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The Legal Profession in Nigeria's Democratisation Processes (1984-1992)

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Résumé: Les facteurs qui alimentent les luttes démocratiques en Afrique varient d'un pays à un autre. Certains de ces facteurs sont d'origine interne, tandis que d'autres viennent de l'extérieur. On peut dire que l'intérêt pour la démocratisation en Afrique s'est généralisé. Au Nigeria, des institutions ont décidé de se mettre au service de la démocratie populaire. Les praticiens du droit au Nigeria, à travers leur association, *le Nigerian Bar Association* (NBA), ont joué un rôle prépondérant dans les processus de démocratisation. La question à laquelle cet article tente d'apporter une réponse est: pourquoi la profession juridique? En plus de l'examen de quelques questions théoriques, nous nous proposons également d'étudier les contraintes qui pèsent sur le rôle des hommes de loi dans la démocratie, de même que la réaction de l'Etat face à ce rôle actif du NBA.

Introduction

The forces which energise democratic struggles in Africa vary from country to country. In some, external forces are the primary engine of change. This is probably the case in Zaire, Kenya, Tanzania; South Africa and a number of countries in East Africa. The local agents of change oftentimes take advantage of this pressure from outside to push forward the democratisation process. Sometimes local forces of change trigger off the democratisation process. By democratisation process, it is meant the opening up of the political space to allow the massive participation of the people, for example, to institute a change from a one-party state to a multiparty system or to bring about an end to military rule and install civilian rule. In the widest sense, it means the effort by the masses to attain the freedom of political choice, freedom from arbitrary arrest and freedom of expression among others. The World Bank, the

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International Monetary Fund (IMF) and the other major aid donors are the main external sources of change in that they set out certain conditionalities that must be met by receiving states before obtaining financial and technical assistance. In the Cold War era, internal agents of political change in the Third World were harassed, incarcerated, marginalised and stigmatised usually by corrupt governments while these donors often turned a blind eye to their plight and cooperated with these dominant political actors. With the end of the Cold War, however, local forces of democratisation in Africa are being encouraged and supported (sometimes materially) by the international donor community. The fear that any part of Africa can be over-run by communists is now all over.

There are several democratisation forces in Nigeria as in other countries that have decided to midwife popular democracy. In Nigeria, some of these agents of democratisation processes include the Academic Staff Union of Universities (ASUU), the Nigerian Bar Association (NBA), the Nigerian Labour Congress (NLC), the Nigerian Medical Association (NMA), the Nigerian Union of Journalists (NUJ), the Nigerian Union of Teachers (NUT) and a host of others.

But from 1987, there has been a new development on the political landscape with the emergence of human rights associations[1] such as the Civil Liberties Organisation (CLO, 1987), the Committee for the Defence of Human Rights (CDHR, 1989), the Constitutional Rights Project (CRP, 1990), and the Gani Fawehinmi Solidarity (GFSA, 1989) among others.

Though these human rights associations have obvious limitations, they are largely independent of the state and are dominated by lawyers. By lawyers, we mean those who are qualified legal practitioners and who could practice as solicitors or advocates or both. In Nigeria lawyers in private practice have dominated the human rights associations. The period under study witnessed a series of intensive activities by lawyers in private practice in the sphere of democratisation. The court room sometimes became a springboard for lawyers to launch their professional skill in championing a change in the *status quo*.

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1 One critique of these human rights associations is their elitist tendencies and their excessive leaning toward America. The human rights communities are also largely urban-based and they rely heavily for their theoretical strength on American jurisprudence. The dominant human rights discourse in Africa has been criticised by Shivji (1989:43-63). African human rights associations have been cautioned not to employ their scholarship to strengthen imperialism in Africa as German intellectuals did for Hitler in their formulation of the theory of differences between the human races.

