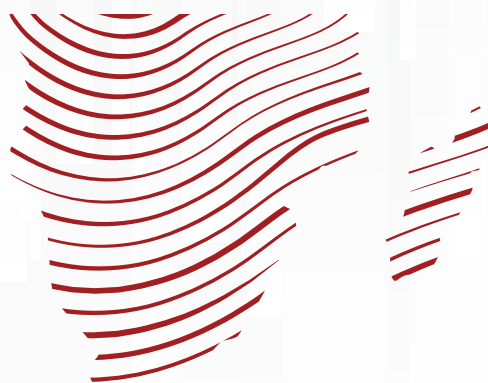




**DECOLONISING SEXUAL
AND REPRODUCTIVE HEALTH
AND RIGHTS:**



**Laying a foundation for
an African-Centered Approach**

September 2022



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A PAPER PREPARED FOR Ahaki

By Prof. Charles Ngwena,
Professor of Law, LLB (Wales), LLM (Wales), LLD (UFS), Barrister-at-law,
Center for Human Rights,
Faculty of Law,
University of Pretoria.

Abstract

This paper seeks to lay a foundation for developing a legal method for implementing decolonisation of law and human rights as they apply to sexual and reproductive health in the African region. It explores decolonisation as theory and praxis and adopts coloniality as a shorthand for the effects of colonisation. It is argued that decolonisation should be anchored in inclusive equality in ways that put a spotlight on intersectionality. The historical criminalisation of abortion is used to illustrate the coloniality of African abortion laws as well as make a case for decolonisation.

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Introduction

European colonisation of the African continent, which began in the latter half of the nineteenth century, has been the most enduring colonisation of the continent, far surpassing the earlier intrusions by the Greeks, Romans and Arabs.¹ The partition of Africa into Westphalian states by Belgium, Britain, France, Portugal, Spain and Italy during the *Scramble for Africa* following the Berlin Conference of 1884-1885, culminated in a profound reconfiguration of Africa with Europe taking direct control of nearly the entire continent's economy and political administration.² It marked a new type of colonialism and entanglement of the continent with a status-subordinating system that gave validity only to the Western world. The system continues manifesting even today in metamorphosing forms.

As a system of power, colonialism has clearly outlived the colonial state. In his seminal work, *The invention of Africa*, Mudimbe speaks to the profound discursive impact of colonialism on the continent. He says:

❖ *The scramble for Africa, and the most active period of colonization, lasted for less than a century. These events, which involved the greater part of the African continent, occurred between the late nineteenth and mid-twentieth centuries. Although in African history the colonial experience represented but a brief moment from the perspective of today, this moment is still charged and controversial, since, to say the least, it signified a new historical form and the possibility of new types of discourses on African traditions and cultures ... Because of the colonizing structure, a dichotomizing system has emerged, and with it a great number of current paradigmatic oppositions have developed.*³

1. *LLB, LL.M, LL.D, Barrister-at Law, Professor, Centre for Human Rights, University of Pretoria. On Greek colonisation, see: ME White 'Greek colonisation' (1961) 21(4) *The Journal of Economic History* 443-454; On Roman colonisation, see: L Cilliers 'A perspective on the rise and fall of Roman North Africa, 2nd-4th Century AD' (2006) 4(2) *International Journal of Humanities* 51-56; On Arab colonisation, see: B Brett 'The Arab conquest and the rise of Islam in North Africa' in JD Fage (ed) *The Cambridge History of Africa* (Cambridge University Press, 2008) 490-555.
2. S Michalopoulos & E Papaioannou 'Contemporary shadow of the Scramble for Africa' in S Michalopoulos & E Papaioannou (eds) *The Long Economic and Political Shadow of History*, Vol 2 (CEPR PRESS, 2017) 50-66; S Ocheni & BC Nwankwo 'Analysis of colonialism and its impact on Africa' (2012) 8(3) *Cross-cultural communication* 46-54. The exception to direct political and economic control by European powers is Ethiopia which successfully resisted colonisation by Italy. See, R Jonas *The Battle of Adwa: African victory in the age of the Empire* (Belknap Press of Harvard University Press, 2011).
3. VY Mudimbe *The invention of Africa: gnosis, philosophy and the order of knowledge* (Indiana University Press, 1988) 4.

Mudimbe is reminding us about the enduring effects of colonisation. The colonial period was much more than colonialists dominating the continent to exploit colonial territories.⁴ It was also about organising and transforming the continent's cultures into fundamentally European constructs. Collectively, these processes produced a colonising experience and a discourse of colonialism in which the cultures of the peoples of Africa were 'integrated' into Western histories and epistemologies.⁵ The route to integration was anything but dialogic. Integration was in fact a discursive 'redesigning' through a discourse of power and an economy of ideological knowledge about a universe in which Africa and Africans were placed at the nadir.⁶

The 'dichotomising system' and the 'paradigmatic oppositions' Mudimbe is alluding to are far-reaching. They manifest in law and policy, in hierarchies of geo-political power, trade, health, labour, and generally in all facets of African lives. The 'new historical form' and the 'new type of discourses' imprinted on Africa by colonialism can be explicated through the grammar of 'coloniality' – a term coined by decolonial theorists to name the persistence of colonialism even after flag independence.⁷ Coloniality implicates colonialism as a system of power that has survived formal decolonisation.

Against this backdrop, the call to decolonise — which is driving many social movements and giving impetus to critical scholarship on the African continent and beyond — is not a new call. Rather, it is a continuation of an unfinished struggle for freedom informed by the realisation that it is Not yet Uhuru.⁸ The effort to reclaim as well as assert the sovereign power of Africans to self-determine in the aftermath of the invention of race, transatlantic slavery, colonialism in its mutating forms. Imperialism and global capitalism, encapsulates the project of decolonisation in an African context. It is an ongoing emancipatory gesture to contest coloniality and reverse its subordinating effects.

This paper seeks to reflect on how the discourse of decolonisation can be used to develop juridical theory for respecting, protecting, promoting and fulfilling the sexual and reproductive health and human rights of Africans in ways that speak to inclusive equality. By inclusive equality, We mean a holistic approach to equality in order to address the universal human quest for meaningful equality which goes beyond mere formal pronouncements on equality we find inscribed in virtually all domestic constitutions and international human rights instruments. Inclusive equality enjoins society to develop and implement normative standards and institutional frameworks for ensuring not merely formal equality but crucially, substantive, lived or de facto equality. It embraces a vision of equality in which cycles of systemic equality and social exclusion are broken through a transformative process that requires institutional and

4. *Id.*, at 1.

5. *Id.*, at 1-5.

6. C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (Pretoria University Law Press, 2018) 218.

7. SJ Ndlovu-Gatsheni *Decolonisation, development and knowledge in Africa: turning over a new leaf* (Routledge, 2020) 31.

