Adjudicative subsidiarity, the "horizontality simpliciter" approach and personality rights: Outlining an integrated and constitutional reading strategy to the law of personality

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SUMMARY

This article argues that an integrated and constitutional approach to the law of personality is required, as multiple sources of law are applicable to the conception and adjudication of personality rights and these sources must give effect to constitutional imperatives related to the human personality. This article further argues that such an integrated and constitutional approach ought to be premised on the principle of adjudicative subsidiarity and the "horizontality simpliciter" approach (as constitutional reading strategies). Each of these strategies functions at different levels in the law of personality and provides a particular method of integrating legal sources, constitutional values, and fundamental rights to private relationships. At the macro level, denoting the interaction between various sources of law, the principle of adjudicative subsidiarity is aimed at identifying and prioritising sources of law to adjudicate a dispute between private individuals. At the micro level, denoting the application of a legal source between individuals in a private relationship, the horizontality simpliciter approach facilitates the application of both constitutional values and fundamental rights to such a source through its "values-based" and "rights-based" analyses. This article argues ultimately that the principle of adjudicative subsidiarity and the horizontality simpliciter approach are complementary in nature in the sense that both these reading strategies locate a cause of action in a non-constitutional source that is constitutionally developed through the application of constitutional values and fundamental rights. This complementariness is expressed in the positive law as follows: the principle of adjudicative subsidiarity determines which source of law is applicable to the adjudication of a particular personality right infringement whereas the horizontality simpliciter guides the development of the applicable source against constitutional values and fundamental rights.

1 Introduction

The law of personality involves the application of various personality rights, constitutional values and fundamental rights to the conception and adjudication of various personality interests in the context of a

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private relationship as facilitated through multiple sources of law.[1] Originally, the common law of personality conceived the following personality rights (as facilitated by the doctrine of subjective rights): bodily integrity, bodily freedom, reputation, dignity, privacy, identity and feelings.[2] What is more, the historical Roman-Dutch law action of the *actio iniuriarum* provided the common law mechanisms to adjudicate a personality right infringement (also known as an *iniuria*).[3] However, with reference to the transformative constitutionalism paradigm,[4] the common law no longer functions as an exclusive or impenetrable stronghold for the conception and adjudication of an *iniuria*.[5] The exposition hereof rests on four foundational premises. First, parliament enacted various pieces of legislation to facilitate the adjudication of various personality rights to meet the needs of a South African society that is diverse, has vulnerable and marginalised members, and is undergoing rapid technological developments.[6] Notable examples include the Promotion of Equality and Prevention of Unfair

1 Visser "Revisiting the Constitutionalisation of the Common Law of Personality: Transformative Constitutionalism and *Le Roux v Dey*" 2020 *SAJHR* 257-259. In this regard, reference to the conception of personality rights refers to personality rights recognised in positive law, including the specific personality interest or interests they seek to protect. Reference to the adjudication of personality rights, or their infringement, refers to the conditions of delictual liability that must be met, and the manner in which they are applied to a particular factual matrix in order to provide a victim with legal recourse.

2 Neethling, Potgieter, and Roos *Neethling on Personality Rights* (2019) 25-38; Visser "The Doctrine of Subjective Rights, the Actio Iniuriarum and the Constitution: A Convergent Doctrinal Basis for the Law of Personality" 2021 *Stell LR* 278-279.

3 Neethling, Potgieter, and Roos (2019) 39; Visser 2021 *Stell LR* 279-282.

4 In brief, transformative constitutionalism has been described as:
"… a long-term project of constitutional enactment, interpretation and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction."
See Klare "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 150. For a discussion of the application of this paradigm to the law of personality, see Visser 2020 *SAJHR* 244-251. Furthermore, various criticisms have been levelled against this paradigm. See, for instance, Madlingozi and Zitzke who examine these criticisms in terms of the transformative constitutionalism and conceptual decolonialisation paradigms. See Madlingozi "Social Justice in a Time of neo-apartheid Constitutionalism: Critiquing the Anti-black Economy of Recognition, Incorporation and Distribution" 2017 *Stell LR* 123-147; Zitzke "A Decolonial Critique of Private Law and Human Rights" 2018 *SAJHR* 503-509. However, it falls beyond the scope of this article to highlight and address these criticisms raised against the transformative constitutionalism paradigm in the context of the horizontal application of the Constitution to non-constitutional sources of law, as this requires further dedicated and comprehensive study.

5 Bhana "The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution" 2013 *SAJHR* 373-374.

6 *Qwelane v South African Human Rights Commission* 2021 6 SA 579 (CC) para 95.

Discrimination Act,[7] the Protection from Harassment Act[8] and the Protection of Personal Information Act.[9]

Secondly, according to constitutional dictates of promoting a plurality of world views in the South African legal system, reverence must be afforded to customary law as a source of law in the context of the law of personality.[10] What is more, customary law can influence the manner in which other sources of law conceive and adjudicate personality rights.[11]

Thirdly, the Bill of Rights provides a "constitutional backdrop" that informs the conception and adjudication of personality rights in the context of private relationships.[12] In other words, courts are now tasked to apply constitutional values and fundamental rights to these private relationships as part of the transformative constitutionalism paradigm.[13]

Lastly, the law of personality must adhere to the "single-system-of-law principle".[14] Within this single system of law, all non-constitutional sources of law derive their "force from the Constitution" and are subject to "constitutional control" so that they can give effect to the transformative aspirations of the Constitution.[15] As a result, when the law of personality conceives and adjudicates personality infringements (also known as *iniuriae*), a single, integrated, and doctrinally coherent body of constitutionalised law should emerge from a reflective consciousness of multiple sources of law that might be applicable.[16]

This article argues that an integrated and constitutional approach (or, more specifically, a reading strategy) to the law of personality is required,

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7 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. In terms of s10, which deals with the prohibition of hate speech, interests related to the collective dignity of vulnerable and marginalised groups, as a protectable interest under the personality right to dignity, receive statutory protection. Also see *Qwelane v South African Human Rights Commission* para 95.

