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International Justice and Pancasila: A Case Study of The Gambia

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Abstract

International justice is as topical as it is relevant to global governance. This is manifest in fledgling and thriving democracies, failed and enduring states, and tyrannous and constitutionally governed states. Similar to the Gambian transitional justice, the Pancasila's social justice system in Indonesia also depicts an unfulfilled project of promoting justice and order during the transition period. Therefore, to make a comprehensive study of international justice and Pancasila using The Gambia as a case study, normative legal research is adopted through a conceptual framework of the international justice and its relation to Pancasila and The Gambia. It focuses on investigating the relation between international justice, Pancasila justice, and the justice system of The Gambia. Both Indonesia and The Gambia experience authoritarianism for decades and they are undergoing democratisation, but the political interests of their post-authoritarian governments over national interests mar their transitional justice systems. Thus, this research, recommends that prioritisation of victim participation, ensuring comprehensive mechanisms like truth and reparations commissions, putting into effect institutional reforms to prevent future abuses, advancing broad public engagement, addressing foundational causes of conflicts, and connecting efforts with other peacebuilding initiatives are keys to a successful transitional justice system.

A. Introduction

Access to justice has become a pillar in democracy and good governance. This is reiterated in Sustainable Development Goal 16 (SDG 16) as one of the fundamental pillars upon which development must anchor. SDG 16 aims at, inter alia, promoting justice and strong institutions. So, a realisation of justice will be a success story accrued to this goal. Justice as a subject of philosophy offers many meanings, dimensions and approaches not only in one country but also globally. This is because views differ concerning development of law as informed by each

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country's social and cultural ideals and values that inform the ways of life of their citizens.[1] It is, therefore, quite impossible to frame a single meaning of justice. Despite the lexical impossibility to give a single meaning to this term, it cannot be refuted that it is one of the most significant legal, political and moral concepts in the global sphere. It is one of the most important subjects discussed in the history of philosophy.[2] According to the *Cambridge Advanced Learner's Dictionary,* justice is fairness in the way people are dealt with. This definition contains the ideology of justice as propounded by John Rawls.[3] Amidst the evolution of law to provide order and decency in society, the grapple with the insecurity continues to be at the centre of states, non-international organisations and natural persons. This makes it a key issue in international law. The concept of justice is evolutionary starting from ancient Greece to contemporary days. These extensive different forms make different views of justice plausible in modern governance structure including in The Gambia and Indonesia.

In Indonesia, the fifth principle of Pancasila establishes a social justice system as a philosophy of uniting the country as a unitary state. As the foundation of the state, Pancasila offers basic values and principles that lead to justice among other things. Pancasila value such as justice can encourage people to actively take part in solving state problems.[4] Indonesia is a country of law based on Pancasila. With the problems that continue to escalate in Indonesia, Pancasila will be a source of reference for forming and enforcing law in the country. If justice does not exist, the law will only be a formality. As a result, Pancasila becomes a philosophy of life and a guide for the life of the state.[5] Many social problems have occurred in Indonesia for a long time. The problems include discrimination and social inequality that have become ingrained in the country so that inevitably he or she has to do this either for personal satisfaction or carrying out his obligations.[6] So, social justice in Indonesia is very important in the lives of people and the state for the sake of prosperity, peace and security. The country is burdened with social responsibility, the state must side with those who are weak by actively involving them in decision making in the political, economic and cultural fields, and the state is demanded to be fair to its citizens without discrimination against anyone, to build a democracy with humanitarian and social justice.[7]

In The Gambia, a state that grapples with inconsistent justice delivery and democracy and this reflects in the core values and principles of the state in its governance. Justice delivery in the country is quite important because it secures effective and good governance which results in sustainable development.[8] For instance, criminal injustice, unlike in civil matters, threatens not only the citizens of a concerned state but also dehumanises and compromises the dignity of the people because their rights are subject to tyrannous and manipulative shenanigans of the political class that continues to undermine the dignity of the people. According to the theory of social contract, people living in a state surrender themselves to be ruled by the ruler according

[1]Ridwan Arifin, "Translating the meaning of justice and legal protection: what exactly is justice?" *Journal of Indonesian Legal Studies* 7, No. 1 (2022): i

[2]Afifeh Hamedi, "The Concept of Justice in Greek Philosophy (Plato and Aristotle)" *Mediterranean Journal of Social Sciences* 5, No. 27 (2014): 1163

[3] John Rawls was an American political philosopher in the liberal tradition. His theory of justice as fairness describes a society of free citizens holding equal basic rights and cooperating within an egalitarian economic system.

