3 An old question in a new domain: Some preliminary insights on balancing the right to privacy and freedom of expression in the digital era under the African human rights law

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Abstract

This chapter seeks to examine how any exercise balancing the right to privacy with that of freedom of expression on the internet should be framed. The balancing of rights is a long-standing debate in human rights law discourse and is now being resurfaced on the internet domain. Courts in various jurisdictions have adopted several touchstones to balance the right to privacy and the right to freedom of expression. This chapter explores two contexts that are of significant current concern under the African human rights system: the publication of personal information and an individual's right to be forgotten. The first focus is the question of the publication of personal information about individuals where their private information is posted on the internet. Under this context, different factors, such as the contribution of the personal information to the general debate, the method of obtaining the information, how the person concerned is well-known, the prior conduct of the person, the content and form, and severity of the sanctions to be imposed, should be used to balance the right to privacy and expression. The right to be forgotten is the second context where the right to privacy is balanced against freedom of expression once the right holder requests the removal of content online where it is deemed prohibited under regional data protection laws. However, which right tipping the scale depends on a case-by-case basis. Ultimately, the chapter aims to offer some preliminary insights into the ways in which an appropriate balance should be struck between the right to privacy and freedom of expression within the African human rights system in the digital environment.

1 Introduction

The issue of balancing human rights may arise in situations where rights compete with one another or when rights conflict.[1] Rights can be understood in many ways and can be understood in absolute or relative terms. Whenever rights are understood as qualified entitlements (and not absolute rights) or along the lines of Raz's interest theory,[2] then conflicts

1 J Waldron 'Rights in conflict' (1989) 99 *Ethics* 503-519.

2 According to Raz, a person may be said to have a right if and only if some aspect

of rights must be regarded as inevitable. The utilitarian theory ('maximise happiness') customarily tends to resolve conflicts by giving precedence to happiness for the masses through sacrificing individual rights.[3] To put it another way, utilitarian reasoning involves trade-offs between competing rights through prioritising public interests. On the other hand, Dworkin argues that the whole point of rights is to trump utilitarian claims that would permit the right to freedom of expression to be limited in the public interest[4] since the right to freedom of expression should prevail over public interest unless in time of emergency.[5]

Whereas Mutua consistently views that the concept of duties under the African Charter is meant to strike a balance between rights and community/public interests.[6] Mutua postulates the idea of the dialectic nature of rights and duties in Africa in that 'individual rights cannot make sense in a social and political vacuum, devoid of the duties assumed by individuals.'[7]

Etymologically, the term 'balance' comes from French yet has Latin origins, having evolved from a blend of 'bi' (meaning double) and 'lanx' (meaning having a two scale pans). Thus, the word 'balance' has the following dictionary meanings[8]:

> a situation in which different things exist in equal, correct or good amounts; (2) an instrument for weighing things, with a bar that is supported in the middle and has dishes hanging from each end. [idiom] (3) to manage to find a way of being fair to two things that are opposed to each other; to find an acceptable position that is between two things.

Based on the above definitions, the word balance can be understood to send two significant messages. Firstly, an instrument of weighing things

of well-being (one's interest) is sufficiently important in itself to justify holding some other person(s) to be under a duty. See J Raz *The morality of freedom* (1986) 166.

3 Waldron (n 1) 507.

4 R Dworkin 'Rights as trumps' in J Waldron (ed) *Theories of rights* (1984) 153.

5 R Dworkin *Taking rights seriously* (1977) 195, 364.

6 See M Mutua, *Human rights: A political and cultural critique* (2002) 73-93; M Mutua, 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995a) 35 *Virginia Journal of International Law* 339, 340; and M Mutua 'Why redraw the map of Africa: A moral and legal inquiry' (1995b) *16 Michigan Journal of International Law* 1146.

7 Mutua 1995a (n 6) 341.

8 Oxford Learners' Online Dictionary definition of the word 'balance' https://www.oxfordlearnersdictionaries.com/definition/english/balance_1?q=balance (accessed 24 August 2023).

that exist on equal footing. In one way, the courts examine one interest outweighing another.[9] Under this view, the balancers (courts) place their interests on a set of scales and rule how the scales tip.[10] For example, the right to privacy and freedom of expression can exist equally but be balanced and the decision maker may favour privacy instead of freedom of expression when the scale tips. Secondly, the decision-makers employ a different version of balancing when they speak of 'striking a balance' between or among competing rights.[11] Here, the decision-makers need to find a way of being fair to two things that are opposed to each other. Accordingly, one right does not override the other; rather, each right survives and is given its due. For instance, in striking a balance between privacy and freedom of expression, the decision maker would finally tilt to freedom of expression rather than privacy but set some modalities that the latter endures.

Habermas has argued that balancing 'deprives basic rights of their normative strength'[12] and, accordingly, the whole process of balancing relegates them to the status of values that must take their place among the range of policies facing legislators and administrators.[13] There are no rational standards for balancing, so decisions on how to weigh, say, freedom of expression against national security become arbitrary or at least unpredictable.[14] Refuting Habermas's claim, Alexy contends that courts can make rational judgments about the intensity of the interference with a right, for example, to freedom of expression under a public order law, and also about the respective importance in these contexts of competing rights.[15]

Balancing presupposes that human rights are not absolute but, rather, limited by a number of restrictions. This means that restrictions could be taken as a means to trade off other interests or rights. When rights are formulated in relative terms, we may face the inevitable balancing

9 TA Aleinikoff 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 946.

10 As above.

11 As above.

12 J Habermas *Between facts and norms* trans W Rehg (1996) 181, 256.

13 See M Rosenfeld & A Arato *Habermas on law and democracy: Critical exchanges* (1998) 381.

14 E Barendt 'Balancing freedom of expression and privacy: The jurisprudence of the Strasbourg Court' (2009) 1 *Journal of Media Law* 50.

15 R Alexy 'Constitutional rights, balancing, and rationality' (2003) 16 *Ratio Juris* 136. See also R Moosavian 'A just balance or just imbalance? The role of metaphor in misuse of private information' (2015) 7 *Journal of Media Law* 196-224, and D Julie 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Character of Human Rights and Responsibilities Act 2006' (2008) 32 *Melbourne University Law Review* 422, 424.

exercise.[16] For example, freedom from torture is an absolute right, as there is no restriction that can hamper the enjoyment of the right. In such cases, the issue of balancing should not arise at all. When it comes to qualified rights, the balancing exercise is an inevitable task. For example, under the International Covenant on Civil and Political Rights (ICCPR), everyone has the right to privacy, but the right may be subject to reasonable and lawful interference.[17] Similarly, the right to freedom of expression may be subject to various restrictions such as the rights or reputations of others (for instance, the right to privacy), the protection of national security, public order, and public health or morals.[18] Hence, balancing rights is a significant weapon to trade-off competing rights.

However, critics claim that balancing rights can possibly squeeze the full enjoyment of rights or 'swallow up the rights' existence.[19] To tackle the potential rights shrinkage, balancing exercises must show a strong commitment to the principle of proportionality.[20] This principle requires that the objective of public interest (utilitarian grounds) has to be sufficiently important to limit the right. Also, the measure of the limitation has to be suitable, must be appropriate to achieve their protective function, and must be the least intrusive instrument among those that might achieve their protective function.[21]

Balancing the right to privacy against the right to freedom of expression to determine which one precedes the other rests on the key normative assumption.[22] Balancing rights over the internet, for example, in the case of the right to privacy and freedom of expression, is sufficiently addressed by the mechanics of the African human rights law and follows a similar modus operandi with offline balancing.[23] Nevertheless, this assumption is

16 B Cali 'Balancing human rights: Methodological problems with weights, scales and proportions' (2007) 29 *Human Rights Quarterly* 253.

