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The quest for information privacy in Africa: A critique of the Makulilo-Yilma debate

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Abstract

In 2017 Kinfe M Yilma wrote a review in the Journal of Information Policy, which critiques Alex B Makulilo's two books – Privacy and data protection in Africa and African data privacy law. Yilma rejects, among others, Makulilo's conclusion that the African concept of privacy is more of an import from the West than an indigenous notion. Yilma states that privacy was present in Africa before contact with the West and that the omission of a privacy provision in the African Charter was a 'mere drafting oversight'. However, Yilma provides no proof that privacy existed in Africa before contact with the West. When Makulilo published a reply to this review in 2018, he capitalises on Yilma's lack of proof. In his reply, Makulilo reiterates the assertion in his two books by providing some evidence that, to him, proves that privacy indeed is a foreign concept imported to Africa. This article names this debate between these two leading scholars on privacy in Africa the 'Makulilo-Yilma debate'. The article is investigative. It interrogates this

* LLB; LLM (Duke Law School); mujib.jimoh@duke.edu; mujibjimoh@yahoo.com. 'The quest for information privacy in Africa' is an article by Alex B Makulilo, published in the *Journal of Information Policy* in response to Kinfe Michael Yilma's article titled 'The quest for information privacy in Africa: A review essay', also published in the *Journal of Information Policy*. Both articles, albeit not conforming, raise some critical arguments about privacy in Africa. This article seeks to interrogate the debate.

debate and underscores the fallacies contained in it. It will investigate the claims of both scholars. In doing so, it seeks to scrutinise the claim that the absence of a privacy provision in the African Charter was a 'mere drafting oversight'. Principally, providing legal, cultural, and sociological proofs, it will argue that privacy existed in Africa before contact with the West – an exercise lacking in Yilma's review – and a claim with which Makulilo, through his scholarship, has disagreed.

Key words: privacy; Africa; African Charter; Makulilo; Yilma

1 Introduction

One important aspect to be considered in the quest for information privacy in Africa is to understand the origin of privacy in Africa in order to ascertain how best to protect it in modern times.[1] Two African scholars who have attempted to locate this origin in the quest for information privacy in Africa are Alex B Makulilo and Kinfe M Yilma. In 2017 Yilma wrote a review of Makulilo's two books, *Privacy and data protection in Africa* and *African data privacy law*, in the *Journal of Information Policy*.[2] Essentially, Yilma rejects Makulilo's conclusion that the African concept of privacy is more of an import from the West than an indigenous notion. A year later, Makulilo responded to this critical review, also in the *Journal of Information Policy*,[3] reiterating his proposition that privacy indeed is a foreign concept imported to Africa. Both the review by Yilma and the reply by Makulilo exemplify a debate in the legal space. Typically, a debate involves two sides: one side in support of a proposition, and the other side opposing it. In Dworkin's thesis, there are bound to be disagreements in the legal space since law is argumentative in nature, where normative arguments are deployed.[4] This article tags both the review and reply the 'Makulilo-Yilma debate'.

In discussing this debate, the article argues that the right to privacy, like other human rights, has cultural dimensions,[5] and should be seen in that light. It posits that in the quest for information privacy in Africa in modern times, it is imperative to always bear in mind the culture, philosophy and the prevailing socio-economic structures of Africa. As Motala observed, 'no single document can represent a blueprint of the full content of "human rights"'. This is because the substance of 'human rights' depends on the cultural setting of a particular society. Moreover, specific human rights doctrines interrelate with prevailing socioeconomic

1 M Jimoh 'The place of digital surveillance under the African Charter on Human and Peoples' Rights and the African human rights system in the era of technology' (2023) 1 *African Journal of Legal Issues in Technology and Innovation* 113.
2 KM Yilma 'The quest for information privacy in Africa: A review essay' (2017) 7 *Journal of Information Policy* 111-119.
3 AB Makulilo 'The quest for information privacy in Africa' (2018) 8 *Journal of Information Policy* 317-337.
4 LR Ludeña 'Legal disagreements: A pluralist reply to Dworkin's challenge' (2016) 28 *Revus* 11.
5 M Mutua 'Savages, victims, and saviours: The metaphor of human rights' (2001) 42 *Harvard International Law Journal* 201-246.

structures.'[6] In part, the Makulilo-Yilma debate shares this reasoned notion,[7] yet, the debate commits some fallacies that this article seeks to address.

The article seeks to argue that within the communal ontology of the pre-colonial African societies, privacy existed. In doing so, the article rejects Makulilo's view that privacy was a Western concept. While it agrees with Yilma that privacy was not imported to Africa, it seeks to provide evidence of privacy in precolonial Africa, an exercise lacking in Yilma's scholarship. The article adopts the Neethling theory of privacy, where privacy is defined as

> an individual condition of life characterised by exclusion from publicity. This condition includes all those personal facts which the person himself [or herself] at the relevant time determines to be excluded from the knowledge of outsiders and in respect of which he [or she] evidences a will for privacy.[8]

It discusses the importance of culture in the quest for information privacy in Africa. In its scope, it will limit its analysis to Yilma's critique of chapter 5 of Makulilo's *Privacy and data protection in Africa*[9] and Makulilo's response thereto.[10] The article will highlight the fallacies contained in the review and the reply. In undertaking this analysis, the article will be divided into five parts. After this introduction, part 2 will summarily discuss the main thesis of the Makulilo-Yilma debate. Part 3 will examine the fallacies in Yilma's review. Part 4 will discuss the fallacies in Makulilo's reply. The fifth part will outline the conclusion.

