 145; Neethling, Potgieter & Roos (note 57 above) 34-39.
[91] *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) 707; *Heyns v Venter* 2004 (3) SA 200 (T); Neethling, Potgieter & Roos (note 57 above) 39-40.
[92] *Le Roux v Dey* (note 55 above) 98-108; Neethling, Potgieter & Roos (note 57 above) 40-41.
[93] *Jackson v NICRO* 1976 (3) SA 1 (A) 4; Neethling, Potgieter & Roos (note 57 above) 41-43.
[94] *O'Keeffe v Argus Printing and Publishing* 1954 (3) SA 244 (C) 248; *Case v Minister of Safety & Security; Curtis v Minister of Safety & Security* 1996 (3) SA 617 (CC) para 91; Neethling, Potgieter & Roos (note 57 above) 45-53.
[95] *Grütter v Lombard* 2007 (4) SA 89 (SCA) paras 12-13; Neethling, Potgieter & Roos (note 57 above) 53-56.

is acknowledged (excluding subjective feelings of dignity).[96]

With the recognition of these personality interests to the physical-mental and spiritual-moral groupings of the human personality, the subject-subject relationship of the doctrine of subjective rights, on the other hand, advances the notion that because of the legal recognition afforded to these various interests in the human personality, other individuals or legal subjects must respect these interests.[97] This implies that some form of legal redress must be made available to a holder when his or her personality interests are infringed by another legal subject.[98] With this in mind, it will then be the task of positive law to translate these various identified personality interests into justiciable personality rights which will afford comprehensive protection to human personality as envisioned by the doctrine of subjective rights. Accordingly, the actio iniuriarum will fulfil this role in positive law.

2.2.2 *The actio iniuriarum*

As the doctrine of subjective rights provides the analytical scheme for the recognition of the different personality rights, Neethling, Potgieter and Roos argue that for the doctrine of subjective rights to be of any practical value, it must be directly linked to the law relating to iniuriae ('personality infringements') which is predicated on the Roman-Dutch actio iniuriarum.[99] As the actio iniuriarum translates the various personality interests into justiciable personality rights, this common law action has become the primary framework that provides the means to articulate and protect these personality interests in the positive law.[100]

The actio iniuriarum is aimed primarily at providing an individual with satisfaction[101] for an 'iniuria', in other words, the wrongful and intentional infringement

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[96] *Peter v Peter* 1959 (2) SA 347 (A); *RH v DE* 2014 (6) SA 436 (SCA); *DE v RH* 2015 (5) SA 83 (CC); Neethling, Potgieter & Roos (note 57 above) 43-45.

[97] Joubert *Grondslae* (note 57 above) 11-12; Neethling, Potgieter & Roos (note 57 above) 11-12; Ackerman (note 17 above) 91; Neethling and Potgieter (note 39 above) 51.

[98] Specifically, in the case of personality rights, the actio iniuriarum becomes available to claim solatium or satisfaction through a damages award, an interdict or an apology (it is beyond the scope of this thesis to provide an exposition of private law remedies in general). See generally Neethling & Potgieter (note 39 above) 267-271; Loubser & Midgley (note 64 above) 489-490 & 519-527; JC Van der Walt & JR Midgley *Principles of Delict* 4th ed (2016) § 296-301.

[99] Joubert *Grondslae* (note 57 above) 11; Neethling, Potgieter & Roos (note 57 above) 4; Ackermann (note 17 above) 87.

[100] *University of Pretoria v South Africans for the Abolition of Vivisection* 2007 (3) SA 395 (O) para 10; Joubert *Grondslae* (note 57 above) 101; Burchell *Personality Rights* (note 69 above) 133; Neethling, Potgieter & Roos (note 57 above) 39.

[101] Neethling, Potgieter & Roos (note 57 above) 39.

of a personality right.[102] This concept of an iniuria then constitutes the three requirements of the actio iniuriarum as originated from the writings of Melius De Villiers[103] and as cited with approval by the Appellate Division (as it then was) in *Delange v Costa*:[104]

i. '"An intention on the part of the offender to produce the effect of his act;
ii. An overt act which the person doing is not legally competent to do; and which at the same time is
iii. An aggression upon the [personality] right of another, by which aggression the other is aggrieved and which constitutes impairment of the person [corpus], dignity [dignitas] or reputation [fama] of the other."'[105]

With reference to these requirements, it is apparent that the actio iniuriarum, through the concept of an iniuria, attempts to protect the human personality as a composite interest by employing the well-known trio of the Roman law regarding iniuria, namely corpus, dignitas and fama.[106] However, unlike its modern-day counterpart, the Roman law actio iniuriarum, with its origin in the Twelve Tables and classical foundation in the Corpus Iuris Civilis, adopted a casuistic approach in protecting human personality.[107] Specifically, through the nascent development of praetorian edicts, the emphasis was placed on the ways in which an iniuria could be committed and there was no general theory of personality rights.[108] As explained above,[109] only with its subsequent development under Roman-Dutch law, with the noticeable influence of the continental legal systems in developing the doctrine of subjective rights, the casuistry of the Roman law could be largely escaped.[110] Through this development, the actio iniuriarum was able to doctrinally translate the composite

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[102] Ibid. See also Joubert *Grondslae* (note 57 above) 112-113; Ackermann (note 17 above) 87.
[103] M De Villiers *The Roman and Roman-Dutch Law of Injuries* (1899) 12.
[104] 1989 (2) SA 857 (A).
[105] Ibid 860-861. See also *R v Umfaam* 1908 TS 62, 66; *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92, 130-131; *R v Chipo and Others* 1953 (4) SA 573 (A) 576; *Dendy v University of the Witwatersrand* (note 11 above) para 5.
[106] Neethling, Potgieter & Roos (note 57 above) 3.
[107] Joubert *Grondslae* (note 57 above) 102-103 & 140; CF Amerasinghe *Aspects of the Actio Iniuriarum in Roman Dutch Law* (1966) 171; PC Pauw *Persoonlikheidskrenking en Skuld in die Suid-Afrikaanse Privaatreg – 'n Regshistoriese and Regsvergelykende Ondersoek* (1976) 1-7; Neethling, Potgieter & Roos (note 57 above) 4; Van der Walt & Midgley (note 98 above) § 11-12. For a detailed historical survey on the actio iniuriarum, see generally De Villiers (note 103 above); Joubert *Grondslae* (note 57 above); Pauw (note 107); R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 1050-1094.
[108] Joubert *Grondslae* (note 57 above) 102-103, 140; Neethling, Potgieter & Roos (note 57 above) 4.
[109] See section 2.2.1 above.
[110] I.e. Roman law focussed on the specific ways in which personality harms are caused without considering underlying or unifying requirements (or general elements) as provided in Roman-Dutch law. This approach was expressly endorsed for purposes of the 'modern' actio iniuriarum in *Tommie Meyer Films* (note 74 above) 381-384. See also Joubert *Grondslae* (note 57 above) 140; Neethling, Potgieter & Roos (note 57 above) 4.

nature of the human personality into a series of justiciable personality rights corresponding to the various interests of the human personality, as recognised under the doctrine of subjective rights.[111]

With this legal development in mind, the modern actio iniuriarum simply uses the Roman law trio of the rights to corpus, dignitas and fama to classify the existing personality interests into one of these three broad categories of personality rights.[112] Specifically, the right to corpus refers to both of the interests related to the physical-mental grouping of personality rights, namely the right to bodily integrity and physical liberty.[113] In terms of the spiritual-moral grouping of personality rights, the rights to fama and dignitas relate to this sphere of the human personality.[114] Looking at the right to dignitas, this right serves as an umbrella term for all the personality interests related to the spiritual-moral sphere of human personality (except for the interest to reputation under the fama), namely dignity, privacy, identity and feelings.[115]

In considering the actio iniuriarum's framework to articulate and provide protection to these personality rights in the positive law, further reference must be made to its requirements, namely the (1) factual violation of a recognised personality right which is (2) wrongful and (3) and intentional.[116] In broad terms, the factual violation requirement, which is the combination of the delictual elements of harm, conduct and causation, is responsible primarily for the articulation of the different personality rights in positive law (as specific tests were developed for each personality right).[117] Apart from articulating the specific personality rights, the factual violation requirement also delineates the individual interests of the holder of a personality right (i.e. the plaintiff through the delictual element of harm), the interests of the individual who infringed the plaintiff's personality right(s) (i.e. the defendant through the element of conduct) and the relevant legal connection between them for

[111] Joubert *Grondslae* (note 57 above) 127.
[112] Ibid 130.
[113] *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) para 38; Neethling, Potgieter & Roos (note 57 above) 83-93, 111-113; Loubser Midgley (note 64 above) 313.
[114] Joubert *Grondslae* (note 57 above) 131.
[115] *O'Keefe v Argus Printing and Publishing* (note 94 above); Neethling, Potgieter & Roos (note 57 above) 4; Loubser & Midgley (note 64 above) 313; CJ Visser & C Gowar & CJ Visser 'Distinguishing between dignity, identity and privacy: Is it really necessary? – Kumalo v Cycle Lab (Pty) Ltd' (2012) 75 *Journal of Contemporary Roman-Dutch Law* 160, 165.
[116] Joubert *Grondslae* (note 57 above) 11-15 & 24-39; Loubser & Midgley (note 64 above) 371-372.
[117] Neethling & Potgieter (note 39 above) 251; Gowar & Visser *Kumalo* (note 115 above) 165.

purposes of establishing delictual liability (i.e. the element of causation).[118] In turn, the wrongfulness requirement determines whether liability should be imposed on the defendant for his or her harm-causing conduct by considering the individual interests of the parties and those of the greater collective.[119] This is done to determine whether a norm has been violated as the threshold for imposing liability on the defendant.[120] Lastly, the intention requirement determines the blameworthiness and subsequent individual responsibility of the defendant for such a norm violation, by examining his or her reprehensible state of mind (which in turn provides greater freedom of action to the defendant as the negligent infringement of personality rights is not actionable).[121]

Neethling, Potgieter and Roos argue that the abovementioned interaction between the doctrine of subjective rights and the actio iniuriarum provides for a general 'doctrine of the law of personality'.[122] In terms of this general doctrine, a personality right indicates a specific interest, characteristic or quality in the human personality that ranges from the physical-mental to spiritual-moral personality interests, which in turn imposes, through the concept of an iniuria, a legal duty on other individuals not to infringe these personality rights in a wrongful and intentional manner.[123] In addition, this legal duty, through the factual violation requirement, articulates the specific personality interests in positive law as the basis of liability for a personality infringement. Liability is then conclusively determined with reference to the wrongfulness and intention requirements. These requirements also seem to indicate, at least in principle, where individual and collectivist considerations will be accommodated in the positive law of personality. Consequently, and as explained in chapter one,[124] the different personality rights will provide the respective contexts in which fundamental values and rights must be identified and applied (i.e. the scope of personality recognised in terms of the doctrine of subjective rights and the framework for their articulation and adjudication in terms of the actio iniuriarum).

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[118] Van der Walt & Midgley (note 98 above) § 44 & 70; Neethling, Potgieter & Roos (note 57 above) 27-28.
[119] Loubser & Midgley (note 64 above)140-141; Neethling & Potgieter (note 39 above) 33-34; Van der Walt & Midgley (note 98 above) § 72.
[120] Ibid.
[121] See preliminary discussion under section 1.1 of chapter one.
[122] Neethling, Potgieter & Roos (note 57 above) 4. See also Joubert *Grondslae* (note 57 above) 121 & 140.
[123] Ackermann (note 17 above) 89.
[124] See section 1.1 of this chapter.

After delineating the specialisation provided by the doctrinal basis of the (common) law of personality, the next part of this section will consider the extent to which the common law doctrines overlap with the Constitution, for purposes of establishing the feasibility of an integrated, single and constitutionalised doctrinal framework.

2.2.3 The overlap between the common law and Constitution with regard to the human personality

As the different personality rights will provide the respective contexts for the application of the Constitution and the Bill of Rights, the question now arises as to whether these contexts can provide the basis for the argument that both the common law and Constitution regard the human personality as a composite legal interest emerging from an integrated doctrinal framework. To clarify, the question is this: With reference to the law of personality, can the common law and Constitution be reconciled in terms of the scope of interests recognised by the common law (in terms of the doctrine of subjective rights and the framework provided by the actio iniuriarum for the articulation and protection of these interests as justiciable personality rights)? Therefore, this section will consider the overlap between the common law and Constitution regarding the composite nature of the human personality as a legal interest, with reference to the scope and framework provided by the former.

To begin with, a brief survey of the Bill of Rights will reveal that several fundamental rights are implicated by the human personality.[125] More specifically, the right to freedom and security of the person,[126] the right to privacy[127] and the right to human dignity[128] are implicated by the human personality.[129] In turn, the common law recognises the following personality rights: bodily integrity, physical liberty, dignity, privacy, identity, feelings and reputation. For this reason, it must be determined if the interests in the human personality recognised by the common law personality rights can be reconciled with the identified fundamental rights.

In examining this potential overlap, it must be remembered that some

[125] B De Villiers, DJ Van Vuuren & M Wiechers *Human Rights: Documents that Paved the* Way (1992); D Van Wyk, J Dugard, B De Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1996) 171; Neethling, Potgieter & Roos (note 57 above) 16-17.
[126] Section 12 of the Constitution of the Republic of South Africa, 1996.
[127] Section 14.
[128] Section 10.
[129] Neethling, Potgieter & Roos (note 57 above) 17 & 75.

personality rights have direct corresponding fundamental rights in the Bill of Rights whereas other personality rights have indirect corresponding fundamental rights.[130] In other words, where there is such a direct corresponding fundamental right, such personality interest is entrenched eo nomine by the Constitution.[131] However, this does not detract from the notion that all the common law personality rights, and the particular interests that they protect, can be entrenched by the Constitution, directly or indirectly. For example, personality rights that receive direct protection as fundamental rights are: bodily integrity and physical liberty as protected by the fundamental right to freedom and security of the person;[132] privacy as protected by the fundamental right to privacy;[133] and dignity as protected by the fundamental right to human dignity.[134] However, personality rights that receive protection by indirect corresponding fundamental rights are reputation, identity and feelings, as protected by the fundamental right to human dignity.[135]

For clarity and summation, this overlap will be outlined here in more concrete terms. First, the personality rights to bodily integrity and physical liberty, under the corpus, are entrenched directly by the fundamental right to freedom and security of the person. Secondly, the personality right to reputation, under the fama, is entrenched indirectly by the fundamental right to human dignity. Thirdly, under the dignitas, the personality rights to dignity, identity, feelings and privacy are entrenched by the fundamental rights to human dignity and privacy. More specifically, the fundamental right to privacy entrenches directly the personality right to privacy whereas the fundamental right to human dignity entrenches directly the personality right to dignity and entrenches indirectly the personality rights to identity and feelings. Therefore, all the common law personality rights, and the interests that they seek to

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[130] Ibid 76 & 271-272.
[131] Ibid 75, 83, 111, 129, 191, 199, 220 & 255.
[132] Section 12 of the Constitution of the Republic of South Africa, 1996; *De Lange v Smuts* 1998 (3) SA 785 (CC) paras 15-16; *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) paras 19-20; Neethling, Potgieter & Roos (note 57 above) 75, 83, 111; I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 286.
[133] Section 14 of the Constitution of the Republic of South Africa, 1996; *Bernstein v Bester* 1996 (2) SA 634 (CC) para 71; *NM v Smith* 2007 (5) SA 250 (CC) para 41; Neethling, Potgieter & Roos (note 57 above) 75 & 220; Currie & De Waal (note 132 above) 297.
[134] Section 10 of the Constitution of the Republic of South Africa, 1996; Neethling, Potgieter & Roos (note 56 above) 75 & 191; Currie & De Waal (note 132 above) 253.
[135] *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) 1216-12-17; *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 28; *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) para 6; *Grütter v Lombard* 2007 (4) SA 89 (SCA) para 12; *RH v DE* 2014 (6) SA 436 (SCA) para 10; Burchell *Personality Rights* (note 60 above) 139; Neethling, Potgieter & Roos (note 57 above) 76-77, 129, 199 & 255.

protect, overlap with the specifically mentioned fundamental rights, as all the common law personality rights are entrenched by fundamental rights in the Bill of Rights.

However, some courts cautioned that one should not take such an overlap on face value, as deeper doctrinal issues may arise. For instance, it must be borne in mind that such overlap does not necessarily mean that, in general, the personality rights can be equated to the fundamental rights. More specifically, as noted by the Constitutional Court in *Bernstein v Bester*,[136] fundamental rights are broader concepts which protect a wider array of interests than those provided for by the personality rights.[137]

It seems that the Supreme Court of Appeal in *Dendy v University of the Witwatersrand*[138] offered a plausible solution to this concern. In particular, the Court accepted that the common law personality rights and fundamental rights related to the human personality aim to protect the same scope of interests in the context of an iniuria (personality infringement), with the effect that the general difference in scope between the personality rights and fundamental rights become non-essential in this context.[139] Given this similarity in scope, the Court further accepted that the actio iniuriarum will provide the necessary legal framework, in positive law, to articulate and adjudicate these personality interests.[140] The actio iniuriarum will become the necessary positive law medium to promote constitutional ideologies in respect of the human personality (subject to constitutional adjustments considering the influence of its underpinning ideologies and attendant legal culture). In addition, in a more general sense, the Constitutional Court has on many occasions confirmed that the frameworks of the private common law can act as the necessary portal to promote the transformative aims and fundamental rights of the Constitution.[141]

As a central argument to this thesis, the common law and Constitution both

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[136] *Bernstein* (note 133 above).

[137] Ibid para 71. See also *Gardener v Whitaker* 1995 (2) SA 672 (E) 690; *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (T) para 11; Neethling, Potgieter & Roos (note 57 above) 220; Currie & De Waal (note 132 above) 295-297; Zitzke *Common-Law Purism* (note 2 above) 214.

[138] *Dendy v University of the Witwatersrand* (SCA) (note 11 above).

[139] Ibid paras 15 and 24.

[140] Ibid. See also *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as amicus curiae)* 2006 (4) SA 230 (CC) 253 paras 39-40; Burchell *Personality Rights* (note 60 above) 106; Neethling, Potgieter & Roos (note 57 above) 17; Currie & De Waal (note 132 above) 297.

[141] *Pharmaceutical Manufacturers Association of South Africa* (note 3 above) para 44; *Mighty Solutions v Engen Petroleum* (note 7 above) para 37; *Gcaba v Minister for Safety and Security* (note 9 above) para 56. In addition, with reference to Zitzke *Constitutional Heedlessness* (note 2 above) 285-289, this accords with 'adjudicative subsidiarity', a reading strategy regarding the various sources in private law to give effect to the Constitution in the creation of a single system of law under the transformative paradigm as grounded in the judgments cited in this footnote.

view the human personality as a composite interest, as these two sources of law can be reconciled in terms of the scope of personality interests recognised by the doctrine of subjective rights and the actio iniuriarum as the appropriate framework to adjudicate these interests. Therefore, because of this reconciliation in terms of scope and framework, the composite nature of the human personality as a legal interest can be maintained by the common law and Constitution. It can be further argued that because of the reconciliation between the doctrine of subjective rights, the actio iniuriarum and the Constitution in respect of the human personality, a single doctrine of the law of personality exists in the context of an iniuria.

It is also worth mentioning that this interplay and overlap between the common law and the Constitution in respect of the human personality is probably not coincidental. According to Zitzke, the common law (or more specifically the doctrine of subjective rights in this context) and the Constitution share the same jurisprudential heritage, namely the natural law tradition.[142] As succinctly (albeit abstractly) theorised by Johann Neethling, both subjective rights, originating from the doctrine of subjective rights, and fundamental rights, as found in national constitutions, originate from the recognition of the natural law tradition that individuals should be afforded innate rights (such as those related to the human personality).[143] This shared heritage further exemplifies the creation of a single doctrine of the law of personality which is then subject to the fundamental shifts required in terms of the transformative paradigm.[144]

Against this background it becomes apparent that there lies much ambiguity in the Constitutional Court's approach in *Le Roux v Dey*[145] in aligning the common law with the Bill of Rights from a doctrinal perspective. As the overlap between the common law and Constitution creates a single doctrine for the law of personality, where the human personality is conceived as a composite legal interest with many different parts, it is doubtful whether the Court's use of human dignity as a fundamental value (which ought to be multi-faceted in nature) can condense and

[142] Zitzke *Constitutional Heedlessness* (note 2 above) 261-263. In general, also see section 2.2.1 above and specifically note 74 above.
[143] J Neethling 'Enkele gedagtes oor die juridiese aard en inhoud van menseregte en fundamentele regte' (1971) 34 *The Journal of Contemporary Roman-Dutch Law* 240*,* 241. As an aside, it must also be acknowledged that Neethling's subsequent conception on the private-public divide places the recognition of natural rights in the private realm whereas the limitation of these rights resides in the public realm. Accordingly, after the advent of the Constitution the recognition and limitation of overlapping subjective and fundamental rights will fall within the single system of law principle in terms of the transformative paradigm.
[144] See section 2.1 above.
[145] *Le Roux* (note 55 above).

abate the composite nature of the human personality. More specifically, the Court's assertion that the human personality as a legal interest does not consist of various personality components or interests but mere variations of subjective feelings of dignity, as based on a thin conception of human dignity and the failure to consider the additional application of fundamental rights, is clearly untenable.[146]

Although a single and integrated doctrine of law exists for the recognition and protection of personality interests, the precise interplay between human dignity as a value and the adjacent overlap between personality rights and fundamental rights to the human personality remains unresolved (as evidenced by *Le Roux v Dey)*.[147] More specifically, the particular functions of the personality rights, fundamental rights and foundational values (with particular reference to human dignity) need further clarification when one considers the further constitutionalisation of the law of personality in terms of ideology, substance and method within the transformative paradigm.

Therefore, the next section will canvas the horizontality simpliciter approach in order to seek guidance on the interplay between common law personality rights, fundamental rights and constitutional values (which will also assist in organising the doctrinal, ideological, substantive and methodological dimensions of constitutionalising the common law of personality).

2.3 The 'horizontality simpliciter' approach: Mapping the interplay between personality rights, fundamental rights and values

As explained in chapter one, the horizontality simpliciter approach emerged from the transformative paradigm.[148] In more specific terms, this approach resulted from the debate that existed on the extent to and the manner in which the Constitution and the Bill of Rights should be horizontally applied.[149] This debate also turned on whether fundamental values or rights are applied to private relationships (i.e. the extent) and whether the framework of the common law or Bill of Rights is used in transforming private relationships (i.e. the manner).[150] This related to the direct-indirect horizontal application debate of the Constitution.

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[146] See section 1.1 of chapter one.
[147] Neethling, Potgieter & Roos (note 57 above) 73.
[148] See section 1.1 of chapter one.
[149] Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 351.
[150] Ibid; Bhana *Judicial Method Revisited* (note 2 above) 122.

Direct horizontality[151] as a form of horizontal application entails a 'rights-based analysis,' where the horizontality of fundamental rights in the Bill of Rights is considered.[152] Specifically, the relevant common law rules and principles are tested directly against the applicable fundamental right(s) to determine whether the former infringes the right(s) in question and, if so, whether such an infringement is reasonable and justifiable in terms of section 36 of the Constitution.[153] The content of the common law is then tested against the Bill of Rights, where its framework of interpreting and applying fundamental rights is used in the constitutionalisation process.[154] Ultimately, with direct horizontality, a parallel constitutional body of law can develop which may eventually replace its common law counterpart, as the latter does not function as an intermediary for constitutional application and may thus become dated.[155]

With indirect horizontality,[156] however, the Constitution and the Bill of Rights establishes an 'objective normative value system', a set of constitutional values that must inform the interpretation, development and application of common law rules.[157] Indirect horizontality contemplates a 'values-based analysis' where, instead of focusing on fundamental rights, focus is placed on the values that underlie the Constitution generally and, more specifically, the fundamental rights as enumerated in the Bill of Rights.[158] Furthermore, the common law's framework (with required constitutional adjustments) is used so that a single constitutionalised system of law can emerge through incremental development.[159] Therefore, the Bill of Rights does not absorb the rules and remedies of the common law but the latter functions as an intermediary through which the Constitution and Bill of Rights apply to private

[151] Sections 8(1) and 8(2) of the Constitution of the Republic of South Africa, 1996.
[152] Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 358-359; Currie & De Waal (note 132 above) 31.
[153] Ibid; Woolman *Vanishing Bill of Rights* (note 50 above) 768-769.
[154] Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 355, 359; Currie & De Waal (note 132 above) 31.
[155] Bhana *A Reconciliation of Sections 8 and 39* (note 2above) 359-360; Currie & De Waal (note 132 above) 45-50.
[156] Section 39(2) of the Constitution of the Republic of South Africa, 1996.
[157] *Carmichele* (note 39 above) para 56; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 48; Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 355; Currie & De Waal (note 132 above) 31.
[158] *Carmichele* (note 39 above) para 40; Bhana *Judicial Method* (note 2 above) 308; Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 359; Currie & De Waal (note 132 above) 32.
[159] Woolman *Vanishing Bill of Rights* (note 49 above) 776-779, 798-799 763, 768-769, 772 & 776-779; Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 355 & 360.

relationships.[160]

Although the desirability of each approach to horizontality has been contested vigorously,[161] many academic commentators argued that the constitutionalisation of the common law should not be limited to the binaries of the direct-indirect horizontality debate.[162] Various academic commentators suggested approaches to transform the common law in terms of the Constitution, ranging from varying degrees of reliance on direct and/or indirect horizontality.[163] Subsequently, the horizontality 'simpliciter' approach emerged from this paradigm, which advocated for an integrated reading of sections 8(2) and 39(2) of the Constitution with an attendant mode of purposive legal reasoning.[164] Although many academic commentators advocated for such an integrated reading and purposive mode of reasoning,[165] it was ultimately Bhana who provided the instrumentation of the 'horizontality simpliciter' approach to effect constitutional transformation in the private common law.[166]

In broad terms, the horizontality simpliciter approach views the horizontal application of the Constitution holistically and purposively with reference to sections 8 and 39 of the Constitution.[167] In doing so, the nuanced interplay and fluidity between sections 8 and 39 of the Constitution can be examined.[168] As a result, the direct-indirect horizontality debate loses much of its significance and an approach emerges in which the horizontal application of the Constitution can take place in terms of fundamental values and rights as applied to the frameworks of the common law.[169]

The horizontality simpliciter approach is based on the premise that the doctrines of the private common law act as the necessary portals to give effect to the

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[160] Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 355; Currie & De Waal (note 132 above) 32.

[161] For a discussion hereof, generally see S Woolman 'Application' in S Woolman, M Bishop & J Brickhill et al (eds) *Constitutional Law of South Africa* 2nd ed (2008 Revision Service 4, 2012) Chapter 31; Currie & De Waal (note 132 above) Chapter 3; CJ Roederer 'Post-matrix legal reasoning: Horizontality and the rule of values in South African law' (2003) 19 *South African Journal on Human Rights* 57.

[162] Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 373-374; Currie & De Waal (note 132 above) 67; Roederer *Post-Matrix Legal Reasoning* (note 161 above) 75-81.

[163] Zitzke *A Decolonial Critique* (note 2 above) 501.

[164] Ibid.

[165] Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 373-374; Currie & De Waal (note 132 above) 67; Roederer *Post-Matrix Legal Reasoning* (note 161 above) 75-81; N Friedman 'The South African common law and the Constitution: Revisiting horizontality' (2014) 30 *South African Journal on Human Rights* 63, 72.

[166] Bhana *A Reconciliation of Sections 8 and 39* (note 2 above).

[167] Ibid 354 & 373; Friedman (note 165 above) 72.

[168] Ibid.

[169] Ibid; See also Currie & De Waal (note 132 above) 67.

transformative aims of the Constitution due to the single-system-of-law principle and the subsequent specialisation provided by these doctrines (as outlined above).[170] Thus, the common law doctrines will function as the starting blocks to initiate the transformative constitutional shifts in private relationships. Subsequent development will then take place in terms of the frameworks of the common law.

As outlined earlier, the scope leg of the horizontality simpliciter will contemplate the ideological development of the common law frameworks in terms of the transformative paradigm.[171] The form leg of the horizontality simpliciter approach will consider the development of the frameworks of the private common law (i.e. the specific manner in which its substance and method are articulated in the positive law) by interrogating the influence of its underpinning ideologies and legal culture against the ideological development contemplated by the scope leg.[172]

As the doctrinal basis for the constitutionalisation of the common law of personality has already been settled in this chapter, the next sections will examine the scope and form legs of the horizontality simpliciter approach and the implications for the development of an alternative approach to the constitutionalisation of the common law of personality.

2.3.1 The 'scope' leg

As mentioned above, the primary function of the scope leg is to guide the ideological development of the private common law frameworks in respect of the transformative paradigm. More specifically, this leg functions as a constitutional lens or ideological constitutional backdrop against which the development of the common law is examined.[173] In general terms, this constitutional lens or ideological backdrop is extrapolated from foundational constitutional values and fundamental rights.[174] Furthermore, the relevant constitutional operative provisions that supply the scaffolding for the scope leg are sections 8(1)-(2) and 39(2) as read together.[175] As a

[170] Ibid. See also Zitzke *Constitutional Heedlessness* (note 2 above) 269-270.
[171] See sections 1.1 and 1.2 of chapter one. Also see Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 373-374
[172] See sections 1.1 and 1.2 of chapter one. Also see Bhana *Reconciliation of Sections 8 and 39* (note 2 above) 374; Bhana *Development of a Basic Approach* (note 2 above) 7-8.
[173] Bhana *Reconciliation of Sections 8 and 39* (note 2 above) 364, 373-374; Bhana *Development of a Basic Approach* (note 2 above) 6.
[174] Ibid.
[175] Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 338 & 353-354; Bhana *Development of a Basic Approach* (note 2 above) 5-9.

result, the ideological development of the common law is interrogated at two levels: firstly, in terms of the values of the Constitution and secondly, in terms of the fundamental rights in the Bill of Rights.[176]

In terms of this values-based spectrum of this constitutional lens, the common law must reverberate with, and give effect to (or at the very least, be consistent with) the 'objective normative value system' of the Constitution.[177] According to Christopher Roederer, the 'objective normative value system' of the Constitution alludes to the founding values of the Constitution, namely freedom, dignity, and equality (which are further shaped by other non-enumerated values such as ubuntu).[178] These values would then be used to evaluate and interpret the frameworks of the common law against the transformative and aspirational goals of the Constitution.[179]

Constitutional values create goals and ideals which serve as guidelines or aspirations to be met either by individuals or the state.[180] Although constitutional values rarely require any specific action, their ability to derive greater specificity from their application to various contexts provide them with the function of serving as interpretative norms for more tangible circumstances (such as the interpretation and adjudication of concrete rules, rights and principles).[181] As noted by Bhana and Gerhard Lubbe respectively, these values should not be used in a vague and generalised manner but should be applied to the contexts provided by the doctrines of the common law and the attendant application of fundamental rights.[182] Therefore, constitutional values, as interpretative norms, have symbolic and foundational functions in law as these are capable of promoting constitutional ideals and serving as

[176] Bhana *Reconciliation of Sections 8 and 39* (note 2 above) 375; Bhana *Development of a Basic Approach* (note 2 above) 7.
[177] Bhana *Reconciliation of Sections 8 and 39* (note 2 above) 372-373. See also D Feldman 'Human dignity as a legal value – Part 1' (1999) *Public Law* 682, 685.
[178] Roederer *Post-Matrix Legal Reasoning* (note 161 above) 59-61. See also *Carmichele* (note 39 above) para 54; Woolman *Application* (note 161 above) 93-94.
[179] Roederer *Post-Matrix Legal Reasoning* (note 161 above) 59-61. See also *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) paras 16-17.
[180] Ibid; S Riley 'Human dignity and the rule of law' (2015) 11 *Utrecht Law* Review 91, 99-100.
[181] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) paras 62-63; Minister *of Home Affairs v National Institute for Crime Prevention* 2005 (3) SA 280 (CC) ('*NICRO*') para 21; Riley (note 180 above) 100.
[182] Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 375; G Lubbe 'Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law' (2004) 121 *South African Law Journal* 395, 408, 415 & 420.

a foundation for more specific and concrete entitlements in law.[183]

Turning to the rights-based spectrum of the constitutional lens, which narrows down and concretises the enquiry of the scope leg,[184] the direct horizontality of applicable fundamental rights are considered in relation to the common law.[185] The respective contexts of the common law are evaluated to determine which specific fundamental rights are implicated (as not all fundamental rights are capable of horizontal application).[186] After this process of delineation, the common law is then measured against the specific entitlements and corresponding duties provided by a fundamental right.[187] More specifically, it must be determined whether the common law respects, promotes or limits the particular fundamental right in question.[188]

It must be remembered that fundamental rights demand greater specificity than foundational values, as these typically define relationships between various members of society, such as the relationship between individuals themselves and between individuals and the state.[189] Accordingly, fundamental rights indicate the standards of conduct that are required from individuals and the state.[190] Specifically, fundamental rights constitute a set of entitlements, that is, either to be free from interference (in the negative sense) or to demand particular goods or services (in the positive sense) in the basic pursuit of the good life.[191] Legal duties are then imposed on individuals and the state, to act in accordance with these negative and positive entitlements as determined by the particular context.[192] Therefore, fundamental rights are more individualised and concrete than foundational values as these are capable of delineating specific constitutional interests (with corresponding legal duties) in the

[183] LR Barrosso 'Here, there, and everywhere: Human dignity in contemporary law and in the transnational discourse' (2012) 35 *Boston College International and Comparative Law* 331, 334-335; Riley (note 180 above) 99-100.
[184] As mandated by s 8(1) of the Constitution.
[185] Bhana *Reconciliation of Sections 8 and 39* (note 2 above) 364-365; Bhana *Development of a Basic Approach* (note 2 above) 7.
[186] Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 365.
[187] Ibid 373-374.
[188] Ibid 375.
[189] *Advance Mining Hydraulics v Botes NO* 2000 (2) BCLR 119 (T) 127; *S v Pienaar* 2000 (7) BCLR 800 (NC) para 10; *Booysen v Minister of Home Affairs & Another* 2001 (4) SA 485 (CC); *Daniels v Campbell* 2004 (5) SA 331 (CC); *Dawood v Minister of Home Affairs: Shalabi v Minister of Home Affairs: Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35.
[190] Ibid. N Rao 'On the use and abuse of dignity in Constitutional law' (2008) 14 *Columbia Journal of European Law* 201, 223.
[191] Ibid.
[192] Ibid.

pursuit of the good life.[193]

In terms of the value- and rights-based spectrums of the scope leg of the horizontal simpliciter approach, the broader scope of the operation of the Constitution is delineated to evaluate the common law's ability to give effect to and promote fundamental values and rights as implicated by a particular context of the common law.[194] In doing so, the specific functions of foundational constitutional values and fundamental rights are also highlighted within the transformative paradigm. Ultimately, these fundamental rights and values will serve as the ideological basis to examine the constitutional resonance of the common law frameworks and to contemplate adjustments to these frameworks where necessary.[195] Therefore, to examine the constitutional resonance of the common law framework against constitutional ideologies, reference must be made to the form leg of the horizontality simpliciter approach.

2.3.2. The 'form' leg

Moving to the form leg of the horizontality simpliciter approach, the focus shifts to the manner in which the common law ought to be developed so that it accords and gives effect to the fundamental values and rights of the Constitution (i.e. constitutional ideologies) and translates these for purposes of application to horizontal relationships.[196] To this end, the form leg, as informed by section 8(3) read together with section 39(2) of the Constitution, act as a constitutional apparatus in which the common law frameworks are infused with fundamental values and rights.[197] The constitutional apparatus is guided in the development of the common law by the values-based spectrum and rights-based spectrum of the constitutional lens of the scope leg. The 'objective normative value system' (denoting the values-based analysis) of the Bill of Rights has a role to play in every common law case and the role of fundamental rights will be determined by a particular context of the common law (denoting the rights-based analysis).[198]

In assessing the constitutional development of the common law under the form

[193] C McCrudden 'Human dignity and judicial interpretation of human rights' (2008) 19 *The European Journal of International Law* 655, 681.
[194] Bhana *Reconciliation of Sections 8 and 39* (note 2 above) 364-365 & 375.
[195] As mandated by s 8(3) of the Constitution.
[196] Bhana *Reconciliation of Sections 8 and 39* (note 2 above) 374; Bhana *Development of a Basic Approach* (note 2 above) 7-8.
[197] Ibid.
[198] Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 372.

leg, as alluded to earlier, these constitutional developments must be assessed according to the link that exists between legal ideology and culture and their resultant influence on the common law frameworks.[199] This inquiry is based on the following three premises:[200] firstly, the modes of legal reasoning adopted by judges pertaining to common law frameworks are not value-neutral; secondly, this is so because when judges apply a particular mode of legal reasoning they ascribe to a particular legal ideology; and, thirdly, such a link between legal ideologies and modes of reasoning are entrenched (and concealed) through legal culture.[201] Some general considerations need to be extrapolated from this link that exists between legal ideology and culture for purposes of constitutionally developing the common law frameworks.

According to Duncan Kennedy and Alfred Cockrell respectively, two modes of legal reasoning exist that are situated at the opposite ends of a methodological continuum, namely legal reasoning as the application of 'rules' or as the application of 'standards'.[202] The choice by the judiciary of a particular mode of legal reasoning is, in fact, ideologically loaded.[203] As explained by Cockrell:

> '[T]here is a connection between [legal modes of reasoning and ideology] in that attachment to the rules-form is often associated with individualism, while attachment to the standards-form is usually associated with collectivism … While the link may not hold as a matter of logical necessity, it certainly does seem undeniable that those who favour the [ideology] of individualism do tend to have a preference for the casting of legal doctrine in the form of rules. And the standards-based form is indeed often advocated by those whose preference is for a collectivist vision of communal life.'[204]

The preference by judges for a particular mode of legal reasoning further plays out on an ideological continuum, where the ideologies of 'individualism' and 'collectivism' (as elucidated earlier in this chapter)[205] are situated at the opposite ends of this spectrum.[206] The preference for a particular mode of legal reasoning which, in turn, is ideologically loaded, Karl Klare depicts as legal culture.[207] Legal culture entrenches the 'legal mode of reasoning and ideology' belief to such an extent that it becomes

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[199] See sections 1.1 and 1.2 of chapter one.
[200] See generally Klare (note 2 above).
[201] Bhana *Role of Judicial Method* (note 2 above) 302. See also A Cockrell 'Substance and form in the South African law of contract' (1992) 109 *South African Law Journal* 40, 41-45.
[202] Kennedy (note 2 above) 1752-1753; Cockrell (note 201 above) 43.
[203] Kennedy (note 2 above) 1776; Cockrell (note 201 above) 44.
[204] Ibid.
[205] See section 2.1 above.
[206] Cockrell (note 201 above) 41. See also Kennedy (note 2 above) 1713-1724, who labels these ideological dichotomies as 'individualism' and 'altruism'.
[207] Klare note (note 2 above) 166.

part of the legal culture of the common law and 'comprises the umbrella under which a legal system operates'.[208] This entrenchment is maintained because, as a sub-set of legal culture, legal ideology informs the preference for a particular mode of legal reasoning which is then held as a central belief in the common law.[209]

This 'legal mode of reasoning and ideology' belief either speaks to a 'conservative' or 'progressive' legal culture.[210] For instance, a conservative legal culture prefers the rules-based form of legal reasoning to promote the determinacy of law, which limits the exercise of judicial discretion, as the judicial mindset is framed in terms of individualistic values.[211] However, a progressive legal culture acknowledges the contextual nature of legal principles, as these principles may produce different results in different contexts.[212] A progressive legal culture prefers the standard-based form of legal reasoning to highlight the contextual nature of legal principles, which tend to be constituted in terms of a collectivist ideology.[213]

The connection between the rules-based form of legal reasoning, individualism and a conservative legal culture, together with the connection between the standards-based form of legal reasoning, collectivism and a progressive legal culture, will be further explored below.

Considering the connection between the rules-based form of legal reasoning, individualism and a conservative legal culture, legal concepts are articulated formalistically whereas the common law is depicted as a 'set of determinate rules' which can be applied by judges to a particular set of facts in a 'mechanical' or rigid manner.[214] More specifically, the role of judges is limited to the unobtrusive formulation of legal concepts and the application of common law 'rules' to proven facts before a court in order to reach a logically correct legal solution.[215] Logically correct solutions are achieved through a fact-finding exercise where specific and

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[208] Ibid. See also Cockrell (note 201 above) 45; Bhana *Judicial Role Revisited* (note 2 above) 124.
[209] Ibid.
[210] Zitzke *Transformative Delict* (note 2 above) 61
[211] Ibid.
[212] Ibid. Bhana *Role of Judicial Method* (note 2 above) 302.
[213] Ibid.
[214] Kennedy (note 2 above) 1685; Cockrell (note 201 above) 43; H Botha 'Freedom and constraint in constitutional adjudication' (2004) 20 *South African Journal on Human Rights* 249, 267; H Collins 'Utility and rights in common law reasoning: Rebalancing private law through constitutionalization' (2007) 30 *Dalhousie Law Journal* 1, 4-6; Zitzke *Transformative Delict* (note 2 above) 56; Bhana *Judicial Method Revisited* (note 2 above) 124 & 127.
[215] Kennedy (note 2 above) 1689-1690 & 1752-1753; Cockrell (note 201 above) 43-44; Klare (note 2 above) 149, 157 & 168; Bhana *Judicial Method* (note 2 above) 303; Bhana *Judicial Method Revisited* (note 2 above) 126.

highly administrable rules are delineated from a particular set of facts and applied without any explicit reference to context-dependant considerations.[216] As a result of this form of legal reasoning, judicial discretion is reduced and a high degree of certainty is attained within the law.[217] According to Cockrell, this type of legal reasoning can be labelled as 'formalism', as the rigid formulation and application of rules amount to formal deductive reasoning where the broader societal impact of the legal solutions is not primarily contemplated.[218] The creation of clearly defined rights in the common law's framework is considered necessary to enable judges to adjudicate competing spheres of individual autonomy against clearly demarcated lines of individual liberty (in terms of the ideology of individualism).[219] Ultimately, these individual liberties limit the function of judges to act as 'night watchmen' who protect individual interests from unjustifiable limitations or infringements.[220]

Moving to the connection between the standards-based form of legal reasoning, collectivism and a progressive legal culture, legal concepts are articulated contextually whereas the common law is conceptualised as a set of 'open-ended standards'.[221] Legal concepts are context-sensitive and the open-ended standards represent 'normative propositions at a high level of abstraction', which in turn use flexible and context-dependent criteria such as 'reasonableness', among others, to reach substantively just legal solutions.[222] Substantively just solutions are secured by purposive interpretation and adjudication that allow judges to make value judgments with the appreciation of all the relevant facts and policy considerations on a case-by-case basis.[223] The result of this form of legal reasoning is that judicial discretion is increased even if a measure of uncertainty is introduced into the law.[224] This is necessary as flexible legal concepts and standards of justice must be woven into communal relationships to promote greater human interconnectedness and solidarity

[216] Kennedy (note 2 above) 1685 & 1752
[217] Kennedy (note 2 above) 1753; Cockrell (note 201 above) 43; Klare (note 2 above) 149-150; Bhana *Judicial Method* (note 2 above) 302; Bhana *Judicial Method Revisited* (note 2 above) 124.
[218] Cockrell (note 201 above) 43. See also Kennedy (note 2 above) 1773; Botha (note 214 above) 251 & 254-255; M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383, 398-399
[219] Ibid.
[220] Ibid.
[221] Kennedy (note 2 above) 1752; Cockrell (note 201 above) 43; Botha (note 214 above) 257; Zitzke *Transformative Delict* (note 2 above) 56; Bhana *Judicial Method Revisited* (note 2 above) 127.
[222] Cockrell (note 201 above) 43; Klare (note 2 above) 148; Botha (note 214 above) 271; Bhana *Judicial Method Revisited* (note 2 above) 127.
[223] Cockrell (note 201 above) 43; Bhana *Judicial Method* (note 2 above) 307; Bhana *Judicial Method Revisited* (note 2 above) 133.
[224] Kennedy (note 2 above) 1685-1688; Cockrell (note 201 above) 43.

in the pursuit of egalitarianism in the private realm.[225] This type of legal reasoning, according to Cockrell, can be labelled as 'pragmatism', as the formulation and application of standards amount to purposive legal decision-making that contemplates the effect that a legal solution will have on society as a whole.[226]

In applying these connections between the various modes of legal reasoning, ideology and culture to the common law frameworks, the particular manner in which the judiciary conceptualises and adjudicates legal concepts can be classified in terms of ideology and culture for purposes of comparison with the Constitution (and this, in turn, unveils the influence of legal ideology and culture, which is otherwise camouflaged).

By comparing and assessing the common law frameworks against the ideological backdrop of the Constitution, the subsequent development of the common law can take place at the following levels:[227] firstly, with regard to the 'objective normative value system' of the Bill of Rights, such developments can include a mere purposive interpretation and application of an extant common law rule, norm or methodology, which better infuses with the 'objective normative value system' of the Bill of Rights;[228] secondly, with reference to the 'objective normative value system', further developments can also include an adjustment of an extant common law rule, norm, and or/methodology;[229] and, thirdly, with reference to implicated fundamental rights, the developments and/or adjustments to the common law will be dictated by its ability to respect and promote the substance of the fundamental right(s) implicated and accommodate the Bill of Rights' mode of adjudicating fundamental rights, that is, the balancing of conflicting fundamental rights and competing policy concerns in accordance with section 36 of the Constitution.[230]

Therefore, the form leg deconstructs the common law's frameworks as a link between modes of legal reasoning, ideology and culture which will have otherwise

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[225] Kennedy (note 2 above) 1713; Cockrell (note 201 above) 42.
[226] Cockrell (note 201 above) 43; DM Davis & KE Klare 'Transformative constitutionalism and common and customary law' (2010) 26 *South African Journal on Human Rights* 403, 411-412; Botha (note 214 above) 256-257; Bhana *Judicial Method Revisited* (note 2 above) 127.
[227] As mandated by section 172 & 173 of the Constitution. See also Bhana *Reconciliation of Sections 8 and 39* (note 2 above) 367-373; Bhana *Judicial Role Revisited* (note 2 above) 144-145; Bhana *Development of a Basic Approach* (note 2 above) 7; Van der Walt & Midgley (note 98 above) § 21 & 25.
[228] Bhana *A Reconciliation of Sections 8 and 39* (note 2 above) 369-370; Friedman (note 165 above) 71; Roederer *Post-Matrix Legal Reasoning* (note 161 above) 61-62; Lubbe (note 182 above) 407.
[229] Ibid.
[230] Ibid.

been concealed. The particular manner in which the judiciary utilises the common law's frameworks to express the latter's substance and method can then be evaluated against the Constitution, as the common law's ideology and legal culture are identifiable and determinable in terms of this link. As explained earlier in this chapter, in terms of the transformative paradigm, an appropriate balance must be observed between the ideologies of individualism and collectivism and a further balance must also be achieved between rules and standards as modes of legal reasoning to transform the private common law.[231] As a result, in terms of the scope and form legs of the horizontality simpliciter approach, the common law (of personality) can be evaluated to determine whether it achieves these balances in the light of constitutional ideologies and if not, adjustments to the common law's framework can be considered (as highlighted in the preceding paragraph).

2.3.3 Guiding the interplay between personality rights, fundamental values and rights: The way forward

In view of the discussion above, I reconfirm the need in this chapter to revisit the constitutionalisation of the common law of personality, given the approach provided by the Constitutional Court in *Le Roux v Dey*[232] and the development of a subsequent alternative framework as contemplated in this thesis.[233] I further argue that this alternative framework ought to be guided by the horizontality simpliciter approach as outlined above.[234]

More specifically, when the horizontality simpliciter is applied to the law of personality, clear and systematic guidelines are provided on the use of the common law, fundamental rights and constitutional values to create a modern and integrated body of law. This is of particular relevance for this thesis, as the constitutionalisation of the law of personality, as argued above,[235] rests on the interplay between common law personality rights, constitutional values and fundamental rights. This alternative framework will consist of various levels of analysis which will interrogate the attainment of a constitutionalised law of personality in terms of doctrine, ideology and the framework of the common law of personality that expresses its substance and

[231] See section 2.1 above.
[232] *Le Roux* (note 55 above).
[233] See the preliminary discussions under section 1.1 and 1.2 of chapter one and the outline of the horizontality simpliciter approach in section 2.3 of this chapter.
[234] Ibid.
[235] See sections 1.1 and 1.2 of chapter one.

method. Furthermore, as the horizontality 'simpliciter' approach emerged from the transformative constitutionalism paradigm, the attendant development of an alternative framework will aspire to give effect to the transformative goals of the Constitution while maintaining a strong doctrinal coherence.[236]

With reference to the horizontality 'simpliciter' approach, the constitutionalisation of the common law of personality in terms of doctrine, ideology, substance and methodology will be rudimentarily outlined below.

