Part II.

Militarism's Legal Forms

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ORACLES AND AUTOCRATS

The Uses of Customary Law

Outside the village of Umuneoha, near Owerri in eastern Nigeria, is an overgrown house surrounded by police barriers. The house and the forested land that stretches out behind it is the home of an oracle named Igwekala. It has a checkered past. Like other oracles in the region, Igwekala played a role in feeding enslaved people into Atlantic slavery in the eighteenth and nineteenth centuries.[1] In the twentieth century it was banned, burned, and rebuilt multiple times. Igwekala was many things. Depending on what angle you viewed it from, it could look like an object, a spirit, a relationship, an institution, or a scam. In the first centuries of its existence it occupied a large piece of wood, which was destroyed by zealous Christian converts around 1900. Those who continued to believe in Igwekala's power argued that it needed no object to serve as its host; it became an invisible force that moved freely around the plot of thickly forested land it "owned." It was associated with fertility, and women struggling to conceive traveled from across the region to seek its assistance. Oracles also had judicial functions, and people consulted Igwekala to settle disputes over land, property, and family affairs.[2]

The shrine was also a business, and Igwekala's priests charged fees to render a decision. A series of rituals would be performed, the litigants were made to wait for a time, more fees were paid, and eventually the priests revealed the oracle's decision. How the oracle operated, and how the priests discerned its will, was a secret. To skeptics, this secrecy was proof that it was a fraud. Its only enforcement mechanism was fear; the parties were told that if they didn't follow through on the oracle's decision, it would "eat" them. A visitor in the 1960s described it as "a carefully organized affair with its own priesthood and a descending order of assistants." An "army of agents" served as middlemen between the priests and the public, and local people made money by renting rooms to visitors. The cost of a consultation depended on "the wealth of the individual and the cleverness of the agent in magnifying the client's future doom if the oracle is not consulted."[3]

The oracle was an instrument of "custom"—the assemblage of norms and institutions that constituted everyday law across much of rural Africa. Custom was a blanket term for the quotidian ways people resolved disputes, structured their families, transferred property, and punished misconduct. It was a sort of folk law.[4] Finding it cheap and effective, the British put custom (sometimes also called "native law") at the center of their rural administrative strategy throughout Africa. A century later, soldiers would do the same thing. To both British colonial officials and the soldiers who ruled in their stead, custom was useful because it could veil repression in "tradition."

Igwekala is an unusual motif to describe customary law. Unlike other implements of custom, it has been statutorily prohibited since 1897, and it remains illegal today under the Witchcraft and Juju Order of sections 207(2) and 210(f) of the Nigerian Criminal Code, which mentions it specifically. But in spite of its prohibition, people quietly consulted Igwekala throughout the twentieth century. After independence, the Nigerian government sometimes enforced the ban and sometimes didn't. The fact that it was technically illegal makes Igwekala distinct from other implements of custom that, far from being proscribed, were encouraged during colonialism and after.[5]

But Igwekala's checkered reputation also makes it a good index of how Nigerians, and the British before them, measured custom; for its "authenticity," on the one hand, and its "repugnance" to prevailing morals on the other. Like the colonial administration, military regimes found that custom was most useful when it found a balancing point: locally credible but not *so* credible that it might compete with their authority.[6] Many who lived under customary law saw the British hand hovering behind it; custom was a burden that had been foisted on them, not something that truly belonged to them. Some

saw custom as an accurate reflection of their moral and cultural values, but they tended to be the people who benefited from it most—chiefs, men, and elders.

The oracle has no written records, which is not surprising given that it was pushed underground before the advent of literacy in the region. But even fully legal, officially recognized instruments of custom—those endowed with authority by the British and supported by military regimes after they left—kept sparse records. Few cases from customary courts were recorded in written form, and even fewer are still extant. Those that survive were typically recorded because they went up to magistrate's courts on appeal. Unlike the other legal forms described in this book (including tribunals, commissions of inquiry, and common-law courts), I cannot describe customary disputes in much detail. There are far more extant records from "secret" military tribunals than from customary courts, even though custom was the primary form of law used by tens of millions of rural people. There is a reason for this: the tracelessness of customary law was part of its appeal, first to the British and later to the military. Customary law itself could be useful as a tool of repression, but soldiers didn't use it against their most important enemies. When military prosecutors wanted to punish high-profile opponents, they tried them for treason in tribunals or wore them down through commissions of inquiry. In contrast, the people they turned customary law against were seldom well known or well connected. Custom was a law for commoners, and like most institutions designed for those at the bottom it gave powerful people a wide berth. They, in turn, usually avoided it.

