The Portable Coup: The Jurisprudence of 'Revolution' in Uganda and Nigeria

SAMUEL FURY CHILDS DALY

In January 1961, nearly 200 African judges met in Lagos, the capital of Nigeria, for the First African Conference on the Rule of Law. The problem before them was a large one: how to adapt legal systems made in Britain, France, Belgium, or Portugal for use in African countries that were now "free," or would be in the near future. Nigeria was a fitting place for the conference. It had won independence from Britain the previous year, and there were, as President Nnamdi Azikiwe told the delegates, "nearly as many lawyers within its borders as there are to be found in the rest of indigenous Africa." Nigeria's mature judicial institutions gave his government moral authority, and made it a model for the rest of the continent. "It is commonly agreed," Azikiwe said, "that Nigeria offers to Africa and to the world probably the best example of a country that is noted for orderly advance."[1] Delegates to the conference could not agree on much, and they

1. *African Conference on the Rule of Law, Lagos, Nigeria January 3–7, 1961: A Report on the Proceedings of the Conference* (Geneva: International Commission of Jurists, 1961), 175. There were approximately 540 African lawyers in Nigeria in 1960, which was far more than in any other former British colony in Africa. In several French ex-colonies, the number of African lawyers could be counted on one hand, and in the Democratic Republic of the

Samuel Fury Childs Daly is an assistant professor of African and African American Studies, History, and International Comparative Studies at Duke University <Samuel.furychilds.daly@duke.edu>. He is the author of *A History of the Republic of Biafra: Law, Crime, and the Nigerian Civil War* (Cambridge: Cambridge University Press, 2020), which won the J. Willard Hurst Prize from the Law and Society Association. He is currently writing a book on law and militarism in postcolonial Africa, and on the history of military desertion. The author thanks editor Gautham Rao and the *Law and History Review*'s anonymous reviewers for their insightful and constructive criticism. He also thanks the participants in the 2015 Cultural Translation of Law workshop at the Max Planck Institute for Legal History and Legal Theory, the 2018 Migratory Justice workshop at Yale University, and the 2018 Legal Histories of Empire conference at the University of the West Indies–Cave Hill, where this material was workshopped.

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sparred over language, ideology, and what to do about the parts of the continent still under colonial rule. They were all of the same mind about one thing, however: the danger of tyranny. The Committee on Executive Powers, chaired by Abdoulaye Wade of Senegal and Herbert Chitepo of Southern Rhodesia, warned that Africa's new states were vulnerable not only to external forces, but to threats from within. Military takeovers threatened to end democracy before it could begin, and emergency measures like martial law endangered hard-won freedoms.[2] Colonial despotism, they feared, might give way to homegrown autarky.

Ten years later, these fears had come to pass. Coups became common events.[3] "It has proved infectious, this seizure of government by armed men, and so effortless," wrote the South African sociologist Ruth First. "Get the keys of the armoury; turn out the barracks; take the radio station, the post office and the airport; arrest the person of the president, and you arrest the state."[4] Many governments had become dictatorships, and soldiers occupied statehouses across the continent. Even in countries where civilians held onto power, emergency measures hollowed out the legal protections available to ordinary people. In Nigeria, military rule was the order of the day for most of the next four decades. When a prominent Nigerian civil rights lawyer was asked to describe how politics worked in his country, he cited neither a constitution, nor a statute, but Mao Zedong's *Little Red Book*. "Power flows from the barrel of the gun," Mike Ozekhome wrote. "Power is an aphrodisiac, a potent catalyst, and a ready tool in the hands of dictators, tyrants, fascists, and autocrats," "a bemusing liquor" which generals imbibed "again and again, with stupendous and insatiable Bacchanalian propensity."[5] What explains this turn to dictatorship, and how did it spread from one place to another? For former British colonies in Africa, a small group of judges who traversed the continent in the name of pan-African cooperation are part of the answer.

Congo there were none at all at independence. Omoniyi Adewoye, *The Judicial System in Southern Nigeria, 1854–1954* (London: Longman, 1977), 286.

2. *African Conference on the Rule of Law*, 56–81, 96–113. On the role of emergency measures in colonial administration, see Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003).

3. One study counted 80 successful coups, 108 failed ones, and 139 plots across 48 African states between 1956 and 2001 (this study excludes those north of the Sahara). Patrick J. McGowan, "African Military Coups D'état, 1956–2001: Frequency, Trends and Distribution," *The Journal of Modern African Studies* 41 (2003): 339–70.

4. Ruth First, *The Barrel of a Gun: Political Power in Africa and the Coup d'Etat* (London: Ruth First Papers Project, 2012), 4.

5. Chief Mike A. A. Ozekhome, "The Recurring Battle for Supremacy Between the Executive and the Judiciary in Nigeria: Who Wins," *Constitutional Rights Journal* (1993): 26–32, at 26, 28.

Soldiers and despots across the continent got "drunk" on power beginning in the mid-1960s, as Ozekhome wrote. But, to extend his metaphor, it was judges who passed the bottle between them. The jurisprudence of authoritarianism was portable, and judges carried it across the continent as they were appointed from one British ex-colony to another. They were indispensable in authorizing executive power, and converting the commands of military leaders into formal administrative structures. "The fascists played the tune," Mahmood Mamdani wrote of this moment in Ugandan history, "and the judges danced."[6] Not all of Africa's military leaders were "fascists," but Mamdani was right to see a dialectic between soldiers and judges. This article traces the itinerary of one Nigerian judge, Sir Egbert Udo Udoma, who served in two African states where the military dominated politics: Uganda, where he was the first African chief justice, and Nigeria, where he sat on the Supreme Court and advised several military governments.[7] His influence was much wider than these two countries, however. Udoma developed a jurisprudence that aspiring military leaders worldwide found useful, and his rulings were used to sanitize coups across the common law world, including in South Asia, the Pacific, and the Caribbean. Udoma is largely unknown today, but he lurks in the background of the global history of militarism in the twentieth century.

The Traffic in Judges

Beginning in the early 1960s, African administrators in former British colonies devised an informal system for sharing legal expertise across their borders. Countries that had many African judges, like Nigeria, would assist those that did not, like Uganda. Commonwealth states in the Caribbean would contribute personnel as well, all under the banner of pan-African solidarity. This arrangement solved a problem; some former British dependencies were better equipped to create their own legal systems than others. In West Africa, Africans had been deeply involved in colonial law since the mid-nineteenth century. In Atlantic enclaves like Freetown, Accra, and Lagos, Africans and Europeans had co-produced feisty legal cultures

6. Mahmood Mamdani, *Imperialism and Fascism in Uganda* (London: Heinemann, 1983), 44.

7. The sources for this project include jurisprudence from Nigeria and Uganda, archival records from the Nigerian Institute of Advanced Legal Studies and the National Archives of the United Kingdom, and various published primary sources. An important source is Udoma's uncirculated memoir, copies of which have been deposited at the Nigerian Institute of Advanced Legal Studies and Duke University.

to structure commerce and resolve disputes, which colonial administrators belatedly realized could be turned against them.[8] By the time British rule came to East Africa, administrators were warier of African involvement in law. In Uganda, Kenya, and Tanganyika, the British made a concerted effort to keep legal education beyond the reach of the African majority.[9] This meant that there were very few African lawyers in these countries at independence, and nearly all judges were European or Asian.[10] In contrast, in Ghana, Nigeria, and Sierra Leone (and, to a lesser extent, Gambia and British Cameroon), there was a large pool of experienced lawyers eligible for appointment to the judiciary by the mid-twentieth century. Some of them became judges by joining the bench in other jurisdictions, like rural Botswana or the distant Seychelles, with the understanding that when they went home it would be to take up prestigious positions in their national judiciaries. In this way, the administrative pathways that had once carried judges between British colonies were repurposed to bring West African judges to the rest of the continent.[11] This was done

8. On colonial legal cultures in Africa see Richard Roberts and Kristin Mann, eds., *Law in Colonial Africa* (Portsmouth: Heinemann, 1991); Kristin Mann, *Slavery and the Birth of an African City: Lagos, 1760–1900* (Bloomington: Indiana University Press, 2007); Sally Falk Moore, *Social Facts and Fabrications: "Customary" Law on Kilimanjaro, 1880–1980* (Cambridge: Cambridge University Press, 1986); Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Portsmouth: Heinemann, 1998); Victoria Barnes and Emily Whewell, "Judicial Biography in the British Empire," *Indiana Journal of Global Legal Studies* 28 (2021): 1–28; and Inge Van Hulle, *Britain and International Law in West Africa: The Practice of Empire* (Oxford: Oxford University Press, 2020).This dynamic was not limited to Africa, and it had long attended the expansion of law in the British Empire. See Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (Cambridge: Cambridge University Press, 2021), 699–794.

