A Postcolonial Legal Critique of Online Expression in Africa

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Abstract

Far beyond the contributions of African and western thought on the right to freedom of expression, there are now normative developments under international human rights law on how states can protect online expression. However, these developments are not applied in African countries. A reason for this is the extant provisions in various laws that threaten online expression. This article applies postcolonial legal theory to understand why and how these provisions threaten online expression in African countries. It identifies relevant thoughts on the right to freedom of expression, normative developments on the right and a new form of digital colonialism in Africa. It concludes that for African states and other actors to combat this new form of digital colonialism head-on, they must carry out targeted legal reform that repeals and amends these provisions.

Keywords: Online expression; postcolonial legal theory; Africa; digital colonialism; criminal codes; penal codes

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Introduction

The right to freedom of expression online is at risk in many African countries.[1] This risk is accentuated by extant but problematic provisions in criminal codes, penal codes, cybercrime laws and electronic communication laws.[2] These laws have come under scrutiny due to the increase in calls for regulation of online harms such as information disorder and targeted online violence. However, in African countries, this regulation has become difficult, due to the problematic nature of the provisions that seek to legislate against such harms; first provided for in colonial criminal and penal codes, they include the offences of sedition, criminal defamation, libel and slander, criminal insults, blasphemy and publication of false news likely to cause fear and alarm. Today, not only have these colonial provisions been received into African legal systems by independent African states, they have been appropriated and repurposed by African governments to regulate online expression through laws concerning cybercrime and

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[1] Media Defence "Mapping digital rights and online freedom of expression litigation in East, West and Southern Africa" (2021) at 8–9, available at: <https://www.mediadefence.org/resource-hub/wp-content/uploads/sites/3/2021/08/Media-Defence-Mapping-digital-rights.pdf> (last accessed 14 January 2022); YE Ayalew "From digital authoritarianism to platforms' leviathan power: Freedom of expression in the digital age under siege in Africa" (2021) 15 *Mizan Law Review* 455 at 472; Freedom House "Freedom on the net 2021: The global drive to control big tech" (2021), available at: <https://freedomhouse.org/report/freedom-net/2021/global-drive-control-big-tech> (last accessed 4 March 2022).

[2] OB Arewa *Disrupting Africa: Technology, Law and Development* (2021, Cambridge University Press) at 157; J Rozen "Colonial and apartheid-era laws still govern press freedom in southern Africa" (7 December 2018) *Quartz Africa*, available at: <https://qz.com/africa/1487311/colonial-apartheid-era-laws-hur-southern-africas-press-freedom/> (last accessed 17 June 2020); UN General Assembly, Disinformation and freedom of opinion and expression: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN doc A/HRC/47/25 (13 April 2021), paras 52 and 82, available at: <http://undocs.org/en/A/HRC/47/25> (last accessed 26 August 2021).

electronic communications. In some instances, these laws by African governments are also used as a basis for requesting social media platforms take down online content in African countries.[3]

Given this context, this article uses postcolonial legal theory to explain why and how these provisions put the right to freedom of expression online at risk in African countries. After an introduction, the next section highlights postcolonial legal theory and the right to freedom of expression in African indigenous societies. There is then an examination of the current normative status of the right to freedom of expression in Africa and the challenges it faces, particularly with the advent of social media platforms. There follows a discussion focusing on how these challenges have been exacerbated by colonial-era and recent legal provisions on online expression in Africa, before the relationship between these provisions is identified as a new form of digital colonialism. The final section concludes that in order to address this new form of digital colonialism in African countries, African governments and other actors must pick up the gauntlet of targeted legal reform of existing laws that violate the right to freedom of expression online.

Postcolonial legal theory and the right to freedom of expression in African indigenous societies

This section briefly considers postcolonial legal theory and uses it to highlight African indigenous ideas of the right to freedom of expression, the dominant western thought on this right and the similarities between these. Beyond examining the material dispossession of property, postcolonial studies also seek to focus on the dispossession of indigenous systems that are not easily categorized under material ownership, such as culture, social practices and the law.[4] Fitzpatrick and Darian-Smith have argued that postcolonialism as a theory continues to deny claims to the completeness and finality of such difficult categorization.[5]

Postcolonial legal theorists have focused on the impact of the law before, during and after the colonial process. According to Roy, postcolonial legal theorists trace the ways colonial laws are imposed on annexed cultures and the ideological effects of this imposition.[6] An important aspect of postcolonial legal theory is its critique of liberal positivism.[7] Its main argument against positivism is that while it creates a theoretical opportunity to discuss legal neutrality, formal inequality and legal objectivity, it is unwilling to see the impacts of other positions, which inevitably results in the promotion of large-scale and substantive inequality.[8]

To Davies, the Western legal project framed in its liberal positivist tradition has not recognized other sources and forms of law.[9] Davies's position points to two important issues of note: first, not only are liberal positivist theories uncritical of their relevance, source and control, they reject, often through force, the need to compare and interrogate a system designed outside their existence. Second, the "otherness" of liberal positivism,

[3] MK Land "Against privatized censorship: Proposals for responsible delegation" (2019) 60 *Virginia Journal of International Law* 363 at 379; AO Salau "Social media and the prohibition of 'false news': Can the free speech jurisprudence of the African Commission on Human and Peoples' Rights provide a litmus test?" (2020) 4 *African Human Rights Yearbook* 231 at 241 and 246.
[4] A Roy "Postcolonial theory and law: A critical introduction" (2008) 29 *Adelaide Law Review* 315 at 318–19; GK Bhambra "Postcolonial and decolonial dialogues" 17 *Postcolonial Studies* at 115 and 120.
[5] P Fitzpatrick and E Darian-Smith "Laws of the postcolonial: An insistent introduction" in P Fitzpatrick and E Darian-Smith (eds) *Laws of the Postcolonial* (1999, University of Michigan Press) 4.
[6] Roy "Postcolonial theory", above at note 4 at 319.
[7] S Bottomley and S Bronitt *Law in Context* (4th ed, 2006, Federation Press) at 16 and 58; M Davies "Race and colonialism: Legal theory as white mythology" in M Davies (ed) *Asking the Law Question: The Dissolution of Legal Theory* (4th ed, 2017, Thomson Reuters Australia) 299.
[8] See P Fitzpatrick *The Mythology of Modern Law* (1992, Routledge); Fitzpatrick and Darian-Smith "Laws of the postcolonial", above at note 5 at 61; RM Unger *Law in Modern Society: Toward a Criticism of Social Theory* (1977, Free Press) at 181.
[9] Davies "Race and colonialism", above at note 7 at 300.

which seeks to make western legal traditions complete in themselves while also regarding cultures outside it as non-existent, is the bane of the theory and needs to be constantly subjected to legal theorizations and inquiries. As a result, one of the major preoccupations of postcolonial legal theory is engagement with the history of legal dispossession. This preoccupation could be likened to a constant torch that seeks to light the paths of colonialism and how they impact on the laws of annexed societies. Therefore, in order to use a postcolonial legal theory perspective, especially as it relates to the right to freedom of expression, it is necessary to understand not only colonial legal systems but also the prior legal systems that such colonial systems have supplanted.