Nigeria's military regimes valued customary law. They took its African characteristics at face value, believing that "traditional" laws could be the building blocks of a genuinely decolonized legal system. They relied heavily on customary courts to dispense justice and resolve disputes, and they tolerated judicial instruments like Igwekala that civilian governments had outlawed. To understand why military regimes embraced custom, this chapter traces the rise, fall, and rise of "customary law" in twentieth-century Nigeria. It begins with the advent of colonialism in Nigeria, when "custom"—how people resolved problems among themselves—became part of the colonial state's administrative repertoire. Projects to standardize and formalize customary law were abandoned after independence in 1960, and civilian jurists argued that there was no place for custom in modern jurisprudence. After the coups of 1966 that ushered in military rule, soldiers came to appreciate customary law for its frugality and for its sharpness; it was useful for disciplinary projects of all kinds.[7] Under military rule, custom moved back

toward the center of the Nigerian legal system. Jurists began a long debate about whether "traditional" customs could replace the English common law as the basis for the law of independent countries.

Custom and Colonialism

Customary law's authority was predicated on the idea that it its origins lay in "time immemorial," as the boilerplate of customary statutes went.[8] In fact, these "timeless" customs often had fairly shallow histories. Historically, Igwekala was only the second-most powerful oracle in southeastern Nigeria. The first was Ibini Ukpabi, also known as the Arochukwu Long Juju, which, like Igwekala, had become prominent in the context of the transatlantic slave trade.[9] Ibini Ukpabi resided in a cave in the forest near Arochukwu, at the nexus between the coast and the densely populated Igbo-speaking inland regions. The oracle served a dual purpose. First, it was a source of justice. The oracle and the priests who maintained it used it to discern the will of Chukwu, a paramount god, in disputes and criminal proceedings. Matters of adultery, theft, and the violation of various taboos were all adjudicated before it. But as slave traders demanded larger and larger numbers of enslaved people, the oracle also came to have an economic function.[10] When it imposed a penalty (which was often), the guilty party would be spirited away to the coast, where European traders waited with cash in hand to buy the person being punished. The priests who controlled the shrine benefited financially from this arrangement, and when the Atlantic system declined they adapted to the "legitimate" economy in palm oil by furnishing labor for it—again through punishment. As British rule expanded in the late nineteenth century the oracle's influence shrunk, and a British expedition destroyed Ibini Ukpabi in 1901.

Several oracles survived the colonial conquest, however, and Igwekala was one of them. News of Ibini Ukpabi's destruction was brought to Umuneoha by an itinerant hunter. During the British occupation of Umuneoha, Igwekala was hidden, and the human sacrifice that allegedly "fed" it was driven underground. It survived surreptitiously, and the colonial administration resignedly admitted that the shrines could not be "wiped out" from the maze of ravines and waterways in the area.[11] In the same breath that they banned Igwekala, the British deputized "traditional" authorities to administer villages on their behalf, and created a "customary" legal system to resolve disputes and punish crimes—tasks that the oracles had previously served. These

courts were to be the sole arbiters of custom.[12] The first Native Court in the Igbo-speaking region of the east was established at Akwete in 1897, where the British charged the local judges "to apply Igbo customary law modified to agree with British sense of justice and natural law."[13]

Customary law took different forms from one place to another. Its most common expression was in village courts and councils of elders, although more metaphysical judicial implements like divination also had a place in it. In theory, customary law was limited to areas of personal law, chieftaincy, and low-level criminal matters. In practice, it embraced all areas of life. Matters like marriage, divorce, and probate were usually adjudicated by customary courts. So were disputes over land ownership, which swelled as the British crammed the region's vast array of land tenure systems into a singular model of ownership they could recognize. Customary courts also had jurisdiction over criminal matters, including trespass (which was important for land cases), assault, sanitation offenses, larceny, and dealing in diseased meat, but their scope waxed and waned over time.[14] The only matters that were fully off limits to customary courts were those involving Europeans. White skin was a jurisdictional bright line, and British administrators feared nothing more than the scene of a black judge casting judgment on a white merchant or bureaucrat.[15] That image would puncture the myth of British infallibility, they feared, and embolden the colonial government's critics.

Customary law was the legal logic of the administrative philosophy known as "indirect rule." This was the name given to the British policy of rule through existing authorities, which mobilized "natural" rulers like chiefs and kings to do the day-to-day business of colonial administration, especially in rural areas. Indirect rule was most closely associated with Lord Frederick Lugard, whose 1914 amalgamation of the northern and southern provinces made Nigeria into one colony. Lugard argued that colonial governors ought to leave in place the existing structures of governance that predated their arrival. A British administrator would be perched at the top of the hierarchy, but he was kept mostly out of sight, giving the appearance that the local chief, emir, or king was still the one in charge. Deputizing local authorities to rule on behalf of the British was cheaper, more efficient, and less likely to provoke dissent than the wholesale replacement of indigenous institutions with British ones. British administrators, the colonial theoretician Margery Perham described, were not like sculptors, trying to carve a new kind of person out of "human clay." Rather, "they were more like tailors trying to make the garments of their administration fit the restless, heterogeneous

and swiftly growing shapes of their African wards."[16] The main appeal of this strategy was that it was cheap; it gave the maximum coercion for the minimum expenditure.