9. The same was largely true in southern Africa. See George H. Karekwaivanane, "'Through the narrow door': Narratives of the First Generation of African Lawyers in Zimbabwe," *Africa* 86 (2016): 59–77; and Roger Gocking, "Colonial Rule and the 'Legal Factor' in Ghana and Lesotho," *Africa* 67 (1997): 61–85.

10. South Asians had lived in East Africa since the nineteenth century, when the British encouraged Indian colonial subjects to emigrate to other British dependencies. They came on a temporary basis as laborers (to build railways) and clerks (to facilitate commerce), but many of them stayed. By independence, Uganda's Asian community had been there for several generations. See Mahmood Mamdani, *From Citizen to Refugee: Uganda Asians Come to Britain* (London: Frances Pinter, 1973).

11. Old colonial institutions were turned to the task of facilitating their appointments. The Commonwealth Secretariat in London served as an informal clearinghouse for judicial placements, and governments could advertise judicial vacancies in the newsletter of the Commonwealth Magistrates and Judges Association. In London, the paramount legal institution of the empire, the Judicial Committee of the Privy Council, was being remade at the same time. On this institution see Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Court* (Oxford: Oxford University Press, 2013); and Rohit De, "'A Peripatetic World

in the name of solidarity. As politicians saw it, sharing personnel not only fixed a staffing problem, it also helped knit together Africa's now-independent states through the legal tradition that they shared as former British colonies.[12] "African judges," predicted the last colonial governor of Eastern Nigeria, "are not, I imagine, disposed to regard themselves as units in a world wide service in quite the same way as their English colleagues."[13] In fact, African judges *did* come to see themselves as interchangeable, but the "world wide service" they moved within would not be the British Empire. Rather, it was the circuit of pan-African cooperation that emerged among Britain's former colonies.

In eastern and southern Africa, West African and Caribbean judges replaced the Europeans and Asians who had staffed the colonial courts.[14] Leaders like Julius Nyerere in Tanzania and Milton Obote in Uganda hoped that they would be palatable to the public in a way that other foreigners were not. Politicians could gesture to the new judges as proof that they had fulfilled their promises to "indigenise" the judiciary, even though they were not citizens of the countries that they served. A network began to emerge, and a series of unusual firsts followed: the first African chief justices of Uganda and Botswana were Nigerians, and the first Black chief justice of Tanzania was from the tiny Caribbean state of Dominica. Kenya and the Seychelles would both have Ghanaian chief justices, and high courts across eastern and southern Africa were presided over by Sierra Leoneans and Gambians. In their new postings, West Africans joined colonial-era appointees from South Asia, Britain, Ireland, and Cyprus, some of whom were quietly kept on after independence, despite politicians' promises that African judiciaries would be made up of Africans.[15]

Court' Cosmopolitan Courts, Nationalist Judges and the Indian Appeal to the Privy Council," *Law and History Review* 32 (2014): 821–51.

12. Nigerian Institute of Advanced Legal Studies (hereafter NIALS), uncatalogued collection [papers of T. Akinola Aguda], Col. Mobolaji Johnson to Sir Adetokunbo Ademola, August 7, 1971.

13. National Archives of the United Kingdom, Kew (hereafter NAUK) CO 554/1409, Governor's Office, Eastern Region, Nigeria to Colonial Office, London, September 26, 1955.

14. East Africa's courts had been perpetually short staffed before independence too. Judicial postings there were not seen as desirable, and personnel regularly had to be brought from Malaya or Aden (an even greater "hardship" post) to cover gaps in service. NAUK CO 822/644, "East Africa Court of Appeal," March 30, 1954.

15. These judges were kept on after independence on a contract basis, and their presence was embarrassing to the now-sovereign governments that they served. They were, as one historian describes the bench in late colonial Kenya, "a mixed bag, ranging from talented jurists to racist eccentrics." Paul Swanepoel, "Kenya's Colonial Judges: The Advocates'

Intra-African judicial appointments took place at various levels.[16] Those who were posted at high ranks—to supreme courts, for example—were elite, accomplished people, who had already served as high court judges in their home countries. In the 1960s and 70s all of them were men, but women would join the African judicial circuit in the 1980s.[17] All had been lawyers before being called to the bench, and most had moved up through the ranks of the colonial courts. None were radicals, although many were ardent nationalists.[18] They valued the common law tradition that their countries had inherited from Britain, even though some also wanted to reform, modify, or indigenize it. They were generally more accomplished than the Europeans whom they replaced, whose level of birth was often higher than their aptitude (the colonial judiciary promised a comfortable life, but few British judges chose it if they could have a career at home). The Europeans took early retirements, or continued their careers elsewhere in Britain's dwindling empire. Judges of South Asian descent were in the hardest position, since most had been born in East Africa and had no other "home" to return to.[19] Some entered academia

Perspective," *Journal of Asian and African Studies* 50 (2015): 41–57, at 52. Across Africa, some "British" judges had been colonial subjects themselves. Sir Vahe Robert Bairamian, for example, was an Armenian Cypriot who became chief justice of Sierra Leone. All judges received the same salaries regardless of race, but Europeans and African judges who were "either of mixed European descent or had family ties in the United Kingdom" received more generous leave and more frequent passages to London than those who were not or did not. This caused much resentment. See NAUK DO 35/10485, "Appointment of Judge to Supreme Court in Nigeria"; NAUK CO 554/159/13, "Leave Passages Regulations in Respect of African Judges," November 2, 1949, and subsequent undated correspondence.

16. Later, West African judges served even more widely in the Commonwealth. A long-serving chief justice of Belize was from Sierra Leone, for example, and small states throughout the South Pacific hired West Africans as judges and magistrates long after they became sovereign. Some still do. On African jurists in Pacific constitution-making, see Coel Kirkby, "Commonwealth Constitution-Maker: The Life of Yash Ghai," in *Commonwealth History in the Twenty-First Century*, ed. Saul Dubow and R. Drayton (Cham: Palgrave Macmillan, 2020); see also David Chappell, "'Africanization' in the Pacific: Blaming Others for Disorder in the Periphery?" *Comparative Studies in Society and History* 47 (2005): 286–317.

17. Mabel Agyemang of Ghana, for example, would serve as chief justice of Gambia, and later as chief justice of Turks and Caicos. Nkemdilim Izuako of Nigeria was the first female judge in the Solomon Islands, and Mary Mam Yassin Sey was a powerful judge in Swaziland, Sierra Leone, and Vanuatu before taking a position on the Supreme Court of her home country, Gambia.

18. Comparatively see Mitra Sharafi, "A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire," *Law and Social Inquiry* 32 (2007): 1059–94.

19. On the complex careers of Indian-African lawyers in the region, see Rohit De, "Brown Lawyers, Black Robes: Indian-African Lawyers and Histories of Decolonial Lawyering," forthcoming.

or sought work in international institutions, while others gave up law entirely.

In lower courts, the foreign appointees to the bench were usually inexperienced. In Tanzania, the Nigerian Judicial Technical Assistance Program staffed rural magistrates' courts with Nigerian lawyers who had never had judicial appointments. Nigeria did not export its best graduates for these positions—the diplomat who facilitated the program could come up with no adjective to describe them besides "unemployed"—and there were regular complaints about their ignorance of local affairs.[20] One local official noted that the Nigerian magistrates openly disdained the "backwardness and low standard of living" of Tanzania, and angled for appointments in cities, "where they cling to the hope they may find some of the High-Life to which they are accustomed back home."[21] They were widely disliked, and the hope that they might have more public credibility than Europeans or Asians quickly dissipated. However, the fact that they were alienated from the people they served was not a problem to the governments that hired them. In fact, it was an asset. If a judge began to rule against the state too often, it was easy to remove him if he was a foreigner. It was even easier if he was unpopular. Firing a respected judge might cause a scandal, but a disreputable one with no local allies could be sent packing at any time.

These expatriate judges carried a heavy burden in their adopted countries. In the era of "big man" politics that followed independence, the task of interpreting the rules made by soldiers (and civilian authoritarians) fell to them. In large part, they were the ones who gave the go-ahead to martial law. As Abdel Razzaq Takriti writes, not all coups reflect "rapacity in the pursuit of power and resources on the part of caricaturized Third World military leaders."[22] Indeed, coup-plotters had their own distinct

20. Austine S.O. Okwu, "The Ahiara Declaration: Polemics and Politics," in *Writing the Nigeria-Biafra War*, ed. Toyin Falola and Ogechukwu Ezekwem (Woodbridge: James Currey, 2016), 90. The Nigerians were usually the first magistrates in their posts to have legal training. Prior to independence, magistrates had been colonial officers, for whom dispensing justice was one small part of a portfolio of administrative duties. Lord Hailey, *An African Survey* (Oxford: Oxford University Press, 1957), 614; Austine S.O. Okwu, *In Truth for Justice and Honor: A Memoir of a Nigerian-Biafran Ambassador* (Princeton: Sungai, 2011), 198.