8 The Protection from Harassment Act 17 of 2011. In terms of the preamble and ss 2 and 3, statutory protection is afforded to the personality rights of dignity, privacy, bodily integrity, and bodily freedom that are implicated and infringement through behaviour that is considered to be "harassment".

9 The Protection of Personal Information Act 4 of 2013. In terms of the preamble and ss 2 and 3, statutory protection is afforded to the personality right of privacy, especially where private or "personal" information is processed.

10 S 211 of the Constitution of the Republic of South Africa, 1996; Zitzke "Decolonial Comparative Law: Thoughts from South Africa" 2022 *Rabel Journal of Comparative and International Private Law* 213-219.

11 *Dikoko v Mokhatla* 2006 6 SA 235 (CC) paras 68-69 and 112-116; *Le Roux v Dey* 2011 3 SA 274 (CC) paras 196-200.

12 Visser 2020 *SAJHR* 249-250.

13 SS 8 and 39 of the Constitution. Also see Bhana 2013 *SAJHR* 351-352.

14 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 647 (CC) para 44.

15 As above.

16 Van der Walt *Property and the Constitution* (2012) 19-24; Zitzke "Constitutional Heedlessness and Over-excitement in the Common Law of Delict's Development" 2015 *CCR* 286.

as multiple sources of law are applicable to the conception and adjudication of personality rights, and these sources must give effect to constitutional imperatives.[17] For instance, these imperatives arguably relate an individual's ability to develop their human personality as a unique expression of the human image, which requires an individual's reliance on the unique facets of their human personality and human solidarity and interdependence from all members of society.[18] This article further argues that such an integrated and constitutional approach ought to be premised on the principle of adjudicative subsidiarity together with the "horizontality simpliciter" approach, as constitutional reading strategies.[19]

Each of these strategies functions at different levels in the law of personality and provides a particular method of integrating legal sources, constitutional values and fundamental rights to private relationships.[20] At the macro level, denoting the interaction between various sources of law, the principle of adjudicative subsidiarity is aimed at identifying and prioritising sources of law to adjudicate a dispute between private individuals (subject to the application of constitutional values and fundamental rights).[21] At the micro level, denoting the application of a legal source between individuals in a private relationship, the horizontality simpliciter approach guides the application of constitutional values and fundamental rights, for purposes of concrete constitutional development, to such a source through its "values-based" and "rights-based" analyses.[22]

17 Visser 2020 *SAJHR* 248-249.
18 As above.
19 Important to note, there are various reading strategies to facilitate the horizontal application of the Constitution to private relationships. See, for instance, generally Friedman "The South African Common Law and the Constitution: Revisiting Horizontality" 2014 *SAJHR*; Dafel "The Directly Enforceable Constitution: Political Parties and the Horizontal Application of the Bill of Rights" 2015 *SAJHR*. Of further importance, is that this article regards both the principle of adjudicative subsidiarity and the horizontality simpliciter approach as constitutional reading strategies and adopts the naming conventions of these strategies as used in case law and academic scholarship. See for instance *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* (CCT 14/19) [2022] ZACC 5 (16 February 2022); Friedman 2014 *SAJHR*. Therefore, the purpose of this article is to outline a constitutional reading strategy cognisant of the doctrinal nature of the law of personality with reference to various sources of law as informed by various constitutional concepts. This article contemplates a novel analysis and integration of the doctrine of adjudicative subsidiarity and the horizontality simpliciter approach. However, this article is limited to a theoretical outline of the integration and operation of these two reading strategies. Consideration of this outline and its operation to specific instances of *iniuriae* warrants further separate study.
20 SS 8 and 39 of the Constitution.
21 Van der Walt (2012) 23-24.
22 Bhana 2013 *SAJHR* 373-374.

The purpose of this article is to examine the principle of adjudicative subsidiarity and the horizontality simpliciter approach, to demonstrate how these constitutional reading strategies complement each other for purposes of outlining an integrated and constitutional reading strategy to the law of personality. Accordingly, Parts 2 and 3 will, respectively, examine the principle of adjudicative subsidiarity and the horizontality simpliciter approach. Thereafter, Part 4 will highlight their complementary nature and demonstrate how this complementariness can function as integrated and constitutional reading strategy to the law of personality.

2 The principle of adjudicative subsidiarity

The principle of adjudicative subsidiarity is a constitutional reading strategy, or a methodological approach, to the sources of law applicable to a particular branch of law.[23] This principle pragmatically creates a hierarchy of sources of law to adjudicate a dispute between parties in a private relationship concerning a fundamental right infringement.[24] In turn, this principle creates a constitutional backdrop that informs the rules and principles of sources of law within the purview of the aforementioned hierarchy.[25]

Important to note, the pragmatism and interpretation associated with the principle of adjudicative subsidiarity are embedded in its "angle of approach".[26] In terms of this approach, the starting point of this principle is to identify a potential fundamental right that is implicated between parties to a dispute in a private relationship.[27] Thereafter, two substantive propositions, together with their two attendant provisos, are applied to determine which source of law will adjudicate a legal dispute (in other words, which legal source will provide a cause of action and remedies) and such a source is then further subjected to constitutional delineation (in other words, constitutional interpretation).[28] This angle of approach will be unpacked below.