Decisions in customary courts were made on the basis of traditions and pseudotraditions, ranked against one another through a hazy logic of which ones were oldest. Practices that had "always" existed trumped those that had recent origins—unless they were inconvenient to a chief or village elder, in which cases the historical logic became blurry. In theory, customary law was a positivist form of law; it was what people did in a given place, and it was located "in the breasts of the judges" rather than in a code. Its purest form was in the memory of "the older generation, grey-haired African aristocrats, looking like Roman senators [in] locally made togas," as a young Udo Udoma argued. "They, and those African women who, arrayed in gaudy bubas [blouses], walk the street with naked feet, constitute the living link between the past and the present."[17] Custom was "the law prevailing in a particular locality among a particular ethnic group," as one jurist argued, "be it gerontocratic, acephalous, or chiefly."[18] "Customary law is an expression of the behaviouristic patterns among a people," described another.[19]

Custom was actually much less authentic than its defenders made it seem. The British had cherry-picked African traditions, preserving only the ones that served colonial interests. If a customary principle worked against those interests, there were ways to erase it from "tradition" and replace it with something more expedient. A "repugnancy clause" was written into British policy about custom, which ensured that any "indecent" practice could be stricken from a customary legal system, even if it was authentically "traditional."[20] Child marriage, trial by ordeal, and widow burning were the practices the British cited most often to defend the clause's necessity.[21] As for Igwekala, the oracle's connection to slavery was enough to deem it "repugnant." The prohibition of Igwekala made a mockery of the idea that customary law was actually about preserving local normative orders. Oracles were among the most important traditional judicial tools in the region, and yet the British banned them. Why?

They banned what they felt they couldn't control. If a custom seemed too powerful, dissident, arcane, or too spookily metaphysical, they called it "repugnant" and banished it from customary law.[22] At the end of the day, *custom* was whatever colonial administrators said it was. What resulted was a form of "decentralized despotism," as Mahmood Mamdani called it, which could be adapted to serve whatever ends the colonial state wanted.[23] The colonial government did nothing so much as tax people, and customary law

was useful for collecting taxes because it allowed chiefs to punish defaulters harshly and swiftly. It was also useful in controlling migration to the cities; it tied people to their home villages through a web of obligations that kept them working on farms, where the British wanted them. It reinforced conservative ideas about gender and the family, which were forces of stability. Customary law fused political and judicial authority in one person—a chief, a king, or a *qadi*—which was convenient when a provocateur had to be silenced.[24] Colonial administrators liked customary law because they believed it was "naturally" authoritarian, even though they were the ones who had made it that way.

Opposition to Customary Law

Customary law had many detractors. African lawyers saw it as a backwater of the legal system. Critics argued that custom was a cudgel the British had handed to the chiefs, and colonial officials admitted it was susceptible to political manipulation (which was both what made it useful to them *and* what made it dangerous). Little customary law had been codified, and even when it was written down it was open to interpretation. Lord Hailey, the British social scientist much respected by colonial administrators, had warned that custom could not be expected to remain unchanged given how much colonization had altered African societies. Nigerian lawyers agreed. In 1956, one chastised the colonial government for ignoring the obvious: "If they are to play their part in the modern world, native institutions must undergo changes which may eventually make them unrecognizable."[25] But colonial jurists continued to believe that "indigenous tradition" could be preserved in modern law, like an ancient insect trapped in amber.

Customary courts were notorious for their corruption, disorganization, and excessive sentences. Corporal punishment was common.[26] There was a "bewildering" array of native courts, each with its rules about jurisdiction and appeal.[27] A schematic diagram of the eastern region's courts looked "like a map of the underground railways in London," as one lawyer complained. A colonial officer in the north observed that "the number of grades of court was unlimited, the permutations and combinations between the various grades of courts, the various classes of persons and the various classes of cases almost makes one's head reel."[28] The fact that many customary court judges were illiterate, which the British had once celebrated as proof of their authenticity, came to be embarrassing. Appointments to most customary courts required no education whatsoever, and poor character did not disqualify a

candidate.[29] Judges could be petty—some were notorious for issuing fines on the spot to anyone who didn't rise when they entered a room. Others used their courts to enrich themselves, reward their friends, or punish their rivals.[30] Customary courts' rules of evidence relied on "boundary marks and the fragile memories of old men," as a teacher remarked in her memoirs. "They seemed so intensely local, concerned with this very stone and that very tree and with what the other old man had been heard to declare his father had once said. . . . Such fundamentals hardly seemed to have a place in the elegant legal edifice of enactments and precedents."[31]

