The privacy awakening: the urgent need to harmonise the right to privacy in Africa

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ABSTRACT: This article argues that, although the African Charter on Human and Peoples' Rights does not expressly provide for a right to privacy, the African Commission on Human and Peoples' Rights can and should — of its own volition or when called upon to do so — read the right to privacy into the African Charter on Human and Peoples' Rights in order to harmonise the African human rights system and provide express recognition to privacy as a fundamental and enforceable human right in Africa. Drawing on the approach taken by the African Commission in *Social and Economic Rights Action Centre and Another v Nigeria* and comparative jurisprudence from the Supreme Court of India in *Justice KS Puttaswamy (Retd) and Another v Union of India and Others*, this article explores how the right to privacy can be read into the African Charter through the right to respect for life and the integrity of the person, the right to dignity, and the right to liberty and security of the person. This article submits that reading the right to privacy into the African Charter is the least imposing and swiftest measure available, and one that mitigates the need to amend the African Charter in terms of its articles 66 or 68. It concludes with arguments as to why it is necessary and important to read the right to privacy into the African Charter, and the broader impact that its enforceability can have on the meaningful realisation of the right to privacy and other associated rights in the region.

TITRE ET RÉSUMÉ EN FRANCAIS:

L'essor du droit a la vie privée: de l'urgente necessite d'une harmonisation du droit a la vie privée en Afrique

RÉSUMÉ: Cette contribution avance que, bien que la Charte africaine des droits de l'homme et des peuples ne garantit pas expressément le droit à la vie privée, la Commission africaine des droits de l'homme et des peuples peut et doit – de sa propre initiative ou lorsqu'elle est saisie – déduire l'existence du droit à la vie privée des dispositions de la Charte africaine afin d'harmoniser le système africain des droits de l'homme et de reconnaître expressément le droit à la vie privée en tant que droit fondamental et applicable en Afrique. S'appuyant sur l'approche adoptée par la Commission africaine dans l'affaire *Social and Economic Rights Action Centre et un*

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autre c. Nigéria et la jurisprudence de la Cour suprême d'Inde dans l'affaire *KS Puttaswamy (Retd) et un Autre c. Union of India et autres*, cet article explore la manière dont le droit à la vie privée peut être déduit des droits à la vie et à l'intégrité de la personne, du droit à la dignité ainsi que du droit à la liberté et à la sécurité de la personne. Cette contribution suggère que la déduction du droit à la vie privée d'autres droits garantis dans la Charte africaine est la voie la moins contraignante et la plus rapide qui soit. Elle atténue la nécessité de modifier la Charte africaine au regard de ses articles 66 ou 68. Enfin, cette contribution discute les raisons pour lesquelles il est nécessaire et important de déduire le droit à la vie privée d'autres droits garantis dans la Charte africaine et l'impact plus large que son caractère exécutoire peut avoir sur la réalisation significative du droit à la vie privée et des autres droits connexes en Afrique.

KEY WORDS: privacy, right to life, right to dignity, right to liberty, security of the person, African Charter on Human and Peoples' Rights, remedies

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1 INTRODUCTION

Before the dawn of the digital age and the spectre of on- and offline privacy violations, the internationally recognised right to privacy played a peripheral role, if any, in African human rights law. This is evidenced by the notable omission of the right from the African Charter on Human and Peoples' Rights (African Charter).[1] However, despite this, and in line with international trends, the right to privacy currently finds reference in the Constitutions of 52 African states[2] and in recent

1 African Charter on Human and Peoples' Rights (1981).

2 The following 52 African constitutions, inclusive of amendments and recent reviews, include reference to the right to privacy: articles 46-7 of the Constitution of Algeria (1989); articles 32-4 of the Constitution of Angola (2010); articles 20-1 of the Constitution of Benin (1990); articles 3 and 9 of the Constitution of Botswana (1966); article 6 of the Constitution of Burkina Faso (1991); article 43 of the Constitution of Burundi (2005); Preamble to the Constitution of Cameroon (1972); articles 38, 41 and 42 of the Constitution of Cape Verde (1980); articles 16 and 19 of the Constitution of the Central African Republic (2016); Preamble to the Constitution of the Comoros (2001); articles 29 and 31 of the Constitution of the Democratic Republic of the Congo (2005); articles 20 and 26 of the Constitution of the Republic of the Congo (2015); article 8 of the Constitution of Côte d'Ivoire; articles 12-3 of the Constitution of Djibouti (2010); articles 57-8 of the Constitution of Egypt (2014); article 13 of the Constitution of Equatorial Guinea (1991); article 18 of the Constitution of Eritrea (1997); article 26 of the

African regional instruments[3] and guidelines.[4] This evinces a disjunct in legal protections available for violations of the right to privacy in domestic laws and those available within the African human rights system.

As the foundational human rights instrument within the African human rights system,[5] the African Charter sets the benchmark for recognised and enforceable human rights in the region. Without adequate recognition of the right to privacy in the African Charter, both as a self-standing right and an enabling right, regional development and enforceability of the right to privacy is constrained, particularly as the founding instruments of the 'building blocks'[6] of the African Union — the regional economic communities (RECs) — make reference to the African Charter as the regional lodestar on human rights.[7] In the midst of global technological advancements and a notable privacy awakening, there is an urgent need to remedy any constraints on the development and enforceability of the right to privacy in the region that may be occasioned by its omission from the African Charter.

