

PROTECTION OF PERSONALITY RIGHT IN THE AFRICAN LEGAL CONTEXT

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African legal stratification

In Africa, the historical evolution of a country characterizes the development of its legal system, and the use of the legal stratification method allowed the jurist that intends to study African law to understand the dynamics of its development in the course of the time. These concepts, developed by the Italian doctrine¹, can be also found in the Anglo-Saxon legal literature, especially if dedicated to African law², and also in the literature in French language on African law³.

The stratigraphic analysis of the African law permitted to identify a first layer of laws originally Africans (better known as African traditional or customary

- 1 See Rodolfo Sacco, *Introduzione al diritto privato somalo*, (1973) Turin, Giappichelli; Id., *Le grandi linee del sistema giuridico somalo*, (1985) Milan, Giuffrè; Id., *Il diritto africano*, (1995) Turin, UTET; Marco Guadagni, *Il diritto in Mozambico*, (1989) Trieste, Trieste University Press; Id. *Il modello pluralista*, (1996) Turin, Giappichelli; Id., entry "Legal Pluralism", in Peter Newman (ed.), *The New Palgrave Dictionary of Economics and the Law* (1998), at 542; Id., *Xeerka Beeraha. Diritto fondiario somalo*, (1981) Milan, Giuffrè.
- 2 See, for example, Robert B. Seidman, *Law and Stratification: The African Case*, in 3 *Crime, Law and Social Change* (1979), at 17; John Griffiths, *What is Legal Pluralism?*, in 24 *Journal of Legal Pluralism and Unofficial Law* (1986), at 1; Michael Bogdan, *Legal Pluralism cit.*; Sally Engle Merry, *Legal Pluralism*, in 22 *Law & Society Review* (1988), n.º 5, at 869.
- 3 See Charles Ntampaka, *Introduction aux systèmes juridiques africains*, (2005) Namur, Presses Universitaires de Namur; Jacques Vanderlinden, *Villes africaines et pluralisme juridique*, in 42 *Journal of Legal Pluralism and Unofficial Law* (1998), at 250; Id., *Return to Legal Pluralism: Twenty Years Later*, in 28 *Journal of Legal Pluralism and Unofficial Law* (1989), at 149; see also Norbert Rouland, *Antropologie juridique*, (It. tr.), (1992) Milan, Giuffrè.

laws) on which a religious layer has been grafted, and to which the layer of the law imported from European colonies (layer composed by the law in force at that time in the colonizing country and that was extended to the colonies, and by the colonial law created *ad hoc* only for the colonies); then, the layer of the post-independence law followed, in which we can note the appearance of legal modes inspired to those of the socialist or the Asian countries, and the emergence of a domestic law of the new states linked to that of the formal colonizing country with some links to the local specificities⁴.

The long period of time passed by now from the attainment of independences in the African countries can bring to modernize this classification, identifying this last as the first layer of law following to the independence that lasted until the '80s, and characterized from the political and legal instabilities that had been present in (and troubled) the entire continent saving only some States, and that had deep impact on the legal systems of the concerned countries, to which the law of the '90s followed, where the participation of the big international financial institutions has conditioned the choices in the legal development in Africa.

In the beginning of this new century, a new layer seems to emerge. It is the law made by the Westerns (mostly Europeans) for the Africans. It is the law that follows the general pattern in terms of legal development presently, where the law has to serve the economic development: the law must be easily accessible and comprehensible for lawyers and non-lawyers, it must provide a legal environment favorable to investments, it shall be affordable and predictable in terms of its application avoiding that the intervention of a State (through legislation or judicial decisions) could render vain any investment.

The person in the African legal culture

Law rises with person, that is the natural person, being the corporation an intellectual creation necessary to classify some relations to which is necessary to recognize legal effects.

African legal culture does not know the "personality rights" in the Western sense.

For the Westerners the person is the living natural person: even if there could be different views on when the life starts and ends, it is undoubted that there is a strict link between biological life and recognition of legal personality with the consequent possibility of protecting the related personality rights⁵.