This then is the rationale for examining the role of the legal profession in Nigeria's democratisation process. A significant proportion of the active lawyers are in private practice and earn their livelihood outside the state and its institutions. Members of the profession acting as individuals and the association as a body have been active in all facets of the democratisation processes in Nigeria. For example, there are well over twenty military decrees and amendments touching on transition to civil rule. Some of the decrees have been challenged by individuals, lawyers, human rights associations and by the Nigerian Bar Association. In response, the state either repealed some of the severely criticised decrees and amended them or imprisoned vocal activists. In 1989, a leading Nigerian legal practitioner, Chief Gani Fawehinmi, was detained for over five months because he attempted to organise a conference on finding alternatives to the Structural Adjustment Programme (SAP). In government's view, there is no alternative to the IMF-sponsored structural adjustment programmes. Some of the legal practitioners detached from the state judicial system have played leading roles in the democratisation processes in Nigeria.

The legal profession offers a vast employment opportunity outside government apparatuses for lawyers and other professionals. This attribute, and perhaps coupled with the recent worldwide concern about human rights in Nigeria has aroused the interest of some Nigerian lawyers to get involved in the democratisation process.

There is really nothing in the training of lawyers that gives them a greater leverage to uphold societal values over other professionals besides the legal practitioner's positivism and his emphasis on law and order. This background added gloss to the democratic struggles against colonialism. The precise place of the legal profession in the present democratisation politics in Nigeria is what this paper highlights.

Apart from this introduction, the paper has five other sections. The second section entails some theoretical issues relating to the place of professionals, (especially lawyers) in democratic struggles. The two contending perspectives of positivism and naturalism in legal jurisprudence are also highlighted in the same section.

The third section focuses on the place of lawyers in the colonial setting; the fourth discusses how lawyers have fostered democratic struggles in the recent past. In the fifth section, the reader will understand the state's responses to the active involvement of the legal practitioner in the democratisation processes. The executive's response was dictated by the assumption that lawyers ought to be an ally of the state apparatus by serving

its interest. But in Nigeria, this is not often the case. The Nigerian lawyers' conclusions are contained in the sixth section wherein also we look ahead and hazard some guesses.

At this point, let us make some remarks on the Nigerian economy from the lawyers perspective and as a professional group participating in democratisation functions. Nigeria remains heavily dependent on oil as its main source of revenue (Olurode 1991). Though agriculture (i.e. peasant farming) continues to provide jobs for many, the agricultural sector has been impoverished by the near-total neglect of the rural settlement where over 80 percent of the population live. The military sector remains a major political facet. Nigeria's economy is import dependent. Inflation has been rising constantly over the past few years. Not too long ago, (*Guardian* 1992) the Central Bank of Nigeria said its efforts to mop up excess naira (the local currency) from the economy has failed miserably and as such the bank could not control over 90 percent of the money in circulation which it said, is caused by extra-budgetary allocation on the part of the military government. Unemployment at both the skilled and unskilled levels is high while the crime rate is alarming. Social services are grossly inadequate. Though the state is said to be divesting itself from the economy, government institutions are on the increase, political parties, etc. received huge funds allocated from the state.

In spite of its weak economy, Nigeria is inhabited by over 250 ethnic groups including the majority Yoruba, Ibo and Hausa/Fulani groups. The 1991 census puts Nigeria's population at over 80 million. Though Nigeria fought a three-year civil war between 1967 and 1970, its Federal structure remains questionable as the clamour by the dominant elites for a national conference to resolve its ethnic problem is on the increase. Owing to Nigeria's low literacy level, only a few elites across the ethnic boundaries impose their values on the rest of the society. These are the main features of the Nigerian society and economy. We shall now consider some theoretical issues.

Some Theoretical Considerations

Professional bodies have certain attributes which may predispose them to conflict situations with the State or its bureaucratic representatives. One attribute that is of immediate relevance to this discussion is the considerable degree of professional autonomy and responsibility which professionals often display.

With particular reference to the legal profession, Talcott Parson (1954:371) had the following to say:

> The lawyer, though in many respects dependent on princes, was to some extent always an independent expert whose doctrines with respect to the law were by no means simply a special mode of expression of the power interests of his

> political superiors. This is a fact which is characteristic of the professions generally and has been so of the law from the beginning of modern society.

