

# LAWYERS IN FRAGILE DEMOCRACIES AND THE CHALLENGES OF DEMOCRATIC CONSOLIDATION: THE NIGERIAN EXPERIENCE

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## INTRODUCTION

African lawyers, like their counterparts all over the world, have an enlightened self-interest in consolidating democracy because lawyers function optimally in a constitutional democracy.<sup>1</sup> Lawyers are highly visible within the society and are generally regarded as members of the clerisy.<sup>2</sup> The legal profession is often the most dominant and the most influential profession in Africa and is non pareil in influence over policy, defense of rights, and the pursuit of justice. Because of their status, special skills, and training, lawyers have the opportunity and indeed the obligation to help attain the nation's political imperative of consolidating democracy.<sup>3</sup> Unlike their colleagues in stable democracies, however, African lawyers face a phalanx of harsh realities and pragmatic constraints that severely limit their ability to deepen democracy, or even to perform their traditional functions.<sup>4</sup> Africa's distinctive problems include political instability, social

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1. Robert W. Gordon, *Are Lawyers Friends of Democracy?* 1–2 (Nov. 11, 2008) (unpublished outline draft, on file with the Fordham Law Review) (“If lawyers are not always friendly to democracy, democracies are friendly to them, because although they may be set above the people because of superior education and knowledge, they spring from the people, and have risen in a meritocratic career open to talent. Hence they are trusted as leaders of democratic movements, and as leaders in democratic politics.”).

2. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 277–85 (Henry Reeve trans., Colonial Press 1900) (1835) (describing the importance of lawyers in the American republic).

3. Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 *GEO. J. LEGAL ETHICS* 155, 162 (2006) (“Their legal training offers a special opportunity to be able to understand our democracy—a system of laws—and to work towards that democracy’s improvement.”).

4. For a detailed discussion of the problems of lawyers in developing societies, see OKECHUKWU OKO, *PROBLEMS AND CHALLENGES FOR LAWYERS IN AFRICA: LESSONS FROM NIGERIA* 335–88 (2007).

disequilibrium, insecurity, corruption, ineffective and inefficient public institutions, a declining economy, and the lack of a democratic culture.<sup>5</sup>

The differences between Africa and most of the established democracies are vast and considerable, and the similarities, when they exist, are often inconsequential.<sup>6</sup> As I have stated elsewhere,

Lawyers in developed societies generally practice within politically stable and economically viable societies with fairly well developed legal systems. In these societies, the judiciary is independent and relatively honest, and the citizens have embraced the rule of law and have shown respect, sometimes admiration, for lawyers and their work. In sharp contrast, lawyers in developing societies work in a difficult and increasingly unstable environment surfeited by political instability, depressed economies, ethnic and religious tensions, inefficient legal systems, corrupt judiciaries that have been unable to insulate themselves from partisan and ethnic pressures, and by a cynical, even distrustful civil society highly ambivalent about involving lawyers in its affairs.<sup>7</sup>

African lawyers operate in a different normative realm that exerts enormous pressures on them to respond not just to traditional demands for legal services but also to the nation's desire for social equilibrium, political stability, and democratic consolidation.<sup>8</sup> More importantly, lawyers in fragile democracies have the added responsibility of helping to create the

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5. THE INT'L REPUBLICAN INST., 2007 NIGERIAN NATIONAL ELECTIONS: PRE-ELECTION ASSESSMENT FINAL REPORT 7 (2007), available at <http://www.iri.org/africa/nigeria/pdfs/2007-02-01-Pre-electionAssessment.pdf>. The report provides an accurate assessment of Nigeria's problems and correctly traces the roots of the problem to years of military rule. The report stated,

There is no denying that the repeated military interventions in the constitutional history of Nigeria have had a cumulative corrosive effect on both the democratic culture as well as the overall political economy of the country, often resulting in weak political institutions and rampant public and private sector corruption, resulting in poor economic performance and decreased governance and other social capacity.

*Id.*

6. FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 23 (2003) ("America's problems are different from—and much smaller than—those that face third world countries.").

7. Okechukwu Oko, *The Problems and Challenges of Lawyering in Developing Societies*, 35 RUTGERS L.J. 569, 573–74 (2004) (footnotes omitted) (citing Nsongurua Udombana, *The Unfinished Business: Conflicts, the African Union and the New Partnership for Africa's Development*, 35 GEO. WASH. INT'L L. REV. 55, 64 (2003)).

8. Justice Orojo, retired Chief Judge Oyo State and one of Nigeria's leading jurists, aptly captures the unique role of lawyers in developing societies:

The Nigerian legal practitioner (as in other developing countries) bears a much heavier responsibility to this society than his counterparts in a highly developed country . . . . Nigerian legal practitioners must be able not only to perform their traditional functions of catering for the professional needs of the citizens, of administering justice and manning the various legal institutions, but they must also be involved in social change; they must be committed to law reform to ensure harmonization of the law with the culture of the people and they must strive to ensure a strict adherence to the rule of law.

J. OLA OROJO, *A GUIDE TO THE CONDUCT AND ETIQUETTE OF LEGAL PRACTITIONERS IN NIGERIA* 46 (1969).

conditions that will secure and consolidate democracy.<sup>9</sup> These realities demonstrate that it is imprudent and unhelpful to focus on abstract ideals about lawyers' roles in a democracy since such an approach will elide the contextual problems that depress the idealism with which lawyers all over the world embrace their functions. An assessment of the role of lawyers in deepening democracy should be undertaken with a strong awareness of that reality. Focusing on a specific country will enable a detailed, accurate, and contextual assessment of the broad range of ways in which prevailing environmental factors constrain and affect the role of lawyers in consolidating democracy.

This essay, using Nigeria as a case study, examines the factors that limit the effectiveness of lawyers in Africa as they seek to deepen democracy. In Africa, leadership failures and the resulting social disequilibrium constrict opportunity for professional practice and disable lawyers from pursuing their professional calling with zeal and creativity.<sup>10</sup> The most serious impediments that lawyers in Africa face as they seek to deepen democracy include: (1) the general insecurity that makes "normal law practice" precarious; (2) judicial corruption; (3) inefficient and ineffective public institutions; and (4) a lack of democratic culture. Lawyers reach their fullest potential when the rule of law thrives, the society is stable, and where institutions, especially the judiciary, function honestly, efficiently, and predictably. Lawyers cannot function effectively as lawyers if the judges cannot function effectively as judges. They also cannot be especially effective agents for democratic reform when they live and practice in a cultural milieu dominated by violence, anomie, and antinomianism.<sup>11</sup> If survival replaces zealous advocacy as the fulcrum of

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9. President Kenneth Kaunda stated,

The lawyer in a developing country must be something more than a professional man, he must be more than the champion of fundamental rights of the individuals. He must . . . in the fullest sense be part and parcel of the society if he is to participate in its development and the advancement of the economic social and political well being of the members; the lawyer must go beyond the narrow limits of law.

P.L.O. Lumumba, *The State of Legal Education in Kenya Today: A Critical Analysis* (Sept. 15, 2000) (unpublished manuscript), available at <http://web.archive.org/web/20030510054058/http://www.lawafrica.com/lsk/confpapers/PLOLumumba.asp>.

10. For a detailed examination of the problems and challenges of lawyering in developing societies, see OKO, *supra* note 4.

11. Late Nigerian Supreme Court Justice Augustine Nnamani's description of societal decay is even more applicable to contemporary Nigerian society. He stated that,

In the socio-cultural field, we are bedeviled by religious bickering, controversy, bigotry and intolerance. The result is naturally tension and suspicion. The erstwhile cordiality between our two great religions appears to be threatened. In the social[ ]field is a breakdown in social responsibility with an upsurge in anti social activities manifesting itself in drug offences, armed robbery, corruption in public and in private life, [and] collapse of family life and marriage institutions. There is an unhealthy growth of materialism in our society. The values of integrity and honesty appear to be co[n]signed to the dust heap.

legal practice, then lawyers become neither useful nor usable in the search for both justice and democratic consolidation.

This essay is divided into two broad parts. Part I examines the problems that limit the legal profession's effectiveness as it seeks to preserve democracy from profanation by politicians. Part II examines the strategies for progress. The problems discussed in Part I, if unaddressed, present formidable challenges that will undermine the legal profession's effectiveness in deepening democracy. Lawyers can deepen democracy, and reciprocally, democracy makes lawyers more effective. Addressing these problems will be important to the legal profession because a viable and well-functioning democracy is good for the legal profession and it is of transcendent importance to the society.<sup>12</sup> The toughest challenges for the legal profession are: (1) to promote accountability by helping citizens check the excesses of their leaders; (2) to help the society establish and sustain effective and viable institutions, processes, and a framework that anneals constitutional democracy; (3) to rejuvenate the civil society and make the citizens more active, involved, and engaged in the democratic process; and (4) to counteract antidemocratic sentiments that have held citizens hostage and contributed to the frustration of past efforts to deepen democracy.

These challenges, though daunting, are not new to African lawyers, some of whom have displayed and continue to display extraordinary courage in the face of severe odds. African lawyers have a long and rich history of acting as countervailing forces against tyranny.<sup>13</sup> Lawyers played crucial roles in the struggles and negotiations that led to independence from the colonial administration.<sup>14</sup> Similarly, lawyers were at the vanguard of society's efforts to disempower the military despots that ruled Africa for the better part of the last two decades.<sup>15</sup> John T. Berry, after visiting Nigeria as

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Augustine Nnamani, *Contemporary Nigeria and the Practice of Law*, Paper Presented at the Annual Conference of the Nigerian Bar Association 3 (Aug. 27–31, 1990) (transcript on file with author).

12. Lord Alexander of Weedon, in an address to the Malaysian Bar, emphasized the symbiotic relationship between the legal profession and democracy by stating, "Without a democratic society you cannot have . . . an independent legal profession. But without such a system of law and such a profession to practice the law, you cannot have true democracy. So democracy and the law are twin pillars of a free society." See Cyrus V. Das, *Role of Non-Judicial and Non-Parliamentary Institutions: The Practising Legal Profession*, in *PARLIAMENTARY SUPREMACY AND JUDICIAL INDEPENDENCE: A COMMONWEALTH APPROACH* (John Hatchard & Peter Slinn eds., 1998) (quoting Lord Alexander of Weedon, Queen's Counsel, Address to Malaysian Bar (1991)).

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

14. Okechukwu Oko, *Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*, 33 VAND. J. TRANSNAT'L L. 573, 635–36 (2000) ("During the colonial era, lawyers championed the cause of independence and fiercely advocated justice from the colonial administration.").

15. For a discussion of military rule in Africa, see SAMUEL DECALO, *COUPS AND ARMY RULE IN AFRICA: STUDIES IN MILITARY STYLE* (1976); for an examination in military rule in Nigeria, see NDUBISI OBIAGA, *NIGERIA: THE INSTABILITY OF MILITARY GOVERNANCE 1983–1998* (2005).

part of the U.S. Department of Justice team, elegantly captured the courage of Nigerian lawyers and the dangerous circumstances under which they strive to defend the rule of law:

In Nigeria I saw some of the worst of human conditions, and some of the very best. The best was exemplified by lawyers, who under the toughest of circumstances are fighting to create a system of justice that decides disputes not by guns or planes crashed into buildings, but by the rule of law. These honest, bright, and courageous men and women are engaged in a daily and dangerous struggle to create what many of us too often take for granted. As bright and well-educated people, they could go to other countries and make far more money, under much safer conditions, but they believe that fighting for the rule of law in their homeland is more important.<sup>16</sup>

The society, again, expects lawyers to confront the imperious task of ensuring that poseur democratic rulers with intractable despotic tendencies do not thwart Africa's democratic aspirations. In addition to protecting rights and liberties, the society expects lawyers to offer creative and imaginative proposals and programs that will engineer institutional reforms as well as attitudinal and behavioral adjustments necessary to deepen and consolidate Africa's fragile democracy.<sup>17</sup>

#### I. PROBLEMS FACING LAWYERS

In responding to society's demand for legal services, the Nigerian legal profession, like its counterparts in established democracies, wants to be an independent profession, free from governmental interference and ready to act as a countervailing force between government and citizens. The idealism with which lawyers approach their functions succumbs to pragmatism, however, as they adjust to the realities of practicing law in a fragile democracy. The reality is that lawyers cannot function effectively, except in the context of social equilibrium, an honest and upright judiciary, effective institutions, and a civil society willing and eager to process its disputes through the legal process. Far too often, these conditions hardly exist in Africa. Lawyers, therefore, must fulfill their traditional roles in hostile and inhospitable environments created by the failures of democracy. Some of the problems are self-inflicted, resulting mainly from an obsessive focus on wealth acquisition and an inadequate training process.<sup>18</sup> Other problems are traceable to systemic factors in the society over which lawyers have little or no control. This portion of the essay discusses four problems that limit the legal profession's effectiveness in Africa: insecurity, judicial

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16. John T. Berry, *Lawyers Are Special: Lessons Learned from Nigeria*, MICH. B.J., June 2002, at 12, 12-13.