In the leadup to independence, more and more people saw customary law as a relic of colonialism. Custom posited that Nigeria was made up of people with clear, singular ethnic identities who could be parceled out into jurisdictions on the basis of those identities. This was not easy to square with the ambition of creating a single country. Nationalists in the National Council of Nigeria and the Cameroons (the political party that took the most unitary view of Nigeria) argued that custom was inappropriate for a country where everyone was a citizen. All Nigerians, Nnamdi Azikiwe argued, ought to all be accountable to the same laws. After the Second World War, the colonial government "retreated from the undiluted Native Authority system," especially in the east, as Afigbo wrote. It adopted a more flexible system of appointments to native courts and administrations, allowing "the educated elements the opportunity to flood the local government councils," to the disappointment of the chiefs and the relief of most others.[32] The use of corporal punishment was banned (with one exception—whipping was still allowed for "male juveniles," who were thought to be irredeemable through other means).[33]

Some Nigerians defended customary law and the broader system of "native administration" it served. Unsurprisingly, its most ardent supporters were chiefs. "The argument that Chiefs tend to be unprogressive and autocratic does not hold water," wrote a group of eastern chiefs during the drafting of Nigeria's constitution, "because chiefs rule at the pleasure of the people and those in authority have less power than the people who place them there."[34] But the number of people who believed this diminished with every passing year. Among intellectuals, a consensus emerged that colonial administrators had played a kind of trick on Nigerians, convincing them that customary law was truly "traditional," and truly theirs.[35]

In the first flush of independence, those who were tasked with organizing Nigeria's legal system looked to many sources. They looked elsewhere in Africa, including to countries like Ghana and Sudan that were already independent,

to the United States, India, and of course to the United Kingdom. This didn't mean that Nigeria could adopt other countries' structures wholesale. "Unlike a motor-car, political systems cannot be usefully imported in their *exact* patterns and forms," wrote Akpan. "For unlike the solid earth on which the motor-car can be operated in whatever country to which it may be imported, the people among whom political systems operate have peculiar feelings, peculiar needs, and a past which cannot be ignored."[36] No matter what they took as their model, however, they shared one conviction: "traditional" modes of governance and their corollaries in customary law were not the answer. Custom was not a resource—it was a *problem*.

During the Nigerian First Republic, jurists spoke as if custom was on its way out. As a law professor at the University of Nigeria–Nsukka explained to a group of visiting Americans in 1964, the importance of customary law in Nigeria was "diminishing as our legal system grows."[37] In some parts of the country, especially in the north, jurists defended custom. But even there, the consensus was that if it was to survive, it had to become more legible and more systematic. The old conviction that custom ought to be "authentic" began to fall away. "Customary courts are like a lady," wrote a federal administrator. "To keep her beauty, her dress should be trimmed and changed from time to time, to be kept up to date with fashions."[38] In the east, the jurisdiction of customary courts was reduced to just matters of family law and chiefly succession.[39] Elsewhere, Native Courts were reformed along the lines of English County Courts—with panels of citizens making decisions, rather than single chiefs, and members designated as justices of the peace. They also were given a clear structure of appeal (typically to magistrate's courts).[40] As F. A. Ajayi wrote, "contrary to certain fallacies that once held the field, but happily not now so widely accepted, that the Customary Law of simpler societies is, among other things, rigid and immutable, there is ample evidence that it has some inherent capacity for self-development."[41]

Strangely, it was British academics who had the greatest faith that African custom could be modernized. The push to reform custom was led by the legal scholar Antony Allott at the School of Oriental and African Studies in London, where his Restatement of African Law Project helped newly independent countries in Africa standardize, codify, and recalibrate their systems of customary law.[42] It was funded by a British charity, and it involved researchers from across the continent. Nigeria was one of its most important sites, and his Nigerian students were among the project's most prolific contributors.[43] Allott's goal was to systematize custom, and to provide the grounding for a "modern" customary law that would be robust and "nation-

ally appropriate." A famous British judge who advised the project described it as a final gesture of goodwill for the colonies. Africa "will soon be on the march," Lord Denning declaimed. "Can we not help it [put] on its coat for the journey—it is a coat of many colours—the coat of African law?"[44] Allott sometimes talked about the project as the first step in unifying the continent's legal systems. "One may hope that the by-product of the conference," he said at one of the many international summits he hosted, "will be a coming together, or at least a harmonisation, of the different national legal systems in Africa in fields of mutual concern."[45]

Critics of the project argued that codifying customary law would void it of meaning. "The courts are not to by hypnotized by the authority of print," argued a skeptical Nigerian Supreme Court justice. "The crucial fact is that a book cannot be cross-examined, either as to the opinions expressed or as to the claims of the author to have special knowledge."[46] Others argued that codifying custom would obviate its greatest value—flexibility—which administrators liked because it gave them broad powers. Civil libertarians worried for a different reason: a rigid, codified version of custom would subject "modern life" to "a kind of mummified ancient law."[47] Those at the top of the Nigerian judiciary saw the project as folly. To Chief Justice Adetokunbo Ademola, custom was irredeemable, and the volumes that Allott's researchers produced were no more than ethnographic curiosities. Irony abounded: while European academics were busy making "African law" in London, African judges in Lagos were arguing that justice was best served by the English common law.