With the starting point of this principle namely the identification of a fundamental right, it is important to note that the law of personality

23 Van der Walt (2012) 24-34 and 37; Murcott and Van der Westhuizen "The Ebb and Flow of the Application of the Principle of Subsidiarity - Critical reflections on *Motau* and *My Vote Counts*" 2015 *CCR* 46; Zitzke 2015 *CCR* 288-289.

24 Notwithstanding the fact that the doctrine of adjudicative subsidiarity is applicable to both private relationships and relationships with the state. This article focuses on the complimentary nature of adjudicative subsidiarity and the horizontality simpliciter approach in the context of private relationships. See Van der Walt (2012) 24-34; Murcott and Van der Westhuizen 2015 *CCR* 46; Zitzke 2015 *CCR* 288-289.

25 Van der Walt (2012) 37.

26 As above.

27 Zitzke 2015 *CCR* 286.

28 Van der Walt (2012) 36-37; Murcott and Van der Westhuizen 2015 *CCR* 47-48; Zitzke 2015 *CCR* 286.

enables a conceptual convergence between the recognised personality rights and rights in the Bill of Rights, given their shared jurisprudential foundation in providing individuals with innate rights according to the natural law tradition.[29] More specifically, a brief survey of the Bill of Rights reveals that several fundamental rights, directly or indirectly, entrench all of the recognised personality rights.[30] For instance:

> First, the personality rights to bodily integrity and physical liberty … are entrenched directly by the fundamental right to freedom and security of the person. Secondly, the personality right to reputation … is entrenched indirectly by the fundamental right to human dignity. Thirdly, … 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 directly entrenches the personality right to privacy whereas the fundamental right to human dignity directly entrenches the personality right to dignity and indirectly entrenches the personality rights to identity and feelings.[31]

In terms of the conception of personality rights, the law of personality in general is favourably positioned to give effect to the single-system-of-law principle, as there is a convergence between this branch of law and the Constitution on the scope of personality rights recognised in the positive law. Therefore, the infringement of a personality right by implication also involves the infringement of an indirect or direct corresponding fundamental right (at least in the context of an *iniuria*).[32]

Moving to the substantive propositions of this principle, the first substantive proposition, as deriving from the judgment of *South African National Defence Union v Minister of Defence*,[33] determines that the adjudication of a potential fundamental right infringement must find its cause of action in legislation that has been expressly enacted to provide protection to the right in question, and direct reliance on the Constitution for a cause of action is untenable.[34] Building upon the first substantive proposition, the second substantive proposition, as originating from the judgment of *Bato Star Fishing (Pty) Ltd v Minister of Environmental*

29 That is, the doctrine of subjective rights and the Bill of Rights are grounded in the natural law tradition. See Visser 2021 *Stell LR* 283-285.

30 Visser 2021 *Stell LR* 283. Important to note, customary law does not mirror the full range of personality rights as recognised in the common law of personality but does provide protection to the dignitarian and bodily aspects of the human personality. The operation of customary law, within its own episteme, resists traditional Western legal classification concomitant to the common law. See Knoetze "Customary Law of Delict" in Bekker, Rautenbach and Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2018) 108-114.

31 Visser 2021 *Stell LR* 284.

32 *Dendy v University of the Witwatersrand* 2007 8 BCLR 910 (SCA) paras 15 and 24; Visser 2020 *SAJHR* 246.

33 *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC).

34 *South African National Defence Union v Minister of Defence* paras 51-52. See also *S v Mhlungu* 1995 3 SA 867 (CC) para 59; Van der Walt (2012) 36; Murcott and Van der Westhuizen 2015 *CCR* 47; Zitzke 2015 *CCR* 287.

Affairs,[35] develops this line of reasoning further by determining that such expressly enacted legislation "cannot be thoughtlessly circumvented" to establish a cause of action in terms of the common law or customary law.[36] As such, it is very clear from these two propositions that legislation is prioritised above other sources of law for purposes of adjudicating a potential right infringement. The rationale for this can be found in S 8(3)(a) of the Constitution which, according to Bhana:

> [R]ecognises the legislature as the foremost institution, which must give voice to the enumerated substantive rights and general dictates of the Bill of Rights. More significantly, the legislature is meant to make the hard choices between what may be competing constitutional rights, underpinning values, and broader policy considerations. Arguably, such deference to the legislature addresses the counter-majoritarian concerns surrounding s 8(2)'s latitude for judicial activism in the constitutionalisation process of the classically private domain. (footnotes omitted).[37]

However, these two substantive propositions do not imply the supremacy of legislation in relation to other sources of law. This finds clarification in the two attendant provisos of the principle of adjudicative subsidiarity (as mentioned earlier). In terms of the first proviso, expressly enacted legislation may be challenged constitutionally, that is, by directly relying on constitutional provisions, when such legislation unjustifiably infringes or fails to provide adequate protection to the right in question.[38] With reference to the second proviso, a victim of a potential rights infringement may rely on the common law or customary law to establish a cause of action when such expressly enacted legislation is constitutionally invalid or its scope of application does not cover instances of *iniuriae* as provided by the common law or customary law.[39] Accordingly, these two provisos clearly demonstrate a hierarchy of sources, as opposed to the supremacy of legislation. To clarify, legislation must first be consulted to establish a cause of action for the adjudication of a potential right infringement and only when such legislation does not pass constitutional muster or its scope of application does not cover a particular *iniuria*, then reliance may be placed on the common law or customary law.[40]