2 The Makulilo-Yilma debate

A critical appraisal of the Makulilo-Yilma debate reveals that the debate seems to be a sub-set of the 'African values and the human rights debate'[11] of the 1980s dominated by scholars such as Howard,[12] Donnelly,[13] Okere,[14] Cobbah[15] and Motala,[16] who all considered the place of culture and the societal philosophy on

6 Z Motala 'Human rights in Africa: A cultural, ideological, and legal examination' (1989) 12 *Hastings International and Comparative Law Review* 373.
7 See, eg, Makulilo (n 3) 321.
8 J Neethling 'The concept of privacy in South African law' (2005) 122 *South African Law Journal* 18-28. Scholars such as Roos and Makulilo agree with this theory. See A Roos 'The law of data (privacy) protection: A comparative and theoretical study' unpublished PhD thesis, University of South of Africa, 2003 554; AB Makulilo 'A person is a person through other persons – A critical analysis of privacy and culture in Africa' (2016) 7 *Beijing Law Review* 196.
9 Yilma (n 2) 114-115.
10 Makulilo (n 3) 331.
11 J Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 309-331.
12 R Howard 'The full-belly thesis: Should economic rights take priority over civil and political rights? Evidence from sub-Saharan Africa' (1983) 5 *Human Rights Quarterly* 467-490.
13 J Donnelly 'Cultural relativism and universal human rights' (1984) 6 *Human Rights Quarterly* 400-419.
14 BO Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly* 141-159.
15 Cobbah (n 11).
16 Motala (n 6).

human rights.[17] Yilma states in his review that 'the omission of a right to privacy provision in the Charter has been the source of *a rather illogical conclusion* about the absence of innate privacy demands in African societies'.[18] Yilma does not state the concluders. In this regard, Makulilo remarks that Yilma does not point out 'who is the accused person'.[19] However, I rather imagine that Yilma is referring to scholars such as Motala, Cobbah and Swanson[20] whose true view was that the conception of a right (whether privacy, or any other) depends on how it is conceptualised in that society.[21] Yilma must have misinterpreted these.

Yilma's review contains critical commentaries on Makulilo's *Privacy and data protection in Africa*[22] and *African data privacy law*.[23] On the critique of chapter 5 of *Privacy and data protection in Africa,* which is the focus of this article, Yilma accuses Makulilo of relying on ubuntu, a notion Yilma claims to be used mostly in Southern Africa, to generalise that privacy is more of an import from the West rather than an indigenous notion.[24] Yilma then states that 'readers might find this claim to be a generalisation about a rather heterogeneous continent of fifty-four nations with diverse ethnic and cultural backgrounds'.[25] In general, the main thesis of Yilma's review is that privacy was not an import from the West to Africa, although Yilma does not provide a cogent proof of this, other than stating that 'several African countries have had some form of privacy protections in their constitutions and civil laws long before the Banjul Charter was adopted'.[26] In part 3 this article discusses the reason why Yilma's assertion that the presence of privacy in these constitutions denotes innate privacy in traditional African societies is premised on a false ground. It will go further to provide some evidence Yilma ought to have provided.

Yilma takes the argument further, accusing Makulilo of 'briefly' considering the absence of an express privacy provision in the African Charter on Human and Peoples' Rights (African Charter)[27] and stating that the *omission* of privacy in the African Charter 'probably was a mere drafting oversight' because 'several African

17 See also E El-Obaid & K Appiagyei-Atua 'Human rights in Africa – A new perspective on linking the past to the present' (1996) 41 *McGill Law Journal* 819-854.
18 Yilma (n 2) 115.
19 Makulilo (n 3) 331.
20 J Swanson 'The emergence of new rights in the African Charter' (1991) 12 *New York Law School Journal of International and Comparative Law* 307-333.
21 Motala (n 6).
22 AB Makulilo *Privacy and data protection in Africa* (2014).
23 AB Makulilo *African data privacy law* (2016).
24 Yilma (n 2) 114.
25 As above.
26 Yilma (n 2) 115.
27 The African Charter is the main regional human rights treaty upon which the African human rights system rests. See M Jimoh 'Investigating the responses of the African Commission on Human and Peoples' Rights to the criticisms of the African Charter' (2023) 4 *Rutgers International Law and Human Rights Law Journal* 1. See also M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339; M Samb 'Fundamental issues and practical challenges of human rights in the context of the African Union' (2009) 15 *Annual Survey of International and Comparative Law* 61.

countries have had some form of privacy protections in their constitutions and civil laws long before the Banjul Charter was adopted'.[28]

In his response to Yilma, Makulilo capitalises heavily on Yilma's lack of cogent proof that privacy was not a foreign notion from the West. Makulilo states:

> The third misconception about the critique is that it evasively denies the proposition I made in my two books that privacy is an imported concept in Africa. Of course, it is not necessary that Yilma has to agree with me. However, his denial remains normative. It lacks any support of evidence yet the critique wants to romanticise that the notion of privacy is not alien to the African culture. Surprisingly, the critique fails to locate the place of privacy in the African culture and/or identify any society in Africa where the notion of privacy existed or was practiced independently of the influence from the West. My position is somewhat similar to other scholars with regard to the origins of privacy in non-Western cultures.[29]