* * *

In independent Nigeria, Igwekala became a symbol of custom's backwardness and atavism. It was already formally banned, but in the first year of independence the federal government decided to enforce that ban. In 1960, the Nigerian Police Force opened an investigation, and two years later, on 22 April 1962, the shrine precinct was raided. Forty-eight people were charged with managing an illegal secret society, and most of them were found guilty. The head priest, Ndodo Nwosu, was sentenced to life in prison, the shrine's buildings were razed, and the forest was fenced in.

A cache of written solicitations to the oracle was seized, which gave a sense of how it worked and who consulted it. Some of the illicit appeals to the oracle were legalistic, concerning property disputes or family matters that the supplicants believed were better served by the oracle than the court. Others were simple requests. "Please try to help me to pass my standard six examination this year," went one. "Please further help me to marriy a good husband which can love me too much."[48] Igwekala was no longer an object of dread like it

was in the time of Atlantic slavery, but Nigerian officials still saw it as a problem. Not only was it fraudulent, as an Owerri court ruled, it was an embarrassment to the modern judiciary.[49] In their minds, Igwekala was a totem of the superstition and antiquarianism that ruled customary law. Life should be governed by law, not superstition, and modern people should bring their problems to a magistrate, not an oracle. There was no place for mysticism in modern law, and Nigerians deserved something better than custom.

Custom under Military Rule

After the January 1966 coup toppled the Nigerian First Republic, the government made an about-face in its stance toward custom. The soldiers now running the country began to argue that custom had its uses. The customary court "is a poor man's court," wrote a military jurist, handy for providing cheap and speedy justice, while "preserving the custom, practices and usages of natives much harrowed by Western Law."[50] It could be used to enforce order in the countryside, keep unruly women in check, and silence opponents without the messiness of due process. Military rulers saw chiefs as allies in the their disciplinary "revolutions." Rural chiefs would help soldiers whip the country into shape. "Since our present pressing problem is Indiscipline, maybe a look at our old village society may put us on course," wrote Justice Chukwudifu Oputa.[51] Selfishness, alienation, greed, and irresponsibility had all crept into the Nigerian psyche through colonialism, Oputa argued. A return to "tradition" would purge those bad qualities. Soldiers found custom useful to this end, much to the dismay of modernizers like Akpan who had tried to minimize its place in Nigerian law. Under military rule, jurists gave credence to customary principles that their predecessors had fought tooth and nail.

Custom appealed to military governments not only because it was a tool for their disciplinary arsenal, but because it undermined the more liberal wing of the judiciary. Judges of the Supreme Court and the High Courts were among the few people who dared to criticize soldiers, as the military had learned in the *Lakanmi* case.[52] Soldiers were wary of going after judges directly. Their ideology of law and order gave them a begrudging respect for the courts, and jailing judges would be a bridge too far for most of them. What they could do, however, was empower the judiciary's most conservative and most easily manipulated members—the chiefs who presided over customary courts. Chiefs were often willing clients, and they were pliable in a way that legally trained judges, with all their high-minded rigidity, were not.

After the military takeover, the Federal Military Government increased the number of customary courts, expanded their powers, and rolled back attempts to "modernize" them. "Go deep into customary laws," the military governor of Plateau State told a Customary Courts Reform Committee in 1977. "You should try and feel the pulse of the people" and find "common aspects" of customary law that could be adopted nationally.[53] In a white paper, lawyers for the military government argued that every "distinct community" the length and width of the country should have its own customary court.[54] In the Mid-West State, military governor David Ejoor presided over a dramatic expansion of customary law while at the same time promising to reform the customary courts, standardize them, and prevent them from being politicized. "The hope was that in due course our nation's laws would be more definitively founded on the customary laws of our peoples," he wrote.[55] Chief Justice Taslim Elias, not typically an ally of the military, wrote approvingly of the return of customary law: "Although native or customary courts virtually disappeared in many states, they are now happily and suddenly re-emerging. This is a very commendable step, for all said and done these are the courts that have complete jurisdiction over you and I."[56]

In the north, some small-town emirs welcomed the return of customary law because they thought it would enhance their powers. They wanted to make sure, however, that Islamic law was given its own status, "separate from the Folk (Customary) legal traditions of the animist communities." "Since British occupation," wrote Ahmed Beita Yusuf, a law lecturer in Zaria, "both the Sharia and the legal tradition of the non-Moslem peoples, particularly in the north, have been erroneously lumped under a single vague label, 'native law and custom.'" This had been an error, he argued, but otherwise the reification of custom and Sharia under colonialism had been a good thing. After independence, the government had erred by failing to see custom's "wonderfully redeeming qualities." "Besides," he went on, "these redeeming qualities will no doubt rhyme well with the changing social and legal conditions in this country"—namely, military dictatorship.[57]

