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WestAfrica INSIGHT

JUSTICE ON TRIAL

Courts and Commissions in West Africa

Centre for Democracy & Development
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EDITORIAL

This Issue:
Justice on trial: Courts and commissions in West Africa

This edition of West Africa Insight looks at the ways in which justice is being sought, and delivered, in Nigeria, Burkina Faso and The Gambia.

In Burkina Faso, Sampala Balima reflects on the September verdict handed down against the 2015 military coup plotters and asks if this verdict can be seen as the start of a new era in which the army remains distant from the states democratic institutions.

The gradual decline of judicial independence and the increasing influence of political actors in Nigeria is discussed by Chidi Anselm Odinkalu in a piece that chronicles this process over time.

In The Gambia, Sait Matty Jaw, looks at the ongoing work of the Truth, Reconciliation and Reparations Commission and argues that the political environment is one factor making it very difficult to achieve the dual objectives of reconciliation and justice.

Finally, Tarila Marclint Ebiede assesses the ECOWAS Court of Justice's role in addressing human rights violations in the region and suggests what it can do better to deliver on its stated mandate.

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POST-COUP JUSTICE:
Strengthening Burkina Faso's transition to democracy?

by Sampala Balima

Four years after the failed military coup of September 2015 against the transitional regime, a Burkinabè military court delivered its verdict in September 2019. Former Chief of Staff of the Presidency, General Gilbert Diendéré, who took the responsibility for the coup, was sentenced to 20 years in prison. Alongside him, General Djibril Bassolé, head of diplomacy of the Blaise Compaoré government, was sentenced to ten years in prison.

This verdict constitutes both a judicial revolution and a normative shift within the military. For the first time in the political history of Burkina Faso, which has been marked by a series of coups d'etat and military regimes, a coup attempt was ruled on in a court of law. The court's ruling goes some way to demonstrating the independence of the judiciary, and signals a break from the old order. This positive development is particularly welcome in the current context; characterised by a security crisis and rapidly approaching elections scheduled for November 2020.

Challenging contexts

The military coup attempt of September 2015 threatened to derail the political transition set up after the popular uprising of October 2014. Following the fall of the regime of Blaise Compaoré, who himself had taken power by force in 1987, a one-year political transition was put in place and tasked with ensuring the continuity of the state and organising free and transparent elections. But the transitional government was the target of several destabilisation attempts by the Presidential Security Regiment (RSP), - an elite unit of the fallen regime.

The last of these attempts - the aborted putsch of September 2015 - was launched in response to the authorities plan to dissolve the RSP and return its regiments to the barracks. However, a week after the coup began, a combination of popular resistance and action by army units, loyal to the transitional government, put an end to it and the transitional institutions were restored.

In early 2018, a trial was opened to judge the irregularity of the action of the military and the actions of the presumed initiators of the failed coup. This trial took place in a tense

socio-political environment. A result of the natural fragility inherent in any political transition, but also given the historical blockages erected against the judicial apparatus under the Compaoré regime. The cases of the assassination of President Thomas Sankara in 1987 and that of the investigative journalist Norbert Zongo in 1998, in which the RSP was singled out, have never been the subject of a court case. In spite of the change of regime, expectations remained low. President Roch Marc Christian Kaboré, elected in November 2015, held important political positions during the Compaoré era, and for some Burkinabe is still associated with it, despite his official break from the former ruling party in January 2014.

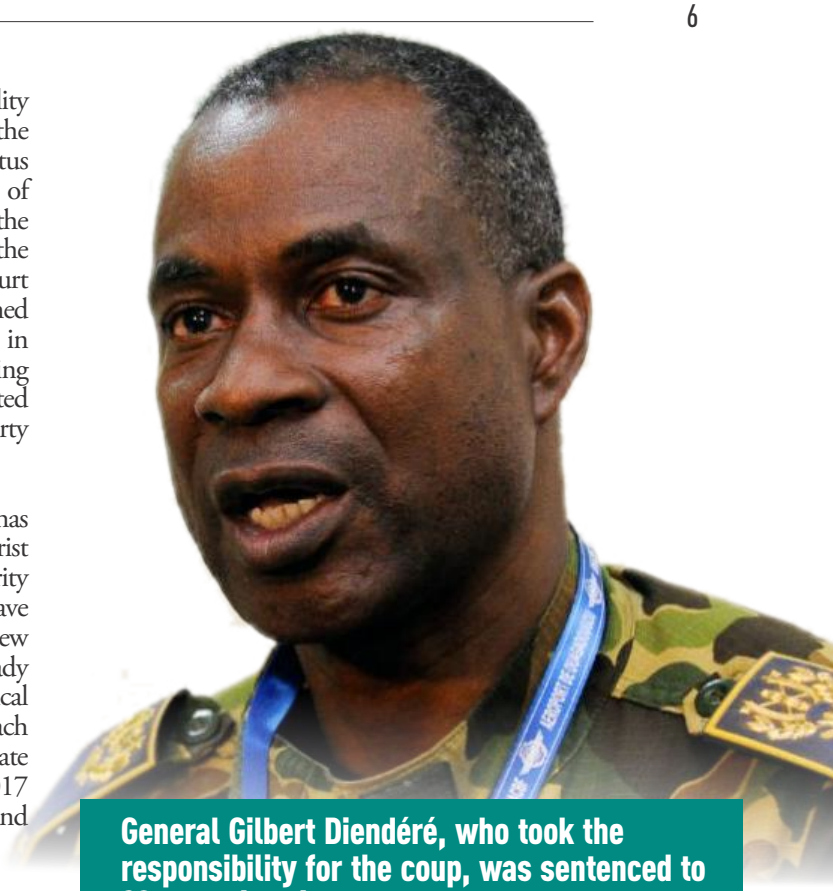
The trial also took place in a security environment which has deteriorated significantly since 2015. Surreptitious terrorist acts and frequent attacks against the defence and security forces, mainly affecting the north and east of the country, have caused an unprecedented humanitarian crisis. These new conflict dynamics are emerging in an environment already marked by economic, environmental, social and political vulnerabilities that are forcing the state to rethink its approach to security. Furthermore, strike action has paralysed the state administrative apparatus. Magistrates went on strike in 2017 and 2019 and disputes within the Ministry of Economy and Finance punctuated 2018.