To buttress his argument, Makulilo then quotes Greenleaf's *Asian data privacy laws: Trade and human rights perspectives*[30] and Bygrave's *Data privacy law: An international perspective*,[31] that privacy is an imported notion to Africa. Makulilo expresses his surprise that Yilma fails to see a clear point from this evidence.[32] On Yilma's accusation that Makulilo briefly considered the absence of a privacy provision in the Africa Charter in his *Privacy and data protection in Africa* and that the omission probably was a mere drafting oversight, Makulilo confronts Yilma with Yilma's joint article with Birhanu published in 2013,[33] where Yilma expresses the view that privacy may be inferred and implied in the African Charter. This sudden shift in position does not sit well with Makulilo, and he remarks that 'in the first instance he argues that privacy in the Charter is implied, in another he argues the absence of the privacy is a mere drafting oversight. This is confusion and lack of academic certainty.'[34]

3 The fallacies in Yilma's review

3.1 The ubuntu fallacy

The first fallacy in Yilma's review is his suggestion that the presence of ubuntu could denote the absence of privacy in [Southern] Africa.[35] Yilma claims that ubuntu 'represents mostly the southern part of Africa'.[36] This is erroneous.

28 Yilma (n 2) 115.
29 Makulilo (n 4) 321-322.
30 G Greenleaf *Asian data privacy laws: Trade and human rights perspectives* (2014).
31 L Bygrave *Data privacy law: An international perspective* (2014).
32 Makulilo (n 3) 322.
33 K Yilma & A Birhanu 'Safeguards of right to privacy in Ethiopia: A critique of laws and practices' (2013) 26 *Journal of Ethiopian Law* 94-152.
34 Makulilo (n 3) 331.
35 Yilma (n 2) 114.
36 As above.

Ubuntu extends beyond the shores of the southern part of Africa. Ubuntu is a core African identity. In the epistemologies of identity, most literature has classified it as an *originary* African identity, and that, just like the *volksgeist* of Germany, ubuntu represents an 'intrinsic core – an organic centre that has always been there'.[37] Although it is argued that the uniqueness of the African culture is not sameness, but diversity,[38] ubuntu represents a general African worldview,[39] even if not called ubuntu throughout Africa. This is because the underlying philosophy of the concept of ubuntu is recognised in the Africa's diverse culture. Among the Yorubas of the Southwestern Nigeria, ubuntu is their concept of *ebi*[40] or *omolúwàbí*.[41] In the Igbo tribe of Southeastern Nigeria, it is their concept of *Ibuanyindanda*.[42] In Angola, ubuntu is their concept of *gimuntu*,[43] Whilst *botho*, *bomoto, vumuntu, umuntu, unhu, ubuthosi,* represent the concept of ubuntu in Botswana, Congo, Malawi, Mozambique, Uganda, the Shona people of Zimbabwe and Ndebele people of Zimbabwe, respectively.[44]

However, it is important to state that the *originary* classification of ubuntu as an African identity, 'a collective true self: an orthodox African sameness, a haecceity or unsullied purity',[45] does not denote its *exclusivity* to the African identity. Ubuntu as a concept embodies some moral principles,[46] and scholars have used different moral words to describe it. For instance, Mugumbate and Nyanguru provide some 17 different words to describe ubuntu.[47] Gade did a study tracing the history and metamorphosis of ubuntu in texts, and posits no less than 32 different words that had been used in literature to describe ubuntu since 1846.[48]

37 C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018) 26.
38 M Letseka 'In defence of ubuntu' (2012) 31 *Studies in Philosophy and Education* 48.
39 C Gade 'The historical development of the written discourses on ubuntu' (2011) 30 *South African Journal of Philosophy* 317.
40 T Fagunwa 'Ubuntu: Revisiting an endangered African philosophy in quest of a pan-Africanist revolutionary ideology' (2019) 3 *Genealogy* 5.
41 B Dauda 'African humanism and ethics: The cases of ubuntu and *omolúwàbí*' in A Afolayan & T Falola (eds) *The Palgrave handbook on African philosophy* (2017) 475-491.
42 K Okoro 'Ubuntu ideality: The foundation of African compassionate and humane living' (2015) 8 *Journal of Scientific Research and Reports* 1-9.
43 J Mugumbate & A Nyanguru 'Exploring African philosophy: The value of ubuntu in social work' (2013) 3 *African Journal of Social Work* 85.
44 As above.
45 Ngwena (n 37) 26.
46 T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532-559.
47 Mugumbate & Nyanguru (n 43) 85.
48 Gade (n 39) 303-329.

Although words such as kindness,[49] politeness,[50] brotherhood,[51] collectivity[52] and dignity[53] have been used to describe ubuntu, it would be ethnocentric to opine that these virtues are *originary* to Africa in the sense of exclusiveness and xenocentric to contend that the ubuntu theory is unique to South Africa.[54] As an instance, the Universal Declaration of Human Rights (Universal Declaration), the first universal human rights document, talks about the 'recognition of the inherent dignity ... is the foundation of freedom, justice and peace in the world',[55] and that 'all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'[56] Van Binsbergen has postulated that dignity and brotherhood are parts of the four attributes of ubuntu,[57] but the none of the diplomats instrumental to the drafting of the Universal Declaration – John Humphrey, Eleanor Roosevelt, Chang Peng-chun and Charles Habib Malik – was African.[58] Aquinas also spoke of the 'common good' in his writings.[59] Thus, it is correct to caution that 'it would be ethnocentric and, indeed, silly to suggest that the ubuntu ethic ... is uniquely African. After all, the values which ubuntu seeks to promote can also be traced in various Eurasian philosophies.'[60]