In terms of doctrine, as already canvassed and interrogated in this chapter,[237] the doctrinal basis of the law of personality, being the doctrine of subjective rights, the actio iniuriarum and the Constitution, views the human personality as a composite legal interest, that is, the human personality is protected as a series of justiciable personality rights. Each personality right indicates a concrete interest or characteristic in the human image, as derived from the congruity between the doctrine of subjective rights and the Constitution. Regarding the congruity between the actio iniuriarum and Constitution, legal duties are then imposed on other members of society not to infringe personality rights as safeguarded by the requirements of the actio iniuriarum. A specific personality interest will indicate the respective contexts in the common law in which fundamental values and rights must be applied.

Considering the ideological dimensions of this process next, the overarching purpose of this level of enquiry will delineate the constitutional vision of the human personality based on the notions of substantive justice, self-development and human interdependence as applied to the law of personality. This constitutional vision will act as the broader ideological backdrop to the proposed alternative approach.

On a more concrete level, this constitutional vision will be extracted primarily from constitutional values (most notably the value of human dignity). Accordingly, as a fundamental value, human dignity (cognisant of its interrelationship with other values) can be used as an interpretative tool in developing, expanding or adjusting the specific interest indicated by a personality right for purposes of a transformative constitutionalism paradigm. The personality rights can also serve to concretise human dignity for purposes of horizontal relationships. Subsequently, human dignity together with the implicated fundamental rights, such as human dignity, privacy, and

[236] This sentiment echoes Zitzke's 'reading strategy' of adjudicative subsidiarity as appropriate for the development of the common law of delict, see Zitzke *Constitutional Heedlessness* (note 2 above) 285 - 289.
[237] See section 2.2 above.

freedom and security of the person (although this thesis will limit the inquiry to the former two fundamental rights),[238] can be utilised to assess the legal duty imposed by a personality right and thus contemplate the appropriateness of the requirements of the actio iniuriarum.

As alluded to above,[239] the actio iniuriarum constitutes the common law's framework for the articulation of the different personality rights and provides the judiciary with the means to adjudicate these rights. To assess the appropriateness of the common law's framework (i.e. the actio iniuriarum), the substantive and methodological considerations of this constitutionalisation process will then come into play. More specifically, the constitutionalisation of the actio iniuriarum should be interrogated through the nexus that exists between legal ideology, culture and their resultant influence on the common law. In practical terms, this will entail evaluating the underlying ideologies of the actio iniuriarum, as embedded in the legal culture of the judiciary, and comparing them to the broader ideological backdrop of the Constitution to determine whether constitutional adjustments must be made in the manner in which the common law articulates and adjudicates (through the judiciary) personality rights. This will lead to the assessment of the extent to which the framework of the actio iniuriarum (as influenced by legal ideology and culture) facilitates context-sensitive or normative reasoning for purposes of realising the Constitution's vision of the human personality.

In the end, before I can develop an alternative framework for the constitutionalisation of the law of personality as contemplated in chapter 5, I must first consider constitutional ideologies in respect of the human personality (as derived from human dignity and other constitutional values) in chapter three, and I need to evaluate the framework of the actio iniuriarum, as influenced by the judiciary, against the previously mentioned constitutional ideologies, in chapter four.

2.4 Conclusion

In this chapter, I interrogated the relationship between the doctrines of the common law of personality and the Constitution under the transformative constitutionalism paradigm. Thus, this chapter contemplated the doctrinal dimensions of this thesis

[238] See the discussion in section 1.2 of chapter one and section 2.2.2 of chapter two where I indicated which relevant personality rights and fundamental rights will be considered in this thesis following the Constitutional Court's Approach in *Le Roux* (note 55 above).
[239] See section 2.2.1 and 2.2.2 above.

and how these dimensions will scaffold the development of an alternative framework to the constitutionalisation of the common law of personality. This entailed considering the interplay between personality rights, fundamental rights and constitutional values as delineated from chapter one of this thesis.

Under the transformative constitutionalism paradigm, I found that the constitutional development of the common law of personality must arise from a single and integrated doctrinal framework arising out of the common law and the Constitution. In terms of this single and integrated doctrinal framework, the common law of personality will provide the necessary specialisation in articulating and protecting the human personality as a composite legal interest while constitutional values and fundamental rights will guide the common law's ideological and structural development. However, within this constitutionalisation process, consideration must be afforded to the inherent limitations of the common law doctrines in respect of their underpinning legal ideologies and overarching cultural beliefs.

With regard to the specialisation provided by the doctrines of the common law of personality, I highlighted, through the doctrine of subjective rights, that a specific personality right will indicate a concrete interest in the human personality. With further reference to the actio iniuriarum, this common law remedy provides the framework in positive law for the articulation and adjudication of personality rights through its three basic requirements.

With reference to the Supreme Court of Appeal in *Dendy v University of the Witwatersrand*,[240] I highlighted the important consideration that common law personality rights and applicable fundamental rights seek to protect the same scope of interests in the context of the law of personality. I also showed that the Court regarded the actio iniuriarum as the necessary common law framework to give effect to the Constitution in the context of the law of personality. I advanced the central argument that a single and integrated doctrinal framework indeed emerges from the interrelationship between the common law of personality and the Constitution.

On this basis, I argued that the common law of personality will delineate the respective contexts in which constitutional values and fundamental rights must be applied. I considered the common law of personality's ideological and structural development in further detail regarding the horizontality simpliciter approach that

[240] *Dendy v University of the Witwatersrand* (note 11 above).

emerged from the transformative paradigm. Specifically, I referred to this approach's scope and form legs.

The scope leg guides the ideological development of the common law of personality as this will entail the application of both constitutional values and fundamental rights to the delineated common law contexts. Preliminarily, I found that constitutional values will assist in interpreting personality rights against the Constitution whereas fundamental rights will help to shape attendant duties between private individuals in respect of the human personality. The scope leg demarcates the constitutional backdrop against which the ideological development of the common law of personality will take place.

With regard to the form leg, the focus shifts to how the framework of the common law must be developed so that it accords with the previously mentioned constitutional ideological backdrop. To initiate this development, the common law must be deconstructed in terms of the link, under the transformative paradigm, that exists between different modes of legal reasoning, ideology and culture. In interrogating the pertinent modes of legal reasoning adopted by the judiciary in respect of the common law's framework, its underpinning ideologies and legal culture are revealed (which would have been otherwise concealed). These will provide a base line to gauge the constitutional development of the frameworks of the common law in terms of its substance and methodology.

I found that these considerations will lay the basic scaffolding for the development of an alternative framework to constitutionalise the common law of personality in terms of doctrine, ideology, substance and methodology.

CHAPTER 3

IDEOLOGY AND HUMAN DIGNITY

3.1 Introduction

> '[Human dignity] is a remarkably rich and evocative concept. Its plasticity, proximity to a range of constitutional rights and values, and affinity with a variety of legal and philosophical traditions makes it a powerful tool of constitutional analysis, consensus building and transformation.'[1]

As explained in chapter one, this thesis proceeds from the basic premise that human dignity, as a constitutional value, is and ought to be the central axis in the constitutionalisation of the common law of personality.[2] As a central axis, with further reference to chapter one, human dignity is significant in initiating an ideological shift in the doctrines and frameworks of the common law of personality as required by the transformative constitutionalism paradigm.[3] Indeed, human dignity interfuses the human personality to an individual's absolute inner human worth which, in turn, comprises of substantive individualistic and collectivist dimensions aiding the individual in his or her pursuit of the good life and maintaining social stability.[4] These dimensions ought to subvert the common law's ideological preoccupation with pre-constitutional notions of (classical) liberalism.[5] In doing so, an appropriate balance between individualistic and collectivist values ought to be achieved in the common law of personality.[6]

As interrogated in chapter two with reference to the horizontality simpliciter approach (especially its scope leg), human dignity, together with other constitutional values and fundamental rights, will form an ideological constitutional backdrop against which the substance and method of the common law of personality (i.e. its framework) can be evaluated and developed.[7] More specifically, human dignity, cognisant of its interplay with other constitutional values, can form a constitutional vision on the human personality which will provide interpretative norms (which I will call 'ideals' in

[1] H Botha 'Human dignity in comparative perspective' (2009) 20 *Stellenbosch Law Review* 201, 201.
[2] See section 1.2.1 of chapter one.
[3] See section 1.1 of chapter one.
[4] In addition, the constitutional imperatives related to the development of an individual and the maintenance of the social cohesion of the greater collective is also implicated through these individual and collectivist dimensions, see section 1.1 of chapter one.
[5] Ibid.
[6] Ibid.
[7] See section 2.3.1 of chapter one.

this chapter) to expand the substance of the different personality rights.[8] These interpretative norms or ideals can further guide the methodological development of the common law for purposes of giving expression to the constitutionally expanded personality rights (in terms of the form leg of the horizontality simpliciter approach).[9]

Therefore, in this chapter, I will explore these various dimensions of human dignity as a constitutional value more concretely, together with the attendant development of a constitutional vision on the human personality. These considerations will form the ideological basis of the development of an alternative framework to that of the Constitutional Court in *Le Roux v Dey*.[10] In this regard, I have rudimentarily established that the Constitutional Court adopted a constitutionally thin conception of human dignity which is not doctrinally sustainable.[11] Given the overlap between the Constitution and common law in respect of the human personality as a composite interest, a multi-faceted conception of human dignity ought to arise for purposes of the transformative paradigm.[12]

The next section of this chapter, section 3.2, will provide a synoptic analysis of human dignity as a constitutional value (as applicable to the law of personality). With reference to Kantian moral philosophy as the basic intellectual foundation to South African human dignity discourse,[13] I will explore human dignity's axiomatic claim that every individual has absolute inner human worth which creates substantive individual and collectivist dimensions aiding an individual in realising this worth.[14] This will be done by providing a jurisprudential account of human dignity with reference to various philosophical traditions as applied in post-apartheid South Africa. I will also include some caveats pertaining to examining human dignity in terms of this theoretical outline. In concluding this section, I will argue that these dimensions give rise to a multi-faceted conception of human dignity for purposes of constitutional analysis and

[8] Ibid. Take note that these ideals will be introduced in section 3.2.2 below and will be further discussed under sections 3.2.3 and 3.3 below.
[9] See section 2.3.2 of chapter one.
[10] 2011 (3) SA 274 (CC).
[11] See section 1.1 of chapter one. See also LM Henry 'The jurisprudence of dignity' (2011) 160 *University of Pennsylvania Law Review* 169, who at 187 explains that viewing human dignity as a singular concept contains the risk of conceptualising it too narrowly, which in turn, ignores its more nuanced features and applications.
[12] See sections 1.1 of chapter one and 2.2.3 of chapter two,
[13] S Woolman 'Dignity' in S Woolman, M Bishop & J Brickhill et al (eds) *Constitutional Law of South Africa* 2ed (2008 Revision Service 4, 2012) Chapter 36, 3-4
[14] See section 1.1 of chapter one.

common law development.[15] In addition, as will become clearer in this section, this multi-faceted conception will implicate other fundamental constitutional values.

In terms of such a multi-faceted conception of human dignity and its interrelationship with other values, in section 3.3, I will consider the development of a constitutional vision of the human personality. More specifically, I will argue that the abovementioned dimensions, together with the other constitutional values of equality, freedom and ubuntu, will provide the ideological foundations of such a constitutional vision in the form of interpretative norms or ideals. However, here I will only consider fundamental values (as opposed to fundamental rights) as these values will always feature as interpretative norms in the respective contexts of the law of personality (as explained in chapter two).[16] The horizontal application of fundamental rights (including the right to human dignity), on the other hand, will depend on the application of specific personality rights and will be later considered in this thesis.[17]

3.2 An overview of human dignity jurisprudence in post-Apartheid South Africa: Kantian moral philosophy and the various dimensions of human dignity

3.2.1 Introductory remarks, Kantian moral philosophy and its parameters as a theoretical outline

> 'South Africa boasts one of the world's most developed bodies of dignity jurisprudence.'[18]

The Constitutional Court in *Dawood and Another v Minister of Home Affairs and Others*[19] declared that the importance of human dignity in our constitutional order cannot be overstated.[20] Fundamentally, according to the Constitutional Court, human

[15] This alludes to the understanding that various meanings and usages can be ascribed to human dignity highlighting its normative and contextual nature. This 'thick conception of human dignity' already has been highlighted in chapter one under sections 1.1 and 1.2.1 as 'a multi-faceted conception of human dignity'. Also see C McCrudden 'Human dignity and judicial interpretation of human rights' (2008) 19 *The European Journal of International Law* 655, 680-681; S Riley 'Human dignity and the rule of law' (2015) 11 *Utrecht Law* Review 91, 98-100; AC Steinmann 'The core meaning of human dignity' (2016) 19 *Potchefstroom Electronic Law Journal* 1, 24.

[16] See sections 2.3.1 and 2.3.2 of chapter two.

[17] The horizontal function and application of fundamental rights, in the development of an alternative approach to the constitutionalisation of the common law of personality, will be examined in Chapter 5 as I will focus here specifically on the personality rights to dignity, reputation and privacy.

[18] Woolman *Dignity* (note 13 above) 1.

[19] 2000 (3) SA 936 (CC).

[20] Ibid para 35.

dignity 'invest(s) in our democracy respect for the in[ner] worth of all human beings'.[21] However, apart from this axiomatic claim, it must be noted that human dignity, as textually used in the Constitution, is not a 'self-defining' or 'self-contained' concept for purposes of South African law.[22] Therefore, the specific questions concerning what human dignity is and the content of its various substantive dimensions ought to be answered with reference to several jurisprudential[23] (and even moral philosophical)[24] traditions.[25]

According to Laurie Ackermann and Anne Hughes respectively, a jurisprudential account of human dignity underlines the 'scaffolding' for a theoretical orientation to and subsequent concrete conceptualisation of human dignity.[26] For this purpose, a jurisprudential account of human dignity, as suggested by Sir Guy Green, will include a discussion of the philosophical roots of human dignity and how this concept is reflected in law.[27] Reference will be made to Kantian moral philosophy as the most pertinent constitutive antecedent to South African dignity discourse. As clarified by Stuart Woolman, '[t]he existing corpus of South Africa's dignity jurisprudence tracks … the trajectory of Kant's ethical thought, and in particular, his various formulations of the categorical imperative'.[28] Indeed, the South African legal fraternity had on many occasions highlighted the nexus between Kantian moral philosophy and our own dignity discourse, especially that of the courts.[29] However,

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[21] Ibid. See also D Cornell 'Bridging the span toward justice: Laurie Ackermann and the ongoing architectonic of dignity jurisprudence' in AJ Barnard-Naudé, D Cornell & F du Bois (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 18, 44; E Daly *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (2012) 25.

[22] L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 2; Steinmann (note 15 above) 3-5.

[23] These would, for example, include the Constitution and all other laws subject to the former.

[24] See the discussion that follows directly below on the parameters of analysing human dignity.

[25] Dawood (note 19 above) para 35; Ackermann *Human Dignity* (note 2 above) 2; G Lubbe 'Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law' (2004) 121 *South African Law Journal* 395, 408, 415, 420; D Bhana 'The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution' (2013) 29 *South African Journal on Human Rights* 351.

[26] Ackermann *Human Dignity* (note 22 above) 26; A Hughes *Human Dignity and Fundamental Rights in South Africa and Ireland* (2014) 6, 25, 29. See also W Binchy 'Dignity as a constitutional concept' in O Doyle & E Carolan (eds) *The Irish Constitution: Governance and Values* (2008) 307.

[27] G Green 'Human dignity and the law' in J Malpas & N Lickiss (eds) *Perspectives on Human Dignity: A conversation* (2007) 151.

[28] Woolman *Dignity* (note 13 above) 3-4.

[29] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 26; *S v Dodo* 2001 (3) SA 382 (CC) para 38; *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 172; WA Joubert *Grondslae van die Persoonlikheidsreg* (1953) 14; S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1, 6; Botha (note 1 above) 207; Woolman *Human Dignity* (note 13 above) 3; Ackermann *Human Dignity* (note 22

although Kantian moral philosophy provides the basic theoretical orientation for the conceptualisation of human dignity, for purposes of South African law, other intellectual traditions are also influential and will be addressed.[30] Significantly, different theoretical orientations towards human dignity, at least in the South African context, are not mutually exclusive towards the ideas presented by Kantian moral philosophy.[31] As a substantive end to Kantian moral philosophy and other theoretical orientations, further reference will be made to case law which will illustrate more concrete versions of these theoretical ideas (as human dignity is applied to concrete contexts).

Starting this jurisprudential account with Kantian moral philosophy as a foundation to our modern dignity discourse, human dignity is generally understood as endowing human beings with a 'special place in creation' due to their autonomous moral agency, which distinguishes humanity from the 'impersonality of nature'.[32] According to Kant, this autonomous moral agency demands the utmost respect and protection.[33] Consequently, this fundamental recognition of autonomous human moral agency with its concomitant mandate of reverence translates human dignity into a categorical imperative which states that:

> '[A] human being … is exalted above any price; for as a person … he is not to be valued merely as a means to the end of others or even to his own ends, but as an end in itself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other relational beings in the world.' [34]

According to Christopher McCrudden and Rinie Steinmann respectively, Kant's categorical imperative presents an axiomatic claim towards human dignity, which has two underlying dimensions (as sub-components), namely an individualistic and collectivist dimension.[35] These constituent parts to Kant's categorical imperative can

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above) 60; J Waldron 'Reply' in Jeremy Waldron and edited by M Dan-Cohen *Dignity, Rank, & Rights: The Berkeley Tanner Lectures* (2016) 133, 135.

[30] However, it must be noted that there are various ways to interpret human dignity with the result that they can point in opposite directions. Universally, there is no formal account on how to interpret human dignity as this is mainly dependent on a particular context with a particular interpreter. See generally R Brownsword and D Byleveld *Human Dignity in Bioethics and Biolaw* (2001).

[31] Botha (note 1 above) 207-209.

[32] AW Wood *Kant's Ethical Thought* (1996) 6**;** I Kant *Groundwork of the Metaphysics of Morals* (1785) (trans MJ Gregor, 2006) 107**;** EW Böckenförde *Recht, Staat,* Freiheit (2006) 382; Hughes (note 26 above) 36-37.

[33] Ibid.

[34] Kant (trans MJ Gregor) (note 32 above) 557.

[35] McCrudden *Human Dignity* (note 15 above) 679-680; Steinmann (note 15 above) 5-8.

be briefly outlined as follows (in the broadest sense of generality):[36] first, the axiomatic claim denotes that every human being possesses absolute inner worth;[37] secondly, the underlying individualistic dimension postulates that this mentioned absolute inner worth arises from all those aspects of the human personality derived from autonomous moral human agency as embedded in the human personality;[38] and thirdly, the underlying collectivist dimension of human dignity asserts that this inner worth should be recognised reciprocally, respected and supported by other individuals and society in further realising this inner worth. [39] In turn, the axiomatic claim with its two dimensions as sub-components, frame human dignity as a multi-faceted concept which reflects individualistic and collectivist interpretative norms or ideals (and signals its interrelationship with other fundamental values).[40] These will provide the necessary constitutional interpretative norms to guide the development of the common law of personality (as clarified in chapter two).[41]

This theoretical outline by McCrudden and Steinmann sustains the basic premise of this thesis that human dignity can initiate an ideological shift in the doctrines and frameworks of the common law of personality. This outline accords with the Constitutional Court's[42] basic understanding of human dignity in post-apartheid South Africa as absolute inner human worth, rooted in Kantian moral philosophy. In addition, this theoretical orientation acknowledges that human dignity comprises of individual and collectivist dimensions which are needed for the

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[36] Ibid. See also LWH Ackermann 'The legal nature of the South African constitutional revolution' (2004) *New Zealand Law Review* 633, 651; A Wood 'Human Dignity, Rights and the Realm of Ends' in AJ Barnard-Naudé, D Cornell & F du Bois (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2009) 47, 53; Woolman *Dignity* (note 13 above) 7-17.

[37] *Dawood v Minister of Home Affairs* (note 19 above) para 35; S v *Dodo* (note 29 above) para 35; Kant (trans McGregor) (note 32 above) 557; McCrudden *Human Dignity* (note 15 above) 679; Ackermann *Human Dignity* (note 22 above) 55.

[38] McCrudden *Human Dignity* (note 15 above) 680-681. See also Botha (note 1 above) 183; D Hicks *Dignity: The Essential Role It Plays in Resolving Conflict* (2011) 4-5; Ackermann *Human Dignity* (note 22 above) 23-24; Hughes (note 26 above) 38, 45-46; F Venter *Fundamental Rights in South Africa: A Brief Introduction* (2015) 27-28.

[39] R Dworkin *Life's Dominion: An Argument about Abortion and Euthanasia* (1993) 25, 82; R Stith 'The priority of respect: How our common humanity can ground our individual dignity' (2004) 44 *International Philosophical Quarterly* 165, 169; McCrudden *Human Dignity* (note 15 above) 680-681; Botha (note 1 above) 188-189; Ackermann *Human Dignity* (note 22 above) 23-24; Venter (note 38 above) 27-28.

[40] N Rao 'On the use and abuse of dignity in Constitutional law' (2008) 14 *Columbia Journal of European Law* 201, 222-223; Botha (note 1 above) 180; McCrudden (note 15 above) 680-681; J Waldron 'Lecture 2: Law, Dignity, and Self-Control' in J Waldron and edited by M Dan-Cohen *Dignity, Rank, & Rights: The Berkeley Tanner Lectures* (2016) 50-51.

[41] Ibid.

[42] *Dawood v Minister of Home Affairs* (note 19 above) para 35.

constitutionalisation of the common law of personality.[43] However, it is important to note that this theoretical outline does not serve as an absolute parameter to the legal conceptualisation of human dignity and cannot therefore be regarded as the exclusive components of human dignity.[44]

These constituent components of this theoretical outline (i.e. the axiomatic claim with its underlying individual and collectivist dimensions of human dignity) must be viewed as variations on Kant's categorical imperative with the implication that these components share 'family resemblances' with one another in relation to human dignity.[45] Therefore, it is untenable to argue that they operate as conceptually distinct components of human dignity with clearly demarcated boundaries. However, it is possible to utilise these components broadly as various dimensions of human dignity which denote fluid yet analytical ideas regarding the theoretical orientation (and subsequent legal conceptualisation) of human dignity. Ultimately, a discussion of these components aims to provide a brief theoretical orientation to human dignity that acknowledges its multi-dimensional and context-dependent nature for purposes of constitutionalising the common law of personality.

Therefore, in the remainder of this section, I will provide a brief discussion of each of these constituent components, with reference to Kantian moral philosophy, other philosophical traditions, case law and the significance of these principles for the legal conceptualisation of human dignity.[46]

3.2.2 The 'axiomatic claim': human dignity as absolute inner worth

In terms of the axiomatic claim, this dimension of human dignity conveys the fundamental idea that every person has absolute inner worth by reason of being human.[47] With reference to Kant's categorical imperative, this absolute inner worth 'exalts' human beings beyond 'any price', the upshot being that every individual

[43] See sections 1.1 of chapter one and 2.1 of chapter two.
[44] Ackermann *Human Dignity* (note 22 above) 2; Steinmann (note 15 above) 3-5.
[45] Ibid. See also Woolman *Dignity* (note 13 above) 5-7.
[46] For a voluminous and detailed discussion of modern human dignity discourse, see generally Ackermann *Human Dignity* (note 22 above); Daly (note 21 above); M *Rosen Dignity: Its History and Meaning* (2012); C McCrudden *Understanding Human* Dignity (2013); Hughes (note 26 above); A Barak *Human Dignity: The Constitutional Value and the Constitutional Right* (2015) (trans D Kayros).
[47] *Egan v Canada* (1995) 29 CRR (2d) 79; Ackermann *The South African Constitutional Revolution* (note 36 above) 651; Botha (note 1 above) 217; Wood *Realms of Ends* (note 36 above) 49; Ackermann *Human Dignity* (note 22 above) 4 & 55; Hughes (note 26 above) 38.

should be treated as an end in him or herself and never as a means to an end.[48] In other words, this absolute worth creates the universal ideal that every human person should be reprieved from objectification.[49] The reasoning behind this, according to the Constitutional Court in *S v Makwanyane*[50] and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,[51] is that there can be no trade-off between human beings and instruments or objects with mere 'price', as the former cannot be disposed of, due to the uniqueness of the human image.[52] Human dignity understood as absolute inner human worth, which in this chapter I will refer to as 'the axiomatic claim',[53] necessitates further discussion, as this dimension of human dignity gives rise to further theoretical implications.

Considering the uniqueness of the human image, the absolute inner worth of human beings cannot embody superficial dimensions of worth, as they are incapable of encapsulating the reverence that should be afforded to human dignity.[54] Consequently, the absolute inner worth of human beings challenges and transcends conventional measures of worth (as associated with classical liberalism) and seeks rational and universal paradigms to perceive human worth (in the pursuit of obtaining social justice in the private realm).[55] Therefore, the axiomatic claim rejects the classical liberal conception of human worth where individuals are distinguished on societal roles and prudential considerations such as social hierarchy, wealth, and privilege.[56]

On the contrary, the absolute inner human worth allied with the axiomatic claim

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[48] Kant (trans McGregor) (note 32 above) 106-107.
[49] Ibid 115, 120. See also Botha (note 1 above) 217-220; Hughes (note 26 above) 45.
[50] *S v Makwanyane* (note 29 above).
[51] 2000 (2) SA 1 (CC).
[52] *S v Makwanyane* (note 29 above) para 328; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 51 above) para 42. See also *Prince v President of the Law Society of the Cape of Good Hope* 2002 (1) SACR 431 (CC) para 49*; S v Jordan (Sex Workers Education & Advocacy Task Force as Amici Curiae)* 2002 (2) SACR 499 (CC) para 74**;** *S v EN* 2014 (1) SACR 198 (SCA) para 15; TE Hill *Dignity and Practical Reason in Kant's Moral Theory* (1992) 48; Ackermann *Human Dignity* (note 22 above) 4.
[53] I use the term 'the axiomatic claim' interchangeably with the concepts of absolute inner human worth and the subsequent reprieval against objectification.
[54] *S v Dodo* (note 29 above) para 38; Kant (trans McGregor) (note 32 above) 115 & 120; Botha (note 1 above) 217-220; Hughes (note 26 above) 45.
[55] The ways in which meaning can be attributed towards human dignity, and conversely, the ways in which dignity can attribute meaning towards human worth will be discussed in Section 3.2.3. See *S v Makwanyane* (note 29 above) para 328; E Bloch *Natural Law and Human Dignity* (1961) (trans DJ Schmidt, 1986) xv, xxix; E Schockenhoff *Natural Law & Human Dignity: Universal Ethics in an Historical World* (2003) 172-173.
[56] R Sullivan *Immanuel Kant's Moral Theory* (1989) 197; Botha (note 1 above) 217-220; R Bayefsky 'Dignity, honour, and human rights: Kant's perspective' (2013) 41 *Political Theory* 809, 818-819.

accrues to every human being qua human regardless of their standing in the social order or material conditions.[57] Every human being possesses absolute worth inherently, as commensurate agents of humanity, which creates a basis for their equal repute and reception.[58] Absolute inner human worth is impaired by treatment premised upon social standing or circumstances which do not relate to innate human needs, capacities and worth.[59] Therefore, the axiomatic claim further underscores the unconditional and equal worth inherent in every human being, thus being linked to the other constitutional value of 'equality', which negates the objectification of human beings.[60]

This absolute inner human worth is deeply significant for each individual's passage through life, as the attendant absolute inner worth strives to imbue 'authenticity' in human existence.[61] In other words, an individual's absolute inner human worth is capable of contributing towards the constitutional imperative of enabling this individual to unlock his or her full potential to lead a good and meaningful life.[62] In terms of Kantian moral philosophy and the Constitutional Court, the effective realisation of this absolute inner human worth, that contributes towards the constitutional imperative of leading a good and meaningful life, as highlighted earlier, rests on individualistic and collectivist dimensions (as sub-components).[63] According to Matthew Liao, to effectively realise this inner worth, individuals need to utilise certain human capacities, which are the individualistic dimensions of this inner

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[57] O Schachter 'Human dignity as a normative concept' (1983) 77 *American Journal of International Law* 848, 851; Ackermann *The South African Constitutional Revolution* (note 36 above) 651; J Barrett 'Dignatio and the human body' 21 (2005) *South African Journal on Human Rights* 525, 530; Botha (note 1 above) 217-220; A Gewirth *Self-Fulfilment* (2009) 164; Ackermann *Human Dignity* (note 22 above) 21-26; Hughes (note 26 above) 45.

[58] Ibid.

[59] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 116; *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* 2006 (1) SA 524 (CC) para 150. See also *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 para 53. Furthermore, see J Malpas 'Human Dignity and Human Being' in J Malpas & N Lickiss *Perspective on Human Dignity: A Conversation* (2007) 19, 20.

[60] *Sv Makwanyane* (note 29 above) para 328; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 51 above) para 42; Gewirth (note 57 above) 164; Botha (note 1 above) 217; Ackermann *Human Dignity* (note 22 above) 23.

[61] R Dworkin *Justice for Hedgehogs* (2011) 209 & 419; Hughes (note 26 above) 38; Barak (note 46 above) 29; SM Liao 'Human Rights as Fundamental Conditions for a Good Life' in R Cruft, SM Liao & M Renzo (eds) *The Philosophical Foundations of Human Rights* (2015) 79, 85 and 92.

[62] Ibid.

[63] *Ferreira v Levin* 1996 (1) SA 984 (CC) para 49; *Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Development and Another* 2014 (1) SACR 327 (CC) para 52; Dworkin *Justice for Hedgehogs* (note 61 above) 195, 209; Marshall *Human Rights Law and Personal Identity* (2014) 33; Liao (note 61 above) 79.

worth, and social options, which are the collectivist dimensions of this inner worth.[64]

To expound, human capacities, as the individualistic dimension, are those characteristics and abilities of the human personality that enable an individual to have control over the direction of his or her life (for example, autonomous moral human agency embedded in the human personality).[65] However, social options, as the collectivist dimension, are those social fora that human beings require when they exercise their human capacities (for example, social interactions and the values and norms that guide them).[66] When viewed from this perspective, these individualistic and collectivist dimensions of the axiomatic claim are conceptually linked with the constitutional value of 'freedom', in other words, an individual's personal freedom to develop his or her own personality and the promotion of this development in society through human interdependence and the facultative role of legal norms and values.[67]

To further frame this chapter's theoretical outline of human dignity, the individualistic and collectivist dimensions of the axiomatic claim in realising absolute inner human worth will be further interrogated. After discussing these two dimensions, this theoretical outline will also highlight human dignity's multi-faceted nature and its connection to other fundamental constitutional values.

3.2.2.1 The 'individualistic dimension': human dignity as the human personality

Moving on to the individualistic dimension of the axiomatic claim, this dimension of human dignity interrogates the characteristics of human beings that endow them with absolute inner worth (in the context of the law of personality).[68] With reference to the Constitutional Court in *Barkhuizen v Napier*,[69] an individual's absolute inner worth derives from autonomous moral human agency[70] – the distinctive human ability to exercise moral choice and practical reason in the pursuit of shaping one's own life.[71]

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[64] Ibid 79 & 85.
[65] Ibid.
[66] Ibid.
[67] *Ferreira v Levin* (note 63 above) paras 49, 51 & 250-251.
[68] McCrudden *Human Dignity and Judicial Interpretation* (note 15 above) 680-681; Botha (note 1 above) 171, 183; Ackermann *Human Dignity* (note 22 above) 23-24; G Kateb *Human Dignity* (2011) 18; DP Sulmasy 'The varieties of human dignity: A logical and conceptual analysis' (2013) 16 *Med Health Care and Philos* 937, 938.
[69] 2007 (5) SA 323 (CC).
[70] Ibid paras 56-58; Kant (trans McGregor) (note 32 above) 37-38.
[71] Ibid. Malpas (note 59 above) 19; McCrudden *Human Dignity and Judicial Interpretation* (note 15 above) 659-660; Liebenberg (note 29 above) 7; Hughes (note 26 above) 42; Henry (note 11 above) 206-208; O Sensen 'Introduction' in O Sensen (ed) *Kant on Moral Autonomy* (2013) 1. However, it must be noted that autonomous moral human agency can also be construed as a freedom as opposed

Autonomous moral human agency gives an individual the freedom to determine the direction of his or her own life through a process of self-creation and self-realisation.[72] Self-creation and self-realisation, in this particular context, are based on the notion that human beings possess unique characteristics and features which enable them to unlock and realise their unparalleled potential in leading a meaningful and good life.[73] Allen Wood argues that these characteristics are exemplified in the 'basic human predisposition' of human personality which serves as a material or substantive end to the uniqueness of the human image.[74]

This dimension of human dignity, which links an individual's absolute inner human worth to his or her personality in terms of autonomous moral human agency (and creates the individualistic ideal), will be analysed further to highlight the various characteristics of the unique human image that enable this individualised expression of absolute inner human worth.

Broadly speaking, the human personality, from the perspective of the individualistic dimension of human dignity, embodies all of those characteristics that define our unique common humanity and individuality.[75] As elucidated by Patrick O' Callaghan, the human personality 'represents at once '"commonness" and "distinctiveness" … through [which] we become conscious of the unique identity of the human species as a whole and the uniqueness of each individual'.[76] Developed to its logical conclusion by nineteenth century moral rights theorists such as Carl Gareis,

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to a distinctively unique human attribute. See A Sen *Inequality Re-examined* (1992) who advances a freedom-enriched conception of human autonomy and dignity. For purposes of this thesis, I intend to view autonomous human moral agency as an inherent human quality as this resonates more with the concept of the human personality which will be discussed directly below.

[72] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 51 above) para 23; *Dawood v Minister of Home Affairs* (note 19 above) para 37; TE Hill *Autonomy and Self*-Respect (1991) 51; Botha (note 1 above) 189; Liebenberg (note 29 above) 7; Hughes (note 26 above) 42.

[73] BVerfGE 45, 187 ('Life Imprisonment Case'); Kateb (note 68 above) 18; Ackermann *Human Dignity* (note 22 above) 227-228.

[74] The concept of a 'basic human predisposition' refers to a basic element or component of the human image. Furthermore, in terms of Kantian moral philosophy, human personality and autonomous moral human agency are closely interrelated concepts. With reference to Hegelian rights discourse, the human personality serves as a 'substantive end' to the individualistic realisation of absolute inner worth through autonomous moral human agency. See Wood *Human Dignity, Rights and the Realms of Ends* (note 36 above) 53-54; GWF Hegal *The Philosophy of Right* § 45 (Grundelinien der Philosophie des Rechts (1820) – translated by A White in 2015; C Swack 'Safeguarding artistic creation and the cultural heritage: A comparison of droit moral between France and the United States' *Columbia-VLA Journal of Law and Arts 22* (1998) 361, 365-366; Ackermann *Human Dignity* (note 22 above) 23-24.

[75] P O' Callaghan *Refining Privacy in Tort Law* (2012) 32-34.

[76] Ibid. See also J Marshall *Personal Freedom Through Human Rights Law? Autonomy, Identity and Integrity Under the European Convention on Human Rights* (2009) 29.

Otto von Gierke and Josef Kohler,[77] the human personality denotes the sum of all the physical and spiritual-moral characteristics of human beings that construe the human image.[78] In line with this general understanding of the human personality, these physical and spiritual-moral characteristics, as embedded in autonomous moral human agency, highlight human beings' membership to and ascendency over the living world.[79] Therefore, the human personality represents both individual and collective human uniqueness from which two broad types of dignitarian characteristics can be highlighted, namely physical characteristics and spiritual-moral characteristics.[80] These two broad types of human characteristics serve as the constituent parts of the human personality. Each of these types of human characteristics will be considered briefly at a more concrete level.

Starting with physical characteristics, this aspect of the human personality, according to Willem Joubert, highlights the physical-mental integrity of an individual.[81] The physical-mental integrity of an individual denotes the bodily or physical aspects of a human being.[82] However, given the uniqueness of the human image, the bodily or physical aspects of human beings also comprehend a mental element.[83] Four facets of the physical-mental integrity of an individual can be identified, namely the body itself, health (in a physical as well as a mental sense), physical freedom and sensory

[77] Moral rights theorists developed Kantian moral philosophy further in relation to the human personality as a substantive end to autonomous moral human agency.

[78] Joubert *Grondslae* (note 29 above) 131; NC Suhl 'Moral rights protection in the United States under the Berne Convention: A fictional work?' (2002) 12 *Fordham Intellectual Property, Media and Entertainment Law Journal* 1203, 1208-1209; J Neethling, JM Potgieter & A Roos *Neethling on Personality Rights* 3rd ed (2019) 24; O' Callaghan (note 75 above) 32-33; Ackermann *Human Dignity* (note 22 above) 89. Furthermore, the Constitutional Court on various occasions confirmed this understanding of the human personality, see *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 27; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 59; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 64.

[79] Ibid. In other words, from a legal perspective, human beings, as living beings, form part of the natural world but their attendant legal subjectivity (i.e. the bearers of rights and duties) endows and enables them to control and shape the natural world. See also M Dan-Cohen 'Dignity in its (dis)content' in J Waldron and edited by M Dan-Cohen *Dignity, Rank, & Rights: The Berkeley Tanner Lectures* (2016) 1, 8-9.

[80] *Khumalo v Holomisa* (note 78 above) para 27; *Dawood v Minister of Home Affairs* (note 19 above) para 35. A plethora of frameworks exist for the division of the human personality, see Joubert *Grondslae* (note 29 above) 41-43. This particular framework was chosen as it builds upon Kantian moral philosophy and provides a holistic view of the human image.

[81] Joubert *Grondslae* (note 29 above) 131. See also Ackermann *Human Dignity* (note 22 above) 151-152.

[82] Neethling, Potgieter and Roos (note 78 above) 25.

[83] That is, the mind forms part of the physical body. See Joubert *Grondslae* (note 26 above) 131; Neethling, Potgieter and Roos (note 78 above) 25.

feelings.[84] Thus, the physical characteristics of the human personality refer to the physical or bodily aspects of human beings, which include the physical human body itself, its spatial freedom and the human mind and which function as the physical determinants of the human image.[85]

Moving on to the spiritual-moral characteristics of the human personality, this aspect of the human personality denotes the intellectual, spiritual and moral attributes of a person which signals humanity's ascendency over the living world.[86] As a more direct expression of autonomous moral human agency, the spiritual-moral characteristics of the human personality enable a person to articulate his or her 'singularity' (i.e. uniqueness) as a person and concomitant individuality.[87] In other words, the spiritual-moral characteristics of the human personality provide a person, among others, with a foundation to individual existence which serves as an 'individualised' expression of a person's absolute inner worth.[88] These spiritual-moral characteristics of the human personality include self-esteem, public esteem, informational autonomy, autonomy over one's likeness and sentiment's towards one's own moral integrity.[89] Furthermore, the individual existence of a person, broadly speaking, is closely linked to his or her innate human capacities represented in these mentioned spiritual-moral characteristics.[90] Therefore, the spiritual-moral characteristics of the human personality connote a personal and individualised interior sphere that sustains the individual existence of a person.[91]

Within this delineation of the dignitarian characteristics to the human personality under the individualistic dimension of the axiomatic claim, it seems likely

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[84] Ibid.

[85] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 51 above) para 22; *Teddy Bear Clinic v Minister of Justice and Constitutional Development* (note 63 above) para 52; *Lee v Minister For Correctional Services* 2013 (1) SA 213 (CC) para 65.

[86] See discussion above. Joubert *Grondslae* (note 29 above) 131-132; Neethling, Potgieter and Roos (note 78 above) 27.

[87] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 49 above) para 23; *Dawood v Minister of Home Affairs* (note 19 above) para 37; C Cernuschi *Re/casting Kokoschka: Ethics and Aesthetics, Epistemology and Politics in Fin-de-siècle Vienna* (2002) 162; S Rosenbaum *Recovering Integrity: Moral Thought in American Pragmatism* (2015) 27. See also Ackermann *Human Dignity* (note 22 above) 152.

[88] *Dawood v Minister of Home Affairs* (note 19 above) para 35; Joubert *Grondslae* (note 29 above) 41-43; Neethling, Potgieter and Roos (note 78 above) 27; Henry (note 11 above) 214-215; Ackermann *Human Dignity* (note 22 above) 152-155.

[89] *O'Keefe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C).

[90] *Khumalo v Holomisa* (note 78 above) para 27; Wood *Human Dignity, Rights and the Realms of Ends* (note 36 above) 49; Ackermann *Human* Dignity (note 22 above) 152; Hughes (note 26 above) 45-46; Kateb (note 68 above) 175.

[91] *Bernstein v Bester* 1996 (2) SA 751 (CC) para 69*;* EJ Eberle *Dignity and Liberty: Constitutional Visions in Germany and the United States* (2002) 61; Ackermann *Human Dignity* (note 22 above) 153.

that these have a close resemblance to the personality rights as identified in chapters one and two – probably stemming from their shared natural law heritage.[92] This apparent resemblance will be outlined here for clarification. First, the personality right to bodily integrity appears to be closely associated with the dignitarian characteristic of the physical human body which houses the human mind and physical-mental health. Secondly, the personality right to physical liberty seems to be related to the dignitarian characteristic of an individual's spatial freedom. Thirdly, the personality right to reputation finds association with the dignitarian characteristic of public esteem. Fourthly, the personality right to (common law) dignity finds resemblance with the dignitarian characteristic of self-esteem. Fifthly, the personality right to privacy shares a resemblance with the dignitarian characteristic of informational autonomy over one's private life. Sixthly, the personality right to identity denotes a linkage to the dignitarian characteristic of autonomy over one's likeness. Lastly, the personality right to feelings bears resemblance with the dignitarian characteristic of sentiments towards one's own moral integrity.

The specific interaction between these various characteristics (in terms of the broader dimensions of human dignity as a fundamental value) with the various personality rights will be considered at a later stage of this thesis.[93] Specifically, the constitutional interpretation and expansion of certain personality rights, namely those rights to (common law) dignity, reputation and privacy, will be considered in chapter five.[94]

When observing the physical and spiritual-moral dignitarian characteristics of human beings more teleologically, this individualistic dimension of human dignity yields the implicit notion that the human personality, apart from sustaining a person's individual existence, promotes the personal integrity of an individual.[95] Personal integrity envisions the integration of an individual's characteristics to evince an individual existence of 'wholeness' or 'completeness' which facilitates the individual expression of absolute inner worth.[96] To clarify, an individual cannot express his or her absolute inner worth adequately when the personality of such an individual is

[92] See sections of 1.1 of chapter one and 2.2 of chapter two, specifically 2.2.3.
[93] This will receive consideration in chapter five where the development of an alternative framework for the constitutionalisation of the common law of personality is considered.
[94] See section 1.2 of chapter one.
[95] Henry (note 11 above) 215.
[96] Ibid 215-216.

reduced to a single characteristic or personal trait.[97] On the contrary, the human personality has a dynamic and multi-faceted nature which envelops the unique human image in its entirety.[98] Although different parts of the human personality are recognisable, the integration of these characteristics facilitate an individual ability's to express absolute inner worth as part of the individual component of leading a good and meaningful life.

As the last consideration to the individualistic dimension of human dignity, the integrated dignitarian interests mentioned in this section will also prompt an individual to acknowledge his or her absolute inner worth.[99] With reference to Kantian moral philosophy and the Constitutional Court,[100] for a person to truly initiate the process of self-realisation and self-creation, they will have to recognise his or her own worth stemming from autonomous human moral agency.[101] Robin Dillon states that recognising one's own worth, or more technically an 'interpersonal recognition of self-[worth]', is in essence a practical acknowledgement of the inherent dignity shared by humanity and the implications of that.[102] For this reason, as noted by Jeremy Waldron, an individual's own recognition of his or her absolute inner worth is an important aspect of utilising the unique characteristics of the human image to individually express absolute inner human worth.[103]

3.2.2.2 The 'collectivist dimension': the intersubjectivity of human dignity

Considering the collectivist dimension of human dignity next, this dimension of the axiomatic claim, with reference to the Constitutional Court in *Khosa v Minister of*

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[97] Ibid.

[98] *Khumalo v Holomisa* (note 78 above) para 27; *Dawood v Minister of Home Affairs* (note 19 above) para 35; PA Pagan Aguiar & T Auer *The Human Person and a Culture of* Freedom (2009) 4; AR Monteiro *Ethics of Human Rights* (2014) 312. It must be noted that this is because the human personality can be regarded as a substantive or material end to autonomous moral human agency.

[99] Liebenberg (note 29 above) 8; Botha (note 1 above) 182; Ackermann *Human Dignity* (note 22 above) 238; Barak (note 46 above) 82.

[100] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 51 above); *Le Roux v Dey* (note 10 above).

[101] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 51 above) para 23; *Le Roux v Dey* (note 10 above) para 154; Dworkin *Justice for Hedgehogs* (note 61 above) 19; Kant (trans McGregor) (note 32 above) 434-437.

[102] RS Dillon 'Humility, arrogance, and self-respect in Kant and Hill' in RN Johnson *Reason, Value, and Respect: Kantian Themes from the Philosophy of Thomas E. Hill, Jr.* (2015) 42, 49.

[103] Waldron (note 29 above) 16. See also R Keshen *Reasonable Self-Esteem* (1996) 143-144; SJ Kerstein 'Dignity and Persevation of Personhood' in P Kaufmann, H Kuch, C Neuhäuser & E Websrer (eds) *Humiliation, Degradation, Dehumanization – Human Dignity Violated* (2011) 231, 233; O Sensen *Kant on Human Dignity* (2011) 170; DG Kirchhoffer *Human Dignity in Contemporary Ethics* (2013) 32-34.

Social Development,[104] expresses absolute inner human worth as a collectivist ideal to guide the socialisation of the unique human personality both from the perspective of the individual and the collective.[105] Human dignity is not only an individualistic ideal, but also constitutive of a social community or collective of varied personalities.[106] This dimension shifts human dignity's focus to the collectivist components of absolute inner worth and the total estimation of this in society.[107] With reference to Kant's social idea of a realm of ends,[108] as associated with the categorical imperative, this particular dimension of human dignity seeks to realise absolute inner worth, as associated with the unique human image, through concretisation within a community.[109] This realisation depends on the communitarian notions of public recognition and human solidarity – which serve as focal points in this regard.[110] This dimension of human dignity, which intertwines absolute inner human worth of an individual with that of the collective, will be analysed further to highlight how absolute inner human worth can be realised through public recognition and human solidarity.

With regard to the concept of public recognition, the collectivist dimension of human dignity advances the imperative that every individual has a claim to respect

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[104] 2004 (6) SA 505 (CC).

[105] Ibid para 74. See also *Bernstein v Bester* (note 91 above) para 67; Eberle (note 91 above) 50-51; Botha (note 1 above) 187; Henry (note 11 above) 220-221; Ackermann *Human Dignity* (note 22 above) 150-151.

[106] Botha (note 1 above) 193;

[107] *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) paras 60 & 78; Botha (note 1 above) 193; Henry (note 11 above) 221.

[108] Wood, *Human Dignity, Rights and the Realms of Ends* (note 36 above) 58, explains this realm of ends as follows:

> 'By a "realm" (Reich) Kant means 'a systematic combination of various rational beings through communal laws", or again, "a whole of all ends in systematic connection". The term "realm of ends" refers to an ideal community with all rational beings as its members; one involving a systematic harmony among the ends of all the members of the community … A collection of *ends* constitutes a "realm" if these ends are not in conflict or competition with one another, but are combined into a mutually supporting system. The *laws* of a realm of ends are those which, if followed, would *combine* all the rational beings, as ends in themselves, and all the ends they set, into a mutually supporting *system* of shared collective ends. Kant's Formula of the Realm of Ends commands us to follow maxims involving ends that belong to this system, and it forbids us to adopt ends that would stand in the way of rational beings sharing a system of ends. Ends that are neither required for nor incompatible with the system are permissible.'

See also *Khosa* (note 104 above) para 74.

[109] *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 53; Botha (note 1 above) 189-190.

[110] N Rao 'Three concepts of dignity in constitutional law' (2011) 86 *Notre Dame Law Review* 183, 243. See also Liebenberg (note 29 above) 11; J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011) 4.

and social recognition from other individuals and the community as a whole.[111] In general terms, the collectivist dimension requires equal respect for every individual's personal integrity.[112] This respect and attendant recognition ground an obligation to treat others congruent to their absolute inner worth by not interfering with it.[113] Certain types of conduct, such as contempt, harm or destruction to an individual's personality – which can be collectively termed as 'degradation' to one's dignity – are inconsistent with the absolute inner worth associated with the unique human image.[114] The collectivist dimension of the axiomatic claim, therefore, aspires to set minimum standards for public recognition and social interaction in a community by rejecting conduct that is irreconcilable with absolute inner human worth.[115]

This dimension of dignity goes much further than dismissing certain types of conduct; it also requires the community, and its members, to validate and to have a good opinion of each person in order to facilitate the socialisation of absolute inner human worth.[116] In this way, respect and social recognition advances co-operation between individuals within the broader community, as opposed to mere non-interference.[117] This envisioned intersubjectivity bespeaks the social ideal of human solidarity. In this particular context, human solidarity[118] contributes towards the realisation of absolute inner human worth by overcoming the solitary autonomy of competing individuals (as associated with classical liberalism) and achieving a social unity that will enable individuals to develop their full human potential – this is

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[111] That is his or her integrated physical and spiritual-moral characteristics deriving from autonomous moral human agency as a primary indicator of individual absolute inner worth. See discussion in section 3.2.2.1. See also L Henkin 'Human dignity and constitutional rights' in MJ Meyer & WA Parent (eds) *The Constitution of Rights: Human Dignity and American Values* (1992) 210-211; Botha (note 1 above) 190; Ackermann (note 22 above) 74; Bayefsky (note 56 above) 823.