African indigenous societies

African indigenous societies are neither monolithic nor homogenous.[10] The explanation offered here does not represent all African indigenous societies when it comes to freedom of expression; rather, it is made up of a few selected societies that are similar in certain aspects. The reason for this limited representation is because African indigenous societies were widely dispersed geographically and were culturally complex. Taking a close look at a few indigenous African human rights systems shows that the organization of indigenous states and stateless societies in Africa prior to colonialism points to the existence of a body of rules that were used to guide social conduct.[11] This can be buttressed by the fact that the British, as one of the western countries that perpetrated colonialism, introduced the indirect system of governance as a result of established and organized indigenous societies in many parts of the continent.[12] A logical conclusion is that African indigenous societies had organized systems which may not have immediately fallen within the democratic or human rights ideals of the colonizers but which were ideal for the Africans guided by such systems.[13] This makes the point that social organization, which is a first precursor to social existence, was as much African as it was western.

Williams's study of 26 African nations and 106 languages noted that African indigenous societies had a semblance of modern-day constitutions through their customary laws and practices. An important aspect of these constitutions was that the right to comment, criticize, express oneself, have opinions and be heard were "fundamental to African culture and participatory democracy".[14] In stating the importance of freedom of opinion and expression in African indigenous societies, Ayittey argues that not only was freedom of expression taken for granted in many of these societies, its actualization was premised on consensus.[15] Ayittey also refers to Cruickshank, who said that "anyone, even the most ordinary youth, will offer his opinion, or make a suggestion with equal chance of being heard, as if it proceeded from the most experienced sage".[16] These thoughts have also been echoed by Busia.[17]

The Ga-Dangme society, which exists in today's Greater Accra region in Ghana, is regarded as having been one of Africa's foremost indigenous state societies before colonial conquests. It was one of the most organized in the

[10] C Ngwena *What Is Africanness? Contesting Nativism in Race, Culture and Sexualities* (2018, Pretoria University Law Press) at 146.
[11] J Donnelly *Universal Human Rights: Theory and Practice* (2nd ed, 2003, Cornell University Press) at 62.
[12] M Lechler and L MacNamee "Indirect colonial rule undermines support for democracy: Evidence from a natural experiment from Namibia" 51 *Comparative Political Studies* 1858 at 1861.
[13] See N Cheeseman and J Fisher "How colonial rule committed Africa to fragile authoritarianism" (2 November 2019) *Quartz Africa*, available at: <https://qz.com/africa/1741033/how-colonial-rule-committed-africa-to-fragile-authoritarianism-2/> (last accessed 17 June 2020).
[14] C Williams *The Destruction of Black Civilization* (3rd ed, 1987, Third World Press) at 175.
[15] G Ayittey *Indigenous African Institutions* (2nd ed, 2006, Transnational Publishers) at 276.
[16] Ibid.
[17] KA Busia *Africa in Search of Democracy* (1967, Routledge and Kegan Paul) at 276.

region and encouraged self-development through expression.[18] The Akans, who are now divided between present-day Ghana and Ivory Coast, encourage not only expression but also effective access to justice.[19] The Somalis, who largely operated stateless societies before colonialism, believe that laws are "a product of reason and the conscience of the community".[20] Law in indigenous Somali societies recognizes that people have inherent freedoms as a result of their existence.[21] According to Cerulli, the Somali legal terminology which was used to regulate their societies before colonial conquests has been found to be practically devoid of loan words from foreign languages, therefore making Somalis' body of jurisprudence, including that on freedom of expression, wholly indigenous.[22] For the Bantu in Southern Africa, the importance of freedom of expression, especially in legal adjudication, is primary.[23] In the Bantu system, both the plaintiff and the defendant are able to freely express themselves before the community judges, who usually number three.[24] According to Winnie Mandela, when she noted the brilliance of the constitutions of African indigenous societies, "the council (of elders) was so completely democratic that all members of the ethnic group could participate in its deliberations".[25] These few examples show that freedom of expression is not alien as a social tool and was crucial in organizing indigenous African societies.[26]

Western liberal theories

Major western liberal theories on the right to freedom of expression can be divided into five ideas: truth, democracy, self-fulfilment, autonomy and human dignity. They are also projected as the basis for the internalization of human rights law. With respect to the theory of truth, according to Mill, establishing the truth is the most important justification of freedom of expression, and this justification is not in any way diminished by the possibility that some forms of expression are false.[27] Stifling an opinion, whether it is false or correct, would be evil.[28] One of the criticisms against Mill's idea of the truth principle is that it is too abstract to justify its use by the state.[29] For example, aside from social punishments that may be carried out by the public on an erring individual and that do not carry formal sanctions, the state, in applying the harm principle, tends to define what harm is, and in so doing creates an undesirable climate for dissent through state institutions. However, it may be argued that Mill's argument is not an end in itself but a means to an end, that being a system that typifies the scope of the limitations that may be exercised by the state in restricting freedom of expression.

The theory of democracy is based on the indispensable need for every qualified adult to contribute to the formation of the state. This is because people-based governments must involve contributory expressions in several ways, including engaging in public policy debates, participating in organizations to further personal or public

[18] Ayittey *Indigenous African Institutions*, above at note 15 at 25.
[19] GY Amoah *Groundwork of Government for West Africa* (1988, Gbenle Press) at 176.
[20] M van Notten *The Law of the Somalis: A Stable Foundation for Economic Development* (2006, Red Sea Press) at 35.
[21] FD Heath "Tribal society and democracy" 5 *The Laissez Faire City Times* 22.
[22] Ayittey *Indigenous African Institutions*, above at note 15 at 79, citing E Cerulli "Somalia: Scritti vari editi et inediti" (3 volumes) *Instituto Polografico dello Stato* (1957–64).
[23] P Bohannan and L Bohannan *Tiv Economy* (1968, Northwestern University Press) at 199.
[24] Ayittey *Indigenous African Institutions*, above at note 15 at 85.
[25] W Mandela *Part of My Soul Went with Him* (1984, Norton) at 53.
[26] I Karp "African systems of thought" in I Karp and CS Bird (eds) *Explorations in African Systems of Thought* (1986, Indiana University Press) 202.
[27] JS Mill *On Liberty* (1859, Longmans, Green, and Company) at 64.
[28] Id at 33.
[29] See DA Dripps "The liberal critique of the harm principle" (1998) 17 *Criminal Justice Ethics* 3.

interests and exercising the right to vote based on personal opinions and expression.[30] A major criticism against the democracy theory is the tyranny of the majority.[31] As argued by Redish, democracy is not an end but a means to an end, which is to establish a system of government that ensures the best output for all. Dahl and Diamond, in their separate works, theorize democracy as being beyond a process. According to both scholars, it includes respect for human rights and the rule of law, collective deliberation, choice and participation, and representative and accountable governments.[32] All of these, when viewed together, cannot be narrowly construed as just a process, but rather an end to be achieved through democracy. A closer look also shows that they are practically impossible without the guarantees of human rights in general and the right to freedom of expression in particular.

The major thrust of the self-fulfilment theory of the right to freedom of expression is the intrinsic and extrinsic quality of the value added through the optimization of personal abilities. Emerson expressed the self-fulfilment theory in two key principles.[33] The first is that for society to hold together, it depends on the individual expressing him/herself, while the second contends that the individual also has a duty to be part of and cooperate with his / her community. However, this theory is premised on the assumption that the individual's goals of self-fulfilment will always agree with those of his / her society. Even though cooperating with society is one of the duties of the self-fulfilling individual, the theory does not adequately address instances where such cooperation would be impossible given tyranny and coercion by the state. A fair response to such criticism would be that in order to advance the self-fulfilment theory, clear and narrow instances of where such fulfilment would affect the well-being of the community must be agreed on by society.

