

**A CONSTITUTIONALISED APPROACH TOWARDS CONSENT
AND PRIVATE INFORMATION ON SOCIAL MEDIA PLATFORMS:
ADJUDICATIVE SUBSIDIARITY AND THE PRIVACY LAWS OF
SOUTH AFRICA**

by

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DECLARATION

I, 1392283 (Student number, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

This research inquiry analyses the concept of consent in a social media context, which is a part of the process which individual users have to undergo when affiliating themselves with online social media platforms. The aim of these platforms is to use, collect, process, share and store users' private personal information.

The analysis engages various legislative frameworks such as the common law, statute, and legislation, to adjudicate issues related to the concept of consent – which ought to be informed. If consent is not informed, this analysis highlights the effect(s), by accentuating its negative implications on the constitutional rights of individual users, such as privacy and dignity. The research inquiry starts by examining these constitutional provisions and is followed by applying a rights-based approach to address the nuances concerning consent on online social media platforms. Furthermore, it considers whether an adjudicative subsidiary can be employed to avoid overextending the powers of the Constitution.

The inquiry also investigates infringements related to informational privacy and evaluates the legal framework intended to safeguard user information from anticipated risks on online social media platforms. The purpose of the legal framework, involves interrogating non-constitutional sources against the Constitution – by giving effect to the constitutional right to privacy, as well as in part, dignity. These non-constitutional sources aim to address the potential risks of privacy violations that users may encounter consequent to giving consent when joining the online social media platforms. The act of consenting by users on these platforms allows them to exercise their right to autonomy – which has a significant moral role.

I INTRODUCTION

As the Fourth Industrial Revolution (“4IR”) unfolds, we are witnessing a rapid emergence of new technologies.¹ The 4IR has prompted a societal shift from the physical world to the online world (“cyberspace”),² resulting in the proliferation of online social media platforms (“platforms”).³ These platforms derive from Social Network Services (“SNSs”),⁴ and have attracted a vast amount of individuals, or social media users (“users”), to interact with various others in the cyberspace.⁵ Examples of such platforms include Facebook, WhatsApp, Twitter, and Instagram.⁶

These platforms have provided users with the means to communicate with a broader audience immediately with relative ease and efficiency.⁷ Accordingly, individuals are sharing and consuming information on a scale that has never been seen before.⁸ However, this enhanced mode of communication is not without any legal risks.

The first common risk is envisioned in the manner in which consent is obtained. Consent is obtained from individuals who want to be users of these platforms. To be

¹ Keun Lee, Chan-Yuan Wong Patarapong Intarakumnerd and Chaiyantorn Limapornvanich ‘Is the Fourth Industrial Revolution a window of opportunity for upgrading or reinforcing the middle-income trap? Asian model of development in Southeast Asia’ (2020) 23 *Journal of Economic Policy Reform* 408 at 409, explains that the 4IR means a ‘new wave of innovations that use several technologies that comprise 3D printing, Internet of things, artificial intelligence (AI), smart cars, big data, and on-demand economy (sharing economy)’. Arianna Martinelli, Andrea Mina and Massimo Moggi ‘The enabling technologies of industry 4.0: examining the seeds of the fourth industrial revolution’ (2021) 30 *Oxford University Press* 161 at 164.

² Shakeel Siddiqui and Darach Turley ‘Extending the Self in Virtual World’ (2006) 33 *Advances in Consumer Research* 647, available at <http://www.acrwebsite.org/volumes/12302/volumes/v33/NA-33>, accessed on 21 March 2022. Bart Custers et al ‘Informed Consent in Social Media Use – The Gap between User Expectations and EU Personal Data Protection Law’ (2013) 10 *SCRIPTed* 436.

³ Michael Dewing ‘Social Media: An Introduction’ (2010) *Library of Parliament In Brief* 1 at 2, Dewing further provides that ‘the term “social media” refers to the wide range of Internet-based and mobile services that allow users to participate in online exchanges, contribute user- created content, or during online communities’.

⁴ *Ibid*, Dewing describes Social Network Sites as ‘web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.’ Anneliese Roos ‘Privacy in the Facebook Era: A South African Legal Perspective’ (2012) 129 *South African Law Journal* 375 at 384. Danah M. Boyd and Nicole B. Ellison. ‘Social Network Site: Definition, History, and Scholarship’ (2007) 13 *Journal of Computer-Mediated Communication* 210 at 211.

⁵ Custers et al op cit note 2.

⁶ S Papadopoulos ‘Revisiting the public disclosure of private facts in cyberworld’ (2009) *Obiter* 30 at 31.

⁷ *Ibid*

⁸ *Ibid*.

a user of these platforms, the individual is required to consent to the terms and conditions of the SNS.⁹

The crux of this analysis revolves around how users understand the nuances of giving consent on these platforms. Users, more often than not, grapple with a misconstrued comprehension of the very nature of consent that they give, particularly as it pertains to the disclosure of their private and personal information to third parties. This disclosure is often a requirement incorporated in the fabric terms & conditions which authorise the users to affiliate themselves with these platforms.¹⁰

It is noteworthy that this disclosure, for a significant number of users, lacks the essence of 'informed consent',¹¹ therefore, giving rise to apprehensions about privacy, more specifically what is commonly known as 'informational privacy'.¹² Among the manifold privacy risks, the act of disclosure which is given by the user(s) permits SNSs, to collect, process and use the private personal information of these users.¹³ The ramifications of this extend beyond the platform, encompassing the sharing of information that is private and personal to third parties, various sources, sites and individuals. This, in turn, exposes users to direct marketing, phishing and other cyber risks – risks which users are unaware of when giving consent on the platform's terms.¹⁴

The implication of user privacy on these platforms is significant. Private personal information of users ends up in the hands of third parties who are unintended recipients, without the users' explicit knowledge or approval. To address this, there needs to be a better, more informed way of seeking consent from the users, one that ensures users know exactly what they are agreeing to when it comes to sharing their personal information on these platforms.¹⁵

Below, various legislative sources and academic literature will analyse the significance of the element of consent. The legal sources will illustrate the implications

⁹ Sylvia Papadopoulos & Sizwe Snail ka Mtuze 'Privacy and Data Protection' in *Cyberlaw@SA the law of the internet in South Africa* 4 ed (2022) at 323.

¹⁰ Ibid.

¹¹ In this regard, informed consent allows the users to be aware of the implications which might arise, and to exercise autonomous discretion when affiliating with these platforms. See Tom L. Beauchamp 'Autonomy and Consent' in Franklin G. Miller and Alan Wertheimer (eds) *The Ethics of Consent: Theory and Practice* (2010) at 55.

¹² 'The common law right to informational privacy explains that an individual has the capacity to determine which facts regarding him or herself is private and the circumstances under which they may be made public'. CJ Visser *Human Dignity and the action iniuriarum: a constitutionalised approach to personality infringements* (unpublished PhD thesis, University of the Witwatersrand, 2020) at 60.

¹³ Roos op cit note 4.

¹⁴ Custers et al op cit note 2 at 439-442.

¹⁵ Ibid.

of an uninformed position of giving consent. Such a position can leave the user(s) in a precarious stance, whereby an unauthorised third-party will have access to the private personal information of the user. This stance can violate an individual's right to privacy and dignitary interests in the course.

What is more, is that these platforms adopt an exclusive stance if one does not give consent by accepting their terms & conditions, as such, individuals are effectively barred from participating on these platforms unless they acquiesce to the stipulated terms.¹⁶ Furthermore, the issue is not that these platforms require the consent from individuals for the processing of their private personal information in order for them to access such platforms, but rather, the prospective user's ability to grasp the nature and consequences of their consent that is being given.

