

# **WESTERN PRIVACY AND UBUNTU – INFLUENCES IN THE FORTHCOMING DATA PRIVACY BILL**

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## **Abstract Title**

There is worldwide concern growing regarding the increasing potential threats to the personal privacy of individuals caused by technologies and governments. The international response of governments has been to draft comprehensive privacy legislation in order to protect their citizen's personal information and to enable their citizens to have control over their personal information. In South Africa, the right to privacy is protected by both Section 14 of the Constitution and the provisions of the Common Law, but has at this stage no formal privacy legislation in place to enforce fair data protection principles. A new Data Privacy Bill must be drafted taking into account South Africa's unique political and social context as well as international demands made by the global economy. The prime influences acting upon the new Data Privacy Bill will be the mandate in the Constitution, the EU Data Protection Directive and the Ubuntu worldview. The EU Data Protection Directive is the best articulated privacy legislation in existence today and the Ubuntu philosophy has been pressed into service very successfully in diverse arenas in South Africa. This paper argues that both influences will be seen in the future Data Privacy Bill, but that the EU Data Protection Directive's influence will be pre-eminent.

Keywords: Ubuntu, privacy, legislation, jurisprudence, South Africa

## INTRODUCTION

In June 2004 several major South African newspapers (Kalideen, 2004) published an article that the South African Post Office would sell the personal information<sup>1</sup> of all registered citizens contained in its National Address Database (NAD). The personal information contained within the NAD was collected via census records, TV licence payments, telephone accounts held and national identity document records held by the Ministry of Home Affairs.

The personal information of millions of South African citizens was therefore literally put up for sale as a commodity without any legal mechanisms in place to stop this action. Individuals could legally do nothing to prevent the sale of their personal information and they felt a fundamental loss of control with respect to who is allowed to receive their personal information and how much of that information is revealed to a third party. As the situation currently stands, South Africa has no data protection laws in place, which would prevent misuse of personal information stored in the hands of third parties.

In South Africa, the right to privacy is recognised by the Constitution (South Africa, 1996) and in the common law. The common law defines privacy as part of an individual's personhood and that harm done to an individual's personhood or personal property is wrong. The sharing of personal information without the consent of the data subject<sup>2</sup> is considered a wrongful act. The South African government has recognised the vulnerabilities and has commissioned the South African Law Reform Commission to investigate the need for a Data Privacy Bill and to make recommendations in this regard.

The trend to legislate comprehensive privacy laws is driven by the recognition of the increasing potential threats to the personal privacy of individuals worldwide. This perceived threat is fuelled by the pervasive deployment of computer systems together with the exponential increase of data collection, data processing, storage and exchange. The EU, South Africa's biggest trading partner, has legislated comprehensive privacy laws to protect the exchange of their citizen's personal information especially during cross-border flows between any EU member country and a foreign country. Countries outside the EU, including the USA, have responded by drawing up general or specific privacy legislation to accommodate the EU's requirements and to ensure continued international trade, information sharing and e-commerce to function.

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<sup>1</sup> The personal information intended for sale constituted the individual's name, national identity number, home address, post office address as well as telephone numbers (Pretoria News, 15 June 2004).

<sup>2</sup> The data subject is the person whose personal information is being collected, processed or shared.

The African worldview driving much of African values and social thinking is “Ubuntu” (Broodryk, 2004). The Ubuntu worldview has been recognised as the primary reason that South Africa has managed to successfully transfer power from a white minority government to a majority-rule government without bloodshed (Murithi, 2000). The South African government will attempt to draft a Data Privacy Bill and strike an appropriate balance within the context of African values and an African worldview.

Ubuntu is difficult to define succinctly, but could be best described as a community-based mindset in which the welfare of the group is greater than the welfare of a single individual in the group (Kwamwangamulu & Nkonko, 1999:27). Ubuntu espouses a value system in seeming contradiction with current Western values. Western cultures are primarily founded on the political philosophy of *Libertarianism*, which places a strong emphasis on the rights of the individual in order to protect and empower them. On the other side of the spectrum resides the political philosophy of *Communitarianism*, which places an emphasis on the good of the community, and especially during ethical decisions the difference between the two sides becomes apparent.

Much of privacy legislation drafted so far seeks to protect the individual against the potential informational exploitation by powerful role players in possession of such personal information. When drafting the upcoming Data Privacy Bill, a potential tension and contradiction can result due to the African frame of reference of placing the interests of the community ahead of that of the individual.

This paper will seek to answer the question of whether the Western notion of privacy, or whether the African worldview of Ubuntu will be the primary influence on the nature and character of the forthcoming Data Privacy Bill. In order to answer this question the following sub-questions had to be answered:

- Is there really is a *contradiction* between Ubuntu values and Western values?
- Which *influence* will assert itself more during the drafting of the privacy legislation – Ubuntu or the internationally harmonised privacy laws of Western countries?
- Will these potential *tensions* drive South Africa’s privacy legislation into a *unique and new direction* when applied to the concept of personal privacy in the digital age?

The remainder of this paper is structured into four main sections as follows: The next section briefly covers the concept of privacy by recalling well-covered groundwork done by other authors. The section following that will then elaborate on Ubuntu – its definitions, applications and the understanding of privacy in the Ubuntu society. The section thereafter will briefly cover the current

South African privacy-related legislation in place. The last section will then cover a comparative analysis with conclusions.

