‘Our Enemies Are Swindlers’! Conceptualising Anti-Corruption Legalism as a Securitising Device

By *Ugochukwu Ezeh*[*]

Abstract: This article seeks to conceptualise anti-corruption legalism as a symptom of a broader phenomenon: the securitisation of corruption. Securitisation refers to the complex social processes through which political actors frame corruption as an existential threat to valued referent objects; construct it as a security problem; and, in turn, acquire broad mandates to tackle it by recourse to emergency measures. By building on case studies from contemporary Nigerian legal history, this article argues that the securitisation of corruption is mediated, to a considerable extent, by anti-corruption legalism – defined as a repertoire of legalistic rules, discourses, and practices that perform a regulatory crackdown on corruption. As a constitutive element of the securitisation of corruption, anti-corruption legalism excises corruption from legal and other normative frameworks applicable to other crimes with a view to tackling it through a repressive national security paradigm. Securitisation, in turn, catalyses the decline of the rule of law through its corrosive effects on judicial power, judicial independence, and human rights. Taken together, securitisation and anti-corruption legalism are counterproductive approaches insofar as they undermine the evolution of democratic values, political accountability mechanisms, and independent constitutional institutions that form the bedrock of meaningful and sustainable anti-corruption strategies.

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A. Introduction

For much of Nigerian constitutional history, corruption has notoriously featured as a perennial source of socio-political malaise and overriding policy concern.[1] Facing pressure to

* Doctoral Candidate in Law, University of Oxford. Some parts of this article are based on the author’s thesis submitted in partial fulfilment of the requirements for the MPhil in Law degree at the University of Oxford. For their valuable comments and feedback on the MPhil research project, the author wishes to thank Professor Liora Lazarus; Professor Catherine O’Regan (former Judge of the Constitutional Court of South Africa); and Professor Claudia Aradau. Many thanks are also due to Professor Lucia Zedner, who gave helpful feedback on an early draft section of this article, as well as to the anonymous peer reviewer, and editors of this special issue.

1 *Robert L. Tignor*, Political Corruption in Nigeria Before Independence, Journal of Modern African Studies 31(2) (1993), pp. 175, 176; *Chinua Achebe*, The Trouble with Nigeria, Enugu 1983, pp.

crack down on corruption, successive governments historically sought to frame it as an existential threat to the Nigerian State with a view to excising it from legal frameworks applicable to other crimes and tackling it through a repressive national security paradigm. The securitisation of corruption in Nigeria has been mediated, to a considerable extent, through anti-corruption legalism[2] - defined as a repertoire of legalistic rules, discourses, and practices that perform a regulatory crackdown on corruption.

During military rule, for instance, anti-corruption legalism in the Nigerian context involved the promulgation of draconian criminal law frameworks that reflected militaristic notions of wars and crusades against corruption.[3] This anti-corruption paradigm involved, inter alia, fragmenting the judicial system through the establishment of parallel and ad hoc anti-corruption tribunals;[4] promulgating ad hominem and retrospective anti-corruption enactments; excluding the application of the Bill of Rights in corruption trials;[5] and vesting plenary jurisdiction on anti-corruption agencies with respect to the imposition of forfeiture orders, administrative detention,[6] and other anti-corruption law enforcement measures.

The formulation, in Nigerian legal discourse, of the notion of corruption suspects as 'vampires'[7] thus marked the logical culmination of a complex and highly charged process of securitisation.[8] Conceptualised as vampires, corruption suspects therefore emerged as pernicious threats to be warded off and resisted – for within the volatile context of a War against Corruption they could not be conceded normal procedural safeguards or transformed into legal subjects entitled to assert rights to fair hearing within the ordinary

41-42; *Larry Diamond*, Political Corruption: Nigeria's Perennial Struggle, Journal of Democracy 2(4) (1991), pp. 73-85; *Okechukwu Oko*, Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus, New York University Journal of International Law and Politics 34(2) (2002), p. 397.

2 See *Simon Coldham*, Legal Responses to State Corruption in Commonwealth Africa, Journal of African Law 39(2) (1995), pp. 115-126.

3 *Segun Osoba*, Corruption in Nigeria: Historical Perspectives, Review of African Political Economy 23(69) (1996), p. 371, 377-378; *Adigun Agbaje / Jinmi Adisa*, Political Education and Public Policy in Nigeria: The War Against Indiscipline (WAI), The Journal of Commonwealth & Comparative Politics 26(1) (1988), p. 22.

4 *M. Adekunle Owoade*, The Military and the Criminal Law in Nigeria, Journal of African Law 33(2) 1989), p. 135, 139-141; *M. Olu Adediran*, Characterisation and Classification of Tribunals and Inquiries in Nigeria, Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 28(4) (1995), pp. 522-523, 536-537; *Yemi Akinseye-George*, Legal System, Corruption and Governance in Nigeria, Lagos 2000, pp. 53 -57.

5 See, for instance, the Public Officers (Investigation of Assets) Decree No. 51 of 1966; Investigation of Assets (Public Officers and Other Persons) Decree No. 37 of 1968; and Forfeiture of Assets, etc. (Validation) Decree No. 45 of 1968.

6 See *Re Mohammed Olayori & Ors* (1969) 2 All NLR 298.

7 See *Lakanmi v Attorney-General* (1971) 1 UILR 201, 222.

8 *Ugochukwu Ezeh*, Judicialisation and Securitisation: A Nigerian Case Study, 1966-1974, MPhil Thesis, University of Oxford 2017, p. 67.

judicial process.[9] Anti-corruption legalism was also characterised by hyper-legalism, conceptualised as frenetic legislative activity[10] as well as relentless and inconsistent policy interventions in the anti-corruption sector. The phenomenon of hyper-legalism has been particularly exemplified, in the Nigerian context, by the proliferation of anti-corruption enactments[11] and the incessant creation of parallel anti-corruption law enforcement agencies.[12]

This article conceptualises anti-corruption legalism as a symptom of the securitisation of corruption. Securitisation, in its essential formulation, refers to the complex social processes through which political actors frame certain issues as existential threats to valued referent objects; construct such threats as security problems; and acquire broad mandates to tackle them by recourse to emergency measures.[13] Drawing on experiences from contemporary Nigerian legal history (1966-1974), this article will conceptualise anti-corruption legalism as a securitising technique with a view to elucidating its deleterious impacts on judicial independence and human rights – crucial aspects of the rule of law. In this respect, anti-corruption legalism, as a constitutive element of the securitisation of corruption, serves to catalyse the decline of the rule of law through its corrosive effects on judicial power, judicial independence, and human rights.

This article is divided into five sections. The first section sets out the analytical framework of securitisation theory and discusses the relevance of key concepts from the theory to the discourse on anti-corruption legalism. The second section unfolds the historical frame for the rest of the article whilst the third section elucidates the ways in which military governments leveraged anti-corruption legalism to consolidate the securitisation of corrup-

9 *Ezeh*, note 8, p. 91. See also *Lawrence Douglas* et al., An Introduction: Criminal/Enemy, in: A. Sarat et al. (eds.), Criminals and Enemies, Amherst 2019, pp. 1-21.

10 See *John L. Comaroff / Jean Comaroff*, Law and Disorder in the Postcolony: An Introduction, in: Jean Comaroff / John L. Comaroff (eds.), Law and Disorder in the Postcolony, Chicago 2006, pp. vii-viii, 19-42.

11 See, for instance, the Recovery of Public Property (Special Military Tribunals) (Amendment No. 2) Decree of 1984: amending the Recovery of Public Property (Special Military Tribunals) Decree 1984 and repealing the Recovery of Public Property (Special Military Tribunals) (Amendment) Decree 1984. For discussions of a raft of anti-corruption enactments and related legislative interventions in the Nigerian anti-corruption sector, see also *Abel A. Emiko*, A Reflection on the Nigerian Corrupt Practices Decree, Journal of the Indian Law Institute 19(1) (1977), p. 17; *Paul Ocheje*, Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000, Journal of African Law 45(2) (2001), p. 173; *M. A. Ayoade / S. A. Igbinedion* (eds.), Legal Perspectives to Corruption, Money Laundering and Assets Recovery in Nigeria, Lagos 2015.

