

African Data Privacy Laws (Law, Governance and Technology Series Book 33)

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African Data Privacy Laws
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This Springer imprint is published by Springer Nature The registered company is Springer International Publishing AG The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland Preface

From 2001 to 2016, African countries enacted 18 comprehensive data protection Acts. One of these pieces of legislation applies in the public sector, while the rest cover both the public and private sectors. There are several draft bills on data protection in consultative stages in some countries and concrete data privacy bills pending in legislative bodies in some African countries. Currently, African countries without comprehensive data privacy laws use general and sectoral legislation to address privacy issues. Europe, which is considered as having a higher standard of data protection policies than the rest of the world, has greatly influenced data privacy law development in Africa. However, the adoption by the African Union of the African Union Cyber Security and Data Protection Convention in 2014, the first and at the moment the single binding treaty across the globe to address data protection outside Europe, has created potentials for new enactments of data privacy legislation in the continent and similarly revisions of existing ones.

The purpose of this book is therefore to analyse the emerging data protection systems in Africa in the context of the national legal tradition and culture of different countries as well as their socio-economic and political settings. From this analysis, this book points out key important areas where privacy reforms are necessary.

This book originates from the 'future research agenda' of my doctoral thesis which led to the award of the doctor juris at the Faculty of Law, University of Bremen in Germany. In my thesis, I dealt with the subject of data privacy in Africa by a case study approach which is inherently limited to generalise the findings to other cases outside the research. I made a call for a new study that could include as many cases as possible. From 2014 to 2016, I was fortunate to be awarded a George Forster research fellowship by the Alexander von Humboldt (AvH) Foundation, which enabled me to stay in Germany and concentrate on this book project which fulfils my then 'future research agenda'. I am really thankful for this fellowship without which this project could have not come to life.

In the course of writing and editing this book, I incurred many debts. I am indebted to the valuable assistance and suggestions I received from my host and mentor, Prof. Bendikt Buchner of the Faculty of Law, University of Bremen. Prof. Buchner supervised my doctoral dissertation and has since then given me useful tips on how to carry forward my research ambitions in the field of information technology law. Special thanks are due to the Institute for Information, Health and Medical Law (IGMR), Faculty of Law at the University of Bremen in Germany, where this book was written while I was postdoc research fellow. I am deeply grateful to them for hosting me. I particularly acknowledge the assistance I got from Ms. Petra Wilkins as well as Ms. Kerstin True-Biletski. They made my life at the IGMR easier by handling all administrative and logistical arrangements that were necessary for carrying out my book project.

I am deeply grateful to the service of our reviewers of the book chapters who ensured that the book comes out at a quality standard. I also take this opportunity to extend my thanks to the book contributors, first of all, for their acceptance to the individual call to contribute to this volume and, second, to ensure that their contributions are made timely. In a special way, I would like to acknowledge the assistance I received from Ms. Patricia Boshe. Apart from being a contributor to this book, she also helped in its organisation. To my twin

brother, Dr. Alexander Makulilo (Department of Political Science, University of Dar es Salaam), and our daughters, Julieth and Noreen, I am thankful for your support as well as your encouragement. I dedicate this book to you (Julieth and Noreen) so that it inspires you in your future career.

Finally I extend my sincere thanks of gratitude to the management of the Open University of Tanzania, where I teach in Tanzania, for allowing me postdoctoral leave to work on this important project in Germany.

2016	Alex B. Makulilo	Bremen, Germany	March
	Contents	Part I Overview	
1 The Context of Data Privacy in Africa		Alex B. Makulilo	
Part II National Data Privacy Laws Africa:		2 Data Protection in North	

Tunisia and Morocco	Alex B. Makulilo	3 Information	
Privacy in Nigeria	Iheanyi Samuel Nwankwo	4 Data	
Protection Law in Burkina Faso	Krissiamba Moumouni Ouiminga		
5 Data Protection in Zimbabwe	Caroline B. Ncube		6
Privacy and Data Protection in Uganda	Ronald Kakungulu-Mayambala		
7 Towards Data Protection Law in Ethiopia		Alebachew Birhanu Enyew	
8 Data Privacy Law Reforms in Tanzania		Patricia Boshe	
9 Data Protection Law in South Africa		Anneliese Roos	
10 The Right to Privacy and Data Protection in Ghana		Dominic N. Dagbanja	
11 Data Protection in Cape Verde:			

An Analysis of the State of the Art	João Luís Traça and	Pedro Marques Gaspar	
12 Protection of Personal Data in Senegal		Patricia Boshe	
13 Data Protection of the Indian Ocean Islands:			

Mauritius, Seychelles, Madagascar	Alex B. Makulilo		14
Data Protection Regulation in Burundi	Patricia Boshe		15
Data Protection in Kenya	Alex B. Makulilo and	Patricia Boshe	
16 Privacy and Data Protection in Lesotho		Alex B. Makulilo and	
Kuena Mophethe	17 Data Protection in Angola		
João Luís Traça and	Francisca Correia	18 Data Protection in Mozambique:	

Inception Phase	João Luís Traça and	Lídia Neves	
Part III Comparative Conclusions	Alex B. Makulilo	19 The Future of Data Protection in Africa	
	Editor	About the Editor and Contributors	

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<http://www.worldlii.org/int/>