It is not expected that things are the same everywhere. In many traditional systems it is not possible to explain several legal issues without assuming that

4 Marco Guadagni, *Il diritto cit.*, at 8.

5 Rodolfo Sacco, *Antropologia giuridica*, (2007) Bologna, Il Mulino.

the defunct has its own rights: he transmits his name to the newborns, takes part to dealings, owns, is entitled to tort compensation: the apparition in a dream is the event that establishes the link between the defunct and the living people. Supernatural personalities can also be entitled to real or personal performances and may own goods (the temple is the place linked with those legal structures). Animals too may have rights or be sanctioned for their faults through judicial proceedings.

People do not necessarily have the same legal status. Several factors like ethnic group, sex, religion, profession, personal status (servant, noble), and so on, decide on the treatment each person deserves.

In Africa three elements rule the social structure: the existence of a link among the various generations, the hierarchy within the family and the primacy of the community over the individual; and these elements are also strictly linked each other.

The human being, whether living or dead, can directly reinforce or diminish the force of the others, the man can influence the activity of the inferior forces (animals, plants), the father gives living force to his children and protects them from adverse influences.

Such interaction justifies the hierarchy existing within the traditional societies. God, who stands above humans, gave living force and powers to the ancestors who are the guardians of customs and traditions of their families maintain them from generation to generation by transmission through the paternal line⁶: then the father will be more important than the mother, the son over the daughter, the eldest over the other sons⁷. The place occupied within the social rank is immutable unless a clear different will from the ancestors is present, and any contrary behavior is considered as a rebellious act against the authority and the ancestors and therefore punished by (traditional) law⁸.

The presence of every person within different groups whose existence is recognized within the society creates different social networks where he plays its own role without being subdued by the group itself since the latter works with people and not against them⁹.

6 More elements in Loteteka Botimela, *L'expérience d'intermédiation culturelle au Tribunal pour enfants de Paris: l'histoire de Mamadou*, in Etienne Le Roy (cur.), *Juridicités. Témoignages réunis à l'occasion du quarantième anniversaire du LAJP*, (2006) Paris, Khartala.

7 As observed by Marco Guadagni, *Il modello cit.*, at 66, matriarchate is quite rare in Africa, and where present the family is anyway based on a male figure.

8 Charles Ntampaka, *Introduction cit.*

9 Norbert Rouland, *Antropologie cit.*, at 199.

The individual and the group

In traditional societies the life of the individual is strictly linked to the group he belongs to. He receives what is necessary to live from the group itself, being then the ties within the group very strong: this predominance of the communitarian system in Africa has been therefore set against the individualism prevailing in Western societies centered on the role of the individual.

The same concept of “individual” is different.

In Western societies the individual is something unitary, indivisible, expressed through the use of the notion of “person”, a subject holder of individual rights strictly linked and inseparable from the person itself. In Africa we meet with a multi-polar concept of the personality, where every person “*is a whole of interdependent fragmentary elements, temporarily unified during the individual life, that may dissociate themselves due to any act of the same person or other people*”¹⁰.

If the central role played by the individual in the Western societies is the background to understand and justify the protection of its personality rights, the above mentioned variegated structure of the person together with the centrality of the group can explain why such problem is outside of the African legal culture.

For example, as referred by Norbert Rouland, the Wolof of Senegal distinguish the human being – including the body and the whiff – the spirit and the vital force, and when the person dies each of those elements goes back to its source: the body to the soil, the whiff to God, the spirit to the ancestors, and the vital force remains linked to the lineage in view of a possible future reincarnation of the ancestor¹¹. Therefore, it proves to be difficult to link the Western approach to the individual and his rights strictly belonging to him to such a complex conception of the person. We could even think that those different aspects composing the individual are a sort of “personality rights” belonging to the respective entity which owns them.