[4]Bambang Yuniarto et al., "The Role of Pancasila and Participation in National Problems" *ADVANCES in Social Humanities Research* 1, No. 12 (2023): 52

[5]Hafaz Muhammad Bintang et al., "Relationship Between Law and Social Justice Values of Pancasila for the Life of Indonesian Society" *Lex Societas: Journal of Law and Public Administration* 3, No. 4 (2024): 122

[6]Ahmad Yanta Fairuz Zudana, "How does Pancasila work to solve social problems?" *Indonesian Journal of Pancasila dan Global Constitutionalism* 2, No. 1 (2023): 3–4

[7]Ridwan Arifin and Vania Shafira Yuniar, "Social Justice in Law, Society and Development: A Marxism Perspective of Indonesian Case" *Jurnal Hukum & Pembangunan* 51, No. 1 (2021): 3

[8]Aboubacar Abdullah Senghore, *Democracy, Human Rights and Governance in The Gambia Essays on Social Adjustment*, The Gambia, CENMEDRA, (2018), p. 132

to the established laws. In modern classical perspective of democratisation and governance, the constitution upholds the sacred values of the people and for the people.

The philosophical underpinning of justice is anchored on two grounds. First, everyone is entitled to lead an independent life in ideals of being a person. Second, a few of the assets important to be able to lead independent lives – such as to run the rule of law, food security, education, and basic healthcare – can only be conveyed through the instrumentality of the state.[9] The American Declaration of Independence 1776 propounded this ideology that: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness – that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government". This points out that the ultimate obligation of a government is to secure the rights of the governed – in this context according to just laws because justice is a universal aspiration.[10] However, delayed justice, which is sacrosanct to this research, is perceived to be inimical to the attainment of substantial and successful transitional justice.[11]

The jurisprudential principles adopted by courts in transitional societies deserve keen attention because the judiciary has become increasingly participative in governance and policymaking in such societies. By the same token, assessments based only on the performance of this institution offer a deficient narrative of contemporary African governance.[12] In his book,[13] the author points out that after The Gambia emerged from 22 years of authoritarianism, the state recognises the role of transitional justice in ensuring accountability, reparation and reconciliation. This ideology is a sine qua non of any society that is determined to make a quantum leap in democratic governance.

In The Gambia and every democratic country, just like politicians decide on the policies in the executive and affect the lives of citizens the judiciary does also have a significant impact on society through their decisions. Judiciary is the custodian of arbitration between individuals and between individuals and States. On November 23, 2021, in *Ismaila Ceesay v Independent Electoral Commission*, the High Court in Banjul ruled in favour of the applicant pointing out that "the cumulative effect of IEC wanton disregard and non-compliance with the prescription of the law and their guidelines profoundly infringes on the applicant's fundamental right guaranteed under Section 20 (c) of the Constitution, that is the right to stand for election without reasonable restriction. The learned judge also finds and holds that the Independent Electoral Commission's rejection of the applicant without adhering to the due process of the law violates Article 13 of the Banjul Charter."[14] The role of the judiciary is to provide fairness, objectivity, accountability, and legality in the governance process of a State.[15] Is the Gambia's judiciary a bastion or last resort for justice for Gambians. This research is quite timely because it will help to assess justice delivery in The Gambia and point out the loopholes that challenge governance according to the international standard.

[9]Miriam Ronzoni & Laura Valentini, "Global justice and the Role of the State: A Critical Survey" in *The Oxford Handbook of Global Justice*, ed. Thom Brook, Oxford University Press, (2012), p. 21

[10] Suri Ratnapala, *Jurisprudence*, Cambridge: Cambridge University Press, (2009), p. 318.

