

ORAL PRESENTATION
Loopholes

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ASA 2004

My paper is a set of preliminary thoughts towards a new collective project on Popular Forms of Accountability that a network of thirteen Nigerian scholars, and three of the panelists here, hope to launch in the near future. The proposal has been written from Nigeria and submitted for funding. We are now waiting to hear and hoping to start in the New Year. In the mean time, LaRay Denzer thought that the ASA would be a fine venue for a discussion of issues and approaches. None of the Nigerian members of the network was able to commit to coming to the meetings at the time of panel submission, so our group today consists of the three of us in the project, and Bill Murphy, who has worked on parallel issues.

The model for the network is based on the one that several members took part in in 1997, of the topic of devaluation in the popular economy of Nigeria, which was published in the U.S. in 2002 and in Nigeria in 2003 under the title of *Money Struggles and City Life. Devaluation in Ibadan and Other Urban Centers in Southern Nigeria, 1986-1996*. The model consists of the organization of a multi-disciplinary network around a theme of common concern: both intellectually in each discipline and strategically with respect to what is happening in the world. The disciplines represented in the proposal are political science, geography, history, economics, sociology, information technology and anthropology. Each scholar carries out their own empirical project, while a series of meetings alongside the research promote debate about concepts, methods, interpretation and finally publication. We chose this theme of popular forms of accountability about two years ago, and have been honing it and recruiting participants since then. The other members of the panel have already made some progress on their research. I have only organized some thoughts and done some reading. So my role here is to launch some ideas, and especially with the contribution of anthropology in mind, around the recent upsurge in invocation of accountability and its related condition of “transparency” in discussions of governance. I have taken on an issue that will arise in all the studies, a “transverse issue”, namely the shape of the spaces in grids of formalities. It follows lines of argument that I developed in Chapter 9 of my recently-published book *Marginal Gains. Monetary Transactions in Atlantic Africa*, which also contains the seeds of my own project for the network.

The concept of accountability is not only a non-western/development issue. American newspapers often refer to accountability these days, albeit not in the same way as for new democracies; here it’s invoked generally in relation to voter mandate and the actual policy performance of elected representatives, in relation to political exigencies, lobbyists and other possibly-dubious influences that might swerve them off-track. It’s

largely about keeping campaign promises. In Africa "off-track" processes are generally grouped together under the rubric of "corruption". It may be debatable whether the corruption that transparency and accountability is supposed to correct is really the signal issue with respect to African governance. But we leave this aside for the moment because there is a clear wellspring of varied interest in a certain re-moralization of political and economic life: in the literal sense of "accounting for" public or collective monetary funds according to known and endorsed rules, and also in the broader sense of the application of standards and sanctions by those who invest a person with responsibility for others. The questions are: how is moralization being framed conceptually and enacted in social life? Where do its key ideas and technologies originate and how are they inculcated? Where is it located institutionally? What kind of arbitration, judgment and sanction does it invoke?

Many quite different constituencies are committed to enlarging and institutionalizing what they all refer to as accountability and transparency in Africa. International institutions are trying to shape public finance in countries where massive sums have evaporated without trace. Large corporate investors are trying to ensure "capacity" and predictability in economic and legal administration. Civil society movements, such as "publish what you pay" aimed at the oil companies, are trying to hold these same investors to standards of responsible action vis-a-vis the state and the global public. And workers and publics are trying to achieve promises about prices and wages in unpredictable times. (Witness the repeated recourse of Nigerians to the threat of a general strike over gasoline prices.) Although these constituencies may share a term – accountability – and a sense of its importance, it is highly unlikely that all have the same focus or concept for the "truth" that should be transparent, the same definition of responsibility, the same judgment of appropriate sanction or the same cost/benefit calculation about prevention of "abuse".

This potential multiplicity of judgmental sites and standards is in part the result of a surge of many constituencies into specific spaces that had opened up in bureaucratic structures during decades of military and autocratic rule. Bureaucracies had been reshaped by manipulative tactics, weakened by the institution of parallel personalized structures, and undermined by destruction of records, loss of personnel, backlogs of cases and so on. The Nigerian press of the 1990s reported ramifying effects of bureaucratic incoherence. For example, the federal government paid its bills to parastatals such as the airlines and the electricity company unpredictably and rarely in full, contributing to blackouts, schedule chaos and ripple effects as some staff augmented salary gaps by running arbitrage schemes on whatever resources they could get access to: offices, phones, funds, letterhead stationery and so on. As the proposal argues, inside and outside bureaucracies, "people developed informal channels for getting things done, for overseeing and sanctioning those in formal positions and for regulating their own endeavors."