12 *Matthew T. Page*, Innovative or Ineffective? Reassessing Anticorruption Law Enforcement in Nigeria, GI-ACE Working Paper No. 9 (2021), pp. 33-35; *Nnamdi Ikpeze*, Fusion of Anti-Corruption Agencies in Nigeria, Journal of Sustainable Development Law and Policy 1(1) (2013), p. 148, 156-167.

13 *Barry Buzan* (et al.), Security – A New Framework for Analysis, Colorado 1998, pp. 21-45; *Thierry Balzacq* (et al.), Securitization Revisited: Theory and Cases, International Relations 30(4) (2016), p. 494.

tion. The fourth section unpacks salient measures of contestation and resistance deployed by courts and litigants in response to anti-corruption legalism and broader securitising processes. By examining certain politico-legal strategies adopted by the military regime to counteract such modes of resistance, the fifth section thematises the deleterious effects that securitisation and anti-corruption legalism had on judicial power, human rights, and the rule of law in Nigeria.

B. The Analytical Framework

I. Securitisation Theory

Securitisation, in its essential formulation, refers to the complex process of framing issues as existential threats to a valued referent object, constructing such threats as security problems, and acquiring a broad mandate to tackle them by recourse to emergency measures.[14] Accordingly, securitisation theory posits 'security' as a discursively constructed concept and offers a systematic framework within which to unpack the social construction of security threats and conceptualise the political character of measures adopted to confront them. Processes of securitisation commence when social actors, qua 'securitising actors', initiate 'securitising moves' that frame certain issues as existential threats with a view to mobilising support for proposals that such issues ought to be elevated to priority status and tackled outside the ambit of the normative frameworks that would ordinarily apply.[15] As such, securitising moves typically occur through the speech-acts of 'securitising actors' who possess the positional influence and political status necessary to determine the security agenda within policy-making processes.[16]

On the premise that inter-subjective acceptance of their legitimacy ultimately sustains security practices,[17] securitisation theory posits the requirement that securitising actors must stage threat constructions for the endorsement or disavowal of relevant security 'audiences'.[18] Accordingly, a process of securitisation may feature the interface of several sub-audiences whose specialised functions and complex interaction with given securitising moves supply the necessary formal, legal, or politico-moral endorsement of eventual se-

14 *Buzan*, note 13, pp. 21-45; *Balzacq*, note 13, p. 494.

15 *Buzan*, note 13, pp. 24-25.

16 *Michael C. Williams*, Images, Enemies: Securitization and International Politics, International Studies Quarterly 47 (2003), p. 511, 514; *Ole Wæver*, Securitization, in: Christopher W. Hughes / Lai Yew Meng (eds.), Security Studies – A Reader, Oxford 2011, p. 93, 94.

17 *Thierry Balzacq*, Legitimacy and the 'Logic' of Security, in: T. Balzacq (ed.), Contesting Security: Strategies and Logics, London 2015, p. 3.

18 *Sarah Leonard / Christian Kaunert*, Reconceptualising the Audience in Securitization Theory, in: T. Balzacq (ed.), Securitization Theory: How Security Problems Emerge and Dissolve, Oxford 2011, p. 57.

curity practices.[19] In democratic societies, for instance, policymakers and the citizenry, acting within the context of an electoral system, may feature as the audiences of certain securitising moves[20] while a smaller network of political elites may constitute the audience in non-democratic settings.[21] In the final analysis, it is through the rubric of 'audiences' that securitisation theory expounds the inter-subjective dimensions through which security meanings and practices are both established and legitimised.

Following from a securitising move, the process of securitisation is consolidated when a pertinent audience sanctions the claim that articulated threats are to be tackled by recourse to emergency measures. As such, audiences and the wider political community to whom the threat construction is conveyed also contribute to establishing 'the critical vulnerability of a referent object' which ought to be protected by recourse to exceptional measures.[22] Ultimately, securitisation then becomes an instrumental mechanism that grounds and justifies emergency politics.[23]

Securitisation analysis, in turn, seeks to unpack the complex mechanisms through which discourse is used to (de)construct security problems. As a means of facilitating systematic empirical analysis, the analytical framework compartmentalises securitised processes along three dimensions. These consist of: (i.) threat constructions (ii.) the deployment of emergency measures in response; and (iii) the significant consequences of concomitant security practices on the interactions of actors within broader political processes.[24]

II. Public Enemies and the 'Logic' of Securitisation

What is the underpinning logic of securitisation? Here, aspects of securitisation theory intersect with the political thought of the constitutional theorist Carl Schmitt.[25] According to a neo-Schmittan strand of securitisation theory, securitising practices are ultimately sustained by a notion of realist politics that is dedicated to constructing divisive political

19 *Thierry Balzacq*, The Three Faces of Securitization: Political Agency, Audience, and Context, European Journal of International Relations 11 (2) (2005), pp. 171 – 201.

20 *Juha Vuori*, Illocutionary Logic and Strands of Securitization: Applying the Study of Securitization to the Study of Non-Democratic Political Orders, European Journal of International Relations 14(1) (2008), p. 65, 69-70.

21 Ibid.

22 *Thierry Balzacq*, A Theory of Securitization: Origins, Core Assumptions, and Variants, in: Thierry Balzacq (ed.), Securitization Theory – How Security Problems Emerge and Dissolve, Oxford 2011, p. 1, 3.

23 *Ralf Emmers*, Securitization, in: Alan Collins (ed.), Contemporary Security Studies, Oxford 2016, p. 171.

24 Ibid at p. 170.

25 *Lene Hansen*, Reconstructing Desecuritisation: The Normative-Political in the Copenhagen School and Directions for How to Apply It, Review of International Studies 38 (2012), p. 525, 529-536.

relationships of enmity.[26] 'The political enemy', as Schmitt famously argued, 'is the Other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien so that in the extreme case conflicts with him are possible.'[27] Thus, the capacity to articulate and identify the existential adversary constitutes the notion of sovereignty in Schmittan thought.[28]

Furthermore, the political character of the State rests on the sovereign 'decision' which determines these existential distinctions.[29] Through the decisive act of the sovereign, unencumbered by normative constraints, a political community sustains and preserves itself. On this account, therefore, securitising processes seek to deploy emergency measures against a dangerous 'Other' who poses an existential threat to a prized security referent. As Aradau concisely puts it, security demarcates 'boundaries between those who are to be secure and those who are endangering this security.'[30] In this regard, securitisation involves delimiting the existential boundaries of a political community and constructing membership criteria that categorize enemies as those who must be expelled in order to secure the continued survival of the polity.[31]

III. Judicial Audiences, Anti-corruption Legalism, and the (De)Legitimation of Securitising Processes

Securitisation theory provides a valuable analytical framework that can usefully illuminate the ways in which constitutional actors such as courts - conceptualised as judicial audiences - contribute towards shaping the construction of security discourses and practices. However, it is important, of course, to avoid an uncritical appropriation of concepts from securitisation theory. For instance, whilst securitising actors often initiate securitising processes through laws and other legislative speech-acts,[32] such laws may not be conceptualised, in some cases, as inchoate 'securitising moves' given that they may already possess, by virtue of an enactment, a juridical status independent of the endorsement of audiences.

Furthermore, some critical security scholars have argued that securitisation theory rests on a debatable normative premise – flowing from its roots in Schmittan political thought

26 *Jeff Huysmans*, The Question of the Limit: Desecuritisation and the Aesthetics of Horror in Political Realism, Millennium – Journal of International Studies (1998), p. 569, 575.

27 *Carl Schmitt*, The Concept of the Political, transl. George Schwab, London 2007, pp. 26-27.

28 *David Dyzenhaus*, Legality and Legitimacy*:* Carl Schmitt*,* Hans Kelsen and Hermann Heller in Weimar, Oxford 1997, pp. 42-43.

29 See also *Andrew Norris*, Carl Schmitt on Friends, Enemies and the Political, Telos 112 (1998), p. 68.

30 *Claudia Aradau*, Rethinking Trafficking in Women: Politics Out of Security, Basingstoke 2008, p. 162.