Sourced primarily from Mill's libertarian thoughts, the concept of autonomy is central to being human. To Scanlon, it concerns how to treat the individual as a rational being who is trusted to make the best decision given the circumstance.[34] This theory believes that the human being is capable of opinions and their expression, and can hold on to a logical balance of both for them to drive his / her life.[35] The autonomy perspective on freedom of expression is intrinsic and as a result should not be interfered with under any circumstances; a rebuttal against autonomy would be when the individual not only creates harms to his / her community but also to him/herself.

Human dignity is considered in relation to the right to freedom of expression in three ways: intrinsic, communitarian and substantive dignity.[36] Intrinsic dignity explains the human being as having an inherently dignified status just by being a human, while communitarian dignity supposes that an individual's dignity is treated with the same respect as others in his / her community. The third form, substantive dignity, applies a certain historical, cultural or political context to what dignity means.

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[30] See MH Redish "Self-realisation, democracy and freedom of expression: A response to Professor Baker" (1981) 130 *University of Pennsylvania Law Review* 678 at 681.
[31] M Redish "The value of free speech" (1982) 130 *University of Pennsylvania Law Review* 591 at 605.
[32] RA Dahl "What political institutions does large-scale democracies require?" (2005) 120 *Political Science Quarterly* 187 at 196; L Diamond "The democratic rollback: The resurgence of the predatory state" (2008) 87 *Foreign Affairs* 36 at 37.
[33] T Emerson *The System of Freedom of Expression* (1970, Random House) at 15.
[34] T Scanlon "A theory of freedom of expression" (1972) 1 *Philosophy and Public Affairs* 204.
[35] Cf. the elements of Karl Popper's *The Open Society and Its Enemies* (vol 1, 1945, George Routledge and Sons at 121, 163 and 284; vol 2, 1971, Princeton University Press at 237); his five theories of what makes an open society are limitation of state institutions and protection of freedoms, elimination of negative utilitarianism and commonwealth benefits for the few, progressive development, rational criticism and individualism, and an autonomous individual at the centre.
[36] GE Carmi "'Dignity' – the enemy from within: A theoretical and comparative analysis of human dignity as a free speech justification" (2006–2007) 9 *University of Pennsylvania Journal of Constitutional Law* 957 at 969–70.

Cross-cutting themes in African indigenous societies and western liberal theories on freedom of expression

The theories highlighted above are a summary of western ideas on the importance of the right to freedom of expression. Many of these have been found not to be practised in the West alone. Taking the Ga-Dangme traditional society, for example, the rigour of their intellectual exercises, which included debates, public speaking, political discussion and many others, were evidence of what western philosophers regard as the truth theory, because of the ability of every individual to freely express themselves. Considering Ayittey's observation about freedom of expression in these traditional societies, it can be seen that not only is it closely tied to assemblies and cohesion, it also involves allowing unpopular opinions. While these may sometimes be false, such falsity is allowed and is further assessed through public debates; therefore censorship is not the immediate solution for disagreeable comments, but rather, there are more conversations that are able to further tease out the truth. Today, these ideas provide African governments with an opportunity to make policies that enable more open and free expression, rather than enabling and adopting legislative practices that are censorious, as will be further discussed below.

Considering both Dahl's and Diamond's theories, the need for freedom of expression in ensuring democracy includes the rule of law, collective deliberation, choice and participation, and representative and accountable governments, all features which could be found in traditional African societies.[37] The nature of publicly sourced law through assemblies and deliberative communications was a key aspect of organization in traditional African societies. There was not much in these traditional societies that is not found in the more popular democracy theory of free speech. These features can be utilized today for the protection of the right to freedom of expression, for example through public consultations by African states and other actors during legal reforms, capacity building for judicial officers and strengthening the independence of state institutions, such as national human rights institutions.

Looking closely at Emerson's ideas on self-fulfilment, which focus on the interrelationship between the individual and his / her community, most African indigenous societies ensure this kind of relationship and more. Understanding that the individual is part of the community, these societies place each person at the core of decision-making but also draw clear lines for when this might have dire impacts on the overall well-being of the community. For example, in the Yoruba traditional society in today's South-West Nigeria, the king, who is often regarded as having the utmost authority, stays in position until the community he leads decides otherwise. There have been many instances where communities in Yoruba societies have actioned their rights to political participation and expression and have banished their kings for misuse of power.[38]

Closely tied to the idea of autonomy as a theory of freedom of expression is the rationality of the human mind, which is presumed to be rational under many circumstances. Therefore, one chooses the best option not only for oneself but also for others within the community. Perhaps closely linked with the non-absolute nature of the right to freedom of expression, the human dignity theory focuses on the individual and his / her community and the interplay between them when it comes to possible harm. The first part of the theory, which is often referred to as intrinsic, leans on the nature of being human: that every human being by his / her very nature can express

[37] Dahl "What political institutions", above at note 32; Diamond "The democratic rollback", above at note 32.
[38] Ayittey *Indigenous African Institutions*, above at note 15 at 49.

themselves and must be allowed to do so. It is this intrinsic nature of human dignity that also relates to another aspect of the theory that focuses on the individual's community, regarding the right to express oneself. This right stops when others are being adversely affected. The substantive aspect of human dignity refers to the possible limitative factor on freedom of expression due to some social backgrounds, such as historical, cultural or political contexts.

The theory of human dignity sits closely with the ideas of freedom of expression in indigenous Africa, as societies like the Akans, Somalis and Bantu (in Southern Africa) not only all ensure freedom of expression because it is intrinsically human, but also draw a line when such expression poses harm to the community in general. A lesson that can be learnt that relates to this line between harm and expression as practised in African traditional societies today involves reviewing existing laws on legitimate restrictions on the right to freedom of expression online, such as hate speech policies, and harmonizing them with various international human rights standards.

It should be noted that the thoughts of most western theorists have been regarded as the bedrock of the formalization of international human rights.[39] However, since institutions, especially those which are global in nature, do not exist without underlying diverse principles or ideals, I have stated above the foundations of this global system and also specified in clear terms how the African indigenous value systems are not alien to such foundations, especially in Africa. When we apply postcolonial legal theory, we can see that African indigenous societies did have ideas that are similar in practice to western ideas on expression. This points to the tapestry of how the right to freedom of expression has been woven through indigenous societies but was supplanted by problematic colonial legal provisions which have now been set straight by various developments under international human rights law. However, despite this, not only are many of the provisions from the colonial era still extant in most African countries, but they have been appropriated and repurposed by governments to regulate online content; this regulation poses dangerous threats to the right to freedom of expression online.[40] It is therefore important to examine developments in the international human rights system and to look at how African governments are failing to measure up.

Normative developments on the right to freedom of expression in the digital age

Recently, the right to freedom of expression has faced major challenges, especially since it became internationally institutionalized. These major challenges, including information disorder, ensuring gender justice, combating online hate speech, regulating online content and many more, have made it important to constantly expand the meaning of freedom of expression to accommodate newer realities as it relates to the Internet and, more recently, social media platforms. This section identifies some of these challenges and how they have been protected through normative expansion of the right within the UN and African Union (AU) human rights systems.

The UN human rights system

[39] D Smith and L Torres "Timeline: A history of free speech" (5 February 2006) *The Guardian*, available at: <https://www.theguardian.com/media/2006/feb/05/religion.news> (last accessed 23 May 2020).

[40] O Mokone "The colonial-era laws that still govern African journalism" (10 March 2019) *Aljazeera*, available at: <https://www.aljazeera.com/programmes/listeningpost/2019/03/colonial-era-laws-govern-african-journalism-190310080903941.html> (last accessed 17 June 2020); Rozen "Colonial and apartheid-era laws", above at note 2.

