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A quest for an African concept of privacy

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Abstract

In spite of the absence of a privacy concept in Africa, privacy as a right has evolved. In the past decade Africa has seen the development of privacy with the adoption and enforcement of information privacy legal and regulatory frameworks. This chapter canvasses privacy as a concept and as a right, in general, followed by a discussion on specific issues relating to privacy and data protection in an African context. Privacy being a relatively new concept in Africa, existing privacy perceptions or concepts are analysed through the lens of an African social context and legal culture to determine their fitness *de jure* in Africa. Despite the fact that the right to privacy is a well-known legal concept and a right in the human rights catalogue, African social norms, cultural values and legal culture have an impact on privacy perception. As a result, the strict adoption of any privacy concept or the right to privacy as understood in the Western world may not reflect African social and jural contexts in a way that its interpretation and enforcement constitutes justice. The analyses made on the African Union (AU) legal framework for human rights and, more specifically, data protection enforcement as well as on African social perspectives indicate a desire for an alternative approach to privacy and data protection, other than the Western approach.

1 Introduction

Regimes regulating privacy regulate social behaviours. These regimes are highly influenced by specific culture and social norms. They affect privacy perceptions and its meaning, and they are the foundation of the jurisdictions creating and supporting privacy regimes.[1] This makes

1 D Nelken 'Towards a sociology of legal adaptation' in D Nelken & J Feest (eds) *Adapting legal cultures* (2001) 25-26.

privacy elusive, transitory[2] and contextual,[3] hence difficult to define and to understand. Privacy has different meanings to different people.[4] It is a concept that 'has [a] protean capacity to be all things to all lawyers'.[5] Its meaning may vary and may be determined based on individual interaction with society, culture and technology. Its character is debatable, whether privacy is a state/condition, a claim or a right.[6] Nevertheless, for jurisprudential reasons it is important to at least understand and describe the interests that privacy protects in order to promote certainty in privacy legislation and enforcement.

This chapter narrates the importance of conceptualising privacy within the context especially of unripe frameworks such as Africa, where privacy is still an abstract concept.[7] Since 2001 African countries are reforming and developing data protection frameworks, with 'robust' and comprehensive frameworks for privacy and data protection – as elaborated in part 3 below. The process has not spared time to define or conceptualise privacy within such frameworks. Despite several calls from African privacy scholars for an African conception of privacy.[8] there still is neither concept nor theory that uniquely deals with privacy in an African context. Contextualising the privacy concept or theory is not only important in the enforcement of privacy and data protection, but is also inevitable in developing and reforming data protection legal frameworks. So far, privacy takes on the Western idea of what privacy is or should be.[9] Privacy is regarded as a form of human dignity or personality right. These definitions or privacy concepts are the focus of this chapter. The chapter analyses the current position where privacy and data protection reforms in Africa seem to

2 J Neethling 'The concept of privacy in South African law' (2005) 122 *South African Law Journal* 18.

3 JL Cohen 'What privacy is for' (2013) 126 *Harvard Law Review* 1904. See also P Boshe 'Data protection legal reforms in Africa' PhD thesis, University of Passau, 2017 20, 49, 53-61.

4 Neethling (n 2); see also AR Miller *The assault on privacy: Computers, data banks, and dossiers* (1971) 25; *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC) 787-788.

5 T Gerety 'Redefining privacy' (1977) 14 *Harvard Civil Rights-Civil Liberties Law Review* 234.

6 LA Bygrave *Data privacy law: An international perspective* (2014) 169.

7 EM Bakibinga 'Managing electronic privacy in the telecommunications sub-sector: The Uganda perspective' Africa Electronic Privacy and Public Voice Symposium (2004).

8 The lack of an African privacy concept or theory had been aired out by African privacy scholars such as Bakibinga (n 7) in 2014 and AB Makulilo 'The context of data privacy in Africa' in AB Makulilo (ed) *African data privacy laws* (2016) 16.

9 AB Makulilo '"A person is a person through other persons": A critical analysis of privacy and culture in Africa' (2016) 7 *Beijing Law Review* 192, 196.

have silently and indirectly adopted the Western construction of privacy. The chapter examines the influence of cultures and social norms on the concept, keeping in mind how it has affected (if at all) the privacy and data protection reform agenda in Africa.

Analyses are driven from the assumption that privacy is a universal concept regardless of varied (privacy) cultures and the opposing arguments that no single concept (or two) can describe or denote privacy across cultures. The AU legal framework on the enforcement of human rights and data protection is then analysed in light of the two premises. Eventually, an explanation as to why Africa should conceptualise privacy based on the underlying socio-legal and cultural values is offered. The chapter is the result of a mixture of constructivism and comparative research approaches. The constructivism approach was instrumental for an in-depth examination of the existing social and legal structures and diverse aspects in legal systems. Through constructivism, knowledge was viewed as socially constructed and able to change based on circumstances. This approach was also used to validate diverse realities attached to contexts and legal culture with regard to privacy. A comparative analysis helped in drawing conclusions on the universality and fitness of the existing privacy concept/perceptions in an African context.

2 African privacy: Does it really matter?

An understanding of privacy in a certain context is crucial in regulating interests and values protected and safeguarded by the right to privacy and data protection laws. Bygrave insists that 'the way in which one conceptualises the interests and values served by these laws is not just an academic interest but has significant regulatory implication. It is pivotal to working out the proper ambit of the laws and, concomitantly, the proper mandate for data protection authorities.'[10] Frowein and Peukert emphasise the clarity of the concept, considering the fact that the right to privacy challenged many legal systems of liberal states in the late half of the twentieth century.[11] Nevertheless, its understanding is not only crucial in ascertaining its objectives but also affects privacy protection in a given context. Concepts such as privacy are a work of theories and not practice and, therefore, one cannot phrase or derive a concept based on practice,[12]

10 LA Bygrave *Data protection law: Approaching its rationale, logic and limit* (2002) 7. See also Bygrave (n 6).

11 JA Frowein & W Peukert *Europäische Menschenrecht Konvention: EMRK-Kommentar* (1996) 338.

12 P Blume 'Privacy as a theoretical and practical concept' (1997) *International Review of Law Computers and Technology* 194.