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urban centers. Only 39.8 % of the population is urban. ⁸ It is estimated that 60 % of African people will be living in cities by 2050. ⁹ More than 14 African countries are expected to be at least 80 % urbanized by 2050. ¹⁰ Although the reasons for this growth are a mixture of factors, the rural to urban migration plays a significant role. Lack of employment, access to services and perceived opportunities of cities are widely considered to encourage people to migrate from rural areas to cities. ¹¹ Politically African states especially those found in south of the Sahara have presidential system of government. Under this system, the president is both the head of the state and head of government. Politics in Africa is mainly based on liberal multi-party political system although not without constraints such as lack of impartial electoral bodies as well as free and fair elections; strict controls on rights to demonstrate and assemble; lack of truly independent judiciary; good governance; adherence to rule of law; freedom of access of information; etc. ¹² Yet the current political system can largely be explained in the context of European external influence which started in the fifteenth century through the well-known slave trade ¹³ rather than internal dynamics. The abolition of slave trade in the nineteenth century did not leave a vacuum. It immediately saw the colonization of the African continent by European powers notably the British, German, France, Portuguese, Italian and Belgian. The colonization process was preceded by the Berlin Conference of 1884–1885 which partitioned Africa. The establishment of the colonial state and its instruments that immediately came after the Berlin Conference had far reaching impacts on indigenous forms of governance. Chiefly among them was the destruction of indigenous tribal leadership. Whenever the latter was tolerated to stay intact strategies to integrate it to the colonial system were made. This is because the colonial rule had its target goals namely production of raw materials for industries located in Europe, mobilization of labour force for the plantations and mines and creation of market to consume manufactured goods from Europe. Concomitantly allowing the indigenous tribal rule to exist side-by-side with the colonial rule without any subjugation into the latter would have defeated the very objectives of colonialism. It was not therefore by accident that Lord Lugard, for example, introduced on behalf of the British colonial administration in Africa the so called 'indirect rule' i.e. colonial rule through the disguise of tribal rulers while slightly the French used the local chiefs and rulers as their agents. ¹⁴ On independence (1960s–1970s) colonial powers introduced in Africa constitutions based on the Western style of politics and governance. These constitutions are popularly known as the 'Westminster' or 'Gaullist' constitution model after that of the United Kingdom, France or Portugal. ¹⁵ The independence constitutions which are widely considered as 'imposed' upon the newly independent African states were tailored around the liberal constitutional principles alien to Africa. Such constitutional principles included the doctrines of separation of powers, rule of law, parliamentary supremacy, ministerial responsibility and judicial independence. Moreover multi-party political system was incorporated in the independence constitutions. Also central to these constitutions was the incorporation of the Bill of Rights which guaranteed individuals' basic rights and freedom. However the independence constitutions were short-lived. They were soon dismantled and replaced by totalitarian governments of military or single party regimes under the guise of socialist ideology (neither were these systems of governance indigenous to Africa). ¹⁶ The collapse of independence constitutions was partly attributed to the fact that many of the assumptions underpinning them were not in the African context, grounded in experience and institutionalized patterns of behaviour, nor indeed in an adequate framework of laws. ¹⁷ Similarly independence constitutions were not suitable vehicle for creating unified states from different and fragmented nations often mixed in the pre-independence era. ¹⁸ It has also been said that a competitive system modelled after that of the Western democracies encouraged political competition and rivalry while at the same time detracted from economic development programmes set out by the independent African countries. ¹⁹ The African nationalist elites generally discarded the independence constitutions as neocolonial devices designed to ensure 'the preservation of imperial interests in the newly emergent state. ²⁰ Interestingly the post-independence Africa's military and single party regimes did not either last longer. The oil crisis of 1970s compounded by excessive draughts, civil and inter-state wars and above all the end