[11]Agbonika John and Alewo Musa, "Delay in the Administration of criminal justice in Nigeria: Issues from a Nigerian viewpoint", *Journal of Law, Policy and Globalization* 26 (2014): 130

[12]Hakeem O. Yusuf, "The judiciary and political change in Africa: Developing transitional jurisprudence in Nigeria", *International Journal of Constitutional Law* 7, No. 4 (2009): 655

[13]Ismene Nicole Zarfis, "The transitional justice in protecting human rights in the New Gambia" In. (ed) Satang Nabaneh et al., *Gambia in Transition: Towards a new constitutional order*, Pretoria University Law Press, (2022), 256

[14]The Fatu Network, "Breaking News: Dr Ismaila Ceesay defeats IEC as court Election House violated the lwa while rejecting CA leader's nomination", https://www.fatunetwork.net/breaking-news-dr-ismaila-ceesay-defeats-iec-as-court-says-election-house-violated-the-law-while-rejecting-ca-leaders-nomination/, accessed 30 July 2022.

[15]Aboubacar Abdallah Senghore, "The judiciary in governance in The Gambia: the quest for autonomy under the Second Republic", *Journal of Third World Studies* 27, No. 2 (2010): 216

This research focuses on the legal normative approach to study secondary legal materials like journals, books and other national and international instruments that are germane to it. Data is collected through investigation of instruments that are relevant to the issues. While using The Gambia as a case study, a comparative research approach is made between Gambian justice and Pancasila justice systems in order to reach an informed conclusion on how to advance international justice in Indonesia and The Gambia.

B. Discussion

1. Justice in Global Context

The subject of justice draws back to ancient Greece when the state was occupied with great philosophers. Included in the longlist of these greater thinkers and writers of the time are Socrates, Plato, and Aristotle. It is not within the purview of this research to make a philosophical narration of these great thinkers who have propounded theories about justice, but it suffices to submit that peace, which is a sine qua non of social cohesion, is a product of the practice of truth and justice according to law. When the peace of the world was challenged and undermined by the Nazi regime between 1939 and 1945 during World War II, the international community sought to address these through a tribunal of justice which led to the establishment of the International Military Tribunal (IMT) in Nuremberg, Germany on 20 November 1945[16] and International Military Tribunal for the Far East (IMTFE) on 29 April 1946.[17] The 20th century faced conflicts which resulted in the establishment of the International Criminal Tribunal for former Yugoslavia on 25 May 1993 and the International Criminal Tribunal for Rwanda on 8 November 1994.[18]

Aside from the above ad hoc tribunals, the international community in its quest for justice and fair co-existence establishes the United Nations which comprises seven organs. Among these organs is the International Court of Justice, the principal judicial organ of the United Nations. The overall aim of this court is to serve justice to the parties concerning issues that are recognised in the UN Charter. The 20th century also witnessed the establishment of the International Criminal Court independent of the United Nations with the jurisdiction to prosecute persons of member states responsible for genocide, the crime of aggression, war crimes and crimes against humanity.[19] These tribunals and courts are informed by certain ideologies that all converge at the point of justice.

So, throughout the medieval period to date, the bone of contention on the interrelationship between justice and law is what occupies the intellectual domains of scholars and philosophers. From the pre-Socratic period, it is pointed out that one of the major problems of Athens was the fact that money had the power to undermine, change and even destroy long-established and respected ethical values.[20] Socrates' dedication to justice and truth was a matter of life and death. He would, therefore, be willing to uphold the same truth even if he were to pass away a hundred times as long as the circumstances surrounding it remained the same.[21] He started discourse on the nature of justice with the assertion that, leading a just life or doing the right thing cannot be tantamount to or result in simply telling the truth or paying one's debts. With

[16]The establishment of this tribunal marked the first step of the international community to seek justice by trying and punishing war criminals mainly the Nazis and the Nazi wing organizations and their affiliates.

[17]This lesser-known tribunal commonly called the Tokyo Trial, was created in Tokyo, Japan according to a 1946 proclamation by U.S. Army General Douglas MacArthur, the supreme commander for the allied Powers in occupied Japan to try leaders of the Empire of Japan for conventional war crimes, crimes against peace, and crimes against humanity.

[18]Like the former tribunal in Yugoslavia, the ICTR was established by Resolution 955 of the UN security Council The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31December 1994, in accordance with the provisions of the present Statute.