Formal internationalization and institutionalization of human rights received a boost with the adoption of international human rights treaties such as the Universal Declaration of Human Rights and, nearly two decades later, the International Covenant on Civil and Political Rights (ICCPR). Article 19 of both treaties provides for the right to freedom of expression, and both formed major fulcrums upon which the right to freedom of expression became more universally acknowledged. Various mechanisms within the UN human rights treaty system have provided wide and accommodating interpretations of the right to freedom of expression in order to engage with the challenges faced by the right, especially with the advent of the Internet.

Perhaps the earliest defining move by the UN on the right to freedom of expression and new technologies, which seems to have presented some of the most daunting challenges given the dynamism of the latter, is the General Comment No 34 of the UN's Human Rights Committee.[41] The General Comment, which was adopted at the turn of the last decade, witnessed the most expansive re-scoping of the right to freedom of expression; it was able to set a course and formally provided more clarity on the position of the UN on the role of human rights and digital technologies, and in particular on the right to freedom of expression and information in the digital age. The previous General Comment No 10 on article 19, which was adopted in 1983, did not dwell on the intricacies and complexities of globalized digital communications, because these were not as prevalent then as they are today.

In addition to the exposition in General Comment No 34, the Committee on the Elimination of Racial Discrimination (CERD) adopted a General Recommendation titled "Combating racist hate speech" in August 2013. This recommendation became necessary to trace the contours of the right to freedom of expression, especially how it relates to legitimate restrictions like prohibited speech. It is also important that given the nature of the restriction, the recommendation has a heavy focus on the criminalization of certain expressions provided for under the ICCPR and more substantively under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). It also considered the possible dynamics such kinds of speech may have on non-traditional media such as Internet-based platforms.[42] The General Recommendation considers other means of combating racist hate speech other than criminalization, including civil and administrative measures. It calls for consideration of contextual factors such as the position or status of the speaker, the objectives of such speech, its reach, content or form, or even the socio-political or socio-legal climate. It also calls for policy measures that involve education, culture, teaching and information as ways of combating racist hate speech.

Since international human rights law cannot implement itself, it requires special procedures, such as the use of Special Rapporteurs, to carry out the necessary protection and promotion of the right to freedom of expression. In keeping up with the challenges that may impact on the protection of the right, the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression and the AU Special Rapporteur on freedom of expression and access to information have provided meaningful guidance. In order to ensure the continued relevance of human rights treaties given the challenges of globalization and development, the UN special rapporteurs, along with other special procedures in the UN and AU human rights systems, have set standards and norms with respect to their mandates.

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[41] M O'Flaherty "Limitations on freedom of opinion and expression: Growing consensus or hidden fault lines" (2012) 106 *Proceedings of the Annual Meeting of the American Society of International Law: Confronting Complexity* 347 at 348.

[42] UN General Assembly, General Comment No 34, CCPR/C/GC/35 (26 September 2013), available at: <http://undocs.org/en/CCPR/C/GC/34> (last accessed 26 June 2020), para 7.

The major functions of these special rapporteurs include preparing annual reports to the Human Rights Council, attending meetings, producing press releases, communications, country visits and standard-setting activities. These functions have been used to advance standard-setting for the right by interpreting it alongside other human rights, producing annual reports to guide state and non-state actors, and collaborating with other regional human rights procedures. Annually, the UN Special Rapporteur teams up with regional special rapporteurs to adopt a joint declaration that complements the normative developments of the reports. So far, between 2000 and 2023, 11 joint declarations have been adopted by the special rapporteurs with respect to the right to freedom of expression and digital technologies. Since the mandate was created in 1994, the UN Special Rapporteur on freedom of expression has adopted at least 21 annual reports that have addressed how to protect online expression, the latest being in 2023. These reports, often based on collaboration between the Special Rapporteur and digital rights experts, make recommendations on how to protect online expression. Some of them have addressed four major thematic issues on online expression, namely disinformation, gender justice, online hate speech and regulation of online content.

The report on disinformation and freedom of opinion and expression focuses on the nature of disinformation and key concerns and guidance on how to regulate it, which the report describes as a form of information disorder.[43] It foregrounds the need to understand disinformation both as a global challenge and also as a contextual problem, especially in the digital age. It is easy to focus only superficially on online disinformation, especially as many African countries are currently doing so without paying close attention to the foundational problems posed by colonial laws in African contexts.[44] The report also sets the parameters of regulating disinformation, and by extension information disorder, within set international human rights standards.[45] These parameters include the application of a four-part test (legality, legitimacy, proportionality and necessity) and the roles of state and non-state actors in regulating information disorder. The essence of the test is to determine the direct relationship between "the speech and harm, and the severity and immediacy of the harm", using the least restrictive means to protect against such harm. On the roles of actors, it identifies a multi-stakeholder approach where actors are able to meaningfully contribute to the development of standards that regulate information disorder.

The Special Rapporteur's report on gender justice can be divided into three broad parts that focus on barriers women experience in exercising their right to freedom of expression online, the roles actors play in such experiences and recommendations on how these actors can ensure more protection of women's expression online. The report points to two major issues worthy of note: first, it demonstrates that the right to freedom of expression is not enjoyed equally by all and is disproportionately limited based on gender. Second, it notes that the right to freedom of expression is required for vulnerable persons, which includes women, sexual minorities, persons living with disabilities, migrants, refugees, asylum seekers and others. This requirement shows a normative gap that needs to be filled, specifically on how these groups of persons can enjoy their rights to freedom of expression online.

[43] UN Disinformation and freedom, above at note 2, para 4.
[44] Ibid.
[45] Id, paras 83–105.

The Special Rapporteur's most recent report on online hate speech has a background in an earlier report from the same office in 2012.[46] The report, which also highlights the impact of new technologies on the right to freedom of expression alongside the extent of restrictions on the Internet, opens with a global perspective on how hate speech has become more accentuated by several factors, such as rising immigration flows, declining domestic economies and growing incidents of terrorism, which have all placed certain groups under the threat of violence through speech. The major point of difference between the 2012 and 2019 reports on hate speech is that while the former focuses on the traditional concepts and application of hate speech under international law, the latter does the same but more within online contexts. For example, the 2019 report declares that state actions such as Internet shutdowns and criminalization of online political dissent or criticisms of government are inconsistent with the provisions of international human rights law. It also points out that when governments are looking to outsource regulations to online platforms through "intermediary liability" laws, such laws must guard against the high chance of over-regulation, censorship and violation of free speech by strictly adhering to the provisions laid down under articles 19(3) and 20 of the ICCPR and article 4 of the ICERD. In addition, the report details the responsibilities of both state parties and companies involved in content regulation with respect to the limitative three-part test and how it applies to regulating hate speech online.

The first report on user-generated content is broadly divided into two parts in its scope: state and private-sector obligations in regulating such content.[47] Identifying ways through which a state's actions may affect online content regulation, the report rightly points out the use of vague laws to restrict freedom of expression that thereby obscure the clear responsibilities of the private sector to adequately engage with more pertinent issues for regulation, such as "representations of child sexual abuse, direct and credible threats of harm and incitement to violence", which are also required to comply with international law.[48] The second part of the report focuses on the obligations of companies to follow these requirements, as have been followed by state parties under the law. According to the report, "few companies apply human rights principles in their operations, and most that do see them as limited to how they respond to government threats and demands".[49] It also points out that state parties, through these dangerous laws, seem to have emboldened the practice by companies of deferring to local laws, thereby avoiding complications with local authorities even if it means violating human rights in the process. Evidence of this claim is provided by the example of Facebook, which has stated that "if, after careful legal review, we determine that the content is illegal under local law, then we make it unavailable in the relevant country or territory".[50] In raising more specific issues about how the activities of private companies affect the protection of the right to freedom of expression, the report identifies areas of concern regarding the content-regulation standards of companies.