17 UN General Assembly International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series (UNTS) vol 999 171, art 17(1).

18 Art 19(3) ICCPR (n 17).

19 BB Lockwood, J Finn & G Jubinsky 'Working Paper for the Committee of Experts on Limitation Provisions' (1985) 7 *Human Rights Quarterly* 35-88.

20 UN Commission on Human Rights The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, Principle 10. See Cali (n 16) 253.

21 UN Human Rights Committee (HRC) CCPR General Comment 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9 paras 14-15. See also M Fordham & T de la Mare 'Identifying the principles of proportionality' in J Jowell & J Cooper (eds) *Understanding human rights principles* (2000) 31.

22 Cali (n 16) 254.

23 This assumption receives additional resonance for the internet than Cali's initial

not straightforward. Rather the relationship among the practical contexts, the underlying values of rights, and public interest aims is multifaceted and controversial.[24]

In some contexts, the right to privacy and freedom of expression can be mutually reinforcing. The right to privacy reinforces the right to freedom of expression to the extent that privacy plays an important role in the creation of the content required to be expressed, thereby making possible the adequate exercise of freedom of expression.[25] Thus, Respect for privacy is a prerequisite for trust by those engaging in communicative activities, which is a pre-condition for exercising the right to freedom of expression.[26] Freedom of expression equally reinforces the right to privacy to the point that freedom of expression is critical to the protection of privacy.[27] For instance, freedom of information enables disclosures about large-scale data breaches and privacy invasions – an instance by behemoth tech companies – that may otherwise not be disclosed. As interdependent rights, freedom of expression and privacy also intersect over the question of protecting a person's reputation and defamation.[28]

However, while the internet has opened new frontiers of freedom of expression, it is also eroding protections for privacy, necessitating a balance between the two rights. When one thinks of balancing the right to privacy and freedom of expression, the balancing exercise remains an arduous task as it requires many factors to weigh these rights. Courts in various jurisdictions have used touchstones to balance these competing rights.[29] The process of balancing both rights is not linear. Thus far, except for the South African case law, there is no rich jurisprudence regarding balancing the right to privacy against freedom of expression under African human rights law. Instead, the chapter draws upon European human rights law or elsewhere for illustrative purposes. Hence, using a lesson-drawing perspective mainly from that of European human rights law, the chapter explores two contexts: the publication of personal information

propositions.

24 Cali (n 16) 255.

25 OHCHR Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue (17 April 2013) UN Doc. A/HRC/23/40.

26 T Mendel and others *Global survey on internet privacy and freedom of expression* UNESCO Series on Internet Freedom, Paris: UNESCO (2012) 95.

27 J Cannataci and others 'Privacy, free expression and transparency and redefining their new boundaries in the internet ecosystem' UNESCO Internet Study (2016) 79.

28 E Barendt 'Privacy and freedom of speech' in AT Kenyon & M Richardson (eds) *New dimensions in privacy law: International and comparative perspectives* (2006) 11-31.

29 Barendt (n 14) 14.

and an individual's right to be forgotten. The first focus is the question of the publication of personal information about individuals where their private information is posted on the internet. The chapter discusses several factors.[30] Some of these factors include: the contribution of the personal information to the general debate, the method of obtaining the information, how the person concerned is well-known, prior conduct of the person, the content, consequence and form of the publication, and severity of the sanctions to be imposed are used to balance the right to privacy and expression. However, which right tips the scale depends on a case-by-case basis.

The chapter is structured in six sections, including this introduction. The second section will discuss the normative protection of internet freedom in Africa. Following this, a discussion will be made on the legal protection of the right to privacy and the right to freedom of expression in the African human rights ecosystem. The third section briefly explores the idea of balancing the right to privacy and freedom of expression on the Internet. How the publication of individuals' personal information has become a causes célèbre in striking an appropriate balance between the right to privacy and freedom of expression, and will be discussed extensively under section four. Section five examines the nuances of the right to be forgotten, and its niche in balancing competing rights on the internet. The chapter concludes by offering few preliminary thoughts on how to strike an appropriate balance between the right to privacy and freedom of expression under the African human rights law.

2 Internet freedom under the African human rights law

The advent of the internet in Africa is a recent phenomenon. The first network in sub-Saharan Africa arrived in 1988 at Rhodes University in Grahamstown, South Africa.[31] Following it, in 1991, the first data packet transmitted from sub-Saharan Africa was sent from South Africa to Portland, Oregon, which, in turn, heralded the arrival of the internet to Africa.[32]

30 See *Axel Springer AG v Germany* European Court of Human Rights (ECtHR) Strasbourg, Application 39954/08, 7 February 2012 paras 89-95; see also *Von Hannover v Germany (No 2)* ECtHR, 12 February 2012 App 40660/08 and 60641/08, paras 108-113.

31 T Nyirenda-Jere & T Biru 'Internet development and internet governance in Africa' (Internet Society, May 2015) 6.

32 As above.

In the past two decades African countries have experienced a steady growth in internet penetration, from 0.78 per cent in 2000 to 43.3 per cent in 2023, with an estimated 590 million people using the internet.[33] Yet, as of 31 December 2022, the number of internet users in Europe was estimated at around 87.7 per cent of the population. This translates to about 727.5 million people, almost twice as many in Africa.[34] Thus, Africa still lags behind the rest of the world in internet penetration since it is still well below the global average of 64.2%.[35] As such, African states should work more towards rapidly bridging the gap.

The use of the internet is speedily increasing across the African continent, with millions of individuals getting online and engaging in a wide range of usages of social media and other digital platforms for varying purposes – including in relation to political matters and for governance, social and economic development.[36] This development has the potential to further the right to freedom of expression but can come at the cost of other rights, including privacy. The central question underlying this chapter is how to achieve an appropriate balance between the right to privacy and freedom of expression on the internet under the African human rights law.

With the expanding pace of internet penetration in Africa, internet freedom has been subjected to different measures by state or non-state actors, resulting in muzzling freedom of expression on the internet and breaching data privacy. For example, it has been claimed that most governments in Africa have turned to internet shutdowns as a tool of political hegemony and for political control.[37] To put it another way, most governments are more than ever using digital technologies with private contractors to surveil, censor and suppress fundamental and basic

33 International Telecommunications Union Global and Regional ICT Data https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx (accessed 20 July 2023). See also Internet World Stats, Internet Penetration in Africa (31 December 2022) https://www.internetworldstats.com/stats1.htm (accessed 13 November 2023).

34 As above.

35 As above

36 African Declaration on Internet Rights and Freedoms, launched at the 18th annual Highway Africa Conference at Rhodes University, Grahamstown, South Africa, 7 September 2014, http://africaninternetrights.org/articles/ (accessed 24 August 2023).