8. We have borrowed this metaphor from Jaramogi Oginga Odinga *Not yet Uhuru: the autobiography of Oginga Odinga* (East African Educational Publishers, 1967). 'Uhuru' means freedom in Swahili.

social changes.⁹ We can think of the normative content of inclusive equality as made up of four intersecting dimensions, namely:

- (a). A recognition dimension to combat stigma, stereotyping, prejudice and violence so as to recognise the dignity of human beings and their intersectionality;
- (b). A participatory dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society;
- (c). An accommodation dimension to make space for difference as a corollary of the diversity of human beings; and
- (d). A fair redistributive dimension to address socioeconomic disadvantages.¹⁰

The paper is divided into three parts. The first part, which is the introduction, provides an overview of the paper and also sets the main arguments. The second part explains the discourse of decolonisation, framing it as both theory and praxis. It expounds on decolonisation as critical social theory for understanding the harmful legacy of colonialism and charting a remedial way forward. We caution against essentialist notions of decolonisation that merely beckon to the past in a bid to retrieve a pure Africanness as such an effort is fatally flawed mainly because it ignores the dynamics of African time. We draw on Achille Mbembe¹¹ to explain African time and on Stuart Hall¹² to argue that decolonisation should be historically and culturally situated.

To speak to the present, decolonisation should not be conflated with de-Westernisation. Rather, decolonisation should muster a capacity for reconciling with African identifications that are not static but are always in motion and subject to radical transformation on account of entanglement with exogenous cultural influences. This requires reading the authenticity of African identifications against the grain as incomplete identifications lodged in contingency and always in the making.¹³ The reading should capture not just a backward movement in which the past informs the present and the future. More importantly, to avoid the pitfall of closed, ahistorical, essentialised African identifications, it should also capture a forward movement so that it is the present and

9. C Sheppard *Inclusive equality: the relational dimensions of systemic discrimination in Canada* (McGill-Queen's University Press, 2010) 4.

10. The four dimensions were articulated by the Committee on the Rights of Persons with Disabilities in General Comment 6 on equality and non-discrimination CRPD C/GC/6 (2018) para 11.

11. JA Mbembe *On the post-colony* (University of California Press, 2001).

12. We draw mainly from two seminal essays by Stuart Hall 'Cultural identity and diaspora' in J Rutherford (ed) *Identity: Community, culture, difference* (Lawrence & Wishart 1990) 222-237, and 'Who needs "identity"?' in J Evans & P Redman (eds) *Identity: A reader* (Sage & Open University 2000) 15-30.

13. Ngwenya, *supra* note 6, at 26-40.

the future which continuously reveal African identifications in their multiplicities.¹⁴

The third part of the paper explores the theoretical and practical implications of decolonisation for sexual and reproductive health and rights (SRHR). This section focuses mainly on the stigmatisation of abortion in law or policy as pivots for discussion. It implicates the criminalisation of abortion as the effect of coloniality. An overarching premise of this part is that whilst race has historically been the more visible site for decolonisation, the sphere of sexual and reproductive health shows that coloniality transcends race to include gender and sexuality among other domains. Though race was foundational to the colonising project, the dichotomising system created by colonialism

Ultimately, the paper seeks to lay a foundation for developing juridical method for implementing decolonisation of law and human rights. It is argued that when deconstructed, decolonisation can be juridically understood as an effort to achieve inclusive equality in ways that put a spotlight on intersectionality.¹⁵ Intersectionality is a conceptual resource for understanding the interstices of the coloniality of power as a matrix of domination and homogenisation whose effects are complex and cross-cutting.¹⁶

It provides us with a key juridical method for implementing a decolonial project in the sexual and reproductive health field on account of its attentiveness to the equal dignity of every person and historical community and discursive openness to dialogue from the perspective of different epistemic traditions.¹⁷ Intersectionality is also a conceptual resource for guarding against essentialist discourses of decolonisation which deny the plurality and agency of Africans by requiring conformity with an imagined authentic past Africanness.

From the outset, it is conceded that a major difficulty with writing about Africa is its sheer complexity. Africa is made up of diverse cultures and multiple ancestries that cannot be homogenised.¹⁸ Regardless, it is possible to name Africa as a historical category with historical communities named as African in colonial, anticolonial and contemporary decolonial discourses.¹⁹ Whilst references to Africa and African in this article risk essentialising peoples of the continent some of whom may not identify as African, the intention is not to generalise. 'Africans' is used contextually as a political category to refer to Black peoples of the continent. As a social group, they share common history of slavery, colonialism and the experience of racial inferiorisation, oppression, exploitation, marginalisation, disempowerment, cultural imperialism, and violence.

14. *Id.*, at 26-40.

15. S Atrey *Intersectional discrimination* (Oxford University Press, 2019).

16. S Tamale *Decolonisation and Afro-feminism* (Daraju Press, 2020) 62-79; Ndlovu-Gatsheni, *supra* note 7, at 21.

17. *Id.*, at 74.

18. Ngwena, *supra* note 6, at 145-150.

19. Tamale, *supra* note 16, at 10-11.

Decolonialisation As Critical Social Theory

The task of any social theory is to interpret and explain social arrangements.²⁰ Social theory should have the capacity to implicate power and explain its architecture and modalities in dominant discourses, institutions and social relations so as to question the truth of authority. Where there is social conflict, social theory serves as a conceptual tool for going beyond explanation and critiquing to embrace transformation as the ultimate goal.

Karl Marx famously said: 'Philosophers have hitherto only interpreted the world in various ways; the point, however, is to change it'.²¹ The project of decolonisation is not simply to understand coloniality but to address its subordinating effects and transform society. The question is whether there is a theory of decolonisation. Do we have at our disposal a theory for understanding and implicating coloniality in order to guide action? This question can be answered affirmatively but without claiming that there is a grand, unified theory of decolonisation.

Conceptually, decolonisation can be described as a transformative social theory aimed at understanding colonialism and countering its continuing status-subordinating effects to achieve pluriversality through a counter-discourse and praxis. In describing it as theory, it is not implied that decolonisation constitutes a grand theory. If it can be accepted that the work of grand social theory is to explain a particular social phenomenon at the highest level of abstraction and in an all-embracing manner so that it is universally applicable, then, decolonisation does not purport to be such a theory.²² Decolonial theory does not claim to utter the universal. It is not a theory for achieving Truth and Universality as pluriversality is its vision and goal.