Some civilians welcomed customary law as a sign of decolonization. In 1975, an editorialist in a Lagos tabloid wrote that Nigerians didn't recognize English law as their own. "Perhaps the greatest injustice which the illiterate majority in Nigerian society is suffering, is the fact that they are being governed by bureaucrats and under laws alien to the traditional world, in the making of which they had never been consulted and the existence of which they were hardly aware." This alienation had created a crisis of credibility. "Little wonder that in exasperation—apart from the fact that he can-

not afford the legal fees—the [common] man, believing that the matchet is better than the lawyer, administers instant justice; that the mob stones to death a self-confessing witch, or batters a thief on the spot, or beats to death unceremoniously a man believed to inflict impotence on a person by mere touching or handshake." All of these were preferred over "the imported white man's legal system."[58] The problem, a businessman in Imo State wrote, was "our lawyers, who are more British than the British." "The lawyers rigidly believe that justice is reached through a process, and therefore have so much regard for 'technicalities' . . . which baffle those who seek justice through the courts." Custom had no such technicalities, he argued, and it offered a purer, more "frictionless" form of justice. Customary law would give the "illiterate masses" a form of law that they could recognize.[59]

Law's rituals could be made more traditional too. Many believed that customary oaths were more effective at convincing people to tell the truth than oaths taken on Bibles or Korans. "'I swear by Ogun, the god of Iron . . .' How about that as an innovation?" asked a newspaper editorialist approvingly. "When people swear to juju," Chief Christopher Obumseli argued, "their conscience can prick for they will recall an instance where in the past someone has had to bear the brunt of invoking the name of the village juju in vain."[60] The convention of taking oaths on the Bible "remains British and derived and developed from the British way of life," observed a lawyer. "If one really wants to get the truth on oath from a Nigerian, one has to go down to his ethnic origin. . . . In my little clan, if a person swears with knife and mixed human blood (not more than the quantity mixed in some of the drugs one takes occasionally), the truth will be heard." These kinds of oaths, which custom's defenders believed Africans found more frightening and effective, ought to be integrated into *all* African courts. "I am not suggesting that we should go back to the primitive age entirely," he clarified. "But if something is good and effective, let's bring it from that gone-by age."[61]

Customary law had a veneer of popular legitimacy. Military regimes had learned from their colonial predecessors that custom was useful in exerting control while concealing where the exertion came from—making it seem like the village chief who handed down a judgment was calling the shots rather than the district officer (or soldier) standing behind him.[62] From a distance, custom looked like an organic legal system that had emerged from the grassroots. But this was just an illusion. Customary law's *grundnorm* was not to be found in any kind of consent to be governed. As Nwabueze wrote in the late 1970s, a customary court's "compulsory character derives from the fact that it is a *state* power, backed by the full authority and coercive sanction

of the state, an attribute that distinguishes it from the authority of an arbitrator which is derived from the consent of the parties themselves."[63] It is this notion of custom—*völkisch* legal positivism given teeth by the state—that Nigeria's military regimes found useful. This may seem counterintuitive, given that the more common sense of "custom" is a system of rules that are *un*official, emerging from social consensus that emerges informally, beyond the reach of the state. But in twentieth-century Africa, customary law was inseparable from state power.

"A Genuinely African Body of Law": Custom and Legal Reform under Military Rule

There was a larger ideological force behind the return of customary law: "Tradition" was part of soldiers' vision for decolonization. They believed custom could be part of a reparative project to restore the ethical world colonialism had destroyed.[64] There was some historical irony in this—"custom" was at least partially a British invention, so a return to customary law was actually a return to colonial ways. Nonetheless, its defenders argued, custom was closer to the soul of African life than any other type of law. There was something genuinely African about custom, Oputa argued, riffing on Chinua Achebe: "Before the advent of colonialism and its devastating impact on our indigenous culture and our subsequent alienation, we lived in small village communities. In those communities, the influences surrounding the individual were relatively steady, uniform, harmonious and consistent. The village community was a society *strictly disciplined by cultural norms and mores. Things then fell apart*." Colonialism had left Nigeria caught between the traditions of the past and a new society that had not yet been born. "We have been uprooted from our indigenous culture but not able wholly to assimilate the culture of our erstwhile colonial masters. We are on the trapeze between the death of an old civilization and the swing to the beginning of a new one."[65] The new society Oputa hoped to land in was one that was modern but had an ethical foundation of its own. It mattered less what this foundation *was* than what it was *not*—that is to say, British.

Soldiers and their friends in the judiciary argued that the common-law system Nigeria had inherited from Britain was deficient. They rued the fact that Nigerian law didn't have an African character. Nwabueze held the most damning view: "The present generation of African judges is handicapped by the fact that their education in England and in the techniques of English law has insulated them from the values and needs of their own people. Their

minds have become imbued with ideas about the unquestionability of parliamentary legislation under English law and about the perfection and symmetry of the common law to render them almost incapable of performing effectively the more creative role demanded of them by constitutional adjudication under a written constitution."[66] The endurance of the English common law was a legacy of imperialism, and it was one of the factors keeping the country from coalescing as a true nation.

