Emerging Community Values and Solidarity in the African Digital Economy

By:

Kholofelo Kugler
Neha Mishra

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The African continent is at the cusp of drastic digital transformation. Internet penetration has increased rapidly in Africa, opening doors for large technology companies and small businesses alike to participate in the growth of the digital economy. Additionally, several tailored policy initiatives at the domestic and regional levels have focused on expanding digital trade opportunities, minimising trade and regulatory barriers, and adopting common principles for regulating the digital sector. However, meaningfully integrating African countries at different stages of digital development through a coherent and robust regional trade framework remains a key challenge.

The African Continent Free Trade Area ('AfCFTA') Protocol on Digital Trade (AfCFTA DTP) presents a significant opportunity to strengthen African digital solidarity. It could also advance a cohesive and strong African consensus and

voice on digital trade regulation. This is especially significant, as Africa is relatively silent in global digital trade dialogues today. Building on the international law concept of international community and its African philosophical equivalent, Ubuntu, we offer a framing device to anchor digital solidarity and develop robust and inclusive Africa-centred digital trade norms. We first explore the relevance of community values in developing a regulatory framework for cross-border data flows in trade agreements, and then examine how shared values and digital solidarity can facilitate the development of a cohesive privacy and data protection regulatory framework in Africa.

International Community, International Solidarity, and Ubuntu

The concept of international community has been debated at length in international law. It is characterised by three prominent views.

The first view is that 'international community' is a well-defined legal concept in public international law, reflecting common shared interests of the community States in contrast to their narrow bilateral/unilateral interests. Scholars have traced this concept in the United Nations Charter, the International Law Commission Articles on State Responsibility, and International Court of Justice judgments. Further, jus cogens norms and erga omnes obligations underline the presence of an international community.

The second view is that 'international community' is a flexible normative concept, which can take the shape of a political construct or a structural framework. For instance, although jus cogens norms and erga omnes obligations are community values defining the international legal order, their substantive content is subject to interpretation. Further, the presence of different voices on certain legal issues across countries does not undermine the normative value of the international community.

The third view is that 'international community' is a mythical concept, particularly due to the unequal power relations between States. Therefore, States use the idea of international community when convenient to satisfy their individual interests. Further, international community often becomes a tool to exclude certain States, such as non-liberal States, from the community.

The idea of international solidarity flows from the concept of the international community. In the 2023 Revised UN Draft Declaration on Human Rights and International Solidarity, solidarity has been defined as 'an expression of unity by which peoples and individuals enjoy the benefits of a peaceful, just and equitable international order, secure their human rights and ensure sustainable development'.

Different scholars view solidarity differently, ranging from being a fundamental principle of international law to a direction for international law. For instance, while solidarity can be viewed as a solid legal basis for meaningful international cooperation (e.g., in environmental or human rights law), others find this approach too transactional. Instead, they argue for a stronger moral basis for solidarity, like engaging in actions for the common good. Nevertheless, it is evident that the international community cannot exist without some degree of solidarity, whether it comes from international law or moral values or a mix of both.

Parallel to the concepts of international community and international solidarity is the African philosophy of Ubuntu. The word 'Ubuntu' originates from the Nguni languages widely spoken in southern Africa. Ubuntu is often qualified as a vague concept as it has many different connotations. Nevertheless, it fundamentally refers to positive moral qualities of a person such as humaneness, as well as caring, sharing, respect, and compassion. While the concept has its roots in southern Africa, it is often popularized as representing an African worldview, which finds expression in African humanism similar to Julius Nyerere's Ujamaa or Leopold Senghor's Negritude. Ubuntu is also portrayed as an African philosophy, a moral theory/ethics, or an African worldview. In politics and law, it also refers to concepts of justice, fairness, and equity. At the essence of Ubuntu, is the feeling of relatedness, interrelatedness, communalism, and interdependence, where the welfare of the individual depends on the welfare of the community.