The technological shift that came with the 4IR has implored the development of a legislative framework,¹⁷ which; (i) induced the protection of 'personality rights'¹⁸ on these platforms, (ii) curtailed the implications envisioned by the users and their online private personal information, and (iii) made way to ensure liability on the part of these platforms.¹⁹ Therefore, though there are risks involved in being a user of these platforms, the user is afforded protection by way of common law, statute and legislation in respect of their privacy and dignitary rights. It can be accepted that cyberspace and its development in social media, has generated platforms that allow individuals to share more than information that is private and personal to them.²⁰

The introduction of a legislative framework aids and governs consensual issues which deal with matters relating to the justifiable use and processing of personal information. South African law has seen the adoption of the Protection of Personal Information Act²¹ ("the POPIA") which takes influence from European Union General Data Protection Regulation²² ("the GDPR").²³

¹⁶ Custers et al op cit note 2 at 456-457.

¹⁷ Roos op cit note 4 at 377.

¹⁸ J Neethling, JM Potgieter & A Roos Neethling on 'Personality Rights' (2019) 24. Jonathan Burchell 'The Legal Protection of Privacy in South Africa: A Transplantable Hybrid' (2009) 13 *Electronic Journal of Comparative Law* 1 at 2; Johan Neethlin 'Personality rights: a comparative overview' (2005) 38 *The Comparative and International Law Journal of South Africa* at 210. These would include rights related to one's 'Privacy, dignity, identity and reputation' which are a component of their personality and are protected by the law of delict.

¹⁹ Roos op cit note 4 at 377.

²⁰ Ibid at 391.

²¹ The Protection of Personal Information Act, No 4 of 2013 ("the POPIA").

²² REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, ("the GDPR").

²³ Roos op cit note 4 at 379.

The GDPR sets a rigorous threshold requirement of ‘consent’.²⁴ Similarly, the POPIA defines consent.²⁵ The GDPR and the POPIA establish stringent standards for consent as a concept, reflecting a shared commitment to safeguarding individuals’ privacy and personal information.²⁶ Both regulations recognise the pivotal role of consent in ensuring that individuals have control over the processing of their data.

The analysis also attracts the application of the POPIA as the most recent and comprehensive legislative intervention adopted to regulate data protection.²⁷ As a result, there are a plethora of provisions on the requirements of consent justifying the collection and use of private information on social media platforms. In addition, these provisions, originating from various sources of law, do not directly reference or mirror each other in respect of the threshold requirements for consent. The application of sources will determine how privacy seeks to protect other constitutional provisions, in particular the right to dignity.

The POPIA and the GDPR will be analysed below in relation to consent when processing one’s private-personal information on these online social media platforms. What this research enquiry will then cover, is the nature of consent as set out in the POPIA, corresponding legislation and case law. In doing so, the ‘legal doctrine’²⁸ of ‘adjudicative subsidiary’ (“doctrine”) will be applied. A doctrine which has been endorsed by the Constitutional Court as a ‘reading strategy’.²⁹ The doctrine will assist to address the issue(s) of various sources of law which apply to privacy, dignity, and consent in order to establish what are the threshold requirements for user consent.

The nature of consent bestowed by users is the question that this analysis aims to answer. As such, the inquiry seeks to raise the importance of the element of consent which is given by the user(s). In the sections below, the element of consent will be considered in conjunction with an individual’s autonomy when making use of or

²⁴ Article 4 of the GDPR.

²⁵ Section 1 of the POPIA, ‘consent means any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information’.

²⁶ A Roos, ‘Data Protection Principles under the GDPR and the POPI Act: A Comparison’ (2023) 86 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* at 3.

²⁷ Adams R. Adeleke F. Anderson D. et al ‘POPIA Code of Conduct for Research’ (2021) 117 *Discussion Document* at 20.

²⁸ Ruth R Faden & Tom L. Beauchamp et al ‘Foundations in Legal Theory’ in *A History and Theory of Informed Consent* 1986 at 25, it is stated that ‘a legal “doctrine” is a body of legal theory applied to a particular topic’.

²⁹ Emile Zitzke ‘Constitutional Heedlessness and Over-Excitement in the Common Law of Delict’s Development’ (2015) 7 *Constitutional Court Review* 259 at 285. Lourens du Plessis ‘Subsidiarity: What’s in the Name for Constitutional Interpretation and Adjudication?’ (2006) 17 *Stellenbosch Law Review* 207 at 209.

intending to use these platforms. Further, the analysis will interrogate the systematic integration of the different sources of law governing the use of private and personal information on these platforms. The objective is to delve into the threshold requirements that ought to be enforced on matters relating to consent as a justification for the collection, publication and use of an individual's private personal information in this particular context.

To establish these threshold requirements for consent in the context of social media, this analysis proposes to utilise the theoretical framework of the doctrine, together with the horizontality provisions of the Constitution³⁰ ("horizontality simpliciter approach") to systematically integrate these sources of law while promoting the transformative goals of the Constitution.

Accordingly, in section 2 of this research report, an examination of the doctrine and the horizontality simpliciter approach will be undertaken. This critical analysis sets the foundation for understanding the legal frameworks and interpretative strategies that will inform subsequent sections. Thereafter, in section 3, the focus shifts to the concept of informational privacy focusing on the common law and the constitutional framework. Emphasis will be placed on the interconnection between informational privacy and dignity, which ought to provide a constitutional lens for assessing the threshold requirements central to this inquiry. Section 4 will conduct a survey on the different privacy laws, which encompass the common law's prerequisites for informed consent, POPIA's conditions for lawful processing of personal information, and the GDPR's provisions governing consent. This survey aims to discern the threshold requirements indispensable for common law consent to serve as a legitimate ground for the justification for lawful processing of personal information. Section 5 will deal with the research issue(s) and provide recommendations for the research question. This section will offer practical insights and guidance derived from the analysis. Finally, in section 6, a conclusion will be drawn from the various sources and be considered against the integration of the doctrine to highlight the threshold requirements needed for consent to justify the collection and use of private information on social media platforms.

³⁰ The Constitution of the Republic of South Africa, 1996 ("the Constitution").

II ADJUDICATIVE SUBSIDIARITY AND THE HORIZONTALITY PROVISIONS OF THE CONSTITUTION

In this section, a discussion is provided on how the doctrine,³¹ and the horizontality simpliciter approach (together, “reading strategies”) complement each other to achieve a transformative constitutional paradigm, commonly known as ‘transformative constitutionalism’.³² This discussion begins by applying the ‘single-system-of-law’ principle (“principle”) to the law of personality, and conceptualises the reading strategies. The reading strategies are aimed at outlining an integration of constitutional issues through the purposive reading of section 8 and 39 of the Constitution (“constitutional backdrop”), by applying them to the law of personality.³³ Notwithstanding that, the constitutional backdrop above will be examined against the context of private relationships, in particular, the infringement of privacy in the context of social media.