With this exposition of the principle of adjudicative subsidiarity, it would appear that, upon a further purposive interpretation with reference to the single-system-of-law principle, it requires from a potential victim of an *iniuria* to rely directly on non-constitutional sources for a cause of action and remedies (subject to constitutional scrutiny). Arguably, upon further investigation, it would appear that the principle's

35 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 7 BCLR 687 (CC).
36 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* para 25. See also Van der Walt (2012) 36; Murcott and Van der Westhuizen 2015 *CCR* 48; Zitzke 2015 *CCR* 286.
37 Bhana 2013 *SAJHR* 368.
38 Van der Walt (2012) 36.
39 As above.

approach to articulating the single-system-of-law principle in this particular manner may find its ideological underpinning in the Constitutional Court's judgments of *Gcaba v Minister for Safety and Security*[41] and *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd*.[42] When reading these two judgments together, it can be seen that the "Constitution recognises the need for specificity and specialisation in a modern and complex society" which ought to be found in the respective sources of law applicable to such a branch of law.[43] As such, these non-constitutional sources provide specificity and specialisation regarding the regulation of private relationships.[44]

Although the principle of adjudicative subsidiarity generally excludes direct reliance on the Constitution for a cause of action in adjudicating a dispute in a private relationship, it must be noted that the Constitution fulfils an unequivocal and important role when one considers the horizontality provisions of the Constitution[45] (as fortified by the powers of the courts regarding constitutional matters, the development of the common law, and the application of customary law) as part of this principle's angle of approach.[46] More specifically, sections 8, 36, 39, 172, 173 and 211 of the Constitution provide mechanisms for the constitutional assessment of non-constitutional sources within the principle of adjudicative subsidiarity.[47] Such constitutional assessment may include a constitutional review or development of the implicated non-constitutional sources.[48] With the mechanism of constitutional review, as premised on sections 8, 36, 39, 172 and 211 of the

40 Zitzke 2015 *CCR* 287. It falls beyond the scope of this article to further investigate the hierarchy in terms of when common law or customary law is applicable when a particular dispute will not be governed by legislation. Here an argument can be made that a court will determine if the parties concluded an agreement to the application of customary law or whether their behaviour is indicative of the application of customary law towards a particular dispute. If the latter circumstances are not applicable, courts will rely on the common law as the default source of law in the absence of legislation. See, for instance, S 211(3) of the Constitution; *Swawintshi v Magidela* 1944 NAH (K&O) 47; *Sibanda v Sithole* 1951 NAH 347 (NO) 350; *Maisela v Kgolane* 2000 2 SA 370 (T).

41 *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC).

42 *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 1 SA 621 (CC).

43 *Gcaba v Minister for Safety and Security Gcaba* para 56; *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* para 37.

44 As above. Also see Zitzke 2015 *CCR* 269-270. Important to note, this rationale may also be expressed in the sense that adjudicative subsidiarity provides that the adjudication of a right infringement in a private regulation must be determined according to a more specific norm as contained in non-constitutional sources of law where constitutional norms are indirectly expressed as opposed to directly relying on constitutional norms, which are broader and more ideological in nature. See Murcott and Van der Westhuizen 2015 *CCR* 46-47.

45 SS 8 and 39 of the Constitution.

46 SS 172 and 173 of the Constitution.

47 Van der Walt (2012) 37; Zitzke 2015 *CCR* 286-290.

48 As above.

Constitution, non-constitutional sources are tested directly against the provisions of the Constitution to determine whether such sources reasonably and justifiably limit a fundamental right, and, if not, such sources are declared unconstitutional and therefore invalid.[49] Moving to the mechanism of constitutional development, as premised on sections 8, 39 and 173 of the Constitution, non-constitutional sources are interpreted against the Constitution to determine the extent to which these sources give effect to a fundamental right and promote "the spirit, purport and objects of the Bill of Rights" in a private relationship and, if applicable, develop them accordingly.[50] Therefore, the Constitution provides a constitutional backdrop to test the constitutional validity and/or constitutional resonance of non-constitutional sources as opposed to directly providing a cause of action and remedies.[51]

The implications of the constitutional backdrop provided by the principle of adjudicative subsidiarity are far-reaching. This backdrop generally signals that all non-constitutional sources must "reverberate" with the transformative aspirations provided by constitutional values and fundamental rights.[52] Arguably, for purposes of adjudicating an *iniuria* between private individuals by selecting an applicable legal source, such a source should always be subjugated to the transformative aspirations of the Constitution, even when the constitutional validity of such a source is not directly challenged. In doing so, not only is direct effect given to the single-system-of-law principle, but non-constitutional sources are continuously and incrementally constitutionally developed as part of transforming the law within the context of the transformative constitutionalism paradigm.[53]

In this regard, the horizontality simpliciter approach arguably provides "practical measures" to the constitutional assessment of non-constitutional sources through its "values-based" and "right-based" analyses in giving practical effect to the abovementioned constitutional backdrop.[54]

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49 SS 8(3), 36(1), 39(1) and 172(1) of the Constitution. Also see Van der Walt (2012) 37; Murcott and Van der Westhuizen 2015 *CCR* 46-47; Zitzke 2015 *CCR* 286-287.

50 SS 8(3), 39(2) and 173 of the Constitution. Also see *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) paras 53 and 55; Van der Walt (2012) 37; Zitzke 2015 *CCR* 287-288.