37 F Erixon & H Lee-Makiyama 'Digital authoritarianism: Human rights, geopolitics and commerce' European Centre for International Political Economy (ECIPE), ECIPE Occasional Paper 5/2011 (2011) 1, http://ecipe.org/wp-content/uploads/2014/12/digital-authoritarianism-human-rights-geopolitics-and-commerce.pdf (accessed 24 August 2023).

freedoms of their people through censorship, filtering, blocking, targeted and targeted and mass surveillance and internet shutdowns.[38]

Internet freedom is a catchphrase referring to human rights in the digital age, particularly access to the internet. Yet, the claim of internet freedom (including access to the internet) as a separate human right remains unsettled.[39] There are contending debates about whether access to internet is a human right. For example, La Rue supports the notion of internet access as a human right since the internet has become a vital communication medium that individuals can use to exercise their right to freedom of expression.[40] On the contrary, Cerf argues that internet access is not a human right. He contends that 'technology is an enabler of rights, not a right itself.'[41] Other authorities claim that access to the internet is not a human right stricto sensu but rather a derivative human right since it enhances the exercise of freedom of expression per the ruling by the *Economic Community of West African States* (ECOWAS) Community Court of Justice in *Amnesty International Togo and & Others v Republic of Togo*.[42]

Traditionally, internet freedom is framed narrowly as the right of access to the internet. According to the former United Nations (UN) Special Rapporteur on the right to freedom of expression, La Rue, access to the internet has at least two dimensions, namely, access to content (without the arbitrary and unwarranted filtering or blocking of content)[43] and access to the infrastructure and equipment required to use the internet.[44] However, internet freedom is a metaphoric term used to convey various rights in the digital age, such as the right to freedom of expression[45] and the right to

38 See A Mare 'Internet shutdowns in Africa: State-ordered internet shutdowns and digital authoritarianism in Zimbabwe' (2020) 14 *International Journal of Communication* 4244..

39 S Tully 'A human right to access the internet? Problems and prospects' (2014) 14 *Human Rights Law Review* 180. See AA Gillespie 'Restricting access to the internet by sex offenders (2011) 19 *International Journal of Law and Information Technology* 171, 184.

40 UN Special Rapporteur (n 25) para 10. See also the UN Human Rights Council's affirmation that rights must be protected online. Human Rights Council 'The promotion, protection and enjoyment of human rights on the internet' A/HRC/20/L.13, 5 July 2012.

41 VG Cerf 'Internet access is not a human right' *New York Times* (4 January 2012), https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html (accessed 30 August 2023).

42 *Amnesty International Togo & Others v Republic of Togo* ECOWAS Community Court of Justice, JUD ECW/CCJ/JUD/09/20 (25 June 2020) para 38.

43 See the Report of the UN Special Rapporteur (n 25) paras 2 & 10.

44 UN Special Rapporteur (n 25) para 61.

45 See M Land 'Toward an international law of the internet' (2013) 54 *Harvard International Law Journal* 393, 457.

communicate,[46] privacy,[47] the right to peaceful assembly[48] and access to the internet.[49] In this respect, Joyce submits that internet freedom plainly 'involves more than questions of infrastructure and the architecture of the internet, and engages with key human rights principles such as freedom of expression, privacy and even security'.[50]

The right to privacy is an important entitlement on the internet domain that requires legal protection, as it is under constant encroachment from governments, for example, rapidly introducing digitalisation, e-government and digital identity programmes and from private actors who aggregate, collect and process personal data without lawful means. It is arising more acutely in the internet as it requires citizens to provide detailed personal information online, for example, biometrics for voters' cards, SIM card registration, identity cards, and driver's licences, among others.[51] In 2015, the UN Human Rights Council adopted a landmark resolution that recognises the right to privacy in the digital age by affirming that: 'the same rights that people have offline must also be protected online, including the right to privacy.'[52] Crucially, while interpreting the right to privacy under Article 16 of the Convention on the Rights of the Child, the UN Committee on the Rights of the Child has clarified that the right to privacy may be exercised in the digital environment.[53]

46 D Joyce 'Internet freedom and human rights' (2015) 26 *European Journal of International Law* 493-514.

47 Report of the Office of the United Nations High Commissioner for Human Rights The right to privacy in the digital age A/HRC/27/37 (30 June 2014) paras 12-14. See also UN Human Rights Council Resolution 28/16, The right to privacy in the digital age A/HRC/RES/28/16 (1 April 2015) art 3: 'The same rights that people have offline must also be protected online, including the right to privacy.'

48 See UN Human Rights Committee, General Comment 37 art 21: right of peaceful assembly, CCPR/C/GC/37 (27 July 2020) para 34.

49 UN Special Rapporteur (n 25) para 2.

50 Joyce (n 46) 506.

51 The Collaboration on International ICT Policy for East and Southern Africa (CIPESA), Mapping Trends in Government Internet Controls, 1999-2019 (September 2019) 5.

52 UN Human Rights Council Resolution 28/16, The *right to privacy in the digital age*, A/HRC/RES/28/16 (1 April 2015) para 3. See also Report of the Office of the United Nations High Commissioner for Human Rights, *The right to privacy in the digital age*, A/HRC/27/37 (30 June 2014) Paras 12-14. On the United Nations General Assembly's Resolution 68/167 on the right to privacy in the digital age, see generally D Joyce, 'Privacy in the Digital Era: Human Rights Online?' (2015) 16 *Melbourne Journal of International Law* 1-15.

53 UN Committee on the Rights of the Child (UNCRC), General comment No. 25 *(2021) on children's rights in relation to the digital environment*, CRC/C/GC/25 (2 March 2021) para 67-79.

Freedom of expression is a linchpin right that enables individuals to participate in a democracy[54] and is also a key to the realisation of other human rights.[55] This role has traditionally been performed by the print media and broadcasters, but online media through the internet is transforming our lives and giving a voice to millions of people in Africa.[56] The internet provides a mechanism for amplifying its exercise in many African countries.[57] For example, the internet in some cases has enabled Africans to replace despotic and dictatorial rulers. For instance, the internet played a role in popular revolutions in Egypt,[58] Ethiopia,[59] Sudan[60] and Tunisia.[61] In relation to freedom of expression on the internet, the emerging concerns include a lack of internet access; draconian national security laws; blanket content filtering; wholesale blackouts; hate speech; and disinformation regulation.[62]

The African human rights law provides a normative framework for the protection of the rights to privacy and freedom of expression on the internet in its different instruments. However, the African Charter on Human and Peoples' Rights (African Charter) does not contain an explicit provision

54 UN Human Rights Committee (HRC) General comment 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 2 http://www.refworld.org/docid/4ed34b562.html (accessed 21 February 2019).

55 E Barendt *Freedom of speech* (2007) 18-21; J Cannataci and others 'Privacy, free expression and transparency and redefining their new boundaries in the internet ecosystem' UNESCO Internet Study, 2016.

56 Media Legal Defence Initiative (MLDI) 'Mapping digital rights and online freedom of expression in East, West and Southern Africa' (2018) 10-14, https://10years.mediadefence.org/wp-content/uploads/2019/07/Mapping-digital-rights-litigation_Media-Defence_Final.pdf (accessed 24 August 2021), See also D McGoldrick 'The limits of freedom of expression on Facebook and social networking sites: A UK perspective' (2013) 13 *Human Rights Law Review* 125, 151.