17. For an examination of the challenges of deepening democracy in Africa, see Okechukwu Oko, *The Challenges of Democratic Consolidation in Africa*, 43 NEW ENG. L. REV. (forthcoming 2009).

18. For a detailed examination of the problems and challenges of lawyering in developing societies, see generally Oko, *supra* note 7.

corruption, deteriorating and ineffective institutions, and a lack of democratic culture.

### A. *Insecurity*

Africa is a continent in perpetual turmoil, incessantly roiled by violence, social disequilibrium, and civil war.<sup>19</sup> Democracy has unleashed destructive ethnic fervor and violent tendencies long held under check by dictators.<sup>20</sup> The freedoms and liberties offered by democracy have produced new anxieties and tensions as citizens and ethnic groups have exploited those liberties to pursue destructive and violent agendas against the government, which they accuse as unjust and unable to cater to their needs.<sup>21</sup> Since the attainment of independence, ethnic groups have incessantly agitated for better treatment by the central government. But since the return to democracy in 1999, these agitations have become more vociferous and more violent.<sup>22</sup> Some citizens, especially youths in the oil-producing Niger Delta areas, motivated by irrational demagoguery and chiliastic appeals launched by ethnic chieftains, have endorsed and embraced violence as a viable means of demanding changes in their

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19. For an excellent collection of essays examining the causes of conflict in Africa, see THE ROOTS OF AFRICAN CONFLICT: THE CAUSES AND COSTS (Alfred Nhema & Paul Tiyambe Zeleza eds., 2008). For an examination of strategies for resolving conflicts in Africa, see ENDING AFRICA'S WARS: PROGRESSING TO PEACE (Oliver Furley & Roy May eds., 2006).

20. Peter Lewis, *Identity, Institutions and Democracy in Nigeria* 1 (Afrobarometer Working Paper No. 68, 2007), available at [http://www.afrobarometer.org/papers/Afro paperNo68.pdf](http://www.afrobarometer.org/papers/Afro%20paperNo68.pdf) ("Since the transition to democratic rule in 1999, ethnic identity and mobilization have been prominent features of the political landscape, with serious consequences for political stability."); UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2004: CULTURAL LIBERTY IN TODAY'S DIVERSE WORLD 52 (2004), available at [http://hdr.undp.org/en/media/hdr04\\_complete.pdf](http://hdr.undp.org/en/media/hdr04_complete.pdf) ("The return of democracy has reanimated regional, ethnic, religious and local identities and intensified communal mobilization. This has led to the social violence that has engulfed the country since the return to civilian rule, whereas previously such conflicts were coercively suppressed by the military regimes.").

21. Professor Augustine Ikelegbe, in his study of the economy and conflict in Niger Delta region of Nigeria, accurately summarized the reasons for the violence in the area:

Decades of oil exploitation, environmental degradation and state neglect has created an impoverished, marginalized and exploited citizenry which after more than two decades produced a resistance of which the youth has been a vanguard. A regime of state repression and corporate violence has further generated popular and criminal violence, lawlessness, illegal appropriations and insecurity.

Augustine Ikelegbe, *The Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria*, 14 NORDIC J. AFR. STUD. 208, 208 (2005).

22. Robert I. Rotberg, *Nigeria: Elections and Continuing Challenges*, in BEYOND HUMANITARIANISM: WHAT YOU NEED TO KNOW ABOUT AFRICA AND WHY IT MATTERS 29, 33 (Princeton N. Lyman & Patricia Dorff eds., 2007) ("Thus far (since Obasanjo became Nigeria's civilian president in 1999), Nigeria is remarkably less secure than when he took office. Its external borders are unchallenged, but nonstate actors and a variety of indigenous insurgent groups continue to attack (rather brazenly) either the nation-state or the governments of individual states. . . . Additionally, crime against persons, including murder, rape, and robbery, has grown in scale and viciousness.").

circumstances.<sup>23</sup> Whatever the precipitating motive, it is fairly obvious that security in Nigeria has collapsed under the weight of intense and implacable ethnic fervor that often erupts into violence, ineffective leadership unable to provide for the safety of citizens, and restive and disaffected citizens who turn to violence to address their economic deprivations and grudges—real and manufactured—against the government.<sup>24</sup>

The government's failure to guarantee security provides opportunities for dysfunctional, extralegal, and criminal conduct that distorts the lives of citizens and undermines democratic consolidation.<sup>25</sup> Three groups, with different justifications and excuses for their conduct, have seized the opportunity and continue to pose severe threats to life and property in Nigeria—ethnic militias,<sup>26</sup> vigilante groups,<sup>27</sup> and criminal elements in the society. The police, at times aided by soldiers, have long struggled, mostly without success, to stem the escalating tide of violent crimes, especially armed robbery, kidnapping, and murder.<sup>28</sup> Major Nigerian cities are blighted by surging and uncontained violence orchestrated and brutally executed by the triad of ethnic militias, vigilantes, and criminal elements in the society.<sup>29</sup> These subterranean networks of criminals have no respect for laws and authorities. In their world, humanity has lost its dignity and sanctity; citizens can be treated and abused as they like and in some cases,

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23. Violence in Africa results from several factors including ethnic irredentism, feelings of marginalization by ethnic minorities, poverty, and failure of the central government to deal fairly with all the ethnic groups that comprise the nation. See, e.g., Charles Gore & David Pratten, *The Politics of Plunder: The Rhetorics of Order and Disorder in Southern Nigeria*, 102 AFR. AFF. 211, 212 (2003) (stating that violent local responses by youth groups mobilized around issues of resource control and community security are a widespread response to the “politics of plunder” and an endemic feature of the Nigerian social landscape); Muna Ndulo, *The Democratic State in Africa: The Challenges for Institution Building*, 16 NAT'L BLACK L.J. 70, 76 (1998) (noting that conflicts in Africa have typically been rooted in struggles for political power, ethnic privilege, national prestige, and scarce resources).

24. HUMAN RIGHTS WATCH, “REST IN PIECES”: POLICE TORTURE AND DEATHS IN CUSTODY IN NIGERIA 12 (2005) [hereinafter REST IN PIECES], available at <http://www.hrw.org/sites/default/files/reports/nigeria0705.pdf> (“Rising poverty, high unemployment and the breakdown of traditional social structures have led to an upsurge of violent crime in recent years which the Nigerian police have been ill-equipped to address.” (citation omitted)).

25. Jeffrey I. Herbst, *The Incomplete Triumph of Democracy in Africa*, The American Enterprise Institute Bradley Lecture (Nov. 1, 2004), available at [http://www.aei.org/publications/pubID.21486,filter.all/pub\\_detail.asp](http://www.aei.org/publications/pubID.21486,filter.all/pub_detail.asp). Discussing the impact of insecurity on democratic consolidation, Professor Jeffrey Herbst stated, “African democracies are threatened by lawlessness, crime, the spillover of rebel activity from neighboring countries, and terrorists. It is imperative that the security services work better so that the security situation of individual countries can be improved.” *Id.*

26. See TUNDE BABAWALE, *URBAN VIOLENCE, ETHNIC MILITIAS AND THE CHALLENGE OF DEMOCRATIC CONSOLIDATION IN NIGERIA* (2003) (examining the activities of ethnic militias and the impact of violence on the democratic process).

27. HUMAN RIGHTS WATCH, *NIGERIA: THE BAKASSI BOYS: THE LEGITIMIZATION OF MURDER AND TORTURE* (2002) [hereinafter THE BAKASSI BOYS], available at <http://www.unhcr.org/refworld/docid/3cea124a.html>.

28. See REST IN PIECES, *supra* note 24, at 13–16 (discussing various efforts by the people to deal with violence and crimes in Nigeria).

29. See *supra* note 20.

used as money-making pawns. Life in Nigeria has almost degenerated to the situation described by Thomas Hobbes as “solitary, poor, nasty, brutish, and short.”<sup>30</sup> Lawyers are especially ineffective in a dystopian environment where violence replaces social dialogue and extralegal measures become the preferred mode of conflict resolution, where disaffected minority groups view violence as an acceptable means of pressing their case for inclusion, and where the rule of law and the social order it sustains have been dethroned and supplanted by jungle justice administered by ethnic militias, vigilante groups, and criminal elements. Lawyers similarly fade into irrelevance when vigilantes and lynch mobs constitute themselves into judges and juries and summarily execute criminal suspects.<sup>31</sup> For lawyers who thrive on, and indeed depend on, the rule of law to effectively discharge their duties, practicing law in such an environment presents insuperable problems and wrenching challenges. Normal legal practice—litigation, counseling, and negotiations—are disrupted or even rendered impossible by insecurity. As I have stated elsewhere,

Insecurity has fundamentally altered the way in which lawyers practice their trade. Lawyers place much premium on survival and are thus unable to discharge their obligations to the society. Fear weighs heavily in a lawyer’s decision to aggressively defend and protect rights and liberties. Far more concerned with staying alive than practicing law, lawyers devote most of their time devising survival strategies that will keep them out of harms way.<sup>32</sup>

When fear is endemic and inept political leaders offer no viable means of safeguarding citizens’ lives and property, and where hoodlums lay siege on the society, lawyers who want to protect rights find themselves in a profound quandary; they cannot defend citizens’ rights without exposing themselves to danger. On the other hand, refusing to assist citizens in need of legal services will expose lawyers to charges of indifference to public good. In crime-blitzed and violent societies, the desire to protect rights and defend liberties has to be balanced against a disturbing reality. Far too often, aggressive defense of rights is not an option for lawyers consumed by fear. Lawyers steeped in self-protection are often unable to adequately offer legal advice, legal representation, or even to provide the reassuring calm typically extended to clients who turn to lawyers for assistance. Indeed, they are, just like their clients, frightened and alarmed by the violence and are ultimately unhelpful and helpless. As a former classmate practicing law in one of Nigeria’s major cities stated, “[F]ear for one’s safety is something you cannot suppress. No matter how hard you try, it is

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30. THOMAS HOBBS, *LEVIATHAN* 86 (Forgotten Books 2008) (1651).

31. *THE BAKASSI BOYS*, *supra* note at 27, at 24 (“Setting themselves up as self-appointed judges, juries and executioners, the Bakassi boys have killed scores of people after putting them through their own form of trial resulting in apparently arbitrary decisions as to the individual’s guilt or innocence, often on the basis of fabricated evidence, evidence extracted under torture, or no evidence at all.”).

32. Oko, *supra* note 7, at 594.

a visceral feeling that keeps popping up in your head and occasionally dominates your thought.”<sup>33</sup>

### B. *Judiciary in Disarray*

Democratic constitutions typically recognize the judiciary as an independent body separate and distinct from other arms of government.<sup>34</sup> The judiciary, when performing its constitutional functions, provides a forum for the citizens to ventilate their grievances and seek redress for wrongs, even against the government and its functionaries.<sup>35</sup> It is generally regarded as the most potent mechanism for checking executive and legislative excesses and also for protecting constitutionally guaranteed rights and liberties.<sup>36</sup> In court, more than anywhere else, citizens can confront the government and assert a claim for justice without feeling disadvantaged or overwhelmed by powers typically vested in the government.<sup>37</sup>

To perform these roles, a nation needs a judiciary that is independent, honest, and willing to engage in neutral, impartial, and dispassionate

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33. Interview with Ikechi Ukoin, Attorney, in Abuja, Nigeria (July 22, 2007).

34. For the corresponding provision of the Nigerian Constitution, see CONSTITUTION, Art. 6 (1999) (Nigeria).

35. See Niki Tobi, *Law, Judiciary and Nigerian Democracy*, in LAW, JUSTICE AND THE NIGERIAN SOCIETY: ESSAYS IN HONOUR OF HON. JUSTICE MOHAMMED BELLO 122, 130 (Ignatius Ayua ed., 1995). Justice Niki Tobi stated that,

The Judge as an arbiter or adjudicator qua *judex* is the custodian of the rule of law which is the life-blood of democracy. . . . The judicial powers vested in the Judge are the tools upon which he can exercise the constitutional powers of judicial review. By his unique position as the independent umpire in the judicial process, the Judge becomes the principal guardian of the democratic process, with the constitutional and inherent powers to protect individual liberty and freedom from being abused or brutalised by government and its agencies.

*Id.*

36. Justice Nasir Ajanah aptly summarized the role of courts in a democracy when he stated,

[T]he Court stands as a shield and fortress against tyranny and oppression, as the defender and custodian of individual rights and liberties, as an asylum or sanctuary and comfort to the oppressed, as a guarantor of hope for the hopeless and the innocent, as a chilling terror to the malignant and the vile; as an encouragement to good behaviour and as a discouragement to evil doers.

Justice Nasir Ajanah, *Access to Justice: Problems and Solutions*, Paper Presented at the Nigerian Bar Association 2003 Annual General Conference 3 (Aug. 15, 2003) (on file with author).

37. The relative importance of the judiciary in a democracy was eloquently stated by retired Nigerian Supreme Court Justice Chukwudifu Oputa. He stated that,

It is the judiciary that will compel the legislature to act within the constitution limits by striking down as unconstitutional, all laws that the legislature either has no power to enact or else that conflict with the spirit or letter of the constitution. It is the judiciary that has to ensure that even the state is subject to the laws and that government—that is the executive branch—should respect the rights of the individual under the law. It is the judiciary that has to ensure that parties who come before it go out satisfied that justice has been done.