no matter how popular such practice is. Concepts are meant to identify and solve practical conflicts, they provoke human mind and underline aspirations and thoughts and, therefore, the most important activity.[13]

Furthermore, diversity in legal cultures[14] and structures, perceptions and an understanding of the right to privacy (or the concept of privacy)[15] have an impact on how a country interprets the basic content and core rules of the law and eventually standards implemented within a specific local jurisdiction.[16] Culture defines law, its purpose, and where and how it is to be found. Arguably, even when the rule is imported, its application is still contextual.[17] Its effectiveness depends on the ability of the interpreter to link the rule with cultural foundations and employ what Krygier refers

13 As above.

14 LM Friedman 'Legal culture and social development' (1969) 29 *Law and Society Review* 35-36. Basically legal culture is the totality of social attitudes, informed by culture and history and countries' institutional characteristics and its legal traditions that give a certain rule a meaning and life.

15 An example on diverging understanding and treatment of privacy and how they impact regulatory standards within certain communities is given by Saad who compares the concept of privacy as perceived in Islamic communities as against the Westerners. In Islamic communities, he said, privacy is aimed at prohibiting public humiliation of the individual even if it is something of a legitimate concern to the public. This is different from the Western concept of privacy that would seem to allow the publication of information of a person's private life if there is legitimate concern. He continues to say that 'even without the existence of law, privacy is a concept recognized in various cultures, but depending on cultural setting, each society has its own attitude and perception towards what amounts to privacy'. AR Saad 'Information privacy and data protection a proposed model for the Kingdom of Saudi Arabia' (unpublished). See also Boshe (n 3) 10.

16 In this context, Tabalujan emphasises that legal culture has an impact on the way in which privacy is perceived and interpreted, which means that social beliefs and norms of the receiving community and the people's willingness and capacity to scour for, understand and obey new laws are important factors that help determine the success of law that is transposed. BS Tabalujan 'Legal development in developing countries: The role of legal culture' (March 2001) 9, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=268564 (accessed 24 December 2020).

17 JJ Kingsley 'Legal transplantation: Is this what the doctor ordered and are the blood types compatible? The application of interdisciplinary research to law reform in the developing world: A case study of corporate governance in Indonesia' (2004) 21 *Arizona Journal of International and Comparative Law* 495. Law reforms in less developed countries that utilise Western frameworks without adapting or localise such frameworks and ignoring cultural diversity are bound to fail. See also a similar view by A Watson *Legal transplant: An approach to comparative law* (1993) 108 where he insists on the importance of paying attention to a country's legal culture instead of blindly injecting foreign legal theories. See also O Kahn-Freund 'On use and misuse of comparative law' (1974) 37 *Modern Law Review* 6; LM Friedman *The legal system: A social science perspective* (1975).

to as positive sanctions and persuasions to ensure compliance.[18] How law is perceived in one state may differ from the beliefs in another. Blume explains thst 'the formal instruments and institutions might be the same, but the differences in the culture imply that the law works or functions in different ways'.[19] This means that an understanding of what privacy means and how it is perceived in Africa is or should be pivotal to any reform process.

The Western understanding of privacy is either a right to be left alone (suggesting an individual claim over one's space or information) or personality right, a right to self-determination or integrity. Looking at the first aspect, simply saying 'right to be left alone' does not say much about the concept. Hickford questioned this definition by saying that it does not clarify content or context – 'left alone how and when?' He states that it presents the possibility of an extreme wide interpretations of situations that may be construed as entailing a right to privacy but may fail to predict the concrete outcomes or when or how to intervene in one case but not in another.[20] This means that this construction poses the danger of being interpreted to apply to situations not intended to have been covered at the time of its conception. Bygrave elaborates on privacy by breaking it down into four elements. The first is based on non-interference; the second is based on limited accessibility; the third is based on information control; and the fourth links privacy to intimate or sensitive aspects of a person's life.[21] This is similar to a meaning given by the Electronic Privacy Information Centre (EPIC) and Privacy International that privacy safeguards four things, namely, personal information; bodily privacy; communications privacy; and territorial privacy.[22] This is also similar to what legal scholars have come to agree upon as a form of protection for a liberal self,[23] or self-determination. It is better described by Neethling as the ability of a person to determine his private facts and hence the scope of his interest in privacy, a power that an individual has, that gives a person a right to claim his right to privacy.[24]

18 M Krygier 'Is there constitutionalism after communism? Institutional optimism, cultural pessimism, and the rule of law' (1996) *International Journal of Sociology* 17-47.

19 Blume (n 1) 194.

20 M Hickford 'A conceptual approach to privacy' Miscellaneous Paper 19/New Zealand Law Commission (October 2007) 19-20.

21 Bygrave (n 6) 70.

22 EPIC 'Privacy and human rights report' (2006), http://www.worldlii.org/int/journals/EPICPrivHR/2006/ (accessed 20 December 2020).

23 See, eg, C Kuner 'International legal framework for data protection: Issues and prospects' (2009) 25 *Computer Law and Security Review* 308.

24 Neethling (n 2).

Although there is still no universally-accepted definition of privacy, legal scholars and judicial pronunciations seem to have agreed on the scope of privacy. Privacy gives an individual control over their private lives against intrusion, physical or otherwise,[25] whether in private, within his intimate space or in social capacity in which people act,[26] and it extends to persons' professional activities and certain activities performed in the public sphere.[27] As described by Hickford, privacy relates to 'those things or aspects of one's life that you, as an individual in social world, would have a reasonable expectation of exerting control over in terms of dissemination or disclosure should you wish to'. Further, as explained by Moreham:

> A person will be in a state of privacy if he or she is only seen, heard, touched or found out about if, and to the extent that, he or she wants to be seen, heard, touched or found out about. Something is therefore 'private' if a person has a desire for privacy in relation to it: A place, event or activity will be 'private' if a person wishes to be free from outside access when attending or undertaking it and information will be 'private; if a person to whom it relates does not want people to know about it.[28]

According to Moreham, privacy is a claim rather than a state or condition of being. It is a claim a person has over his state of affairs, his information and his space that he considers private and intends it to be private. It is a claim of choice; one can choose elements and extent of publicity they desire about themselves. Similarly, Altman believes that privacy is a claim of choice that depends on one's ability to control interaction with others, but he also adds that privacy regulation is a cultural pervasive process.[29]

As a cultural pervasive process, privacy manages social interaction, establishes plans and strategies for interaction with others and develops

25 See also C Cuijpers 'A private law approach to privacy: Mandatory law obliged?' (2007) 4 *SCRIPTed* 312.

26 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smith NO* 2001 (1) SA 545 (CC) 557.