Admittedly, there is a core principle of ubuntu – the notion of communality – that is not Western. According to Swanson, the notion of communality was abandoned in the West after the emergence of liberalism in the seventeenth and eighteenth century Europe as a reaction to medieval political thought borne out of the writings of Hobbes and Locke.[61] Modern continental European scholars continue to propagate liberalism over communalism in their writings.[62] Yilma seems to have adopted only the communal notion of ubuntu to arrive at the conclusion that Makulilo makes a generalisation that privacy was imported to the whole of Africa, as though Yilma agrees that the presence of ubuntu in (Southern) Africa denotes the absence of privacy in that society. This view is erroneous. Using the Yoruba ethic-nation of Southwestern Nigeria as an example,

49 M Letseka 'African philosophy and educational discourse' in P Higgs and others (eds) *African Voices in Education* (2000) 180.
50 Gade (n 40) 307.
51 WV Binsbergen *Ubuntu and the globalisation of Southern African thought and society* (2002) 34.
52 L Mbigi & J Maree *Ubuntu: The spirit of African transformation management* (1995) 111; Okoro (n 42) 3.
53 Metz (n 46) 532.
54 Makulilo (n 3) 320.
55 Univerdal Declaration Preamble, clause 1.
56 Universal Declaration art 1.
57 Binsbergen (n 51) 34; Fagunwa (n 40) 5.
58 Britannica 'Universal Declaration of Human Rights', https://www.britannica.com/topic/Universal-Declaration-of-Human-Rights (accessed 30 January 2023).
59 P Singh 'Macbeth's three witches: Capitalism, common good and international law' (2012) 14 *Oregon Review of International Law* 61.
60 D Louw 'Ubuntu and the challenges of multiculturalism in post-apartheid South Africa' (2001) 15 *Quest: An African Journal of Philosophy* 28.
61 Swanson (n 20) 325.
62 A Rhodes 'How collective human rights undermine individual human rights' (2020) 227 *The Heritage Foundation* 1-28.

the concept of ubuntu is their notion of *ebi*.[63] In a sociological study of the Yoruba compound conducted by Fadipe and Shitta-Bey, they point out that even within the communal setting of a Yoruba compound, some privacy remained:

> The prevalent form of human dwelling-place in Yorubaland is a collection of apartments for individual families. These apartments together are known as the compound, or to the Yoruba as *agbo ile* (lit, a flock of houses). They consist of two or more rooms for each family – polygynous or monogamous – and adjoin each other, with a common wall between adjacent apartments. The whole collection forms a square enclosing an open space in the middle. A veranda, which opens on to the quadrangle, runs right round the compound and, unlike the rooms behind it, it is not divided by any partition so as to enable inmates to walk from one end of the compound to the other under cover.[64]

From the above, in a typical Yoruba compound, while there was an open space at the centre of the compound, each room was divided by wall – proof of the presence of privacy. In addition, the Yoruba notion of *Àroko* is an exhibition of some privacy. *Àroko* was the traditional system of communication among the Yorubas long before contact with the West.[65] It involves communication using packaged material symbols meant to exclude those who were not steeped in the tradition in which the symbols were used. It was an exhibition secrecy,[66] and such may as well qualify as collective privacy in modern times.[67] Perhaps Yilma does not consider the view that human rights in traditional African societies were strongly based on the 'principle of respect'[68] and that ubuntu is an African world view, and not just a Southern African notion.[69] If he did so, Yilma would probably have made a different inference on the relationship between ubuntu and privacy.

3.2 Lack of proof

Although Yilma posits that privacy was not imported to Africa from the West, he provides no proof, apart from his assertion that 'several African countries have had some form of privacy protections in their constitutions and civil laws long before the Banjul Charter was adopted'.[70] It is true that African countries have had privacy in their constitutions before the adoption of the African Charter in 1986. But this does not *ipso facto* prove Yilma right, namely, that such presence of

63 Fagunwa (n 40) 5.
64 N Fadipe *The sociology of the Yoruba* (1970) 97-98; A Shitta-Bey 'The family as basis of social order: Insights from the Yoruba traditional culture' (2014) 23 *International Letters of Social and Humanistic Science* 79-89.
65 TA Akanbi & OA Aladesanmi 'Shortcut in communication: A case of Àrokò in information and communications technology (ICT)' (2014) 14 *Global Journal of Human-Social Science: G Linguistics and Education* 25.
66 As above.
67 W Hartzog 'What is privacy? That's the wrong question' (2021) 88 *University of Chicago Law Review* 1684.
68 Motala (n 6) 381; Cobbah (n 11) 321; N Sudarkasa 'African and Afro-American family structure: A comparison' (1980) 11 *Black Scholar* 50.
69 Gade (n 39) 317; Cobbah (n 11) 323.
70 Yilma (n 2) 115.

privacy in those constitutions validates the view that privacy was always present in African societies and was not imported to Africa. This is not to say that privacy was imported to Africa. As stated above, there indeed is evidence of the presence of privacy in traditional African societies (or, at least, in the Yoruba ethic nation), even within their communal ontology. Rather, Yilma argues on a false premise, although he arrives at a correct conclusion. The false premise is the assertion that the presence of privacy provisions in several African constitutions before the adoption of the African Charter denotes the presence of innate privacy in these societies. Yet, Yilma was right in his conclusion that there was innate privacy in these societies before contact with the West.