[112] *Bernstein v Bester* (note 91 above) para 67; *Khosa v Minister of Social Development* (note 104 above) para 74; Minister of Home Affairs v Fourie (note 107 above) paras 60 & 78.

[113] This, among others, requires individuals to recognise the human personality of others and not to treat them as objects. See also Ackermann *Human Dignity* (note 22 above) 147.

[114] *S v Makwanyane* (note 29 above) para 328; *S v Dodo* (note 29 above) para 38; Rao *Three Concepts of Dignity* (note 110 above) 246; Hughes (note 26 above) 43.

[115] Henry (note 11 above) 220-221. This also implies that the individual is required to respect the absolute inner worth of others as well as the collective community.

[116] Botha (note 1 above) 187; Liebenberg (note 29 above) 9; T Metz 'Ubuntu as a moral theory and human right in South Africa' (2011) 11 *African Human Rights Law Journal* 532,538; Rao *Three Concepts of Dignity* (note 10 above) 243-244 & 248.

[117] Ibid.

[118] A Laitinen and AB Pessi define this concept as follows (A Laitinen & AB Pessi 'An introduction' in A Laitinen & AB Pessi (eds) *Solidarity: Theory and Practice* (2014) Chapter 1, 2):

> 'As a concept, solidarity is both descriptive and normative. Solidarity in its different descriptive senses refers today to a kind of connection to other people, to other members of a group, large or small … "Solidarity" may be used to describe and explain the normal order and normative social integration in societies or communities, as opposed to chaos and conflict, and as opposed to order based on coercion or maximization of self-interest.'

premised on the common human aspiration of leading a good and meaningful life.[119] Therefore, a few ideas need to be highlighted regarding the potential scope of human solidarity in realising absolute inner human worth.

First, human solidarity contributes towards the development of an individual's personal integrity (as explained in the preceding sub-section).[120] Specifically, the self-creation and self-realisation of an individual are constituted through his or her individual personality and his or her relationship to the greater social whole.[121] An individual's absolute inner worth is also realised through other individuals.[122] Secondly and closely related to the first idea, human solidarity transcends the classical liberal idea of the 'unencumbered' or 'atomistic self'.[123] In particular, participation in social life, as a component of the external realisation of absolute inner human worth, contemplates that individual personalities are both restricted and empowered through individual relationships and communal ties.[124] With reference to these two ideas, individual personalities do not exist in the abstract and are consummated through societal memberships and relationships.[125] Lastly, this intersubjectivity resonates with the value of ubuntu, at least in the South African context, which facilitates the interplay between individual and collectivist values as it 'combines individual rights [or interests] with a communitarian philosophy'.[126] The value of ubuntu promotes a culture in which individual and communal interests are

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[119] *S v Makwanyane* (note ## above) para 308; *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) para 51; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 113; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 71; C Wellman 'Solidarity, the individual and human rights' (2000) 22 *Human Rights Quarterly* 639, 642; Botha (note 1 above) 187; Hughes (note 26 above) 39.

[120] See section 2.2.2.1 above for a discussion of this concept.

[121] *MEC Education v Pillay* (note 109 above) para 53; Metz (note 116 above) 536; Rao *Three Concepts of Dignity* (note 110 above) 243.

[122] Ibid.

[123] Ibid. See also Eberle (note 91 above) 50-52; Botha (note 1 above) 187-188; Ackermann *Human Dignity* (note 22 above) 109. Also generally see R Forst 'How not to speak about identity: The concept of the person in a theory of justice' (1992) 18 *Philosophy and Social Criticism* 293.

[124] *MEC Education v Pillay* (note 109 above) para 53; Botha (note 1 above) 187-189; Ackermann *Human Dignity* (note 2 above) 109. This coincides with the idea that human dignity, in general, can be conceptualised as both 'empowerment' and 'constraint'. See D Bhana & M Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited' (2005) 122 *The South African Law Journal* 865, 880-881.

[125] Botha (note 1 above) 187.

[126] *Dikoko v Mokhatla* (note 119 above) para 113; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37. Furthermore, the well-known term 'ubuntu' is a contraction of the African maxim umuntu ngumuntu ngabantu, meaning 'a person is a person because of other people'. This expression articulates that ubuntu, as a rule of conduct, promotes basic respect and compassion between members of a community. See DJ Louw & A Spijker 'Family conferencing: Notes' (2007) 28 *Obiter* 101, 106.

harmoniously balanced through the categorical imperative of reciprocal respect.[127] Simply put, the recognition and protection of individual interests are interdependent on the same level of recognition and protection afforded towards the subjective interests of other individuals of the community.[128]

On this basis, the collectivist dimension of human dignity, as influenced by the concepts of public recognition and human solidarity, with a specific focus on ubuntu, provides a benchmark of reciprocity which ought to further guide social interactions in realising the absolute inner worth of individuals.[129] This benchmark of reciprocity recognises the importance of the personal integrity of individuals and their intersubjectivity with each other and with the broader collective.[130] This further suggests that a harmonious balance between the interests of individuals and that of the collective ought to be achieved.[131] The broader collective has an interest in balancing such individual and collective interests as, arguably, this lays down the foundation for the collective to maintain its own social constitution, that is to develop its own 'cultural identity' and 'preserve the stability of social life'.[132] In other words, this benchmark of reciprocity forms the basis for societal relationships through which the broader collective can maintain its identity and stability (as a constitutional imperative).[133] Certain norms and values ought to be created to prescribe standards of conduct for the broader collective and its constitutive parts to balance individual and collective interests and maintain social cohesion to realise the absolute inner

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[127] CJ Visser 'The revival of the amende honorable as applied to defamation by the media (2011) 128 *The South African Law Journal* 327, 334-336. See also Langa J (as he then was) in S v *Makwanyane* (note 29 above) para 224 where he elucidated these relational tenets of ubuntu as follows:

> '[Ubuntu] recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.'

See paras 223-227 of this judgment for a more detailed explanation of the value of ubuntu. See also D Cornell & K Van Marle 'Exploring ubuntu: Tentative reflections' (2005) 5 *African Human Rights Law Journal* 195.

[128] Visser (note 127 above) 335. See also D Bhana & CJ Visser 'The concurrence of breach of contract and delict in a constitutional context' (2019) 35 *South African Journal on Human Rights* 94, 110. This argument will be further developed under sections 3.2.3 and 3.3 of this chapter.

[129] S Benhabib *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (2013) 164.

[130] Bhana & Visser (note 128 above) 110.

[131] Ibid.

[132] RC Post 'The social foundations of defamation law: Reputation and the Constitution' (1986) 74 *California Law Review* 691, 711 and 716.

[133] Ibid 716. See sections 1.1 of chapter one and 3.1 of chapter three.

worth of individuals in this particular manner.[134]

As argued in this thesis,[135] the creation of such attendant norms and values will find preliminary guidance from the abovementioned dimensions of human dignity (and not only its collectivist dimension). In other words, human dignity needs to be construed as a multi-faceted concept to function as an interpretative norm to guide the constitutionalisation of the law of personality. However, at this juncture, it needs to be clarified that the overall constitutionalisation of the common law of personality will also rest on other fundamental values, fundamental rights and the frameworks of the private law (which alludes to the desired interplay between fundamental values, rights and personality rights as highlighted in this thesis).[136] With this point of clarification in mind, the next section of this chapter will explore the multi-faceted nature of human dignity as part of the discussed overarching paradigm, including its interrelationship with other fundamental values as implicitly directed by the axiomatic claim.

3.2.3 The multi-faceted nature of human dignity and its interrelationship with other fundamental values

The preceding jurisprudential account of human dignity, with reference to its axiomatic claim and its individualistic and collectivist dimensions in terms of Kantian moral philosophy, directs us to understand human dignity as a multi-faceted concept in law.[137] In this particular context, human dignity, as a constitutional value, presents a catalogue of ideals (i.e. interpretative norms) which are centred on absolute inner human worth associated with being human.[138] Consideration must be afforded to the complexity of the human image with its various dignitarian characteristics. In turn, the human image does not only signal the uniqueness of individuals but also the solidarity and 'at oneness' of the human race based on these characteristics. As a result, social interactions based on reciprocal respect and human solidarity are further needed to realise the absolute inner worth associated with the human image. When

[134] Ibid 711 & 716.
[135] See sections 1.1 of chapter one and 2.3 of chapter two.
[136] See sections 1.1 of chapter one and 2.1 of chapter one explaining the fundamental shifts required in the common law of personality together with the horizontality simpliciter approach in achieving such a shift in the positive common law.
[137] MYK Lee *Equality, Dignity, and Same-Sex Marriage: A Rights Disagreement in Democratic* Societies (2010) 157; Malpas (note 59 above) 1.
[138] Rao *Use and Abuse of Dignity* (note 40 above) 222; McCrudden *Human Dignity and Judicial Interpretation* (note 15 above) 680-681.

viewed from a macro level, such social interactions form the bedrock for the stability of the greater collective.

Although the axiomatic claim with its individualistic and collectivist dimensions presents fluid and interrelated ideas regarding human dignity, as mentioned earlier,[139] they still highlight more concrete dimensions of human dignity (and by implication interpretative norms), especially in the context of the law of personality. For instance, the axiomatic claim denotes the absolute inner worth associated with the human image and broader collective as a universal ideal and constitutional imperative. This absolute inner human worth as a universal ideal, according to the individualistic dimension of the axiomatic claim, derives from the potential rooted in the human personality which further consists of various yet integrated dignitarian characteristics (as an individualistic ideal). Furthermore, as inculcated by the collectivist dimension of the axiomatic claim, the development of the human personality does not exist in a vacuum and also requires public recognition and solidarity to unlock the full potential of the human image (as a collectivist ideal).

Therefore, as a multi-faceted concept, human dignity provides the preliminary ideological basis for the development of the common law of personality. As noted in this thesis, the constitutional development of the common law of personality will operate from an ideological shift in the doctrines and frameworks of the common law of personality.[140] More specifically, as rudimentarily discussed in chapter one and fleshed out in chapter two, this shift entails moving the doctrines and frameworks of the common law of personality, on the ideological continuum, from (classical) liberalism to greater collectivism. In this respect, I argue that such an ideological shift falls within the ideological scope of human dignity as a constitutional value (although not exclusively if one takes cognisance of other constitutional values).

Human dignity ideologically presents a spectrum of individualistic and collectivist ideals, as demonstrated above, that ought to counter any extreme notions of liberalism or collectivism. Human dignity does not conceive these individualistic and collectivist ideals as diametrically opposed on an ideological continuum. On the contrary, human dignity conceives these ideals as inherent to the human image, which mutually support each other in respect of the development of absolute inner human worth. As a result, with reference to the positive law of personality, individual

[139] See discussion at Section 3.2.1 above.
[140] See sections 1.1 of chapter one and 2.1 of chapter two.

personality interests can be evaluated in terms of collective interests to the extent that a liberal approach towards these personality interests are rebuked and that individual interests are not subsumed in the collective.[141] This spectrum of individual and collective ideals also resists a stark divide between private and public values as individual interests are protected while a public community is also maintained (as premised in chapter one of this thesis).[142] These ideals will provide the interpretative norms in constitutionally shaping the frameworks of the common law of personality.

The axiomatic claim with its individualistic and collectivist dimensions also highlights human dignity's connection to other fundamental values such as equality, freedom and ubuntu (as already alluded to above).[143] I will briefly unpack these values to clarify their interplay with human dignity (more specifically, in terms of its interpretative norms).

Starting with the value of equality, Cathi Albertyn and Beth Goldblatt state that this constitutional value consummately contributes to the constitutional imperative of leading a good and meaningful life in the following manner:

> 'The value of equality promotes and protects the ability of each human being to develop to his or her full human potential and to forge mutually supportive human relationships in the home, the community, the workplace and society as a whole. The laws, policies and practices of the state and society should promote relationships between persons and groups which facilitate each person's ability to be full social citizens of our new democracy.'[144]

According to Henk Botha, there is congruity between equality and human dignity's universal, individualistic and collectivist ideals in terms of developing human potential through the individual him- or herself and the broader collective.[145]

Apart from such congruity, equality also directs us to the notion that absolute inner human worth accrues to all individuals based on their shared humanity and not material conditions.[146] Thus, within the transformative constitutionalism paradigm, the human personality ought to be further contextualised in terms of 'substantive equality'

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[141] F Du Bois 'Freedom and the dignity of citizens' in AJ Barnard-Naudé, D Cornell & F du Bois (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2009) 112, 131; Rao *The Use and Abuse of* Dignity (note 40 above) 222-223; Botha (note 1 above) 171, 176-177; Hughes (note 26 above) 94.

[142] Schachter (note 56 above) 849-850; Rao *The Use and Abuse of* Dignity (note 40 above) 226; Riley (note 15 above) 105.

[143] See section 3.2.1 above.

[144] Cathi Albertyn & Beth Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248, 254. See also D Bhana & M Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited' (2005) 122 *South African Law Journal* 865, 880.

[145] H Botha 'Equality, Plurality and Structural Power' (2009) 25 *South African Journal on Human Rights* 1, 3.

[146] Ibid 11.

as opposed to 'formal equality'.[147] To explain, substantive equality acknowledges that the material conditions of individuals, as a measure of worth, are incapable of promoting social justice in the private realm as individuals do not have equal access and opportunity to these material conditions (whereas formal equality assumes such equal access).[148] Equality in this sense resonates with human dignity's universal ideal that absolute inner human worth should transcend liberal notions of human worth and is more closely associated with the uniqueness of the human image than any external material condition.

Considering the constitutional value of freedom next, Ackermann J, as he then was, explained the relationship between dignity and freedom in the Constitutional Court judgment of *Ferreira v Levin* as follows:[149]

> 'Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked.'[150]

However, in the same judgment, Sachs J, as he then was, warned against couching the value of freedom in liberal terms.[151] Taking into account freedom's interplay with human dignity and equality, Sachs J articulated that freedom must take cognisance of human interdependence and the limited access to material conditions as the determinant of freedom and human worth.[152] Freedom should be understood as a value supporting autonomous human moral agency (as related to the individualistic ideal) but also supporting social interactions and the attendant development of the human personality in a social context (as related to the collectivist ideal).[153] The freedom enjoyed by individuals in this regard is not unlimited and is moderated by reciprocal notions of respect rather than a laissez-faire conception, which places little value on human solidarity, unconditional absolute inner human worth and the attainment of social justice in the private realm (as related to the universal ideal).[154]

The value of freedom reminds us again of the individualistic and collectivist ideals necessary to realise the constitutional imperative of leading a good and meaningful life and that such meaning is to be found in unconditional and

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[147] Ibid. See also Albertyn & Goldblatt (note 144 above) 250; C Albertyn & J Kentridge 'Introducing the right to equality in the interim Constitution' (1994) 10 *South African Journal on Human Rights* 149, 153.
[148] Albertyn & Kentridge (note 146 above) 152.
[149] *Ferreira v Levin* (note 63 above).
[150] Ibid para 49.
[151] Ibid para 251.
[152] Ibid.
[153] Ibid para 253.
[154] Ibid para 254.

transcendental notions of human worth embedded in the unique human image (as associated with human dignity and equality).

Lastly, in considering the constitutional value of ubuntu next, I already examined its connection to human dignity and its relevance for the constitutional imperatives related to the broader collective (in terms of ubuntu's collectivist ideal). I also examined ubuntu's basic tenets in reconciling individual and collectivist interests through respectful and dignified social interactions.[155] However, it must be noted further that the Constitutional Court in *Dikoko v Mokhatla*[156] considered the specific relationship between the constitutional values of human dignity, equality, freedom and ubuntu in the context of the law of personality.[157] The Court explained that human dignity, as informed by the value of ubuntu, 'has an enduring and creative character' that binds together the values of freedom and equality through 'the element of human solidarity' in order to create 'an affirmative and mutually supportive triad of central constitutional values'.[158] In other words, as already clarified in chapter two of this thesis, these values will provide the objective normative value system of the Constitution to interpret and evaluate the frameworks of the common law of personality against the transformative constitutionalism paradigm.[159]

From this objective normative value system, and the specific dimensions of human dignity, a constitutional vision of the human personality can be delineated as the ideological basis of the constitutionalisation of the common law of personality. To provide further clarification, in this chapter[160] and in chapter two[161] I have explained that this objective normative value system will provide the necessary interpretative norms to guide the constitutional development of the common law of personality in terms of substance and method (i.e. its framework). In the same sections and chapters of this thesis, I have further noted that these interpretative norms are context-dependent and will find greater concretisation in the respective contexts provided by the common law of personality in terms of the transformative constitutionalism paradigm (i.e. the various personality rights and the attendant duties that they create in the positive law).

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[155] See section 3.2.2.2 above.
[156] *Dkikoko v Mokhatla* (note 119 above).
[157] Ibid para 113.
[158] Ibid.
[159] See section 2.3.2 of chapter two.
[160] See section 3.2.2.2. of this chapter
[161] See section 2.3.2 of chapter two.

With these considerations in mind, in the next section of this chapter, I will present a few ideas surrounding a potential constitutionalised vision of the human personality as the ideological basis of this thesis.

3.3 A constitutional vision of the human personality: An ideological basis for the constitutionalisation of the common law of personality

As argued throughout this thesis, the human personality must be understood as a composite legal interest, i.e. consisting out of many interests and ideals, for purposes of constitutionalising the common law of personality.[162] As explained in chapters one and two of this thesis, this notion of compositeness stems from the common law of personality's doctrinal basis, that is, the doctrine of subjective rights and the actio iniuriarum.[163] However, within the transformative constitutionalism paradigm, such doctrinal basis now emerges from a single, integrated doctrinal framework predicated on the shared natural law heritage between the common law of personality (namely the doctrine of subjective rights) and the Constitution. In more concrete terms, as clarified by the Supreme Court of Appeal in *Dendy v University of the Witwatersrand*,[164] common law personality rights and the fundamental rights in the Bill of Rights recognise and protect the same scope of various interests related to the human personality.[165]

In this chapter, I advance this argument further regarding the composite nature of the human personality, in terms of ideology through the multi-faceted nature of human dignity as a constitutional value (cognisant of its interplay with other constitutional values). In other words, I argue that the composite nature of the human personality will also be ideologically tenable given the multi-faceted nature of human dignity. To expound, as various dimensions and attendant ideals or interpretative norms will imbue the human personality in positive law, the composite nature of the human personality will be maintainable in ideology too. The constitutional vision of the human personality ought to reflect this notion of compositeness.

Such a constitutional vision can be extracted from the specific dimensions of human dignity together with its interplay with the constitutional values of equality, freedom and ubuntu, which, create a constitutional objective normative value system

[162] See sections 1.1 of chapter one and 2.2 of chapter two.
[163] Ibid.
[164] 2007 (8) BCLR 910 (SCA).
[165] Ibid paras 15 & 24.

as discussed above. As highlighted in the preceding section of this chapter, this objective normative value system seems to converge at three prominent interpretative norms or ideals, namely, the universal ideal, the individualistic ideal and the collectivist ideal.[166] These ideals will provide more specific and concrete insights into a constitutional vision of the human personality. In delineating a constitutional vision of the human personality, I will map out the most salient features of this vision with reference to these ideals or interpretative norms.

Starting with the universal ideal, originating from the axiomatic claim of human dignity, the human personality, as a legal interest, ought to serve as the necessary positive law vehicle, in the context of the law of personality, to substantively realise relevant constitutional imperatives.[167] These imperatives relate to the personal development of individuals in pursuing a good life and maintaining the social constitution and stability of the greater collective.[168]

For the human personality to function as such a positive law vehicle, it must be grounded in Kant's categorical imperative that individuals possess absolute inner human worth.[169] With further reference to the constitutional value of equality, such absolute inner worth accrues unconditionally to every individual's human personality through his or her essential humanity and not according to any liberalistic measures of human worth.[170] To realise this notion of human worth, with further reference to the value of freedom, it must be accepted that the human personality has both individualistic and collectivist dimensions and ideals.[171] The development of human personalities, in pursuit of these constitutional imperatives, will rely on individualistic dimensions or ideals, which are the dignitarian characteristics of the unique human image, and collectivist ones, i.e. the socialisation of these individual personalities through human solidarity and reciprocal standards of respect.[172] Proceeding from this basic exposition of the constitutional vision of the human personality, the value of ubuntu will serve as a salutary reminder that not only are these individualistic and

[166] See Section 3.2.3 above.
[167] See section 3.2.2 above.
[168] *Bernstein v Bester* (note 91 above) para 65; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, amici curiae)* 2005 (5) SA 3 (CC) para 36; EJ Eberle 'Observations on the development of human dignity and personality in German constitutional law: An overview' (2013) 33 *Liverpool Law Review* 201, 202; Hughes (note 26 above) 38-39; Botha (note 1 above) 204; O' Callaghan (note 75 above) 32-34.
[169] See sections 3.2.1 and 3.2.2 above.
[170] See section 3.2.3 above.
[171] Ibid.
[172] Ibid.

collectivist ideals needed to pursue these constitutional imperatives, these ideals ought to be harmoniously balanced within the frameworks of the positive law to resist the binaries of stark notions of liberalism or collectivism.[173]

Moving then to the individualistic ideal, as originating from the individualistic dimension of human dignity's axiomatic claim, the human personality ought to conceptualise the individual as a 'physical-mental' and 'spiritual-moral being' who is endowed with distinctive qualities relating to the essential characteristics of the human image.[174] This notion will probably guide one to the potential interplay between the doctrinal basis of the common law of personality and the individualistic dimensions of the axiomatic claim. Both these paradigms recognise the 'physical-mental' and 'spiritual-moral' characteristics of the human personality. Given the potential congruence between the individualistic dimensions and the doctrinal basis of the common law of personality, it will be possible to argue that these characteristics of the human personality will find specific concretisation in the personality interests related to corpus, dignitas and fama as these will indicate the concrete interests of the human personality for purposes of the positive law.[175]

In terms of the individualistic ideal, it must be remembered that these different characteristics or qualities of the human personality will find concretisation in the different common law personality rights, which do not represent atomistic components of the human personality. On the contrary, all these characteristics or qualities are necessary for the maintenance and development of an individual's 'personal integrity'.[176] In other words, all these characteristics, as the essential attributes of the human image, will equally contribute to an individual's ability to express his or her absolute inner worth and attendant uniqueness as part of the constitutional imperative of leading a good and meaningful life. The personal integrity of an individual will further cement the compositeness, complexity and cohesiveness of the human personality for purposes of the transformative constitutionalism paradigm in effecting an ideological shift in the frameworks of the common law of personality.

Lastly, in referring to the collectivist ideal, of which genesis is to be found in the collectivist dimension of the axiomatic claim, it must be further remembered that these characteristics of the human image are shared by all individuals which, in turn, bind

[173] Ibid.
[174] See section 3.2.2.1 above.
[175] Ibid.
[176] Ibid.

them together through the notions of human solidarity and interdependence.[177] The constitutional imperative in leading a good and meaningful life also becomes a shared human aspiration bolstering human solidarity and interdependence. An individual cannot be viewed as an 'unencumbered self'' but as a 'physical-mental' and 'spiritual-moral being' whose unique and shared humanity is developed and maintained through social interactions guided by human solidarity and interdependence. These values will be premised on the categorical imperative of reciprocal respect and recognition.[178]

When considering the further influence of the constitutional value of ubuntu, this categorical imperative can be used to impose duties on society and its individual members to comply with this benchmark of reciprocity and human solidarity. Such benchmarks of reciprocity and human solidarity ought to initiate greater flexible standards of justice when adjudicating the relationships between private individuals and their relationship towards the greater collective (as synchronous to the transformative constitutionalism paradigm).[179] More concretely, these benchmarks should permeate the legal rights and duties created by the doctrinal basis and framework of the law of personality (as alluded to earlier).[180] Guiding social interactions in this particular manner also assists the greater collective in maintaining its social constitution through the stability and cohesion of its societal structures as a constitutional imperative.[181]

In referring to all these ideals collectively, the delineation of a constitutional conception of the human personality reflects the multi-faceted nature of human dignity. Consisting out of various ideals, a constitutional conception of the human personality will resist a narrow or one-dimensional conception of the human personality (clearly in contrast to the Constitutional Court's conception of human dignity in *Le Roux v Dey* as being limited to subjective feelings of self-respect).[182] Therefore, the salient features of this constitutional vision of the human personality, for purposes of convenience and clarification, will be summarised here. Firstly, the human personality will serve as the necessary positive law vehicle to attain the constitutional imperatives relating to the individual (in realising absolute inner human

[177] See section 3.2.2.2 above.
[178] Ibid.
[179] Ibid.
[180] Ibid.
[181] Ibid.
[182] *Le Roux Dey* (note 10 above) and see section 1.1 of chapter one.

worth) and broader society (in maintaining social unity and stability) in the context of the law of personality. Secondly, in attaining these constitutional imperatives in the positive law, the human personality must be further understood in terms of its individualistic and collectivist dimensions and ideals as necessary components in realising these imperatives. Thirdly, the individualistic dimensions or ideals refer to the unique image of an individual which contains the concrete interests in the human personality (which conceptualises the latter as a composite interest in law). Lastly, the collectivist dimensions and ideals refer to the shared humanity of individuals which establishes standards of conduct, i.e. benchmarks of reciprocity and solidarity, with regard to the human personality (that ought to find concretisation in the legal rights and duties created by the doctrinal basis and frameworks of the law of personality).

In the final analysis, this constitutional vision of the human personality, as the ideological basis for the constitutionalisation of the common law of personality, can be utilised to evaluate the common law's framework in conceptualising and adjudicating the human personality in terms of the current position in positive law (as largely determined by the judiciary). This evaluation will take place in chapter 4, as explained in the outline of this thesis.[183]

3.4 Conclusion

In this chapter, I interrogated the concept of human dignity as a fundamental constitutional value, to highlight its various dimensions in the post-apartheid South African legal order. Building upon these various dimensions, I also sought to delineate a constitutional vision of the human personality. These enquiries were undertaken to provide an ideological basis to the actual constitutionalisation of the common law of personality as contemplated in this thesis (that is, providing an alternative framework to that of the Constitutional Court in *Le Roux v Dey*).[184]

To frame these enquiries, I started this chapter by providing a jurisprudential account of human dignity in post-apartheid South Africa to provide a basic theoretical outline to the abovementioned ideological basis. I contextualised human dignity with reference to Kantian moral philosophy as the constitutive antecedent to South African dignity discourse (as supplemented by other jurisprudential traditions and the more

[183] See section 1.2.1 of chapter one.
[184] See sections 1.1 and 1.2 of chapter one.

concrete pronouncements of the courts). I also pointed out that in terms of Kantian moral philosophy, human dignity is generally understood as absolute inner human worth deriving from autonomous moral agency. I further illustrated that this absolute inner human worth creates a categorical imperative, that is, human dignity, as understood in this particular manner, demands the utmost respect and protection from other individuals and society as a whole.[185]

With further reference to McCrudden and Steinmann, I provided a more concrete theoretical outline to human dignity. This outline is premised on human dignity's axiomatic claim, which has two further underlying dimensions, namely its individualistic and collectivist dimensions (as sub-components). This axiomatic claim, together with its two underlying dimensions, presents more concrete manifestations of Kant's categorical imperative.[186] In terms of this specific theoretical outline, together with the constitutional values of equality, freedom and ubuntu, I highlighted the multi-faceted nature of human dignity and its interplay with these values. Such interplay creates a constitutional objective normative value system to the law of personality. In terms of such an objective normative value system, I argued that a constitutional vision on the human personality can be developed, giving rise to certain ideals (or interpretative norms) in respect of the human personality. These are the universal, individualistic and collectivist ideals of the constitutional vision of the human personality.

Firstly, in terms of the universal ideal, the human personality serves as the positive law vehicle to attain constitutional imperatives related to the individual and the collective. To realise these imperatives further, the human personality must be further understood in terms of its individualistic and collectivist ideals as necessary sub-components. Secondly, in terms of the individualistic ideal, the human personality refers to the unique image of an individual which contains concrete interests in the human personality (which confirms its composite nature in positive law). Lastly, in terms of the collectivist ideal, the human personality also refers to the shared humanity of individuals which establishes reciprocal standards of conduct vested in human personality (which will permeate the adjudication of private law relationships).

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[185] Kant (trans McGregor) (note 32 above) 557.
[186] McCrudden *Human Dignity and Judicial Interpretation* (note ## above) 679-680; Steinmann (note 15 above) 5-8.

This constitutional vision of the human personality can be used as the ideological backdrop constitutionally to evaluate and develop the frameworks of the common law of personality.

CHAPTER 4

LEGAL IDEOLOGY, CULTURE AND THE COMMON LAW FRAMEWORK

4.1 Introduction

> [T]he broader goal of constitutionalising the common law … relates not only to [its underpinning ideology] but also to [its] … framework.'[1]

In chapter one of this thesis, I problematised the constitutional development of the common law of personality's framework (i.e. the specific manner in which the judiciary interprets and adjudicates the human personality as a legal interest in terms of the actio iniuriarum)[2] with reference to the Constitutional Court judgment of *Le Roux v Dey*.[3] Briefly, I found that the Court adopted a constitutionally thin conception of human dignity that influenced its understanding of the human personality as a legal interest.[4] More specifically, as the Court regarded human dignity as subjective feelings of self-respect, the Court was unwilling to recognise conceptually discreet personality interests based on this conception of human dignity (influencing the common law's substance).[5] In addition, the Court's specific understanding of human dignity and the human personality influenced the particular manner in which it adjudicated personality rights.

With reference to the three requirements of the actio iniuriarum, representing the common law of personality's accepted legal method, the Court used the factual violation and wrongfulness requirements in a manner that prevented the articulation of multiple personality rights on the same factual matrix.[6] With the wrongfulness requirement, the Court did not provide a clear discussion on the prima facie wrongfulness mechanism as applied to the different personality rights (in question).[7] In addition, the Court did not consider the constitutional development of the fault

[1] D Bhana 'The role of judicial method in contract law revisited' (2015) 132 *South African Law Journal* 122, 122.
[2] Ibid 124-125; See D Bhana 'The role of judicial method in the relinquishing of constitutional rights through contract' (2008) 24 *South African Journal on Human Rights* 300, 302.
[3] (3) SA 274 (CC). See section 1.1 of chapter one.
[4] Ibid.
[5] See section 1.1 of chapter one; *Le Roux v Dey* (note 3 above) paras 138-143.
[6] See section 1.1 of chapter one; *Le Roux v Dey* (note 3 above) paras 138-152.
[7] Ibid.

requirement to include negligence in addition to intent as an appropriate standard of fault (despite existing calls for such inclusion).[8]

On this basis, with reference to the overarching transformative constitutionalism paradigm, I hypothesised that the underlying cause to these concerns, i.e. the particular manner in which the common law's framework conceptualises and adjudicates personality concepts, is a judicial ideology ascribing to a classical liberal mindset which systematically limits judicial discretion as part of a conservative legal culture.[9]

These preliminary observations in terms of *Le Roux v Dey*[10] will animate this chapter's research inquiry into the common law's framework. Here, I propose to deconstruct this framework to show its shortcomings in respect of the transformative constitutionalism paradigm. Pursuant to this chapter's specific research inquiry, I already outlined the doctrinal and ideological dimensions of this thesis in chapter one and investigated these dimensions in chapters two and three. I have done so to provide a theoretical basis for the deconstruction mentioned previously. I will briefly summarise my findings in these chapters.

In terms of chapter two, where I interrogated the doctrinal dimensions of this thesis, I found that the overarching transformative constitutionalism paradigm requires an ideological shift in the frameworks of the common law.[11] In this regard, it is well documented that the frameworks of the South African common private law are generally underpinned by classical liberalism.[12] What is more, I found that legal culture, that of the judiciary specifically, can conceal these ideologies underpinning the common law.[13] Such concealment is maintained through a conservative legal culture which naturalises limitations on judicial discretion under the claim of legal certainty or neutrality.[14] Such a conservative mindset appears to be present with the

[8] See section 1.1 of chapter one; *Le Roux v Dey* (note 3 above) paras 149-151.
[9] See section 1.1 of chapter one.
[10] *Le Roux v Dey* (note 3 above).
[11] See section 2.1 of chapter two.
[12] See section 2.1 of chapter two. Also see KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 159; Bhana *Judicial Method* (note 2 above) 301-302 & 310; E Zitzke 'Stop the illusionary nonsense! Teaching transformative delict' (2014) 46 *Acta Academia* 52, 57-61*;* Bhana *Judicial Method Revisited* (note 1 above) 124 & 130-131; E Zitzke 'The history and politics of contemporary common-law purism' (2017) 23 *Fundamia* 185, 186; D Bhana & CJ Visser 'The concurrence of breach of contract and delict in a constitutional context' (2019) 35 *South African Journal on Human Rights* 94, 109-110.
[13] Ibid.
[14] Ibid.

South African judiciary[15] and traditional judicial beliefs held about the scope of judicial discretion, and their concealment, further require transformation.[16] As explained in this thesis, such a constitutive classical liberal ideology and attendant conservative culture are counterintuitive to the transformative goals of the Constitution.[17]

To achieve such constitutional transformation within the frameworks of the common law, I further referred to the horizontality simpliciter approach that emerged from the transformative constitutionalism paradigm.[18] In terms of this approach, the constitutionalisation of the frameworks of the common law can be achieved through its scope and form legs.[19] These legs deal with legal ideology and culture and their influence on the common law frameworks for purposes of constitutionalising the latter.[20]

Starting with the form leg, for purposes of this chapter, it essentially deconstructs the common law's framework as a link between legal modes of reasoning, ideology and culture.[21] In applying this link to the common law frameworks, the particular manner in which the judiciary conceptualises and adjudicates legal concepts can then be classified in terms of ideology and culture for purposes of constitutional analysis.[22]

With reference to Duncan Kennedy, Alfred Cockrell and Deeksha Bhana respectively, I highlighted two types of links or connections between legal modes of reasoning, ideology and culture in this regard.[23] First, I identified the link between the rules-based form of legal reasoning, individualism and a conservative legal culture.[24] In terms of this link or connection, judicial discretion is limited as legal concepts ought to be conceptualised formalistically and adjudication ought to entail the application of highly administrable rules to a set of delineated facts to ensure logically correct

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[15] Ibid.
[16] Ibid.
[17] For more detail see chapter two and see Zitzke *Common-Law Purism* (note 12 above) 186-187.
[18] See section 2.3 of chapter two. Also generally see D Bhana 'The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution' (2013) 29 *South African Journal on Human Rights* 351.
[19] Ibid.
[20] Ibid.
[21] Bhana *Reconciliation of Sections 8 and 39* (note 18 above) 373-374.
[22] Ibid.
[23] D Kennedy 'Form and substance in private law adjudication' (1976) 89 Harvard Law Review 1685, 1689-1690, 1713, 1752-1753 & 1773; A Cockrell 'Substance and form in the South African law of contract' (1992) 109 South African Law Journal 40, 42-44; Bhana *Judicial Method* (note 2 above) 302-303 & 307; Bhana *Judicial Method Revisited* (note 1 above) 124, 126-127 & 133. See also Klare (note 12 above) 148-150, 157 & 168; Zitzke *Transformative Delict* (note 12 above) 56.
[24] Ibid.

solutions.[25] I then highlighted the link between standards-based form of legal reasoning, collectivism and a progressive legal culture.[26] With this link or connection, judicial discretion is increased as legal concepts ought to be conceptualised as context-sensitive and adjudication ought to entail the consideration of open-ended standards which result in value judgments to secure substantively just solutions.[27]

In deconstructing the common law's framework in this manner, the scope leg of the horizontality simpliciter approach provides the ideological basis to evaluate this framework constitutionally (with its exposed ideologies and overarching cultural beliefs in terms of the form leg).[28] In this regard, I found that foundational constitutional values and implicated fundamental rights will provide such ideological basis.[29]

In chapter one and two, I highlighted that foundational constitutional values, especially human dignity, and fundamental rights will provide the ideological basis for the constitutional development of the common law of personality.[30] In chapter three, I developed the ideological dimensions of this thesis further with reference to these constitutional values (as these will always feature as interpretative norms or ideals in the respective contexts of the common law's framework).[31] I then argued that these constitutional values form an objective normative value system that will guide the development of the common law's framework.[32] Such an objective normative value system consists of a multi-faceted conception of human dignity and its interplay with the other constitutional values of equality, freedom and ubuntu.[33] In the context of the constitutional development of the law of personality, I termed this objective normative value system 'the constitutional vision on the human personality'.[34]

This constitutional vision features a wide array of interpretative norms or ideals. I indicated in chapter 3 that these norms or ideals are the universal, the

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[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Bhana *Reconciliation of Sections 8 and 39* (note 18 above) 373-374.
[29] Ibid.
[30] See section 1.1 of chapter one.
[31] See section 3.2 of chapter three. As explained in section 2.2 of chapter two, the application of fundamental rights are implicated differently by the different personality rights. The application of a fundamental right depends on the personality right implicated in a factual matrix. Therefore, the consideration of fundamental rights will take place in chapter five where I will develop an alternative framework for the constitutionalisation of the common law of personality.
[32] See section 3.2.3 of chapter three. Also see *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 113.
[33] Ibid.
[34] Ibid.

individualistic and the collectivist ideals.[35] To briefly explain, the universal ideal acknowledges that the human personality, as a legal interest, serves as the positive law vehicle to attain constitutional imperatives related to the individual and the collective (premised on an individual's and humanity's absolute worth).[36] To attain these imperatives, the human personality must be understood in terms of its individualistic and collectivists dimensions as sub-components to the universal ideal. With reference to the individualistic ideal, the human personality refers to the unique image of an individual which contains concrete interests in the human personality.[37] However, in terms of the collectivist ideal, the human personality also refers to the shared humanity of individuals which ought to establish reciprocal standards of conduct as grounded in the value of human solidarity.[38] These reciprocal standards of conduct ought to regulate and adjudicate private relationships in respect of the human personality.

These ideals will subvert any extreme notions of individualism or collectivism. This is because the human personality ought to be constituted as a composite yet fully integrated legal concept in terms of its interests and ideologies ranging from individualism to collectivism. It is these ideals against which the common law's framework will be evaluated.

Ultimately, under the transformative constitutional paradigm, an appropriate balance must be observed between the ideologies of individualism and collectivism. A balance must also be achieved between rules and standards as modes of legal reasoning to transform the private common law.[39] Building upon this, Bhana and I explained that such a balance:[40]

> 'means that the recognition and protection of the individual interests of … parties … are intimately linked to the recognition and protection of the subjective interests of other individuals of the community together with the interests of the community as a whole … a failure to strike the right constitutional balance between the relevant individual and collective interests would lead to an insufficient or excessive allocation of loss between them … In other words, the risk arises that certain individual interests would receive inadequate constitutional protection in relation to their social value … while the unwavering protection of other interests … may, in constitutional terms,

[35] See section 3.3 above. Also see I Kant *Groundwork of the Metaphysics of Morals* (1785) (trans MJ Gregor, 2006) 557; C McCrudden 'Human dignity and judicial interpretation of human rights' (2008) 19 *The European Journal of International Law* 655, 680-681; AC Steinmann 'The core meaning of human dignity' (2016) 19 *Potchefstroom Electronic Law Journal* 1, 5-8 & 24.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] See section 2.1 above.
[40] Bhana & Visser (note 12 above).

> place an excessive burden on society in relation to the social value of the interests being protected (footnotes omitted).'[41]

Against the doctrinal and ideological dimensions of this thesis, I will explore the constitutional development of the common law's framework, with reference to the Constitutional Court judgment in *Le Roux v Dey*,[42] in conjunction with the form and scope legs of the horizontality simpliciter approach.

This will entail deconstructing, as explained above, the particular manner in which the substance and method of the common law of personality, namely the actio iniuriarum, is articulated in the positive law by the judiciary. This will be done primarily through the link that exists between legal ideology and culture and their influence on the common law's framework. Following this, in terms of this deconstruction, the underpinning ideologies of the common law's framework (together with its interconnection to legal culture) will be evaluated against the ideals of the constitutional vision of the human personality. This evaluation, as part of this thesis' basic research aims,[43] will form the substantive and methodological dimensions of the proposed alternative approach. These dimensions will indicate how the current framework of the common law may frustrate the constitutional development of the common law of personality. This will also indicate which aspects of the common law's framework will require constitutional adjustment (to be contemplated in chapter five of this thesis).

In the next section of this chapter, section 4.2, I will examine the Constitutional Court's articulation of the substance of the common law of personality in greater detail.[44] As I suspect that this judgment and the broader judicial culture feed into classical liberalism and conservatism, I will expand my scope of inquiry, in section 4.3, to the interaction between the law of delict, as the overarching discipline, and the law of personality, as the sub-discipline.[45] Against these considerations, I will then interrogate, in section 4.4, the legal method of the common law of personality in general (i.e. the three requirements of the actio iniuriarum). In that discussion, I will pertinently show a direct connection between the substance of the law of personality and its method as influenced by a classical liberal judicial mindset.

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[41] Ibid 109-110. See also *Natal Fresh Produce Growers Association v Agroserve* (Pty) Ltd 1990 (4) SA (N) 753–754; *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) 361; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 62-63.
[42] *Le Roux v Dey* (note 3 above)
[43] See Section 1.2.1 of chapter one.
[44] *Le Roux v Dey* (note 3 above).
[45] J Neethling & JM Potgieter *Neethling – Potgieter – Visser: Law of Delict* 7th ed (2015) 4.

4.2 *Le Roux v Dey* and the substance of the common law of personality's framework

As explained in the introductory section of this chapter, here I will interrogate the judiciary's conception of human dignity and the human personality with reference to the Constitutional Court in *Le Roux v Dey*.[46] As further explained above, this interrogation will be contextualised in terms of the link that exists between legal ideology and culture and their subsequent influence on the framework of the common law, especially its substance, for this section of this chapter. These conceptions of the Court will be measured against the constitutional vision on the human personality.

Before I continue with this scope of inquiry, I will briefly recapitulate the Court's conceptions of human dignity and the human personality (as already outlined in chapter one).[47] Starting with human dignity, in the context of the law of personality, the Court found that an infringement of a recognised personality interest is an 'affront to dignity' that manifests itself in some form of 'degradation', which implies subjective feelings related to an infringement of one's self-worth.[48] In this sense, the Court probably reduced human dignity to subjective feelings of self-worth.[49] Considering the human personality next, the Court continued that as an infringement of the different personality is essentially an 'affront to dignity', it was unconvinced that the different personality rights are conceptually distinct from human dignity and subsequently from one another.[50] In other words, the Court condensed and abated the doctrinal compositeness of the human personality as a legal interest (i.e. as an integrated collection of various personality rights indicating distinguishable interests in the unique human image).[51] Consequently, the Court regarded the human personality and its various personality rights as mere variations of subjective feelings of dignity.[52]

The argument that I am going to develop is that the Court adopted oversimplified conceptions of human dignity and the human personality, especially if these conceptions are measured against a multi-faceted conception of human dignity and the constitutional vision on the human personality. What is more, with these

[46] Ibid.
[47] See section 1.1 of chapter one.
[48] *Le Roux v Dey* (note 3 above) paras 98-106, 116 & 141.
[49] See section 1.1 of chapter one.
[50] *Le Roux v Dey* (note 3 above) paras 141-142.
[51] See section 1.1 of chapter one.
[52] Ibid.

oversimplified conceptions, the Court minimised its discretion to interpret progressively the human personality against a constitutionally expansive notion of human dignity. With reference to the transformative constitutionalism paradigm, the Court adopted a 'cautious' tradition of legal reasoning which favoured facile interpretations of human dignity and the human personality over normative and multi-faceted ones.[53] This suggests a type of conservatism.[54]

In exploring this claim of legal conservatism further, such judicial cultural beliefs are further linked to a constitutive classical liberal ideology[55] (as hypothesised in chapter one of this thesis).[56] Below I suggest that the Court framed human dignity and the human personality in terms of individualistic values such as self-interest, self-reliance and self-determination.[57] The interconnectedness of individual personalities is not contemplated, as the focus is on the liberties of an atomistic individual. The law of delict, including its sub-discipline of the law of personality, is then ideologically viewed as a 'system of corrective justice based on individual autonomy and individual responsibility' where individuals are free to exercise their autonomy as long as they do not cause harm to others unjustifiably.[58]

To test these claims of legal liberalism and conservatism, I will now measure

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[53] Klare (note 12 above) 166 & 168-170; Bhana *Judicial Method Revisited* (note 1 above) 125-133; Zitzke *Transformative Delict* (note 12 above) 61-62

[54] Ibid. Also see Bhana *Judicial Method* (note 2 above) 303. Further reference can be made to Emile Zitzke's notion of 'constitutionally wanting reasoning' to bolster the argument I made here concerning the Court's conservative mindset. See E Zitzke A 'constitutionally wanting' obiter on omissions – *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA)' (2018) 81 *Journal of Contemporary Roman-Dutch Law* 497. In brief, at 498, Zitzke explains that constitutionally wanting reasoning superficially employs phraseology of the Constitution but such reasoning does not show 'faithfulness to the politics that underlies the South African constitutional project'. In other words, as highlighted by Zitzke in an earlier work, E Zitzke 'Realist evolutionary functionalism and extra-constitutional grounds for developing the common law of delict: A critical analysis of Heroldt v Wills 2013 2 SA 530 (GSJ)" 2016 *Journal of Contemporary Roman-Dutch Law* 103, 117 & 120, constitutionally wanting reasoning is unaware of the "trajectory of competing political' ideologies that influence the judicial reasoning process. As highlighted in section 2.1 of chapter two, this bespeaks a conservative judicial mindset which clamours to the perceived determinacy of the law. Therefore, although the Court referred to human dignity, it has done so in a reductivist manner which fails to appreciate human dignity's multi-faceted nature and ability to transcend classical liberalism in the private law domain. Accordingly, the Court's approach is not transformative.

[55] Klare (note 12 above) 166-167; T Roux 'Pro-poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court' (2004) 20 *South African Journal on Human Rights* 511, 531; Bhana *Judicial Method Revisited* (note 1 above) 124; Zitzke *Transformative Delict* (note 12 above) 61.

[56] See sections 1.1 and 1.2.1 of chapter one.

[57] Kennedy (note 23 above) 1713; Zitzke *Transformative Delict* (note 12 above) 64.

[58] RW Wright 'Causation, responsibility, risk, probability, named statistics and proof: Pruning the bramble bush by clarifying the concepts' (1988) 73 *Iowa Law Review* 1001, 1004; CH Schroeder 'Corrective justice and liability for increasing risks' (1990) 37 *The University of California, Los Angeles Law Review* 439, 445-446.

the Court's conceptions of human dignity and the human personality against the constitutional vision of the human personality to determine whether sufficient expression is afforded to this vision's interpretative ideals. As a reminder, these include the universal, individualistic and collectivist ideals.

Starting with the universal ideal, the Court only highlighted the individualistic (or subjective) dimensions of an individual's absolute inner worth. When one looks at the Court's conceptions from a purely individualistic perspective, the Court did not contemplate the complexities associated with the individualistic dimensions of the human personality. From a collectivist perspective, it seems that the Court engaged actively with a classical liberal notion of freedom of action and was less engaged with (or even unaware) of collectivist values such as human solidarity. By highlighting subjective feelings of self-respect, the Court duly recognised that these feelings should not be unjustifiably infringed, but afforded no active consideration to more solidary notions of societal interactions.[59] Consequently, the Court dislodged the human personality from constitutional imperatives dealing with the development of an individual and the maintenance of the broader collective. Subjective feelings of self-worth fail to articulate the complexities, nuances and multi-faceted ideals of the constitutional vision on the human personality.

Considering the individualistic ideal next, it must be realised that a greater focus on subjective notions of self-worth prevents the articulation of the human personality as a collection of the essential attributes of the human image. When the human personality is reduced to a single trait such as subjective feelings of self-respect, an individual is not legally conceived as a 'physical-mental' and 'spiritual-moral being' who is endowed with an intricate range of distinctive human qualities. The compositeness and personal integrity of the human personality are lost. With such loss, an individual is incapable of fully expressing his or her absolute inner human worth when they cannot utilise the full range of distinctive human qualities in realising a good and meaningful life. By limiting the individualistic dimension of the human personality in this manner, these conceptions subsequently inhibit an individual from exercising self-creation and self-realisation, as these aspirations are superseded by a reductionist notion of what the human image constitutes.

[59] *Le Roux v Dey* (note 3 above) para 143. For a similar interpretation of this aspect of the judgment, see C Gowar & CJ Visser 'The actio iniuriarum – One action, but only one iniuria? – Le Roux v Dey 2011 (3) SA 274 (CC)' (2013) 76 *Journal of Contemporary Roman-Dutch Law* 480, 496-497.