27 See, eg, *Niemitz v Germany* Application 13710/88 16 September 1992 para 29; *Coeriel & Aurik v The Netherlands* (1994) Comm 453/1991 para 10.2, reported in, among others, (1994) 15 HRLJ, 422; P de Hert & S Gutwirth 'Data protection in the case law of Strasbourg and Luxemburg: Constitutionalisation in action' in S Gutwirth (ed) *Reinventing data protection* (2009) 15.

28 NA Moreham 'Privacy in the common law: A doctrinal and theoretical analysis' (2005) 121 *Law Quarterly Review* 636; see also Boshe (n 3) 56.

29 I Altman 'Privacy regulation: Culturally universal or culturally specific?' (1997) 33 *Journal of Social Issues* 68.

and maintains self-identity.[30] So long as privacy is seen in the context of human interaction, regulating social interchange, its meaning, perception and value are inevitably derived from that particular society. What privacy means in one society cannot be taken to mean the same in another, unless the two societies share history, social and cultural norms that affect the privacy perception. For this reason, scholars such as Cohen believe that privacy should not be viewed as a right because 'the ability to have and manage it depends on the attributes of one's social, material and informational environment'.[31] At the same time, privacy arguably attends to the body politic to promote civil liberties and, further, fundamental public policy goals relating to liberal democratic citizenship, innovation and human flourishing.[32] Consequently, a single formulation of privacy purpose should neither be expected nor should it be viewed as a fixed condition as it changes with individual relationships, social and cultural context in boundary management.[33] Therefore, it is only logical to define or conceptualise privacy by its existence and nature in factual reality.

Certainty on what interests and values privacy or data protection promotes within a specific context is necessary in explaining and discharging supervisory (in case of data protection) and enforcement powers, proportional to, and in safeguarding other societal interests and values in privacy. Unfortunately, even in the Western world, where the right to privacy is relatively developed, there is considerable uncertainty about exactly which interests and values are promoted by data protection laws[34] despite extensive researches, publication and in-depth analyses made on the subject.[35] As a result, many data privacy laws fail to specify the interests and values they protect.[36] Some specify the objectives in general terms, such as the protection of personality or fundamental rights, or as narrow as the protection of personal integrity.

30 Altman (n 29) 29.

31 Cohen (n 3) 9-20.

32 Hickford (n 20) 35.

33 Cohen (n 3) 7.

34 D Korff 'Study on the protection of the rights and interests of legal persons with regards to the processing of personal data relating to such persons' Final Report to the EC Commission (October 1998); see also B Napier 'International data protection standards and British experience' (1992) *Informatica ediritto*; Makulilo (n 9) 195; DJ Solove 'Conceptualising privacy' (2002) 90 *California Law Review* 1087.

35 O Mallmann ´Zielfunktionen des Datenschutzes: Schutz der Privatsphäre, korrekte Information. Mit einer Studie zum Datenschutz im Bereich von Kreditinformationssystemen‘ (1977) 10 cited in Bygrave (n 9) 172.

36 Bygrave (n 9) 8.

The African regional human rights instrument, the African Charter on Human and Peoples' Rights (African Charter)[37] contains no provision on the right to privacy. This omission caused scholars to insinuate that Africa lacks privacy values, arguing that African communalism makes privacy a less important value.[38] However, in 2018 the African Union (AU) Commission and the Internet Society published the Guidelines for Personal Data Protection in Africa.[39] The Guidelines emphasise the need to have an African understanding of privacy in cognisance of African unique settings. The Guidelines state that '[t]here is a significant cultural and legal diversity across that leads to different privacy expectations and difficulty of formulating and enforcing consistent policy among and sometimes even within member states'.[40] The need to contextualise privacy had also been advocated in 2004 by Bakibinga, who suggested that '[i]n the myriad of privacy definition and conceptual myopia, there is a need for defining privacy in a way accepted by the society, given the emphasis on communalism versus individualism'.[41]

Laws are about the promotion of justice, and justice[42] is seen in the protection of social interests. It is essential to have an African understanding of privacy to be able to protect those interests. Although privacy regulation arguably is culturally universal, specific behaviours – unique to a particular culture – and techniques used to control interaction

37 African Charter on Human and Peoples' Rights (African Charter) adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986.

38 LA Bygrave 'Privacy protection in a global context: A comparative overview' (2004) *Scandinavian Studies in Law* 343; Bakibinga (n 7) 2-3; and HN Olinger and others 'Western privacy and/or ubuntu? Some critical comments on the influences in the forthcoming Data Privacy Bill in South Africa' (2007) 39 *International Information and Library Review* 35-36, who through the concept of Ubuntu explains 'the culture of transparency and openness in *ubuntu* would not understand the need for personal privacy or able to justify it. Thus, personal privacy would rather be interpreted as "secrecy". This "secrecy" would not be seen as something good because it would indirectly imply that the *Ubuntu* individual is trying to hide something. namely her personhood …. there is little room for personal privacy because the person's identity is dependent on the group. The individualistic cultures of the West argue that personal privacy is required for a person to express his true individuality. With *Ubuntu* individuality is discovered and expressed together with other people and not alone in some autonomous space, and hence personal privacy plays no role in this *Ubuntu* context.'

39 African Union Commission and the Internet Society 'Personal Data Protection Guidelines for Africa' (9 May 2018).

40 As above.

41 Bakibinga (n 7).

42 As justice to a large degree is concerned with living conditions in a broad sense, founded on observation of human behaviour. See Blume (n 14) 193.