One dimension of the work of the network will be to look at operational moralities in these arenas that developed outside the state, or within the interstices of state evacuation, whose idioms and practices of social and political discipline now become part of the conceptual repertoire in circulation. Under the do-it-yourself society and economy of military rule between 1983 and 1998, all kinds of old and new associational forms developed their own modes of trust, accountability and sanction that

cross-cut and supported one another in a whole variety of ways: business networks, cross-border money-changers, religious congregations, home town associations, occupational organizations, labor unions, youth groups and so on. They seem to have consolidated their own modes of regulation, day-to-day ethics of interaction and transaction about the minutiae of everyday life without much direct input from a legalizing or moralizing state in the literature (see Michaels Watts on Delta youth groups; Dan Smith, Kate Meagher on vigilantes; Olutayo Adesina on money changers). Hence the multiple sites from which particular terms and practices of accountability may be emerging that go far beyond the dual levels of the national and the local (ethnic) public that Peter Ekeh postulated in the 1970s. Fifteen years of military rule, and particularly the years between 1990 and 1998, placed all kinds of groups under pressure to be inventive.

Another emphasis starts from formal sector and state institutions themselves, focussing on the points at which state interfaces with the public and their organizations are being recrafted. There is, of course, a process of recrafting at the center as well: audits of ministries, restructuring of hierarchies, redefinition of mandates, retrieval of functions once farmed out to parastatals, and so on. But our own focus on “popular forms” means attention to the margins: margin understood as the limits of its own structure rather than some geographical space at the territorial edge. Here I think it’s worth standing back from the recent experience of Africa to the liberal state model itself, which of necessity envisages its own limitations and therefore recognizes important ordering processes in society with which it will interact to try to discipline social processes (see Foucault on epistemes of governmentality). Complex, varied and shifting practices of moral translation and commensuration are necessarily at issue on ever-changing margins.

From the beginning, the liberal model was morally utopian about the “person” beyond the state, in that ethical standards were a *precondition* of social and economic action and not an imperfect process or result of it. Adam Smith is passionately clear about this. The liberal state is to be limited, for several reasons: to accommodate the freedom of citizens; to prevent that “insidious and crafty animal, vulgarly called a statesman or politician” from intervening in “the momentary fluctuations of affairs” (*The Wealth of Nations*, 435). But also because of what he calls the danger of “casuistry” in government. There are three sources of regulation of behavior: jurisprudence, casuistry and ethics. Casuists deal with the detailed application of rules to the whole range of specific cases. They cover what might be considered ambiguous areas such as “How (it is) possible to ascertain by rules the exact point at which, in every case, a delicate sense of justice begins to run into a frivolous and weak scrupulosity of conscience” to “when (it is) that secrecy and reserve begin to grow into dissimulation” (*The Theory of Moral Sentiments*, 339). He judges these processes entirely negatively, as attempts to “direct by precise rules what it belongs to feeling and sentiment only to judge of”; they are at best “vain subtilities and frivolous accuracy”, at worst betraying us into “dangerous errors” (TMS, 340). The regulatory space is properly filled by jurisprudence on the one hand (the law) and ethics on the other, about which he is extraordinarily exacting and unforgiving, in explicitly Protestant Christian terms: “Our imagination therefore attaches the idea of shame to all violations of faith, in every circumstance and in every situation...No circumstances, no solicitation can excuse it; no sorrow, no repentance atone for it...even to the most worthless of mankind” (TMS, 332), with which he contrasts “the Roman Catholic superstition (introduced) in times of barbarism and ignorance” (333), that one

could confess and be absolved. This puts the constraints on behavior into a large non-legal sphere, where the “casuistry” of application of moral standards is left to personal judgment, animated by anxiety to do one’s duty and the love of generosity and nobility. It is sanctioned from society and conscience, by “ignominy, shame and contrition”, as distinct from regulation being derivative of the law, belonging rightfully in the construction of the state.

The result hardly followed the ideal, even in the heart of established protestantism (although not Calvinism...which might be the problem). In the 1830s in England the Municipal Corporation Commissioners were reported to be involved in “mismanagement of the corporate property of the most glaring kind...execution of long leases for nominal consideration, voting of salaries to sinecure, unnecessary or overpaid officers, entertainment of the Common Council and their friends,” and in the countryside “active participation in local affairs too often resolves itself into an unsuccessful struggle with the grossest ignorance, the most offensive mob oratory, and the most sordid self-seeking” (from Webb and Webb on British local government, 1963, 41, 185).

The dilemma of responsabilizing a liberal state has always been deeply problematic, from Adam Smith to the present. If the law and ethics are the two domains, one sanctioned by public force and the other by private fear (of damnation, and therefore a rather hit-or-miss affair), the grey area of “casuistry” can become very large: an area – geographical or functional or concerned with a level of minutiae - which is neither one nor the other and yet carries some aura of public morality, collective opinion or censure. Disjunctures and areas of invention are intrinsic to all versions of the liberal model, including those with sizable populations that are, in their own estimation, guided by Scottish Calvinism. More challenging yet is understanding of citizenries manifestly not guided by the moral sentiments of Adam Smith, including all the many variants of moralities guided by concepts of the common good as distinct from – although not necessarily antithetical to - the goodness of individuals. The generic nature of this intellectual and political problem of casuistry could be obscured, in Africa, by formulations that have an African specificity at their heart.