The doctrine is relevant to this research as the Constitution is not the only legal framework that speaks to the infringement of the fundamental right to privacy.³⁴ The doctrine is a term used by Du Plessis to ensure that various sources of law are applied to cases where it is possible to apply them.³⁵ As a starting point, the doctrine works from the purview that a private law dispute involves a fundamental right that is implicated in a private law or horizontal relationship,³⁶ so as to not overuse the Constitution.³⁷

It is then that the doctrine applies – to give effect to the Constitution, by relying first on legislation, and where legislation does not deal with the private dispute or a

³¹ Zitzke op cit note 29 at 285-286. CJ Visser ‘Adjudicative subsidiarity, the “horizontality simpliciter” approach and personality rights: Outlining an integrated and constitutional reading strategy to the law of personality’ (2022) *De Jure Law Journal* 124 at 128-132.

³² Karl E Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 150, implies that a transformative constitution ‘connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law’. See also Justice Pius Langa ‘Transformative Constitutionalism’ (2006) 3 *Stellenbosch Law Report* 351 at 351-352.

³³ Visser op cit note 12. C.J. Visser ‘Revisiting the constitutionalisation of the common law of personality: transformative constitutionalism and *le Roux v Dey*’ (2020) 36 *South African Journal on Human Rights* 242 at 259.

³⁴ Burchell op cit note 18 at 69. ‘The legal protection of privacy can be derived from a variety of sources, the three major tributaries being the common (or civil) law (usually the law of delict or tort), a Bill of Rights and legislation.’

³⁵ Du Plessis op cit note 29 at 209.

³⁶ Visser op cit note 31 at 128.

³⁷ Du Plessis op cit note 29.

particular issue, we may then refer to common law, alternatively foreign law.³⁸ However, these non-constitutional sources must be subject to the application and interpretation of the Constitution, as stipulated in terms of section 39 of the Constitution.³⁹ The constitutional backdrop has a two-stage inquiry that must be implemented where there is a concerned case of constitutionally protected matters, such adjudication must be approached by confirming the constitutionality of the statute.⁴⁰ The doctrine is a strategic analysis of the adjudicative processes by setting a theoretical framework for issues pertaining to law.⁴¹

Zitzke in 'Constitutional Heedlessness and Over-excitement' further supports Du Plessis' analysis on the basis that the doctrine is a 'reading strategy'⁴² used by the Constitutional Court to enjoin various non-constitutional legal sources such as common law, customary law, legislation, and case law to deal with issues subject to the Constitution.⁴³ The legal sources must give effect to the Constitution in light of its provisions.⁴⁴ Through this application, the doctrine allows an integration of the sources as opposed to isolating them, ensuring a cohesive approach to constitutional matters.

Du Plessis conceptualizes the notion set by Kentridge AJ in *S v Mhlungu*⁴⁵ which was a minority judgment by the Constitutional Court. Kentridge AJ provided that he 'would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'.⁴⁶ There is a wide interpretation that follows this approach. This interpretation is problematic as it rejects the argument of integration through the use of the doctrine which follows in this research inquiry.

What needs to be understood is that the Constitution is always the starting point – in so far as the doctrine is concerned, it requires that a legal dispute is adjudicated preferably through a non-constitutional source such as legislation and common law.⁴⁷ Focus cannot only be put on the Constitution to the extent that other sources are

³⁸ Burchell op cit note 18. Section 39 of the Constitution.

³⁹ Ibid.

⁴⁰ Section 172(1) of the Constitution.

⁴¹ Du Plessis op cit note 29 at 215.

⁴² Zitzke op cit note 29.

⁴³ Ibid at 286.

⁴⁴ Ibid.

⁴⁵ *S v Mhlungu* 1995 (2) SA 277 (CC).

⁴⁶ *S v Mhlungu* supra para 59.

⁴⁷ Section 8(3)(a) of the Constitution.

ignored.⁴⁸ The doctrine necessitates a comprehensive consideration of the subsidiarized legal sources, interpreting and applying them in conjunction with the Constitution.⁴⁹

One of the principles of subsidiarity was provided for in the *South African National Defence Union v Minister of Defence and Others* (“SANDU”),⁵⁰ where the Constitutional Court set the first principle.⁵¹ Ngcobo J noted that:

*[W]here legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard’.*⁵²

In other words, where a constitutional right is implicated and there exists a legislative framework specific to that constitutional right. That legal framework must be engaged and interpreted against the Constitution or other legal sources addressing the same issue(s).⁵³ When interpreting legislation, section 39(2) of the Constitution must be applied to promote the objectives of the Bill of Rights.⁵⁴

The application of the reading strategies, such as the doctrine, is to see whether the legal dispute can be adjudicated by using any other source other than the Constitution, without ignoring those sources that deal specifically with the constitutional issue.⁵⁵ Though the Constitution is the supreme law of the Republic, the application of the doctrine does not overlook the Constitution. Rather, it seeks to find the most appropriate legal source for adjudication, ensuring a nuanced consideration of constitutional and non-constitutional sources.

Zitzke identifies a second principle in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*.⁵⁶ According to the second principle, it elucidates that subsidiarity in instances where a constitutional right has been implicated should be adjudicated by the promulgated legislation specified to it, and not apply other sources of law that adjudicate rights infringements.⁵⁷ The second principle prevents

⁴⁸ Zitzke op cit note 29 at 277.

⁴⁹ Zitzke op cit note 29 at 286-288. *South African National Defence Union v Minister of Defence and Others* 2007 5 SA 400 (CC) (“SANDU”).

⁵⁰ 2007 (5) SA 400 (CC).

⁵¹ Zitzke op cit note 29 at 286.

⁵² SANDU supra note 49 para 51.

⁵³ Visser op cit note 31 at 129.

⁵⁴ Zitzke op cit note 29 at 287.

⁵⁵ Ibid.

⁵⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).

⁵⁷ Visser op cit note 31 at 130.

circumventing promoted legislation and upholds the constitutional objective for the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.⁵⁸ If the doctrine is ignored, the courts will be going against constitutional values and principles.

In this regard, it can be argued that even though the constitutional right to privacy does not expressly address the protection of private and personal information on social media platforms, the general principle set by Kentridge AJ in *Mhlungu* suggests that legal protection can be inferred. Such inference can be relayed specifically to disputes about whether individuals should provide consent for the lawful processing of their private personal information when joining these platforms as regulated by the POPIA.

This approach expands on the doctrine. It indicates that the legal issues in this context are not limited to constitutional principles and rules alone. Instead, they are also subjected to legislated framework, like POPIA, enacted to give effect to the implicated right, in this case informational privacy. The main ideas of informational privacy are rooted in common law, constitutional values, and constitutional rights. As such, the horizontality simpliciter approach is applicable to informational privacy, extending its relevance to the relationship between private individuals.⁵⁹ What this means is that the common law of personality must be considered. As Visser puts it, common law must coincide with 'public law values' and apply 'constitutional values and rights' in the relationship between private individuals.⁶⁰

In the context of protecting private and personal information on digital platforms, the application of the POPIA is significant. However, its role in setting precedent on these matters is contingent on the legislation's constitutional validity – which could be brought into question.⁶¹ Concurrently, the application of common and customary law rules and principles are contextualised in instances where the legislation in question cannot serve as means to resolve the issues that legislation ought to adjudicate upon, as a matter of subsidiarity and legal precedent.⁶² Furthermore, it is necessary to develop common law principles so that they act as a guiding feature to resolve disputes which are not addressed as certain concepts in legislation.⁶³ Zitzke points out

⁵⁸ Section 7(2) of the Constitution.

⁵⁹ Visser op cit note 12 at 244.

⁶⁰ Ibid.

⁶¹ Section 172 of the Constitution.

⁶² Section 8(3) of the Constitution.