31 See *Huysmans*, note 26, p. 577.

32 See, for instance, *Liora Lazarus*, The Right to Security – Securing Rights or Securitising Rights, in: R. Dickson et al., Examining Critical Perspectives on Human Rights, Cambridge 2012, pp. 87-106.

– that posits security practices as measures to be deconstructed and resisted given their inherently illiberal and anti-democratic nature.[33] It also bears mentioning that securitisation scholars are currently engaged in heated debates that seek to reckon with the moral and epistemological foundations of the theory and unpack the degree to which its key concepts may be inflected with 'civilizationism, methodological whiteness, and antiblack racism'.[34] Nonetheless, the theory does provide a useful basis to level nuanced angles of critique with respect to the ways in which securitising actors leverage legal speech-acts in the social construction of security problems.

Within the volatile context of anti-corruption regulation, for instance, courts may be conceptualised as judicial audiences that perform at least two strategic, albeit divergent, roles – approbation and contestation. On the one hand, approbation may occur through judicial decisions that explicitly uphold the legality of securitising measures within the anti-corruption sector. By the same token, judicial audiences may tacitly legitimate securitising measures by handing down highly deferential decisions that essentially affirm and consolidate the securitising capacities of anti-corruption practitioners. Conversely, judicial audiences may facilitate the deconstruction and delegitimation of securitising measures perceived as unjustified or unlawful. Contestation, in this regard, may involve judicial decisions that expressly reject certain securitising moves as illegal. Judicial audiences may also facilitate contestation by affirming the rights of persons securitised as public enemies to challenge the legality of this framing in an independent adjudicatory forum that guarantees the civil liberties, substantive values, and procedural safeguards enshrined in the democratic legal order.

C. Historical Background

I. The 1966 Military Intervention as a Facilitating Condition for Eventual Securitisation

The collapse of the First Republic in 1966 was, partly, the outcome of a militarised anti-corruption crusade.[35] On 15 January 1966, a radicalised regiment of the Nigerian army mutinied against the civilian government by executing a coup d'état. Framed as an anti-corruption campaign, the coup was premised on the notion of military intervention as a remedial measure against the misrule, political corruption, electoral malpractices, and other

33 *Thierry Balzacq*, Legitimacy and the 'Logic' of Security, in: T. Balzacq (ed.), Contesting Security – Strategies and Logics, Oxford 2015, pp. 4-5.

34 See *Alison Howell / Melanie Richter-Montpetit*, Is Securitization Theory Racist? Civilizationism, Methodological Whiteness, and Anti-Black Thought in the Copenhagen School, Security Dialogue 51(1) (2020) p. 3, 4. Cf. *Ole Wæver / Barry Buzan*, Racism and Responsibility - The Critical Limits of Deepfake Methodology in Security Studies: A Reply to Howell and Richter-Montpetit, Security Dialogue 51(4) (2020), p. 386.

35 *Ben Gbulie*, Nigeria's Five Majors: Coup D'état of 15 January 1966, Onitsha 1981, p. 8, 72; *Adewale Ademoyega*, Why We Struck: The Story of the First Nigerian Coup, Ibadan 1981, p. 21, 87.

constitutional violations in which the civilian government was implicated.[36] The mutineers assassinated the Prime Minister, Sir Abubakar Tafawa Balewa; the premiers of the Northern and Western regions; the reputedly corrupt federal Minister of Finance; and other prominent members of the Nigerian politico-military establishment.[37]

The coup, however, proved abortive as the mutineers failed to seize Lagos, then the federal capital. The surviving military elite, led by Major-General Aguiyi Ironsi, rallied the bulk of the troops, foiled the coup, and held anxious meetings with the Acting President and surviving members of the federal Council of Ministers in order to assess the political situation.[38] At a subsequent emergency meeting held on 16 January 1966, the demoralised surviving members of the federal Council of Ministers issued a declaration of abdication,[39] relinquished political authority, and invited Major-General Ironsi to form an interim military government[40] with a mandate to restore law and order and take decisive charge of the unfolding political crisis.[41]

Following these events, the Republican Constitution was suspended, in part, and modified to incorporate the organisational structure of the nascent military regime.[42] Having suspended the elected branches of government, the Ironsi regime assumed powers to govern by decree. Subsequently, the regime formalised its political authority by promulgating Decree No. 1 of 1966 as its chief constitutive instrument.[43] It is noteworthy that the effect of these events on the judiciary was, initially, relatively minimal[44] as the post-coup restructuring of the Nigerian constitutional framework generally preserved the extant personnel, offices, and organisational apparatus of the courts.

However, military rule - and the violent anti-corruption campaign that heralded it - exacerbated the political instability, constitutional crisis, and inter-ethnic conflicts confronting the fledgling Nigerian State. The abortive coup, which was initially welcomed enthusiastically as a vaunted anti-corruption crusade, soon became mired in controversy

36 *Larry Diamond*, Class, Ethnicity and Democracy in Nigeria – The Failure of the First Republic, London 1988, pp. 252-253, 288-322.

37 *Max Siollun*, Oil, Politics and Violence: Nigeria's Military Coup Culture (1966-1976), New York 2009, pp. 47-48.

38 Ibid at p. 60.

39 *K. O. Mbadiwe*, Rebirth of a Nation, Enugu 1991, p. 186.

40 *Ruth First*, The Barrel of a Gun: Political Power in Africa and the Coup d'état, London 1970, p. 287; *Benjamin O. Nwabueze*, A Constitutional History of Nigeria, Ibadan 1982, p. 162.

41 Government Notice No. 147 of 1966: Nigeria Gazette, Lagos, 26th January, 1966 at 103.

42 *D.I.O. Ewelukwa*, Military System of Administration in Nigeria, Journal of Legal Pluralism and Unofficial Law 6(10) (1974), p. 67, 69-71.

43 Ibid. See also General Aguiyi Ironsi's Proclamation Address on the 17th of January 1966 announcing the suspension of the 1963 Republican Constitution, especially the provisions relating to the elected branches of government and the options for restructuring the constitutional framework of the State.

44 *Adeoye Akinsanya*, The Machinery of Government During the Military Regime in Nigeria, International Review of Administrative Sciences 42(4) (1976), p. 357, 367.

and political intrigue. Conspiracy theories subsequently averred that the mutineers were preponderantly of Igbo extraction,[45] and that the abortive coup had disproportionately and selectively targeted political figures from other ethnicities whilst shielding from elimination Igbo politicians who were just 'as solidly steeped in the vices of the First Republic as any other ethnic group'.[46] Furthermore, the incidental emergence of General Ironsi, an Igbo, as Supreme Commander and Head of State in the aftermath of the abortive coup, appeared to reify rumours of a purported conspiracy to entrench Igbo hegemony in the country. Although these conspiracy theories have since been cogently refuted,[47] it is significant that they did not necessarily repudiate the securitising logic and lethal violence that characterised the abortive coup; they implied, instead, that the pattern of killings should have been more evenly distributed.

When the Ironsi regime unilaterally abolished the federal structure of the Nigerian constitution in order to institutionalise its preference for unitary government in May 1966,[48] this measure met with considerable resistance. Pogroms subsequently erupted across the country in which thousands of Igbos and ethnic minorities from the Eastern Region were killed.[49] On 29 July 1966, General Ironsi was himself assassinated in a counter-coup that brought Lt. Col Yakubu Gowon to power. By May 1967, the Eastern Region declared its secession from the Nigerian federation[50] and the political crisis degenerated into civil war.[51] On 15 January 1970, the war ended following the surrender of the Biafran secessionist forces to the federal military government of Nigeria.

45 *Eghosa E. Osaghae*, Crippled Giant: Nigeria Since Independence, Bloomington 1998, pp. 58-59; *Ahmed R. Mohammed*, The Nigerian Civil War 1967-1970 – A Critical Look at The Developments that Led to It, in: U. O. Eleazu (ed.), Nigeria – The First 25 Years, Lagos 1988, pp. 75-76.

46 *Turi Muhammadu / Mohammed Haruna*, The Civil War, in: O. Oyediran (ed.), Nigerian Government and Politics Under Military Rule, London 1979, p. 27.