## **CONCEPT OF PRIVACY**

Substantial work has already been done on the concept of privacy by several authors and this paper will not add to, or change the current understanding of privacy in western cultures. Privacy deals primarily with the personal space and personal information of individuals (Brandeis & Warren, 1890; Privacy International, 2003; Neethling cited in Britz, 1998), how access to it is controlled (Office of Technology Assessment, cited in Rosenberg, 1998:138), the freedom of space to exercise autonomy (Milberg, 1995; Clarke, 1999), a balancing of rights and a continuously variable boundary between privacy and publicity (Altman, 1999; cited in Dourish & Palen, 2003). The most common thread running through the definitions of privacy is the notion of the *control of personal information* and having *autonomous space* to act as moral beings.

Several authors have argued that a certain amount ethical relativism does exist and that cultures have differing interpretations on certain ethical issues, of which privacy is one. This can lead to a prioritisation of rights, a justification of rights and the privilege to practice distinctive rights in respective cultures (Johnson, 2001; Bell, 2001). This has an important impact on the way privacy is perceived and interpreted in different cultures.

## **UBUNTU**

### **Introduction**

“Ubuntu” is an African worldview and is driving much of South Africa’s values and social thinking (Broodryk, 2004). Ubuntu has also been described as an African phenomenon and an accurate reflection of Africa’s historical cultural, legislative and social systems. The term Ubuntu features very largely in several well-known African agenda’s such as the *African Renaissance* and the *Millennium Action Plan* (Jana, 2001). Beyond that Ubuntu is becoming a globalising concept that is being seriously considered as an alternative to “extractive capitalism” (Van Binsbergen, 2002). Ubuntu is currently being driven and marketed by the political powers and intellectual elite of many countries in Africa as the solution to the poverty, political strife; ethnic conflict experienced in Africa and is an “awakening” of true africaness. This is especially true of post-1994 South Africa where the political leadership is looking for an ideology to press into service to build a new society. Above that, Ubuntu is seen as an answer to conflict resolution and Restorative Justice (Anderson, 1999; Van Binsbergen, 2001).

## **Definitions of Ubuntu**

As noted above, Ubuntu is difficult to define succinctly, but we will draw on a few definitions of Ubuntu to illustrate its breadth of interpretation. Louw (2001) describes the concept of Ubuntu within the following phrase:

*“Umntu ungumuntu ngabanye abantu”* (Nguni languages of Zulu and Xhosa)

The phrase roughly translated into English would mean;

*“A person is a person through other persons”.*

This encapsulates the concepts of “humanity”, “humanness” and even “humane-ness” and expresses respect and compassion to others (Louw, 2001). Broodryk (2002) states that Ubuntu is essentially:

*“An ancient African worldview based on the values of intense humanness, caring, respect, compassion, and associated values ensuring a happy and qualitative human community life in a spirit of family.”*

Ubuntu could also be described as a community-based mindset in which the welfare of the group is greater than the welfare of a single individual in the group (Kwamwangamulu & Nkonko, 1999:27).

## **Concepts of Ubuntu**

Justice Mokgoro explains that Ubuntu is essentially an African philosophy of life, which reflects the African approach and worldview when considering cultural, social and political aspects of life (Mokgoro, 1997). Furthermore Justice Mokgoro states that Ubuntu is a metaphor that describes group solidarity in such a way that the survival of the group depends on this solidarity of individuals to the group. The individual’s existence and identity is relative to the group and is defined by the group as well. This is in stark contrast to the Cartesian notion of individuality that states, “I think, therefore I am”. The Ubuntu notion of individuality is more complex and multi-faceted and suggests a multiplicity of “I’s” – one for each relationship the Ubuntu individual is involved in (Louw, 1999).

According to Van Binsbergen (2002) Ubuntu recognises the following four attributes of human beings:

- Human dignity and equality
- Universal brotherhood
- Sacredness of life
- “Being” is the most desirable state of life (i.e. community-based living)

Human beings are recognised as being all equal, sharing a common basic brotherhood, having the right to life and finding their ultimate meaning and purpose within communities. The last attribute is in stark contrast to the extreme individualism and self-centredness of Western cultures.

## **Core values of Ubuntu**

### **Communalism**

The literature review confirms that *Communalism* comes across as a foundational cornerstone of Ubuntu. It would be accurate in stating that *Ubuntu is communalism* in the most fundamental sense of the word. According to Kwamwangamulu & Nkonko (1999:27) communalism is the core value of Ubuntu and implies that the interests of the individual are subordinate to that of the group. The communalist group will focus the interests of each individual member towards those activities and behaviours that will ensure the good of the group. Communalism furthermore believes that once the good of the group is ensured, the benefits will flow through to each individual member.

Another associated concept of Ubuntu communalism is that of collective solidarity, meaning that individuals will focus their interests, activities, and loyalties of their own accord, in line with the group's cause and well-being (Mokgoro, 1997). Each individual realises that he is part of a group and that the group depends on his skills, inputs, labour and loyalty in order to survive. The communalist lifestyle also places within each individual a strong sense of belonging – arguably one of the strongest needs in humans today. The communalist lifestyle thus provides each member a sense of purpose and security in relation to that 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 his family, clan or tribe (Kwamwangamulu & Nkonko: 1999:27). The communalist lifestyle goes so far in that children are not the sole responsibility of the parents alone, but are the responsibility of the extended family and entire clan of adult members. Individuals are taught, by experience, that an individual cannot live alone or manage life by himself; he needs the collective wisdom and experience of others in order to become his best. By becoming his best he also will benefit the group as a whole.