[19]Article 5 of the Rome Statute of the International Criminal Court

[20]Richard Seaford, *Money and the Early Greek Mind*, Cambridge: Cambridge University Press, (2004), p. 94

[21]Mogobe Ramose, "Dying a hundred deaths: Socrates on Truth and Justice", *Phronimon* 15, No. 1 (2014): 67

this succinct observation, Plato draws in to question Cephalus' underlying encouragement behind his actions to obtain an answer to the question, what is justice itself? To validate his point, Socrates makes the illustration of a friend in a reasonable state of mind lending him a knife and later, in a craze situation, demanding the knife be returned. Socrates then points out that it would be morally unjust to return the knife because it would jeopardise the lives of others. It is from this example that Socrates then deduces that telling the truth and returning what we have borrowed is not tantamount to doing the right thing.[22]

The interrelationship between justice and law is complex. Legal and political theorists since the time of Plato have contended with the issue of whether justice is part of the law or is a moral judgment about the law. An example of the latter is an 'unjust law'[23] which points out that the law is not always just. It is one of the old and polemical ideologies of legal and political philosophies. In his book, *The Republic*, Plato built up the theory that justice is firmly established in the works of both an individual and the framed society. After condemning the conventional theories of justice that are propounded by Cephalus, Polemarchus and Thrasymachus, Plato propounded his theory of justice. For him, justice is a human virtue that makes an individual good and self-consistent. It is a social awareness that creates a society that is internally harmonious and excellent.[24] To him, justice is a tool that unifies and promotes social cohesion and integration. Aristotle's theory of justice can be propounded through laws because laws are expressions of justice. Laws must be less opened to interpretation in prescribing tools on how social and economic inequalities are to be addressed so that they are both reasonably applied to everyone's advantage. If a political society has all this, then the state is considered capable of providing a flourishing setting for everyone. However, justice which is presumed to be expressed by the laws is not enough because to have laws intentionally by the rational domain of the soul, a high level of political consciousness is further required.[25]

Thus, strong institutions of law need to be in place. In the context of global tyranny and justice the International Court of Justice, which is a principal organ of the United Nations, ought to be revamped not structurally but by ensuring that the delivery of justice is effective and efficiently based on reasonable standard among nations.

2. The African and the Pancasila Justice

Without a doubt, despite the terrible repercussions it can have in some situations, conflict has come to define many cultures. The phenomenon has remained unshakable despite the methods and tools at the disposal of contemporary nation-states in their western-styled approaches to conflict resolution in Africa.[26] It is necessary to reestablish impartiality, neutrality, and transparency – the three pillars of conflict resolution in traditional African societies – in justice processes.

In 2017, African Heads of State and Government adopted a non-binding resolution urging the African Union (AU) member states to withdraw collectively from the International Criminal Court (ICC) at the conclusion of an African Union summit held in Addis Ababa. This followed the announcements by Burundi, South Africa, and The Gambia that they would be leaving the International Criminal Court. These modifications prompted an uproar against the court for

[22] Hope Grigsby, "Justice in the State and Individual", *Phronesis* 4, No. 2 (2013): 6
[23] Komal Parnami, "Concept of justice difficulties in defining justice", *IJLMH* 2, No. 5 (2019): 2
[24]Mfonobong David Udoudom & Samuel A. Bassey, "Plato and John Rawls on Social Justice" *Journal of Arts, Science & Commerce* IX, No. 3 (2018): 111
[25]Wilson Villones, "Some Reflections on Aristotle's Concept of Justice", *https://www.researchgate.net/publication/315757442_Some_Reflections_on_Aristotle%27s_Concept_of_Justice*, p.3, accessed on 23 June 2023
[26]Adeshina I. Omotayo, "Reintegrating African Traditional Dispute Resolution Mechanisms in Conflict Resolution", *International Journal of Advanced Academic Research* 7, No. 12 (2021): 91

unfairly targeting Africans across the continent and eroding African State sovereignty.[27] What will happen next in the continental legal framework of Africa is a fundamental question raised as regards their exit from the court. In a continent where there are numerous instances of human rights violations and where allegations of crimes against humanity are made, this question is extremely important. Are there other judicial systems and institutions in Africa that are 'Afrocentric' in nature capable of dealing with African problems?

The justice system in Africa is going to the dogs because it is undeniable that among the civilisations of the world, Africans are recognized for their pure traditional values. As a result of the blind imbibement, assimilation, and effects of foreign values that are antagonistic to and in conflict with the traditional ones, Africa is currently experiencing traumatic experiences that have corroded, devalued, and desecrated these values.[28] While the adoption of western values are being blamed for the cause of problems of justice in Africa, the ideology and cliché of "African solution to African problem" is far from the reality.