See Umaru Eri, *Commentary*, in ALL NIGERIA JUDGES' CONFERENCE 2001, at 200, 201 (2001) (quoting Oputa).

interpretation of the law.<sup>38</sup> So much depends on the background, character, and judicial philosophy of judicial officers.<sup>39</sup> The major problem in Nigeria, however, seems to be the character of judicial officers and not their judicial philosophy. Character flaws manifest predominantly in two areas: succumbing to government influence and corruption.<sup>40</sup>

### 1. Government Interference

The Nigerian Constitution speaks eloquently about judicial independence, but judges in fact remain beholden to the executive. For example, judges at all levels of the judiciary—High Courts, Courts of Appeal, and the Supreme Court—are appointed and promoted by the executive branch, often without screening and/or confirmation by the legislature.<sup>41</sup> The Executive also controls some of the facilities needed by

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38. Retired Supreme Court Justice Chukwudifu Oputa eloquently stated what the judiciary must do to regain public confidence:

To inspire public confidence in the judicial process, judges should not only be transparently impartial but also should be seen to be accentuated only by the principles of justice and fair play. The judge should therefore scrupulously eschew bias in any shape or form. It is not merely of some importance, but is of fundamental importance, that justice should not only be done but should manifestly and undoubtedly be seen to be done. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking—"the judge was biased."

Chukwudifu Oputa, *Judicial Ethics and Canons of Judicial Conduct*, in *JUSTICE IN THE JUDICIAL PROCESS: ESSAYS IN HONOR OF JUSTICE EUGENE UBAEZONU* 193, 201 (C. C. Nweze ed., 2002).

39. Lavenski R. Smith, *Judicial Selection: It's More About the Choices than Who Does the Choosing*, 30 U. ARK. LITTLE ROCK L. REV. 799, 801 (2008) ("The types of jurists who serve on the bench have a significant impact on whether a 'feeling of injustice' exists among the people. Regardless of the substantive law applied throughout history, all peoples 'seem to have been unanimous in the desire for judges who could be trusted to judge justly and without fear or favor.' This is because the 'quality of justice' is more dependent on the quality of the individuals administering the law rather than on the 'content of the law they administer.'").

40. See TRANSPARENCY INT'L, *GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS*, at xxii–xxiv (2007), available at [http://transparency.org/publications/gcr/download\\_gcr/download\\_gcr\\_2007](http://transparency.org/publications/gcr/download_gcr/download_gcr_2007) (listing political interference and bribery as two kinds of judicial corruption). P. O. E. Bassey, a former High Court judge, identified two kinds of corruption:

There are two types of corruption. People who accept money to give justice to the highest bidder. . . . The other type of corruption is when you have a case against the government. This is where the greatest danger lies. Most of the Judges will find "grounds" to give judgment in favour of the government.

P. O. E. BASSEY, *THE NIGERIAN JUDICIARY: THE DEPARTING GLORY* 38 (2000) (citation omitted).

41. The Chief Justice of Nigeria and the justices of the Supreme Court are appointed by the President on the recommendation of the National Judicial Council, subject to confirmation by the Senate. See CONSTITUTION, Art. 231 (1999) (Nigeria). The President of the Court of Appeal is appointed by the President on the recommendation of the National Judicial Council subject to confirmation by the Senate. *Id.* Art. 238(1). Other justices of the Court of Appeal are appointed by the President on the recommendation of the National Judicial Council. *Id.* Art. 238(2). The Chief Judge of the Federal High Court is appointed by the President on the recommendation of the National Judicial Council subject to

the judiciary such as housing, transportation, and support staff.<sup>42</sup> Governments, impatient with rules that constrain their authority, view courts as proxies to pursue their domination and control of the state and the citizens.<sup>43</sup> This attitude leads them to appoint judges who will feel beholden to them and can therefore be counted on to tilt the scale of justice in their favor. It also leads them to seek to influence court decisions, especially in cases where the government has a significant interest.<sup>44</sup>

The power of appointment gives the executive branch a considerable level of influence over the judiciary and leaves judges vulnerable to manipulation and control.<sup>45</sup> Feelings of vulnerability are deep, pervasive, and often unallayable among judges whose career advancements, as well as

confirmation by the Senate. *Id.* Art. 250(1). At the state level, the Chief Judge is appointed by the Governor on the recommendation of the National Judicial Council, subject to confirmation by the House of Assembly of the state. *Id.* Art. 271(1). Other state high court judges are appointed by the state governor on the recommendation of the National Judicial Council. *Id.* Art. 271(2).

42. A. G. Karibi-Whyte, *The Place of the Judiciary in the 1999 Constitution*, in 1999 ALL NIGERIA JUDGES' CONFERENCE 101, 163 (2000) ("As long as the Judges are beholden to the Executive for the important facilities, such as health, transport, housing and indeed material for the performances of their duties, the principle of judicial independence envisaged in the Constitution will remain theoretical and a sham.").

43. Ochereome Nnanna, *People & Politics: Taming the Executive Monster*, VANGUARD (Nig.), Jan. 26 2004, <http://news.biafranigeriaworld.com/archive/2004/jan/26/225.html> ("Right from Independence, . . . Nigerian leaders, whether in military uniform or civilian attire, have always sought to exploit the Judiciary to their own partisan political advantage and the detriment of the growth of democracy.").

44. Professor Ben Nwabueze's assessment of the attitude of politicians toward the judiciary still retains currency in contemporary Nigeria. He stated, "[P]oliticians in this country are strongly inclined and prepared to use pressure of various kinds to try to influence in their favour the judge's decision—from lobbying to intimidation to outright bribery." BEN O. NWABUEZE, *NIGERIA'S PRESIDENTIAL CONSTITUTION: THE SECOND EXPERIMENT IN CONSTITUTIONAL DEMOCRACY* 443 (1985).

45. Several organizations, including Human Rights Watch, Amnesty International, and the U.S. Department of State, have documented problems with fair trial rights in Nigeria. The U.S. Department of State Country Report on Human Rights Practices observed,

Although the constitution and law provide for an independent judiciary, the judicial branch remained susceptible to executive and legislative branch pressure. Political leaders influenced the judiciary, particularly at the state and local levels. Understaffing, underfunding, inefficiency, and corruption continued to prevent the judiciary from functioning adequately. There was a widespread perception that judges were easily bribed and that litigants could not rely on the courts to render impartial judgments. Citizens encountered long delays and frequent requests from judicial officials for bribes to expedite cases or obtain a favorable ruling. Judges frequently failed to appear for trials, often because they were pursuing other sources of income, and sometimes because of threats against them. In addition court officials often lacked the proper equipment, training, and motivation to perform their duties, with lack of motivation primarily due to inadequate compensation.

U.S. DEP'T OF STATE, 2007 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: NIGERIA (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100498.htm>; Freedom House, *Freedom in the World: 2004 Country Reports: Nigeria*, <http://www.freedomhouse.org/template.cfm?page=22&country=2999&year=2004> (last visited Feb. 22, 2009) (reporting that "[t]he judiciary is subject to political interference and is hampered by corruption and inefficiency").

access to facilities like housing and transportation depend on the Executive. It also explains why some judges easily truckle to the Executive in hopes of receiving favorable consideration for judicial promotion or a favorable posting.<sup>46</sup>

The government's operational control of the judiciary presents opportunities and temptation for manipulating and influencing judges.<sup>47</sup> Most judges are lawyers of integrity. They want to be as fair and impartial as possible, but they cannot help but be affected by the career-changing, enormous powers of government.<sup>48</sup> Judges live with the anxiety that government officials, unhappy with their decisions, could make life difficult by denying them decent housing and transportation.<sup>49</sup> This mindset infects both the attitude and the disposition of judges and often leads them imperceptibly to propitiate the Executive. The ability of government to advance judges' careers invariably affects how they treat cases involving the government.

In some high-profile cases, a government intent on frustrating the search for justice adopts two principal strategies: subtly influence the judge to issue decisions favorable to the government, or make it difficult for the courts to do the right thing.<sup>50</sup> These two ploys were distressingly displayed by the Obasanjo administration and his successor, the current President Umaru Musa Yar'Adua. Two weeks before the Presidential Election Tribunal adjudicated the highly charged petition by the losing candidates challenging the 2007 election of President Yar'Adua, the government announced the elevation of the chairman of the tribunal, Appeal Court

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46. Elevation to a higher bench far too often does not depend on competence and integrity of the judge as evidenced by their judicial track record. Rather, a judge's contacts with the powerful have become major determinants of career advancement in the judiciary.

47. See *supra* note 40 and accompanying text.

48. Susan Webber Wright, *In Defense of Judicial Independence*, 25 OKLA. CITY U. L. REV. 633, 635 (2000) ("A judge who is concerned that his or her rulings might affect his or her career is a judge who might lose focus on the most important of judicial duties: to maintain the rule of law.").

49. Karibi-Whyte, *supra* note 42, at 149. Justice Karibi-Whyte stated,

When the Executive controls what the Judiciary requires for discharging its constitutional functions, when the maintenance of the health and comfort of members of the Judiciary lies at the whims of the Executive; when the facilities for interaction with other judicial colleagues all the world over is controlled by the Executive, the only value left is that of impartiality which is maintained by the human spirit, and the sacred resolve to uphold the judicial oath. To what extent the vagaries of the executive oppression affects impartiality depends upon the pain threshold of the individual Judges and resistance of the injustice inflicted by the executive misdemeanours.

*Id.*

50. In a report on judicial corruption, Transparency International observed that: "A dispiriting finding of this volume is that despite several decades of reform efforts and international instruments protecting judicial independence, judges and court personnel around the world continue to face pressure to rule in favour of powerful political or economic entities, rather than according to the law." TRANSPARENCY INT'L, *supra* note 40, at xxii.

Justice James Ogebe, to the Supreme Court.<sup>51</sup> The tribunal eventually rendered its judgment dismissing the petitions against the President.<sup>52</sup> Even though there may be no credible evidence to show that the appointment affected the outcome of the case, such an appointment does nothing to bolster public confidence in the judiciary. In a highly contested election with credible evidence of rigging by the ruling party, such an appointment fueled public speculation that the appointment of Justice Ogebe was designed to influence the outcome of the case. It also provides the perverse incentive for judges to exercise their powers and discretion in favor of the government in hopes of receiving similar favors extended to Justice Ogebe.<sup>53</sup>

The second option, far more sinister than the first one, involves efforts by the government to obfuscate or delay judicial proceedings. This option is typically employed when the government feels that the court cannot be influenced. Before the 2007 general elections, President Olusegun Obasanjo's open war with his Vice President, Atiku Abubakar, made its way to the court. The Vice President had filed an action challenging the validity of his disqualification by the electoral commission from contesting the presidential election under the banner of his new party, the Action Congress. Less than eight days before the presidential election, the Supreme Court set aside two days, Thursday and Friday, for the parties to present their cases. Soon after that, the federal government, apparently motivated either by fear of an adverse judgment or by the impulse to demonstrate its authority, declared public holidays on those days, thus making it impossible for the court to adjudicate the matter.<sup>54</sup> Presidential consiglieres heaving with schadenfreude over the setback the public holiday had on Vice President Abubakar and his lawyers, impishly offered an unconvincing explanation that the holiday was necessary to enable public servants to travel to their local precincts to vote.<sup>55</sup> This explanation was as risible as the government's vacuous denial that the holiday was in no way

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51. See Laide Akinboade & Ise-Oluwa Ige, *Yar'Adua Sends Tribunal Chairman to S-Court*, VANGUARD (Nig.) Feb. 20, 2008, [http://www.vanguardngr.com/index.php?option=com\\_content&task=view&id=2943&Itemid=0](http://www.vanguardngr.com/index.php?option=com_content&task=view&id=2943&Itemid=0).

52. See *Nigeria Poll Petitions Dismissed*, BBC NEWS, Feb. 26, 2008, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/7263534.stm>.

53. I. O. Agbede, *The Rule of Law: Fact or Fiction*, in ADMINISTRATION OF JUSTICE IN NIGERIA: ESSAYS IN HONOUR OF HON. JUSTICE MOHAMMED LAWAL UWAI 137, 143 (John Ademola Yakubu ed., 2000) ("The more ambitious judges may wish to curry the favour of the Executive by deliberately going out of their way to pervert the course of justice in order to please the executive organ and earn its favour.").

54. Malachy Uzendu & Olatubosun Sowemimo, *FG Declares Public Holidays*, DAILY CHAMPION (Nig.), Apr. 12, 2007, available at <http://allafrica.com/stories/200704120140.html> (reporting that the President designated Thursday, April 12, and Friday, April 13, as work-free days so that people could travel to participate in the elections on Saturday, April 14).