21. Quoted in Ellen R. Feingold, *Colonial Justice and Decolonization in the High Court of Tanzania, 1920–1971* (Cham: Palgrave Macmillan, 2018), 206. Feingold notes that the Nigerian magistrates were abruptly called home in 1967, when Nyerere's support for the Biafran side of the Nigerian Civil War soured the relationship between Tanzania and Nigeria.

22. Abdel Razzaq Takriti, "Colonial Coups and the War on Popular Sovereignty," *American Historical Review* 124 (2019): 878–909, at 880.

ideologies, and few of them simply wanted power for its own sake. Many hoped to transform their societies. The same was true of judges, some of whom also believed that law could be a tool to "discipline" public life. More than anything else, Nigeria's guiding ideology from its first coup in 1966 to the return of democracy in 1999 was an abstemious kind of militarism. The soldiers who ruled Nigeria hoped that making military law into the law of the land—for *everyone*, not just men in uniform—would revolutionize society. In Uganda, Idi Amin would espouse a similar hope. "Since I came into power," he described in a 1974 interview, "automatically Uganda became revolutionary. Not only the armed forces, but the whole police, prisons, the whole public."[23] Military leaders promised that their "revolutions" would cleanse African societies of the decadence and corruption that lingered after the end of colonialism, bringing order and prosperity as they went. Some called their takeovers acts of "decolonization," and cast themselves as the vanguards of liberation—a liberation that would be more meaningful, they said, than formal independence, which civilian elites had fumbled. To soldiers and their supporters, there was no irony in the notion that true freedom would come in the form of an army officer.

But most civilians did not see soldiers as liberators. In both Nigeria and Uganda, military rule was a time of repression and humiliation. After the return of democracy in Nigeria, a Lagos businesswoman named Nkem Liliwhite-Nwosu looked back on it with undiminished fury. The "jackboots" who ran Nigeria into the ground were "blue-blooded aristocrats who spoke with authority through the nozzle of the gun; ignorant greenhorns who claimed to have the solution to problems which their refined, erudite, old fathers could not solve, and who ended up compounding the problems for us all."[24] Her anger was justified, and many people shared it, even though not all regimes could be painted with the same brush. To be fair, military rule was not inherently repressive, just as not all civilian governments were disposed towards freedom.[25] Even moderate military regimes were illiberal, however, and nearly all soldiers shared a disdain for civilians, whom they saw as a chaotic rabble in need of discipline and tutelage. How did the political fortunes of so many African states fall into despotism, and how did this happen so quickly? Some have blamed

23. Barbet Schroeder, *General Idi Amin Dada: A Self-Portrait*, Criterion Collection [film], 1974.

24. Nkem Liliwhite-Nwosu, *Divine Restoration of Nigeria: Eyewitness Account of Her Trials and Triumphs* (Lagos: CSS Books, 2004).

25. Moreover, some of the most repressive governments born of "coups" were not led by soldiers at all, as became clear in Uganda.

authoritarian personalities, others Cold War geopolitics.[26] Ideology and psychology explain something about where Africa's authoritarians came from, but they do not explain how coup-plotters and impetuous soldiers became "legitimate" heads of state. It was judges who translated their vague promises of "order" into tangible policies, and transfigured their power grabs into political transitions that the rest of the world recognized. For Nigeria and Uganda, that story begins in a Dublin lecture hall.

Sir Egbert Udo Udoma

The soldiers who ruled Nigeria and Uganda trained and served in the British armed forces, and they venerated Britain's martial culture even when they styled themselves as radicals.[27] However, the colonial barracks was not the only place militarism sprang from. Its roots lay in law schools too. Starting in the late nineteenth century, a trickle of West Africans went to English and Irish universities to study law, supported by their families, towns, and churches. One of these students was Egbert Udo Udoma, an academically gifted trader's son from the Ibibio town of Ikot Abasi in southeastern Nigeria. Udoma studied law at Trinity College, Dublin in the 1930s, where he became a prominent student leader. He then went to Oxford to read for a doctorate with Margery Perham, after which he was called to the bar at Gray's Inn.[28] The ideas he encountered there shaped how he later interpreted the law at home. He read philosophers

26. A. B. Assensoh and Yvette Alex-Assensoh, *African Military History and Politics: Coups and Ideological Incursions, 1900-Present* (New York: Palgrave, 2001); Samuel Decalo, *Coups and Army Rule in Africa: Motivations and Constraints* (New Haven: Yale University Press, 1990); Maggie Dwyer, *Soldiers in Revolt: Army Mutinies in Africa* (Oxford: Oxford University Press, 2017); Eboe Hutchful and Abdoulaye Bathily, *The Military and Militarism in Africa* (Dakar: CODESRIA, 1998); Godfrey Mwakikagile, *Military Coups in West Africa since the Sixties* (Huntington, NY: Nova Science Publishers, 2001); and Eze Ogueri, *African Nationalism and Military Ascendancy* (Owerri: Conch, 1976).

27. Idi Amin had been in the King's African Rifles, for example, and many of Nigeria's military leaders trained at military academies like Sandhurst and Mons.

28. Udoma gained a reputation as a firebrand during his studies. In 1943 he delivered a speech called "The Lion and the Oil-Palm," which stridently criticized the British policy of indirect rule. It caught the attention of the policy's architect, Lord Frederick Lugard. When Lugard proposed to meet, Udoma rebuffed him. His relationship with Perham, who was an influential theorist of colonial administration, was also not a happy one; "she accused me of extreme nationalism that was likely to colour my work as a scholar," he recalled. "She felt that she was a liberal and I a nationalist and that the two were incompatible." "Sir Udo Udoma: My Life and Times," *The Nigerian Law Times* (1993): 23; and Egbert Udo Udoma, *The Lion and the Oil-Palm (A Study of British Rule in West Africa)* (Dublin: University Press, 1943).

like H.L.A. Hart and J.L. Austin, who would leave a deep mark on African law by way of students like Udoma.[29] He was also exposed to continental theorists like Carl Schmitt and Hans Kelsen, who were starting to appear in British university curricula.[30] Udoma would remember Kelsen particularly well.

After completing his education, Udoma returned to Nigeria in 1945, where he became a successful lawyer.[31] In 1961, a year after independence, he was appointed to the High Court of the Federal Territory of Lagos, which was the main feeder to the Nigerian Supreme Court. In his telling, his appointment was a ploy by his rival Nnamdi Azikiwe, who "would have preferred to see me as a judge than a politician in Parliament in the opposition."[32] In his decisions, Udoma showed himself to be a staunch disciplinarian with little patience for civil liberties.[33] Executive power was the lodestar of his judicial philosophy, and ethnic patriotism lay at the center of his politics.[34] Throughout his career, Udoma would speak of the need to indigenize the practice of law, and he often claimed that his legal thought was influenced by the moral world of his upbringing.[35] Udoma saw the Ibibio people as an embattled minority caught between the larger groups that swayed national politics, and a concern for the interests of

29. "Correspondence with students, 1928–1940," Papers of Ladipo Solanke, West African Students Union, Gandhi Library, University of Lagos.

30. See Christoph Kletzer, "The Role and Reception of the Work of Hans Kelsen in the United Kingdom," in *Hans Kelsen Abroad*, ed. Klaus Zeleny and Robert Waler (Vienna: Manz, 2010), 133–67.

31. He was best known for his involvement in the trials of several chiefs accused of "leopard" murders. These trials, concerning a string of killings committed by people disguised as leopards, became famous across the empire. See David Pratten, *The Man-Leopard Murders: History and Society in Colonial Nigeria* (Edinburgh: Edinburgh University Press, 2007).

32. Udo Udoma, *The Eagle in its Flight: Being the Memoir of The Hon. Sir Udo Udoma, CFR* (Lagos: Grace and Son, 2008), 119.

33. During Western Region Premier Obafemi Awolowo's 1962 treason trial, for example, Udoma ruled to bar Awolowo's British lawyer from entering Nigeria even though it deprived him of counsel. *Chief Obafemi Awolowo v. The Hon. Mallam Usman Sarki (Federal Minister of Internal Affairs) and the Attorney-General of the Federation*, 1 ANLR 1966, 178.

34. I borrow the term "ethnic patriotism" from Derek R. Peterson, *Ethnic Patriotism and the East African Revival: A History of Dissent, c. 1935–1972* (Cambridge: Cambridge University Press, 2012).

