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Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa

Okechukwu Oko*

ABSTRACT

African countries during the post-colonial era have struggled to establish democratic governments, too frequently succumbing to authoritarian, usually military, rule. This instability, as nations swing from one regime to another, has hindered the economic growth and respect for civil rights that citizens had hoped would be the legacy of independence. Despite such abuses, both the elite and the masses in Africa recognize that democracy represents the best hope for future stability. In countries like Nigeria, citizens are demanding the replacement of corrupt, paternalistic military officers with democratic, civilian rule.

Even the election of civilian administrations, however, offers no guarantee that democracy will take root. African nations continue to confront challenges from politicized militaries, fragmented civil societies, and dysfunctional institutions. To negotiate their way through such obstacles, these countries require institutional changes consistent with democratic ideals, including passing new laws and educating citizens in democracy.

The legal profession, more than any other segment of society, is in the best position to lead African nations to these goals. Lawyers play a prominent role in checking arbitrary governmental power, protecting civil rights, and reforming legal institutions. Yet most observers have largely ignored this role that the legal profession must play in building African democracies. Unfortunately, lawyers too often have tainted

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themselves by their association with despotic regimes, thus requiring the legal profession to regain the public trust.

This Article examines the necessary role of lawyers in democratic transitions in Africa, offering suggestions for addressing the inadequacies of the legal profession and for improving the public perception of the legal profession in these countries. Ultimately, the Article argues that despite their current weaknesses, lawyers are well suited to solve the problems that the transition from authoritarianism presents.

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I. INTRODUCTION

In the dawn of the new millennium, the quest for a durable democracy in Africa remains largely unsolved.¹ As democratization efforts that engulfed Africa immediately after colonial rule quickly atrophied, authoritarian rule supplemented them,² mostly in the form of military regimes³ and one-party states.⁴ Even in countries

1. See Ann Seidman & Robert B. Seidman, *Beyond Contested Elections: The Processes of Bill Creation and the Fulfillment of Democracy's Promises to the Third World*, 34 HARV. J. ON LEGIS. 1, 12-13 (1997). The authors note:

By the mid-1990s, the trend toward conducting contested elections in the Third World, which observers cited as evidence of meaningful democratization, had slowed considerably or even reversed. In Zimbabwe, in April 1996, President Mugabe was returned to office in a one-man race; Algeria's military canceled elections in 1992 and excluded a Muslim fundamentalist party from future electoral participation when that party was projected as the election's winner; Nigeria's military voided the results of an election that went against its candidate and imprisoned the winner; in the Central African Republic, in May 1996, only the timely intervention of the French troops prevented a military mutiny from becoming a coup; Kenya seems unlikely to stage more competitive, multiparty elections like those in 1992; and Zambia recently elected a president only after forbidding the nomination of its long-time former president, Kenneth Kaunda.

Id. at 12 n.40.

2. Only five African countries have enjoyed uninterrupted democracy since attaining independence. These countries are Botswana, Gambia, Mauritius, Zimbabwe, and Namibia. See Samuel Decalo, *The Process, Prospects and Constraints of Democratization in Africa*, AFR. AFF., Jan. 2, 1992, at 7, 13; Larry Diamond, *Introduction: Roots of Failure, Seeds of Hope*, in 2 DEMOCRACY IN DEVELOPING COUNTRIES: AFRICA 1 (Larry Diamond et al. eds., 1988).

3. J.W. Salacuse, then President of the International Third World Legal Studies Association, observed in 1988 that

Africa's experience with constitutionalism has not been a happy one in the thirty years since most Sub-Saharan countries became independent. The great enthusiasm of the early 1960s that greeted new constitutions providing for democracy, the rule of law, and guarantees of human rights has, in many places, been dashed by military coups, emergency decrees, suspension of constitutional guarantees, and autocratic, abusive rule.

Jeswald W. Salacuse, *President's Foreword to 1988 THIRD WORLD LEGAL STUD.* at xi.

4. See Lawrence Zimba, *The Origins and Spread of One-Party States in Commonwealth Africa, and Their Impact on Personal Liberties: A Case Study of the Zambian Model*, in LAW IN ZAMBIA 113 (Muna Ndulo ed., 1984). The adoption of a one-party state was justified by some African states on the grounds that it offered the best form of democracy given Africa's peculiar circumstances. See *id.* at 114-19. In Kenya, the adoption of a one-party state was explained by J.B. Ojwang who observed:

Here . . . we seek out the modern constitutional form most suited to our traditional needs Our people have always governed their affairs by looking to an elected Council of Elders . . . headed by their own chosen [sic] leaders, giving them strong and wise leadership. That tradition—which is an Africanism—will be preserved in this new constitution.

with elected civilian administrations, democracy serves as a gloss that veils abuses by tyrants and despots masquerading as democrats.⁵ Some commentators blame the failure of democracy on the unchecked predatory instincts of a politicized military.⁶ Others insist that the selfish impulses of political elite who seek the power of democracy but reject its concomitant obligations,⁷ coupled with the absence of meaningful democratic traditions,⁸ are what frustrate democratization efforts in Africa.

A review of the democratic experiment in African nations reveals that most attempts to establish democracy are often short-lived and

J.B. OJWANG, CONSTITUTIONAL DEVELOPMENT IN KENYA: INSTITUTIONAL ADAPTATION AND SOCIAL CHANGE 79 (1990) (quoting Minister of Justice and Constitutional Affairs, House of Representatives, 3 *Official Report* (Oct. 7, 1964), cols. 3381ff (alterations in original)).

5. See Eboe Hutchful, *Militarism and Problems of Democratic Transition, in DEMOCRACY IN AFRICA: THE HARD ROAD AHEAD* 43 (Marina Ottaway ed., 1997) [hereinafter *DEMOCRACY IN AFRICA*] (noting that "in a large number of cases, elections have merely 'constitutionalized' existing authoritarian regimes, military as well as civilian, with former dictators donning a thin mantle of democracy").

6. For a detailed analysis of the military and African politics, see Robin Luckham, *The Military, Militarization and Democratization in Africa: A Survey of Literature and Issues*, 37 *AFR. STUD. REV.* 13 (1994).

7. Dudley succinctly describes the attitude of political elite to political power. He states that

for the political elite, power was an end-in-itself and not a means to the realization of some "good" for the community, and whatever the instrumentalities employed in the pursuit of power, such instrumentalities were legitimate. It follows from this that any talk about "rules of the game" must be irrelevant, for to talk about "rules of the game" is to pre-suppose some ends or ends which such rules are intended to serve but there can be no such ends since power has been taken as an end in itself The only possible kind of ethic thus becomes that of privatization, the preoccupation of the individual with his personal rather than his social situation.

JULIUS O. IHONVBERE & TIMOTHY M. SHAW, ILLUSIONS OF POWER: NIGERIA IN TRANSITION 41 (1998) (alteration in original) [hereinafter *ILLUSIONS OF POWER*]. *The Economist* aptly characterizes the attitude of politicians toward democracy in writing:

On the whole they rushed through the door marked winner and slammed it behind them. They used democracy as a route to power, but they did not become democrats. And losers either joined the winning side or denounced the election as a fraud and gave up.

Democracy African Style, *ECONOMIST*, Feb. 3, 1996, at 14.

8. Professor Ben Nwabueze correctly identified what Nigeria must do to successfully implement democracy. He stated that

liberty and democracy if they are to take firm root and thrive (not if they are to be embarked upon at all) must have a foundation in certain shared sentiments that bind a society to respect human rights and to behave democratically, common sentiments expressed in habits, traditions, attitudes, a moral sense and a transcendental spirit.

B.O. NWABUEZE, *DEMOCRATISATION* 5 (1993).

typically followed by military regimes.⁹ The gyration from democracy to authoritarianism has left most African nations in deep turmoil as no African government has significantly advanced the welfare of its citizens.¹⁰ Consequently, most African nations have not experienced the social equilibrium, respect for human and civil rights, or economic development that the citizens hoped would flow from the attainment of independence.¹¹ Far too often, the political elite that admirably won the battle for independence turned into despots and unleashed a reign of terror on their citizens.¹² As Professor Ndulo aptly observed, “[t]he dreams of prosperity following independence

9. The most formidable threat to democracy in developing nations comes from the military, which has the necessary resources and power to interrupt the political process whenever it wants. Several African nations have experienced abbreviated democratic regimes, including Nigeria, Ghana, Sudan, Benin, Liberia, and Uganda. See Decalo, *supra* note 2, at 13.

10. Most African nations have not had governments in the true sense of the word. In most cases, military officers and civilians operating like hoodlums govern without any sense of accountability. These governments, notes Andrew Levin, have “a great deal in common with a group of gangsters.” Andrew S. Levin, *Civil Society and Democratization in Haiti*, 9 EMORY INT’L L. REV. 389, 410 (1995). Marcus Mabry, *Newsweek’s* African Bureau Chief, describes Nigeria’s military rulers as “a string of military thugs.” Marcus Mabry, *Sani Days*, NEW REPUBLIC, May 18, 1998, at 14. Ogaga Ifowodo, a civil rights activist in Nigeria stated that “governments in most of Africa—and, at least, in Nigeria under the military—are committees of unfeeling beasts who have no respect for the rule of law.” N.J Udombana, *The Rule of Law and the Rule of Man in Military Dictatorship*, in CURRENT THEMES IN NIGERIAN LAW 73 (I.O. Agbede & E.O. Akanki eds., 1997) [hereinafter CURRENT THEMES].

11. See Joshua Hammer, *A Generation of Failure*, NEWSWEEK, Aug. 1, 1994, at 32. Hammer observed:

A generation ago, Africa seemed on the brink of a triumphant new era. As one country after another shook loose from colonial rule, new leaders roused their jubilant countrymen with visions of prosperity and democracy. But while Eastern Europe and Southeast Asia *have* moved toward those goals, in Africa the hopes of the early 1960s have collapsed into ethnic violence, corruption, poverty and despair.

Id.

12. The attainment of independence does not always translate into freedom and respect for the rights of the citizens. Far too often the freedom fighters, upon attaining power, turn into tyrants and despots unleashing against their own people the evil they risked their lives to stop. Albie Sachs observed that

the elimination of [colonialism] does not by itself guarantee freedom even for the formerly oppressed. History unfortunately records many examples of freedom-fighters of one generation becoming oppressors of the next. Sometimes the very qualities of determination and sense of being involved in a historic endeavour which give freedom-fighters the courage to raise the banner of liberty in the face of barbarous repression, transmute themselves into sources of authoritarianism and historical forced-marches later on. On the other occasions, the habits of clandestinity and mistrust, of tight discipline and centralized control, without which the freedom fighting nucleus would have been wiped out, continue with dire results into the new society.

ALBIE SACHS, THE FUTURE CONSTITUTIONAL POSITION OF WHITE SOUTH AFRICANS, *quoted* in Patrick Fitzgerald, *Democracy and Civil Society in South Africa: A Response to Daryl Glaser*, REV. AFR. POL. ECON., Winter 1990, at 94, 108-09.

and self rule became a nightmare of insecurity and poverty.”¹³ The frequent collapse of democracy in Africa has created a continent that is less stable, economically crippled, and incapable of resolving conflicts in a peaceful manner.¹⁴

Despite democracy’s checkered history in Africa, there remains an enduring commitment, at both the elite and mass levels, that elevating the citizens’ well-being, economic development,¹⁵ and social equilibrium are best achieved through democracy.¹⁶ Africans are increasingly demanding the restoration of democracy, especially the right to govern themselves free from paternalistic, corrupt, and often abusive military officers.¹⁷ Olusegun Obasanjo, Nigeria’s new

13. Muna Ndulo, *The Democratic State in Africa: The Challenges for Institution Building*, 16 NAT’L BLACK L.J. 70, 78 (1998).

14. See Abiodun Onadipe, *Africa and the Search for Democracy*, CONTEMP. REV., Mar. 1, 1998, at 118, available in 1998 WL 12047066. The author writes:

Africa today, forty years after the independence of Ghana, the first on the continent, presents a picture which is at the same time enthralling and despairing. More the latter than the former, however. Fighting is on the increase throughout Africa as competition for political power continues unabated. There is a broad swath of instability and armed conflict on the continent.

Id.

15. Discussing the relationship between democracy and economic development in Africa, Professor Mutharika notes that “[o]ver the past decade, however, the African states have begun to understand that societies that democratize, respect human rights and uphold the rule of law tend to create the kind of stability that is conducive to economic development.” A. Peter Mutharika, *Some Thoughts on Rebuilding African State Capability*, 76 WASH. U. L.Q. 281, 283 (1998). *The Chicago Tribune* linked economic progress in Africa to democracy. According to the editors:

In fact, the African countries with the highest long-term growth rates have been Botswana and Mauritius, which also have the longest records of democratic rule. More recently, positive growth has returned to Benin, Ghana, Mozambique and South Africa, where the resurgence of democracy has been strongest. Growth is also positive in the Ivory Coast and Malawi, where democratic transitions are still at an early stage. Africa’s worst performers during the 1990s—Kenya, Nigeria and the former Zaire—are cases not of failed democratization but failed authoritarian rule. The clear lesson from Africa is that economic renewal and democratization go hand in hand.

It’s No Time to Forsake Democracy in Africa, CHI. TRIB., Aug. 9, 1998, at C15.

16. See Crawford Young, *The Impossible Necessity of Nigeria: A Struggle for Nationhood*, FOREIGN AFF., Nov.-Dec. 1996, at 142 (noting that “[t]hrough the decades of corruption and political turmoil, a public commitment to the democratic process as an indispensable source of legitimacy has remained a remarkable constant in Nigerian political life”); see also John A. Wiseman, *Comparative Politics*, 92 AM. POL. SCI. REV. 721 (1998) (reviewing DILEMMAS OF DEMOCRACY IN NIGERIA (Paul A. Beckett & Crawford Young eds., 1997) (noting that “it is a central paradox of Nigerian politics that, despite a military government for nearly three-quarters of the postindependence period, there remains a widespread and strongly held belief among Nigerians that military rule is an aberration and what ought to exist is a democratically elected civilian government”).

17. Most African nations aspire to be what Larry Diamond characterizes as “electoral” democracy: “a civilian, constitutional system in which the legislative and

President, spoke for the vast majority of Africans when he observed during his inauguration that "[w]e will leave no stone unturned to insure [the] sustenance of democracy because it is good for us, it is good for Africa, and it is good for the world."¹⁸ Even the despot, civilian, and military rulers¹⁹ grudgingly concede that democracy is an idea whose time has come in Africa.²⁰ Thus, democratic transitions are taking place in Africa,²¹ some violently, others peacefully.²²

chief executive offices are filled through regular, competitive, multiparty elections with universal suffrage." LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 10 (1999). This is consistent with Joseph Schumpeter's definition of democracy as "that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 269 (2d ed. 1942). Professor Wing identifies five concepts as necessary for Western-style democracy: popular participation, social equality, concern for the public welfare, united government, and a tradition for democratic behavior. See Adrien Katherine Wing, *Towards Democracy in a New South Africa*, 16 MICH. J. INT'L L. 689, 689 n.4 (1995) (book review):

Popular participation includes regular elections for governmental representatives and the ability to express opinion publicly. Social equality presumes that all members of a society have the ability to participate without discrimination on the basis of race, sex, color, ethnicity, religion, political opinion, or property ownership. Concern for public welfare means that the government must hold "serving the people" as its primary objective.

Id.

18. Norimitsu Onishi, *Nigeria's Military Turns Over Power to Elected Leader*, N.Y. TIMES, May 30, 1999, at 1.

19. General Babangida, Nigeria's military despot, observed in 1992 that "[t]he quest for democracy and freedom . . . is now so universal that no amount of repression can hold it in check for too long." *Babangida's Report*, 1992 W. AFR. 1163.

20. The attitude of African despots to democratic reforms varies from genuine desire for reform to blatant defiance of the people's desire for changes. Michael Schatzberg captures the reactions of the despots to democratic changes:

Besieged everywhere by the forces of change, long-ruling autocrats of both the left and the right have pursued a range of strategies and tactics to remain in power. Few have gracefully ceded their coveted positions as heads of a state-party without resistance; fewer still have openly and sincerely embraced the new crosscurrents of political change. The vast majority of them have waged a fierce and occasionally violent political struggle to retain both their positions and their power.

Michael G. Schatzberg, *Highjacking Change: Zaire's "Transition" in Comparative Perspective*, in *DEMOCRACY IN AFRICA*, *supra* note 5, at 113, 113.

21. Democratic transitions in Africa are taking place at such a rapid rate that one commentator described this period as the second independence of the Continent. See Colin Legum, *The Coming of Africa's Second Independence*, 13 WASH. Q. 129 (1989). Between 1988 and 1994, 40 African countries initiated transitions from authoritarian rule to democracy. See MICHAEL BRATTON & NICOLAS VAN DE WALLE, *DEMOCRATIC EXPERIMENTS IN AFRICA: REGIME TRANSITIONS IN COMPARATIVE PERSPECTIVE* 118-20 (1997).

22. Professor Nwabueze identifies three patterns of transition to democracy, namely transitions voluntarily embarked upon by the incumbent regime, transition by constitutional but forced process, and transition by forced process. See NWABUEZE,

The transition from authoritarianism to democracy²³ creates intriguing challenges as African nations battle to implement constitutional democracy within the existing but severely distorted institutions, processes, and political attitudes of the prior authoritarian regimes.²⁴ The election of a civilian administration is the most important preliminary step toward democratization, but it offers no guarantee that democracy will be actualized.²⁵ The major challenge for African countries making democratic transitions is how to preserve and consolidate democracy amidst threats and challenges by politicized militaries,²⁶ morally bankrupt political

supra note 8, at 6. Most transitions in Africa occur peacefully rather than by force. The military, for a variety of reasons, agrees to hand over the reigns of government to a democratically-elected civilian administration.

23. Democratic transitions in Africa have spurred several scholarly articles that examine various facets of the democratic transition process. See, e.g., Richard Joseph, *Africa: The Rebirth of Political Freedom*, J. DEMOCRACY, Fall 1991, at 11; Gilbert M. Khadiagala, *The Military in Africa's Democratic Transitions: Regional Dimensions*, AFR. TODAY, Jan. 1, 1995, at 61, available in 1995 WL 14770054; George Klay Kieh, Jr. & Pita Ogaba Agbese, *From Politics Back to the Barracks in Nigeria: A Theoretical Exploration*, 30 J. PEACE RES. 409 (1993); Legum, *supra* note 21, at 129-40; Stephen Riley, *The Democratic Transition in Africa: An End to the One Party State?*, CONFLICT STUD., Oct. 1991, at 1-36; John A. Wiseman, *Democratic Resurgence in Black Africa*, 259 CONTEMP. REV. 7 (1991).

24. The problems faced by African countries in transition to democracy was eloquently summarized by Peter Lewis. He observed:

Years of predatory rule have created formidable difficulties The demoralized armed forces have fallen into disrepute. Leading institutions such as the civil service, the judiciary, and the public education system have been seriously undermined. Central elements of civilian rule, including electoral authorities and political parties, have been weakened by repeated manipulation. The political class, tainted by past transgressions and by its willingness to collaborate with military stratagems, is viewed with disdain by many Nigerians.

Peter M. Lewis, *Nigeria: An End to the Permanent Transition?*, J. DEMOCRACY, Jan. 1999, at 141, 151.

25. The Secretary General of the United Nations observed in 1991 that

elections in and of themselves do not constitute democracy. They are not an end but a step, albeit an important and often essential one, on the path towards the democratization of societies and the realization of the right to take part in the governance of one's country as enunciated in major international human rights instruments. It would be unfortunate to confuse the end with the means and to forget that democracy implies far more than the mere act of periodically casting a vote, but covers the entire process of participation by citizens in the political life of their country.

Report of the Secretary General, para. 76, U.N. Doc. A/46609 (1991).

26. See Julius Ihonvbere & Olufemi Vaughn, *Nigeria: Democracy and Civil Society*, in DEMOCRACY AND POLITICAL CHANGE IN SUB-SAHARAN AFRICA, at 71, 88 (John A. Wiseman ed., 1995). Adam Przeworski frames the challenge in rather graphic terms. The challenge for the transition to democracy according to him is "to get to democracy without being either killed by those who have arms or starved by those who control productive resources." ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA 51 (1991).

classes,²⁷ fragmented civil societies, pervasive and palpable lack of democratic traditions, ethnic tensions,²⁸ and dysfunctional political, economic, and legal institutions.²⁹ Democracy cannot be realized unless African countries meaningfully address the human and structural problems that threaten democratic reform.³⁰ Perhaps no one appreciates these challenges more than Nelson Mandela. He stated that

the world is grappling with the problems of governance, legitimacy and human rights. In recent years, particularly during the past decade, there has been a remarkable movement in various regions of the world away from undemocratic and repressive rule towards the establishment of constitutional democracies.

....

Transition in these societies has therefore been accompanied by enormous challenges. While it has signified new hopes and aspirations, it has at the same time brought into sharp focus the difficult choices that these countries would have to make on their road to democracy and economic progress.³¹

27. See Lewis, *supra* note 24, at 151.

28. See Jendayi Frazer, *Editor's Introduction to Symposium, African Governments: The Military and Democratic Transitions*, AFR. TODAY, Jan. 1, 1995, at 3, available in 1995 WL 14770050 (noting that "[t]he triple legacies of military intervention, weak state structures, and ethnic tensions pose fundamental challenges to the success of democratic transition in Africa").

29. Larry Diamond's 1992 assessment of the situation is still relevant today. He stated that

[e]ven when elections are democratic and transfers of government occur, the new regimes inherit a weak institutional framework for democracy. Government bureaucracies may lack both managerial competence and sensitivity in responding to newly mobilized democratic publics. Legislators lack the staffs, resources, and experience to investigate and monitor the conduct of the executive branch. Judges, prosecutors, law schools, and human rights organizations are short of training, experience, and resources as they seek to construct a genuine rule of law. Newly elected local government officials need the training and staff support to function as a meaningful tier of government, and the one closest to the people in a democracy.

Larry Diamond, *The Second Liberation*, 37 AFR. REP. 38, 39-40 (1992).

30. See David F. Gordon, *On Promoting Democracy in Africa: The International Dimension*, in DEMOCRACY IN AFRICA, *supra* note 5, at 153 (noting that the "most serious and intractable obstacles to democratic transitions and to the consolidation of democracy in Africa are structural, rooted in the underlying socioeconomic conditions and characteristics of most African states and societies").

31. Nelson Mandela, *Foreword to 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* at xi (Neil J. Kritz ed., 1995). A 1993 editorial succinctly captured the difficulties encountered by African nations attempting to implement constitutional democracy. The editorial stated that

countries which have had successful transitions, and voted out incumbent presidents (notably Benin, Zambia, Congo and more recently, Niger and Madagascar) are not finding it easy to operate democracies. In Zambia there is a state of emergency; and in Congo, where the second set of parliamentary

Democratic transition results in the intersection of two profound challenges: (1) emancipating citizens from the clutches of authoritarianism,³² and (2) erecting a democratic infrastructure that can withstand the avalanche of implacable environmental factors that threatened and ultimately derailed past democratization efforts.³³ To meaningfully address these challenges, African nations require institutional, structural, and behavioral changes that are consistent with their democratic aspirations.³⁴ New laws are needed

elections in less than a year is currently underway because of machinations from the former military leader, President Lissouba is seeking a "mandate to govern." In Benin, most volatile of all West African countries, President Soglo's honeymoon is over. In Mali, where the change came with a coup rather than a vote, the new democratic government ran into damaging student riots in April. In case after case, with a certain inevitability, the hopes that improvements would come with democracy have been dashed. Just as independence did not bring progress, so there is a risk that the "second independence" will also lead to disappointment.