This article argues that, despite the existence of regional instruments that make reference to the right to privacy, the African

Constitution of Ethiopia (1994); article(1)(5)-(6) of the Constitution of Gabon (1991); article 23 of the Constitution of The Gambia (1996); article 18 of the Constitution of Ghana (1992); article 12 of the Constitution of Guinea (2010); Articles 44 and 48 of the Constitution of Guinea-Bissau (1984); article 31 of the Constitution of Kenya (2010); article 4(f)-(g) of the Constitution of Lesotho (1993); article 16 of the Constitution of Liberia (1986); articles 11-3 of the Constitution of Libya (2011); article 13 of the Constitution of Madagascar (2010); article 21 of the Constitution of Malawi (1994); article 6 of the Constitution of Mali (1992); article 13 of the Constitution of Mauritania (1991); articles 3(c) and 9 of the Constitution of Mauritius (1968); article 24 of the Constitution of Morocco (2011); article 41 of the Constitution of Mozambique (2004); article 13 of the Constitution of Namibia (1990); articles 27 and 29 of the Constitution of Niger (2017); article 37 of the Constitution of Nigeria (1999); article 2 of the Constitution of Rwanda (2003); articles 24-25 of the Constitution of Sao Tome and Principe (1975); articles 13 and 16 of the Constitution of Senegal (2001); article 20 of the Constitution of the Seychelles (1993); article 15(c) of the Constitution of Sierra Leone (1991); article 19 of the Constitution of Somalia (2012); article 14 of the Constitution of South Africa (1996); article 22 of the Constitution of South Sudan (2011); article 14(1)(c) of the Constitution of Swaziland (2005); articles 16 and 18 of the Constitution of the United Republic of Tanzania (1977); article 28 of the Constitution of Togo (1992); article 24 of the Constitution of Tunisia (2014); article 27(1) of the Constitution of Uganda (1995); articles 11(d) and 17 of the Constitution of Zambia (1991); and article 57 of the Constitution of Zimbabwe (2013). See https://www.constituteproject.org (accessed 15 August 2019).

3 See, for example, the African Charter on the Rights and Welfare of the Child (1990) and the African Union Convention on Cyber Security and Personal Data Protection (2014).

4 Personal Data Protection Guidelines for Africa (2018).

5 The African Charter is referred to in the Constitutive Act of the African Union (2000) which provides in article 3(h) that 'The objectives of the [African] Union shall be to promote and protect human and peoples' rights in accordance with the African Charter ... and other relevant human rights instruments'.

6 African Union 'Regional Economic Communities', https://au.int/en/organs/recs (accessed 16 August 2019).

7 See, for example, article 6(d) of the Treaty for the Establishment of the East African Community (1999).

Commission on Human and Peoples' Rights (African Commission) can and should — of its own volition or when called upon to do so — read the right to privacy into the African Charter in order to harmonise the African human rights system and provide express recognition to privacy as a fundamental and enforceable human right in Africa. Drawing on the approach taken by the African Commission in *Social and Economic Rights Action Centre and Another v Nigeria*[8] (*SERAC*) and comparative jurisprudence from the Supreme Court of India in *Justice K.S. Puttaswamy (Retd.) and Another v Union of India and Others*[9] (*Puttaswamy*), this article explores how the right to privacy can be read into the African Charter through the right to respect for life and the integrity of the person,[10] the right to dignity,[11] and the right to liberty and security of the person.[12] This article submits that reading the right to privacy into the African Charter is the least imposing and swiftest measure available, and one that mitigates the need to amend the African Charter in terms of its articles 66 or 68. Lastly, this article concludes with arguments as to why it is necessary and important to read the right to privacy into the African Charter, and the broader impact that its enforceability can have on the meaningful realisation of the right to privacy and other associated rights in the region.

2 RECOGNITION OF THE RIGHT TO PRIVACY IN INTERNATIONAL HUMAN RIGHTS LAW AND IN THE AFRICAN HUMAN RIGHTS SYSTEM

2.1 The right to privacy in international human rights law

The right to privacy finds its first direct international reference in article 5 of the 1948 American Declaration of the Rights and Duties of

8 (2001) AHRLR 60 (ACHPR 2001).

9 Writ Petition (Civil) No. 494 of 2012, https://sci.gov.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf (accessed 10 August 2019).

10 Article 4 of the African Charter (n 1) provides that

> 'human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'

11 Article 5 of the African Charter (n 1) provides as follows:

> 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

12 Article 6 of the African Charter (n 1) provides:

> 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'

Man[13] (American Declaration). Article 5 of the American Declaration provides that '[e]very person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.' Shortly thereafter, the 1948 Universal Declaration of Human Rights[14] (Universal Declaration) provides, in its article 12, that '[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.' The 1950 European Convention on Human Rights[15] (European Convention), which established the European Court of Human Rights, was the first binding international instrument to recognise the right to privacy. It provides, in its article 8(1), that '[e]veryone has the right to respect for his private and family life, his home and his correspondence.' The European Convention further provides, in its article 8(2), as follows:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The European Convention was followed by the 1966 International Covenant on Civil and Political Rights[16] (ICCPR), and its article 17, which largely mirrors article 12 of the Universal Declaration, save for the addition of the words 'or unlawful' following the word 'arbitrary'. Shortly thereafter, article 11(2) of the 1969 American Convention on Human Rights[17] (American Convention) also refers to the right to privacy, stating that '[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.'