– psychological mechanisms used to regulate it – may be quite different from culture to culture.[43] Therefore, as Lacey insisted, it is important to contextualise law and legal practices in that 'legal practices lie not merely in an analysis of doctrinal language but in a historical and social studies of institutions and power relations within which that usage takes place,[44] especially with privacy, a concept that is hard to define, highly contextual, and with ever-changing value'. Bennett once said that privacy is highly subjective, which means that it varies by time, jurisdiction, ethnic group and gender. To have an acceptable privacy legal framework, the individuals concerned should be those defining the contents of and interests in privacy according to the context.[45]

The argument that law and legal practice on privacy should adhere to factual reality, as Neethling suggested, is based on the knowledge that by nature a person has a fundamental interest in particular facets of their personality (such as their body, good name, privacy, dignity, and so forth). These interests exist autonomously *de facto*, independently of their formal recognition *de jure.*[46] Consequently, if the jurisprudential concept of privacy is in conflict with its nature *de facto*, it can neither be considered as scientific concept nor can it promote justice. Legal principles based on an inaccurate understanding of factual reality will necessarily lead to uncertainty and contradictions and, consequently, may produce unfair results.[47]

3 Privacy in data protection

Privacy has two dimensions, namely, information privacy and local privacy.[48] Information or data privacy comprises all 'personal' information and facts about an individual, information that requires management in the social world. However, as Hickford elaborates, the term 'personal information' should not be confused with 'private information' as information may be 'private' but not 'personal' at all,[49] and a person may have 'privacy' but not the 'right to privacy'. To have the right to privacy, 'there must be some valid norms that specifies that some personal information about, or experience of, individuals, should be kept out of

43 Altman (n 29) 68-69.

44 N Lacey *A life of HLA Hart: The nightmare and the noble dream* (2006) 219.

45 C Bennett 'Information policy and information privacy: International arenas for governance' (2002) 2 *Journal of Law, Technology and Policy* 386, 389.

46 Neethling (n 2).

47 J Neethling *Persoonlikheidsreg* (1979) 30.

48 Hickford (n 20) 6.

49 As above.

other people's reach'.[50] Local privacy is the privacy in one's space (control over access to oneself), places inhabited by intimate relationships, places of solitude and those occupied or used in the promotion of personal or professional growth, such as in households, work places as well as in public places.

Data protection as an extension of the right to privacy emerged in the 1970s. At the time scholars insisted on the need to change the terminology and improve privacy protections to suit the changing circumstances. In the Western world, data protection regulations became inevitable with technological development and the emergence of networks that simplified data sharing and eased access to a wider range of personal data. This development also enhanced organisational capacity to collection, share, use and reuse of personal data across organisational boundaries, all of which increased vulnerability in data, and raised security and privacy issues. Although a more or less similar situation arose in Africa, African countries did not adopt frameworks to regulate data usage and information privacy protection. There were no social or academic pressures towards such regulation as in the case of the Western world. The pressure seems to have been brought about by the extraterritorial application of the European Union (EU) framework (initially the 1995 Data Protection Directive (DPD) and the current General Data Protection Regulation (GDPR)). Even South Africa, a country with a longer history in adjudicating the right to privacy than any other African country, stalled with the upgrade from the conventional right to privacy to data protection. It was only in July 2020, 19 years after the first African country adopted a comprehensive data protection framework, that the South African comprehensive framework for data protection came into force.[51]

This rationalises arguments that data protection regulations in Africa are an invention of an outside force, not driven from within but from outside. This, in itself, is not a problem. The extraterritorial rules in the DPD and GDPR do not impose an obligation on third countries to adopt a similar framework but rather to provide similar levels of protection. The term 'similar' does not necessarily mean 'identical'.[52] A country, therefore, may be able to provide a similar level of protection without

50 Hickford (n 20) 40.

51 The law was adopted in 2013, and has been enforced piecemeal. Although substantial provisions entered into force in July 2020 (with a grace period of 12 months) certain provisions relating to the oversight of the access to information will commence on 30 June 2021.

52 M Hennemann 'Wettbewerb der Datenschutzrechtsordnungen Zur Rezeption der Datenschutz-Grundverordnung'(2020) 84 *The Rabels Journal of Comparative and International Private Law* 864.

necessarily adopting identical content.[53] Similarly, a country can adopt an identical framework or content and still fail to provide the required levels of protection. In fact, this is the case in Africa. The majority of data protection frameworks adopted an identical framework/content as the EU (either the DPD or the GDPR) but no African country had passed the European Commission adequacy test, neither in the DPD era nor in the current GDPR framework. An adequacy assessment goes beyond a legal text. The assessment looks into the overall framework, the existing supporting system including the political environment, legal and cultural aspects that affect how the substance/content is interpreted and applied. The point is that African countries can have data protection regulations contextualised to specific social contexts and reflect cultural values without copying other frameworks, and at the same time be able to provide for necessary protection within their (African) context and beyond (external adequacy requirements). Legal concepts are neither rigid nor universal and, therefore, can be contextualised to fit underlying social contexts and legal cultures without diminishing fundamental objectives of the law. Blume argues that contextualising concepts is necessary even in the quest for the internationalisation of laws.[54]

In addition, the trends in data protection reforms and development in Africa also suggest existence of a legal challenge. Presently, 20 years after the first African country adopted data protection framework, in an EU style, only 34 out of 55 countries (around 62 per cent) have data protection regulations,[55] and only 16 of the 33 countries (around 48 per cent) have established enforcement agencies. Furthermore, the AU Convention on Cyber Security and Personal Data Protection (Malabo Convention) since its adoption in 2014 has received only 14 signatures and eight ratifications and deposits. According to article 36, to enter into force, the Convention requires at least 15 ratifications and depositions of the ratification instruments at the AU Commission. At the sub-regional level, five of

53 G Greenleaf 'The influence of European data privacy standards outside Europe: Implications for globalisation of Convention 108' (2012) 2 *International Data Privacy Law* 68.