One observation about the communalist nature of Ubuntu is that it is sustainable at a local village level, but is difficult to exercise beyond the boundaries of everyday relationships. Individuals have a limited capacity to relate to other people in terms of sheer numbers of relationships, and since relationships are a cornerstone to Ubuntu, the practice of Ubuntu occurs primarily within the boundaries of the individual's primary relationships. This does not mean that Ubuntu's ethos and culture are not carried over to other areas, but that it is practised in localities by individuals in groups that know each other well (Scorgie, 2004).

## Interdependence

The second core value of Ubuntu is that of interdependence. According to Mbigi (1995:2) the individual owes his existence to others because “*you are because I am*” and “*I am because you are*” (cited in Brack et al, 2003). This is interpreted from the Ubuntu statement, “*people are people through other people*”. Bhengu (1996) says that in the context of Ubuntu, a man cannot exist *of himself, by himself, or for himself* (cited in Kwamwangamulu & Nkonko, 1999). Therefore man exists in a social cluster and has an interpersonal nature, a nature dependent on others to help define and distinguish. The strong communalist and interdependent nature of Ubuntu has established the virtues of patience, hospitality, loyalty, respect, sociability, and sharing among its adherents (Kwamwangamulu & Nkonko, 1999:27).

Kwamwangamulu & Nkonko further explain that people bound within high-context cultures are strongly interdependent and deeply involved in each other’s lives. This means that individuals become entwined with other members of the family, clan or tribe over their lifetime in a series of obligations and expectations. The social value of interdependence is taught in many African proverbs (Kwamwangamulu & Nkonko, 1999):

- A man here, a man there means no fear. (*We can achieve anything if we support one another.*)
- The sickness of the eye is the sickness of the nose. (*Your neighbour’s problem is your problem.*)
- A neighbour is a sibling. (*Care for your neighbours as family.*)

These proverbs indicate the strong bonds of intimacy, mutual support and interdependence found in true Ubuntu societies.

## Other core values of Ubuntu

Broodryk (2002) expands on the following core values of Ubuntu:

**Table 1: Ubuntu Values**

Ubuntu Core Value	Associated Social Values
Humanness	Warmth, Tolerance, Understanding, Peace, Humanity
Caring	Empathy, Sympathy, Helpfulness, Charity, Friendliness
Sharing	Unconditional giving, Redistribution, Open-handedness
Respect	Commitment, Dignity, Obedience, Order
Compassion	Love, Cohesion, Informality, Forgiveness, Spontaneity

Broodryk (2002:31) points out that the English word closest to Ubuntu is “humanness”. Humanness implies that all men are living human beings deserving of recognition by others in such a

way all men have the right to life. Caring within Ubuntu does not differ from caring in other cultures, except that it is intensely expressed in Ubuntu through how people are treated (Broodryk, 2002).

The sharing in Ubuntu is called *Mahala* and is the unconditional sharing of one's excess resources (Broodryk, 2002). Mdluli (1987) states that respect is an extremely important value of Ubuntu (cited in Broodryk, 2002). Respect is interpreted to mean the authority of elders over younger people, parents over children and leaders over followers. It also reflected in humility towards others, and the social structures of law, order and discipline.

Finally, compassion in the Ubuntu person is of an intense nature and is defined by the manner in which one lives, and is especially experienced by the rural cultures of Africa more deeply than the urban (Broodryk: 2002). Mangani (1983) states that in Ubuntu people treat each other as human beings and not simply as tools or a means to an end (cited in Broodryk, 2002). This touches on the Categorical Imperative of Kant (1968) which states that humans must be seen as an end, and never be treated as a means to an end.

## **Applications of Ubuntu**

The benefits of the Ubuntu world-view have been recognised and have been applied to various spheres of life including philosophy, politics, management, business, and the judiciary. In some cases Ubuntu has been borrowed for expediency and applied in a remote intellectual manner instead of being lived out and experienced. Van Binsbergen (2002) explains that the majority of the South African population today do not live out Ubuntu in the true sense of the word and that they have been taught Ubuntu by reformulation. Politicians and university intellectuals have primarily done this as an abstract model of an African ideal. Ndabele feels that Ubuntu is being over-interpreted by many of the elite in South Africa today and that Ubuntu is no different from the ethical standards promoted in other cultures (cited in Cerff, 2004).

Ubuntu in South Africa has been applied in the following areas (Olinger, 2004):

- Politics – the African Renaissance (Jana, 2001; Louw, 1999)
- Business – through collective learning, teamwork, sustainability, a local community focus, and an alternative to extractive capitalism (Chossek, 2003; cited in Nussbaum, 2003; Mollner, 2002)
- Corporate governance – through the attitudes of fairness, collectiveness, humility (Nussbaum, 2003)
- Restorative justice – through the use of dialogue, collective restitution and healing (Anderson, 1999)

- Conflict resolution and reconciliation – through the Ubuntu ethos of the TRC (Van Binsbergen, 2001; Murithi, 2000)

### **Privacy within the Ubuntu Culture**

During the extensive literature review privacy was not explicitly mentioned anywhere among the Ubuntu writings. Privacy was glaringly absent as a cherished value or right within Ubuntu societies.