Testing judicial institutions

The putsch trial was a test of the maturity and independence of the judiciary, one that required the continued vigilance of the population. This attention - reflected by the high turn-out at public hearings, at least in the early days of the trial, and the sustained media coverage of the various stages - placed continued scrutiny on the judiciary. Despite the political and human turnovers which have occurred in recent years, the judiciary is still looked upon with suspicion and at times has been accused of bias or politicisation. These suspicions were enhanced by the fact that the individuals charged with orchestrating the putsch were to be tried before a military court, a special court which confers significant power in the Ministry of Defense. President Kaboré headed this ministry until February 2017. Subsequently, it was under the aegis of Jean Claude Bouda and, after a January 2019 reshuffle, Cherif Moumina Sy, both civilians whose media appearances illustrate ongoing tensions within the military.

The fear of a biased verdict was raised by Amnesty International who were concerned that soldiers accused of human rights crimes would be tried through a military process, rather than a civil court. Procedural faltering at the beginning of the trial reinforced the suspicion of political interference. For example, the abandonment of the lawsuit against Guillaume Soro, the former president of the Ivorian national assembly, despite wiretaps pointing to his implication in the coup effort, appeared as a victory of realpolitik over justice.

But despite this, and efforts by the defence to multiply procedures in an effort to slow down or escape justice, the verdict rendered under these conditions appears to demonstrate, at the very least, a desire to break with the muddled judicial procedures of the past.



General Gilbert Diendéré, who took the responsibility for the coup, was sentenced to 20 years in prison

Keeping the army out

The September 2019 verdict, which can be subject to an appeal of presidential pardon, disqualifies Bassolé and Diendéré from the immediate, and even most distant, elections. General Bassolé, in particular, had shown his political inclinations with the formation of the New Alliance of Faso political party. General Diendéré, even without the affirmation of official party membership, remained an important political actor and a possible candidate to contest for the presidency, if not in 2020, then in future contests. But the ruling against the Generals also included a pedagogical dimension. The judiciary reaffirmed the apolitical place of the republican army in the function of the affairs of the state. However, the thorny question of the practical depoliticisation of the army remains, even if the verdict of the trial reinforced its importance.

Built outside the institutional fold of the state, the Burkinabe army, like those of other French-speaking West African states, was fragmented by high political activism in the ranks. The army was unable to aggregate individualities in an esprit de corps, which resulted in the emergence of armies within the army, as was the case with the RSP. The trial highlighted these aspects of the internal dysfunction of the army, as well as previously unknown fracture lines within the RSP itself.

In the context of the current insecurity, which has seen a state of emergency imposed on more than half of the territory, moving towards a more politically neutral army is vitally important. The fight against terrorism implies a militarisation not of politics but of society; one that will see an increased presence of the defence and security forces in the social space. As an

exceptional regime, the state of emergency grants additional powers to the defence and security forces at the same time as reducing certain individual freedoms.

Between the political necessity of reforming the army and the obligation of putting it centre-stage in the fight against terrorism, the new regime finds itself in a difficult situation. Cognisant that without careful management the people-in-arms may turn, once again, against Burkina Faso's democratic institutions

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Nigeria's judiciary: On trial

On 3 April 2003, Nigeria's Supreme Court decided a remarkable case that began 20 years earlier, in September 1983, with the declaration of results for the position of governor of Niger State in north-central Nigeria. Awwal Ibrahim, then incumbent governor and candidate of the ruling National Party of Nigeria (NPN) was announced to have defeated his main opponent, Alhassan Abubakar Badakoshi, of the Nigeria Peoples' Party (NPP). Badakoshi challenged the result before the election petition tribunal but before a decision could be made, on 31 December 1983, the military sacked all the civilians elected to office in the 1983 general elections. By the time he died on 16 March 2003, nearly 20 years after his challenge began, the case was still not decided. But 19 days after his death, on 3 April, the Supreme Court finally decided that Alhassan Badakoshi was in fact the rightful winner of Niger State's 1983 Governorship election 20 years earlier. The case lasted 16 years longer than the four-year tenure that Badakoshi would have had if he had been declared winner of the election.

The Badakoshi case illustrates in many ways the kind of fate that has befallen the institution of the judiciary and the processes of judicial decision making under elective government in Nigeria. As this writer has pointed out elsewhere, "every election cycle in Nigeria has three seasons. The campaign season belongs to the parties, the politicians and their godfathers. This is followed by the voting season, during which the security agencies and the Independent National Electoral Commission hold sway. Thereafter, matters shift to the courts for the dispute resolution season, which belongs to the lawyers (mostly Senior Advocates of Nigeria) and judges."

The consequence has been to unduly judicialise politics and politicise the judiciary, with three notable consequences. First, an inflation in political cases has clogged up the courts, leading to interminable delays in court processes and corroding the reputation of the courts as credible arbiters on questions of law and justice. Second, with politicians desperate to be anointed winners through the courts, judicial corruption has become the norm, not the exception. Finally, as a result of these two factors, the process and quality of judicial preferment has become unduly politicised, eroding the judiciary of any pretension to independence or integrity. The controversial suspension of Chief Justice Walter Onnoghen just before the 2019 election was a logical upshot of a trend that has deep historical roots.

2015 marked the first time that Nigeria's presidential elections did not end up being contested in court after President Goodluck Jonathan conceded defeat. It was also the first time since 2003 that the proportion of election contests that ended up in court was less than 50%.

Democracy by court order

The onset of presidential politics in 1979 arrived with a deeper role for the judiciary in determining election winners. The presidential election of that year was settled by the Supreme Court in a famous judicial contest, every bit as keen as the electoral one, between the two leading candidates, Shehu Shagari of the NPN and Obafemi Awolowo of the Unity Party of Nigeria (UPN). By a majority of 6-1, the Supreme Court affirmed the declaration of Shagari as the winner. But in so doing, the court unleashed a trend which had consequences for judicial independence and integrity that should have been foreseeable.