47 *Wale Ademoyega*, Why We Struck: The Story of the First Nigerian Coup, Ibadan 1981, p. 61; *G. N. Uzoigwe*, Background to the Nigerian Civil War, in: Toyin Falola / Ogechukwu Ezekwem (eds.), Writing the Nigeria-Biafra War, Rochester, NY 2016, pp. 29-30. See also *Max Siollun*, Oil, Politics and Violence: Nigeria's Military Coup Culture 1966-1976, New York 2009, pp. 141-142: discussing the historical evidence and arguing, correctly, that 'multi-ethnic participants' executed the 15 January 1966 coup.

48 See the Constitution (Suspension and Modification No. 5) Decree, 1966 (also known as Decree No 34 of 1966); *J. Isawa Elaigwu*, Nigerian Federalism Under Civilian and Military Regimes, Publius: The Journal of Federalism 18(1) (1988), p. 173, 174.

49 *Chinua Achebe*, There Was a Country: A Personal History of Biafra, New York 2012, p. 82-83; *G. N. Uzoigwe*, Background to the Nigerian Civil War, in: Toyin Falola / Ogechukwu Ezekwem (eds.), Writing the Nigeria-Biafra War, Rochester, NY 2016, p. 20; *Lasse Heerten*, The Biafran War and Postcolonial Humanitarianism: Spectacles of Suffering, Cambridge 2017, p. 49.

50 *Obi Nwakanma*, The Nigerian Civil War and the Biafran Secessionist Revival, in: A. Carl LeVan / Patrick Ukata (eds.), The Oxford Handbook of Nigerian Politics, Oxford 2018, pp. 626-627.

51 For comprehensive studies on the background to the Nigeria-Biafra War, see *John De* St. Jorre, The Nigeria Civil War, London 1972; *Anthony Kirk-Greene*, Crisis and Conflict in Nigeria: A Documentary Sourcebook 1966-1969, Vol. II, Oxford 1971.

II. (Anti)Corruption, Securitisation, and Military Rule

Military intervention in Nigeria had at least two important consequences. First, it facilitated the emergence of anti-corruption legalism and the concomitant securitisation of corruption. Although corruption had emerged as a politicised and incendiary issue in Nigeria during the twilight years of colonial rule,[52] the abortive January 15 1966 coup marked a critical juncture in Nigerian corruption discourse. By launching a militarised anti-corruption campaign involving the elimination of reputedly corrupt members of the political establishment, the mutineers effected a pivotal securitising move aimed at excising the issue of corruption from the normative frameworks applicable to other crimes.

It was also significant that the mutineers explicitly evinced their intention to redefine corruption, inter alia, as a capital offence in the Declaration of Martial Law they promulgated in the Northern Region. Adumbrating a list of enemies who posed existential threats to the State, the Declaration further proclaimed that:

> *Our enemies are the political profiteers, swindlers, the men in the high and low places that seek bribes and demand ten per cent, those that seek to keep the country divided permanently so that they can remain in office as ministers and VIPs of waste, the tribalists, the nepotists, those that make the country look big for nothing before international circles, those that have corrupted our society and put the Nigerian political calendar back by their words and deeds.*[53]

Securitised as public 'enemies', persons designated as corrupt thus figured as existential threats who had to be summarily executed in order to secure the survival of the Nigerian polity. As Steven Pierce cogently observed, in relation to Festus Okotie-Eboh, the reputedly corrupt Finance Minister assassinated by the mutineers, '[t]he perlocutionary force of corruption discourse may itself have been the difference between life and death'.[54]

In a perceptive historical study of corruption in Nigeria before Independence, Tignor elucidates the instrumental functions of the discourse around corruption within the Nigerian political process. In the years leading up to Independence from British rule, officials in the colonial bureaucracy strategically constructed an anti-corruption discourse to discredit prominent anticolonial agitators, weaken the emergent nationalist movement, and undercut

52 *Robert L. Tignor*, Political Corruption in Nigeria Before Independence, Journal of Modern African Studies 31(2) (1993), p. 175; *Hollis R. Lynch*, K. O. Mbadiwe: A Nigerian Political Biography, 1915-1990, New York 2012, pp. 153-160.

53 Reproduced in *Kole Omotoso*, Fellow Nigerians: Famous First Words of Nigerian Coup-Makers, 1966 – 1985, Ile-Ife 1989. The Declaration was issued by Major Chukwuma Kaduna Nzeogwu.

54 See *Steven Pierce*, Moral Economies of Corruption: State Formation and Political Culture in Nigeria, Durham, NC 2016, p. 198. As Huysmans also suggests, in an insightful discussion of the securitisation of immigration, the material prospect of a resort to militarised force is the 'condition of exception which the enemy calls into being.' See *Jeff Huysmans*, The Question of the Limit: Desecuritisation and the Aesthetics of Horror in Political Realism, Millennium – Journal of International Studies (1998), p. 569, 580.

the case for Independence.[55] On this historical account, local politicians and pressure groups in the late 1950s also began to weaponize corruption allegations in internecine political conflicts by routinely petitioning the colonial authorities to establish commissions of inquiry into the affairs of political rivals.[56] Such commissions of inquiry, even when they failed to disclose cogent evidence to ground criminal liability for corruption,[57] often attracted widespread publicity. As such, they performed strategic political functions for both the colonial government[58] and local political elite insofar as they shaped a corruption discourse that impugned the credibility of political opponents.[59] The politicised nature of (anti)corruption discourse did not abate after Independence in 1960, and within the first few years of the First Republic the ruling class began to leverage popular pressure to tackle corruption by selectively deploying anti-corruption enforcement measures against prominent politicians and parties in opposition.[60]

However, military intervention in the Nigerian political process redefined the status of corruption in the national consciousness by inscribing it within a securitised discourse. Although the mutineers failed to capture the reins of power, they nonetheless dislodged a government widely perceived as corrupt, and thus succeeded in situating corruption within an exceptional register of meaning that posited military intervention as an appropriate emergency response.[61] This discursive construction of corruption as a social menace requiring an exceptional response resonated with the populace in a zeitgeist suffused with

55 *Tignor*, note 52, at pp. 177-178; *Chibuike U. Uche*, Banking 'Scandal' In a British West African Colony: The Politics of the African Continental Bank Crisis, Financial History Review 4(1) (1997), p. 51, 58-59.

56 *Martin Lynn*, The 'Eastern Crisis' of 1955-57, The Colonial Office, and Nigerian Decolonisation, The Journal of Imperial and Commonwealth History 30(3) (2002), p. 91, 103-104; *Lynch*, note 52, at pp. 153-154.

57 *Michael Vickers*, Competition and Control in Modern Nigeria: Origins of the War with Biafra, International Journal 25(3) (1970), p. 603, 612; *Uche*, note 55, at p. 61.

58 See *Steven Pierce*, The Invention of Corruption: Political Malpractice and Selective Prosecution in Colonial Northern Nigeria, Journal of West African History 2(2) (2016), p. 1, 13-14.

59 *Pierce*, note 54, at pp. 97-98.

60 Ibid, pp. 93-99: discussing the 1962 report of the Coker Commission of Inquiry into the Affairs of Certain Statutory Corporations in Western Nigeria. The politicised nature of the corruption investigations undertaken by the Coker Commission was noticeable in its partisan pronouncements and damning verdict against Chief Obafemi Awolowo, the most prominent opposition politician, in the period leading up to the 1964 Federal Elections. More so, the expedient establishment of the Coker Commission stood in stark contrast to the tepid response of the federal government in 1964 to a corruption scandal implicating Dr K. O. Mbadiwe, the Federal Minister of Aviation and ally of the Federal Prime Minister, Sir Abubakar Tafawa Balewa. See *Larry Diamond*, Class, Ethnicity and Democracy in Nigeria – The Failure of the First Republic, London 1988, p. 252.

61 See *N. J. Miners*, The Nigerian Army, 1956-1966, London 1971, p. 180: observing that 'the joy at the end of the [Balewa] political regime was obvious all over the country.'.

anti-corruption fervour[62] and exerted considerable influence on the Ironsi and Gowon regimes.