Moreover it should be considered that every person belongs to a clan, a lineage, a family. During his life he is inserted in and changes different groups: with the marriage he creates a new family, a new entity center of legally relevant interest, but doing this he leaves the group of the unmarried youths and maybe enters in that of the peasants or the forgers, according to the activity he will do in his life¹². If we don’t know to which group he belongs to, we can’t understand which its rights are.

Every person has a status within the society determined by the family he belongs to and the degree of kindred within it. In general, the personal status

¹⁰ Ibid.

¹¹ Ibid.

¹² Norbert Rouland, *Antropologie cit.*, at 198.

determines the sphere of rights (also patrimonial) that everyone may have during his life, but such group of rights is enforceable only within the group every person belongs to, and is not valid *erga omnes*. Those rights are linked with the position each person has in his group, and then with the position the group has in the wider social context¹³.

Moreover, those rights are completely lost in the case where the person leaves the group for any reason (abandonment or expulsion), and the possibility of acquiring rights in another group is subject to the acceptance by the related members and the new recognized (almost always lower) position¹⁴.

Within the group the rank of every person is different, and that of the man is different from that of the woman. The society itself is stratified. We distinguish the status of noble and slave, (sometimes the slave of a powerful man can have a high social rank), the castes (fishermen, hunters, butchers, ...), classes of age, and each of these divisions has its consequences in the rights and obligations belonging to each group (sometimes they have common housing, patrimonies, women), so that it becomes almost impossible to distinguish what belongs to the group and what to the individual¹⁵.

Protection of personality rights in Africa today

The analysis of the "law in the books" shows that today the protection of several rights inherent to the personality presents a quite standardized framework, where constitutions play the primary role in most of the African legal systems through their parts dedicated to the fundamental rights.

a) Civil law jurisdictions

French-speaking countries which were former French colonies guarantee at the constitutional level the protection of some specific personality rights, like the right to life¹⁶, personal integrity¹⁷, domicile inviolability¹⁸, secrecy of the

13 See a clear example in Massimo Colucci, *Principi di diritto consuetudinario della Somalia italiana meridionale*, (1924), Florence, La Voce.

14 Marco Guadagni, *Il modello cit.*

15 Edward E. Evans-Pritchard, *The Nuer: a Description of the Modes of Livelihood and Political Institutions of a Nilotic People*, (It. tr.), (2001) Milan, Franco Angeli.

16 Benin (Art. 15), Burkina Faso (Art. 2), Central African Republic (Art. 3), Chad (Art. 17), Congo (Art. 10), Djibouti (Art. 10), Ivory Coast (Art. 2), Mali (Art. 1), Niger (Art. 11), Senegal (Art. 6).

17 Algeria (Art. 34), Benin (Art. 15), Burkina Faso (Art. 2), Central African Republic (Art. 1 and 3), Chad (Art. 17), Djibouti (Art. 10), Madagascar (Art. 13), Mali (Art. 1), Mauritania (Art. 13), Niger (Art. 10 and 12), Senegal (Art. 6), Togo (Art. 13 and 21).

18 Algeria (Art. 40), Benin (Art. 20), Burkina Faso (Art. 6), Central African Republic (Art. 14),

correspondence¹⁹, as well as, in some cases, the protection of a general right to the privacy²⁰, and of dignity²¹, honour and good reputation²².

The Central African *code de la famille* has a chapter²³ on personality rights where all of them are considered as not negotiable and particular emphasis is given to the protection of the physical integrity and to the protection of the image. We face the same situation in Congo where the *code de la famille* is opened by the rules related to the rights of personality reaffirming the sanctity of human life, establishing the nullity of any voluntary limitation to the personality rights, and paying particular attention to the protection of the domicile, the physical integrity and the image²⁴. A more detailed discipline to the personality rights is present in the civil code of Gabon²⁵ establishing the nullity of any act of disposition to the personality rights, protecting physical integrity, privacy and the image, while a separate chapter is dedicated to the name and its usurpation²⁶. The *code de la famille* in Benin²⁷, the Senegalese *code de la famille*²⁸, and the Togolese *code des personnes et de la famille*²⁹ hold a rule for the protection of names from usurpation.