A classical justice system of the Rwandan Gacaca is an epitome of the strive for African justice system. Gacaca, in Kinyarwanda *Gachacha*, is a traditional justice system.[29] From the beginning, the gacaca process, according to official sources and academic analysts, had five objectives: to establish the truth about what occurred; to expedite legal proceedings for those accused of genocide crimes; to end a culture of impunity; to reconcile Rwandans and strengthen their unity; and to use Rwandan society's resources to administer justice in accordance with Rwandan custom. Reparation was not among these objectives. There has not been much focus on making amends for the Rwandan genocide victims. The institutional response has largely been retributive in nature and has therefore been centred on holding those responsible for the alleged crimes accountable in local and international courts.[30] The former primarily occurred through the gacaca courts, while the latter primarily through proceedings before the International Criminal Tribunal for Rwanda (ICTR) and tribunals in other nations.

Given the complete devastation the genocide caused to the nation's legal and justice system, Rwanda's domestic pursuit of thorough justice in the wake of the genocide is more impressive in Africa.[31] This Rwandan model of justice is something that gives The Gambia impetus to embrace a transitional justice system in the form of Truth, Reparation and Reconciliation Commission although the latter's approach was not in the context of "The Gambia's solution to The Gambia's problem".

a. Delayed Justice in The Gambia

The contextualisation of justice in this research is on the justice system in The Gambia. The Gambia was a British colony in 1821 until it regained its political independence on 18 February 1965 and became a Republic on 24 April 1970 with Sir Dawda Jawara as its first President. The Gambia encompasses a tripartite legal system comprising of common law, customary law, and sharia law.

The Republic of The Gambia is upgraded with the Constitution of the Republic of the Gambia, 1997 (as Amended to 2017) and an Introductory Note. The Introductory Note depicts the sacred and constitutional history of The Gambia, Africa's smallest mainland state, which reacquired independence from Britain in 1965. It covers the first republic from 1970, the military overthrow of the Presidency of Dawda Jawara in 1994, and the introduction of the

[27]Nguh Nwei Asanga Fon, "An 'African Justice': Legal Integration and the Emergence of an African Judicial System", *Journal of Asian and African Studies* 54, No. 4 (2019): 1

[28]Christopher Alexander Udofia, "Traditional African Values" *Brolly, Journal of Social Sciences* 4, No. 1 (2021): 113

[29]Hilmi M. Zawati, "Retributive or Restorative Justice: Gacaca Courts' Contribution to Transitional Justice and Reconciliation in Post-Genocide Rwanda" In. Jennifer Heath & Ashraf Zahedi (ed.) *Book of the Disappeared: The Quest for Transitional Justice*, University of Michigan Press, (2023), p. 255

[30]Bert Ingelaere, "Reparation in Rwanda's gacaca courts", *Témoigner Entre histoire et mémoire* No. 129 (2019): 84

[31]Mark A. Drumbl, "Post-Genocide justice in Rwanda", *Journal of International Peacekeeping* 22, No. 1-4 (2020): 249

Constitution in 1997, which recognises the country as a sovereign secular republic.[32] Section 7 of the Constitution of the Gambia outlines the sources of laws in The Gambia, aside from the Constitution, and they include:

(a) Acts of the National Assembly made under the Constitution and subsidiary legislation made under such Acts;
(b) Any Orders, Rules, Regulations or other legislation made by a person or authority under a power conferred by this Constitution or any other law;
(c) The existing laws including all decrees passed by the Armed Forces and Provisional Ruling Council;
(d) The Common law and principles of equity;
(e) Customary law so far as concerns members of the communities to which it applies;[33]
(f) The Sharia as regards matters of marriage, divorce and inheritance among members of the communities to which it applies.[34]

The law aims to maintain order and decency in society – the urgency for social justice. While the law is a means of achieving justice these two are often confused but they are not the same. We talk about "unjust laws". That means adhering to a law is not instantaneously tantamount to justice. Justice is a set of ideas, values and social practices that provides for all persons and groups the enjoyment of economic security, effective participation in economic decision-making and show concern and respect for one another to live harmoniously.[35]