It was therefore almost inevitable that both military regimes would accord high priority to the issue of public-sector corruption in attempts to construct a justificatory basis for their political authority. Both regimes thus adopted legislative approaches that framed corruption as an existential threat with a view to excising it altogether from the normative constitutional and statutory frameworks applicable to other crimes.[63] Against this backdrop, there are good grounds for arguing that the initial mutineers and successive military regimes, qua securitising actors, effected discursive shifts in the meaning of corruption that subsequently shaped the trajectory of Nigerian corruption discourse and anti-corruption policy.

Second, the securitisation of corruption was a major catalyst for the decline of judicial independence and the rule of law. Initially, the suspension of representative government occasioned by military rule foregrounded the role of the judiciary as a crucial site of political dissent in a burgeoning authoritarian context. Accordingly, judicial review was increasingly mobilised by courts and litigants as a countervailing mechanism against the progressively authoritarian character of the nascent military regimes. This phenomenon was particularly evident in the anti-corruption sector given the draconian nature of the criminal law frameworks promulgated by the Ironsi and Gowon administrations to tackle the issue of public-sector corruption.

In the aftermath of military intervention in the political process, the Nigerian anti-corruption sector was transformed into a volatile terrain in which constitutional actors, litigants, and anti-corruption practitioners struggled to contest - or defend - the constitutional validity of the legal regime on corruption. When the Supreme Court assertively positioned itself as the guardian of the Nigerian constitutional order, by striking down certain draconian anti-corruption enactments as unconstitutional, it collided with the Gowon military government in circumstances that had far-reaching consequences for judicial independence and the rule of law. The judicial response to anti-corruption legalism and the securitisation

62 Editorial, 'Road to Survival' Morning Post (Nigeria 19 January 1966), reproduced in Ministry of Information (Eastern Nigeria), Crisis '66: Eastern Nigeria Viewpoint, Ministry of Information: Eastern Nigeria 1966, p. 66. See also *J. M. Essien*, In the Shadow of Death: Personal Recollections of Events During the Nigerian Civil War, Ibadan 1987, p. 9: discussing public displays of property seized from government officials and politicians shortly after the overthrow of the First Republic. The spectacle, created by such displays, 'stir[red] up hatred for politicians who were already hated for their unsavoury acts.'.

63 Alternative legislative approaches available to the Ironsi and Gowon regimes included enacting substantial reforms - whilst preserving normal constitutional safeguards – to address the defective and cumbersome statutory framework on corruption inherited from the colonial era. On the deficiencies of the anti-corruption provisions in the Criminal Code, and some of the shortcomings of law reform efforts adopted by the military regime in 1966, see *Isabella Okagbue,* Developments in Criminal Law and Procedure, in: T. Akinola Aguda (ed.), The Challenge of the Nigerian Nation – An Examination of Its Legal Development, 1960-1985, Lagos 1985, pp. 70-71.

of corruption was brought into sharp relief in the celebrated case of *Lakanmi v Attorney General (Western State of Nigeria)*.[64]

D. Background to the Lakanmi Case

I. Leveraging Anti-Corruption Legalism as a Securitising Device

In view of its self-presentation as a corrective regime, the National Military Government[65] in June 1966 promulgated the Public Officers (Investigation of Assets) Decree No. 51 of 1966 with the ostensible legislative objective of creating a legal framework to regulate the declaration, verification, and forfeiture, in appropriate cases, of the assets of public officers. Although this Decree advertised itself as a legal framework for the investigation and verification of assets held by public officers, it was also a penal statute. Significantly, Decree No. 51 conferred absolute discretionary powers on the military Head of State to nominate certain public servants with a directive to submit declarations of assets. By virtue of Decree No. 51, such declarations would, in turn, be transmitted to an ad hoc tribunal for verification.

Inspired by this Decree, the Western regional military government enacted Edict No. 5 of 1967 to establish a localised legal framework to regulate the forfeiture of proceeds of corruption as well as the investigation, punishment, and reparatory liability of certain public officers. To further demonstrate its commitment to the anti-corruption policy, Edict No. 5 of 1967 initially enumerated the names of 761 public officers in its schedules and charged a five-member tribunal of inquiry with the task of investigating whether each of the enumerated officials had 'corruptly or improperly enriched himself or any person by virtue of his office or otherwise howsoever'.[66] Adopting an expansive definition of corrupt or improper enrichment,[67] the Edict empowered the Military Governor of Western Nigeria to extend its provisions, mutatis mutandis, to any persons affiliated with a public officer - such as through relationships of consanguinity and affinity - where such persons appeared to him to have acquired assets far in excess of their ostensible means of livelihood.[68]

Remarkably, the Edict conferred plenary discretion on the military governor to amend the schedule enumerating the persons whose assets were to be investigated, and this power

64 (1971) 1 UILR 201.

65 After the short-lived Ironsi regime promulgated Decree No. 34 of 1966, which imposed a unitary system and abolished the federal structure of the Constitution, the administration was renamed as the 'National Military Government'. The Unification decree was abrogated in September 1966 following the overthrow of the Ironsi regime and Nigeria reverted to its federal constitutional structure. See also *Jadesola Akande*, Constitutional Developments, in: T. Akinola Aguda (ed.), The Challenge of the Nigerian Nation – An Examination of Its Legal Development, 1960-1985, Lagos 1985, pp. 15-16.

66 Edict No. 5 of 1967, S 4(1)(a).

67 Ibid s 2(2).

68 Ibid s 9(1) - (2).

was in fact arbitrarily exercised by deletion and insertion of new names.[69] In addition, the Edict provided that the proceedings of the assets tribunal were to be conducted in secret when making prima facie findings of guilt, whereupon subsequent sittings concerning the affected persons would then be held in public.[70] Furthermore, where the tribunal was satisfied that a prima facie case of guilt had been established, it was empowered by the Edict to make orders prohibiting the disposition of property allegedly acquired through corrupt means.[71]

In order to institute a penal regime, the Edict made non-compliance with orders of the tribunal of inquiry an offence attracting a mandatory minimum five-year term of imprisonment upon conviction.[72] It also established a special tribunal to try offences under both its provisions and those of the federal Decree.[73] The Edict shifted the onus of proof onto alleged offenders[74] whilst preserving, as a parsimonious gesture, the right of legal representation before the special tribunal. Furthermore, the membership of this tribunal was to include a senior military officer[75] and its jurisdiction to impose sentences was made subject to the approval or disavowal of the Military Governor.[76] Finally, Edict No. 5, in an expansive privative clause, purported to inoculate all measures taken pursuant to its provisions from all forms of legal challenge. Accordingly, it precluded the courts from assuming judicial review powers in any 'form whatsoever' against all proceedings, findings, and orders of the assets and special tribunals.[77]

The *Lakanmi* case was instituted to challenge an order of the Assets Tribunal restraining the applicants, Mr E.O. Lakanmi and his daughter Kikelomo Ola, from dealing with certain items of their real and intangible property, and forfeiting to the military government all income due to the applicants in respect of such property.

Upholding the privative clause in Edict No. 5 of 1967, the trial court dismissed the application for a certiorari whereupon the applicants appealed to the Western State Court of Appeal. During the pendency of this appeal, the federal military government,

69 Ibid s 23(1). With effect from 14th July 1967, the Public Officers and Other Persons (Investigation of Assets) (Amendment) Order 1967 inserted new names to Parts I-VI of the 1st Schedule to Edict No. 5 of 1967. The 1967 Order deleted Part VII (containing the names of 278 members of the local government police forces), replacing the deleted names with a new list containing the names of 12 customary court officials. The name of the appellant in *Lakanmi* was listed pursuant to the amendments to Part II of the 1st Schedule (containing the names of Chairmen, Executive Directors of Corporations and Boards and Subsidiary Companies) to Edict No. 5.