Makulilo exploits Yilma's lack of evidence, stating that Yilma's 'denial remains normative. It lacks any support of evidence yet the critique wants to romanticise that the notion of privacy is not alien to the African culture.'[71] One source showing the recognition of privacy before the adoption of the African Charter is section 22 of the 1960 Nigerian Constitution which guaranteed the right to private and family life. Nevertheless, this does not prove innate privacy in African societies, as Yilma attempts to argue. It should be noted that the presence of privacy in the constitutions of African states before the adoption of the African Charter is as a result of colonial contact with the West, rather than the innate privacy in African societies. Motala posits:

> The constitutions of most independent African countries were initially modelled on, and embodied principles taken from, the constitutions of the colonial powers and the Universal Declaration. For many African countries, acceptance of the constitution drafted by the colonial power was a prerequisite for achieving independence. Admittedly, most African governments have accepted the United Nations Charter and the Universal Declaration. However, to argue that acceptance of the United Nations documents by many African governments is an indication of universal standards, would be merely legalistic and would fail to consider wider factors such as the circumstances surrounding the adoption of the constitution.[72]

Thus, such inclusion in these constitutions does not mean that privacy was innate to African societies. Yilma ought not base his assertion on the presence of privacy in these constitutions. Yet, neither does it mean that privacy was imported from the West to African societies. The reasonable possibility inferred from existing scholarship is that both the West, with its liberalism, and Africa, with its communalism, respected human privacy, since 'there may be some common beliefs and values (*like privacy*)',[73] even though their conceptualisation of these values might be different.[74] The notion of privacy in the two societies, albeit present in both, was conceived differently. This difference in conception of what privacy meant and its scope neither changes the assertion that privacy existed in

71 Makulilo (n 3) 322.
72 Motala (n 6) 378.
73 My emphasis. See R D'sa 'Human and peoples' rights: Distinctive features of the African Charter' (1985) 29 *Journal of African Law* 72-81.
74 El-Obaid & Appiagyei-Atua (n 17) 829-830.

African societies before contact with the West nor does it mean that the West is the originator of privacy.

It is interesting that a society that Yilma – having an Ethiopian origin – could have used as proof that privacy existed in pre-colonial African societies is the Amhara community of Ethiopia. According to Levine, 'the Amhara ... maintain a high degree of respect for privacy, despite the hierarchy character of their society'.[75] Levine states that in this community, 'the individual home is regarded with great respect' and that 'no one, not even a relative, presumes to enter another's home without being properly acknowledged or escorted inside'.[76] The privacy notion in this community is premised on the view that no one has 'a just claim to information about one's person'.[77]

3.3 Omission of privacy in the African Charter as an oversight

Further, Yilma is of the view that the absence of privacy in the African Charter is an 'omission' which 'probably was a mere drafting oversight'.[78] This proposition is so critical and could only be made when the jurisprudence behind the African Charter is not considered. Articles such as 'Human and peoples' rights: Distinctive features of the African Charter' by D'sa; 'The African Charter on Human and Peoples' Rights: A legal analysis' by Gittleman;[79] 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American systems' by Okere; 'A critique of the African Charter on Human and Peoples' Rights' by Bondzie-Simpson;[80] 'Human rights in Africa: A cultural, ideological, and legal examination' by Motala; and Swanson's 'The emergence of new rights in the African Charter', all underscore the distinctiveness of the African Charter which, if considered by Yilma, would have caused him to abandon the thought that privacy was omitted in the African Charter as a result of an oversight.

The assignment of the drafters of the African Charter was straightforward: They 'were entrusted with the mandate of preparing an African Charter on Human and Peoples' Rights which "reflects the African conception of human rights"' and were instructed to 'take as a pattern the African philosophy of law and meet the needs of Africa'.[81] The reason for this deliberate quest to ensure that the African Charter contains human rights grounded in African custom and tradition is shared by many scholars.[82] According to Swanson:

75 DN Levine *Wax and gold: Tradition and innovation in Ethiopian culture* (1972) 264.
76 As above.
77 Levine (n 75) 265.
78 Yilma (n 2) 115.
79 R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667-714.
80 E Bondzi-Simpson 'A critique of the African Charter on Human and Peoples' Rights' (1988) 31 *Howard Law Journal* 643.
81 D'sa (n 73) 73.
82 See, eg, Gittleman (n 79) 667-714; Swanson (n 20) 307-333; Motala (n 6) 373-410.

> Many Africans believed that at the time the Universal Declaration and the International Covenants were drafted most of the member states of the United Nations were states 'with white populations and largely Christian traditions'. Therefore, they were determined to create a uniquely African document more responsive to African needs.[83]

The African Charter mirrors traditional African values.[84] Therefore, where it markedly differs from other international human rights instruments, such difference should not be hastily labelled as an oversight but must first be considered in light of African customs before a conclusion is made. Using the analogy of the absence of a court in the African Charter as an example,[85] the African Court on Human and Peoples' Rights was not included in the African Charter, but was established in 2006[86] after the required number of ratifications needed for the Protocol establishing it was completed in 2004.[87] Should it be concluded that the absence of the African Court in the African Charter probably also was a mere drafting oversight? Notable human rights scholars such as Swanson and Murray maintain that the reason for the absence is because the drafters 'insisted that this feature, *like much of the Charter*, is more suited to traditional methods of settling disputes through friendly arbitration than to the adversarial approach of the West'.[88] Therefore, since the African Charter is unique, it is necessary to consider whether the absence of a privacy provision is also *like much of the Charter* before concluding that the omission was an oversight. Much of the available evidence supports the proposition that the absence of a privacy provision was deliberate, rather than an oversight.