of the Cold War resulting into the collapse of U.S.S.R in 1990s as the world superpower (once living side-by-side with the U.S.A) [21](#) saw dramatic turn for developing countries including Africa. Because of economic failures attributed by those enumerated factors, African states found themselves on the mercy of the International Monetary Fund (IMF), World Bank (WB) and European donor communities in their efforts to reform the devastated economies. By 1980s the latter imposed on Africa 'structural adjustment programs' commonly known as SAPs. As part of conditions to access reliefs under SAPs African states were required to liberalize their political systems by allowing multi-party political system, democratic elections, exercise of individual rights, good governance, rule of law, accountability, etc. In short, SAPs practically required African states to return to most of the features of their independence constitutions. To achieve this African states quickly adopted either completely new constitutions or just amended the existing ones by incorporating the liberal constitutional principles. SAPs widened the space under which internal dynamics (poor living standards, legitimacy crisis, etc.) would operate to mount internal pressure to the African regimes to adopt changes. [22](#) As pointed out, Africa's adoption of liberal constitutions on independence and in 1980s had been pre-conditioned by foreign pressures. As a result and in practical terms such constitutions have been derailed by many African leaders. This, to some extent, explains why the executive in Africa is still very strong and not fully accountable to the people. It also explains the current election problems; lack of respect to the rule of law; interference with the judiciary; weak legislatures; weak opposition parties; problems of transparency and respect for human rights generally and basic rights and freedom of individuals. Notwithstanding, the liberal constitutions have had progressive gains in improving the political systems and life in Africa. For example, courts have so far produced a corpus of important rulings protecting civil and political liberties and limiting governmental powers. [23](#) At least there are now regular elections after every 4–5 years in many African countries. These elections are reinforced by the rise of new era of presidential term limits. [24](#) There are also ascendance of fearless and strong private media and civil societies. [25](#) In some countries such as South Africa and Mauritius governments are largely made accountable to the electorates through legislatures. Moreover some countries are moving towards the fourth generation of constitution making (after the independence constitutions; military/single party constitutions 1960s–1980s and liberal constitutions 1980s–1990s) with the view of increasingly curbing the executive powers and making the legislatures and judiciary discharge efficiently their traditional roles. This is the case with Kenya which only adopted its new constitution in 2010. Other countries such as Tanzania are currently undertaking constitutional review for purposes of overhauling the existing constitution enacted in 1977 but which has been amended from time to time. Zimbabwe has similarly adopted a new constitution in 2013. [26](#) Economically Africa has evolved through pre-colonial, colonial, post-independent/neo colonial and now global economies. In pre-colonial times Africa's economy was largely subsistence. Small scale agriculture and livestock keeping were the permanent feature. Family was the main unit of labour force. Pastoralism was practiced in arid and semi-arid areas. The Maasai of the East African Valley and grassland plateau, the Fulani of Western Sudan, the Khoi Khoi of the Cape Region in South Africa, the Herero of Namibia, the Tswana of Botswana, the Galla and the Somali of the semi-desert regions of the Horn of Africa provide typical examples of pastoralist societies in Africa. [27](#) Mining, industry and trade were present but limited. Technology was low and the iron technology which was invented in the first millennium A.D was used to make working tools in some societies only. [28](#) Starting from the fifteenth century the African pre-colonial economies became incorporated into the world capitalist economy through the mercantile capitalism which saw the beginning of the Atlantic Slave Trade, then colonialism, neo-colonialism and now globalization. [29](#) Despite the above incorporation which might have positively transformed Africa, that has not been the case. The external links affected Africa adversely. Africa's economy is still characterized as pre-industrial or simply agrarian with little export trade. The national per capita income is relatively very low. [30](#) Agriculture forms the largest sector of its economy but it faces many challenges due to lack of technology, viable industries, draught conditions, capital and researches. Together Africa accounts for less than 2 % of the global trade. [31](#) The industrial and mineral sectors as well

as tourism have yet been fully realized although the continent is rich in these natural resources.

In the period following independence the state in African countries was in total control of economy. The private sector was very weak. However with SAPs which came about in 1980s strict terms were imposed on African states by the IMF, World Bank and Africa's lenders and creditors of the last resort, as a condition for providing interim relief, to liberalize and deregulate their economies and structure their public administrations; privatize the loss-making state enterprises, remove price controls and subsidies for the social services, and trim bloated public payrolls.

[31](#) The economic liberalization has resulted into significant growth of the private sector in present day Africa. It has also changed the pattern of ownership. The latter in turn has led to the individual ownership of property.

Technologically Africa has come far away. Walter Rodney asserts that in the fifteenth century when Africa first came in contact with Europe, the latter's technological development was not superior to that of Africa and the rest of the world generally. [32](#) Yet he

notes that there were certain specific features that were highly advantageous to Europe such as shipping industry and (to a lesser extent) guns. [33](#) According to this historian Africa had

strength in the cloth industry and irrigation technology (e.g. North Africa particularly Egypt).

[34](#) However through the Atlantic slave trade that saw the declining of Africa's skilled labour force and colonialism Africa lost its technological grip. Under colonialism Africa remained the exporter of raw materials as well as importer of manufactured goods from Europe. This explains why, for example, the African cotton cloth industry declined as a result of competition from importing manufactured cotton cloth which were of cheap and of high quality. [35](#) Accordingly this

remarkable reversal is tied to technological advance in Europe and to stagnation of technology in Africa owing to the very trade with Europe. [36](#) Yet while Europe has its share in the Africa's

'technological arrest' African nationalist elites after independence fueled the regression. This is mainly because immediately after independence most African countries purporting to completely detach from European influence and in view of stimulating industrialization in the newly

independent states banned imports from Europe. [37](#) While it was thought this could have boosted local technological development and industries, the same failed to produce such effect. Instead such protectionist policies greatly constrained Africa's ability to participate in international trade. [38](#) As a result technologically the continent has remained backward compared to the

rest of the world, particularly Europe and America. However two caveats need to be made. First, when a society for whatever reason finds itself technologically trailing behind others, it catches up not so much by independent inventions but by borrowing. [39](#) Japan is widely cited as an

example of a country which effectively borrowed technology from Europe and became capitalist. [40](#) Yet this could not happen in Africa despite centuries of contact with Europe because of the

nature of the relationship between the two continents which operated in disfavor of the former. [41](#) The second caveat partly linked to the first is that technology transfer should be distinguished

from transplantation. Whereas in the former case the demand for European technology would have come from inside Africa with the willingness of both sides [42](#) the latter involves the imposition of such technology from Europe to Africa. As a result customization of such technology to suit the local needs has been difficult. Undoubtedly this second caveat has contributed to Africa's resistance to embracing imported technology.