Lastly, with consideration of the collectivist ideal, centring human dignity and the human personality around subjective feelings of self-worth potentially limits social interactions to negative obligations, as individuals and the broader collective are only tasked with refraining from infringing the subjective feelings of others. As a result, the socialisation of individual personalities against greater collectivist values such as human interdependence and solidarity are minimised. This is unsurprising as the Courts' conceptions create the impression that individuals are tasked by themselves to develop their personalities, obviating the need for co-operation.[60] The Court's conceptions foster no shared vision of the individual and collective significance of the human personality contributing towards the mentioned constitutional imperatives.

The resultant norms and values that will permeate social interactions will be based on the entitlement of individuals not to have their subjective feelings of self-worth infringed, as opposed to the interconnected and harmonious development of individuals and the broader collective. Such a focus on individual entitlements would limit the range of values that would permeate social interactions. There would be a greater focus on individualist values than collectivist ones, and achieving a balance between individualist and collectivist values that would influence the interpretation and application of the human personality in positive law, will not be effectively realised.

The Court's conceptions will not be conducive to the ideological and cultural shifts required in terms of the transformative constitutionalism paradigm. Self-worth, by itself, cannot do the full work that the ideals of the constitutional vision on the human personality require. In addition, these facile conceptions of the Court further demonstrate that the reasoning it adopted lacks analytical rigour or awareness of context (as these conceptions do not appreciate the composite nature of the human personality or a layered understanding of human dignity in a transformative context). Therefore, in terms of the transformative constitutionalism paradigm, the Court's conceptions ought to be rejected.

This analysis of the Court's approach to the substance of the common law's framework confirms the hypothesis of this thesis that the Court ascribed to a classical liberal mindset which limits purposive interpretation, revealing a conservative legal culture, at least in the context of the substance of the common law's framework.

However, for purposes of deconstructing the common law's framework in its

[60] Kennedy (note 23 above) 1713; Klare (note 12 above) 152.

entirety, it must be established whether the *Le Roux v Dey*[61] judgment is an isolated application of classical liberalism and legal conservatism or whether this judgment is symptomatic of a broader judicial mindset that feeds into this classical liberalism and conservatism. If the *Le Roux v Dey* judgment is indeed such an instance of an isolated application of classical liberalism and conservatism, then the constitutionalisation of the common law of personality ought to be straightforward. For instance, the approaches followed by the broader judicial mindset in respect of the law of personality would then provide insight into the means to rectify the problematic approach presented by the Constitutional Court. These approaches followed by the broader judicial mindset will then have to inform this thesis' research aim of developing an alternative approach to that of the Constitutional Court.

However, I do suspect that this is not the case, for a number of reasons. As a starting point, a closer analysis of the methodology of the common law's framework, as embedded in the historic actio iniuriarum, will be instructive. The fault requirement of the actio iniuriarum seems to suggest a classical liberal notion of individual blameworthiness. There is a logical correlation, as discussed in chapter two of this thesis, between the substance and method of the common law framework, as both are influenced by the same constitutive ideologies and legal-cultural beliefs. In other words, the substance and method of the common law's framework tend to reflect the same legal ideologies and cultural beliefs. Following this line of reasoning, the same could be said for the law of personality as a sub-discipline of the law of delict. In more simplistic terms, it is conceivable that a sub-discipline could reflect the legal ideologies and cultural beliefs of the overarching discipline, such as the law of personality and the law of delict, even if this occurs in an oblique manner. Thus, the *Le Roux v Dey* judgment needs to be analysed in terms of its broader context for purposes of this chapter, i.e. the overarching areas of applicable legal disciplines and the method of the common law's framework.

In the next section of this chapter, I will highlight the broader judicial mindset in respect of the law of personality by contextualising the latter within its overarching discipline, namely the law of delict.

[61] *Le Roux v Dey* (note 3 above).

4.3 Legal ideology, culture and the law of delict: Unveiling the broader judicial mindset in respect of the law of personality

To reveal the broader judicial mindset in respect of the law of personality, referring impliedly to the treatment of human personality as a legal interest in positive law, I will examine, in this section, the interaction between the law of delict and the law of personality. This examination will start with a general discussion of the ideology, framework and culture of the law of delict. Then, at a rudimentary level, I will compare the general structure of the South African law of delict to the law of personality in these respects. I will then contemplate what this shows in terms of ideology and culture, as an additional basis for examining the framework of the common law of personality.

Starting with ideology, the law of delict is understood as a means to regulate 'the allocation of losses' for the harm suffered by the plaintiff, in relation to his or her property, person or personality, which was caused by the defendant's conduct.[62] In allocating such losses, the law of delict balances the individual interests of the plaintiff and defendant against the greater collective interests of society as a whole.[63] Public policy must determine whether the plaintiff will be compensated for the loss caused by the defendant by imposing liability on the latter when a recognised delictual norm has been violated.[64] In doing so, the greater social concerns determine when the interests of the plaintiff warrant protection and the type of individual responsibility and standard of care that is required from the defendant in the allocation of losses.[65]

This broad ideology appears to be reflected in the general framework of the law of delict. The law of delict follows a generalising approach where general principles or elements regulate the protection of the plaintiff's interests by imposing liability on the defendant.[66] This happens when the defendant's harm-causing

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[62] C Sappideen & P Vines *Fleming's the Law of Torts* 10th ed (2011) 5 & 11-12; *Union Government v Ocean Accident & Guarantee Corporation Ltd* 1956 (1) SA 577 (A) 584; *Chartaprops 16 (Pty) Ltd v Silberman* 2009 (1) SA 265 (SCA) para 37; M Loubser & R Midgley (eds) *The Law of Delict in South Africa* 3rd ed (2017) 5; Neethling & Potgieter (note 45 above) 3; JC Van Der Walt & JR Midgley *Principles of Delict* 4th ed (2016) § 27.

[63] *Universiteit van Pretoria v Tommie Meyer Films* (*Edms*) *Bpk* 1977 (4) SA 376 (T) 387; *Dikoko* (note 32 above) para 68; PQR Boberg *The Law of Delict: Volume 1 Aquilian Liability* (1984) 26; Loubser & Midgley (note 62 above) 152; Neethling & Potgieter (note 45 above) 38.

[64] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) para 1; *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) para 37; *Imvula Quality Protection (Pty) Ltd v Loureiro* 2013 (3) SA 407 (SCA) para 56; Loubser & Midgley (note 62 above) 21; Neethling & Potgieter (note 45 above) 80.

[65] Loubser & Midgley (note 62 above) 19; Van der Walt and Midgley (note 62 above) § 27.

[66] Van der Walt & Midgley (note 62 above) § 2.

conduct wrongfully and culpably infringes these protected interests (thus, the general elements of delictual liability are harm, conduct, causation, wrongfulness and fault).[67] These elements consider and adjudicate these individual interests of the plaintiff and defendant with those of the greater collective.[68]

For instance, an investigation into the harm-causing conduct of the defendant, which represents the elements of harm, conduct and causation, methodologically identifies the individual interests of the plaintiff, namely the harm element, and the defendant, namely the conduct element (while their pertinent normative and ideological consideration fall under the other elements of wrongfulness and fault).[69] The harm-causing conduct also shows the causal connection, and thus the relationship that is potentially relevant delictually for purposes of establishing liability, between the plaintiff's interests and the defendant's conduct.[70] Considering the wrongfulness element next, in determining whether liability should be imposed on the defendant, it evaluates whether the defendant's 'harm-causing conduct' violates a legal norm against broader policy considerations.[71] Wrongfulness utilises the collectivist policy-orientated concept of the boni mores (the legal convictions of the community) to establish the reasonableness of imposing liability.[72] This entails a balancing exercise of individual and collectivist interests where no particular interests

[67] *Perlman v Zoutendyk* 1934 CPD 151, 155; *Maisel v Van Naeren* 1960 (4) SA 836 (C) 846; *Smit v Abrahams* 1992 (3) SA 158 (C) 160; Loubser & Midgley (note 62 above) 15-16; Neethling & Potgieter (note 45 above) 4.

[68] *Herschel v Mrupe* 1954 (3) SA 464 (A) 477; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) para 12; Van der Walt and Midgley (note 62 above) § 27; Loubser & Midley (note 62 above) 6; Neethling & Potgieter (note 45 above) 3.

[69] Important to note, this grouping of these elements was provided by the Constitutional Court in *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 54 to denote the distinction between the fact-based elements of a delict and the primarily normative based elements. For a further critical discussion of the mentioned grouping, see JM Burchell *Principles of Delict* (1993) 23; Van der Walt & Midgley (note 62 above) § 3; Loubser & Midgley (note 62 above) 21-22. However, for this thesis, I intend to use this grouping, i.e. the harm-causing conduct grouping of the elements of harm, conduct and causation, to illustrate the individualistic dimensions of delictual liability and not to provide a constitutional evaluation of such a grouping as it falls beyond the scope of this thesis.

[70] Van der Walt & Midgley (note 62 above) § 44 & 70. See also P Cane *The Anatomy of Tort Law* (1997) 1. Important to note, the law of torts is the English law equivalent of our South African law of delict.

[71] *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) 109; *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 596–597; *Universiteit van Pretoria v Tommie Meyer Films* (note 63 above) 387–388; *Lillicrap Wassenaar and Partners v Pilkington Brothers (S.A) (Pty) Ltd.* 1985 (1) SA 475 (A) 498; *F v Minister of Safety & Security* 2012 (1) SA 536 (CC) para 120; *H v Fetal Assessment* Centre (note 69 above) para 67; *Steenkamp v Provincial Tender Board* (note 64 above) para 41; Burchell (note 69 above) 24-29; Loubser & Midgley (note 62 above)140-141; Neethling & Potgieter (note 45 above) 33-34; Van der Walt & Midgley (note 62 above) § 72.

[72] *Minister van Polisie v Ewels* (note 71 above) 597.

occupy a primacy of place as the default position.[73] Likewise, to determine whether the defendant can be held responsible for his or her wrongful harm-causing conduct, an enquiry is made into two standards of fault, namely intention or negligence (that is, his or her individual blameworthiness).[74] The inquiry into these two forms of fault also illustrates a pertinent consideration of individualistic and collectivist values. For instance, intention examines the reprehensibility of the defendant's individual state of mind (framing the defendant's standard of care more in terms of individualistic values).[75] However, negligence assesses the defendant's behaviour against the criterion of the reasonable person, which represents the social expectations of the greater collective in terms of the threshold when responsibility or blameworthiness ensues (framing the defendant's standard of care more in terms of collectivist values).[76]

This ideology and framework appear to be a result of the various developments that delictual legal culture underwent during the twentieth- and twenty-first century. Delictual legal culture has been largely described as conservative before the mid-1970s, as the courts were extremely cautious to extend liability and the frameworks of the common law reflected this.[77] For instance, the element of wrongfulness did not

[73] *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) 833-834; *Shell and BP SA Pertroleum Refineries (Pty) Ltd v Osborne Pana SA* 1980 (3) SA 653 (D); *Minister of Law and Order v* Kadir 1995 (1) SA 303 (A) 317-318; *Le Roux v Dey* (note 3 above) para 53; *Loureiro v iMvula Quality Protection* (*Pty*) *Ltd* 2014 3 SA 394 (CC) para 53; *Country Cloud Trading CC v MEC Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) para 21; F Du Bois 'Getting wrongfulness right: A Ciceronian attempt' (2000) *Acta Juridica* 1, 38.
A Fagan 'Further reflections on wrongfulness in the law of delict' (2018) 135 *South African Law Journal* 18, 31-35; Loubser & Midgley (note 62 above) 144-146 & 152-156; Neethling & Potgieter (note 45 above) 38-50; Van der Walt & Midgley (note 62 above) § 75.

[74] Loubser & Midgley (note 62 above) 104-109; Neethling & Potgieter (note 45 above) 129; Van der Walt & Midgley (note 62 above) §135.

[75] *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 (1) SA 390 (A) 396; JR Midgley 'Intention remains the fault criterion under the actio injuriarum' (2001) 118 *South African Law Journal* 433, 435. The link between intention and individualistic values will be further explored below where I provide a pertinent analysis of this form of fault against the ideals of the constitutional vision on the human personality. See section 4.4.4 below.

[76] *Cape Town Municipality v Paine* 1923 AD 207 216–217 & 225; *Kruger v Coetzee* 1966 (2) SA 428 (A) 430; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A); *Sea Harvest Corporation* (*Pty*) *Ltd v Duncan Dock Cold Storage* (*Pty*) *Ltd* 2000 (1) SA 827 (SCA) para 21; *Marais v Groenewald* 2001 (1) SA 634 (T) 646; *Minister of Safety & Security v Van Duivenboden* 2002 6 SA 431 (SCA) para 12; Loubser & Midgley (note 62 above) 103-110 & 117-120; Neethling & Potgieter (note 45 above) 129-132 & 137-138; Van der Walt & Midgley (note 62 above) § 135, 137 & 148. The link between negligence and collectivist values will be further explored below where I provide a pertinent analysis of this form of fault against the ideals of the constitutional vision on the human personality. See section 4.4.4 below.

[77] *Halliwell v Johannesburg Municipality* 1912 AD 659; *Union Government v Ocean Accident & Guarantee Corporation* (note 62 above) 584; *Silva's Fishing Corporation v Maweza* 1957 (2) SA 256 (A); Van der Walt & Midgley (note 62 above) § 26; Zitzke *Transformative Delict* (note 12 above) 59; D Kleyn & E Zitzke 'The omissions in *Oppelt*' (2018) *24 Fundamina* 58, 67.

have the ideological and structural considerations that we are accustomed to today as there was a strict reliance on foreseeability of harm and a limited list of scenarios where liability could ensue.[78] However, after this time period, delictual legal culture became steadily more progressive as the wrongfulness element became intertwined with the collectivist policy-orientated concept of the boni mores, with its attendant balancing of a wide array of interests which premised the imposition of liability on public policy.[79] With the advent of the Constitution, the reliance on public policy to adjudicate delictual matters has increased significantly as the substantive transformative values of the Constitution initiated a greater shift towards collectivism in delict, as reflected in the elements of harm, causation and fault.[80] These mentioned elements, rely on public policy in varying degrees. In very broad terms, delictual legal culture today leans towards being more progressive than conservative.

On face value, the constitutionalisation of the common law of delict, including its sub-disciplines such as the law of personality, ought to be relatively straightforward. For one thing, the general framework employed by the law of delict, through its general elements of liability, considers individual and collectivist interests and values at various stages in determining delictual liability. It would appear that the law of delict adequately balances these individual and collectivist interests and values by allocating distinct functions to the various elements in this regard. To begin with, the harm-causing conduct grouping of the elements of harm, conduct and causation identify the pertinent individual interests (although these elements are not limited per se only to individualistic values).[81] Further, the wrongfulness element balances these individual interests with collectivist interests without providing a privileged position for either of these interests (which pertinently considers individualistic and collectivist values). Finally, the element of fault considers either individualistic or collectivist standards of care and responsibility.[82] Realisation of the constitutional vision of the human personality ought to be achieved without much difficulty in the law of personality if the law of delict's ideology, culture and framework are generally reflected in the requirements of the actio iniuriarum.

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[78] Ibid.
[79] *Minister van Polisie v Ewels* (note 71 above) 597; Kleyn & Zitzke (note 77 above) 67.
[80] For a more pertinent discussion of this development, see Van der Walt & Midgley (note 62 above) § 26. See also *Loureiro v iMvula Quality Protection* (note 73 above) para 53; Zitzke *Transformative Delict* (note 12 above) 66-67; Kleyn & Zitzke (note 77 above) 71; Bhana & Visser (note 12 above) 11-17.
[81] See for instance Loubser & Midgley (note 62 above) 10-12 & 22-25.
[82] Zitzke *Transformative Delict* (note 12 above) 58.

As a basic premise to this thesis, these elements are generally not applied in the abstract and are structurally adjusted in terms of the three fundamental actions of the law of delict, i.e. the Aquilian action, the action for pain and suffering and the actio iniuriarum.[83] Arguably, more specific ideological and structural permeations will be apparent in the law of delict through these actions – ultimately this will influence the actual adjudication of delictual matters.[84] For instance, different forms of harm are actionable under these different actions.[85] This may create different ideological and legal-cultural beliefs which are further developed in the elements of a delict under these actions. These different forms of harm attract the differential application of the boni mores criterion under the elements of wrongfulness as these various forms of harm are considered to be either prima facie wrongful or lawful.[86] These actions require different standards of personal responsibility and care, that is fault in the form of intention and/or negligence, which may also invoke different ideological and legal-cultural beliefs.[87] Therefore, the general constitutive elements of a delict and their relationship with the different main delictual actions influence the actual constitutionalisation of the common law of delict's framework.

This relationship between the general elements of a delict and the three main delictual actions is called the 'secondary characteristics' of the law of delict. For clarity, the secondary characteristics of the law of delict supplement the generalising approach in order to promote 'practical utility' and 'legal certainty' to any given field of delictual liability.[88] The actio iniuriarum's framework is based on the framework provided by this generalising approach, as well as secondary characteristics to be found in the actio iniuriarum itself. In other words, ultimately the framework of the actio iniuriarum will influence the realisation of the constitutional vision on the human

[83] See section 1.2.3 of chapter one. Further see Van der Walt & Midgley (note 62 above) § 15.
[84] Loubser & Midgley (note 62 above) 20.
[85] That is, patrimonial interests find protection under the Aquilian action, non-patrimonial interests related to a person's body find protection under the action for pain and suffering, and non-patrimonial interests related to a person's human personality finds protection under the actio iniuriarum. See for instance Neethling & Potgieter (note 45 above) 8-17; Van der Walt & Midgley (note 62 above) § 2.
[86] The relevance of this will be explored in further detail in section 4.4 below. See for instance Neethling & Potgieter (note 45 above) 45-50; Van der Walt & Midgley (note 62 above) § 76.
[87] See for instance Neethling & Potgieter (note 45 above) 29-31; Van der Walt & Midgley (note 62 above) § 26.
[88] *Perlman v Zoutendyk* (note 67 above) 155; Loubser & Midgley (note 62 above) 17; Neethling & Potgieter (note 45 above) 4; *Minister of Finance v EBN Trading (Pty) Ltd* 1998 (2) SA 319 (N) 234-235; Van der Walt & Midgley (note 62 above) § 2.

personality (and not the general framework of the law of delict in the abstract).[89]

These secondary characteristics may also reveal the oblique legal culture of the law of delict, as each of the three fundamental actions may reveal further judicial bias with regard to the protection of delictual interests. Indeed, JC Van der Walt and Rob Midgley argue that these secondary characteristics still perpetuate the vestiges of a conservative (and pre-constitutional) delictual culture and liberal mindset, as the different delictual interests associated with the three fundamental actions receive different consideration and protection in the law of delict.[90] Van der Walt and Midgley highlight that a clear hierarchy can be discerned between these delictual interests.[91] For example, at the top of the hierarchy are patrimonial (or financial) interests associated with the Aquilian action. This is followed by non-patrimonial (or non-financial) interests associated with a person's body in terms of the action for pain and suffering and the actio iniuriarum. At the bottom of this hierarchy are non-patrimonial (or non-financial) interests associated with the spiritual-moral aspects of the human personality in terms of the actio iniuriarum (that is, the intangible interests of the human personality, for example, dignity, privacy, identity, feelings and the reputation).[92] When considering this ostensible hierarchy from the perspective of legal ideology, culture and their influence on a legal framework, a few preliminary observations can be made.

First in terms of ideology, it appears that, according to Van der Walt and Midgley, the broader judicial mindset believes that all the recognised delictual interests have different social value. What is less clear is whether these different interests have differential value to contribute towards constitutional imperatives relating to the individual and the collective.[93]

Secondly, in terms of the method of the common law's framework, the judicial process of adjudication is influenced by these beliefs as the delictual elements related

[89] This also arguably applies to the other delictual action, namely the Aquilian action and the action for pain and suffering. However, these considerations fall beyond the scope of this thesis. It must also be noted that the requirements of the actio iniuriarum are also further adjusted in relation to the specific personality right applicable. Therefore, this chapter will only focus on the broad framework provided by the actio iniuriarum and the consideration of specific personality rights and their further influence on methodology will be pertinently be considered in chapter five of this thesis, namely the rights to dignity, reputation and privacy.
[90] Van der Walt & Midgley (note 62 above) § 27.
[91] Ibid. However, the authors do not necessarily provide an expansive ideological analysis to the basis of such a hierarchy in the law of delict. In this regard, I will provide a potential explanation for this hierarchy.
[92] Ibid. See also Zitzke *Transformative Delict* (note 12 above) 65-67.
[93] Ibid.

to these interests protected higher up in the hierarchy appear to cast the net of liability wider to facilitate greater protection. For example, the prima facie wrongfulness mechanism[94] and a wide standard of fault (which requires either intent or negligence) are used for patrimonial interests related to a person's property and person.[95] However, the same adjustments are not made for those non-patrimonial interests lower on the hierarchy, especially those interests related to dignity, privacy, identity, feelings and reputation.[96]

Finally, and most importantly, Emile Zitzke links this hierarchy to a conservative judicial legal culture where delictual interests are scrutinised on their ability to function as commodities in a laissez-faire market economy and not on their interconnectedness with the integrated nature of the human image or their promotion of harmonious social relationships.[97] This would explain why Van der Walt and Midgley list property interests as the most important in the hierarchy of interests protected by the law of delict. For purposes of this thesis, the secondary characteristics of the law of delict reveal the judiciary's preoccupation with an individualistic ideology and attendant conservative culture, which uses the framework of the common law to promote these ideologies and cultural beliefs in the positive law. In simplistic terms, it appears that the law of personality is approached by the broader judicial mindset steeped in (pre-constitutional notions of) classical liberalism. Arguably, this is evidenced by the fact that the judiciary structurally approaches delictual interests lower on the hierarchy, such as those related to the spiritual-moral sphere of the human personality, with a similar mode of conservative reasoning. This probably stems from the cultural belief that there is no impetus to consider the inherent individual and collective value of the human personality when considering the imposition of liability and the type of individual responsibility required.

When reverting back to the Constitutional Court's judgment in *Le Roux v Dey,*[98] the bigger picture is revealed that this judgment is not an example of an

[94] In other words, wrongfulness is simply rebuttably presumed in these circumstances due to their importance in term of the boni mores and therefore requires no further investigation by courts unless recognised defences, i.e. grounds of justification, are raised. See generally *Minister of Safety and Security v Rudman* 2005 (2) SA 16 (SCA); *Country Cloud Trading CC v MEC Department of Infrastructure Development* (note 73 above).
[95] Van der Walt & Midgley (note 62 above) § 26 7 27. See also Bhana & Visser (note 12 above) 17-18.
[96] Ibid.
[97] Zitzke *Transformative Delict* (note 12 above) 64-67. See also Kleyn & Zitzke (note 77 above) 71-72; *Minister of Safety & Security v Van Duivenboden* (note 76 above) para 19.
[98] *Le Roux* (note 3 above).

isolated application of (pre-constitutional) classical liberalism but is symptomatic of a broader conservative legal culture pertaining to the human personality. It should not come as a surprise when courts view human dignity and the human personality with thin and facile conceptions prioritising individualistic values. Furthermore, as outlined earlier in this chapter,[99] the judiciary's use of the requirements of the actio iniuriarum, as specifically demonstrated by the Court in *Le Roux v Dey*,[100] perpetuate these classical liberal conceptions in the common law's framework.

For instance, the one-dimensional application of the factual violation and the wrongfulness requirement will prevent the articulation of the composite nature of the human personality. This refers to the situation where a court fails to distinctively apply the factual violation and wrongfulness requirements between the different personality rights.[101] The differential use of the prima facie mechanisms, and by implication the boni mores, at face value, can depreciate the appropriate consideration between individualistic and collectivist interests.[102] In addition, the exclusive maintenance of intention-based liability over the additional inclusion of negligence-based liability further suggests the judiciary's preference for a liberalistic formulation of freedom of action in the private realm.[103] Arguably, such an individualistic and conservative approach to the framework of the law of personality will probably fail to realise the multi-faceted nature of human dignity and the attendant constitutional vision of the human personality.[104]

However, at this stage, these considerations in respect of the method of the common law's framework are only tentative as these are based on the conclusions reached on the substance and broader judicial culture pertaining to the law of personality. Therefore, in the next section of this chapter, I will interrogate the methodology of the common law of personality's framework through the requirements of the actio iniuriarum more extensively. In particular, I will examine the extent to which the actual methodology of the common law of personality is besieged with this overarching conservative judicial culture and its actual influence over the ability of the actio iniuriarum to realise constitutional ideologies and imperatives in respect of the human personality.

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[99] See sections 4.1 and 4.2.
[100] *Le Roux* (note 3 above).
[101] See section 1.1 of chapter one.
[102] Ibid.
[103] Ibid.
[104] Klare (note 12 above) 171; Zitzke *Transformative Delict* (note 12 above) 61.

4.4 *Le Roux v Dey*, legal culture and the method of the common law of personality's framework

4.4.1 Introductory remarks

> '[The actio iniuriarum's] main aim is to protect plaintiffs against [the] wrongful and intentional infringement of [their personality rights] … There are three basic [requirements] for an action under the *actio iniuriarum*: (a) an infringement of a personality right in a (b) wrongful and (c) intentional way (footnotes omitted).'[105]

In this section of this chapter, I will provide an extensive analysis of the judiciary's approach to the legal method of the actio iniuriarum in respect of its three requirements. To facilitate this endeavour, I will provide here a brief delineation of the scope of my approach before I commence with the actual examination and evaluation of these three requirements.

Starting with the factual violation requirement to be discussed in sub-section 4.2.2, I have already identified that this requirement (as incorporating the harm, conduct and causation elements) identifies individual interests of the plaintiff and defendant.[106] However, I want to examine how this requirement of the actio iniuriarum actually conceptualises, distinguishes and articulates the composite nature of the human personality as a collection of individual personality rights given the conservative mindset of the courts.

As the requirements of the actio iniuriarum ought to identify the distinct personality rights, they must also be able to highlight the individual and collectivist dimensions attached to each personality right. Arguably, such delineation ought to be yielded by the separate application of the requirements of the actio iniuriarum, especially the factual violation and wrongfulness requirements. As highlighted earlier, these requirements delineate the individual and collectivist dimensions of personality rights.[107] I will also interrogate, considering the interrelationship between the factual violation and wrongfulness requirements, whether these requirements can also articulate effectively the individual and collectivist dimensions of the different personality rights. In simplistic terms, I want to see whether the courts appreciate the distinct functions of these two requirements. For convenience, this interrogation will

[105] Loubser & Midgley (note 62 above) 371. See also *De Lange v Costa* 1989 (2) SA 857 (A) 860-861.
[106] See sections 1.1 of chapter one and 2.2.2 of chapter two. Also see sections 4.1 and 4.3 of this chapter above.
[107] Ibid.

form part of the factual violation requirement discussion, given this interrelationship and the necessity for appropriate delineation.

Moving to the wrongfulness requirement, which I will discuss in sub-section 4.4.3, I have already highlighted that the consideration and neutral balancing of individual and collectivist interests and values primarily takes place with this requirement.[108] However, given the conservative mindset of the courts, I want to interrogate how the wrongfulness requirement under the actio iniuriarum actually facilitates such consideration and balancing of interests. With reference to the prima facie wrongfulness mechanism, I want to consider if these interests are appropriately interrogated by the courts, taking into account that a conservative and liberalistic approach to this mechanism may prevent the full exploration of these interests and values.

Considering the requirement of intent next, to be addressed in sub-section 4.4.4, I have already shown that the fault requirement in general provides consideration for individual and collectivist considerations when determining the type of care and responsibility required for a personality infringement.[109] Immediately, with the actio iniuriarum, the concern is raised that limiting liability for a personality infringement to intent alone may negate the overarching collectivist considerations (which is traditionally associated more with the standard of care created in the context of negligence-based liability). I want to analyse how the intention standard of fault can give effect, if at all, to these collectivist dimensions of the human personality. These collectivist dimensions probably provide the baseline standard of care (or conduct) for societal interactions with regard to the human personality within a constitutional context.[110]

Under the requirement of intent, consideration must also be given to the question of whether this standard of fault can adequately, on its own, protect the human personality as a legal interest in a transformative constitutionalism paradigm. As mentioned earlier, intention casts the net of liability narrower than negligence.[111] Thus, as the exclusive standard of fault for personality infringements, intention-based liability may provide insufficient protection of the human personality in relation to its

[108] Ibid.
[109] Ibid.
[110] See section 3.2.2.2 of chapter three.
[111] See section 1.1 of chapter one. Also see sections 4.1 and 4.3 of this chapter above.

attendant constitutional value.[112]

Finally, the interrogation below is structured in the following manner. First, I will discuss the general doctrinal tenets of these requirements, i.e. their abstract form derived from the doctrinal basis of the common law of personality.[113] This will be followed by the Court's application, in *Le Roux v Dey*,[114] of these requirements as further supplemented by other judgments (as part of examining the broader judicial culture). I will then evaluate the courts' application of these requirements against the constitutional vision of the human personality.

4.4.2 The factual violation requirement

As mentioned above, the factual violation requirement, as a corollary to the 'harm-causing conduct' configuration of delictual elements, groups together the elements of harm, conduct and causation for the purpose of a personality infringement.[115] It appears that the explicit focus of this requirement rests on the interrogation of the effect, or negative impact more specifically, that the defendant's conduct had on the plaintiff's personality.[116] In the broadest sense, this speaks to the element of harm in the context of a personality infringement. This is the methodological basis on which the actio iniuriarum identifies and distinguishes the different personality rights.[117] It appears that this is the explicit focus of this requirement of the actio iniuriarum.[118] However, implicit to the factual violation requirement are the elements of conduct and causation.[119]

A court must be satisfied that the plaintiff's personality infringement was caused by the conduct of the defendant. However, the implicit nature of these elements appears to stem from the perceived proximity between these elements and from the legal relationship between the plaintiff and defendant.[120] To clarify, courts readily accept that when a defendant intended the consequences of his or her conduct or when it was foreseeable that the defendant's conduct may implicate the

[112] See the immediate discussion above at section 4.3.
[113] See section 2.2 of chapter two for further clarification.
[114] *Le Roux v Dey* (note 3 above).
[115] See the discussion and explanation hereof in section 4.3 above.
[116] Loubser & Midgley (note 62 above) 321
[117] Ibid. See also Van der Walt & Midgley (note 62 above) § 182.
[118] Ibid.
[119] This is probably because the requirements of the actio iniuriarum were framed casuistically under Roman law. The generalising approach of the actio iniuriarum developed under the doctrine of subjective rights under Roman-Dutch law. See Van der Walt & Midgley (note 62 above) § 10, 11 & 18.
[120] Van der Walt & Midgley (note 62 above) § 182; Loubser & Midgley (note 62 above) 31.

personality of the plaintiff, the nexus between harm, conduct and causation is anodyne as a matter of legal policy.[121] In the context of the law of personality then, a personality infringement is appraised to the conduct of the defendant, as such infringements tend to result from intended or foreseeable consequences as there is usually a direct relationship between the plaintiff and defendant.[122]

However, three important caveats must be mentioned in this regard. First, if the plaintiff's personality infringement is an unexpected consequence flowing from the defendant's harm-causing conduct, then the appraisal cannot be accepted as a logical consequence.[123] Secondly, and closely related to the first caveat, if additional causes, to that of the defendant's harm-causing conduct, contribute towards the plaintiff's personality infringement, the appraisal cannot automatically occur.[124] Lastly, liability for a personality infringement may be denied on the basis of a range of other policy factors (especially those related to wrongfulness and fault).[125] The active consideration[126] of the elements of conduct[127] and/or causation[128] may become material in these circumstances and must be judicially considered (especially in

[121] This implies that the element of fault may influence considerations into causation and speaks to the interrelationship between these elements which implicate conduct as a matter of logical inclusion. See for instance Loubser & Midgley (note 62 above) 129-132.

[122] Ibid. With a direct relationship I allude to the fact that there are no intervening events and/or third parties between the conduct of the defendant and the harm of the plaintiff.

[123] Loubser & Midgley (note 62 above) 129-132.

[124] Ibid.

[125] Ibid.

[126] Thus, for purposes of brevity, the methodological considerations into the elements of conduct and causation will be summarised in the ensuing footnotes.

[127] In terms of the element of conduct, for this element to be satisfied, the following characteristics must be present on the part of the defendant as a question of fact: voluntary human conduct either in the form of a positive act (commission) or negative act (omission). See *Molefe v Mahaeng* 1999 (1) SA 562 (SCA); Loubser & Midgley (note 62 above) 64; Neethling & Potgieter (note 45 above) 25-26.

[128] In terms of the element of causation, this element consists out of both factual and legal causation. Factual causation indicates a factual nexus whereas legal causation indicates a sufficiently close juridical nexus based on policy factors. See *Minister of Police v Skosana* 1977 (1) SA 31 (A) 34-35; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700; Loubser & Midgley (note 62 above) 70; Neethling & Potgieter (note 45 above) 183-184. With factual causation, a factual nexus is established if the defendant's conduct contributed in any way to the harm sustained by the plaintiff by considering factual evidence as well as relevant probabilities which can either culminate in the application of the 'but-for' test (conditio sine qua non test), material contribution test or general human experience. See CJ Visser & C Kennedy-Good 'The emergence of a 'flexible' conditio sine qua non test for factual causation?' *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC)' (2015) 36 *Obiter* 150, 151-153. See also *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) paras 40-41. Considering legal causation next, a sufficiently close juridical nexus is examined through the lens of limiting the liability of the defendant to harmful consequences which can be legally imputed to him/her by applying the well-known flexible approach which is based on policy considerations such as reasonableness fairness and justice with specific regard to the following criteria; adequate causation, direct consequences and reasonable foreseeability. See *Smit v Abrahams* 1992 (3) SA 158 (C) 162; *Fourway Haulage SA (Pty) Ltd v SA National Roads* Agency 2009 (2) SA 150 (SCA) paras 33-34; Loubser & Midgley (note 62 above) 91-98; Neethling & Potgieter (note 45 above) 197-216; Van der Walt & Midgley (note 62 above) § 176.

respect of the first two caveats).

Shifting the focus to the harm element of the factual violation requirement (as its explicit consideration), it is important to first consider the range of personality rights recognised in our law, as this is the foundation to determining the existence of a personality infringement. As highlighted in chapters one and two of this thesis, the human personality is both doctrinally and ideologically concretised into various distinct personality rights.[129] For comprehensiveness, the following personality rights are recognised: bodily integrity, physical liberty, dignity, privacy, identity, reputation and feelings.[130] Furthermore, as explained in chapter two of this thesis, with reference to the doctrine of subjective rights, each of these recognised personality rights identifies a specific interest in the human personality which endows the holder a right to enjoy, use and dispose of such right/s (that is, the subject-object relationship).[131]

A factual violation, i.e. an infringement of a recognised personality interest, takes place when a defendant, through his or her harm-causing conduct, violates the right of a plaintiff to enjoy, use or dispose of a particular personality interest.[132] In terms of methodology, a factual violation is generally determined by means of a comparative method,[133] which relates to the utility and quality of a personality interest before and after the commissioning of the harm-causing conduct.[134] As mentioned earlier, the primary focus here is what effect the harm-causing conduct had on the plaintiff in relation to his or her personality, or rather, a specific interest or interests of his or her personality. However, as influenced by the legal development that has taken place with the actio iniuriarum, distinctive tests are developed for each personality interest to determine whether a factual violation has taken place (as opposed to a mere comparison).[135] Because of this legal development, these distinctive tests are finely calibrated towards the content of the specific personality

[129] See sections 1.1 of chapter one, 2.1 of chapter two and 3.2.2.1 of chapter three.
[130] See section 2.2 of Chapter Two.
[131] Ibid.
[132] J Neethling, JM Potgieter & A Roos *Neethling on Personality Rights* 3rd ed (2019) 12; Neethling & Potgieter (note 45 above) 51 & 54.
[133] In general, the utility and quality of a recognised and protected delictual interest of the plaintiff are compared before and after the commission of a delict. Accordingly, if a diminution of the utility and quality of the plaintiff's interest is present, according to the comparative method, then harm has indeed taken place. Neethling & Potgieter (note 45 above) 225; Van der Walt & Midgley (note 62 above) § 44.
[134] Ibid.
[135] C Gowar & CJ Visser 'Distinguishing between dignity, identity and privacy: Is it really necessary? – Kumalo v Cycle Lab (Pty) Ltd' (2012) 75 *Journal of Contemporary Roman-Dutch Law* 156, 160; Loubser & Midgley (note 62 above) 54.

interest, which contributes towards the actual identification, articulation and differentiation of the different personality rights. I will provide a brief exposition below of these distinctive tests with respect to the different personality rights.

With reference to bodily integrity, its distinctive test entails an assessment as to the existence of a bodily injury.[136] Moving to physical liberty, an inquiry is made into the existence of any impediment that interferes with the plaintiff's physical-spatial autonomy.[137] Considering dignity next, its distinctive test examines the plaintiff's expectation to self-worth and the diminution of it by the defendant's conduct.[138] In terms of privacy, its unique test examines the plaintiff's expectation of keeping certain facts private and any subsequent intrusion into this or disclosure of them.[139] With reference to identity, this entails an assessment of whether the plaintiff's distinctive personal features are used in a manner that does not reflect the plaintiff's true image of him or herself.[140] In terms of reputation, an inquiry is made as to whether the plaintiff's social estimation has been lowered in the estimation of a particular community.[141] Lastly, considering feelings entails an assessment of the plaintiff's expectation towards his or her feelings to morality, religion and kinship and the subsequent diminution of them.[142]

Despite the development of these specific tests to articulate the various personality rights in a factual nexus, some courts are still ambiguous in their delineation of these interests.[143] These courts are simply satisfied with the presence of an iniuria. That is, the mere perception that some form of personality harm exists is satisfactory. These courts do not investigate further which specific personality right or rights are implicated by the defendant's harm-causing conduct, or they simply conflate the different personality rights to fit this broad construction of personality harm. This judicial practice is most notable with the personality rights to dignity, privacy and

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[136] Neethling & Potgieter (note 45 above) 347-348 and the authorities cited in footnotes 47-53.
[137] *Sievers v Bonthuys* 1911 EDL 525, 531-532; *Birch v Johannesburg City Council* 1949 (1) SA 231 (T).
[138] *De Lange v Costa* (note 105) 862; *Jacobs v Waks* 1992 (1) SA 521 (A) 541-542.
[139] *National Media Ltd v Jooste* 1996 (3) SA 262 (A) 271-272.
[140] *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) 248.
[141] *Mohammed v Jassiem* 1996 (1) SA 673 (A) 704.
[142] Neethling, Potgieter & Roos (note 132 above) 49-51 & 202-203. See generally Neethling & Potgieter (note 45 above) 341-378.
[143] With the implication that only personality infringement or iniuria is actionable on a set of facts despite the reality that various personality rights of an individual may have been infringed. See generally *Khumalo v Holomisa* 2002 (5) SA 401 (CC); *Le Roux v Dey* (note 3 above); *Kumalo v Cycle Lab* (Pty) Ltd (31871/2008) [2011] ZAGPJHC 56 (17 June 2011). See also Gowar & Visser *Kumalo* (note 135 above) 160; Gowar & Visser *Le Roux* (note 59 above) 480.

reputation.[144] For instance, as already detailed in this thesis, the Constitutional Court in *Le Roux v Dey*[145] had to adjudicate claims for the impairment of dignity and reputation arising from the same factual matrix. As already explained, the Court simply accepted that proving the infringement of one personality right will automatically prove the infringement of another without applying the distinctive test for the other personality right.[146]

This ambiguous delineation between the different personality interests is further compounded by some courts failing to recognise the doctrinal independence and interdependence between the factual violation and wrongfulness requirements.[147] Some courts tend to interrogate the impairment of a particular personality interest through either the lens of the factual violation requirement or the wrongfulness requirement.[148] Here the courts tend to fail to contemplate the effects that the (potential) impairment had on the plaintiff (namely the factual violation requirement) and the broader societal relevance of such effects (namely the wrongfulness requirement). As a result, the function of each element is usurped. As explained in this thesis, the Constitutional Court in *Le Roux v Dey* accepted that proving the infringement of one personality right does not only prove the existence of another, but it also spills over to the wrongfulness of the other personality right and so obviates the need to apply the boni mores further.[149]

A similar judicial practice can be observed from the High Court in in *Kumalo v Cycle Lab (Pty) Ltd*.[150] Here, the plaintiff, a well-known South African television personality, Basetsana Kumalo, visited the premises of the defendant, a bicycle shop, and was subsequently photographed by a store clerk of the defendant.[151] Without the consent of the plaintiff, the defendant used the photograph of the plaintiff for advertising purposes.[152] As a result, the plaintiff instituted the actio iniuriarum against the defendant claiming general damages for the infringement of her personality interests to dignity and privacy, amongst others.[153] Subsequently, the Court found

[144] Ibid.
[145] *Le Roux v Dey* (note 3 above).
[146] Ibid paras 138-149.
[147] See generally Gowar & Visser *Kumalo* (note 135 above) and Gowar & Visser *Le Roux* (note 59 above).
[148] Ibid.
[149] Gowar & Visser *Le Roux* (note 59 above) 496-497.
[150] *Kumalo v Cycle Lab* (note 143 above).
[151] Ibid paras 2-4.
[152] Ibid.
[153] Ibid para 10.

that ‘an iniuria’ was present, without delineating which particular personality interest was implicated. This could be attributed to the Court not applying the factual violation and wrongfulness requirements separately.[154] This result was further cemented by the Court’s failure to interrogate analytically the distinctive tests for each of these personality rights to dignity and privacy.[155]

In sum, the courts simply ignore the doctrinal and methodological bases to differentiate between the different personality rights and the elements of factual violation and wrongfulness.[156] These methodological concerns, in terms of the common law’s framework, speak undoubtedly to the judiciary’s conservative and classical liberal mindset towards the human personality. This was foreshadowed earlier in this chapter.[157] When evaluating these specific judicial practices against the constitutional vision of the human personality, it becomes clear that the courts use the factual violation requirement, together with the failure to apply it distinctively from the wrongfulness requirement, in a manner which promotes facile conceptions of human dignity and the human personality. In this regard, I have illustrated that these conceptions are limited to subjective feelings of self-worth.[158] As further explained, such conceptions ignore the complexity of the essential characteristics of the human image (namely the individualistic ideal) and the collectivist dimensions of the human personality (namely the collectivist ideal). This dislodges this composite legal interest from the constitutional imperatives related to the individual and the collective.[159]

Now, in terms of the methodology of the common law’s framework, I am in a position to highlight how these judicial practices achieve specifically these conservative conceptions in terms of method and further diminish the ideals of the constitutional vision on the human personality.

First, the failure to apply the distinctive tests of the different personality rights prevents the articulation of human dignity as a multi-faceted concept and the human personality as a composite interest. As mentioned earlier, these distinctive tests are the basis for such articulation in terms of the factual violation requirement. However, if these tests are not utilised, such articulation cannot take place. Moreover, in terms

[154] Ibid paras 20-24; Gowar & Visser *Kumalo* (note 135 above) 165-167.
[155] Ibid.
[156] Notice should also be taken of the implicated nature of the conduct and causation elements under the factual violation requirement.
[157] See sections 4.2 and 4.3 above.
[158] Ibid.
[159] See section 4.2 above.

of the individualistic ideal of the constitutional vision of the human personality, the dynamism and integrity of the human personality is obliterated for purposes of the positive law. This is the unfortunate consequence as the essential attributes of the human image (which ought to be represented by the distinctive tests provided by the different personality rights) are not made available to individuals in terms of the positive law.

Secondly, the failure to apply distinctively the factual violation and wrongfulness requirements of the actio iniuriarum to the same factual matrix, diminishes obliquely the collectivist ideal of the constitutional vision on the human personality. To elaborate, as mentioned earlier, the factual violation requirement ought to highlight individual interests whereas the wrongfulness requirement ought to balance these individual interests with collectivist interests and values.[160] The ambiguous treatment of the factual violation and wrongfulness requirements may effectively exclude collectivist considerations if courts only rely on the presence of an iniuria without testing a factual violation against the boni mores as the accepted legal test for wrongfulness. As a result, the composite nature of the human personality, consisting of individualistic and collectivist dimensions, is further reduced in the positive law.

Lastly, the judicial practices mentioned above reveal a lack of analytical rigour in terms of the framework of the common law of personality. These practices significantly reduce judicial discretion to the extent that proper expression cannot be given to the doctrinal basis of the common law of personality as informed constitutionally. These practices also elude the ideals of the constitutional vision of the human personality for the purpose of a transformative paradigm. The current framework adopted by the judiciary will not highlight distinct personality interests as a doctrinal concern. In addition, the ideals of the constitutional vision on the human personality will find no such expression as an ideological concern.

Sight should not be lost of the fact that these personality interests must create legal duties for purposes of private relationships, to be of any practical relevance.[161] Arguably, these reductive methodological practices by the courts leave no room to consider the specific entitlements that ought to be created with reference to the doctrinal interplay between personality rights, foundational constitutional values (as

[160] See section 4.3 above.
[161] See the specific argument made in terms of sections 1.1 of chapter one and 2.2 of chapter two.

embedded in the constitutional vision of the human personality) and fundamental rights. As mentioned earlier in this thesis, fundamental rights, in this regard, are context-dependent and implicated by different personality rights on a particular set of facts.[162] If the courts are not delineating the specific personality rights, then the constitutionalisation of these attendant duties will be superficial or even unattainable.

The judicial practices adopted in terms of the factual violation requirement and its interplay with the wrongfulness requirement ought to be rejected for purposes of constitutionalising the common law of personality. As an overarching consideration, ultimately these practices will fail to give effect to the constitutional imperatives associated with the universal ideal of the constitutional vision on the human personality.

4.4.3 The wrongfulness requirement

After establishing a factual violation of a recognised personality right, the next requirement of the actio iniuriarum is that such violation must be done with wrongfulness (if courts were to apply the factual violation and wrongfulness requirements separately). In following the general framework of the law of delict, the basic boni mores test (referring to 'the legal convictions of the community'), encapsulating the criterion of reasonableness, ought to animate the wrongfulness requirement of the actio iniuriarum in principle.[163] As explained earlier in this chapter, the general doctrinal tenets of the wrongfulness requirement seek to determine whether it will be reasonable to impose liability on the defendant for his or her harm-causing conduct.[164] With reference to the legal convictions of the community, the interests of the individual parties and those of the collective are weighed-up.[165] This weigh-up exercise of the boni mores can be characterised as collectivist, policy-orientated and pragmatic in nature.[166]

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[162] See sections 2.3.1 and 2.3.2 of chapter two.
[163] *Universiteit van Pretoria v Tommie Meyer Films* (note 63 above) 387; *Marais v Richard* 1981 (1) SA 1157 (A) 1168; Neethling, Potgieter & Roos (note 45 above) 54-55.
[164] Ibid.
[165] Ibid.
[166] See the full discussion at Section 4.3 above. For the main summative points on the wrongfulness requirement, the Constitutional Court in *Loureiro v iMvula Quality Protection* (note 73 above) at para 53 stated the following:

> 'The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm — indeed to respect rights — and questions the reasonableness of imposing liability.'

However, as further explained in this chapter, with reference to the secondary characteristics of the law of delict, the doctrinal tenets of the wrongfulness requirement are adjusted to the actio iniuriarum through the use of the prima facie wrongfulness mechanism.[167] As outlined earlier in this section of this chapter, here I will examine the application of the prima facie wrongfulness mechanism to the different personality rights.[168] In particular, given the conservative culture and liberal mindset of the courts, I want to interrogate whether appropriate consideration is afforded to collectivist interests and values. In doing so, I want to establish whether the courts use the prima facie wrongfulness mechanism to further diminish the collectivist dimensions of the constitutional vision of the human personality. To facilitate this discussion, I first need to elucidate the prima facie wrongfulness mechanism (as applied to personality infringements).[169]

To begin with, the prima facie wrongfulness mechanism is applied divergently to the main groupings of the different personality rights; namely the corpus, dignitas and fama of the human personality.[170] It appears that the factual violation of the personality rights relating to the corpus, that is, bodily integrity and physical liberty, are rebuttably presumed wrongful.[171] This means that once a factual violation of these interests is established, it is presumed that these interests were wrongfully infringed. On face value, the unreasonableness of these violations is accepted

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In this regard, applicable policy considerations range from individual characteristics and attributes of both the plaintiff and the defendant and the relationship between them, to more collectivist concerns such as the social, economic and legal relevance of these individual interests, factual and normative considerations contemplating an active or passive legal duty not to infringe these interests, the social and/or economic consequences of imposing liability for the infringement of these interests, and possible justifications for the infringement of the mentioned interests. This in part also relates to the various ways in which the boni mores can be determined, through the prima facie wrongfulness mechanism, wrongfulness as the infringement of a right configuration and wrongfulness as the breach of a legal duty configuration. As I have already discussed the prima facie wrongfulness mechanism, the infringement of a subjective right configuration merely requires from other private law subjects to refrain from infringing the subjective rights of another whilst the breach of a legal duty configuration, in certain circumstances, require private law subjects to act positively to protect the interests of another where the legal convictions of the community requires so. Nonetheless, both configurations entail the application of the balancing exercises in terms of the boni mores. See Loubser & Midgley (note 62 above) 152-155; Neethling & Potgieter (note 45 above) 45-47, 69-71 & 73-76; Van der Walt & Midgley (note 62 above) § 75 & 80-81.

