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# Balancing the Anti-graft Wars in Africa with the Rule of Law

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## Summary

**Ex**isting studies and discourses on anti-graft wars focus exclusively on the need and strategies to punish accused persons. This, however, does not answer the question of how best to handle this threat to sustainable human development in Africa. This policy brief addresses the question of how an anti-graft war becomes a framework to protect basic constitutional freedoms and liberties for both victims and alleged perpetrators of corruption? It does so by arguing that while anti-graft regimes in Africa must not be too lenient so as to help perpetrators of corruption escape justice, these should also not be too tough to jettison the rights of accused persons. Anti-graft wars should be based on the rule of law. This is an important issue because it constitutes an indispensable component of liberal democracy, and is critical to the promotion of sustainable development in Africa.

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## Introduction

In partnership with the United Nations Office for West Africa and the Sahel (UNOWAS) and the Université des Lettres et Sciences Humaines de Bamako (ULSHB), the Council for Development of Social Science Research in Africa (CODESRIA) organized a 2-day workshop on “Money, Security and Democratic Governance” from October 19 to 20 2017 in Bamako, Mali. This generated a stimulating exchange of ideas on illicit financial flows in Africa. However, the discourse resulted in more unanswered questions. One of them is the question of the extent to which the anti-graft wars in Africa are sensitive to the rule of law. This policy brief was commissioned to address this issue. The document reflects several nuanced observations, developments, and policy suggestions aimed at deepening human rights practice in Africa as African states fight corruption, a virus said to have the capacity of killing a nation that fails to fight and kill it.

The level of corruption in Africa is regularly underscored in the annual Corruption Perceptions Indexes published by the Transparency International (TI). The 2017 TI records, for example, present Sub-Saharan Africa as ranking amongst the worst performing regions in the world. While New Zealand and Denmark rank highest with scores of 89 and 88 respectively, Syria, South Sudan and Somalia rank lowest with scores of 14, 12 and 9 respectively. Most of the other

countries in Africa are usually painted in a despicable red colour in the TI map to illustrate their poor performances. Usually, African countries reject the methodologies and contents of the reports, but this does not negate the fact that the continent has an obvious problem to contend with. The declaration of 2018 as the African Union Year against corruption shows that there is a growing consensus around the African leaders themselves that corruption is indeed becoming a very worrisome human security problem in Africa.

What is corruption? What are its markers? What are its costs and why are anti-corruption drives important for Africa? Why are political leaders tempted not to adhere to the rule of law in their anti-graft wars? What are the effects of such disrespect of the law? How does media reporting of anti-graft cases violate the fundamental rights of the suspects? These and a few other questions constitute the subject of this policy brief.

Until recently, most corruption-related discourses in Africa limited the scope of the problem to incidences of bribery, extortions, and other financial crimes. Corruption was perceived as using one’s official position to advance personal (economic) rather than public interests. Some pundits now consider this understanding of corruption to be reductionist and self-serving for the political leaders promoting it. Hence, there is a growing body of literature showing that corruption goes beyond

incidences of unfair allocation of a country's wealth; it could also be a question of intentional distortion in a country's social and political decision-making. In this context, corruption includes cases of "stolen elections", lopsided political appointments, ethnic and religious influences in a political system, and other forms of nepotism.

Unfortunately, only the political opposition, pro-democracy and human rights activists complain about the political forms of corruption. Such individuals and groups are often treated as otiose or social irritants to be ignored and dealt with unkindly dealt as is often experienced in African politics. Hence, most of the celebrated cases of corruption in Africa today revolve around stolen state resources. As reductionist as this compromised understanding of corruption appears, it seems a good starting point for the anti-graft wars in Africa given the adverse effects of economic corruption on sustainable human development on the continent. It is costly to business, political stability, and social welfare. It rewards criminality and punishes hard work and honesty. This makes anti-graft measures compelling for African states.

Hence, many African countries now have anti-graft measures. The frontline countries include Nigeria, Zambia, Tanzania, Tunisia, and South Africa. The war comes in different forms. One of the pledges made by Cyril Ramaphosa, when he was elected as the leader of South Africa's ruling African National

Congress (ANC) in December 2017, was to fight corruption. He strengthened his commitment to the anti-graft war when he succeeded Jacob Zuma as the President of South Africa on February 15, 2018. The former trade unionist said in his inauguration speech that fighting corruption and mismanagement of public services would be one of his administration's top priorities. The newly elected Liberian President, George Weah, made a similar pledge. In his first speech to the nation in December 2017, the former soccer star stated, "Those looking to cheat the Liberian people through corruption will have no place". The candidates in all the African states conducting their national elections in 2018 and far beyond are most likely to have this "fashionable" issue of anti-corruption in their campaign promises.