When analysing the concepts and values of Ubuntu one can infer directly the implications for privacy and the attitude towards personal privacy. The statements made earlier about the welfare of the community (or group) being more important than that of the individual immediately shows that there is a tension between privacy and social good. The case here is that personal privacy might be regarded as not being beneficial for the good of the community. An individual right will only be accepted if it serves the community and in Ubuntu it is difficult to make the case for the social benefit of personal privacy. The culture of transparency and openness in Ubuntu would not understand the need for personal privacy or be able to justify it. Thus personal privacy would rather be interpreted as “secrecy”. This “secrecy” would not be seen as something good because it would indirectly imply that the Ubuntu individual is trying to hide something instead of protecting something – namely his personhood.

The core definition of Ubuntu, “*people are people through other people*”, indicates that there is little room for personal privacy because the person’s identity is dependent on the group. The individualistic cultures of the West argue that personal privacy is required for a person to express his true individuality. With Ubuntu individuality is discovered and expressed together with other people and not alone in some autonomous space, and hence personal privacy plays no role in this Ubuntu context.

According to Louw (1999) the individual’s identity is relative to the group and is even defined by the group. This has direct implications for the role of privacy in these relationships, because privacy is understood by the Western Cultures as part of the personhood of an individual. If that personhood is relative to the relationships experienced within a group setting then the privacy is relative and by further deduction – non-existent. The reason we argue this is that the lowest common denominator of relationship in a transparent community will become the dominant level of relationship. An individual in this multiple relationship scenario will arguably experience some more “open” relationships than other more “closed” relationships. The more open relationships will be shared as common knowledge within the community because of the nature of human networks and the human need to share ideas and thoughts. Therefore the details of the open relationships will become the knowledge that all immediate members of the community share of that individual. Therefore the closed, more private, relationships

will eventually cease to exist in any meaningful way due to the other persons knowing more personal information of that specific individual. This is contrary to the concept of requiring privacy to form special relationships. By inference privacy cannot meaningfully exist in these relationships.

The idea of multiple “I’s” (Louw, 1999) also indicates the same lack of privacy, because it suffers a similar fate as the relative identity issue discussed in the previous paragraph.

The Ubuntu culture of openness and transparency is in strong contrast to the western culture is privacy and private autonomous spheres. While openness and transparency do not entirely negate privacy, they certainly diminish its importance significantly, because privacy would be a hindrance to openness and transparency. There we argue in such an open culture of Ubuntu, privacy plays a lesser role.

According to Scorgie (2004), some privacy is enjoyed in Ubuntu communities even though privacy is seen as secondary to relationships and relationship-building. People are understood to have their own unique thoughts, ideas, characteristics and accomplishments. People have privacy in the context of these aforementioned items – a sense that these are the private possessions of an individual. This idea does not run counter to the Western concept of privacy as dignity and as a part of an individual’s personhood. Scorgie (2004) furthermore states that in rural villages in KwaZulu Natal there is not a strong sentiment towards privacy and that privacy has expressed itself as a response to community envy. Individuals that enjoy material success beyond the boundaries of the villages in urban employment become victims of community envy and tend to become “secretive” or “private” about these successes (Scorgie, 2004). This is a unique form of privacy that has originated to defend the individual against the community, and is by no means the norm for communitarian societies.

An aspect of privacy in the rural communalist cultures is one of the privacy of ownership, in other words, the community recognises an individual’s private ownership of material possessions.

The Ubuntu communal system will impose a type of “Panopticon effect” upon the members of the respective community through the openness, transparency and surveillance nature of their interrelationships. Since there is little freedom from observation in a communal system, people’s inner dealings and activities become obvious to the rest of the community.

One final argument we wish to make for privacy within the Ubuntu culture is that of consent – the requirement that an individual cannot order his life without consent from family, clan and the community (Kwamwangamulu & Nkonko: 1999:27). This requirement is in contradiction to the notion

of autonomy in order to make free moral decisions. To that end privacy is required to ensure personal autonomy and hence provide the ability to make those free moral decisions.

Thus, in sum, we have shown that within the Ubuntu culture privacy has been relegated to a position of lower importance than in the Western cultures. This fact could possibly have a bearing on the nature and character of the future Data Privacy Bill.

### **Conclusions on Ubuntu**

The concept of privacy within Ubuntu has a nominal existence and is not considered as important as other aspects of Ubuntu such as relationships. The chapter has further shown that Ubuntu has been successfully applied to various arenas ranging from politics, business, and justice to conflict resolution. This gives Ubuntu much credence when considering future applications of this philosophy in other areas.

## **WORLDWIDE PRIVACY LEGISLATION AND DIRECTIVES**

### **Introduction**

Comprehensive privacy legislation exists in most countries around the world today of which the EU's Data Protection Directive is the most well-known. Governments typically draft and enact privacy legislation while international bodies and organisations would set down privacy directives for their members to voluntarily adhere to.