55. *Controversy over FG Public Holidays*, THIS DAY (Nig.), Apr. 12, 2007, available at <http://www.afrika.no/Detailed/13917.html> (reporting that the Secretary to the Government of the Federation stated that "the unexpected holidays w[ere] intended to enable people to travel to participate in this weekend's elections").

designed to frustrate Vice President Abubakar's efforts to seek judicial relief. This scheme delayed but did not affect the outcome of the case, as the Supreme Court subsequently ruled that the embattled Vice President should be allowed to contest elections as the flag bearer of his new party. However, the delay served President Obasanjo's political motivations; judgment was given only five days prior to the presidential election, thus providing insufficient time for the Vice President to sustain the interest and support of his restive supporters.<sup>56</sup>

The belief that the judiciary can be annexed to achieve political objectives, widely shared by governments in Africa, provided the impetus for the government's obfuscatory efforts in the Abubakar case. Two things stand out from the conduct of the federal government in Abubakar's case. The first is that it vividly amplifies the arrogance and hubris of a government that feels unaccountable to the citizens. The second, subtle but far more sinister than the first, is that it betokens the government's skewed view of the judiciary as an annex of the bureaucracy and a proxy for the government to maintain its hegemony over the nation.<sup>57</sup>

## 2. Corruption

Corruption, the scourge coursing through the nation, has regrettably infected a judiciary once considered impregnable to the lures of corruption.<sup>58</sup> The temple of justice where honesty and fairness once ruled has been disassembled and replaced by corruption, favoritism, and insidious opportunism.<sup>59</sup> Judicial integrity, once the defining virtue of the judiciary, is vanishing swiftly and possibly irretrievably. Corrupt judges are victims

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56. Whether or not the delay affected Atiku Abubakar's chances at the polls may never be known. It is conceivable that it did not have any effect because the level of electoral fraud orchestrated by the ruling party would have overwhelmed any presidential candidate, even one as determined and well-financed as Abubakar.

57. Government officials view the judiciary as vital to their power base and therefore engage in all kinds of machinations to turn the judiciary into a malleable instrument of state power. The dominant government attitude toward the judiciary was eloquently stated by Petter Langseth, a crime prevention officer with the United Nations Centre for International Crime Prevention. He stated, "One has . . . to understand the political resistance to judicial independence as the result of the unwillingness of executive branches and legislatures to abandon a court system frequently used as a tool to settle political scores or to consolidate political bases." PETER LANGSETH, CTR. FOR INT'L CRIME PREVENTION, UNITED NATIONS OFFICE FOR DRUG CONTROL & CRIME PREVENTION, EMPOWERING THE VICTIMS OF CORRUPTION THROUGH SOCIAL CONTROL MECHANISMS 24 (2001), available at <http://www.unodc.org/pdf/crime/gpacpublications/cicp17.pdf>.

58. Osita Nnamani Ogbu, *Combating Corruption in Nigeria: A Critical Appraisal of the Laws, Institutions, and the Political Will*, 14 ANN. SURV. INT'L & COMP. L. 99, 99 (2008) ("Corruption is pervasive and widespread in Nigerian society. It has permeated all facets of life and every segment of society is involved."). For a discussion of corruption in Nigeria, see Okechukwu Oko, *Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus*, 34 N.Y.U. J. INT'L L. & POL. 397 (2001).

59. For a detailed analysis of judicial corruption and other problems of the judiciary in Nigeria, see Okechukwu Oko, *Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria*, 31 BROOK. J. INT'L L. 9 (2005).

of their own character flaws and are motivated more by avarice than fear of government. Bribery and favoritism lead judges to approach adjudication with ideas and sentiments that prevent or impede neutral, fair, and objective evaluation of matters before them. Corruption extirpates objectivity and impartiality from the judicial process and leaves litigants at the mercy of compromised judicial officers. Integrity takes a very distant backseat to greed and avarice as corrupt judges readily sacrifice every virtue to make money.<sup>60</sup> The absence of juries in Nigeria gives judges more influence and power over litigation. Judges evaluate and rule on both questions of law as well as fact and therefore have limitless opportunities to skew the process to achieve preordained outcomes.

Judicial corruption disaffects the masses and diminishes the already low level of confidence in the judicial process.<sup>61</sup> Judicial corruption also sends an unsettling message to an already demoralized citizenry that the judiciary is not the forum for seeking redress.<sup>62</sup> Some citizens are reluctant to process their disputes through the judicial process because they believe that it is money that ultimately determines the outcome of cases in court.<sup>63</sup> Other citizens, distrustful of the judiciary, invite vigilante groups to settle civil disputes.<sup>64</sup> Despite mounting public criticisms, the judiciary repeatedly demonstrates a tendency, especially in high-profile and election

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60. In a system festooned with corruption, justice is often determined by the depth of a party's purse or social status. A corrupt judge is driven by the desire to amass wealth and is willing to bend the law to accommodate compliant parties who grease his palm. Nigerian Supreme Court Justice Niki Tobi aptly described the mindset and modus operandi of a corrupt judge:

[A] judge who is corrupt is the greatest enemy of the judicial process. A corrupt judge is blind to the truth. He is incapable of searching for the truth in the judicial process. His mind is diseased and he is incapable of doing justice in the matter before him. He likes the party who has given him the bribe. He hates the party who has not given him the bribe. He therefore, gives judgment to the party he likes and gives judgment against the party he hates.

Niki Tobi, *Code of Conduct and Professional Ethics for Judicial Officers in Nigeria*, in *JUDICIAL EXCELLENCE: ESSAYS IN HONOR OF HON. JUSTICE ANTHONY I. IGUH* 37, 82–83 (J. O. Irukwu & I. A. Umezulike eds., 2004).

61. *Metro. Props. Co. (F.G.C.) v. Lannon* [1969] 1 Q.B. 577, 599 (C.A.) (Lord Denning, M.R.) (“Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: ‘The judge was biased.’”); Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 *HARV. L. REV.* 16, 53 (2002) (stating that the three conditions necessary for judges to function efficiently are independence of the judiciary, judicial objectivity, and the public's confidence).

62. *TRANSPARENCY INT'L*, *supra* note 40, at xxi (“Judicial systems debased by bribery undermine confidence in governance by facilitating corruption across all sectors of government, starting at the helm of power. In so doing they send a blunt message to the people: in this country corruption is tolerated.”).

63. Alex B. Long, “*Stop Me Before I Vote for This Judge Again*”: *Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 *W. VA. L. REV.* 1, 8–9 (2003) (“[T]he continued vitality of the judiciary depends in no small measure on the public's confidence that judges are ethical and that justice is being dispensed fairly and impartially.”).

64. ROBERT I. ROTBERG, *NIGERIA: ELECTIONS AND CONTINUING CHALLENGES* 21 (2007) (“[T]he country's formal justice system . . . rarely settles disputes quickly and fairly, compelling too many Nigerians to conclude disputes by force.”).

cases, to lend its process in the service of the powerful, well-connected, and wealthy citizens.<sup>65</sup>

More desperate and audacious litigants try to bribe judges to gain some tactical advantages over the opposing parties.<sup>66</sup> Parties watch compromised judges issue dubious and at times mortifying decisions not only with angst but also with determination never again to allow opposing parties to gain an unfair advantage. They therefore join the sweepstakes and try to out-bribe the other party by giving more money to the judges. This mindset leads to a pernicious dynamic in which the judicial process is viewed as an auction in which judgment goes to the highest bidder.<sup>67</sup>

Judicial independence, one of the cornerstones of constitutional democracy, means nothing when an arrogant government can frustrate proceedings and influence and manipulate the judges. No judiciary can be said to be truly independent when judges are appointed by government and depend on government for essential facilities like housing, transportation, and support staff. The lawyers' role as defenders of rights and protectors of liberties equally mean nothing if lawyers cannot predict with reasonable certainty what the judges will do. Judicial corruption not only constitutes a disheartening impediment to democratic consolidation but also disables lawyers from effectively discharging their obligations to their clients.

In no way do I imply that judicial corruption is limited to developing societies and fragile democracies.<sup>68</sup> Judicial corruption is a global phenomenon and affects all countries, albeit with varying degrees of severity and frequency. The difference, however, is that established democracies often have effective mechanisms to address instances of judicial impropriety and to quickly restore public confidence in the system. In developing societies, the mechanisms for dealing with judicial corruption are often inefficient and are beset by social problems like ethnicity and favoritism that ultimately render them incapable of responding swiftly and effectively to allegations of judicial misconduct. In some ways the government, especially in fragile democracies, often is ambivalent toward judicial independence. Government officials profess commitment to judicial independence but are more focused on securing their power base. Leaders, most of whom assumed power through dubious and questionable elections, often seek to enlist the support of the judiciary in their bid to

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65. Ordinary citizens whose rights and interests have been affected by either the government or other citizens are disinclined to go to court because they feel that it is futile. Conversely, the powerful and well-connected citizens rush to court secure in the knowledge that the court can be used to validate their positions. See U.S. DEP'T OF STATE, *supra* note 45.

66. A. J. Owonikoko, *Law and Human Rights: Tackling Corruption in the Administration of Justice*, VANGUARD (Nig.), Apr. 3, 2003, <http://web.archive.org/web/20030405212926/http://www.vanguardngr.com/articles/2002/features/fe304042003.html> (observing that the average Nigerian believes that the judiciary is corrupt, and so she expects that corruption is part of the pricing component of our justice system).

67. *Id.*

68. TRANSPARENCY INT'L, *supra* note 40 (discussing judicial corruption in different countries).

bolster their legitimacy and achieve their political objectives. A corrupt or weakened judiciary, in some perverse way, inures to the benefit of the ruling party, which can and often seeks to use the judiciary to achieve political objectives. Political leaders seem willing, even eager, to pawn judicial independence for raw power that enables them to turn the judiciary into a pliable instrument of state power.<sup>69</sup> Robert Calderisi, in his insightful book appropriately titled *The Trouble with Africa*, stated that,

A corrupt judicial system is another millstone around Africa's neck. In fact, dishonest judges are as bad as the dictators. Efforts to clean up the judicial system—training judges, computerizing records, strengthening the role of clerks—have borne little fruit because the politicians have found it more convenient to have a crooked and malleable judiciary than an independent one.<sup>70</sup>

### C. *Deteriorating and Ineffective Institutions*

Public institutions provide services that enable citizens to claim and enjoy the benefits and privileges afforded by constitutional democracy. The implicit premise is that public institutions will treat all patrons honestly, equally, fairly, and according to established rules and regulations. Public institutions in Nigeria are neither efficient nor effective and have proven to be incapable of meeting the demands and challenges of a rapidly developing and democratizing society. The problems of public institutions in Nigeria are systemic as well as individual, and result from years of neglect, underfunding, and inadequate supervision. The bureaucracy is riddled with corruption, Kafkaesque bureaucratic delays, favoritism, ineptitude, and mismanagement, and it lacks the level of transparency and accountability necessary to meet the demands of a democratizing society. Administrative rules and regulations are archaic, cumbersome, and often obtuse. Political elites, like their erstwhile military counterparts, place loyalty over competence and staff public institutions with incompetent but dependable allies. The most debilitating problem is that public servants have succumbed to the viral compulsion to gain advantage.<sup>71</sup>

The few public servants who strive to treat and deal with patrons fairly and honestly often fail to do so because of environmental pressures and incentives from politicians and patrons. They operate within a structure

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69. Transparency International accurately identified the perverse incentives for the government's support of a corrupt judiciary. The report on judicial corruption states that, "A pliable judiciary provides 'legal' protection to those in power for dubious or illegal strategies such as embezzlement, nepotism, crony privatisations or political decisions that might otherwise encounter resistance in the legislature or from the media." *Id.* at xxiii.

70. ROBERT CALDERISI, *THE TROUBLE WITH AFRICA: WHY FOREIGN AID ISN'T WORKING* 89 (2006).

71. As I have stated elsewhere, "Fueled by greed and the absence of meaningful supervision, government officials use their powers over public enterprises to enrich themselves. They often engage in various forms of illegal activities, including demanding bribes, extortion, embezzlement, fraud, and even outright expropriation of the state's resources." Oko, *supra* note 58, at 415.

that displays an unacceptable degree of bureaucratic lassitude. The administrative machinery is laggard and public servants are often underpaid, ill-equipped, overstretched, unmotivated, and ultimately insufficiently committed to the goals of the institution and to the interests of the public. Senior and midlevel public servants facing severe economic hardships, and realizing that their superiors are corrupt and indifferent to their welfare, engage in corrupt activities to augment their meager incomes.<sup>72</sup> Professor H. Kwasi Prempeh accurately describes bureaucratic abuses in Africa, stating,

The faces of “abuse of public power” most intimately familiar to the African are not necessarily those of the president or a minister of state; they are often those of the police sergeant manning the checkpoint or road block; the midlevel tax assessor at the district tax office; the customs official at the port of entry or border post; the clerk at the land-title office; the municipal clerk in charge of allocating market stalls; the official at the local vehicle registration or drivers’ licensing office; and the principal determining admission to the local high school. The public’s recurring encounters with these public officers are characterized by spur-of-the-moment “rule making,” unjustified discrimination, opportunistic delays, and plain extortion.<sup>73</sup>

The administrative and bureaucratic rules—especially laws—are often couched in needlessly obscure or technical language that is difficult for citizens to understand without assistance from lawyers.<sup>74</sup> Citizens therefore need lawyers to help them comply with regulations and, more importantly, to “resist, deflect or ameliorate government regulation.”<sup>75</sup> Lawyers thrive on the ability to predict with reasonable certainty what legal institutions will do, which gives lawyers the leverage to counsel and advise their clients. It also enables them to effectively represent their clients before public agencies. Civil servants, devoid of concerns for the public and stripped of

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72. This phenomenon was explained by Robert Calderisi who stated,

Imagine being a minister of finance, trying to raise a family of five or six on a salary of \$500 a month . . . and surrounded by less competent colleagues who have already sent their children to American or French universities and have handsome apartments in London or Nice. Only the rarest of human beings could resist such temptations very long. Remarkably, many still do. One way of honoring that resistance is to close the yawning gaps in government rules—foreign and domestic—that allow officials to rob public money with impunity.