When it sacked the civilian government on the last day of 1983, the military regime of General Muhammadu Buhari launched a judicial commission of inquiry into the operations of the Federal Election Commission (FEDECO). In its final report, submitted in 1986 to Buhari's military nemesis, Ibrahim Babangida, the Bolarinwa Babalakin Commission of Inquiry, (named after the senior judge who chaired the inquiry and who later went on to serve on Nigeria's Supreme Court), called attention to the election petitions. It noted that, "as the verdicts began to be pronounced, the general public often expressed shock and dismay. Some commentators in the nation's newspapers took the view that the verdicts in a number of instances constituted a rape of democracy perpetrated through the law courts. Allegations of corruption in high places were freely made".

This trend would deepen with the return to elective government in 1999 after 15 years of military rule. In 2003, leading Nigerian public law scholar, Obi Nwabueze, a Senior Advocate of Nigeria (SAN), accused the Supreme Court and the judiciary of playing a "discreditable part" in eroding the credibility of electoral politics through questionable decisions conferring judicial legitimacy to rigged elections. In the contest for the Anambra South senatorial seat in 2003, for instance, two Justices of Appeal, Okwuchukwu Opene and David Adeniji, were dismissed after they were found to have taken bribes to award the seat and the judgment to Ugochukwu Uba of the Peoples' Democratic Party (PDP) but Senator Uba went on to serve out his tenure, unaffected by the crime by which it was procured.

2007 was the nadir. 1,299 elective office contests out of a total of 1,496 ended up in election petition tribunals; an astounding 86.5%. By 2008, The Economist concluded that Nigeria's system of government was a unique form of "democracy by court order", while academics Hakeem Onapajo and Ufo Okeke Uzodike believed that elections in Nigeria were a systematic case of "rigging through the courts".

The trajectory of the narrative has been far from one directional, however. In 2011, 769 petitions were filed, totaling 51.4% of all contested positions. This was a reduction of over 36% compared to the petitions in 2007. 2015 marked the first time that Nigeria's presidential elections did not end up being contested in court after President Goodluck Jonathan conceded defeat. It was also the first time since 2003 that the proportion of election contests that ended up in court was less than 50%. However, the 2019 elections have so far produced 766 petitions a reversal replicating the numbers from 2011. The persistence of these election contests being settled in the courts has drained the judiciary in Nigeria of the intangible institutional assets of character, credibility, impartiality and independence which are key foundations of the judicial process.

A crisis of judicial integrity

In 2010, Nobel Laureate, Wole Soyinka, speaking at the awards dinner of the Nigerian Lawyers Association reportedly lamented that "today, many judges [in Nigeria] can be bought for two a penny". In the same week SAN, Yemi Candide-Johnson, complained about "the collapse of judicial integrity." Rising from its National Executive Council meeting in Awka, Anambra State, in February 2011, the Nigerian Bar Association acknowledged the "decay in the judiciary" and "the hydra-headed problem of corruption that has bedeviled that arm of government in recent times."

A month later, NEXT Newspaper alleged that Supreme Court Justices took bribes to validate the Yar'Adua/Jonathan election, citing leaked diplomatic cables filed by former US Ambassador to Nigeria, Robin Sanders. The following week, the same newspaper wrote:

"*The Nigerian judiciary is in the eye of a raging storm. Never before in the country's history has the judiciary been at the centre of so damaging an allegation of graft and misconduct. ...Whilst there may never have really been a time when Nigerians viewed the judiciary as being above reproach, the current happenings suggest that those who should dispense justice in the country are deeply involved in the ignominy*"

In the same year and amidst these controversies over judicial corruption, the two most powerful judicial figures in the country, the Chief Justice of Nigeria, Aloysius Katsina-Alu and the President of the Court of Appeal, Ayo Salami, had an irretrievable falling out over allegations that the former had interfered in a case pending before the latter.

Three years earlier, Salami, was passed over when James Ogebe, a more junior Justice of Appeal, who, like Salami, hailed from north-central Nigeria was elevated to the Supreme Court. Ogebe had sat on the presidential election petition tribunal and his elevation shortly after the controversial verdict of the tribunal looked untidily like reward for the outcome. When in 2011, Salami was recommended for appointment to the Supreme Court, he turned it down, going as far as instituting action in court to prevent the appointment. All of these developments took place in the shadows of the politics of election dispute resolution in which senior politicians and political parties vied for influence in determining who occupied the various senior judicial offices of the country.

A crisis of judicial independence

In April 2009, acting on a summary resolution of the State House of Assembly, which he controlled, then Governor of Kwara State, Bukola Saraki, procured the removal of the independent-minded Chief Judge of the State, Raliat Elelu-Habeeb. In judicial proceedings that followed, the Supreme Court determined on 17 February 2012 that the removal was unconstitutional as it was not preceded by a disciplinary investigation by the National Judicial Council (NJC). Although this judgment appeared to reassure those concerned about the independence of judicial tenure, ongoing developments were soon to negate its effect.

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Nowhere has the effect of the immersion of the judiciary in electoral politics been felt more viciously than in the politics of appointment to the headship of the judicial branch at both the federal and state levels. The main battlegrounds in this struggle have become the offices of the Chief Justice of the Federation, President of the Court of Appeal, Chief Judge of the Federal High Court, President of the National Industrial Court, and Chief Judge of the respective high courts of the 36 states and the Federal Capital Territory (FCT).

The reasons for this are clear: the presiding judicial officer is the conduit for control of appointments, capital projects and budgets, as well as the key influence in the court system over which he or she presides. They also control the assignment of cases or constitution of panels in the most sensitive cases. Notably, the presiding judicial officers determine who gets to sit or be excluded from election petitions. Above all, presiding judicial officers are constitutionally required to constitute panels of investigation where a case for the impeachment of a governor or president (or their deputies) arises.