[46] UN General Assembly, Hate speech, incitement to hatred and freedom of opinion and expression: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN doc A/67/357 (9 October 2019), available at: <http://undocs.org/en/A/67/357> (last accessed 22 August 2020).
[47] UN General Assembly, Online content regulation and freedom of opinion and expression: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN doc A/HRC/38/35 (6 April 2018), available at: <http://undocs.org/en/A/HRC/38/35> (last accessed 26 August 2021).
[48] Id, para 13.
[49] Id, para 10.
[50] Id, para 22; Facebook "What is a legal restriction on access to content on Facebook", available at: <https://www.facebook.com/help/1601435423440616?helpref=related> (last accessed 15 June 2019).

The report also considers how the rules applied to content moderation on these platforms are vague, subjective and capable of being subjected to arbitrary meanings, which poses great dangers to free speech. Facebook, Twitter, YouTube and a host of other social media platforms have such vague provisions on issues of violence, extremism, incitement, hate speech and other online harms, which have been used as examples in the report.[51] Perhaps one of the major bases for platforms' compliance with state parties on content regulation has been a reason to do so due to context. The report argues that despite claims that context is applied, it has not reduced the illegal removal of content. Also, companies claim that they require more context in their community-driven regulation practices, but how this context is then achieved in the final decision-making process is unclear. The report also identified the issue of anonymity in businesses carrying out their responsibilities on content regulation.

The African human rights system

The African Charter on Human and Peoples' Rights (the African Charter) is the primary regional human rights instrument in Africa. Article 9 of the African Charter provides for the right to freedom of expression and information as follows: "1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law."[52] This provision has often raised more questions than answers when it comes to the protection of the right. One of the issues it has raised is that, of all the regional human rights instruments, it is the shortest and "the weakest formulation of freedom of expression of any major international human rights document".[53] Also, in addition to the challenges posed by inadequate protection of the right in Africa, this provision is often interpreted by states wrongly, due to the clawback clause "within the law". In the past, many states have interpreted this clause to mean using domestic law to limit the right, regardless of its effect, and therefore having the powers to limit the right as they wish. However, the African Commission on Human and Peoples' Rights (the African Commission), as the institution established by the African Charter to interpret the rights contained in it, has developed jurisprudence on the right to freedom of expression, especially in relation to the meaning of the clawback clause.[54] It has stated that the meaning of the "law" as referred to in the Charter is international law and not national or domestic law – restrictions must by law be legitimate and necessary. This settled the erroneous claim that state laws can limit the right, without recourse to the standards set under international law and consistent with state parties' obligations under international law. In complying with these standards, state parties must show that such law does not override either constitutional or international standards, is consistent with state obligations and that the provisions of the Charter are not applied in such a manner that it would render meaningless the rights provided for within it.[55]

In 2002, in one of its roles made pursuant to article 45 of the African Charter, the African Commission adopted a resolution on article 9, referred to as the Declaration of Principles on Freedom of Expression in Africa, at its 32nd Ordinary Session. This Declaration presented stakeholders in Africa who work on the protection and

[51] UN Online content, above at note 47, paras 26–31.
[52] African Charter on Human and Peoples' Rights, art 9.
[53] CE Welch "The African Charter and the freedom of expression in Africa" (1998) 4 *Buffalo Human Rights Law Review* 103 at 112.
[54] *Constitutional Rights Project v Nigeria* [2000] AHRLR 191 (ACHPR 1998), para 58; *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* [2000] AHRLR 227 (ACHPR 1999), paras 41–42; *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt I* [2011] AHRLR 42 (ACHPR 2011), para 255.
[55] Ibid.

promotion of the right to freedom of expression and information with the opportunity to advocate for a home-grown directional policy on the scope and meaning of the right to freedom of expression. These efforts further culminated in the establishment of the mandate of the Special Rapporteur on freedom of expression in 2004 at the Commission's 36th Ordinary Session. The scope of this mandate was expanded in 2007; it encompasses analysis of national media regulation, fact-finding missions to member states, undertaking promotional country missions, making public interventions on violations of the right, keeping a record of these violations and submitting reports to the Ordinary Sessions of the African Commission.[56]

In 2012, also through a resolution, the African Commission revised the Declaration to include access to information.[57] The Declaration focused largely on the right to freedom of expression as a right, however in such a manner that it cannot be easily divorceable from the right to information. In terms of its standard-setting norms on both rights, the Declaration provided for state members to ensure access to public information, private and public media ownership, print media, media plurality, broadcasts and telecommunications, criminal measures on speech and many other topical issues that constituted challenges to the protection and promotion of the right.[58] Notably, just like the other regional and global mechanisms, there had been no meaningful directions on the right, especially in relation to new technologies, until the turn of the new decade in 2011. It was at this point that, through the General Comment No 34, most stakeholders, including governments, became more aware of freedom of expression and new technologies.

The African experience, at least regionally, of this growing awareness was seen through a number of initiatives, including joint declarations by the AU Special Rapporteur with her other regional and UN counterparts, resolutions by the African Commission, press releases, and a Declaration, revised in 2019 to incorporate the current realities of new technologies in the promotion, protection and interpretation of the right to freedom of expression and access to information in Africa.[59] This new Declaration replaces the 2002 version and so far may be regarded as the most direct and near-binding instrument on the right to freedom of expression online in Africa; it may be seen as a fulfilment of the hopes of correcting the weak provisions on the right under the African Charter. To quote Welch: "[A] vague or weakly-worded treaty can be developed or interpreted over time if the political will is present. The limitations of the African Charter are striking; even more, in the case of freedom of expression, the political will to interpret the wording of the African Charter broadly has not been present."[60]

In remedying this situation, the Declaration has perhaps provided interesting and extensive clarity on some thorny issues on protecting the right to freedom of expression, while also developing the scope of the right under the Charter. The nature of the Declaration may be assessed in two key ways. First, it is direct, because it is sourced from the mechanisms provided for in the African Charter, such as articles 9, 45 and 60. Article 9, as highlighted above,

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[56] African Commission "Special Rapporteur on freedom of expression and access to information", available at: <https://www.achpr.org/specialmechanisms/detail?id=2> (last accessed 15 March 2020).
[57] African Commission Resolution ACHPR/Res.222(LI)2012, 2 May 2012.
[58] See Declaration of Principles on Freedom of Expression in Africa 2002, available at: <https://www.achpr.org/presspublic/publication?id=3> (last accessed 15 March 2020).
[59] Organization for Security and Co-operation in Europe (OSCE) "Joint declarations", available at: <https://www.osce.org/fom/66176>; African Commission "Documentation center", available at: <https://www.achpr.org/documentationcenter>; African Commission "Declaration of principles on freedom of expression and access to information in Africa 2019", available at: <https://www.achpr.org/presspublic/publication?id=80> (all last accessed 1 December 2021).
[60] Welch "The African Charter", above at note 53 at 113.

provides for the substantive right, article 45 provides for the norm-setting responsibilities of the African Commission through the mandate of the Special Rapporteur, and article 60 provides an interconnection between the substantive right, the norm-setting responsibilities and the wider application of the international human rights treaties.