35. Udoma often recalled the fact that his mother had been shot by a British soldier during the Aba Women's War (*Ogu Umunwaanyi*) of 1929, which seems to have marked him for life. The Ibibio Union had provided his scholarship to study in Ireland, which initiated his lifelong involvement in Ibibio local politics. See the 600-page book he wrote on the topic: *The Story of the Ibibio Union: Its Background, Emergence, Aims, Objectives and Achievements* (Ibadan: Spectrum, 1987). See also D.S. Udo-Inyang, *The Man: Sir Justice Udo Udoma* (Calabar: Wusen Press, 1985).

minorities—ethnic and otherwise—ran through his jurisprudence. He was a Nigerian nationalist, but when forced to choose between the interests of the country and those of his ethnic community, he often chose the latter.[36]

In 1962, Ugandan Prime Minister Milton Obote approached the Nigerian government to request an African judge who could serve as chief justice of Uganda. Udoma's name came up as a possible candidate, and after some deliberation, Nigerian Chief Justice Sir Adetokunbo Ademola offered him the opportunity. Udoma had reservations about it; the pay was not high enough, and although the prestige of being a chief justice was attractive (as was the knighthood that came with it), Udoma's ambitions lay in Nigeria, not on the other side of the continent.[37] Ademola assured him that a spot on the Nigerian Supreme Court would be his after his sojourn to Uganda. Reassured by this promise, Udoma packed his bags and moved to Kampala with his family. One of the first people he met was the wife of the British high commissioner, who embarrassed him by remarking on how many Nigerians were serving in east African judiciaries. "Darling, this is a complete takeover!" she noted candidly.[38] She was not entirely wrong. Several Nigerian judges were already on the bench in Kenya, and more were being planned for Tanganyika, although none occupied a rank as high as Udoma's.

Milton Obote needed someone like Udoma. Obote was not a populist, and he could not count on the mass support of the Ugandan people; he had been borne to power by a series of tepid political compromises, not a wave of public approval. He had many enemies, and his authority was tightly constrained.[39] He was hamstrung by the 1962 constitution that Uganda adopted at independence—a document drafted, like many African constitutions, around a negotiating table in London. This constitution gave outsized power to Buganda, the rich and politically savvy kingdom at the center of the country, and its king served as Uganda's

36. Udoma might as well have been the model for Peter Ekeh's figure of the African professional caught between "two publics": the austere and artificial sphere of the state on the one hand, and the "primordial" realm of ethnic politics on the other. Peter P. Ekeh, "Colonialism and the Two Publics in Africa: A Theoretical Statement," *Comparative Studies in Society and History* 17 (1975): 91–112.

37. Ini Akpan Udoka, *Sir Udo Udoma: A Portrait of History* (Port Harcourt: Footsteps Publishing, 1996), 174.

38. Udoma, *The Eagle in its Flight*, 132.

39. On Obote's position see Omongole R. Anguria, ed., *Apollo Milton Obote: What Others Say* (Kampala: Fountain Publishers, 2006); Godfrey E. N. Nsubuga, *The Person of Dr. Milton Obote: A Classic Personality Study* (Kampala: Nissi Publishers, 2013); and Richard J. Reid, *A History of Modern Uganda* (Cambridge: Cambridge University Press, 2017), xxv–xxvi.

president.[40] This was a ceremonial position, but that did not make Obote any less wary of *kabaka* Muteesa II, whom he saw as a rival. The legislature was beyond his control. He commanded the military, but soldiers like Idi Amin clearly had minds of their own (and Amin's coup would eventually be Obote's undoing). He had few friends, at home or abroad. His best hope was to corner the judiciary, but to do so he needed someone pliable at its top. Udoma, a respected judge with no local entanglements, and no protector but Obote himself, was the perfect candidate. Udoma seemed oblivious of this wider context, which made him all the more useful. His technical approach to the law, and his accommodating stance toward executive power (as shown by the 1966 *Chief Obafemi Awolowo* case, among others), meant that Obote could count on Udoma's support as long as he framed the facts in the right way. Obote controlled what his chief justice saw and who he met, which allowed him to do just that.

As soon as he arrived in Uganda, Udoma set about reforming the legal system along more national lines. His first step was to abolish the terminological distinction between the High Court system, which was used mostly by Asians and Europeans, and the "African Courts" that heard village-level disputes and civil matters, and used local customary laws. "All the courts in the country were African courts," he contended, "since Uganda was an African country." "African" customary courts were converted into magistrate's courts, making their structure of appeal to the High Courts more straightforward, and many customary offenses were abolished. Seeing that there was "not a single African judge" and only two African magistrates in Uganda, he promoted the magistrates to judges, and appointed others from the small but growing bar. He also saw to it that Uganda "no longer looked towards India for inspiration" in legal matters. This entailed replacing the penal code (derived from Calcutta's) with one modeled on Nigeria's.[41] Udoma did all this because he felt it was his mandate to create a legal system "unbesmirched by colonial folly or imperial impudence," as a fellow judge wrote of his tenure.[42] He got on "congenially with Obote, whose major objective was to give Udoma maximum

40. On Buganda's place in national politics see Jonathon L. Earle, *Colonial Buganda and the End of Empire: Political Thought and Historical Imagination in Africa* (Cambridge: Cambridge University Press, 2017); Richard J. Reid, *A Modern History of Uganda* (Cambridge: Cambridge University Press, 2017); Apollo N. Makubuya, *Protection, Patronage, or Plunder?: British Machinations and (B)Uganda's Struggle for Independence* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2018); and D.A. Low, *Buganda in Modern History* (Berkeley: University of California Press, 1971).

41. Udoma, *The Eagle in its Flight*, 135–38.

42. Justice James Ogoola, "The Age of the Rule of Tear Gas: An Address to the Uganda Law Society," October 8, 2012.

comfort."[43] He was also made president of the constitutional court, which would soon make him a very important person.

Three years into his appointment as chief justice, Udoma took his Christmas holiday in Nigeria. While he was there, he witnessed the January 1966 coup that toppled the First Republic and installed a military regime. He returned to Uganda the following month, which, to his astonishment, was also in turmoil. On February 22, Obote suspended the constitution, seized all powers of government, and dismissed the president, *kabaka* Muteesa II, on the grounds that he was plotting a coup. On April 15, Obote announced a new constitution, giving himself wide, dictatorial powers. He dissolved Buganda and destroyed its palace, including the chamber holding the drums of state.[44] Obote defended this as an act of decolonization; it was, as Oloka-Onyango wrote, "an attempt at *autochthony*, in other words, the indigenization of the constitutional regime. . .seeing that the 1962 instrument was basically an arrangement with Britain."[45] It was also imperious and undemocratic. Udoma was blindsided by these back-to-back crises, and he began taking Valium to relieve his anxiety.[46] Several months later, Uganda's new constitution was put to a legal test. Udoma would be the one to decide it (Figure 1).

Uganda v. Commissioner of Prisons ex parte Matovu

The challenge to the new constitution came in the form of Michael Matovu, a provincial chief of Buganda who had been arrested during the constitutional transition.[47] Matovu's lawyer filed a writ of habeas corpus for his client's release, which led to a suit before the supreme court, *Uganda v. Commissioner of Prisons ex parte Matovu*.[48] The state's case was made by Godfrey Binaisa, Uganda's attorney-general and most

43. Udoka, *Sir Udo Udoma*, 179.

44. The military officer assigned to this duty was Idi Amin. On the fate of other chiefly objects, see Derek R. Peterson, Richard Vokes, Nelson Abiti, and Edgar C. Taylor, "The Unseen Archive of Idi Amin: Making History in a Tight Corner," *Comparative Studies in Society and History* 63 (2021): 4–40, at 11.

45. Joe Oloka-Onyango, "Ghosts and the Law: An Inaugural Lecture," November 12, 2015, 18. See also A. W. Bradley "Constitution-Making in Uganda," *Transition* 32 (1967): 25–31.

46. Udoma, *The Eagle in its Flight,* 155.

47. These emergency regulations were designed to constrain opposition from the kingdom of Buganda. Oloka-Onyango, "Ghosts and the Law," 26.

48. The British High Commission watched the case very closely, and collected many documents related to it. For this reason, a fairly complete record of the proceedings is available in NAUK FCO 31/181 "Validity of High Court ruling under 1966 Constitution: Habeas corpus judgment re Michael Matovu," 1967.

Figure 1. Sir Egbert Udo Udoma in his chambers, Kampala, 1967.

accomplished lawyer.[49] Matovu's lawyer was Abubaker Kakyama Mayanja, a member of Parliament from Kabaka Yekka, a Catholic party affiliated with Buganda. Udoma had a low opinion of Mayanja. He found the lawyer's filing defective for several procedural reasons, and he might have declined to consider it for any one of them.[50] But the court went ahead with the hearing: "We decided, in the interests of justice, to

49. At this time Binaisa was an ally of Obote, although their relationship would later sour. Some evidence suggests that Binaisa was threatened into serving as Obote's counsel. NAUK FCO 31/185, British High Commission, Kampala to Commonwealth Office, July 27, 1967.