70 Ibid s 5(4).

71 Ibid s 13(1).

72 Ibid s 13(2).

73 Ibid ss. 17-19.

74 Ibid s 19(2).

75 Ibid s 18(2)(b).

76 Ibid s 20.

77 Ibid s 21.

apprehensive of defeat in the appellate courts, swiftly promulgated three decrees over the space of a month to preclude this possibility.[78] These federal decrees were also aimed at consolidating the legal position of the regional government with respect to the ongoing *Lakanmi* litigation. The first enactment, Decree No. 37 of 1968, repealed the impugned legislations forming the subject-matter of the suit, affirmed the continued existence of the Assets Tribunal and the validity of its orders, and re-enacted an anti-corruption framework for public officers. Furthermore, it purported to exclude judicial review and suspended the application of the Bill of Rights with respect to all matters arising from its provisions or those of the repealed decrees.[79]

The second enactment, Decree No. 43 of 1968 - an amending legislation expressed to have retrospective effect - altered the situation by restoring the statutory competence of courts to exercise judicial review of measures taken pursuant to the repealed edict. It further provided that the savings clause in respect of the validity of orders under the repealed decree was to operate insofar as it did not affect any cause or matter pending in the courts at the time of the repeal.[80] If this was to be taken as a meaningful concession to rule of law concerns - a doubtful proposition considering that the amending decree preserved the suspension of the Bill of Rights with respect to the legal framework for the investigation of public officers - even this position was subsequently reversed by another decree.

In this respect, the third enactment, Decree No. 45 of 1968, explicitly validated the order attaching the properties of the applicants under Edict No. 5 of 1967,[81] and again excluded judicial review of all measures done or purported to be done under the repealed Edict. Decree No. 45 also took care to expressly prohibit the application of the Bill of Rights with respect to any matters arising under it or the repealed enactments.[82] Significantly, the schedule to Decree No. 45, inter alia, specifically validated the order of the Assets Tribunal against the appellants. Finally, Decree No. 45 provided for the abatement of all matters and proceedings pending in the courts either with respect to its provisions or those of the repealed decrees, a position which, to all intents and purposes, was essentially directed at the then pending *Lakanmi* case.[83] Against this backdrop, the Western State Court of Appeal declined jurisdiction to hear the appeal at which point the appellants brought a further appeal to the Supreme Court.

There are good grounds for arguing that the illocutionary force of the foregoing set of enactments served to securitise the issue of public-sector corruption and construct the af-

78 Investigation of Assets (Public Officers and Other Persons) Decree No. 37 of 1968; Investigation of Assets (Public Officers and Other Persons) (Amendment) Decree No. 43 of 1968; and the Forfeiture of Assets, etc. (Validation) Decree No. 45 of 1968.

79 Decree No. 37 of 1968, ss. 12, 14.

80 Decree No 43 of 1968, ss. 1-2.

81 Decree No 45, s 1(2).

82 Ibid s 2(1).

83 Ibid s 2(2).

fected individuals as existential threats to the Nigerian state. Conceptualised as 'jurisdictive speech-acts'[84] of the military legislator, qua securitising actor, the foregoing enactments thus designated the affected persons as security threats and precluded judicial review of the securitising measures they codified. If the constitutional validity of the securitising enactments were judicially upheld, this would sanction the transfer of the anti-corruption legal regime into a 'securitized site'[85] characterised by the absence of meaningful notions of substantive legal accountability. It was against this backdrop that the Supreme Court, qua apex judicial audience, assumed jurisdiction to hear the appeal in *Lakanmi*. The case also provided an adjudicatory basis to consider the constitutional implications of the securitising anti-corruption enactments.

E. Judicial Contestation and Resistance

I. Initial Judicial Responses to Anti-Corruption Legalism and Securitising Processes

In many ways, the Supreme Court's decision in the *Lakanmi* case on 24 April 1970 was the culmination of mounting judicial concern with the repressive character of anti-corruption legalism in the aftermath of military intervention. The notion had begun to coalesce in judicial circles that the trajectory of anti-corruption legalism tended to severely compromise key normative values of the Nigerian constitutional order. Interestingly, this judicial attitude was exemplified as early as October 1966 in the Supreme Court's decision in *State v Odofin Bello*,[86] a high-profile corruption case. *Bello* involved a Commissioner of Police who had been charged with corruption, shortly after the collapse of the First Republic, for allegedly receiving bribes from the deposed ruling party in the Western Region to shield its stalwarts from detection and punishment for certain offences. Following a raid on the homes of prominent members of the ancien régime, the defendant was prosecuted and convicted of official corruption in the High Court of Western Nigeria.

Setting aside the conviction on appeal, the Supreme Court emphasised the dangers of convicting a defendant on the uncorroborated evidence of an accomplice – as was the case in *Bello* - and deprecated the prosecution for misleading the trial court by suppressing evidence favourable to the accused. The Court particularly decried the 'disgraceful conduct' of the prosecuting counsel, and unanimously reiterated the duty of the prosecution 'to put all the facts at its disposal before the court and not to hide any fact'[87] even within the context of a high-profile corruption case.

84 *Roberta Kevelson*, Law as a System of Signs, New York 1988, p. 24, 105: 'Jurisdictive speech-acts' refer to speech-acts in which 'the message is exchanged between authoritative, official legal actors.'.

85 *T. Balzacq*, Legitimacy and the 'Logic' of Security, in: Balzacq, note 33, p. 3.

86 (1966) 1 All NLR 223.

87 Ibid at p. 232.

In 1969, the Lagos High Court expressed similar normative concerns about the anti-corruption policy in *Re Mohammed Olayori & Ors*.[88] The case involved habeas corpus applications brought by civilians who had private contractual disputes with military authorities and were consequently accused of corruption and imprisoned under detention orders purportedly issued pursuant to a wartime enactment - the Armed Forces and Police (Special Powers) Decree of 1967. Discussing the politico-discursive ramifications of designating certain people as 'corrupt', Pierce persuasively argues that '[p]eople talk about corruption in order to achieve specific political ends, which are accomplished in and through the act of labelling.'[89] On this perspective, 'corruption', beyond denoting a material set of practices, also features as a discursive label that enables the exercise of certain forms of coercive power.[90] In this respect, the instrumental political function of the charge of 'corruption' was accentuated by the particular facts of *Olayori*. In designating the applicants as 'corrupt', the military authorities, qua securitising actors, asserted their purported jurisdiction to curtail the rights to personal liberty of individuals arbitrarily defined as threats to national security.

In the considered view of the court, the applicants ought to have been handed over to the civilian authorities, in accordance with the rule of law, for the purpose of ventilating the dispute within the ordinary judicial process. According to the court, the arbitrary detention of the applicants in such circumstances amounted to a 'complete farce, and mockery' of the 'main object' of the preventive detention powers enshrined in a wartime decree promulgated to preserve 'the security of the State'.[91] Indeed, Idowu Taylor CJ vividly expressed his 'shock, as a member of an honourable [legal] profession and . . . the Bench' to witness the argument, advanced by counsel for the respondent, that the military regime possessed illimitable jurisdiction to enforce its anti-corruption policy through administrative detention.[92] Rejecting this argument, the learned judge ordered the immediate release of the applicants and emphasised that the status of anti-corruption regulation as a legitimate objective was tied to its conformity with the rule of law. As Idowu Taylor CJ put it:

> *I am, as I know is every member of the Bench and every right thinking and honest member of our society, against the prevailing conditions of corruption and embezzlement of public funds existing in the Country today, but, if we are to live by the rule of law; if we are to have our actions guided and restrained in certain ways for the benefit of society in general and individual members in particular, then whatever status, whatever post we hold we must succumb to the rule of law.*[93]

88 (1969) 2 All NLR 298.

89 *Pierce*, note 54 , p. 21.

90 Ibid. See also *Ronald Kroeze* et al., Introduction: Debating Corruption and Anti-corruption in History, in: R. Kroeze et al (eds.), Anticorruption in History - from Antiquity to the Modern Era, Oxford 2018, p. 6.

91 *Re Mohammed Olayori & Ors* (1969) 2 All NLR 298 at p. 307.