What of Democracy?, 1993 W. AFR. 810.

32. Democracy represents citizens' last hope to eliminate, or at the very least significantly reduce, their vulnerability to an oppressive and abusive state. Claude Ake eloquently explained the recent upsurge in demands for democracy in Africa. He stated that

the democracy movement has gathered momentum as commodities disappeared from grocery stores in Lusaka and Dar es Salem, as unemployment and inflation got out of control in Kinshasha and Lagos, as a bankrupt government failed to pay wages in Cotonou, as the vanishing legitimacy of incompetent and corrupt managers of state power drove them to political repression in Nairobi, as poverty intensified everywhere defeating all possibilities of self-realization threatening even mere physical existence, so that democracy movement in Africa is among other things, an expression of the will to survive. The survival strategies which the ordinary people spontaneously devised to cope with economic austerity and to reduce their vulnerability to a predatory state, engendered popular empowerment, energised civil society and strengthened the will to struggle for democracy.

Claude Ake, *The Feasibility of Democracy in Africa*, quoted in M.A. Banire, *Critical Appraisal of the Democratic Principles Enshrined in the Management of Corporate Real Property Under Customary Law*, in CURRENT THEMES, *supra* note 10, at 257, 274; see also Peter P. Ekeh, *The Concept of Second Liberation and the Prospects of Democracy in Africa: A Nigerian Context*, in DILEMMAS OF DEMOCRACY IN NIGERIA 83 (Paul A. Beckett & Crawford Young eds., 1997) (discussing the citizens' struggle for freedom from tyranny).

33. Failed democratic experiments in Nigeria amply demonstrate the futility of seeking to implement democracy without addressing anti-democratic environmental factors. For a general discussion on the problems and prospects of democracy in Nigeria, see NWABUEZE, *supra* note 8.

34. The benchmark for a successful transition program was eloquently stated by Juan J. Linz and Alfred Stephan. According to them, a successful transition program occurs when

sufficient agreement has been reached about political procedures to produce an elected government, when a government comes to power that is the direct result of a free and popular vote, when this government, *de facto* has the authority to generate new policies, and when the executive, legislative and

to bring these societies in line with democratic ideals,³⁵ institutions and structures required to operate the democratic machinery must be strengthened and rejuvenated,³⁶ and attitudinal changes are required to counteract the citizens' skepticism about the democratic process.³⁷

These solutions, in turn, call for creative and imaginative lawyers to assist in defining, enforcing, and enhancing the principles and standards of democracy.³⁸ The legal profession has always occupied a preeminent position in society.³⁹ It is often the most powerful institution in any country. Lawyers are defenders of liberties and formidable opponents of totalitarian and dictatorial regimes.⁴⁰ Lawyers, therefore, more than any other group in society, have the capacity to check the arbitrary powers of government, expand and protect citizens' rights, reform legal

judicial power generated by the new democracy does not have to share power with other bodies *de jure*.

JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 3 (1996).

35. See *infra* Part III.B.3 for a discussion on how to strengthen democratic values in Africa.

36. The lack of credible institutions capable of effectively dealing with social and economic problems is a major problem in most African countries. Institutions currently in place in Africa are inadequate and in some cases unresponsive to the needs of a developing nation in the process of democratization.

37. *The Economist*, in reviewing President Obasanjo's efforts to implement democracy, observed that

the task before Mr. Obasanjo is nothing less than the reconstruction of Nigeria. It cannot be solved by gestures. Nigerians have no common vision of a nation-state called Nigeria, no sense of citizenship . . . The hierarchies and structures that help hold most modern states together do not exist in Nigeria. They have been undermined and distorted by ethnic or religious loyalties, by networks of mafias or secret societies, and by bribery . . . Mr. Obasanjo must start to refashion not just the institutions of the state but the codes of practice and patterns of behaviour among the people at large that make civilised life possible. It will take years.

Nigeria in Civvy Street, ECONOMIST, June 19, 1999, at 17.

38. See Mario M. Cuomo, *The Lawyer: Indispensable Ingredient of Democracy*, 61 N.Y. ST. B.J. 8, 10 (1989) (noting that the legal profession is "indispensable to the operation of . . . democracy and largely responsible for its excellence").

39. See Okechukwu Oko, *Contemporary Law Practice in Nigeria*, 38 J. AFR. L. 104 (1994).

40. The lawyer's central role in the fight against injustice was succinctly captured by Justice Felix Frankfurter of the U.S. Supreme Court who stated that

all the interests of man that are comprised under the constitutional guarantees given to "life, liberty and property" are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield" . . . in defense of right and to ward off wrong.

Schwartz v. Board of Bar Examiners, 353 U.S. 232, 247 (1957).

institutions, rejuvenate the civil society, and induce attitudinal changes necessary to sustain democracy.⁴¹

Despite the preeminent role played by lawyers in the birth, growth, and perpetuation of a democratic process, the role of African lawyers in the Continent's search for democracy has been largely ignored.⁴² This Article examines the important yet often ignored roles played by lawyers in democratic transitions. It also offers suggestions that will address the legal profession's inadequacies and improve the public perception of lawyers as they battle to enthrone democracy on a troubled continent. The central thesis of this Article is that the problems presented by the transition from despotism to democracy are challenges that lawyers are well suited to undertake.⁴³

Although the issues raised and discussed herein are relevant to most, if not all, of Africa, the focus will be on Nigeria to give the study significant concreteness.⁴⁴ Furthermore, while data and literature from other African countries will be referred to as a general background, reliance will be on Nigerian experiences and practices that illustrate and typify the plight and role of lawyers in the democratic process. Nigeria provides an important model for this study because "in no African country has the effort to create democracy been more far-reaching or of longer duration that in

41. Alexis de Tocqueville argued that lawyers are essential to the working of democracy. He stated that

[m]en who have made a special study of the laws derive from occupation certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude.

1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 283 (Phillips Bradley ed., Vintage Books 1954) (1862).

42. Though there exists some literature on the role of lawyers in developing societies, no article has extensively discussed the role of lawyers in democratic transitions. For a general discussion of the lawyer's role in developing societies, see L.C.B. GOWER, *INDEPENDENT AFRICA: THE CHALLENGE TO THE LEGAL PROFESSION* (1967); O. Akinkugbe, *The Role of Lawyers in Society*, in *LAW AND SOCIAL CHANGE* 89 (T.O. Elias ed., 1972); T.O.S. Benson, *Lawyers and Our Society*, 12 *NIG. B.J.* 63 (1974); Wolfgang G. Friedmann, *The Role of Law and the Function of the Lawyer in the Developing Countries*, 17 *VAND. L. REV.* 181 (1964); L. Michael Hager, *The Role of Lawyers in Developing Countries*, 58 *A.B.A. J.* 33 (1972); J.O.B. Omotosho, *The Role of a Lawyer in a Developing Society*, 8 *NIG. B.J.* 40 (1967).

43. For a general discussion of the problems and challenges of democratic transition, see *DILEMMAS OF DEMOCRACY IN NIGERIA*, *supra* note 32.

44. Since attaining independence in 1960, Nigeria has initiated four transition programs, including one in 1998 that resulted in the installation of the current civilian administration in 1999: the Muhammed/Obasanjo transition program, 1976-79; the Babangida transition program, 1989-1993; the Abacha transition program, 1994-1998; and the Abubakar transition program, 1998-1999. See Constitutional Rights Project, *From Transition to Transition*, 8 *CONST. RTS. J.*, 28, 28-29 (1998).

Nigeria.⁴⁵ The Nigerian experience demonstrates that lawyers have not shown sufficient commitment to the democratization process. Inadequate training, lack of strong ideological commitment to civic responsibilities, and harassment by the military have prevented lawyers from making meaningful contributions to the search for democracy.⁴⁶

The transition to democracy cannot be meaningfully discussed without examining the era of despotism, especially the impact of military dictatorship on the legal process and civil society. Understanding the machinery of military governance will put the democratic transition program in its proper perspective. Also, it will provide a framework for evaluating the role and effectiveness of the legal profession in the democratic transition process. The framework will enhance an understanding of how factors like political instability, depressed economy, and harassment of lawyers influence and shape lawyers' professional practice. The framework also will show how the machinery of a military administration hinders the growth and development of democracy. Part II of this Article will provide background information on military regimes. Part III will examine the role of the legal profession in the transition to democracy. Part IV will discuss what can be done to enhance the legal profession's effectiveness in the struggle for democracy in Africa.

II. THE ERA OF DESPOTISM

The military's assumption of political authority has become a common phenomenon in many developing nations.⁴⁷ Military intervention, commonly known as *coups d'état*, is perhaps "the most visible and recurrent characteristic of the [post-colonial] African political experience."⁴⁸ Few democratically elected presidents in Africa complete their terms without a military coup.⁴⁹ The military establishment has become a strong force in the political process and arrogantly perceives itself as the "last defenders of Western and

45. Paul Beckett & Crawford Young, *Introduction: Beyond the Impasse of "Permanent Transition" in Nigeria*, in *DILEMMAS OF DEMOCRACY IN NIGERIA*, *supra* note 32, at 1.

46. *See infra* Part III.

47. *See* EDWARD LUTTWAK, *COUP D'ÉTAT: A PRACTICAL HANDBOOK* 190-207 (2d ed. 1979) (documenting 142 successful *coups d'état* in the world between 1945 and 1978).

48. SAMUEL DECALO, *COUPS AND ARMY RULE IN AFRICA: MOTIVATIONS AND CONSTRAINTS* 1 (2d ed. 1990).

49. *See* Diamond, *supra* note 2, at 1.

Christian civilization"⁵⁰ with an unquestioned right to intervene in the political process whenever it feels a need to do so.⁵¹

Military regimes justify their right to intervene for different reasons.⁵² For example, they have justified coups based on a need to forestall the breakup of the country,⁵³ or a need to redress the nation's economic and social problems.⁵⁴ Military regimes often seize power proclaiming a desire to correct the ills of the ousted regime.⁵⁵ Upon assuming the reigns of power, they typically make pious commitments to respect civil liberties,⁵⁶ to promote economic

50. Aldo C. Vacs, *Authoritarian Breakdown and Redemocratization in Argentina*, in *AUTHORITARIANS AND DEMOCRATS: REGIME TRANSITION IN LATIN AMERICA* 15, 37 (James M. Malloy & Mitchell A. Seligson eds., 1987).

51. Between 1966 and 1997, Nigeria experienced five successful coups. Six other coup attempts were either uncovered or circumvented in 1966, 1976, 1985, 1990, 1994, and 1997. For an accurate chronicle and history of coups and attempted coups in Nigeria between 1966 and 1994, see *Factsheet on Coup Precedents in Nigeria*, AGENCE FR.-PRESSE, Mar. 10, 1995, available in 1995 WL 7775421.

52. Military administrators are compelled by certain factors to intervene either on grounds of national security or, for example, to forestall the break up of the country or to redress the economy. Professor Nwabueze succinctly spells out the *raison d'être* of military regimes in Nigeria. According to Nwabueze,

[a] military government is the product of a revolution inspired by a certain mission. That mission is predetermined by the circumstances and conditions that prompted it to take over the government. And so determined, the mission of the military government in Nigeria can be easily stated: to repair the ravages of political warfare between opposing political parties; to rehabilitate the economy from the damage of mismanagement by the civilian rulers; to ameliorate the depressing conditions of life resulting from government neglect and lack of concern for the welfare of the people; to punish the unbridled corruption of the past and check its future occurrence; to recover public money and property lost through corruption; and generally to cleanse the society of the scourges of corruption, abuse of office and indiscipline and thereby forge a national habit of orderly and disciplined social life, a national ethic of patriotism and respect for the national interest, obedience to laws, of service to the nation and self-reliance.

Ben Nwabueze, *The Process and Challenge of Legislation in a Military Government*, 17 *NIG. B.J.* 73 (1984).

53. For example, this was the reason for the first military intervention in Nigeria in 1966. See OKAY ACHIKE, *GROUNDWORK OF MILITARY LAW AND MILITARY RULE IN NIGERIA* 99-100 (1978).

54. The Buhari regime provided this as the main reason for its intervention in Nigeria in 1983. See ABIOLA OJO, *CONSTITUTIONAL LAW AND MILITARY RULE IN NIGERIA* 27-28 (1987).

55. Brigadier (later General) Sanni Abacha, who ruled Nigeria from 1993 until his death in 1998, announced the coup that ousted President Shehu Shagari. After accusing the Shagari administration of corruption and imposing a "grave economic predicament" on Nigeria, he stated that "after due consultation [the armed forces] in discharge of [their] national role as promoters and protectors of our national interest decided to effect a change in the leadership of the government of the Federal Republic of Nigeria." TOYIN FALOLA & JULIUS IHONVBERE, *THE RISE AND FALL OF NIGERIA'S SECOND REPUBLIC: 1979-1984*, at 229-30 (1985) (second alteration in original).

56. See, e.g., Bola A. Ajibola, *Human Rights Under Military Rule in Africa: The Nigerian Experience*, in 1 *ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS* 373, 383

development,⁵⁷ to correct the economic and social ills of the country,⁵⁸ and to lay a solid foundation for an enduring democratic rule.⁵⁹ These promises tend to sway the public, especially the illiterate and the uneducated, who tend to view the military regime as a messiah capable of solving all the country's problems.⁶⁰

A. Nature of Military Rule

A military regime is a socio-political aberration built on the Austinian theory of legal positivism—by force rather than the consent of the governed.⁶¹ Military regimes are essentially dictatorial and by their *modus operandi* incompatible with constitutional democracy.⁶² Two dominant factors shape military

(Emmanuel G. Bello & Bola A. Ajibola eds., 1992). In 1966, General Yakubu Gowon, the Nigerian Head of State, declared that

Human Rights and Fundamental Freedoms . . . constitute the cornerstone of the constitution of the Federal Republic of Nigeria. We therefore remain irrevocably committed in every aspect of our national life to the principle of upholding, preserving and defending the individual rights and personal freedoms of our citizens within the framework of the existing laws.

Id.

57. General Buhari (1984-1985) stated that the army took over "in order to put an end to the serious economic predicaments and the crisis of confidence now affecting our nation." *Buhari's New Year Broadcast*, 1984 W. AFR. 56.

58. See generally OJO, *supra* note 54.

59. Virtually all speeches by new military leaders contain similar promises. For example, when General Abacha seized power in Nigeria in November of 1993, he promised an early return to civilian rule, improved economic performance, and a curb on narcotics and crime syndicates centered in Nigeria. See *Abacha Dissolves Government and Political Parties*, BBC SUMMARY OF WORLD BROADCASTS, Nov. 20, 1993, available in LEXIS, News Group File, Beyond Two Years. For similar promises by General Babangida, see *Babangida Takes Over*, 1985 W. AFR. 1789.

60. The idea of the military as the only force that can prevent the disintegration of the country and save the masses from politicians has been repeatedly recycled by successive military regimes in Nigeria. For example, upon assuming office in 1993, General Abacha stated that "the military still remains the only institution in the position to put an end to the drift towards the yawning abyss of total collapse of the nation." *General Abacha Presents 1994 Budget*, BBC SUMMARY OF WORLD BROADCASTS, Jan. 18, 1994, available in LEXIS, News Group File, Beyond Two Years.

61. According to Professor Nwabueze, one of Africa's leading jurists,

a certain amount of authoritarianism is inseparable from a military government. It is, by its very nature, a regime of force. The whole orientation of the military is based upon command—unified and hierarchical command—discipline and regimentation. Its structure tends to be monolithic, characterised by a concentration of powers. And they would naturally be prone to carry this into government.

Udombana, *supra* note 10, at 90.

62. Describing military rule as a "clog in the wheel of the progress of democracy in any country," Justice Oputa, retired Justice of the Supreme Court of Nigeria, summarized the problems with military rule. According to Justice Oputa,

administrations in Africa: (1) the need to dominate the civil society, and (2) the desire to secure its power base.⁶³ These factors engender a strong dictatorial mind set. In governing the nation, the military is omnipresent, unchecked by any constitutional restraints.⁶⁴ Military regimes have a disturbing contempt for law and legal rules; they care only about achieving their stated objectives.⁶⁵ Military regimes, which perceive themselves as above the laws that govern society, have systematically erased society's lines of authority that promote accountability and respect for citizens' rights.⁶⁶ The ultimate authority on the legality of governmental action lies not with the court, but with the military.⁶⁷

[m]ilitary [r]ule is wrong not only because it is military, but also because it is unconstitutional and undemocratic. It lacks the legitimacy which only a constitution can confer

The second quarrel with a Military Regime is that it is an oligarchy. It is government by the few, government by a military junta

The next difficulty with a Military Regime is that it is military. It has, if not the actuality, the potentiality of force. The proper disposition of the military is Command and Unquestioning Obedience to such Command. That surely is not the language of political diplomacy.

Chukwudifu Oputa, *The Sovereignty of the Court and the Nigerian Military Regimes*, Dr. Chukwudifu Ubezonu Memorial Lecture 51 (May 30, 1996) (transcript on file with author).

63. Some of the laws promulgated by the military are preemptive acts of self-preservation by a regime obsessed with securing its power base.

64. See generally I.O. Agbede, *Foundation of Legal Order in a Military Regime*, in CURRENT THEMES, *supra* note 10, at 20.

65. Successive military regimes in Nigeria have used extralegal measures to achieve short-range political and economic goals. They justify such constitutional violations, however egregious, by the interest of the state, national security, and economic development. General Olusegun Obasanjo, who ruled from 1976 to 1979, defended the promulgation of laws that violate constitutional and human rights norms by the military, stating that "when occasions do call for such laws to save the nation from political or economic destruction, the governing majority must be able to act in defense of the nation." Richard Joseph, *Nigeria: Inside the Dismal Tunnel*, 95 CURRENT HIST. 193, 200 (1996).

66. See Udombana, *supra* note 10, at 84. The author noted that "the practical truth, however, is that under a military dictatorship, the government is above the law, even its own law. State officials normally act as if there is no law. They choose, for example, when to obey court orders and when not to obey." *Id.*

67. Judicial review, the cornerstone of constitutionalism, does not exist in a military rule. Most decrees contain "ouster clauses," see *infra* note 76, that effectively bar the courts from reviewing both the laws and acts done pursuant to them. Professor Nwabueze writes that

[t]he military government, right from its inception in 1966 has often conferred unquestionability on its executive acts done or purported to be done under individual decrees Between January, 1966 and September, 1979 on the one hand and January, 1984 and May, 1985 on the other, some 64 decrees which conferred unquestionability on executive acts done or purported to be done under their provisions have been promulgated. A variety of forms and combination of forms were used to achieve this, the aim being to ensure that all loopholes for the court's intervention are effectively plugged.

Under such military regimes, the ruling dictators adopt an instrumentalist and distorted philosophy on law. They view law as an instrument that the state employs to preserve its authority.⁶⁸ The military hierarchy, rather than democratically-elected legislative houses, promulgates laws, usually in the form of decrees⁶⁹ and edicts.⁷⁰ In the military's reality, the overarching aim of the law is to consolidate state power and to induce conformity under threat of sanctions.⁷¹ Consequently, laws, processes, and institutions that facilitate the enjoyment of rights are either abrogated or severely restricted.⁷² The absence of institutional restraints on the exercise of governmental power gives the military considerable latitude in its bid to dominate the civil society.⁷³ The military *junta*,⁷⁴ which has

BEN NWABUEZE, *MILITARY RULE AND CONSTITUTIONALISM* 20 (1990).

68. This corresponds to the Marxist notion of law as instrument of domination and oppression.

69. Laws promulgated by the federal government are called decrees. Under a military regime, decrees are enacted by the highest legislative organ of the military administration. The highest legislative body in Nigeria has been called various names by each military administration. The Gowon administration (1966-1975) and the Buhari regime (1983-1985) called it the Supreme Military Council, the Bagangida regime (1985-1992) called it the Armed Forces Ruling Council, and the Abacha administration (1993-1998) called it the Provisional Ruling Council.

70. Laws enacted by state governments are called edicts. For an account of the history of decrees and edicts in Nigeria, see O.A. Joshua, *The Legality of Military Decrees and Edicts*, in *CURRENT THEMES*, *supra* note 10, at 356.

71. Vukor-Quarshie eloquently explains why the military adopts an instrumentalist notion of law:

[M]ilitary regimes mistrust those institutions, processes and procedures normally appendant to a popularly and democratically elected government. Insecure because of this deficit in legitimacy and not being able to assert moral authority, military governments resort to emergency type laws which vest them with wide and unbridled powers to fight political instability as well as imagined enemies. The need for survival is obviously one explanation for the military's adoption of such an "instrumentalist" view of the law. The law becomes, as it were, a commodity that only the state may mobilize and manipulate. It must not be encumbered by autonomous and neutral processes and procedures which hallmark the regular courts. Dominated groups should not be allowed any purchase of the law except as part of careful stage management. Thus, it is inconceivable to place limitations on the powers of the government itself as are challenges to the government to enforce human rights.

G.N.K. Vukor-Quarshie, *Developments in the Field of Criminal Justice Administration in Nigeria: Saro-Wiwa in Review*, 41 J. AFR. L. 215, 224 (1997).

72. For example, State Security (Detention of Persons) Decree No. 2 of 1984 promulgated by the Buhari administration suspended Chapter IV of the 1979 Nigerian Constitution, which deals with fundamental human rights. For a detailed discussion of the detention laws, see Akin Ibidapo-Obe, *Human Rights and State Security: The Nigerian Experience*, 5 J. HUM. RTS. L. & PRAC. 86 (1995).

73. For lists and a brief discussion of military decrees that violate citizens' rights, see Niki Tobi, *Development of Constitutional Law and Military Regimes in Nigeria*, in 2 *ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS* 673 (Emmanuel G. Bello & Bola A. Ajibola eds., 1992).

74. See *infra* note 102 and accompanying text.

arrogated to itself supreme and absolute powers over all, dictates economic and social agendas.⁷⁵ Law is what the military says it is. The military promulgates the law and administers it free from judicial fetters.⁷⁶

Consistent with its dictatorial stance, the military that makes the laws also assumes the responsibility for executing them.⁷⁷ In the exercise of executive functions, the military hierarchy has a broad range of discretionary powers that the law in no way constrains.⁷⁸ Soldiers at the lower executive hierarchy, consistent with military tradition, slavishly follow orders handed down by their superiors.⁷⁹

75. Explaining the basis for the military government's absolute power, Professor Nwabueze writes that

[t]he basis of the military government's absolute power is, of course, force. A military government is a regime of force. It rules by the "barrel of the gun," not by the people's consent. What is of far greater significance is that, the authority exercised by the military government does not derive from the people. It robs the people of the most fundamental attribute of their sovereignty, the right, by means of a constitution, to institute a form of government for themselves and to define the extent of power being delegated.