Following the adoption of the right to privacy by the international community between the 1940s and 1970s, the 1988 ICCPR General Comment 16: Article 17 (Right to Privacy)[18] (General Comment 16) gives additional insight into the right to privacy in international law, including a statement that the 'gathering and holding or personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law'.[19] A year later, the 1989 *Convention on the Rights of the Child* expressly recognises the right to privacy in respect of children through its article 16.[20] Following this, a decade later, the 2000 *Charter of Fundamental Rights of the European Union*[21] (European Charter) goes on to provide in article 7 that '[e]veryone has the right to respect

13 American Declaration of the Rights and Duties of Man (1948).
14 Universal Declaration of Human Rights (1948).
15 European Convention on Human Rights (1950).
16 International Covenant on Civil and Political Rights (1966).
17 American Convention on Human Rights (1969).
18 UN Human Rights Committee *General Comment 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988).
19 General Comment 16 (n 18) para 11.
20 Convention on the Rights of the Child (1989).
21 Charter of Fundamental Rights of the European Union (2000).

for his or her private life, home and communications', and in article 8 that '[e]veryone has the right to the protection of personal data concerning him or her.'

Most recently, the United Nations has started to consider the import of the right to privacy in the digital age, and the impact that this has on the exercise of other rights. In this regard, the United Nation General Assembly published in 2014 *The right to privacy in the digital age*,[22] a report of the Office of the United Nations High Commissioner for Human Rights, and in 2015 appointed the first United Nations Special Rapporteur on the right to privacy in recognition of the 'global and open nature of the Internet and the rapid advancement in information and communications technology'.[23]

2.2 The right to privacy in African regional human rights instruments

From an African perspective, and despite international human rights law developments, the adoption of privacy as a fundamental right in the African Charter did not take place in 1981 when the treaty was adopted. However, the right to privacy finds application in two regional treaties and in the recent Personal Data Protection Guidelines for Africa (Data Protection Guidelines);[24] various sub-regional frameworks and agreements which are detailed below; and through the work of the African Commission, particularly through the work of its Special Rapporteur on Freedom of Expression and Access to Information and its NGO Forum.

The right to privacy first finds continental-wide application in the 1990 African Children's Charter[25] which contains an express right to privacy in respect of children. Article 10 of the African Children's Charter provides:

> No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

In addition, the most recent direct expression to the right to privacy in treaty law is contained in the 2014 African Union Convention on Cyber Security and Personal Data Protection[26] (AU Data Protection Convention), which notes in its preamble the commitment of the

22 Office of the United Nations High Commissioner for Human Rights *The right to privacy in the digital age* (2014).

23 United Nations General Assembly *The right to privacy in the digital age*, A/HRC/RES/28/16 (1 April 2015) paras 2 and 4.

24 See the African Charter on the Rights and Welfare of the Child (1990) and the African Union Convention on Cyber Security and Personal Data Protection (2014); and the Personal Data Protection Guidelines for Africa (2018).

25 African Charter on the Rights and Welfare of the Child (1990).

26 African Union Convention on Cyber Security and Personal Data Protection (2014).

African Union to build the 'Information Society' and to protect 'the privacy of its citizens in their daily or professional lives, while guaranteeing the free flow of information.' The primary objective of the AU Data Protection Convention in relation to personal data protection is the commitment from each state party 'to establishing a legal framework aimed at strengthening fundamental rights and public freedoms, particularly the protection of physical data, and [to] punish any violation of privacy without prejudice to the principle of [the] flow of personal data'.[27] Despite these ideals, the AU Data Protection Convention — which in terms of its article 36 requires ratification by fifteen member states to enter in force — has only received five ratifications.[28]

Allied to the AU Data Protection Convention and in terms of its article 31, the 2018 Data Protection Guidelines have been published. The Data Protection Guidelines include 18 recommendations: including two foundational principles to create trust, privacy and responsible use of personal data; eight recommendations for action by states and policy makers, data protection authorities, and data controllers and processors; and eight recommendations on multi-stakeholder solutions, wellbeing of the digital citizen, and enabling and sustaining measures. While the Data Protection Guidelines are a welcome development, there is still no recognised and enforceable fundamental right to privacy in the African human rights system, with the exception of the African Children's Charter which applies only to children.

2.3 The right to privacy in African sub-regional frameworks and agreements

As mentioned, the African Union system relies on RECs as its 'building blocks'.[29] Despite privacy not being recognised as a fundamental right in the African Charter, RECs have developed a series of frameworks, directives and model laws relevant to the right to privacy. However, these instruments remain largely unenforceable and do not find continental wide application.

In 2008, the East African Community (EAC) prepared the Draft EAC legal framework for cyberlaws[30] (EAC Framework). The EAC Framework was prepared by the EAC Task Force on Cyberlaws, comprising representatives from the partner states and the EAC Secretariat, with the support of the United Nations Conference on Trade and Development. It covers various topics in addition to data

27 Article 8(1) of the AU Data Protection Convention.

28 African Union List of countries which have signed, ratified or acceded to the African Union Convention on Cyber Security and Personal Data Protection (2014), accessible at https://au.int/sites/default/files/treaties/29560-sl-AFRICAN%20UNION%20CONVENTION%20ON%20CYBER%20SECURITY%20AND%20PERSONAL%20DATA%20PROTECTION.pdf (accessed 16 August 2019).