However Africa's technological breakthrough in the formal sense started with the lifting of protectionist policies in 1980s-1990s following SAPs. Through trade liberalization African countries began to import technology from developed countries particularly Europe. Today Africa has realized the importance of technology as the basis of creating an information economy. [43](#) Recent statistical records by the International

Telecommunication Union (ITU) [44](#) indicate that Africa is the region with the highest mobile phone growth rate. By the end of 2008, it had 246 million mobile subscriptions compared to the five million mobile cellular subscriptions in 2000; and mobile penetration has risen from just 5 % in 2003 to well over 30 % by 2009. [45](#) The number of Internet users has also grown faster than in

other regions. [46](#) Yet despite rapid growth, Africa's ICT penetration levels in 2009 was still far behind the rest of the world and very few African countries reach ICT levels comparable to global averages. [47](#) Less than 5 % of Africans use the Internet, and fixed and mobile broadband

penetration levels are negligible. [48](#) It is noteworthy that the pattern of ICT infrastructure in

Africa has left a 'digital divide' between urban and rural areas with high ICT concentration in the former. ⁴⁹ Yet efforts to bridge the gap are being made although with some slow progress. ⁵⁰ Socially Africans' ways of life have been greatly affected by political, economic and technological liberalism. Prior to external contacts with Europe in the fifteenth century and generally in pre-colonial era Africans were predominantly living in kinship and other closely associated groups. ⁵¹ In such socio-political organizations, individuals lived in interdependence. This relationship between an individual and another in the African community has been expressed in summary in a famous Zulu/Xhosa proverb: *umuntu ngumuntu ngabantu abanye* (i.e. a person is a person through other persons). The shorthand of this proverb is commonly cited as *Ubuntu*. ⁵² The latter's core values include aspects like communalism, interdependence, humanness, sharing, compassion, respect and caring. ⁵³ Mbiti, a Kenyan famous philosopher, has underscored the African relationship in the following expression: 'I am because we are, and since we are therefore I am'. ⁵⁴ Yet although *Ubuntu* philosophy has its roots in South Africa it has been popularized as representing African worldview. ⁵⁵ Some scholarships have only regarded it as the most recent manifestation of the notion of an African humanism, similar to earlier notions such as Pan-Africanism, *Ujamaa* (i.e. the special type of socialism in Tanzania) or *negritude* ⁵⁶ especially after the collapse of the latter. They have therefore dismissed *Ubuntu* as a post-colonial 'Utopia' invention and/or a 'prophetic' illusion crafted by the African political elites in the age of globalization. ⁵⁷ The dominant discourse by African and non-African scholars claim that Africans have only been collectivists. Yet individualism and individualistic life style could/can still be identified in pre-colonial African societies and the subsequent periods. This point is well articulated by Professor Olufemi Taiwo who posits:-

Africans and non-Africans alike believe that African societies are essentially communalistic and are fundamentally reluctant to pollute these waters with an introduction of the bad philosophy of individualism. This is a misplaced identification. It ignores the fact that what needs to be accounted for when we investigate social forms are what type of individualism can be found in various societies, what indigenous nodes of individualist transformations are there to be isolated, and how those nodes were affected by colonialism. What is at issue is not whether there were forms of individualism in any but the most primitive societies but what kind of individualism there is and what role it plays in social ordering. In addition a blanket condemnation of individualism reinforces a reluctance to identify its presence in African societies, past and present. I abjure such a blanket condemnation. While this is not the place to consider the many sides of individualism, I must insist that its introduction into African societies by the apostles of modernity and its evolution in indigenous societies following upon their own internal dynamics deserve serious scholarly attention that does not preclude condemnation of its deleterious consequences if there have been such. ⁵⁸

The preceding paragraph clearly suggests that some forms of individualism existed in pre-colonial African societies even without external influences. Taiwo's views are reinforced by Ezedike who argues:-

At the same time, let it be said here, that African communitarianism is not unqualified collectivism. It would be unbalanced and naive assessment to portray the African traditional community as a totalitarian community in which an individual is a mere pawn within the rigid and ruthless set-up. What we are saying is that the idea of community consciousness should not be interpreted to mean that an individual is completely submerged in the collectivism and thus has no rights, personal initiatives nor any sense of self-reliance. This would certainly amount to exaggeration and distortion of facts. An individual can hardly be regarded as a slave to community.

⁵⁹ Taiwo and Ezedike's views are reiterated by Kigongo. The latter holds that in African traditional society social cohesion was dominant over individuality; unlike individualism, it seems to have been distinctly discernible. ⁶⁰ It is imperative to mention that the co-existence of collectivism and individualism in pre-colonial societies is similarly pondered by two renowned African philosophers Kwame Gyekye and Leopold Senghor. Gyekye observes, 'it would be more correct to describe that order (i.e. African social order) as amphibious, for it manifests features of both communality and individuality....African social thought seeks to avoid the excesses of the two

exaggerated systems, while allowing for a meaningful, albeit uneasy, interaction between the individual and the society'. [61](#) In line with Gyekye, Senghor regards traditional African society to be 'based both on the community and on the person and in which, because it was founded on dialogue and reciprocity, the group had priority over the individual without crashing him, but allowing him to blossom as a person.' [62](#) During the colonial period the African social relationship experienced stronger external shock of waves than those in the slave trade. Western education and Christianity played significant role in impacting on the African social cohesion. With colonial education and religion western values based on individualism slowly permeated into African cultures making *Things Fall Apart* [63](#) or creating *The River Between* [64](#) as some African literature writers have portrayed the effect of colonialism in their fiction. Apart from education and religion, the colonial government and the colonial economy exerted enormous pressures on the African cultural life. Under colonialism almost every individual was forced into the colonial monetary system and economy by provision of labour force which sometimes displaced families (in case of labour migration), payment of taxes, etc. This point is well underscored by Okigbo with respect to the impact of colonialism in West Africa where he observed that the family and kinship structures showed signs of breaking down as a result of the impact of the growing individualism. [65](#) In postcolonial period, the external forces continued to erode the African social forms in the direction of individualism. First, leaders and African scholars of the African independence and post-independence era analyzed the African value system with socio-economic and political implications that are drawn from a different value system, Marxism. [66](#) The former used African value system as justification for their choice of Marxist socialism. [67](#) The latter was the dominant ideology in Africa shortly after independence yet it was alien in the continent although it was similar to African value system. Second, and perhaps the most important, following the collapse of world's socialist system, Africans are now engaged in the process of completely abandoning their value system and attempting to embrace liberalism. [68](#) Under liberalism Africans are living in societies in which everything is permitted under the name of individual freedom and autonomy. [69](#) The Kenyan rural sociologist Preston Chitere, offers the following observation regarding the current state of the African family in Kenya, a state or condition that exists in many other sub-Saharan African nations:-