54 Blume (n 12) 194.

55 Algeria (2018); Angola (2011); Benin (2009, amended in 2017); Botswana (2018); Burkina Faso (2004); Cape Verde (2001, amended in 2013); Chad (2015); Congo Brazzaville (2019); Côte d'lvoire (2013); Egypt (2020); Equatorial Guinea (2016); Gabon (2011); Ghana (2012); Guinea (Conakry) (2016); Kenya (2019); Lesotho (2011 gazetted 2012); Madagascar (2014); Mali (2013); Mauritania (2017); Mauritius (2004, amended in 2017); Morocco (2009); Niger (2017, amended in 2019); Nigeria (the 2019 Data Protection Regulation; currently there is a Personal Information and Data Protection Bill of 2020); Rwanda (2020); São Tomé and Principe (2016); Senegal (2008, proposal for review made in 2019); Seychelles (2004); South Africa (2013); Togo (2019); Tunisia (2004); Uganda (2019).

the regional economic communities (RECs) have frameworks for data protection.[56] The regional and sub-regional frameworks and national laws have adopted similar definitions and data protection-related concepts. Although assumed, these laws do not explicitly elucidate whether the adoption of the EU framework and similar data protection concepts also implies the adoption of the underlying privacy concept(s).

4 A myth about African privacy

Popular knowledge is that the right to privacy in Africa is a colonial importation through national constitutions.[57] This might be true as far as the right to privacy in written form is concerned. However, forms of human rights and individual liberties existed in Africa long before colonisation.[58] These principles were not in written form because the traditional African legal systems are characterised by unwritten codes. Yet, the law is known by society, enforced through an established mechanism and learnt through observation, in songs, tales and sayings. For this reason, no documentary evidence can be produced as proof. Nonetheless, Frémount mentions the existence of at least one written document enshrining these rights in Africa. He says that in 1236 there was the adoption in *Kouroukan Fuga* (Kanbaga, Mali) of a charter containing human rights. He cites some provisions of the charter, including article 5 which states that '[e]veryone is entitled to life and to the preservation of their physical integrity'.

Frémount states that pre-colonial communities embraced and were tolerant of one another's rights and liberties, as they co-existed.[59]

> The fact that many traditional African religions co-existed also suggests the African acknowledgment and respect to human rights and liberties (tolerance). Such rights that existed include liberty of association, freedom of expression, the right to participate in affairs of the state and freedom of circulation. These rights were not conceived and experienced in terms of conflicts, rather, in terms of group rights and of responsibilities.[60]

56 ECOWAS Supplementary Act A/SA.1/01/10 on Personal Data Protection, in Abuja on 16 February 2010, followed by EAC Legal Framework for Cyber Laws in 2018-2010, the SADC Data Protection Model Law of 2012 and the ECCAS Model Law and the CEMAC Directive 2013.

57 See Makulilo (n 8).

58 J Frémont 'Legal pluralism, customary law and human rights in Francophone African countries' (2009) 40(1) *Victoria University of Wellington Law Review* 159.

59 Frémont (n 58).

60 K M'Baye *Les Droits de l'Homme en Afrique* (2002) 71-73.

The African human rights system gives rights and imposes duties to one another and to society. This approach is also seen in the current human rights system, an example being articles 18(1) and (2) and chapter II of the African Charter.

The right to privacy introduced in constitutions through bills of rights only complemented (or complicated) local legal systems by creating mixed legal systems (influenced by the Dutch, British, French or Belgians) and superimposed on the existed African traditional legal foundations.[61] As a result, most African countries have pluralistic legal systems, with customary African traditional legal systems,[62] mixed with a foreign legal system (either common law, civil law, Roman-Dutch or Islamic law).[63]

The African Charter was adopted 1981 transposing the Universal Declaration of Human Rights (Universal Declaration) but excluded the right to privacy. The assumption is that the omission is based on the 'incompatibility' of the right to privacy as defined under the Universal Declaration.[64] The definition is in conflict with the spirit of the African Charter. If the right to privacy under the Universal Declaration were to be incorporated under the African Charter without any modification, it would have paralysed the whole idea of the Charter, that is, the promotion of communal values and African cultural norms, in this case, communalism as against individualism. In fact, Ankumah suggests that the African Charter offers little legal protection of individual rights.[65]

A few African countries adjudicated on the right to privacy. In doing so, courts used classic legal remedies from the common law (mostly the law of torts) to provide relief for privacy infringements. South Africa went the extra mile. The South African Constitutional Court in *National Media*

61 Frémont (n 58).

62 P Onyango *African customary law: An introduction* (2013).

63 F Baldelli 'Legal origins, legal institutions and poverty in sub-Saharan Africa' Master's degree thesis, LUISS Guido Carli University, 201020. He argues that 'although colonialism shaped African legal system through legal transplants, erasing large part of customary law, African traditional law continues to persist even after colonialism. Twenty-seven countries in sub-Saharan Africa have a legal system with French civil law influence; sixteen have a British common law system, two have a bi-juridical law system and one, Sudan, applies the Shari'a.' Boshe (n 17) 62.

64 Art 12: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'

65 EL Ankumah ´La Commission Africaine des Droits de l'Homme et des Peuples. Pratiques et procédures, Londres' (1995) *Société africaine de droit international et comparé* 189.

Ltd v Joost[66] adopted a description of privacy promulgated by the Supreme Court in the American case of *Griswold v Connecticut.* In this case, privacy is seen as 'a condition which includes all personal facts which a person himself at a relevant time determines to be excluded from the knowledge of outsiders and in respect of which he evidences a will for privacy'.[67] This meaning of privacy has since been used and cited in African privacy literary works.[68]

Surprisingly, although the dominant understanding of privacy has American roots, the AU and African countries adopted the EU framework for data protection. The ongoing reforms have neither conceptualised nor contextualised privacy. There also is no express provision on whether privacy takes the European or American form. Much scholarly work emerged during this time, where scholars limited their probing to whether privacy is a concept worth protecting in Africa,[69] or cementing the fact that privacy in Africa is a Western-imported liberal concept.[70] Scholars reproduced the same argument that, due to African collectivist culture, data privacy/protection had little chance of success.[71] Another scholar, Gutwirth, argued that a collectivism culture devalues the right to privacy rendering it irrelevant and ineffective in Africa. He believes that Africans view privacy as a foreign right with no basis in an African context, that its meaning is unfitting to African social settings. For the right of privacy to work in Africa, it must be proclaimed by African states and the legal systems.[72] Most scholars who also believe that privacy is a value recognised, accepted and treasured by Africans are convinced that privacy and data protection enforcement stumbles due to its Western connotations,[73] which is unsuited to African social values and legal culture, that is, communalism. Saad states that the dilemma is not on whether African societies recognise and expect privacy, but rather how it is perceived in the African context; that, 'even without the existence of law, privacy is a concept recognised in various cultures, but depending on a cultural setting, each society has its own attitude and perception towards what amounts to privacy'.[74]

66 [1996] 3 SA 262(A) 271.