⁶³ Zitzke op cit note 29.

that for transformative constitutionalism to prevail, there is a need or requirement for common law development as envisioned by the Constitution.⁶⁴

At issue the development of common law is not the primary concern. Rather, the focus lies on the constitutional interpretation of POPIA. The two principles of subsidiarity, set out in the *SANDU* and *Bato Star* cases, underscore the integration of sources when interpreting potential infringements of fundamental rights. These principles suggest that a hierarchy of sources exists so as to not delineate the Constitution.⁶⁵ However, contrary to the general principle set by Kentridge AJ in *Mhlungu*, which in its wide interpretation, allows for sources to be used in isolation, albeit subject to the Constitution.

Concluding with the horizontality simpliciter approach. Visser provides that ‘the Bill of Rights in Chapter 2 of the Constitution is horizontally applicable’.⁶⁶ He argues that for a dispute arising out of a private relationship and an adjudication of an *iniuria* between the parties, the suitable legal source should apply, and the source should always be subjected to constitutional scrutiny even if its ‘constitutional invalidity’⁶⁷ is not contested.⁶⁸ He further addresses that the horizontality simpliciter approach enriches non-constitutional sources to observe a constitutional backdrop through the Constitution’s ‘value-based’ analysis in terms of section 39 of the Constitution and a ‘rights-based’ analysis in terms of section 8 of the Constitution by providing pragmatic solutions.⁶⁹ The approach entails infusing non-constitutional sources with the transformative aims of the constitution through the application of the single-system-of-law principle which creates a constitutional assessment. The sources must give effect to the constitutional values of dignity, equality, freedom, and ubuntu.⁷⁰

III THE CONCEPT OF INFORMATIONAL PRIVACY IN A COMMON LAW AND CONSTITUTIONAL CONTEXT

The concept of informational privacy has developed under both the common law and the Constitution.⁷¹ This section, focuses on the constitutional backdrop interpreted

⁶⁴ Visser op cit note 12 at 262.

⁶⁵ Visser op cit note 31 at 130.

⁶⁶ Visser op cit note 12 at 244.

⁶⁷ Section 172(1)(a) of the Constitution.

⁶⁸ Visser op cit note 31 at 132.

⁶⁹ Ibid.

⁷⁰ Visser op cit note 31 at 135.

⁷¹ Ibid.

against the POPIA to achieve the aims of subsidiarity. Notably, the common law right to privacy is referred to by Neethling as ‘informational privacy’,⁷² a designation that needs to be further explored.

Informational privacy seeks to protect an individual’s personality interests to ‘informational self-determination’.⁷³ What informational self-determination entails is that, an individual has the power,⁷⁴ to ‘determine the destiny of his/her private facts and therefore the scope of his [or her] interest in [those private facts]’.⁷⁵ Moreover, informational self-determination under the common law context obliges others to refrain from acquiring and disclosing another’s private personal information, whether or not an objective consideration applies.⁷⁶

Self-determination in respect of privacy is a subjective consideration, in that, individuals accord themselves with how, why, where, and when their private personal facts should be disclosed.⁷⁷ However, despite the subjective consideration, there is what Visser refers to as a ‘subjective expectation of privacy’, which implies that one’s subjective consideration to privacy is not absolute as the subjective expectation of privacy must objectively be reasonable and in accordance with the norms of society.⁷⁸

The infringement of the subjective expectation of privacy is a delictual offence, which is characterised by an ‘unauthorised acquaintance’.⁷⁹ This infringement occurs through two ways.⁸⁰ First, by an unauthorised intrusion, where any other person other than the person whose private facts are concerned becomes acquainted with the implicated person’s private personal information. Second, unauthorised disclosure, where any other person reveals to third parties facts related to a person’s private

⁷² J Neethling ‘The concept of privacy in South African law’ (2005) 122 *South African Law Journal* 18 at 20. *Mistry v Interim National Medical and Dental Council* 1998 (4) SA 1127 (CC) para 14; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) para 16.

⁷³ Neethling Ibid.

⁷⁴ Visser op cit note 31 at 176.

⁷⁵ Ibid; Neethling in *Die Reg op Privaatheid* (1976 thesis UNISA); *National Media Ltd v Jooste* 1996 3 SA 262 (A); *National Media v Jooste* at 271A-272E; *Greeff v Protection 4U* 2012 6 SA 393 (GNP) para 54; Neethling, Potgieter & Roos op cit note 18 at 32.

⁷⁶ Visser op cit note 31 at 177.

⁷⁷ *NM v Smith* 2007 (5) SA 250 (CC).

⁷⁸ Visser op cit note 31 at 176-177.

⁷⁹ Ibid.

⁸⁰ *The Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Rayan Sooknunan t/a Glory Divine World Ministries* (2012) 3 All SA 322. In this case the private information of the recipient was disclosed on Facebook without the consent of the data subject, therefore, an invasion of privacy.

personal information knowing that such facts are private.⁸¹ Both forms of breach are contemplated contrary to the person's subjective expectation of privacy.⁸²

Under the current common law framework, there exists a legal duty that refrains others from intruding on one's privacy and disclosing such facts which are private and personal to them, to another.⁸³ This legal foundation reinforces the importance of respecting individuals' subjective expectations of privacy while providing a basis for legal recourse in the event of breaches.

In addressing privacy breaches, the Roman-Dutch Law remedy known as the *actio iniuriarum* found in delict applies.⁸⁴ However, to satisfy the test for common law liability for privacy infringement, Snail and Papadopoulos identify that the infringed individual must be able to establish three requirements; '(i) an impairment of privacy (either intrusion or disclosure); (ii) wrongfulness and (iii) intention (*animus iniuriandi*)'.⁸⁵

Constitutionally, section 14 of the Constitution emerges as it is the empowering constitutional provision of the right to privacy. It provides that '[e]veryone has a right to privacy, which includes the right not to have — (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed'.⁸⁶

However, despite the constitutional context, various scholars have accepted that giving meaning to what privacy is proves to be difficult as a result of the vagueness that comes with the concept of privacy.⁸⁷

⁸¹ Neethling op cit note 72 at 21.

⁸² *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) para 462E-J.

⁸³ *National Media v Jooste* supra note 75; *Bernstein v Bester* 1996 (2) SA 634 (CC) para 67-68; *NM v Smith* supra note 77 para 45; *Financial Mail v Sage Holdings* supra; *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A) para 850A-F; *Motor Industry Fund Administrators (Pty) Ltd v Janit* 1994 (3) SA 56 (W) 60.

⁸⁴ *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 17; *O'Keeffe v Argus Printing and Publishing* 1954 (3) SA 244 (C); *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T); *National Media Ltd v Jooste* supra note 75 para 267.

⁸⁵ David Mcquoid-Mason 'Invasion of privacy: Common law v constitutional delict – does it make a difference' (2000) *Acta Juridica* 227 at 228-234; Sylvia Papadopoulos and Sizwe Snail 'Privacy and data protection' in *Cyberlaw@SA III: the law of the internet in South Africa* 3 ed (2012) at 276. See also *Financial Mail v Sage Holdings* supra note 83; *Bernstein v Bester* supra note 83 para 68; *NM v Smith* supra note 77 para 55.

⁸⁶ Section 14 of the Constitution.

⁸⁷ Neethling op cit note 72 at 18. See also A R Miller & Ann Arbour 'The Assault on Privacy: Computers, Data Banks and Dossiers' (1971) *The University of Michigan Press* 190; South African Law Reform Commission *Privacy and Data Protection* Project 124: Issue Paper 24 (2003) at 47. Papadopoulos op cit note 6 at 34.