The effects of capitalism are already being felt in our families. Individualism in society is increasing. Even families in rural areas like to operate in isolation, and those who offer any help are keen to help their immediate families only. The (conjugal) family is becoming more independent. The loss of community networks and the development of individualism have resulted in (increased occurrences of) suicide, loneliness, drug abuse and mental illness. The communal system is breaking down. The extended family had certain functions to perform, for instance, to reconcile couples at loggerheads with each other, but this is no longer the case. It is no one (else's) business to know what's happening in one's marriage today. [70](#) In the Nigeria context Omobowale observes that since the incorporation of the Nigerian economy into the world capitalist system, the indigenous social structure has been fundamentally restructured with the youth being immensely immersed in Western cultures. [71](#) Empirical studies carried out in different parts of Africa confirm the above observations. Suffice here to mention four of them.

The first study: Individualism versus Community in Africa? The Case of Botswana [72](#) was carried out in Botswana to answer the following question: How is it possible that two deeply-rooted values in some African societies-the people's sense of individualism and their sense of community-have persisted through time when they seem to work against each other? [73](#) This study was carried out in the context of collective and private government-sponsored farming projects in rural areas. The study found that it is not that the African value of individualism undermines the chances of success for government-sponsored group efforts, or that the African value of community hampers the successful operation of government-initiated efforts to promote private enterprises. [74](#) Rather what works against these endeavors in many rural areas is that they involve taking risks, when the cultural context in which they are meant to operate, both at the individual and societal levels, has been profoundly averse to taking such risks. [75](#) The second study was carried out in Kenya: Individualism versus Collectivism: A Comparison of

Kenyan and American Self-Concepts. [76](#) This study involved two levels of comparison of self-concepts in relation to culture. The first level was a comparison between Kenya and America in which case it was found that conceptions of the self among the pastoral nomads in Kenya are more collective and less individualized than Western or American self-concepts. [77](#) This first level confirmed the researchers' hypothesis as it was expected. The second level of comparison involved the various groups and communities within Kenya. As compared to Kenyans living in rural areas especially the Maasai, the study found that factors of urbanization, development, modernization and Western education influenced the self-concepts of Kenyans living in Nairobi (the capital city of Kenya) and resulted in a decreased level of collectivism. [78](#) The third empirical study was carried out in Swaziland under the title: The Indigenous Rights of Personality with Particular Reference to the Swazi in the Kingdom of Swaziland. [79](#) This research found among other things that the rural areas of Swaziland have never remained static. [80](#) Instead, considerable pressure has been exerted on traditional Swazi structures by large agri-business, medical and educational missionaries leading to modernization and transformation of traditional rural populations. [81](#) More specifically, industrialization and urbanization with the accompanying labour migration have eroded the ties of kinship with the result that women alone have been obliged to rear families, with modern Swazi households lacking the establishing influence of a patriarchal head. [82](#) Accordingly the foundation and social cohesion upon which the family and kinship ties were based upon had collapsed. The fourth study illustrating the diminishing value of collectivism in Africa was carried out in Malawi. [83](#) This study is interesting as it specifically investigated the existence of Ubuntu in Malawi's political system. It was found by this study that the dictatorial regime of the then President Kamuzu Banda associated with massive corruption; violation of individuals' rights, embezzlement of public resources, torture, political killings, mysterious deaths, etc denied the regime of any Ubuntu standards. [84](#)

Under globalization African culture of collectivism has to a large extent given way to Western individualism. Maduagwu argues that the present-day extreme individualism of the West, the outcome of centuries of laissez-faire capitalism, is being transmitted across the world as the final stage of world civilization to which all cultures must strive to attain. [85](#) It is elucidated that the communication dimension of globalization 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. [86](#) People living in the urban centers, towns and large cities of Africa are currently experiencing the rapid growing of Western individualism. [87](#) Rural areas of Africa are also slowly being drawn in individualism. [88](#)

1.3 African Information Privacy Concept

Privacy is contextual. What is regarded as privacy in society A may not necessarily held the same in society B. This is also the case for individuals even if they live in the same society. Yet in developed countries particularly those in the Western Europe, individuals have higher considerations of privacy than those in developing countries. These differences are due to a number of factors particularly the architecture of such societies. Indeed, in the developed world individuals are autonomous of the society they live. Hence they have enough room to advance claims for privacy. In contrast in developing countries individuals are subordinate to their societies. An individual exists in a network of other members of the society he lives in. African scholars are of the general view that the African society is structured in such a way that an individual has little latitude for self-determination outside the context of the traditional African family and community. [89](#) The African society be it a clan, family, etc is predominant over the freedom of the individual. The 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. [90](#) Thus the core values of the African society are thus communalism and interdependence. This has ramification in the understanding of the notion privacy and consequently its practice. In Africa, the concept of privacy is relatively new. Formal reference to privacy appeared for the first time in use towards the end of the colonial rule in 1960s. During this time privacy right was frequently mentioned in the Bill of Rights of many independence constitutions. No wonder this

was the case at the time of independence and not during the colonial rule because for, a clear reason, the outgoing colonial rulers from Europe notably Britain, France, Belgian and Portuguese felt it important to shield and protect European settlers that continued to stay in former colonies after independence. It is for these reasons data privacy commentators have held that even though African countries shortly after independence partly or fully adopted the legal system of their former colonial powers which was based on the individual, in practice, the dominance of the collective spirit probably even exceeds the boundaries set by that legal system. ⁹¹ This view when considered in the context of the notion of privacy simply means that legal documents surrounding the regulation of privacy in Africa developed in isolation of pre-existing societal values.