In African countries fighting corruption, it is common for the accused persons to allege political victimization. Such allegations, which are sometimes escapist, are welcome in a democracy and must be addressed. This policy brief responds to this and related issues by positing that those fighting corruption in Africa should confer higher procedural and institutional credibility on their efforts through strict adherence to the rule of law. This would neutralize the criticisms against their efforts and strengthen democratic governance in Africa.

This suggests that there are both fair and unfair ways of fighting corruption

from the standpoint of strict adherence to the rule of law in managing the emerging cases. Many African states still grapple with the transition from the unfair to the fair approach. The experience of President Muhammadu Buhari as a two-time Nigerian head of state and now the Champion of African Union's (henceforth, AU) anti-corruption year could be used to illustrate the two paradoxical extremes. He was a military head of state from 31 December 1983 to 27 August 1985, during which some Nigerians, accused of corruption were jailed with little or no reference to their fundamental rights. The accused persons regained their freedom only after Buhari was overthrown. Rethinking the situation in November 2017, Buhari said "When I was the military head of state, I arrested many people and jailed them for alleged corruption and in the end, I also ended [up] in jail".

Buhari became Nigeria's civilian President in 2015 based on the campaign promise of upholding the tenets of democracy in boosting the country's economy, fighting insurgency and corruption. Characteristically, the new regime arrested and charged several people to court for corruption but found it difficult to secure any reasonable conviction. The difference was that the accused persons asserted their rights under the law and many of them were acquitted of the charges against them. This disillusioned Buhari about the chances of anti-graft war in a democratic setting. He expressed his frustration about this in a weird manner

when he said at a town hall meeting in Kano on December 7 2017 and said "... fighting corruption is more difficult than fighting insurgency". He expressed the same sentiment at the 30<sup>th</sup> Assembly of Heads of State and Governments of the AU on 28 January 2018 when he was inaugurated as the Champion of the AU continental fight against corruption. In his acceptance speech, he advised the other African heads of state to expect corruption to fight back as they pursue their anti-graft policies.

To many African leaders, an anti-graft drive is limited to catching and punishing corrupt persons. This is half the task. The other half, which is often neglected, is to ensure that the rights of the accused persons are duly respected in handling the cases. Where these rights are not acknowledged and protected, an anti-graft drive could itself become a form of corruption that should be frontally fought. Related issues are addressed below.

## Political Victimization

An anti-graft war becomes a question of critical rule of law where and when it is deliberately meant to decimate or degrade the rank and file of political rivals. This is a common allegation around Africa. It is difficult to prove, but the problem is fathomable. In some African countries the corrupt persons are carefully handpicked amongst political rivals or errant former allies. A good case for illustrating this problem can be taken from Cameroun where President Paul Biya

is engaged in what is locally known as “Operation Sparrow Hawk”: an anti-graft war widely perceived by the people to be a witch-hunt of potential political rivals of the president when his tenure ends in 2018. By 2016 over two dozen former government officials, including several ex-ministers and heads of state-owned corporation were reported to be under trial for corruption under this system. The political environment in Zimbabwe was no different until President Robert Mugabe was removed from power in November 2017. He hounded political rivals into detention based on political corruption charges that were flimsy at best.

On the other hand, criminals within the ruling elite are protected through instrumental denial of the allegations against them or refusal to prosecute them. In some countries, members of the opposition join the ruling party partly to have the cases against them “forgotten”. Those who leave the ruling party to join the opposition are arrested and arraigned for corruption for offences they committed many years ago when they were in “safe corridors”.

## Rights of Accused Persons

Those accused of corrupt practices have rights that must be protected. Such people are considered innocent until the cases against them are proven beyond a reasonable doubt. The burden of proof rests with those accusing them

of corruption. Vested interests could make these rights easily forgotten by political leaders (and their allies in the judiciary) if not carefully monitored. This can occur in several ways. The drive to fulfill campaign promises could blind an anti-graft regime to the need for altruism and transparency in fighting corruption. Having won elections by demonizing their opponents, political leaders are often desperate to prove that they truly have the capacity to fight corruption. Under this kind of atmosphere, an anti-graft war could assume lawlessness. Secondly, some political leaders imagine anti-graft wars as licensed reprisal actions against political rivals or as strategies for winning public sympathy towards future elections. Thirdly, the unlawful acts of the regime could a response to a thunderous public outcry for politically exposed persons and groups to be punished.

