Reimagining Corporate Responsibility for Structural (In)justice in the Digital Ecosystem: A Perspective from African Ethics of Duty

By:

Kebene Wodajo
Isabel Ebert

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Structured large-scale problems such as digitally replicated injustices challenge contemporary regulatory regimes necessitating a critical inquiry into existing systems of governance. While these injustices and risks disproportionately impact those in the Global South, both the problem and remedy are rarely placed in the necessary contextual perspective of Southern hemispheres. From victims' access to remedy vantage point, delocalization of justice for harms originated in Africa and most Global South nations is often justified on the basis of a search for favorable legal systems. Some of the justificatory claims include the financial and procedural advantage courts in the West offer victims, high

prospect for out-of-court settlement and financial compensation, and high publicity. While the transnational quest for justice is understandable, it appears to be a weak answer to a complex question. It starts off from an assumption that the current paradigm of the liability regime provides an answer, and that venues in the West would provide better access to justice. An interrogation of the deeper epistemological paradigm that shapes the horizon of possibilities to access justice is lacking. In todays' structured large-scale governance gaps, a response to the perceived absence of favorable judicial environment in Africa and the quest for justice by switching fora is at best an incomplete solution. At worst, shifting fora could come with an implied risk of neo-colonial implications. It is against this backdrop that we argue that a critical appraisal of the conventional liability regimes on which legal systems rely to determine responsibility for injustice is necessary.

Using the question of justice in the digital space to assess current liability regimes, we interrogate the conventional liability regime based on liberal political theory, identify its shortcomings for dealing with the questions of justice raised by the digital space, and propose an alternative to address the identified shortcomings through an alternate perspective of responsibility inspired by the African ethics of duty. This perspective can contribute to the improvement of access to justice and re-center the African ethics of duty in the conversation around quest for justice.

The Mismatch: Gaps in Regulatory Frameworks to Account for Structural Injustices in the Digital Space

The nature of **human rights risks and injustices in the digital space are increasingly structural**. Studies show that the algorithmically enabled learning, prediction and decision making threaten to replicate existing inequalities and injustice such as racial and gender discrimination, socio-cultural and economic marginalization. The causality underlying most of the digital rights violations is beyond an isolatable incident, intended outcome, and remedial capacity of a single agent. Most of these violations are collectively produced harms and continuations of the underlying unjust structures. Their structural nature is characterized by 1) involvement of multiple actions taken by "multi-actors", 2) resulting in harms that can be unintended consequences, and (3) are deeply rooted in the socio-technical nature of using digital

technology. Can the conventional liability regime address such structural injustices sufficiently?

Human rights risks and injustice produced by the digital space are often considered as isolated incidents of rights violations, while their structural nature is commonly overlooked, and in particular affected stakeholders in the Global South struggle to access remedy. For this, we outline the critiques below that unpack the limits of existing regulatory regimes.

Firstly, we identify a set of **flaws in the liberal political theory** that make it unfit for dealing with structural injustices in the digital space. These are the normative roots of liberal political theory based on **individual wrongdoing**, **causation** and **intent based liability**. We argue that the injustices in the digital space cannot exclusively be tied to an individual wrongdoing, nor sufficiently establish causation or intent to an individual actor. Rather, injustices are constructed irrespective of the agent's motive through the interrelated character of a chain of actions from multiple actors making attribution of wrongdoing to individual actors almost impossible. Structural features of injustice in the digital space are shared by other large scale global problems such as climate crises, sweatshops, child labor etc. These structural features help injustices skip the lens of individualist, narrow causation and intent based liability regimes. So far, the conventional liability regime, whether implemented in the Global North or South, has hardly delivered on its promise to come to the rescue of victims in desperate need of justice. This limitation has primarily to do with how the paradigm of liability/responsibility regime is structured and shaped the current horizon of options to access justice.

In a second step, we look for further approaches that theorize responsibility and justice with regard to the interaction of state, business and the people. With slight improvements in terms of its preventative approach – i.e., identifying, addressing and mitigating harm, the **business and human rights regime also does not adequately remedy** structural injustice in the digital space. This is primarily due to two limitations: its focus on an isolatable event of human rights risks linked to tech companies without looking at the structure enabling the violations; and its exclusion of positive obligations, while focusing on the responsibility of "do no harm" – i.e., negative obligation. Collectively produced harms, such as structural injustice, requires a responsibility not just

to avoid harm but to positively contribute, cooperate and participate in a collective solution by going beyond the “call of duty”.

The Alternative: An Ethics of Duty Perspective Based on African Notion of Duty-oriented Responsibility

To improve the regulatory gap by re-centering the African perspectives in the quest for justice, we **suggest an alternative perspective** on corporate responsibility inspired by an African ethics of duty. We don’t claim to present a complete African worldview even though our perspective is inspired by it, nor do we delve into the debate of the concept of human rights in Africa in this limited space. Hence, we keep our description of the African ethics of duty to its broadly accepted focus on duty-oriented responsibility and nature of communality. Rooted in the communal nature of African society, the duty-oriented responsibility of African ethics stresses that the performance of duty is induced by consciousness of needs rather than rights. People fulfil and ought to fulfill their duty towards others and community because they are the community - “I am because we are, and because we are therefore I am”. Duty-oriented responsibility stands opposite to “commonsense morality” of the liberal political theory that distinguishes between supererogation—i.e., an act beyond the “call of duty”—and obligatory moral duty. The argument follows that a morally good act ought to be performed even when it is not obligatory. As members of the human family, every agent has a moral responsibility to contribute to the improvement of a structure that produces injustices, even in the absence of wrongdoing. Such responsibility naturally requires taking a positive action and goes beyond not harming.