Governors appear to have learnt from the multiplicity of such cases brought since 1999 not to have persons in such positions whom they cannot control. When, for instance, then Governor of Nasarawa State, Tanko Al-Makura of the All Progressives Congress (APC), faced impeachment from a State House of Assembly controlled by the PDP in July 2014, the investigation panel constituted by the State Chief Judge, Suleiman Dikko, proved its loyalty by clearing him of all allegations. Then Federal Attorney-General, Mohammed Bello Adoke, would later suggest in his memoir that the governor had been very strategic in ensuring he had the right offices under his influence and control.

Selection by seniority?

Over the years, a norm of judicial seniority has emerged in the preferment of judges to the headship of the judiciary at various levels in Nigeria. In a 2011 study on judicial appointments dating back to pre-independence era, Solomon Ukhuegbe, who specializes in the study of the Nigerian Supreme Court, pointed out that "the consistent practice for three decades, since 1979, has been that the senior justice is promoted to chief justice." If the main rationale for this was to diminish the vicious politics of appointment and promotions, it has been far from entirely successful.

In theory, appointments to judicial headship constitutionally require collaboration among the three branches of government. The judicial branch vets and puts forward options; the executive branch nominates the candidates and the legislative branch confirms them before formal appointment is then completed by the executive branch. The reality is quite different.

In 2004, Jacob Ugwu was due to retire as the Chief Judge of Enugu State. The NJC recommended Raphael Agbo, the most senior active judge in the state, to succeed him. However, the then state governor, Chimaraoke Nnamani, had other ideas. He maneuvered to get Agbo elevated to the Court of Appeal, creating the opportunity he needed to elevate his preferred candidate Innocent Umezulike, to the position of Chief Judge. At that point, however, Umezulike was only sixth in seniority among the judges on the High Court of Enugu State. After 13 years as chief judge, Umezulike suffered the ignominy of removal in 2017 on charges of criminal corruption. At his death in June 2018, he was undergoing trial on multiple counts of egregious corruption.

When former Rivers State Governor, Rotimi Amaechi, could not get his preferred candidate in 2012-2013 to become Chief Judge of the State, he refused to appoint anyone recommended by the NJC. As a result, courts in Rivers State were shut down for the last two years of his tenure because there was no Chief Judge to assign the cases or manage the judiciary. The governor was presumably fearful that a Chief Judge other than his preferred candidate could be unpredictable in an impeachment battle with a State House of Assembly controlled by the PDP party from which he had defected to the APC.

To avoid appointing Patricia Mahmoud as substantive Chief Judge in 2017, the Kano State government appeared to informally intervene in order to have her elevated to the Court of Appeal. Justice Mahmoud had been a judicial figure in Kano State since 1991 and was, by a long margin, the most senior judge in the High Court of Kano State. She had previously been appointed as Acting Chief Judge of Kano in 2015.

Unfinished judicial business

President Muhammadu Buhari encountered the judiciary many times in his repeated attempts to win the presidency, before eventually prevailing in 2015. On three occasions - 2003, 2007 and 2011 - he unsuccessfully challenged his loss in the presidential elections before the courts. The decision in 2008 was particularly egregious. In the 2007 elections, the Independent National Electoral Commission had deployed ballot papers without serial numbers, making it impossible to control for ballot stuffing or ballot contamination. But the Supreme Court decided, by a 4-3 majority, that there was no legal impediment to organising an election with non-serialised ballot papers.

On attaining power in May 2015, President Buhari may well have arrived with a sense of unfinished judicial business. In October 2016, the State Security Service, an agency under the direct control of the President, raided the houses of several judges in Abuja, arresting them on allegations of corruption. All of these judges, it turned out, had issued decisions that the government did not find appealing. One was the judge in a case involving Nnamdi Kanu, the leader of the secessionist Indigenous Peoples of Biafra. Another had issued orders against the government in the interminable case involving former National Security Adviser, Sambo Dasuki. None of the claims against the judges were subsequently established before any judicial forum. The two cases which did go before the courts collapsed. In these actions the government had shown its hand.

It is in this context that the January 2019 removal of Chief Justice Walter Onnoghen, which was an entirely executive affair, did not come as a surprise. Charges of corruption were preferred against him before the Code of Conduct Tribunal (CCT), an executive body under the control of the President. The petition against CJN Onnoghen was dated 7 January. It was stamped into the office of the Chairman of the Code of Conduct Bureau (CCB) on 9 January. On the same day, according to the ex-parte order of the CCT requiring his removal, the Buhari administration filed a petition with the CCT seeking his removal. Given these timeframes there was clearly no time for any investigation to take place. Under the law, the obligation to verify claims made in asset declaration forms belongs exclusively to the CCB. This could not have been done before charges were filed. In fact, the application to remove Onnoghen, dated 9 January, predated the filing of the charges against him, which did not happen until the following day, 10 January. All of this would suggest that there was more to his removal than the announced facts.

To replace Onnoghen, who came from Cross-River State in the Niger-Delta, President Buhari nominated, and got appointed as Chief Justice, Tanko Muhammad, the senior-most Justice of the Supreme Court, whose hails from Bauchi State, in north-east Nigeria. As a senior Justice of Appeal in 2002, Justice Muhammad had claimed in an affidavit that he lost his basic education certificates when they were eaten up by termites in an undisclosed place and time. It is arguable that the enforced departure of Walter Onnoghen was designed to achieve the ascendancy of Tanko Mohammed.

Trading lawyers for judges

The removal of Chief Justice Walter Onnoghen was a predictable inflection point in a long-running narrative of erosion of judicial integrity and independence, in which the judges themselves have become complicit through a combination of personal ambition and appetite for material perquisites. As the judicialisation of Nigeria's electoral process has deepened since 1999, politicians have moved on from the belief that they needed to have excellent lawyers in their back-pockets to stand any chance in the multi-dimensional contests for power. Increasingly, it is now clear this is not good enough. They now also need to have judges who are manifestly well disposed to them.

Beating back the forces of ambition and politics that appear to be in conspiracy to compromise the mission of Nigeria's judiciary will not be easy. Politicians appear increasingly invested in nominating as judges many persons who may ordinarily not be fit for purpose except as tools to be controlled or influenced by them. To improve the quality of personnel, the idea of judicial preferment as quid pro quo for political patronage needs to end.