50. In deciding to hear *Matovu* despite its defects, Udoma arguably planted the seed of its demise. Oloka-Onyango contends that this laid the groundwork for public interest lawyering in Uganda; if a case was of sufficient importance from a constitutional perspective, formal or procedural irregularities could not be grounds to dismiss it. See J. Oloka-Onyango, *When*

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jettison formalism to the winds and to overlook the several deficiencies in the application."[51] Citing the American cases *Marbury v. Madison* and *Baker v. Carr* on the political doctrine question, and the Pakistani case *State v. Dosso* on what constituted a legitimate coup, Udoma ruled in favor of the state. In a lengthy decision, he concluded that the new constitution was legal because it was the product of a "revolution." For years to come, the legitimacy of many African governments would turn on Udoma's use of this term.

Udoma's understanding of what constituted a revolution came from the Austrian jurist Hans Kelsen, whose *Pure Theory of Law*, first published in 1934, had a strange career in the postcolonial world.[52] Udoma's interpretation of Kelsen went as follows: if a regime had taken power suddenly, and it was able to rule "effectively," then it was "revolutionary," which, in the custom of international law, made it "legitimate." A system could be said to be "effective" if its commands were obeyed, and infractions of them were punished according to that system's own rules.[53] Udoma found Kelsen's positivism useful for its emphasis on "effectiveness" as a tool to assess the validity of regimes born of coups.[54] In *Matovu*, the state presented just eight affidavits attesting to the new constitution's effectiveness, all by members of Obote's inner circle. One of them was by Binaisa himself in his capacity as attorney-general. These sworn statements were scant evidence of the new government's broad acceptability, but they were proof enough for Udoma. A low bar for "effectiveness" had been set. This was a crude kind of positivism, and it did not do much justice to the theorist cited to prop it up.[55] Kelsen's "pure theory" of law was just that—a theory—and his defenders did not condone how judges like Udoma used his ideas. "The courts, in their conduct, can never 'use', 'apply', 'approve',

Courts do Politics: Public Interest Law and Litigation in East Africa (Newcastle upon Tyne: Cambridge Scholars Publishing, 2017), 47.

51. Quoted in Oloka-Onyango, "Ghosts and the Law," 31.

52. The path of "pure theory" also passed through Latin America. See Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (New York: Cambridge University Press, 2007); and Carlos Eduardo de Abreu Boucault, "Hans Kelsen: The Reception of 'Pure Theory' in South America, Particularly in Brazil," *Seqüência: Estudos Jurídicos e Políticos* 36 (2015): 95–105.

53. J. W. Harris, "When and Why Does the Grundnorm Change?" *The Cambridge Law Journal* 29 (1971): 103–33, at 120.

54. On Kelsen, and the larger history of positivism in Ugandan jurisprudence, see Coel Thomas Kirkby, "Exocrising *Matovu*'s Ghost: Legal Positivism, Pluralism and Ideology in Uganda's Appellate Courts" (unpublished LL.M. Thesis, McGill University, 2008).

55. See Abiodun Jacob Osuntogun, "Pure Theory of Law: Another Perspective," in *Jurisprudence and Legal Theory in Nigeria*, ed. Adewale Taiwo and Ifeolu John Koni (Lagos: Princeton Associates Publishing, 2019), 233–61.

or 'follow' Kelsen's theory," Denis Ong observed. "They can only be the instruments by means of which Kelsen illustrates his descriptive thesis. The judges cannot use Kelsen: Kelsen uses them."[56] The fact that Kelsen meant his work to be descriptive rather than prescriptive did not stop judges from making his theory into a political mandate, however. To politicians like Obote, Kelsen was helpful in transmogrifying power grabs into "revolutions."

Matovu had a larger effect, which radiated outward across the continent in the wake of the trial. *Matovu* established that Uganda's *grundnorm*—the spirit that animated its law—was not to be found in a constitution, a king, or an abstraction like "the people," but in Obote's "revolution" *as an event*. In so doing, it institutionalized the coup as a legitimate form of political succession, making it easy for usurpers to cloak their actions in legality. As Oloka-Onyango writes, "it marked the first real test of the post-colonial judiciary, and it also commenced the transition from a parliamentary system of governance to a presidential regime, buttressed by a framework of military and autocratic central authority."[57] In Uganda, the effect of the decision was to sanitize the new constitution, and with it Obote's heavy-handed administration. The constitution eliminated Obote's most persistent rival—Buganda—and it allowed him to make Uganda "a police state in a real sense," as a British diplomat observed. It gave him the "physical and legal apparatus to enforce his will by whatever degree of persuasion or compulsion may be expedient—provided that he can keep the army in its corner."[58] Obote could not in fact keep the military on his side. But until that time came, the new constitution was a powerfully repressive tool at his disposal. *Matovu* gave it a legal imprimatur.[59] General Idi Amin would find this positivist doctrine useful when he overthrew Obote, his former ally, in 1971.[60] He was not the only one. By giving upstart soldiers a

56. D.S.K. Ong, "Legal Aspects of Constitutional Breakdown in the Commonwealth, With Particular Reference to Nigeria and Southern Rhodesia" (PhD diss., School of Oriental and African Studies, University of London, 1972).

57. Oloka-Onyango, "Ghosts and the Law," 2.

58. NAUK FCO 31/184, "Uganda: A Stocktaking," March 26, 1968.

59. The following year, the 1966 constitution was itself replaced. The 1967 constitution was an amended version of Obote's 1966 document, with even greater authority earmarked for the executive. Nelson Kasfir, "The 1967 Uganda Constituent Assembly Debate," *Transition* 33 (1967): 52–56.

60. On the Amin regime's uses and abuses of law, see Peter Allen, *Days of Judgment: A Judge in Idi Amin's Uganda* (London: Kimber, 1987); and Alicia C. Decker, "'Sometimes you may leave your husband in Karuma Falls or in the forest there': A Gendered History of Disappearance in Idi Amin's Uganda, 1971–79," *Journal of Eastern African Studies* 7 (2013): 125–42.

path to legitimacy, it emboldened them to overthrow civilian governments (and one another).

Once the blood had been mopped up, the first thing many coup plotters did was head to court. Foreign powers were more likely to recognize a new regime if it had the support of its judiciary, and an order from a judge made it easier to bring the rest of the state apparatus in line. All the usurpers had to do was convince a judge that they had staged a "revolution," and he, in turn, had to justify why that was the case. Throughout the Commonwealth, judges cited Kelsen to argue that any sudden, systemic political change (like a coup) counted as a revolution, and that revolution was legitimate as long as it was successful.[61] They cited one another too, building up a self-supporting structure of jurisprudence as they went. *Matovu*, along with the *Dosso* case from Pakistan, served as its foundation. The putsches, constitutional annulments, and sham declarations of independence that judges called "revolutions" were not revolutionary in any sense outside of the Kelsenian one (and not always even that).[62] They made little attempt to destroy the existing structures of governance and build new ones in their place, and few of them were ideological transformations. Some, like Obote's constitutional "coup," did not even involve a change in leadership. Soldiers and other authoritarians who seized power through coups usually presented themselves as forces of stability and continuity—except in the courtroom, where it was in their interests to argue the opposite.

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After the *Matovu* decision had been handed down, Obote showered Udoma with respect. A driver and car with a special "Chief Justice" license plate was provided for him ("the car was a Mercedes Benz," he recalled wistfully in his memoirs), as were "soft furnishings of my residence" and an "increased emolument for myself" that allowed him to host elaborate garden parties.[63] In late 1968, Obote abruptly turned on his chief justice, firing him through a press release. Udoma believed he was dismissed because his Nigerian rivals had bribed Obote to dismiss him in a complex (and probably fictitious) plot to derail his career. The more likely explanation is that Udoma had simply run the course of his usefulness; Obote had gotten what

61. See Tayyab Mahmud, "Jurisprudence of Successful Treason: Coup d'Etat and Common Law," *Cornell International Law Journal* 27 (1994): 50–140, at 53.

62. One recent book argues that the twentieth century's revolutions have taken place in distinct "waves," each global in scale. The "revolutions" described here would not fit in any of them, but the surge of militarism across the postcolonial world constitutes a "wave" in itself. See David Motadel, ed., *Revolutionary World: Global Upheaval in the Modern Age* (Cambridge: Cambridge University Press, 2021).

63. Udoma, *The Eagle in its Flight,* 169, 177.

he wanted out of him, and so he was sent home. Obote explained the dismissal by saying that the next step in the development of the Ugandan judiciary was to appoint a Ugandan as chief justice. In the next breath, he instead appointed Sir Dermot Sheridan, an Irish judge who had been Udoma's subordinate.