CALDERISI, *supra* note 70, at 90.

73. H. Kwasi Prempeh, *Africa’s “Constitutionalism Revival”: False Start or New Dawn?*, 5 INT’L J. CONST. L. 469, 500 (2007).

74. The complaint that laws are couched in technical language difficult for lay persons to interpret appears to be a global phenomenon. As David Luban observed about the American legal system,

It is an obvious fact . . . that all of our legal institutions . . . are designed to be operated by lawyers and not by laypersons. Laws are written in such a way that they can be interpreted only by lawyers; judicial decisions are crafted so as to be fully intelligible only to the legally trained.

DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 244 (1988).

75. Geoffrey C. Hazard, Jr., *Seeking Justice, Preserving Liberty*, 54 HASTINGS L.J. 695, 701 (2003).

integrity, turn the government bureaucracy into a nightmare for lawyers. When public institutions do not function efficiently and are riddled with corruption, lawyers prove unable to achieve measurable results for their clients.

For a country that operates a semisocialistic economy where the government plays a predominant part in business activities, lawyers encounter considerable difficulties in helping their clients conform transactions to law. Corruption, ineptitude, and inefficiency combine to create a context where lawyers' dealings with public institutions are rendered more complex, less predictable, and beset with artificial obstacles created by rent-seeking and corrupt officials. For example, civil servants who process applications for licenses and concessions often engage in all kinds of delay tactics to extort money from the applicants. These delay tactics are crudely and unsuccessfully disguised as an attempt to ensure compliance with all the rules and regulations. Corrupt intent is not always easy to prove but not impossible to discern, especially when public officials offer no plausible explanation for delaying the process. Lawyers see through this unctuousness but are often unable to correct it. Lawyers' sense of helplessness derives from an understanding of the futility of filing complaints against erring civil servants and a recognition of the systemic problems in the public service sector.

Dealing with dysfunctional, corrupt, and unpredictable public institutions is very disconcerting for lawyers. Corruption in public institutions creates a context in which lawyers' ability to serve their clients often depends, not on their skills and mastery of the regulations, but on how they deal with public servants who demand bribes without scruples or restraint. Lawyers caught in this kind of situation face two unpalatable choices. The first choice is to refuse to pay the bribe and lodge a complaint with the appropriate authorities.<sup>76</sup> This commitment to good ethics puts them at a great disadvantage because clients rarely understand why a lawyer cannot secure a business permit or license, especially when it is common knowledge that other lawyers obtained the same benefits for their friends and even competitors. Also, sounding the tocsin of impropriety will further alienate the lawyer and portray him as inefficient to the needy and desperate client. The lawyer may also face retaliatory measures from the establishment,

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76. This could be the head of the institution, the police, or more recently the Independent Corrupt Practices Commission or the Economic and Financial Crimes Commission. The Corrupt Practices and Other Related Offences Act, section 23(2) requires

any person from whom any gratification has been solicited or obtained, or from whom an attempt has been made to obtain such gratification, . . . [to], at the earliest opportunity thereafter, report such soliciting or obtaining, or attempt to obtain the gratification . . . to the nearest officer of the Commission or Police Officer.

See The Corrupt Practices and Other Related Offences Act No. 5 (2000) § 23(2) (Nigeria).

especially by the friends and latitudinarian colleagues of the outed employee.<sup>77</sup>

For the second choice, some lawyers, moved either by desire for self-advantage or the desire to appease uncomprehending and impatient clients, resolve the conundrum by paying money to move the files along. These lawyers follow the unethical and illegal but necessary (in their view) route of offering bribes to achieve results for their clients. The *pas de deux* featuring a corrupt public servant and a lawyer willing to pay ensures that files move quickly and ultimately enables the lawyer to achieve results for the client. Offering bribes to public servants is not only unethical but also emboldens corrupt public servants to demand more bribes before discharging their duties. More importantly, lawyers who yield to the temptation to bribe public servants not only bring shame and disrepute to the legal profession, but they also cause the legal profession to forfeit credibility to the public it seeks to persuade to embrace democracy. Some citizens believe that the conduct of the few bribe-giving lawyers is representative of the entire legal profession, thus fueling the charge that lawyers are unconstrained by ethical standards and that they, like members of the public, are willing to do anything to achieve the results they desire. Citizens who subscribe to this negative impression of lawyers are skeptical of, if not averse to, efforts by lawyers to encourage them to support democracy.

#### D. *Lack of Democratic Culture*

Democracy requires a frame of mind that many Africans have not developed or are simply uninterested in cultivating. Democracy will flourish only when its values and precepts resonate with the citizens. Democracy, after all, is supposed to be a government of the people and by the people. As African nations widely and rightly celebrate democracy as the preferred mode of governance, there are some citizens who, for reasons partly historical and partly experiential, are less enthusiastic about playing active roles in the democratic process.<sup>78</sup> Disinterest with the legal system, a disabling threat to the democratic process, has a long provenance in

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77. This was disclosed to me during interviews with some lawyers, mostly my classmates and former students, whose practices predominantly involve dealing with administrative and regulatory agencies on behalf of their clients.

78. Explaining the difference between the Western concept of democracy and traditional notions of democracy, Professor Salvatore Mancuso stated that,

The western concept of democracy—for example—is based on the power of a majority coming out [from] a people's consultation that can impose its decisions over the minority. But there is a different concept not enough "publicized" through scholarly research but strongly alive in the African culture, according to which only the unanimous decision is binding because no reasoning can justify the submission of the minority to the majority will: it is allowed to persuade, not to impose.

Salvatore Mancuso, *The New African Law: Beyond the Difference Between Common Law and Civil Law*, 14 ANN. SURV. INT'L & COMP. L. 39, 54 n.45 (2008).

Nigeria. The British colonial administration hastily imposed its legal culture and system on a continent with dramatically different cultural and social assumptions.<sup>79</sup> Little or no effort was made to appreciate the culture of the subjects. Rather, the colonial rulers compelled citizens to comply with the rules.<sup>80</sup> Some citizens felt outraged and angry that colonial administrators ignored and in some cases disrespected and even disdained local institutions and norms.<sup>81</sup> The imperial perversion of culture moved some citizens to recoil into their shells in an attempt to live their lives in total indifference, perhaps contempt, for the Western legal apparatus, including the democratic process.<sup>82</sup>

Some citizens have been unable to erase memories of brutality and humiliation they or their forbears suffered during the colonial era.<sup>83</sup> Though the factors that fueled disdain for the legal system have changed, contempt for the legal process remains and seems to have been transmitted over the years from one generation to the next. Members of this subgroup claim to have no need for the legal process. The prevailing zeitgeist in this

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79. Gwendolyn Mikell, *Ethnic Particularism and the Creation of State Legitimacy in West Africa*, 4 TULSA J. COMP. & INT'L L. 99, 104–05 (1996) (noting that, under British rule, cultural values were assaulted and that pride in the welfare of the people was frowned upon and derisively described as native, and concluding that the dignity of the human person based upon cultural awareness was devalued).

80. Elizabeth Justice, *The African Union: Building a Dream to Facilitate Trade, Development, and Debt Relief*, CURRENTS: INT'L TRADE L.J., Summer 2003, at 127, 128 (“With the arrival of colonialism, African society was gradually, sometimes violently, brought under and subjected to an authoritarian form of government.”); Kwamina Panford, *The Evolution of Workers’ Rights in Africa: The British Colonial Experience*, 14 B.U. INT'L L.J. 55, 68 (1996) (“Colonialism as a form of government is characterized by the use of coercion and force. The very essence of colonial rule—a system of government designed to allow exploitation of a dominated people by foreign power—made the use of force inevitable.”).

81. See Chukwudifu Oputa, *The Sovereignty of the Court Under the Civilian and Military Regimes*, Dr. Chukwudifu Ubezonu Memorial Lecture at University of Nigeria, Enugu Campus 37 (May 30, 1996) (on file with author). Justice Oputa described the effect of imposing a foreign legal system on Nigeria:

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.

*Id.*

82. Muna Ndulo, *The Democratic State in Africa: The Challenges for Institution Building*, 16 NAT'L BLACK L.J. 70, 76–77 (1998) (“Culturally, colonialism divided Africa into two societies—the traditional culture found in the rural areas where the great majority of the people live and which was largely outside the framework of colonial elitism and the “modern” culture found in the urban areas. . . . The rural/urban divide inherited from the colonial period continues today, and in fact has grown. . . . The state is extremely weak and is almost completely irrelevant as a provider of services in rural areas.”).

83. Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903, 906 n.12 (1997) (“Colonialism wrecked havoc on African political, social, and economic institutions and the continent may never recover from this domination.”).

subsector of the society discourages recourse to the Western-type legal process, especially the courts. Culture and tradition are important to members of the subsociety. Efforts to alter their mindset often have been paternalistic, condescending, and ultimately ineffective. In some cases, these ersatz efforts have actually strengthened the citizens' resolve and determination to cling to their culture. They prefer to settle their disputes using the traditional dispute mechanism.<sup>84</sup> The Western-style legal system is incompatible with indigenous customs and is alien to traditional notions of justice. It is also contradictory to the spirit of reconciliation, which animates traditional dispute resolution mechanisms. Furthermore, these traditional justice mechanisms differ in ways that provoke resentment. For example, the traditional justice conflict resolution mechanism focuses predominantly on reestablishment of social harmony by promoting reconciliation among the disputants.<sup>85</sup> On the other hand, the Western legal process aims to achieve justice, sometimes retribution, without concern for how the judgment of the court will affect the general society.

Dislike or disdain for the Western legal process often, sometimes inevitably, slides into disdain for lawyers. Lawyers are associated with, and in some cases blamed for, the problems with the legal process, especially the high cost of litigation and the cumbersome procedures. These disaffected citizens feel no need for lawyers and rarely consult them to redress their grievances or to solve their problems. The dislike for the Western legal process is often implacable, and members of this group remain overwhelmingly indifferent to the Western legal order. Pleas by lawyers or civic organizations to these citizens to embrace constitutional democracy are often ignored, even disdained. More fundamentally, violations, corruption, and excesses of leaders continue to stoke their atavistic fears that Western-type democracy is inimical to their culture and values.

Another problem is that democratic values have been slow to take root because a segment of Nigeria is demoralized by the way democracy is

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84. Mancuso, *supra* note 78, at 56–57 (“[I]n the areas where customary law has been traditionally stronger, the laws enacted by the State have been simply ignored by the people who prefer to continue having their life ruled by tradition and to solve any related dispute using the customary ways of dispute resolution.”).

85. See AMAZU A. ASOUZU, INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES: PRACTICE, PARTICIPATION AND INSTITUTIONAL DEVELOPMENT 15–16 (2001). Discussing Africans' preference for traditional dispute mechanism, Dr. Amazu Asouzu stated,

African social values and family cohesion dictated a dispute settlement process that accorded with these traits and ensured economic and social progress. Family heads, and where they exist, chiefs, usually engage in the traditional peace making effort, the object being not to declare and enforce strict legal rights but to assuage injured feelings, to restore peace and to reach a compromise acceptable to both parties. A greater degree of reconciliation rather than rigid adjudication is used to diffuse tensions in the family and society, since tensions in the traditional African society would disrupt the communistic modes of economic production.

*Id.*

practiced.<sup>86</sup> They are especially troubled by the brazen corruption and human rights abuses perpetrated by politicians who won elections by promising to do better than the military dictatorship.<sup>87</sup> Citizens who are constantly and understandably concerned about the activities of elected politicians have little or no way of holding the government accountable. Their wishes as expressed through elections are ignored by electoral fraud and massive rigging orchestrated by the government.<sup>88</sup> They recognize the importance of lawyers but are distrustful both of lawyers and the legal system because of the prevailing negative perception of lawyers. They view lawyers with contempt bordering on derision. They view clearly manipulated election results, judicial corruption, and lawyers' misconduct as vindication of their distrust for the legal process.