Ubuntu has lasting relevance for the international legal order today. Ubuntu and foreign policy may appear an unlikely combination, especially in the prevailing realist international legal order. A point of departure between the ideals informing public international law and Ubuntu is that Western culture privileges the individual and individualism, while in traditional African culture,

the community is an organic whole and acts as the driver of individual identities. Nevertheless, the Ubuntu philosophy and the concept of international community can be aligned so as to address various challenges in global affairs and act as a counterforce to Western hegemony in global relations. Its dynamism offers hope and a counterpoise to the realist perspective that privileges power and self-interest, thereby offering a more equitable and humane global system.

Indeed, certain scholars have argued that the philosophy of Ubuntu can meaningfully inform many branches of public international law. For instance, the idea of humanity is central to international human rights law and international humanitarian law. It especially finds concrete expression in the Geneva Conventions of the Law of War and their Additional Protocols, including in the context of exercising restraint towards prisoners of war. Therefore, the core values of humanity enshrined in Ubuntu, can inform normative standards in international law.

Digital Solidarity in Digital Trade Regulation: Regulating Cross-Border Data Flows

Next, we assess how community values and solidarity are realised in digital trade. Perhaps the toughest issue in digital trade negotiations at both the World Trade Organization and under various Preferential Trade Agreements (PTAs) is the regulation of cross-border data flows. At the very core, the divide on cross-border data flows is a conflict of two values: Data sovereignty (arguably, representing the self-interested behaviour of States, characteristic of bilateral relations) and the free flow of data (arguably, representing community values premised on global connectivity and economic freedom). In practice, most States operate in between the two ends of this spectrum as they combine data sovereignty concerns with practical concerns around global connectivity. So far, there is no global consensus on the common values necessary to develop a framework for data regulation.

Yet, several countries acknowledge the importance of globally connected networks for digital trade. For instance, 45 PTAs contain some kind of commitment on cross-border data flows, although those with hard commitments also contain broad national security and public policy exceptions.

Further, 25 PTAs contain commitments prohibiting data localisation measures and 120 PTAs have commitments on data protection. The varied levels of commitments across PTAs on these issues indicate that despite shared interests/values some political/ideological differences remain.

The policy efforts towards finding a common ground on data flows is not limited to trade bodies. Internet multi-stakeholder bodies and certain United Nations (UN) bodies have also contributed to common frameworks on different aspects of transnational data regulation. At the G20, Japan proposed a multi-track framework called the Data Free Flow with Trust (currently also being discussed at OECD and G7).

Regional bodies also increasingly deliberate upon common norms/principles to enable digital connectivity, digital trade, and data flows. For example, ASEAN members have developed the ASEAN E-Commerce Agreement, Framework on Data Governance, and the Digital Integration Framework Action Plan. They have also developed a framework instrument to enable cross-border data flows for businesses. A key component of their impending Digital Economy Framework Agreement is addressing digital development disparities across the region and preparing micro, small and medium-sized enterprises to participate meaningfully in digital ecosystems.

While we see different power structures and structures of exclusion/inclusion in the above initiatives, they all reflect a common interest in fostering shared values and norms to enable cross-border data flows while preserving core policy goals such as privacy. In the next section, we turn towards the AfCFTA DTP, focusing on the protection of personal data and privacy.

Case Study: Emerging Consensus on Data Protection and Privacy in Africa

The establishment of the AfCFTA is a powerful politico-legal manifestation of African solidarity and can be viewed both from the lens of Ubuntu and the concept of international community. One of the most foundations elements of the digital economy is the flow of digital data across borders and related policy concerns of data protection and privacy. Thus, the first question is whether privacy and data protection are shared community values in Africa. For instance, some scholars doubt whether privacy can be considered as an African

value owing to the collective nature of African culture. Several scholars have even argued that the absence of any reference to privacy in the African Charter on Human and Peoples' Rights 1981 reflects the lack of a privacy culture in Africa. Notwithstanding these theoretical debates, privacy and data protection is fait accompli in Africa – at the continental, sub-regional, and national levels. At the supranational level, there is a movement to draw upon Ubuntu and community values in continental data protection/privacy legal instruments.