Unlike grand theory, decolonial theory is not about abstraction and disaffirming subjectivity. Inherently, it is incompatible with the notion of a unified abstract theory as it seeks to address the concrete. It is abstraction that has historically shielded institutionalised norms from democratic scrutiny and universalised the subjective

20. K Allan *Contemporary social and sociological theory: visualizing social worlds* (Pine Forge Press, 2006).

21. K Marx *Theses on Feuerbach* (1888).

22. M Fineman 'Challenging law, establishing differences: the future of feminist legal scholarship' (1990) 42 *Florida Law Review* 25 at 27-30; M Oliver *Understanding Disability: From Theory to Practice* (St Martin's Press, 1996) 130.

experience of dominant Eurocentric, Christian-centric, heteropatriarchal and capitalist values as objective values as happened in the making of the colonial state.

Rather, like feminism, it seeks to candidly acknowledge and integrate subjectivity into politics and law. This is necessary not only for challenging and countering historically privileged interests and assuring a redress of power in an imagined alternative world that allows what has been excluded, devalued or undermined to be recognised and included. In this sense, decolonial theory can serve as a legal and human rights method that puts under the spotlight issues of power with a view to radical change. It is a result-orientated discourse, fusing theory and practice to achieve certain ends.

The theorisation of decolonisation must necessarily be constructed on the back of a long history of debate about resistance against colonialism which began from the time of 'discovery' and conquest in different parts of the world.²³ Any decolonial theory should be attentive to the lived time. It should remain open to democratic iteration as it must necessarily shun the homogenising tendencies and fundamentalism that constituted colonial power.²⁴ Its multivocal nature is a resource for giving concrete expression to heterogenous epistemic spheres and multiple subjectivities in recognition of divergent colonial experiences across different geopolitical spaces. Colonial practices in Africa, Asia, the Caribbean, the Middle East and the Americas have axes of similarities as well as differences. Even within Africa, no two colonialisms have been the same.

Therefore, there is no single decolonial theory but a plurality of theories that speak from convergent as well as divergent experiences which unite in critiquing a subordinating Eurocentrism.²⁵ The epistemologies, cosmologies and ontologies that inform decolonial theory cannot be homogenised as they do not converge towards a single point. Rather, like feminism, decolonial theory can be described as a repertoire of theories, schools of thought, emancipatory strategies and praxis that at times are contradictory but whose confluence or rallying point is the project of achieving liberation from status-subordinating discourses that have their genesis in the colonialism founded by Europe in the fifteenth century. Also, like feminism, decolonial theory can be likened to a theory of 'middle range' falling somewhere between telling stories and grand theory.²⁶

23. For example, in a Latin American context, the debates in 1550-1551 between Bartolomé de la Casas and Juan Ginés de Sepúlveda about the morality of Spanish colonialism in the Americas, provide an historical site for the development of theory for decolonisation. See, R Blanco & ACT Delgado 'Problematizing the ultimate Other of modernity: the crystallisation of modernity in international politics' (2019) 41(3) *Contexto Internacional* 599 at 607-613.

24. R Grosfoguel 'The epistemic decolonial turn: beyond political economy paradigms' (2007) 21(2) *Cultural Studies* 211-223 at 212; Ndlovu-Gatsheni, *supra* note 7, at 38.

25. Ndlovu-Gatsheni *id.*, at 17.

26. Fineman, *supra* note 22, at 27-30. Fineman borrows the term 'theory of middle range' from the sociologist Robert Merton. See, R Merton *On theoretical sociology: five essays, old and new* (1967) 39, 68.

There is no unified global decolonisation project not with standing global and regional alliances. Each generation, community, location and school of thought will tell its own story and define its own decolonial project. For Africans, in the 50s and 60s, when African nationalist movements were fighting for independence, colonialism was an episode, and so was decolonisation.

Colonialism had a founding moment and was supposed to have an endpoint. It was geographically bound as it spoke to reversing power relations in a territorial entity. In popular imagination, decolonisation meant achieving the end of colonial rule. The act of reversing territorial occupation and direct governance of Africa by European colonial powers and restoring the power to govern to Africans consecrated decolonisation. Symbolically, it was signalled by the lowering of the imperial flag, the raising of the national flag. Juridically, it was marked by the adoption of a constitution. However, these symbols and juridical imprimatur only served to create the 'myth' of decolonisation.²⁷

At the time of independence, Africa was already entangled in a global system where the colonial power dynamics located it at the receiving end of ongoing exploitation and domination by Europe and America, marking a shift from global territorial colonisation to global coloniality.²⁸ Today, decolonisation means continuing with the unfinished business of decolonising Africa. As the historian, Sabelo Ndlovu-Gatsheni, puts it in his book, *Decolonisation, development and knowledge in Africa*, in the same way that colonialism represents a radical long-standing turn in the history of the West, equally decolonisation is to formerly colonised peoples a radical long-standing turn to undo colonialism and its effects and create a new humanism.²⁹

The decolonial turn cannot be understood as only directed at undoing the ideology of race. This is not to underplay the place of race in colonisation. Of course, the colonial world was founded and sustained through a geopolitical order whose foundation was race.³⁰ The biocentric codification of epidermal differences between the conquerors and the conquered into calibrated racial differences which was developed in the fifteenth and sixteenth century has become the racial *longue durée*.³¹ It has far outlasted slavery and colonisation in which it established its initial rationale. Rather, looking beyond race gives us a fuller picture of the multifarious nature of the tentacles of colonialism which extended to all the facets of the lifeworlds of the indigenes. In recognition of the all-encompassing nature of colonialism, Ndlovu-Gatsheni argues:

27. SJ Ndlovu-Gatsheni *Coloniality of power in postcolonial Africa: myths of decolonization* (CODESRIA Book Series, 2013).

28. R Grosfoguel 'Colonial difference, geopolitics of knowledge and global coloniality in the modern/colonial capitalist world-system' (2002) 25(3) *Review* 203-224.

29. Ndlovu-Gatsheni, *supra* note 7.

30. W Mignolo 'The enduring enchantment (or the epistemic privilege of modernity and where to go from here)' (2002) 101 *South Atlantic Quarterly* 927 at 934.

31. S Wynter 'Unsettling the coloniality of being/power/truth/freedom: Towards the human, after man, its overrepresentation – An argument' (2003) 3 *CR: The New Centennial Review* 257 at 263; H Winant 'The dark matter: race and racism in the 21st century' (2015) 41 *Critical Sociology* 313 at 316-318; Ngwena, *supra* note 4, at 77.

