Africa’s Digital Sovereignty: Elusive or a Stark Possibility through the AfCFTA?

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The digital acceleration attributable to COVID-19 served an often forgotten tale of the digital divide, acutely manifest in Africa, owing to the large population on the continent living without access to the benefits of digitization. The Continent has not been spared from the elitist technological domination of the West bounded in the narratives of techno-solutionism and saving. This, alongside the constant struggle for influence, power exertion and domination in the digital space by big technology companies has been a risk that has been referred to as digital colonialism.

As alarm on issues digital colonialism are habitually amplified in academia, actions by African governments either through crafted state policies or inactions alike at the regional level have so far not inspired confidence in this new fight for technological domination of the continent. Unremitted signatories to the 1991 African Union Convention on Cybersecurity and Data Protection,

otherwise known as the Malabo Convention, is one such example. But perhaps, therein lay hope in light of the fact that there is a proposal within the African Continental Free Trade Agreement (AfCFTA) for an e-commerce protocol. This then raises the question, can the AfCFTA and/or Regional Economic Communities (RECs) help reset the balance of domination in the changing architecture of power between states and tech behemoths in the attainment of digital sovereignty in Africa?

Undoubtedly, treaty adherence in Africa is marred in deficiency in political will, as well as by multiple and overlapping membership to trade agreements, RECs progressing at different pace, insufficient competitiveness, economic transformation, industrialisation and production diversification.

Variations of Sovereignty to political and non-political entities

Whilst sovereignty has traditionally been the purview of Nation States, emergence of digital technologies is deconstructing that notion thereby molding 'new actors' such as indigenous communities, civil society organizations, individuals and [thinly] private entities who have sought to exert control in new forms. The notion of individual and Indigenous communities' technological sovereignty is embedded in subaltern perspectives of countering big tech hegemonic power through the assertion of various modes of autonomy interalia: control over the collection, ownership and application of data, advocacy for free and open-source software, encryption tools, community networks and privacy. Private entities on the other hand have centralized their services creating chokepoints on the internet stack marking themselves as gateways to the internet consequently upending societies and democracy ideals.

Characterizations of digital sovereignty as advanced by governments is premised on Westphalian understanding of sovereignty. It is currently situated in geopolitical tensions of control, legitimation and autonomy of States to counter-balance technological control by big tech or foreign countries and to seek control over one's data and telecommunication networks. Synonymous to the term albeit with slight differentiated meanings are: internet sovereignty, data sovereignty and technological sovereignty. Nation allies may also be sought using the premise of digital sovereignty, often, by dominant States such

as the USA through its Clean Network Program or China's Digital Silk Road initiative.

The dire situation from assessing Africa's digital sovereignty sends one on a frail end of cautious optimism and an endless sense of despair. It is common knowledge that China is Africa's top financier with a large chunk of the latter's telecommunication infrastructure and smart phone provider being rendered by Chinese institutions. Critical infrastructure needed to ensure the continent's connectivity, namely submarine cables, terrestrial fibre-optic networks and data centers are primarily rendered by dominant foreign market players. Laden with colonial configurations, when it comes to data traffic in African countries, practically all international traffic goes to servers based in the US (56%) and Europe (32%). Such dependencies risks putting states autonomy into jeopardy yet countering such imbalance will be an uphill task.

As the global North sets in motion negotiations for e-commerce multilateral rules at the WTO, existing asymmetries of power will swing the rules in their favour to the detriment of the global South. This in contrast affords Africa an opportunity to develop its e-commerce protocol on terms which prioritize the collective interests of the Continent.

Concluding an E-commerce protocol prior to World Trade Organization's e-commerce multilateral rules aids cementing Africa's position on e-commerce rules in the global context as expressed in a statement of refusal to negotiations on binding rules on digital trade. Actualization of African Union's Digital Transformation Strategy may draw nigh with the inexistence of a concluded preferential trade agreement with e-commerce commitments to a third-party state with Africa- save for Mauritius and Morocco. But fissures to this 'solidarity' are visibly manifested in expressed interests by six countries to the Joint Statement Initiative on e-commerce negotiations and the proposed Kenya-USA Free Trade Agreement constituting e-commerce provisions.

Yet, with no acquis on e-commerce for regional economic communities, how shall this path be chartered?

Suggested proposals-Capitalising on regionalism

To make any gains on this front, African countries must consider power delegation or 'sacrificing' national sovereignty to regional economic communities they ascribe to, based on functional imperatives. Retraction of any such power should be possible, but prohibitively costly, so as to lock in desired policy outcomes. As our efforts in regionalism have demonstrated, this will by no means be an easy endeavor. Why? Despite acquisition of political freedom from colonial rule, our economic sovereignty has been ensnared in predatory policing-IMF conditionalities for cash strapped economies is one such example. Further, inherited colonial inequalities have been maintained and developed by the ruling classes who wield control over their subjects. This hold to power has stalled regional integration on the continent through the advancement of overt nationalism over regional development.