Personal privacy is usually enforced by the restriction of the flow of information – personal information. The focus of privacy legislation is generally to provide the individual (a) autonomous space and to provide him the (b) ability to control the flow of his personal information. The latter laws are usually referred to as *Data Protection Laws*. Data protection laws are a recent phenomenon due to the recent advent of modern computing and find their first expression in the 1970s. The USA drafted their first privacy legislation in 1974, Germany in 1977, and France in 1978 and the number of countries has grown to more than thirty in total (Law Reform Commission, 2003).

### **United Nations**

The first mention of personal privacy is found in Article 12 of the UN's Universal Declaration of Human Rights (UN, 1948). The declaration focuses on territorial and communications privacy (Law Reform Commission, 2003), but not on the other dimensions of personal privacy.

## **United States of America**

The United States Constitution does not specifically mention privacy as a right, but it can be inferred from the text of the 4<sup>th</sup> Amendment to the Constitution. The 4<sup>th</sup> Amendment focuses on freedom from unreasonable searches and seizures (USA, 1992).

## **Europe**

The European Union (EU, 1995) enacted their benchmark privacy directive in 1995 and is called by its short form as the Data Protection Directive<sup>3</sup>. This Data Protection Directive guarantees European citizens a fundamental political right to privacy across every member state of the EU (European Union, 1995, Kilian & Kunkat, 2000:1061, St Amant, 1999:5). The important articles in the Directive, Articles 25 and 26, discuss data protection principles and derogations that impact non-EU countries trading with the EU. These two articles of the Data Protection Directive state the non-EU countries must provide “adequate levels of protection” when processing personal information of EU citizens. If the levels of protection are deemed not to be adequate, then the EU Commission will prevent the information transfer to the third country (EU, 1995). The data subject (i.e. EU citizen) has the right to allow the transborder flow of his personal information if it is necessary to conclude a contract, a legal requirement, or it being in the vital interests of the individual (EU, 1995). Thus explicit consent is required from the individual before his personal information is used by third countries with inadequate privacy regimes.

The EU’s increasingly dominant position in international trade and politics has been the main driver for many non-EU countries to adopt adequate privacy legislation. As mentioned earlier the privacy protection measures are needed to allow international trade, information sharing and e-commerce to continue. It is important to point out that the EU’s privacy regime fosters a socio-political right to privacy that has personal dignity at its core. This is in stark contrast to the US notion of liberty combined with varying sectoral privacy laws.

## **Africa**

The African Charter on Human Rights fails to mention privacy in any of its articles and thus guidance cannot be found in this directive for personal privacy. As alluded to earlier, the African Charter of Human and Peoples’ Rights adopted in June 1981 (OAU, 1982) fails to mention privacy at all, while the African Charter on the Rights and Welfare of the Child (OAU, 1990) does mention privacy quite clearly, but in a limited context.

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<sup>3</sup> Directive 95/46/EC of the European Parliament

The failure to mention privacy indicates that privacy was simply not seen as a necessary right for Africans to live freely and peaceably. The charter instead focuses on those Ubuntu values of human equality, dignity, dialogue, freedom of choice for his solidarity and community security (OAU, 1982). The African Charter was established *after* the UN Charter on Human Rights where the right to privacy is explicitly stated. It is somewhat strange that that privacy is mentioned as a right for a child in the Charter of 1990 but has not been mentioned in the earlier Charter of 1981 as a right for all human beings. As mentioned before, we can only suggest that firstly, by 1990 the concept of privacy had begun to emerge as an important right and secondly, that children are as regarded as vulnerable and in need of a greater reinforcement of their rights.

## **SOUTH AFRICAN PRIVACY LEGISLATION**

### **Introduction**

South Africa has no Data Privacy Bill yet, but certain important provisions and references for the need for personal privacy have been mentioned in several legal instruments. The Common Law provides for personality rights such as physical integrity, freedom, reputation, dignity and privacy (Law Reform Commission, 2003). Above that the right to privacy is enshrined in the Constitution of the Republic of South Africa (South Africa, 1996).

### **South African Constitution**

The provisions for privacy in the Constitution place the South African government under obligation to provide the relevant legislation to protect these privacy rights of South African citizens. By briefly analysing the statements made in Section 14 of the Constitution it can be seen that the dimensions of privacy addressed are (Law Reform Commission, 2003:50):

- Freedom from intrusion
- Freedom from disclosures of personal information
- Personal autonomy

The terms “possessions” in Section 14c could be interpreted to range from *tangible property* through to *intangible property* such as personal reputation, intellectual property, personal photographs, and personality-related concepts such as personal preferences.

### **South African Common Law**

The Common Law emphasizes privacy as part of a person’s inviolate personality and as such enjoys protection while the Constitution provides for privacy as a constitutional right. A constitutional right is the highest form of right a citizen (or juristic person) may enjoy, because it binds all state organs, the

judiciary and the executive to ensure these rights are protected and entrenched for citizens (Law Reform Commission, 2003).

In certain common law rulings (Law Reform Commission, 2003:44), the dignity of an individual was widely interpreted and included a host of personality rights including privacy. Within the Constitution, the rights to dignity (Section 10) and privacy (Section 14) are separated with both enjoying equal importance in the eyes of the Constitution (Law Reform Commission, 2003: 45). Thus privacy has advanced from the Common Law times as being part of the list of personality rights of an individual up to becoming a Constitutional Right in the final Constitution of 1996.

