

Privacy at the Crossroads: Navigating Technological Innovation and Human Rights in the Digital Age

It is with great anticipation and a sense of duty that we present to you the latest issue of the Global Privacy Law Review (GPLR). In an era where technology relentlessly reshapes the boundaries of privacy and data protection, this edition seeks to delve into the intricate dance between innovation and individual rights.

Our contributors, through rigorous scholarship and acute legal analysis, have provided insights into the evolving landscape of privacy law as it confronts new technological frontiers.

Our opening article, *A Facial Recognition Panopticon on Border and Migration Controls: Can Privacy and Data Protection Survive?*, offers a critical examination of the deployment of facial recognition technology at borders.¹

Facial recognition systems are increasingly becoming the norm at international borders. Maja Nišević, Lorenzo Gugliotta and Maria Avramidou note that this technology, touted for its efficiency in managing migration and enhancing security, also has the potential to create a panopticon-like environment, where privacy is compromised in the name of security.

The authors adeptly repurpose the term ‘panopticon’, originally conceived by the English philosopher and jurist Jeremy Bentham, to capture the essence of automated surveillance – a ceaseless observation mechanism that could lead to a significant erosion of personal privacy.²

The authors also navigate through complex legal terrains, questioning how existing privacy and data protection frameworks can be fortified to withstand these emerging challenges, and explore specific use cases at airport border controls.³

The conversation on privacy continues with *Leveraging Privacy Torts: A Case for Statutory Damages under European Data Protection Law*.⁴ In this article, Oleksandr Pastukhov

from the University of Malta explores the potency of privacy torts as a mechanism to hold infringers accountable and deter future infringements.

Generally, the law of tort is an area of common law comprising a wide-ranging body of rights, obligations and proceedings related to wrongful or negligent acts. Its primary aim is to provide compensation for injuries suffered by individuals. It encompasses a broad range of wrongful actions, including but not limited to, negligence, intentional infliction of harm, property damage, and defamation.

Pastukhov searches for ways to leverage privacy torts, in which, he argues, European legislators have shown a ‘lack of interest’.⁵ The author notes that the assessment of a non-material damage caused by a privacy infringement may be complex, and thus proposes to adopt statutory damages similar to those that have been adopted in intellectual property law.⁶

According to the author, with personal data being constantly collected, processed, and potentially misused, privacy torts offer a pathway for individuals to assert control over their personal information and to hold accountable those who unlawfully encroach upon their private sphere.

The discussion is particularly timely, considering the ever-growing importance of the General Data Protection Regulation (GDPR) in the EU and its global influence.

Turning our gaze towards Africa, the third article, *Kenya's Digital Identity Revolution: Balancing Progress and Human Rights*, presents a nuanced narrative of Kenya's ambitious efforts to implement a national digital identification system.⁷

Kenya's digital identification (ID) system, known in Swahili as Huduma Namba, was a government initiative

Notes

- ¹ Maja Nišević, Lorenzo Gugliotta & Maria Avramidou, *A Facial Recognition Panopticon on Border and Migration Controls: Can Privacy and Data Protection Survive?*, in this issue at 60.
- ² Jeremy Bentham, *Panopticon: Or the Inspection-House* (T. Payne 1791).
- ³ Nišević et al., *supra* n. 1, s. 3.2.
- ⁴ Oleksandr Pastukhov, *Leveraging Privacy Torts: A Case for Statutory Damages under European Data Protection Law*, in this issue at 69.
- ⁵ *Ibid.*, at 70.
- ⁶ *Ibid.*, at 76-77.
- ⁷ Ronald Odhiambo Bwana, *Kenya's Digital Identity Revolution: Balancing Progress and Human Rights*, in this issue at 82.

designed to create a centralized and comprehensive national biometric population database.⁸ The purpose of this system was to enhance the government's ability to deliver services to its citizens and to support planning and allocation of resources.⁹

The Huduma Namba, which translates to 'Service Number', was introduced by the Kenyan government as part of the broader National Integrated Identity Management System (NIIMS).¹⁰ It aims to assign a unique identification number to every Kenyan citizen and foreign resident, which will be linked to the individual's biometric data and personal details.

However, the Huduma Namba's roll-out has faced challenges and controversies.¹¹ Concerns have been raised regarding privacy, data protection, and the potential for increased surveillance and control over the population. Critics also worry about the exclusion of marginalized groups who may lack the required documentation to register for the Huduma Namba.¹²

In response to these concerns, there have been calls for the Kenyan government to ensure that strong data protection laws are in place and that the rights to privacy and access to government services are upheld, especially for those who might be at risk of exclusion due to the digital divide.