Continentally, both the African Digital Transformation Strategy and the AU Data Policy Framework address privacy and data protection. Beyond these general strategies, the principal continental data protection legal instrument, the AU Convention on Cyber Security and Personal Data Protection, 2014 (Malabo Convention), seeks to establish an intra-African data transfer regulatory framework. Its entry into force on 8 June 2023, nine years after its signature, is a significant milestone in Africa's data protection aspirations. Article 8(2) specifically requires that data processing must recognise, amongst others, the rights of local communities. This infuses into the realm of data protection Ubuntu approach of centralising the community and not (just) the individual.

At the sub-regional level, thus far, the only adopted binding legal instrument is the Economic Commission of West African States (ECOWAS) Supplementary Act on Personal Data Protection (2010) (ECOWAS Supplementary Act). The ECOWAS Court recently found this Supplementary Act to be a human rights instrument protecting privacy and personal data. The other non-binding sub-regional data protection instruments include the East African Community Framework for Cyberlaws (2010) and the Southern African Development Community Model Law on Data Protection (2012).

Moreover, several African countries have actively adopted domestic data protection regulations. UNCTAD indicates that out of the 54 African countries included in its database, 33 (or 61%) have data protection legislation and six (or 11%) have draft legislation. Adding to the spaghetti bowl of data protection applicable to African countries, Cabo Verde, Mauritius, Morocco, Senegal, and Tunisia have ratified Convention 108.

The multiple layers of data protection regulation can potentially fragment and disrupt digital trade flows and pose a threat to regional solidarity. Therefore,

the obvious value proposition of the AfCFTA DTP is adopting the principles of Ubuntu and fostering community values and solidarity to find common ground to develop adequate, coherent, and inclusive African data protection standards.

For example, African States could adopt “flexible harmonisation” in their data protection laws, converging on a GDPR-like adequacy/conditional mechanism, subject to agreed-upon safeguards and country-specific idiosyncrasies. Essentially, all AfCFTA State Parties would agree to grant each other adequacy and follow the same conditional flow/adequacy model when transferring African data to third-party countries so as not to erode the higher levels of protection agreed in the AfCFTA DTP. This model could be operationalised by ensuring that national, regional, and continental data protection agencies are capacitated, and an Africa-wide data protection agency could be established for further support, monitoring, and evaluation.

A complementary and, arguably, more Africa-attuned model could recognise privacy as a community right, as proposed in the AU Data Policy Framework. It acknowledges that certain widely used models of data protection, like informed consent, are ill suited for Africa because of significant digital illiteracy. It proposes an alternative model of data stewardship, such as data trusts, wherein a fiduciary entity manages data on behalf of the community to protect their digital rights collectively. Further, giving credence to the importance of community and collective rights in Africa (as opposed to only individual privacy), this framework proposes framing data protection as a ‘data justice’ issue (along with, inter alia, cybersecurity, the rule of law, and institutional accountability). New Zealand has taken a similar approach by recognising the collective rights of the Maōri peoples in its PTAs. Ultimately, identifying and building upon common values/interests in Africa is key to building a regional framework on data protection.

Conclusion

We have emphasised the importance of community values and the parallel philosophy of Ubuntu in setting a framework for digital trade regulation. While these concepts seem vague at first sight, their malleability provides a useful framing device and anchor for countries seeking to develop an inclusive and holistic model of digital trade integration. A cohesive digital trade community

can help accommodate diverse interests and facilitate the development of digital trade norms.

We already see glimpses of digital solidarity in several African initiatives on digital integration. Under the umbrella of the AFCFTA DTP, African countries can continue to bolster their shared values and interests to create a robust, relevant and tailor-made regulatory framework for digital integration.

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