Where citizens do not care about democracy and are reluctant to process their problems through the legal system, there is very little lawyers can do. Because the rules of etiquette prohibit lawyers from soliciting and advertising their services, lawyers are severely limited in the kinds of cases they handle and the clients they serve. The legal profession, for the most part, seems unprepared or has paid scant attention to the problems posed by citizens who distrust lawyers and shun the legal process. Lawyers will continue to be significantly limited in their efforts to deepen democracy

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86. Lydia Polgreen, *Africa's Crisis of Democracy*, N.Y. TIMES, Apr. 23, 2007, at A1 ("In 2000, in the euphoric aftermath of Nigeria's transition from a long spell of military rule to democracy, 84 percent of Nigerians said that they were satisfied with democracy as practiced in Nigeria, according to the Afrobarometer survey. By 2005, that number had plummeted to 25 percent, lower than all the countries surveyed save Zimbabwe.").

87. See HUMAN RIGHTS WATCH, CRIMINAL POLITICS: VIOLENCE, "GODFATHERS" AND CORRUPTION IN NIGERIA 1 (2007) [hereinafter CRIMINAL POLITICS], available at [http://www.hrw.org/sites/default/files/reports/nigeria1007webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/nigeria1007webwcover_0.pdf). Human Rights Watch provides an accurate assessment of the deficiencies of Nigeria's democratic rulers when it states that,

Nigeria is mired in a crisis of governance. Eight years since the end of military rule, the country's longest-ever stretch of uninterrupted civilian government, the conduct of many public officials and government institutions is so pervasively marked by violence and corruption as to more resemble criminal activity than democratic governance.

*Id.*; see also LARRY DIAMOND, THE SPIRIT OF DEMOCRACY 70 (2008) ("[I]n Africa's most populous country [(Nigeria)], the promise of democratic reform was squandered in the early 2000s by a combination of gross electoral fraud, rising levels of political violence and criminal penetration of politics and a relentless effort by President Olusegun Obasanjo and his supporters to amend the constitution to permit him to run for a third term.").

88. Scholars, psephologists, and international organizations all agree that electoral irregularities occur in virtually every election in Africa. See, e.g., John Makumbe, *Zimbabwe's Hijacked Elections*, 13 J. DEMOCRACY 87 (2002) (describing President Mugabe's efforts to manipulate the elections); Nicolas Van de Walle, *Presidentialism and Clientelism in Africa's Emerging Party Systems*, 41 J. MOD. AFR. STUD. 297, 306 (2003) ("Elections may be nominally free, but governments engage in extensive gerrymandering, manipulation of voter registration and harassment of opposition parties."); Devra C. Moehler, *Free and Fair or Fraudulent and Forged: Elections and Legitimacy in Africa 4* (Afrobarometer Working Paper No. 55, 2005), available at <http://www.afrobarometer.org/papers/Afropaper55.pdf> ("[M]ost campaigns and elections in Africa are plagued by irregularities, either by design or due to lack of resources, infrastructure, and experience.").

unless they come up with coherent and pragmatic strategies to address the cultural ethos that spawn antidemocratic sentiments and mistrust for the legal process and legal actors, especially judges and lawyers.

## II. STRATEGIES FOR CHANGE

The legal profession's selling points have been its readiness to act as a bulwark against injustice, its commitment to public good, training in and familiarity with legal rules, and that it adequately and uniquely prepares lawyers to serve as effective agents of democratic reform and consolidation.<sup>89</sup> The democratic ideals of a society governed by law, where rights and liberties are respected, fit neatly with the roles bequeathed to the legal profession by history and tradition. The society accepts these assumptions and counts on lawyers to play active roles in promoting social justice and consolidating democracy.<sup>90</sup> If the legal profession ignores the challenges and the opportunities presented by democratic transition, lawyers will forfeit not only their prestige and public standing, they will also jeopardize the lives of citizens who count on lawyers for assistance in troubled times.

Lawyers who ignore their ethical and public service obligations betray everything the legal profession cherishes and professes to embody.<sup>91</sup> The legal profession needs a new and better strategy for discharging its obligations to the society—one that emphasizes lawyers' ethical and public service obligations. The legal profession must also scotch the prevailing notion that lawyers are self-indulgent, unethical, and unconcerned about the public good. To act as better and more effective instruments of democratic consolidation, the legal profession must repackage itself as a profession dedicated to the public good, a profession with an abiding commitment to its obligation, and a profession that subordinates the pursuit of wealth to the overriding interests of justice. To achieve these goals, the legal profession must strenuously address the following nonexhaustive list of issues: promoting accountability, strengthening public institutions, recapturing the sense of public good, rejuvenating the civil society, and helping to improve security.

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89. Rosen, *supra* note 3, at 155 (“[W]hat characterizes the legal profession is its members’ supposed expertise in the mechanics and principles of our polity. Such knowledge enables lawyers to make a difference in our polity and brings with it special responsibility to our democracy.”).

90. Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 *FORDHAM L. REV.* 1543, 1561 (2002) (“Lawyers have been at the forefront of every major movement for social justice in American history.”).

91. The Nigerian Bar Association lists as one of its missions “to apply the knowledge and experience of the profession to public good.” See SONIA AKINBIYI, *ETHICS OF THE LEGAL PROFESSION IN NIGERIA* 57 (2003) (internal quotation marks omitted).

A. *Promoting Accountability*

Despite democratic transitions, Africa is governed by civilians who are insufficiently committed to democratic ideals.<sup>92</sup> They are arrogant, corrupt, abusive toward citizens, and continue to display a disturbing inclination to circumvent accountability mechanisms in their bid to advance their selfish interests. Despite disingenuous declarations and emollient rhetoric professing respect for rights and liberties, the same old rights violations and abuses continue in Africa.<sup>93</sup> As disaffected and disgruntled citizens deal with the surrounding drear, and as they face straitened circumstances, especially abridgements of their rights, they frequently turn to lawyers to help protect and defend the full panoply of rights, freedoms, and liberties enshrined in the constitution.<sup>94</sup> Citizens filled with fearful anxiety direct their yowls of protest at lawyers whom they want to help them hold leaders accountable and generally eliminate the lingering vestiges of abuse and lawlessness.<sup>95</sup>

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92. Larry Diamond paints a gruesome picture of the state of democracy in some countries, including Nigeria. He states that,

Some countries such as Nigeria . . . occupy an ambiguous or disputed space between democracy and overt authoritarianism. They have a multiparty electoral system, with significant opposition. They have some space for civil society and intellectual dissent. However, individual and associational freedoms are under such mounting pressure, or elections are so riddled with fraud, or the arenas of political opposition and competition are so constrained and intimidated by the domineering power of the incumbent, that it is difficult to call the systems democratic, even in the minimal sense.

DIAMOND, *supra* note 87, at 26.

93. The U.S. State Department's Country Report on Human Rights Practices contains troubling accounts of human rights abuses and practices that significantly diminish the quality of life for Nigerian citizens. The report states that,

The government's human rights record remained poor, and government officials at all levels continued to commit serious abuses. The most significant human rights problems included the abridgement of citizens' right to change their government; politically motivated and extrajudicial killings by security forces; the use of excessive force including torture, by security forces; vigilante killings; impunity for abuses by security forces; beatings of prisoners, detainees, and suspected criminals; harsh and life-threatening prison conditions; [and] arbitrary arrest and prolonged pretrial detention . . .

U.S. DEP'T OF STATE, *supra* note 45.

94. Describing American lawyers' efforts to expand the frontiers of rights and liberties, Edward D. Re, Chief Judge Emeritus of the U.S. Court of International Trade states,

In pursuing great causes, the role of lawyers has been crucial, for it was their successful pleading and advocacy that removed so many barriers to human freedom. This, in turn, gave a wider and fuller meaning to the ideals of human dignity and liberty enshrined in the Constitution and laws of the United States.

Edward D. Re, *Professionalism for the Legal Profession*, 11 FED. CIR. B.J. 683, 687 (2002).

95. Alexis de Tocqueville noted,

The more we reflect upon all that occurs in the United States[,] the more shall we 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 powers, and even by its defects, to neutralize the vices which are inherent in popular government. When the American people is intoxicated by passion, or carried away by the impetuosity of its ideas, it is checked and stopped by the almost invisible influence of its legal counsellors . . .

The excesses of leaders demand greater vigilance from the legal profession.<sup>96</sup> African leaders typically adopt a Machiavellian end-justifies-the-means philosophy to power and often use extralegal means to strengthen their grip on power, including rigging elections, violating citizens' rights and curtailing their freedoms, and muzzling dissent and suppressing the right of free speech.<sup>97</sup> History and experience have shown that laws, moral persuasion, or even public pleas for greater sensitivity to civil rights will not stop African leaders obsessively pursuing ways to tighten their grip on power from abusing their citizens and violating their rights. Only bold assertions of justice by lawyers on behalf of citizens can tear down the carapace poseur political elites erected around themselves and force them to govern according to law.<sup>98</sup> Pusillanimity or indifference to leadership excesses will embolden the tyrants in their bid to exercise unbridled powers over the citizens. Lassitude in defense of rights will carry grave consequences for all the parties concerned: the citizens whose lives and fortunes hang precariously on the good faith of the leaders, the legal profession whose integrity and public standing depend on its ability to live up to its billing as defender of rights and protector of liberties, and the nation whose interests in social equilibrium and democratic consolidation trump all else.

Lawyers must confront this abuse of power not just because of its adverse impact on affected citizens but more because of its effect on constitutional democracy.<sup>99</sup> If Africa is to deepen democracy, lawyers must be at the forefront of society's efforts to curb the excesses of notoriously corrupt, arrogant, and abusive leaders. Lawyers must reassure the citizens that they are equally disturbed by executive excesses, that they will not be inattentive or indifferent to abuse, and that they will resist rights violations and abuses by standing between the government and the citizens,

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TOCQUEVILLE, *supra* note 2, at 283.

96. The excesses of African leaders have spurned a litany of articles. *See, e.g.*, Robert I. Rotberg, *Africa's Mess, Mugabe's Mayhem*, FOREIGN AFF., Sept.–Oct. 2000, at 47, 47–61 (discussing Mugabe's excesses); Robert I. Rotberg, *Strengthening African Leadership: There Is Another Way*, in BEYOND HUMANITARIANISM: WHAT YOU NEED TO KNOW ABOUT AFRICA AND WHY IT MATTERS, *supra* note 22, at 165, 165 (“Africa has long been saddled with poor, even malevolent, leadership: predatory kleptocrats, military-installed autocrats, economic illiterates, and puffed-up posturers.”); Nicholas van de Walle, *Africa's Range of Regimes*, 13 J. DEMOCRACY 66, 69 (2002) (“In most African countries, power lies with a president and a small ruling circle who use the state's resources to keep the support of a large network of political clients.”).

97. For an account of leadership styles in some African countries, including Uganda, Zambia, Malawi, Senegal, Nigeria, and Zimbabwe, see Edward Kannyo, *Liberalization, Democratization and Political Leadership in Africa*, in TOWARDS AFRICA'S RENEWAL 63 (Jeggan C. Senghor & Nana K. Poku eds., 2007).

98. *See supra* note 95.

99. Ann Seidman & Robert B. Seidman, *Beyond Contested Elections: The Process of Bill Creation and the Fulfillment of Democracy's Promises to the Third World*, 34 HARV. J. ON LEGIS. 1, 8 (1997) (“The Western concept of democracy implies that elected officials will use state power to enhance the majority's quality of life. Third-world governments' failure to use the legal order effectively to promote development constitutes a failure of democracy.”).

vigorously asserting claims for justice on behalf of injured citizens. Lawyers must find ways to protect the rights of citizens, especially the poor and the disadvantaged, currently under siege by arrogant and repressive governments in the continent. Nothing demoralizes citizens more than forfeiting their rights because of lack of means.<sup>100</sup> Lack of access to the courts remains an obtrusive point in most developing countries battling to consolidate democracy amidst a myriad of social problems like poverty, illiteracy, and growing public dissatisfaction with both the leaders and the legal system.<sup>101</sup> To ignore the plight of the poor who are denied access to court on account of poverty is obtuse and puzzling and will ultimately elicit countervailing public disdain for the legal profession. It eclipses all other good things lawyers do and also reinforces the insidious notion that lawyers do not care about the public good and are even more unconcerned about citizens who cannot pay for legal services. Vigorous defense of rights will not only buoy the confidence and hope of the citizens, it will also inspire them to be more receptive to the legal profession's other efforts to deepen democracy. Legal representation will provide effective and ultimate answers to both executive hubris and citizens' apathy toward the justice system. Additionally, seeking justice for individual citizens is vital to the broader goal of inducing societal changes. One way legal professions worldwide address the problem of lack of access to the courts is through pro bono services. In Nigeria, there are lawyers who either individually or as part of nongovernmental organizations (NGOs) and state-sponsored legal aid schemes provide free legal services to citizens in need.<sup>102</sup> The emergence of NGOs represents clear and encouraging trends in the struggles to link poor citizens to the legal process. But the current pro bono scheme is disorganized, even disjointed and uncoordinated. The legal profession must explore ways to maximize and combine efforts of all those involved in pro bono activities in ways that will broaden the reach and efficiency of such activities. Such services will nurture and sustain an environment where citizens have faith in the ability of lawyers to protect rights. Moreover, constitutional democracy will be far stronger if citizens feel confident about the legal profession's capacity and willingness to come to the aid of citizens in distress. Democracy will be immeasurably deepened if lawyers identify, pro bono, with the legal needs and concerns of

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100. Etannibi Alemika, *Legitimacy, Rule of Law and Violent Conflicts in Africa* 14 (Univ. of Cape Town Ctr. for Soc. Sci. Research Working Paper No. 70, 2004). The author admirably states the problems that limit access to the courts:

The capacity of the citizen to ensure adherence to the rule of law through litigation is inhibited by several factors including: (a) mass poverty and the absence of public assistance in litigating human rights violations; (b) the physical distance of the courts from many communities, especially in rural areas; (c) alienating technical language and proceedings of courts; and (d) public mistrust of the courts.