67 *Griswold v Connecticut* 381 US 479 [1965].

68 Makulilo (n 9) 196; A Roos 'The law of data (privacy) protection: A comparative and theoretical study' PhD thesis, University of South Africa, 2003 554-560.

69 Bygrave (n 11) 328; S Gutwirth *Privacy and the information age* (2002) 24.

70 Makulilo (n 9) 196.

71 Gutwirth (n 69) 24; Bygrave (n 11); Bakibinga (n 7) 2-3.

72 Gutwirth (n 69) 25-26; Boshe (n 17) 18.

73 Bygrave (n 11); Gutwirth (n 69); Olinger (n 11).

74 Gutwirth (n 69).

5 African privacy: A way forward

An understanding of 'African' is a first step towards understanding and defining African privacy. The reception, perception and value of privacy depend on African values and expectations of what privacy should bring. As in the Western world, the way in which privacy is perceived, valued and regulated reflects the existing privacy notions and values. Legal values are construed from social standards, moral values and a long-standing belief of what is important and just. These are the bases of human personality and a very powerful but silent force affecting human behaviour. They reflect moral spirit and contain a judgmental element, involving an individual's idea as to what is right, good and desirable.[75] In this context, a question once posed by Bygrave is whether privacy is considered an exclusive right to an individual or is also seen to have broader societal benefits.[76]

5.1 Privacy: Understanding the African social context

In Africa, a sense of community overrides a sense of individualism. In fact, an African idea of security and its value depends on personal identification with and within the community. The community, therefore, offers an individual psychological and ultimately security. It is from the community that members receive both physical and ideological identity. The community produces and presents an individual as a community-culture bearer. Since culture is a community property, the community protects it.[77] It is unlikely for an individual identity to take precedence over community identity. This is not to say that individualism as an ideology and principle of life is completely disregarded. It is discouraged in context of the community; it comes second to the community.[78] Communalism is reflected in individual consciousness on community needs and rights before 'one-self'. An individual retains a sense of 'individuality' in terms of personal initiatives, a sense of self- reliance,[79] having their own unique thoughts, ideas, characteristics, accomplishments and private possession.[80]

75 K Sinha 'Essay on values: Meaning, characteristics and importance', https://www.yourarticlelibrary.com/essay/values/essay-on-values-meaning-characteristics-and-importance/63830 (accessed 30 September 2020).

76 Bygrave (n 11).

77 Boshe (n 3); see also KJ Onipede & OF Phillips 'Cultural values: Index for peace and branding Africa' (2019) *Ladoke Akintola University of Technology* 5.

78 A Olasunkanmi 'Liberalism versus communal values in Africa: A philosophical duel' (2013) *IOSR Journal of Humanities and Social Science* 80.

79 EU Ezedike 'Individualism and community consciousness in contemporary Africa: A complementary reflection' (2005) 8 *African Journal of Philosophy* 2.

80 Olinger (n 38) 296.

That is to say, communalism and individualism co-exist. Yet, as Senghor asserted, it is a system built upon dialogue and reciprocity where the group or the community has priority over the individual without thrashing him, but allowing him to blossom as a person.[81] The African Charter also echoes this aspect by including the word 'peoples' indicating the idea of 'peoplehood', that is, the community. This is in contrast with the superstructure of the Western world which, as Shahadah illustrates it, 'elevates individual over the society and therefore enshrines an ethic of one against others in a situation of existential tension. All institutions of the West predicate their existence on the assertion of an individual as unique even without the group.'[82]

One may argue that culture is not static. In fact, scholars contend that globalisation and technological development influence cultural changes. Ntibagirirwa, Kimana and Omobowale state that, because of changes in political systems and globalisation, Africans are abandoning their value systems and embrace liberalism and capitalism in support and promotion of individual freedom and autonomy.[83] Muduagwu further emphasises that 'globalisation has the potential of eroding national cultures and values and replacing them with the cultural values of more technologically and economically advanced countries, particularly the United States and members of the European Union'.[84]

Shahadah is of a different opinion. He accepts that culture is not static and globalisation and technological development influence cultural changes and impact social values. However, he argues that the shifting dynamics of culture does not mean an alteration in the fundamental principles of the culture. A distinction must be made between practices of the people and their cultural ideals, what he calls 'the superego of the culture'.[85] That superego remains static. The African cultural superego has always been communalism. Despite the changing dynamics in support of

81 LS Senghor 'Negritute: A humanism of 20th century' (1966) 16 *Optima* 1-8.

82 A Shahadah 'African culture complex', http://www.africanholocaust.net/africanculture.html (accessed 1 October 2020).

83 Cited in Makulilo (n 8) 12-13; P Kinani 'When the family become a burden' (1998) *Daily Nations Weekender Magazine.* S Ntibagirirwa 'A wrong way: From being to having in the African value system' in P Giddy (ed) *Protest and engagement: Philosophy after apartheid at an historically black South African university* (2001); AO Omobowale 'The youth and the family in transition in Nigeria' (2006) 16 *Review of Sociology* 85-95.

84 Also cited in Makulilo (n 8) 15; MO Maduagwu 'Globalisation and its challenge to national culture and values: A perspective of a sub-Saharan Africa' in H Köchler and others (eds) *Globality versus democracy? The changing nature of international relations in the era of globalisation* (2000).