Second, the Declaration is near-binding because of how it ensures an active rather than a passive implementation process in which soft laws are often used. This is evident in the cumulative provisions of principle 43 of the Declaration, which mandate implementation through review of policies in order to conform with the Declaration, the Model Law on Access to Information and the Guidelines on Access to Information and Elections in Africa.[61] Importantly, in combining implementation with effective monitoring and evaluation, it includes the provision of article 62 of the Charter, which mandates the submission of periodic reports on measures taken to comply with the Declaration.

Perhaps the most defining feature of the new Declaration is how it is able to combine the old Declaration with its new objectives of setting standards on the right to freedom of expression and information and new technologies. In demonstrating this feature, it attempts to plugs existing gaps in the application of the right under the African Charter by providing for corrective provisions. The corrective role of the Declaration is best understood as providing amendments to the substantive right to freedom of expression and information in Africa; it provides for both the provisions of prohibited speech in the ICCPR and ICERD, while also incorporating the basic principles of non-discrimination against children and persons with disabilities under the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities respectively.[62] Also, as noted above on the scope of protection afforded to the right to freedom of expression and information, under both the African Charter and the ICCPR, the right to hold an opinion is qualified. However, as one of the corrective features of the Declaration, principle 2 explicitly provides that the freedom to hold an opinion shall not be interfered with by states. This provision settles the debate as to whether the right to hold an opinion under the African Charter, or instruments made pursuant to it, is qualified or not.

Another feature of the new Declaration is that principles 22 and 23 lay down the conditions that must be met for justifiable limitation of the right to freedom of expression and information, which was not provided for under the African Charter. For example, under principle 22, three additional provisions are made, to include the requirement of states to repeal insults and false news laws, the decriminalization of defamation and libel, and non-imposition of custodial sentences for defamation offences.[63] Currently, these provisions are provided for in most criminal codes and in cybercrime and electronic communications laws in Africa, where they do not comply with international human rights standards. The only identified legitimate restriction of speech is provided for in article 20 of the ICCPR and article 4 of ICERD; more recently, principle 23 of the Declaration expressly prohibits speech that advocates violence. These two major provisions provide a basis for states to reform various laws that bear on information disorder, online violence and hate speech in the African context.

[61] African Commission "Model law on access to information", available at: <https://achpr.au.int/en/node/873>; African Commission "Guidelines on access to information and elections in Africa", available at: <https://achpr.au.int/en/node/894> (both last accessed 14 February 2024).
[62] African Commission "Declaration", above at note 59, principle 3.
[63] Id, principle 22(2), (3) and (4).

Currently, many African countries still provide for the criminal offences of sedition, insult or false news in their legal systems; their foundations were laid by criminal codes with colonial backgrounds. It is this background that finds its way into other laws that currently affect freedom of expression online in Africa. Also, the explicit provision on decriminalization of defamation will not only embolden the regional courts which have been forward-looking in their protection of the right, but will also provide a framework for holistic reform in the sector of Internet rights and policy in Africa.[64] These new provisions, together with the previous ones, have solidified the regional jurisprudence on what constitutes justifiable limitation of the right to freedom of expression and information, especially with respect to criminalization. In addition, principle 23 addresses the lacuna of prohibited speech under article 20 of the ICCPR, which provides for the limitation of the right through hateful speech. It not only establishes the limitation; it also explains the cumulative conditions that must be fulfilled before it may be applied. Principle 9 provides for a more general, elaborate and conjunctive application of justifiable limitations in national contexts with respect to the right. It not only restates the three-part test on justifiable limitations, but it further breaks down each test and how it can be practically applied.

In addition to these, the Declaration also carries out a unique standard-setting role. For example, principle 4 clearly settles the debate of whether the phrase "within the law" as provided for under the African Charter refers to national law or international law. It provides that where there seems to be a conflict between both systems, the international law system takes precedence on the protection of the right, and national laws must be brought into line.[65] Also, the Declaration introduces self-regulation and co-regulation of the media under principle 16, which sets standards beyond the traditional approach of regulation through law by states. Another unique norm-setting role under the Declaration may be found in the provisions of principle 17(4), which offer a multi-stakeholder model for regulation of telecommunications and the Internet, beyond co-regulation, self-regulation and traditional regulation. It makes it a requirement for states to develop a multi-stakeholder regulatory approach for broadcasting, telecommunications and the Internet regulatory framework.[66] Perhaps the most defining part of the Declaration with respect to the subject discussed here is the provisions of principle 39, which regulate the relationship between states and Internet intermediaries. The provisions protect issues like freedom of expression and access to information online, content-moderation policies and new technologies which respect rights, transparency while safeguarding human rights online, and several others.

The contributions of the African human rights system to the international human rights system has been discussed in the past; how these contributions have been underutilized internationally has also been focused on.[67] However, how the African human rights system, both its past indigenous human rights culture and now its regional designs, has been underused by African countries has not been adequately discussed. According to Welch, "because

[64] Id, principle 22(3).
[65] African Charter on Human and Peoples' Rights, arts 60 and 61.
[66] The report that reviewed multi-stakeholder initiatives notes that they might not have been effective, but this does not mean they have not worked; they have upped the ante with respect to rights protection. See Institute for Multi-Stakeholder Initiative Integrity "Not fit-for-purpose: The grand experiment of multi-stakeholder initiatives in corporate accountability, human rights and global governance" (2020), available at: <https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf> (last accessed 15 July 2020).
[67] See F Viljoen "Africa's contribution to the development of international human rights and humanitarian law" (2001) 1 *African Human Rights Law Journal* 18 at 19–31; R Murray "International human rights: Neglect of perspectives from African institutions" (2006) 55 *The International and Comparative Law Quarterly* 193.

Africa was subjected to a particularly strong, intense form of colonial rule, individual governments were endowed with powerful means of restraining the media and restricting freedom of expression".[68] Not only do these laws have colonial foundations, they are now being transplanted into laws regulating cyberspace by African states, such that freedom of expression online is now at risk. This transplantation, viewed through the lens of postcolonial legal theory, demonstrates that the violation of the right to freedom of expression online has a deep feeder taproot in colonial laws, underscoring the importance of applying critical legal studies when appraising the right in Africa.

In connecting the challenges to the protection of the right before and after 2011 (with General Comment No 34), Welch argues that "the trend identified in the early years of the 21st century is not anecdotal or incidental but entrenched and historical in nature".[69] This points to the fact that violations of the right are not necessarily as a result of recent technological advancements or increased state involvement in violations, but are due to the foundations laid in the past, which in the context of African countries is the colonial impact on legal systems and the continued appropriation of these laws by independent governments for online content regulation.[70]

Colonial criminal laws and the right to freedom of expression online in African countries

Normative developments, especially on how to mitigate online harms, are absent in many African national legal and regulatory contexts. There are two major reasons for this: first, political developments, where African countries became independent of western colonial rule (first Ghana, in 1957; and last Zimbabwe, in 1980; Namibia, Eritrea and South Sudan also became independent from the rule of other countries in 1990, 1993 and 2011 respectively), were opportunities for those states to develop their formal legal and regulatory systems outside those established by western and foreign rule. However, this did not take place, and various problematic provisions in colonial criminal and penal laws are still in force today. Second, these provisions in colonial criminal and penal codes have now found their way into recent cybercrime and electronic communications laws with new legal language. They include sedition, criminal defamation, libel and slander, criminal insults and blasphemy, and publication of false news likely to cause fear and alarm. These offences, which have a linear relationship with colonial laws, pose huge threats to the protection of online expression in African countries. They create a hybrid context whereby old colonial criminal and penal codes, and their postcolonial impacts, are appropriated and repurposed by African governments today. The way in which these codes have been employed is typified by three systems: linear, semi-linear and non-linear.