*Id.*

101. See Oko, *supra* note 17.

102. For an interesting study of the impact of nongovernmental organizations (NGOs) on the human rights climate in Nigeria, see OBIORA CHINEDU OKAFOR, *LEGITIMIZING HUMAN RIGHTS NGOs: LESSONS FROM NIGERIA* (2006).

the society and patiently and sympathetically help citizens, especially the poor, to vindicate their rights and enjoy the freedoms and liberties available to citizens in a democratic society.

### B. *Strengthening Public Institutions*

When public institutions malfunction, as they often do in Africa, their inadequacies color and define the tenor and assumptions that undergird the relationship between the rulers and the citizens. The failures of public institutions habituate citizens not to expect much from the government and rob them of the trust and confidence so vital to the legitimacy and effectiveness of democratic governments. Public institutions in Nigeria continue to show signs of decay and inadequacy in coping with the dynamics and demands of a rapidly developing society in the process of democratization.<sup>103</sup> Bedraggled by corruption and enervated by ineptitude, mismanagement, and years of neglect, most public institutions have lost the capacity to respond effectively and efficiently to the demands of the public.<sup>104</sup> They exhibit the weaknesses of the human infrastructure that operates them; they are afflicted with corruption, nepotism, and inefficiency and lack commitment to public good. There exists a widespread popular dissatisfaction with public institutions—the courts, the police, and public service institutions. Problems with public institutions are often systemic, deep rooted, and pervasive. They cannot be addressed by cosmetic or superficial changes.

Lawyers cannot deepen democracy without simultaneously helping to strengthen democratic institutions.<sup>105</sup> Democracy works best when the institutions and processes that anneal constitutional democracy function effectively and efficiently.<sup>106</sup> These include ensuring fair and free

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103. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD 65 (2002), available at [http://hdr.undp.org/en/media/HDR\\_2002\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_2002_EN_Complete.pdf) (“[D]emocratic institutions in many countries—especially newer democracies—are overburdened and lack the means to do their jobs. . . . Oversight and regulatory agencies lack well-trained staff. And bureaucrats are underpaid, overworked or both.”).

104. Herbst, *supra* note 25. As Professor Herbst noted,

Beyond elections themselves, many of the democratic institutions in most African countries are far from the democratic ideal. Parliaments are just trying to organize themselves and often cannot provide effective counterweight to the executive. The courts are extraordinarily weak; judges are sometimes corrupt, seldom well-paid, and often unable to access the simplest resources. The police and military are often badly resourced, corrupt and distracted from their primar[y] missions of providing internal and external security by the political ambitions of their leaders and rivalries within their ranks.

*Id.*

105. Richard Joseph, *Challenges of a “Frontier” Region*, 19 J. DEMOCRACY 94, 103 (2008) (“Democracy will not flourish in Africa until public institutions perform their most fundamental duties in a reasonably efficient and predictable manner.”).

106. Professor Larry Diamond identifies three institutions that need to be strengthened: “the state administrative apparatus (the bureaucracy); the institutions of democratic representation and governance (political parties, legislatures, the electoral system); and the

elections, improving access to the justice system, and fighting judicial corruption. In addition to the tasks described above, citizens want lawyers to help them overcome and dismantle the institutional impediments that limit their ability to enjoy the rewards of democracy. Specifically, they want lawyers as soldiers on the front line of the nation's legal structures to suggest ideas and strategies for revamping public institutions, strengthening the judiciary, improving the legal system, and making the police more efficient and less corrupt. As Justice William J. Brennan, Jr., rightly observed,

Lawyers, before any other group, must continue to point out how the system is really working—how it actually affects 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.<sup>107</sup>

Lawyers are expected to play vital leadership roles in identifying inadequacies of public institutions and offering solutions to make public institutions more efficient, effective, and transparent.<sup>108</sup> Public and regulatory agencies need well-publicized, simple, and clear rules expressed in language that is easily understandable to citizens and lawyers who represent them. Public institutions also need competent and motivated public servants who will neutrally apply rules and standards to all patrons, regardless of political connections, ethnic background, or economic status. They also need a legal and regulatory framework that will provide a more propitious climate for them to function effectively and efficiently. Law reform has always piqued the interest of lawyers all over the world and indeed in some cases remains the profession's greatest contribution to the improvement of society.<sup>109</sup> Lawyers' participation in law reform is essential, given the Nigerian's lethargic attitude and even disinterest in law reform. Law reforms serve society's transformational purposes. It will help excise outdated laws from the statute books and help pass new laws consistent with the society's democratic aspirations.

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structures that ensure horizontal accountability, constitutionalism, and the rule of law." LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 93 (1999).

107. William J. Brennan, Jr., *Are Citizens Justified in Being Suspicious of the Law and the Legal System?*, 43 U. MIAMI L. REV. 981, 986 (1989).

108. Professor Wolfgang G. Friedmann's admonition in his seminal work on the functions of lawyers in developing countries bears repeating. He states that, "The contemporary lawyer . . . in the developing nations[] must become an active and responsible participant in the shaping and formulation of development plans." Wolfgang Friedmann, *The Role of Law and the Function of the Lawyer in the Developing Countries*, 17 VAND. L. REV. 181, 186 (1964).

109. 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").

### C. Revamping the Legal System

Vindication of rights and liberties in both civil and criminal cases is painfully slow, rendered inefficient by the *mélange* of archaic rules, prohibitive costs, and inordinate delays that characterize the legal system.<sup>110</sup> Lamenting the infrastructural shortcomings in Nigerian courts, Osita Okoro, a lawyer, stated that,

The hardware and software of the court system is moribund. Extreme delays in trial are routine. Record keeping and document management facilities and procedures are rudimentary. Court procedures are outdated, compelling judges to borrow books from lawyers appearing before them. Time saving court procedures such as discovery and interrogatories are largely regarded by the bench and the bar alike as novelties. Modern information technology and office equipment are virtually unknown. Verbatim recording of trials is not available; judges are compelled to manually record proceedings in long hand. Many court buildings are leaky and some in disrepair.<sup>111</sup>

Citizens are concerned about the slow pace of the judicial process because this is inherently contrary to how courts should function in a democracy. For example, detaining criminal suspects for an inordinate length of time without bail is not how criminal defendants are treated in a system that professes respect for the rights of all, including criminal suspects.

Constitutional mandates for fair hearings and the presumption of innocence will remain hollow promises if the current defects in the system remain unaddressed.<sup>112</sup> The right to a fair hearing demands that cases be heard and resolved expeditiously. To curb the delays in court proceedings, the 1999 Constitution imposed a time limit for judgments to be delivered after the hearing and addresses of counsel.<sup>113</sup> Judges are now required to deliver judgment no later than ninety days after the conclusion of evidence

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110. For a discussion of the problems and causes of delays in the administration of justice, see Justice Niki Tobi, *Delay in the Administration of Justice*, in JUSTICE IN THE JUDICIAL PROCESS: ESSAYS IN HONOR OF HONORABLE JUSTICE EUGENE UBAEZONU, *supra* note 38, at 135.

111. Osita Okoro, *The Judiciary and the New Development Agenda*, THIS DAY (Nig.), Dec. 22, 2003, <http://www.thisdayonline.com/archive/2003/12/23/20031223law07.html>.

112. Professor Adedokun Adeyemi identifies the following as the major obstacles to the administration of justice: inadequate funding for the judicial institutions; poor and inadequate physical facilities; shortage of an obsolescence in equipments; shortage and inadequate utilization of available staff; inadequate or total lack of training; poor conditions of service; delay in trial and congestion in courts; dishonest practices and corruption; culturally incompatible laws and procedures; and lack of datarized information. Adedokun A. Adeyemi, *The Challenges of Administration of Justice in Nigeria for the Twenty-First Century*, in PERSPECTIVES IN LAW AND JUSTICE: ESSAYS IN HONOUR OF HON. JUSTICE EZE OZOBU 195–211 (I. A. Umezulike & C. C. Nweze eds., 1996).

113. Article 294(1) of the 1999 Nigerian Constitution provides as follows: “Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof.” CONSTITUTION, Art. 294(1) (1999) (Nigeria).

and final address by counsel.<sup>114</sup> Pretrial detentions without bail also implicate constitutional mandates of a fair hearing and should be discouraged except when absolutely necessary.<sup>115</sup> Even at that, it must be for the shortest possible time. Besides the hardship and injustice to parties, complaints about the inadequacies of the justice system continue to fuel resentment and distrust for constitutional democracy.

Some of the current problems can be addressed by introducing new rules to ensure that the system functions efficiently. For example, delays caused by lawyers who file frivolous applications can be addressed by introducing new rules to impose sanctions personally against lawyers who file applications merely to delay the judicial process.<sup>116</sup> Other problems can be ameliorated by consistently enforcing the laws in the books. For example, the constitution stipulates that trials must be conducted in a timely fashion. But these rules are hardly recognized, much less enforced by the system. Introducing these changes will move the society closer to the ideals of constitutional democracy. It will also enhance public respect and appreciation for the legal profession. The legal profession will benefit immensely if it heeds the wise admonition of U.S. Supreme Court Associate Justice Ruth Bader Ginsburg: “Lawyers will fare best, in their own estimation and in the esteem of others, if they do their part to help move society to the place they would like it to be for the health and well-being of all who dwell in this land.”<sup>117</sup>

#### D. Addressing Judicial Impropriety

The legal profession’s efforts to deepen democracy will be futile unless corruption is extirpated from the judiciary. Judicial corruption emboldens the pseudodemocrats who rule Africa, cripples lawyers and prevents them from acting as effective counterweights against tyranny and injustice, exposes citizens to abuses and predations by tyrannical governments and powerful private citizens,<sup>118</sup> and ultimately destroys public confidence so

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114. *Id.*

115. Specifically, article 36 of the Nigerian Constitution provides,

In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.

*Id.* Art. 36(1). For a general discussion of the concept of fair hearing in Nigeria, see Akin Olujinmi, *Fair Hearing in Nigeria: The Current State of the Law*, in ADMINISTRATION OF JUSTICE IN NIGERIA: ESSAYS IN HONOR OF HON. JUSTICE MOHAMMED LAWAL UWAI 1 (J. A. Yakubu ed., 2000).

116. For a detailed discussion of the problems and solutions to frivolous applications by lawyers, see OKO, *supra* note 4, at 425–40.

117. Ruth Bader Ginsburg, *In Pursuit of the Public Good: Lawyers Who Care*, 52 ME. L. REV. 301, 309 (2000).

118. Alexander Hamilton observed that restraints on governmental abuse “can be preserved in practice no other way than through the medium of courts of justice. . . . [W]ithout this, all the reservation of particular rights or privileges would amount to nothing.”

vital to the integrity of the judiciary.<sup>119</sup> Judges face skepticism, even disdain and increasing dissatisfaction, with the way they operate. At present, judges often function in inhospitable environments and amidst a deluge of negative sentiments from citizens who either impute corrupt motives to them or impugn their integrity. Some of the allegations of impropriety against judges are real, but most of them are contrived and invented by litigants to muddle the stream of justice and bludgeon judges into passivity. Claims of corruption, even though unsubstantiated, find automatic resonance in Nigeria because of the prevailing sentiments toward judges.

The National Judicial Council, the body charged with disciplining judicial officers, is battling mightily to arrest judicial corruption.<sup>120</sup> The National Judicial Council's nascent efforts to maintain judicial integrity are slowly but surely changing the judicial landscape. Some judges have been sanctioned for judicial impropriety,<sup>121</sup> but punishing few judges has not translated into systemic changes. At present, bribe-giving litigants and lawyers who act as middlemen are rarely identified and even more rarely punished. The National Judicial Council's tough attitude toward judicial impropriety would be more effective if it were extended to lawyers and litigants involved in the scheme to bribe judges.

The legal profession can help the National Judicial Council clean up the judiciary by playing a more active role in identifying corrupt judicial officers and their cohorts at the bar.<sup>122</sup> An effective response will require bimodal initiatives that focus on addressing the underlying factors that lead

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THE FEDERALIST No. 78, at 465, 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Similarly, Lord Atkin of the British House of Lords stated,

In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law.

Liversidge v. Anderson, [1942] A.C. 206, 244 (H.L.) (Atkin, L.J., dissenting).