Military jurists found a remedy in a unified system of custom that they hoped could one day replace the English common law.[67] From being mere "village law," preoccupied with pilfered livestock and petty infidelities, custom could rise to the level of a national legal system—one that spoke to local realities and was self-consciously African in nature. They pointed out the fact that African customs were no more parochial than the medieval English rules that had become universalized as "law" through Europe's colonization of the rest of the world. After all, English law's origins *also* lay in rustic superstitions and countrified conservativism (i.e., feudalism). It was only with time that the English common law took on its dignified, ecumenical character, and the same would eventually happen with African custom. In the meantime, customary principles were more "appropriate" for Nigeria's needs, and they would better serve the task of decolonization.

Returning to those principles required filtering out colonialism's contamination. "At a time when the glamour of some of our indigenous laws seems to be dwindling to abysmal ignorance," a court administrator argued, customary law needed formal, statutory recognition if it was going to survive. Custom had been "mutilated" and "falsified" by "authors who were spoonfed with distorted opinions by ethnic groups who desired to be placed in positions of honour and advantage" by the British.[68] They believed that empiricism could solve this problem, and jurists who favored custom encouraged the collection and publication of customary statutes. This time the collecting would be done not by Allott and his army of research assistants in London but by the Federal Military Government itself.[69]

Jurists sympathetic to custom argued that Nigeria's hundreds of "native" legal systems could be harmonized.[70] There were nearly as many customary legal systems as there were villages, one law professor wrote, but the principles they shared were "so overwhelming that they overrule completely the advertised differences[,] which are either consciously or sub-consciously over-exaggerated to demonstrate the primitivity and incohesiveness of the black man."[71] With a few modest reforms, customary courts could be made the center of Nigeria's legal system. Omoniyi Adewoye argued that all African

normative orders shared an ethos: "Always the objective was to seek a genuine settlement that would disperse all feelings of rancor and restore harmony to the whole community. This constant effort at peace-keeping is a distinguishing feature of African traditional jurisprudence."[72] There was a "measure of basic uniformity" across customary traditions, Nwabueze believed, which led him to argue that custom might serve as the foundation of "a genuinely African body of law."[73] A single system of African law that applied to everyone was possible, and it could be discovered by superimposing customs on top of one another to see which principles they shared. Once those principles were known, jurists could draw a line of best fit through them. That would become the basis of a general system of custom recognizable to all Nigerians.

What were those customary principles that inspired such faith? Nobody ever spelled out the specifics. When asked to describe what made custom valuable, soldiers usually mentioned efficiency. Customary courts meted out punishments quickly and cheaply, which was appealing in light of Nigeria's trenchant criminological problems. But "efficiency" didn't answer the question. Although they seldom said so explicitly, the customary principles they most valued were the ones that compelled people to work and kept them from moving around too much. These included the rights of men to keep women from leaving their homes and of older men to control the labor of younger men. Although soldiers were young men themselves, they differentiated themselves from the irrepressible migrants from the countryside (a *lumpenproletariat* known in Nigeria as "area boys"). They saw themselves as good sons who respected their elders and their chiefs, and a kind of filial piety was woven into the ideology of discipline they espoused.[74] Powerful customary prohibitions on vagrancy, for example, could keep young men on the farms rather than in the towns where they might abandon their duties to their families. In personal law, bride prices, which nearly all customary systems recognized, could keep young women under the thumb of their husbands and fathers. But aside from general values and a handful of shared principles, jurists like Oputa and Nwabueze were vague about what a universal system of customary law would look like.

They were clearer about which customary principles they did *not* want revived. They had no interest in principles that might deter investment, like strong entitlements to use land by the people who occupied it—Nigeria's military regimes courted foreign capital assiduously, and no one wanted to spook investors. Also off the table were customary rights that women had lost over

the course of colonial rule. Military rulers had no nostalgia for the forms of power Nigerian women had wielded in the past, and they would not broker the views of feminists who argued that precolonial models of womanhood could empower Nigerian women in the present. Prominent intellectuals like Ifi Amadiume and Oyèrónk# Oyěwùmí made these arguments from exile in the 1980s and 1990s, when military rule was firmly entrenched. But the African "senses" they wanted to bring back—flexible notions of gender, a fluid logic of sexual difference, a meaningful place for women in politics—were not the ones that men like Babangida and Abacha wanted to resuscitate.[75]