Support for the conclusion in the preceding paragraph may be found when one considers the *travaux préparatoires* of the African Charter. Generally, the African Charter is said to have a few available *travaux préparatoires*.[89] However, several scholarships have asserted that the first draft of the African Charter – prepared by Keba M'baye – contained a privacy provision.[90] Subsequently, several

83 Swanson (n 20) 327.
84 African Charter Preamble, art 4; Okere (n 14) 145.
85 This analogy had been used in Jimoh (n 27).
86 See TG Daly & M Wiebusch 'The African Court on Human and Peoples' Rights: Mapping resistance against a young court' (2018) *International Journal of Law in Context* 294.
87 NB Pityana 'Reflections on the African Court on Human and Peoples' Rights' (2004) 4 *African Human Rights Law Journal* 121. Prior to the establishment of the African Court, the African Commission served as the only [quasi] judicial body to address claims of violation of the African Charter since 1987. See M Jimoh 'A critique of the seizure criteria of the African Commission on Human and Peoples' Rights (2022) 22 *African Human Rights Law Journal* 364.
88 Swanson (n 20) 330. R Murray & D Long 'Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights' (2021) 21 *African Human Rights Law Journal* 837.
89 See MA Plagis & L Riemer 'From context to content of human rights: The drafting history of the African Charter on Human and Peoples' Rights and the enigma of article 7' (2021) 25 *Journal of History of International Law* 563.
90 YE Ayalew 'Untrodden paths towards the right to privacy in the digital era under African human rights law' (2022) 12 *International Data Privacy Law* 26.

other drafts[91] were introduced by African states and groups during seminars and conferences, which excluded privacy. For this reason, notable scholars such as Viljoen and Murray submit that 'it appears that the right to privacy was left out of the Charter deliberately'.[92] While it is unclear why privacy was excluded from the available *travaux préparatoires,* one persuasive reason is that 'the drafters felt that the privacy contained in other international human rights treaties that preceded the Charter was more Western oriented, which was thought to be too individualistic and contrasted with the communalistic foundation of the Charter'.[93] This indeed arguably better explains the absence of privacy in the African Charter, rather than Yilma's critical assertion that it was mistakenly omitted.

4 The fallacies in Makulilo's response

This article considers three fallacies in Makulilo's response below.

4.1 Evidence but unreliable evidence

Makulilo criticises Yilma in the following words:

> Surprisingly, the critique fails to locate the place of privacy in the African culture and/or identify any society in Africa where the notion of privacy existed or was practiced independently of the influence from the West. My position is somewhat similar to other scholars with regard to the origins of privacy in non-Western cultures.[94]

There are two issues here. First, Yilma's failure to provide evidence of where the notion of privacy existed independently of the influence from the West does not validate Makulilo's view that privacy originated from the West. Second, Makulilo proceeds to present his own evidence citing two scholars who, according to Makulilo, underscore his view that privacy is a Western notion. Makulilo quotes Greenleaf's *Asian data privacy laws: Trade and human rights perspectives* who argues in his book:

> Are *data privacy* laws legal transplants? *Data privacy laws* originated as a 'Western' notion, in that their earliest legislative instantiations were in North America (1970 and 1974), and in seven Western European countries in the 1970s. Furthermore, the principal players who negotiated their transformation into an international

91 For discussion on the debates and drafts, see AB Akinyemi 'The African Charter on Human and Peoples' Rights: An overview' (1985) 46 *Indian Journal of Political Science* 207-238.

92 R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 89.

93 Jimoh (n 27). See also A Ibidapo-Obe *Essays on human rights law in Africa* (2005) 260; O Ogbu *Human rights law and practice in Nigeria* (2013) 280-281.

94 Makulilo (n 3) 322.

> standard, the OECD Guidelines, in 1978-80 were from Europe, North America, and Australasia.[95]

After quoting Greenleaf, Makulilo states that 'the above passage clearly provides that *privacy* is not indigenous to any Asian country. Both the concept and its regulation are imported from the West. This is true to other non-Western cultures including Africa.'[96] Makulilo thereafter quotes Bygrave's *Data privacy law: An international perspective*, where Bygrave expresses the following view:

> The development of *data privacy law* in Africa reflects multiple factors. These include: a desire to meet the adequacy requirements of DPD articles 25-26 and thereby attract foreign investment, particularly in the use of local outsourcing industry; recent first-hand experience of political oppression; the requirements of ICCPR article 17; and old lines of colonial influence. [97]

I was lost for a moment after reading Makulilo's view. His debate with Yilma is about the origin of *privacy* in Africa and not the origin of *data privacy* in Africa. These two concepts are entirely different. Greenleaf's and Bygrave's books quoted by Makulilo as his proof that privacy was imported from the West to Africa underline the origin of *data privacy,* and not the origin of *privacy* in Africa, which is the purport of Makulilo's debate with Yilma. Roos, one of African's early academic scholars in the field of data privacy, has made the point in one of her papers – 'Privacy in the Facebook era: A South African legal perspective' –that data privacy is a narrower concept than privacy.[98] In her words, 'data protection law is related to privacy, but is a narrower concept in that it relates only to the processing of personal information'.[99] Roos cites Christopherm, whose view is the following:

> Privacy includes issues relating to the protection of an individual's 'personal space' *that go beyond data protection*, such as 'private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection against misuse of private communications, protection from disclosure of information given or received by the individual confidentially'.[100]

It is interesting to note that Makulilo cites this Roos's article in his response to Yilma's review and even accords respect to Roos, stating:

> I am aware early African academic scholars in the field of data privacy such as Professor Anneliese Roos who graduated with her PhD degree at the University of South Africa in 2003 has not stopped conducting research in this field. One of