Neethling⁸⁸ and Rautenbach⁸⁹ have grappled with what has been known as a 'merry-go-round' phenomenon in arguing the approach of defining the concept of privacy.⁹⁰ However, Neethling goes on to define the concept of privacy, for purposes of the common law as:

*'[An] individual condition of life characterised by seclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has himself determined to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private.'*⁹¹

Further, Rautenbach raises a critical point and argues that while Neethling's definition may suffice for private law conceptions, it might fall short for constitutional purposes.⁹² In respect to both arguments, the application for the definition of privacy and whether protection should be determined or afforded rests solely on the given nature of the circumstance present.⁹³

The discussion on privacy is amorphous, especially that which is related to online privacy.⁹⁴ As the world progresses, more definitions on privacy shall develop. Moreover, the common law approach to privacy has stressed that privacy will continue to develop despite other facets of life such as; social, economic and technological influences – which shape privacy as a concept.⁹⁵

In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*,⁹⁶ Langa DP held that:

⁸⁸ See Neethling, Potgieter, Visser 'Right to Privacy' in *Neethling's Law of Personality* 2ed (2005).

⁸⁹ See I M Rautenbach 'The conduct and interests protected by the right to privacy in section 14 of the constitution' (2001) *Journal of South African Law* 115.

⁹⁰ Ian Currie 'The Concept of Privacy in the South African Constitution: Reprise' (2008) 3 *Journal of South African Law* 549 at 549 & 550.

⁹¹ Neethling op cit note 72 at 19-20: he argues that 'This concept of privacy is, however, too narrow since it negates other private facts relating to a person worthy of protection'. Rautenbach op cit note 89 at 116. *National Media Ltd v Jooste* supra note 72; *Financial Mail (Pty) Ltd v Sage Holdings Ltd* supra note 82; In *Bernstein v Bester* supra note 83 para 67 & 79, according to Ackermann J '*[P]rivacy relates only to the inner sanctum of a person or his truly personal realm (such as his family life, sexual preference and home environment) — that is, the most personal aspects of a person's existence — and not to every aspect within his personal knowledge and experience.*'

⁹² Currie cit note 90 at 550.

⁹³ Neethling op cit note 72 at 19.

⁹⁴ Lillian Edwards 'Privacy and Data Protection Online: The Laws Don't Work?' in Lillian Edwards and Charlotte Waelde et al (eds) *Law and the Internet* 3 ed (2009) at 443.

⁹⁵ This approach promotes the spirit, purport, and objects of the Bill of rights which entails development of the common law in terms of section 39(2) of the Constitution.

⁹⁶ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) (Hyundai).

*'[T]he right to privacy does not relate solely to the individual within his intimate space, but is also retained in the social capacities in which people act (e.g. when they are in their offices, in their cars or on mobile telephones.'*⁹⁷

Our courts have developed an enquiry when approaching the law of personality. In *Bernstein v Bester*, the Constitutional Court held that:

*'[T]he party seeking suppression of the evidence must establish both that he or she has a subjective expectation of privacy and that the society has recognized that expectation as objectively reasonable.'*⁹⁸

The same approach is applied to the establishment of an infringement of the right to privacy in common law, in that the convictions of the public – which are objective – consider the reasonableness of the persons subjective expectation of privacy (the *boni mores*).⁹⁹

Furthermore, in *Bernstein*, the Constitutional Court stated that there is a difference between informational privacy and constitutional privacy. However, the Constitutional Court in the *Hyundai* case stated that the general constitutional right to privacy includes informational privacy.

There is a plethora of case law dealing with the protection of the right to privacy in South Africa – since the 1950s.¹⁰⁰ From some of the case law, a case of infringement of one's right to privacy, is assumed to foreshadow the infringement of that individual's dignity.¹⁰¹

Neethling argues that these personality rights are distinguishable,¹⁰² and correctly so. The above assertion is premised in the case of *Khumalo v Holomisa*.¹⁰³ This case, caused an upsurge in defamatory claims which resulted from a newspaper article published on Mr Holomisa, which prompted a balance between freedom of expression and the interconnectedness of an individual's dignity and right to privacy.¹⁰⁴ O'Regan J, in her judgment, opined that 'in our new constitutional order, no sharp line can be drawn between these injuries to personality rights'.¹⁰⁵

⁹⁷ *Hyundai* supra para 16.

⁹⁸ *Bernstein v Bester* supra note 83 para 75.

⁹⁹ Papadopoulos & Snail op cit note 85 at 278, the determination of public conviction is based on the *boni mores* test. *Bernstein v Bester* supra note 83 para 68; Neethling, Potgieter & Roos op cit note 18.

¹⁰⁰ Roos op cit note 4 at 377.

¹⁰¹ Neethling op cit note 72 at 22.

¹⁰² Ibid.

¹⁰³ *Khumalo v Holomisa* supra note 84.

¹⁰⁴ Section 16 of the Constitution.

¹⁰⁵ *Khumalo v Holomisa* supra note 84 para 27.

The meaning of the above statement implies that the constitutional provisions of privacy and human dignity are closely related. The right to privacy as envisioned in section 14 is aimed at protecting those dignitary interests which may be implicated. Informational self-determination and human dignity find common ground in an individual's autonomy. This is endorsed in what *Khumalo v Holomisa* asserts, in that, the infringements related to privacy concurrently affect one's right to dignity.

While these personality rights are individually recognised by the Bill of Rights of the Constitution, respectively in terms of section 14 (the right to privacy) and section 10 (the right to dignity). The proposition that infringements related to privacy concurrently affect one's right to dignity might be misconceived at a general level. However, the proposition can be accepted if these legal matters are adjudicated on a case by case basis, as has been in the past. The courts' decisions in cases like *Khumalo v Holomisa* indicate that the Constitution's protection of the right to privacy effectively extends to the nuanced concept of informational privacy.¹⁰⁶

In South Africa, the interpretation of privacy is characterized by two conceptual models: the constitutional framework and the common law as discussed earlier. Neethling's common law principle introduces the concept of 'informational self-determination' and the exercise of autonomy, influencing the constitutional understanding of privacy.¹⁰⁷ Currie highlights Neethling's foundational work, suggesting that if the constitutional concept aligns with the common law, reliance on Neethling's common-law definition suffices. However, Currie introduces a note of caution:

*'[I]f the constitutional concept of privacy is the same as that in the common law then we need do no more than rely on the sound foundation of Neethling's definitional work on the common-law conception. But there are good reasons to suspect that constitutional privacy is not identical with common-law privacy.'*¹⁰⁸

Currie's perspective implies that that while Neethling's common-law concept serves as a robust foundation, there might be a notable distinction between the models of privacy.¹⁰⁹ This nuanced understanding gives rise to a cautious approach, suggesting that scholarly definitions rooted in the common-law conception may not be universally applicable to the constitutional framework.

¹⁰⁶ Papadopoulos & Snail op cit note 9.

¹⁰⁷ Currie op cit note 90 at 553.

¹⁰⁸ Ibid at 551.

¹⁰⁹ Ibid.

IV PRIVACY LAWS AND CONSENT

In South Africa, the Constitution serves as a paramount protector of the right to privacy, and the purpose of the POPIA is to give effect to that constitutional right.¹¹⁰ Having dealt with the common law's perspective on the right to informational privacy, the focus of the forthcoming discussion will shift to engage on legislative principles which are envisioned to protecting an individual's data privacy with the view of understanding and addressing the concept of consent.