Courts handling corruption cases exercise fairness by basing their judicial pronouncements not on sentiments but time-tested and time-honoured jurisprudential principles and established legal procedures. In this context, those handling corruption cases must prove that, indeed, a crime known to the laws of the land had been committed; that the accused person is the legal personality that committed the crime; and that sufficient evidence, established beyond reasonable doubt, exists to show that the person is guilty of the crime. He (or she) must also be granted unfettered access to his defense. Those defending such individuals and groups should not be

parochially demonized as state enemies but respected individuals making vital contributions to the attainment of the rule of law in the society. Where the accused person is acquitted for want of sufficient evidence, the judges should not be demonized as frustrating a government's anti-graft drives. On the other hand, nobody should regard any judges that convict suspects of corruption as stooges of the ruling party but agents of the state doing what the laws require of them.

The foregoing does not automatically suggest that all lawyers and judges handling corruption cases in Africa are transparently committed to the rule of law. There are some infractions. Several examples exist for illustrating the nature of this problem. In December 2015, the Judicial Council of Ghana fired 21 judges who were implicated in a high-profile case of bribe taking. A five-man disciplinary committee constituted by Ghana's Chief Justice, Theodora Georgina Wood, tried the judges and indicted them based on undercover footage shot by journalist, Anas Aremeyaw. In Kenya, some senior judges were equally fired in 2012. The allegations included collection of "gifts" from litigants and "constituting a stumbling block" to the country's fight against corruption. There are several examples in Nigeria.

## Media Trial of Suspects

It makes better sense for political incumbents to arrest a former leader

who is considered corrupt and bring him to trial than to subject such persons to insults and wild accusations during media chats. This is the experience of some former African leaders. Some people charged with corruption experience other forms of "media trials". Even where sufficient evidence is absent, the arrest of such persons is repeatedly reported to the public in a triumphant manner, ultimately perpetuating their guilt. Security agencies sometimes add to the news contents by making the arrests in front of television cameras to enable the viewers at home appreciate the efforts put into the anti-graft war by the government. The schools and health centres that are not built by the government are carelessly blamed on the accused person and his likes in the society. Every appearance of the suspect in the court is reported in a sensational manner. Television discussions are organized around the incident and editorials and feature articles are written in a compromising manner that "convicts" the accused person even before the conclusion of the case against them. The foregoing becomes more questionable when some of the suspects are found not guilty of the allegations against them. There are several cases of this nature in different parts of Africa. Many of the victims live with the humiliation of these "media trials" for the rest of their lives, as they are unable to reverse the indignities suffered.

## International Aspects

As the annual corruption index of the Transparency International shows, there is corruption all over the world but the manifestation of the problem in Africa is phenomenal. Some members of the international community aid and abet the scale of the problem in the continent not only through direct or indirect involvement in some of the deals but also by relaxing their banking rules on illicit financial flows to enable stolen money from Africa to get into their banks. This is often followed by “silent complicity”: keeping sealed lips about the whereabouts of the loots. This kind of attitude is easily explainable by the African adage that says, “It is bad table manners to be eating and talking at same time”. What’s more? African nations contend with difficult legal impediments for getting stolen money returned to them from the developed world. Once stolen monies get to the banks of the developed world, it is difficult to return them home except when given to African states as loans or when the interests accruing from them form part of the “development aid to Africa”.

The conditions for repatriating looted funds to Africa would probably be easier if the AU could establish a stronger collaborative framework with African leaders to deal with the matter. The regional body seems to be moving in this direction having declared 2018 as the “Africa Year against Corruption”. The theme of the year is “Winning the fight against corruption: A sustainable

path to Africa’s transformation”. Winning the fight requires collaboration with the international community and having to extend the jurisdiction of the African Court on Human and People’s Rights (AfCHPR) to cover anti-graft cases.