Like their colonial predecessors, postcolonial jurists struggled with what custom should look like. How would a unified system of custom reconcile principles that were at odds with one another? Would Islamic law be considered "customary," and if so, how would it be squared with "pagan" regimes of personal law? How would this unified system of custom be implemented? As a code? Would it be imposed through decree, like everything else in military regimes? Even more fundamentally, how would jurists know what the scattered, mostly oral customary laws they wanted to implement *were*?[76] Military jurists fell back on vague bromides to argue that "native law" was all more or less the same. They cited proverbs as evidence of broadly shared principles, arguing that they could be the basis of laws.[77]

There were many problems with this approach. For one thing, the principles that were general enough that they applied everywhere were not very useful in founding a legal system. Folksy proverbs did not provide answers to the complex questions that came up in a vast, diverse, industrializing society like Nigeria. Moreover, there were real differences between different customary traditions, which general doctrines merely papered over. A certain spirit might be shared across African laws and modes of reasoning, but as soon as one drilled down into the details it became clear that they weren't all commensurable with each other. Custom also changed over time, which a codified system of custom could not account for. To historically minded jurists, this was a cardinal sin. "In retrospect," Omoniyi Adewoye wrote, "it was futile to embark upon a policy aimed at simply 'preserving' the traditional."[78] "Custom" was a moving target, and there was no reason to believe that it was going to stop moving once it had been written down. Moreover, its value to authoritarian governments (be they colonial or military) lay in its malleability—it was a blank that could be filled in with whatever was convenient. Standardizing and codifying it would make it less flexible, and therefore less useful as an administrative tool. It would become an "artificial dehydration of

customary law," the jurist Alexander Nékám argued, which would be useful to nobody.[79]

Finally, it was hard to avoid ethnic chauvinism in arguments for custom. During military rule, philosophers like Sophie Olúwọlé led the charge in arguing that African ontologies made dormant by colonialism could be revived. Soldiers were receptive to this idea, and the notion that African customs and "traditional" systems of thought could serve as the basis of government appealed to Nigerians across the political spectrum. But not all traditions were equal. Revival could slip into jingoism: "Yoruba Philosophy is better than Western Philosophy," Olúwọlé said in a candid interview shortly before she died. "We are better than them."[80] Nearly every proponent of a unified system of custom had one *particular* customary tradition in mind as the basis for it—which was often the one he or she came from. One jurist wrote that he had "no doubt" that the normative order he had learned in his village "can be found in the hearts and minds of peoples of other tribes in Nigeria."[81] If this was true, it was only true in a very general sense.

A unified customary law never came to pass, but military regimes found Nigeria's bricolage of customs useful all the same.[82] Lawyers, for their part, continued to mistrust custom despite the military's embrace of it. "Any pedantic advocacy for exclusive adoption of our customary law as our sole source of law," wrote a civil rights lawyer during the Abacha regime, "will have the unfortunate tendency to hang traditions like fetters upon the hands of reformative enterprise."[83] This was exactly what soldiers liked about it.

Conclusion

For the Igwekala oracle, military rule was a heyday. Igwekala's grove was damaged during the Nigerian Civil War, first by the secessionist government of Biafra (which, like the Nigerian First Republic, was wary of custom) and subsequently by the Nigerian occupation. The town of Umuneoha was spared, however, which some local people took as a sign of Igwekala's power. After the war, it remained a "prohibited juju," but the shrine's business quietly boomed under military rule. The investigations and raids of the early 1960s were not repeated, and it operated relatively openly under several military administrations. Even though it was technically illegal, Igwekala was useful, both to the military government and to the people who consulted it. Nigerians went to Igwekala not because they saw it as "just" or even necessarily because they believed in its powers. Rather, they used it because it rendered cheap and speedy decisions. From commercial disputes to matters

of the heart, sometimes it is less important where a decision comes from—be it a judge, a chief, or an oracle—than whether the parties accept it. If oracles, chiefs, and other "traditional" entities made rules that bent toward "discipline" and rendered decisions that fostered "harmony," as many soldiers believed they did, they let them flourish.

After the return of civilian rule in 1999, the prohibition of Igwekala—which had been on the books the whole time—was enforced again. The shrine has been raided several times since then, following accusations that its priests were engaged in human sacrifice, or meddling with electoral politics, or some jumbled combination of the two.[84] Igwekala is officially out of commission, but it isn't really gone. Today, it is rumored to play a role in many of Nigeria's criminal industries, including fraud and drug trading. Oracles are also used to explain human trafficking.[85] Towns in the region are part of a network that brings young women from southern Nigeria to Europe to engage in sex work, domestic labor, or jobs that are a little of both. Antitrafficking agencies maintain that women are "tricked" by "juju" oaths to convince them to go and to scare them away from absconding when they arrive in Palermo or Paris.[86] Urbane young women probably aren't duped by the theatrics of oracles, and their decisions are better explained by debt and a lack of local opportunity.[87] Nonetheless, oracles still have a grip on the public imagination. Today as in the past, those who want to control people's labor and movement find custom and its totems useful—whether they're formally recognized as law or not.