At the core of digital sovereignty is a gnawing growth of mistrust between states and usurpation of power by multinational corporations which governments seek to control. As the plethora of issues plaguing e-commerce has been argued to make the WTO an unfavourable venue for leading the discussions, with plurilateral agreements taking centre stage, it behoves Africa's States to make a joint effort to counter existing data inequalities. This need for collective pooling of strategies, efforts and resources is crucial owing to the integration of domestic and international law and policy abounding from digital technologies. Kenya keeping "free data flows" with the USA further entrenches the latter's power asymmetry since such flows grant USA-based technology companies lead in profiting from data collection and processing from the former. Whilst solo projects such as Nigeria's and South Africa's Cloud Policy being a step in the right direction, funding, resourcing such activities and competing with established cloud providers such as Amazon Web Service or Microsoft Azure on long term will prove to be an arduous task. To be clear, I do not argue that national digital development should not be sought after but rather, any emancipatory stratagem by African states, as most are far behind capacity, should acknowledge that technology-led solutions are not autonomous of broader relations of production and complex political economy geographies.

The AU Extraordinary Summit in December 2020 decided that e-commerce negotiations should be included in Phase II, in light of the expansion and growth in e-commerce across the continent during the COVID-19 pandemic. In so doing

the Assembly urged Member States to critically review approaches that are being made to them by bilateral partners to enter into bilateral e-Commerce legal instruments with them in order to ensure that Africa is able to negotiate and implement an AfCFTA Protocol on e-Commerce where Africa has full authority on all aspects of e-commerce such as data and products being traded under e-commerce, and to promote the emergence of African owned e-Commerce platforms at national, regional and continental levels as part of our preparations for the negotiation of an AfCFTA Protocol on e-Commerce. Since the Protocol will be an integral part of the AfCFTA Agreement, both AfCFTA's secretariat, enforcement institution and RECs institutions will play a crucial role in overseeing implementation of the Protocol.

Whether acclaimed as power reallocation or transfer of sovereign powers, appreciation of either sub-regional policy at the RECS level is paramount to counterbalance existing global market hegemonies, besides if you are a small country, you will never have a full sovereign technology stack. National ICT policies will equally need to be revised in light of this cooperation noting that the content of such policies should help realise the AU Digital strategy and Agenda 2063. It would be prudent to state that the promotion of this model is hinged on the predatory model of trade that the global north is relentless in upholding.

To bolster Africa's attempts at digital sovereignty, the AfCFTA E-commerce Protocol should embed principles of supremacy of community law, principle of direct effect and the principle of direct applicability. Further, noting our stratified levels of economic growth nuanced special and differential treatment qua variable geometry should be employed. Continuing lacklustre performance by RECs must be thrown into abeyance if progress is to be made on this area. Partner States must be willing to elevate community laws above national laws in the text of the protocol and complimentarily member states legal system should adopt this strand through legislative fiats. Regional courts and tribunal tasked with interpreting AFCFTA's instruments or REC's adjudicatory bodies ought to uplift the international status of the e-commerce protocol rejecting any attempts by partner states to cite conflicting national legislation as excuses for breaching the treaty. These same judicial bodies must proclaim that the e-commerce protocol takes precedence over incompatible national legislations and must emphasise that the protocol can be invoked by individuals before

national courts thereby establishing a doctrine of direct effect of community law. Needless to say, to maintain this primacy of laws, national judicial reception of community law should follow suit for their acceptance of direct application of community law and adoption of jurisprudence from RECs adjudicatory legitimises the authority of community law in partner states.

Alluding to the legitimacy of transfer of sovereign powers to an international organ being drawn from a partner states constitutional order, it is anticipated that there will be a divergence of opinion on the extent of primacy of community laws over national constitutions. As demonstrated in the East African Community, national courts have put up a willed resistance and rejection of the primacy of Community law over national constitutions. The EACJ in similar fashion has exercised restraint in declaring community law's supremacy over national constitutions noting the political reactions that would accompany seemingly sovereignty stripping judicial pronouncements.

The mutability and fluidity of ideological positions in Pan-Africanism will most certainly prevail in the quest for domination in the digital domain. Once again, visions of Pan-Africanism will be put to test in Africa's new digital scramble and partition. And because technology is always political the poor political vision exhibited by the current majority of Africa's political class our likelihood of being an immiserated digital population is at an all-time high.

Conclusion

In sum, the very substance of the e-commerce protocol will be crucial to aid development in the continent whose design should pay heed to small member states infant telecommunications industries. Because Africa's digital landscape does not set terms of engagement in ongoing geo-political tech tensions, the Continent's status is one subject to a power grab since its political leaders are at the moment, more concerned in making economic headways. Such headways will be made often with autocratic regimes giving economic concession at the lowest bid. At the international fora, Africa should consider strategic partnerships with state allied with its visions, exude meaningful position and participation in initiatives like the OEWG and seek to reconstruct data as an extension of human personalities.

In this essay I reflect on the question: What do we make of Africa's States' sovereignty whose economies have been reordered/structured around imperial relations of domination, whose larger reigns of social coexistence reeks of neoliberalism and whose citizens are always served the short end of the stick in the access or provision of social welfare services? Not to belabour the point, our increasingly datafied lives promising 'enormous' economic value require renewed governance, effort and thinking most pertinently from African States lest what we have as statehood is annihilated on the altar of technological imperialism.

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