57 A Puddephatt *Freedom of expression and the internet* (UNESCO 2016) 17.

58 See Frank la Rue, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Human Rights Council, A/HRC/17/27 (16 May 2011) para 4; K Clarke & K Kocak 'Launching revolution: Social media and the Egyptian uprising's first movers' (2020) 50(3) *British Journal of Political Science* 1025.

59 *A Bitew* 'Social media and the simmering Ethiopian revolution' ECDAF (3 September 2016), https://ecadforum.com/2016/09/03/social-media-and-the-simmering-ethiopian-revolution-alem-bitew/ (accessed 24 August 2021).

60 *N Taha* 'Sudan's social media deemed major player in Bashir's ouster' *VOA News* 18 April https://www.voanews.com/a/sudan-s-social-media-deemed-major-player-in-bashir-s-ouster-/4882059.html (accessed 24 August 2021).

61 A Dhillon 'Social media and revolution: The importance of the internet in Tunisia's uprising' (2014) *Independent Study Project (ISP) Collection 1-21.*

62 See Y Ayalew 'Assessing the limitations to freedom of expression on the internet in Ethiopia against the African Charter on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 315.

on the right to privacy but addresses the right to privacy impliedly as part of the right to integrity and life under article 4, right to dignity under article 5, the right to security and liberty under article 7 and the right to health under article 16 of the African Charter. Also, there is a growing understanding that the right to privacy[63] can be read under the African Charter through the right to dignity[64] and the right to liberty and security of a person.[65] The concept of dignity is consubstantial, intrinsic and inherent to the human person.[66] This means that dignity empowers individuals to feel honour or respect to the extent of protecting their privacy.[67] However, other relevant instruments that provide for the right to privacy include the African Charter on the Rights and Welfare of the Child (African Children's Charter);[68] the African Union Convention on Cyber Security and Personal Data Protection;[69] the Personal Data Protection Guidelines for Africa;[70] and the African Declaration on Freedom of Expression and Access to Information.[71]

Regional economic communities (RECs) have adopted measures to protect the right to privacy. For example, the East African Community (EAC) adopted a Framework for Cyber Laws to guide its member states on regional and national processes to facilitate a harmonised legal regime on privacy and data protection.[72] In addition, in 2010, ECOWAS adopted

63 See A Singh & M Power 'The privacy awakening: the urgent need to harmonise the right to privacy in Africa' (2019) 3 *African Human Rights Yearbook* 211; see also YE Ayalew, 'Untrodden paths towards the right to privacy in the digital era under African human rights law,'(2022) 12 *International Data Privacy Law 16-32.*

64 Art 5 Organisation of African Unity (OAU) African Charter on Human and Peoples' Rights (African Charter) 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (African Charter).

65 Arts 4 and 6 African Charter.

66 *Open Society Justice Initiative v Côte d'Ivoire*, (ACHPR), Communication 318/06, 27 May 2016, para 139.

67 See R Murray, *The African Charter on Human and Peoples' Rights a Commentary* (Oxford University Press, 2019) 138.

68 Organisation of African Unity (OAU) African Charter on the Rights and Welfare of the Child 11 July 1990, CAB/LEG/24.9/49 (1990), art 10.

69 Art 8 African Union Convention on Cyber Security and Personal Data Protection ('Malabo Convention'), opened for signature in 27 June 2014, entered into force 8 June 2023.

70 See the Personal Data Protection Guidelines for Africa (2018), Internet Society and the African Union.

71 Principle 40 Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019) Lawrence Mute, Special Rapporteur on Freedom of Expression and Access to Information in Africa.

72 Art 19 Draft East African Community (EAC) Legal Framework for Cyber Laws (2008).

the Supplementary Act on Personal Data Protection, which urges member states to establish a legal framework of protection for privacy of data relating to the collection, processing, transmission, storage, and use of personal data without prejudice to the general interest of the state.[73] Similarly, in an effort to harmonise data protection laws in Southern Africa, the Southern African Development Community (SADC) published the SADC Model Law on Data Protection in 2013.[74]

The African Charter recognises the right to freedom of expression[75] but subject to legitimate limitations.[76] The jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) regarding the right to freedom of expression on the internet is still developing. However, the Commission has already decided on some important communications – on a free press,[77] expressed through any form of media,[78] and the right to publish an article on the internet.[79] Additionally, a few developments have been observed in Africa aimed at enhancing the right to privacy and freedom of expression on the internet, at least in the form of soft law. For instance, inspired by the landmark UN Human Rights Council Resolution,[80] the African Commission Resolution on Freedom of Information and Expression on the Internet has urged African states to respect the right to freedom of expression on the internet through implementing legislative and other measures.[81]

73 Art 2 Supplementary Act on Personal Data Protection within Economic Community of West African States (ECOWAS) 2010.

74 Southern African Development Community (SADC) Model Law: Data Protection (2013).

75 Art 9 African Charter.

76 Arts 9(2) & 27 African Charter.

77 *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) para 107.

78 *MonimElgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* Communication 379/09, ACHPR) para 114.

79 *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe* (ACHPR 294/04) paras 3, 110-112.

80 The promotion, protection and enjoyment of human rights on the Internet: resolution adopted by the Human Rights Council, 18 July 2016, A/HRC/RES/32/13 para 1.

81 Art 1 African Commission on Human and Peoples' Rights (the Commission), Resolution on the Right to Freedom of Information and Expression on the Internet in Africa - ACHPR/Res. 362(LIX) 2016, meeting at its 59thOrdinary Session, held Banjul, Islamic Republic of the Gambia, from 21 October to 04 November 2016. See preamble para IX "Further recognizing that privacy online is important for the realization of the right to freedom of expression and to hold opinions without interference, and the right to freedom of peaceful assembly and association."

Internet access is a mechanism to ensure internet freedom. To this end, the African Declaration emphasised that a universal, equitable, affordable and meaningful access to the internet is necessary for realising freedom of expression.[82] In this respect, African states have a positive obligation to adopt laws, policies and other measures to provide universal, equitable, affordable and meaningful access to the internet without discrimination.[83] First, states should develop independent and transparent regulatory mechanisms for effective oversight. Second, states should improve information and communication technology and internet infrastructure for universal coverage.

In Africa the digital divide – where individuals and communities experience uneven distribution of access to the internet – is still unequal. States should endeavour to bridge these gaps. African states set Agenda 2063 as a noble initiative to tackle the socio-economic challenges and transform the continent into development, pursued under Ppan-Africanism and African Renaissance.[84] For instance, it aspires to a digital economy, and connecting Africa through high-speed internet.[85] Similarly, universal internet access is one of the aspirations that states commit to achieving under the UN Sustainable Development Goals (SDGs).[86]

Lastly, the most significant contribution of the African Declaration is how it recognises the need to balance the right to privacy and freedom of expression. In the Preamble, the Declaration underscores that the right to privacy and freedom of expression are mutually-reinforcing rights.[87] Likewise, the right to privacy and freedom of expression may conflict, and in such cases a proper balance should be struck. This chapter has identified two contexts, namely, publication of personal information[88] and the right to be forgotten,[89] found in the African Declaration, which merit a

82 Principle 37(2) African Declaration.

83 Principle 37(3) (n 65 above) African Declaration.

84 African Union, Agenda 2063: The Africa We Want (African Union Commission 2015).

85 As above, paras 25 and 72 (g): 'ICT: A continent on equal footing with the rest of the world as an information society, an integrated e-economy where every government, business and citizen has access to reliable and affordable ICT services by increasing broadband penetration by 10% by 2018, broadband connectivity by 20 percentage points and providing access to ICT to children in schools and venture capital to young ICT entrepreneurs and innovators and migration to digital TV broadcasting by 2016.'