92 Ibid at pp. 307-308.

93 Ibid at p. 308.

II. The Supreme Court and The Lakanmi Case – Resisting the Securitising Process

By the time the *Lakanmi* case wound its way up to the Supreme Court in 1970, it was thus clear that the question of the normative limits of the anti-corruption policy was inextricably bound up with the need to clarify the status of the military regime within the Nigerian constitutional order. Accordingly, in order to render the securitising enactments in *Lakanmi* impervious to constitutional judicial review, the respondents advanced a concept of revolutionary legality[94] before the Supreme Court. As such, the Attorney General for the Western State contended, on behalf of the respondents, that the military government, was a revolutionary regime of force imbued with absolute legislative sovereignty.[95]

On the premise that the military interventions of 1966 amounted to revolutions, it was further contended that the pre-existing Nigerian legal order had been radically altered and that Decree No. 1 of 1966, the chief constituent instrument of the military regime, had displaced the 1963 Republican Constitution as the basis of legal validity. If these arguments were upheld, it would follow that the principle of constitutional supremacy – a central tenet of Nigerian constitutional law – had thereby yielded to the doctrine of legislative sovereignty in a new legal order. The significant jurisdictional point, in this respect, was to preclude the Supreme Court from questioning the validity of the securitising enactments. On these arguments, revolutionary legality fused with anti-corruption legalism would ultimately serve as a springboard for the absolute sovereignty of the nascent military regime.

The submissions of the appellants on the other hand, rested on a more complex set of interlocking arguments. Rather than hinge their case on notions of legal discontinuity and revolutionary legality, they reframed the issues by focussing on the constitutional legitimacy of the military regime. In this regard, they sought to derive a quasi-democratic nexus between the federal military government and the citizenry by arguing that it was the 'representatives of the people' who had transferred governmental authority to the military in the aftermath of the abortive 15 January 1966 coup.[96] On this argument, the constitutional basis of the transfer of authority was derived from a doctrine of state necessity which was an implicit part of the 1963 Republican Constitution.[97]

If the military regime could be properly designated as a 'constitutional interim government' - as opposed to a revolutionary regime – its ultimate objective would be to uphold, rather than subvert, the Constitution.[98] Accordingly, the legal validity of the policies of the military regime – including the impugned anti-corruption statutory framework – would therefore have to be decided by reference to the provisions of the 1963 Republican

94 *Lakanmi v Attorney-General* (1971) 1 UILR 201 at p. 212.
95 Ibid at p. 215.
96 Ibid at p. 212.
97 Ibid.
98 Ibid.

Constitution. Furthermore, the appellants contended that the securitising enactments, as well as some other aspects of the anti-corruption framework, infringed on the doctrine of separation of powers in the Nigerian constitution. Accordingly, they characterised Decree No. 45 of 1968 - the securitising enactment which validated the forfeiture orders of the Assets Tribunal in the *Lakanmi* case - as a legislative usurpation of judicial power to make conclusive determinations of legal guilt.

The Supreme Court was acutely aware of its status as the preeminent judicial audience with respect to the securitising processes initiated by the military regime through the draconian anti-corruption framework. In a unanimous decision, the Court - sitting as a full court - rejected the argument that the military regime was a revolutionary government with unfettered powers to promulgate decrees impervious to judicial review. Conceding that the transfer of governmental authority was an event 'unprecedented in history',[99] the Court reasoned that this measure was nonetheless justified by the severity of the political crisis occasioned by the abortive January 1966 coup as well as by a doctrine of state necessity which formed part of the Nigerian constitutional order.

According to the Court, the absence of express authorisation, in the 1963 Constitution, for the transfer was neither unusual nor tantamount to a revolutionary break in legal continuity given that '[n]o constitution can anticipate all the different forms of phenomena which may beset a nation'.[100] 'It was evident', Chief Justice Ademola noted, 'that the [military] Government thus formed is an interim government which would uphold the Constitution of Nigeria and would only suspend certain sections as the necessity arises'.[101] As such, the Court held that the 1963 Republican Constitution retained its juridical status as 'a superior norm'[102] notwithstanding the limited jurisdiction conferred on the military regime to suspend the operation of some constitutional provisions in exceptional cases.

Following from this, the Court rejected the notion that the military government could lawfully excise corruption from the legal and normative frameworks applicable to other crimes. The Court reasoned that if the regime wished to adopt such a course of action, it had a duty to establish that such an extreme regulatory approach was 'reasonably necessary'.[103] In addition, the regime bore the onus of establishing that the methods adopted were proportionate to the legislative objectives it sought to attain. Whilst affirming anti-corruption regulation as a legitimate objective, the Court reasoned that the costs of a securitising approach would significantly compromise other legitimate values such as civil liberties, judicial independence, and the principle of constitutional supremacy.[104] Accord-

99 *Lakanmi v Attorney-General* (1971) 1 UILR 201 at p. 215.

100 Ibid.

101 Ibid at p. 214.

102 Ibid at p. 217.

103 *Lakanmi v Attorney-General* (1971) 1 UILR 201 at p. 222.

104 See also *David Baldwin*, The Concept of Security, Review of International Studies 23 (1997), p. 5, 16: 'The pursuit of security always involves costs, i.e., the sacrifice of other goals that could have been pursued with the resources devoted to security'.

ingly, the military regime, qua securitising actor, was subject to the rule of law and lacked the authority to inoculate itself against the substantive values of the constitutional order.

Observing that the legal force of Decree No 45 of 1968, a key securitising enactment, was 'spent on' the appellants the Court characterised it as an ad hominem enactment which violated the provisions of the Republican Constitution guaranteeing fair hearing and the right to property.[105] The Court also deprecated the facts that Decree No 45 'validated everything that was wrong or wrongly done'; was vague by failing to define a 'public officer'; and 'purported to abate all actions and appeals pending before any court'.[106] Following from this, the Court held that the Decree violated the separation of powers doctrine which it characterised as the 'structure of [the Nigerian] Constitution' even within the context of interim military rule.[107] Characterising Decree No. 45 as 'nothing short of legislative judgement' and 'an exercise of judicial power'[108] the Court struck it down as void and quashed the impugned order of the Assets Tribunal.

By building on the foregoing premises, the Court thus endorsed the necessity of ordinary legislative regulation, rather than securitisation, of public-sector corruption whilst simultaneously denouncing as grossly disproportionate and unconstitutional the legislative methods adopted. And by correctly pointing out the failure of Decree No. 45 to meet elementary standards of legality, the Court was actually positing such standards as the normative bases from which the military legislator could not depart if it wished to continue to engage in the exercise of law-making:

> *We are in no doubt that the object of the Federal Military Government, when it engaged in this exercise, is to clean up a section of the society which had engaged itself in corrupt practices – those vampires in the society whose occupation was to enrich themselves at the expense of the country. But if, in this pursuit, the Government, however well-meaning, fell into the error of passing legislation which specifically in effect, passed judgment and inflicted punishment or in other words eroded to [sic: into?] the jurisdiction of the courts, in a manner that the dignity and freedom of the individual, once assured, are taken away, the courts must intervene.*[109]

In the final analysis, *Lakanmi* established the principle that the appellants - despite being securitised as enemies of the State - ought to have been allowed the opportunity to contest their legal liability in an impartial and independent forum and in accordance with the substantive values enshrined in the 1963 Constitution. Viewed from this perspective, an interesting sub-text to the decision was indeed the overarching insistence that Nigeria

105 *Lakanmi v Attorney-General*, note 103, at p. 221.
106 Ibid at p. 222.
107 Ibid at p. 218.
108 Ibid at p. 222.
109 Ibid.

was still a constitutional democracy in 1970 – the military interlude notwithstanding – that could not, by definition, claim authoritarian recourse against any category of socially undesirable citizens. By handing down this assertive and valiant decision,[110] the Supreme Court unanimously indicated the final phase of its rejection of the securitising moves initiated by the military regime.

F. Reviving the Securitising Process

I. Counteracting Judicial Resistance in the Aftermath of Lakanmi

The *Lakanmi* decision was not well received. Apprehending the de-legitimising effects of *Lakanmi*, the federal military government moved swiftly to revive its securitising moves. On 9 May 1970, two weeks after the Supreme Court's decision in *Lakanmi*, the regime promulgated the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970. By virtue of this Decree, the Gowon regime consolidated power by proclaiming itself a revolutionary government and nullifying the *Lakanmi* decision.