51 Van der Walt (2012) 37. At this juncture, it is worth mentioning that a victim of a potential rights infringement may consider constitutional damages in terms of section 38 of the Constitution when the results of the application of the doctrine of adjudicative subsidiarity do not yield constitutionally valid or compliant sources to a dispute in a private relationship. See Zitzke 2015 *CCR* 288-289.

52 Van der Walt "Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation between Common-law and Constitutional Jurisprudence" 2001 *SAJHR* 359; Van der Walt (2012) 37; Bhana 2013 *SAJHR* 353. Zitzke 2015 *CCR* 287-288.

53 Zitzke 2015 *CCR* 287-288.

54 Visser 2020 *SAJHR* 250.

3 The horizontality simpliciter approach

The horizontality simpliciter approach is a constitutional reading strategy that specifically focuses on the constitutional assessment of non-constitutional sources regulating a dispute between parties in a private relationship.[55] Important to note, this approach resulted from the debate that existed on the "extent" to and the "manner" in which the Constitution should be horizontally applied.[56] In other words, this debate turned on whether constitutional values or fundamental rights are applied to private relationships (that is, the extent) and whether the Constitution or non-constitutional sources will directly adjudicate a dispute in private relationships (that is, the manner).[57] This related to the direct-indirect horizontal application debate of the Constitution.[58]

Direct horizontality,[59] as a form of horizontal application, entails a rights-based analysis in which the horizontality of fundamental rights in the Bill of Rights is considered.[60] Specifically, the relevant rules and principles of a non-constitutional source are tested directly against an applicable fundamental right to determine whether the former infringes the right in question and, if so, whether such an infringement is reasonable and justifiable in terms of section 36 of the Constitution.[61] By implication, the rules and principles of the Constitution are used instead of those of non-constitutional source.[62] Accordingly, a parallel constitutional body of law can develop that may eventually replace non-constitutional sources, as the Constitution provides its own cause of action and remedies as opposed to indirectly assessing non-constitutional sources.[63]

With indirect horizontality,[64] however, the Constitution establishes an "objective normative value system", a set of constitutional values that must inform the interpretation, development and application of non-constitutional sources.[65] Indirect horizontality contemplates a "values-based analysis" in which, instead of focusing on fundamental rights, focus is placed on the values that underlie the Constitution generally and,

55 By implication, on a broader level, the horizontality simpliciter approach focuses on the horizontal application of the Constitution to disputes between private parties. See Friedman 2014 *SAJHR* 72.
56 Bhana 2013 *SAJHR* 351; Dafel 2015 *SAJHR* 56.
57 Bhana "The Role of Judicial Method in Contract Law Revisited" 2015 *SALJ* 122.
58 Dafel 2015 *SAJHR* 58.
59 SS 8(1) and 8(2) of the Constitution.
60 Bhana 2013 *SAJHR* 358-359; Currie and De Waal *The Bill of Rights Handbook* (2013) 31.
61 Woolman "The Amazing, Vanishing Bill of Rights" 2007 *SALJ* 768-769.
62 Bhana 2013 *SAJHR* 355 and 359; Currie and De Waal (2013) 31; Dafel 2015 *SAJHR* 58.
63 Bhana 2013 *SAJHR* 359-360; Currie and De Waal (2013) 45-50.
64 S 39(2) of the Constitution.
65 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 48; Dafel 2015 *SAJHR* 58-59.

more specifically, the fundamental rights as enumerated in the Bill of Rights.[66] By implication, non-constitutional sources are developed through the application of constitutional values so that a single constitutionalised body of law can emerge through incremental development.[67] Therefore, the Constitution does not provide its own cause of action and remedies, but non-constitutional sources function as intermediaries through which the Constitution applies, to adjudicate disputes in private relationships.[68]

Although the desirability of each approach to horizontality has been contested vigorously,[69] many academic commentators argued that the horizontal application of the Constitution should not be limited to the binaries of the direct-indirect horizontality debate.[70] Various academic commentators suggested approaches to the horizontal application of the Constitution, ranging from varying degrees of reliance on direct and/or indirect horizontality.[71] Subsequently, the "horizontality simpliciter" approach emerged, which advocated for an integrated reading of sections 8 and 39 of the Constitution.[72] Although many academic commentators advocated for such an integrated reading,[73] it was ultimately Deeksha Bhana who provided the instrumentation of the horizontality simpliciter approach to effect constitutional assessment and development of non-constitutional sources.[74]

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.[75] In doing so, the nuanced interplay and fluidity between sections 8 and 39 of the Constitution can be examined (together with sections 36, 172, 173 and

66 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 40.
67 Bhana 2013 *SAJHR* 355 and 360.
68 Bhana 2013 *SAJHR* 355; Currie and De Waal (2013) 32.
69 For a discussion hereof, generally see Currie and De Waal (2013) Chapter 3; Roederer "Post-matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law" 2003 *SAJHR* 57; Woolman "Application" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2008 Revision Service 5, 2013).
70 Bhana 2013 *SAJHR* 373-374; Currie and De Waal (2013) 67; Roederer 2003 *SAJHR* 75-81; Dafel 2015 *SAJHR* 60.
71 Zitzke 2018 *SAJHR* 501.
72 Important to note, the development of the horizontality simpliciter approach originally focussed on the constitutional assessment and development of the common law as a non-constitutional source of law. However, as it will become clearer in this article, this approach utilises the same constitutional provisions as apparent to the constitutional backdrop of the doctrine of adjudicative subsidiarity, with reference to the single-system-of-law principle, which can adequately deal with all non-constitutional sources as this approach provides practical measures to be utilised towards the application of constitutional values and fundamental rights to non-constitutional sources.
73 Bhana 2013 *SAJHR* 373-374; Currie and De Waal (2013) 75-81; Friedman 2014 *SAJHR* 72.
74 See generally Bhana 2013 *SAJHR*.
75 Bhana 2013 *SAJHR* 354 and 373; Friedman 2014 *SAJHR* 72.