The judicialisation of election disputes needs to be re-calibrated. Judges must step back from the temptation to declare winners and losers in elections. Where elections do not meet lawful standards, courts should ask the candidates to return to the people. Retired judges may be better placed than serving ones to undertake election dispute resolution. That would also help free up serving judges to attend to the everyday judicial business of ordinary Nigerians.

Any reform of the election petitions system must also pay attention to ensuring that politicians (and their lawyers) who seek to corrupt judges pay a high price for doing so. Judicial discipline also needs attention. The practice and jurisprudence on this has been quite uneven. The NJC has become too powerful and not accountable. Its roles need to be rationalised. Above all, however, the politicians who work so hard to corrupt judges must receive close attention from the public and citizens to whom all the losses from their corrupt enterprise are passed. There will be no magic bullets, however. Progress may be slow and in judicious increments.

Judicial independence is often read as the independence of the judicial branch from even modest suggestions from ordinary citizens. The judiciary is an extraordinarily important branch of government in underpinning a stable society founded on justice and the rule of law. In this mission, it must be accountable under the constitution to citizens. It is too important to be left to judges and politicians alone.

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The complicated quest for truth, reconciliation and justice in The Gambia

Following the surprise defeat of Yahya Jammeh in the December 2016 presidential election after 22 years in power, his successor, President Adama Barrow, initiated a number of transitional justice measures aimed at addressing impunity, supporting healing and reconciling a 'divided nation'. Central to this was the establishment of the Truth Reconciliation and Reparation Commission (TRRC) in December 2017.

Launched in October 2018, The Gambia's TRRC is mandated to "investigate and establish an impartial historical record of the nature, causes and extent of violations and abuses of human rights committed during the period July 1994 to January 2017 and to consider the granting of reparations to victims and for connected matters." It aims to "promote healing and reconciliation, respond to the needs of the victims, address impunity and prevent a repetition of the violations and abuses suffered by making recommendations for the establishment of appropriate preventive mechanisms including institutional and legal reforms".

While many Gambians welcomed the establishment of the commission as a mechanism that will shed light on the numerous human rights violations that took place under the Jammeh regime, a not insignificant number believe the commission is a 'witch hunt' against the former president. Whereas the TRRC has been able to attract high public interest due to its quasi-judicial and 'reality TV style' proceedings, and its victim centered approach, it continues to operate within the political realities shaping post-Jammeh Gambia. This includes perceived "selective justice" on the part of government and the growing polarisation of the political environment along ethno-regional lines.

An era of violations

The shock electoral defeat of Jammeh by a relative unknown, Adama Barrow, who was backed by a coalition of seven political parties and an independent candidate, ushered in a new political dispensation in early 2017. Under Jammeh's rule many human rights violations ranging from enforced disappearances, unlawful arrests and killings, torture, sexual and gender based violence, and persecution of real or perceived political opponents, characterised the Gambia. According to a 2018 Afrobarometer Survey, 28% of Gambians reported that they or a member of their family had suffered one form of human rights violations in the period.

These violations by the Jammeh regime as well as the regular dismissal of senior government officials had a direct effect on state effectiveness as it eroded the capacities of the judiciary and other arms of government to deliver services.

TRRC: composition and expectations

In October 2018, President Adama Barrow launched the TRRC, granting it a two year mandate with the possibility of extension. It is scheduled to submit an interim report to the government, after one year of operation, detailing its activities. Gambians expressed high and diverse expectations for the TRRC in a 2018 Afrobarometer survey. 34% of the population expected it to deliver an outcome of national peace, reconciliation, forgiveness and healing, 30% believed it should create an accurate record of human rights abuses of the past regime and 28% believed that it will prosecute and punish persons found guilty of crimes against humanity.

Its 11 commissioners, who are representative of The Gambia's ethno-regional, religious and gender diversity, were selected through a rigorous, participatory and inclusive process. According to the Executive Secretary of the TRRC, Baba Galleh Jallow, "all commissioners were nominated by the people and had to go through a very rigorous public and civil society vetting process before their final appointment by the president".

On 7 January 2019, the commission started its hearings. Except for one closed-door session, which was designed to hide the identity of the witness, all of the hearings have been broadcast live on radio, television and streamed on Facebook and YouTube. By the end of September, 114 witnesses, including 18 women and members of the Gambian diaspora, had testified before the commission, either in person or via videolink. Over a quarter of these witnesses were perpetrators or alleged perpetrators who voluntarily appeared before the TRRC.

Aside from the hearings, the TRRC has set up specialised committees to engage with the different aspects of its mandate. These committees headed by commissioners include the Human Rights Committee, the Amnesty Committee, the Reparations Committee, the Child and Gender Violations Committee and the Reconciliation Committee. The commissioners are also supported by a gender balanced secretariat. Under the secretariat, there are specialised entities conducting research and investigations, providing support to victims (particularly women) and witnesses and engaging in community outreach activities.

The commissioners are also supported by a gender balanced secretariat. Under the secretariat, there are specialised entities conducting research and investigations, providing support to victims (particularly women) and witnesses and engaging in community outreach activities

A quasi-judicial process

The innovative quasi-judicial style of TRRC hearings, characterised by witness cross-examination, has been cited in some quarters as an effective approach given that several witnesses, particularly alleged perpetrators, appear to lie to the commission despite ample evidence of their guilt. The cross-examination process has helped in not only directing the hearings as per the mandate of the commission, but in identifying those that are deliberately obstructing the process and hiding the truth.

However there is criticism that the hearings are sometimes overshadowed by the Lead Counsel, Essa Faal's, "prosecutorial" style. Critics argue that regular interjections and accusations of lying do not allow witnesses to explain themselves, or the context, fully. This style of questioning has been perceived to be more focused on criminal prosecution rather than voluntary truth telling. Even though witnesses are given the chance at the end of their testimony to speak directly to the nation, sometimes important facts that might help better explain the context or the why of a situation are missed. Critics have accused Faal of "attempting to extort information from witnesses" but he has continued to defend his tough questioning as a vital part of ensuring that the commission receives answers from people who are uncooperative.