◇ [D]ecolonization must be an expansive liberation initiative, dealing with psychological, aesthetic, ideological, epistemic, institutional, social, economic, political, cultural, and other aspects of African life. It must be restorative of what was lost and inventive of the new.³²

Writing from an African feminist perspective, Sylvia Tamale, echoes Ndlovu-Gatsheni, and posits decolonisation as entailing the task of ‘dismantling several layers of complex and entrenched colonial structures, ideologies, narratives, identities and practices that pervade every aspect of our lives’.³³ ‘Coloniality’, a term coined by Latin American scholars, captures the pervasiveness of colonialism. It brings to the grammar of decolonial theory an incisive discursive tool for unveiling the myth of formal decolonisation. Nelson Maldonado-Torres explains coloniality in this way:

◇ Coloniality is different from colonialism. Colonialism denotes a political and economic relation in which the sovereignty of a nation or a people rests on the power of another nation, which makes such nation an empire. Coloniality, instead, refers to long-standing patterns of power that emerged as a result of colonialism, but that define culture, labor, intersubjective relations, and knowledge production well beyond the strict limits of colonial administrations. Thus, coloniality survives colonialism. It is maintained alive in books, in the criteria for academic performance, in cultural patterns, in common sense, in the self-image of peoples, in aspirations of self, and so many other aspects of our modern experience. In a way, as modern subjects we breath coloniality all the time and everyday.³⁴

Maldonado-Torres underlines the importance of not understanding coloniality as something that happens after colonialism but rather a power dynamic and effect that began at the time of ‘discovery’ and conquest.³⁵ It is then that new forms of domination and subordination tied to capitalist exploitation were borne. It is also then that the effort to decolonise began with the refusal by the indigenes. Thus, coloniality should not be understood as a synonym for colonialism or even neocolonialism as it is much more. Coloniality implies moving away from treating colonialism as an episode. Decoloniality entails delving deeper into the inner recesses of colonialism, first, to reveal its long tentacles and effects as an organising principle and an evolving discourse sustained by discrepant global power and, second, to advance a transformative counter-discourse of decoloniality.

The project of advancing a transformative counter-discourse to undo coloniality requires situating decolonisation in a cultural and historical context aware of the dynamic of African time and the multiplicities of African identifications. When seeking

32. Ndlovu-Gatsheni, *supra* note 7, at 12.

33. Tamale, *supra* note 16, at 20.

34. N Maldonado-Torres ‘On the development of coloniality of being: contributions to the development of a concept’ (2007) 21(2/3) *Cultural Studies* 243.

35. *Id.*, at 243.

to contest coloniality, what serves us better is not an archaeological approach to decolonisation – simply beckoning the past to inform the present – but a historically conscious concept of decoloniality. Using archaeology as our pointer towards decolonised social, economic or political identifications is tenable only if African time is not arrested in linear segments and denied its multiplicities and simultaneities, presences and absences.³⁶ Achille Mbembe urges us to eschew the falsity of a universalised and abstracted temporal normative gaze so that we think of African time as made up of entangled temporalities with contradictory significations to different actors. Explaining African time, he says,

❖ *This time of African existence is neither a linear time nor a simple sequence in which each moment effaces, annuls and replaces those that preceded it, to the point where a single age axis exists within society. This time is not a series but an interlocking of presents, pasts, and futures that retain their depths of other presents, pasts, and futures, each age bearing, altering, and maintaining the previous ones.*³⁷

To engage with entangled temporalities, the interpretive horizon of a decolonial prism should avoid positing African identifications in neat and severable divisions between ‘precolonial’, ‘colonial’ and ‘postcolonial’ Africa. Such an approach to comprehending African time would be too simplistic. Neat periodisation renders the project of decolonisation vulnerable to fundamentalism and repressive communitarianism as it erases the hybridity of history and invisibilises the multiplicity of subjectivities, implying that African social formations have always converged towards a single point. In his work on identity, Stuart Hall reminds us that whilst the past is a necessary reference, it is not the only reference. It cannot simply be summoned as the decolonial lodestar as time has not stood still since Africa was first colonised.³⁸ African social, economic and political identifications that were extant when Africa and Africans were first colonised, can no longer operate within their originary paradigm for the simple historical reason that the old Africa is no longer there.³⁹

Equally, reckoning with Africa’s entangled temporalities means decolonisation cannot be equated with de-Westernisation.⁴⁰ Being wary of Western imperialism should not translate into cultural hermeticism that requires subscribing to a reductionist and monolithic view of culture as static, unitary, geographically bound and ethnically owned. To require Africans to renounce cultural influences from outside the continent diminishes rather than enhances their humanity. It reduces Africans to cultural automatons. Unsullied cultural communities are imagined communities that are not substantiated by history.

De-Westernisation compels Africans to deny their pluralities in favour of a de-historicised view of a pure African culture as a unique biometric or corporate identity in which Africans are so extraordinarily homogeneous as always to register the same cultural data and subjectivity. In the historical period Africans find themselves,

36. Mbembe, *supra* note 11, at 16–17.

37. *Id.*, at 16.

38. Hall, *supra* note 12, at 232.

39. *Id.*, at 232.

40. Ngwena, *supra* note 6, at 218–222.

cultural hybridity is real rather than notional as interaction with other cultures is a regular occurrence. Legitimate African concerns with oppressive or imperialistic Western epistemologies should still leave Africans with the autonomy to build of new commonalities with other cultures and hemispheric communities. Rather, as Ngũgĩ wa Thiong’o has argued, decolonisation is a project of ‘recentering’ Africans so that they can ‘see themselves’ in the archive in relation to themselves and other selves.

We ought, therefore, to concede that framing decolonised Africanness in terms of integral, ordinary and unified identifications, which were never there in the first place, is even less convincing today.⁴¹ History ‘contaminates’ cultures.⁴² African identifications are a product of deeply rooted and irrevocable effects of transculturation for which any theory of decolonisation must reconcile with. Africanness is ‘becoming and being’, something that is always in the making.⁴³ What serves us better is a theory of decolonisation that registers plural African identifications that are not static but fluid and metamorphosing to mark a transformed interval – an in-betweenness or liminality – between reversal and the emergence of something that was not there before including the emergence of new cultural and transcultural forms, or hybridity.⁴⁴

To register plural African identifications, decolonisation should avoid operating on a single axis of coloniality. To this end, it can avail itself of the theory of intersectionality as a resource for checking any essentialist excess in the theory and praxis of decolonisation. Intersectionality has an important place in mapping African identifications.⁴⁵

Whilst intersectionality has diverse roots, it surfaced mainly as a Black feminist critique of the abstracted or generic woman in American feminist theory to capture the interlocking nature of sex, gender and race as vectors of oppression.⁴⁶ As Shreya Atrey observes, its spread has been far-reaching.⁴⁷ Atrey highlights that intersectionality has developed into a theory with a capacity to speak to myriad systems of power and structures of domination in diverse contexts beyond sex, gender and race across locations.⁴⁸ For example, it has been appropriated by other historically marginalised social groups including disabled people, indigenous people, sexual minorities and gender minorities.⁴⁹

The Constitutional Court of South Africa in its application of the equality clause of the South African Constitution has used intersectionality. In *Mahlangu and Another v. Minister of Labour and Others*, it applied intersectionality to implicate the compounded unfair discriminatory impact of legislation that excluded domestic workers, who were

41. KA Appiah *In my father's house: Africa in philosophy of culture* (Oxford University Press, 1992) 174; F Kalua ‘Homi Bhabha’s Third Space and African identity’ (2009) 21 *Journal of African Cultural Studies* 23.