211 of the Constitution).[76] 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 constitutional values and fundamental as applied to non-constitutional sources (offering a plausible solution to the debate on the extent of the application of the Constitution).[77] Furthermore, this approach is based on the premise that non-constitutional sources act as the necessary portals to give effect to the transformative aims of the Constitution because of the single-system-of-law principle and the subsequent specialisation provided by these doctrines (as outlined above).[78] Thus, non-constitutional sources are subject to constitutional assessment and development in creating a single and integrated constitutionalised body of law (and there is no direct reliance on the Constitution for a cause of action or remedies offering a plausible solution to the debate on the manner in which horizontal application should take place).[79]

In more practical terms, this approach views the application of constitutional values and applicable fundamental rights as creating a constitutional backdrop against which non-constitutional sources are measured for purposes of constitutional assessment.[80] As a result, the constitutional assessment of non-constitutional sources takes place in terms of the "practical measures" of the horizontality simpliciter approach, namely its "values-based" and "rights-based" analyses (as adapted from the traditional understanding of direct and indirect horizontality).[81] In terms of each analysis, non-constitutional sources are assessed against constitutional values and/or fundamental rights to determine whether constitutional adjustments ought to be made.[82] Each of these analyses will be interrogated further below.

In terms of the values-based analysis,[83] non-constitutional sources must reverberate with, and give effect to (or at the very least, be consistent with) the objective normative value system of the Constitution.[84] The objective normative value system of the Constitution refers to the founding values of the Constitution, namely freedom, dignity and the achievement of equality (which are further shaped by other non-enumerated values such as ubuntu).[85] Constitutional values create goals and ideals which serve as guidelines or aspirations to be

76 As above.
77 Currie and De Waal (2013) 67; Zitzke 2015 *CCR* 269-270.
78 As above.
79 Bhana 2013 *SAJHR* 373-374.
80 Bhana 2013 *SAJHR* 364 and 373-374.
81 Bhana 2013 *SAJHR* 373-374.
82 Bhana "The Development of a Basic Approach for the Constitutionalisation of our Common Law of Contract" 2015 *Stell LR* 7.
83 As mandated by s 39 of the Constitution.
84 Bhana 2013 *SAJHR* 372-373.
85 Roederer 2003 *SAJHR* 59-61; Zitzke 2022 *Rabel Journal of Comparative and International Private Law* 221-222. Also see *Carmichele v Minister of Safety and Security* para 54.

realised in private relationships.[86] 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).[87] As noted by Bhana, these values should not be used in a vague and generalised manner but should be applied to the contexts provided by the frameworks of the common law and the attendant application of fundamental rights.[88] Therefore, constitutional values, as interpretative norms, have symbolic and foundational functions in law as these are capable of promoting constitutional ideals and serving as a foundation for more specific and concrete entitlements in law.[89]

Moving to the rights-based analysis,[90] the direct horizontality of applicable fundamental rights is considered.[91] In the context of the law of personality (as mentioned above), fundamental rights are always implicated in a dispute regarding an *iniuria* as the various recognised personality rights correspond directly or indirectly to fundamental rights. As such, non-constitutional sources are then measured against the specific entitlements and corresponding duties provided by a fundamental right.[92] For instance, fundamental rights demand greater specificity than constitutional values, as these typically define relationships between private individuals.[93] Accordingly, fundamental rights indicate the standards of conduct that are required from individuals.[94] 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) inherent to an applicable fundamental right.[95] Legal duties are then imposed on individuals to act in accordance with these negative and positive entitlements as determined by the particular context.[96] As such, fundamental rights are more individualised and concrete than foundational values as these are capable of delineating specific constitutional interests (with corresponding legal duties) in regulating

86 Riley "Human Dignity and the Rule of Law' 2015 *Utrecht LR* 99-100.
87 *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) para 21.
88 Bhana 2013 *SAJHR* 375.
89 Riley 2015 *Utrecht LR* 99-100.
90 As mandated by s 39 of the Constitution.
91 Bhana 2013 *SAJHR* 364-365.
92 Bhana 2013 *SAJHR* 373-374.
93 *S v Pienaar* 2000 7 BCLR 800 (NC) para 10; *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; Dafel 2015 *SAJHR* 61.
94 Rao "On the Use and Abuse of Dignity in Constitutional Law" 2008 *Columbia J of European L* 223; Dafel 2015 *SAJHR* 62.
95 As above.
96 As above.

private relationships.[97] Therefore, the constitutional assessment of non-constitutional sources will be dictated by their ability to respect and promote the substance of the fundamental right implicated.[98]

When considering the value- and rights-based analyses together for the purpose of assessing non-constitutional sources against the aforementioned constitutional backdrop, the constitutional development and review of these sources can take place at the following levels:[99] first, this can include a mere purposive interpretation of the substance of extant rules and principles of non-constitutional sources, which better infuses with the objective normative value system of the Constitution;[100] secondly, this can also include an adjustment to extant rules and principles of non-constitutional sources with regard to the manner in which these sources adjudicate disputes when measured against constitutional values and fundamental rights;[101] and, thirdly, with direct reference to applicable fundamental rights, this can lastly include declaring non-constitutional sources constitutionally invalid.[102]