The Kenyan High Court has also weighed in, emphasizing that enrolment in NIIMS should be voluntary and that the government must first enact proper data protection legislation to safeguard citizens' personal information before full roll-out of the system.¹³ The judges ruled that any collection of DNA and the use of GPS to record the precise location of a person's home was intrusive and unconstitutional.¹⁴

Huduma Namba has since been replaced by 'Maisha Namba', which includes a unique personal ID number assigned to every Kenyan citizen upon registration, typically at birth.¹⁵

However, in December 2023, the Kenyan High Court once again halted the roll-out due to the lack of a data protection impact assessment (DPIA).¹⁶

Eventually, in February 2024, the court lifted the suspension and transferred the case to the constitutional division.¹⁷

While acknowledging the potential of such systems to propel economic and administrative efficiency, Ronald Odhiambo Bwana's article remains astutely aware of the human rights implications. The author encourages a balanced approach, emphasizing the importance of embedding human rights considerations into the core of digital identity infrastructure.

Finally, our issue is rounded off with a compelling case note, *Privacy in the Age of Neurotechnology: Guido Girardi Lavín v. Emotiv, Inc.*¹⁸ This note scrutinizes a landmark decision by the Chilean Supreme Court of 9 August 2023, which grapples with the profound legal and ethical implications of neurotechnology.

The case illustrates the pressing need for legal systems worldwide to adapt to advancements that challenge traditional notions of privacy and personal autonomy.

Across these articles, a common thread emerges: the tension between the march of technological progress and the preservation of privacy rights. While addressing different issues, each author underscores the vital role of the law as both a shield and a catalyst in the face of innovation. They invite us to consider how privacy can be both a cornerstone of personal liberty and a cornerstone of societal advancement.

As we put out this issue, we hope it serves not only as a repository of scholarship but also as a call to action for policymakers, legal practitioners, and academics, to engage in the ongoing dialogue about the future of privacy and data protection.

I trust that these articles will inspire reflection, discussion, and further research. Thank you for your continued support of our journal, and we look forward to the contributions that this issue will make to the broader discourse on privacy law and technology.

Sincerely
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Editor-in-Chief

Notes

⁸ Government of Kenya, *Huduma Namba*, www.hudumanamba.go.ke (accessed 6 Apr. 2024).

⁹ Lyndsay Nyawira, *All You Need To Know About The Huduma Namba*, *The Star* (2 Apr. 2019), www.the-star.co.ke/news/2019-04-02-all-you-need-to-know-about-huduma-namba (accessed 6 Apr. 2024).

¹⁰ Government of Kenya, *supra* n. 8.

¹¹ Christine Mungai, *Kenya's Huduma: Data Commodification And Government Tyranny*, *Al Jazeera* (6 Aug. 2019), www.aljazeera.com/opinions/2019/8/6/kenyas-huduma-data-commodification-and-government-tyranny (accessed 6 Apr. 2024).

¹² Mustafa Mahmoud, *Stopping the Digital ID Register in Kenya – A Stand Against Discrimination*, *Namati* (25 Apr. 2019), namati.org/news-stories/stopping-the-digital-id-register-in-kenya-a-stand-against-discrimination (accessed 6 Apr. 2024).

¹³ BBC, *Huduma Namba: Kenya Court Halts Biometric ID Over Data Fears* (31 Jan. 2020), www.bbc.com/news/world-africa-51324954 (accessed 6 Apr. 2024).

¹⁴ *Ibid.*

¹⁵ Kevin Cheruiyot, *Digital ID: Government Switches From Huduma To Maisha Number At A Cost Of Sh1 Billion*, *Nation* (12 Sep. 2023), nation.africa/kenya/news/digital-id-government-switches-from-huduma-to-maisha-number-at-a-cost-of-sh1-billion-4366788 (accessed 6 Apr. 2024).

¹⁶ Chris Burt, *History Repeats With Kenyan High Court Blocking Maisha Namba For Lack Of DPIA*, *Biometrics* (5 Dec. 2023), www.biometricupdate.com/202312/history-repeats-with-kenyan-high-court-blocking-maisha-namba-for-lack-of-dpia (accessed 6 Apr. 2024).

¹⁷ Susan Muhindi, *Relief For State As Court Lifts Orders Suspending Rollout Of Maisha Namba*, *The Star* (23 Feb. 2024), www.the-star.co.ke/news/realtime/2024-02-23-relief-for-state-as-court-lifts-orders-suspending-rollout-of-maisha-namba (accessed 6 Apr. 2024).

¹⁸ Javier D. Briceño, *Privacy in the Age of Neurotechnology: Guido Girardi Lavín v. Emotiv, Inc.*, in this issue at 88.