The Gambia is not only 'donated' English as an official language but also donated laws that are operative in Britain including the doctrines of equity as an 'emissary' from the Court of Chancery to ameliorate the harshness of common law emanating from the practice of courts of the English kings following the Norman Conquest in 1066. One of the doctrines of this law of equity is "justice delayed is justice denied". A question worth asking here is: Why are court proceedings sometimes delayed in the Gambia?[36] It is reasonable that judges are not encouraged to promote speed settlement among the parties to litigation because they are assessed on the basis of the quality of their decisions and therefore, they do not want to be overruled by the higher courts. Judges' desire to "show off" their prowess to interpret and apply the law and setting judicial precedents for other judges, lawyers and law scholars also points the reason for certain delays in administration of justice.[37]

b. Transitional Justice in Gambian and the Pancasila Perspective

The Gambia had undergone a phase of human rights violations including extrajudicial killing, arbitrary detention and forced disappearance during the regime of the former president, Yahya Jammeh from 1994 to 2016.[38] Now, the reemergence of 'new democracy' in The Gambia following the December 2016 presidential election brings in a phase of transitional justice including reparation and reconciliation processes and the establishment of the National Human Rights Commission, a permanent independent institution with the mandate to protect and promote human rights and also with the recommendation from the Truth, Reconciliation

[32]Satang Nabaneh,"The Gambia: Commentary" In. ed. Rudiger Wolfrum et al., *Constitutions of the World*, Oxford: Oxford University Press, (2017), p. 1
[33]See *Jaiteh v. Jaiteh (No 2)* 1997-2001 GR, in which the Supreme Court of The Gambia per Jallow JSC (as he then was), points out the constitutional and statutory basis for the applicability and otherwise of customary law in The Gambia.
[34]Constitution of the Republic of the Gambia, 1997 available online at: *http://hrlibrary.umn.edu/research/gambia-constitution.pdf*. Accessed 03 October 2022.
[35]Komal Parnami, "Concept of justice difficulties in defining justice", *IJLMH* 2, No. 5 (2019): 6
[36]Dawda Faye, "High Court Judge expresses concern over delay of records of proceedings", *https://thepoint.gm/africa/gambia/headlines/high-court-judge-expresses-concern-over-delay-of-records-of-proceedings*, Accessed on 4 October 2022.
[37]Giuseppe Di Vita, "Production of laws and delays in court decisions", *International Review of Law and Economics* 30, No. 3 (2010): 276
[38]Attorney General's Chambers & Ministry of Justice, "Government White Paper on the report of the Truth, Reconciliation and Reparations Commission", *https://www.moj.gm/downloads*, Accessed on 3 October 2022.

and Reparations Commission to monitor the transitional justice process provided in these recommendations.

Transitional justice is defined by International Centre for Transitional Justice as "the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses".[39] The relation between the present justice system in The Gambia and transitional justice is that both lie in the view that human beings are the primary 'factor' of justice irrespective of territorial boundaries. As globalisation connects people, justice also raises associated responsibilities between them. Until now, the keen interests in justice among political philosophers and social ethicists was primarily focused on the nation state.[40] The Gambia does not exist in a vacuum and if it is to realise fair and effective justice delivery, the rule of law must no more be undermined by the judiciary.[41]

The subject of justice and sovereignty was established by Hobbes. He submitted that even though we can unveil true principles of justice by moral reasoning alone, actual justice cannot be realised except within a sovereign state. Justice is a concept of relationship among human beings which requires government as an empowering condition. Hobbes drew a clear consequence for the worldwide field, where he saw separate sovereigns unavoidably confronting each other in a state of war, from which both justice and injustice are absent.

So, when democratisation took place in 1998 after the three decades of authoritarianism in Indonesia, transitional justice became part of national agenda. Because of the flawed character of political transitions, transitional justice united the interests of those who wanted to return to politics and those who wanted to distance themselves from the oppressive regime. As a result, while transitional justice measures were successfully implemented at the start of the political transition, they were unable to fulfil their objectives of breaking with the previous government and providing victims with justice.[42] The *ad hoc* Court of Human Rights has failed to reveal truth for some prominent cases, let alone providing remedy and reconciliation.[43]

The justice system in Indonesia anchors on Pancasila justice. Indonesia has yet to provide justice for the human rights abuses that occurred during the New Order (1966–1998), over 26 years after authoritarianism fell. Therefore, it is possible to characterise the Indonesian transitional justice process at best as 'delayed'[44] or at worst as 'failed'.[45] This calls into question how Indonesian civil society actors have handled the situation, especially in light of what is likely the most complicated of the nation's historical human rights abuses: the violence that occurred in 1965–1966, which resulted in the deaths of over half a million people and the prolonged detention of hundreds of thousands of others without charge or trial.[46] Even at regional level, certain region like Aceh[47] has a delayed transitional justice process.