Along the duty-oriented notion of African ethics, we draw **three key elements of looking at responsibility** that would help us fill gaps in the conventional liability regimes. Our arguments do not disregard the relevance of the conventional liability regimes and enforcement mechanisms. Rather, we seek to strengthen them by pointing out another way of looking at responsibility that ought to inform the contemporary justice system. Therefore, our proposal here is applicable only to cases of structural injustice and not to other form of direct rights violations for which the conventional liability model - proof of causation and intent - are realizable. Our propositions are:

First, **responsibility should emanate from a sense of membership in a community** (at a national and global level), beyond positive law. Structural injustice and human rights risks in the digital space and beyond are best addressed through collective and cooperative involvement of all actors with a consideration to improving the unjust situation in the community. This way, responsibility emanates from participation in the structure that produces unjust outcomes and that agents taking part in and benefiting from the structure are obliged to contribute to its transformation.

Second, such **responsibility must be seen as an obligation to make a difference**, even though the extent and magnitude of responsibility would vary with the power and leverage one has over the digital structure and beyond. In this sense, responsibility is independent from responsibility for wrongdoing or illicit intent. The responsibility lies in a duty to positively contribute to the improvement of unjust circumstances. Duty in this sense is not necessarily correlated to rights for which duty-holders are identified and held legally responsible. Neither is it tied to the mental state of intent or awareness of the consequence of one's act and causal relation between the act and harm. It is more in the sense of obligation expected from those in possession of power, leverage and interest to make a difference. If those in power do not feel obliged, it is their failure to live up to their obligations to improve unjust circumstance, given their power, leverage or interest. Hence, moral and legal responsibilities demand that risks of structural nature merit exceptional treatment, in particular the conventional parameters of liability, intent and proximate cause, should either be taken loosely or disregarded.

Third, if agents are part of the community (national or global) and hence responsible to improve the unjust situation in their community despite a lack of wrongdoing, then it logically follows that the **responsibility is a positive duty to improve** the situation. Such a form of responsibility requires going beyond preventing harm and what is conventionally obligatory through positive action. This raises several questions that are too broad to cover here, such as how do we determine what improvement is and who decides what improvement is? Briefly put, in this particular context, positive change to victims' access to meaningful remedy when injustice happens is the primary concern that would need an improvement. Since the victims are the agents with the primary interest in the improvement of the situation, the "state of

improvement" should be determined by the victims through broad communal participatory engagement. The other agents, such as corporations, states, CSOs, and/or scholars would then cooperate and collaborate in the realization of the "state of improvement" determined by victims.

For this to happen, it is necessary to think of responsibility beyond individually focused causation and intent based liability for injustice. The proposed responsibility perspective could be fostered in three ways: 1) As a moral standard, individual agent's (institutional and non-institutional) behavior must be oriented along communality with a consciousness that the agent's action and decision impact beyond the individual actor and transcend boundaries and generations. 2) Create a permissive environment for such perspective to inform regulatory efforts including policy decisions and legislation at the national and international levels. 3) Reimagine/rethink judicial decision-making procedures in cases of large-scale global problems with structural nature. Such rethinking would require overcoming hurdles for victims created by the established conventional paraments of liability – i.e., intent and causation.

The Notion of African Ethics Manifested in Key African Institutions

The presented perspective assists in theorizing how centering local ethical epistemologies such as the African ethics of duty would introduce an alternative viewpoint to fill gaps in the conventional regulatory regimes. Framing responsibility from a duty-oriented communal responsibility angle would alleviate challenges that come with delocalization. By fostering cross-cultural understanding of responsibility, the proposed perspective expands the horizon of responsibility for injustice (or access to justice) and by that expands ranges of local remedies and strengthen their stance given the cultural, psychocultural and geographical proximity to the victims of injustice and the harm materialized. This claim may rightly be questioned for reasons such that many African nations inherited legal and judicial systems from the colonial era which lack African ethics underpinnings. Beside the path-dependent character of the historical genesis of many African constitutions, there are legal and institutional mechanisms that have taken up the notion of African Ethics in present-day legal and policy document and have become "living documents" in key policy institutions. The most prominent example is the Banjul Charter of which implementation is overseen by the African Commission on Human and

People’s Rights. The Charter’s preamble asserts that member states’ observance of the concept of human and peoples’ rights should be inspired and characterized by **their tradition and values of African civilization**. Further, the African value of duty-oriented responsibility is stipulated under Article 27(1) of the Charter that subjects every individual to a duty towards family, society, state and international community. As a binding international instrument, the Charter obliges member states to shape their judicial, legal and other institutional frameworks accordingly. Hence, states would use these provisions as a steppingstone to reformulate their national responsibility parameters (for structural injustice) along the African ethics of duty. The African Ethics notion as stipulated in the Banjul charter might contribute to decreasing the burden of proof of narrow-causation and intent by victims of structural injustice, it eases victims’ time and resource intensive struggle to bring evidence to move cases abroad. The communal perspective incentivizes agents to take due levels of care, not just to prevent harms but solve harms that are not strictly attributed to them but are within their capacity to solve.

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* *Kebene Wodajo and Isabel Ebert, presenting ideas from our paper co-authored with Thierry Ngosso Institute for Business Ethics, University of St. Gallen*

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