Udoma was embittered that his close relationship with Obote had ended, but he was proud of what he had done. "I left Uganda a happy man," he wrote, "satisfied that I had served Uganda honestly and sincerely to the best of my ability and which had won for me the admiration of the people and respect and affection for me in their hearts."[64] One biographer contends that Udoma had private reservations about his role in enabling Uganda's authoritarian path, but his commitment to the "correct" interpretation of the law led him to rule as he did despite his misgivings.[65] If Udoma did have qualms, or if he understood what his decision might lead to in the future, he left no record of them. The fact that precedent was portable between common law jurisdictions meant that judges far beyond Uganda would read his decision, cite it, and use it as a guide for how to suspend constitutions, or launder coups. Its logic can be found in contexts ranging from Rhodesia's illegal independence to preserve white minority rule, to the flurry of military coups in the Seychelles, to Guyana and Fiji in their eras of dictatorship. One of the most important stops on the *Matovu* decision's itinerary was closer to home, however: Nigeria, where Udoma returned in 1969 to take up the position on the Nigerian Supreme Court that he had long coveted.

Lakanmi and Another v. the Attorney General of the Western Region of Nigeria and Others

Much had changed in Nigeria during Udoma's time in East Africa. Coups in January and July 1966 had overthrown the Nigerian First Republic, making the country into a military dictatorship. The Eastern Region seceded as the Republic of Biafra, precipitating a brutal civil war.[66] The republican constitution was suspended for the duration of the war, and its principles were abandoned in the name of keeping the country from breaking apart. Nigeria had starved its own citizens, bombed its eastern region into oblivion, and transformed its armed forces into a war machine. After the secessionist side was defeated in 1970, people began to raise

64. Ibid., 179.

65. Udoka, *Sir Udo Udoma*, 184.

66. See Samuel Fury Childs Daly, *A History of the Republic of Biafra: Law, Crime, and the Nigerian Civil War* (Cambridge: Cambridge University Press, 2020).

questions about the military government they were left with. What gave soldiers the right to rule, and what was the regime's foundational force? Could it be found in the constitution, even though that constitution had been suspended by decree? Did it reside in the will of the executive, or in some general public mandate? Did civilians have *any* rights that soldiers could not take away? These questions, which had been raised in Uganda seven years before, were now recapitulated in Nigeria.

The Nigerian military government's legality was tested in the 1970 case *Lakanmi and Another v. the Attorney General of the Western Region of Nigeria and Others*. *Lakanmi* considered three linked questions: what constituted a coup d'etat, whether the sitting military government had seized power "legally," and whether the Nigerian constitution remained in force under military rule.[67] The case arose over a convoluted dispute about which federal entity was allowed to investigate the assets of public servants in the Western Region who had been accused of corruption. This jurisdictional quibble was the product of a flurry of contradictory decrees and edicts by the federal and regional governments. Decrees were the main lawmaking apparatus of military administrations, and most were broad, sweeping, and virtually incomprehensible to the general public. At issue in *Lakanmi* was one such decree, Decree No. 45 of 1968, which declared that "the validity of any order, notice or document made or given or purported to be made or given or of any other thing whatsoever done or purported to be done under the provisions of any enactment of law repealed. . .shall not be enquired into in any court of law." In short, it declared that no civilian court could adjudicate an issue arising from the abandoned Nigerian constitution. Nor could courts assess the validity of the military's decrees. Chief Justice Sir Adetokunbo Ademola objected to this, and the Supreme Court took on *Lakanmi* in order to measure how far the power of judicial review extended.

Just like *Matovu*, *Lakanmi* turned on the question of whether or not the Federal Military Government was "revolutionary," and, therefore, whether or not it was legitimate. Ademola led the court to rule that the Nigerian military's takeover had not been a real revolution, and was therefore illegitimate.[68] From this, it followed that the constitution of 1963 was still in force, and that the contents of decrees were justiciable by civilian courts.

67. *Lakanmi and Another v. the Attorney General of the Western Region and Others* (1970) LPELR-SC.58/69. See B.O. Nwabueze, *Judicialism in Commonwealth Africa* (London: Hurst, 1977); Taslim O. Elias, "Law in a Developing Society," *The Nigerian Law Journal* 4 (1970): 21–45; and D. Eweluka, "The Military System of Administration in Nigeria," *African Law Studies* 10 (1974): 67–125.

68. *E.O. Lakanmi and Others v. The Attorney-General of the Western Region and Others,* 1970 LPELF-SC.58/69.

In support of this interpretation, Ademola cited the fact that an "interim" military government had taken over after the July 1966 coup that brought Yakubu Gowon to power. If the "interim" government had been intended as temporary, as that term implied, then it did not meet the standard of permanence to be considered a "revolution." Moreover, although Decree No. 1 of 1966 had formally nullified the civilian constitution, the fact that much of the state apparatus had continued to operate as if it were still in place meant that the new regime was not "effective." This was further evidence that no revolution had happened in Nigeria. Udoma dissented, arguing that Gowon's coup constituted a legitimate revolution, just as Obote's "coup" in Uganda had.

Ademola's ruling was narrow and technical, but it amounted to a defense of civilian democracy: it established that the military cabal that had ruled Nigeria for the four years prior was illegal, and its decrees were fallible. The civilian constitution had been in force all that time, albeit in the shadow of the Supreme Military Council. Ademola's decision was a brave provocation, which he knew would goad the dictatorship he deemed "illegal."[69] The press scorned the ruling, and the public cared little about the theoretical and, as one journalist called it, "metaphysical" tone of the debate about *grundnorm*, a Kelsenian term of art that became an unlikely buzzword in 1970s Nigeria. The public was angriest about the ruling's most immediate consequence: that the corrupt bureaucrats whose investigation started it all got off on a technicality. *Lakanmi* was "a grave challenge" to soldiers, as Ben Nwabueze remarked, and there was no doubt in anyone's mind that the military would strike back.[70]

The court delivered its judgment on April 24, 1970, and two weeks later the Supreme Military Council promulgated the *Federal Military Government (Supremacy and Enforcement of Powers) Decree (No. 78)*. The decree nullified Ademola's ruling by executive order, and it borrowed heavily from Udoma's earlier rulings.[71] In language derived from Kelsen, it declared that the military government was a "legal" regime. It proclaimed that the January 1966 coup that toppled the First Republic and the July 1966 coup that installed Yakubu Gowon as head of state had been "revolutions," and were therefore legitimate transfers of power. "Both revolutions," moreover, "effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the Constitution

69. Ademola was about to retire, which perhaps explains why he was willing to be so bold. Akin Alao, *Statesmanship on the Bench: The Judicial Career of Sir Adetokunbo Ademola, 1939–1977* (Trenton: Africa World Press, 2007), 242–43.

70. Livy Uzuokwu, *Grundnorm of Nigeria* (Lagos: Greg Groupe, 1991), 2.

71. Udoma himself was proud of his influence. Sir Udo Udoma, *History and the Law of the Constitution of Nigeria* (Lagos: Malthouse, 1994), 266–308.

(Suspension and Modification) Decree 1966, that is, Decree No. 1."[72] Courts, including the Supreme Court, could make no more judgments about the contents or validity of decrees, and they were to make no mention of the constitution.

At the heart of the *Lakanmi* case was a disagreement about law's purpose. To soldiers like Gowon, law was a tool of social control. It was useful because it could foster "discipline" (which was one of their ideological touchstones), but using it for anything beyond that might bind the military's hands. To Ademola, law's most important function was not to make order, but to protect people from their leaders. The military's annulment of Ademola's ruling was a threat to lawyers not to meddle in the military's affairs. Many took it to heart, and law lecturers fell over themselves to show how the Supreme Court had erred in deciding the case. "It is to the credit of the military administrators that the judiciaries were left severely alone" during the civil war, one of them wrote, "but it is regrettable that it took them some time to appreciate the reality of the new political situation."[73] "The Supreme Court took its stand on a banana skin," wrote an editorialist, "and not surprisingly, it has been helped to slip."[74] After this point, courts did not adjudicate the military's edicts and decrees so much as referee them against one another. The legal foundation for the next three decades of military dictatorship had been laid.[75]

Eventually, the Kelsenian doctrine that military regimes found so useful ceased to be good law. In Pakistan, the *Dosso* decision was overturned by *Asma Jilani v. Government of the Punjab* in 1972. In one fell swoop, *Asma Jilani* declared Pakistan's military government illegal, ended martial law, and renounced the language of "revolution" that validated coups as legitimate state-making events.[76] Positivism, the Pakistani court ruled, had been stretched to the breaking point: Kelsen's definition of "revolution" was "by no means a universally accepted theory, nor was it a theory which could

72. Abiola Ojo, "The Search for a Grundnorm in Nigeria: The Lakanmi Case," *The International and Comparative Law Quarterly* 20 (1971): 117–36, at 238.

73. A. Ojo, "Constitutional Developments in Nigeria since Independence," in *Law and Social Change in Nigeria*, ed. T.O. Elias (Lagos: Evans Brothers, 1972), 20; see also D. O. Aihe, "Nigerian Federal Military Government and the Judiciary: A Reflection on *Lakanmi v. Attorney-General (Western State of Nigeria),*" *Journal of the Indian Law Institute* 13 (1971): 570–80.