With the introduction of Law No. 39 of 1999 on Human Rights, Indonesia aimed to establish a legal foundation for the protection of human rights and punish the perpetrators of past

[39]International Centre for Transitional Justice, What is Transitional Justice. https://www.ictj.org/about/transitional-justice (Accessed on 1 February 2025)

[40]Göran Collste, "Globalisation and global justice – A thematic Introduction", *De Ethica. A Journal of Philosophical, Theological and Applied Ethics* 3, No. 1 (2016): 8

[41]Momodou Jawo, "Neneh accuses Justice Minister of disrespecting court orders", *https://thepoint.gm/africa/gambia/headlines/neneh-accuses-justice-minister-of-disrespecting-court-orders*, accessed 33 October 2022.

[42]Sri Lestari Wahyuningroem, "Towards Post-Transitional Justice: The Failures of Transitional justice and the Roles of Civil Society in Indonesia" *Journal of Southeast Asian Human Rights* 3, No. 1 (2019): 124

[43]Mirza Satria Buana, "A Realistic Perspective to Transitional Justice: A Study of Its Impediments in Indonesia" *Journal of Southeast Asian Human Rights* 4, No. 2 (2020): 406

[44]Jiwon Suh, 'The Suharto Case'. *Asian Journal of Social Science* 44 (2026): 241

[45]Ehito Kimura, "The Struggle for Justice and Reconciliation in Post-Suharto Indonesia" *Southeast Asian Studies* 4, No. 1 (2015): 73

[46]Ken Setiawan, "The omnipresent past: Rethinking transitional justice through digital storytelling on Indonesia's 1965 violence" In. (ed) Lia Kent et al. *Civil Society and Transitional Justice in Asia and the Pacific*, ANU Press, (2019), p. 63

[47]Edward Aspinall and Fajran Zain, "Transitional Justice Delayed in Aceh, Indonesia" In. Renée Jeffery (ed) *Transitional Justice in the Asia-Pacific*, Cambridge University Press, (2013), p. 87

violations.[48] However, whilst this law has led to significant improvements in the area of establishing a legal foundation for justice, the implementation of the law lacks in practicality. Injustice still prevails with little success registered over the years.

c. Judicial Impact

In his article, "The judiciary in governance in The Gambia: the quest for autonomy under the Second republic", Aboubacar Abdallah Senghore points out four fundamental questions as a sine qua non of an effective justice delivery system. They are:

i. Are court proceedings conducted and completed within a reasonable time?
ii. Do independent and impartial tribunals established by law administer the justice system?

These questions are important because the works of Gambian court system are still yet to answer these questions in the affirmative.

After the despotic regime was overthrown in 2016, a national transitional justice process was started by the Gambian government. It establishes several institutions such as the Truth, Reconciliation and Reparations Committee (TRRC), a mechanism to restructure the security sector, and another commission to investigate the former dictator's financial affairs.[49] President Barrow's administration has taken action to revamp the judicial system by appointing a group of new judges, including distinguished Gambian Chief Justice Hassan Jallow, a former prosecutor at the International Criminal Tribunal for Rwanda. This is done in response to numerous attacks on the autonomy of the judiciary and its politicisation. Further appointments followed including those at the Supreme Court level. Fourteen Gambian judges were among the sixteen judges of superior courts who were appointed in 2017 to the Supreme Court, Court of Appeals, and High Court.[50] However, this noble gesture is still a misnomer to the dispensation of justice in the country.

A constitution is at the centre of judicial process in any country that is premised on the rule of law. Transitional justice starts through the establishment of Truth, Reconciliation and Reparation Commission, the Janneh Commission Inquiry and Constitutional Review Commission. The latter commission was to give the state a new constitution although it was rejected the National Assembly for allegedly protecting political interests.[51] The draft constitution was 'killed' by political divisiveness and partisanship. All political actors did not actively engage in reaching a consensus in a sufficient amount of time.[52]

3. Failures in Indonesian and Gambian Transitional Justice

Transitional justice systems are initiated in countries that have undergone inhumane treatments and systems as these are designed to bridge the past and a promising future by creating a healing process that promote both reparation and reconciliation. Both Indonesia and The Gambia set this after the end of the New Order in 1998 and the dictatorship in 2017 respectively.