This robust style of questioning was put into test with the appearance of Edward Singhateh, former vice president of the ECOWAS Commission and a member of Jammeh's ruling circle. Many expected the encounter dubbed "Edward Vs Essa Faal" would be an interesting session to watch given Singhateh's eloquence, popularity and legal training. For human rights activist Coach Pa Samba Jow the fact that it ended up becoming a personality contest between Singhateh and Faal obscured from view what the TRRC should have been about, "an avenue where twenty-two years of murder, torture and rape are unearthed".

A Fulani Herder (Photo: kessbenfm.com)

Hearing from the past

The TRRC has been able to hear from high-ranking officials of the former regime including members of the military Junta and former vice president of the Gambia between 1997 and 2017 Dr Isatou Njie Saidy. This was despite initial concerns as to whether members of the Armed Forces Provisional Ruling Council (APRC) would appear given that transitional clauses in Gambia's 1997 constitution 'indemnify' the Junta from all crimes committed during the transition from 1994-1996. Equally laws such as the 2001 Indemnity Act, enacted after student protests in 2000 to exonerate security officers involved in killing 14 students, were seen as potential obstacles to TRRC investigations.

But the appearance of former junta members Sana Sabally, Yankuba Touray and Edward Singhateh albeit with different results, has boosted the commissions credibility. Sabally, Touray and Singhateh were adversely mentioned with regards to extra judicial killings that took place after the foiled coup of 11 November 1994. Singhateh and Touray were also alleged to have been involved in the murder of former Finance Minister, Ousman Korro Ceesay, in 1995. While Sabally and Singhateh cooperated with the commission - both admitted to their involvement in the execution of soldiers in 1994, whilst Singhateh denied any party in the murder of Ceesay - Touray refused to testify citing constitutional immunity.

Touray's appearance on 26 June 2019 tested the commission's legality and its power to investigate Junta members. During the televised proceeding he refused to take the prescribed oath insisting that he will first have to make a statement, "I am not swearing-in. If I am not going to speak [make a statement], then I am leaving." In doing so, he defied the commission in full view of the nation. Although Touray did not cite any provision of the constitution, activists such as Madi Jobarteh highlighted Section 13 (1) of the 1997 constitution that protects the members of AFPRC or their ministers or appointees from answering before any court or authority for their action or inaction in the performance of their official duties. Although it is generally agreed that torture and murder is not part of their duties, Section 13 (4) states that even if such action was taken not in accordance with any procedure prescribed by law, it cannot be questioned.

Following back and forward with Lead Counsel Faal, who admitted that "this is the first time the powers of this commission have been so blatantly challenged", Chairman of the Commission Lamin Sise issued a warrant for Touray's arrest, arguing that he was in contempt of the TRRC. This was not the first time that Touray had shown his opposition to the TRRC process. In March 2019, he was arrested and arraigned before court accused of having interfered with a witness. Touray was charged under Section 36 paragraphs (a) and (b) of the 2017 TRRC Act but the case was subsequently dropped due to a lack of evidence.

Touray's refusal to testify provoked a strong public reaction, with citizens angry that he was disrespecting the commission and the victims. Under pressure to act, the Minister of Justice, Ba Tambadou charged Touray with the murder of Ousman Koro Ceesay in 1995. However the fact that the Ceesay murder was still a focus of investigation by the TRRC raised questions as to its direction and purpose. With the action against Touray and the initial arrest of a few other witnesses they believed to have lied to commission, critics accused the government of undue interference in the TRRC process.

Jungle justice?

The TRRC has so far been able to confirm many allegations that were levied against Jammeh and his regime. Victims have shared their stories and then watched and listened to perpetrators describe how they horrifically executed their loved ones. Although this has provided some degree of closure, many victims continue to demand for justice. The appearance of "the Junglers", Jammeh's elite force of secret operatives who meted out much of his extra judicial justice, in August 2019 brought this issue into stark focus. Though little was known about them, the appearance of six junglers at the TRRC shocked the whole country. For the first time Gambians heard about their role in the murders of prominent journalist Deyda Hydara and about 50 West African migrants, mostly Ghanaians.

Following their graphic testimonies - one individual, Omar Jallow, confirmed that he had been part of more than 48 killings -, Minister of Justice Tambadou recommended that fourof the junglers be released having "cooperated" with the TRRC. "The objective of the release is to put the three men in a similar situation as those who have appeared at the TRRC and admitted to participating in human rights violations and abuses, but none of them is currently in custody and rightly so," he said. Although, Minister Tambadou emphasised that the release was not amnesty, this unilateral decision evoked strong emotions among victims and the wider public.

Whilst the ministry argued that such a decision is for the long term benefit of the victims, citing the possibility of future prosecutions against Jammeh himself and the need to have witnesses willing to testify against him, the Gambia Victims' Center for human rights violations vehemently criticised the minister for not consulting more widely prior to their release. Baba Hydara son of Deyda Hydara was left "devastated, angry and shocked" at the decision. Other victims are also worried that the long-term possibility of prosecution has reduced in light of the decision to release the three men. It has been perceived as illustrative of the government's lack of commitment to prosecute human rights violations even when people confirm their participation in atrocities before the commission. More than that, victims are left frustrated that having admitted to committing murders, they are allowed to walk back into their families as if nothing happened.

Recognising loss

The approach of the TRRC in Gambia is to a large extent driven by the African Union's Transitional Justice Policy Framework. According to the policy, justice is the provision of judicial and non-judicial measures that not only ensure accountability of perpetrators of violations, but also redress to individuals and communities that suffered violations. In the Gambia, while prosecution is expected to follow the findings of the commission, non-judicial remedies such as reparations are a central pillar.

The TRRC is mandated to both recommend reparations but it also operates a reparation fund to directly pay reparations to victims. Although the framework or policy for how this money is to be allocated remains unclear, the TRRC has already started supporting some victim families with scholarships and medical care. On 7 October, Minister of Justice, Abubacarr Tambadou announced that the government had contributed 50 million Dalasis ($1 Million) into the TRRC Reparation fund; money seized from former president Jammeh. Noting that "it has become increasingly apparent to the government based on revelations at the TRRC over the past one year that former President Yahya Jammeh was a central pillar of the terror and human rights abuses that were unleashed on ordinary Gambians and others under his leadership. Consequently, the government deems it fitting and just that reparations for his victims should be granted directly from his wealth and assets".