29 AU (n 6).

30 Draft EAC legal framework for cyberlaws (2008).

protection, including electronic commerce, data security and consumer protection. The EAC Framework is not intended to be a model law, but instead provides guidance and recommendations to states to assist with informing their respective legal development. Data protection and privacy is dealt with briefly at paragraph 2.5 of the EAC Framework, and provides limited detail on the substantive conditions for the lawful processing of personal information. The EAC Legal Framework concludes on the topic of data protection stating as follows:[31]

> The Task Force recognises the critical importance of data protection and privacy and recommends that further work needs to carried out on this issue, to ensure that (a) the privacy of citizens is not eroded through the Internet; (b) that legislation providing for access to official information is appropriately taken into account; (c) the institutional implications of such reforms; and (d) to take into account fully international best practice in the are.

In 2010, the Economic Community of West African States (ECOWAS) enacted the Supplementary Act on Personal Data Protection within ECOWAS[32] (ECOWAS Supplementary Act), together with the Supplementary Act on Electronic Transactions within ECOWAS.[33] In 2011, it published the Directive on Fighting Cyber Crime within ECOWAS.[34] These documents are key to the right to privacy within ECOWAS and together constitute a bouquet of privacy-related protections, including seven guiding principles[35] on the processing of personal data and provisions on the establishment and responsibilities of data protection authorities.[36] The ECOWAS Supplementary Act provides as its overarching aim:[37]

> Each Member State shall establish a legal framework or 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.

In 2013, 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[38] (SADC Model Law). The SADC Model Law seeks to ensure the harmonisations of information and communications technologies (ICTs) policies, and recognises that developments in ICTs impact the right to privacy and protection of personal data, including in government and commercial activities. It seeks to strike a balance to ensure that the benefits of using ICTs do not result in the weakened protection of personal data and it provides, in its article 3(1), that independent administrative authorities

31 Draft EAC legal framework for cyberlaws (2008) para R.19.

32 Supplementary Act on Personal Data Protection within ECOWAS A/SA.1/01/10 (16 February 2010).

33 Supplementary Act on Electronic Transactions within ECOWAS A/SA.2/01/10 (16 February 2010).

34 Directive in Fighting Cyber Crime within ECOWAS C/DIR. 1/08/11 (August 2011).

35 Articles 23-9 of the ECOWAS Supplementary Act.

36 Articles 14 and 19 of the ECOWAS Supplementary Act.

37 Article 2 of the Supplementary Act on Personal Data Protection within ECOWAS A/SA.1/01/10 (16 February 2010).

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

should be established within member states with oversight over the 'respective rights of privacy' in national territories.

2.4 The right to privacy and the African Commission

Alongside the African Children's Charter and the AU Data Protection Convention, as well as the EAC Framework, the ECOWAS Supplementary Act and the SADC Model Law, efforts to promote the right to privacy have only occurred to a limited degree at the African Commission. Most recently, the Legal Resources Centre, supported by Privacy International and the International Network of Civil Liberties Organizations (INCLO), introduced a draft resolution on the right to privacy,[39] which was adopted by the NGO Forum and forwarded to the African Commission for consideration. Although the draft resolution was not formally adopted by the African Commission, the text of the draft resolution is informative.

In particular, the draft resolution calls on the African Commission to resolve, among other things, that human dignity is a core right and value that underpins the need for the recognition of the right to privacy; that effective respect and promotion of the right to privacy is necessary for the enjoyment of a range of human rights, including freedom of expression, access to information, association and peaceful assembly; and that the mandate of the Special Rapporteur on Freedom of Expression and Access to Information should include privacy and digital rights concerns.[40]

In addition, the African Commission has recently considered and adopted the revised 2002 Declaration of Principles on Freedom of Expression and Access to Information in Africa,[41] which includes significant provisions on the right to privacy.[42] Although a soft law instrument, its adoption is a landmark development in the recognition

39 Privacy International *Privacy International at the 62nd Session of the African Commission on Human and Peoples Rights (ACHPR)*, https://privacyinternational.org/blog/2227/privacy-international-62nd-session-african-commission-human-and-peoples-rights-achpr (accessed 16 August 2019).

40 Legal Resources Centre *Recommended Resolution to the NGO Forum (April 2018)*, https://privacyinternational.org/sites/default/files/2018-08/LRC%20Recommended%20Resolution%20to%20the%20NGO%20Forum%20April%2018.pdf (accessed 16 August 2019).

41 Declaration of Principles on Freedom of Expression and Access to Information in Africa (2002). The Commission at its 65th Ordinary Session in Banjul, The Gambia, 21 October - 10 November 2019, adopted the revised version of the Declaration (see the Final Communiqué of the Session, para 35(ix)).