Within the ambit of the common law, an invasion of an individual's privacy will be interpreted as an impairment of his personality (Law Reform Commission, 2003:55). This can provide the victim a legal ground for civil claims. Within the ambit the constitutional right to privacy, an invasion of privacy will be seen as an illegal act or an unconstitutional act (Law Reform Commission, 2003:55).

### **South African legislation relevant to privacy**

Even though no Data Privacy Bill exists yet, several other Bills touch on aspects of privacy and the most important ones to mention are (Privacy International, 2003; Law Reform Commission, 2003):

- The Provision of Access to Information Act (South Africa, 2000)
- The Electronic Communications and Transaction Act (South Africa, 2002)
- The Interception of Communications and Provision of Communication-related Information Act (South Africa, 2002)

The first Bill mentioned in the bullets, the *Provision of Access to Information (hereafter referred to as "PAIA")*, deals with allowing individuals obtaining access to their personal information, but it does not regulate who and how that personal information may be corrected and controlled by the individual (Law Reform Commission, 2003:1). Privacy is strongly related by how personal information can be controlled by the information owner, and this provision is missing in the PAIA. It is specifically, the failure of the PAIA in comprehensively addressing privacy that a separate Data Privacy Bill will have to be drafted and legislated.

The second Bill of note is the *Electronic Communications and Transactions Act (hereafter referred to as "ECT Act")*, focuses on establishing a framework within which e-commerce can be regulated (Michalsons & Hughes, 2004). One of the supporting objectives of the ECT Act is to protect individuals engaged in e-commerce and this expresses itself in Chapter 8 as a voluntary regime of data protection principles for personal information (Michalsons & Hughes, 2004). Businesses can voluntary

decide to subscribe to these data protection principles and hopefully create favourable business opportunities by promising to safeguard the personal information of customers. The ECT Act does therefore, not allow absolute protection under the law for personal privacy.

The third Bill to be mentioned is the *Interception of Communications and Provision of Communication-related Information Act* (hereafter referred to as “*Surveillance Act*”). The Surveillance Act primarily focuses on the communications aspect of privacy by prohibiting all wiretaps and surveillance of all personal communications. The only exception allowed is either for law enforcement agencies to perform wiretaps during criminal investigations or when special permission has been obtained (Privacy International, 2003).

The South African legislation in place at the moment each touches on an aspect of privacy or mentions privacy as a fundamental need. There is however, no blanket legislation broadly addressing privacy as a fundamental political right in balance with other rights.

## **COMPARATIVE ANALYSIS WITH CONCLUSIONS**

### **The Ubuntu-Western influence**

The question is whether Ubuntu can assert itself and influence privacy legislation more than international trends in this arena. Other important factors driving privacy legislation are the EU’s pressure on third countries processing personal information of EU citizens. As a result of the EU’s stance, information sharing and trade could be jeopardised if data protection is not in place. These are strong influences and drivers for the enactment of a Data Privacy Bill, but could Ubuntu be an even stronger influence?

### **Ubuntu’s influence on jurisprudence**

We have briefly shown how widely the principles of Ubuntu have been implemented in politics, business, corporate governance and restorative justice. The influence of Ubuntu has not been minor, but quite broad and useful. The aspects of Ubuntu applied in the four areas mentioned above relate primarily to Ubuntu’s African roots, humanness in leadership, consensus, dialogue and reconciliation.

Justice Mokgoro<sup>4</sup> (1997) makes a case for Ubuntu's influence in future South African jurisprudence based on:

- The adoption of the Ubuntu values of dignity and equality in the Constitution of South Africa
- The successful application of Ubuntu values in forming national reconciliation and forgiveness between the various race groups

It cannot be denied that the road to reconciliation in South Africa has been successfully negotiated so far. Archbishop Tutu has given the credit for this to the application of Ubuntu values and principles (Murithi, 2000). Chapter 16 of the Interim Constitution of South Africa clearly states that reparation and Ubuntu<sup>5</sup> are needed to ensure national unity, peace, reconciliation and reconstruction (South Africa, 1993). In the final constitution of 1996 Ubuntu is not mentioned anywhere explicitly within the Constitution's articles or preamble. There has been a slight shift between both versions of the Constitution where Ubuntu was a stronger focus during the Interim Constitution than in the Constitution of 1996. Dugard (1997) argues that essentially both constitutions are similar and that the principles of the Interim Constitution have been carried over to the final Constitution of 1996. The description of the right to privacy is almost unchanged between the two versions of the Constitution<sup>6,7</sup>.

I wish to argue that, in future, the Ubuntu influence on jurisprudence in the realm of privacy legislation will be less than Mokgoro suggests for the following reasons:

1. Mokgoro argues for the influence of Ubuntu in domains where Ubuntu is clearly demonstrable and has definable principles

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<sup>4</sup> Madam Justice Yvonne Mokgoro is the Chairperson of the South Africa Law Reform Commission, which has drawn up the comprehensively researched Issue Paper No.24 on Data Privacy. Her opinions regarding Ubuntu and jurisprudence should be seriously considered when her dual role as Law Reform Commission Chairperson and her past experience with Ubuntuist jurisprudence is considered.

<sup>5</sup> Interim Constitution of South Africa (Act 200 of 1993)  
[Chapter 16] National Unity and Reconciliation

...These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for **Ubuntu** but not for victimization.