Codifying the arguments of the Attorney-General in *Lakanmi*, Decree No. 28 reversed the Supreme Court's positioning of the 1963 Republican Constitution as the basic norm of the Nigerian legal order. The decree also provided that the Constitution was retained at the behest of the revolutionary military government and was therefore inferior to legislative enactments of the regime. Furthermore, Decree No. 28 stripped the Supreme Court of much of its substantive judicial review powers, and provided for the retrospective and prospective abrogation of any court decision 'which has purported to declare or shall hereafter purport to declare the invalidity of any Decree or . . . Edict'.[111]

Tellingly, the regime defended these drastic and unprecedented measures - Decree No. 28 marked the first time the Supreme Court was overruled in Nigerian constitutional history – as necessary to ensure 'the efficacy and stability of the government of the Federation'[112] as well as the 'effective maintenance of the territorial integrity of Nigeria and the peace, order and good government of the Federation'.[113] To borrow an apt phrase from Buzan et al., the 'rhetorical and semiotic structure'[114] of Decree No. 28 divulged its status as a

110 Cf. *Abiola Ojo*, The Search for a Grundnorm in Nigeria: The Lakanmi Case, International & Comparative Law Quarterly 20(1) (1971), p. 117; *Tayyab Mahmud*, Jurisprudence of Successful Treason: Coup d'état and Common Law, Cornell International Law Journal 27(1) (1994), p. 49, 69-72.

111 Decree No. 28 of 1970, s 1(2)(b). See also *B. O. Nwabueze*, Constitutionalism in the Emergent States, London 1973, p. 207; *Michael P. Seng*, Democracy in Nigeria, National Black Law Journal 9(2) (1985), p. 113, 142.

112 Decree No. 28 of 1970, s 1(2)(a).

113 Ibid s 1(2)(b).

114 *Barry Buzan* et al., Security: A New Framework for Analysis, London 1998, p. 25. See also *Teun A. van Djik*, Principles of Critical Discourse Analysis, Discourse and Society 4(2) (1993), p. 249: on the ways in which discourses are deployed to enact relations of power and dominance.

legislative securitising speech-act that aimed at justifying exceptional measures by positing the state as a security referent. As Lazarus has also observed elsewhere, the rhetoricity of securitising speech-acts often serves to simultaneously legitimise and mask subtle expansions in the coercive attributes of the State.[115] Properly situated within the context of the ongoing securitising process, Decree No. 28 therefore posited the military regime in a privileged vantage position from which it could securitise corruption unencumbered by any requirements of rational justification within the judicial process.

II. Cultivating an Alternative Securitising Audience

Having failed to secure judicial support, the regime then sought to cultivate an alternative securitising audience by issuing an explanatory memorandum to Decree No. 28.[116] This accompanying official statement, which was subsequently circulated in the press, was itself a securitising speech act directed at the broader public, qua popular audience. As such, the statement defended both Decree No. 45 and the forfeiture order annulled by the Supreme Court by emphasising that the regime had recovered public assets from persons who had corruptly enriched themselves. The statement caricatured the Supreme Court's normative concerns about the substantive and procedural unconstitutionality of the means adopted to determine legal liability in the *Lakanmi* case.

The regime further sought to characterise the *Lakanmi* decision as an attempt to frustrate the official anti-corruption policy by suggesting that the Supreme Court had given the impression that 'fraud is being encouraged by legal technicalities'.[117] This rhetorical strategy was well chosen in order to pre-empt public discourse on the *Lakanmi* decision as well as for its tendency to resonate with a popular audience more preoccupied with the practical outcomes of a populist anti-corruption campaign than the technical niceties of procedural due process.

The aftermath of the *Lakanmi* decision demonstrated the extent to which the complex interaction between judicial and other distinct audiences may combine to influence securitising outcomes. As Leonard and Kaunert rightly posit, a given securitisation process comprises the overlap of distinct audiences that are themselves propelled by 'different logics of persuasion' that shape their interactions with the securitising move.[118] In this respect, although the Supreme Court, qua apex judicial audience, proceeded on the assumption that its rejection of the securitising move would prove conclusive, it paid insufficient attention

115 *Liora Lazarus*, The Right to Security – Securing Rights or Securitising Rights, in: R. Dickson et al., Examining Critical Perspectives on Human Rights, Cambridge 2012, pp. 87-106.

116 See the Explanatory Memorandum to Decree No. 28, Nigeria Lawyers' Quarterly 5(1-4) (1970), p. 161, 161-162.

117 Ibid.

118 *Sarah Leonard / Christian Kaunert*, Reconceptualising the Audience in Securitization Theory, in: T. Balzacq (ed.), Securitization Theory: How Security Problems Emerge and Dissolve, Oxford 2011, p. 57, 69.

to the impact of other audiences upon the ongoing securitising process. However, the legislative intent of Decree No. 28 and its accompanying statement were fulfilled when the broader public indicated approval of the government's position.

To this end, the press rallied behind the regime even as influential newspapers editorialised their endorsement of the official anti-corruption crusade. Echoing the official explanatory memorandum to Decree No. 28, an oft-cited editorial sardonically remarked that 'by nullifying the forfeiture of stolen public money',[119] the Supreme Court had chosen to 'stand on a banana skin'.[120] The editorial further asserted that the Supreme Court could 'not expect sympathy from any quarters on this particular issue' because its *Lakanmi* decision undermined the authority of the military regime and endangered the political stability of the country.[121]

By the same token, citizens, in written contributions to newspapers, expressed enthusiastic support for the securitising process, and censured the Supreme Court for obstructing the ongoing anti-corruption campaign - with the more caustic commentaries even going as far as to call for the resignation of the judges who heard the appeal.[122] So virulent was public opposition to the *Lakanmi* decision that there were 'frenzied call[s]' to 'disband' the entire Supreme Court.[123]

III. Consolidating Securitisation

Given the political backlash and opprobrium heaped on the courts in the aftermath of *Lakanmi*, judicial resistance to securitisation in the anti-corruption sector faltered. In *Adebiyi Adejumo v Military Governor of Lagos State*,[124] a case involving the forfeiture of property through securitising enactments, the Supreme Court – sitting as a full court – yielded to the military regime by conceding that legislative enactments, including forfeiture orders, were impervious to judicial review.[125] In a far-reaching volte-face, the Court also

119 Editorial, 'Laws and Super Laws' *New Nigerian* (12 May 1970) quoted in *Abiola Ojo*, The Search for a Grundnorm in Nigeria: The Lakanmi Case, International & Comparative Law Quarterly 20(1) (1971), p. 117, 135.

120 Ibid.

121 Ibid.

122 See *Bola Ige*, In the Name of Justice Resign, Sunday Sketch, May 17, 1970, pp. 2, 4 reproduced in *Abidina Coomassie*, Democracy and Political Opportunism in Nigeria – A Documentary Source Book, Abuja 1998, p. 64, 68.

123 *Lateef Adegbite*, The Organisation and Role of the Judiciary Under a Federal Constitution, in: A. B. Akinyemi, P. D. Cole / W. Ofonagoro (eds.), Readings on Federalism, Lagos 1979, p. 44, 50-51.

124 (1972) 1 All NLR 159.

125 See also *Hope Harriman v Johnson* (1970) 2 All NLR 192.

impliedly demolished a major premise of its earlier decision in *Lakanmi* by recognising the regime as a revolutionary government.[126]

A subsquent attempt to challenge the constitutionality of the anti-corruption statutory framework failed in 1974 when an emollient Supreme Court reiterated its reluctance to impugn the absolute legislative sovereignty of the military regime.[127] The securitising process had been consolidated.

G. Conclusion

A violent anti-corruption campaign culminated in the overthrow of the First Republic and the termination of Nigeria's nascent democracy in 1966. The anti-corruption framework promulgated in the aftermath of military intervention emerged as a terrain of contestation in which courts, anti-corruption agencies, and other constitutional actors struggled to preserve – and resist encroachment on – their respective jurisdictional spheres. The eventual securitisation of corruption was, however, largely mediated through anti-corruption legalism.

Following the *Lakanmi* controversy, the federal military government consolidated power by enlarging its mandate from interim military administration to sovereign military dictatorship. Beyond the anti-corruption sector, the consequences of this development were refracted throughout the entire constitutional order with deleterious implications for human rights, judicial independence, and the rule of law. With the exception of a brief civilian interregnum (1979-1983), democracy would not return to Nigeria until 1999.

126 *Adebiyi Adejumo v Military Governor*, note 124.

127 *Adenrele Adejumo v Colonel Mobolaji Johnson* (1974) 1 All NLR 28.