NWABUEZE, *supra* note 67, at 5.

76. The technique used by military regimes to put their activities beyond judicial review is to insert clauses in decrees ousting the jurisdiction of courts from reviewing legislative and executive acts of the military. Ouster clauses have been invoked to protect irregularities ranging from human rights abuses to civil forfeiture. For a detailed study of the use of ouster clauses by military regimes in Nigeria, see Gani Fawehinmi, *Denial of Justice Through Ouster of Courts Jurisdiction in Nigeria*, 1 J. HUM. RTS. L. & PRAC. 7 (1991).

77. By vesting executive authority in the military hierarchy, the concept of separation of power is negated. As one commentator stated, "the absence of separation of legislative and executive powers in a military dictatorship inhibits the rule of law and advances the rule of man." Udombana, *supra* note 10, at 80.

78. Professor Nwabueze writes:

Military government in Nigeria has resulted in an erosion of the Rule of Law by reason, first, of the supremacy and absolutism of military legislation, i.e. the fact . . . that law-making by the military government is limited neither by a supreme constitution which defines the permissible content and form of legislation and form of legislation and procedure for making it nor, as in Britain, by conventional rules sanctioned by tradition and the force of public opinion. The erosion of the Rule of Law resulting from the legislative absolutism of the military government is attested to by the spate of *ad hominem* and *ex post facto* decrees and other military legislation repressive of individual liberty.

NWABUEZE, *supra* note 67, at 19.

79. For an interesting analysis of the structure of military government, see Abiola Ojo, *Constitutional Structure and Nature of the Nigerian Military Government—The New Constitutional Decrees*, 10 NIG. L.J. 82 (1976).

B. *Modus Operandi*

After a brief euphoric interlude of democratic pretensions, military regimes typically entrench themselves,⁸⁰ routinely violating constitutional and civil liberties.⁸¹ The focus of the military government shifts almost entirely toward the achievement of its short-range political and economic goals. To further bolster its domination of civil society and to achieve stated objectives, military regimes typically exhibit contempt for constitutional democratic order.⁸² The Constitution (Suspension and Modification) Decree, which is the first law that virtually all military regimes in Nigeria promulgate, illustrates the military's contempt for the rule of law.⁸³ This decree confers plenary power on the military to ignore or dismantle existing legal and political institutions.⁸⁴ Parts of the constitution are suspended, abrogated, or modified; political parties are disbanded and civil liberties are severely circumscribed. This

80. The formula adopted by military regimes to entrench themselves is an elongated transition program spanning several years. The promise to hand over power to civilians serves as an effective ploy to reduce public clamor for an immediate cessation of military rule. For a detailed analysis of Nigeria's transition programs, see DILEMMAS OF DEMOCRACY IN NIGERIA, *supra* note 32, at 1; Peter Koehn, *Competitive Transition to Civilian Rule: Nigeria's First and Second Experiments*, 27 J. MOD. AFR. STUD. 401 (1989); Larry Diamond, *Nigeria's Search for a New Political Order*, J. DEMOCRACY, Spring 1991, at 54.

81. For vivid accounts of human rights violations in Nigeria, see U.S. DEPARTMENT OF STATE, 1994 COUNTRY REPORT ON HUMAN RIGHTS PRACTICE 287.

82. Constitutional democratic order means "not only the formal constitution, but that body of law establishing institutions and processes necessary to implement, promote, and protect the principles of the constitution and the rights guaranteed by it." James C.N. Paul, *Human Rights and the Structure of Security Forces in Constitutional Orders: The Case of Ethiopia*, 3 WM. & MARY BILL RTS. J. 235, 236 n.7 (1994).

83. In 1966, the first military regime in Nigeria promulgated the Constitution (Suspension and Modification) Decree No. 1, which suspended portions of the constitution and established that "[t]his constitution shall have the force of law throughout Nigeria [provided] that this constitution shall not prevail over a Decree, and nothing in this constitution shall render any provision of a Decree void to any extent whatsoever." Constitution (Suspension and Modification) Decree No 1, § 1(2) sched. 2, in ANNUAL VOLUME OF THE LAWS OF THE FEDERAL REPUBLIC OF NIGERIA 1966, at A1, A11 (amending NIG. CONST. § 1 (1963)). The Decree gave "[t]he Federal Military Government . . . power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever." *Id.* § 3(1). The Decree further ousted the jurisdiction of the courts from reviewing any act or order of the military regime. *Id.* § 6. All subsequent military regimes in Nigeria have adopted basically the same legislative format to validate the military's action. For example, the Constitution (Suspension and Modification) Decree No. 107 of 1993, promulgated by the Abacha regime in 1993, substantially re-enacted the provisions of the 1966 decree. See Constitution (Suspension and Modification) Decree No. 107 (1993).

84. For an interesting review of the impact of military rule on democratic institutions, see B.O. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES 219 (1973).

decree usually heralds the military's desire to neutralize legal rules and processes that constrain the exercise of state power.⁸⁵ The military accomplishes this in four distinct ways: (1) the arrogation to itself of legislative and executive powers,⁸⁶ (2) the insulation of executive and legislative actions from judicial review,⁸⁷ (3) the abridgment of civil liberties,⁸⁸ and (4) the assigning of adjudicatory functions to tribunals.⁸⁹

C. *Military and Civil Society*

The military's attitude toward civil rights and liberties amply illustrates how it perceives the civil society. Military regimes have a distorted notion of civil society—a society based on expediency and governed not by law but according to the whims of the military hierarchy. Every aspect of the civil society remains subject to the unchecked and unreviewable authority of the military.⁹⁰ There are

85. Udombana observed that "the first sign that a military regime is threading the path of a dictatorship is its suspension of the constitution or various provisions of it as soon as it seizes power." Udombana, *supra* note 10, at 90.

86. See Okechukwu Oko, *Lawyers in Chains: Restrictions on Human Rights Advocacy Under Nigeria's Military Regimes*, 10 HARV. HUM. RTS. J. 257, 260 (1997).

87. See *id.*

88. See *id.*

89. Justice Oputa, a retired Justice of the Nigerian Supreme Court, admirably catalogues the extralegal measures adopted by virtually all military regimes in Nigeria. He notes that

[t]he 1966 coup [the first in Nigeria] and all subsequent coups have been followed by the promulgation of

- (i) Suspension and modification Decrees.
- (ii) Supremacy Decrees, making Decrees some type of super laws, over and above the constitution itself and other ordinary laws of the land.
- (iii) The promulgation of Decrees and Edicts clogging or circumventing the judicial powers of the courts by ouster of jurisdiction clauses.
- (iv) In a Military Regime the Doctrine of Separation of Powers and the Distribution of these powers of governance among the Legislative, Executive and Judicial Branches of government is subverted. In Nigeria the legislative powers of government are vested in the Supreme Military Council later called Armed Forces Ruling Council now called Provisional Ruling Council. The executive powers are vested in the President who is also the Chairman of the Provisional Ruling Council. The judicial powers or more precisely whatever is left of them are vested in the courts.

Oputa, *supra* note 62, at 57-58.

90. Richard Joseph paints a gruesome picture of life under Nigeria's military regimes. He stated that

[a]rbitrary arrests and detentions, extrajudicial killings, endemic corruption, excessive use of force, torture of detainees, life-threatening prison conditions, imprisonment without charge or trial, harassment of journalists and democratic activists, corruption of the judiciary, arson attacks on media houses, seizure of passports—in virtually every sphere, Nigeria has become one of the world's most oppressed nations.

no standards against which the legality of military governmental actions can be judged and no clearly defined and objectively verifiable rules governing conduct.⁹¹ Opposition and diverse opinions are muzzled,⁹² favoritism replaces meritocracy, and the public good is subordinated to the selfish interests of the ruling military *junta*.⁹³

In dealing with the civil society, the desire to ensure total domination preoccupies the military. Consequently, the military regime confers on itself a broad array of powers under which it can abridge rights and ensure compliance with its policies.⁹⁴ The regime progressively obligates the institutions, rules, and processes that protect the citizens against abuse, thus leaving the citizens at the mercy of the despotic rule.⁹⁵ Citizens' rights are violated, as they are abridged through numerous decrees and executive actions of the ruling military *junta*.⁹⁶ In some cases, rights violations result from the military's attempt to address pressing social problems in the country.⁹⁷ Some of the laws are specifically aimed at perceived enemies of the state, such as former elected officials, the press, and

Richard Joseph, *Democratization Under Military Rule and Repression in Nigeria*, in *DILEMMAS OF DEMOCRACY IN NIGERIA*, *supra* note 32, at 137, 137.

91. Patrick Clawson aptly describes life under a dictatorship. He states that

[t]he fundamental problem of modern dictatorship . . . is that the state becomes too powerful. The state takes over economic life, and it subordinates to its control every institution of civil society from churches to trade unions to professional associations, sports clubs, and charitable groups. The effects are as pernicious on the economy as on political and social life.

Patrick Clawson, *Promoting Democracy Abroad*, 37 *ORBIS: J. WORLD AFF.* 505, 507 (1993).

92. The military is highly sensitive to criticisms. Journalists who write news items considered unpalatable by the military are detained, while newspapers or news magazines that publish such items are proscribed. *See, e.g.*, The Guardian Newspapers and African Guardian Weekly Magazine (Proscription and Prohibition from Circulation) Decree No. 8 of 1994 (banning the publishing and circulation of *The Guardian* newspaper and magazine); The Punch Newspaper (Proscription and Prohibition from Circulation) Decree No. 7 of 1994 (banning the publishing and circulation of *Punch* newspaper); The Concord Newspapers and African Concord Weekly Magazine (Proscription and Prohibition from Circulation) Decree No 6 of 1994 (proscribing the publishing of *Concord* newspapers and news magazine).

93. *See generally* Udombana, *supra* note 10.

94. *See supra* notes 80-89 and accompanying text.

95. *See id.*

96. *See* Tobi, *supra* note 73, at 702-12 (examining the human rights position in the military regime).

97. The military believes that society is best served by aggressively pursuing its policy objectives short of restraints. This attitude is best illustrated by the decrees promulgated by the Buhari regime in 1984. For example, the Special Tribunal (Miscellaneous Offenses) Decree created numerous offenses triable under new rules and procedure that ran counter to the due process requirements. *See* M. Adekunle Owoade, *The Military and the Criminal Law in Nigeria*, 33 *J. AFR. L.* 135, 141-42 (1989).

unions.⁹⁸ These broad and often arbitrary laws permit the harassment, arrest, detention, and torture of citizens shorn of the due process requirements contained in existing laws, including the constitution.⁹⁹

Civil rights are neglected not only because the military regime unduly emphasizes self-aggrandizement, but also because the machinery of government revolves around personalities rather than laws.¹⁰⁰ Within such a personality-centered administration, the military uses the machinery of state to settle old scores and silence perceived enemies of the military regime.¹⁰¹ Citizens who do not submit to or align themselves with the military are shut out from the nation's economic and social activities.¹⁰² On the other hand, loyalty and support for the military can significantly enhance one's career and generate considerable wealth.¹⁰³ For a culture that

98. For a catalogue of *ad hominem* decrees, see NWABUEZE, *supra* note 67, at 14-15.

99. For a detailed discussion of the security laws passed by military regimes in Nigeria, see Olisa Agbakoba, *Nigeria's State Security (Detention of Persons) Decree No. 2 of 1984: Exploding The Myth of Judicial Impotence*, 4 J. HUM. RTS. L. & PRAC. 46 (1994); Ibidapo-Obe, *supra* note 72, at 86.

100. Professor Mutharika notes that

[w]hen a state has been structured in a manner that prevents accountability, it usually leads to the emergence of a small elite class whose main preoccupation is self-preservation through exclusive control of the economic and political institutions. Individuals who pose a threat to this group—especially those in the security services (army, intelligence, and police)—are usually co-opted through a generous reward system.

Mutharika, *supra* note 15, at 284.

101. The legal order under a military regime is replete with laws directed to or against named individuals. Professor Nwabueze writes:

From the inception of the military government in January, 1966 to September, 1979, there have been some 39 decrees (edicts of the state government excluded) directed to or against named persons or associations. The actions directed by the decrees range from arrest and detention of persons (20 decrees), forfeiture of assets (14), dissolution of political parties and certain tribal or cultural associations and the forfeiture of their assets (2), imposition of disability (1), to vacation of office or annulment of appointments (2).

NWABUEZE, *supra* note 67, at 14.

102. The military's brutalization of the civil society has some dire consequences for the continued existence of Nigeria as a nation. All the elements that make for progress and development in a nation have been disrupted by abusive and unaccountable military junta. The military's brutalization of the civil society has also provoked different responses among the citizens. Some citizens have withdrawn from all activities and engaged in various forms of protective schemes to avoid the wrath of the military. Others have irredeemably lost faith in the nation and chosen to seek fortune in foreign countries. As Olusegun Obasanjo observed, "the men and women of spirit who are the leaven of every society either began to go into exile in foreign countries or withdrew into stultifying private life; to their loss yes, but to the even greater loss of society at large." Ndulo, *supra* note 13, at 78.

103. Nigeria operates a semi-socialistic economy where the government determines for the most part what private citizens can and cannot do. This enables

celebrates materialism over integrity, it is not surprising that even the most oppressive military regimes have been able to cultivate support from civil society.¹⁰⁴

Citizens on the short end of the stick continue to clamor for democracy. The military's perpetration of massive human rights violations seems to convince the masses that social equilibrium cannot be achieved by remaining silent. Citizens eager to change the climate of oppression and injustice form organizations, associations, and groups and openly demand the restoration of democracy.¹⁰⁵ The quest for greater freedom manifests itself predominantly through public demonstrations and boycott of state functions.¹⁰⁶ These activities often lead to greater frustration as the military uses every tactic at its disposal, including violence, to silence the citizens.¹⁰⁷

the military to set up bloated, overlapping, and corrupt bureaucracies to reward their friends and cronies. For a discussion of General Babangida's (1985-1992) use of an extensive patronage system to control and manipulate the civil society, see KUNLE AMUWO, *GENERAL BABANGIDA, CIVIL SOCIETY AND THE MILITARY IN NIGERIA: ANATOMY OF A PERSONAL RULERSHIP PROJECT* (1995).

104. Citizens understand that military regimes are highly sensitive to criticisms and contrary opinions. Therefore, they profess support for the military regime as a practical way to avoid its wrath. Professor Nwabueze explains the reason for a higher level of sycophancy under military regimes:

Such a regime [of military dictatorship] breeds and nurtures sycophancy to an extent intolerably greater than is found in a democratic polity. Sycophancy is the bane of all dictatorships; it is, perhaps, an understandable response to the futility of arguing with absolute, armed power—as the saying goes, if you cannot beat them, join them.

NWABUEZE, *supra* note 67, at xii.

105. The Civil Liberties Organization, founded in 1987, pioneered the emergence of formal human rights bodies in Nigeria. Other major human rights organizations include the Committee for the Defense of Human Rights, the Constitutional Rights Project, Human Rights Africa, the National Association of Democratic Lawyers, and the Gani Fawehinmi Solidarity Association. For the history of human rights organizations in Nigeria, see Tony Iyare, *Like the Mushroom*, *NEWSWATCH*, June 29, 1992, at 15.

106. Human and civil rights organizations in Nigeria, in an attempt to ensure accountability and promote respect for human rights, frequently mobilize the civil society to stand up to the military. Through public protests, demonstrations, and boycotts, these organizations force the military to make some concessions and rethink their oppressive decisions. The highlight of the non-governmental organizations' success was the resignation of General Babangida in 1992 following unprecedented public demonstrations due to the annulment of the 1992 presidential elections. See *ILLUSIONS OF POWER*, *supra* note 7, at 131-57.

107. Chief Gani Fawehimi, one of Nigeria's pro-democracy advocates, graphically illustrates the plight of citizens under Nigeria's military regime:

In Nigeria, when a policy is initiated, the people have no say as to its initiation. The policy is not presented to the Nigerian people through any structural democratic process. The people are unable to ventilate their opposition or support through any structural platform. Political appointees are sworn-in without the people's vetting through a political machinery in which the people are involved. Policies are translated into laws, the laws

Prolonged military rule in Africa has created severely weakened nations, fractured along religious and cultural lines. It has impoverished and economically stagnated vast segments of the civil society.¹⁰⁸ Military rule has left a *tour de force*, rather than a legacy, that has destroyed and decimated the civil society.¹⁰⁹ Overwhelming evidence of abuse, mismanagement, and corruption seriously discredit the claims that the military is the only institution that can restore order and social equilibrium.¹¹⁰ Such abuses have left the civil society teetering on the brink of collapse.¹¹¹ Only the legal profession retains sufficient status and authority to prepare and mobilize the civil society for democratic reforms.

III. ROLE OF LAWYERS IN THE TRANSITION PROCESS

The transition from despotism to democracy requires overhauling the paraphernalia of the military administration and its legislative and adjudicatory processes. More importantly, it requires counteracting the negative attitudes developed during years of

transgress the people's rights—property rights, political rights, economic rights, cultural rights. The people feel injured and aggrieved. They run to the judges and in desperate exasperation, the judges throw up their arms in a fateful resignation, pointing to the legislative sections ousting their jurisdictions. The aggrieved face a stone-wall. They turn back in pain, in anguish and in frustration bemoaning their fate and when they go underground (or over the ground) to ventilate their anger in one form of violence or the other they meet a volley of bullets.

Fawehinmi, *supra* note 76, at 69.

108. For an analysis of the impact of military rule on the civil society, see ILLUSIONS OF POWER, *supra* note 7, at 189-218; AMUWO, *supra* note 103.

109. General Abacha, who ruled Nigeria from 1993 until his death in 1998, claimed that "the military remains the only institution in a position to put an end to the drift towards the yawning abyss of total collapse of the nation." See *General Abacha Presents 1994 Budget*, *supra* note 60.

110. Professor Nwabueze offers an objective assessment of the military rule in Nigeria and concludes that

[t]he performance of the military government in Nigeria bears out our contention that it is incapable of solving the country's problems. While it has to its credit a few accomplishments . . . for the rest, the record is one of dismal failure. It has failed to integrate the country into one, united nation; to improve the quality of life of the people and to modernise the society; to evolve a just and egalitarian society; to curb and eradicate corruption; or generally to transform the society and change its undesirable habits and practices . . .

NWABUEZE, *supra* note 67, at 328; see also Paul Adams, *Legacy of the General*, AFR. REP., Sept.-Oct., 1993, at 67-69 (listing Babangida's legacy as a battered economy, rampant corruption, a resurgence of quiescent ethnic divisions, and tarnished democratic institutions).

111. For the impact of military rule on the civil society, see generally ILLUSIONS OF POWER, *supra* note 7.

authoritarianism.¹¹² Enduring democratic change will depend on reinvigorating institutions and processes that protect citizens' rights and replacing the reign of terror with the rule of law.¹¹³ These tasks are crucial because military dictators have abused all the elements that make for order in a polity, including the legal system.¹¹⁴ The laws passed by the military fail miserably to advance the cause of democracy, and worse, serve narrow selfish interests rather than societal searching.¹¹⁵

Using the legal order¹¹⁶ for selfish rather than popular interests presents several problems: it leads to abuse of rights,¹¹⁷ it generates public cynicism and loss of confidence in the justice system;¹¹⁸ it

112. Besides establishing legal and political institutions, the major challenge is to help the citizens suppress undesirable habits and attitudes developed during military rule. Military rule has forced the citizens to internalize and assimilate authoritarian values without any appreciation of democratic ideals. Jibrin Ibrahim traces a causal relationship between military rule and authoritarian culture. He observed that

[m]ilitary rule has strongly impacted the country's culture and institutions. Our argument is that military rule ultimately impacts negatively on society by generalizing its authoritarian values which are in essence anti-social and destructive of politics Military regimes have succeeded in permeating civil society with their values—both the formal military values of centralization and authoritarianism and the informal lumpen values associated with "barrack culture" and brutality that were derived from the colonial army The specific legacy from the military is therefore neither corruption nor authoritarianism, much as they took both to new heights. The military legacy is the fabrication of a political culture oriented towards the imposition of a command and control structure on the political process, which has the effect of destroying the residual democratic values that have survived in the Nigerian society.

Jibrin Ibrahim, *Obstacles to Democratization [In] Nigeria*, in *DILEMMAS OF DEMOCRACY IN NIGERIA*, *supra* note 32, at 155, 160-61.

113. For an interesting analysis of the reign of terror unleashed on Nigeria by the military, see Udombana, *supra* note 10. Even after elections, most of the institution—carryovers from the military regime—seem to have difficulties overcoming the authoritarian attitudes and mindset developed during years of military rule. The major challenge for lawyers is to infuse democratic values into the personnel and officers who operate these institutions.

114. Military regimes use law and the legal order to ensure domination of the civil society and to legitimize arbitrary and repressive governmental actions. For a rich analysis of the military's use of law as an instrument of oppression, see CONSTITUTIONAL RIGHTS PROJECT, *SUPPRESSION AS LAW: THE ARBITRARY USE OF MILITARY DECREES IN NIGERIA* (1994).

115. The use of law to advance selfish interests is perhaps one of the biggest tragedies of military dictatorship in Nigeria. In more than three decades of military rule, the military has slanted the law to suit the whims and caprices of the military hierarchy, violated rights, and disrupted legal and political institutions.

116. See Seidman & Seidman, *supra* note 1, at 8 n.22 (defining legal order to include not only the text of laws, regulations and other norms promulgated by the state, but also the lawmaking and law-implementing institutions—i.e., the entire normative system in which the state has a hand).

117. See *supra* notes 86-88 and accompanying text.

118. The military's manipulation of the justice system, especially the administration of justice through special tribunals, has created profound public

leads to the promulgation of laws that do not adequately meet the needs of a developing society in the process of modernization and democratization,¹¹⁹ and it produces a demoralized citizenry highly suspect of the transformative abilities of the law.¹²⁰ Citizens, especially victims of a military regime's brutality and oppression, have come to associate law with oppression—a coercive tool used by despots to ensure compliance.

The transition to democracy, therefore, creates new responsibilities for lawyers, as guardians of democracy.¹²¹ As custodians of society's rights, members of the legal profession must help restore order in a system decimated by authoritarianism.¹²² Lawyers are expected to act as agents of change even as they help maintain order in a chaotic environment.¹²³ The central thrust of the legal profession's efforts should be to disempower the despot and undermine prevailing submissive mentalities and self-images

skepticism about the ability of the judicial process to effectively and objectively dispense justice. All military regimes have used military tribunals to administer justice. See A.A. Olowofoyeku, *The Beleaguered Fortress: Reflections on the Independence of Nigeria's Judiciary*, 33 J. AFR. L. 55, 57-58 (1989) (discussing the deficiencies of Nigeria's judiciary).

119. The military regime's fixation with security leads to the promulgation of laws that deal mainly with security issues. Laws that deal with non-security matters often address social problems accorded high priority by the military. No effort is made by the military to promulgate laws that move the country closer to democracy.

120. Oppressive and brutal military rule has magnified social and economic problems on the continent of Africa. The seeming inability of the military, even with their uncontrolled domination of the legislative process, to use the law to bring about change has led to public cynicism and contempt for the creative use of law as an instrument of social change.