Linear systems can be found in African countries whose legal systems had direct contact with colonial laws that impact on freedom of expression and where such contact continues to date. As an example of such a system, Kenya's Penal Code provides for illegitimate restrictions on the right to freedom of expression, despite the constitutional protection of both the right to freedom of expression and access to information, and the country's accession to both the ICCPR and the African Charter. Sections 52, 53, 56, 57, 132, 194 and 195 of the Penal Code provide for various speech offences that have all been identified as posing threats to freedom of expression.[71] This example is also found in Nigeria, Tanzania, Uganda and other legal systems in Africa.[72]

[68] Welch "The African Charter", above at note 53 at 106.
[69] Ibid.
[70] Ibid.
[71] Penal Code, Laws of Kenya, cap 63; B Rickcard "Words that started a riot: An appraisal of the law against sedition and criminal libel in Kenya" (2019), available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3525353> (last accessed 16 February 2024).

Semi-linear systems can be found in those countries that did not have colonial laws directly introduced into their systems (or did once have but the laws were reviewed), but where the systems are still influenced by experiences from colonial systems in the framing of laws on limitation of free speech. Examples of semi-linear countries are Ethiopia and Ghana. Even though Ethiopia was not colonized, it was largely influenced by colonial legal structures, especially in illegitimate restriction of free speech. Despite its constitutional provisions and its accession to applicable international human rights treaties, Ethiopia still has laws with offences like criminal defamation, insults and offences against national interests under chapter 2 of its Penal Code, which deals with injuries to honour.[73] Also, the Mass Media and Access to Information Proclamation, in its section 41(1), makes a link to the Criminal Code with respect to criminal liability for defamation, while sub-section (2) provides for the punishment of criminal defamation.[74] Ghana is another similar example of a country with a semi-linear system; the offences of criminal defamation and dissemination of false information in its 1960 Criminal Code are still evident in its Electronic Communications Act of 2008.[75] Section 76 of this Act provides for the offence of false information, which runs contrary to the provisions of international law.[76]

Non-linear systems are found in those countries which have had contact with the colonial system but which have since reformed, or have shown signs of reform of their laws with respect to the problematic provisions. South Africa represents an example of a country with a non-linear system, where even during apartheid, defamation was largely a civil matter rather than a criminal one.[77]

A new form of digital colonialism in African countries

Given the above context, it is clear that colonialism cannot be solely blamed for problematic laws on online expression in African countries, because African governments have continued to appropriate and repurpose those laws. Therefore this new form of colonialism can be pictured as a group of rings in a circle (see Figure 1). Colonialism is the outer and biggest circle, while the next closest ring represents colonial legal systems. Next are colonial criminal legal systems as established by colonial rule and perpetuated by African governments, and then comes the impact of this criminal legal system on human rights. The last ring is digital colonialism as it impacts on the right to freedom of opinion, expression and information. It suffices to state that these rings are all connected and

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[72] In Nigeria, sec 59 of the 2004 Criminal Code Act (cap C38, Laws of the Federation of Nigeria) and sec 418 of Penal Code (Northern States) Federal Provisions Act (cap P3, Laws of the Federation of Nigeria Penal Code) provide for the offence of false information; sec 24(1)(b) of the Cybercrime (Prohibition, Prevention etc) Act 2015 (Cybercrime Act) provides for the offence of false information online; sec 399 of the Criminal Code and sec 204 of the Penal Code provide for the offence of insulting language and insult to religion respectively; sec 24(1)(b) of the Cybercrime Act provides for the offence of insulting and annoying language online; sec 373 of the Criminal Code and sec 391 of the Penal Code provide for the offence of criminal defamation; sec 24(1)(b) of the Cybercrime Act provides for criminalization of false statements meant to annoy or cause ill will; secs 50–52 of the Criminal Code and secs 416–22 of the Penal Code provide for the offence of sedition; sec 3 of the Protection from Internet Falsehood and Manipulation Bill provides for the offence of causing disaffection against the state (sedition) online. For Tanzania's colonial provisions, see secs 55 (seditious intention), 63b (raising discontent or ill-will for unlawful purposes), 63c (hate speech), 89 (abusive language) and 125 (insulting to religion) of the revised edition of the Penal Code of Tanzania 2019, which was first adopted in 1945. For similar provisions in Tanzania's Cybercrime Act 2015, see secs 16 (publication of false information), 17 (racist and xenophobic material), 18 (racist and xenophobic motivated insults) and 23 (cyberbullying). For Uganda's colonial provisions, see secs 39 (seditious intention), 40 (seditious offences), 50 (publication of false news), 118 (insults to religion) and 179–82 (criminal defamation) of the Penal Code Act of 1950. Similar secs in Uganda's Computer Misuse Act 2011 are secs 24 (cyberharassment), 25 (offensive communications) and 26 (cyberstalking).

[73] Penal Code of Ethiopia (No 158 of 1957).

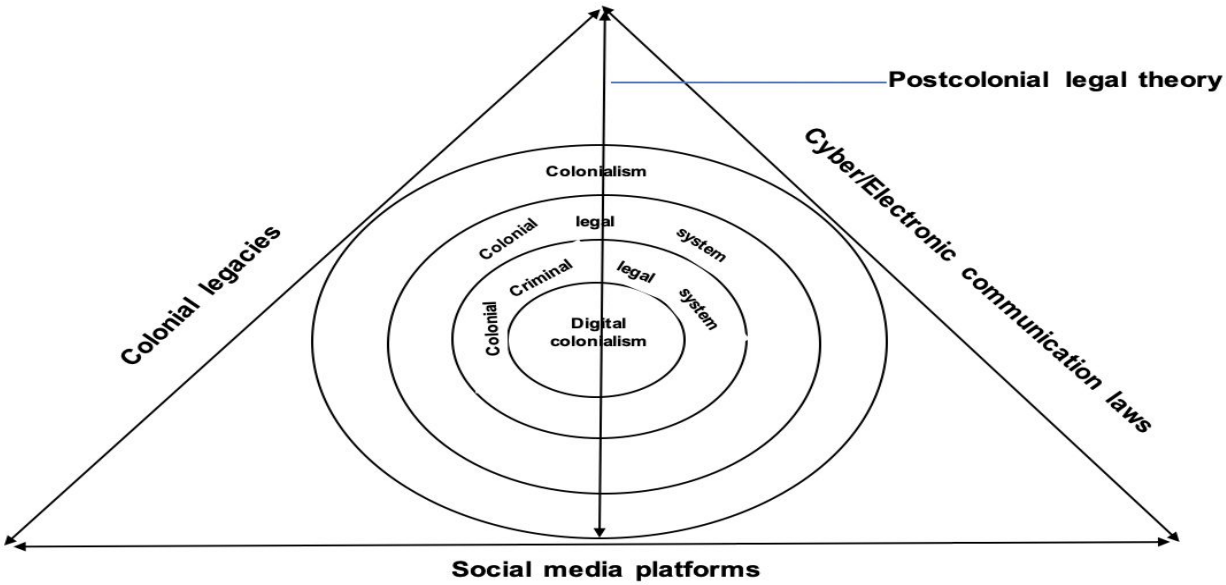
[74] Mass Media and Access to Information Proclamation (no 590/2008).