74. Quoted in Ojo, "The Search for a Grundnorm," 135.

75. There would be two brief interruptions to military rule: the civilian administration of Shehu Shagari from 1979 to 1983 and the aborted election of 1993.

76. Imtiaz Omar, *Emergency Powers and the Courts in India and Pakistan* (The Hague: Kluwer Law International, 2002), 59.

claim to have become a basic doctrine of modern jurisprudence."[77] Judges who were friendly to the military had willfully misinterpreted Kelsen's theory, making an academic abstraction into a concrete, empirical rule. Finally, it was recognized for what it was: a facade for tyranny. It took many years for it to crumble, but *Asma Jilani* was the first crack in the wall.[78]

As for Udoma himself, he ended his career embittered that he had never been made chief justice of Nigeria. When Ademola retired in 1972, Udoma was overlooked for promotion. Ademola believed that Udoma had betrayed the judiciary, and he made it clear that he did not want Udoma to succeed him as chief justice. Gowon respected Ademola's opinion in spite of their differences, and he appointed Attorney General Taslim Elias to the position instead. In 1975 Udoma was passed over again, this time for a foreign judge, Sir Darnley Alexander of St. Lucia. "It should be noted," observed one of Udoma's hagiographers, "that army officers at the highest echelon of government had preferred Udoma for the job because of his brilliance and seniority at the Bench."[79] It is no surprise that the army angled for Udoma, but it was not because of his "brilliance." It was because he had been an enabler of executive power in every judicial appointment he held.

In February 1975, Gowon made a speech to jurists from thirty-four former British colonies who had gathered in Lagos for the annual meeting of Commonwealth Law Ministers. He assured them that his government both "operates with a constitutional framework" and "maintains a deep respect for the rule of law." Neither of these things was true. Nigeria's constitution had been abandoned for nearly a decade, and the "rule of law" meant little under military rule. But most of the ministers listening to him were in no position to point out his hypocrisy. Military coups and constitutional annulments were happening all over the former British Empire, and only a few months later, Indira Gandhi would declare a state of emergency in the largest common law country of them all, India.[80] Her law minister,

77. Leslie Wolf-Phillips, "Legitimacy: A Study of the Doctrine of Necessity," *Third World Quarterly* 1 (1979): 97–133, at 113. The full decision appears in All Pakistan Law Decisions (PLD) 1972 SC 183–204. For the 1958 case see PLD 1958 SC 533-4, 537-8.

78. Even critics of the military accepted its basic validity. "Military revolution we now know from experience is a factual reality," wrote a rebellious lawyer in 1988, during General Ibrahim Babangida's dictatorship, "as postulated by the renowned jurist Hans Kelsen." Nigerian Institute of International Affairs Press Collections, Nigeria-Courts, Adebayo Adejare, "Courts and Civil Liberties in a Military Revolution," *New Nigerian*, September 21, 1988.

79. Udoka, *Sir Udo Udoma*, 126.

80. On this episode, see Gyan Prakash, *Emergency Chronicles: Indira Gandhi and Democracy's Turning Point* (Princeton: Princeton University Press, 2019).

H.R. Gokhale, who would draft some of the harshest measures of the Indian emergency, may have been in the audience for Gowon's address (members of his delegation certainly were). Perhaps they were emboldened by what they saw in Lagos, watching the audience politely assent as Gowon insisted that Nigeria's constitutional suspension "need not be construed as an aberration from the over-riding premise of the rule of law."[81] To my knowledge, Indira Gandhi's jurists did not cite African precedent to justify the Indian emergency, but they certainly knew what was going on in Nigeria.

Over time, African judiciaries would see their power to constrain presidents and generals diminish even further. "The tempo by which our country is governed," wrote Nigerian law professor Olu Onagoruwa in 1990, "places more emphasis on power rather than right, on force rather than morality, on executive rascality and deceit rather than decorum and humane consideration." By the 1990s, the Nigerian military had so fully captured the state that judges could simply be commanded. Onagoruwa wrote that General Ibrahim Babangida legitimized his power "by the sheer force of his own metamorphosis—a legal Frankenstein capable of consuming its creator."[82] Some observers came to doubt whether law had any real meaning in postcolonial Africa. As the Kenyan jurist Yash Ghai wrote, "Public consciousness is relatively unmarked by the discourse of rights, democracy or justice. The rule of law is a quixotic idea, although there are certainly ministers and lawyers who will pay lip service to it on suitably ceremonial occasions. More prevalent is the discourse of power."[83] Indeed, it was raw struggles for executive power, not sober debates between judges, that characterized most African politics at the end of the twentieth century.

Nonetheless, autocrats like Babangida, Idi Amin, or Obote (who returned to power in 1981) continued to seek the approval of judges, both for their coups and for the decisions that they made once they were in charge. What they sought in law was legitimacy, both to their own people, and to the wider community of nation-states.[84] They also sought tools

81. *Nigerian Chronicle* [Lagos], February 21, 1975, 3.

82. Olu Onagoruwa, "International Conventions: The Constitution and Military Decrees in Nigeria," *The Lord Justice: A Journal of the Law Students' Society, University of Ibadan* 3 (1990): 1; and Ozekhome, "The Recurring Battle," 30.

83. Yash Ghai, "The Role of Law in the Transition of Societies: The African Experience," *Journal of African Law* 35 (1991): 8–20, at 13.

84. The endorsement of a judge was a "uniquely valuable source of credibility" for both of those purposes. See Farooq Hassan, "A Juridical Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of a Coup d'Etat in the Common Law," *Stanford Journal of International Law* 20 (1984): 191–258, at 234–35.

to help them "discipline" society, which some judges were willing to give them. In the end, authoritarians usually got their way whether they had the support of their judiciaries or not. If a judge refused to be pliant, he could be overruled, removed, or, if all else failed, assassinated. Even so, it was better to have a judge's stamp of approval than not. The judges most likely to give it were foreigners.

Legal Challenges to Military Rule

As Ademola's ruling in *Lakanmi* shows, not all judges in military regimes accommodated authoritarianism. There were judges who moved in the same circles as Udoma who worked doggedly to keep soldiers out of politics. Some critiqued executive power from the bench, and several paid a high price for doing so.[85] We might consider Frederick Kwasi Apaloo, the Ghanaian judge who tenaciously sat on his country's Supreme Court from Kwame Nkrumah's administration through Flight Lieutenant Jerry Rawlings'. His attempts to check executive power perturbed all eleven of the governments (civilian and military) that he served, and both Nkrumah and Rawlings tried and failed to remove him. After retiring, he became Chief Justice of Kenya in 1993, where, much as he had at home, he aggravated the dictatorship of Daniel arap Moi by crusading against the death penalty. Unlike Nkrumah and Rawlings, Moi could get rid of his meddling chief justice because he was a foreigner, and Apaloo was sent back to Ghana after less than two years.[86]

Another important critic of military rule was T. Akinola Aguda, the Nigerian judge who served as Botswana's first African chief justice, and

85. It was lawyers, however, who were arguably the most consistent critics of military regimes. Taking significant risks to their professional positions (and indeed their lives), lawyers like Ben Nwabueze and Gani Fawehinmi in Nigeria, or more recently Sylvia Tamale and Nicholas Opiyo in Uganda, openly criticized autocratic leaders and the judges who authorized their actions. See Ben Nwabueze, "Constitutional Problems of Military Coups in Nigeria," *Legal Practitioners' Review* 2 (1987): 31–43; Gani Fawehinmi, *Ouster of Court Jurisdiction in Nigeria, 1914–2003* (Lagos: Nigerian Law Publications, 2004); and Sylvia Tamale, *When Hens Begin to Crow: Gender and Parliamentary Politics in Uganda* (Boulder: Westview Press, 1999).