121. Lawyers have been variously described as guardians of democracy and foot soldiers of democracy. See, e.g., William W. Kilgarlin, *Lawyers: Guardians of Democracy*, 38 BAYLOR L. REV. 249, 250 (1986) (describing lawyers as "Guardians of Democracy").

122. Lawyers historically have exerted considerable influence over the legal order and served to counterpoise democracy. Alexis de Tocqueville observed, "In visiting the Americans and studying their laws, we perceive that the authority they have entrusted to members of the legal profession, and the influence that these individuals exercise in the government is the most powerful existing security against the excesses of democracy." DE TOCQUEVILLE, *supra* note 41, at 283.

123. Hon. Taslim Elias, the late Chief Justice of the World Court, in his seminal work on law in a developing society, clearly articulated the role of lawyers in societies undergoing transformation. According to Dr. Elias,

[t]he prevailing social and economic forces call for a type of lawyer who is at once a social engineer and an analyst, a Pericles and a plumber, capable of appreciating the values of existing institutions and *mores* and yet ever ready to make a dynamic contribution to the maintenance of a proper balance between the need for stability and the need for change, between the claims of the state and those of the individual.

T.O. Elias, *Law in a Developing Society*, 4 NIG. L.J. 1, 19 (1970).

nurtured to suit the ancient regime.¹²⁴ More importantly, lawyers must guide and assist society to transform institutions and processes decimated by the military into effective tools of democratic reform.¹²⁵

Discharging this obligation requires lawyers to mediate between the government and the civil society. The legal profession remains the most credible institution that can effectively mediate between the military and the civil society. Alexis de Tocqueville, noting that lawyers belong to the people by birth and interest and to aristocracy by habit and taste, described the American legal profession as the connecting link between the two great classes in society.¹²⁶ This characterization of lawyers aptly describes the important roles lawyers must play in the democratic transition process. Power that the aristocracy normally holds now belongs to the military, which feels threatened by change. The "aristocrats" in military uniform are highly dubious about the democratic process and engage in various forms of protective devices to maintain their hegemony over society.¹²⁷ The legal profession stands between the military and the civil society, trying to curtail the excesses of the military and seeking to influence the civil society to embrace democratic ideals.¹²⁸ Lawyers can effectively act as a countervailing force against tyranny by helping to disempower the "aristocrats" and protecting citizens against abuse.¹²⁹ The legal profession must play a crucial role in

124. See Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 CARDOZO L. REV. 1891, 1892 (1998).

125. See *supra* note 95 and accompanying text.

126. DE TOCQUEVILLE, *supra* note 41, at 286.

127. The most popular strategy employed by the military to prolong their stay in power is an elongated transition program spanning several years. For details of General Babangida's elongated transition program, see Diamond, *supra* note 80; Koehn, *supra* note 80; Peter M. Lewis, *Endgame in Nigeria? The Politics of a Failed Democratic Transition*, AFR. AFF., July 1994, at 323, 328. General Abacha, in his 1995 Independence Day broadcast to the nation, sought to justify the elongated transition program. He stated that

to establish the foundation of a durable democracy, we estimate that the time required will cover a period of no more than 36 months. A detailed and carefully considered programme of sequence of events that will lead to that deadline has been worked out. This sequence will begin with a stage-by-stage phased handing over at the local government level. It has been calculated that a completion date, at the level of the presidency when the final tier of a democratically elected civil government shall be installed, should be feasible for October 1, 1998.

Abacha's Anniversary Broadcast, 1995 W. AFR. 1556, 1557.

128. See *infra* Part III.B.

129. This role is not new to lawyers in developing nations. Professor Brabanti stated that

[t]he sheer size of the legal community, strongly organized into bar associations and closely allied with equally strong courts has not only been a

transmitting the civil society's demands and concerns to the military. It must also help the military reconcile the tensions inherent in the military's involvement in politics.¹³⁰ Properly performed, these functions will promote a healthy military-civil society relationship, thus laying the foundation for a durable democratic process.¹³¹

The success of the transition program depends in large measure on the ability of the legal profession to induce behavioral and institutional changes necessary to sustain constitutional democracy. Unlike the military and politicians who focus on the immediate need of gaining or retaining power, the legal profession must look beyond elections—which in the long term represent the initial relatively uncomplicated phase of democratic transition—and seek ways to meet the challenges of democratic transition.¹³² The legal

major source for the diffusion and regeneration of norms generally, but by weight of numbers has enabled the courts to remain strong and has prevented the rise of administrative lawlessness [T]he legal community is a force to be reckoned with. It has challenged the executive during and after martial law, it has defied efforts to restrict court jurisdiction it has compelled justiciability of fundamental rights, it has forced abrogation of several restrictive enactments.

Brabanti, *The Role of Law in Political Development*, presented at the Conference on International and Comparative Law of the Commonwealth, Duke University, Durham, North Carolina, Oct. 28, 1966, at 27-28, *quoted in* Hager, *supra* note 42, at 37.

130. Larry Diamond admirably summarizes the military's unsuitability for politics. He states that

[t]he military must be steadily removed from the political realm, including from such nonmilitary responsibilities as rural development, "civic action," domestic intelligence, policing, and participation in the cabinet. Such involvement in domestic affairs, even in worthy goals such as developing the hinterland, erodes the military's distinct role as a defense force and immerses it in political conflicts and concerns.

DIAMOND, *supra* note 17, at 113-14.

131. Unless the role of the military is meaningfully addressed, democracy will never be consolidated in Nigeria. Efforts must be made to alter the interventionist mind-set of the military and to reorient military officers to issues of national security. See Robin Luckham, *Dilemmas of Military Disengagement and Democratization in Africa*, 26 IDS BULL. 49, 52-53 (1995) (arguing that in Nigeria, as in most other African countries, the military establishment, and other repressive apparatuses of the state continue to be the single most important obstacle to democracy in Nigeria); Pita Ogaba Agbese, *The Impending Demise of Nigeria's Forthcoming Third Republic*, 37 AFR. TODAY 23, 40 (1990) (noting that the military itself poses one of the major obstacles to democracy in Nigeria).

132. Consolidating democracy represents the biggest challenge for African nations. Lawyers, by history and tradition, are expected to assist the nation in overcoming challenges. In December 1962, the International Congress of Jurists in Rio de Janeiro acknowledged the lawyer's role in helping nations overcome challenges. The body declared:

In a changing and interdependent world, lawyers should give guidance and leadership in the creation of new legal concepts, institutions and techniques

profession, comprised of professionals with special training in and control over law, has the capacity to advance the cause of democracy and counter destructive environmental factors that threaten social equilibrium in society.¹³³ The legal profession must act as a stabilizing force, one that not only articulates and propagates, but also defends the central tenets of democracy. Lawyers must address the ills of despotism and reassure the brutalized and cynical public that democracy holds the key to a better and brighter future.¹³⁴ Lawyers must wear the garb of reformers, brokering an end to repression and facilitating the transition to the democratic process. Specifically, the legal profession in countries making the transition to constitutional democracy faces four major tasks: (1) protecting legal rights, (2) rejuvenating the civil society, (3) reforming laws, and (4) assisting in the constitution-drafting process. These functions, properly and effectively discharged, not only ensure a successful transition program, but also ensure the consolidation and continuation of democracy.

A. *Protecting Legal Rights*

For a better part of Nigeria's history as an independent nation, the military has manipulated and used the machinery of the state, including legislation, to deny citizens their rights and freedoms.¹³⁵ The military, in its bid to dominate the civil society, has compromised and corrupted the key institutions of the legal system, including the courts, police, ministry of justice, and the legal profession.¹³⁶ Untrammelled by legislative or judicial fetters, the military has erected a network of protective devices that ensure total domination over the civil society.¹³⁷ These devices include (1) broad and often arbitrary detention laws,¹³⁸ (2) laws that insulate

to enable man to meet the challenges and dangers of the times and to realize the aspirations of all people.

CHUKWUDIFU OPUTA, IN SEARCH OF A DISCIPLINED SOCIETY THROUGH LAW 3 (1986).

133. See *Oko*, *supra* note 86, at 261.

134. See *generally Ake*, *supra* note 32.

135. See *Tobi*, *supra* note 73, at 686 (questioning the effect of military legislation).

136. See *supra* notes 47-79 and accompanying text.

137. See *generally Oputa*, *supra* note 62.

138. Successive Nigerian military regimes have used vague and expansive decrees permitting indefinite detention without trial to arrest and detain civilians, especially vocal critics of the military. For example, the State Security (Detention of Persons) Act empowered the government to detain without charge persons suspected of acts prejudicial to state security or harmful to the economic well-being of the country. See State Security (Detention of Persons) Act, ch. 414 (1990) (Nig.). Furthermore, the State Security (Detention of Persons Amendment (No. 2)) Decree of 1994 barred the courts from compelling the government to produce detainees in

governmental actions from review,¹³⁹ and (3) ex post facto laws that enable the military to retroactively criminalize otherwise innocent conduct.¹⁴⁰ The major task for lawyers in the transition process is to dismantle all the protective devices that infringe upon these rights of citizens.¹⁴¹ Lawyers, stewards of all the legal rights and obligations of all the citizens,¹⁴² have a historic obligation to act as a bulwark against tyranny. As I have stated elsewhere:

The legal profession, more than any other group, is uniquely situated to act as a countervailing force to despotism and tyranny. Lawyers must champion society's effort to develop a civil society that holds rulers accountable for violations of legal rights and in which civil liberties are respected. Citizens expect lawyers to openly condemn human rights violations whenever they occur, provide legal assistance to victims of human rights violations, and exert moral leadership.¹⁴³

Protecting legal rights is a potentially dangerous enterprise under a despotic regime that operates without any sense of restraint or accountability.¹⁴⁴ Nevertheless, this is a task that lawyers historically and traditionally perform. As the late Dr. Nnamdi Azikiwe, the first civilian President of Nigeria, stated:

History . . . ha[s] bequeathed to this organised body of legal practitioners, a heritage of being the mouthpiece of the downtrodden, the voice of the oppressed, the clarion of the under-privileged and the sword of fairplay for the forgotten men and women of a selfish and greedy world.¹⁴⁵

Lawyers must be vigilant and courageous in compelling those in power, whether military or civilian, to respect the rule of law and the rights of citizens.¹⁴⁶ Armed with the knowledge of the law, lawyers

court, thereby neutralizing the effects of habeas corpus. See State Security (Detention of Persons Amendment (No. 2)) Decree 14 (1994). The decree and the subsequent amendments were all abrogated as Nigeria prepared to elect a civilian administration in 1999.

139. See Oko, *supra* note 86, at 273-74.

140. See *id.* at 284.

141. Late Justice Augustine Nnamani of the Nigerian Supreme Court succinctly described the role of lawyers when he observed that "[t]he function of the Bar is to present and assist members of the Community in asserting and protecting rights relating to persons and property, and to assist them in organising and rearranging their affairs in domestic and commercial contexts." AUGUSTINE NNAMANI, CONTEMPORARY NIGERIA AND THE PRACTICE OF LAW 6 (1990) (unpublished manuscript, on file with author).

142. See ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES at vii (1953).

143. Oko, *supra* note 86, at 286.

144. See *id.* at 261.

145. *Lawyers Are the Custodians of Liberty*, DAILY TIMES (Nig.), Dec. 3, 1974, at 1 (quotation marks omitted).

146. Professor Araujo identifies courage as one of the virtues of professionalism and states that "[c]ourage is the virtue that enables lawyers to meet the challenge of harm or danger when they attempt to take action based on the care and concern they have for individuals and communities." Robert J. Araujo, *The Lawyer's Duty to*

must stand between government and citizens, fearlessly defending citizens against oppression and abuse.¹⁴⁷ To achieve justice in society, lawyers must often ignore the risks and dangers to their personal safety and stand up for principles in which they believe.¹⁴⁸ By helping citizens maintain their legitimate standing before the law, lawyers protect society from the whims and caprices of an overbearing, possibly tyrannical government.¹⁴⁹ By enabling citizens to resist governmental encroachment of rights and freedoms of citizens, the legal profession, in essence, becomes "an instrument of both liberty and political justice."¹⁵⁰

The legal profession's ability to effectively protect rights under a despotic regime depends on the extent to which it is able to reconcile two apparent antonyms: the short-term interest of the despotic regime in maintaining national security¹⁵¹ and the libertarian interests of citizens in implementing a democratic system that emphasizes respect for citizens' rights.¹⁵² Reconciling the demands of the military and the interests of citizens has proved particularly invidious. The military is adamantly committed to the idea that citizens' rights must be subordinate to the security interests of the nation.¹⁵³ Citizens, on the other hand, recognize that the threat to national security is real and cogent, but insist that

Promote the Common Good: The Virtuous Law Student and Teacher, 40 S. TEX. L. REV. 83, 115 (1999).

147. By checking the excesses of an arbitrary and often capricious government, lawyers will promote public confidence in the rule of law, thus enhancing the prospects for democratic consolidation.

148. Dean Anthony Kronman, emphasizing the importance of courage in professional practice, states that a courageous lawyer is prepared to take risks for what he believes is right; to risk anger, contempt, and a lower income for the sake of the law's own good; and nothing can be a substitute for the fortitude this requires. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 145 (1993).

149. Alexis de Tocqueville noted:

The more we reflect upon all that occurs in the United States, the more we shall be persuaded that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element [T]he legal profession is qualified by its attributes, and even by its faults, to neutralize the vices inherent in the popular government. When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counselors.

DE TOCQUEVILLE, *supra* note 41, at 288-89.

150. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1244 (1991).

151. See *supra* note 52 and accompanying text.

152. See NWABUEZE, *supra* note 8, at 91-103 (discussing the requirements for a democratic society).

153. See Joseph, *supra* note 65, at 199-200.

such threats should be dealt with according to the rule of law.¹⁵⁴ Lawyers under despotic regimes are therefore thrust into a profound crisis, caught between a military regime that seeks untrammelled powers to advance the nation's security and economic interests and a society that demands the rule of law and the restoration of democratic rule. The lawyers' dilemma is principally within the area of human rights because of the military regime's proclivity to violate human rights in the name of national security.¹⁵⁵ True to their professional dictates, lawyers want a society in which existing legal and political institutions function according to legal and human rights norms.¹⁵⁶

Military regimes usually reject this posture and often view lawyers' human rights activities as a threat to national security,¹⁵⁷ an affront to prestige, and an attempt to diminish their authority.¹⁵⁸ Military regimes view lawyers as potential enemies to be monitored closely and neutralized by any means.¹⁵⁹

Generally, lawyers incur the wrath of the military regime for engaging in three kinds of activities: (1) filing wrongful detention suits against the military government,¹⁶⁰ (2) criticizing the military

154. The civil society's insistence that the military respect rights and liberties animated most protests and demonstrations in Nigeria during the military era. See generally ILLUSIONS OF POWER, *supra* note 7.

155. See notes 62-64 and accompanying text. Under the banner of national security, military regimes engage in human and civil rights violations in ways unimaginable in democratic societies.

156. See, e.g., GENERAL COUNCIL OF THE BAR (Nig.), RULES OF PROFESSIONAL CONDUCT IN THE LEGAL PROFESSION, Rule 24 (1967). Rule 24 enjoins Nigerian lawyers to uphold the rule of law. For a detailed study of the rules of professional conduct in the Nigerian legal profession, see J. OLA OROJO, CONDUCT AND ETIQUETTE FOR LEGAL PRACTITIONERS (1979).

157. Akin Ibidapo-Obe states that

[m]ilitary regimes are notoriously sensitive about security matters. Owing to its lack of institutional succession process, a military government is usually changed by the same process by which the incumbent government seized power—through the barrel of the gun. The adage of Nigeria's Yoruba tribe is apposite in this regard[.] . . .

"Those who live by the sword never want an armed person to come near them."

Akin Ibidapo-Obe, *Human Rights and State Security: The Nigerian Experience*, in *BLUE PRINT FOR NIGERIAN LAW* 288, 296 (Obilade ed., 1995).

158. For example, in 1991, retired Navy Admiral Augustus Aikhomu, then Vice-President of Nigeria, accused lawyers involved with human rights organizations of unpatriotic behavior for defending political detainees. Admiral Aikhomu stated, "Today, we are fighting people responsible for illicit dealing in drugs, rapists, people who want to turn the society into a jungle but the so-called human rights organisations in this country have interest to defend the rights of these enemies of society more than anything else." *Who Funds Them?*, NEWSWATCH, Oct. 21, 1991, at 15-16.

159. For a detailed analysis of the techniques used by the military to neutralize the legal profession, see generally Oko, *supra* note 86.

160. See *id.* at 263.

government,¹⁶¹ and (3) calling for the restoration of democracy.¹⁶² Military regimes expect lawyers, along with the rest of society, to passively accept their policies. They fear that frequent criticisms will incite the public and view such calls as attempts to remove them from power. Military regimes, therefore, seek ways to cabin legal practice, especially human rights litigation,¹⁶³ to prevent lawyers from pursuing the protection of civil liberties beyond limits acceptable to the military regime. Military regimes limit lawyers' activities and prestige in society by generally disregarding the constitutional democratic order,¹⁶⁴ manipulating the leadership of the legal profession,¹⁶⁵ and threatening and carrying out acts of violence against lawyers.¹⁶⁶ The published reports of human rights

161. *Id.*

162. Driven by the belief that calls for democracy threaten their power base, Nigerian military regimes often resort to brutal measures to silence perceived opponents, especially pro-democracy activists, and to prevent them from disseminating information about democracy. *See id.* at 264.

163. The military regime's attitude toward human rights is somewhat ambivalent. It recognizes, and indeed professes, respect for human rights but gets anxious whenever citizens and lawyers exercise those rights, especially the freedom of expression. Vice President Augustus Aikhomu's address at a human rights seminar held in Lagos in 1992 amply portrays the military's attitude toward human rights:

[W]hen this administration took office in August 1985, it assured the nation that most of its policies would be anchored on human rights. I have often stated that given the socio-economic circumstances under which we have had to operate over the years, I am willing to stick out my neck to assure this August gathering that we have done well. . . .

Having made these points, I would like to draw attention to a recent development which in my view is unwholesome. My concern stems from the activities of certain individuals who would want to tarnish obviously well intended policies and actions with the paint brush of human rights Surely, human rights protection does not demand of a public office holder such stringent code of performance as would be unexpected of his colleagues elsewhere. To crusade for human rights is not a license to lampoon the integrity of fellow citizens.

Vice President Admiral Aikhomu, *Address, in Federal Min. of Justice, Law Review Series No. 12, PERSPECTIVES ON HUMAN RIGHTS 290 (1992)* [hereinafter *PERSPECTIVES ON HUMAN RIGHTS*].

164. *See* Ameze Guobadia, *Human Rights in Nigeria: A Historical Perspective, in PERSPECTIVES ON HUMAN RIGHTS, supra* note 163, at 57. Guobadia accurately describes the military's contempt for constitutionalism:

[T]he military have left their mark on the history of human rights in Nigeria. Their rule has been characterised by a litany of infractions of human rights provisions. These include detention without trial under different State Security and Detention of Persons Decrees, suspension of the fundamental human rights provisions of existing constitutions, and the related practice of promulgation of ouster clauses by which the courts are excluded from inquiring or adjudicating upon claims; retroactive legislation even in criminal matters contrary to section 35(7) of the constitution of 1979.

Id. at 66.

165. *See* Oko, *supra* note 86, at 265.

166. *See id.* at 262-65.

organizations contain chilling and gruesome accounts of harassment, detention without trial, the torture, and even murder of lawyers, especially those actively engaged in human rights litigation.¹⁶⁷

These techniques have ensured government emasculation of the legal profession and undermined the lawyers' role in society.¹⁶⁸ A credible threat of harassment lingers menacingly over members of the legal profession, generating a degree of uncertainty inhospitable to human rights litigation.¹⁶⁹ The military's unchallenged control of the government machinery gives it considerable leverage to chasten or reward lawyers, depending upon their stand on issues of national concern.¹⁷⁰ Very few lawyers in countries under a military regime find confronting the military so compelling as to warrant professional and personal ruin.

The net result of manipulation and harassment of the legal profession is a substantially weakened, fragmented, and disorganized profession that lacks the capacity to effectively respond to human rights violations by the military.¹⁷¹ A demoralized and disorganized legal profession offers little threat to an adamant and resolute dictatorship. A legal profession controlled, manipulated, and incessantly harassed by the military has not only damaged the integrity of the legal profession, but also has robbed society of the services and advice necessary to sustain the rule of law.

As discussed above, considerable tension between the military and lawyers has characterized the military era.¹⁷² The enthronement of a civilian regime and the adoption of a new constitution will strengthen the position of lawyers in Africa. Constitutional democracy provides an opportunity for African nations to rise above their ignoble past, to address the legacy of oppression and human rights violations, and most

167. For a detailed account of harassment of lawyers in Nigeria, see AYO OLANREWaju, *THE BAR AND THE BENCH IN DEFENSE OF RULE OF LAW IN NIGERIA*, 86-104 (1992). The repressive techniques designed by the Nigerian military regimes to harass and intimidate the legal profession are similar to measures adopted by military regimes around the world to neutralize lawyers. See *LAWYERS' COMMITTEE FOR HUMAN RIGHTS, IN DEFENSE OF RIGHTS: ATTACKS ON LAWYERS AND JUDGES IN 1993*, at 35-40 (1994); *LAWYERS' COMMITTEE FOR HUMAN RIGHTS, SHACKLING THE DEFENDERS: LEGAL RESTRICTIONS ON INDEPENDENT HUMAN RIGHTS ADVOCACY WORLDWIDE* (1994).

168. See *Oko*, *supra* note 86, at 260-61.

169. See *id.* at 262-65.

170. See *id.* The military regime's dual strategy of co-optation and harassment seems to have produced the desired results. Upon accepting appointive positions, senior members of the legal profession who have the capacity to mobilize lawyers against the military turn into pliable instruments of state power. They do whatever the military wants them to do, including sanctioning human rights violations. On the other hand, the harassment of lawyers, especially those active in civil rights protection, discourages lawyers from speaking out against injustice. See *id.* at 265.

171. Motivated by concerns for personal safety, some lawyers shy away from human rights litigation. See *id.* at 262-67.

172. See *supra* notes 61-79 and accompanying text.

importantly, to restore the dignity of their citizens. However, it is unrealistic to expect that democracy will dissolve the instinct for oppression and victimization so deeply embedded in the consciousness of elected officials.¹⁷³ Guaranteeing rights and freedoms is a relatively simple task; it only requires provisions in the constitution stipulating or enumerating citizens' rights and freedoms. The major task is to ensure that elected officials respect the rights contained in the constitution. The legal profession must give life and meaning to the abstract human rights provisions contained in the new constitution.¹⁷⁴ Freed from the shackles of despotism, lawyers will help the civil society curb the excesses of elected officials.