In 1999, the Habibie government in Indonesia initiated the establishment of a human rights court through the enactment of Law No. 39/1999. Subsequently, Law No. 26/2000 on Human Rights Courts was passed by the government to formalise its establishment. Prior to this, President Habibie had used the presidential authority to introduce Government Regulation in

[48]Ousu Mendy, "The State and Prospect of Legislation Number 39 Year 1999 of Indonesia" *International Journal of Humanities, Management and Social Science (IJ-HuMaSS)* 6, No. 1 (2023): 13-22

[49]International Centre for Transitional Justice, "Background: Fulfilling the Promise of 'Never Again'", *https://www.ictj.org/where-we-work/gambia*, accessed on 5 August 2023.

[50]Gaye Sowe & Satang Nabaneh, "The Gambia: The state of liberal democracy", In. Richard Albert et al., *2017 Global Review of Constitutional Law*, (2018), p. 100

[51]Satang Nabaneh, "Attempts at Constitutional Reform in The Gambia: Whither the Draft Constitution?", *https://blog-iacl-aidc.org/2020-posts/2020/9/29/attempts-at-constitutional-reform-in-the-gambia-whither-the-draft-constitution*, accessed 29 September 2020.

[52]Satang Nabaneh, *Constitutional Law Developments in The Gambia: 2020*, Law Hub Gambia, (2020): 1

Lieu of Law No. 1/1999 on Human Rights Courts, which was prompted by the political policy of the government in terms of resolving many past cases of gross human rights violations. The development of this law was guided by national and international interest considerations, aiming to address past violations and restore peace and security in Indonesia. Article 104 of Law No. 39/1999 paved the way for the enactment of Law No. 26/2000, which established both permanent and ad hoc human rights courts to try gross human rights violations. In addition to creating a legal framework for accountability through courts, Law No. 26/2000 on Human Rights Courts also allowed for extrajudicial resolution of past human rights violations by forming a truth and reconciliation commission, in line with MPR Decree No. V/2000 on National Unity and Integrity. State politics that impedes social capacity building are considered the root cause of injustice under past administrations. Similar to Indonesia's transitional justice, the lethargic nature of the transitional justice system in The Gambia since the Truth, Reconciliation and Reparations Commission concluded its findings and presented the White Paper to the government on 25 May 2022[53] points to the ruling government's lack of interest to provide justice to the victims of dictatorship. In Indonesia, the primary obstacle to transitional justice are political circumstances in which political elites care more about economic problems and the eradication of corruption, collusion, and nepotism than about human rights abuses.

C. Conclusion

The failed transitional justice in Indonesia can be made effective if a 'grassroot model' is embraced. To use this mechanism, it must be alive to the social realities on the ground and find unique solutions to every issue. This is how Rwanda solved its 1994 genocide atrocities after International criminal Tribunal for Rwanda (ICTR) failed to deliver effectively. This is important because more often than not, international models in transitional justice fail to deliver to the expectation of both the victims and the society at large. Failing to address large-scale abuses is likely to create social division and erode trust in state institutions.

In addition, ignoring such abuses has hindered efforts to achieve political stability, security, and development. Implementing effective transitional justice measures can help build better relationships between different groups and state institutions, leading to peace, stability, and development. It involves a range of interrelated elements that are both practical and conceptual in nature. The process of democratisation in Indonesia can be shaped by a universal view of democracy and the transitional justice procedures that follow. This view can be heavily influenced by liberal democratic ideas and the notion of inherent human rights as a foundational principle.

Finally, for The Gambia to realise a successful transitional justice process in the domain of international justice, there must be prioritisation of victim participation, ensuring comprehensive mechanisms like truth commissions and reparations programs which the country has not fully utilised. There should also be implementation of institutional reforms to prevent future abuses, fostering of broad public engagement, addressing of the root causes of conflicts. By coordinating efforts with other peacebuilding initiatives while tailoring approaches to the specific context of the country and ensuring inclusivity across different communities.

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