85 Shahadah (n 82).

individual ways of life, the level of individualism in Africa still is not the same as that in the Western world.[86] That is the one thing that creates an entirely different paradigm and behaviour. Communalism informs on the legal culture, which fundamentally informs notions of morality that in turn informs legislation and national hood.[87] It is the fundamental law. Speaking in the context of African communalism, Desmond Tutu once said that '[w]e are meant to complement each other. All kinds of things go horribly wrong when we break that fundamental law of our being. We say a person is a person through other people. It is not "I think therefore I am". It is rather "I am human because I belong". I participate, I share.'[88]

This explains African notions such as ubuntu[89] and *ujamaa*[90] which describe African values that place an individual identity within communal solidarity and interdependence.[91] These notions are translated in the African Charter as 'African solidarity'. African solidarity requires an individual to forgo some rights and privileges for the good of the community. Article 29 places a duty on individuals to preserve and strengthen social and national solidarity, African cultural values in relations with other members of the society, and promote and achieve African unity.

Suffice it to say that, in Africa, culture is not only the people, their practices and beliefs; it is the whole process from legal and family to the political level. It instructs life with values and habits that service humanity and has a role in personal continuation. Therefore, African identity is not one hard thing but a multitude of self-imposed conditions, which ideologically run fluidly across indigenous Africa. It is not a scientific observation but a cultural-political one.[92] Eventually, the African 'legal' system has an ultimate goal of pulling the society together and upholding such cultural values.[93]

86 Makulilo (n 9) 194.

87 Shahadah (n 82).

88 Archbishop Desmond Tutu quoted in C Banda 'The privatised self? A theological critique of the commodification of human identity in modern technological age in an African context professing ubuntu' (2019) 75 *Theological Studies* 5.

89 A Nguni proverb *umuntu ngumuntu ngabantu* roughly translated as a person is a person through other person, or I am, because we are; and since we are, therefore I am. See further Banda (n 88).

90 A Swahili word and a social policy introduced by the first President of Tanzania, Mwalimu Julius Kambarage Nyerere. It means togetherness, familyhood.

91 Banda (n 88).

92 Shahadah (n 82).

93 Frémont (n 58) 162.

5.2 Privacy concept and regulation in Africa: A proposal

Communalism also exists and has survived globalisation and technological changes in other parts of the world, such as in Latin America and the Far East. Similar to African communities, they have community-oriented cultures that emphasise 'denial of self'. As such, having privacy as a concept that protects an individual autonomy brings about value conflicts.[94] Capurro illustrates this in the context of Japan where in 1964 the Western notion of privacy was introduced and made a legal term. Although adopted from the Western world, privacy is perceived differently from in the Western world. In Japan privacy is perceived as a 'crisis of privacy issue' and not as the basis for democratic concern as in the Western world. It takes a form of 'self' within a group dynamic.[95] In China[96] privacy is protected in a social context, in consideration of social security and the stability of the social order. The emphasis rather is on the interests of the nation and society than on the individual, although an individual still has a right to privacy.[97] Similar to the position in Japan and China, in Africa an individual's privacy is recognised as secondary to community rights and interests.[98]

The fact that privacy has always been defined as reflecting Western cultures is neither a barrier nor an excuse for non-Western cultures to define privacy to reflect specific cultural values and social norms. In fact, even in the Western world the concepts and legal frameworks regarding the protection of privacy differ. On the one hand, privacy as initially defined in the US gives a person a right to define and limit access to his space – the right to be left alone. Eventually, privacy policies have a central role in securing a person's 'aloneness'. In the words of Bygrave, the US privacy has a goal of securing individuality and achieving individual goals of self-realisation against the need of a wider society.[99] On the other hand, the European approach is more or less the promotion of personality rights, that is, the right to self-determination, personal identity, integrity and personal development. In terms of the regulation, the US takes a

94 R Capurro 'Privacy: An intercultural perspective' (2005) *Ethics and Information Technology* 37.

95 R Capurro 'Intercultural aspects of digitally mediated whoness, privacy and freedom' in R Capurro and others *Digital whoness: Identity, privacy and freedom in the cyberworld* (2013) 217.

96 See A Geller 'How comprehensive is Chinese data protection law? A systematisation of Chinese data protection law from a European perspective' (2020) 69 *GRUR International* 1191.

97 Geller (n 96) 223.

98 See Malabo Convention in ch II sec I art 2.

99 Bygrave (n 11) 171.

sectoral approach in combination with co-regulatory schemes while Europe adopts a comprehensive regulatory approach. The GDPR recently introduced co-regulatory approaches to complement the comprehensive regulation.[100] This also demonstrates that frameworks regulating privacy and data protection are contextual as well as revolving based on societal underlying interests and what justice is in a given time and place.[101]

African solidarity is an important aspect not only in understanding privacy perceptions but also in conceptualising and regulating privacy and related rights. There is a need for an approach to privacy that reflects African solidarity instead of submerging it, to avoid 'creating' or adopting a right or a legal framework that is incompatible with or where its enforcement undermines the spirit of the regional human rights charter. Narrating the importance of solidarity in African law making, Frémont states that 'the duty of solidarity has played and continues to play a major role in the establishment of behavioural norms, which are usually very constraining. For all purposes, they organise the life of the family, the clan and the village. The translation of such solidarities, ideally, should be found in legal norms.'[102]

An alternative approach to privacy, such as relational privacy, where privacy is a right enforced in view of or in relation to other community rights and duties, may be adopted. Lassiter once reiterated that in Africa an 'individual's existence and identity is relative to the group and is defined by the group. The strong collective thinking of ubuntu implies that the individual members of the group cannot imagine ordering their lives individualistically without the consent of their family, clan or tribe.'[103] In the alternative, a form of group privacy, as a conditional right in view of one's community, can be developed. This approach would also seem to be implied by the Malabo Convention – in data protection and the African Charter – as an approach to human rights enforcement in Africa.

100 Art 42 of the GDPR that encourages member states to create certification mechanisms in demonstrating compliance with the Regulation; also art 40 encouraging the drafting of codes of conduct for the implementation of the regulation in specific sectors or for specific needs. Art 27 of the 1995 EU Data Protection Directive that was replaced by GDPR.

101 On factors influencing approaches to privacy and data protection policies and regulatory framework in Bygrave (n 11) 177.