In the countries which were former Belgian colonies, the constitutional legislators guarantee the protection of the right to life and personal integrity, and sanction domicile inviolability and secrecy of the correspondence³⁰. The reference to the protection of the dignity in the Constitutions of Burundi and Democratic Republic of Congo has to be mentioned³¹, while in the Rwandese constitutional text a reference to the protection of private life (the same reference is made in

Chad (Art. 42), Congo (Art. 24), Djibouti (Art. 12), Gabon (Art. 12), Ivory Coast (Art. 4), Madagascar (Art. 13), Mali (Art. 6), Mauritania (Art. 13), Morocco (Art. 10), Niger (Art. 20), Senegal (Art. 13), Togo (Art. 28).

19 Algeria (Art. 39), Central African Republic (Art. 13), Congo (Art. 28), Djibouti (Art. 13), Mauritania (Art. 13), Morocco (Art. 11), Togo (Art. 28).

20 Benin (Art. 21), Chad (Art. 45), Niger (Art. 22),

21 Ivory Coast (Art. 2).

22 Mauritania (Art. 13), Togo (Art. 28). In other cases (Djibouti, Art. 15; Senegal, Art. 7) honour and good reputation of the person are protected as a limit to the right of freedom of expression.

23 Art. 50 to 63.

24 Art. 1 to 21.

25 Art. 78 to 92.

26 See in particular Art. 109 and 110.

27 Art. 13. The same code reaffirms in its Art. 1 the right to life as an inviolable right of the person.

28 Art. 11.

29 Art. 14.

30 Burundi, Art. 28; Democratic Republic of Congo, Art. 29 and 31; Rwanda, Art. 22.

31 Burundi, Art. 13; Democratic Republic of Congo, Art. 11.

the constitution of Burundi³²), honour and the reputation of the person is made³³.

The *code de la famille* in DRC has two articles³⁴ dedicated to the protection of the name, and the invalidity of any agreement for the disposition of the personal name, while Rwandese *code civil* holds a rule giving to the holder of a name to oppose any use that might cause him moral or material damages³⁵.

In the constitutional charters of the Portuguese-speaking countries the right to the life and physical integrity is generally guaranteed³⁶. The domicile inviolability, the secrecy of the correspondence, the name and the reputation are rights guaranteed at the constitutional level in Cape Verde³⁷, Guinea Bissau³⁸, São Tome³⁹, and Angola⁴⁰. In addition, the general right to privacy, together with the right to the honour and the image, are guaranteed in Cape Verde⁴¹ and Mozambique⁴².

The Mozambican civil code has a section (Art. 70 to 81) dedicated to the protection of personality rights from any offence, and extended to the deceased people. The section includes rules protecting name, pseudonym, privacy, and image.

In the countries where Italy exercised its colonial influence, the constitutional texts⁴³ recognize the protection of the right to the life⁴⁴, and the human dignity⁴⁵. Reference shall also be made to the acknowledgment of the general right to the privacy, that is materialized in the inviolability of the domicile

32 Art. 28.

33 Art. 22.

34 Art. 67 and 68.

35 Art. 72.

36 Angola (Art. 20), Cape Verde (Art. 27), Guinea-Bissau (Art. 32), Mozambique (Art. 70), São Tomé e Príncipe (Art. 22 and 23).

37 Art. 40, 42 and 43.

38 Art. 34.

39 Art. 24 and 25

40 Art. 20.

41 Art. 40 and 44.

42 Mozambique, Art. 71. In Cape Verde honour and good reputation of the person are protected as a limit to the right of freedom of expression.

43 In Eritrea the constitution has been approved in 1997, but it never entered into force.

44 Eritrea (Art. 15); Ethiopia (Art. 15); Somalia (Art. 16 of the Transitional Federal Charter of the Somali Republic; Art. 24 of the Somaliland Constitution; Art. 31 of the Puntland Constitution).