86 UN General Assembly Transforming our world: The 2030 Agenda for Sustainable Development 21 October 2015, A/RES/70/1, goal 9 target 9(c).

87 Preamble para XVIII African Declaration.

88 Principle 26 African Declaration.

89 Principle 42(3)(d) African Declaration.

further discussion for balancing freedom of expression and privacy rights in sections 4 and 5.

3 Balancing the right to privacy and freedom of expression: Preliminary insights

The advent of balancing competing rights dates back to the late 1950s to early 1960s through a series of synchronous decisions by the German Constitutional Court[90] and the US Supreme Court.[91] In these early judgments, balancing was first referred to and discussed in the area of the right to freedom of expression adjudication. The US and German courts have influenced the contemporary understanding of balancing rights as seen in other states such as the United Kingdom.[92]

The balancing of rights implies an image of weights assigned to values in rights and a head-to-head comparison of these weights.[93] Technically, acts of balancing require 'identification, valuation, and comparison of competing of interests', assigning values to them and ultimately to deciding which interest yields the net benefit.[94]

Balancing rights involves understanding the values that societies highly prioritise. Koskenniemi argues that any sort of balancing rights will involve broad cultural and political assumptions about whether the society should prefer the values of public order, individual rights or the right that better outweighs.[95] This means that states give cultural and political assumptions in upholding one right than the other. For example, in the US legal system, the right to free speech is given precedence than any right as the country's long tradition of civil liberties and self-expression.

90 See *Lüth* case, Federal Constitutional Court (First Senate) 15 January 1958 BVerfGE 7 198.

91 See *Barenblatt v United States* 360 US 109 (1959); *Konigsberg v State Bar of California* 366 US 36 (1961); *Communist Party v Subversive Activities Control Board* 367 US 1 (1961). For a detailed analysis, see J Bomhoff *Balancing constitutional rights: The origins and meanings of post-war legal discourse* (2013) 28, 72.

92 See a number of cases that evolved in the UK addressing balancing rights: *Campbell v MGN* [2004] UK House of Lords 22 [107]; the decisions of the Court of Appeal in *Douglas v Hello! (No 6)* [2006] QB 125, in *McKennitt v Ash* [2008] QB 73, and in *Murray v Express Newspapers plc* [2008] EMLR 12, *Mosley v News Group Newspapers Ltd* [2008] EMLR 20, *Spelman v Express Newspapers* [2012] EWHC 355 [48], and *Sir Cliff Richard v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police*, Royal Court of Justice, Case HC-2016-002849, UK, 18 July 2018.

93 TA Aleinikoff 'Constitutional law in the age of balancing' (1987) 96 *Yale Law Journal* 945.

94 See Cali (n 10) 259 and Aleinikoff (n 93) 945.

95 M Koskenniemi *The politics of international law* (Bloomsbury Publishing, 2011) 144.

However, in the European setting, both the right to privacy and freedom of expression enjoy legal protection.

On the other hand, the African Charter provides the right to freedom of expression but not privacy. The early draft of the African Charter on Human and Peoples' Rights, which Kéba Mbaye drafted in 1979, contains an explicit provision on the right to privacy.[96] However, the final adopted draft of the African Charter on Human and Peoples' Rights contained no clear provision dedicated to the right to privacy when it was adopted in Banjul in 1981. It is unclear why the right to privacy was dropped in the final adopted version of the African Charter. Perhaps the reasons might be linked to two factors. One possible explanation is found in the Dakar Draft where drafters were fully convinced that peoples' rights should be inserted beside individual rights. They stated: 'The conception of an individual who is utterly free and utterly irresponsible and opposed to society is not consonant with African philosophy.'[97] The other reason could be when various delegates raised the concern during the second ministerial conference of the OAU that the Charter must reflect African traditional values.[98] This view was later accepted, and to this effect, a preambular provision was inserted in the final text.[99] Arguably, given an absence of an explicit provision on the right to privacy under the African Charter, the framers of the African Charter perhaps had assigned more value to free speech than privacy.

Based on the case laws of the European Court of Human Rights, one can draw the following balancing techniques. First, the traditional balancing exercise starts with a presumption in favour of either the right to privacy or of the right to freedom of expression – depending on the provision of the European Convention is invoked by the applicant.[100]

96 Art 24 The Kéba Mbaye Draft on African Charter on Human and Peoples' Rights prepared for the Meeting of Experts in Dakar, Senegal from 28 November to 8 December 1979, CAB/LEG/67/1.

97 See [Dakar Draft] African Charter on Human and Peoples' Rights, Preliminary draft of the African Charter prepared during the Dakar Meeting of Experts at the end of 1979. CAB/LEG/67/3/Rev. 1., third governing principle.

98 Second Session of OAU Ministerial Conference on the Draft African Charter on Human and Peoples' Rights (Banjul The Gambia 7 - 19 January 1981) introduction, para 1.

99 African Charter para V 'Taking into consideration the virtues of their historical traditions and the values of African civilisation which should inspire and characterise their reflections on the concept of human and peoples' rights'.

100 Eg, in the first *Von Hannover* case itself, that a national judgment in favour of the press in a privacy case failed to respect her rights under art 8. See *Von Hannover v Germany* (1st case) ECtHR Application 59320/00) judgment, Strasbourg, 24 June 2004, paras 79-80. See dissenting opinion of Schäffer J in the case of *Pfeifer v Austria* ECtHR

Then, it requires 'the state to show that the interference with the exercise of that right is necessary in a democratic society to protect the rights and freedoms of others'.[101] Second, the issue of balancing could be resolved through the concept of 'margin of appreciation' doctrine, where the European Court tends to defer matters to the will of states since national authorities better know the local contexts.[102] Third, the issue of balancing may be resolved through employing a matrix of several touchstones such as contribution of the personal information to the general debate, the method of obtaining the information, the how the person concerned is well-known, method of obtaining the information and its veracity, the content, form and consequences of the publication and the severity of sanctions imposed, which are discussed at length under section 4.

In Africa, states such as South African have some established jurisprudence in balancing competing rights.[103] In the case of *South African Broadcasting Co v Thatcher*[104] the South African High Court has granted a broadcasting company access to record legal proceedings and determined that courts should adopt a flexible approach that favours justice, and fairness, and based on the principle of proportionality subject to limitations applicable[105] when balancing the right to privacy with the right to freedom of expression.[106] In the same way, in the matter of *Tshabalala-Msimang & Another v Makhanya & Others*[107] the South African

(Application 12556/03) 15 November 2007, Judgment, Strasburg, para 5. 'Where both values are at stake, the result of the Court's balancing exercise ought not to depend on which particular article of the Convention has been relied on in the case before it.'