[167] See sections 4.3 and 4.4.1 above.

[168] See the outline above at section 4.4.1

[169] For the application of the prima facie wrongfulness mechanism in the law of delict more generally, see *Country Cloud Trading v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) para 22; *Minister of Safety and Security v Rudman* 2005 (2) SA 16 (SCA) para 57.

[170] See section 2.2 of chapter two for a detailed discussion of these groupings and the specific personality rights that belong to each.

[171] Neethling, Potgieter & Roos (note 132 above) 93 & 115.

(although not conclusively as the wrongfulness inquiry does not end here).[172] The onus shifts onto the defendant to rebut this presumption of wrongfulness with a recognised ground of justification.[173]

As a result, the wrongfulness inquiry focuses on whether these violations can be justified with reference to recognised grounds of justification, that is, defences that negate wrongfulness.[174] To be sure, an inquiry into grounds of justification also involves the reasonableness criterion of the general mores test.[175] More specifically, grounds of justification are "nothing more than practical expressions" of the boni mores.[176] These defences are "stereotyped examples" of instances that excuse the initial wrongfulness of a factual violation.[177] For purposes of this thesis, these grounds of justification still involve the balancing of individual interests and values against collectivist ones.

With regard to the other personality rights, the prima facie wrongfulness mechanism also applies to the personality right to reputation, which falls under the fama.[178] However, the personality rights related to dignitas, which are dignity, privacy, identity and feelings, appear not to be presumed wrongful.[179] In effect, this means a factual violation of these personality rights must be tested first against the reasonableness criterion of the boni mores, that is, whether it would be reasonable to impose liability on the defendant for the infringement of these rights.[180] Only afterwards are grounds of justification considered.[181] In both instances, individual

[172] Ibid.
[173] *Borgin v De Villiers* 1980 (3) SA 556 (A); *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 18; *Le Roux* (note 3 above) para 85; Loubser & Midgley (note 62 above) 340; Neethling & Potgieter (note 45 above) 355; Van der Walt & Midgley (note 62 above) § 104.
[174] Importantly, the defendant bears a full onus and cannot negate a claim of wrongfulness through a bare denial. See *Minister of Justice v Hofmeyr* (note 76 above) 153; Neethling, Potgieter & Roos (note 132 above) 93 & 115.
[175] Neethling & Potgieter (note 45 above) 87-88; Van der Walt & Midgley (note 62 above) § 110; Loubser & Midgley (note 62 above) 203-204.
[176] Ibid. See also *Clarke v Hurst NO* 1992 (4) SA 630 (D) 650.
[177] Ibid.
[178] *National Media Ltd v Bogoshi* 1998 (4) 1196 (SCA) 1202*;* *Khumalo v Holomisa* (note 173 above) para 18; *Le Roux v Dey* (note 3 above) paras 84- 85; Neethling, Potgieter & Roos (note 132 above) 143.
[179] *Universiteit van Pretoria v Tommie Meyer Films* (note 63 above) 386; *De Lange v Costa* (note 138 above) 862; *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) 462; *Smalle and Another v Southern Palace Investments 440 (Pty) Limited and Another* (121/2016) [2016] ZASCA 189 (1 December 2016) para 23; *Chowan v Associated Motor Holdings (Pty) Ltd and Others* 2018 (4) SA 145 (GJ) para 65; Neethling, Potgieter & Roos (note 132 above) 195, 205, 210, 231 & 256.
[180] Ibid.
[181] Ibid.

interests and values are considered against collectivist ones.[182]

For example, the use of the prima facie wrongfulness mechanism is evident in the Constitutional Court judgment of *Le Roux v Dey.*[183] Here, as already explained,[184] the Court recognised that the factual violation of the personality right to reputation is considered to be prima facie wrongful whereas the violation of the personality right to dignity is not.[185] The Court reiterated that the wrongfulness enquiry under the personality right to reputation will mainly revolve around the justification of the defendant's factual violation (as the wrongfulness of the factual violation is already assumed) while the wrongfulness enquiry under the personality right to dignity, as a first step, will determine whether a norm was violated for purposes of considering the imposition of liability.[186] Although the Court left the discussion here, it can be reasonably assumed that the next step in the wrongfulness inquiry into dignity will entail grounds of justification[187] However, as mentioned before, the Court provided no explanation of why a factual violation of the personality right to reputation is prima facie wrongful whereas the same does not apply to the personality right to dignity.[188]

In broad terms, when testing the prima facie wrongfulness mechanism against the constitutional vision of the human personality, the initial fear is allayed that insufficient consideration will be provided to collectivist interests. To explain, a factual violation of a recognised personality right will at some stage be subjected to the reasonable criterion of the boni mores. This will either take place at the factual violation of a recognised personality right or at the inquiry into grounds of justification. Individual interests and values are proportionately balanced against collectivist ones which resist the classical liberal notion of the 'unencumbered self'.[189]

In terms of the constitutional vision of the human personality, courts must then be mindful when, considering the wrongfulness of a factual violation, that appropriate consideration is afforded to individual and collective interests and values. This will be achieved if courts appreciate that prima facie wrongfulness is not a conclusive finding

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[182] See Loubser & Midgley (note 62 above) 152-155; Neethling & Potgieter (note 45 above) 45-47, 69-71 and 73-76; Van der Walt & Midgley (note 62 above) § 75 & 80-81.
[183] *Le Roux v Dey* (note 3 above).
[184] See sections 1.1 of chapter one and section 4.1 of this chapter.
[185] *Le Roux v Dey* (note 3 above) paras 85 & 138-152.
[186] Ibid. See also paras 129-128.
[187] Ibid paras 143-144.
[188] See sections 1.1 of chapter one and 4.1 of this chapter.
[189] The general tenets of this ideological concept have been explained under sections 2.1 of chapter two and 3.2.2.2 of chapter three.

of wrongfulness and subsequent steps will involve the boni mores as applied to grounds of justification. However, what may be of interest is the divergent application of the prima facie wrongfulness mechanism towards the different personality rights. As highlighted above, the personality rights related to the corpus and fama are considered to be prima facie wrongful whereas those related to the dignitas are considered not.[190] This may be indicative, in a broad ideological sense, of the courts perceiving the social value of the different personality rights as different. However, as illustrated above, this divergent application has little practical effect for the consideration of collectivist interests or the direct promotion of classical liberal ideologies.

As hinted by Zitzke, these perspectives in terms of differing social values may stem from a conservative legal culture where the material dimensions of personality rights carry more weight than their humanistic ones.[191] When this divergent protection is viewed through the lens of classical private law liberalism (as associated with a conservative legal culture), the personality rights related to the corpus and fama are more susceptible to commodification and social stratification than those related to the dignitas, as the latter are not as 'socially prestigious' as the former in terms of a liberal mindset.[192] Therefore, the operation of the wrongfulness requirement through the use of the prima facie mechanism appears subtly to further suggest a classical liberal mindset towards the different personality rights.

However, the question arises whether this liberal mindset, with its reductive perspective regarding the collectivist dimensions of the human personality, will find more concrete expression under the requirement of intent. This may be the case, as the choice of intention-based liability over negligence-based liability, as alluded to above,[193] does not only have ideological implications but also influences the practical effects of positive law. Of greater concern, this may lead to the over- or under-protection of the different personality rights in positive law, which is at the opposite end of the transformative constitutionalism paradigm. These considerations will be discussed in the next sub-section.

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[190] In this regard, refer to section 2.2 of chapter one for a detailed explanation of these groupings of personality rights.

[191] Zitzke *Transformative Delict* (note 12 above) 64-67. See also J Barrett 'Dignatio and the human body' 21 (2005) *South African Journal on Human Rights* 525, 535; D Rolph *Reputation, Celebrity and Defamation Law* (2008) 25.

[192] Ibid.

[193] See sections 4.3 and 4.4.1 above.

4.4.4 The requirement of intent

As already highlighted earlier in this chapter, an investigation into the element of fault, under the general framework of the law of delict evaluates the standard of care expected of a defendant and his or her subsequent blameworthiness.[194] In turn, the blameworthiness of a defendant signals his or her individual responsibility which either turns on his or her reprehensible state of mind (namely intention) or his or her reckless behaviour which fails to meet the standard of responsibility as required from the greater collective (namely negligence).[195] I also briefly indicated that intent, as a standard of fault, represents a more individualistic standard of care whereas negligence casts the standard of care, as expected from the defendant, in more collectivist terms.[196] With reference to the secondary characteristics of the actio iniuriarum, I further established that liability for a personality infringement is generally limited to intention to the exclusion of negligence.[197] Therefore, in this section, I will examine how the exclusive reliance on intention-based liability may promote classical liberal ideologies in respect of the human personality in positive law. In addition, I will examine whether intention-based liability provides the necessary protection of the human personality, given its importance in a constitutional context. To frame this particular examination, I need briefly to contextualise the standards of fault in the form of intent and negligence in terms of the link that exists between ideology and culture (with their resultant influence on the common law's framework).

Starting with intent, known as animus iniuriandi in the context of a personality infringement,[198] this form of fault entails that a defendant is held responsible for having a legally reprehensible state of mind which consists of directing one's will to achieve a particular result with an accompanying consciousness of the wrongfulness of achieving the said result.[199] In other words, intent, as a standard of fault, consists

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[194] See section 4.3 above.
[195] Ibid.
[196] Ibid.
[197] Ibid.
[198] Translated from Latin, animus iniuriandi refers to 'the intention to injure', see *Le Roux v Dey* (note 3 above) para 129.
[199] *Pakendorf v De Flamingh* 1982 (3) SA 146 (A) 157; *Marais* v *Groenewald* (note 76 above) 645-646. See JC Knobel 'Thoughts on intention, consciousness of wrongfulness and negligence in delict' 75 (2012) *Journal of Contemporary Roman-Dutch Law* 484 for a discussion of the correctness hereof. See also Loubser & Midgley (note 62 above) 317; Neethling & Potgieter (note 45 above) 350. Furthermore, intent may take three forms, namely dolus directus, dolus indirectus and dolus eventualis. Dolus directus is present where the defendant directed his will to achieve a particular result, that is,

of the direction of will and knowledge of wrongfulness.[200] With intention, an inquiry is made into the subjective state of mind of a particular individual to draw inferences regarding his or her direction of will to cause harm while taking cognisance of the wrongfulness.[201]

Negligence, however, exemplifies societal expectations of how a particular defendant should have acted in a particular set of circumstances.[202] This is evidenced by the objective criterion of 'the reasonable person' as the methodological yardstick to determine whether a particular defendant exercised the necessary care in relation to the particular interests of the plaintiff.[203] More specifically, a particular defendant is negligent when a reasonable person would have acted differently by reasonably foreseeing and preventing a particular plaintiff's harm resulting from the former's harm-causing conduct.[204] It must be remembered that a reasonable person is placed in the individual circumstances of a particular defendant and the evaluation of the defendant's conduct does not take place in the abstract.[205]

It appears that negligence provides a greater departure from a predominantly individualistic and subjective conception of blameworthiness (than is the case with intention).[206] Therefore, negligence pays greater consideration to collectivist values than intention does; the former measures the wrongful harm-causing conduct against societal expectations whereas the latter limits the inquiry to a specific subjective mindset.[207] Preliminarily, it appears that negligence considers both individual and collective values extensively, in blaming a particular individual (as opposed to

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harm. Dolus indirectus is present where the defendant directs his or her will to achieve a particular result, that is harm, but at the same time realises that another result will unavoidably occur in pursuing his or her direct will. Dolus eventualis is present where the defendant, in pursuing his or her direct will, foresees the possibility that another result may occur and reconciles him or herself with this possibility. Neethling & Potgieter (note 45 above) 57. For a detailed account on the explanation of the different forms of intention, see generally Loubser & Midgley (note 62 above) 114; Neethling & Potgieter (note 45 above) 133-135; Van der Walt & Midgley (note 62 above) § 137.

[200] *Khumalo v Holomisa* (note 173 above) para 20.

[201] *Dantex Investment Holdings* (note 75 above) 396; Loubser & Midgley (note 62 above) 109-110; Neethling & Potgieter (note 45 above) 132-132; Van der Walt & Midgley (note 62 above) § 137.

[202] Loubser & Midgley (note 62 above) 117; Neethling & Potgieter (note 45 above) 137; Van der Walt & Midgley (note 62 above) § 26 & 148.

[203] *Cape Town Municipality v Paine* (note 76 above) 216–217 & 225; *Herschel v Mrupe* (note 68 above) 490; *Weber v Santam* 1983 (1) 381 SA (A) 410-411; Loubser & Midgley (note 62 above) 117-118; Neethling & Potgieter (note 45 above) 137; Van der Walt & Midgley (note 62 above) § 148.

[204] *Kruger v Coetzee* (note 76 above) 430; *Sea Harvest Corporation v Duncan Dock Cold Storage* (note 76 above) para 21; *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) paras 53-57; Loubser & Midgley (note 62 above) 118-120; Neethling & Potgieter (note 45 above) 137-138; Van der Walt & Midgley (note 62 above) § 148.

[205] Ibid.

[206] Van der Walt & Midgley (note 62 above) § 26 &148.

[207] *Marais v Groenewald* (note 76 above) 646.

intention) by evaluating the harm-causing conduct of an individual in a particular set of circumstances against collectivist expectations of the appropriate standard of care.[208]

Against these considerations, the question arises of whether intention, in its purest manifestation,[209] ought to function as the exclusive standard of fault for personality infringements.[210] For one thing, intention, on its own, cannot provide a greater shift towards collectivism for purposes of a transformative constitutionalism paradigm. Intention is arguably linked to individualistic values such self-interest, self-reliance and self-determination, which in turn permeate the individual subjective mindset as the basis for the required standard of care and threshold for personal blameworthiness.[211] This standard of care and threshold for personal responsibility is framed in classical liberal terms, as this standard of fault provides the defendant with the greatest freedom of action. I argue that intention-based liability, as the exclusive form of fault for personality infringements, cannot give full expression to the collectivist ideal of the constitutional vision of the human personality. To elaborate, this collectivist ideal, as one of the dimensions of the constitutional vision on the human personality, aspires to create a reciprocal benchmark of respect which requires collectivist policy-orientated considerations connected to the values of human interdependence and solidarity.[212] In other words, negligence requires a standard of care which requires from individuals not only to refrain from actively infringing the interests of another but also requires from individuals to exercise reasonable care and prudence so that the interests of others are not recklessly infringed.[213] For this reason, I argue that, for purposes of constitutionalising the common law of personality, intention should not be the exclusive standard of fault for personality infringements.

In response to these shortcomings of intention-based liability in the context of personality infringements, the courts considered various alternatives to this standard of fault.

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[208] Ibid; Van der Walt & Midgley (note 62 above) § 26 & 148.
[209] That is, a subjective inquiry that focuses on the defendant's direction of will to infringe a personality right with an accompanying consciousness that such infringement is wrongful.
[210] See for example *National Media v Bogoshi* (note 178 above); *Marais v Groenewald* (note 76 above); *Heyns v Venter* 2004 (3) SA 200 (T); *Le Roux v Dey* (note 3 above); JC Knobel 'Nalatige persoonlikheidskrenking' (2002) 65 *Journal of Contemporary Roman-Dutch Law* 24; Neethling, Potgieter & Roos (note 132 above) 58-59; Van der Walt and Midgley (note 62 above) § 138.
[211] Ibid.
[212] See the full discussion hereof at sections 3.2.2.2-3.3 of chapter three.
[213] Van der Walt & Midgley (note 62 above) § 26.

In the first instance, some courts suggested that strict liability, i.e. liability without fault, may be considered for certain personality infringements. This appears to be the case with the personality right to bodily freedom, although in very limited and select circumstances.[214] The introduction of strict liability for personality infringements is generally not considered by the courts.[215]

In the other instance, the Supreme Court of Appeal in *Le Roux v Dey*[216] opted for an attenuated form of intention to be applied to all personality infringements.[217] Specifically, the Supreme Court of Appeal stated that intention or animus iniuriandi, under the actio iniuriarum, ought to only include the direction of will to infringe a personality interest without the consciousness of the wrongfulness.[218] As a result, the mistaken belief in the existence of a justification for a personality infringement will no longer excuse liability.[219] In this regard, Harms DP argued that, on constitutional policy grounds, it will be unsatisfactory to hold a defendant liable who cannot prove a recognised defence to a prima facie case of personality harm but can escape liability on the mere subjective belief that such defence existed.[220] However, the Constitutional Court in *Le Roux v Dey*[221] rejected this proposition and kept intention in its original form, as discussed above.[222]

In the final instance, some courts ventured into the possibility of pivoting liability for a personality infringement on negligence. Although contestable, it seems that the Supreme Court of Appeal in *National Media v Bogoshi*[223] introduced

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[214] Specifically, strict liability only applies to wrongful arrest claims, under the personality right to bodily freedom, and not to the other claims under this personality right such as wrongful detention and malicious prosecution claims. See *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) 707; *Relyant Trading (Pty) Ltd. v Shongwe and Another* [2007] 1 All SA 375 (SCA) paras 4-6; *Woji v Minister of Police* 2015 (1) SACR 409 (SCA); Minister of Home Affairs v Rahim 2016 (3) SA 218 (CC); Loubser & Midgley (note 62 above) 375;

[215] Ibid.

[216] 2010 (4) SA 210 (SCA).

[217] Knobel *Thoughts on Intention* (note 199 above) 485-487.

[218] *Le Roux v Dey* (SCA) (note 216 above) 27-41.

[219] Knobel *Thoughts on Intention* (note 199 above) Ibid 487-490.

[220] *Le Roux v Dey* (SCA) (note 216 above) para 37. Presumably, the pertinent constitutional policy consideration in this regard alludes to the fact that an appropriate balance must be struck between the fundamental constitutional rights corresponding with the recognised personality rights and the other fundamental constitutional fundamental rights. This includes section 16 of the Constitution of the Republic of South Africa, 1996 which guarantees the right to freedom of expression, which underlies the defences to a prima facie case of personality harm. However, it falls beyond the scope of this thesis to venture in the realm of defences and remedies as explained in section 1.2.3 of chapter one.

[221] *Le Roux v Dey* (CC) (note 3 above).

[222] Ibid para 137.

[223] *National Media v Bogoshi* (note 178 above).

negligence liability in media defamation cases.[224] In this regard, the Court acknowledged that media defendants can cause widespread harm through the increased circulation of its publications.[225] The Court also noted that media defendants perform important social functions such as contributing towards the formation of public opinion.[226] For these reasons, the Court held that media defendants ought to be held to a higher standard of accountability.[227] It will be inappropriate for media defendants to escape liability for reckless (read as negligent) conduct or for the mistaken belief that their actions were justified (referring to the consciousness of wrongfulness component under animus iniuriandi).[228] Adjudicating the issue of fault in this particular manner provides consideration to the individual interests of the parties against a more collectivist conception of a threshold for personal responsibility.[229] Some High Courts proposed that the same standard of liability should apply to non-media defendants in defamation cases for similar reasons (as the boundaries between media and non-media defendants have become porous with the advent of paradigm-shifting technologies).[230]

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[224] Ibid 1214-1215. Specifically, Hefer JA held that 'there are compelling reasons for holding that the media should not be treated on the same footing as ordinary members of the public by permitting them to rely on the absence of *animus injuriandi,* and that it would be appropriate to hold media defendants liable unless they were not negligent in the circumstances of the case'. However, there is considerable controversy as to whether the Supreme Court of Appeal introduced negligence liability or waived the consciousness of wrongfulness component under the animus iniuriandi. For instance, Midgley strongly argues that the Supreme Court of Appeal did not introduce negligence liability and merely waived the consciousness of wrongfulness requirement, see JR Midgley 'Intention remains the fault criterion under the actio injuriarum' (2001) 118 *South African Law Journal* 433, 438-440. On the other hand, the High Court in the judgments of *Marais v Groenewald* (note 76 above) 644-646 and *Heyns v Venter* (note 210 above) para 14, fully supports the view that the Supreme Court of Appeal introduced negligence liability and this was further confirmed by the minority judgment of Langa CJ and O'Regan J in *NM v Smith* 2007 (5) SA 250 (CC) paras 93-97 & 173. Furthermore, academic commentators such as Neethling, Potgieter & Roos (note 132 above) 58-59 and Knobel *Thoughts on Intention* (note 199 above) 488-489 also support the negligence liability view.

[225] *National Media v Bogoshi* (note 178 above) 1214.

[226] Ibid.

[227] Ibid.

[228] Ibid.

[229] Ibid 1214-1215.

[230] *Marais v Groenewald* (note 76 above) 644-646; *Heyns v Venter* (note 210 above) para 14; *Pieterse v Clicks Group Ltd* 2015 (5) SA 317 (GJ) para 71. See also *Manuel v Economic Freedom Fighters and Others* [2019] 3 All SA 584 (GJ) paras 61-67 where the High Court confirmed that the same considerations that apply to a media defendant should apply to non-media defendants, however, the Court was silent on the issue of fault. Accordingly, this judgment may serve as implied authority for the notion that reliance on intention-based liability, at least in the context of the personality right to reputation, needs to be adjusted to include negligence-based liability. In this regard, in a recent judgment of the High Court in *Gqubule-Mbeki and Another v Economic Freedom Fighters and Another* (30143/2018) [2020] ZAGPJHC 2 (24 January 2020) paras 71-78, the Court still maintained the distinction between media and non-media defendants. To date, this is the only judgment from the High Court that suggests this.

In the context of breach of privacy cases, that is the infringement of the personality right to privacy, the Constitutional Court in *NM v Smith*[231] was confronted with a similar issue of whether negligence liability ought to be introduced in these circumstances. Here, the defendants, a prominent politician, Patricia de Lille, and a publisher, Charlene Smith, published a biography concerning the former in which the HIV status of the plaintiffs was disclosed.[232] The relevant part of the autobiography detailed de Lille's probe into controversial clinical HIV trials held at the University of Pretoria[233] And three participants in the trials were identified, namely the plaintiffs, as HIV-positive and unemployed women who lived in informal settlements.[234] The plaintiffs instituted the actio iniuriarum against the defendants for the infringement of their personality right to privacy as the disclosure of their HIV status was made without their consent.[235]

The plaintiffs argued that they had consented to disclosure for purposes of an independent external investigation but not for the purpose of the defendants' publication.[236] The plaintiffs submitted that the defendants either acted with intention or with negligence, with the latter being more likely on the facts. The assertion towards negligence would consequently have required the development of the actio iniuriarum, as liability for a privacy infringement is generally limited to intention only.[237]

On the facts, the majority of the Constitutional Court found it unnecessary to pursue the development of the actio iniuriarum to include liability for negligence as, according to the Court, the defendants acted with intention.[238] The Court maintained that the defendants were aware or subjectively foresaw the possibility that the plaintiffs did not consent to disclosure for purposes of the autobiography.[239] This is indeed surprising as the evidence clearly suggested that the defendants assumed that the plaintiffs consented to disclosure and deemed it unnecessary to make any further inquiries[240] – this probably evidenced reckless or careless behaviour but not a

[231] *NM v Smith* (note 224 above).
[232] Ibid para 5.
[233] Ibid paras 7-20.
[234] Ibid para 4.
[235] Ibid para 19.
[236] Ibid paras 56-57.
[237] Ibid.
[238] Ibid para 57.
[239] Ibid paras 64-65.
[240] Ibid paras 14 & 60-62.

reprehensible state of mind.[241] The majority of the Constitutional Court still maintained intention-based liability for breach of privacy cases.

With these alternatives in mind, together with the whole body of academic writing concerning intention-based liability in the context of the actio iniuriarum, Johan Knobel is of the firm opinion that:[242]

> 'The logical next step in the evolution of our law of delict appears to be that, as a general point of departure, all delictual liability should be based on negligence unless compelling reasons (other than historical heritage alone) justify an exception. Employing the objective standard of the reasonable person with its built-in value judgment should in most instances be a more satisfactory basis for liability than a subjective inquiry into whether an alleged wrongdoer directed his or her will at causing a certain result, whether the value judgment inherent in a consciousness of wrongfulness element is part of the inquiry or not.'[243]

In providing further context to this departure from sole reliance on intention-based liability in the law of personality, Knobel illustrates the desirability of this departure in the following pragmatic terms:

> '[T]he present author remains of the opinion that the objective standard of the reasonable person would be the preferable criterion and the one most suitable for a wide general application across the whole field of delictual liability. From the perspective of the plaintiff it is advantageous because it imposes a higher degree of care on the defendant than intention; from the perspective of the defendant it is fair because it requires no more than what a reasonable person would have done, and from the perspective of the bench it is easier to apply because it is objective in nature and is not "seated in the mind" of the defendant'.[244]

Arguably, these pragmatic considerations dovetail with this thesis' exposition of the individual and collectivist dimensions of the human personality in a constitutional context. These pragmatic considerations speak ideologically to the ability of negligence, as a standard of fault, to accommodate the individual interests of the parties while promoting a collectivist conception of a threshold for individual responsibility. Although these pragmatic and ideological considerations signal an impetus for reconsidering the approach to fault under the actio iniuriarum, a final pressing issue needs to be addressed. As intention provides a more liberalistic threshold of personal responsibility, an examination is required as to whether this

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[241] G Penfold & D Milo 'Media freedom and the law of privacy: NM and Others v Smith and Others (Freedom of Expression Institute Intervening as Amicus Curiae)' (2008) 1 *Constitutional Court Review* 311, 322-325; D Milo, G Penfold & A Stein 'Freedom of expression' in S Woolman, M Bishop & J Brickhill et al (eds) *Constitutional Law of South Africa* 2ed (2008 Revision Service 4, 2012) Chapter 42, 108-111.

[242] Knobel *Thoughts on Intention* (note 199 above).

[243] Ibid 489. See Neethling, Potgieter & Roos (note 132 above) 58-59; Midgley (note 224 above) 440; Knobel *Thoughts on Intention* (note 199 above) 488-489; Van der Walt and Midgley (note 62 above) § 138.

[244] Knobel *Thoughts on Intention* (note 199 above) 490.

form of fault, on its own, can afford adequate protection to the human personality within the transformative paradigm. This is necessarily so as liability is hinged on the subjective mind of a defendant and not according to greater societal expectations as to the appropriate standard of care. [245]

When reverting back to the ideals of the constitutional vision on the human personality, it must be remembered that, firstly, in terms of the universal ideal, the human personality, as a composite legal interest, is intertwined with constitutional imperatives related to the development of the individual and the stability of the greater collective. Secondly, the individualistic ideal acknowledges the unique and multi-faceted nature of the human image which enables an individual to lead a good and meaningful life as a constitutional imperative. Thirdly, the collectivist ideal recognises the interconnected nature of human beings which requires reciprocal standards of respect. In turn, these reciprocal standards provide the basis for maintaining the stability of society as a further constitutional imperative. As a result, it is unequivocal that the human personality has immense constitutional value.

With this in mind, I argue that intention, even stripped of its knowledge-of-wrongfulness component, as contemplated above in the alternatives to this form of fault, cannot provide the same scope of extensive protection as negligence.[246] On a pragmatic level, intention is a difficult form of fault to prove as one is essentially tasked to determine the subjective mind of a defendant.[247] In comparison to negligence, which hinges liability on comparing the conduct of the defendant to that of the reasonable person, it is an evidentiary difficult task to establish intention.[248] This evidentiary difficulty makes it easier to establish negligence over intention. This then accounts for the proposition of why negligence casts the net of liability wider than intention due to this evidentiary difficulty.[249]

Consequently, a defendant can currently escape liability for a personality infringement if he or she caused such an infringement with reckless (understood as negligent) behaviour even if it results in widespread harm.[250] In this regard, reference can be made again to the facts in *NM v Smith*[251] which illustrate that negligent

[245] *Marais v Groenewald* (note 76 above) 646; Van der Walt & Midgley (note 62 above) § 26.
[246] *Marais v Groenewald* (note 76 above) 646; Van der Walt & Midgley (note 62 above) § 26.
[247] Ibid.
[248] Ibid.
[249] Reference is made to this proposition under section 4.3 above.
[250] *Marais v Groenewald* (note 76 above) 646; Van der Walt & Midgley (note 62 above) § 26.
[251] *NM v Smith* (note 224 above).

personality infringements are possible (despite the courts' willingness to twist the facts of a particular case to fit a finding of intention).[252] However, the imposition of strict liability for a personality infringement, in my opinion, will provide excessive protection to the human personality as a legal interest. The human personality, as underpinned by constitutional values and fundamental rights, cannot, for instance, supersede other interests, such as the right to freedom of expression, [253] which also features in the common law of personality.[254]

Unlike the wrongfulness requirement, the requirement of intent is not subtle in its promotion of classical liberalism in the frameworks of the common law of personality. Consequently, the important difference between the methodological adjustments in respect of intention, as opposed to wrongfulness, affects the ability of the common law framework to provide adequate protection to the human personality as a legal interest (as illustrated above). As a result, the human personality receives insufficient protection in relation to its constitutional value with regard to the constitutional vision on the human personality. In broad terms, with reference to the universal ideal, the requirement of intent attenuates the human personality's link to constitutional imperatives as reckless behaviour towards the personalities of other individuals are not deterred. This also implicates the individualistic ideal, as the unique characteristics of the human image and individual personalities do not receive proper protection. When viewing this through the collectivist ideal, the collectivist values of human interdependence and solidarity are not fully realised, as the standard

[252] In addition, the onus of proving fault in the context of the actio iniuriarum is subjected to further methodological adjustments. When the plaintiff proves that a wrongful factual violation of a personality right occurred, he or she is further assisted by a rebuttable presumption of fault. In other words, when a wrongful factual disturbance has been established, the requirement of fault is presumed. See *De Lange v Costa* (note 105 above) 861; *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (AD) 849. Consequently, this means that the onus shifts onto the defendant to rebut this presumption by proving a defence that negates fault on a preponderance of probabilities. From a brief survey of positive law, it appears that the presumption of fault applies to all the personality interests and a differentiation is not made between them. See Loubser & Midgley (note 62 above) 114; Van der Walt & Midgley (note 62 above) § 147. However, this consideration is only mentioned in passing as the final adjudication of fault in these circumstances will rest on the potential defences that can be raised by the defendant, which falls beyond the scope of this thesis. In addition, when clarity is gained as to the appropriate standard of fault that should be used in the context of the actio iniuriarum, then this issue concerning the presumption of fault can be adequately addressed.

[253] Section 16 of the Constitution of the Republic of South Africa, 1996.

[254] In this regard, the right to freedom of expression is more directly implicated under the justification and remedy stages in the adjudication of a personality right. As explained in section 1.2.3 of chapter one, these stages fall beyond the scope of this thesis. Also take note that the right to freedom of expression needs to be balanced with the personality rights to dignity, privacy, identity, feelings and reputations as opposed to the personality rights to bodily integrity and physical liberty. See JM Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 31-38.

of care that intention requires does not take into account reckless behaviour (as negligence does in terms of societal expectations). Arguably, these collectivist values will be better served by determining an individual's responsibility through societal expectations as to the care and diligence required from individual members of society.

In the end, the requirement of intent confirms this thesis' hypothesis that the broader judicial mindset is besieged with classical liberalism (in respect of the common law's method). This is in addition to the courts' application of the factual violation requirement and their further failure to apply this requirement distinctively from the wrongfulness requirement. With that being said, the method of the common law of personality is used as a portal to promote these liberal ideologies and conservative judicial beliefs. As mentioned throughout this chapter, this stems from the judiciary's limited and liberal conception of human dignity and the human personality. However, a more detailed summary of these findings will be provided in the concluding section of this chapter. In addition, the specific constitutional adjustments required to the common law's framework will form the basis of chapter 5 where I will develop an alternative approach to the constitutionalisation of the common law of personality. The development of this alternative approach will speak specifically to these substantive and methodological considerations (of this chapter) as informed by the transformative constitutionalism paradigm and the constitutional vision on the human personality.

4.5 Conclusion

In this chapter, I interrogated the constitutionalisation of the common law of personality's framework. I examined the specific manner in which the courts use the common law's framework, as constituted in the actio iniuriarum, to conceptualise and adjudicate personality rights against the transformative constitutionalism paradigm. In more simplistic terms, I investigated the substance and method of the common law's framework, as applied by the courts, for purposes of its constitutionalisation.

As a starting point, I referred to the *Le Roux v Dey*[255] judgment which is the most recent and authoritative case dealing with the common law's framework from a post-liberal perspective. The judgment served as a reference point to gauge the judicial mindset in respect of the human personality. In addition to this, I provided a

[255] *Le Roux v Dey* (note 3 above).

brief outline of the previous chapters and illustrated the pertinent connections between them. In doing so, I devised a framework to deconstruct the common law's framework in terms of its underlying judicial ideology and culture (which would have been otherwise concealed).[256] As maintained throughout this thesis, this is the theoretical basis on which I approach the constitutionalisation of the common law of personality.

I proceeded to evaluate the substance of the common law of personality with reference to *Le Roux v Dey*. Here, I found that the Constitutional Court provided thin and facile conceptions of human dignity and the human personality.[257] More specifically, the Court limited these conceptions to subjective feelings of self-worth. When viewed against the ideals of the constitutional vision on the human personality, these conceptions are framed in a liberal and conservative manner. For instance, the Court's conceptions are limited in analytical scope and involve minimal judicial discretion. In addition, the Court's conceptions only focus on specific aspects of the individual dimensions of the human personality which consider the liberties of individuals. Little consideration is afforded to the full scope of the individualistic and collectivist ideals of the constitutional vision on the human personality. Consequently, from the perspective of the universal ideal, these conceptions attenuate the human personality's link to constitutional imperatives related to the individual and the greater collective. Ultimately, I reached the conclusion that these conceptions of the Court ought to be rejected in terms of the transformative constitutionalism paradigm.

I suspected that the *Le Roux v Dey* judgment is not an isolated application of judicial liberalism and conservatism. To facilitate this further level of analysis, I expanded my scope of inquiry to the interaction between the law of delict and the law of personality (as a sub-discipline of the former).[258] Here, I highlighted that the law of delict follows a generalising approach where general elements of liability are applied to establish liability. I further highlighted that the law of delict contains secondary characteristics, i.e. the general elements of delictual liability are adjusted and applied in a specific manner under each of the main delictual actions. In this regard, I argued that the secondary characteristics of the law of delict will reveal the broader judicial mindset in respect of the human personality. I further argued that these secondary

[256] See section 4.1.
[257] See section 4.2.
[258] Section 4.3

characteristics will ultimately influence the actual constitutionalisation of the common law of personality's framework.

Within this expanded scope of inquiry, I found that the secondary characteristics of the law of personality reveal the oblique manner in which the judiciary perpetrates a liberal and conservative mindset towards the human personality. In comparison with other delictual interests, the courts adjust the general delictual elements to provide less protection to the human personality. This is indeed unsurprising when one considers the one-dimensional way the Constitutional Court in *Le Roux v Dey* conceptualised human dignity and the human personality. Stripped of its linkage to constitutional imperatives, and reduced to subjective feelings of self-worth, there exists little to no judicial impetus to afford comprehensive consideration and protection to the human personality.

These discussions confirmed this thesis' initial hypothesis that the courts, in general, approach the human personality in classically liberal and conservative terms. This is further illustrated when the courts' approach to the method of the common law's framework is examined from a constitutional perspective.[259] As mentioned, the common law's method is to be found in the three requirements of the actio iniuriarum. The practices that the courts adopt in respect of each requirement will be summarised in turn.

First, to promote a one-dimensional conception of human dignity and the human personality, the courts, under the factual violation requirement, fail to apply distinctively the different tests for the personality rights.[260] This has the effect that different personality rights cannot be articulated in the same factual matrix. This reduces judicial discretion to the extent that the specific interests in the human personality are unarticulated. This leaves little scope for the further consideration of the ideals of the constitutional vision of the human personality and attendant fundamental rights.

Secondly, to promote a liberal conception of the human personality, the courts fail to apply both the factual violation and wrongfulness requirements distinctively to a set of facts.[261] In this regard, courts are satisfied with the presence of an iniuria. In other words, without investigating which specific personality right is at stake or the

[259] See sections 4.4 and 4.4.1.
[260] See section 4.4.2.
[261] Ibid.

actual wrongfulness of it, courts readily accept the existence of some indication of personality harm. The implication is that the courts do not fully consider individual interests against collectivist ones (which are facilitated through the basic test for wrongfulness, namely the boni mores). In addition, I investigated the prima facie wrongfulness mechanism[262] and found that this mechanism had no direct impact on the positive law of personality (although it revealed the courts' sometimes subtle classical liberal approach towards the human personality).

Finally, to further promote a one-dimensional and classical liberal conception of the human personality, the courts solely focus on intention-based liability to the exclusion of negligence-based liability (even when directly confronted with the possibility of reconsidering the fault requirement, with some minor exceptions).[263] As a result, intention as a standard of fault is framed in individualistic terms. More specifically, the individual responsibility of a particular defendant rests on his or her subjective state of mind (which is traditionally associated with an individualistic standard of care as opposed to a collectivist one). Intention also provides insufficient protection to the human personality as it is an evidentiary difficult task to determine a specific defendant's individual state of mind.

As a reference point, I also examined negligence as a standard of fault. Here, I found that negligence considers both individualistic and collectivist considerations (unlike intention).[264] This is done by placing the so-called reasonable person, as the societal and a collectivist threshold of personal responsibility, in the position of a specific defendant to determine blameworthiness. It is also worth noting that negligence arguably provides sufficient protection to the human personality, as the blameworthiness of defendants is measured against societal expectations (which is easier to establish than intention). Ultimately, with this comparison, I attempted to show, with reference to the constitutional vision of the human personality, the inappropriateness of intention as the exclusive standard of fault for personality infringements. This is because intention, on its own, provides defendants with the greatest freedom of action and largely ignores collectivist considerations. Thus, with the requirement of intention, I argued that classical liberalism is firmly cemented in the framework of the common law of personality.

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[262] See section 4.4.3.
[263] See section 4.4.4.
[264] Ibid.

On this basis, I argued that these judicial practices should be rejected for purposes of constitutionalisation of the framework of the common law of personality. These considerations in terms of substance and method, together with the transformative constitutionalism paradigm and the constitutional vision of the human personality, form the basis for the development of an alternative approach to the constitutionalisation of the common law of personality, to be developed in chapter five.

CHAPTER 5

THE DEVELOPMENT OF AN ALTERNATIVE APPROACH TOWARDS THE CONSTITUTIONALISATION OF THE COMMON LAW OF PERSONALITY: THE 'PERSONALITY FRAMEWORK'

5.1 Introduction

The basic aim of this thesis, as stated in chapter one, is to interrogate the constitutionalisation of the common law of personality with regard to its doctrine, its underpinning ideology and how these influence the framework of the positive law in terms of substance and methodology.[1] I argued accordingly that this process of constitutionalisation must be contemplated in terms of doctrine,[2] ideology[3], substance and method (the latter two referring to the appropriate legal framework).[4]

I contextualised this process directly against the transformative constitutionalism paradigm.[5] In terms of this paradigm, an ideological shift is required in respect of the ideologies (and resultant judicial culture) that influence the substance and method of the common law's framework. This shift entails moving the private common law of personality from (pre-constitutional) notions of classical liberalism towards greater collectivism (without sacrificing the individualistic nature of the private law). In addition, this ideological shift requires a re-examination of the judicial mindset in respect of the manner in which it conceptualises and adjudicates personality concepts (which, in turn, represents the positive law framework of the common law of personality).

To achieve this shift, and to organise the doctrinal, ideological and structural dimensions of the aforementioned constitutionalisation process, I referred to the horizontality simpliciter approach that emerged from the transformative paradigm.[6]

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[1] See section 1.2.1 of chapter one.
[2] See generally chapter two.
[3] See generally chapter three.
[4] See generally chapter four.
[5] See sections 1.1 of chapter one and 2.1 of chapter two. See generally KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146; E Zitzke 'Stop the illusionary nonsense! Teaching transformative delict' (2014) 46 *Acta Academia* 52; D Bhana 'The role of judicial method in contract law revisited' (2015) 132 *South African Law Journal* 122.
[6] Ibid. See generally D Bhana 'The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution' (2013) 29 *South African Journal on Human Rights* 351; N Friedman 'The South African common law and the Constitution: Revisiting horizontality' (2014) 30 *South African Journal on Human Rights* 63.

Predicated on an integrated reading of the horizontality provisions of the Constitution,[7] the horizontality simpliciter approach addresses practically the constitutionalisation of the private common law in terms of its 'scope' and 'form' legs.[8] In broad terms, the scope leg delineates the respective contexts in which foundational constitutional values and fundamental rights will be applied with reference to the doctrines of the private common law. In addition, the scope leg highlights constitutional ideologies, in the form of foundational values and fundamental rights, to assess the framework of the common law (and to contemplate constitutional adjustments where necessary). Moving to the form leg, the common law framework is deconstructed in terms of its underlying ideology and culture for purposes of constitutional evaluation. More specifically, the underlying ideology and culture of the common law are compared to constitutional ideologies. In using the doctrine and framework of the common law, adjustments are made to the former's framework to ensure that foundational values and fundamental rights are given effect to and promoted in the positive law (i.e. constitutional ideologies).

For purposes of this chapter, I argue that the constitutionalisation of the common law of personality involves both a process of constitutional deconstruction and reconstitution with regard to doctrine, ideology, substance and method (as contemplated throughout this thesis).[9] In the previous chapter, I examined explicitly the deconstruction of the common law of personality.[10] In this chapter, I will consider its reconstruction, or more specifically, develop a framework for its actual constitutionalisation considering the doctrinal, ideological and structural dimensions of this thesis. Therefore, as its most practical research objective,[11] this thesis will consider the development of an alternative approach to that of the Constitutional Court in *Le Roux v Dey*,[12] and to that of the judiciary's approach in general, as this approach was problematised in chapters one and four specifically.[13]

To facilitate this process, I will briefly highlight the main points of the previous chapters and extrapolate the pertinent connections between them for purposes of constitutionally reconstructing the common law of personality.

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[7] Sections 8(2) and 39(2) of the Constitution of the Republic of South Africa, 1996. See also section 2.3 of chapter two.
[8] See section 2.3 of chapter two.
[9] See sections 1.2 of chapter one and 2.3.3 of chapter two.
[10] That is, chapter four of this thesis.
[11] See sections 1.2.1 and 1.2.2 of chapter one.
[12] 2011 (3) SA 274 (CC).
[13] See section 1.1 of chapter one and chapter four in general.

In terms of doctrine, as canvassed in chapter two, I highlighted that the constitutionalisation of the common law of personality involves the application of common law personality rights, foundational constitutional values and fundamental rights.[14] However, as the interplay between these legal concepts remains ambiguous from case law,[15] I sought guidance from the perceived symbiosis between the common law and Constitution in respect of the human personality. Specifically, with reference to the judgment of the Supreme Court of Appeal in *Dendy v University of the Witwatersrand*,[16] the Court found that the common law and Constitution are doctrinally consistent in terms of the scope of personality interests recognised and protected in law (i.e. the doctrine of subjective rights and the Bill of Rights) as well as the method to facilitate such protection in positive law (i.e. actio iniuriarum).[17] This provides the basis for a single and constitutionalised doctrine of the law of personality.[18] This doctrinal basis views the human personality as a composite legal interest, that is, the human personality is protected as a series of justiciable personality rights.[19]

Further clarity was obtained from the horizontality simpliciter approach in respect of the interplay between private common law and constitutional concepts.[20] Preliminarily, the application of the horizontality simpliciter approach to the law of personality, as premised on a single and constitutionalised doctrine of the law of personality in this context, shows that each personality right will indicate a specific, concrete and distinguishable interest in the human personality, derived from the congruity between the doctrine of subjective rights and the Constitution.[21] With regard to the congruity between the actio iniuriarum and Constitution, the guidelines of the horizontality simpliciter approach, as applied to the law of personality, further show that legal duties are imposed on other members of society not to infringe personality rights as primarily vested in the requirements of the actio iniuriarum (in conjunction with the implicated fundamental rights).[22] To determine the further constitutional development of each personality right and the content of these

[14] See sections 2.2.3 and 2.3.3 of chapter two.
[15] See section 1.1 of chapter one.
[16] 2007 (8) BCLR 910 (SCA).
[17] Ibid paras 15 & 24.
[18] See section 2.2.3 of chapter two.
[19] Ibid.
[20] See section 2.3 of chapter two.
[21] See section 2.3.3 of chapter two.
[22] Ibid.

attendant duties, for purposes of reconstructing the common law of personality, consideration must be afforded to the ideological dimensions of the mentioned constitutionalisation process. This will also yield the concrete functions that foundational values and fundamental rights will serve in these respective contexts provided by the personality rights.

With reference to ideology, as explored in chapter three, I interrogated human dignity, as a fundamental constitutional value, together with its interplay with other values, such as equality, freedom and ubuntu, to delineate an ideological constitutional backdrop to guide the development of the common law of personality.[23] I called this ideological constitutional backdrop the 'constitutional vision of the human personality'.[24] It must be noted that the composite parts of this constitutional vision comprise a multi-faceted conception of human dignity cognisant of its interplay with other constitutional values (and fundamental rights).[25]

From an ideological perspective, this constitutional vision creates a series of interconnected interpretative norms (or 'ideals' as I have called them).[26] The functions of these ideals are twofold: first, they can guide the ideological expansion of the different common law personality rights, and secondly, they can be used as the ideological basis to evaluate the common law's framework for purposes of a transformative constitutionalism paradigm. These ideals are the universal, the individualistic and the collectivist. I will briefly summarise each of these here.

Firstly, in terms of the universal ideal, the human personality serves as the positive law vehicle to attain constitutional imperatives related to the individual and the collective.[27] This is ideologically so as the human personality is intertwined with the absolute inner worth of individuals and humanity. To further realise these imperatives, the human personality must be further understood in terms of its individualistic and collectivist ideals as necessary sub-components in realising these imperatives. Secondly, in terms of the individualistic ideal, the human personality refers to the unique image of an individual containing concrete interests in the human personality (which confirms its composite nature in positive law). Lastly, in terms of the collectivist ideal, the human personality also refers to the shared humanity of

[23] See sections 3.2 and 3.3 of chapter three.
[24] See section 3.3 of chapter three.
[25] See section 3.2.2 of chapter three.
[26] See section 3.3 of chapter three.
[27] Ibid.

individuals which establishes reciprocal standards of conduct based on substantive and fully realised notions of human interconnectedness and solidarity. These standards of conduct (cognisant of both individualistic and collectivist values) should underlie societal relationships in respect of the human personality, which ought to permeate the adjudication of private law relationships.

Building upon the doctrinal dimensions of this thesis, the constitutional vision of the human personality, as this thesis' ideological basis, will add several further considerations to the reconstruction of the common law of personality. For instance, the ideals of the constitutional vision on the human personality will act as interpretative norms or tools to imbue the specific common law personality rights with substantive individualistic and collectivist constitutional dimensions to ensure their linkage with constitutional imperatives and their realisation in positive law.[28] In other words, these ideals will expand the common law personality rights (and the attendant interests in the human personality) substantively to fit a transformative constitutionalism paradigm. In addition, as already illustrated in chapter four, these ideals can be used to evaluate (read as deconstruct) the common law's framework.

Forming part of the constitutional vision on the human personality are the fundamental rights implicated by the different personality rights.[29] As mentioned throughout this thesis, the application of fundamental rights, unlike the ideals of the constitutional vision of the human person (which is an interplay of foundational values), depends on the contexts provided by the different personality rights.[30] In other words, the horizontal application of specific fundamental rights depends on the specific personality right(s) implicated in a factual matrix. In addition, as opposed to providing interpretative norms, fundamental rights contain specific entitlements which influence the relationships between private individuals.[31] In more simplistic terms, these specific entitlements will help to shape the legal duties created by the personality interests in terms of the doctrinal basis of the law of personality. These entitlements, together with the requirements of the actio iniuriarum, will determine the type of duty that ought to be imposed in private relationships in respect of the different personality rights (as constitutionally informed).[32]

[28] See sections 2.2.1 of chapter two and 3.3 of chapter three.
[29] See sections 2.2.3 and 2.3 of chapter two and 3.2.3 of chapter three.
[30] Ibid.
[31] See section 2.3 of chapter two.
[32] Ibid.

To determine how the constitutional vision on the human personality ought to permeate the framework of the positive common law, consideration must be afforded of the structural dimensions of this thesis (that is, the substantive and methodological dimensions yielded from the common law's deconstruction).