95 Greenleaf (n 30) 12; see Makulilo (n 3) 322.
96 As above.
97 Bygrave (n 31) 106; Makulilo (n 3) 322-323.
98 A Roos 'Privacy in the Facebook era: A South African legal perspective' (2012) 129 *South African Law Journal* 375.
99 As above.
100 K Christopher 'An international legal framework for data protection: Issues and prospects' (2009) 25 *Computer Law and Security Review* 307-317; see Roos (n 98) 375.

her recent publications that has addressed the challenges of modern technology is *Privacy in the Facebook era: A South African legal perspective*. Roos has authored chapter 9 of the *African data privacy laws*. Could this and, according to Yilma, place Roos in the second generation?[101]

Perhaps Makulilo mistakenly misses this point in Roos's paper. This then leaves one to the conclusion that Makulilo falls into the same fallacy for which he criticises Yilma: He too does not provide evidence that *privacy* originated from the West. Clearly, the Greenleaf and Bygrave evidence relied on by Makulilo in support of his assertion that privacy is a Western concept at best is evidence that data privacy may be a Western concept, but it is not evidence that privacy is a Western concept.

4.2 The individualistic–communalistic argument

Notwithstanding Makulilo's lack of evidence on the importation of privacy from the West, he, unlike Yilma, has been consistent in his views about privacy in Africa. In as article published in 2016,[102] Makulilo posits that traditional African society did not recognise the concept of privacy, a situation he termed 'privacy myopia'.[103] He refers to traditional African society as the pre-colonial period – a period before contact with the West.[104] Using the Neethling theory – which he states to have been adopted by the Supreme Court of Appeal of South Africa[105] – Makulilo argues that the individualistic nature of privacy contrasts with the communalistic nature of traditional African society and that it is safe to argue that 'privacy in Africa is principally a Western imported liberal concept'.[106] However, what is missing in Makulilo's view is that privacy involves some measure of space creation[107] and this is found in all societies, including in Africa, before contact with the West. The examples of the Yoruba society in Nigeria and the Amhara community of Ethiopia described above are proof of this exertion.[108] Of course, this is not to suggest that all forms of space creation imply privacy, but certainly privacy in all its forms connotes space creation. Roos has made this point in her writings.[109]

In recent times, the individualistic-communalistic argument about privacy is waning. This is because there are several reasons why it is fallacious to assert that privacy cannot exist in a communalistic society. First, such assertion tends to portray the view that individual rights cannot exist in a communal setting. Yet, individual rights are protected in communal societies. According to Taylor,

101 Makulilo (n 3) 334.
102 Makulilo (n 8).
103 Makulilo (n 8) 193.
104 Makulilo (n 8).
105 Makulilo (n 8) 196.
106 Makulilo (n 8).
107 Roos (n 19) 555.
108 Fadipe (n 64); Shitta-Bay (n 64); Levine (n 75).
109 Roos (n 8) 556.

the choice is not always between a close, family-like community and a modern, impersonal society since it is possible to have a 'communitarian or holist ontology and to value liberalism's individual rights'.[110] Second, there is the 'societal dimension of privacy'. In any society – whether individualist or communalistic – 'individual privacy has a social value because protecting it contributes to societal goals'.[111] For these reasons, there were several values to be protected with the respect of privacy rights in African societies before contact with the West.

I suppose Makulilo's view that traditional African society did not recognise the concept of privacy emanates from equating autonomy with privacy. The communalistic nature of traditional African society erodes autonomy, and not privacy. Roos gives a clear distinction between these two concepts in her PhD thesis. She posits that autonomy is when there is a prescription on how to manage private lives. In this case, 'it is not privacy that is involved here', states Roos, 'but the individual's right to freely exercise his or her will, that is his or her autonomy, or the capacity to live one's life as one chooses'.[112]

The thesis of this article is that the communalistic nature of the traditional African society affects individual autonomy, and not privacy, which some scholars even consider innate to all humans.[113] According to a researcher's experience while conducting biomedical research in a rural community in the Northern KwaZulu-Natal province of South Africa:

> For me to talk to the mother and the child, the granny and the father must give me permission. It means now, they are the ones who are allowing that person, so that person is not, there is no *autonomy* in her because she is not allowed to decide whether she wants it or not. She must first get consent from these two other people or the mother-in-law, must say yes or no or even father-in-law. You see, so that her autonomy is affected. She cannot voluntarily say no I am going to take part. She has got to wait for husband or *gogo* [grandmother] or mother-in-law, you know.[114]

The foregoing underscores a situation where the autonomy of the subject is eroded, and not the privacy of the subject. Using the Neethling theory, one may find that the subject had some aspects of their life private from their father, mother or grandmother. Also, the marital bedrooms of pre-colonial Africa had 'sacred precincts', and it would be absurd to argue that there was no privacy in Africa before contact with the West. Pre-colonial Africa had a practice where the families of couples and villagers only knew of the virginity status of the wife when the husband publicly disclosed what went on in sacred precinct of the

110 C Taylor 'Cross-purposes: The liberal-communitarian debate' in N Rosenblum (ed) *Liberalism and the moral life* (1991) 161.
111 DJ Solove 'The limitations of privacy rights' (2023) 98 *Notre Dame Law Review* 987.
112 Roos (n 8) 559.
113 See, eg, E Neill *Rites of privacy and the privacy trade: On the limits of protection for the self* (1962) 36.
114 F Akpa-Inyang & SC Chima 'South African traditional values and beliefs regarding informed consent and limitations of the principle of respect for autonomy in African communities: A cross-cultural qualitative study' (2021) 22 *BMC Medical Ethics* 9.