101 Barendt (n 14) 58.

102 The margin of appreciation should in principle be the same in both the right to privacy and freedom of expression. This means that contracting states enjoy a certain margin of appreciation in assessing whether and to what extent an interference with these rights guaranteed under each provision is necessary. See *Fürst-Pfeifer v Austria* (Applications 33677/10 and 52340/10) Judgment 17 May 2016 para 40; *Axel Springer AG v Germany* ([GC] 39954/08, para 87, 7 February 2012) and *Delfi AS v Estonia* [GC] 64569/09, para 139, 16 June 2015.

103 See PM Bekker & AG Janse van Rensburg 'Balancing freedom of expression and the right to the privacy of medical data and information – The winner does not take all: *Mantombazana Edmie Tshabalala-Msimang & Medi Clinic v Makhanya*' (2010) 73 *Journal for Contemporary Roman-Dutch Law* 41-60.

104 *South African Broadcasting Co v Thatcher* High Court of South Africa for the Cape of Good Hope Provincial Division, **Case** 8924/2004, 31 August 2005 paras 1-2: 'The South African Broadcasting Company (SABC) requested the right to televise the proceedings against Mark Thatcher, who was on trial for his involvement in an attempted coup in Equatorial Guinea.'

105 *Thatcher* case (n 104) paras 110-111.

106 *Thatcher* case (n 104) para 118.

107 *Tshabalala-Msimang & Another v Makhanya & Others* (18656/07) 2008 (3) BCLR 338 (W) paras 6-9. 'An article was published in the *Sunday Times* with the heading 'Manto

High Court has found that respondents' right to freedom of expression – on the basis that the disclosure of information is in the public interest – weighed more than the first applicant's right to privacy.[108] The first applicant's right to privacy in her capacity as a public figure is not an absolute constitutionally protected right and can be limited under section 36 of the Constitution. Therefore, the Court resolved the balancing of competing rights through applying common limitation clauses under the Constitution. In the next section, I turn to the first context of balancing the rights to freedom of expression and to privacy in the digital environment, i.e., the publication of personal information.

4 Publication of personal information

The issue of balancing has traditionally been common in the context of the publication of personal information about individuals. When an individual's personal information relating to personal identity,[109] for example, photographs, medical information, contact details, or financial records, is published by online media, hounding press outlets or tabloid magazines, the right to privacy (reputation) of individuals may easily be tampered. The question is how an appropriate balance can be struck between the right of the press to freedom of expression and individuals' privacy.

The African Declaration provides the modalities of individuals' access to information whereby individuals have the right to access information held by public and relevant private bodies including proactive disclosure,[110] in a prompt and inexpensive manner.[111] The access may also include personal information in published works although its application would give rise to a conflict with the right to privacy.

The publication of personal information has acquired additional resonance in the context of the internet because it enables the sharing and disseminating personal information to large sections of society at a time.

's hospital booze binge'. It was alleged that according to the first applicant's medical records she consumed alcohol on various occasions while she was treated with prescription drugs namely painkillers and sleeping tablets while hospitalised in one of the branches of the Medi-Clinic Group. The first applicant was at the time of the alleged infringement of her right to privacy of medical records and data, the Minister of Health and a member of the cabinet of the Government of the Republic of South Africa.'

108 *Tshabalala-Msimang* (n 107) para 44.

109 *Von Hannover v Germany* (n 30) para 50.

110 African Declaration Principle 29.

111 African Declaration Principle 26(1).

One of the overarching problems of the digital age is the unnecessary sensationalism of news or information virtually at times when individuals or the media access information. Although this touchstone varies in individual cases, unnecessary sensationalism of information while expressing one's right to freedom of expression arguably infringes the right to privacy.[112]

In *Axel Springer v Germany* the European Court indicated that several touchstones should be used to balance the right to freedom of expression and privacy in the context of media stories about persons.[113] Using similar standards, in 2017 the European Court in the case of *Einarsson v Iceland*[114] held that a balance should be tilted in favour of the right to privacy over the right to freedom of expression on the internet domain in the context of an Instagram post accusing the applicant of committing a rape.[115] These include the contribution to the debate of general interest, how well-known is the person concerned and what is the subject of the report, the prior conduct of the person concerned, the method of obtaining the information and its veracity, content, form and consequence of the publication, and severity of the sanction imposed.

Accordingly, the first factor to be considered in weighing the right to privacy against freedom of expression in the context of publication of personal information is the contribution to a debate of general interest. This means publishing the alleged photos or articles must contribute to a debate of general interest.[116] However, the question of what constitutes a subject of general interest will depend on the circumstances of the case. For example, the European Court considers the existence of general interest where the publication concerned focuses on political matters or criminal

112 *Sir Cliff Richard v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police*, Royal Court of Justice, Case HC-2016-002849, United Kingdom, 18 July 2018, paras 276, 318, 446(c). "the court found that the manner of reporting chosen by the BBC was to give great emphasis to the news as they decided to add sensationalism by using the helicopter.'

113 *Axel Springer AG v Germany* (n 30) paras 89-95; see also *Von Hannover v Germany (No 2)* (n 30), para 108-113.

114 *Einarsson v Iceland* (Application 24703/15) [2017] ECHR 7 November 2017 para 53.

115 *Einarsson* (n 114) *para 8*.

116 *Axel Springer AG v Germany* (n 30) para 90; *Minelli v Switzerland* (dec.), ECHR no. ECtHR 14991/02, 14 June 2005.

issues,[117] an article in the online archive of the newspaper,[118] and sporting issues or performing arts.[119] Yet, the marital or financial difficulties of the head of states or famous singers were not deemed to be matters of general interest.[120]

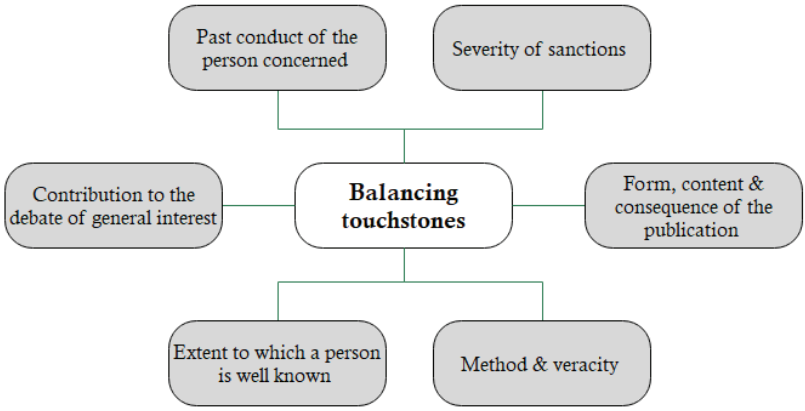

Figure 1: Publication of personal information and balancing touchstones adopted by the European Court of Human Rights (source: author)

The second factor is the extent to which the person concerned and the subject of the report are well-known. In the case of celebrities,[121] political or public figures which are generally known to the public, unlike private individuals who are unknown to the public, may not often claim protection of privacy.[122] However, the public's right to be informed may be limited – 'where the published photos relate exclusively to details of the public figures' private life and have the sole aim of satisfying the curiosity of a

117 *White v Sweden* 42435/02, ECtHR para 29, 19 September 2006; *Egeland and Hanseid v Norway* ECtHR 34438/04, 16 April 2009, para 58; *Leempoel & S.A. ED Ciné Revue v Belgium* ECtHR 64772/01, 9 November 2006 para 72; and *Einarsson v Iceland* (n 114 above) para 45.