Turning to the substantive and methodological dimensions of this thesis, as interrogated in chapter four, I examined how the current judicial approach to the human personality may frustrate or impede the realisation of the constitutional vision on the human personality in the frameworks of the positive law.[33]

Starting with substance, I found that the Constitutional Court in *Le Roux v Dey*[34] conceptualised human dignity and the human personality in terms of (pre-constitutional) notions of classical liberalism with an attendant conservative mindset.[35] I found that the Court limited these legal concepts to subjective feelings of self-respect which are reductive in nature. These conceptions attenuate the human personality's link to these constitutional imperatives. By reducing human dignity and the human personality to subjective feelings of self-respect, the human personality is stripped of its dynamism of inculcating the unique characteristics of the human image in the positive law. In addition, these reductionist conceptions only focus on the individualistic dimensions of the human personality, in a classical liberal manner, without providing proper consideration to its collectivist dimensions.

I argued that the Court's conceptions must be rejected for purposes of a transformative constitutionalism paradigm. Specifically, these conceptions will hinder the constitutional expansion of the different personality rights required by this paradigm. In more concrete terms, the conceptualisation of human dignity and the human personality ought to be constituted in terms of the ideological dimensions of this thesis as set out above.

As I suspected that there is a direct correlation between these conceptions and their subsequent adjudication in the common law of personality, which refers to the methodology of the common law's framework, I contemplated whether the *Le Roux v Dey* judgment is an isolated application of classical liberalism or whether the broader judicial mindset feeds into this classical liberalism (and attendant conservatism).[36] To do this, I considered the general elements of delictual liability and examined their

[33] See section 4.1 of chapter four.
[34] See note 12 above.
[35] See section 4.2 of chapter four.
[36] See section 4.3 of chapter four.

application to the different delictual actions purporting to protect different legal interests. This speaks to the relationship between the generalising approach of the law of delict with its secondary characteristics found in the specific delictual actions. With this relationship, I unveiled the oblique manner in which the law of delict perpetuates classical liberalism and attendant conservatism through its secondary characteristics. More specifically, with regard to the human personality, as protected through the actio iniuriarum in positive law, there is little to no judicial impetus to afford comprehensive consideration and protection to the human personality. In a broad sense, this is reflected in the three requirements of the actio iniuriarum being (1) the factual violation of a recognised personality right, (2) which must be wrongful and (3) intentional.[37]

I specifically mapped out the requirements of the actio iniuriarum and the attendant judicial practices that frustrate and impede the realisation of the constitutional vision of the human personality (through the previously mentioned process of deconstruction).[38]

Starting with the factual violation requirement, the courts fail to distinctively apply the different tests for the different personality rights.[39] This is the primary methodological basis through which the courts ought to articulate various personality rights in a factual matrix. As a result, this judicial practice promotes the courts' one-dimensional conception of human dignity and the human personality.

Moving to the relationship between the factual violation and wrongfulness requirements, here the courts fail to distinctively apply these requirements to a particular factual matrix. [40] This ought to be the primary methodological basis through which the courts consider the individualistic and collectivist dimensions of the human personality. For that reason, this judicial practice promotes the courts' classical liberal conception of human dignity and the human personality.

In addition, I investigated the wrongfulness requirement on its own and found that the prima facie wrongfulness mechanism that is used, in principle, ought to give sufficient consideration to the individualistic and collectivist dimensions of the human personality.[41] The application of the wrongfulness requirement arguably does not

[37] See section 4.4.1 of chapter four.
[38] See section 4.4 of chapter four.
[39] See section 4.4.2 of chapter four.
[40] Ibid.
[41] See section 4.4.3 of chapter four.

present any difficulty for the realisation of the constitutional vision on the human personality.

Finally, the courts rely exclusively on intention-based liability to the general exclusion of negligence (although opportunities arose in which the courts could have reconsidered the fault requirement of the actio iniuriarum).[42] As I have argued, the fault requirement, through the consideration of both intention and negligence as appropriate standards of fault, is the methodological basis through which the courts ought to provide sufficient protection to the human personality as a legal interest, given its importance in a constitutional context. Here the courts ought to protect the human personality against infringements caused either on purpose (namely intention) or recklessly (namely negligence). This mode of protection also establishes the standard of care with which individuals ought to comply. To elaborate, this creates a basis of personal responsibility (or blameworthiness), which is hinged on both individualistic and collectivist considerations. However, the judicial practice of exclusively relying on intention-based liability ultimately entrenches the courts' one-dimensional and liberal conception of human dignity and the human personality.

For purposes of a transformative constitutionalism paradigm, and to contemplate the potential reconstruction of the framework of the law of personality in respect of the law of personality, I argued that these judicial practices, except for the use of the prima facie wrongfulness mechanism, must be rejected. To give effect to the constitutional vision of the human personality, and to calibrate the methodology of the actio iniuriarum to give effect to these constitutional ideological dimensions, constitutional adjustments must be contemplated.[43] These methodological considerations also form the basis for the reconstruction of the legal duties that ought to be created in terms of the constitutionally informed doctrinal basis of the law of personality.

Therefore, I argue that the development of an alternative framework to the constitutionalisation of the common law should be based in doctrine, ideology, substance and methodology. The development of this alternative approach (or the constitutional reconstruction of the common law of personality) will draw its basic construction from the constitutive observations made in this introductory section of

[42] See section 4.4.4 of chapter four.
[43] For this particular purpose, I will identify and elaborate on the constitutional adjustments required to the framework of the common law of personality. This will be discussed in section 5.2 of this chapter.

this chapter (as premised on the practical guidelines of the horizontality simpliciter approach). For emphasis, I will briefly recapitulate these observations.

First, in terms of doctrine, a specific personality right will indicate the specific contexts in which fundamental rights and constitutional values must be applied. To be sure, each common law personality right will implicate the ideals of the constitutional vision on the human personality (i.e. constitutional values) and a corresponding fundamental right. Secondly, with further reference to doctrine, each specific personality right will concretely delineate a specific interest in the human personality. Thirdly, with reference to ideology, the ideals of the constitutional vision on the human personality will constitutionally enrich the substance of the common law personality rights, and by implication the human personality as a legal interest, and set the stage for the reconstruction of the methodological framework of the common law of personality. Fourthly, to give effect to the constitutionally enriched substance of the personality rights, constitutional adjustments are required to the judicial practices in respect of the factual violation requirement, the distinctive application of the factual and wrongfulness requirements, and the fault requirement. To clarify, this observation refers to the method of the common law's framework. Lastly, the application of specific fundamental rights, together with the constitutional adjustments to the requirements of the actio iniuriarum, will help to shape the legal duties that ought to be created in respect of each personality right.

In this chapter, I will use the observations mentioned in the previous paragraph to develop an alternative framework for the constitutionalisation of the common law of personality. For convenience and clarity, I will call this alternative approach 'the personality framework' for the remainder of this chapter and thesis. The naming of this framework specifically speaks to the constitutionalisation (or constitutional reconstruction) of the law of personality, as a sub-discipline of the law of delict, which only focuses on the human personality as a protected legal interest.[44]

So far, I have only preliminarily and broadly outlined the bare scaffolding of such an approach and will have to substantively populate this framework with reference to the specific personality rights, the ideals of the constitutional vision of the human personality and the fundamental rights specifically implicated, in conjunction with a constitutionally adjusted common law framework. Of equal importance, I will

[44] Take note of the limitations of this thesis as discussed in section 1.2.3 of chapter one.

also illustrate the desired interplay between these legal concepts by demonstrating their proper functioning in terms of this proposed framework. With regard to the latter objective, I will apply this framework to the specific personality rights of dignity, reputation and privacy.[45] As indicated in this thesis, I will consider these specific personality rights as they are related to each other in a constitutional context, which caused some courts to question their distinctiveness in terms of a constitutional context.[46] To provide a further practical illustration of the operation of this framework, I will apply and contextualise it in relation to selected post-constitutional judgments.[47]

As such, I will elucidate the nuanced features of the envisioned alternative framework in section 5.2 of this chapter and illustrate its operation within the framework of the positive law, i.e. applying it to the three mentioned personality rights, in section 5.3.

5.2 The development of 'the personality framework'

Proceeding from the constitutive observations made in the previous section, the personality framework, in its most rudimentary form, arguably provides a number of guidelines for reconstructing (or constitutionalising) the common law of personality.[48] I will enumerate these guidelines and then discuss them in turn.

First, a specific personality right will delineate a concrete interest in the human personality as enabled by the doctrinal basis of the law of personality. I will call this the 'doctrinal guideline'.

Secondly, the ideals of the constitutional vision of the human personality will guide the ideological development of the delineated personality interest to ensure its connection to constitutional imperatives and ideologies. Accordingly, I will call this guideline the 'ideological guideline'.

Lastly, to give effect to the constitutionally expanded personality interest, adjustments are required to the current framework of the common law of personality

[45] See sections 1.1 and 1.2 of chapter one. The consideration of the other personality rights in terms of the personality framework falls beyond the scope of this thesis and requires further study. Also see *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 27; *Le Roux v Dey* (note 12 above) para 141.
[46] See section 1.2.1 of chapter one.
[47] *Kumalo v Cycle Lab (Pty) Ltd* (31871/2008) [2011] ZAGPJHC 56 (17 June 2011); *NM v Smith* 2007 (5) SA 250 (CC); *Le Roux v Dey* (note 12 above). As indicated earlier in this thesis, I used these judgments to problematise the judiciary's approach to the framework of the common law of personality. These judgments were primarily discussed in section 4.4 of chapter four.
[48] Arguably, these are the most practical guidelines that can be extracted from the constitutive observations in section 5.1 above.

(namely the requirements of the actio iniuriarum). For this reason, I will call this the 'framework guideline'. Here, the substantive and methodological observations made in terms of the common law's deconstruction will be instructive. The fundamental right implicated by a specific personality interest will also inform these constitutional adjustments in respect of the specific entitlements that these rights create.

Starting with the doctrinal guideline, it must be acknowledged that the interests in the human personality in respect of dignity, reputation and privacy are closely related, as these interests can be loosely grouped together as 'dignitarian interests'.[49] Generally speaking, dignitarian interests are interests in having the state and other private individuals behave in a way that is appropriate to one's absolute inner worth and concomitant autonomous moral human agency.[50] Thus, underlying each of these interests is the foundational constitutional value of human dignity.[51] However, these personality rights also indicate, by the individualistic dimensions of the constitutional vision of the human personality, interests in one's life having a particular characteristic or quality, in other words, a more concrete interest in the human personality,[52] for instance the interest in self-worth, namely common law dignity (or dignitas), the interest in public esteem, namely common law reputation (or fama), and informational autonomy concerning private facts, namely common law privacy (or informational privacy) among others.[53]

Although the personality rights to dignity, reputation and privacy can be classified as dignitarian interests, this does not imply that they are mere variations of a genus of rights which expect the state and other private individuals to behave in a particular way. It must be realised that each of these personality rights interacts with an essential characteristic of the human image and indicates a distinct interest of

[49] This should not be confused with dignitary torts that exist in the common law legal systems, see B Harris 'A Roman law solution to an eternal problem: A proposed new dignitary tort to remedy sexual harassment' (2017) 42 *Alternative Law Journal* 200, 200-201. See also *Khumalo v Holomisa* (note 45 above) paras 26-27; A Fagan 'Dignity and the political right to freedom' 2008 *Acta Juridica* 177, 179-180. See also section 3.2.2.1 of chapter three.

[50] B*arkhuizen v Napier* 2007 (5) SA 323 (CC) paras 56-58; I Kant *Groundwork of the Metaphysics of Morals* (1785) (trans HJ Paton, 2005) 37-38; S Woolman Dignity' in S Woolman, M Bishop & J Brickhill et al (eds) *Constitutional Law of South Africa* 2ed (2008 Revision Service 4, 2012) Chapter 36, 25; Fagan (note 49 above) 179-180.

[51] Ibid.

[52] Fagan (note 49 above) 182. See also sections 2.2.1 of chapter two and 3.2.2.1 of chapter three.

[53] Ibid.

personality accordingly.[54] For example, the common law personality right to dignity (dignitas) indicates a person's individual sense of self-worth.[55] However, the common law right to reputation (fama) indicates a person's public esteem which is held by others.[56] Lastly, when considering the common law right to privacy (informational privacy), a person's autonomy to create and control a personal sphere of seclusion from public life is indicated.[57]

The first guideline of the personality framework, namely the doctrinal guideline, highlights the specific interests in the human personality and thus the conceptual distinctiveness between them. This conceptual distinctiveness provides the basis for which each of these interests can be constitutionally expanded ideologically, while at the same time maintaining the doctrinal compositeness of the human personality as a legal interest.

Moving to the ideological guideline, it must be appreciated that as these different personality rights will implicate different aspects of the human personality, so too will they implicate different aspects of the constitutional vision of the human personality.[58] A particular personality right may have a natural affinity with a particular ideal of the constitutional vision of the human personality or even aspects of it.[59] To clarify, that would be the universal, individualistic and collectivist ideals.[60]

For instance, all of the personality rights will be firmly grounded in the understanding of human dignity as absolute inner human worth in terms of the universal ideal.[61] However, each of these personality rights will implicate this absolute inner human worth differently. For example, the common law right to dignity will resonate with the self-acknowledgement aspect of absolute inner human worth.[62] However, the common law right to reputation will find expression in the public

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[54] JM Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 133; J Neethling, JM Potgieter & A Roos *Neethling on Personality Rights* (2019) 24-38; M Loubser & R Midgley (eds) *The Law of Delict in South Africa* 3rd ed (2017) 86-92.

[55] Burchell (note 54 above) 328; Neethling, Potgieter & Roos (note 54 above) 28; Loubser & Midgley (note 54 above) 93. Also see sections 2.2.1 of chapter two and 3.2.2.1 of chapter three.

[56] Burchell (note 54 above) 139; Neethling, Potgieter & Roos (note 54 above) 27; Loubser & Midgley (note 54 above) 93. Also see sections 2.2.1 of chapter two and 3.2.2.1 of chapter three.

[57] Burchell (note 54 above) 365-367; Neethling, Potgieter & Roos (note 54 above) 30; Loubser & Midgley (note 54 above) 88. Also see sections 2.2.1 of chapter two and 3.2.2.1 of chapter three.

[58] For a similar argument made in relation to the constitutionalisation of the common law of contract, see D Bhana 'The development of a basic approach for the constitutionalisation of our common law of contract' (2015) 26 *Stellenbosch Law Review* 3, 17.

[59] Ibid 19.

[60] See sections 3.2 and 3.3 of chapter three for a full discussion of these ideals and their various aspects, as well as the other fundamental constitutional values that are applicable.

[61] See section 3.2.2 of chapter three.

[62] See section 3.2.2.1 of chapter three.

estimation aspect of this absolute inner human worth.[63] In addition, the common law right to privacy will probably be located in the human autonomy aspect of absolute inner human worth.[64] The common law rights to dignity and privacy will lean towards the individualistic ideal as these are more concerned with the unique characteristics of an individual. With the right to reputation, this personality right will probably lean towards the collectivist ideal, as this denotes public acknowledgement of an individual's worth.

However, these affinities will, in turn, serve as the platform to imbue these personality rights with the other aspects of and ideals of the constitutional vision of the human personality (and not to their exclusion). More specifically, the constitutional vision on the human personality will recognise that all of these personality rights have individual and collective dimensions to them.[65] As a result, this guideline is concerned with ideologically expanding the different personality rights in terms of the individualistic and collectivist dimensions of the constitutional vision on the human personality. This is to ensure that the human personality, as a legal interest, is intertwined with the constitutional imperatives related to the individual and the broader collective. Consequently, the ability of these different personality rights to contribute towards constitutional imperatives needs to be realised in the frameworks of the positive law. This then falls in the realm of the next guideline.

Considering the last guideline of the personality framework, namely the framework guideline, the ideological dimensions of the constitutionally enriched personality interests ought to be anchored in the positive law through the creation of a legal duty in terms of the framework of the actio iniuriarum (as constitutionally adjusted). Arguably, one will look here at both the substance of this duty and its legal method. To clarify, the substance of this duty will determine its general content, that is, the entitlements that it creates or ought to create, as guided by a particular corresponding fundamental right as implicated by a specific personality right. However, the legal methodology of this duty would refer to its adjudication in terms of the positive law for purposes of establishing liability, namely the constitutionally adjusted requirements of the actio iniuriarum. Accordingly, each of these aspects of

[63] See section 3.2.2.2 of chapter three.
[64] See section 3.2.2.1 of chapter three.
[65] See section 3.2.2 of chapter three.

the creation of this legal duty will be briefly considered in turn.[66]

With regard to the substance of the aforementioned legal duty, it must be noted that the personality rights to dignity and reputation will implicate the fundamental right to human dignity and the personality right to privacy will implicate the fundamental right to privacy (as explored earlier in this thesis).[67] With regard to the specific entitlements to be created, reference must be made again to the *Dendy* judgment,[68] which postulates that the scope of interests protected by personality rights and fundamental rights will converge in the context of the human personality.[69] It will be possible to argue that the entitlements created in terms of the human personality will highlight that a specific personality right and a specific fundamental right mirror each other in respect of a specific personality interest. However, this does not indicate the redundancy of the implicated fundamental rights. On the contrary, the relationship between a particular personality right and fundamental right will indicate which constitutional concepts related to the human personality can be concretised for purposes of horizontal relationships.[70] In other words, the horizontal application of fundamental rights will be more concretely and in a more nuanced manner interrogated as to which components or dimensions of the fundamental right in question are capable of horizontal application in the context of the human personality.[71] At the same time, the relationship between a specific personality right and fundamental right will also indicate the distinctive nature of this attendant legal duty in respect of the personality rights to dignity, reputation and privacy.

Moving to the legal methodology of this duty, here the requirements of the actio iniuriarum will arguably indicate its basic methodological construction for purposes of establishing liability for the infringement of a specific personality right (in other words, an iniuria).[72] For instance, a wrongful and culpable[73] factual violation of a recognised

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[66] This particular guideline is predicated on the common law of personality framework's deconstruction in chapter four.
[67] See section 2.2.3 of chapter two.
[68] *Dendy v University of the Witwatersrand* (note 16 above).
[69] Ibid paras 15 & 24.
[70] This assertion is premised on the notion that the Constitution can influence the common law of personality and vice versa, see sections 1.1 of chapter one and section 2.3 of chapter two.
[71] Ibid.
[72] See section 2.2 of chapter two.
[73] At this stage I am pre-empting the subsequent argument to be developed in this thesis that the appropriate standard of fault for personality infringement require intention- and/or negligence based liability which is denoted by the aforementioned term of 'culpable'.

personality right will still establish the basis of liability for an iniuria.[74] However, the operation of these three requirements in terms of a transformative constitutionalism paradigm will require adjustment in terms of the ideological basis of this thesis.[75] More specifically, the operation of the requirements of the actio iniuriarum must be attuned to constitutional ideologies so that the human personality is understood as a composite interest comprising of various personality interests. Such adjustments must also reflect the individualistic and collectivist dimensions of a particular personality right, which in turn contribute towards constitutional imperatives related to the individual and the broader collective.[76] Practically, this will entail adjusting either the content of a requirement of the actio iniuriarum or the manner in which a requirement is applied by the judiciary.[77] I propose a number of methodological adjustments for purposes of the creation of this legal duty in terms of the last guideline of the personality framework.[78]

First, the various recognised personality rights must be articulated as distinctive interests of the human personality in terms of the framework of the positive law. This will be methodologically achieved when the distinctive tests, which have been developed for each personality right under the factual violation requirement, are applied to a particular factual matrix.[79] This will further ensure that the composite nature of the human personality (as informed by the constitutional vision of the human personality) is realised in the framework of the common law of personality.

Secondly, the individualistic and collectivist dimensions of the various personality rights must permeate the framework of the common law of personality. To achieve this, both the factual violation and wrongfulness requirements must be distinctively applied to a particular personality interest in a specific factual matrix.[80] As mentioned in this thesis, the factual violation requirement conceptually speaks to the individual interests whereas the wrongfulness requirement balances these with collectivist ones.[81]

Lastly, the appropriate standard of fault for the actio iniuriarum must include negligence together with intention. This is to ensure that individualistic and collectivist

[74] *De Lange v Costa* 1989 (2) SA 857 (A) 800-861. See further section 4.4 of chapter four.
[75] See discussion under the ideological guideline and section 3.3 of chapter three.
[76] See section 3.3 of chapter three.
[77] See sections 2.3.2 and 2.3.3 of chapter two.
[78] See section 4.4 of chapter four.
[79] See section 4.4.2.
[80] Ibid.
[81] See section 4.3 of chapter four.

values underlie the basis of personal responsibility for a personality infringement.[82] This will also promote standards of care, cognisant of these individualistic and collectivist values, permeating the positive law duties in respect of the different personality rights. This adjustment to the fault requirement will also provide sufficient protection to the human personality, as a legal interest, given its constitutional importance in a transformative context.[83]

Upon further reflection on the personality framework as a whole, with its three guidelines as discussed above, I argue that this framework enables one to draw conceptually clear lines between the personality rights to dignity, reputation and privacy. For instance, the personality rights to dignity and reputation, although both dignitarian interests implicating the fundamental right to human dignity, will maintain their distinctive nature as they primarily implicate different aspects of the human personality. Each of these personality rights will have their own distinctive interaction, as elucidated above, with the ideals of the constitutional vision on the human personality to create distinct constitutionally enriched personality interests. In addition, these personality rights will have their distinctive interaction with the fundamental right to human dignity to create unique corresponding legal duties in the framework of the positive law. Arguably, the same considerations will apply to the personality right to privacy. For this reason, this framework ought to prevent the collapsing of the different personality rights into a ubiquitous right based on an abstract and subjective notion of human dignity (as evidenced by the current position in the common law).[84]

The operation of this framework ought not to detract from the coherence and integrity of the doctrinal basis of the law of personality.[85] This framework is premised on a single integrated and constitutional doctrine of the law of personality[86] and the personality framework ought to fit the transformative paradigm which reveres the specialisation provided by the private common law while acknowledging that it derives its force from the Constitution (or to be more exact, constitutional ideologies).[87] The personality framework will assist in translating constitutional concepts related to the

[82] See section 4.4.4 of chapter four.
[83] As negligence liability provides greater protection to an interest as it casts the net of liability wider than intention liability, see section 4.4.4 of chapter four.
[84] See sections 1.1 of chapter one and 4.2 of chapter four. Furthermore, this is most evident from the Constitutional Court judgment in *Le Roux v Dey* (note 12 above).
[85] See sections 1.1 of chapter one and 2.1 of chapter two.
[86] Ibid.
[87] See sections 1.1 of chapter one and 2.1 of chapter two.

human personality to private horizontal relationships, for instance.[88] As illustrated, the relationship between personality rights and the ideals of the constitutional vision of the human personality will delineate concrete interests in the human personality while highlighting these interests' ideological connection to constitutional imperatives.[89] In addition, the relationship between personality rights and fundamental rights, as discussed above, will offer a more nuanced approach towards the horizontal application of fundamental rights concerning the human personality. The common law of personality ought to be sufficiently imbued with the ideologies of the Constitution and ought to provide the necessary framework to facilitate the attainment of constitutional imperatives at the private law level.

Having thus outlined the broad tenets of the personality framework, I will now illustrate its operation in the positive law by applying it to the respective contexts provided by the personality rights to dignity, reputation and privacy.

5.3 The personality framework and the personality rights to dignity, reputation and privacy

In this section, I will apply the personality framework to the personality rights of dignity, reputation and privacy to illustrate its operation, relevance and feasibility within the positive law. In doing so, I will structure such application according to the three guidelines of this framework.

More specifically, I will interrogate the specific interest delineated by a specific personality right. To contextualise this interest, I will provide a brief overview of the actio iniuriarum's framework in respect of this interest. This is to highlight how the common law's framework currently operates for purposes of constitutional adjustment, which will be considered under the framework guideline. I will then consider this interest's interaction with the ideals of the constitutional vision of the human personality for purposes of its ideological expansion. After this, I will consider this interest's further interaction with the implicated fundamental right regarding the proposed constitutional adjustments to the common law's framework as highlighted in the preceding section. Under this guideline, I will consider the creation of a constitutionally informed legal duty pertaining to the specific personality interest in

[88] See for instance the 'wire mesh fence' analogy used in section 1.1 of chapter one. See also Bhana *Reconciliation of Sections 8 and 39* (note 6 above) 374-375.
[89] This is further premised on the perceived symbiosis between the common law and the Constitution in respect of the human personality. See section 1.1 of chapter one and 2.2 of chapter two.

terms of substance and method.

To provide a more practical illustration of the operation and effect of the personality framework, I will apply it to selected post-constitutional judgments. These judgments include *Kumalo v Cycle Lab,*[90] *Le Roux v Dey,*[91] and *NM v Smith,*[92] which I already interrogated in chapter four to problematise the judiciary's approach to the framework of the common law.[93] In doing so, I will attempt to address the ideological, doctrinal and structural problems that these judgments create and provide solutions to them through the application of the personality framework.

5.3.1 The personality right to dignity: the personality framework and dignitas

> '[Dignitas] embraces … the subjective feelings of dignity or self-respect or the personal sense of self-worth: a person's pride in his own moral value. Infringing a persons' [dignitas] means insulting that person (footnotes omitted).'[94]

Starting with the doctrinal guideline of the personality framework, the common law personality right to dignity, which I will call dignitas in this chapter,[95] highlights and protects an individual's interest in his or her self-worth (which also includes semantic variations of 'self-esteem', 'self-respect' and 'moral value' in this particular context).[96] In terms of the common law's current framework, the personality right to dignitas imposes a legal duty on others not to infringe another's subjective feelings of self-

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[90] See note 47 above.
[91] See note 12 above.
[92] See note 47 above.
[93] See section 4.4.
[94] Neethling, Potgieter & Roos (note 54 above) 42. See also *Jackson v NICRO* 1976 (3) SA 1 (A) 4; *Brandon v Minister of Law and* Order 1997 (3) SA 68 (C) 78; *Le Roux v Dey* (note 12 above) para 138; *Greeff v Protection 4U h/a Protect International* 2012 6 SA 393 (GNP) 408; *Cele v Avusa Media Ltd* [2013] 2 All SA 412 (GSJ) para 41; J Neethling & JM Potgieter *Neethling – Potgieter – Visser: Law of Delict* 7th ed (2015) 369; Loubser & Midgley (note 54 above) 380-381. As I am dealing with the common law right to dignitas, I will not engage with legislative means to protect an individual's dignity in the broadest sense. As a result, I will not refer to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which regulates hate speech, which is an indirect way of protecting an individual's and the broader community's dignity in the widest sense of the word.
[95] The common law concept of dignitas has both a broad and a narrow meaning. In its broad sense, dignitas includes a person's right to his or her feelings (the right not to be subjected to an iniuria or insult) as well as the rights of privacy and dignity. The narrow meaning restricts the right to the impairment of the plaintiff's feelings of subjective self-worth in the form of insult. See Loubser & Midgley (note 54 above) 380-391. In this chapter, the narrow meaning of dignitas will be used, as the broad meaning was historically used with the early development of the actio iniuriarum which did not take into account the legal development that has taken place with regards to the distinct nature of the different personality interests. See generally C Gowar & CJ Visser 'Distinguishing between dignity, identity and privacy: Is it really necessary? – Kumalo v Cycle Lab (Pty) Ltd' (2012) 75 *Journal of Contemporary Roman-Dutch Law* 160; C Gowar & CJ Visser 'The actio iniuriarum – One action, but only one iniuria? – Le Roux v Dey 2011 (3) SA 274 (CC)' (2013) 76 *Journal of Contemporary Roman-Dutch Law* 480.
[96] *Jackson v NICRO* (note 94 above) 11; *Delange v Costa* (note 74 above) 861; *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (T) para 11.

worth by means of insulting behaviour which is wrongful and intentional.[97] To receive such protection in the positive law for the impairment of one's dignitas, the requirements of the delict for the impairment of dignity must be satisfied (as based on the current framework of the actio iniuriarum): (1) a factual violation of the plaintiff's feelings of self-worth which is both (2) wrongful and (3) intentional.[98]

In examining the (pre-constitutionally adjusted) requirements of the delict for the impairment of dignity further, the factual violation requirement is concerned with the actual subjective feelings of the plaintiff and whether the plaintiff' felt humiliated by the conduct of the defendant.[99] In this regard, the infringement usually takes the form of an insult (in other words, when contumelia is present).[100] With wrongfulness, the enquiry turns to whether the insult was objectively unreasonable according to the boni mores.[101] In other words, the wrongfulness requirement determines whether the humiliation experienced by the plaintiff was unreasonable according to the legal convictions of the community for purposes of establishing a norm violation.[102] However, at this stage it must be remembered that the courts generally fail to differentiate between the separate application of the factual violation and wrongfulness requirements of the delict of impairment of dignity and tend to be satisfied with the mere presence of an iniuria.[103] As explained in chapter four, this refers to the situation where courts simply establish an infringement of dignitas without considering the application of the boni mores in terms of the wrongfulness requirement.[104] Thereafter, the courts proceed into the requirement of intention, that is, whether the defendant subjectively directed his or her will to injure the dignitas of the plaintiff with the consciousness that it is wrongful to do so.[105]

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[97] See also Neethling, Potgieter & Roos (note 54 above) 192; Neethling & Potgieter (note 94 above) 368; Loubser & Midgley (note 54 above) 380.
[98] Ibid.
[99] That is, insulting, degrading and scornful behaviour from the defendant towards the plaintiff which evidences contempt of the latter's subjective feelings of self worth. See *Delange v* Costa (note 74 above) 860-861; Burchell *Personality* Rights (note 54 above) 346-347; Neethling, Potgieter & Roos (note 54 above) 192-193; Neethling & Potgieter (note 94 above) 369-370; Loubser & Midgley (note 54 above) 381.
[100] Ibid.
[101] *Delange v Costa* (note 74 above) 862; *Cele v Avusa Media* (note 94 above) para 46; Neethling, Potgieter & Roos (note 54above) 194-197; Neethling & Potgieter (note 94 above) 369-370; Loubser & Midgley (note 54 above) 382.
[102] Ibid.
[103] *Kumalo v Cycle Lab* (note 47 above) paras 20-24; Gowar & Visser *Le Roux* (note 95 above) 496-497.
[104] See section 4.4.2.
[105] *Delange v Costa* (note 74 above) 861; Neethling, Potgieter & Roos (note 54 above) 197; Neethling & Potgieter (note 94 above) 369-370; Loubser & Midgley (note 54 above) 385. However, it must be

Upon reflecting on the first guideline of the personality framework as applied to dignitas, the concrete personality interest delineated is a person's subjective feelings of self-worth. In positive law, this protection is enabled by the actio iniuriarum, which currently imposes a duty on others not to insult others wrongfully and intentionally in their social interactions. This legal duty is further qualified by the judicial practices, which are classical liberal in nature, of failing to apply the factual violation and wrongfulness requirements separately, together with an exclusive reliance on intention-based liability. For this reason, the ideological and structural development of the personality right to dignitas will be guided by the last two guidelines of the personality framework.

Moving to the ideological guideline of the personality framework, the universal ideal will locate the personality interest to feelings of self-worth in the categorical imperative that absolute inner worth attaches to every individual unconditionally.[106] Within the context of dignitas, and as indicated rudimentarily above, the categorical imperative will highlight the subjective dimension of this absolute inner worth, namely an individual's subjective recognition of his or her absolute inner worth.[107] This subjective recognition can manifest itself in the general perception that one is a valuable member of society that is continuously influenced by experiences that bolster or threaten one's self-worth.[108]

With reference to the individualistic ideal, such a subjective recognition is a primary step in the practical acknowledgement of this absolute worth inherent to all

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noted that when a plaintiff proves, in theory, both the factual violation and the wrongfulness requirement, intention is presumed. As explained in section 4.4.4 of chapter four, this thesis will examine the appropriate standard of fault applicable to the impairment of dignitas rather than engaging with this presumption as the former is a more fundamental issue.

[106] *S v Lawrence* 1997 (4) SA 1176 (CC) para 168; *Dawood v Minister of Home Affairs: Shalabi v Minister of Home Affairs: Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC*)* para 35; *S v Dodo* 2001 (3) SA 382 (CC) para 35; I Kant *Groundwork of the Metaphysics of Morals* (1785) (trans HJ Paton, 2005) 96; C McCrudden 'Human dignity and judicial interpretation of human rights' (2008) 19 *The European Journal of International Law* 655, 679; L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 23-24.

[107] P Chazan *The Moral Self* (1998) 13; RS Dillon 'Humility, Arrogance, and Self-Respect in Kant and Hill' in RN Johnson *Reason, Value, and Respect: Kantian Themes from the Philosophy of Thomas E. Hill, Jr.* (2015) 42, 49.

[108] Shultziner & Rabinovici acknowledged that a comparative social-psychological approach can be followed to ascribed meaning to the legal concept of self-worth, see D Shultziner & I Rabinovici 'Human dignity, self-worth, and humiliation: A comparative legal psychological approach' (2012) 18 *Psychology, Public Policy, and Law* 105, 106-107. Therefore, the explanation provided towards the explanation to the subjective content of self-worth was extrapolated from one of the most prominent social-psychological theories in this regard, see JD Brown, KA Dutton & KE Cook 'From the top down: Self-esteem and self-evaluations' 15 (2001) *Cognition and Emotion* 615, 616-617.

human beings.[109] This process of self-acknowledgement enables an individual to express this inner worth subjectively as part of the constitutional imperative of leading a good and meaningful life.[110] This subjective recognition of absolute inner human worth, that is self-worth, is a distinctive quality or characteristic of the human personality derived from autonomous moral human agency, which individually contributes to the constitutional imperative discussed previously.

It is important to note at this juncture of the second guideline of the personality framework that the considerations in terms of the universal and individualistic ideal encapsulate the individual dimensions of the personality interest to self-worth and its connection to the constitutional imperative related to the development of the individual.

In consulting the ideals of the constitutional vision on the human personality further, it must be remembered that the interest in self-worth is not an entirely subjective or individualistic concept. On the contrary, the interest in self-worth ought to be construed as having both individualistic and collectivist dimensions. Explaining this further with reference to the collectivist ideal, the realisation of an individual's self-worth requires the co-operation of the broader community, and not mere non-interference, with reference to the concepts of human solidarity and interdependence (as found in the constitutional value of ubuntu), to collectively recognise, respect and protect this interest in self-worth.[111] In doing so, the interest to self-worth becomes a shared aspiration which seeks to regulate social interactions through the reciprocal recognition of this self-worth as part of the constitutional imperative in maintaining the cohesion of the broader society.[112] This reciprocal recognition forms the secondary step in the practical acknowledgement of this self-worth inherent in all human beings.

With further reference to the collectivist ideal, this notion of the reciprocal recognition of self-worth can be developed into a set of objective and specific entitlements which regulates private relationships through the legal instrumentarium

[109] *Ferreira v Levin* 1996 (1) SA 984 (CC) para 49; *Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Development and Another* 2014 (1) SACR 327 (CC) para 52.
[110] Ibid.
[111] S Benhabib *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (2013) 164.
[112] Ibid. See also P De Vos & W Freedman (eds) *South African Constitutional Law in Context* (2014) 458.

of rights and duties.[113] In other words, this reciprocal recognition of self-worth can indicate a standard of care, premised on a shared aspiration of recognising and protecting self-worth, that is expected from individuals in their horizontal relationships with one another.[114]

Therefore, the ideological considerations in respect of the universal ideal, as a sub-component of the universal ideal, designate the collective dimensions of the personality interests to self-worth and its connection to the constitutional imperative related to the broader collective.

With reference to the next guideline of the personality framework, namely the framework guideline, the contemplation of specific entitlements with regard to self-worth as a personality interest will attract the application of fundamental rights to private relationships, or in this particular case, the fundamental right to human dignity.[115]

In terms of section 10 of the Constitution,

> 'Everyone has inherent dignity and the right to have their dignity respected and protected.'[116]

From a purposive interpretation of section 10 of the Constitution, it appears that the fundamental right to human dignity generally guarantees an individual's protection from treatment or conditions which infringe his or her sense of self-worth in society.[117] More specifically, treatment which is abusive, degrading or demeaning, or conditions that expose individuals to systematic disadvantage are contrary to the entitlements found in section 10 of the Constitution, in that such treatment or conditions fails to recognise and respect the absolute inner worth of an individual.[118] Consequently, as the inherent dignity of each individual is guaranteed, corresponding duties are imposed on other individuals in horizontal relationships. These individuals must respect the self-worth of others and not burden them with abusive, degrading or

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[113] See also *Advance Mining Hydraulics v Botes NO* 2000 (2) BCLR 119 (T) 127; *S v Pienaar* 2000 (7) BCLR 800 (NC) para 10; *Booysen v Minister of Home Affairs & Another* 2001 (4) SA 485 (CC); *Daniels v Campbell* 2004 (5) SA 331 (CC).
[114] Ibid.
[115] Section 10 of the Constitution of the Republic of South Africa, 1996.
[116] Ibid.
[117] De Vos & Freedman (note 112 above) 457; I Currie & J De Waal *The Bill of Rights Handbook* 6th ed (2013).
[118] Ibid. See also *S v Williams* 1995 (3) SA 632 (CC) para 45; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 328; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) paras 28 & 120; O Schachter 'Human dignity as a normative concept' (1983) 77 *American Journal of International Law* 848, 849; E Grant 'Dignity and equality' (2007) 7 *Human Rights Law Review* 299, 321.

demeaning conduct in their social interactions.[119]

In terms of the substance of this legal duty with respect to the last guideline of the personality framework, as predicted by the Supreme of Court of Appeal in *Dendy v University of the Witwatersrand*[120] and confirmed by Jonathan Burchell, there appears to be some congruency and symbiosis between dignitas and human dignity in respect of the substance of this legal duty.[121] Indeed, the core concern of protecting an individual's subjective interest in his or her self-worth is shared by dignitas and human dignity. This shared protection imposes a similar duty on other individuals to respect this self-worth and to refrain from contumelious conduct, at least in the context of private relationships. In this respect, dignitas and human dignity have the same overarching quality in recognising and protecting the personality interest to subjective self-worth.[122]

When contemplating the methodology of this legal duty, the common law, through the consideration of the requirements of the delict for impairment of dignitas, subject to constitutional adjustment, can help shape such duties suitable to concrete private relationships. For instance, the factual violation requirement can help realise the subjective dimension of protecting self-worth through examining the individual effect that a potential impairment had on the plaintiff by determining the existence of contumelious conduct. To broaden this inquiry, the wrongfulness requirement can assist in realising the collective dimension of protecting self-worth by examining the broader societal effects of a potential impairment through the boni mores criterion as grounded in the normative value system of the Constitution. In addition, the standard of care required from individuals, to contribute towards the recognition and protection of a constitutionally informed conception of dignitas, ought to be grounded in the requirement of fault. To achieve this, the standard of care expected from individuals must also effectively realise collectivist values such as human solidarity and interdependence. This will require the inclusion of negligence as an appropriate standard of fault to ensure that individuals do not deliberately (namely intention) or recklessly (namely negligence) infringe another's interest to self-worth.

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[119] While the state, for example, is further tasked to protect individuals from treatment or conditions that systematically infringe their self-worth. *See Glenister v President of RSA and Others; Helen Suzman Foundation as Amicus Curiae* 2011 (3) SA 347 (CC) paras 189-191; Ackermann (note 106 above) 95-96; Woolman (note 50 above) 21; Currie & De Waal (note 117 above) 253; De Vos & Freedman (note 112 above) 460.

[120] *Dendy v University of the Witwatersrand* (SCA) (note 16 above).

[121] Ibid paras 15 and 24. See also Burchell *Personality Rights* (note 54 above) 329.

[122] Ibid. See also Neethling, Potgieter & Roos (note 54 above) 191.

When contemplating the actual operation of this legal duty, that is, the requirements of the actio iniuriarum (as constitutionally adjusted) to a set of facts, the factual violation and wrongfulness requirements of the delict of the impairment of dignity must be applied separately to highlight dignitas' individual and collective dimensions as immediately discussed above. Of further importance is the adjustment of the requirement of fault to the delict of impairment of dignity. As this will expand the personal responsibility of a potential defendant through the inclusion of negligence, in addition to intention, some rudimentary statements must be made about how this standard of fault can play out in a particular set of facts.

To start off with, the traditional test of the reasonable person for negligence, as formulated in the locus classicus of *Kruger v Coetzee*,[123] with its two legs of reasonable foreseeability and preventability will be applied to a potential infringement of the personality right to dignitas.[124] In terms of reasonable foreseeability, the enquiry will consider whether a reasonable person in the position of the defendant would have foreseen that his or her conduct may infringe the plaintiff's' personality right to dignitas.[125] Conversely, the reasonable preventability leg of the negligence test will consider whether a reasonable person in the position of the defendant would have taken reasonable steps to prevent the plaintiff's infringement of his or her dignitas as implicated by the former's conduct.[126] The fault requirement will not be limited to the subjective state of mind of the defendant but will include the standard of care expected from a reasonable person who exercises care and prudence in social interactions that may implicate an individual's dignitas.[127]

In the final analysis,[128] the constitutionalisation of the concept of dignitas in terms of the personality framework lies primarily in the apparent symbiosis between the common law and Constitution with regard to the recognition and protection of self-

[123] 1966 (2) SA 428 (A).
[124] Ibid 430. See also *Mukheiber v Raath and Another* 1999 (3) SA 1065 (SCA) para 31.
[125] *Sea Harvest Corporation v Duncan Dock Cold Storage* 2000 (1) SA 827 (SCA) paras 21-22. See also *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 60.
[126] *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) 776. See also generally *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA); *Minister of Safety and Security v Mohofe* 2007 (4) SA 215 (A); *Avonmore Supermarket v Venter* 2014 (5) SA 399 (SCA).
[127] *Herschel v Mrupe* 1954 3 SA 464 (A) 490. See also *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) 1212-1213; *Gold Reef City Theme Park (Pty) Ltd v Electronic Media Network Ltd and Another, Akani Egoli (Pty) Ltd v Electronic Media Network Ltd and Another* 2011 (3) SA 208 (GSJ) paras 81-83.
[128] It must be kept in mind that the scope, content and entitlements created by human dignity as a fundamental value and as fundamental right are not similar to those of dignitas. See Burchell *Personality Rights* (note 54 above) 329. These entitlements, as this stage, seem to converge in the context of the law of personality.

worth as a distinct personality interest. The personality framework identified the distinct personality interest embedded in the personality right to dignitas. This specific personality interest was constitutionally expanded with reference to the various ideals of the constitutional vision on the human personality implicating constitutional imperatives. Lastly, the legal duty formulated, for purposes of the positive law, derived from the structural adjustments made to the current framework of the common law of personality together with the fundamental right to human dignity. A more practical illustration of the application of the personality framework to dignitas will be included at the end of this section of the chapter.

5.3.2 The personality right to reputation: the personality framework and fama

> 'A person's good name or reputation (*fama*) is the opinion or regard which he enjoys within the community. Since a person is part of society and by nature a social creature, the esteem in which he is held by others with whom he is in contact, is particularly important to him … Any action which tarnishes or lower's a person's reputation within the community infringes his good name (footnotes omitted).'[129]

Beginning with the application of the doctrinal guideline to the common law personality right to reputation, which I will call fama in this chapter, protection is afforded to an individual's interest in his or her public esteem (which also includes semantic variations of 'status', 'good name' and 'reputation' in this particular context).[130] As a distinct interest in the human personality, a person's public esteem refers to the good name that a person enjoys in the estimation of others – that is, what others think of that individual as a person.[131] Fama is thus distinct from dignitas in that there is an essential difference between what others think of a person (fama) and what a person thinks of himself or herself (dignitas).[132] In terms of the common law's current framework, the fama generally imposes a legal duty on others not to lower the public estimation of an individual in a wrongful and intentional[133] manner.[134]

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[129] Neethling, Potgieter & Roos (note 54 above) 27. See also *National Media v Bogoshi* (note 128 above) 1216-1217; *Le Roux v Dey* (note 12 above) para 138; Burchell *Personality Rights* (note 54 above) 139; Neethling & Potgieter (note 94 above) 352; Loubser & Midgley (note 54 above) 411-412.

[130] *Whittington v Bowles* 1934 EDL 142, 145; *O'Keeffe v Argus Printing and Publishing Co* Ltd 1954 (3) SA 244 (C) 247-248; Neethling, Potgieter & Roos (note 54 above) 129; Neethling & Potgieter (note 94 above) 352; Loubser & Midgley (note 54 above) 412.

[131] Ibid.

[132] This is also doctrinally reflected in the positive law as defamation requires an element of publication to another person than the plaintiff which is not the case with dignitas. See NJ Van der Merwe & PJJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 445-446; Neethling, Potgieter & Roos (note 54 above) 28, 131; Loubser & Midgley (note 54 above) 412.

[133] With regard to recent legal developments, a distinction is made between media and non-media defendants. Although not entirely resolved in positive law, it would appear that the standard of fault

Such protection for an individual's personality interest to public esteem is enabled when the requirements for a defamation action have been satisfied (i.e. the delict for the impairment of fama which is based on the secondary characteristics of the actio iniuriarum). However, to fully grasp these requirements for a defamation action, one needs to appreciate the distinction and interaction between the definitional components of defamation and the requirements for this specific delict.[135]

Defamation is defined as the '(a) wrongful and (b) intentional (c) publication of a (d) defamatory statement (e) concerning the plaintiff'.[136] However, academic commentators have recognised that this definition, with its various definitional components, does not represent the positive law requirements of a defamation action in terms of the actio iniuriarum.[137] Accordingly, the positive law requirements of a defamation action are regarded as: (1) a factual violation of the plaintiff's public esteem which is both (2) wrongful and (3) intentional (although, with the last requirement, greater latitude is afforded to media defendants).[138]

Max Loubser and Rob Midgley explain this interaction between the definitional components and requirements of a defamation action as follows: (1) the factual violation requirement incorporates (c) the publication of a (d) defamatory statement (e) concerning the plaintiff.[139] In other words, the factual violation requirement of a defamation action follows the same general structure of the factual violation requirement under the actio iniuriarum, i.e. incorporating the elements of conduct, harm and causation.[140] To clarify, the other two requirements relate to (2)

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required for media defendants is negligence while for non-media defendants it would seem that only intention will suffice. See *National Media v Bogoshi* (note 128 above) 1214; *Mthembi-Mahanyele v Mail & Guardian* 2004 (6) SA 329 (SCA) para 46.

[134] *Le Roux v Dey* (note 12 above) para 138; Neething, Potgieter & Roos (note 54 above) 131; Neethling & Potgieter (note 94 above) 352.

[135] *Khumalo v Holomisa* (note 45 above) para 18, *Le Roux v Dey* (note 12 above) 84; Neethling & Potgieter (note 94 above) 352; Loubser & Midgley (note 54 above) 412.

[136] Ibid. Furthermore, it was further clarified in *Khumalo v Holomisa* (note 45 above) at paras 35-45 that falsity is not a requirement for a defamation action. This particularly alludes to the consideration of defences which would further give expression to the fundamental right to freedom of expression, section 16 of the Constitution. However, as stated in this thesis, see section 1.2.3 of chapter one, such considerations fall beyond the scope of this thesis.

[137] Neethling & Potgieter (note 94 above) 352-365; Loubser & Midgley (note 54 above) 412.

[138] Ibid. See also *De Lange v Costa* (note 74 above) 800-861.

[139] Loubser & Midgley (note 54 above) 412.

[140] See section 4.4.2 of chapter four. Neething and Potgieter take a very different view to that of Loubser and Midgley. More specifically, Neethling and Potgieter regard the (1) factual violation requirement as incorporating (c) the publication of material (e) referring to the plaintiff and the (2) wrongfulness requirement includes the inquiry as to whether the published material is (d) defamatory or not. See Neethling & Potgieter (note 94 above) 352-365. See also Neethling, Potgieter & Roos (note 54 above) 135-140. Thus, the main contention between these authors lies in whether the

wrongfulness and (3) intention.

Moving to the examination of the positive law requirements for a defamation, action, the factual violation requirement,[141] as contextualised and explained above, interrogates whether the defendant (i) published material (ii) about the plaintiff to a third party which (iii) was defamatory.[142]

In considering the first aspect of the factual violation requirement (i), this component is met if the publication, which may take the form of words or conduct, is made known or disclosed to a third party, that is, an individual other than the plaintiff.[143] This third party must also appreciate, on a very rudimentary level, the publication's meaning and significance.[144] In broad terms, this speaks to the element of conduct in terms of the general elements of delictual liability.

The second aspect of the factual violation requirement (ii) will be established if the publication was about the plaintiff. This entails an interrogation of whether the plaintiff is specifically referenced in the publication in question or a reasonable person would identify the plaintiff from the specific publication.[145] This refers generally to the element of causation.

The third and final aspect of the factual violation requirement (iii) seeks to determine what the legal meaning of such publication is and whether its meaning is defamatory (i.e. lowering the plaintiff's public esteem) according to the objective reasonable observer standard.[146] Considering the legal meaning of the publication,

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determination of a defamatory statement falls under the scope of the factual violation or wrongfulness requirement. However, in terms of the general doctrine of the law of delict, the defamatory statement is associated with the element of harm. In this regard, this is the approach that the courts follow. See *Khumalo v Holomisa* (note 45 above) para 18, *Le Roux v Dey* (note 12 above) para 84. However, for purposes of this thesis, I will follow the Loubser and Midgley structural ordering as this enables the different requirements to fulfil their distinctive roles. See section 4.3 of chapter four.