(a) *The Protection Of Personal Information Act (POPIA)*

The POPIA is one of the comprehensive data protection laws in South Africa.¹¹¹ It represents a non-constitutional source that regulates the lawful processing of personal information.¹¹² The POPIA came into force on 1 July 2020, and has been put into full effect as of 1 July 2021.¹¹³ The South African legislature formulated the draft of the POPIA 'on the experience of other countries'.¹¹⁴ Given South Africa's hybrid legal system,¹¹⁵ to its benefit, the drafting of the POPIA is largely influenced by the EU Data Protection Directive¹¹⁶ which has now been replaced by the GDPR.¹¹⁷

The POPIA protects personal information, particularly in respect to the processing, collecting and storing of private information.¹¹⁸ Its aim is to regulate the processing of personal information through the conditions of lawful processing of

¹¹⁰ Section 2 of the POPIA provides that: '*The purpose of this Act is to-*

(a) give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at-

(i) balancing the right to privacy against other rights, particularly the right of access to information; and

(ii) protecting important interests, including the free flow of information within the Republic and across international borders;

(b) regulate the manner in which personal information may be processed, by establishing conditions, in harmony with international standards, that prescribe the minimum threshold requirements for the lawful processing of personal information;

...'

¹¹¹ POPIA and the Promotion of Access to Information Act 2 of 2000 ("PAIA"). See E Staunton and E de Stadler 'Protection of Personal Information Act No. 4 OF 2013: Implications for biobanks' (2019) 109 *SAMJ* at 232.

¹¹² Section 9 of the POPIA.

¹¹³ Adams. Adeleke. Anderson. et al op cit note 27.

¹¹⁴ Burchell op cit note 18 at 14.

¹¹⁵ Joan Church, 'The Convergence of the Western Legal System and the Indigenous African Legal System in South Africa with Reference to Legal Development in the Last Five Years (1999) 5 *Fundamina* at 8.

¹¹⁶ Directive 95/46/EC.

¹¹⁷ Roos op cite note 26 at 4.

¹¹⁸ Chapter 13 of the POPIA.

personal information and data between private and public bodies subject to justifiable limitations which protect rights and other interests.¹¹⁹ This protection allows for the limitations of the right to privacy to be justified and protected along with other rights and interests.¹²⁰

The enactment of the POPIA came as a model which aimed at protecting the individuals interests to informational privacy.¹²¹ It allows for remedial action in cases where there is a disclosure of information without the authority of that person.¹²²

The provisions of the POPIA apply to various pertinent roles when considering the threshold requirement of consent. The roles include, amongst others, the:

- i. 'data subject', in these circumstances the user: being the person whose personal information relates to;
- ii. 'responsible party', the platforms: being the person or body that determines how and why the personal information of the data subject is being processed; and
- iii. 'operator', any third party: being the person or entity contracted by the responsible party to conduct the duty of processing the data subject's personal information.¹²³

The POPIA's definition for consent in terms of section 1 states that 'consent means 'any voluntary,¹²⁴ specific,¹²⁵ and informed¹²⁶ expression of will in terms of which permission is given for the processing of personal information'.

For personal information to be processed lawfully by any person other than the data subject, it should satisfy the provisions enlisted in section 11 of the POPIA. The processing limitation condition within the POPIA establishes critical principles for the lawful processing of personal information. The grounds which render processing of information lawful are sixfold. They are that:

- i. 'the data subject has consented;

¹¹⁹ The Preamble of the POPIA.

¹²⁰ Adams. Adeleke. Anderson. et al op cit note at 27.

¹²¹ Ibid.

¹²² Burchell op cit note 18 at 89.

¹²³ Ibid; Adams. Adeleke. Anderson. et al op cit note 27.

¹²⁴ Maurice White & Patrick Hanks et al (eds) *Oxford Thesaurus of English 2* ed (2004) 1, states that voluntary means 'at one's discretion...'

¹²⁵ Ibid, specific means, 'particular, specified... accurate, well defined, unambiguous...'

¹²⁶ Ibid, informed means to know, or be notified.

- ii. the processing of personal information is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party;
- iii. processing complies with an application imposed by law on the responsible party (controller);
- iv. processing protects a legitimate interests of the data subject;
- v. processing is necessary for the proper performance of a public law duty by a public body; or
- vi. processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied'.¹²⁷

This inquiry focuses only on consent as a lawful basis for processing information.

The responsible party bears the burden of proof for the data subject's and the data subject may withdraw their consent at any time, provided that the withdrawal or the processing of personal information does not affect the conclusion or performance of a contract or pursuit of a legitimate interest of a responsible party or third party to whom the personal information is supplied.¹²⁸ The collection of personal information should directly be from the data subject,¹²⁹ however, there are exceptions as contemplated in section 12(2) of the POPIA.¹³⁰

The POPIA further lists more grounds for processing personal information that would not be considered incompatible with the original purpose. These grounds broaden the scope of permissible processing activities, provided that it is necessary '(a) to avoid prejudice to the maintenance of the law by any public body including the prevention, detection, investigation, prosecution, and punishment of offences; (b) to comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue; (c) for the conduct of proceedings in any court or tribunal; or (d) in the interests of national security'.¹³¹

These specified grounds provide a comprehensive framework, ensuring that personal information can be processed beyond its original purpose in a manner that

¹²⁷ Roos op cit note 26 at 8-9. Anneliese Roos, 'The European Union's General Data Protection Regulation (GDPR) and Its Implications for South African Data Privacy Law: An Evaluation of Selected 'Content Principles' (2020) 53(3) *Comparative and International Law Journal of Southern Africa* at 16.

¹²⁸ Section 11(2) of the POPIA.

¹²⁹ Section 12 of the POPIA.

¹³⁰ Adams. Adeleke. Anderson. et al op cit note 27 at 24.

¹³¹ Roos op cit note 26 at 12.

aligns with legal and societal considerations, thereby striking a balance between privacy protection and broader public interests.

The above analysis proves that the POPIA scantily discusses the concept of consent itself. The POPIA conveys consent as a ground of justification as set out by the common law.¹³² For this reason the POPIA is not a solution by itself to the issue(s) of consent.

(b) General Data Protection Regulation (the GDPR)

The GDPR stands as a cornerstone in the EU's commitment to safeguarding the personal data of individuals, both within and outside the EU.¹³³ The GDPR is a robust legal framework enacted to address the concerns of the digital age, for the protection of digital privacy,¹³⁴ and other digital socio-economic challenges.¹³⁵ Its principles serve as a global benchmark for data protection, influencing legislative developments beyond the EU's borders, such as South Africa with the POPIA. The adoption of the GDPR, came in 2016 to modernise its predecessor and to fit in technological shifts.¹³⁶

Furthermore, the GDPR does not remain silent on what consent entails as Article 4 defines consent of the data subject as:

*'[A]ny freely given, specific, informed, and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.'*¹³⁷

One of the aims of the GDPR is to monitor the processing of one's personal data.¹³⁸ This relates to the development of 'information and communication technologies and commercial practice'¹³⁹ and imposes a rigorous threshold requirement of consent on both the data subject and the responsible party to which the information belongs.¹⁴⁰

¹³² Section 11 of the POPIA.

¹³³ Roos op cite note 26.

¹³⁴ *Handbook on European data protection law* 2018 at 33.

¹³⁵ *Ibid* at 30.

¹³⁶ *Ibid*.

¹³⁷ Article 4(11) of the GDPR.