42 See articles 97-100 of the Draft Declaration of Principles on Freedom of Expression and Access to Information in Africa issued by the Special Rapporteur on Freedom of Expression and Access to Information in Africa, for consultation with States and other Stakeholders, pursuant to Resolution 350 (ACHPR/Res.350 (EXT.OS/XX) 2016) of the African Commission on Human and Peoples' Rights (30 April 2019), https://www.achpr.org/public/Document/file/English/draft_declaration_of_principles_on_freedom_of_expression_in_africa_eng.pdf (accessed 20 October 2019).

of the right to privacy at the regional level, both as an independent right and as an enabler of the right to freedom of expression.

While key efforts to fully introduce the right to privacy in the region have taken place, full recognition of the right is yet to occur. The rapid advancements in, and use of, ICTs — domestically, regionally and globally — warrants an urgent and holistic response to the right to privacy in Africa. In the absence of the recognition of the right to privacy as a fundamental right in the African Charter, and its concomitant status as a lodestar for RECs, the current piecemeal and un-harmonised approach limits the ability of all people on the continent to realise their privacy rights or seek vindication for violations from regional bodies and courts. This must be urgently remedied.

3 READING THE RIGHT TO PRIVACY INTO THE AFRICAN CHARTER

In order to effectively and urgently harmonise the right to privacy in the African human rights system, the African Commission can and should — of its own volition or when called upon to do so — read the right into the African Charter through not only the right to dignity, as has been proposed by civil society at the African Commission, but also through the right to respect for life and the integrity of the person and the right to liberty and security of the person.[43] The approach of reading rights into the African Charter is not novel, as the African Commission has previously read the right to housing or shelter and the right to food into the African Charter, finding these rights to be implicitly reflected in the African Charter through a confluence of other rights. Additionally, this argument finds further comparative reference in the recent *Puttaswamy* judgment of the Supreme Court of India, which read the right to privacy into the Indian Constitution.

3.1 Guidance from the African Commission: reading the rights to housing and food into the African Charter

In *SERAC*,[44] it was alleged that the Government of Nigeria had been directly involved in oil production — through the state oil company, the Nigerian National Petroleum Company, the majority shareholder in a consortium with Shell Petroleum Development Corporation — and that these operations had caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni people. As set out in the communication, it was alleged that the oil consortium had exploited oil reserves in Ogoni land with no

43 Articles 4, 5 and 6 of the African Charter.
44 *SERAC* (n 8).

regard for the health or environment of the local communities, and the Government of Nigeria had condoned and facilitated these violations by placing the legal and military powers of the state at the disposal of the oil companies.[45] The communication alleged 'a concerted violation of a wide range of rights guaranteed under the [African Charter]'.[46] However, notwithstanding the communication relying directly on provisions contained in the African Charter, it further urged the African Commission to read rights into the African Charter, namely the right to housing or shelter, as well as the right to food.

With regard to the right to housing or shelter, the complainants argued that the government had 'massively and systematically' violated the right to adequate housing of members of the Ogoni community under the right to property,[47] and implicitly recognised by the rights to health[48] and family as the natural unit and basis of society,[49] as contained in the African Charter.[50] Importantly, in respect of the argument that the right to housing or shelter should be read into the African Charter, the African Commission held:[51]

> Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian government has apparently violated.

In terms of the right to food, the communication argued that the right to food is also implicit in the African Charter through provisions such as the rights to life,[52] health[53] and economic, social and cultural development.[54] As with the right to housing or shelter, the African Commission accepted that it could read rights into the African Charter on the basis of a confluence of other rights already expressly contained therein. As such, in respect to food, the African Commission stated that: '[b]y its violation of [the rights contained in articles 4, 16 and 22 of the African Charter], the Nigerian government disregarded not only the explicitly protected rights but also upon the right to food implicitly guaranteed.'[55]

This innovative approach by the African Commission marked the first instance in which the African Commission found violations of

45 *SERAC* (n 8) paras 2-3.
46 *SERAC* (n 8) para 43. Specifically, the communication referred to articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter.
47 Article 14 of the African Charter (n 1).
48 Article 16 of the African Charter (n 1).
49 Article 18(1) of the African Charter (n 1).
50 *SERAC* (n 8) para 59.
51 *SERAC* (n 8) para 60.
52 Article 4 of the African Charter (n 1).
53 Article 16 of the African Charter (n 1).
54 Article 2 of the African Charter (n 1).
55 *SERAC* (n 8) paras 64-65.

rights which are not expressly contained in the African Charter. However, it was not the first time that the African Commission adopted a purposive interpretation of the provisions of the African Charter: for instance, it previously followed a similar approach in respect of claw-back clauses, such as 'subject to law' and 'in accordance with law'.[56] Here, the African Commission had interpreted these provisions in a manner that ensured that the limitations did not defeat the purposes of the African Charter.

In sum, the African Commission read the right to housing and the right to food into the African Charter, enunciated its views on the substantive content of these rights and consequently found the Government of Nigeria to be in violation of these rights. This, the African Commission did in fulfilment of its mandate to promote fundamental rights in the region. The Supreme Court of India has done the same but with regard to the right to privacy in terms of the Indian Constitution.