[141] For a comprehensive discussion of the factual violation requirement, see Loubser & Midgley (note 54 above) chapter 30.

[142] *Whittington v Bowles* (note 30 above) 145; *Pretorius v Niehaus* 1960 (3) SA 109 (O) 112; J Burchell *Principles of Delict* (1993) 161; Neethling, Potgieter & Roos (note 54 above) 131-132; D Milo & P Stein *A Practical Guide to Media* Law (2013) 20-21; Neethling & Potgieter (note 94 above) 352-353; Loubser & Midgley (note 54 above) 417.

[143] *Vermaak v Van der Merwe* 1981 (3) SA 78 (N) 78-80; *NEHAWU v Tsatsi* 2006 (6) SA 327 (SCA) paras 15-16; *Le Roux v Dey* (note 12 above) para 86; Neethling & Potgieter (note 94 above) 353; Loubser & Midgley (note 54 above) 421.

[144] Ibid.

[145] *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) 884; *Sauls v Hendrickse* 1992 (3) SA 912 (A) 918-920; *NEHAWU v Tsatsi* (note 143 above) para 16; *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA) 114; *Aymac CC v Widgerow* 2009 (6) SA 433 (W) 445; *Isparta v Richter* 2013 6 SA 529 (GP) paras 20 & 35. I

[146] In other words, what meaning will a reasonable observer attribute towards the publication and whether a reasonable person will find the meaning of the publication defamatory with regards to the context of the publication. Furthermore, see *Dremmers v Wyllie* 1980 (1) SA 835 (A) 842; *Sindani v*

courts will either rely on its primary meaning or secondary meaning (i.e. an innuendo).[147] With regard to the defamatory effect of the publication, this aspect of the factual violation requirement will be satisfied if the published defamatory statement will likely harm, that is more probable than not, the plaintiff's public esteem, by exposing him or her to moral condemnation, hatred, contempt, ridicule, or ostracism.[148] This denotes the harm element of general delictual liability.

However, it must be remembered that at this stage in terms of the current framework of the actio iniuriarum, some courts tend to confuse the personality right to fama with the personality right to dignitas, despite the specific tests that were developed for each personality right.[149] The Constitutional Court in *Le Roux v Dey* found that if a reasonable observer would find that a publication is defamatory, the same individual will also find that the publication is contumelious (that is, also a factual violation of the plaintiff's dignitas).[150] This is further evidenced by the fact that the Court accepted that examples of a defamatory effect will include the plaintiff's exposure to humiliation (contumelia).[151] The differentiation between personality interests is not clearly maintained by the courts, or at least by the Constitutional Court.

After establishing a factual violation of the plaintiff's fama, a rebuttable presumption exists that the plaintiff's reputation was infringed wrongfully.[152] This is not a conclusive finding on wrongfulness as grounds of justification are generally considered at a later stage.[153] Furthermore, as detailed in this thesis and chapter,[154]

Van der Merwe 2002 (2) SA 32 (SCA) para 10-11; *Le Roux v Dey* (note 12 above) para 86; Neethling & Potgieter (note 94 above) 354-355; *Mtyhopo v South African Municipal Workers Union National Provident Fund* 2015 (11) BCLR 1393 (CC) para 30; Loubser & Midgley (note 54 above) 422-431.

[147] The primary meaning of a publication generally refers to its ordinary grammatical meaning. See *Sindani v Van der Merwe* (note 146 above) paras 10-11. On the other hand, an innuendo refers to a hidden meaning, that is, the specific meaning of a publication will come to light when it is understood in terms of special circumstances which is reasonably known to the target audience of the publication. See *Sutter v Brown* 1926 AD 155, 162. Further see *Le Roux v Dey* (note 12 above) paras 87-88 for a general exposition on determining the meaning of a publication.

[148] *Dremmers v Wyllie* (note 146 above) 842; *Johnson v Beckett and Another* 1992 (1) SA 762 (AD) 774; L*e Roux v Dey* (note 12 above) para 9; Loubser & Midgley (note 54 above) 424-426. Actual evidence of whether a reasonable observer would think less of the plaintiff is not a requirement, see *Le Roux v Dey* (note 12 above) para 91.

[149] For a detailed discussion of this, see section 4.4.2 of chapter four.

[150] *Le Roux v Dey* (note 12 above) paras 141-143. See also Gowar & Visser *Le Roux* (note 95 above) 497-497.

[151] *Le Roux v Dey* (note 12 above) para 90.

[152] *Joubert and Others v Venter* 1985 (1) SA 654 (A) 696; *Botha v Mthiyane* 2002 (1) SA 289 (W) para 51; *Modiri v Minister of Safety and Security* 2011 (6) SA 370 (SCA) para 10; *Le Roux v Dey* (note 12 above) para 85; Loubser & Midgley (note 54 above) 433-434.

[153] See section 4.4.3 of chapter four.

the general standard of fault for the infringement of a plaintiff's reputation is intention[155] (although the courts have made some concessions into negligence when the defendant is a member of the institutional media).[156]

With this exposition of the current framework of the actio iniuriarum, the first guideline of the personality framework shows that the personality right to fama delineates the concrete personality interest to an individual's public esteem. An individual's public esteem is conceptualised as a social construct with its existence found in the criterion of the reasonable observer (and not subjectively according to the individual him- or herself). The current positive law affords protection to the fama in the form of imposing a legal duty on others not to publish material which lowers a person's public esteem in a wrongful and intentional manner (in their interactions with third parties). However, this legal duty is constrained by classical liberal considerations as the courts fail to differentiate between the different personality interests. In addition, except for the institutional media, negligence-based liability is still universally unavailable for other types of defendants. This further entrenches (pre-constitutional) classical liberalism. The ideological and structural development of the personality right to fama will be considered in terms of the next two guidelines of the personality framework.

Moving to the next stage of the personality framework, which is the consideration of the ideological guideline, the universal ideal will firstly ground a person's public esteem in the universal categorical imperative that each individual possesses absolute inner worth.[157] As opposed to the subjective quality of absolute inner worth associated with dignitas, public esteem invokes the objective quality of this absolute inner worth.[158] To expound, this objective quality of human dignity

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[154] See sections 4.3 and 4.4 of chapter four and section 5.1 of this chapter.

[155] Consisting out of the direction of will and knowledge-of-wrongfulness components. See *SAUK v O'Malley* 1997 (3) SA 394 (A) 401-403; *Le Roux and Others v Dey* (note 12 above) paras 129-137. As explained in section 4.4.4 of chapter four, this thesis will examine the appropriate standard of fault applicable to the impairment of dignitas rather than engaging with this presumption as the former is a more fundamental issue. It must be noted that this again will not be a conclusive finding on fault and, in an indirect manner, a court will still interrogate the fault issue. See *Modiri v Minister of Safety and Security* (note 152) para 12.

[156] *National Media v Bogoshi* (note 128 above) 1214; *Mthembi-Mahanyele v Mail & Guardian* (note 133) para 46.

[157] *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 para 107.

[158] *National Media v Bogoshi* (note 128 above) 1216-1217; *Khumalo v Holomisa* (note 45 above) paras 27-28; RC Post 'The social foundations of defamation law: Reputation and the Constitution' (1986) 74 *California Law Review* 691, 711; J Neethling 'The Constitutional Court gives the green light to the common law of defamation' (2002) 119 *South African Law Journal* 700, 702; A Hughes *Human*

relates to the public estimation of the worth or value of an individual (which culminates in the individual reputation of a person).[159] However, a person's public esteem ought to be detangled from classical liberal conceptions of human worth, which objectify an individual in terms of material considerations such as social hierarchy, wealth and privilege.[160] Instead, a person's public esteem ought to derive its value from the reverence that arises from that individual's full and equal membership to society.[161] As a result, the social concept of public esteem seeks to protect the ability of individuals to be integrated into a community[162] and a person's public esteem has both individual significance (the individualistic ideal) and collective significance (the collectivist ideal).[163]

In terms of the individualistic ideal, all individuals have membership of humanity which exemplifies 'the unique identity of the human species as a whole and the uniqueness of each individual'.[164] In more practical terms, a person's public esteem affords an individual equal membership to this shared humanity, which will enable him or her to develop his or her uniqueness. This binds that individual's uniqueness to that of the human image in general[165] and an individual has an interest in his or her public esteem, a distinctive quality of the human personality, as part of the constitutional imperative of leading a good and meaningful life.

Both the universal ideal and its sub-component, the individualistic ideal, depict the individual dimensions of the personality interest to public esteem and its linkage to

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Dignity and Fundamental Rights in South Africa and Ireland (2014) 168, 219; Currie & De Waal (note 117 above) 256.

[159] Ibid.

[160] Post (note 158 above) 711; R Sullivan *Immanuel Kant's Moral Theory* (1989) 197; H Botha 'Human dignity in comparative perspective' (2009) 20 *Stellenbosch Law Review* 201, 217-220; R Bayefsky 'Dignity, honour, and human rights: Kant's perspective' (2013) 41 *Political Theory* 809, 818-819.

[161] *Ferreira v Levin* (note 109 above) para 49; *S v* Makwanyane (note 118 above) para 224; *Masethla v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 27; D Bilchitz 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' (2009) 25 *South African Journal on Human Rights* 38, 40; Hughes (note 158 above) 158.

[162] Post (note 158 above) 716-717. See also *New York Times v Sullivan* 376 US 254 (1964); *Gertz v Robert Welch, Inc* 418 US 323 (1974) 341.

[163] Ibid. The dignitarian view of public esteem prompts more collectivist considerations in the realisation of a person's public esteem. Consequently, these greater collectivist considerations may find further expression in the collectivist ideal of the constitutional vision on the human personality. See also *Hill v Church of Scientology of Toronto* (note 157 above) para 108; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) 201; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 178-179.

[164] Post (note 158 above) 713 and 716; J Marshall *Personal Freedom Through Human Rights Law? Autonomy, Identity and Integrity Under the European Convention on Human Rights* (2009) 29; P O'Callaghan *Refining Privacy in Tort Law* (2012) 32-34.

[165] DL Zimmerman 'Requiem for a heavyweight: A farewell to Warren and Brandeis's privacy tort' (1983) 68 *Cornell Law Review* 291, 326-337; Post (note 158 above) 711-712

the constitutional imperatives related to the development of the individual.

Considering the collectivist ideal next, the shared humanity mentioned previously is grounded in the concept of public esteem, as it lays down the foundation, amongst others, for society to maintain the contours of its own social constitution, that is to develop its own 'cultural identity' and 'preserve the stability of social life'.[166] In other words, public esteem constitutes individual reputations that form the basis for societal relationships in which a society can maintain its identity and stability.[167] Society has an interest in defining and maintaining the membership of individuals to the greater collective[168] and, arguably, this can be achieved by setting down standards of conduct guiding the social interactions of the collective and its members with regard to the concept of public esteem.[169] Certain values ought to be created to underpin these standards of conduct for its members with regard to shared human membership.

According to Robert Post, such values must be framed in a more communitarian fashion as the identity and stability of society can only be maintained through standards of conduct or care which increase individual members of society's awareness of their own and each other's public estimation.[170] In other words, the solidarity and interconnectedness between individuals in respect of their shared human membership. Such values should incorporate several broad goals. First, all members of society ought to have a good opinion of each other to facilitate the harmonious participation in social life.[171] Secondly, when such harmonious participation in social life is disturbed, society ought to rehabilitate such disturbance through adjudicative frameworks that promote social cohesion and identity.[172] With regard to these goals, it is then implicit to determine when an individual will find protection for the reduction of his or her public esteem by considering the specific entitlements created by an individual's interest to his or her public esteem. This speaks to the creation and application of rights and duties to private relationships (in other words, legal duties in respect of the positive law's framework).

Before continuing with the third guideline of the personality framework, it is

[166] KT Erikson *Wayward Puritans: A Study in the Sociology of Deviance* (1966) 13; Post (note 158 above) 711 & 716.
[167] Post (note 158 above) 716.
[168] Ibid 711 & 716.
[169] Ibid.
[170] Ibid.
[171] Ibid 712-713, 717.
[172] Ibid.

imperative to note that the collectivist ideal, as a sub-component of the universal ideal, denotes the collective dimensions of the personality right to fama and its affiliation with the constitutional imperative concerning the greater collective.

Moving to the third guideline of the personality framework, that is the framework guideline, the personality interest to public esteem will also invoke the fundamental right to human dignity, as in the case with dignitas as discussed above.[173] However, while the general guarantees of section 10 of the Constitution will also be applicable (as the fundamental right to human dignity also encompasses the interest to public esteem), the specific entitlements that ought to be created under the fama should be different to that of dignitas.[174] This is so dignitas and fama implicate different and distinct parts of the human personality, as provided by the constitutional vision of the human personality.[175]

Constitutional scholars recognised that the entitlements created by human dignity as a fundamental right are more general than specific when compared to other more concrete interests or rights.[176] In other words, the fundamental right to human dignity is a norm of great abstraction which operates mostly as an 'interdependent and correlative right' which is shaped by more specific interests or rights.[177] Other concrete interests or rights are seen as more specific incidences of the general entitlements provided by human dignity as a fundamental right.[178] These interests or rights also give expression to the core concern of protecting absolute inner human worth,[179] The fundamental right to human dignity embraces and informs these other substantive interests or rights as the specific entitlements and corresponding duties will be located in the interests or rights of greater specificity.[180] This means that for purposes of applying the personality framework to fama, the constitutional protection of public esteem will fall under the banner of the fundamental right to human dignity. However, the creation of specific constitutionalised entitlements with regard to public

[173] See section 5.3.1 above.
[174] Section 10 of the Constitution of the Republic of South Africa, 1996.
[175] See section 3.2.2.1 of chapter three. Also see G Devenish *A Commentary on the South African Bill of Rights* (1999) 87; Hughes (note 158 above) 208-210.
[176] Woolman (note 50 above) 21; Currie & De Waal (note 117 above) 253; De Vos & Freedman (note 112 above) 460.
[177] Woolman (note 50 above) 25; Currie & De Waal (note 117 above) 253; De Vos & Freedman (note 112 above) 460-461.
[178] Ibid. See also *Khumalo v Holomisa* (note 45 above) para 27; S Cowen 'Can dignity guide South Africa's equality jurisprudence?' (2001) 17 *South African Journal of Human Rights* 34, 47.
[179] Ibid.
[180] Ibid.

esteem will find greater specificity in the constitutionalised personality right to reputation. For purposes of clarification, this refers to the legal duty to be created in terms of the framework of the common law of personality (as constitutionally adjusted).

Considering the substance of this legal duty, one has to take note of the apparent symbiosis between the fama and human dignity (i.e. the interplay between the constitutional value and fundamental right) as both legal concepts reach convergence at the notion of public esteem as envisioned by the Supreme Court of Appeal in the *Dendy* judgment.[181] In this particular context, both the fama and human dignity seek to protect an individual's public esteem, i.e. his or her estimation according to other individuals. Both legal concepts conceive an individual's public esteem, through the personality right to reputation, as an objective social construct which affords an individual some form of affiliation to or means to participate in the greater collective. This symbiosis culminates in the shared goal that an individual receives protection against an unjustified reduction of his or her public esteem. Within this particular context, this symbiosis also seems to illustrate the conceptual difference between the qualities of having self-worth (dignitas) and public esteem (fama).[182] The distinctive quality of having public esteem contributes in its own right towards the constitutional imperatives of leading a good and meaningful life and the maintenance of the cohesion and stability of the greater collective.

Moving to the methodology of this legal duty, in terms of the framework guideline, the requirements of a defamation action can give primary form to this duty in the positive law.

With reference to the first requirement of a defamation action, the factual violation requirement will effectively realise the individual dimensions pertaining to public esteem. In other words, the factual violation requirement can indicate the distinct nature of the fama and the subsequent individual effect that a purported defamation had on the plaintiff. First, the publication component (that is, publication to third parties) will indicate that the fama is implicated. Secondly, the component that the publication must refer to the plaintiff will indicate the public esteem of a specific

[181] *Dendy v University of the Witwatersrand* (note 16 above) paras 15 and 24; *National Media v Bogoshi* (note 128 above) 1216; *Khumalo v Holomisa* (note 45 above) para 36; *Le Roux v Dey* (note 12 above) para 138.

[182] I.e. one's own perception as a valuable member of society versus the participation in society based on one own's membership to humanity and society. See section 5.3.1 for comparison.

plaintiff. Lastly, the defamatory component as part of the factual violation requirement (that is, the lowering of public estimation) will further highlight the distinguishable harm that was perpetrated against the plaintiff's (that is, the lowering of the plaintiff's public estimation).[183]

However, the defamatory component, under the factual violation requirement, will also interrogate collectivist considerations. When determining the defamatory effect of a publication, the criterion of the reasonable person standard is employed to establish whether a publication will likely harm the public esteem of the plaintiff. Through the employment of the reasonable person criterion, the defamatory component will also implicate societal expectations in respect of the plaintiff's potential lowered estimation. As argued in this thesis, the reasonable person standard represents the societal expectations of the greater collective.[184] Accordingly, the reasonable person criterion simultaneously signifies an individual's reputation and its connection to the broader collective. This starts to confirm the notion that public esteem serves as a portal to express individuals' shared membership to the uniqueness of the human image.[185]

This is further entrenched by the wrongfulness requirement. The prima facie wrongfulness mechanism probably suggests that individuals ought to have a good opinion of each other to facilitate harmonious social relationships based on this shared human membership. Any unjustified deviation from this societal expectation can indicate a norm violation. However, it must be kept in mind that this is not a conclusive finding on wrongfulness. Consequently, the consideration of defences under the justification stage will provide a more concrete investigation into individual interests as balanced against those of the greater collective.[186]

With final consideration to the fault requirement of a defamation action, the standard of care required from individuals to respect and contribute towards the social cohesion and identity of the greater collective can be benchmarked by this requirement of a defamation action. However, the requisite standard of fault, that is the degree of personal responsibility and care required from individuals, should not

[183] A Fagan 'The Constitutional Court loses its (and our) sense of humour: *Le Roux v Dey*: Notes' (2011) 128 *South African Law Journal* 395, 400.
[184] In particular see sections 4.4.4 of chapter and 5.2 of this chapter.
[185] In this regard, the context of the application of the reasonable person standard determines the purposes for which it is used. For harm, the reasonable person standard is used to highlight the social significance of an individual's public esteem. In the context of fault, the reasonable person generally indicates the standard of care expected from individuals.
[186] See section 4.4.3 of chapter four.

only reflect the individual interests in public esteem, it should also reflect its collective dimensions. This will require the inclusion of negligence as an appropriate standard of fault in a transformative constitutionalism paradigm.

In considering the final aspect of the third guideline of the personality framework, here I will illustrate the potential operation of the methodology of the mentioned legal duty mentioned before as influenced by the constitutional adjustments contemplated in this chapter.

Starting with the factual violation requirement, it is imperative that courts distinguish between the various personality rights such as dignitas and fama. The distinctive nature of the different personality rights is expressed in the factual violation requirement for each personality right,[187] for instance, the factual violation requirement of the delict of impairment of dignity seeks the presence of contumelious (or humiliating behaviour) which the plaintiff subjectively experienced. With the factual violation requirement of a defamation action, however, the existence of a publication about the plaintiff which lowers the plaintiff's estimation is sought (according to the reasonable observer standard independent of the plaintiff's subjective feelings). From a structural point of view, this will then mean that defamatory conduct is not per se contumelious and vice versa. Ultimately, contrary to what the Constitutional Court in *Le Roux v Dey* suggested, the fama and dignitas are not mere variations of an abstract concept of human dignity and can be distinguished from one another on the same factual matrix.[188]

Considering the wrongfulness requirement next, despite the prima facie wrongfulness mechanism, courts must appreciate that the boni mores criterion ought to be applied under the justification stage of a defamation action.[189] With the boni mores criterion, individual interests will be balanced against those of the greater collective. Accordingly, the wrongfulness requirement ought to serve as the positive law vehicle to realise the collectivist dimensions of the human personality. The prima facie wrongfulness mechanism arguably embodies the norm that all members of society ought to have a good opinion of each other to facilitate the harmonious participation in social life.[190] This norm lays the foundation for the standard of care required from individuals under the fault requirement.

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[187] See section 4.3 and 4.4.3 of chapter four.
[188] See sections 1.1 of chapter one, 2.2 of chapter two, 3.2 of chapter three and 4.3 of chapter four.
[189] See section 4.4.2 of chapter four.
[190] Post (note 158 above) 712-713 & 717.

Lastly, in terms of the fault requirement, negligence, as a standard of fault, must, in addition to intention, be included in the requirements of a defamation action. Negligence ought to be applicable to *all* defendants and not only those who form part of the institutional media.[191] In this regard, various divisions of the High Court have considered the implications of introducing negligence liability in the context of the personality right to fama.[192] For instance, in *Pieterse v Clicks Group Ltd*[193] the High Court acknowledged negligence as an appropriate standard of fault for defamation cases and stated that '[t]he test for negligence is premised on the deviation from acts of a reasonable person (the *diligens paterfamilias*), which in turn is informed by our constitutional values'.[194] Accordingly, a deviation from the reasonable person standard, i.e. the standard of care expected from individuals, will be established in terms of the two legs of the negligence test, namely reasonable foreseeability and preventability.[195]

In examining these two legs in greater detail, the Supreme Court of Appeal in *National Media Ltd v Bogoshi*[196] gave some implicit consideration to the potential content of these two legs as applied to a defamation action.[197] In terms of reasonable foreseeability, the enquiry will turn to whether a reasonable person in the position of the defendant would have foreseen that his or her publication would have lowered the plaintiff's public esteem.[198] Applicable factors may include the nature, tone and extent of the defamatory imputation and its intended audience.[199] Considering the reasonable preventability leg, the interrogation here will focus on whether a reasonable person would have refrained from communicating the defamatory imputation.[200] With this leg, applicable factors potentially cover whether the defendant could have verified the information contained in the defamatory imputation

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[191] *National Media Ltd v Bogoshi* (note 128 above) 1214; Neethling, Potgieter & Roos (note 54 above) 244-245.
[192] *Marais v Groenewald* 2001 (1) SA 634 (T) 644-646; *Heyns v Venter* 2004 (3) SA 200 (T) para 14; *Pieterse v Clicks Group Ltd* 2015 (5) SA 317 (GJ) para 71; *Manuel v Economic Freedom Fighters and Others* [2019] 3 All SA 584 (GJ) paras 61-67.
[193] *Pieterse v Clicks Group Ltd* (note 192 above).
[194] Ibid para 57.
[195] *Cape Town Municipality v Paine* 1923 AD 207 216; *Kruger v Coetzee* (note 123 above) 430.
[196] *National Media Ltd v Bogoshi* (note 128 above).
[197] Ibid 1212-1213. However, the Court gave these guidelines in terms of the defence of reasonableness only applicable to media defendants. But the considerations given here can equally be applied to the reasonable foreseeability and preventability of the negligence test in respect of all defendants.
[198] Ibid.
[199] Ibid.
[200] Ibid.

(that is, the allegations made against the plaintiff), the relative ease of such verification and the relative social importance of the information contained in the defamatory imputation.[201] The introduction of negligence liability, as applicable to all defendants, will require individuals not to deliberately and carelessly damage the reputation of others (and attempt to verify the content of their defamatory imputations).[202]

Upon final reflection on the application of the personality framework to the personality right to fama,[203] the constitutionalisation of this personality right finds its basis in the apparent symbiosis between the common law and Constitution. In terms of this symbiosis, public esteem is recognised and protected as a distinct personality interest. In addition, the personality framework identified the distinct personality interest embedded in the personality right to fama, its individual and collective dimensions, the implication of constitutional imperatives, and the legal duty to be formulated for purposes of the positive law as derived from methodological adjustments made to the current framework of the common law of personality. With regard to the creation of this legal duty, substantive adjustments were contemplated about fault requirement and the separate application of the factual violation and wrongfulness requirements. A more practical illustration of the application of the personality framework to fama will be included at the end of this section of the chapter.

5.3.3 The personality right to privacy: the personality framework and informational privacy

> 'Privacy is an individual condition of life characterised by seclusion from the public and publicity, the extent of which is determined by the individual himself. This implies an absence of acquaintance with the individual or his personal affairs in this state. Accordingly, privacy can only be infringed by unauthorised acquaintance by outsiders with the individual or his personal affairs (footnotes omitted).'[204]

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[201] Ibid.

[202] *Gold Reef City Theme Park v Electronic Media Network Media Network* (note 128 above) paras 81-83.

[203] It must be kept in mind that the scope, content and entitlements created by human dignity as a fundamental value and as fundamental right are not similar to those of fama. See *Khumalo v Holomisa* (note 45 above) para 27. The application of the personality framework to the personality right to dignitas only attemps to illustrate the symbiosis between constitutional and private law concepts in the context of personality infringements and does not attempt to reduce the content of the Constitution to these particular circumstances.

[204] Neethling & Potgieter (note 94 above) 371. See also *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) 462; *National Media Ltd v Jooste* 1996 (3) SA 262 (A) 271; *Bernstein v Bester* 1996 (2) SA 751 para 54; Burchell *Personality Rights* (note 54 above) 365-367; Neethling, Potgieter &

In terms of the doctrinal guideline of the personality framework, the personality right to privacy, which I will call informational privacy in this chapter, seeks to demarcate and protect an individual's personality interest to informational self-determination (which includes the semantic variation of 'personal privacy' in this particular context).[205] To expound, with informational self-determination, a person has the competence to 'determine the destiny of his [or her] private facts and therefore the scope of his [or her] interest in [those private facts]'.[206]

Analysing this personality interest further, a person subjectively determines which facts, relating to him or her, are private, that is information he or she wishes to exclude from the knowledge of outsiders.[207] Within this subjective determination, a person can accordingly determine the ambit, purpose, method or conditions of disclosing such private facts.[208] However, this subjective determination by an individual, which is more commonly known as a 'subjective expectation of privacy', is not absolute or inviolable, as the individual's expectation of privacy must be objectively reasonable according to the norms of society.[209]

Therefore, informational self-determination, in terms of the current common law framework, imposes a legal duty on others to refrain from acquiring and disclosing information of another's private life, against the latter's expectation of privacy, in a wrongful and intentional manner.[210] To receive protection in positive law for the

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Roos (note 54 above) 30; Loubser & Midgley (note 54 above) 391. As I am dealing with the common law right to informational privacy, I will not engage with legislative means to protect an individual's privacy in the broadest sense. I will not refer to the Protection of Personal Information Act 4 of 2013 which encompasses data protection principles which in a broader yet distinct sense protects an individual's interest to personal information. The scope of this Act's application, in terms of section 3, relates to personal information that has been recorded or stored and is thus distinct to informational self-determination,

[205] See J Neethling 'The concept of privacy in South African law' (2005) 122 *South African Law Journal* 18, 20 where common law privacy is termed as 'informational privacy'. See also *Bernstein v Bester* (note 204 above) para 68; *Mistry v Interim National Medical and Dental Council and Others* 1998 (4) SA 1127 (CC) para 14; South African Law Reform Commission *Discussion Paper 109 Privacy and Data Protection* (October 2005) Ch 2, 12; I Currie 'The concept of privacy in the South African Constitution: Reprise' (2008) *Journal of South African Law* 449, 553; Currie & De Waal (note 117 above) 303.

[206] *National Media v Jooste* (note 204 above) 271-272; *Greeff v Protection 4U* (note 94 above) 384; Neethling (note 205 above) 20; Neethling, Potgieter & Roos (note 54 above) 32; Loubser & Midgley (note 54 above) 391; Milo & Stein (note 142 above) 51.

[207] Ibid.

[208] Ibid.

[209] *National Media v Jooste* (note 204 above) 270-271; *Bernstein v Bester* (note 204 above) paras 67-68; *NM v Smith* (note 47 above) para 45; Neethling, Potgieter & Roos (note 54 above) 221; Milo & Stein (note 142 above) 52; Currie & De Waal (note 117 above) 297-298 & 303.

[210] Ibid. See also *Financial Mail v Sage Holdings* (note 204 above) 462; *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A) 850; *Motor Industry Fund Administrators (Pty) Ltd v Janit* 1994 (3) SA 56 (W) 60; Loubser & Midgley (note 54 above) 391.

infringement of an individual's informational privacy, the following requirements of the delict of impairment of privacy, which is also known as breach of privacy, must be satisfied (as underpinned by the current framework of the actio iniuriarum): (1) a factual violation of the plaintiff's subjective expectation of privacy that is (2) wrongful, in that the plaintiff's expectation is objective reasonable, and (3) intentional.[211]

In examining these requirements for the delict of breach of privacy further, the factual violation requirement determines whether a plaintiff's subjective expectation of privacy was infringed through an acquaintance of private facts by the defendant.[212] Such an acquaintance can take the form of an unauthorised intrusion[213] and/or disclosure.[214] In addition, the factual violation must be contrary to the plaintiff's subjective expectation of privacy without being contumelious (namely dignitas) or necessarily published to a third party (namely fama).[215]

With regard to the wrongfulness requirement, the objective reasonableness of the plaintiff's expectation of privacy is interrogated against the reasonableness criterion of the boni mores.[216] The factual violation of a plaintiff's interests should not only be against his or her subjective determination, but also against the legal convictions of the community (the boni mores).[217] To determine the reasonableness of the plaintiff's expectation of privacy, that is whether the boni mores should accept the facts in question as legally private and deserving of protection, the boni mores is conceptualised as a 'continuum' in terms of which the more 'a … person interrelates

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[211] *Financial Mail v Sage Holdings* (note 204 above) 462; *Bernstein v Bester* (note 204 above) para 68; *NM v Smith* (note 47 above) para 55; Neethling, Potgieter & Roos (note 54 above) 253; Neethling & Potgieter (note 94 above) 370-373; Loubser & Midgley (note 54 above) 391.

[212] *Financial Mail v Sage Holdings* (note 204 above) 462. See also D McQuoid-Mason 'Invasion of privacy: Common law versus constitutional delict – does it make a difference?' (2000) *Acta Juridica* 227, 229-232.

[213] An unauthorised intrusion refers to the situation where an outsider him- or herself acquires knowledge of personal facts relating to the plaintiff contrary to the plaintiff's expectation of privacy; see Neethling, Potgieter & Roos (note 54 above) 222.

[214] An unauthorised disclosure refers to the situation where an outsider reveals to third parties personal facts relating to the plaintiff contrary to his or her expectation of privacy, see Neethling, Potgieter & Roos (note 54 above) 226.

[215] *O'Keeffe v Argus Printing and Publishing* (note 130 above) 248; *Financial Mail v Sage Holdings* (note 204 above) 462; *Jansen van Vuuren v Kruger* (note 210 above) 849; *Greeff v Protection 4U* (note 94 above) 406-407; Neethling, Potgieter & Roos (note 54 above) 222. For a detailed discussion of the factual violation requirement, see Neethling, Potgieter & Roos (note 54 above) Chapter 8; Loubser & Midgley (note 54 above) Chapter 28.

[216] *Financial Mail v Sage Holdings* (note 204 above) 462; *Jansen van Vuuren v Kruger* (note 210 above) 850; *National Media v Jooste* (note 204 above) 272; *Bernstein v Bester* (note 204 above) para 68; Neethling, Potgieter & Roos (note 54 above) 221; Loubser & Midgley (note 54 above) 394.

[217] Ibid.

with the world[,] the more the right to [informational] privacy becomes attenuated'.[218] As further explained by Neethling, Potgieter and Roos, '[t]he *continuum* starts in the wholly inviolable inner self, then moves to the impervious sanctum of the home and personal life and ends in the public realm where the right to [informational] privacy would only be remotely implicated'.[219] In terms of the boni mores, on the one end of the continuum, where the inner self is positioned, a person will receive the most protection for his or her expectation of privacy, and, on the other end of the continuum, where the public realm is situated, a person will receive the least protection.[220] Therefore, the more a person moves from the inner sanctum to the public realm, the less likely a court will find that a factual violation was unreasonable.

Despite the development of sophisticated and distinct legal criteria to determine a factual violation of the personality right to informational privacy, and the subsequent wrongfulness of such violation, some courts tend to focus only on the factual violation requirement, that is, the subjective expectation of the plaintiff without testing this expectation against the boni mores.[221] For instance, in *Kumalo v Cycle Lab (Pty) Ltd*[222] the court was satisfied with the presence of 'an iniuria' when it established that the specific plaintiff's subjective expectation of privacy was infringed even though the court omitted to consider the objective reasonableness of it in respect of the legal convictions of the community.[223] Some courts tend to overlook the application of the wrongfulness requirement when the factual violation requirement is established, especially with the personality right to informational privacy.

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[218] Neethling, Potgieter & Roos (note 54 above) 221. With regards to the 'continuum of privacy', there was some ambivalence at to whether this concept only applied to the constitutional right to privacy, in section 14 of the Bill of Rights, or also found expression in informational privacy through the boni mores. For instance, the Constitutional Court articulated the continuum of privacy with regards to the fundamental right to privacy and the Court itself accepted that the genesis of this concept did not attach to informational privacy as the scope of these two rights are not the same, see *Bernstein v Bester* (note 54 above) paras 67 & 71. However, in a later judgment of the Constitutional Court it was accepted that the wrongfulness inquiry under the common law was permeated by the continuum of privacy, see *NM v Smith* (note 47 above) paras 33 & 41-45. See also IM Rautenbach & R Venter *Rautenbach-Malherbe Constitutional Law* 7th ed (2018) 378-380.

[219] Neethling, Potgieter & Roos (note 54 above) 221-222. See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) para 18.

[220] Ibid. See also *Mistry v Interim National Medical and Dental Council* (note 205 above) 1144-1145; *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC) para 49.

[221] *Kumalo v Cycle Lab* (note 47 above) paras 20-24.

[222] Ibid.

[223] Ibid. See also Gowar & Visser *Kumalo* (note 95 above) 165-167. However, this form part of a greater tendency where the courts do not separately apply the factual violation and wrongfulness requirements of the delicts concerning dignitas, fama and informational privacy. See section 4.4.2 of chapter four.

With regard to the last requirement of the delict of breach of privacy, courts require that the wrongful factual violation of the personality right to informational privacy must paired with intention, as the appropriate standard of fault,[224] to the exclusion of negligence.[225] Most notably, the Constitutional Court in *NM v Smith*[226] recanted the need for negligence liability as the Court was able to find liability in the manner in which it applied the requirement of intention to the particular facts before it.[227] Consequently, the majority decision was of the opinion that there was no need to introduce negligence-based liability for the infringement of the personality right to informational privacy (in addition to intention).[228]

To provide a summary of the current common law position at this juncture in terms of the first guideline of the personality framework, the concrete personality interest delineated under informational privacy is an individual's informational self-determination. This interest is subjective in nature but is qualified through the continuum of privacy which requires this subjective determination to be objectively reasonable according to the mores of society. Therefore, the personality interest to informational privacy imposes a duty on others not to violate an individual's informational self-determination wrongfully and intentionally when confronted with the personal private spheres of others. However, this legal duty is constrained by classical liberal considerations given the courts' failure to interrogate the wrongfulness requirement thoroughly and their recantation of the inclusion of negligence as an appropriate standard of fault.[229] Thus, the ideological and structural development of the personality right to informational privacy will be considered in terms of the next two guidelines of the personality framework.

Moving to the next stage of the personality framework, namely the consideration of the ideological guideline, the universal ideal and its sub-component, the individualistic ideal, will first highlight the close link between informational self-

[224] See sections 5.3.1 and 5.3.2 above. For thoroughness, intention in these circumstances refers to the plaintiff's direction of his or her will to injure the plaintiff's informational privacy with the knowledge that doing so is is wrongful. See *NM v Smith* (note 47 above) para 56.
[225] *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 461 (W) 468; *Jansen van Vuuren v Kruger* (note 210 above) 849.
[226] *NM v Smith* (note 47 above).
[227] Ibid para 68.
[228] Ibid para 57. When a plaintiff proves, in theory, both the factual violation and the wrongfulness requirement, intention is presumed. As explained in section 4.4.4 of chapter four, this thesis will examine the appropriate standard of fault applicable to the impairment of informational privacy rather than inquiring into the desirability of having intention presumed as the inclusion of negligence will supersede this particular issue in its entirety.
[229] See section 4.4 of chapter four for a more detailed discussion.

determination and human dignity as legal concepts.[230] Informational self-determination and human dignity's interconnectedness lie in an individual's autonomy, which enables him or her to express his or her absolute inner human worth through the unique human process of self-determination.[231] Autonomy, in this particular context, presupposes a 'sphere of personal autonomy' where an individual can choose how to live his or her life.[232] In this sphere of personal autonomy an individual can reflect on who he or she is, how he or she should relate to the outside world and exercise choices based on this process of self-reflection.[233] Autonomy, connecting human dignity and informational self-determination, focuses here on the unique interest of self-determination which relies on a personal sphere of self-reflection that enables an individual to develop his or her personality as part of the constitutional imperative of leading a good and meaningful life.[234]

The universal ideal and its sub-component, the individualistic ideal, illustrate the individual dimensions of the personality interest to informational self-determination and its association to constitutional imperatives dealing with the development of the individual.

In terms of the collectivist ideal, autonomy, in this particular context, ought to be understood in terms of its dignitarian (read as communitarian) roots free from extreme notions of classical liberalism.[235] Autonomy, in terms of the collectivist ideal, does not envision the individual as 'an unencumbered self' but as a 'spiritual-moral being' whose autonomous choices are guided by a sense of social need, personal responsibility, and human solidarity.[236] In terms of this vision of autonomy, an

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[230] *Khumalo v Holomisa* (note 45 above) para 27; *NM v Smith* (note 47 above) para 131; *Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Development* (note 109 above) paras 52 & 64.

[231] *Khumalo v Holomisa* (note 45 above) para 27; *NM v Smith* (note 47 above) paras 131-132; Botha (note 160 above) 189; Hughes (note 158 above) 263.

[232] *NM v Smith* (note 47 above) 131; R Thomas 'Where to from *Castell v De Greef*? Lessons from recent developments in South Africa and abroad regarding consent to treatment and the standard of disclosure' (2007) 124 *South African Law Journal* 188, 204.

[233] *Bernstein v Bester* (note 204 above) para 65; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 118 above) para 32; BVerfGE 27 ('the microcensus case'), 1, 6; EJ Eberle 'Human Dignity, privacy, and personality in German and American constitutional law' (1997) *Utah Law Review* 963, 980; RC Post 'Three concepts of privacy (2000-2001) 89 *Georgetown Law Review* 2087, 2092; Botha (note 160 above) 204; Woolman (note 50 above) 43-44.

[234] *Khumalo v Holomisa* (note 45 above) para 27; *NM v Smith* (note 47 above) para 132; Eberle (note 233 above) 980.

[235] *Bernstein v Bester* (note 204 above) para 65; Post *Three Concepts of Privacy* (note 233 above) 2092-2096; Botha (note 160 above) 204.

[236] Ibid. See also Eberle (note 233 above) 973.

individual is to be related and bound by the broader community.[237] An individual's autonomous self-determination is dependent on intersubjective values and norms which will enable an individual not only to develop his or her personality from within him or herself, but also externally in terms of the reciprocal embrace from the broader community.[238] Viewed from this perspective, autonomous self-determination reveals the need for a delicate balance between an individual's active engagement with the broader community, where the individual's personality is developed through social interactions, and the withdrawal of an individual from the broader community, where the individual retreats into him or herself for reflective self-development.[239]

The broader community, that is society, has an interest to observe this balance between active engagement and reflective retreat amidst changing economic, social and technological conditions.[240] An upset to this balance, especially within the context of the fourth industrial revolution with its onslaught of paradigm-shifting technologies, may deprive individuals of a reflective space necessary for self-determination.[241] Arguably, such a deprivation may curtail individuals' active engagement in the broader community in an attempt to protect their reflective spaces, which in turn diminishes the quality of participation in social life.[242] An argument can be made that autonomous self-determination does not only serve the interests of the individual, it also serves the interests of the broader society. This is because autonomous self-determination contributes towards the maintenance of the latter's social constitution by fostering social interaction and participation.

The observance of this balance between public participation and reflective retreat implies the need for regulatory norms.[243] These norms ought to guide the interaction between an individual's interest in his or her autonomous self-determination and society's interests in maintaining its social constitution and cohesion.[244] The balancing of these interests may present a range of complexities when the limits of individual autonomy are tested against the autonomy of other individuals and the interest of the greater collective in surveilling individual affairs to

[237] Ibid. See also Botha (note 160 above) 187-188.
[238] Post *Three Concepts of Privacy* (note 233 above) 2092;
[239] Eberle (note 233 above) 980.
[240] Ibid 1000-1001.
[241] Ibid 1002.
[242] Ibid.
[243] Ibid 980.
[244] Ibid 992.

ensure its own stability.[245] Legal norms ought to be used in response to this to weigh these interests in order to demarcate the resolve of individual autonomy and the exercised reach of the greater collective into individual affairs.[246] As suggested by Edward Eberle in this context, individual autonomy ought to be afforded an 'innermost inviolable area', that is the 'ultimate core of [the] personality', where entry into is forbidden.[247] Individual affairs which do not fall within this area, on the other hand, may be entered upon showing an overriding interest of the greater collective.[248] In acknowledging these 'spaces', concomitant specific entitlements with regard to autonomous self-determination may develop as the extent of the protection afforded by these entitlements is determined according to these spaces.[249] In other words, these norms ought to provide sufficient consideration to individual and collectivist interests which, in turn, should be balanced with each other.

The ideological considerations in respect of the collectivist ideal, as a sub-component of the universal ideal, highlight the collective dimensions of the personality interest to informational self-determination and its linkage to constitutional imperatives related to the collective.

Considering the third guideline of the personality framework next, namely the framework guideline, the contemplation of specific entitlements in respect of informational self-determination requires an examination into the fundamental right to privacy.[250]

In terms of section 14 of the Constitution,

'Everyone has the 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.'[251]

According to leading academic commentators in the field of constitutional law, the

[245] Ibid 994; JA Eichbaum 'Towards an autonomy-based theory of constitutional privacy: Beyond the ideology of familial privacy' (1974) 14 *Harvard Civil Rights-Civil Liberties Law Review* 361, 364.
[246] Eberle (note 233 above) 1001. See also Botha (note 160 above) 204.
[247] Ibid 997. See also *The National Coalition for Gay and Lesbian Equality v The Minister of Justice* (note 118 above) para 32; Woolman (note 50 above) 43-44.
[248] Ibid. See also Post *Three Concepts of Privacy* (note 233 above) 2095-2096; *NM v Smith* (note 47 above) para 132.
[249] *NM v Smith* (note 47 above) para 131.
[250] Section 14 of the Constitution of the Republic of South Africa, 1996.
[251] Ibid.

right to privacy, in section 14 of the Constitution, has two components.[252] First, it contains a general right or guarantee to privacy.[253] Secondly, it contains a specific guarantee against 'enumerated infringements of privacy, namely searches and seizures of someone's person, property or possessions and infringements of the privacy' of communications.[254]

These enumerated areas of protection form part of the general right to privacy.[255] For this reason, 'the general right to privacy is not confined to protecting individuals against searches and seizures or interference with private communications' as these specific instances are subordinate aspects of the right to privacy.[256] Accordingly, the general right to privacy extends protection to any other unlawful method of obtaining information or making unauthorised disclosures which ultimately interferes with an individual's autonomy in his or her sphere of private intimacy.[257] This sphere of private intimacy and autonomy, as the overarching concern at the core of the right to privacy, provides an individual general protection against unjustifiable (a) intrusions into an individual's private life, (b) interferences with an individual's private life (including the exercise of choices related thereto), and (c) disclosures of private facts or facts destined for a limited and/or specific purpose.[258]

Within this broad ambit of the general right to privacy, it is important to note that the Constitutional Court accepted that informational privacy, that is informational self-determination, forms part of the general right to privacy.[259] According to the Court in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*,[260] the general right to privacy is also implicated '[w]herever a

[252] Currie & De Waal (note 117 above) 294; De Vos & Freedman (note 112 above) 462; South African Law Reform Commission *Privacy and Data Protection* (note 205 above) Ch 2, 12.
[253] Ibid.
[254] Ibid.
[255] Ibid.
[256] Currie & De Waal (note 117 above) 295.
[257] See the immediate discussion above for the relationship between dignity and privacy through the concept of dignitarian autonomy. *The National Coalition for Gay and Lesbian Equality v The Minister of Justice* (note 118 above) para 32; Currie & De Waal (note 117 above) 302; De Vos & Freedom (note 112 above) 462; Rautenbach & Venter (note 218) above 375; South African Law Reform Commission *Privacy and Data Protection* (note 205 above) Ch 2, 12.
[258] Ibid. Although there appears to be some ambivalence to the exact scope and understanding of the constitutional right of privacy, which falls beyond the scope of this thesis as its discussion is only limited to the constitutionalisation of the common law of personality. See generally Neethling *The Concept of Privacy* (note 205 above); Currie *The Concept of Privacy* (note 205 above); IM Rautenbach 'Privacy taxonomies' (2009) *The Journal of South African Law* 548.
[259] *Mistry v Interim National Medical and Dental Council* (note 205 above) para 14; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* (note 219 above) para 16.
[260] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* (note 219 above).

person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable'.[261] In very broad terms, this seems to correspond with the common law concept of privacy or informational privacy when this aspect of the fundamental right to privacy is implicated.

Important to bear in mind is that the Constitutional Court in *Bernstein v Bester*[262] highlighted that the fundamental right to privacy extends only to those aspects 'in regards to which a legitimate expectation of privacy can be harboured'.[263] According to the Court, 'a legitimate expectation of privacy' has two components, namely (i) 'a subjective expectation of privacy' which ought to be (ii) 'objectively reasonable' according to the norms of society.[264] In terms of the subjective expectation of privacy, a person him- or herself determines which aspects (and concomitant autonomous choices) of his or her life is excluded from the public and not subject to intrusions or interferences.[265] The objective reasonableness of this expectation of privacy, conversely, focuses on a determination by the court whether the person claiming an infringement of his or her subjective expectation of privacy ought to receive juridical protection.[266] An individual's subjective expectation of privacy is measured according to constitutional standards as to when and under which circumstances an individual can legitimately expect external protection to the private aspect of his or her life.[267] Therefore, as analogous to the common law position as highlighted earlier, this determination of the objective reasonableness of a subjective expectation of privacy involves 'the continuum of privacy' concept which generally creates 'high and low privacy expectations'.[268] These privacy expectations depend on the extent to which an individual finds him- or herself in private or in public life and the existence of public interest which sets objective limits to privacy

[261] Ibid para 16. See also Rautenbach & Venter (note 218 above) 378-380; *NM v Smith* (note 47 above) paras 33 & 41-45; *Magajane v Chairperson, North West Gambling Board* 2005 (5) SA 520 (CC) paras 42-53; *Gaertner v Minister of Finance* (note 220 above) para 49.
[262] *Bernstein v Bester* (note 204 above).
[263] Ibid para 75. See also Currie & De Waal (note 117 above) 297-300; De Vos & Feedman (note 112 above) 462-464; Rautenbach & Venter (note 218 above) 378-380.
[264] Ibid.
[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] Ibid.

expectations.[269]

When considering the creation of a positive law duty in terms of the last aspect of the framework guideline, there appears to be a strong synergetic relationship between common law informational privacy and constitutional privacy with regard to the personality interest to informational self-determination.[270] In respect of the substance of this legal duty, both the common law and Constitution provide protection for an individual's informational self-determination deriving from autonomous moral human agency. In addition, both the common law and Constitution conceptualise informational self-determination as the ability of an individual to determine which facts of his or her life are private and the scope to which these facts may be made public.

As noted by the Constitutional Court in *NM v Smith* and academic commentators such as Ig Rautenbach and Roxanne Venter respectively, the unassailable convergence between common law informational privacy and constitutional privacy is apparent with regard to the scope of protection afforded to privacy by means of the legitimate expectation of privacy construct.[271] As succinctly elucidated by Rautenbach and Venter, after an individual's subjective determination of his or her expectation of privacy, courts objectively determine the reasonableness of this expectation.[272] As further explained by Rautenbach and Venter, the reasonableness of this expectation is determined by arranging broader societal expectations to privacy in 'concentric circles', ranging from the so-called 'inner sanctum', referring to family life and home affairs, which receives absolute protection, to so-called 'periphery privacy', referring to public life and participation in public affairs, which can be so diluted by societal interests that a subjective privacy

[269] Ibid. See also R Wacks *Privacy and Press Freedom* (1995) 39-43. However, unlike the common law, constitutional adjudication of an apparent infringement of privacy involves a 'two-stage process'; firstly, the nature of the particular interest relating to the autonomy in one's private life is assessed with regards to the continuum of privacy to determine whether there was an infringement, and secondly, if there has been an infringement, it must be determined whether such infringement was justifiable under section 36 of the Constitution, namely the limitation clause.[269] In this regard, the Constitutional Court in *Bernstein v Bester* (note 204 above) para 71 noted that the enquiry under the common law inquiry is a singular process which rests on the wrongfulness of the infringement of an individual's informational self-determination which is a far narrower concept than having autonomy in one's private life. It will be illustrated immediately below that there is convergence between the personality right to informational privacy and the fundamental right to privacy in the context of the human personality.