42. Kalua id. HK Bhabha *Location of culture* (Routledge, 1994).

43. Ngwena, *supra* note 6, at 26-30.

44. Hall, *supra* note 12, at 16.

45. Ngwena, *supra* note 6, at 20-21.

46. Atrey, *supra* note 15, at 34-35.

47. *Id.*, at 35.

48. *Id.*, at 35.

49. *Id.*, at 35.

mainly black women, from its social security protection ambit on the ground that they did not fit into a statutory definition of 'employees'.⁵⁰

At its foundation, intersectionality is an analytic method for ensuring inclusive equality. It acknowledges that individuals and social groups are made up of more than a single subjectivity and that in the workings of structural power, subaltern groups come under multi-layered axes of subordination simultaneously or in interlocking ways.⁵¹ Intersectionality is instructive for decolonial theory as it cautions against operationalising single axis of coloniality. It highlights that responsiveness to coloniality requires turning away from prescribing, as universally normative, a unified, totalising abstract decolonial theory in favour of the concrete and the particular.

Universalising the subjective experiences of ex-colonised social groups means holding them up as the objective experiences for all ex-colonised peoples. Such abstraction is the antithesis of inclusive equality. It only serves to promote false universalism as it has the effect of ignoring cleavages of difference, including varied histories and imbalances of power among historically subordinated groups.

50. *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24. S Atrey 'Beyond discrimination: Mahlangu and the use of intersectionality as a general theory of constitutional interpretation' (2021) 21(2) *International Journal of Discrimination and the Law* 168-178.

51. KW Crenshaw 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) 140 *University of Chicago Legal Forum* 139; KW Crenshaw 'Mapping the margins: Intersectionality, identity politics and violence against women of colour' (1991) 43 *Stanford Law Review* 1241; S Cho et al 'Toward a field on intersectionality studies: Theory, applications and praxis' (2013) 34 *Signs: Journal of Women in Culture and Society* 785.

Implication of Decolonisation for Sexual and Reproductive Health and Human Rights

The domain of sexual and reproductive health is an important site for decolonisation precisely because it carries the palpable imprint of coloniality. Colonialism was not just a racial and territorial project. It was also an epistemic project that systematically sought to silence indigenous knowledges in order to suppress African difference and heterogeneities.⁵² Colonisation of the global south succeeded in achieving the Europeanisation of the world.⁵³ Colonial discourses reordered Africa through the fiat of an exclusionary Eurocentric order that drew its impulse not just from racial hierarchisation but also from patriarchy, Christian-centrism, hetero-normativity, capitalism, militarism and imperialism as the normative pillars of a hegemonic modernity.⁵⁴

Among other prescriptions, the new order spawned laws and policies that regulated the sexual and reproductive moral economy of Africans, including criminalising abortion and homoerotic sexualities and stigmatising third genders. The irony should not be lost that, with a few exceptions, African states have maintained the order ostensibly on the grounds of protecting African culture and religions from Western decadence but at the cost of denying diversity in African subjectivities and depriving Africans of access to much needed health care.

The persistence of a colonially-founded moral order to regulate the sexual and reproductive economy of Africans implicates deep-seated coloniality which calls for decolonisation and epistemic justice. This section considers how rights and more specifically, human rights can be used as tools for decolonising the sexual and reproductive domain in one area – abortion. Abortion serves as an illustration only as the coloniality of African jurisprudence in the field of sexual and reproductive health is present in a wider range of sites. In using human rights as decolonial tools, it is important to be mindful of the coloniality human rights and their epistemic limits. It is, therefore, appropriate to begin with implicating the coloniality of human rights.

52. B De Sousa Santos *Epistemologies of the South: justice against epistemicide* (Routledge, 2014).

53. Ndlovu-Gatsheni, *supra* note 7, at 150.

54. Grosfoguel, *supra* note.

3.1. The coloniality of human rights

Two main points can be made about the coloniality of human rights. The first is lack of participatory democracy in the making of human rights. It cannot be gainsaid that the origins and founding ideology of modern human rights are problematic as extensions of Western imperialism. The human rights corpus that was inaugurated by the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 was deeply immersed in a Western bourgeoisie worldview.⁵⁵

The philosophy that was used to create the 'human' came out of Enlightenment which arrogated to itself the status of the wellspring for defining the universal and modernity. Though, rhetorically, the philosophy of human rights affirmed all humanity, in its beginnings especially, it invisibilised many categories of humanity including women, colonised peoples, indigenous people, poor people, persons with disabilities, sexual and gender minorities and non-Christians.

The UDHR fulfilled Western philosophical and political traditions even if some of them were inimical to the interests of the survivors of colonialism. The knowledge system that was used to create the UDHR maintained an illusion that the universal had its origins in a Western centre.⁵⁶ How else, for example, can the guarantee of a right to property be understood.⁵⁷ In the property guarantee, the UDHR delivered to colonised and ex-colonised communities whose indigenous title to land had been lost through colonial dispossession, a specious guarantee. Prior to colonisation, common ownership of land and not freehold had been the cardinal basis of the economies of Africans.⁵⁸

Land was centrally tied to African identity. Land dispossession culminated in profound reconfiguration of African spaces and bodies causing displacement and dismemberment of indigenes as in other colonised parts of the world.⁵⁹ For the UDHR to have missed this catastrophe, a different episteme was at play. To dispossessed indigenes, the property guarantee only served to legitimise the doctrine of discovery.⁶⁰ It endorsed the status quo of colonial dispossession making it financially impossible for the postcolonial state to effect agrarian reform as that would entail buying back dispossessed land from colonists or their successors.

55. IG Shivji *The concept of human rights in Africa* (Codesria Book Series, 1989); WD Mignolo 'Who speaks for the "human" in human rights?' *Human Rights in Latin American and Iberian Cultures Hispanic Issues online* 5.1 (2009), available at <https://hdl.handle.net/11299/182855> (accessed 26 January 2022); M Mutua 'Savages, victims, and saviors: the metaphor of human rights' (2001) 42 *Harvard International Law Journal* 201-245.

56. Shivji id; Mignolo id; Mutua id.

57. Mignolo id., at 12.

58. Ngwena, *supra* note 6, at 54.

59. WJ Jennings *The Christian imagination: Theology and the origins of race* (Yale University Press, 2010) 24.

60. ST Newcomb *Pagans in the promised land: Decoding the doctrine Christian discovery* (2008); JH Greenberg 'The doctrine of discovery as a doctrine of domination' (2016) 10 *Journal for the Study of Religion, Nature and Culture* 236; R Stott 'The Dark Continent: Africa as female boy in Haggard's adventure fiction' (1989) 32 *Feminist Review* 69 at 77-79.