¹³⁸ Article 4 of the GDPR.

¹³⁹ Article 57(1)(i) of the GDPR.

¹⁴⁰ Shoshanah Zuboff 'The Right to Sanctuary' in *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (2019) at 451.

Various key principles are provided in the GDPR to address the governance of processing of personal information.¹⁴¹ One principle significant to this area of research is the 'lawful' processing of personal information.¹⁴² The 'lawfulness of processing'¹⁴³ requires consent of the data subject as one of the 'lawful grounds for processing' to protect the data subjects' interests when processing their information.¹⁴⁴

Though the issue of consent can also be determined in the common law context, the GDPR in its lawful grounds for processing information, requires consent as an important requirement to ensure its data subject(s) legal protection. In that, there are four requirements upon which the lawfulness ground can be attained in regard to the element of consent which should be established as provided for by the definition, these include free consent, informed consent, specific consent, and unambiguous consent.

The EU's approach to online data protection emphasizes key principles governing user consent on social media platforms. Free consent, a foundational element,¹⁴⁵ ensures individuals have the autonomy to accept or decline data processing without facing detrimental consequences.¹⁴⁶ Informed consent stands out as pivotal, demanding transparent communication to empower users with a comprehensive understanding of the implications tied to data processing.¹⁴⁷ Specific consent underscores the importance of consistency, requiring that the information users consent to remains unchanged throughout the contractual phase, with any alterations communicated to users.¹⁴⁸ Unambiguous consent serves as a critical safeguard against potential privacy violations, emphasizing the necessity for users to fully comprehend and appreciate the consequences of their agreements.¹⁴⁹ In the evolving landscape of technology, these consent principles are indispensable, providing a framework that respects user rights and privacy amidst digital advancements. Upholding these standards is vital for creating a trustworthy and

¹⁴¹ Article 5 of the GDPR. The principles include lawfulness, fairness, and transparency principle; purpose limitation principle; data minimisation principle; data accuracy principle; storage limitation principle; integrity and confidentiality principle.

¹⁴² Article 5(1)(a) of the GDPR.

¹⁴³ Article 6 of the GDPR.

¹⁴⁴ Handbook op cit note 134 at 117.

¹⁴⁵ Article 7 of the GDPR.

¹⁴⁶ Handbook op cit note 134 at 143.

¹⁴⁷ Ibid at 146.

¹⁴⁸ Ibid at 147.

¹⁴⁹ Ibid.

respectful online environment where individuals can navigate data processing with clarity and confidence.

(c) Common law consent as a ground for justification

In common law, consent stands as a ground for the justification of collecting, publishing, and utilizing an individual's private personal information.¹⁵⁰ For purposes of lawful processing of information and whether consent is in fact valid. The assertion was reinforced in *Van der Bank v The State*,¹⁵¹ where the SCA held that consent has to be free, voluntary, and consciously given in order to be valid.¹⁵² The court further set out the criteria outlined by Burchell where he provided that for consent to be valid, 'it must be recognized by law; the consent must be real; and the consent must be given by someone capable of consenting'.¹⁵³

Further, in *Castell v de Greef*,¹⁵⁴ Ackerman J held that in any medical intervention, doctors have a legal duty to obtain the patient's informed consent so that he or she fully appreciates the nature and extent of the harm which he or she is consenting to.¹⁵⁵ This standard encourages an exercise of an individual's autonomy and self-determination, which asserts to promote the constitutional values of human dignity,¹⁵⁶ and in the context of information privacy.

In *Barkhuizen v Napier*¹⁵⁷ the Constitutional Court held that 'self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity'.¹⁵⁸

The acceptable standard of common law consent in South African law as set in *Castell* is as follows:

¹⁵⁰ Samantha Krause 'Going Gently into that Good Night: The Constitutionality Of Consent In Cases Of Euthanasia' 2012 *Obiter* 47 at 48.

¹⁵¹ *Van der Bank v State* [2015] ZASCA 10 (09 March 2016).

¹⁵² *Van der Bank v State* supra para 10.

¹⁵³ *Van der Bank v State* supra note 151; Jonathan Burchell *South African Criminal Law and Procedure Volume 1: General Principles of Criminal Law* 4 ed (2011) at 217.

¹⁵⁴ *Castell v De Greef* 1994 (4) SA 408 (C). The standard of disclosure required informed consent to medical treatment, See Rhiannon 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) *South African Law Journal* 188.

¹⁵⁵ *Ibid* at 188; *Castell v De Greef* supra at 425F-J.

¹⁵⁶ *Ibid* at 189.

¹⁵⁷ *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

¹⁵⁸ *Barkhuizen v Napier* supra para 57.

‘the consenting party “must have had knowledge and been aware of the nature and extent of the harm or risk”;

(b) the consenting party “must have appreciated and understood the nature and extent of the harm or risk”;

(c) the consenting party “must have consented to the harm or assumed the risk”;

(d) the consent “must be comprehensive, that is extend to the entire transaction, inclusive of its consequences.”¹⁵⁹

The test set in *Castell* was also accepted by the Supreme Court of Appeal in *Broude v McIntosh*.¹⁶⁰

Consent plays a significant moral role,¹⁶¹ therefore, the value of dignity is also implicated. The vital question which arises concerns the interplay between consent and the constitutional right to dignity. The constitutional emphasis on individual autonomy in making informed decisions raises critical considerations regarding how the absence of consent is conceptualized.¹⁶² Understanding this dynamic is crucial as it elucidates the intricate relationship between the requirement of consent and the constitutional focus on dignity and autonomy.¹⁶³

V THE THRESHOLD REQUIREMENTS FOR CONSTITUTIONALLY INFORMED CONSENT IN A SOCIAL MEDIA CONTEXT

Identifying whether a threshold requirement for consent exists within legislative frameworks is not too cumbersome. What becomes a challenge is finding out whether there exists a threshold requirement for constitutionally informed consent in a social media context within the laws of the Republic of South Africa. This section aims to interrogate by employing a systematic integration of the reading strategies pertaining to the use, collection, and processing of users private and personal information on these platforms. The concept of consent, often obscured in the cyberspace, is the focal point of scrutiny.

Building upon the groundwork laid in preceding sections, this exploration begins by closely scrutinising the nature of consent as bestowed by users on social media platforms. Section one of this inquiry stated that users often provide consent based on

¹⁵⁹ Thomas op cit note 154 at 191; *Castell v De Greef* supra note 154 at 425F-J.

¹⁶⁰ *Broude v McIntosh* 1998 (3) SA 60 (SCA).

¹⁶¹ John Kleinig ‘Nature Consent’ in Franklin G. Miller and Alan Wertheimer (eds) *The Ethics of Consent: Theory and Practice* (2010) at 4.

¹⁶² *Broude v McIntosh* supra note 160 at 68A-69B.

¹⁶³ Thomas op cit note 154 at 192. See also *Barkhuizen v Napier* op cit note 157.

a misinformed perspective, impacting not only their informational privacy but also potentially encroaching upon their dignitary interests.¹⁶⁴ This encroachment, influenced by the moral dimensions associated with consent and the exercise of individual autonomy,¹⁶⁵ raises concerns about the adequacy of current South African privacy laws in safeguarding against such infringements.

The argument which unfolds relating to the insufficiencies of current privacy laws in South Africa is asserted as there is a need for the development of data privacy laws to adequately address the evolving challenges posed by the cyberspace.