3.2 Guidance from the Supreme Court of India: reading the right to privacy into the rights to life and liberty

In August 2017, the Supreme Court of India handed down the landmark *Puttaswamy* judgment which dealt with the right to privacy.[57] The key question before the Supreme Court was whether the right is a domestic right under the Indian Constitution, despite it not finding explicit reference in the text. Although it appeared from the constitutional drafting history that there had been suggested clauses dealing with privacy, specifically the right to secrecy of correspondence and the protection against unreasonable searches and seizures, these clauses were ultimately not included in the final draft.[58] As a result, the Supreme Court was tasked with deciding whether the right to privacy should be implicitly read into article 21 of the Constitution, which provides that: '[n]o person shall be deprived of his life or personal liberty except according to procedure established by law.'[59]

The Supreme Court noted the importance of the right to privacy as a 'concomitant of the right of the individual to exercise control over his or her personality'[60] and characterised the right as among those that are 'natural to or inherent in a human being', and which are therefore 'inalienable because they are inseparable from the human

56 D Chirwa 'Towards revitalising economic, social and cultural rights in Africa' (2002) 10 *Human Rights Brief* 14 at 17.

57 *Puttaswamy* (n 9).

58 *Puttaswamy* (n 9) para 148.

59 Constitution of India, 1949, https://www.constituteproject.org/constitution/India_2016.pdf?lang=en (accessed 10 August 2019).

60 *Puttaswamy* (n 9) para 40.

personality'.[61] It went on to recognise the import of the right to privacy on the exercise of the rights to life and dignity, stating as follows:[62]

> Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions. 'Life' within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life.
>
> To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve.

Regarding the argument that elements of the right to privacy had been considered during the drafting of the Indian Constitution but ultimately excluded, the Supreme Court noted that the provisions considered at the time focused on two narrow aspects of the right to privacy — namely, the right to secrecy of correspondence and the protection against unreasonable searches and seizures. From this, the Supreme Court held that '[i]t cannot be concluded that the Constituent Assembly had expressly resolved to reject the notion of the right to privacy as an integral election of the liberty and freedoms guaranteed by the fundamental rights.'[63] The Supreme Court also dispelled the misplaced notion that privacy is a privilege for the few or an elitist construct. In this regard, the Supreme Court emphasised that '[e]very individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects.'[64]

In addition, the Supreme Court rejected the argument that recognising the right to privacy would require a constitutional amendment, finding that this incorrectly assumed that the right to privacy stands independent of the liberties already guaranteed under the Indian Constitution. One of the key findings made by the Supreme Court was that that the right to privacy is an element of human dignity, from which it followed that the recognition of the right to privacy as a constitutional entitlement was not tantamount to fashioning a new fundamental right.[65] The import of this finding bears emphasis: it is the ability of the right to privacy to enable the fundamental elements of the person, particularly the right to dignity, in which the inherent value of the right lies, and which renders it intrinsic to the overarching human rights framework as a whole.

61 *Puttaswamy* (n 9) para 40.
62 *Puttaswamy* (n 9) paras 106-107.
63 *Puttaswamy* (n 9) para 148.
64 *Puttaswamy* (n 9) para 157.
65 *Puttaswamy* (n 9) para 113.

The Supreme Court ultimately held that although privacy had not been couched as an independent fundamental right in the Indian Constitution, this did not detract from the protection afforded to it because privacy lay across the spectrum of protected freedoms.[66] Accordingly, the Supreme Court concluded that privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in article 21 of the Constitution, with elements of privacy also arising in varying contexts from the other facets of freedom and dignity which are constitutionally recognised and guaranteed.[67]

The approach taken by the Supreme Court of India in reading in the right to privacy aligns with the approach taken by the African Commission in reading in the rights to housing or food into the African Charter. It follows that the African Commission is well-placed — and appropriately empowered, as is apparent from its own jurisprudence — to take guidance from the *Puttaswamy* judgment and read the right to privacy into the African Charter. In doing so, the African Charter is primed to provide the necessary and urgent harmonisation of the right to privacy needed in the African human rights system.

3.3 Where to from here?

It is apparent from the preceding discussion that the African Commission has been both willing and empowered to read rights into the African Charter where it is appropriate to do so. In line with the Supreme Court of India's reasoning in *Puttaswamy*, as well as the rapid technological advancements on the continent, it is likewise appropriate for the right to privacy to be read into the rights to life, dignity, liberty and security of the person.[68] In doing so, and as the African Commission did in *SERAC*, the right to privacy should be read to include the same substantive duties on states as the rights expressly contained in the African Charter. This includes the duty to respect, protect and fulfil the right;[69] a minimum standard of conduct expected

66 *Puttaswamy* (n 9) para 169. For a summary of principles espoused in the different concurring judgments in *Puttaswamy*, see Columbia Global Freedom of Expression *Puttaswamy v India* https://globalfreedomofexpression.columbia.edu/cases/puttaswamy-v-india/ (accessed 14 August 2019).

67 *Puttaswamy* (n 9) para 3C. The Supreme Court stated further (para 3E): 'Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty'.