The challenge of unity

The varying counter narratives of the past, current political uncertainties and political polarisation are opening old wounds that are creating a challenging context in which the TRRC must operate. Whether the TRRC is healing the national or further dividing the country is hard to tell. However, what is clear is that the growing political divide that exists in Gambia has a direct impact on how people perceive its actions.

From its inception there have been those who view the commission as a witch hunt designed to unfairly target Jammeh. Residents of the Foni region, Jammeh's political base, have accused the government of targeting the region and holding it responsible for Jammeh's atrocities. In responding to queries in the National Assembly, the Vice President of the Gambia Dr. Isatou Touray claimed that Foni benefitted more than any region during the Jammeh era. "Foni was getting free rice, free electricity and other benefits from the Jammeh regime" she said, fuelling accusations that the current regime plans to marginalise the region. The APRC currently holds five seats in parliament, all of which are in Foni region.

A fundamental challenge to reconciliation according to political commentator Abdoulie Jabang is that, "Gambians, particularly some elements of the TRRC, see Foni as the site for oppression or a force that backed Jammeh's tyranny". The government's decision to militarise the region as part of its security strategy has worsened the situation, with a protest in Kanilai (Jammeh's hometown) in June 2017, leading to the death of one resident (Haruna Jatta) after clashes with ECOMIG forces. The government's refusal to investigate the shootings has further embedded a sense among residents that they are being unfairly punished for the actions of the Jammeh regime.

The vice chair of the TRRC Adelaid Sosseh recently came under attack while explaining some challenges the commission is facing in a diaspora meeting. In reference to a particular investigation in Foni region, she narrated that community members are not coming forward to help the commission and highlighted how generally they face challenges in the region. For activists in Foni, the recent statement by the TRRC vice chair is a clear example of the commissions bias against it a sentiment that is shared widely on active Facebook groups.

The politics of justice and reconciliation

How the TRRC will balance ideas of retributive justice and reconciliation remains unclear. It is an open secret that those which the law is likely to find culpable of crimes committed during the regime of former president Jammeh will run to quite a large number. To justiciable accord corresponding judicial actions to all culprits through a fair and incorruptible justice system vis-a-vis the political connotations attributed to the truth seeking process will be very difficult. Any verdict reached will face opposition particularly from those whose allegiance still lies with former president Jammeh. But also from opposition parties who might seek to discredit the fairness of the litigation proceedings when it makes political sense to do so.

Furthermore, the decision to establish a truth-telling process was initiated by a coalition government of many stakeholders which has subsequently collapsed. Many of the former coalition partners, including President Barrow's former party and backer the United Democratic Party (UDP) is convinced that he is not interested in advancing the transitional agenda, which originally had prescribed a three-year mandate before he stepped aside.

Barrow is now insisting that he will serve a five-year term, as per the constitution, and perhaps even contest again in 2021. Furthermore he has reached out to former APRC stalwarts, firing key coalition stakeholders including former vice president and leader of UDP, Ousainou Darboe, in the process. Barrow now stands accused of protecting former Jammeh 'enablers' such as the current Chief Protocol Officer Alhagie Ceesay, Finance Minister Mambury Njie and Foreign Affairs Minister, Momodou Tangara. A recent commission of inquiry report indicted Njie and Ceesay, but a government white paper rejected the recommendation.

Such inconsistencies have led Gambians to start to question the mandate of the TRRC, especially as moves not to pursue criminal investigations into the actions of the junglers was cited as a "no go area" by many activists. Gambians are worried that the government will not fully implement the recommendations of the commission, particularly in cases where it recommends for prosecution, when it presents its final report in January 2021. In 2018, before the commission started its hearings, 68% of Gambians told Afrobarometer that they wanted human rights violators to be prosecuted regardless of the outcome of the TRRC. This would suggest that any decision, which is perceived to shy away from prosecution, would not only affect the victims seeking justice, but further divide the country.

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JUSTICE BEYOND BORDERS?

Human rights and the ECOWAS Court of Justice

Human rights violations are a common feature of everyday life in countries across West Africa. Social media channels are one way in which the abuse of civil and political rights, as well as the economic, social and cultural rights, of the regions citizens and residents are chronicled. This abuse is often perpetuated by governments, representatives of the state or powerful individuals. In the last decade, terrorists groups and armed bandits have further contributed to human rights violations with the Economic Community of West African States (ECOWAS).

But victims of human rights violations in the region face structural, political and administrative challenges in successfully seeking justice within their domestic judicial systems. While there are some cases of successful redress in national courts, such as the decision of Nigeria's Supreme Court to uphold the rights of female children in property inheritance among the Igbo ethnic group, most cases of human rights violations, especially those perpetuated by the state, remain unaddressed.

The ECOWAS Court of Justice expanded its jurisdiction to include individual cases of human rights violations from citizens of ECOWAS member states in 2005. But whilst this provision exists a question that remains unanswered is how reliable and effective the court is for West Africans whose rights have been abused by their governments.

Human rights violations in the region face structural, political and administrative challenges in successfully seeking justice within their domestic judicial systems.

Recognising human rights violations

Democracy has taken root in the majority of ECOWAS member-states since the early 2000s. This is a deviation from the early 1990s when most countries in West Africa, with the exception of Ghana, Senegal and Benin, were characterised by military rule, repressive regimes or ongoing civil conflicts. The democratic progress made in the late 1990s and early 2000s brought new hope to the human rights situation in the region. But despite thesedemocratic gains, human rights violations continue to persist.

In The Gambia, former President Yahya Jammeh oversaw enforced disappearances, imprisonment and unlawful killings. In Nigeria, citizens continue to experience state sanctioned forced displacement, abuse by military officers and illegal detentions according to reports by Human Rights Watch and Amnesty International.