## Treating Equals Unequally

It is now a regular practice for ex-African presidents leaving office to ask for and be granted immunities and amnesties that exempt them from an investigation of corruption-related offences. The anti-graft war in the country is then targeted towards “smaller criminals”. The most recent cases include those of Gambia President Yahya Jameh and President Mugabe of Zimbabwe. Issues of amnesties delayed the negotiation process for the exit of both presidents from power. Another case is that of President Zine Al-Abidine Ben Ali who fled Tunisia in December 2010 at the wake of the Arab Spring in his country. Initial efforts were made to punish him for corruption but a draft National Reconciliation Act has now been put in place that included the provision of amnesty for him. This is a critical rule of law question that must be redressed. Any African head of government that dares to steal the resources of the people should be tried and if culpable sent to jail as a deterrent to the others. Granting them amnesty has dangerous multiplier effects. Such leniency can make people see the public office as a license to steal public funds.

Parallels can be drawn between the present situation in Africa and what happened elsewhere. It is observed, for example, that immediately after leaving office in 2002, President Arnaldo “Ele Gordo” Aleman of Nicaragua was arrested and charged for stealing \$100 million from his country and was sentenced to 20 years in jail, along with some close family members and friends. Alberto Fujimori, President of Peru went to jail after leaving office due to financial improprieties committed while in power. Jean-Claude Duvalier, President of Haiti died of heart attack while standing trial after leaving office. South Africa seemed to be following this civilized track when it recently resolved that its former President, Jacob Zuma, would have to face the old charges of fraud, racketeering and money laundering against him. Africa’s only remaining female head of state, Mauritius President Ameenah Gurib-Fakim, resigned from office on 17 March 2018 following her alleged involvement in a credit card scandal. She needs to submit herself for investigation to clear her name of what her lawyer has called “false allegations”. The lesson here is that any leader that is daring enough to steal state resources should be strong enough to stand trial for his criminal acts.

## The Toxic Bottom Millions

The anti-graft wars in Africa focus exclusively on politically exposed persons, namely individuals that held political positions. The millions of junior and senior officers, particularly in the public service, that facilitated the criminal processes are hardly touched. Issues relating to them should be captured in a rule of law discourse of this nature. These public servants prepare the fraud papers. Their readiness to facilitate corrupt practices results largely from the fact that they are paid dehumanizing wages which have to be augmented by money obtained from illicit practices. In Nigeria, for example, the minimum monthly wage is about \$50. The legitimate earnings of workers are graded upwards that way. On the other hand, The Economist magazine of 15 July 2013 reported the basic pay of the lawmakers in the same country to be the highest in the world as a ratio of Gross Domestic Product (GDP) per person. The second, third and fifth countries with such disproportional reward systems in the world are Kenya, Ghana and South Africa, respectively. In these countries, the average citizen works and their political representatives take home the benefits.

Those in this kind of unequal reward system redress the injustices done to them by treating bribes and extortions as the “real incentive or bonus for getting the work done”. They prepare the papers for the phony public procurements through which politicians and their associates skim off state resources. They micromanage corruption by helping to move files from one table to the other and can, in

the process, frustrate public detection, investigation and prosecution of some corruption cases. This partly explains why some anti-graft cases fail on the grounds of “weak” (but in reality, stolen) evidence. These people steal millions and are hardly mentioned in anti-graft cases or extant literature. No anti-graft policy would work without addressing their nuisance value.

## Recommendations

1. Africa’s anti-graft wars must be matched with the protection of the rights of accused persons during the detection, investigation, prosecution and decision of the cases. Accused persons are entitled to legal representation and the judgments against them must reflect appropriate laws of ruling.
2. An anti-graft drive should have no sacred cow or sacrificial lamb. The process loses its worth if turned into a weapon for punishing political rivals or protecting certain serving or retired leaders. Amnesty should be denied the leaders asking for it as this is self-incriminating and increases human insecurity in Africa.
3. Those accused of corruption should be protected from media trials; except where the case against such people has been proven beyond reasonable doubt, it is wrong to cast aspersions on their personality in the media.
4. The developed world should support the anti-graft drives in Africa by preventing looted funds from the continent reaching their banks. Africans engaged in money laundering should be apprehended and prosecuted. Legal huddles should be removed for repatriating looted funds to Africa.
5. CODESRIA needs to join the AU in marking 2018 as the African Year against corruption. The anti-corruption regimes in Africa know what they want. CODESRIA should be policy-relevant by helping them identify the missing gaps and how to fill them.



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