A claim of universality requires intersubjective praxis and remaining porous to democratic iteration.⁶¹ It should create room for an heterogeneous public sphere in which the conquerors and the conquered agree on the ethics of the human rights of ownership of property, including providing for duties to provide reparations where there have been palpable injustices. Prescribing universality by imagining it prior to a cultural dialogue on an issue that is so central to the lifeworlds of a people impacted upon is the quintessence of imperialism.

In mitigation, over the years, there have attempts to revisit the human rights corpus to fill some of the gaps. One attempt has been the global effort to expand the scope of rights beyond the civil and political rights corpus of Western liberalism in order to give epistemic validity to communitarian ideals and the notion of the indivisibility of human rights that is shared by humanity in the non-Western world. The adoption in 1966 of the International Covenant on Social, Economic and Cultural Rights (ICESCR)⁶² to fill the communitarian gap in the International Covenant on Civil and Political Rights (ICCPR),⁶³ was an august step to this end. In the sphere of health, it has facilitated the development of jurisprudence on the right to health built on an egalitarian ethic. The human right to health is built around a state duty to deliver health care services that are available, accessible, acceptable and of good quality to all.⁶⁴

Another positive development is the ongoing explicit acknowledgment of the rights of historically marginalised social groups that were invisibilised by generic references to the rights of ‘everyone’ in the UDHR, ICCPR and ICESCR, the latest exemplification of which is the adoption of the Convention on the Rights of Persons with Disabilities in 2006.⁶⁵ The adoption of regional human rights instruments is also another example of mitigating the coloniality of a Western-spawned universalising human rights corpus by providing the region with an opportunity to inscribe epistemic justice into the normative content of human rights.⁶⁶

61. Ngwena, *supra* note 6, at 164.

62. International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966 through GA. Resolution 2200A (XXI), and came in force 3 January 1976.

63. International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar.1976).

64. Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4). See also, Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/22 Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4). See also, Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/22.

65. Convention on the Rights of Persons with Disabilities, adopted by the General Assembly by Resolution 61/106, at its 76th plenary meeting on 13 December 2006, entry into force: 3 May 2008.

66. M Mutua ‘The Banjul Charter and the African cultural fingerprint: an evaluation of the language of duties’ (1995) *Virginia Journal of International Law* 339-380.

The adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) by the African Union in 2003, which is discussed below, serves as an attempt, however incomplete, in decolonising human rights, including in the sexual and reproductive sphere.⁶⁷

A second point to make about the coloniality of human rights and their epistemic limits is that, above all, the human rights corpus ushered in by the UDHR was oblivious to discrepant power between the colonisers and the colonised. The corpus did not come with resources for achieving reparatory justice or meaningful capabilities to address global inequities. Implicating the coloniality of power is a necessary analytic task of any decolonising project.⁶⁸ Coloniality of power unmasks the absence of a level playing field in global relations.

It must be conceded that international human rights have little to say about Africa as a region that has been historically underdeveloped by Western powers and yet co-opted into a system of globalisation in which it has only token participatory power, including in the regulation of global trade under the World Trade Organisation and global finance under the Bretton Woods institutions. Regardless of the existence of an international human rights system, the asymmetry between the global north and global south continues to be constructed and reconfigured to assure the production hegemonies of Euro-American-centrism, racial superiority, Christian-centrism, heteropatriarchy, anthropomorphism, capitalism and heteronormativity.

The moral, however, is not to throw out the baby with the bathwater. Notwithstanding the coloniality of human rights, it would be disingenuous to suggest, even remotely, that they are superfluous to the contemporary lives of Africans. The Westphalian state that colonialism bequeathed to the 'postcolonial' African state makes it imperative to have a buffer between state and citizen.⁶⁹ The sovereign power that is bestowed on the Westphalian state to facilitate governance creates the need for juridical mechanisms for accountability. There is need to counter abuse of state sovereignty and, ultimately, to demarcate the limits of state sovereignty. Human rights and human rights law are buffer mechanisms.

Frans Viljoen explains their place in this way:

67. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Protocol to the African Charter on Human and Peoples' Rights and on the Rights of Women in Africa, adopted 11 July 2003, 2nd Ordinary Session of the Assembly of the African Union, AHG/Res. 240 (XXXI) (entered into force 25 Nov. 2005).

68. A Quijano 'Coloniality of power, Eurocentrism, and Latin America.' (2000) 1(3) *Nepantla: Views from South* 1 (3): 533-580; MD Mignolo 'Coloniality: the darker side of modernity' In S Breitwischer (ed) *Modernologies. Contemporary artists researching modernity and modernism* (MACBA, 2009) 39-49; Grosfoguel, supra note 24, at 215.

69. E Kannyo *Human rights in Africa: problems and prospects* A report prepared by the International League of Human rights (1980).

❖ [H]uman rights law' is closely linked to the emergence of the nation state. The implication of this state-centredness is that states are the primary duty-bearers in respect of these rights. A fundamental paradox is therefore introduced: individuals depend on states to guarantee their rights, but they also need to defend their rights against these very states as the principal violators of their rights. In a particular state, 'human rights law' represents the state's obligations at a given time, while 'human rights' serve as a yardstick against which the nature and extent of these obligations may be assessed..⁷⁰

Therefore, however imperfect, human rights are ultimately concerned with asserting and protecting human dignity and the intrinsic worth of the individual as a universal phenomenon relevant to Africans in the same way as to other peoples. If anything, Africa exemplifies a region where human rights protections, regardless of their limitations, are solely needed on account of the postcolonial state's sterling record of repressive governance and obstinate refusal to account for exercise of power in ways that rival the colonial state. The cycle of nationalist or liberation movements that deliver Africans from colonial bondage only to introduce new pathologies of power or reproduce old forms has thus far been an embedded feature of governance on the continent.

In *The wretched of the earth*, Frantz Fanon wrote about the pitfalls of African nationalism that in the postcolonial period fails to transform socio-economic relations.⁷¹ Fanon warned about the dangers of postcolonial nationalism that has a propensity to create the same structures of domination and subordination as its colonial counterpart.⁷² The postcolonial African state has come woefully short on delivering inclusive citizenship. Women, sexual and gender minorities are among the historical communities that have been left out. Though the African state has been successful in deracialising citizenship and granting universal franchise from the time of independence, it has been less successful in democratising citizenship especially in those areas contested or marginalised by dominant cultural discourses. In the sexual and reproductive domain, statecraft following African independence has reproduced the same oppressions as found in the colonial order.