45 Eritrea (Art. 16). See also Art. 24 of the Somaliland Constitution, and Art. 31 of the Puntland Constitution.

and the secrecy of the correspondence⁴⁶. Somaliland constitution makes also reference to the protection of personal reputation⁴⁷.

The Ethiopian civil code protects the name, its abuse and usurpation providing for different actions in favour of the victim⁴⁸.

Equatorial Guinea, a former Spanish colony, protects in its constitution the right to life and personal integrity, honour and good reputation, domicile inviolability and privacy of all correspondence⁴⁹.

b) Common law jurisdictions

Although traditionally in England no text is found to guarantee the right to the privacy as such, it is interesting to notice how the African countries belonging to the common law tradition in continuity with the colonial period, expressly guarantee, at the constitutional level, the right to the privacy⁵⁰, also in its different displays (inviolability of the domicile, correspondence or communications)⁵¹, together with other specific personality rights, like the right to the life⁵², physical and moral integrity⁵³.

In specific cases personal reputation is protected, sometimes as a limit to the freedom of expression⁵⁴.

c) Mixed jurisdictions

The recitals of the Cameroonian constitution, that according to its Art. 65 is an integral part of the same constitution, recognize a number of specific rights (inviolability of home, privacy of all correspondence, life, physical and moral integrity) in the ambit of the protection of the general personality right.

The Mauritian constitution contains also provisions for the protection of

46 See Articles 18 and 26 of the Eritrean and Ethiopian constitutions respectively. Art. 29 of the Somaliland Constitution makes reference to the "sanctity of the house". With reference to the secrecy of the correspondence see also Art. 36 of the Puntland Constitution.

47 Art. 24 of the Somaliland Constitution.

48 See Jacques Vanderlinden, *Introduction au droit de l'Éthiopie moderne*, (1971) Paris, LGDJ.

49 Art. 13.

50 Kenya (Art. 31).

51 Botswana (Art. 9), Gambia (Art. 23), Ghana (Art. 18), Kenya (Art. 31), Liberia (Art. 16), Nigeria (Art. 37), Sierra Leone (Art. 25), Uganda (Art. 27), Zambia (Art. 17), Zimbabwe (Art. 17).

52 Botswana (Art. 4), Gambia (Art. 18), Ghana (Art. 13), Kenya (Art. 26), Liberia (indirectly recognized by Art. 20), Nigeria (Art. 33), Sierra Leone (Art. 15), Tanzania (Art. 14), Uganda (Art. 22), Zambia (Art. 12), Zimbabwe (Art. 12).

53 Ghana (Art. 15), Uganda (Art. 24).

54 Kenya (Art. 33).

the rights to life and privacy of the house⁵⁵, the latter having their correspondent in rules of the civil code on the protection of private life⁵⁶; in the same civil code we also find the rules related to the protection of the personal identity⁵⁷.

Namibia has express rules on the protection of life and privacy⁵⁸, and similar provision can be found in the constitutions of Lesotho⁵⁹, Seychelles⁶⁰, and Swaziland⁶¹.

In South Africa there is a specific protection for human dignity, life and privacy⁶², and a “Protection of Personal Information Bill”, has been published in the Government Gazette n.32495 of 14th August 2009⁶³.

In Sudan, where the Western sources of law are highly contaminated and mixed with the Islamic principles, the constitution the right to life and privacy⁶⁴.

If this is the approach coming out from the “law in the books”, a look to the “law in action” reveals that here and there some personality rights are not fully enforced, especially in those countries having major problems in terms of effectiveness of law. The “Western” foundation of these rights and the differences with the African legal culture briefly highlighted before are surely elements which not help in the full implementation of those rights in Africa.

55 Art. 3, 4 and 9.

56 Art. 22.

57 Art. 23 and ff.

58 Art. 6 and 13.

59 Art. 5 and 11.

60 Art. 15 and 20.

61 Art. 15 and 22.

62 Art. 10, 11 and 14.

63 Available at <http://www.info.gov.za/view/DownloadFileAction?id=105938> (last visited on 4 October 2010).

64 Art. 20 and 29.