102 Frémont (n 58) 150.

103 JE Lassiter 'African culture and personality: Bad social science, effective social activism, or a call to reinvent ethnology?' (2000) *African Studies Quarterly* 5; quoted in Makulilo (n 9) 194.

The African Charter not only envisions the promotion and protection of group or community rights, but requires human rights enforcement to take into account histories and African values in conceptualising human and peoples' rights in Africa. The Preamble states:

> Taking into consideration the virtues of their historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights;
> [Member states f]irmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa.

Specifically on data protection, the Malabo Convention states in Preamble 12 that one of its goals is to see the enforcement of the rights – within the Convention – in cognisance of among other things, community rights.[104] Such a framework should not only secure personal information and support knowledge economy, but also reflect the African cultural, legal and social context.[105]

Furthermore, chapter II section I article 2 of the Convention states:

> The mechanism so established [for protection of data and punish any violation of privacy] shall ensure that any form of data processing respects the fundamental principles and rights of natural persons while recognising the prerogatives of the State, the rights of the local communities and the purposes for which businesses were established.

104 The Preamble states: 'Considering that the goal of this Convention is to address the need for harmonised legislation in the area of cyber security in Member States of the African Union, and to establish in each State party a mechanism capable of combating violations of privacy that may be generated by personal data collection, processing, transmission, storage and use; that by proposing a type of institutional basis, the Convention guarantees that whatever form of processing is used shall respect the basic freedoms and rights of individuals while also taking into account the prerogatives of States, the rights of local communities and the interests of businesses; and take on board internationally recognized best practices.'

105 Preamble 9 of the Malabo Convention: 'Convinced that the afore-listed observations justify the call for the establishment of an appropriate normative framework consistent with the African legal, cultural, economic and social environment; and that the objective of this Convention is therefore to provide the necessary security and legal framework for the emergence of the knowledge economy in Africa.'

The suggested approach would mean that the enforcement of the individual right to privacy takes into account existing privacy-related group rights without necessarily affecting any privacy rights of an individual. It means, as well elaborated by Floridi, that 'any defence of personal privacy must also take into account moderate group privacy, for affecting the latter does mean affecting the personal privacy of its members'.[106] It is a framework that expresses the desires put forward by the African Charter and the Malabo Convention to support African solidarity; a desire to maintain social identity and personhood as understood within the African context. The essence of group privacy is to protect individual privacy without completely secluding that individual from the group or without forcing a person to abandon the group and to stand alone as an individual.[107] It upholds the integrity of the social structure. As Bloustein clarifies:

> Group privacy is an extension of individual privacy. The interest protected by group privacy is the desire and need of people to come together, to exchange information, share feelings, make plans and act in concert to attain their objectives … Individual privacy by regulating whether, and how much of, the self will be shared; group privacy is fashioned by regulating the sharing or association process.[108]

The idea of enforcing group rights is not a new phenomenon. The first human rights documents, the Universal Declaration and the International Covenant on Civil and Political Rights (ICCPR), listed rights that should not be curtailed irrespectively of whether it concerned the liberties of individuals, groups or even legal persons. According to Taylor, the main idea behind these documents was not one of granting subjective rights to natural persons, but rather laying down minimum obligations for the use of power by states. Consequently, states, legal persons, groups and natural persons could complain if the state exceeded its legal discretion.[109]

Enforcing privacy in relation to relational privacy or as part of a group (group privacy) would reflect the spirit of the African Charter and an African approach to human rights enforcement, that is, rights must correspond to duties and interests of society – the group. The enforcement

106 L Floridi 'Group privacy: A defence and an interpretation' in L Taylor, L Floridi & B van der Sloot (eds) *Group privacy: New challenges of data technologies* (2017) 113.

107 EJ Bloustein 'Group privacy: The right to huddle' (1977) 8 *Rutgers Camden Law Journal* 222.

108 As above.

109 L Taylor and others 'Introduction: A new perspective on privacy' in Taylor and others (n 106) 18.

framework could incorporate or recognise communal groups (to include rights-based organisations such as consumer protection groups) as well as community elders – when applicable – as having *locus stand* in privacy litigations to represent the group (privacy) interests. In this case, the adjudging authority is in a position to assess and balance the individual and group rights; in the words of the Malabo Convention, to give cognisance of the community rights in the enforcement of individual rights.

6 Conclusion

Privacy and data protection regulations are necessary even in Africa where many legal scholars believe privacy to have no value, is irrelevant and its regulation is ineffective. Despite communalism, privacy has value in Africa. Furthermore, African countries face similar data vulnerability, privacy and security issues as in the rest of the world. The lack of a reference to privacy in the African Charter is neither an implication nor an evidence of a lack of privacy values inAfrica, but rather could be construed as a possible conflict in the underlying concept.

In 2001, when African states embarked on the data protection legal reform journey, they did so unpreparedly. The African Charter had not 'recognised' privacy as a human right. Despite its judicial enforcement in some of African countries, privacy had not been 'embraced' as a fundamental human right. Nevertheless, states adopted the EU data protection framework to sustain trade while figuring out where Africa stands. Yet, 20 years later, data protection enforcement is stalling, and there still is no privacy concept or philosophy. Nonetheless, the Malabo Convention, the African Privacy Guidelines and some of the RECs' data protection frameworks illustrate the presence of an African philosophy/concept of privacy or at least an African approach to privacy. They also emphasise the need to translate the already-adopted data protection frameworks to reflect that 'philosophy/concept of privacy'. Nevertheless, what African privacy entails is not expressly and clearly presented in any of these documents.

The AU, by suggesting the existence of an African privacy, has a corresponding duty to present a 'suitable' privacy concept or philosophy. This is important not only for juridical reasons but also for setting standards that will define privacy in Africa in the future, to provide a firm legal consensus on the exact values and interest that privacy promotes in an African context, lest Africa is subjecting itself to adopting whatever privacy concepts, philosophies and regimes that would, in the future, dominate the discourse. A blueprint for conceptualising privacy as

presented in exists in legal texts – both at the AU as well as RECs – could be used to conceptualise privacy in Africa.

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