marital bedroom on the wedding night. Virginity testing is a private matter in pre-colonial Africa, unless announced publicly.[115]

The Yorubas, for instance, also have several proverbs depicting that privacy was a value in their societies. The saying *ile eni lati n je ekute onidodo* – which literally means 'it is in one's house that one eats a rat with abdomen' – is used to describe a situation where one intends to keep a situation private. Several other sociological studies describing the Yoruba architectural courtyard state that privacy was an important value that influenced the design.[116] Beyond the Yorubas, the African house has been described as being rooted in 'principles of privacy and spatial comfort'.[117] Specifically, studies describing the Benin houses conclude that 'the spatial arrangement of spaces in Benin houses has spaces for private and collective use'.[118] The *Zaure* in Hausaland also depicts the respect for privacy in this society before contact with the West. The *Zaure* is a place for guest reception.[119] Describing a traditional Hausa residence, Umar and others state:

> A traditional Hausa residence is conceptually subdivided into (3) parts or layout, inner core (private area), a central core (semi-private area), and outer core (public areas) ... These concepts historically originated from Egyptian domestic architecture of around (500 CE). Hence, Hausa traditional village layouts of shelter and settlements that developed to villages and town in such morphology.[120]

Further, a study analysing the traditional courtyard houses in Nigeria – in the Yoruba, Igbo and Hausa cultures – reveals that privacy is a main influence in the design of these courtyards.[121] Thus, evidence abounds – which may be found in proverbs, architectural designs, customary laws – showing that traditional African societies respected privacy within their communal ontology before contact with the West.

4.3 *Ad hominem*

Makulilo also commits *ad hominem* in his reaction to Yilma's critique that he briefly mentions the absence of privacy in the African Charter in his book *Privacy and data protection in Africa*. Makulilo fails to address Yilma's critical view that the

115 OW Ogbomo & QO Ogbomo 'Women and society in pre-colonial Iyede' (1993) 88 *Anthropos* 437.

116 A Adedokun 'Incorporating traditional architecture into modern architecture: Case study of Yoruba traditional architecture' (2014) 11 *British Journal of Humanities and Social Sciences* 39-45, 42; TM Adebara 'Private open space as a reflection of culture: the example of traditional courtyard houses in Nigeria' (2023) 48 *Open House International* 617-635.

117 AE Ikudayisi & TO Odeyale 'Designing for cultural revival: African housing in perspective' (2021) 24 *Space and Culture* 630.

118 CO Adeokun, EN Ekhaese & F Isaacs-Sodeye 'Space use patterns and building morphology in Yoruba and Benin' (2013) Proceedings of the Ninth International Space Syntax Symposium 20.

119 Ikudayisi & Odeyale (n 117) 625.

120 GK Umar and others 'The practice of Hausa traditional architecture: Towards conservation and restoration of spatial morphology and techniques' (2019) 5 *Scientific African* 3.

121 Adebara (n 116).

absence of privacy in the African Charter probably was a mere drafting oversight. Instead, Makulilo confronts Yilma with Yilma's earlier contrary view. He states:

> He (Yilma) complains that I made brief mention of the absence of the right to privacy in the African Charter ... In their joint article Yilma and Birhanu had previously assigned a different reasoning to account for the lack of a privacy provision in the ACHPR: 'Although the African Charter on Human and Peoples' Rights (hereinafter the African Charter) does not explicitly say anything about the right to privacy, one may argue that some aspect of privacy is impliedly enshrined in it when the Charter stipulates that (art 5): And hence, such aspect of privacy can be inferred from the African Charter.' This is evidence that Yilma has always been contradictory of his earlier opinion. In the first instance he argues that privacy in the Charter is implied, in another he argues the absence of the privacy is a mere drafting oversight. This is confusion and lack of academic certainty.[122]

Like Yilma, Makulilo does not explain why privacy was omitted in the African Charter. With due respect, the whole response of Makulilo to Yilma's review of chapter 5 of Makulilo's book, *Privacy and data protection in Africa,* makes one wonder whether Makulilo is trying to make Westerners out of Africans in respect of the origin of privacy in Africa.

5 Conclusion

This article wades into the debate started by Alex B Makulilo and Kinfe M Yilma on the origin of privacy in Africa. While the article agrees with Yilma that the notion of privacy was not alien to Africa before contact with the West, it solidifies this claim by providing evidence, an exercise lacking in Yilma's review. The article argues that within the communal ontology of pre-colonial African societies, privacy existed. In addition, the article interrogates some other aspects of the Makulilo-Yilma debate, especially the relationship between ubuntu and privacy and the claim that the absence of privacy in the African Charter probably was 'a mere drafting oversight'. It finds that the presence of ubuntu in African societies does not denote absence of privacy. It also argues that the absence of a privacy provision in the African Charter was not a drafting oversight, but a deliberate effort to exclude privacy, which was understood as individualistic at the time of drafting the African Charter, from a communalistic treaty such as the African Charter. The drafting history of the African Charter shows that the right to privacy was initially considered despite being subsequently abandoned. Therefore, its absence in the African Charter could not have been an oversight. The article also finds that Makulilo – the chief proponent of the idea that privacy was imported to Africa from the West – has provided no proof to such claim. The article argues that the evidence provided by Makulilo shows that data privacy was imported to Africa, and not privacy.

122 Makulilo (n 3) 331.