118 *Fuchsmann v Germany* ECtHR Application *no.* 71233/13 paras 38-39, 2017.

119 *Nikowitz and Verlagsgruppe News GmbH v Austria* ECtHR 5266/03 para 25, 22 February 2007; *Colaço Mestre and SIC – Sociedade Independente de Comunicação, SA v Portugal* ECtHR 11182/03 and 11319/03, para 28, 26 April 2007; and *Sapan v Turkey*, ECtHR 44102/04, para 34, 8 June 2010.

120 *Standard Verlags GmbH v Austria (No 2)* 21277/05 para 52, 4 June 2009, and *Hachette Filipacchi Associés* (*ICI PARIS*) *v France* 12268/03 para 43, 23 July 2009.

121 See generally P Loughlan and others *Celebrity and the Law* (The Federation Press, 2010) 125.

122 *Axel Springer AG v Germany* (n 30) para 91.

particular readership in that respect'.[123] In terms of the subject of report, the European Court pointed out a guidance on *Einarsson v Iceland (Instagram case) that* the matter was an altered picture of the applicant published on X's Instagram account along with the caption 'F**k you rapist bastard', after two rape charges against the applicant had been dropped.[124] As stated in the facts, X published an altered picture of the applicant on Instagram by drawing an upside-down cross on the applicant's forehead and writing "loser" across his face with the above caption while apparently, he had believed that only his friends who were his "followers" on Instagram, had access to the pictures that he published. But his pictures were also accessible to other Instagram users.[125]

The third factor to be considered in balancing privacy and freedom of expression is the prior conduct of the person concerned. Simply put, when individual's photos or any personal information have already appeared in an earlier publication, these prior conducts need to be considered.[126] For example, in the Instagram case the European Court ruled that the applicant had prior conduct in terms of professional activities such as online writing, publication of books, appearances on television and experience in presenting oneself in the media.[127] Nevertheless, the mere fact of having experience with the press in previous events cannot bar the person concerned from protection against the publication of personal information.[128]

The method of obtaining the information and its veracity is another significant factor to consider in balancing rights. This means that press or journalists have to exercise good faith in finding information and provide accurate and, reliable information as per the ethics of journalism.[129] However, the South African High Court in *Tshabalala-Msimang and Another v Makhanya* and Others found that the publication of unlawfully-obtained controversial information relating to a politician in the exercise of State functions is capable of contributing to a debate in a democratic society.[130]

123 *Von Hannover v Germany* (no. 2) (n 29 above) para 65; *Standard Verlags GmbH v Austria (No 2)* 21277/05, para 53, 4 June 2009).

124 *Einarsson* (n 114) para 43.

125 *Einarsson* (n 114) para 8 and 9.

126 *Hachette Filipacchi Associés* (n 113) paras 52-53.

127 *Einarsson* (n 114) para 43.

128 *Egeland and Hanseid* (n 110) para 62, *Von Hannover (No 2)* (n 28) para 111.

129 *Fressoz and Roire v France* [GC] 29183/95 para 54, ECHR 1999-I; *Stoll v Switzerland* [GC] 69698/01, para 103, ECHR 2007-V).

130 *Tshabalala-Msimang* (n 100) para 46.

The content, form and consequences of the publication may also be considered. In other words, the way in which the photo or report is published, the manner in which the person concerned is represented, and the ultimate effect of the publication should be taken into consideration.[131] In the Instagram case, the European Court found that the risk of harm posed by content and communications on the internet to the exercise of the right to privacy certainly is higher than that posed by the press[132] since the altered picture along with the caption had been accessible not only to X's followers on Instagram, but to other users of this platform.[133] Thus, decision-makers need to consider whether online newspapers should be under a requirement to notify subjects of stories which contain private information in advance.[134]

Finally, the severity of the sanctions imposed is also a factor to be considered when assessing the proportionality of interference with the exercise of the freedom of expression.[135] This means the sanctions imposed to vindicate the right to privacy should not shackle the right to freedom of expression. For example, banning, impounding or interim injunctions might be imposed to defend the privacy of individuals, yet such measures may not disproportionately affect the press freedom of publishers and individuals. In the Axel Springer case, the European Court noted that the injunctions on publication of the photos accompanying the disputed articles could have a chilling effect on the applicant's company.[136] While the German regional Court imposed an injunction on the publication of the photos accompanying the disputed articles, such measures were capable of stifling the right to freedom of expression. It follows that an appropriate balance between the two rights must be placed. This implies that when the sanction imposed against the problematic publication is severe (largely to safeguard the right to privacy), it chills the right to freedom of expression. The next section turns to the second context of balancing the rights to freedom of expression and to privacy in the digital environment, i.e., the rights to be forgotten.

131 See *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft mbH v Austria (No 3)* 66298/01 and 15653/02, para 47, 13 December 2005; *Reklos and Davourlis v Greece* 1234/05, para 42, 15 January 2009; and *Jokitaipale and Others v Finland* 43349/05, para 68, 6 April 2010.

132 *Delfi* (n 102) para 133.

133 *Einarsson* (n 114) para 46.

134 L Taylor 'Balancing the right to a private life and freedom of expression: Is pre-publication notification the way forward?' (2017) 9 *Journal of Media Law* 72-99.

135 *Pedersen and Baadsgaard v Denmark* [GC] 49017/99, ECHR 2004-XI, para 93.

136 *Axel Springer* (n 30) paras 108-109.

5 The right to be forgotten

The right to be forgotten is an emerging right of individuals that enables rights holders to rectify or correct personal data. The right to be forgotten has been discussed by the UN Human Rights Committee under General Comment 16 on the right to privacy.[137] In cases where individuals' private files maintained by public authorities contain incorrect personal data or have been collected or processed contrary to the provisions of the law, an individual should have the right to request rectification or elimination.[138]

The right to be forgotten implies the right of rectification or erasure of data, which is addressed under the African human rights law such as the African Declaration. For example, a social media platform could retain information about individuals for the sake of imparting information. This, however, could jeopardise an individual's data privacy if the platform contains incorrect data about individuals. Additionally, African human rights law offers important normative provisions on the right to be forgotten.[139] For example, the African Union Cyber Convention on Security and Data Protection[140] under article 19 protects the right to be forgotten. The Convention stipulates:

> Any natural person may demand that the data controller rectify, complete, update, block or erase, as the case may be, the personal data concerning him/her where such data are inaccurate, equivocal or out of date, whose collection, use, disclosure or storage are prohibited.

On the other hand, RECs have contributed to the development of data protection in Africa at the sub-regional level. Africa has eight RECs but only two as yet are significant in terms of the data privacy context, including the right to be forgotten: ECOWAS and SADC. The ECOWAS Supplementary Act spells out the right to rectify or destroy personal information, otherwise known as the right to be forgotten. The Act stipulates:

137 UN Human Rights Committee (HRC) CCPR General Comment 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988 para 10.

138 General Comment 16 (n 137) para 10.

139 LA Abdulrauf and CM Fombad, 'The African Union's Data Protection Convention 2014: A Possible Cause for Celebration of Human Rights in Africa?' (2016) 8(1) *Journal of Media Law* 67,85.