86. Moi's most important judicial enabler was the English judge Sir James Wicks, who was rumored to have rewritten his judgments to Moi's specifications. Moi rewarded him by raising the age limit for judges several times, allowing him to become Kenya's longest-serving chief justice to date. On Apaloo, Wicks, and their peers, see Abdul Majid Cocker, *Doings, Non-Doings, and Mis-Doings by Kenya Chief Justices, 1963–1998* (Nairobi: Zand Graphics Ltd., 2012).

later as the pugnacious director of the Nigerian Institute of Advanced Legal Studies.[87] On the Botswana Court of Appeal, he vigorously defended the judiciary's independence, and issued a landmark ruling against corporal punishment.[88] At home in Nigeria, he was a vocal critic of the military. Aguda cut through the flimsy legal scaffolding that upheld military rule. Why were soldiers in charge? "The only reason is that they control our guns," he answered in 1986. "No more, no less. Is that a viable political arrangement? Why not a government formed entirely of the trade union leaders? Or the doctors? Or the architects? Or the engineers? Or the lawyers? The only reason is that these people have not got guns."[89] Aguda rejected the positivist doctrine that had accommodated military rule. He was withering toward his fellow judges: their "bulging bank accounts" had made them forget their obligations to the public, and the "Austinian positivism" they half-remembered from their legal educations gave intellectual cover for their complicity with militarism.[90] The judiciary, he argued, had legitimized soldiers' heavy handedness, and gilded the destruction of hard-won legal protections as acts of "decolonisation." Any judge who gave credence to a military regime "should resign his appointment," he wrote, naming those whose actions he found especially shameful. The argument they had derived from Kelsen—that the "effectiveness" of a military regime was also proof of its legality—was, in his view, a cowardly "face-saving formula."[91] It was a self-serving interpretation that allowed them to keep their comfortable positions, while leaving civilians defenseless against the "hot-blooded young lions with no respect for human life," as Liliwhite-Nwosu memorably called Nigeria's soldier elite.[92]

It would perhaps be asking too much of Udoma and others like him to have acted differently. A dissident judge in a usurper regime is caught

87. NIALS carried on the activist tradition that Aguda started, taking an increasingly combative stance against the military as soldiers' tactics became more repressive. See Epiphany Azinge and Laura Ani, eds., *Freedom of Protest* (Lagos: Nigerian Institute of Advanced Legal Studies, 2013). On lawyers' activism in this period see Bonny Ibhawoh, *Human Rights in Africa* (Cambridge: Cambridge University Press, 2018), 173–220.

88. NIALS uncatalogued collection, *Clover Petrus and Mokgamedi Selaolo v. The State* (1982).

89. NIALS uncatalogued collection, T. Akinola Aguda, "Re-Thinking Our Values: A Speech Made at Ikorodu," April 6, 1986.

90. T. Akinola Aguda, *The Crisis of Justice* (Akure: Eresu Hills Publishers, 1986), ix.

91. Aguda took great risks in saying this while the military was in power, although, as a law professor, he was more insulated from soldiers' wrath than those who held current judicial appointments. NIALS uncatalogued collection, I.O. Agbede, "Hon. Dr. T. Akinola Aguda: The Man, His Works and Society" (c. 1987).

92. Liliwhite-Nwosu, *Divine Restoration of Nigeria*.

between a rock and a hard place; if you resign, you will almost certainly be replaced with someone more pliable. If you keep your post, you may be able to rein in the regime through your rulings, but you will also legitimize it by your very presence. Both options risk retaliation, and neither is likely to achieve much. As the Cameroonian jurist Carlson Anyangwe wrote, "no revolutionary regime has ever surrendered its newly won power for the sake of a judge's unhappy conscience."[93] This is a defeatist view, but it reflects the calculations that judges have to make when faced with a case like *Matovu* or *Lakanmi*. The victories that courts won against militaries were usually pyrrhic: a judge might find his decision simply annulled, as in Nigeria, or he might face an even worse fate. In Amin's Uganda, there was no need to cultivate a judiciary that would support the executive's decisions. If a judge stood in his way, Amin simply had him killed.[94] Civilian courts were gelded by military dictators, who preferred tribunals (for soldiers and civilians alike), commissions of inquiry, or their own commands as instruments of law. Decisions like *Matovu* and *Lakanmi* opened the door to this, but soldiers might have forced it open anyway.

It is important that the *Matovu* decision, which profoundly shaped Uganda's postcolonial history, was not made by a Ugandan judge. "The mere fact that somebody is black or a Ugandan does not necessarily mean that he is devoid of colonial outlook towards law and justice," wrote the lawyer Picho Ali, alluding to Udoma's endorsement of Uganda's undemocratic constitution. "But the chances are that a Ugandan is more likely to appreciate the socio-political values of our society as reflected in our laws. This appreciation constitutes a rebellion against colonialism in the field of law and the judiciary."[95] What is "colonial" about law and what constitutes "rebellion" against it are debatable, but one thing seems clear: it is easier for a judge to rule against the public good when he or she is not part of the "public" in question.

Udoma is not the only proof of this concept. We could look to any of the British judges who preceded him on the Ugandan bench—men who, to understate the matter, also made rulings that harmed the Ugandan public.

93. Carlson Anyangwe, *Revolutionary Overthrow of Constitutional Orders in Africa* (Bamenda: Langaa Research and Publishing, 2012), 83.

94. In 1972, Amin famously ordered the murder of Uganda's Chief Justice, Benedicto Kiwanuka. Semakula Kiwanuka, *Amin and the Tragedy of Uganda* (Munich: Weltforum Verlag, 1979), 89–93; and J.J. Carney, "Benedicto Kiwanuka and Catholic Democracy in Uganda," *Journal of Religious History* 44 (2020): 212–29. On Amin's other attacks on the judiciary see Colin Legum, "Behind the Clown's Mask," *Transition* 75/76 (1997, originally 1976): 250–58

95. Ali would be murdered by the Amin regime. Picho Ali, "Ideological Commitment and the Judiciary," *Transition* 36 (1968): 47–49.

Or we might consider James John Skinner, an Irish-born judge who became a fellow traveler to the Zambian nationalist movement. He became a Zambian citizen at independence, and in 1969 he was appointed chief justice of his adopted country. In this position, he vocally defended the independence of the judiciary.[96] After an especially bad clash with Kenneth Kaunda in 1970, Skinner accepted a position as chief justice in neighboring Malawi. In Malawi, where he had no status and no history, he would be less querulous. There were no more principled stands against executive power from the Malawian bench, and he settled into a copacetic relationship with the autocratic president who hired him, Hastings Banda. Up until his departure in 1985, Skinner sided with the government on nearly everything, from banning miniskirts to allowing Banda to be president for life. Another example is Philip Telford Georges, the Dominican judge who served as Chief Justice of Tanzania from 1965 to 1971. The Supreme Court heard few legal challenges to the ruling party's increasingly autocratic conduct during these eventful years, even as Tanzania remade itself through villagization and embraced a radical new form of socialism: transformations that one would expect would keep the Supreme Court busy. In fact the court was conspicuously quiet, in part because Tanzania's chief justice was a foreigner from a small country, who could be sent home if he rocked the boat.[97] Skinner and Telford Georges were not necessarily bad judges, but they were in no position to curb the power of the leaders who hired them. Knowing they might be deported at any minute, they usually placated the governments they served. This could entail giving a coup a legal gloss, turning a blind eye to repression, or handing a president a blank check. Putting their rhetorical commitments to indigenization aside, presidents and generals liked foreign judges because they were pliable and replaceable.

Udoma cast a long shadow in the countries where he served. In Uganda, parts of *Matovu* remain in force today, and the form of military rule endorsed by *Lakanmi*'s annulment lasted until 1999. In both countries, much precedent from the military era still stands. Coel Kirkby and Joe Oloka-Onyango both used the language of ghosts to describe how the *Matovu* decision shaped Ugandan law long after the president who orchestrated it was chased into exile. This language is apt: precedent can "haunt"

96. Jeremy Gould, "Postcolonial Liberalism and the Legal Complex in Zambia," in *Fates of Political Liberalism in the British Post-Colony*, ed. Terence Halliday, Lucien Karpik, and Malcolm Feeley (Cambridge: Cambridge University Press, 2012), 412–54.

97. Telford Georges developed a legal philosophy that accommodated *ujamaa*, the massive project of social and economic reorganization that the party implemented, rather than challenging it. See Philip Telford Georges, *Law and its Administration in a One Party State: Selected Speeches* (Nairobi: East African Literature Bureau, 1973).

law even after it is overturned, and Africa's most gripping political metaphors are those about the undead—zombies in Nigeria, for example, or vampires in Uganda.[98] When Murtala Muhammed fired Nigerian judges en masse, or Olusegun Obasanjo flicked away challenges by executive order, *Lakanmi* hovered just out of sight. When Yoweri Museveni detained Ugandan dissidents, *Matovu* whispered in his ear.

Conclusion

In the aftermath of colonialism, pan-African cooperation forged paths across the continent, and the ties that had bound the empire were remade as postcolonial solidarities. Once Africa's new states were connected by these circuits, there was no telling what would move along them. Sometimes these circuits carried radical ideas about decolonization, new art forms, and new designs for living. At other times, they carried absolutism and its legal contrivances. Cooperation made coups and the jurisprudence underpinning them portable, and judges like Udoma were the ones who carried it in their baggage. Behind the story of the portable coup is a larger point: independence had a dual spirit. One of those spirits was liberatory, but the choices that soldiers and judges made did not always bend towards freedom. The other spirit was martial. In many former British colonies, that was the one that prevailed. As of this writing, both Nigeria and Uganda have presidents who began their political careers in uniform. The age of military rule in Africa has come to an end, but the martial spirit lives on.

98. On the zombie metaphor, see Tejumola Olaniyan, *Arrest the Music!: Fela and His Rebel Art and Politics* (Bloomington: Indiana University Press, 2004), 92–95. On vampires, see Luise White, *Speaking with Vampires: Rumor and History in Colonial Africa* (Berkeley: University of California Press, 2000).