[75] Electronic Communications Act (Act 775 of 2008).

[76] See the discussion of normative developments on the right to freedom of expression above.

[77] See D Milo *Defamation and Freedom of Speech* (2008, Oxford University Press).

Figure 1: Postcolonial legal theory and online expression in African countries



accentuated by postcolonial legal theory, which seeks to highlight the impacts of colonialism on the legal cultures of the colonized.

<< Insert Fig. 1 near here >>

Within the context of this article, digital colonialism means the colonial influences on cybercrime laws that seek to limit the right to freedom of expression online. These influences are found in criminal and penal codes that still provide for the offences of insult, sedition, criminal defamation and publication of false information, which are also provided for in cybercrime and electronic communication laws enacted by African governments to regulate online speech. As it relates to African experiences, digital colonialism is how colonial systems, their legacies and successive African governments have laid the foundations for violations of human rights in the digital age, and in particular with respect to the right to freedom of expression, information and opinion, through laws and practices which have continued to have linear impacts on the protection of the right to the present day.[78]

This form of digital colonialism is communicated electronically and is neo-colonialist and speech-focused, while the main kind of data colonialism is the sum total of the impact of big tech companies from the Global North on the Global South.[79] It is therefore similar to the principal form of data colonialism, which focuses on the expropriation of data from the Global South by the Global North's big tech companies. While this form of digital colonialism may be focused mainly on data expropriation, it is the most developed with respect to digital colonialism studies and is still emerging. In addition to this, this kind of digital colonialism considers the various dimensions of impacts like governance, human rights and human development; this article seeks to establish how the digital colonialism, just like data colonialism, focuses on a more specific aspect of these dimensions: its impacts on the right to freedom of expression online in Africa. Digital colonialism has a semi-technical application as a multidimensional concept, especially how it manifests in relation to online free speech in African countries. As a result, I posit that beyond data colonialism, digital colonialism exists in law texts and is exacerbated by platform governance as currently constituted.

It is these laws that are currently being used to regulate both offline and online speech in most African countries and that companies, recently described by Klonick as "new governors of speech", adhere to when applying their content-moderation policies.[80] Therefore, these colonial laws lay a foundation that companies, which are now important stakeholders in the future of online speech, refer to as "local laws" and to which they defer.[81] This means that companies will not defer to international human rights standards in their content-moderation policies, especially

[78] Nyabola examines the impacts of social media platforms that reinforce existing stereotypes, using Kenya as an example. She points out that aside from the appropriation of the data of citizens of the Global South by many big tech companies, including social media platforms, the challenges of offline harms have been accentuated and transmuted into the online space. See N Nyabola *Digital Democracy, Analogue Politics: How the Internet Era Is Transforming Politics in Kenya* (2018, Zed) at 157–78.

[79] Compare Nyabola, ibid, to N Couldry and UA Mejias "Data colonialism: rethinking big data's relation to the contemporary subject" (2019) 20/4 *Television and New Media* 1 at 1–14.

[80] K Klonick "The new governors: The people, rules and processes governing online speech" (2018) 131 *Harvard Law Review* 1599 at 1603.

[81] Facebook "What is a legal restriction", above at note 50; Twitter "About country withheld content", available at: <https://help.twitter.com/en/rules-and-policies/tweet-withheld-by-country> (last accessed 12 February 2020); Facebook "Government request to remove content", available at: <https://transparencyreport.google.com/government-removals/overview?hl=en> (last accessed 13 February 2020).

when dealing with local contexts.[82] Most countries in the Global South, especially those in Africa, do not have any meaningful input to the content-moderation policies of these companies, who moderate globally based on limited application of human rights.[83] This limitation also suggests that these companies do not necessarily verify whether these laws violate human rights standards. Therefore, as described above, colonial legacies, cybercrime and electronic communication laws that violate freedom of expression online, and private actors triangulate above the network of rings shown in Figure 1 to operationalize digital colonialism, which exacerbates online harms. For example, information disorder and targeted online violence are further amplified as a result of foundationally faulty laws and non-contextual platform governance. This paints a clear but complex picture of the future of freedom of expression in Africa, which relies on platform governance – the ecosystem of key stakeholders who make rules and regulations on how online content and speech are governed. It has therefore become more important to analyse the resultant impacts of this new form of colonialism: online harms and how they violate the right to freedom of expression in the region.

Conclusion

Regulating online harms such as information disorder and targeted online violence is difficult. However, colonial legacies in African countries' legal systems, that criminalize false information, sedition and insults, and many other restrictions which are illegitimate under international law make regulation harder. Existing cybercrime and electronic communication laws enacted by many African governments to govern online expression have also borrowed from these legacies, complicating the chances of effective regulation of online harms. As a result, online expression in African countries is continuously violated by colonial laws, thereby making this a form of digital colonialism.

In establishing this central premise, postcolonial legal theory seeks to shine a light on the many impacts of colonialism on the legal systems of former colonies. This article has helped to show how old colonial laws on the right to freedom of expression have made the protection of online expression difficult in African countries. One of the many debilitating motivations of colonialism was the repression of dissent, and these colonial laws are now being enacted by African governments through new cybercrime and electronic communications laws to silence dissent. Through these laws, colonialism, which seems a thing of the past but is not, is being used to govern digital spaces in African countries as enabled by African governments, thereby giving rise to a new form of displacement – digital colonialism.

This article has shown through postcolonial legal theory that old criminal and penal code laws, with provisions on the right to freedom of expression, that were enacted by colonial systems are now being transplanted into the governance of online expression in African countries. This points to a major challenge: state actors cannot be entrusted with sole responsibility for online speech governance in African countries because they have failed in the past to systematically protect expression through targeted reform of old colonial laws. Therefore, to address this

[82] D Kaye *Speech Police: The Global Struggle to Govern the Internet* (2018, Columbia Global Reports) at 33–34.

[83] Klonick points out that most content-moderation policies, especially from the likes of Facebook, which has the greatest number of platform users, are made up of Euro-American rules and that input from systems in the Global South is largely absent, despite those citizens making up most of Facebook's users. See K Klonick "The Facebook Oversight Board: Creating an independent institution to adjudicate online free expression" (2020) 129 *Yale Law Journal* 2418 at 2437.

new form of digital colonialism in African countries, state actors must collaborate with other actors, such as the UN and AU human rights systems, international and local civil-society actors and national human rights institutions, to carry out necessary legal reform that must include the repeal of provisions in old criminal and penal codes (such as sedition, criminal defamation, libel and slander, criminal insults and blasphemy, and publication of false news likely to cause fear and alarm) that violate the right to freedom of expression online. This reform must also include amendment of relevant provisions in new cybercrime and electronic communication laws, in line with UN and AU human rights standards.

Such reform presents at least three opportunities for African states and other actors. First, it provides states with an opportunity to directly comply with the provisions of principle 22 of the revised Declaration of principles on freedom of expression and access to information. This principle requires African states to repeal and amend relevant problematic laws on online expression. Second, it is also a chance for governments to comply with the provisions of principle 43(1) on the legislative and other measures they must adopt to give effect to the Declaration. Third, the reform provides an opportunity to practically receive and implement international human rights norms on how to protect online expression today in national contexts. In fighting this new form of digital colonialism, African states and other actors must ensure that this targeted legal reform is not the last act of protecting online expression but lays a strong foundation for protecting it through law.

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