Faden and Beauchamp state that consent has been outlined to mean informed consent.¹⁶⁶ Moreover, the connection has misplaced the understanding of consent 'toward providing information and being informed'. They argue that the analysis of the concept of consent is based on two features, 'information' and 'consent'. The first feature refers to whether the information being disclosed is fully comprehended by the person disclosing it, and the second feature refers to the voluntariness of the decision made and its endorsement.¹⁶⁷ Furthermore, they elicit the following 5 (five) basic elements of informed consent (emphasis);

*'(1) competence, (2) disclosure, (3) understanding, (4)voluntariness, and (5) consent... One gives an informed consent to an intervention if (and perhaps only if, but this claim is questionable) one is competent to act, receive a thorough disclosure, comprehends the disclosure, chooses voluntarily, and consents to the intervention.'*¹⁶⁸

Roos outlines the implications which privacy rights are encountered on SNSs. She regards the implications as follows:

*'(1) [W]hen the user reveals personal information on his or her webpage;
(2) when the SNS operator [responsible party] receives information from the user or third parties and processes it;
(3) when third parties gain access to the user's personal information;
...'*¹⁶⁹

The question which ought to follow from these implications, is whether the user was informed, and the most common answer is no, despite the information as set out

¹⁶⁴ Mcquoid-Mason op cit note 85 at 232.

¹⁶⁵ Kleinig op cit note 162.

¹⁶⁶ Faden & Beauchamp op cit note 28 at 55.

¹⁶⁷ Ibid at 56.

¹⁶⁸ Ibid.

¹⁶⁹ Roos op cit note 4 at 386.

by the terms and conditions having been provided. The user would still not foresee the implications that would infringe their privacy on these platforms.

Often than not, responsible, and third party infringements are as a result of unauthorized acquaintance – which affects an individual's subjective expectation of privacy.¹⁷⁰ Moreover, other factors such as the user not being informed of the nature of consent they provide to affiliate with platforms, has proven to be problematic. Third party access to users' personal information infringes such informational privacy in various ways. This may include the disclosure of the user's personal information by the responsible party to advertisers.¹⁷¹ Furthermore, there is a 'processing undertaking'¹⁷² of the user's personal information once they affiliate with these platforms.

In terms of the legislative framework, the processing of personal information is subjected to data protection principles,¹⁷³ and the POPIA enforces this mandate by ensuring that there is lawful processing of data subjects' personal information by responsible parties.¹⁷⁴ This protection however, at this instance is theoretical rather than practical – as very few cases where there is an infringement of informational privacy come before the Information Regulator¹⁷⁵ (IR) or are adjudicated upon. The urge is that the affected users should adopt a more pragmatic approach in order to enforce their constitutional rights in relation to the protection of their privacy and dignity.

The IR, is among others, empowered to monitor and enforce compliance by public and private bodies with the provisions of the POPIA.¹⁷⁶ Despite the functions of the IR, the responsible party is obliged to ensure that the conditions for lawful processing set by the POPIA are met.¹⁷⁷ Furthermore, the data subject is duty bound to report any infringement of its privacy to the IR. To ensure an engagement process to curb informational privacy infringements by SNSs and others involved, an

¹⁷⁰ Thomas op cit note 154 at 192.

¹⁷¹ Roos op cit note 4 at 390.

¹⁷² Which contains the storing, using, and collating of the user's personal information by the responsible party.

¹⁷³ Roos op cit note 4 at 387.

¹⁷⁴ Section 4 and Part A (ss 8 – 25) of the POPIA.

¹⁷⁵ See <https://info regulator.org.za/about/>, accessed 20 December 2022.

¹⁷⁶ Section 40 of the POPIA.

¹⁷⁷ Section 8 of the POPIA.

agreement similar to the 'Safe Harbor Agreement'¹⁷⁸ which Facebook subscribes to and is reached between the US Department of Commerce and the EU, must be considered and be directed to all SNSs operating within the Republic.¹⁷⁹ The Safe Harbor Agreement is aimed at data protection, where a flow personal information is not adequately protected by a member state, the GDPR prohibits the flow of personal information of EU citizens to and/or by non-EU member states without adequate data protection laws.¹⁸⁰

As determined above in section three, an infringement of informational privacy requires a two-fold test which incorporates that the affected person must establish his or her subjective self-determination of privacy which is recognized by society as objectively reasonable.¹⁸¹ The first leg – which is subjective in nature, determines that where an individual has expressly consented to the conduct of a party,¹⁸² the affected person cannot raise a claim for infringement of privacy under delict.¹⁸³ The second leg – which is objectively determined, has to establish the *boni mores* test which considered by the reasonable standards of society.¹⁸⁴

*'Under the common law whether or not a factual infringement of a personality interest should be considered wrongful, is determined by the boni mores or legal convictions of the community. It is an objective test based on the criterion of reasonableness. Subjective factors such as honesty, motive or knowledge are not relevant in determining wrongfulness. The criterion of reasonableness is also used to determine wrongfulness of an infringement of the constitutional right to privacy.'*¹⁸⁵

The conclusion aligns with Papadopoulos' approach, which emphasises the importance of a legislative framework in shaping the law of personality within cyberspace. Recognising the internet's unique dynamics, Papadopoulos advocates for an evolved understanding of *boni mores*, considering when a user can legitimately

¹⁷⁸ Sets out seven privacy principles which a SNSs service must comply with in order to be presumed to have adequate data protection mechanism, these principles include: 'notice, choice, onward transfer, access, security, data integrity and enforcement'.

¹⁷⁹ Roos op cit note 4 at 388.

¹⁸⁰ Ibid.

¹⁸¹ Currie, De Waal and Erasmus *The Bill of Rights Handbook* 5ed (2005) at 318-319. *Bernstein v Bester supra* 83 para 75.

¹⁸² Papadopoulos op cit note 6 at 36-37; 'Consent may be given expressly or tacitly and when validly granted there can be no question of wrongfulness. The infringement of privacy and will be justified if the affected person who gave consent did so in a manner where he or she is legally capable and has freely, voluntary and been informed while consenting to the conduct. *Castell v De Greef supra* note 153.

¹⁸³ Ibid at 36.

¹⁸⁴ Ibid.

¹⁸⁵ Neethling, Potgieter, Visser op cit note 88 at 221.

expect privacy on digital platforms. This approach, coupled with robust legislation, is crucial for navigating the evolving landscape of informational privacy in the digital age.¹⁸⁶

VI CONCLUSION

In pursuit of understanding the intricate constitutional landscape surrounding the use, collection, and processing of individuals private and personal information from a social media context, this research inquiry aimed to integrate various sources of law. By analyzing the threshold requirements which pertain to consent as a justification of lawful processing of private and personal information on these platforms, provided that such consent is voluntary, specific, and informed to serve as a valid justification.

As Roos submits, the individuals who subscribe to these platforms should be conscious of the fact that their affiliation on these platform is not without any privacy risks. Regardless of the form of consent provided, these platforms may not be as private as users perceive, highlighting the need for a heightened awareness of the potential implications.¹⁸⁷

It is evident that the legal landscape surrounding privacy in social media is dynamic, requiring continual adaptation to technological advancements and evolving societal norms. The integration of legal principles, consent requirements, and an awareness of privacy risks sets the foundation for a more robust framework. This research contributes to the ongoing discourse on the intersection of law and technology, providing insights that can inform future legislative developments and user awareness initiatives in safeguarding privacy rights in the digital age.

¹⁸⁶ Papadopoulos op cit note 6 at 43.

¹⁸⁷ Roos op cit note 4 at 402.

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