119. See *supra* note 61 and accompanying text.

120. The National Judicial Council exercises disciplinary control over both federal and state judicial officers. CONSTITUTION, 3d. sched., pt. 1, § 21(b) (Nigeria). The individual states' Judicial Service Committees exercise disciplinary control of the magistrates and other officials of inferior courts of record. See, e.g., *id.* 3d. sched., pt. III, § 2(c). For a detailed analysis of the structure and functions of the National Judicial Council, see Philip Nnaemeka-Agu, *The Role of the National Judicial Council in the Administration of Justice Under the 1999 Constitution* (Dec. 8–13, 2003) (unpublished manuscript, on file with author).

121. See Oko, *supra* note 59, at 26–28, for a discussion of punishments meted out to corrupt judges.

122. Angela Krueger, a lawyer who spent time in Afghanistan working to improve the justice system in that country, observes in her discussion of the role of defense lawyers in building a fair and stable criminal justice system that “[i]t is fairly well accepted that defense lawyers help to combat corruption among judges.” Madeline R. Vann, *Another Perspective: Indigent Defense in the Third World*, 56 LA. B.J. 16, 18 (2008) (internal quotation marks omitted).

to judicial misconduct and methods of instituting a more effective way of identifying and punishing corrupt judges. Lawyers are on the front lines, and some of them at the receiving end of judicial corruption. They are familiar with the players and often know intimately the corrupt schemes and how they are crocheted and carried out. Their familiarity with the terrain and the players puts them in a position to offer significant information and suggestions that will help the National Judicial Council subvert the scourge that threatens to engulf the judiciary.

The legal profession can also assist the National Judicial Council by offering suggestions that will make the judiciary more independent and less amenable to manipulation and control by the government and political elites. This is very important because in some cases, judicial impropriety is caused not by moral failures or even greed on the part of the judges but by pressures that drain judges of the capacity to assert their independence against overbearing and influence-peddling governmental officials and political operatives of the ruling party. For judges who fit that description, impropriety will end or be significantly reduced if structures around them are reinforced to make them immune from external pressures.

#### E. *Recapturing the Sense of Public Good*

Commitment to public good is the legal profession's indispensable and most valuable asset.<sup>123</sup> It is the major aspect that separates the legal profession from other professions.<sup>124</sup> Commitment to public good also serves as a counterweight to materialism, which encourages citizens to seek private gain at the expense of everything else. The legal profession, like legal professions all over the world, espouses commitment to public good, but there remains an unbridged gulf between declarations and actions.<sup>125</sup> The legal profession's bold aspirations of public service have been marred by indifference, albeit indifference engendered by circumstance. At present, commitment to public good manifests itself predominantly at the rhetorical level. Most lawyers are not sufficiently sensitized to the legal profession's public service obligations, and a great majority of them simply do not care about non-revenue-yielding ventures.<sup>126</sup> Too many lawyers

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123. Harry Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1150 (1990) (arguing that, "as a part of their professional role, lawyers have a positive duty to serve the public good").

124. Anthony T. Kronman, *The Law as a Profession*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 29, 31 (Deborah L. Rhode ed., 2000) ("[T]he law is a public calling which entails a duty to serve the good of the community as a whole, and not just one's own good or that of one's clients.").

125. Lawyers' disinterest in public service appears to be a global phenomenon. See generally ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1995) (discussing the decline in professionalism among American lawyers).

126. LUBAN, *supra* note 109, at xvii ("The commonest and bitterest complaint against the legal profession is that lawyers do not give a damn about justice, or, when they do, it is despite their profession rather than because of it."). For a discussion of Nigerian lawyers' lack of interest in public service, see OKO, *supra* note 4, at 395-410.

care more about amassing wealth and are marginally interested, if at all, in public service.<sup>127</sup>

Obsession with wealth is not a distinctive trait peculiar to the legal profession: it is a reflection of the prevailing ethos of a society obsessed with wealth.<sup>128</sup> For the legal profession, however, it comes with enormous consequences. Lack of commitment to public good generates disrespect and engenders apathy that undermines efforts by the legal profession to perform its beneficent roles in the society.<sup>129</sup> Citizens distrust lawyers and therefore view every move, however well-intentioned, as nothing more than an attempt to mask their selfish interest in some specious appearance of public concern. Distrust for lawyers not only prevents citizens from working cooperatively with lawyers, it also leads to disinterest in activities organized by lawyers. More importantly, lack of favorable public opinion deprives the legal profession of the leverage to mobilize the masses for democratic reform. It is therefore essential for the legal profession to restore its credibility as a profession that cares about public good, and to convey to the anxious public that it stands ready to defend rights, to initiate programs, and to engage in activities that deepen democracy. The legal profession must seriously consider how best to recapture public trust, because changing public perception of lawyers will be vital to the legal profession's efforts to deepen democracy. Regaining their aplomb will also create a more propitious atmosphere for lawyers to more effectively perform their beneficent roles in the society.

#### F. *Rejuvenating the Civil Society*

Democracy is threatened by antidemocratic attitudes and indifference. Some citizens still nurse antidemocratic sentiments developed during years of dictatorship. Others are indifferent to the needs and challenges of democracy. The success of democracy lies to a considerable degree on changing the attitudes of an increasingly disaffected and disillusioned civil

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127. This is not peculiar to lawyers in Africa. See Debra Lyn Basset, *Redefining the "Public" Profession*, 36 RUTGERS L.J. 721, 723 (2005) ("Law practice today is simply another profit-making business, in which regard for the common good is no more than an afterthought."); see also ZAKARIA, *supra* note 6, at 23 (discussing the American legal profession's loss of public respect and observing that "lawyers . . . who once formed a kind of local aristocracy with duties and responsibilities toward their towns and cities. . . . have lost their prestige and public purpose, becoming anxious hustlers").

128. Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 420 (2001). Professor Russell Pearce explains why lawyers find it difficult to subordinate selfish interests to the common good. He states that, "Lawyers, like others in society, have come to doubt that they or anyone else can rise above self-interest. They understand their responsibilities in terms of individual and not communal obligation. The hired gun conception of the lawyer's role is far more compatible with these perspectives than the governing class ideal of disinterested commitment to the common good." *Id.*

129. For an excellent analysis of the cause of the public's dissatisfaction with the legal profession, see Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85 (1994).

society affronted by leadership failures, especially corruption and human rights abuses. Leadership failures and excesses continue partly because of the attitudes of leaders, but also because of the prevailing and perverse public disinterest in the political process. An active, alert, and engaged public is vital to the success of democracy, because, as Cornel West persuasively argued, “Democracy is always a movement of an energized public to make elites responsible—it is at its core and most basic foundation the taking back of one’s powers in the face of the misuse of elite power.”<sup>130</sup>

Apathy toward the democratic process is deep and growing. It is unrealistic to expect that all citizens will embrace constitutional democracy; there will always be citizens who remain inexpiably resentful of democracy. There is nothing that the legal profession can do about them. Lawyers should, however, strive to reach a significant majority of the citizens because, as Robert Dahl observes, “unless a substantial majority of citizens prefer democracy and its political institutions to any non democratic alternative and support political leaders who uphold democratic practices, democracy is unlikely to survive through its inevitable crises.”<sup>131</sup>

### G. *Dealing with Insecurity*

Insecurity is an offshoot of leadership failures, especially the government’s inability to deal fairly and equitably with minority ethnic groups.<sup>132</sup> There is very little that lawyers can do on their own to reestablish social equilibrium and improve the security in the country. However, lawyers’ efforts in other areas can, even if tangentially, help to address conflicts that ultimately lead to violence.<sup>133</sup> Some of the social forces that spurn insecurity—inequitable distribution of the nation’s resources and human rights abuses—can be processed through the legal system if lawyers provide the right leadership.<sup>134</sup> Also, by fighting to promote accountability and the rule of law, lawyers can make the government more responsible and sensitive to the needs of the public. It can also through litigation compel the federal government to deal more equitably with minority groups, thus eliminating the impetus for the

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130. CORNEL WEST, *DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM* 68 (2004).

131. ROBERT A. DAHL, *ON DEMOCRACY* 157–58 (1998).

132. E. Wayne Nafziger, *Development, Inequality, and War in Africa*, 1 *ECON. PEACE & SECURITY J.* 14 (2006) (arguing that tangible and salient factors such as marked deterioration of living conditions, especially during a period of high expectations, are more likely to produce sociopolitical discontent that may be mobilized into political violence).

133. W. Bradley Wendel, *Civil Obedience*, 104 *COLUM. L. REV.* 363, 384 (2004) (“Most lawyers are not literally officials in the same way that judges and executive officers are . . . but they nevertheless act in the name of society by providing a mechanism through which normative disagreements are channeled into an authoritative process of resolution.”).

134. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 104 (1994) (“By training and experience lawyers are accustomed to making shrewd guesses about where trouble is most likely to arise in the future, and adept at creating arrangements to avoid those situations or minimize harm if they occur.”).

activities of ethnic militias. Such litigation is not new to lawyers in Nigeria. Indeed, it has been used successfully by lawyers representing some state governments to force the federal government to rework its revenue allocation formula to address the complaints of state governments. Successfully litigating these matters may convince some of the ethnic chieftains that processing their grievances through the legal process may be the right and viable way for them to obtain justice. Lawyers must, however, be careful not to ask too much of the judiciary by inviting the courts to resolve issues that can best be addressed through the political process either through dialogue or political compromise.<sup>135</sup> Inviting the courts to rule on such matters may compromise its legitimacy and needlessly inject politics into the judicial process.<sup>136</sup>

Lawyers, partly due to their training and also because of the nature of their jobs, have superior problem-solving skills that can be of immense assistance to the government in its efforts to find peaceful solutions to ethnic agitations that often lead to violence.<sup>137</sup> Working closely with the political leadership, the legal profession can help confect a plan or strategy for addressing some of the social and economic factors that spurn violence.<sup>138</sup> The key is to educate both sides—the government and the citizens—that agitations, however violent and disruptive, cannot be addressed by heavy-handed brutality and reciprocal violence. Brutality against an entire community for the alleged acts of a few is an option in the repertoire of tyrants and dictators, not elected leaders in a constitutional democracy. Citizens, on their part, need to be educated to move away from the insidious notion that violence provides an effective counterweight to marginalization and pressing social problems. Citizens may be persuaded to abandon violence if they are made to understand that it is pointless and counterproductive to seek to achieve violently what can be addressed by

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135. Lawyers will be well served if they adhere to the admonitions of late Justice Nnamani, who observed that, “Suits dealing with socio-economic questions which do not lend themselves to resolution under well defined laws of the land or even by the provisions of our Constitution ought not to be filed in our Courts.” Nnamani, *supra* note 11, at 10.

136. Geoffrey C. Hazard, *Law and Justice in the Twenty-First Century*, 70 FORDHAM L. REV. 1739, 1744 (2002) (noting that the judicial forum is simply not the appropriate place to resolve issues that are obviously and deeply political).

137. Professor Mary Ann Glendon’s discussion of the need for lawyers to provide solutions to society’s nagging problems will find support and acceptance in Africa. She observed that,

Lawyers of all sorts, for better or worse, will continue to have much influence on how America deals with the great issues of our time . . . . Traditionally, the country has depended on the legal profession to supply most of our needs for consensus builders, problem solvers, troubleshooters, dispute avoiders, and dispute settlers. The country’s need for talented persons in such roles is greater than it has ever been.

GLENDON, *supra* note 134, at 100–01.

138. See generally Philip C. Aka, *Nigeria: The Need for an Effective Policy of Ethnic Reconciliation in the New Century*, 14 TEMP. INT’L & COMP. L.J. 327 (2000) (arguing that “Nigeria needs an effective policy of ethnic reconciliation”).

peaceful nonviolent political or legal means.<sup>139</sup> Violence, whatever its motivation or justification, squanders the humanity of both its perpetrators and their intended victims to the loss of the nation. Persuading both sides to abandon their commitment to violence will enable the building of consensus that will help resolve the problems that spurn violence.<sup>140</sup>

#### CONCLUSION

The legal profession has faced several challenges dealing with colonial administrators, tyrants, and dictators, but there is no greater challenge for the legal profession than consolidating democracy. Democratic consolidation offers an historic opportunity for paradigm shifting and transformative changes that will set Africa securely on the path of social equilibrium, heading toward greater respect for rights and liberties and, more importantly, the upliftment of citizens. Nigerian lawyers harbor no illusions that the task of consolidating democracy will be easy. They fully understand and identify with the sentiments so eloquently stated by Robert Dahl that “[a]chieving stable democracy isn’t just fair-weather sailing; it also means sailing sometimes in foul and dangerous weather.”<sup>141</sup>

Lawyers appreciate the enormity of the task and understand its difficulties and are prepared to save Africa and themselves from the anarchy that is sure to come should democracy fail to be deepened in the continent of Africa. A legal profession and citizens united by shared visions of a better life under a democracy can, and ultimately have to, find the will to pursue with unrelenting tenacity and dogged determination the eminently desirable task of consolidating Africa’s fragile democracy.

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139. Wendel, *supra* note 133, at 376 (“[A]ttempts to persuade one’s fellow citizens are crucial to the democratic process and often change the shape and texture of societal decisions.”).

140. Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 *NEV. L.J.* 347, 359 (2005) (noting that consensus-building lawyering is one of the concrete ways in which the vision of deliberative democracy can be realized).

141. DAHL, *supra* note 131, at 156.