68 Articles 4, 5 and 6 of the African Charter.

69 *SERAC* (n 8) para 61. Human rights treaties and customary international law impose three obligations on states: the duty to respect; the duty to protect; and the duty to fulfil. The duty to respect means that states are obliged to refrain from interfering in the enjoyment of rights by individuals and groups, and prohibits state actions that may undermine the enjoyment of rights; the duty to protect requires states to protect individuals against abuses by non-state actors, foreign actors or state agents acting outside their official capacity, requiring both a preventative and remedial dimension; and the duty to fulfil requires states to take

by the state;[70] and a minimum core of the right that the state is required to meet.[71]

In terms of the content of the obligations under the African Charter, these obligations are both positive and negative. Accordingly, states are not only required not to infringe the right to privacy but also to take positive action to realise it. Allied to this, states must make remedies for violations of the right available, as the African Commission has made clear that there should be no right in the African Charter that cannot be made effective.[72] Further, the African Commission did not treat the reading in of rights as an endeavour of last resort. For instance, in respect of the right to food read into the African Charter, the African Commission held that the Government of Nigeria had violated this right in addition to the rights to respect for life and integrity of the person, the best attainable state of physical and mental health and to economic, social and cultural development.[73] In other words, even though there were other rights that the African Commission found to have been violated — with these rights being expressly recognised in the African Charter — this did not inhibit the African Commission from going further in finding an additional violation of a right to food that had been implicitly read in.

Recognising that a right to privacy can be read into the African Charter is only the first step: the next is giving content to the right. In *SERAC*, in addition to reading the rights to housing and food into the African Charter, the African Commission went further to ascribe substantive content to these rights. In respect of the right to privacy, there are a number of international instruments that could be looked to for guidance on the content of the right, such as article 17 of the ICCPR[74] and General Comment 16.[75] However, it must necessarily be accepted that the right to privacy — as with all rights — is not static, but

ısitive action to ensure that human rights can be realised. See Office of the High ommissioner on Human Rights 'Human rights: Handbook for parliamentarians' 2016 31-33 https://www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf (accessed 13 August 2019).

70 *SERAC* (n 8) para 61.

71 *SERAC* (n 8) para 65.

72 *SERAC* (n 8) para 68.

73 *SERAC* (n 8) para 63.

74 Article 17 of the ICCPR provides as follows:

> '(1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to harmful attacks on his honour or reputation.
> (2) Everyone has the right to the protection of the law against such interference or attacks.'"

The right to privacy is also contained in regional human rights instruments, such as article 8 of the European Convention and article 11 of the American Convention. For a discussion of the content of the right to privacy under international law, see *Ismayilova v Azerbaijan* App. Nos 65286/13 and 57270/14 (10 January 2019) para 139.

75 This is consonant with the approach taken by the African Commission in *SERAC* (n 8 above) para 61, in which it looked to General Comment No. 4 (1991) and General Comment No 7 (1997) in respect of the right to adequate housing to give content to the right that it had read into the African Charter.

rather one that is constantly evolving as society and technological advancements progress. This requires lawmakers, judicial officers and other stakeholders to be flexible and resilient to changing norms that reflect the needs of society at the time. This is especially pertinent in relation to the right to privacy in an ever-changing digital age.

Importantly, particularly with technological advancements used for nefarious purposes which place individual autonomy at risk, the rights to dignity and liberty demand that the right to privacy be urgently recognised as an element of the African human rights system, if these rights are to be fully and meaningfully realised. By reading in the right to privacy into the African Charter — this being presumably the swiftest vindication of the right under increasingly urgent circumstances — an amendment to the treaty itself in unnecessary.[76]

4 IMPORTANCE OF THE RIGHT TO PRIVACY IN THE AFRICAN HUMAN RIGHTS SYSTEM

The right to privacy is essential for every person to fully realise their own autonomy, identity and personality, on their own terms and for their own self-development. This does not negate the importance of a person's engagement with the broader community. As explained by the Constitutional Court of South Africa: '[t]he scope of privacy has been closely related to the concept of identity and it has been stated that "rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity"'.[77] Indeed, one of the very reasons for which privacy is so valued is because it enables the person to choose how to live their life within the overall framework of a broader community.[78]

The limited and disjointed recognition that the right to privacy currently receives in the African human rights system fails to provide adequate protection. What is required is a holistic recognition of this fundamental right in the African Charter in order for it to receive the elevated recognition that it deserves and, thereafter, for RECs instruments to harmonise with the African Charter. The harmonisation of the right to privacy is premised not only on the importance of the right itself, but also as a crucial enabling right. Beyond the rights to dignity and liberty, there is an array of other rights whose full realisation depend on an effective right to privacy:[79] the confidentiality

76 As explained in *Puttaswamy* (n 9) para 113:

> 'To recognise the value of privacy as a constitutional entitlement and interest is not to fashion a new fundamental right by a process of amendment through judicial fiat. Neither are the judges nor is the process of judicial review entrusted with the constitutional responsibility to amend the Constitution. But judicial review certainly has the task before it of determining the nature and extent of the freedoms available to each person under the fabric of those constitutional guarantees which are protected.'

77 *Bernstein v Bester NO* 1996 (2) SA 751 (CC) para 65.

78 *NM v Smith* 2007 (5) SA 250 (CC) para 131.