Human rights protection under a civilian administration is equally important because the political elite that openly condemn human rights violations under military regimes often end up as the worst violators of human rights.¹⁷⁵ Civilian administrations tend to continue human rights violations inherited from prior military regimes.¹⁷⁶ Furthermore, the powers conferred on the state are enormous and prone to be subverted by elected officials, most of whom are unfamiliar with democratic traditions.¹⁷⁷ The real possibility exists that the state will unduly encroach on rights and liberties. Therefore, lawyers must maintain their vigilance under

173. Democracy marks the end of military dictatorship—an end to formalized and sanctioned disregard for the rule of law by the military that operates under expansive and elaborate laws authorizing it to operate without any sense of accountability. Democracy will not necessarily mark the end of human and civil rights abuses.

174. Poignantly describing the lawyers' role in the protection of human rights under a constitutional government, Nnaemeka Agu, a retired Justice of the Nigerian Supreme Court, observed that

it is the Lawyer in various capacities who can see that human rights provisions in the constitution and those instruments do not simply become dead letter. The real challenge to Nigerian lawyers is to see that the legal infrastructure for flourishing human rights principles and the machinery for their enforcement are clearly in place.

Justice Nnaemeka-Agu, *The Role of Lawyers in the Protection and Advancement of Human Rights*, quoted in Olisa Agbakoba, *The Role of Lawyers and the Observance of Human Rights*, 5 J. HUM. RTS. L. & PRAC. 115, 120 (1995).

175. Nigeria's human rights record under civilian administrations is less than satisfactory. The most egregious human rights violation under a civilian administration occurred in 1980 when the ruling party, the National Party of Nigeria, arrested and deported to Chad a prominent politician from a rival party on the unverified and unprovable allegation that he was not a Nigerian. Alhaji Shugaba, the majority leader of the Great Nigeria Peoples Party in Borno state, was arrested in the early hours of the morning and transported across the country's borders by federal agents without an opportunity to defend himself. For details of the deportation and the lawsuit that followed, see *Shugaba v. Federal Minister of Internal Aff.*, 1 N.C.L.R. 25 (1981) (Nig.).

176. For a vivid account of the misdeeds of the last civilian administration led by Alhaji Shehu Shagari from 1979 to 1983, see WOLE SOYINKA, *THE OPEN SORE OF A CONTINENT: A PERSONAL NARRATIVE OF THE NIGERIAN CRISIS* 61-74 (1996).

177. See NWABUEZE, *supra* note 8, at 259-60.

civilian administration and serve as mitigators of the destructive tendencies of democracy.¹⁷⁸ The legal profession must expand the scope of rights defense to cover the entire gamut of rights from contractual to constitutionally guaranteed rights. Just as civil and human rights are in jeopardy of governmental abuse, so too are other private rights at the hands of private citizens and organizations, most of whom are unaccustomed to respecting rights of fellow citizens.¹⁷⁹ Lawyers must intervene on behalf of vulnerable parties, especially the poor, marginalized, and disenfranchised minorities, and check the excesses of elected officials. Through aggressive rights litigation and advocacy, lawyers will check the tyrannical instincts of politicians and extend the promises of democracy to all in society.¹⁸⁰ The legal profession should heed the suggestion offered by the late Justice Nnamani of the Nigerian Supreme Court, who urged lawyers to mount a broad and aggressive program aimed at extending the frontiers of rights enjoyment in Nigeria. He admonished that

a courageous, honest, industrious, vigilant, independent, knowledgeable Bar is a necessary instrument for the protection of the rights of the society. Such protection is not only concerned with representation in Court in matters in which one right or the other has been violated or is threatened, but extends to giving legal advice which may either warn the client against embarking on a course of action which will bring him into conflict with the Law and threaten his rights, or may assist him in taking such steps as are necessary to protect his rights from violation, or to extract remedies where they have been infringed.¹⁸¹

Lawyers must also build protective devices around institutions necessary for the proper functioning of democracy. Lawyers, on behalf of such institutions, must promptly challenge legislation and executive decisions that constrain and limit the activities of these institutions. The effectiveness of democracy is usually inextricably linked to the existence of an adequate institutional infrastructure.¹⁸² Lawyers must champion the rights of institutions, especially the

178. See Hazard, *supra* note 150, at 1241.

179. Professor Nwabueze blames rights violations in Nigeria on the absence of a spirit or tradition of respect for human rights. See NWABUEZE, *supra* note 8, at 259-60.

180. Alexis de Tocqueville stated that "the authority [Americans] have entrusted to members of the legal profession, and the influence that these individuals exercise in government, are the most powerful existing security against the excesses of democracy." DE TOCQUEVILLE, *supra* note 41, at 283.

181. See Augustine Nnamani, *Law and the Larger Society*, 1 LAW. J. 9 (1990), quoted in Agbakoba, *supra* note 174, at 126-27.

182. See DIAMOND, *supra* note 17, at 93 (arguing that democratic consolidation must address the challenge of strengthening three types of political institutions: "the state administrative apparatus (the bureaucracy); the institutions of democratic representation and governance (political parties, legislatures, the electoral system); and the structures that ensure horizontal accountability, constitutionalism and the rule of law").

judiciary and the press, both of which have been decimated by the military regime.¹⁸³ A free press willing to expose injustice and condemn executive lawlessness will serve as a check upon the government's abuse of power. An active press that provides the public with information on the affairs of state will make the government more responsive to the wishes of the public.¹⁸⁴ The quality of public debates and discussions on issues of national concern will be significantly enhanced if the press provides the public with the necessary information. An independent judiciary insulated from political pressures will be in a better position to administer justice.¹⁸⁵

B. *Rejuvenating the Civil Society*

The vast majority of Nigerians do not expect much from the political process.¹⁸⁶ Indifference or apathy toward the political process results from years of abuse at the hands of an omnipresent despot.¹⁸⁷ Change from a military to a civilian administration will not by itself change the social realities of apathy toward politics. Addressing these social problems is very crucial because the social reality, rather than change in administration, ultimately determines the success of democracy. If democracy is to prosper in Africa, lawyers must help to re-energize the civil society and help it "learn anew the ways of independent existence and action."¹⁸⁸ They must revamp democratic institutions, alter citizens' poor and often negative perception of the political process, and help the civil society resist the excesses of elected officials.¹⁸⁹ Lawyers must repair and

183. For a detailed account of the suppression of freedom of the press under Nigeria's military regimes, see CONSTITUTIONAL RIGHTS PROJECT, SUPPRESSION OF PRESS FREEDOM IN NIGERIA (1997).

184. See OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 142 (1996).

185. See DE TOCQUEVILLE, *supra* note 41, at 102-03.

186. The military's litany of broken promises to restore civilian administration has irredeemably destroyed citizens' faith in the democratic process. See Sakah Mahmud, *The Failed Transition to Civilian Rule in Nigeria: Its Implications for Democracy and Human Rights*, 40 AFR. TODAY 87, 91 (1993) (noting that the frequency with which Nigerians have been disappointed with the process of democratization is enough to create a negative and, perhaps, lasting feeling of hopelessness and disbelief that the cycle of military rule will be permanently broken).

187. See *supra* text accompanying notes 47-60.

188. NWABUEZE, *supra* note 8, at 85.

189. No one person or factor can singularly promote democratic consolidation. Successful democratic transition requires a major overhaul of virtually all aspects of society. More importantly, the citizens' attitudes to and concepts of law and the nation must be transformed for democracy to take hold in Africa. Ambassador Pickering's observation regarding the success of the current transition efforts in Nigeria is very apposite. He observed that

rejuvenate the civil society upon which rests the effectiveness of democracy.¹⁹⁰ To attain these objectives, lawyers must move beyond establishing formal democratic institutions and encourage citizens to have faith in the democratic process.¹⁹¹ Lawyers must cultivate in citizens the attributes necessary to sustain democracy. By rejuvenating the civil society, lawyers will empower citizens to avail themselves of legal devices that protect legal rights and encourage them to appreciate, reciprocate, and fulfill the obligations and responsibilities of citizens in a democracy.¹⁹² Moreover, a strong civil society will hold the government accountable and curb government functionaries' excesses and abuse of power.¹⁹³ Rejuvenating the civil society can be accomplished in two main ways: (1) promoting public confidence in the legal system, and (2) dislodging anti-democratic sentiments.

1. Promoting Public Confidence in the Legal System

The legal system in most developing nations is a replication of the model imported from Western countries.¹⁹⁴ Most of the laws imported from the west differ markedly from the legal culture and

[i]n the short run, the transition's success also will hinge on the cooperation of the military and the capacity of the newly elected officials to deal with social and economic problems while reconstructing democratic institutions. In the longer term, Nigeria's success will depend on the efforts and attitudes of leaders in every field, and citizens of every ethnic and religious group, to maintain its unity, freedom, direction, and sense of national purpose.

Pickering Reviews Prospects for Democracy in Nigeria, AFR. NEWS, Jan. 6, 1999.

190. For the role of the civil society in the democratization process, see Levin, *supra* note 10.

191. Central to the success of the democratic process is faith in the ability of citizens to govern themselves. John Dewey noted that

the foundation of democracy is faith in the capacities of human nature; faith in human intelligence and in the power of pooled and cooperative experience. It is not belief that these things are complete but that if given a show they will grow and be able to generate progressively the knowledge and wisdom needed to guide collective action.

JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 211 (1927).

192. A weak civil society will adversely affect democratic consolidations in Africa. See generally Crawford Young, *In Search of Civil Society, in CIVIL SOCIETY AND THE STATE IN AFRICA* 33 (John W. Harbeson et al. eds., 1994).

193. This will satisfy the two conditions for democracy laid down by Madison—a government capable of governing and a society capable of controlling the government. For a discussion of how a virile civil society can promote democratic consolidation, see DIAMOND, *supra* note 17, at 239-50.

194. See Thomas W. Waelde & James L. Gunderson, *Legislative Reform in Transition Economies: Western Transplants—A Short Cut to Social Market Economy Status?*, 43 INT'L & COMP. L.Q. 347, 367 (1994) (noting that in many, if not most, developing countries, law transplant from the former metropolitan countries occurred during and even after political emancipation).

the legal process of the receiving nation.¹⁹⁵ The Western-type legal system is often viewed with suspicion, especially by the poor and unsophisticated segments of society.¹⁹⁶ Suspicion of the legal system manifests itself in two ways. First, many citizens, especially the illiterate and the poor, feel alienated by the legal system. To them, the imported legal system is replete with inequities designed to protect the interests of the elite in society.¹⁹⁷ Most of them blame their inability to enjoy facilities of modern society on the structural imbalances and inequities in the legal system. The high costs of legal services, long and complex court processes, and inordinate delays in court, tend to reinforce the belief that access to and enjoyment of legal rights depends on status.¹⁹⁸

The second suspicion, more fundamental than the first, threatens the very foundation of the system of justice. The formal dispute resolution machinery of the legal system is mostly

195. See *id.* at 368.

196. Justice Oputa, retired Justice of the Nigerian Supreme Court, eloquently describes the result of the imposition of foreign laws and legal institutions on Nigeria. He states that

[t]he problems of law and justice anywhere in the world are enormous and acute. These problems appear in greater and sharper relief in post colonial developing societies. In many of these, (as in Nigeria), the law and legal institutions were imported and transported from the "mother country." They were not gradually developed internally. The above situation resulted in the average indigenes—the village dwellers—viewing those laws written in a foreign language, as not made for their benefit, but as vestiges of our colonial past. Thus they did not, and maybe could not, appreciate the role of law in society. There was thus a sense of utter helplessness amongst our people of what the law can do for them. The only times, the average villager comes in contact with the law, are when the tax or rate collector comes to arrest him for nonpayment of his taxes or rates or when constable comes along on a criminal investigation.

Oputa, *supra* note 62, at 37.

197. See *id.* at 38. Oputa notes that "[t]he colonial system was not based on right but might, on violence, on the subjugation of the native population, on structural disparity and injustice, on ruthless economic exploitation, on racism and discrimination, on the superiority of the colonisers and the inferiority of the colonised." *Id.*

198. See G.N.K. Vukor-Quarshie, *Criminal Justice Administration in Nigeria: Saro-Wiwa in Review*, 8 CRIM. L.F. 87, 104 (1997). The author notes that

the criminal justice system that the British bequeathed to Nigeria has certain objective shortcomings: the system is expensive, inflexible, overly technical, and elitist. Social and economic disadvantages also "rule out access to the judicial process for the overwhelming majority of the population; for them the antiquated informal procedures of conciliation and mediation are the first recourse in situations of conflict. For the majority, the rights of the official legal system are unavailable."

Id. (quoting J.B. Ojwang, *Laying a Basis for Rights Towards a Jurisprudence of Development*, in AFRICAN LAW AND LEGAL THEORY 371 (Gordon R. Woodman & Akintunde O. Obilade eds., 1995)).

incompatible with traditional conflict resolution patterns.¹⁹⁹ This incompatibility leads some citizens to regard the legal system as an impediment to social equilibrium. Civilians also view the Western-type legal system, a relic of colonialism, as unresponsive to society's desire for justice and social harmony. For example, an ardent Moslem will be hard-pressed to understand why the constitutional requirements of freedom of religion make it perfectly legal for a non-Moslem to openly consume alcohol in a Moslem city. Also, some people cannot relate to the fact that a person who killed his neighbor can escape punishment on technical grounds like self-defense or the prosecution's failure to prove its case beyond a reasonable doubt.²⁰⁰ These attitudes undermine the legitimacy of the Western-type legal system and engender distrust for the legal order, including the democratic process.

Distrust for the legal process cannot be treated as just another consequence of underdevelopment that the transition to democracy can easily address. Quite to the contrary, distrust in legislators can easily cripple the democratic process. The history of distrust of the system is long and deep, and citizens may be unprepared to abandon deeply held sentiments simply because of the transition to democracy. When citizens remain distrustful of the legal process, the dynamics of the democratic process, which depends on the rule of law, are severely weakened and ultimately unable to function.²⁰¹

199. Traditional Nigerian society has within it a complete system of social ordering based on customary norms, mores and values, and patterns of dispute resolution that chiefly rely not upon rules but the resolution of the conflict by talking and accommodation. The traditional dispute resolution mechanism subordinated the rights of the individual to the overriding interests of the community. This contrasts sharply with the Western-type legal system that places significant emphasis on the legal rights of the disputants. For an interesting study of customary arbitration in Nigeria, see Virtus Chitoo Igbokwe, *The Law and Practice of Customary Arbitration in Nigeria: Agu v. Ikewibe and Applicable Law Issues Revisited*, 41 J. AFR. L. 201 (1997).

200. In traditional Ibo society, the killing of another, regardless of circumstances, is inexcusable and attracts severe punishment. See, e.g., CHINUA ACHEBE, *THINGS FALL APART* (1959); Okey Martin Ejidike, *Human Rights in the Cultural Traditions and Social Practice of the Igbo of South-Eastern Nigeria*, 43 J. AFR. L. 71, 75 (1999) (noting that the seriousness with which homicide is viewed is a function of its conception as an offense against the earth goddess).

201. The relationship between the rule of law and democracy is well documented. As Thomas Carothers observed,

[t]he relationship between the rule of law and liberal democracy is profound. The rule of law makes possible individual rights, which are at the core of democracy. A government's respect for the sovereign authority of the people and a constitution depends on its acceptance of law. Democracy includes institutions and processes that, although beyond the immediate domain of the legal system, are rooted in it Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy—regulatory mechanisms, tax systems, customs structures, monetary policy, and the like—would be unfair, inefficient, and opaque.

Democracy cannot be consolidated if citizens do not have faith in the ability of the legal process to meaningfully address their demands. Lawyers must help citizens to overcome their distrust and contempt for the Western legal system, including the democratic process. Cynicism may be overcome, or at least considerably reduced, through education. Educating the masses on the dynamics and benefits of democracy may produce enough moral suasion to induce behavioral changes in citizens who may be apathetic to democracy. Contemporary civic education efforts have yielded scant results principally because such efforts are largely uncoordinated, ill-organized, and without any institutional backing from the legal profession.²⁰² The legal profession must, in a coherent fashion, engage in civic education programs designed to encourage citizens to change their attitudes toward the legal order.²⁰³

Another way to promote confidence in the legal system is to create a consciousness of legal rights. Consolidating democracy requires a virile civil society, aware of legal rights and willing to rely on the legal process to resolve conflict.²⁰⁴ Lawyers must educate citizens on the parameters of acceptable conduct and encourage them to follow the law in the pursuit of their objectives. The legal profession can influence citizens to obey the law by explaining the law to them and promoting the central virtues of the legal order. Lawyers must help translate abstract and often esoteric legal concepts into language easily understandable to the masses.²⁰⁵ Reducing the law to simple and readable language, preferably local language, will strip away much of the mystery that surrounds the legal system. Constitutionally guaranteed rights and freedoms mean little or nothing unless citizens are aware of such rights and are prepared to defend them against abuse. Sufficient incentives can be mustered to encourage citizens to follow the dictates of the law once

Thomas Carothers, *Law and Foreign Policy: Creating a Legal Culture*, CURRENT, May 1998, at 23.

202. The Constitutional Rights Project, a non-governmental organization, is trying to fill the void in this area by publishing journals, bulletins, and flyers that educate the citizens about their rights, duties, and obligations in a democracy.

203. Extolling the virtues of civic education, A. E. Dick Howard stated that

ultimately, no objective is more important than civic education—the inculcation of civic virtues. A viable democracy requires that citizens understand that liberty is not a license, that the open society depends on mutual tolerance, that rights have a universal quality. A people who do not understand the basic precepts of free government are unlikely to keep it alive and vibrant.

A. E. Dick Howard, *Constitution-Making in Central and Eastern Europe*, 28 SUFFOLK U. L. REV. 5, 15-16 (1994).

204. See DIAMOND, *supra* note 17, at 64.

205. See Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181, 182-83 (1999) (arguing that providing access to the law is part of the primary function of lawyers in society).

the legal profession explains them. Citizens need to know their rights, how to protect those rights, and most importantly, to appreciate the relevance of the rule of law in society.²⁰⁶ If citizens know their legal rights and the freedoms, they will exhibit greater commitment to the rule of law, thus significantly enhancing the prospects of implementing democracy.²⁰⁷

Democracy will prosper once citizens believe "in the existence and effectiveness of the rule of law as the best means of conflict resolution."²⁰⁸ Symposia organized or sponsored by the legal profession for the laity will provide an effective medium for promoting awareness of the role of law in society. These frequent symposia will provide occasions for the public to learn about the law, exchange ideas, and raise concerns about legal issues. Seminars should cover issues such as rights, liberties, the nature of the political process, accountability systems, and avenues for redress. The aim should be to educate and ultimately empower the citizens to take advantage of the law to advance their legitimate interests.

2. Dislodging Anti-Democratic Attitudes

Most democratic transition programs focus almost exclusively on creating formal democratic structures, such as drafting and adopting a new constitution, establishing political institutions, such as political parties, and electing a civilian administration through competitive elections.²⁰⁹ Little or no attempt is made either to dislodge anti-democratic sentiments developed during years of

206. Lawyers must help establish a rule of law culture that permeates every aspect of society. Citizens should be encouraged to heed the advice of Henry Hyde, Chairman of the House Judiciary Committee, who admonished that

[t]he "rule of law" is no pious aspiration from a civics textbook. The rule of law is what stands between all of us and the arbitrary exercise of power by the state. The rule of law is the safeguard of our liberties. The rule of law is what allows us to live our freedom in ways that honor the freedom of others while strengthening the common good.

Impeachment Trial of President William Jefferson Clinton, 106th Cong. (1999), available in 1999 WL 14242 (closing remarks of Rep. Henry Hyde, Chair of the House Judiciary Committee).

207. Pepper states, "The presumption is that these laws are created for the common good. They can function as intended, however, only if those intended to be affected, benefited, restrained and channeled by the vast welter of laws know of them." Pepper, *supra* note 205, at 182.

208. Ellen L. Lutz, *Strengthening Core Values in the Americas: Regional Commitment to Democracy and the Protection of Human Rights*, 19 HOUS. J. INT'L L. 643, 647 (1997).

209. See Koehn, *supra* note 80, at 418 (arguing that Nigeria's transition programs deal more with formal structural rearrangement and realignments and avoid dealing with the difficult matters of political culture, political economy, and mass mobilization in the official structures and electoral process).

military rule²¹⁰ or to induce behavior modification necessary to sustain democracy.²¹¹

Nigeria's experience reveals that it is difficult to implement democracy without corresponding behavioral and attitudinal changes.²¹² Nigeria, like most African nations, has learned that democratic societies cannot be established through force or executive fiat, but only through creating the right environment for democracy to foster.²¹³ Encouraging citizens to change their attitude toward democracy is the only way to prevent the cyclic and endemic disruption of the democratic process in Africa. There must be a desire for change on the part of both the masses and the elected officials. Democracy works if citizens are committed to it.²¹⁴ As the German President rightly observed:

Not even the most perfect constitution can ensure the development of democracy in any state if this development is not supported by citizens . . . [d]emocracy lives from bases which not even the best possible

210. For the impact of military rule on the civil society, see Ibrahim, *supra* note 112, at 155, 160.

211. See J.C. Sonnekus, *South Africa's Transition to Democracy and the Rule of Law*, 29 INT'L LAW. 659, 684 (1995) (noting that "[t]he history of post-independent Africa reveals an almost total failure of constitutionalism as exhibited by the lack of respect for constitutions or constitutional documents and the rule of law.")

212. Prior attempts at establishing democracy focused almost exclusively on creating legal and political infrastructure. No effort was made to promote the social and environmental factors necessary to sustain democracy. Professor Nwabueze lists twelve factors necessary for democracy:

- (i.) multi-partyism under a democratic constitution having the force of a supreme, overriding law;
- (ii.) a complete change of guards and the exclusion of certain other categories of persons from participation in democratic politics and government;
- (iii.) a genuine and meaningful popular participation in politics and government;
- (iv.) a virile civil society;
- (v.) a democratic society;
- (vi.) a free society;
- (vii.) a just society;
- (viii.) equal treatment of all the citizens by the state;
- (ix.) the Rule of Law;
- (x.) an ordered stable society;
- (xi.) a society infused with the spirit of liberty, democracy and justice; and
- (xii.) an independent, self-reliant, prosperous market economy.

NWABUEZE, *supra* note 8, at 3.

213. See Robert A. Dahl, *Thinking About Democratic Constitutions: Conclusions from Democratic Experience*, in POLITICAL ORDER 175, 178 (Ian Shapiro & Russell Hardin eds., 1996) (noting that for developing and maintaining democratic political institutions, constitutional arrangements are less important than the existence of certain favorable conditions).

214. See DEMOCRACY IN AFRICA, *supra* note 5 (noting that democracy by definition cannot be imposed by force, but it is based on largely voluntary compliance with a set of rules of the political game).

democratic constitution can guarantee the active engagement of the citizens. Democracy can serve us only if we learn to serve democracy.²¹⁵

Behavioral changes are necessary in Africa because soldiers engaged in the transition process, and neither civilians eager to assume the reigns of power nor the masses have the necessary democratic spirit.²¹⁶ The implications of a lack of appreciation of democratic principles are threefold. First, soldiers, visibly lacking an appreciation for their role in a democracy, frequently disrupt the political process.²¹⁷ Second, political elite unrestrained and unfamiliar with democratic traditions behave opportunistically, seeking power through any means and using it for selfish ends.²¹⁸ Third, citizens, highly cynical about the viability of the democratic process, do not exhibit the level of commitment necessary to sustain democracy.²¹⁹

The opportunistic, perhaps Machiavellian, attitude politicians display profoundly affects the masses' perception of politics. Deeply embedded in the Nigerian consciousness is the view that politicians are materialistic and selfish individuals who use the banner of constitutional democracy for personal aggrandizement and pursuit of sectional interests.²²⁰ This perception, empirically verifiable and backed by credible evidence, cannot be ignored without doing incalculable damage to the democratic process. Lawyers must help society counteract anti-democratic sentiments, especially the culture that condones the military's subversion of civilian authority, political

215. Weizsaecker, *Havel Say Citizen Involvement Builds Democracy*, CZECH NEWS AGENCY WORLD REP., Feb. 26, 1999, available in 1999 WL 5472099.