[270] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* (note 219 above) para 16; *NM v Smith* (note 47 above) paras 33 & 41-45; South African Law Reform Commission *Privacy and Data Protection* (note 205 above) Ch 2, 12; Rautenbach & Venter (note 218 above) 378-380

[271] Ibid.

[272] Rautenbach & Venter (note 218 above) 379.

expectation becomes unreasonable.'[273] With further contemplation of the *Dendy* judgment, the entitlements created by the fundamental right to privacy and the personality right to informational privacy converge in the personality interest to informational self-determination for purposes of the transformative constitutionalism paradigm.[274]

This synergetic relationship between the fundamental right to privacy and the common law personality right to informational privacy arguably further converge in terms of the broad method of the aforementioned legal duty as constituted in the requirements of the actio iniuriarum. The common law will be able to accommodate the legitimate expectation of privacy construct as it is inherent to the scope of privacy in terms of the common law and the Constitution, that is, those subjective and objective considerations as to when information is private and deserving of protection. The paragraphs below will canvass this convergence in terms of the broad methodology of the requirements for the delict of breach of privacy.

With regard to the first requirement of a breach of privacy action, the factual violation requirement can effectively accommodate the subjective dimension of the legitimate expectation to privacy construct. Through the specific tests that developed for the personality right to informational privacy, the factual violation requirement can indicate the distinct nature of this interest and the subsequent individual effect that a potential breach of privacy had on the plaintiff. A purported factual violation of a plaintiff's subjective expectation to privacy will indicate which private facts of a specific plaintiff are interfered with contrary to the determination of that plaintiff. In doing so, the unique characteristic of this personality interest will also be highlighted (as opposed to the protection of the personality interests to self- or public esteem). The factual violation requirement will be able to address the individual dimensions of the personality right to informational privacy.

Moving towards the next requirement of the breach of privacy action, the objective dimension of the legitimate expectation of privacy construct, which also represents the collectivist dimensions of the personality interest to informational self-determination, will find sufficient expression in the wrongfulness requirement of the delict for breach of privacy. As the boni mores is situated on a continuum, for purposes of the wrongfulness requirement, it subsequently entails a proportionality

[273] Ibid.
[274] *Dendy v University of the Witwatersrand* (note 16 above) paras 15 & 24.

exercise which balances the interests of the plaintiff, defendant and society.[275] In doing so, the wrongfulness requirement is able to consider broader societal concerns in addition to those of the plaintiff and defendant.[276] For this reason, the scope enquiry is broadened to accommodate the interests of the broader collective.

With regard to the last requirement of a breach of privacy action, the standard of care and degree of personal responsibility required from individuals to observe and respect the expectation of privacy of others can be supported by the requirement of fault. However, the requisite standard of fault required from individuals should not only reflect the individual dimensions of informational self-determination, it should also reflect its collective dimensions rooted in the communitarian values of human interconnectedness and solidarity. This will require the inclusion of negligence as an appropriate standard of fault in a transformative constitutionalism paradigm to accommodate this benchmark of human interconnectedness and solidarity in respect of other's spheres of intimacy and privacy. The inclusion of negligence will also propagate an adequate balancing between the individual and collective dimensions of the personality right to informational privacy.

Lastly, considering the actual operation of this legal duty in terms of the ideological dimensions and concomitant constitutional adjustments to the framework of the personality right to informational privacy, consideration must be afforded to the actual application of the factual violation, wrongfulness and fault requirements.[277] To emphasise, here I will consider how the method of the aforementioned legal duty in terms of the positive law ought to operate under a transformative constitutionalism paradigm.

As suggested previously with the personality rights to dignitas and fama,[278] the wrongfulness requirement must be applied independently to that of the factual

[275] As noted by the Constitutional Court in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 43, the balancing exercise of the boni mores is compatible with the proportionality exercise as embedded in the methodology of the Bill of Right's framework, that is the section 36-analysis. Furthermore, the Constitutional Court in *NM v Smith* (note 47 above) at paras 33 & 41-45, explicitly confirmed the compatibility of the wrongfulness requirement of informational privacy to that of the Constitution in respect of the continuum of privacy construct as to determine the objective reasonableness of an individual's subjective expectation of privacy. Therefore, the congruence in methodology between the common law and Constitution in respect of the personality interest to informational privacy would also indicate the common law's ability to accommodate the collectivist dimensions embedded in this personality interest.

[276] Ibid.

[277] With regards to the factual violation requirement, I argue that the requirement itself is uncontentious; however, the difficulty arises when the courts do not apply the wrongfulness requirement independently of it.

[278] See Sections 5.3.1 and 5.3.2 of this chapter. See also section s 4.4.2 of chapter four.

violation requirement to give effect to the individual and collective dimensions of the constitutionally informed personality interest to informational self-determination. In doing so, the upshot is that one is further able to clearly distinguish the different personality rights from one another as they implicate distinct individual and collective interests and considerations.

The fault requirement of the breach of privacy action requires constitutional reconsideration to give proper effect to a more collectivist conceptualisation of the standard of care required from individuals. In particular, negligence, as a standard of fault, must be included in the requirements of the breach of privacy action in addition to intention. This is to ensure, given the constitutional importance of the personality right to informational privacy, that this personality right is protected against deliberate (namely intention) and reckless (namely negligence) infringements.

Some of the courts considered the implications of introducing negligence liability in the context of the personality right to informational privacy.[279] For instance, Langa CJ (as he then was) in the minority judgment of *NM v Smith* considered the general inclusion of negligence-based liability.[280] Broadly, Langa CJ found that 'negligence [will be] established if a reasonable person in the position of the defendant would have foreseen the harm, the reasonable person would have taken steps to prevent it and the defendant failed to take those steps.'[281]

Referring to the general criterion of the reasonable person as the legal test for negligence, Langa CJ further considered the application of the two main legs of the negligence test, that is, reasonable foreseeability and preventability, to an infringement of informational privacy.[282] In terms of reasonable foreseeability, the enquiry would turn to whether a reasonable person in the position of the defendant would have foreseen that the information concerning the plaintiff, of which an intrusion to or disclosure of might result in harm, was essentially private.[283] Considerations ought to be afforded to the plaintiff's perceived expectation of privacy into private facts in question and whether these facts attracted publicity beforehand.[284] Furthermore, in terms of the reasonable preventability leg, courts will have to determine whether a reasonable person would have refrained from gaining access to or disclosing private

[279] For instance the minority judgments of O'Regan J and Langa CJ in *NM v Smith* (note 47 above).
[280] Ibid para 100. See also *Kruger v Coetzee* (note 123 above) 430.
[281] Ibid.
[282] Ibid paras 100-112.
[283] Ibid para 108.
[284] Ibid.

facts concerning a particular plaintiff.[285] Consideration must be given to the extent of the potential harm if the private information concerning the plaintiff was published and the ease with which the private nature of such information can be verified.[286]

Consequently, according to the minority judgment of Sachs J in *NM v Smith*,[287] determining negligence in the context of the personality right to informational privacy centres on the defendant's ability to consider and verify the privacy expectations of the particular plaintiff and those of the broader collective in the facts which were intruded on or disclosed by the defendant.[288]

In the end,[289] the constitutionalisation of the personality right to informational privacy, through the application of the personality framework, found its propagation in the symbiosis between the common law and the Constitution with regard to the personality interest of informational self-determination. The application of the personality framework in this regard identified the distinct personality interest embedded in the personality right to informational privacy, the personality right's individual and collective dimensions which resonate with the subjective and objective dimensions of the expectation of privacy construct in terms of the frameworks of the common law and Constitution, and the creation of the legal duty to be applied in positive law as derived from the constitutional adjustments made to the framework of the delict of breach of privacy. As a result of the personality framework, the ideological and structural dimensions of the personality right to informational privacy were constitutionally enriched while the basic doctrinal and structural components of this personality right were utilised. A more practical illustration of the application of the personality framework to informational privacy will be included below in the following sub-section.

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[285] Ibid para 111.
[286] Ibid.
[287] Ibid.
[288] O'Regan J also considered the issue of negligence in the context of informational privacy, see *NM v Smith* (note 47 above) paras 122-200. However, reference is not made to O'Regan J's judgments as she interrogated this issue through the lens of the liability of the media and contemplated the reasonable publication defence under the delict of defamation and did not develop specific guidelines concerning negligence in the context of informational privacy.
[289] The scope, content and entitlements created by the fundamental right to privacy and the personality right to informational privacy are not identical in all respects. See *Bernstein v Bester* (note 204 above) para 71. The application of the personality framework to the personality right to informational privacy only attempts to illustrate the symbiosis between constitutional and private law concepts in the context of personality infringements and does not attempt to reduce the content of the Constitution to these particular circumstances.

5.3.4 A practical illustration of the operation of the personality framework: Selected post-constitutional judgments

In this part of the chapter, I will provide a more practical illustration of the operation of the personality framework by applying it to selected post-constitutional judgments. As indicated earlier in this chapter,[290] these judgments include *Kumalo v Cycle Lab*,[291] *Le Roux v Dey*,[292] and *NM v Smith*.[293] I also provided discussions and analyses of these judgments earlier in this thesis.[294] Through the application of the personality framework, here I will address the doctrinal, ideological and structural problems created by these judgments in respect of the personality rights to dignitas, fama and informational privacy. I will propose solutions to these problems to the extent that they feature in these judgments. Each of these judgments will be discussed below.

Starting with *Kumalo v Cycle Lab*,[295] the plaintiff, a well-known South African television personality, was photographed by an employee of the defendant when she visited the latter's bicycle shop.[296] Without the plaintiff's consent, the defendant used the photograph for advertising purposes.[297] Consequently, the plaintiff instituted legal action against the defendant, based on the actio iniuriarum, for non-patrimonial damages arising out an alleged infringement of her personality rights to dignitas, identity and informational privacy.[298] The Court found that 'an iniuria' was present without delineating which particular personality right was implicated.[299] As highlighted earlier in this thesis, the Court achieved this result by failing to apply the factual violation and wrongfulness requirements, and the distinct tests that developed under each requirement, separately in respect of these potentially implicated personality rights.[300]

If the applicable personality rights were conceived as substantively distinct personality interests and methodologically delineated as such, through the separate

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[290] See sections 5.1 and 5.3 above.
[291] Note 47 above.
[292] Note 12 above.
[293] Note 47 above.
[294] See in particular sections 1.1 of chapter one and 4.2 and 4.4 of chapter four. I will only discuss these judgments as a basis to apply the personality framework and will not provide an in-depth analysis of these judgments here.
[295] Note 47 above.
[296] Ibid paras 2-4.
[297] Ibid.
[298] Take note, that the claim concerning identify, at para 10, falls beyond the scope of this thesis as indicated in section 1.2.1 of chapter one.
[299] Ibid paras 20-24; Gowar & Visser *Kumalo* (note 95 above) 165-167.
[300] See section 4.4.2 of chapter four.

application of the factual violation and wrongfulness requirements in terms of the application of the personality framework, the Court would have probably arrived at a different outcome. For instance, the Court could have found that contumelious conduct, the juridical test under the factual violation requirement for dignitas, was not present as the use of the plaintiff's image was not humiliating. In turn, the Court could have found that the publication of the plaintiff's image, without her consent, was contrary to her subjective informational determination, being the juridical test under the factual violation requirement under informational privacy.[301]

If the wrongfulness requirement of the breach of privacy action was applied to the facts, the Court would have probably found that the plaintiff's subjective expectation of privacy was objectively unreasonable under the circumstances. For instance, under the wrongfulness requirement of a breach of privacy action, where the boni mores criterion is conceived as a continuum of privacy, the Court could have found that the plaintiff's subjective expectation of privacy was objectively unreasonable as the plaintiff's photograph was taken in a public place which would have diluted any reasonable expectation to privacy under the specific circumstances.[302] Therefore, through the distinct application of the factual violation and wrongfulness requirements, the actionability of the plaintiff's interest to dignity and privacy would have been logically excluded. This would have allowed the Court to pursue the actionability of the use of the photograph for advertising purposes without the plaintiff's consent (falling within the ambit of the personality right to identity).[303]

Moving to *Le Roux v Dey*[304], in this judgment the defendants, three high school boys, manipulated and distributed an image which depicted their school principal and deputy principal, the plaintiff, as two naked men sitting side by side in a 'sexually suggestive and intimate' position.[305] Specifically, the defendants superimposed the heads of the principal and the plaintiff onto the naked figures depicted in the image, which was found on an erotic website dedicated to non-heteronormative bodybuilders.[306] The image was then completed by placing a school badge over the

[301] Gowar & Visser *Kumalo* (note 95 above) 165-167.
[302] Ibid 167.
[303] Ibid. Arguably, the personality right to identity was infringed in the particular circumstances.
[304] Note 12 above.
[305] Ibid para 14.
[306] Ibid.

hands and genitalia of the naked figures.[307] The image was then published widely within the school.[308] As a result, the plaintiff, the deputy principal, instituted the actio iniuriarum against the defendants for the infringement of his personality rights to dignitas and fama.[309]

In response to this, the Constitutional Court held that only one personality infringement is actionable in a factual matrix and, in this particular case, the Court reasoned that the manipulated image was defamatory with the implication that it was not necessary to inquire further into dignitas.[310] The court's main contention for this finding, as explained in this thesis, is that both dignitas and fama overlap with each other as both interests implicate 'dignity'.[311] Accordingly, the Court assumed that the application of the factual violation and wrongfulness requirements for each interest would yield the same result[312] and, as such, suggested that these two personality interests were not conceptually distinct from each other in the particular circumstances.[313]

In applying the personality framework to this judgment, specifically its doctrinal and ideological guidelines, the dignitas and fama are doctrinally, ideologically and substantively distinct from one another in a transformative constitutionalism paradigm. The dignitas and fama invoke different qualities or characteristics of the unique human image, which contribute towards constitutional imperatives in their own right. For instance, dignitas refers to an individual's self-worth, i.e. what an individual's thinks about him- or herself, while the fama refers to an individual's public esteem, i.e. what third parties think about an individual.[314] When viewed through the constitutional vision on the human personality, the dignitas implicates an individual's subjective recognition of his or her self-worth whereas the fama conceptualises an individual reputation as a means to participate in social life.[315] Therefore, contrary to what the Constitutional Court suggested, the fama and dignitas are indeed substantively distinct from each other.[316]

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[307] Ibid.
[308] Ibid paras 14-18.
[309] Ibid para 22.
[310] Ibid paras 27. 103, 105, 107 & 138-140.
[311] See section 1.1 of chapter one and 4.4.2 of chapter four.
[312] *Le Roux v Dey* (note 12 above) paras 141-146.
[313] Ibid paras 148-149.
[314] See section 5.3.1 and 5.3.2 above.
[315] Ibid.
[316] See section 2.2 of chapter two and 3.2.2.1 of chapter three.

Considering the framework guideline of the personality framework next, the distinctiveness between the dignitas and fama discussed above ought to inform the methodology of the common law's framework as well. As argued in this thesis, defamatory conduct is not per se contumelious and vice versa.[317] For instance, the factual violation requirement of dignitas should have shown that the publication of the image subjectively humiliated the plaintiff while under the fama that a publication was made which referred to the plaintiff with denigration. When examining the factual violation requirement of the fama further, it is untenable to hold the view that because the publication of the image was humiliating, the broader public would have thought less of the plaintiff causing his diminished participation from public life. In other words, the publication may bring the humiliation to the attention of a broader audience, but this does not necessarily mean that such humiliation will automatically ostracise an individual. When viewed in context, a reasonable person would have probably noticed that the publication of the image derived from the immature machinations of mischievous minors. It stands to reason that a reasonable person would not interpret the image as a commentary on an inappropriate relationship between a principal and deputy principal with the potential to exclude them from public life,[318] so it is deeply questionable whether the publication of the image was defamatory.[319] Ultimately, a distinct substantive recognition of the different personality rights, which is structurally mirrored in the separate application of their requirements of the corresponding delicts, will provide a more contextual and rigorous mode of adjudication as opposed to one based on reductivist conceptions and legal conservatism.

Considering *NM v Smith*[320] last, in this judgment, the defendants, a prominent politician, Patricia de Lille, and a publisher, Charlene Smith, published a biography concerning the former in which the HIV status of the plaintiffs was disclosed.[321] More specifically, the relevant part of the autobiography detailed de Lille's probe into

[317] See section 5.3.2 above.
[318] Fagan *Le Roux v Dey* (note 183 above) 399-401. However, a further criticism has been levelled against the Court that it adopted a strict heteronormative view of social life and implied that being non-heteronormative will attract social opprobrium. For a full discussion of this criticism, see generally J Barnard-Naude and P De Vos 'The heteronormative observer: The Constitutional Court's decision in Le Roux v Dey' (2011) 128 *South African Law Journal* 407.
[319] See for instance the minority judgment of Froneman J and Cameron J paras 162-173.
[320] Note 47 above.
[321] Ibid para 5.

controversial clinical HIV trials held at the University of Pretoria.[322] Three participants in the trials were identified, namely the plaintiffs, as HIV-positive and unemployed women who lived in informal settlements.[323] Consequently, the plaintiffs instituted the actio iniuriarum against the defendants for the infringement of their right to informational privacy as the disclosure of the latter's HIV status was made without their consent.[324] The plaintiffs stated that they consented to disclosure for purposes of an independent external investigation but not for the purpose of the defendants' subsequent publication.[325] They argued that the defendants either acted with intention or with negligence, which would have consequently required the development of the actio iniuriarum, as liability for a personality infringement, related to informational privacy, is only limited to intention.[326]

Evidence before the Court suggested that the defendants assumed that the plaintiffs consented to the disclosure of their HIV status for purposes of the publication in question and deemed it unnecessary to verify the correctness of their assumptions.[327] It stands to reason that the defendants acted carelessly (indicating negligence) as opposed to deliberately (indicating intention) in publishing the private facts about the plaintiffs.[328] However, as discussed earlier in this thesis,[329] the Constitutional Court held that the defendants acted with intention and there was no need to develop the common law of personality, specifically in respect of the personality right to information.[330] As further explained in this thesis, this finding by the Court can be viewed through the lens of classical liberalism as the standard of care envisioned by the Court. It provided the defendants with the greatest freedom of action without being curtailed by more collectivist considerations such as human interconnectedness and solidarity.[331]

In applying the personality framework to this judgment, extensive persuasion

[322] Ibid paras 7-20.
[323] Ibid para 4.
[324] Ibid para 19.
[325] Ibid paras 56-57.
[326] Ibid.
[327] Ibid paras 14 & 60-62.
[328] S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762, 781-783; G Penfold & D Milo 'Media Freedom and the Law of Privacy: NM and Others v Smith and Others (Freedom of Expression Institute Intervening as Amicus Curiae)' (2008) 1 *Constitutional Court Review* 311, 322-325; D Milo, G Penfold & A Stein 'Freedom of Expression' in S Woolman, M Bishop & J Brickhill et al (eds) *Constitutional Law of South Africa* 2ed (2008 Revision Service 4, 2012) Chapter 42, 108-111.
[329] See section 4.4.4 of chapter four.
[330] *NM v Smith* (note 47 above) paras 57 & 64-65
[331] See sections 4.4.4 of chapter four and 5.1 of this chapter.

is, arguably, not required as to why the defendants acted negligently and not intentionally. The argument can be made that a reasonable person in the same position as the defendants would have verified the private information concerning the plaintiffs, including the scope of their consent, given the sensitive nature of the private facts in question (i.e. the plaintiffs' HIV status).[332] It is doubtful whether the defendants themselves subjectively foresaw the possibility that the facts in question were private and lacked consent from the plaintiffs for purposes of the autobiography.[333]

The introduction of negligence-based liability would have addressed the necessary development required in terms of the framework of the actio iniuriarum.[334] This development relates to expanding the standard of care required from individuals not to deliberately (i.e. with intention) or recklessly (i.e. with negligence) infringe the informational privacy of others.[335] In doing so, the constitutional importance of the human personality as a composite legal interest, with its embedded individualistic and collectivist dimensions, would have been effectively realised in the framework of the common law of personality. Thus, *NM v Smith* serves as a prime example that, because of the complexity of social life and attendant modes of gathering and disseminating information, a personality interest can be infringed through reckless or careless behaviour (namely negligence) and not only through deliberate behaviour (namely intention).[336]

5.4 Conclusion

In this chapter, I summarised the main points of each of the previous chapters and extrapolated the pertinent connections between them. I highlighted the basic consideration that the constitutionalisation of the common law of personality entails the application of common law personality rights, foundational constitutional values and fundamental rights.[337]

I then argued that the constitutionalisation of the common law of personality entails a process of constitutional de- and reconstruction. As I have already

[332] See the explanation of the application of the negligence standard to breach of privacy cases in section 5.3.3 above.
[333] Subjective foresight denotes intention whereas foresight by a reasonable person denotes negligence.
[334] For an extensive discussion of this, see the sources cited in note 328 above.
[335] See sections 4.4.4 of chapter four and 5.2 of this chapter.
[336] See note 328 above.
[337] See section 5.1 above.

deconstructed the current framework of the common law of personality, in this chapter I contemplated its reconstruction in terms of the constitutional vision of the human personality. In doing so, I developed an alternative framework for the constitutionalisation of the common law of personality, to that of the judiciary, which I termed the personality framework. I advocated for the basic development of the personality framework in terms of the doctrinal, ideological, substantive and methodological dimensions of this thesis. As a starting point, the personality framework is premised on the following constitutive observations:

(1) Starting with doctrine, a personality right will indicate the specific contexts in which fundamental rights and constitutional values must be applied;
(2) With further reference to doctrine, each specific personality right will concretely delineate a specific interest in the human personality;
(3) Moving to ideology, the ideals of the constitutional vision of the human personality will constitutionally enrich the common law personality rights;
(4) To give effect to the constitutionally enriched personality rights, constitutional adjustments are required to the common law's framework; and
(5) In terms of these constitutional adjustments, together with the application of fundamental rights, the framework will shape the legal duties that ought to be created in respect of each personality right.

Following from these constitutive observations, I developed three basic guidelines to initiate the application of the personality framework to the common law of personality.[338] With these guidelines, I extracted the most practical considerations of the aforementioned constitutive observations and further explained the nuanced features of these guidelines. These guidelines are summarised as follows:

(a) 'The doctrinal guideline': the specific personality rights will delineate specific interests in the human personality which are conceptually distinct from one another;
(b) 'The ideological guideline': the ideals of the constitutional vision of the human personality will guide the ideological development of the different personality interests by imbuing them with individualistic and collectivist dimensions, thus ensuring their linkage to constitutional imperatives concerning the individual and the collective; and

[338] See section 5.2 above.

(c) 'The framework guideline': to give effect to the constitutionally expanded personality interests, adjustments are required to the current framework of the common law of personality (namely the requirements of the actio iniuriarum). As a result, these constitutional adjustments must give rise a legal duty, which both in terms of substance and method, effectively realise the constitutional vision of the human personality and implicated fundamental rights in frameworks of the positive law.

With further consideration to the framework guideline, to animate the aforementioned constitutionally informed legal duty, I proposed that the following constitutional adjustments are made to the current framework of the common law:[339]

(i) The various recognised personality rights must be articulated as distinctive interests of the human personality in terms of the framework of the positive law. This will be achieved when the distinctive tests, which have been developed for each personality right under the factual violation requirement, are applied to a particular factual matrix;

(ii) To realise the individualistic and collectivist dimensions of the various personality rights, both the factual violation and wrongfulness requirements must be distinctively applied to a particular personality interest in a specific factual matrix; and

(iii) The appropriate standard of fault for the actio iniuriarum must include intention *and negligence*. This is to ensure that both individualistic and collectivist dimensions inform the basis of personal responsibility for a personality infringement and the standard of care required from individuals in these circumstances. This also ensures that sufficient protection is afforded at the same time to the human personality, given its importance in a transformative constitutionalism paradigm.

To illustrate the actual operation of the personality framework,[340] I applied it to three personality rights, namely dignitas,[341] fama[342] and informational privacy.[343] I have shown how these respective personality rights indicate a distinct interest or quality of the human personality and distinctively implicate different ideals of the constitutional

[339] Ibid.
[340] See section 5.3 above.
[341] See section 5.3.1 above.
[342] See section 5.3.2 above.
[343] See section 5.3.2 above.

vision of the human personality. This, together with applicable fundamental rights, can shape legal duties appropriately for private relationships as embedded in a symbiosis between the common law and Constitution in respect of the human personality.

Finally, to provide a more practical illustration of the operation of the personality framework, I applied it to selected post-constitutional judgments,[344] providing solutions, in terms of the personality framework, to the doctrinal, ideological and structural problems created by these judgments.

In sum, through the development and application of the personality framework, I have highlighted and reaffirmed the initial symbiosis between the common law and the Constitution with regard to the human personality.[345] Consequently, I have shown how this symbiosis can be developed into a systematic process of constitutionalising the common law of personality as envisioned by the transformative constitutionalism paradigm.[346] More specifically, I have shown how the common law can translate constitutional concepts related to the human personality to private relationships while the Constitution can adjust the framework of the common law of personality.[347] Importantly, I have shown how all of this is possible without sacrificing certainty or doctrinal coherence within our law of personality. I have proposed developments that are not only doctrinally consistent but can also facilitate the realisation of the constitutional vision of the human personality. Significantly, in doing so, I have also illustrated how the conceptual distinctions between the different personality rights can be maintained in positive law through the constitutionally adjusted requirements of the actio iniuriarum.

I argue that this framework can also be used going forward to constitutionalise the other personality rights, which I did not engage with, in terms of the prima facie stage of the adjudication of a personality right. With further reflection, refinement and development, the personality framework can be applied to the other stages of the adjudication of a personality right (i.e. the defence and remedy stages),[348] given that the constitutionalisation of the common law of personality was interrogated in respect of its fundamental constituent parts.

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[344] See section 5.3.4. above.
[345] See section 1.1 of chapter one.
[346] See sections 2.1 and 2.3 of chapter two.
[347] See section 3.3 of chapter three and 4.4 of chapter four.
[348] See section 1.2.3 of chapter one.

CHAPTER 6

CONCLUSION

6.1 An overview of the basic aims, premises and research question of this thesis

In this thesis, I interrogated the constitutionalisation of the common law of personality in terms of its doctrine and underpinning ideology, both in terms of substance and method, as invoked by the doctrine of subjective rights and the actio iniuriarum.[1] This interrogation is the result of the criticisms that I levelled against the Constitutional Court in *Le Roux v Dey*,[2] and the judiciary in general,[3] regarding the post-constitutional operation of the framework of the common law of personality.[4] These criticisms relate to the doctrinal, ideological, substantive and methodological problems created by the judiciary's current approach to the framework of the law of personality.[5]

For instance, in terms of doctrine, the doctrinal basis of the law of personality, i.e. the interaction between the doctrine of subjective rights and the actio iniuriarum, conceptualises the human personality as a composite interest which consists of discreet and justiciable personality rights. From a constitutional perspective, the doctrinal basis of the law of personality creates a natural symbiosis between these personality rights and fundamental rights in the Bill of Rights in respect of the human personality.[6] However, the judiciary conceptualises the human personality as a broad amorphous legal concept with no discernible facets and with a limited ideological scope.[7] What is more, the judiciary uses the framework of the common law of personality, i.e. the three requirements of the actio iniuriarum, to realise this limited view on the human personality in the positive law.[8] In addition, the judiciary's approach does not meaningfully engage with the interplay between common law personality rights and fundamental rights for purposes of a transformative

[1] See sections 1.1 and 1.2 of chapter one.
[2] *Le Roux and Others v Dey* 2011 (3) SA 274 (CC). Important to note, the *Le Roux v Dey* judgment is the most recent and authoritative case dealing with the common law's framework from a post-liberal (read as post-constitutional) perspective.
[3] See for instance *NM v Smith* 2007 (5) SA 250 (CC); *Kumalo v Cycle Lab* (Pty) Ltd (31871/2008) [2011] ZAGPJHC 56 (17 June 2011). See also sections 4.2 and 4.4 of chapter four.
[4] See sections 1.1 and 1.2.1 of chapter one.
[5] See section 1.2.1 of chapter one.
[6] *Dendy v University of the Witwatersrand* 2007 (8) BCLR 910 (SCA) paras 15 & 24.
[7] See sections 1.1 and 1.2.1 of chapter one.
[8] Ibid.

constitutionalism paradigm.[9] In doing so, the judiciary introduces a great amount of ambiguity about the post-constitutional operation of the framework of the law of personality.[10]

In terms of ideology, I highlighted that human dignity, as a constitutional value, ought to occupy a central role in the constitutionalisation of the law of personality.[11] Accordingly, in the context of the law of personality, I argued that human dignity is a multi-dimensional concept which implicates the absolute inner human worth of individuals, the unique characteristics of the human image and human interconnectedness and solidarity to realise individual personalities and maintain the stability of the broader collective (as constitutional imperatives).[12] However, the judiciary views human dignity and the human personality with substantively and ideologically facile conceptions. Human dignity and the human personality are reduced by the judiciary to individual subjective notions of self-respect which fails to realise the various dimensions of human dignity and its multi-dimensional influence on the human personality.[13] Apart from the ambiguity created in terms of the desired interplay between personality rights and fundamental rights, the judiciary's approach provides further uncertainty in respect of the application of human dignity as a foundational constitutional value to the frameworks of the private law.

Lastly, in terms of substance and method, denoting the common law of personality's framework, the judiciary's approach to this framework lacks the same constitutional and ideological rigour as there is no concentrated effort, despite the potential of the doctrines of the common law of personality indicating otherwise, to realise the various dimensions of human dignity including its influence on the human personality as a legal interest.[14] With reference to the three requirements of the actio iniuriarum, the judiciary utilises the factual violation and wrongfulness requirements in such a manner that the articulation of multiple personality rights on the same factual matrix is prevented.[15] In addition, both the Supreme Court of Appeal[16] and the Constitutional Court[17] did not consider the constitutional development of the fault

[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] *NM v Smith* (note 3 above).
[17] *Le Roux v Dey* (note 2 above).

requirement to include negligence in addition to intent as an appropriate standard of fault which will introduce multi-layered protection to the human personality as a legal interest.[18]

On this basis, with reference to the overarching transformative constitutionalism paradigm, I hypothesised that the underlying cause of these problems, i.e. the particular manner in which the judiciary conceptualises and adjudicates personality concepts, is a judicial mindset that ascribes to (pre-constitutional) notions of classical liberalism which systematically limits judicial discretion as part of a conservative legal culture.[19] The resultant effect of this mindset is that judicial discretion is limited to such an extent that it cannot critically engage with the interplay between personality rights, human dignity as a constitutional value and fundamental rights within the frameworks of the common law (which is arguably required by the transformative constitutionalism paradigm).[20]

In response to this, I advocated for the development of an alternative framework to the judiciary's approach to constitutionalise the common law of personality in terms of doctrine, ideology, substance and method.[21] I termed this alternative approach the 'personality framework'[22] and argued that the development of the personality framework will find its doctrinal and structural basis in the desired interplay between common law personality rights, foundational constitutional values and fundamental rights.[23] I further argued that the ideological development of this framework will be grounded in the foundational constitutional value of human dignity, cognisant of its interaction with other constitutional values.[24]

My basic research question related to the manner in which the foundational value of human dignity should be invoked and given content in the constitutionalisation of the common law of personality, which is dependent on its interplay with common law personality rights and fundamental rights.[25] In more practical terms, my basic research question relates to the development and application of the personality framework to the common law of personality (as an alternative framework addressing the problems created by the current approach of the

[18] See sections 1.1 and 1.2.1 of chapter one.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] See sections 5.1 and 5.2 of chapter five.
[23] See section 1.2.1 of chapter one.
[24] Ibid.
[25] See section 1.2.2 of chapter one.

judiciary).[26]

In the following section of this chapter, section 6.2, I will provide a synopsis of the main arguments of this thesis, as developed through the substantive chapters, that lead to the creation of the personality framework. In section 6.3 I will draw attention to those issues that have not been interrogated in this thesis but necessitate further research in the context of the constitutionalisation of the common law of personality. In section 6.4, I will end this thesis with reflective thoughts on the constitutionalisation of the common law of personality.

6.2 The development and application of the personality framework: An overview of the arguments of this thesis

Starting with chapter two of this thesis, I interrogated the relationship between the doctrines of the common law of personality and the Constitution under the transformative constitutionalism paradigm.[27] I contemplated the doctrinal dimensions of this thesis and how these dimensions will scaffold the development of an alternative framework to the constitutionalisation of the common law of personality.

To facilitate this interrogation, I contextualised the development of the personality framework against the transformative constitutionalism paradigm.[28] In this regard, I found that the constitutional development of the common law of personality must arise from a single and integrated doctrinal framework consisting out of the common law and Constitution.[29] However, within this constitutionalisation process, consideration must also be afforded to the inherent limitations of the common law doctrines in respect of its underpinning legal ideologies and overarching judicial beliefs (i.e. a classical liberal constitutive judicial ideology and an attendant conservative mindset).

To initiate the ideological shift required in terms of the ideologies (and attendant judicial culture) underpinning the doctrines of the common law, and to organise the doctrinal, ideological and structural dimensions of the personality framework, I referred to the horizontality simpliciter approach that emerged from the

[26] See section 1.2.1 of chapter one.
[27] See section 2.1 of chapter two.
[28] See sections 1.1 of chapter one and 2.1 of chapter two. See generally KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146; E Zitzke 'Stop the illusionary nonsense! Teaching transformative delict' (2014) 46 *Acta Academia* 52; D Bhana 'The role of judicial method in contract law revisited' (2015) 132 *South African Law Journal* 122.
[29] See sections 2.1 and 2.2 of chapter two.

transformative paradigm.[30] In terms of this approach, the constitutionalisation of the frameworks of the common law can be achieved through its scope and form legs. These legs deal with legal ideology and culture and their influence on the common law frameworks for purposes of constitutionalising the latter.[31]

In brief, the scope leg delineates the respective contexts in which foundational constitutional values and fundamental rights will be applied with reference to the doctrines of the private common law. In addition, the scope leg highlights constitutional ideologies, in the form of foundational values and fundamental rights, to assess and develop the frameworks of the common law.[32]

Moving to the form leg, the common law framework is deconstructed in terms of its underlying ideology and culture for purposes of constitutional evaluation. The underlying ideology and culture of the common law is compared to constitutional ideologies. On this basis, in using the doctrine and framework of the common law, adjustments were made to the former's framework to ensure that foundational values and fundamental rights are given effect to and promoted in the positive law (i.e. constitutional ideologies).[33]

I advanced the central argument of this thesis that a single and integrated doctrinal framework emerges from the interrelationship between the common law of personality and the Constitution.[34] Specifically, with reference to the judgment of the Supreme Court of Appeal in *Dendy v University of the Witwatersrand*,[35] the Court found that the common law and Constitution are doctrinally consistent in terms of the scope of personality interests recognised and protected in law (i.e. the doctrine of subjective rights and the Bill of Rights). as well as the method to facilitate such protection in positive law (i.e. actio iniuriarum).[36]

As a result, I identified the first basic components of the personality framework.[37] To begin with, in terms of a single and integrated law of personality, I argued that the common law personality rights will delineate the respective contexts

[30] See section 2.3 of chapter two. See generally D Bhana 'The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution' (2013) 29 *South African Journal on Human Rights* 351; N Friedman 'The South African common law and the Constitution: Revisiting horizontality' (2014) 30 *South African Journal on Human Rights* 63.
[31] See sections 2.3.1 and 2.3.2 of chapter two.
[32] See section 2.3.1 of chapter two.
[33] See section 2.3.2 of chapter two.
[34] See section 2.2.3 of chapter two.
[35] *Dendy v University of the Witwatersrand* (note 6 above).
[36] Ibid paras 15 & 24.
[37] See section 2.3.3 of chapter two.

wherein constitutional values and fundamental rights must be applied.[38] Each personality right indicates a concrete interest or characteristic in the human image, as derived from the congruity between the doctrine of subjective rights and the Constitution.[39] Lastly, with regard to the congruity between the actio iniuriarum and Constitution, legal duties are then imposed on other members of society to adopt a standard of care not to unjustifiably infringe personality rights as safeguarded by the requirements of the actio iniuriarum.[40]

Moving to chapter three, with its theoretical basis to be found in the scope leg of the horizontality simpliciter approach, I interrogated the concept of human dignity as a fundamental constitutional value, to highlight its various dimensions in the post-apartheid South African legal order.[41] Building upon these various dimensions, I also sought to delineate a constitutional vision of the human personality.[42] I argued that this constitutional vision of the human personality will delineate the personality framework's ideological basis.[43] To expound, the constitutional vision of the human personality consists of human dignity as a constitutional value and its interplay with other values such as equality, freedom and ubuntu (and the fundamental rights implicated by the various personality rights).

I further argued that this constitutional vision creates a series of interconnected interpretative norms or 'ideals'.[44] The functions of these ideals are twofold: first, they can guide the ideological expansion of the different common law personality rights, and secondly, they can be used as the ideological basis to evaluate the common law's framework for purposes of a transformative constitutionalism paradigm. These ideals are the universal, the individualistic and the collectivist ideals which link the human personality to constitutional imperatives related to the individual and the collective.[45] To achieve these imperatives, these ideals ought to imbue the human personality with constitutional individualistic and collectivist dimensions in the positive law.[46] As a further consequence, these ideals subvert any extreme notions of individualism or collectivism as the human personality, in a constitutional context,

[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] See section 3.1 of chapter three.
[42] See section 3.3 of chapter three.
[43] Ibid.
[44] See section 3.3 of chapter three.
[45] Ibid.
[46] Ibid.

ought to be constituted as a composite yet fully integrated legal concept in terms of its personality interests and ideologies ranging from individualism to collectivism.[47]

With these ideals primarily in mind, I identified further basic components to the personality framework. Specifically, these ideals will expand the common law personality rights (and the attendant interests in the human personality) substantively to fit a transformative constitutionalism paradigm.[48] In addition, forming part of the aforementioned constitutional vision is the application of fundamental rights which contain specific entitlements as opposed to interpretative norms.[49] These specific entitlements will help to shape the legal duties created by the personality interests in terms of the doctrinal basis of the law of personality.

Considering chapter four next, I interrogated the constitutionalisation of the common law of personality's framework.[50] I examined the specific manner in which the courts use the common law's framework, as constituted in the requirements of the actio iniuriarum, to conceptualise and adjudicate personality rights against the transformative constitutionalism paradigm. These considerations constitute the structural dimensions of the personality framework.

In this chapter, I confirmed this thesis' hypothesis that the judiciary ascribes to a (pre-constitutional) classical liberal mindset with an attendant mode of conservative legal reasoning.[51] To illustrate this, I applied the theoretical dimensions of the form leg of the horizontality simpliciter approach to deconstruct the current framework of the law of personality in terms of its substance and method (as influenced by the judiciary). In this regard, I highlighted the correlation between how the judiciary views the substance of the law of personality and the particular manner in which the judiciary uses the method of the law of personality (in terms of its classical liberal and conservative mindset).[52] Hence, I specifically mapped out the judicial practices in respect of the requirements of the actio iniuriarum which realises the judiciary's limited conception of the human personality.[53] These judicial practices are counterintuitive to the ideological dimensions of the constitutional vision of the human

[47] Ibid.
[48] See section 3.2.2.2 of chapter three.
[49] Ibid.
[50] See section 4.1 of chapter four.
[51] See sections 4.2 and 4.3 of chapter four.
[52] See section of chapter four. See generally A Cockrell 'Substance and form in the South African law of contract' (1992) 109 *South African Law Journal* 40; Klare (note 28 above); Bhana *Judicial Method Revisited* (note 30 above)
[53] See section 4.4 of chapter four.

personality.[54]

Following the identification of these judicial practices, I identified further basic components to the personality framework. To give effect to the ideological developments required in terms of the constitutional vision on the human personality, constitutional adjustments are required to the current framework of the common law of personality.[55] I emphasised the point that these ideological developments relate both to the ideals of the constitutional vision of the human personality, i.e. human dignity as a constitutional value cognisant of its interplay with other values, and the applicable fundamental rights in respect of the human personality.[56]

Finally, in chapter five, I used the previously described basic components of the personality framework to contemplate its construction.[57] Following from these basic components, I developed three basic guidelines to initiate the application of the personality framework to the common law of personality.[58] In brief, these guidelines are as follows:

(a) 'The doctrinal guideline': specific personality rights will delineate specific interests in the human personality which are conceptually distinct from one another;[59]

(b) 'The ideological guideline': the ideals of the constitutional vision on the human personality will guide the ideological development of the different personality interests by imbuing them with individualistic and collectivist constitutional dimensions ensuring their linkage to constitutional imperatives;[60] and

(c) 'The framework guideline': to give effect to the constitutionally expanded personality interests, adjustments are required to the current framework of the common law of personality (namely the requirements of the actio iniuriarum). As a result, these constitutional adjustments must give rise to a legal duty, which both in terms of substance and method, effectively realise the constitutional vision of the human personality and implicated fundamental rights in frameworks of the positive law.[61]

To illustrate the operation of the personality framework,[62] I applied it to three

[54] See section 4.4 of chapter four.
[55] See section 4.4 and 4.5 of chapter four.
[56] See section 4.1 of chapter four.
[57] See section 5.1 of chapter five.
[58] See section 5.2 above.
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] See section 5.3 above.

personality rights,[63] namely dignitas,[64] fama[65] and informational privacy[66]. To provide a more practical illustration, I applied the personality framework to selected post-constitutional cases.[67]

Accordingly, I showed how these guidelines can address the doctrinal, ideological and structural problems created by the current approach of the judiciary to the framework of the law of personality. I demonstrated more specifically with the application of the personality framework how it is possible to identify discreet personality interests in a factual matrix. In addition, I illustrated how the substance of these personality interests can be ideologically developed with regard to the constitutional vision of the human personality. In terms of the law of personality's framework, I detailed how constitutional adjustments to the common law's framework, together with the application of fundamental rights, can shape legal duties in the positive law to promote a standard of care as dictated by the constitutional vision on the human personality. In the final instance, I showed how all of this is possible without sacrificing legal certainty or doctrinal coherence by proposing developments that are doctrinally consistent with the law of personality, as constitutionally informed, and that seek to realise the constitutional vision of the human personality.

6.3 The limitations of this thesis and suggestions for further research

In chapter one of this thesis I outlined the limitations of the thesis, given its explicit focus on the constitutionalisation of the common law of personality.[68] The main focal point of this thesis was the framework of the common law of personality operating under a transformative constitutionalism paradigm.

Consequently, I focused on the constitutionalisation of the common law of personality within its own framework and did not consider legislative means to do so or legislative influence. In addition, given the unique dimensions of the South African transformative constitutionalism paradigm, I did not seek to undertake an explicit comparative study.

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[63] I have specifically chosen these three personality rights as the Constitutional Court questioned the independent constitutional development of these rights. See *Khumalo v Holomisa* 2002 (5) SA 401 (CC); *Le Roux* (note 2 above).
[64] See section 5.3.1 of chapter five.
[65] See section 5.3.2 of chapter five.
[66] See section 5.3.2 of chapter five.
[67] See *Le Roux v Dey* (note 2 above); *NM v Smith* (note 3 above); *Kumalo v Cycle Lab* (note 3 above).
[68] See section 1.2.3 of chapter one.

This thesis did not attempt to examine the constitutionalisation of the common law of personality in its entirety (nor the law of delict). As explained in chapter one, this thesis only focused on the first adjudicative stage of the law of personality, namely the prima facie stage. In other words, this thesis only considered the stage in the adjudication of a personality infringement where the onus rests on the plaintiff to establish, with prima facie evidence, the elements of an iniuria which give rise to various presumptions.

In addition, this thesis only considered constitutional concepts to the extent that they implicate the human personality as a legal interest. For instance, I did not undertake to provide a broad analysis of concepts such as dignity, equality, freedom and privacy, but only considered their application to the law of personality. In addition, I limited these concepts to the contexts of the doctrines of the law.

This thesis did not explore a number of research inquiries. In brief, I will briefly outline these here.

First, I did not engage with the interplay or potential interplay between the common law of personality, the Constitution and legislation. Most notably, with regard to the personality right to informational privacy, I did not consider the Protection of Personal Information Act[69] which purports to give effect to the broad constitutional notion of privacy.[70] I also did not consider the Promotion of Equality and Prevention of Unfair Discrimination Act[71] which seeks to protect an individual's dignity in a broad constitutional sense. However, I argue that the personality framework may provide the foundational basis to engage with this interplay, as the relevant Acts must be interpreted against the ideological basis of the Constitution in respect of the human personality (i.e. fundamental constitutional values and rights).

Secondly, at the end of this thesis, I only applied the personality framework to three selected personality rights, namely dignitas, fama and informational privacy. I did not consider its application to the personality rights of bodily integrity, physical liberty, identity or feelings. However, I considered the specific interests created by these personality rights,[72] their basic ideological interaction with the individualistic ideal of the constitutional vision on the human personality,[73] and their basic

[69] Act 4 of 2013.
[70] Ibid. See the preamble of this Act.
[71] Act 4 of 2000.
[72] See section 2.2.1 of chapter two.
[73] See section 3.2.2.1 of chapter three.

framework in terms of the actio iniuriarum.[74] As a result, I foresee the same developmental patterns for these personality rights as for those personality rights to which I applied the personality framework.

Thirdly, it must be emphasised again that I did not seek to interrogate the constitutionalisation of the law of personality in its entirety. Most notably, I did not consider the operation of defences to a prima facie case of a personality infringement or remedies. For instance, I did not consider how the ideals of the constitutional vision on the human personality or fundamental rights ought to function in respect of defences or remedies.[75] Consequently, I did not further consider the applicable common law frameworks in this regard. However, I also argue that the personality framework may provide the basic foundation to analyse these further stages of a personality infringement, as it provides a basic approach for considering the ideological expansion of the common law together with the means to interrogate the common law frameworks for this purpose.

Lastly, as I specifically focused on the law of personality, I did not interrogate the constitutionalisation of the law of delict as the overarching discipline. Although I identified pre-constitutional notions of classical liberalism in the secondary characteristics of the law of delict, I did not explore this issue further. However, the guidelines I developed for the personality framework to engage with the interplay between common law subjective rights, foundational constitutional values and fundamental rights may provide preliminary guidance in this regard, together with other overarching theoretical paradigms.[76]

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[74] See section 4.4 of chapter four.

[75] This is based on the fundamental premise of this thesis that the constitutionalisation of the actio iniuriarum ought to occur in different stages, see section 1.2.3 of chapter one. These are the prima facie, justification and remedy stages. This thesis only considered the prima facie stage which ought to serve as a basis for the constitutionalisation of the other stages to the actio iniuriarum. For purposes of clarification, the defence and remedy stages follow sequentially on the prima facie stages both in terms of substance and method. In other words, the defences and remedy stages build upon the prima facie stage. For this reason, I did not consider substantive issues pertinent to the defences and remedy stages that will influence their constitutionalisation (as these stages will not influence the prima facie stage directly but the constitutionalisation of the common law of personality as a whole). For instance, this thesis did not consider how an appropriate balance ought to be achieved between the right to reputation and the right to freedom of expression at the defence stage of a personality infringement (which will require further research). In this regard, preliminary consideration ought to be afforded to *Khumalo v Holomisa* (note 63 above) para 26. Furthermore, I have not attempted to address the historic penal nature of the actio iniuriarum which arguably finds expression in the remedy stage of a personality infringement (as a specific consideration which requires further study). See generally F du Bois "Punishment, reparation and the evolution of private law: The *actio iniuriarum* in a changing world" (2019) *Acta Juridica* 229.

[76] See for instance the doctrine of adjudicative subsidiarity as advocated by Emile Zitke for purposes of an overarching theoretical approach which goes beyond the constitutionalisation of common law

6.4 Concluding reflections

'The human form will always be

Far more than what the eye can see'[77]

The transformative constitutionalism paradigm requires the legal fraternity to broaden its ideological gaze and use the frameworks of the positive law with such ideological mindedness. The law must also embrace the human dimension of legal reasoning in its doctrines and can no longer play favourite to legal determinism. In this sense, the law must serve as a portal to realise the human condition and not as a means to enslave it with clinical legal precision. Fortunately, the Constitution provides us with the means to broaden our gaze beyond the perceived determinacy of the law and admire the ideology of its transformative powers.

This thesis aspired to bring these reflections to the common law of personality and specifically illustrated the vast ideological dimensions of the human personality as a legal interest. This thesis also illustrated the practicality of the frameworks of the law to reach these ideological dimensions and in doing so provided a reminder of the humanistic dimensions upon which the law of personality is predicated.

In the end, this thesis has a very simple message: 'The human form will always be, [f]ar more than what [legal] eye[s] can see'.[78]

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frameworks withing its own frameworks by considering legislative intervention and constitutional remedies. See generally E Zitzke 'Constitutional heedlessness and over-excitement in the common law of delict's development' (2015) 7 *Constitutional Court Review* 259.

[77] L Etscovitz 'The Transsexual Experience' in D Riley Long Island Trans Experience (2002) <https://groups.yahoo.com/neo/groups/LITAC/conversations/topics/105?var=1>.

[78] Ibid.

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