3.2. Abortion

Abortion is one of the areas where the African state has remained resistant to inclusive citizenship and retained gendered citizenship bequeathed by the colonial state. Abortion is an age-old tradition on the continent. Prior to colonisation, in sub-Saharan Africa, abortion was not considered to be a matter in the public domain. Abortifacients were certainly known and used.⁷³

70. F Viljoen *International human rights law in Africa* (Oxford University Press, 2012) 4.

71. F Fanon *The wretched of the Earth* (Grove Press, 1967) chapter 3.

72. A Cherki 'Fanon, fifty years later: Resisting the air of our present time' In NC. Gibson (ed) *Living Fanon: Global Perspectives* (Palgrave-Macmillan, 2011) 131-138 at 132-133.

73. Riddle *Contraception and abortion from the ancient world to renaissance* (1992); EJ Sobo 'Abortion traditions in rural Jamaica' (1996) 42(4) *Social Science and Medicine* 495.

It can be inferred from studies that have been conducted as far apart as Nigeria⁷⁴ and Lesotho⁷⁵ that in precolonial society, abortion was regarded as a private matter for resolution by the family rather than indigenous courts, with women playing a pre-eminent role. Whilst abortion was socially frowned upon, sanctions meted out by indigenous courts were the exception rather than the rule.⁷⁶ The issue of punishment, if any, was left to the family unit.

The fact that abortion was generally outside the jurisdiction of indigenous courts is, for instance, illustrated by a study that was conducted in 1872 shortly after the annexation of Basutoland (now Lesotho) to the Cape Colony.⁷⁷ A Commission had been appointed by the Cape Colony legislative assembly to inquire into the law and customs of the Basotho. The Commission took evidence from persons that were recognised to be knowledgeable in customary law, including the son of the founder of the Basotho Nation who was at the time a police inspector. When asked whether there was any law regulating abortion, his response was that he had 'never heard of any punishment being inflicted for this offence'.⁷⁸

Although abortion was regarded with moral approbation, nonetheless, it remained confined to the private domain of the family. Support for this position has also come from anthropological studies.⁷⁹ Any public moral censure of abortion was juxtaposed with respect for privacy thus indicating not just a measure of public tolerance for abortion but also the recognition of moral pluralism. African spiritualities did not equate foetal life with borne life.

The advent of the colonisation of the continent radically altered the position. It introduced a new epistemology designed to silence African lifeworlds. Colonial abortion laws came with two main flaws. First, they were Christian-centric and, second, they were androcentric.

A common feature of abortion laws that were imposed on the colonial state, whether originating from the codified laws of Belgium, France, Italy, Spain or Portugal or the common law of England, is that they all criminalised abortion.⁸⁰ The basis for criminalisation was ecclesiastical to reflect a sense of religious sin and to enforce Christian morality.⁸¹ The ban on abortion served to revere and protect unborn life, irrespective of the harmful consequences to the mother. The Roman Catholic Church in particular had an abiding influence in the criminalisation of abortion. By the time

74. EP Renne 'The pregnancy that doesn't stay: the practice and perception of abortion by Ekiti Yuroba Women' (1996) 42(4) *Social Science and Medicine* 483.

75. S Poulter *et al* *Law and population growth in Lesotho* (1981) 45.

76. A Armstrong and RT Nhlapo *The legal position of women in Swaziland* (1985) 116.

77. *Commission on Laws and Customs of the Basutos* (1873). This account has been taken from a secondary source: Poulter *et al* *supra* note 75, at 45.

78. *Commission on Laws and Customs of the Basutos id.*, at 43.

79. H Ashton *The Basotho* (Routledge, 1967).

80. C Ngwenya 'Access to legal abortion: developments in Africa from a reproductive and sexual health perspective' (2004) 19 *SA Public Law* 328-350.

81. RJ Cook and BM Dickens 'The injustice of unsafe motherhood' (2002) 2(1) *Developing world bioethics* 64, 71-74.

colonial jurisprudence imposed itself on Africa, Roman Catholic doctrines had firmly permeated and influenced the law on abortion. The redefinition of mortal sin by the Roman Catholic Church in 1869 to apply not only from ‘quickening’ but earlier – from the time of conception – impacted on secular criminal law and served to reinforce the criminalisation of abortion.⁸²

The imposition of European abortion laws on Africa was not just about establishing control over conquered territory. It was also about conquering Africans in every facet of their lives, including their spiritualities so that they could be rendered wholly amenable to accepting the permanence of the supremacy of Christian-centric doctrines. A useful unit of analysis for decoding colonial African abortion laws is the ‘coloniality of being’.⁸³ The ‘colonising structure’ that Mudimbe alludes to in *The invention of Africa* speaks to an epistemological model then functioning in the West which renounced all that was African. This episteme, which Engelbert Mveng, the Cameroonian theologian, described as epitomising ‘anthropological poverty’, used inferiorisation to unequivocally condemn everything to do with the being of Africans, including their identities, physical appearances, histories, cultures and spiritualities.⁸⁴

In the colonial encounter, African spiritualities were reduced to satanic beliefs in contrast to Christianity that was presented as the inheritor of Greek reason and a sequel to Judaic revelation which professed universality. The vernacular traditions of African spiritualisms failed to muster the qualities of rational religiosity and written scriptures.⁸⁵ In consequence, African gods were not merely reduced to the status of infinitely pagan gods standing in opposition to an omnipotent Christian God. Christian missiology demanded that the gods be re-described as fetishes demonic spirits – the representations of Satan. More than merely derisive, Christianity has been an epistemicidal discourse in its relationship with African spiritualisms. Its theology was deeply imperialistic. It spoke a parsimonious language of systematic and absolute refutation of the very being of Africans as a people in need of European salvation.⁸⁶

It is trite that not all Africans share the theologies that underpin the criminalisation of abortion. Following the colonial encounter, indigenous ways of being were given back to indigenes transformed but dismembered and stereotyped by Christian-centrism. African spiritualities were returned to indigenes with a spoiled identity which reduced them to fetishes: spectacles in excess of what they were before the colonial moment in order to assuage a Eurocentric need for a prototype for easily recognisable deviant spiritualities. Part of the project of decoloniality, therefore, is to recover repressed ontologies. It is to give recognition to alienated and repressed spiritualities including in the regulation of abortion by enacting laws that respect, protect, promote and fulfil African reproductive choices.

82. RJ Cook & BM Dickens ‘Human rights dynamics of law reform’ (2003) 25 *Human Rights Quarterly* 1, at 9.

83. Tamale, *supra* note 16, at 83.

84. E Mveng ‘Third World theology – What theology? What Third World? Evaluation by an African delegate’ In V Fabella & S Torres (eds) *Irruption of the Third World: Challenge to theology* (1983) 220.