<sup>6</sup> Interim Constitution of South Africa (Act 200 of 1993) Section 13: Privacy

Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

<sup>7</sup> Constitution of South Africa (Act 108 of 1996) Section 14: Privacy

Everyone has the right to privacy, which includes the right not to have:

- their person or home searched;
- their property searched;
- their possessions seized, or
- the privacy of their communications infringed.

2. The notion of privacy in Ubuntu is weaker than in Western cultures
3. Ubuntu could be an idealised concept

On the first point, it can be argued that human dignity is the prime Ubuntu value that has been infused into the Constitutions of South Africa. Equality, as well as dignity is expressed in the Constitution, but there exist no Ubuntu-specific references to privacy. These strengths of Ubuntu, in influencing the Constitutions, cannot be extrapolated to privacy because the concepts of dignity, equality, reconciliation and forgiveness are important in Ubuntu, while privacy enjoys less prominence. A careful study of the Constitution of South Africa (1996) reveals that the Ubuntu influences have been profound, but limited to human dignity, equality, and reconciliation.

On the second point, Justice Mokgoro may be partially correct in asserting that Ubuntu will influence jurisprudence, but it would only be so in those areas where Ubuntu has a strong expression and philosophy, but not where Ubuntu leaves a vacuum of philosophy. In the case of privacy, Ubuntu leaves little doubt that privacy is not esteemed as a priority for the community or for the individual. Therefore, with respect to privacy, Ubuntu cannot guide or influence legislation significantly more than the EU Data Directive's principles.

On the third point, Van Binsbergen (2002) states that Ubuntu as an ideology claims to represent the value orientation of the majority of urbanised South Africans today. However, Van Binsbergen (2002) argues that the practice of Ubuntu is fragmented in Southern Africa especially among the urbanised population. It is a conceptual worldview borrowed by the academic and political elite and used for their socio-political purposes (Van Binsbergen, 2002). The concept of Ubuntu has been elevated to "star status" by these academics and politicians from a theoretical and distant intellectual perspective and not because of first-hand experiences. The drive argues Van Binsbergen (2002) was to find an African answer to the challenges faced by the continent. This drive and elevation of Ubuntu is being done despite the contradictions and the ubiquitous conflicts currently being experienced over the African continent. Van Kessel (2001) also explains that in the African Renaissance ideology of Mbeki, the pan-African roots of Ubuntu are the source of inspiration for the African Renaissance. From an historical perspective, though, Africa did not enjoy a common language, culture or civilisation as Mbeki and other Renaissance adherents wish to believe. The African continent only started its common experience once the European colonialists arrived and facilitated more communication and trade between separate parts of Africa (Van Kessel, 2001). The sum of Van Kessel's thoughts on Ubuntu as a foundation for the African Renaissance are that it was borrowed for political expediency and inspiration, and not because it indeed is the foundation of a pan-African worldview. Van Binsbergen (2002) is also concerned that

there are simply too many contradictions to Ubuntu currently being experienced in Africa to justify the case for Ubuntu's successful implementation.

The population of southern Africa today have had to learn Ubuntu as a reformulation of African village values (Van Binsbergen, 2002) and had not, for the most part, really lived Ubuntu themselves experientially. This weakens the impact of Ubuntu, because it is not common knowledge and it is at best abstract knowledge for the majority of people in Southern Africa. Scorgie (2004) argues that people who commute between the urban and rural centres of South Africa, adapt to the two different cultures automatically, practising Ubuntu while in their rural environments and being westernised while in their urban environments. Some of the Ubuntu influences do migrate with to the urban centres, but Ubuntu is not practised fully in the urbanised environment (Scorgie, 2004).

Van Binsbergen (2002) further argues that globalisation has so deeply impacted southern African societies that Ubuntu is a fragmented social fabric with incoherent application. The community of village life is hidden under the deluge of globalisation to such an extent that in some contexts community village life has become a distant myth (Van Binsbergen, 2002). The rampant westernisation of urbanised Africans has concerned politicians and the academic elite alike and been one reason that Ubuntu has been highlighted as part of the africanisation and moral regeneration process. Van Kessel (2001) also argues that Ubuntu is exclusivist because it is seen as an African concept and that other cultures living in Africa do not have it. This further reduces Ubuntu's application across all cultures in South Africa.

Thus, the three points in sum show that Ubuntu could have been overextended and over-idealised in its abilities and its applicability for societal challenges. Therefore we argue that the Ubuntu influence in privacy jurisprudence will be weaker and that the guidance for formulating the future Data Privacy Bill will be found in other sources.

### International privacy models as influences

The two most influential models of privacy legislation can be found in the USA and the EU, and due to the effects of globalisation their potential influence on privacy legislation could be felt on South Africa's shores. As discussed before, the US culture of privacy is one of liberty while the European culture is one of dignity. If Ubuntu were compared to the two cultures of privacy, it would lean closer to the European culture of privacy. The reason for this is that the Ubuntu worldview and the European culture of privacy both share *dignity* as a very important cornerstone. When comparing Ubuntu and the US culture of privacy, where *personal space* and *autonomy* are very important, then there is no overlap or commonality. Whitman (2003) researched the US and EU models-, and interpretations of privacy

and performed an analysis of the differences between these two western cultures of privacy. We have summarised the salient themes of these privacy models in Table 2.