216. Nwabueze defines democratic temper as "a spirit . . . of tolerance of other people's interests and opinions, . . . [and the rulers'] willingness to accept that the power they exercise belongs to the people." NWABUEZE, *supra* note 8, at 258.

217. See *supra* notes 47-51 and accompanying text.

218. Professor Ewelukwa aptly provides an accurate characterization of Nigerian politicians during the first republic of 1960-1966. He states that

[m]ost of the politicians were ignorant, small-minded and parochial in outlook, and sought to make the Nigerian political arena congenial to their acquisitive, corrupt and undemocratic tendencies in life. By their methods, they made politics a rough, uncomfortable and hazardous pursuit for anyone, and in their frantic bid to enrich themselves illicitly out of public funds, they combined with certain professionals, independent contractors and even public servants to trample upon the rights and liberties of individual and to make life difficult for the common man, thereby alienating his sympathy In fact, all of [the politicians] directly or indirectly supported and encouraged improper dealings with public funds as well as aided and abetted [sic] gradual debasement of human rights and democratic values.

D.I.O. Ewelukwa, *The Constitutional Aspects of Military Take-over in Nigeria*, 2 NIG. L.J. 1, 2 (1967).

219. See *supra* notes 212-15 and accompanying text.

220. The conduct of elected officials lends credence to the perception that politicians are corrupt. See generally Ewelukwa, *supra* note 218.

corruption, and citizens' apathy toward the democratic process. In the absence of truly national political parties, only lawyers have the necessary credibility to mobilize the citizens for democratic reform.

Lawyers must shepherd the transformation of a country with despotic tendencies into one where democratic ideals prevail. This could be accomplished through education, seminars, and symposia that educate the public on the dynamics of constitutional democracy.²²¹ Educational programs initiated by lawyers should focus on two main goals: (1) inculcating democratic values in the citizens, and (2) inducing behavioral changes among the military.

3. Educating the Civil Society

The major challenge for the legal profession is to rejuvenate the civil society so that the vast majority of citizens who feel alienated from the political process will become interested.²²² Lawyers must use education as a vehicle to strengthen and promote understanding of democratic values. The ultimate goals of civic education must be to encourage citizens to appreciate and respect the central tenets of democracy—subordination of the military to civilian authority, respect for constituted authority, and resolution of conflict through established channels.²²³

Lawyers, through an aggressive civics education program, can change ignorance-driven sentiments about the democratic process. Lawyers must emphasize to the public that participating in the electoral process serves as a potent tool for citizens to ensure accountability.²²⁴ Widespread citizen participation in the political

221. Extolling the values of civic education in a democracy, Mário Soares writes that

[d]emocracy requires civic education and possession of knowledge, for it needs free and aware citizens at every level of decision making It is not sufficient to repeat the ritual of elections and to ensure that they are freely held, freely contested, and freely supervised. Voting constitutes a civic duty, but democracy requires more. Respect for the rights of minorities must be ensured, along with the rule of law. The laws must be obeyed by everyone, but above all by those who are temporarily entrusted with public office by their fellow citizens. Only if it meets these requirements can democracy preserve pluralism, secure alternation in power, and enable civil society to breathe freely.

Mário Soares, *The Democratic Invention*, J. DEMOCRACY, April 1999, at 105-06.

222. See *supra* notes 212-15 and accompanying text.

223. See generally NWABUEZE, *supra* note 8 (providing a detailed analysis of the requirements of democracy).

224. See EDWARD S. GREENBERG & BENJAMIN I. PAGE, *THE STRUGGLE FOR DEMOCRACY* 25 (1993). Extolling the virtues of popular participation in the political process, the authors observed that

[w]idespread participation in politics is a sign and a guarantee that the popular will is both expressed and enforced. Without widespread participation,

process will promote the quality of political discourse, enhance the level and quality of awareness, and ensure the enthronement of a responsive and accountable government. In addition, lawyers must educate the public on the virtues of democracy and encourage them to appreciate, reciprocate, and fulfill the obligations and responsibilities expected of citizens in a democracy.²²⁵ For example, citizens must be told that responsible citizens in a democracy pay taxes, take part in community activities, and, in some circumstances, must subordinate their preferences to the overriding interest of the public.

Citizens must also understand that constitutional democracy involves not only a civilian administration chosen through competitive elections, but also a devotion to and unquestioned acceptance of the rules and tenets of democracy.²²⁶ Citizens must be reassured that the rule of law will blossom under democracy and that their rights and liberties would be respected. More importantly, they must be convinced that the democratic process provides the best avenue for the protection of their interests.²²⁷ Only then will they be prepared to make the necessary behavioral and attitudinal adjustments necessary to sustain democracy.²²⁸

. . . the nature of the popular will can only be guessed at. And without popular participation, nothing guarantees that officials will respond to the popular will. Widespread popular participation—at least in voting and elections—is necessary in order to ensure that responsive representatives are chosen and that they have continuous incentives to pay attention to the people.

Id.

225. See *Democratic System Thrives on an Informed Citizenry*, TIMES OF ZAMBIA, Aug. 25, 1998, available in 1998 WL 17254472.

226. See DIAMOND, *supra* note 17, at 68 (“At the level of the mass public, consolidation is indicated when the overwhelming majority of citizens believe [sic] that democracy is the best form of government in principle and that it is also the most suitable form of government for their country at their time.”).

227. See ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 322 (1989) (noting that the democratic process is the most reliable means for protecting and advancing the interests of all persons subject to its collective decisions).

228. See Ndiribe A.A. Ndiribe, *Nigeria Needs the Basics to Make Democracy Work*, STAR-LEDGER (Newark, N.J.), May 6, 1999, at 22, available in 1999 WL 2977125. Ndiribe aptly describes the changes Nigerians must undertake to make democracy work:

[F]or democracy to work in Nigeria, the people must go beyond the surface and make the moral commitments without which no worthwhile development ever takes place If Nigerians want democracy, they must be ready to work for it. This means they must rededicate themselves to the protection of the civility and morality without which no society can truly be free or democratic. No society can long survive if laws are observed only in the breach, if corruption becomes an abiding social ethic, if leaders become not public servants but public paymasters, if political position becomes a blank check on which the politician writes off the wealth and future of the people.

Id.

In addition, lawyers must focus their attention on the political elite. This is very important because much of the public frustration with the democratic process stems from the behavior of political elite.²²⁹ Democracy will flourish only if it is embraced by political elite who agree to play by the rules of democracy. Thus, consolidation of democracy in Africa depends in large measure on the ability of political elite to subordinate selfish interests to the public good. Democracy will not prosper unless citizens are convinced that newly elected civilian officials will perform better than their predecessors.²³⁰ Dr. Azikiwe's admonition more than two decades ago is still relevant today. According to Dr. Azikiwe, the former President of Nigeria,

The only justification for transition to civilian rule should be unqualified assurance to the Nigerian electorate by their would-be civilian rulers that the iniquities of the past shall not be repeated, and that our people shall enjoy fundamental freedom and basic human rights under the law, and that efforts would be made to emancipate our people from ignorance, disease and want. Otherwise, any political change at present must be like jumping from the frying pan into fire.²³¹

The political elite must be encouraged to view the democratic process as the only viable way of advancing their interests.²³² Those in power must respect the rights of citizens. The opposition and those out of power must be reassured that they will be treated fairly and equitably, that their rights will be respected, that their opinions will be heard, and that adequate remedies exist for the protection of their rights. Such conditions present little incentive for anyone, including the military, to subvert the authority of the government.

4. Educating the Military

One of the most difficult challenges confronting African nations is getting the military to accept civilian authority.²³³ This task is

229. See NWABUEZE, *supra* note 8, at 264 (ranking abuse of office as "one of the greatest dangers facing democracy in Africa").

230. According to Donna Arzt, "True democracy requires much harder work, particularly in the form of long-term adult and childhood education and generally in building justification for the public's faith that democracy will be meaningfully different from the old dictatorship." Donna E. Arzt, *Bridge Over Troubled Water: Law and the Emergence of New Democracies*, 22 SYRACUSE J. INT'L L. & COM. 81, 99 (1996) (reviewing TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995) and HUMAN RIGHTS AND PEACE LAW DOCKET, 1945-1993 (Ann Fagan Ginger & Jim Ginger eds., 1995)).

231. NNAMDI AZIKIWE, DEMOCRACY WITH MILITARY VIGILANCE 12 (1974).

232. See BRUCE M. RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD 31-32 (1993) (describing how people in a democracy perceive themselves as live-and-let-live).

233. The formidable obstacle posed by Africa's military in the Continent's search for democracy was poignantly summarized by William Foltz. He stated that "[i]n most

especially difficult in Nigeria because of the long history of military rule.²³⁴ Since most military officers have spent their formative years under military rule, the only model of professionalism known to them is military involvement in government.²³⁵ Prolonged military interference in the political process has produced a highly politicized, unprofessional, and ill-trained military visibly lacking *esprit de corps*.²³⁶ General Abubakar, who presided over the transition program that culminated in the election of the Obasanjo civilian administration, in an address to the armed forces, admonished that "coup making has ceased to be fashionable"²³⁷ and urged the military officers to stop lobbying for political positions and rediscover a sense of professionalism.²³⁸ He observed that

of Africa, government has been synonymous with the military. Today, as civilian administrations struggle to create democratic traditions, their toughest task may be to convince their armies to accept secondary status and maintain political neutrality." William J. Foltz, *Officers and Politicians*, AFR. REP., May-June, 1993, at 64, 65.

234. The military has ruled Nigeria for 30 of its 39 year history as an independent nation. See Paul Adams, *Reign of the General*, AFR. REP., Nov.-Dec. 1994, at 27.

235. See Funmi Olonisakin, *Nigeria Squares up to Democratic Transition*, JANE'S INTELLIGENCE REV., May 1, 1999, available in 1999 WL 8945697 (noting that the "formidable challenge that awaits the Obasanjo government is how to sustain civilian democratic rule and keep the military out of politics"). The strategy adopted by President Obasanjo to restore professionalism in the army is to retire all army officers who have held political appointment. Commenting on the retirement of 93 officers who held political appointments between 1985 and 1999, President Obasanjo observed that "the retirements were aimed at strengthening professionalism in the public service, including the armed forces." Segun Adeyemi, *Nigeria Retires "Political" Officers*, JANE'S DEF. WKLY., July 14, 1999, available in 1999 WL 7271350.

236. The deleterious effect of military dictatorship on professionalism in the army was well stated by General Salihu Ibrahim, the former Chief of Army Staff in Nigeria. He lamented:

I make no pretence of my disdain of the involvement of the military in the political affairs of this country. I hold the strong view that any military organization that intends to remain professional and relevant to its calling has no business meddling in the political affairs of its country . . . It is quite an open secret that some officers openly preferred political appointments over and above regimental appointments no matter the relevance of such appointments to their career progress. The inability of us to make the desired progress in our professional orientation during my tenure is explained by this political interest group, who though very small in number, constituted themselves into a very powerful pressure group, unfortunately to the detriment of the service, and, of course, their colleagues. The end result of the collective actions of this pressure group was the visible decline in professionalism, morale and discipline in the Nigerian Army. For example, we suddenly found ourselves operating the Nigerian Army with disregard to the existing rules and regulations . . . We became an army whereby subordinate officers would not only be contemptuous of their superiors but would exhibit total disregard to legitimate instructions of such superiors.

Hutchful, *supra* note 5, at 54-55 (alterations in original).

237. *Pickering Reviews Prospects for Democracy in Nigeria*, *supra* note 189.

238. See *id.*

a major consequence of prolonged military rule has been a grave lessening of professionalism among officer and men. . . . *Esprit de corps* is dangerously undermined and the sense of cohesion to the operational effectiveness of our services has been dangerously eroded.²³⁹

The military has never shown eagerness to abide by the dictates of constitutional democracy, especially the acceptance of civilian authority. Even under democratic regimes, the military exerts considerable influence in domestic affairs, cutting deals, demanding concessions, and extracting assurances that run counter to democracy. Politicians, acutely aware of their vulnerability, and eager to stay in office, readily grant the military whatever it asks for. This severely weakens the authority of the civilian administration and ultimately undermines the consolidation of democracy. In some cases, the military works to undermine the democratic process to justify its continued existence or to return to power.²⁴⁰

The challenge for most developing nations in the transition to democracy is figuring out how to effectively disengage the military from the political process and reorient it to issues of external security.²⁴¹ Progress in democratic transition will easily be reversed if the emergent democracy cannot compel the military to accept civilian authority. Compelling the military to accept civilian authority will not be an easy task, especially for a military that has historically arrogated to itself the right to determine what is good for the country.²⁴² Nigeria's experience shows that it is futile to use the law to curb frequent military intervention.²⁴³

Insulating the democratic process from military interference will only be effective to the extent that the military is transformed into

239. *Id.*

240. Babangida's annulment of the 1992 presidential election in Nigeria amply illustrates this point.

241. See DIAMOND, *supra* note 17, at 113 (maintaining that democracy cannot be consolidated until the military becomes firmly subordinated to civilian control and committed to the democratic constitutional order).

242. See *supra* notes 59-60 and accompanying text.

243. Section 1(2) of the 1979 Nigerian Constitution outlawed forceful assumption of political power by the military. It stated that "the Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of the constitution." NIG. CONST. § 1(2) (1979). Though this provision did not prevent the December 1983 coup that ousted the Shagari regime, Professor Nwabueze defends the inclusion of such a provision in the constitution. He argued that

[t]he provision is not as naive and useless as it may seem. It has a certain symbolism and psychological appeal which a similar prohibition in an ordinary law is not likely to command. Such an injunction embodied in the very first article of the Constitution may aid the process of creating an ethic of respect for the Constitution on the part of all, including the military.

NWABUEZE, *supra* note 67, at 337.

a professional establishment. Reorienting the military to issues of national security, enhancing professionalism in the military, and educating the military on its role in a democracy may prove to be the best way to forestall military involvement in politics. This reorientation requires education that lawyers can skillfully and delicately provide. The military must be educated to become productive and responsible members of a democratic society. Lawyers must promote dialogue between the military and the civil society.²⁴⁴ Frequent interaction between the military and the civil society will help each party overcome negative images and ultimately serve the cause of democracy. George Biddle notes that

[t]he military must not be isolated and insulated from civil society. Rather the two must have an active and ongoing exchange. If the military is exposed to the diverse interests and forces within pluralistic civil society, the armed forces begin to understand that their role is not to dominate or influence the civil sector but to be subordinate to it and protect it from foreign threat. If the military learns to appreciate the broad spectrum of interests that exist, it intuitively realizes that its function is to remain neutral and thus serve democracy. Therefore, civil society and the armed forces must be constantly exposed to one another and maintain an open and transparent dialogue.²⁴⁵

C. *Lawyers and Law Reforms*

Most developing nations use law as an important instrument of social change.²⁴⁶ Lawyers understand, better than ordinary citizens, the role of law in a constitutional democracy. For lawyers to successfully assist in the consolidation of democracy, they must help craft laws that change the legacy of authoritarianism. Policies, proclamations, and rhetoric will never suffice; each must be reflected in laws consistent with democratic ideals. It is the lawyer's job to sift through the pronouncements and help enact laws that will

244. Funmi Oloisakin, a political commentator, observed that "there must be a massive re-education programme to engage the military institution and the civilian population in continuous dialogue. A level of trust could then be rebuilt between the two to recreate stable civil-military relations, which is presently at its lowest ebb." Oloisakin, *supra* note 235.

245. Hutchful, *supra* note 5, at 27 (quoting George Biddle).

246. See Franz von Benda-Beckmann, *Scape-Goat and Magic Charm: Law in Development Theory and Practice*, 28 J. LEGAL PLURALISM & UNOFFICIAL L. 129, 129-30 (1989):

The idea of legal engineering, of achieving social and economic change through government law, still ranks foremost in the arsenal of development techniques. Law . . . is used as a magic charm. The lawmaker seeks to capture desired economic or social conditions, and the practice supposed to lead towards them, in normative terms, and leaves the rest to law enforcement, or expressed more generally, to the implementation of policy. (citations omitted)

modify behavior toward the desired goals and change institutions that frustrate the democratic transition.²⁴⁷

Democracy and law reform must therefore reinforce and complement each other. Law and legal institutions must be reformed to achieve the goals of democracy. Great transformative energies are unleashed not only when lawyers confront despots, but also when lawyers engage in constructive law reform and offer suggestions that seek to bring the law and society closer to universally accepted norms of justice.²⁴⁸ Lawyers need to reorient the legal process to handle massive changes that will result from the restoration of a democratically elected civilian administration.²⁴⁹

Law reform efforts should focus on three main areas. First, laws imported from England do not adequately address the realities of a developing nation with dramatically different cultural, economic, and political assumptions.²⁵⁰ The legal profession must play a leadership role in helping society revise such existing imported laws and assist in the promulgation of laws that faithfully correspond to the aspirations of a nation in its own process of democratization.²⁵¹

247. See ANN SEIDMAN & ROBERT B. SEIDMAN, *STATE AND LAW IN THE DEVELOPMENT PROCESS: PROBLEM-SOLVING AND INSTITUTIONAL CHANGE IN THE THIRD WORLD* 38-39 (1994) (arguing that to foster development, government must use law to change institutions that perpetuate underdevelopment).

248. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 171 (1988) (citing Louis Brandeis for the proposition that "lawyers have the opportunity to make the law better by law reform activity, and to make their clients better by using their advisory role to awaken the clients to the public dimension of their activities, to steer them in the direction of the public good").

249. Military regimes often enact laws that violate established practices and procedures that safeguard citizens' rights. Most of the changes in the legal system introduced by the military serve to further the military's desire to use the law to achieve stated objectives shorn of legal constraints. As Vukor-Quarshie observed,

[i]n the area of economic crimes there has been considerable law reform activity by successive military regimes in Nigeria. Ironically however, apart from increasingly resorting to shifting the burden of proof on to the accused, and imposing harsher penalties, the principles and elements of the much disparaged Euro-American criminal jurisprudence still survive.

Vukor-Quarshie, *supra* note 71, at 224 n.65.

250. A review of the laws in Nigeria reveal that some pre-1900 English Statutes that have long been abolished in England still apply in Nigeria. For example, a study conducted by the National Law Reform Commission in 1987 showed that 195 pre-1900 English statutes were still applicable in Nigeria. Urging a revision of the laws to suit the realities of Nigeria, Vukor-Quarshie observed that "legal theories and processes crafted for the developed countries may not adequately explain the social reality in a developing nation like Nigeria, and neither can they be employed to prescribe policies." *Id.* at 224.

251. There exists in Nigeria a lethargic attitude to law reform. There has been no determined effort by the authorities to revise the laws of the country and establish legal institutions and concepts that will correspond to the complex and dynamic character of Nigerian modern history and politics. Even when changes are introduced, they are often ad hoc, ill-conceived, and hurriedly made to suit the exigencies of the moment. Vukor-Quarshie criticizes the ad hoc approach to law reform:

Second, laws enacted by military despots need to be revised to bring them in line with constitutional democracy. The laws that structure military rule and ensure the military's domination of the civil society must be abrogated and replaced with laws consistent with democratic aspirations of the country. This is especially important because most of the laws promulgated during years of authoritarianism are inadequate for and often detrimental to democracy.²⁵² Military regimes give little thought to promulgating laws that advance democratic ideals. Rather, the ruling military *junta* is so obsessed with protecting its power base that most laws address issues of national security.²⁵³ Security laws that curtail liberties must be replaced with laws that emphasize freedom. Adjudication of disputes should be removed from the tribunal and placed where it belongs—the courts.²⁵⁴

Third, lawyers must guide and assist the country to reform democratic and legal institutions that the military dictatorship has decimated. Lawyers must offer suggestions and proposals that will make these institutions competent, effective, and responsive to the realities of the country. Lawyers must introduce proposals that will revitalize the training of personnel involved in the running of these institutions—the judges, prosecutors, police, prison officials, and security officers. Reform measures that promote the independence of the judiciary and ensure a selection and removal procedure insulated from partisan politics will help achieve the goal of democratic consolidation.

The credibility and viability of the legal profession in society will be undermined if lawyers do not play active roles in law reform. The distrusting and cynical public will readily view nonchalant attitudes toward issues of law reform as complicity in perpetuating injustice in society. How can lawyers “expect much respect for the law from someone who has seen how readily even lawyer-citizens tolerated such inequities?”²⁵⁵ The only credible way for the legal profession

Unfortunately, the bulk of the changes and innovations in the criminal law of Nigeria has not only been reactive and incremental in nature, it has also been accomplished post-haste and *ad hoc*. Thus, being the products of *diktat* they lack the benefits of broad consultation, reasoned and dispassionate argumentation, multi-partisan input and optional models which are some of the necessary factors in paving the way towards unearthing a genuine [autonomous] legal system.

Id. at 225.

252. See generally Tobi, *supra* note 73.

253. See *supra* Part II.A.

254. One of the features of a military regime is the administration of justice through special tribunals. For a detailed study of the perilous effects of vesting adjudicatory functions in special tribunals, see CONSTITUTIONAL RIGHTS PROJECT, *MILITARY TRIBUNALS AND DUE PROCESS IN NIGERIA* (1999).

255. William J. Brennan, Jr., *Are Citizens Justified in Being Suspicious of the Law and the Legal System?*, 43 U. MIAMI L. REV. 981, 985 (1989).

to acquit itself of charges of complicity in perpetuating injustice is to champion law reform. Lawyers must constantly expose the inequities and defects in the legal system and offer suggestions for reform. Aggressive law reform championed by lawyers would convince the distrusting public that lawyers neither condone nor seek to perpetuate injustice in society. As Justice Brennan rightly observed:

Lawyers, before any other group, must continue to point out how the system is really working—how it actually affects real people. They must constantly demonstrate to courts and legislatures alike the tragic results of legal nonintervention. They must highlight how legal doctrines no longer bear any relation to reality, whether in landlord and tenant law, holder in due course law, or any other law. In sum, lawyers must bring real morality into the legal consciousness.²⁵⁶

Effective law reform requires research. Laws must be grounded upon experience, reason, and logic, rather than expediency. The legal profession should conduct frequent studies into legal problems that citizens frequently encounter, factors that impede the operation of the rule of law, and the adequacy of existing legal rules and institutions in dealing with these problems. Regular systematic surveys of problems will enable the legal profession to press for reforms and passage of laws that will alleviate the social and economic imbalances of the law. Reports of such studies may provide data and information that will help the profession structure the legal services delivery system to address the peculiar needs of those who lack the resources to protect their legitimate standing before the law.