140 The Malabo Convention (n 69).

> If personal data of which an individual is the data subject are inaccurate, incomplete, questionable, outdated or prohibited from collection, use, disclosure or preservation, [one] is entitled to ask the data controller to have such data rectified, supplemented, updated, blocked or destroyed, as appropriate.[141]

Accordingly, the data subject shall have the right to obtain from the controller the erasure of personal data where the data is for example prohibited. The SADC Model Law, on the other hand, envisages the right to be forgotten, which further invigorates data subjects to enforce their right to privacy on the internet from search engines and internet intermediaries.[142] The Model Law is, however, not binding; instead, it serves as a template for SADC member states to enact domestic legislation on data protection. While some RECs - such as the ECOWAS and SADC - go further in incorporating specific data protection rules, including the right to be forgotten, there is, as yet, a dearth in jurisprudence concerning the enforcement of the right to be forgotten and the right to privacy before tribunals established at the sub-regional level.

By the same token, the African Declaration states that individuals have the right to be forgotten[143] in generic terms. Specifically, they have the right to erase personal information that is prohibited from collection, use, disclosure or storage. Despite these nascent normative rules, African states are yet to make compelling judicial pronouncements on how to balance the right to privacy and freedom of expression in the context of the right to be forgotten.

Balancing in the context of the right to be forgotten has arisen for discussion because the internet removes individuals' ability to live down their pasts.[144] Accordingly, the right to be forgotten may refer to the right to erasure,[145] forgetting, delisting and takedown.[146] In *Google Spain SL v*

141 Art 41 ECOWAS Act.

142 Art 32(1)(a) SADC Model Law.

143 African Declaration Principle 42(3)(d).

144 P Lambert 'The right to be forgotten: Context and the problem of time' (2019) 24 *Communications Law* 74-79. See S Kulk & FZ Borgesius 'Privacy, freedom of expression, and the right to be forgotten in Europe' in E Selinger and others (eds) *The Cambridge handbook of consumer privacy* (2018) 301-320.

145 Art 17 *EU General Data Protection Regulation (GDPR):* Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

146 C Bartolini & L Siry 'The right to be forgotten in the light of the consent of the data

Agencia Española de Protección de Datos[147] (*Google Spain* case) Mr González made a complaint to the Spanish Data Protection Agency (AEPD) against La Vanguardia newspaper, Google Spain and Google Inc, wanting the newspaper to remove or alter the record of his 1998 garnishment proceedings so that the information would no longer be available on the internet.[148] This matter was referred to the Court of Justice of the European Union (CJEU) to strike a balance between an individual's privacy and the public's access to information. The CJEU held that individuals whose personal data are publicly available through internet search engines may request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results.[149] The court in particular held:

> their rights to privacy override not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name.[150]

However, the Court highlighted some the factors on which the balance may depend, namely, the nature of the information, its sensitivity for the data subject's private life and the interest of the public in having that information, an interest that may vary, in particular, according to the role played by the data subject in public life.[151]

Once a search engine operator like Google delists a search result, the right to freedom of expression could be triggered otherwise impinged in at least three ways.[152] First, publishers' or journalists' freedom of expression would be muzzled since the publication or source will no longer be available. Second, search engine users have a right to receive information.[153] Third, a search engine operator exercises its freedom of expression when it offers its search results, which search results could be considered a form of expression.[154] As a result, search engine operators need to be cautious, and take competing interests seriously.

subject' (2016) 32(2) *Computer Law and Security Review* 218.

147 *Google Spain SL, Google Inc v Agencia Española de Protección de Dato* 13 May 2014, Judgment, Case C-131/12, 13 May 2014, Court of Justice of the European Union [CJEU].

148 *Google Spain* (n 147) paras 14-15.

149 *Google Spain* (n 147) para 81.

150 As above.

151 As above.

152 See J van Hoboken *Search engine freedom: On the implications of the right to freedom of expression for the legal governance of web search engines* (2012) 350.

153 Kulk & Borgesius (n 144) 312.

154 Van Hoboken (n 152) 351.

In another landmark decision, the Grand Chamber of the CJEU in *Google LLC v French Data Protection Authority (CNIL)* ruled in favour of freedom of expression than privacy for extra-territorial balancing issues where the existing EU law did not oblige Google to carry out an order to de-reference search results on all versions of its search engine.[155] The right to be de-referenced (right to be forgotten) is geographically limited to EU member states.[156] Nevertheless, within the EU the right to privacy will be balanced against other fundamental rights, such as freedom of expression, in accordance with the principle of proportionality.[157]

To conclude, following the Google Spain case, companies such as Google introduced commendable measures regarding the right to be forgotten, such as the preparation of an 'online form',[158] which enables applicants to request the delisting of particular results for searches on their name. When the request is being processed, Google must operationalise the balance between applicants' privacy with the public's interest to know and the right to freedom of expression.[159] The next section concludes.

6 Conclusion

Balancing the right to privacy against freedom of expression is an old question in the human rights law debate. However, the debate has resurfaced on the new domain: the internet. This chapter has demonstrated how balancing process provides a useful mechanism for reconciling the right to privacy and freedom of expression on the internet. What it requires is the identification, valuation, and comparison of competing rights. Yet, the balancing process remains an arduous task since courts in various jurisdictions have been grappling with offering an appropriate touchstone to balance the rights to privacy and to freedom of expression.

The African human rights law has sheer normative rules that could be used to resolve the issue of balancing the rights to privacy and freedom of expression. While there is no rich jurisprudence on balancing competing

155 *Google LLC v Commission nationale de l'informatique et des libertés (CNIL)*, C-507/17, The Grand Chamber of the Court of Justice of European Union (CJEU) 24 September 2019 para 72.

156 *Google LLC* (n 155) para 62.

157 *Google LLC* (n 155) para 60; *Volker und Markus Schecke and Eifert*, CJEU C-92/09 and C-93/09, EU:C:2010:662 para 48.

158 See Report content for legal reasons, Google, https://support.google.com/legal/answer/3110420?visit_id=637369736799701053-129110386&rd=2 (accessed 24 August 2023).

159 Removing Content from Google, https://support.google.com/legal/troubleshooter/1114905?hl=en#ts= (accessed 24 August 2023).

rights in the continent, the South African courts have resolved the balancing issues through applying the proportionality principle which is found under the limitation of rights clause in Section 36 of the Constitution.

To examine how the balancing exercise should be done, the chapter has explored two current contexts: the publication of personal information and an individual's right to be forgotten. First, in case of the publication of personal information where an individual's personal information is published on the internet, for example, the European Court has pointed out six-part touchstones, such as the contribution of personal information to the general debate; the method of obtaining the information; how the person concerned is well-known; the prior conduct of the person; the content, form and consequence of publication; and the severity of the sanctions to be imposed, which should be applied to balance the right to privacy and freedom of expression.

The chapter also discussed how the right to be forgotten is another context to strike a balance between the right to privacy and freedom of expression where the right holder requests the removal of online content where it is deemed unlawful as per Principle 42(3) of the 2019 African Declaration and Article 19 of the Malabo Convention. After the landmark Google Spain case in 2014, some internet intermediaries such as Google commenced an online form that could enable right holders to claim the right to be forgotten. For this reason, internet intermediaries and search engine operators should apply copious balancing touchstones as established by courts whenever they face balancing issues. Ultimately, as to which right prevails-whether the right to privacy or freedom of expression – the chapter argues that tipping the scale depends on several factors and should be addressed on a case-by-case basis.

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