However societies are never static. The strong social bonding that held African societies in collectives in the last century is disintegrating due to the globalisation process. In the urban areas and large cities, societal bonding has fallen apart making individuals no longer relying on inter-dependence. Rural areas in Africa where there are still some forms of collectivism, changes are also occurring due to the diminishing gap between rural–urban divide. Modern technologies which are part and parcel of the globalisation have played and continue to play a significant role in transformation of African societies. However despite their benefits such technologies have raised concerns for privacy in a number of ways. Thus the emerging privacy policies and regulations are now very crucial in Africa.

Despite the emerging data privacy policies in the continent, there is yet no philosophical conception of the term privacy in the African context. African scholarship has struggled to conceptualise privacy in the African cultural context in vain. Bakibinga has made a fruitless call that ‘privacy has to be defined in a way that is acceptable to the Ugandan society given the emphasis on communalism versus individual rights.’ ⁹² She recommends that one way to start seeking for such definition would be to commission studies to obtain perceptions of privacy within the Ugandan society. ⁹³ However Bakibinga realises that although in Africa the community comes first, privacy will still be an important concern as the information technology revolution advances. ⁹⁴

The only attempt made so far to define privacy in Africa though reference to an individual is still central as in the Western culture is that of Professor Neethling. His theory states that ‘privacy is an individual condition of life characterised by exclusion from publicity. This condition includes all those personal facts which the person himself at the relevant time determines to be excluded from the knowledge of outsiders and in respect of which he evidences a will for privacy.’ ⁹⁵ Neethling’s definition of privacy does not depart from a class of definitions known as information control theory propounded by Westin. It is also closer to another class of definitions known as non-interference theory demonstrated by the ‘right to be let alone’ in the seminal article of Samuel Warren and Louis Brandeis. ⁹⁶

Critically viewed Neethling’s definition is principally a Western liberal concept. The foundation of this concept is based on the notion of individuality and self-autonomy. It can be concluded that up to this point in time privacy as a concept in the African context is conceptualised in similar terms as its counterpart Western society. However the significance of Neethling’s theory of privacy is that it has received a wide recognition and acceptability in academia in Africa. ⁹⁷ Similarly it has been cited with approval by the Supreme Court of Appeal of South Africa in the case of *National Media Ltd v Jooste*. ⁹⁸

However there is a great difference between privacy as such and information privacy and correspondingly privacy laws and information privacy laws or data privacy laws or as it is called often in Europe data protection laws. ⁹⁹ Questions have also arisen as to whether case law developed around the notion of privacy particularly as it is provided in the human rights treaties have the potential of spelling out data protection principles which are ordinarily part of data protection laws. ¹⁰⁰

This chapter does not intend to dwell on the debates about the differences between privacy and data privacy. However at a basic level, data privacy is a subset of general privacy as it specifically focuses on a special aspect of privacy relating to information as opposed to other forms such as bodily privacy, territorial privacy, etc. In short information privacy deals with the establishment of rules governing the collection and handling of personal data, i.e. information identifying a natural living person and accordingly data protection law specifically regulates all or most stages in the processing of certain kinds of data. ¹⁰¹ This includes how such personal data is gathered, registered, stored, exploited, and disseminated.

[102](#) In this chapter reference to privacy is used interchangeably with data protection, unless the context dictates otherwise.

1.4 International Data Privacy Policies and Their Influence

Privacy benchmarks at an international level are found in the international human rights treaties. The Universal Declaration of Human Rights 1948 states in Article 12 that 'no one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honour or reputation. Everyone has the right to the protection of the law against such interferences or attacks'. This provision is reproduced as Article 17 in the International Covenant on Civil and Political Rights 1966 (ICCPR). Other international human rights instruments that specifically recognize privacy as a right include Article 14 of the United Nations Convention on Migrant Workers 1990, and Article 16 of the United Nations Convention on Protection of the Child 1989.

Privacy protection in the international human rights agreements provides the normative basis for the data protection laws. The earliest formal international instruments which lay frameworks for data privacy protection are the Organization for Economic Cooperation and Development's Guidelines Governing the Protection of Privacy 1980 (i.e. the OECD Privacy Guidelines) and the Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data 1981 of the Council of Europe. The rules within these two documents form the core of the data protection laws of many countries. The key privacy principles incorporated in these instruments require that personal data must be obtained fairly and lawfully; used only for the original specified purpose; adequate, relevant and not excessive to purpose; accurate and up to date; and destroyed after its purpose is completed. They also require establishment of a supervisory authority to enforce the data protection principles. It is important to note that the Convention number 108 of the Council of Europe concerning the protection of personal data is open to accession by non-European countries. So far from Africa, Mauritius and Senegal have acceded to the Council of Europe Convention 108 on data protection and its Additional Protocol. Similarly Morocco, Tunisia and Cape Verde have been invited by the Council of Europe to accede to these instruments.