79 *NM v Smith* (n 78) para 131.

of medical records as an element of the right to healthcare; the sacrosanct requirement of legal privilege as fundamental to the right to a fair trial; the protection of whistleblowers and sources from the interception of communications as indispensable to the right to freedom of expression and press freedom; the legitimate expectation of not being under unlawful surveillance as quintessential to the rights to freedom of association and movement; and a world without privacy falls foul of the right to a general satisfactory environment favourable to development. As held in *Puttaswamy*:[80]

> Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

Certain components of the right to privacy also warrant special attention. First, the need for informational privacy and data protection laws has gained global attention in the digital age, in a time when the generation of data through online technologies has rendered people vulnerable to their information being used against them if not properly secured and safeguarded. The right to privacy is fundamental to these safeguards, including by providing a basis to advocate for the development and implementation of robust laws to protect personal information.[81] Such data protection regimes are essential to protecting the autonomy of the person, in addition to providing data subjects with other rights inherent to the data protection framework, such as the right to consent or to object to certain forms of processing of personal information.

Linked to this is the issue of the interception and surveillance of communications. The implications of mass surveillance on the fundamental rights of people is staggering, and yet in countries without effective privacy regimes, these surveillance practices continue with little to no legal framework, or oversight and accountability mechanisms. Throughout the region, the lack of effective privacy protections has resulted in rights violations without remedy as a result of unlawful surveillance. This has included the unlawful surveillance of human rights defenders, opposition leaders, critics and members of the media, whose struggles have been made all the more challenging by having to withstand unlawful and disproportionate surveillance. Where countries enable these violations and do not provide for the right to an effective remedy, regional human rights mechanisms — empowered by appropriate legal frameworks — must step in and vindicate rights.

While there are various aspects to which the right to privacy pertains, one that bears special mention is that of equality, particularly in the context of sexuality and sexual orientation. These aspects of every person's life are essential attributes of the right to privacy, with

80 *Puttaswamy* (n 9) para 169.

81 The *Puttaswamy* judgment, for instance, has formed part of a broader litigation strategy seeking to compel the state to enact a comprehensive data protection framework to meaningfully protect the right to privacy. See *Puttaswamy* (n 9) paras 177-178.

discrimination against an individual on the basis of sexuality or sexual orientation being deeply offensive to a person's dignity.[82] As explained by the Constitutional Court of South Africa: '[p]rivacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.'[83] The way in which we give expression to our sexuality is at the core of the right to privacy.

In addition to the substantive importance of the right to privacy being read into the African Charter, there are also practical applications that arise. As mentioned, the recognition of the right within the African Charter creates a basis for members of the public to lobby for privacy-related law reform — such as data protection laws — in their domestic jurisdictions. The binding nature of the African Charter and the primacy with which it is treated within the African human rights system makes this both a binding and persuasive advocacy tool. Reading privacy into the African Charter also finds application at the RECs level. This is because core RECs instruments, such as the Treaty for the Establishment of the East African Community (East African Treaty) and the Revised Treaty of the Economic Community of West African States (ECOWAS Treaty), make express reference to the rights contained in the African Charter being binding within RECs frameworks as well.[84] This elevated status that the African Charter holds highlights the need for the right to privacy to be appropriately recognised as an element of the African Charter, in order to ensure an appropriate level of protection and the meaningful realisation of the associated rights.

Lastly, privacy plays an important role in facilitating the work of the African Commission. It will allow for communications to be filed in order to vindicate the right where states have violated it, and it will allow for recommendations on effective remedies. This recognition will enable the African Commission to provide soft law guidance through the development of resolutions, declarations, principles and model laws that could provide guidance to states to realise the right in a meaningful and appropriate rights-based manner. Also, states would be required to report on their compliance and fulfilment of the right as part of the treaty-body reporting requirements. And it would enable the relevant country rapporteurs and mandate-holders of the African Commission to investigate the measures taken by states and other actors to respect, protect and fulfil the right the right to privacy in their jurisdictions.

As with all rights, the right to privacy is not absolute. However, a recognition of the right within the African Charter will ensure that any limitation of the right would have to comply with the three-part test for

82 *Puttaswamy* (n 9) para 126.

83 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 31.

84 Article 6(d) of the East African Treaty and article 4(g) of the ECOWAS Treaty both provide for 'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights as being a fundamental principle.

a justifiable limitation, namely that such limitation be provided for in law, serve a legitimate aim and be proportionate to that aim. The right to privacy is an important constraint on the state — making the right one that is worthy of protection, particularly in times where it is increasingly under threat from both state and private actors seeking to violate the inviolable personal sphere in order to gain unfettered, and oftentimes unlawful, access to private information.

5 CONCLUSION

Urgent harmonisation and recognition of the right to privacy within the African human rights system, through its foundational instrument, the African Charter, is needed. The African Commission is best placed to do this by reading the right to privacy into the existing provisions on the rights to life, dignity and liberty and security of the person. Such action by the African Commission will create the impetus for a range of consequent rights and protections, including informational privacy, data protection, and the prevention of unlawful surveillance, among others. Most importantly, it enables every person to live with the dignity, autonomy and self-determination that the African Charter demands, and to meaningfully self-actualise within their broader community.

The right to privacy is not a luxury, certainly not in the digital age in which data has become a currency. Every aspect of our person is at risk of being exploited if not appropriately protected through effective rights-based measures that take due account of the exigencies of the right to privacy. The starting point for this can and should be the recognition of the right to privacy in the African regional human rights system as an essential step in the protection and harmonisation of the broader scheme of rights fundamental to every person in the region. A privacy awakening in Africa is urgently needed and it should be led by the African Commission.