**Table 2: Comparison between the US and European Privacy Frameworks**

	Privacy Framework	
	United States of America	European Union
<b>1</b>	Liberty	Dignity
<b>2</b>	Economic right	Political right
<b>3</b>	Sectoral	Continental
<b>4</b>	No oversight agency	EU Commission
<b>5</b>	Fragmented	Comprehensive
<b>6</b>	Capitalist	Cultural

The European model of privacy should become the more dominant influence of the two privacy models when drafting the future Data Privacy Bill. There will be other minor influences from other countries, but the EU’s comprehensive privacy model is the best-articulated privacy legislation in existence today. It elevates personal privacy to a new level as a political right and does not reduce it as a sectoral right as is the case in the USA. The reasons why the EU’s privacy legislation will be the dominant influence are among the following:

- The core expression of privacy is to protect dignity (which is in harmony with the spirit of Ubuntu)
- The privacy rights are comprehensive (which is in line with the Constitution’s mandate)
- The privacy rights are political
- The EU enjoys strong trade links with South Africa
- The harmonisation of international privacy laws (in line with the EU Data Protection Directive)

Firstly, the protection of dignity (Whitman, 2003) is a core expression of the EU’s Data Protection Directive. This overlaps with Ubuntu’s concept of human dignity, the South African Constitution’s principle of dignity<sup>8</sup> as well as the Common Law’s concept of personal dignity. Dignity, the right

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<sup>8</sup> Constitution of the Republic of South Africa ( Act 108 of 1996)

Chapter 1: Section 1:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- Non-racialism and non-sexism.
- Supremacy of the constitution and the rule of law.

thereto, and the protection thereof are found widely in South African jurisprudence and should therefore find their way into future privacy legislation. Since dignity is an accepted and understood value in South African jurisprudence it will find the similar values of dignity in the EU Data Protection Directive as a welcoming point of commonality. For this reason the EU Data Protection Directive will find favour with South African legislators and be used as a reference model to draw up the Data Privacy Bill.

Secondly, the privacy rights described in the EU Data Protection Directive are comprehensive and compulsory for all EU member states to comply with<sup>9</sup>. Even though the right to privacy is not a constitutional right, the right to privacy has been elevated to the highest level possible via the EU Data Protection Directive applicable to all sectors in the EU. The South African Constitution (1996) enshrines the right to privacy as a constitutional right, which is the highest order of protection and embodiment of a right possible. Thus in both instances, privacy is highly esteemed, and granted as a right irrespective of which economic sector personal information is processed.

Thirdly, since the EU is the major trading partner with South Africa, its directives, charters and protocols will have an influence and direct bearing on South Africa. A case in point is the very Data Protection Directive, which states that any personal information flowing to a third country must provide adequate protection<sup>10</sup>. South Africa will have to comply in order to facilitate the free flow of information, which is a prerequisite to economic activity and for e-commerce to function properly. The best way to ensure that adequate privacy protections are in place is to implement a privacy regime of the same order as the European model.

Lastly, the prime reason that South Africa will take its cue from the EU Data Protection Directive is that there is a worldwide trend to harmonise privacy legislation using the EU model as a basis (Law

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- Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

<sup>9</sup> Directive 95/46/EC of the European Parliament

Article 1: Object of the Directive

In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

<sup>10</sup> Directive 95/46/EC of the European Parliament

Chapter IV: Article 25: Principles

1. The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection.

Reform Commission, 2003). The Law Reform Commission (2003) speaks of a convergence and harmonisation of privacy models to such an extent that there is really only one global approach to choose from.

Thus, to summarise, the best option for South Africa is to take its cue from the EU Data Protection Directive and design a Data Privacy Bill of similar nature to ensure harmony with international trends and to ensure continued trade in an e-world.

### **The character of the proposed Data Privacy Bill**

The prime guiding influences that will shape the nature of South Africa's Data Privacy Bill will be the Constitution's mandate for privacy, the EU Data Directive as model and the preservation of personal dignity for the individual South African citizen.

The Data Privacy Bill will firstly provide for comprehensive privacy legislation to protect the individual against State abuses or public abuses. The Bill will furthermore be a balance of the constitutional approach of the EU Data Directive and the commercial approach of the US sectoral legislation (Louw, 2005), but the emphasis will be on the former approach. The latter influence will be taken into account in order to receive the buy-in of the commercial and business sectors. Ubuntu will find its place and influence in the Bill via the concept of human dignity.

### **CONCLUSIONS**

International Privacy Models, such as the EU Data Protection Directive, as well as Ubuntu, will influence the Data Privacy Bill. Some characteristics of the new Data Privacy Bill, such as dignity and equality will be common characteristics of both the EU Data Protection Directive and Ubuntu. In other cases certain influences might stem from the EU Data Protection Directive, but could have equally well been the influence of Ubuntu in other circumstances.

It has been argued that Ubuntu has had a wide influence and application in South Africa post-1994, and that Ubuntu has its strengths and weaknesses. Ubuntu has a strong influence and role to play in politics for shaping societal values, in business, in conflict resolution and even in corporate governance. However, in defining and guiding legislation on privacy, Ubuntu does not possess an advanced concept of privacy and model of privacy that the EU Data Protection Directive would have.

I have therefore argued that both influences would find sufficient expression in the Data Privacy Bill, but that the EU Data Protection Directive has the edge in its ability to influence.



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