In terms of the value- and rights-based analyses of the horizontality simpliciter approach, the broader scope of the operation of the Constitution is delineated to assess the ability of non-constitutional sources to give effect to and promote constitutional values and fundamental rights.[103] In doing so, the specific functions of foundational constitutional values and fundamental rights are also highlighted within the transformative constitutionalism paradigm. Ultimately, these fundamental rights and values will guide the substantive development and/or methodological development of non-constitutional sources in regulating private disputes (or *iniuriae* in the context of the law of personality).[104]

4 Outlining an integrated and constitutional reading strategy

In outlining an integrated and constitutional reading strategy to the law of personality, it is important to first examine the complimentary nature of the principle of adjudicative subsidiarity and the horizontality

97 McCrudden "Human Dignity and Judicial Interpretation of Human Rights' 2008 *The European J of International L* 681.
98 As mandated by ss 39, 172 and 173 of the Constitution. Also see Bhana 2013 *SAJHR* 367-373.
99 As above.
100 Roederer 2003 *SAJHR* 61-62; Bhana 2013 *SAJHR* 369-370; Friedman 2014 *SAJHR* 71.
101 As above.
102 Bhana 2013 *SAJHR* 373-374.
103 Important to note, the broader scope of the operation of the Constitution refers to aforementioned constitutional backdrop comprising of constitutional values and fundamental rights. See Bhana 2013 *SAJHR* 364-365 and 375.
104 Bhana 2013 *SAJHR* 373-374.

simpliciter approach. Thereafter, consideration will be afforded on how the complimentary nature of these two constitutional reading strategies can be integrated to practically express the envisioned reading strategy in positive law.

To begin with, both the principle of adjudicative subsidiarity and the horizontality simpliciter approach are grounded in the single-system-of-law principle as part of the transformative constitutionalism paradigm.[105] As a result, these constitutional reading strategies affirm that the application of the Constitution and non-constitutional sources to private law disputes ought to create a single constitutionalised body of law as opposed to creating two parallel systems of law, namely one constitutional and one non-constitutional. Of importance here is the particular manner in which these constitutional reading strategies express the articulation of the single-system-of-law principle. More specifically, regarding the adjudication of a private law dispute (or more specifically, a fundamental rights infringement that in the context of the law of personality translates to an *iniuria*), both these constitutional reading strategies locate a cause of action in non-constitutional sources instead of relying on the Constitution directly. The ideological underpinning for articulating the single-system-of-law principle in this particular manner resides in the notion that non-constitutional sources provide specialisation in adjudicative private law disputes, whereas the Constitution provides broader transformative imperatives.[106]

In locating a cause of action in non-constitutional sources in terms of the single-system-of-law principle, both these constitutional reading strategies feed into the constitutional backdrop to assess such non-constitutional sources' ability to promote, respect and protect constitutional values and fundamental rights (as the constituent parts of this backdrop).[107] Although these non-constitutional sources provide specialisation towards the adjudication of private law disputes, they still find their operative force within the Constitution, ensuring their symbiotic existence with the former in a transformative constitutionalism paradigm.[108] In other words, such symbiosis is guaranteed by subjecting non-constitutional sources to constitutional review and development as part of the assessment function of the constitutional backdrop (without relying directly on the Constitution for providing a cause of action). Such constitutional assessment is facilitated

105 Bhana 2013 *SAJHR* 373-374; Murcott and Van der Westhuizen 2015 *CCR* 46-47; Zitzke 2015 *CCR* 269-270.

106 *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum* para 37. Also see s 39(3) of the Constitution, which arguably bolsters this notion of specialisation to the extent that such non-constitutional sources are consistent with the Bill of Rights.

107 Van der Walt (2012) 37; Bhana 2013 *SAJHR* 364-365 and 375; Visser 2020 *SAJHR* 249-250.

108 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* para 44. Also see S 39(3) of the Constitution.

in positive law by the horizontality provisions of the Constitution (and other constitutional provisions as mentioned above),[109] upon which both the principle of adjudicative subsidiarity and the horizontality simpliciter approach are predicated.

Moving to the provisions of the Constitution, sections 8, 36, 39, 172, 173 and 211 provide the legal mechanisms for the constitutional assessment of non-constitutional sources in terms of the constitutional backdrop, for purposes of review and development, into which both the principle of adjudicative subsidiarity and the horizontality simpliciter approach feed. In terms of these constitutional provisions, the ability of the constitutional backdrop to assess non-constitutional sources is primarily entrenched in sections 8(1)[110] and 39(2)[111] of the Constitution, which collectively provides that non-constitutional sources must respect, protect and promote constitutional values and fundamental rights.[112] In terms of considering constitutional values, non-constitutional sources can be developed to ensure that they effectively resonate with the objective normative value system of the Constitution (through sections 39(2) and 173[113] of the Constitution).[114] However, regarding the contemplation of fundamental rights, non-constitutional sources must respect and protect these rights otherwise such a source will be declared constitutionally invalid or require adjustment (through sections 36(1),[115]

109 See Parts 2 and 3 above.

110 S 8(1) reads as follows: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

111 S 39(2) reads as follows: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

112 Also see S 2, which reads as follows: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." Further see *Carmichele v Minister of Safety and Security* para 33.