It might seem that in elaborated liberal states there is little remaining casuistry outside of regulatory processes. Possibly intermittent shifts to a more social welfare model have closed the gap between law and ethics, and/or the lawyers have assimilated as much of the casuistry as possible into the law. But there are still whole domains of action where moral ambiguity reigns. Loopholes is one of them: spaces in a net of legal obligation that exist but not entirely approved of. They are often points of obscurity and secrecy (“shelters” that are eventually “probed”) in the otherwise transparent grid of a law which in principle is enacted, investigated, prosecuted in public.

Take, for example, some recent news from the NYT Business Page: “\$500 million frozen in IRS crackdown in doctors’ tax case”: where about 4,000 doctors and dentists across the United States had recourse to what are now termed “abusive tax shelters”; abusive because the financial instrument set up for them allowed them to look as if they were contributing to a charity fund, while withdrawing from it to pay children’s college tuition. Legally possible (so far, until investigation decides otherwise) and casuistically constructed on the margins of both ethics and the law, informed by another commitment from another domain of life. Exploiting loopholes is quite explicit as a practice. Personal accountants trawl the tax code every year looking for new loopholes opened up by last

year's legislation (often intended to close old loopholes). In Nigeria, searching for loopholes was once described to me as a national pastime, across many domains of public life, and across all types of state. There are hundreds of references to loopholes in the Nigerian press, past and present, as any web-search will show. Indeed, some of what goes on that is termed "corruption" is not strictly speaking illegal at the time it is committed. Its moral valence and forms of sanction fall in that shady area between ethics and the law.

Just to cite a couple of recent references: "Why Conduct Bureau Can't Probe Corrupt Public Officers" (Vanguard of November 4, 2004): because the public won't come forward to testify (without which there is no case) and because, in some areas, a couple will never report their assets individually, so there is no way to trace the enrichment of one of them. On a national scale, the monitoring of oil revenues by the NNPC (Nigerian National Petroleum Corporation), has "loopholes" that allowed politicians to "use the petroleum sector as their petty cash till" (Daily Trust, October 17th 2003)

Looking analytically and comparatively at a generic issue, such as the fate of casuistry in the liberal state, is classic anthropological territory: the ambiguous, the anomalous, the interstitial, the non-rational (or non-systematized). A recent book entitled *Anthropology in the Margins of the State* (edited by my colleagues at Hopkins, Veena Das and Deborah Poole) offers case studies of various marginal dynamics: informal models of justice implicitly sanctioned simply by state withdrawal from a geographical area or a domain of social life; the expectation of bureaucratic consistency eroding in practice into what Ferme calls a "system of resonances" with no practical and livable logic; the state's own actions rendered illegible when "the very persons charged with implementing rules might also have to struggle with how to read the rules and regulations" (Das, 238), and where the implementation of normal administrative schemes turn into "an everyday ecology of fear and greed through which the poor end up as partners in the coercive programs of the state." (239). (This is India.)

Back to Africa: there are examples large and small of all these marginal dynamics, points at which accountability is not just a case of imposing well understood rules and sanctions that fall squarely into the reinstatement of the liberal model of the state (i.e. the reform of pathologies), but where the state itself evacuates spaces for casuistry, and where different tropes and practices of judgment may enter into contest.

I have used loopholes as an example of the space between law and ethics because their existence, their sheer enormity as a phenomenon, and the fact of a *politics* to their production, is not contentious. Everyone knows they exist, that many are not accidental and some are almost impossible to close. They are hidden, but not unacknowledged in public life. Is/was it possible to pursue logical advantages through "gaps" in the regulations: could the managers of Community Bank funds put them in suddenly-created lucrative 7-day accounts with larger banks? What are the management moralities for running the hajj from Nigeria to Mecca? Can schools collect and use development fees as they wish? What accounts for unusually large electricity bills (a computer virus or what)? How long can payments be delayed? What happens to a court case when the police prosecutor fails to turn up for the trial? Is there any recourse when hundreds of civil service workers are taken off the payrolls to try to purge "ghost workers"? How did (reported in 1994) public officers manage to circumvent the law against holding accounts abroad? Ingenuity far outstripped regulations in place. How did anyone even dream up

the idea that an educational testing organization would sell test scores, registering as absent the person who actually took the test, and sharing the profit amongst invigilators, inspectors and organization staff? These are just a very few of the many, many cases that appear in the newspapers. Far larger is the legal “loophole” through which oil companies escape complaints brought by communities, because communities do not have the adequate status in law to bring damages and compensation suits (Frynas).

There have been varied official languages to instill a national ethics: The Ministry for National Guidance under President Shagari; the War Against Indiscipline under Buhari. But what are the emergent terms of engagement within those sites, where law meets ethics and where casuistries are improvised along with their own contentions and illegibilities? An anthropological attention to accountability is not looking only at what lies beyond the state, or at what is specifically non-western, but rather at domains and sites within the liberal/limited state where originalities of practice and concept emerge: like loopholes.