D. *Drafting a New Constitution*

A new constitution signals a dramatic change in the governance process—from authoritarianism and executive lawlessness to a system governed by the rule of law in which there is respect for the rights of citizens.²⁵⁷ A constitution is a *sine qua non* to constitutional democracy.²⁵⁸ Professor Ndulo has written that “[t]he basic law that implements constitutional democracy is the national constitution. It represents the basic structure of an organized

256. *Id.* at 986.

257. Professor Nwabueze observed:

Since an authoritarian or autocratic regime is, by definition, a government inadequately limited by, or which, in the case of an autocracy, is not subject at all to, a constitution having the force of a supreme, overriding law, such a constitution is, accordingly, a necessary condition in any scheme of transition from authoritarianism or autocracy to constitutional democracy.

NWABUEZE, *supra* note 8, at 26.

258. *See id.* at 20.

society. Formal or informal, written or unwritten, its existence, in whatever form, is inevitable."²⁵⁹ Drafting and shepherding the adoption of a new constitution represents the culmination of the legal profession's law reform efforts. Because the object of this section is to examine the role of lawyers in the constitution-making process, substantive provisions of the constitution will not be discussed. Rather, the focus is on the two main ways by which lawyers can enhance public acceptance of the constitution: (1) promoting public involvement in the constitution-making process, and (2) helping to couch broad general agreements on key issues into enforceable constitutional provisions.²⁶⁰

Transition to democracy will be significantly facilitated by undertaking a genuine constitution-drafting process. Earlier African constitutions merely mimicked the American or British model that the departing colonial authorities imposed on the countries.²⁶¹ Local political elite later drafted constitutions without the involvement of vast segments of society.²⁶² Both the earlier and later constitutional models contained sound provisions and had the potential for promoting and maintaining democratic order.²⁶³ The introduction of foreign models without significant input from the public and necessary changes to suit local situations, coupled with the lack of democratic traditions, however, quickly led to the demise of constitutions and the regimes they sought to govern.²⁶⁴ Some of the constitutional provisions had little or no relevance to the ethos and social realities of the citizenry whose affairs the constitution was expected to govern.²⁶⁵ Politicians, the masses, and

259. Ndulo, *supra* note 13, at 80; see also OJWANG, *supra* note 4, at 1 (stating that a "constitution is the scheme of organisation of public responsibilities which must be performed in any community. It identifies or prescribes the public organs of the community and vests in them . . . particular roles which are to be performed in the interest of the people as a whole.")

260. Adopting a constitution in Nigeria typically involves four stages: (1) setting up a committee of experts to produce a draft constitution, (2) public discussion of the constitutional proposals, (3) convening a constituent assembly, and, finally, (4) promulgation of a new constitution by the Federal Military Government. See NWABUEZE, *supra* note 8, at 21.

261. See Lis Wiehl, *Constitution, Anyone? A New Cottage Industry*, N.Y. TIMES, Feb. 2, 1990, at B3 (noting that "departing colonial powers hastily imposed [on newly independent African states] carbon copies of their own documents, which evolved from different cultural and historical backgrounds.")

262. For an interesting analysis of Nigeria's constitutional history, see generally BEN NWABUEZE, *A CONSTITUTIONAL HISTORY OF NIGERIA* (1982).

263. Since attaining independence in 1960, Nigeria has changed its constitution four times, in 1963, 1979, 1989, and 1999.

264. See generally FALOLA & IHONVBERE, *supra* note 55 (discussing the failure of Nigeria's second experiment with constitutional democracy); LARRY DIAMOND, *CLASS, ETHNICITY AND DEMOCRACY IN NIGERIA: THE FAILURE OF THE FIRST REPUBLIC* (1988).

265. See Rett R. Ludwikowski, *Constitution Making in the Countries of Former Soviet Dominance: Current Development*, 23 GA. J. INT'L & COMP. L. 155, 158 (1993) (noting that one significant reason for the failure of constitutions in the Third World was the tendency to copy constitutional structures from pre-existing models, regardless of their applicability to the particular situation).

even the soldiers had one reason or another to ignore the constitution and conduct their affairs unaffected and unrestrained by it.²⁶⁶ Consequently, constitutions in most African countries have become just another book on the bookshelves of the political elite and the military, both of whom ignore and violate them with impunity.²⁶⁷

Until the public is meaningfully involved in the constitution-drafting process, a constitution that adequately deals with the aspirations of the people will not emerge.²⁶⁸ Most developing nations need a national debate on the kind of political arrangement and constitutional structure that best serve their interests.²⁶⁹ In Nigeria, for example, opinions differ markedly over the kind of political arrangement that will guarantee political stability. Some people view partition as the only viable option,²⁷⁰ while others prefer democratization under the current structure as a panacea for the country's social ills.²⁷¹ Other constitutional issues facing Nigeria include the following: representation and involvement of all ethnic groups in the governance process,²⁷² the appropriate revenue

266. The failure of constitutions appears to be a global phenomenon. See ZIYAD MOTALA, *CONSTITUTION MAKING IN AFRICA: MOVING BEYOND ETHNIC BASED CONSTITUTIONS TOWARDS A RESPONSIVE AND DEMOCRATIC CONSTITUTION* 14-20 (discussing failed constitutions in Africa); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997) (discussing failed constitutional experiment).

267. See Richard A. Rosen, *Constitutional Process, Constitutionalism, and the Eritrean Experience*, 24 N.C. J. INT'L L. & COM. REG. 263, 275 (1999) (noting that "[t]he world, unfortunately, is cluttered with reasonable, well-written constitutions, many of which have turned out to have little more value than the wallpaper on the houses of the politicians and generals who have ignored them").

268. Professor Reginald Green laments the inability of African countries to find the right constitutional model that adequately address the realities of the Continent. He wrote that

[m]any African constitutions are simply irrelevant. They do not in any meaningful sense represent the goals or operating principles of any significant interest groups[,] . . . are not seen as relevant to constitutional orders and exist because it is believed that, like national anthems, coats of arms and flags, constitutions and "development plans" are something that states have to have for ceremonial and formal symbolic purposes.

Reginald H. Green, *Participatory Pluralism and Pervasive Poverty: Some Reflections*, 1989 THIRD WORLD LEGAL STUD. 21, 47.

269. See generally *id.*

270. The growing despair over the inability of African nations to implement democracy has resulted in calls for alternatives to democratization. See Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995) (advocating partition as a panacea to social ills in Africa); Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POL'Y 3 (1992-93) (calling for the setting up of a trusteeship under the auspices of the United Nations to act as the administering authority in troubled states); William Pfaff, *A New Colonialism? Europe Must Go Back into Africa*, 74 FOREIGN AFF. 2 (1995) (making a case for recolonization).

271. See Okechukwu Oko, *Partition or Perish: Restoring Social Equilibrium in Nigeria Through Reconfiguration*, 8 IND. INT'L & COMP. L. REV. 317 (1998).

272. Ethnic tensions and distrust are serious problems in Africa. In most African nations, one or more ethnic groups, for a variety of reasons, have dominated

allocation formula,²⁷³ the role of the military in a democracy, and the powers and number of terms a president should serve.²⁷⁴

A constitution that can meaningfully resolve these problems will significantly enhance public acceptance of the constitution. The legal profession must mobilize the citizens, community groups, and associations to participate in the discussion of constitutional proposals recommended by the constitution-drafting committee. Also, through town meetings, conferences, symposia, radio, and television programs, the legal profession can enlighten and educate the citizens on key issues in the constitution. Lawyers must goad the politicians toward building a consensus developed by extensive and broad public participation. The legal profession must encourage dialogue on the entire spectrum of problems facing Nigeria. Amicable resolution of these issues is vital to the continued existence of Nigeria because, in the final analysis, a constitution will only be effective if it is acceptable to the political elite and supported by the masses.²⁷⁵ The overarching goal of constitution-making is to produce a constitution that will be "legitimate, credible and enduring, that guarantees rights and freedoms perceived to be fundamental, and that provides a structure for the effective conduct of the nation's business, for the achievement of its economic development and for the welfare of its citizens."²⁷⁶

Constitutions drafted after long public debate are likely to enjoy greater legitimacy than those imposed by fiat.²⁷⁷ Public debates will promote public acceptance and understanding of the new constitution.²⁷⁸ Citizens will begin to view the constitution as not

other ethnic groups since independence. Unless meaningfully resolved, ethnic tensions pose a tremendous potential for thwarting the democratic process.

273. For a detailed analysis of the controversy surrounding revenue allocation in Nigeria during the Second Republic, 1979-83, see Attorney Gen. Bendel State v Attorney Gen. of the Fed., 2 N.C.L.R. 1 (1982) (Nig.).

274. Constitution drafters in developing nations face a set of problems that may be unique to developing segments of the world: ethnic conflicts, a politically motivated military that lacks a culture of subordination to civilian authority, and legacies of mismanagement, corruption, poverty and anti-democratic sentiments. Yash Ghai stated, "In the developing countries, constitutions were expected to carry a much heavier burden. They had to foster a new nationalism, create national unity out of diverse ethnic and religious communities, prevent oppression and promote equitable development, inculcate habits of tolerance and democracy, and ensure capacity for administration." Yash Ghai, *The Theory of the State in the Third World and the Problem of Constitutionalism*, 6 CONN. J. INT'L L. 411, 416 (1991).

275. See BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 62 (1992) (noting that once the elite accept the constitution, it will be more difficult for them to upset the constitutional equilibrium).

276. Muna B. Ndulo & Robert B. Kent, *Constitutionalism in Zambia: Past, Present and Future*, 40 J. AFR. L. 256 (1996).

277. See David A. J. Richards, *Comparative Revolutionary Constitutionalism: A Research Agenda for Comparative Law*, 26 N.Y.U. J. INT'L L. & POL. 1, 14-15 (1993) (noting that popular discussion and debate in American constitution-making was important for the legitimacy of institutions created by the constitution).

278. Advocating the need to involve the public in the constitution making process, Professor Nwabueze writes that

just an abstract document replete with pious declarations, but as something "they can use to define, defend and promote widely shared social interests—as a law empowering the people to demand protections against recurrence of the abuses of the past."²⁷⁹ Public participation in the constitution-drafting process is especially important in a country like Nigeria with high illiteracy and a significant lack of democratic culture. Educating the public on the dynamics of constitutionalism will engender public respect and acceptance of the constitution that ultimately emerges. As Professor Rosen rightly stated:

In a society which has limited experience with successful constitutional governance, and in which the notions of democracy, constitutionalism, and the rule of law are not well developed, the drafters must also popularize and educate the people about these concepts, for a people cannot be wedded to something which they do not understand.²⁸⁰

The advantages of such a debate will be lost if the military can impose its preferences on the nation.²⁸¹ Most Constituent Assemblies set up to ratify constitutions are often restricted or tele-guided by the military.²⁸² They have become venues for citizens and handpicked government representatives to discuss issues pre-ordained by the military.²⁸³ In 1979, the Obasanjo regime prodded the Constituent Assembly to adopt a presidential system of government.²⁸⁴ In 1988, the Babangida administration publicly

[t]he aim is to generate public interest in the Constitution and an acceptance of it as the common property of all, an attitude that everybody has a stake in it. A sense of identification, of acceptance and attachment is necessary to bestow some legitimacy on the Constitution, and to ensure its longevity; for without it, the Constitution is likely to remain a remote, artificial object, with no more real existence than the paper on which it is written.

NWABUEZE, *supra* note 67, at 343.

279. Paul, *supra* note 82, at 235.

280. Rosen, *supra* note 267, at 277.

281. See *Towards a Free and Democratic Uganda: The Basic Principles and Policies of the National Resistance Movement (NRM)*, quoted in Oliver Furley & James Katalikawe, *Constitutional Reform in Uganda: The New Approach*, AFR. AFF., Apr. 1, 1997, at 243 n.8 ("Constitutions imposed on the people by guise, wile or force cannot be the basis of stable and peaceful governance of men.")

282. See Peter M. Lewis, *Civil Society, Political Society, and Democratic Failure in Nigeria*, in *DEMOCRACY IN AFRICA*, *supra* note 20, at 135, 139 (noting that "[t]he Constituent Assembly of 1988-89, charged with revising the constitution, received repeated admonitions from the president over the boundaries of acceptable reform").

283. For example, the Constitutional Conference set up in 1994 by General Abacha to review the constitution consisted of 273 elected delegates and 96 delegates nominated by the Abacha regime. See Richard L. Sklar, *Crises and Transitions in the Political History of Independent Nigeria*, in *DILEMMAS OF DEMOCRACY IN NIGERIA*, *supra* note 32, at 15, 39.

284. See *id.* at 25. In October 1975, General Muhammed appointed a Constitutional Drafting Committee and instructed them *inter alia* to provide for an executive president and an independent judiciary. See *id.* at 23.

announced its stand on vital aspects of the constitution prior to the setting up of a Constitution Review Committee and a Constituent Assembly to review and ratify a new constitution for Nigeria.²⁸⁵ Similarly, General Abacha hoisted the idea of a rotational presidency on the Constituent Assembly.²⁸⁶ In some cases, the military government unilaterally amended the constitution after the Constituent Assembly ratified it.²⁸⁷

IV. PREPARING AFRICAN LAWYERS FOR DEMOCRATIC REFORM

The absence of a credible political process and the prevalence of authoritarian culture and a high illiteracy level in most African nations have thrust upon African lawyers functions and problems scarcely encountered by their counterparts in developed nations.²⁸⁸ In addition to protecting individual rights through counseling and litigation, African lawyers are expected to fill the vacuum created by the military's disruption of the political process.²⁸⁹ Lawyers must offer new ideas and suggestions on how to produce social equilibrium.²⁹⁰ In particular, they must devise creative ways of

285. See NWABUEZE, *supra* note 67, at 341-46. The preferences of the Babangida administration that were ultimately included in the constitution include a presidential system of government, two presidential terms of four years each, a bicameral legislature at the federal level, a two-party system, and appointment and removal of members of the electoral body by the Council of State. See *id.* at 348.

286. See *id.*

287. In 1979, the Obasanjo-led Supreme Military Council amended the constitution after it was approved by the Constituent Assembly. See ILLUSIONS OF POWER, *supra* note 7, at 89. For details of the amendment, see NWABUEZE, *supra* note 67, at 346. In 1989, the Armed Forces Ruling Council during the Babangida administration amended the constitution after it was approved by the Constituent Assembly. *Id.*

288. The absence of legal restraints coupled with total domination of the governance process by the military pose significant problems for the legal profession. Unlike their counterparts in developed democracies who invoke legal rules to curb the excesses of elected officials, African lawyers must confront the despot unaided by either legal rules or a culture that celebrates respect for law and order.

289. One of the initial acts of the military upon seizing the reigns of power is to dismantle political institutions, especially political parties. For example, upon assuming office in 1984, the Buhari administration promulgated the Political Parties (Dissolution) Decree No. 9 of 1984 dissolving all political parties. Similarly, General Abacha, in his maiden address to the nation on November 18, 1993, dissolved the two political parties and banned political activities in the country. See *Nigeria Scraps Political Parties*, HERALD (Glasgow), Nov. 19, 1993, available in LEXIS, News Group File, Beyond Two Years.

290. Wolfgang Friedmann's admonition in a much-cited article written 36 years ago is still relevant in today's Africa. He wrote, "The contemporary lawyer . . . in the developing nations . . . must become an active and responsible participant in the shaping and formulation of development plans." Friedmann, *supra* note 42, at 186. Friedmann continues, stating:

An ever increasing . . . part of the work of the lawyer is neither litigation nor the resolution of disputes. It lies in the shaping and formulation of

dealing with the potentially dangerous but urgent tasks of disempowering the despot and protecting rights.²⁹¹ To fulfil this role, every lawyer must “remain aware of developments in governmental affairs, to participate in civic activities, and to enter the public forum to defend, improve, or otherwise have an impact on our public institutions.”²⁹²

Regrettably, the legal profession has not made an appreciable impact upon the Continent’s search for constitutional democracy. Inadequate training, fixation with private practice, and frequent harassment by the military have disabled the legal profession from playing meaningful roles in the quest for democracy.²⁹³ Democratic transition calls for lawyers “who are something more than journeyman practitioners but law reformers and sophisticated legal planners.”²⁹⁴ The legal profession’s fixation with private practice has compromised its ability to function as either law reformer or sophisticated planner. Absent a change of focus, the legal profession will confront irrelevance, growing public cynicism, and outright disrespect.

Much of the problem with the legal profession is the result of lawyers not living up to the ideals of the profession. Professional ethics, training standards, and commitment to public good have all succumbed to the harsh realities of military dictatorship. Lawyers

policies, in the exercise of legal powers, constructively establishing or altering the relations between private legal parties *inter se*, between public authorities and private parties, between governments and foreign investors, and the like

Id. at 188. Friedmann adds that

[i]n all these questions, the lawyer must play an important, often a decisive, part. It is he who must draft the necessary legislation or the complex international agreements; it is he who will usually be the principal, or one of the principal, representatives of his country in international trade negotiations It would be as artificial as it would be wasteful of the still desperately scarce trained manpower resources of developing countries to believe that the lawyer should or could confine himself to the strictly legal issues

Id. at 189.

291. Discussing the enormity of the tasks faced by lawyers in authoritarian regimes in their effort to contain tyrants, Kwasi Prempeh stated that

[i]n today’s transitional democracies, the tyranny to be feared is that of an omnipotent executive or strongman With its control of the military and police and its vast power of patronage, the executive is decidedly a more formidable adversary, one that plays by a different set of rules than would a legislature.

H. Kwasi Prempeh, *Lawyers and Liberal Democracy*, J. DEMOCRACY, Jan. 2000, at 71, 76.

292. L. Harold Levinson, *Making Society’s Legal System Accessible to Society: The Lawyer’s Role and its Implications*, 41 VAND. L. REV. 789, 801-02 (1988).

293. See generally GOWER, *supra* note 42.

294. *Id.*

have a great deal of restoration to do if they are to assist society in attaining the best ideals of democracy. Recapturing the lost glory of the legal profession requires fundamental changes in the legal training system and inculcating a better sense of public service among lawyers. The training mechanism must give prospective lawyers a solid grounding in legal subjects, as well as a sound appreciation of the ethical obligations that separate the legal profession from other professions.

A. *Reforming Legal Education*

Legal education in Nigeria consists of a two-tiered system of training: academic training offered by the university and practical training at the Nigerian Law School.²⁹⁵ The training at the Nigerian Law School marks the end of formal training for lawyers in Nigeria. Further training either in the form of postgraduate study or participation in continuing legal education programs is essentially a voluntary activity.²⁹⁶

The separation of the university law curriculum from the practical training course means that in Nigeria, as in England, "theory" and "practice" are sharply separated. Theory is taught at universities without much regard to practice, and practice is taught at the law school without infusing it with practical analysis. A survey of the current training mechanism for lawyers reveals a lack of congruence between the model of legal services implicit in legal education—one dictated by tradition and imported from England—and the tasks lawyers actually perform in a complex and developing Nigerian society.²⁹⁷ The dominant model of legal education in Africa places significant emphasis on private practice. Law schools reinforce this model by emphasizing technical competence in some designated courses in the curriculum.²⁹⁸ Little or no effort is made to prepare lawyers for their other roles in society.²⁹⁹ The nation's complex social and political realities are ignored in the training of lawyers and other preparation for legal practice. For example,

295. The two-tiered system of training was established in 1962 following the recommendations of the Unsworth Committee set up by the Federal Government to consider the future of legal profession in Nigeria. See REPORT OF THE COMMITTEE ON THE FUTURE OF THE LEGAL PROFESSION IN NIGERIA (1959).

296. For a detailed analysis of legal education in Nigeria, see Alan Milner, *Legal Education and Training in Nigeria*, 17 J. LEGAL EDUC. 285 (1965); Okechukwu Oko, *Legal Education and Training in Nigeria*, 6 AFR. J. INT'L & COMP. L. 271 (1994).

297. See generally Oko, *supra* note 296 (critiquing legal education in Nigeria).

298. See *id.* at 280-81 (listing courses offered in the curriculum).

299. The problem is further exacerbated by the artificial and somewhat misleading distinction between academic and practical training encouraged by the two-tiered system. Law faculties are denied the opportunity to introduce programs and offer courses that enable prospective lawyers to sharpen their skills in vital areas such as counseling, interviewing, and drafting.

although the military has ruled Nigeria for more than three decades, the structure and processes of military rule do not form part of the subject of instruction in any Nigerian law faculty.³⁰⁰

The legal profession has failed to mount effective training mechanisms that prepare and sensitize lawyers to their obligations in a democracy.³⁰¹ The narrow focus of legal education disables lawyers from understanding the society in which they live and practice.³⁰² It also affects the ability of law schools to provide the broad legal training lawyers need in developing societies. Lawyers are not sufficiently trained to appreciate their role in society and are correspondingly ill-equipped to assist in the understanding of law or to participate in the use of law as a creative instrument of social change. It is not surprising, therefore, that Nigerian lawyers have not been successful in motivating or mobilizing the masses toward a cause as noble as democracy.

To make lawyers effective agents of democracy, the legal training mechanism must be reformed. Lawyers must be better educated and trained to understand the complexities of law in society so that they can have a clearer and more realistic conception of their place and function in a democratic society. The overarching goal of the legal training mechanism should be to

turn[] out men and women who, as well as becoming proficient and competent practitioners, are also adequately equipped to take a keen interest in the quality of our substantive law; in the efficiency of our legal system; in the betterment of the standard of lives of our rural and urban population[;] and finally in the establishment of a nation "where no man is oppressed and so with peace and plenty Nigeria may be blest."³⁰³

To attain these objectives, law faculties should provide comprehensive and functional training to prospective lawyers. Since

300. For the curricular requirements at law faculties, see Oko, *supra* note 296, at 280-83.

301. *See id.* at 275.

302. In an attempt to address this problem and introduce a broad and more functional legal training for lawyers, the National Universities Commission in 1989 re-articulated the goals of legal education in Nigeria. The National Universities Commission stated that

[b]ecause all human activities—social, economic, political, etc.—take place within the legal framework, it is necessary that the students of law should have a broad general knowledge and exposure to other disciplines in the process of acquiring legal education. Legal education should therefore act first as a stimulus to stir the student into the critical analysis and examination of the prevailing social, economic and political systems of his community and, secondly, as an intellectual exercise aimed at studying and assessing the operation, efficacy and relevance of various rules of law in society.

Id. at 273.

303. Chukwudifu Oputa, *The Challenge of Excellence in the Legal Profession* 4 (May 3, 1988) (unpublished manuscript, on file with author).

law is an undergraduate degree program in Africa, most prospective lawyers enroll in law schools at a tender age, unsure of the role of law and the lawyer in society.³⁰⁴ These students look to the law schools to shape and mold them and offer guidance on the requirements of a successful legal career.³⁰⁵ This reliance puts law schools in a unique position to inculcate the necessary ideas, attitudes, and professional values.³⁰⁶

Law faculties should focus on training lawyers who can participate in the use of law as a creative instrument of change, including the transition to democracy. This is very important because law is used all throughout Africa as the governments' chief vehicle to change repetitive patterns of behavior that frustrate the democratic process. Legal education should be restructured to teach prospective lawyers how to use law, including legislation, to change human behavior. For example, law students must learn how to use law to change the behavior of the masses so they can become more involved in the democratic process, to change the conduct of elected officials so they become less corrupt and more responsible, and to change the behavior of soldiers so they can resist the urge to meddle in the political affairs of the nation.³⁰⁷ These goals require drastic changes in the curriculum. New courses that explore the relationship between law and different facets of society must be included in the curriculum.