In 1990s two new important privacy policies were adopted. The first was the United Nations Guidelines for the Regulation of Computerized Personal Data Files 1990 and the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (i.e. EU Directive 95/46/EC). The Data Protection Directive sets a benchmark for national law which harmonizes law throughout the European Union.

[103](#) Of all the privacy policies mentioned, the EU Data Protection Directive is the most influential in the privacy law reforms in non-EU countries. Its influence is exerted by its Article 25 which imposes an obligation on EU member States to ensure that personal information relating to European citizens is covered by law when it is exported to, and processed in, countries outside Europe. This requirement has resulted in growing pressure outside Europe for the passage of privacy laws.

[104](#) Those countries which refuse to adopt meaningful privacy law may find themselves unable to conduct certain types of information flows with Europe, particularly if they involve sensitive data. [105](#) As far as the African countries are concerned, in most cases securing better chances for off-shoring business from Europe is a major reason as to why African countries have adopted or plan to adopt comprehensive data protection laws.

At the regional level, the African Union (AU) adopted on 27 June 2014 the AU Convention on Cybersecurity and Personal Data Protection 2014. This Convention covers three main issues: electronic transactions, personal data protection and cybercrimes. The part that covers data protection i.e. Chapter II (Articles 8–23) of the Cybersecurity Convention is similar to the EU Directive 95/46/EC. However, this Convention has not yet come into force. It is noteworthy that the AU Cybersecurity Convention was preceded by other initiatives to protect privacy in Africa. These include the Supplementary Act A/SA.1/01/10 on Personal Data Protection for the Economic Community of West African States (ECOWAS) as well as the Data Protection Model Law 2012 for Southern African Development Community (SADC). It is also important to mention the EAC Legal Framework for Cyber Laws 2008 (Phase I) adopted in 2010 for the East African Community (EAC) states. In contrast to the ECOWAS Act and SADC Model Law, the EAC Frameworks are only recommendations for the member states to adopt the data privacy legislation in compliance with the international data privacy standards. Another data

privacy policy initiative that preceded the AU Cybersecurity Convention is the Francophone Binding Corporate Rules (BCR) 2013 on cross-border transfer of personal data among French speaking countries (including French speaking countries in Africa). The Francophone BCR is at least one of the old lines of colonial influence in the data privacy reform in Africa. Bygrave has noted similar efforts by the French Data Protection Authority (with its French acronym CNIL) to provide technical expertise and perhaps financial support to cultivate data privacy in the former French colonies of north-west Africa. ¹⁰⁶ There are also traces of Portuguese inspiration for the laws enacted in former Portuguese colonies (Angola, Cape Verde) ¹⁰⁷ and recently such influences are notable in the third former Portuguese colony of Mozambique. Moreover the so called old lines of colonial influences are accentuated by the existence of the two major legal systems in Africa namely common and civil law legal systems which are Western in origin. These systems which were introduced by the French and British during the colonial rule in Africa create fertile grounds for adaptability of European law. For example, in many former British colonies in Africa, common law, doctrines of equity and statutes of general application in the United Kingdom are still the sources of municipal law. ¹⁰⁸ It is noteworthy that the attitude to view the civil and common law legal systems as colonial has diminished significantly as more customisation continues to take place. To sum up this section, three points can be made. First, so far the EU Directive 95/46/EC is the main influential privacy policy in privacy reform in Africa. It influenced individual country in Africa to adopt comprehensive data protection legislation and subsequently the regional and sub-regional data privacy policies and codes such as the AU Cybersecurity Convention, ECOWAS Supplementary Act, SADC Model Law and EAC Cyberlaw Framework. Secondly, some African countries have acceded to the CoE Convention 108 on data protection while others have been invited by the Council of Europe to accede to the CoE Convention signifying the second international influence from Europe in the data privacy law reform in Africa. Perhaps this move towards accession of the Council of Europe data privacy policies is due to failed attempts by Burkina Faso, Mauritius, Tunisia and Morocco to receive EU's positive adequacy finding in 2010. ¹⁰⁹ Thirdly, the role of former colonial powers (from Europe) in Africa in cultivating data privacy in their respective former colonies in addition to the influence of EU Directive and CoE Convention, make the influence of European data privacy standards in Africa more dominant. 1.5

National Protection of Personal Data Data privacy laws are not indigenous of any African nation. They originated from Western nations. In Africa privacy is protected in most national constitutions. However being framed as a broad right, it has not been well enforced. There is little case law based on constitutional right to privacy in the continent. In former Portuguese colonies in Africa (Angola, Cape Verde and Mozambique) privacy is over and above protected in constitutions as habeas data similar to the protection offered to individuals in many Latin American countries. Habeas data provides individuals with a possibility of legal action of access to public databases for the purpose, as necessary, of updating, correcting, removing, or reserving information about the individual concerned. So far there is little case law developed around habeas data provision and it is not clearly known how this right is exercised in practice. Apart from constitutions, privacy is protected in sectoral legislation as well as in general law such as civil codes. Most often the protection in such legislation is focused on principles of secrecy and confidentiality. It was not until in 2000s when comprehensive data protection laws started to develop in Africa. Cape Verde, a former Portuguese colony, was the first nation in Africa to adopt comprehensive data privacy legislation. As of now in Africa there are 18 countries out of 54 which have implemented omnibus data protection legislation. These include Angola, Benin, Burkina Faso, Cape Verde, Gabon, Ghana, Ivory Coast, Lesotho, Mali, Madagascar, Mauritius, Morocco, Sao Thome and Principe, Senegal, Seychelles, South Africa, and Tunisia. It is important to note that Zimbabwe has a data protection legislation which covers only the public sector. Despite the adoption of data privacy legislation in Africa, in many instances such laws have yet to be properly enforced. This is due to the fact that in some countries data protection commissions have not yet been appointed or the law is not yet in force. Even where the commissioner has been appointed, sometimes enforcement has been problematic. 1.6 Conclusion An overview of the above discussion points that Africa is undergoing transformation due to globalisation process.