85. Ngwena, *supra* note 6, at 65.

86. Ngwena, *supra* note 6, at 65.

Criminalisation of abortion in colonial abortion laws was intertwined with the 'misrecognition' of women. Beyond just conceiving deliberate termination of pregnancy as a mortal sin, the laws also stereotyped women as physiological and procreative beings.⁸⁷ In sub-Saharan Africa, criminalisation of abortion presents two unenviable choices to women with unwanted pregnancies: reluctantly becoming mothers or having recourse to illegal and frequently unsafe abortions with a consequent toll on life and health.

The manner in which the therapeutic exception to the criminalisation of abortion was conceived under the 18th century European abortion laws (laws which were in turn transplanted to colonies, including colonies in the Americas and Africa) is telling of the gender-scripted role of women as reproductive instruments. Abortion was only permitted as an expression of the doctrine of necessity 'to save the mother's life'. Literally, it meant permitting abortion only when continuing with the pregnancy brought the woman dangerously close to losing her life.

Though several African states have made significant progress in reforming abortion laws, the preponderance of reforms remain steeped in coloniality. Decolonising abortion is only consistent with laws that respect, protect, promote and fulfil reproductive autonomy, including permitting abortion on request. The primary function of law when regulating abortion should not be to curtail choice but to ensure that termination is carried out safely. Decolonisation requires a paradigm shift; a shift from a crime and punishment approach to a reproductive health approach.

The current human rights corpus fails the test of coloniality because it remains steeped in the Christian-centric origins of European abortion laws. Though international human rights bodies have used general comments, general recommendations and concluding observations to incrementally read a woman's right to safe abortion into existing human rights instruments, they have only managed to articulate an apologetic right to abortion. The right to abortion as currently developed under international human rights law is still predicated on requiring the woman to first show the harm or likelihood of harm if she is required to continue with the pregnancy. There is no recognition of the right to request an abortion as a matter of choice. This is so even under the Maputo Protocol.

In one sense, the Maputo Protocol exemplifies decolonisation of abortion jurisprudence in that article 14 of the Protocol is the first time in history that abortion has been cast as a discrete human right in a human rights treaty.⁸⁸ At the same time, the Protocol is still in thrall of patriarchy and the hegemony of Abrahamic faiths as it does not offer more than what is recognised under the incremental approach of the United

87. Cook & Dickens, *supra note 82*, at 8–9.

88. CG Ngwena 'Inscribing abortion as a human right: significance of the Protocol on the Rights of Women in Africa' (2010) 32(4) *Human Rights Quarterly* 783-864.

Nations treaty monitoring bodies. The Maputo Protocol requires the ground of rape, incest, risk to the health or life of the pregnant woman or risk to the life of the foetus to be first met. Though intended to promote the sexual and reproductive health of women, article 14 is ambivalent about women's equality. It remains conspicuously gendered and trapped in coloniality to the point of depriving the Protocol of any claim to inclusive equality.⁸⁹ Ultimately, it retains the crime and punishment model bequeathed by the colonial state.

The South African Choice on Termination of Pregnancy Act of 1996, which was enacted after the demise of apartheid rule to signal a new constitutional dispensation, provides Africans with an instructive lesson on reforming abortion law in ways that break with coloniality. Erstwhile laws, which were outgrowths of abortion laws transplanted to South Africa at the time of its colonisation, were highly restrictive and inaccessible, especially for black and poor women, with a consequent toll on mortality and morbidity. The preamble to the Choice on Termination of Pregnancy Act, on its own, constitutes a decolonial statement. It speaks to an Act that is committed to inclusive equality, is cognisant of intersectionality and is ultimately designed to make a radical break with the colonial and apartheid past.

The preamble says:

- ☑ Recognising the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism and the advancement of human rights and freedoms which underlie a democratic South Africa;
- ☑ Recognising that the Constitution protects the right of persons to make decisions concerning reproduction and to security in and control over their bodies;
- ☑ Recognising that the Constitution protects the right to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility
- ☑ Regulation of their choice, and that women have the right of access to appropriate health care services to ensure safe pregnancy and childbirth;
- ☑ Recognising that the decision to have children is fundamental to women's physical, psychological and social health and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy, as well as sexuality education and counselling programmes and services;

89. *Id.*, at 828.

- ☑ Recognising that the State has the responsibility to provide reproductive health to all, and to also provide safe conditions under which the right of choice can be exercised without fear or harm; Believing that termination of pregnancy is not a form of contraception or population control;

- ☑ This Act therefore repeals the restrictive and inaccessible provisions of the Abortion and Sterilization Act, 1975 (Act 2 of 1975), and promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs.

The substantive provisions of the Choice on Termination Act live up to the promise of the preamble. They transform the regulation of abortion from a crime and punishment model to a reproductive health model. It is particularly significant that the Act permits abortion on mere request in the first trimester and recognises the competence of appropriately trained nurses and midwives to perform abortions in the first trimester. Of course, the Act has experienced challenges in implementation. Nonetheless, it has broken with the colonial past and transformed access to legal abortion for African women.

Conclusion

The philosophy of decolonisation has multiple dimensions all of which coalesce around overcoming the historical status of subordination of Africans which was founded by the institutions of slavery, colonialism and imperialism and continues today in more subtle forms including the persistence of coloniality and asymmetrical globalisation. As a counter discourse, decolonisation ultimately seeks parity in participation. Its main goal is to ensure that when addressing matters that impact on the lives and aspirations of Africans in all sectors, the humanity of Africans is placed at the centre.

Needless to say, centring the humanity of the Africans does not mean according them privileges denied to others. Equally, it does not mean treating Africans as primordial humanity that is hermetically sealed from other humanities and lives outside of modernity. Rather, it means subscribing to the ethics of inclusive equality in the design and implementation of the ideology and infrastructure for realising political, socio-economic and juridical spheres in ways that are open to democratic iteration.

We have argued that decolonial theory should not make the mistake of trying to recover an originary Africanness but that it should reimagine authenticity in ways that recognise transformed identifications and heterogeneities among Africans. Intersectionality is an essential resource for decolonial theory. In seeking to explore the implications of an African-centred approach for the intersection between health, sexual and reproductive health and human rights, We argued that whilst human rights come with limitations, they are important and necessary allies of decolonial theory when implicating the coloniality of laws and policies on sexual and reproductive health.

The area of abortion served to illustrate formal decolonisation is juxtaposed with colonial continuities in the postcolonial African state. We extended the same argument to the development of abortion jurisprudence under human rights instrument including the Maputo Protocol to underscore the imperative of decolonising the sexual and reproductive health and human rights archive. The analysis in this paper can also be applied to other sexual and reproductive sites, including homoerotic sexualities and non-heteronormative genders.

ahaki
Afya na Haki
Harnessing Africa's Potential

Plot 6105, Valley Road, Canaan Sites,
Nakwero, Gayaza – Kalagi Road.
Tel : +256 414 660 733 Email: info@afyanahaki.org

  @afyanahakiug   Afya na Haki