Another deficiency in the legal education system relates to the failure to provide sufficient ethics coverage in the law school

304. For admission requirements into law school, see Oko, *supra* note 296, at 276-79.

305. The notion of law teachers as role models was emphasized in the *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities*, a voluntary aspirational statement adopted by the Executive Committee of the Association of American Law Schools in 1987. Pertinent portions of the resolution include the following:

As teachers, scholars, counselors, mentors, and friends, law professors can profoundly influence students' attitudes concerning professional competence and responsibility. Professors should assist students to recognize the responsibility of lawyers to advance individual and social justice.

Because of their inevitable function as role models, professor should be guided by the most sensitive ethical and professional standards . . .

. . . .

Law professors have an obligation to treat students with civility and respect and to foster a stimulating and productive learning environment in which the pros and cons of debatable issues are fairly acknowledged.

STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES, *reprinted in* ASSOCIATION OF AM. LAW SCH., 1999 HANDBOOK 89, 90 (1999).

306. See Oputa, *supra* note 62 (noting that the duty to impart proper legal training is the responsibility of the law faculty).

307. Law serves as government's main instrument to influence behavior. See DONALD BLACK, *THE BEHAVIOR OF LAW 2* (1976).

curriculum.³⁰⁸ A great deal of public frustration with the legal profession stems from defective ethics.³⁰⁹ Citizens will change their views about the legal profession once lawyers observe the expected ethical standards. Law schools must train lawyers to appreciate their ethical and social obligations to society.³¹⁰ Ethics are a vital component of legal practice and must occupy a pivotal place in the legal training system. Lawyers must be instructed on how to balance the demands of legal practice with the much touted and widely ignored obligation to serve the public good.³¹¹

Implementing these suggestions demands a much broader and more functional training than currently exists. Legal education must be restructured to offer programs that sensitize lawyers, early in their careers, to their public service responsibilities.³¹² Law faculties must teach prospective lawyers that public service is a vital component of professional practice. The most effective approach would be to introduce programs and courses that expose prospective lawyers to the legal needs of the poor and the legal problems frequently encountered by the poor.³¹³ The program could take the form of an ethics course that requires pro bono work as a condition for graduation.³¹⁴ With proper education and training, it may be possible to strengthen the self-perception and self-confidence of lawyers, thereby building a foundation for a more competent and ethical practice.

B. Regaining Public Trust

The Nigerian legal profession that admirably served as a vital piece of the struggle for independence has undergone a tremendous transformation.³¹⁵ During the colonial era, lawyers championed the

308. See generally ABA Committee on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 263, 266 (1986).

309. See *id.* at 266.

310. See *id.* (suggesting that law schools constitute the "greatest opportunit[y]" to instill an ethic of public service in younger lawyers).

311. See *id.*

312. See Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 400-01 (1993-94) (discussing options for sensitizing law students to their public service obligations).

313. See Phoebe A. Haddon, *Education For a Public Calling in the 21st Century*, 69 WASH. L. REV. 573, 585 (1994) (noting that "[l]egal education should socialize students to be more sensitive to existing inequities and should provide opportunities for them to think about the problems of mobilizing resources to ensure that the legal system can serve underrepresented poor clients' interests as well as the interests of corporate and other paying clients").

314. See generally *id.*

315. Justice Oputa eloquently captured the falling standards of the legal profession. He observed that

cause of independence and fiercely advocated justice from the colonial administration. The influence and prestige of the legal profession carried over to the post-independence era. The citizens respected membership in the legal profession and most of them saw lawyers as symbols of justice and paragons of virtue. Soon after independence, everything changed. Lawyers became obsessed with preserving and enriching themselves, often failing to observe the ethical standards and professional etiquette associated with the legal profession.³¹⁶ Placing selfish interest over and above the common good ultimately generated public disrespect, even contempt, of the legal profession.

The lawyer in Nigeria conjures several negative images in the minds of the public, ranging from grubby and materialistic to self-serving individuals who prey on the vulnerabilities of the unsuspecting public. Although some of these descriptions have no basis, the attitudes of some lawyers in Nigeria lend credence to public distrust for the legal profession. Lawyers in virtually all spheres, from private practice to public service, have not performed in a way that would generate public trust and confidence. Lamenting the Nigerian lawyers' dismal record in public service, Odesanya noted:

Before the coup d'état of 15th January, 1966, this country had a number of lawyers in the federal cabinet holding important portfolios. Two were regional Prime Ministers and one a Regional Deputy Premier. Many Regional Ministers were recruited from the profession. Of course, all the federal and regional ministers of justice were members of the profession. Lawyers served in many important public corporations all over the country. Unfortunately, some of them did considerable damage to the public image of the profession. They showed insufficient wisdom and woefully inadequate and ethical and professional standards. Their performance certainly did not inspire confidence in the profession. The profession almost forfeited the right

[l]ooking back . . . on the legal profession in Nigeria in the forties, fifties and even early sixties one sees in retrospect a rather dignified, respectable and self respecting profession—the pride of lawyers, the ambition of many and an object of reverence by the generality of our people. Nowadays things seem to be falling apart. Nowadays again one notices a significant shift from the erstwhile awe and reverence with which the profession was once regarded. Could it be that members of the profession are now forgetting some of the qualities which earned for them and their profession the envied and dignified appellation of “learned and honourable”? Could it be that newcomers from our Law School have not been sufficiently inducted into or have not imbibed the traditions and conventions of this great profession? Could it be that we have said goodbye to the sublime objectives of our great profession? Whatever it is, the fact remains and the present situation demands that something be done to restore the pristine dignity, splendour and glory that was the legal profession in our country in years gone-by.

C. A. OPUTA, CONDUCT AT THE BAR AND THE UNWRITTEN LAWS OF THE LEGAL PROFESSION at ii-iii (1982).

316. See generally *id.*

to be regarded by the people as the personification of all that is socially desirable and progressive.³¹⁷

Odesanya's observations, made more than thirty years ago, aptly characterize the public perception of lawyers in contemporary Nigerian society.³¹⁸ Nothing has changed to give the public reason to change its attitude toward lawyers. In fact, public distrust for lawyers intensified during military rule. The negative public perception of Nigerian lawyers is traceable to the legal profession's collaboration with the military. As part of the military's strategy to control the legal profession, the military actively recruited senior lawyers into the military administration.³¹⁹ Many lawyers abandoned their commitment to the public good and sought to ingratiate themselves with the ruling military *junta*. Such lawyers seemed to have no moral scruples working for and collaborating with an evil regime.³²⁰ The military leadership, eager to turn lawyers into pliable instruments of state power, handed out all forms of political patronage, ranging from cabinet positions to board memberships in government corporations,³²¹ which the lawyers gleefully accepted.

Lawyers who accept positions in military regimes often turn out to be potent tools for legitimating authoritarianism.³²² They not only fail to help society hold the military accountable, they also help the military in the desecration of democracy.³²³ Olisa Agbakoba,

317. M.A. Odesanya, *The Role of the Lawyer in a Developing Society*, quoted in Agbakoba, *supra* note 99, at 46.

318. *See id.*

319. For an analysis of the military regime's political manipulation of the legal profession, see Oko, *supra* note 86, at 265-67.

320. Olisa Agbakoba, a lawyer and one of the leading human rights activists in Nigeria, deplored the co-opting of human rights activists, including lawyers, into government and argued that the Abacha regime would not have assumed office but for the collaboration of Nigerians who claimed to be opposed to military rule. Agbakoba stated, "It looks bad. It must be our fault because of the betrayal of substantial numbers of senior members of the pro-democracy movement. Abacha succeeded in co-opting people who had portrayed themselves as pro-democracy activists. He decimated our forces." Chris McGreal, *Divided Opposition Still No Match For Meddling Military*, *GUARDIAN* (London), June 3, 1995, at 16, available in 1995 WL 7605041.

321. The military in Nigeria has used political patronage to destabilize key associations in the country. In 1995, General Abacha "broke . . . the unions and outmaneuvered a host of professional organizations which dared to challenge him." *Id.* at 16.

322. This phenomenon is not unique to Nigeria. As Prempeh observed, "[S]ome of the modern world's most repressive regimes have been maintained as much by the clever counsel and strategem of lawyers in the pay of the strongman as by brute force." Prempeh, *supra* note 291, at 76.

323. *See The Violators, the Victims*, *CONST. RTS. J.*, July-Sept. 1999, at 13, 16, which notes that

[i]t is sad to note how judges and lawyers trained to respect and uphold the rule of law and fundamental freedom of citizens threw all moral and legal

one of the leading civil rights activists lamented: In Nigeria, lawyers were, regrettably, in some cases, direct participants in the desecration of democracy and the rule of law which has so sadly characterized our politics. In other cases, they colluded with politicians to ravage the country in critical periods of our history.³²⁴ While some may view accepting a position in government as perfectly normal, a majority of lawyers, indeed many in the public at large, find such appointments disgraceful.³²⁵ The image of "lawyers for sale" represented by former presidents of the bar association and senior human rights activists who accept positions in a brutal military regime, seriously threatens the integrity of the legal profession. Such radical departures from the vision of lawyers as persons of unquestionable integrity inevitably result in public contempt and distrust for the legal profession. In a scathing condemnation of the legal profession's collusive relationship with the military, Otteh has commented:

For now, the general impression is that the Nigerian Bar is a member of the government's fraternity. No doubt the Bar is perfectly entitled to choose from the options open to it for action, and the issue whether it keeps fine relations with Government is also within its discretion. But really, we should ask ourselves whether it is sound to spare the Government some hard knocks when some of its officers derogate from and ultimately denigrate the rights of citizens, the inviolability of sacred institutions, and the rule of law. Should government officials continue to comfort themselves with the thought that their rough shod drive over their subjects rights will only be discussed at cocktails and amidst the clinking of glasses, muttering and jests with none of the more vitriolic public denunciations and programs of popular

decorum to the winds, to fashion out all forms of decrees that greatly undermined the rule of law and fundamental rights of citizens.

324. Agbakoba, *supra* note 99, at 128. General Babangida, in power from 1986 to 1992, used political patronage to keep the legal profession compliant to the wishes of his administration. The most troubling pattern of political patronage was the appointment of the incumbent President of the Nigeria Bar Association as the Attorney General of the Federation. This occurred first in 1985 when the President of the Nigeria Bar Association, a noted critic of the military administration, was made the Attorney General by the Babangida administration. This pattern continued in 1992 when then President of the Nigeria Bar Association was appointed Attorney General of the Federation, following the appointment of the incumbent to the World Court at the Hague. General Abacha actively recruited senior lawyers and human rights activists to join his administration. Soon after he assumed office, Abacha appointed Dr. Olu Onagoruwa, a prominent human rights activist, to the position of Attorney General and Minister for Justice. In 1993, the Abacha administration also appointed Bashur Dilhatu, a prominent lawyer who had campaigned for the Presidency of the Bar Association in 1992, as a cabinet minister. Other cabinet ministers appointed by Abacha included Solomon Lar, Ebenezer Babatope, and Ada Adogu—all senior members of the bar, who at one time or another had played prominent roles in the struggle for democracy.

325. A vast majority of lawyers interviewed as part of this project condemned the appointment of the President of the Bar Association as the Attorney General of the Federation. See *The Violators, The Victims*, *supra* note 323, at 16.

resistance? Should the bar not assume a more positive drive in defense of their society?³²⁶

Otteh concluded by warning that

[t]hese fears must be allayed for the Bar to regain a confidence which cost it so much to acquire, because, in the final analysis, governments come and leave, but the governed remain and the eventual judgment of that will be passed on the relevance of the Bar as well as other professional unions is by the people for whom they exist to defend and protect.³²⁷

The legal profession has not only lost its moral authority, but also its prestige and influence in society because of its dalliance with a rogue regime. Exerting professional skill in the service of evil is not one of the virtues of the legal profession. One of the hallmarks of professionalism is the ability to resist pressures to lend services to causes that run counter to justice. The Nigerian legal profession is at a mortal risk of irrelevance chiefly because of its obsession with materialism. Materialism has eclipsed the obligation to public good, widely celebrated as one of the distinguishing features of the legal profession. Commitment to the public good has disappeared from the moral horizon of the legal profession. Lawyers are far less concerned with promoting the public good than with enriching themselves.

A great deal of the legal profession's prestige and effectiveness in society rests on the trust and confidence of the public.³²⁸ To be effective agents of change, the legal profession in Nigeria must regain the trust and confidence of the public. The legal profession must re-invent itself as caring, technically-competent professionals committed to the elevation of the well-being of society. The legal profession must recapture the widely touted image of the lawyer as a statesman whose primary obligation is to serve the public.³²⁹ Generating public trust can be accomplished in two main ways: (1) reaffirming commitment to civic duties and (2) providing an expanded legal aid program.

326. Joseph Chukwuma Otteh, *The Bar and the Government*, SUNDAY GUARDIAN, May 19, 1991, at A9.

327. *Id.*

328. See DE TOCQUEVILLE, *supra* note 41, at 286 (noting that people in democratic states do not mistrust the members of the legal profession because it is known that they are interested to serve popular causes; and the people listen to them without irritation, because they do not attribute to them any sinister design).

329. Dean Kronman describes the lawyer-statesman as "a devoted citizen . . . [who] cares about the public good and is prepared to sacrifice his own well-being for it." KRONMAN, *supra* note 148, at 14. Dean Kronman also asserts that the lawyer-statesman has a "special talent for discovering where the public good lies and for fashioning those arrangements needed to secure it." *Id.*

1. Commitment to Civic Responsibility

The vast majority of African lawyers are neither trained nor encouraged to understand the society in which they live and practice. Consistent with the emphasis placed on private law practice, lawyers devote their time almost exclusively to revenue-yielding ventures.³³⁰ Lawyers cast in this mold frequently ignore and perhaps consciously avoid professional activities that have no financial implications.

Another problem that contributes to the failure of lawyers to engage in public service activities is the failure of the legal profession to clearly articulate its civic responsibilities.³³¹ At present, public service is a matter left entirely to the judgment of individual lawyers, to be discharged at their discretion. This attitude has endured for more than three decades, notwithstanding dramatic changes in both society and the legal profession itself. The legal profession's failure to articulate lawyers' obligations to the public has unwittingly resulted in apathy toward civic responsibility.

Lawyers scarcely participate in community service and are even more unconcerned with those who cannot pay.

The disinclination to perform civic duties undermines the legitimacy of the legal profession. The notion of materialism celebrated by Nigerian lawyers has resulted in a decline in professionalism³³² and has engendered public contempt for the legal profession. It also makes it difficult for the profession to enlist public support, especially in its attempt to disempower the despot.³³³ The public will never support or appreciate a legal profession that is more interested in making money than serving the public. As long as the legal profession continues to shy away from civic responsibilities, lawyers will not only betray society but will

330. See O.A. Bowen, *An Operational Assessment of the Nigerian Legal Aid Scheme*, in *LAW AND DEVELOPMENT* 259 (J.A. Omotola & A.A. Adeogun eds., 1987) (noting the reluctance of Nigerian lawyers to participate in the legal aid scheme).

331. Perhaps, the legal profession should adopt the lawyers duty to the community formulated by Justice Oputa. Justice Oputa stated that "[it] is the duty of the advocate, a duty which he owes to the community to ensure that the individual is properly protected from power, to see that there is a fair, equitable and just balance between those who have the power and those who are subjected to such power." C.A. OPUTA, *MODERN BAR ADVOCACY* 8 (1982).

332. The decline of professionalism, especially the commitment to public good, is not unique to Nigeria. It appears to be a global phenomenon. See generally, e.g., KRONMAN, *supra* note 148; Warren E. Burger, *The Decline of Professionalism*, 61 *TENN. L. REV.* 1 (1993); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 *ST. JOHN'S L. REV.* 85 (1994).

333. See Re, *supra* note 332, at 94-97.

also foster negative public perceptions that undermine their legitimacy in society.³³⁴

If the legal profession seeks greater public support than it now enjoys, it must rededicate itself to public service, stand up against tyranny, and lend its voice to the clarion call for democracy. The legal profession must look beyond narrow issues of protecting private interests and pay more attention to its civic responsibilities. To act as effective agents of change in the democratic process, the legal profession must clearly articulate the lawyer's duty to serve the public and must institute appropriate and effective mechanisms to promote awareness of public service.³³⁵ The legal profession must provide institutional leadership in devising ways to improve the image of the legal profession. The major challenge for the legal profession is to articulate a vision of civic responsibility that is appropriate to the realities of a developing nation. Any public service ideology developed by the legal profession must be reinforced by training systems and programs that provide opportunities and support for lawyers to participate. Performance of civic duties will change the public perception of lawyers and ultimately end the long history of public distrust for lawyers.

2. Expanded Legal Aid Program

The legal system in most African countries is a replication of the British system, founded upon an adversary procedure. Its efficacy depends on the professional representation of litigants and criminal defendants. Problems such as illiteracy and poverty severely impede access to the justice system, thus creating discontent in society. Public discontent with the justice system often translates into hatred for the legal profession. Therefore, another way to regain public trust is through an expanded legal aid program.

Currently, the profession's legal aid activities are simply catalogues of largely unorganized and uncoordinated activities of individual lawyers clearly lacking institutional support.³³⁶ Existing legal aid schemes organized by the federal government are often

334. *See id.* at 114.

335. Some legal scholars have argued that lawyers have a positive duty to serve the public. *See, e.g.,* Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1150 (1990) (arguing that "lawyers have a duty to conform their practice to our highest ideals—what I will call the profession's 'public spiritedness' In advancing a standard of 'public spiritedness,' I mean to suggest that, as part of their professional role, lawyers have a positive duty to serve the public good.").

336. Voluntary non-governmental associations that currently provide legal aid include the Civil Liberties Organization, the National Association of Democratic Lawyers, the Federation of Women Lawyers, the Constitutional Rights Project, and the Tenants Solidarity Association. *See generally* M.A. Banire, *Legal Aid in the Administration of Justice in Nigeria*, in *CURRENT THEMES*, *supra* note 10, at 53.

inadequately funded, unduly narrow, and inaccessible to many potential beneficiaries.³³⁷ The legal profession should enlist public support by aggressively providing legal assistance to citizens in need. The legal profession will forfeit respect in society if it fails to address the legal problems of the poor in some coherent and comprehensive fashion. A comprehensive legal aid scheme has become an ethical imperative that the legal profession can only ignore at great cost to its integrity and legitimacy. Providing legal aid offers a unique and public forum for the legal profession to display its commitment to the public good. As Justice Oputa stated:

The primary obligation of the legal profession in any Legal Aid Scheme is to sponsor and use its best efforts to ensure that adequate legal representation by lawyers of standing and experience is provided under the Scheme. It is in these "poor persons" cases that the lawyer should strive to be a visible example of the lofty ideals of his profession: namely integrity, competence, courage and dedication to the services [sic] of the poor, to the service of his fellowman.³³⁸

Due process "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."³³⁹ Democracy means nothing to a citizen who lacks access to the court system to vindicate legal rights. This is especially important in Africa, a continent undergoing rapid modernization. Life in Africa is growing increasingly complex and sophisticated. Most citizens, especially the poor and illiterate, frequently require legal assistance to enable them to make the necessary adjustments and resolve the problems modernization poses. For example, a poor man may require legal assistance to enable him to resist the unreasonable and unlawful demands of his landlord, or he may require some legal advice in his bid to seek redress against his employer for flagrantly breaching the terms of his employment. A poor illiterate housewife may need legal aid to claim alimony and child support from an uncaring husband who abandoned her and her children without

337. The government sponsored legal aid scheme is regulated by the Legal Aid Act. See Legal Aid Act, ch. 205 (1990) (Nig.). The scope of legal aid in respect of both criminal and civil matters is limited to the following: (1) murder of any degree under the criminal code and culpable homicide punishable by death under the penal code; (2) manslaughter under the criminal code and culpable homicide not punishable by death under the penal code; (3) malicious or willful wounding or inflicting grievous bodily harm under the criminal code and grievous hurt under the penal code; (4) assault occasioning actual bodily harm under the criminal code and criminal force occasioning actual bodily hurt under the penal code; (5) common assault; (6) affray; (7) stealing; (8) rape; (9) aiding and abetting, or counseling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit, any of the offenses listed above. See *id.* sched. 2. The scope for civil matters includes civil claims in respect of accidents and civil claims in respect of breach of fundamental rights as guaranteed under NIG. CONST. ch.4 (1979), as amended. See *id.*

338. Oputa, *supra* note 315, at 13.

339. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

financial support. Providing assistance in such circumstances not only ensures that rights are protected, but also restores public confidence in the justice system.

Providing legal representation to the poor, a significant portion of African citizenry, will promote confidence in the democratic process founded upon rights and equality before the law.³⁴⁰ Equality before the law will be largely compromised, even completely drained of relevance, if citizens do not have the services of lawyers to articulate and present their cases in court. A legal profession willing to defend, pro bono, the rights of the poor and attack all forms of injustice and inequities in society will dispel doubts that the justice system exists solely for the wealthy. Therefore, the bar association should set up legal aid clinics to help citizens understand their rights under the law and familiarize them with the processes and avenues for redress should their rights be threatened.

V. CONCLUSION

Transition to democracy is never a simple task. Indeed, it is "bound to be gradual, messy, fitful and slow, with many imperfections along the way."³⁴¹ Conducting elections and enthroning civilian administration represent the first steps in what is a long and treacherous journey. Caution, sustained attention, and commitment are required because disciplining the dictatorial instincts of the political elite, transforming anti-democratic values, and creating an active and enlightened citizenry requires the passage of a long period of time. The consequences of failure are so grave that lawyers must strive valiantly to assist society to overcome problems that threaten democratic consolidation.

The legal profession's ability to broker an end to repression and establish a democratic government will be one of the greatest achievements of this millennium. The legal profession, through a variety of avenues, should strive to imbue in lawyers a commitment to building a society where rights are respected, elected officials govern according to law, and citizens pursue their dreams and aspirations free from harassment and intimidation. Democracy may not necessarily end all of Africa's problems; however, it will significantly enhance the prospects of social equilibrium. Properly

340. See generally LUBAN, *supra* note 248. Stressing the importance of enforcing legal rights, David Luban notes that "the principle of equal access to the legal system is part of our framework of political legitimacy . . . and to deny a person legal assistance is to deny her equality before the law, and that to deny someone equality before the law delegitimizes our form of government." *Id.*

341. *It's Not Over Yet in Sierra Leone . . . But It Is in Equatorial Guinea*, 1996 W. AFR. 328.

conducted, most social problems that plague Africa will yield to peaceful solutions. The benefits of democracy should provide an added impetus for lawyers to tackle the difficult but immensely rewarding task of consolidating democracy on a troubled continent.