In this way, its cultural foundations which used to hold individuals in social groups are disintegrating giving individuals self-autonomy. Claims for privacy in Africa are slowly becoming commonplace due to an increased use in modern technologies by both individuals and institutions. As a result the need to protect privacy arises. It is also important to note that the initial push to the adoption of privacy policies in Africa did not come from these concerns rather from trading and business considerations with European countries.

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Footnotes [1](#) See e.g., Arendt ([1958](#)), pp. 152–168. [2](#) Hongladarom ([2016](#)), p. 9. [3](#) Nwauche ([2007](#)), Vol. 1, No. 1, pp. 62–90, at p. 66. [4](#) Westin ([1967](#)). [5](#) Bezanson ([1992](#)), Vol. 80, No. 5, pp. 1133–1175, at p. 1137. [6](#) World meters

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accessed 02.06.2016. [7](#) Ibid. [9](#) Ibid. African Business ([2011](#)), Issue No. 381, pp. 17–24, at p. 18. [10](#) Ibid. [11](#) Ibid, p. 19. [12](#) For detailed discussion of the efficacy or otherwise of the current political system in Africa see generally Makulilo ([2008](#)); Gentili ([2005](#)). [13](#)

Historians generally agree that Africa came into first contacts with Europe in the fifteenth century through Atlantic slave trade also known as 'Triangular Slave Trade' because of its behavioural pattern starting from Africa where slaves were sourced, proceeding to America where such slaves had to offer intensive labour force in mines and plantations owned by Europeans, then to Europe where farm and mineral products from America were finally shipped for industrial processing; and from Europe back to Africa where manufactured goods were dumped into Africa

as market. [14](#) For details about the British 'Indirect Rule' see e.g. Crowder ([1964](#)), Vol. 34, No. 3, pp. 197–205.
[15](#) See e.g., Andrew ([2004](#)), Vol. 4, No. 2, pp. 143–166; Sinjela ([1998](#)), Vol. 23, No. 60, pp. 23–29, at p. 23.
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[17](#) Paul ([1988](#)), Vol. 7, No. 1, pp. 1–34, at p. 14.
[18](#) Sinjela, (n 15). [19](#)
Ibid. [20](#) The Editors of the Spark ([1965](#)), P. 39. [21](#) The collapse of Soviet power led to the withdraw of military support to a variety of Soviet client states such as Angola. Moreover the end of Cold War reduced the geographical significance of Africa in Western eyes, because there was no longer any communist enemy to confront. Thus, western economic support for repressive anti-communist regimes lessened as well, see Wing (n16), p. 309.
[22](#) Prempeh (n16), p. 502. [23](#) Ibid, p. 487. [24](#) Ibid, pp. 488–489.
[25](#) Constitution of Zimbabwe Amendment (No. 20) Act, 2013. [26](#) Tanzania Institute of Education ([2002](#)), pp. 16–17.
[27](#) Ibid, p. 18. [28](#) See

e.g., Henriot,
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[html](#) accessed 08.06.2016; Olutayo and Omobawale ([2007](#)), Vol. 32, No. 2, pp. 97–112, at pp. 100–106. [29](#) See e.g., World Bank ([2014](#)),
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[pdf](#) accessed 08.06.2016. [30](#) Arieff et al. ([2010](#)),
p. 8,
[\[fas.\]\(#\)](http://www.fas.</p></div><div data-bbox=)

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103. [33](#) Ibid. [32](#) Rodney ([31](#) [1972](#)), p. 103. Prempeh (n16), p. 483.
[2001](#)), pp. 1–35, at p. 8. [36](#) Ibid, p. 104. [35](#) Ibid, pp. 103–104. [34](#) Ibid, pp. 41 and
[39](#) Rodney (n32), p. 106. [38](#) [37](#) Ibid. [37](#) Martin (
*)

This volume presents analyses of data protection systems and of 26 jurisdictions with data protection legislation in Africa, as well as additional selected countries without comprehensive data protection laws. In addition, it covers all sub-regional and regional data privacy policies in Africa. Apart from analysing data protection law, the book focuses on the socio-economic contexts, political settings and legal culture in which such laws developed and operate. It bases its analyses on the African legal culture and comparative international data privacy law.

In Africa protection of personal data, the central preoccupation of data privacy laws, is on the policy agenda. The recently adopted African Union Cyber Security and Data Protection Convention 2014, which is the first and currently the only single treaty across the globe to address data protection outside Europe, serves as an illustration of such interest. In addition, there are data protection frameworks at sub-regional levels for West Africa, East Africa and Southern Africa. Similarly, laws on protection of personal data are increasingly being adopted at national plane. Yet despite these data privacy law reforms there is very little literature about data privacy law in Africa and its recent developments. This book fills that gap.Â

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