From the perspective of regional integration, what is striking is that these human rights violations are taking place in a regional context where ECOWAS member-states have pledged, in Article 4 (g) of the 1993 Revised ECOWAS Treaty, to the "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights". Article 15 of this treaty established the ECOWAS Court and sets out the instruments establishing its jurisdiction to adjudicate on the interpretation, application and legality of ECOWAS regulations.
The jurisdiction to adjudicate on matters of human rights violation was not in the original mandate of the court but was introduced in 2005. This change followed pressure from citizens who approach the court to resolve human rights disputes. The inclusion of human rights issues in the jurisdiction of the court expanded the opportunities for ordinary people to seek justice beyond the limits of the nation-state.

Protestors versus the State in Port Harcourt

Human rights cases have been among the most prominent of the cases before the court. ECW/CCJ/APP/10/10 brought by Socio-Economic Rights and Accountability Project (SERAP) and Israel Okari; Joy Williams; Austin Onwe; Tamuno Tonye Ama; Victor Opium; Mark Bomowe; Napoleon Tokubiye; Jonathan Boko; Williams Tamuno; and Linus John (plaintiffs) against the Minister of Justice and Attorney General of the Federation; Rivers State Governor Rotimi Amaechi; Commissioner for Justice of Rivers State and the Commissioner for Urban Development (defendants) provides a useful lens for looking at the courts function

The plaintiffs were demonstrators that were shot and injured by soldiers in Port Harcourt, Nigeria during a protest in October 2009 against the demolition of their houses which had been announced by the then Governor of Rivers State, Rotimi Amaechi. The Rivers State government claimed that it was seeking to demolish the structures as part of efforts to implement the city's masterplan. But it was a vision that did not include an estimated 480,000 people living in these structures, or provide for their relocation. In response to resistance from waterfront residents, the state government authorised soldiers and riot police to put an end to the resistance.

With the support of Port Harcourt activists and civil society groups, including Amnesty International, the victims of the shooting took the Nigerian government to the ECOWAS court, citing a lack of faith in the national courts of Nigeria. The Nigerian judiciary has consistently been subjected to criticism for its failure to effectively respond to issues of human rights violations brought before it.

In its ruling delivered on 10 June 2014, the ECOWAS court upheld the fundamental rights of plaintiffs to peaceful assembly as enshrined under the African Charter for Human Rights, which Nigeria is a signatory to and under strict obligation to enforce. The court held the Federal Government of Nigeria liable for failure to protect this right or remedy the breach and awarded damages, subsequently paid by the government, of N500,000 (US$3,000 at the time) to each plaintiff and a further N6 million (US$36,000 in 2014) to three plaintiffs that suffered life changing injuries. However, it ruled that it did not have jurisdiction to try the Rivers State government, the actual perpetrator of the violations.

While it may seem that the ruling brought temporary succour to the victims the process leading to the judgement was far from straightforward. First, the victims required the support of several non-governmental organisations - Amnesty International, the Collaborative Media Advocacy Project and the SERAP - to approach the court. Without this support it would have been difficult to access the court and have their case heard. Second, the victims considered the process to be "painfully slow". The entire legal process took five years. While this is a normal time frame in legal proceedings, the victims felt stuck and wanted a quick decision to enable them move on with their lives.

Finally the jurisdiction of the court does not capture the heterogeneous nature of state structures in the sub-region. In the context of Nigeria, the actions of the Rivers State government, a sub-national unit, were what led to the abuse of the fundamental human rights of the plaintiffs. But due to the limit of jurisdiction, the Rivers State government did not suffer any legal damage or attendant financial consequence for their actions.

Required reforms

The ECOWAS Court is increasingly relevant but needs to be enhanced to better serve citizens of member states in cases related to human rights. For this to happen, there is an urgent need to address some issues that limits its current effectiveness.

The plaintiffs in the Port Harcourt case saw the judgement adhered to by the Nigerian state. But at the regional level, a sustained criticism is that the judgements of the ECOWAS court are often not enforced by its member states. Setting up a competent national authority for the enforcement of court decisions is clearly prescribed in the Supplementary Protocol of the ECOWAS Court. Nigeria is one of only five member states - Burkina Faso, Guinea, Mali and Togo are the others - that has created this authority. But even this has not stopped Nigeria from refusing to comply with the rulings of the court. In the case of former national security adviser, Sambo Dasuki, it has failed to release him despite a 2016 judgement deeming his arrest unlawful.

To further strengthen regional integration, efforts need to be made to build stronger links between the court and national judicial systems. Currently, the ECOWAS court is not a court of last resort. Whilst this does not affect the mostly civil cases, it might create technical grounds for member-states prioritising rulings from national courts over those of the ECOWAS court. This will betray plaintiffs whose main reasons for approaching the court is based on lack of trust for national courts.

Reform of the court should also include improving citizen access. Individuals can directly access the courts, but in many instances, cases against national governments have been brought before the court by human rights organisations. This limitation is largely down to a lack of awareness of the courts function and insufficient resources to access it, due to its location in Abuja. There is a need to develop a mechanism that allows individuals to bring their cases before the court remotely. A liaison, embedded in each countries justice department that allows independent administrative filing processes, is one possible solution.

Further reform is needed to expedite the process of reaching a verdict. The case of the victims of the Port Harcourt shootings took five years; a process that can leave victims weary. The limited capacity of the courts was further reduced in 2014 when member states reduced the number of judges from seven to five. This decision was made as part of cost saving measures by ECOWAS following Nigeria's decision to withhold its funding of the body for seven months. This has impacted on the effective administration of justice. So too has the reduction of the tenure of judges, again in 2014, from a renewable five-year tenure to a single four year term. There is an urgent need for the representatives of ECOWAS member states to reverse these decisions in order to expedite the administration of justice.

Ultimately the ECOWAS court is a product of regional integration. As with all regional integration projects, it is the commitment of the member states to enhance its powers and effectiveness that will eventually lead to change. As a judicial institution, the jurisdiction and powers of the court can only be strengthened through its continued use. Therefore whilst it may be imperfect, stakeholders, especially civil society, should continue to bring cases before the court. This will contribute to building the jurisprudence of the court, extending its jurisdiction and strengthening its position and independence in the region.

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