113 S 173 reads as follows: "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

114 With specific reference to customary law, see *Mayelane v Ngwenyama* 2013 4 SA 415 (CC) para 24, which states that "… customary law is nevertheless subject to the Constitution and has to be interpreted in the light of its values". Also see *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) paras 52-54; see *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) paras 48 and 81; *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) paras 42-43 and 48; Ozoemena "Legislation as a Critical Tool in Addressing Social Change in South Africa: Lessons from *Mayelane v Ngwenyama*" 2015 *PELJ* 976-984.

115 S 36(1) reads as follows: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

172(1)[116] and 211(3)[117] of the Constitution).

Therefore, the complementary nature of the principle of adjudicative subsidiarity and the horizontality simpliciter approach can be summarised as follows: in pursuing a single constitutionalised body of law, as premised on the horizontality provisions of the Constitution (together with other constitutional provisions related to the powers of the courts), the principle of adjudicative subsidiarity and the horizontality simpliciter approach locate a cause of action in a non-constitutional source for the adjudication of a right infringement in the context of a private relationship, which is constitutionally assessed through the application of constitutional values and fundamental rights as part of the constitutional backdrop. With this complementariness in mind, their integration can be sequentially illustrated below for the purpose of outlining an integrated and constitutional reading strategy to the law of personality.

First, at the macro level of the proposed integrated and constitutional reading strategy, the principle of adjudicative subsidiarity will, through its angle of approach, identify and prioritise a relevant non-constitutional source of law to the infringement of a personality right which by implication imputes a fundamental right as the primary constitutional reference point. In identifying and prioritising a relevant non-constitutional source, a hierarchy of sources are created where legislation must be consulted first and the common or customary law thereafter, when the implicated act does not pass constitutional muster or does not cover the scope of a particular personality right in question.

Secondly, after an appropriate non-constitutional source has been designated to a personality right infringement, moving from the macro to the micro level, the principle of adjudicative subsidiarity and the horizontality simpliciter approach will constitutionally assess such a source against the constitutional backdrop consisting of constitutional values and fundamental rights as the secondary constitutional reference point. In broad terms, such assessment can take the form of (1) constitutional review (that is, considering the constitutional validity) of a non-constitutional source against an imputed fundamental right or (2) take the form of constitutional development or interpretation (that is, determining the constitutional resonance) of a non-constitutional source

116 S 172(1) reads as follows: "When deciding a constitutional matter within its power, a court –
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including –
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

117 S 211(3) reads as follows: "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".

against constitutional values and the imputed fundamental right. Important to note, the constitutional assessment of non-constitutional sources is not only limited to their direct constitutional validity but also their ability to reverberate with constitutional values and rights to promote and respect the transformative aspirations of the Constitution.

Lastly, as the implications of declaring a non-constitutional source invalid are arguably self-evident, the constitutional assessment of non-constitutional sources on their ability to reverberate with constitutional transformative aspirations, as part of the constitutional backdrop, will receive further and practical guidance from the horizontality simpliciter approach. Through its values-based and rights-based analyses as its practical measures, the horizontality simpliciter approach will serve to constitutionally enrich non-constitutional sources with reference to their conception of personality rights and the manner in which such sources adjudicate *iniuria* (as an additional dimension to the constitutional backdrop). More specifically, constitutional values, as interpretative norms, read together with fundamental rights, that delineate appropriate standards through the imposition of corresponding legal duties, will be instructive in reconceptualising the manner in which non-constitutional sources conceive and adjudicate personality rights and their infringement. Therefore, this level of analysis represents the micro level of the proposed constitutional reading strategy.[118]

In summary, in outlining an integrated and constitutional reading strategy, the principle of adjudicative subsidiarity determines which non-constitutional source of law is applicable to a particular *iniuria*, whereas the horizontality simpliciter guides the development of the applicable source against constitutional values and fundamental rights regarding the former's conception and adjudication of an *iniuria*.

5 Conclusion

The contemporary law of personality must navigate a multiplicity of legal sources, adhere to the transformative aspirations of the Constitution, and function within the single-system-of-law principle, as part of the transformative constitutionalism paradigm. As a result, various doctrinal, ideological, and methodological demands are imposed on the law of personality in terms of its conception of personality rights and adjudication of *iniuriae*. In turn, these demands highlight the need for an integrated and constitutional reading strategy. Without contemplating such a reading strategy, the law of personality, when conceiving personality rights and adjudicating *iniuriae*, may arguably fall victim to over-reliance or under-reliance on the Constitution or non-constitutional

118 Important to note, the integration of the principle of adjudicative subsidiarity and the horizontality simpliciter approach as applied to the law of personality necessitates certain conceptual and practical adjustments to these constitutional readings strategies as demonstrated in this article where personality rights unequivocally implicate fundamental rights.

sources while not taking proper cognisance of the diversity of our South African society.[119]

This article offers a potential integrated and constitutional reading strategy to the law of personality based on an integrated understanding and application of the principle of adjudicative subsidiarity and the horizontality simpliciter approach. In doing so, the aim of this article is to outline a reading strategy that deals with the integration of legal sources, constitutional values, and fundament rights to *iniuriae*. Such an outline of an integrated and constitutional reading strategy arguably provides formative considerations to the discourse on the operation of the law of personality in a transformative constitutionalism paradigm. However, this is not the end of this discussion. In going forward, this discourse will have to grapple with the actual assessment of non-constitutional sources in conceiving and adjudicating *iniuriae* against the Constitution.

119 Zitzke 2015 *CCR* 261-285.