The detachment of the lawyer or his independence from the State does not make him to be anti-state or on the side of popular struggles. If he is employed outside the state institution (or if he believes that there are better opportunities in private practice), he could decide to antagonise the state, even though, he owes his employment to the State.

A number of factors come into play to influence the radical or conservative posture of a lawyer, some other professional or an intellectual. As an example, we may consider the professional's self-image. In America, Lipset (1981:351) was of the view that the leftist tendencies of an American intellectual could be explained in terms of his feeling of inferiority. The situation in American is however changing as intellectuals are increasingly recruited from those with formidable origins.

There is a strong inclination among marxist-oriented scholars that lawyers merely uphold the dominant class position on the subject of law and order. Marx in his various writings and particularly in *Capital* Volume one, had shown that law is merely an instrument through which the instrumentality of law, the working class was treated as 'Voluntary' Criminals and assumed that it was entirely within their powers to go on working under the old conditions which in fact no longer existed (Marx 1976:896).

Marx spoke several times of what he described as Bloody Legislation against the expropriated (Marx 1976:896-907). And in an earlier chapter where he discussed *The Working Day*, Marx made reference to a number of pro-capital legislations and how the manufacturers actually sat in judgement over their own cases — making the owners of capital to be judges in their own cases in gross violation of the fundamental principle of natural justice.

Recent debates of Marxist analysis of law have identified three phases in the development. The first was referred to as the oppositional or critical phase which stood for marxists' reaction to the consensus view of law. Some marxists actually called for an abandonment of law. The second phase stood for the class character of law as it is employed to assert the domination of capital over labour. In the third phase, a substantial analysis of law was undertaken and its form and effects need to be examined.

This conception of law does not regard law as having its own autonomy. Law is regarded mainly as an instrument of exploitation. This is a classical Marxist view. A purely marxist interpretation of law and of lawyers role in society would seem to suffer from certain pitfalls. Lawyers, in spite of their

training, could not merely be regarded as upholding the ideology of the dominant class all the time.

Lawyers in Nigeria can be classified into two broad categories if we follow the traditional dichotomy between the positivists and the naturalists. A former president of the Nigeria Bar Association, Alao Aka-Bashorun, even admitted this cleavage (*Guardian* 7.9.87). A most able proponent of the positivist school of thought in legal jurisprudence was John Austin who in his *Command Theory of Law* had put forward the view that law is law, i.e., law is a command from an uncommanded commander. It does not matter that the law is immoral, it is the primary duty of lawyers to uphold the law no matter its end result (Austin 1979:223-257). Hart (1958:611) was a main proponent of this school of thought and he defended the position against several criticisms directed at it. He argued that '... we cannot use the errors of formalism as something which per se demonstrate the falsity of the utilitarian insistence on the distinction between law as it is and law as morally it ought to be' (Hart 1958:614). This view of law is however conservative as it upholds the interests of the most powerful groups in society.

The naturalists on the other hand are of the view that for law to be law it must be an expression of that which ought to be. This means that for this school, law must reflect the morals of the society. As Lon Fuller (1958) argued, there is often an internal morality which makes law to be possible to enforce. The radical lawyers in Nigeria have often employed this approach in their struggle against unpopular and undemocratic legislation or regimes. For the naturalists, natural rights are themselves part of human nature and no human being therefore should be deprived of them. As Shivji (1989:20) pointed out, 'legal human rights are those to be found in the positive law while moral human rights are claims which ought to be in the positive law'.

These two tendencies actually exist in Nigeria. The two positions are however not exhaustive of all the possibilities. If the two theoretical positions exist, then it implies that we cannot talk of the legal profession as such. Since there may be a lack of consensus on issues relating to the State and the Law. The chances are therefore rare for members of the profession to speak with one voice on any given subject. At any point in time, the position of the legal profession may be informed by the political orientation of those who control its affairs.

However, we can talk of the legal profession in two ways. On the one hand, the profession (through its association, the Nigerian Bar Association) has provided a platform for radical lawyers to attack and challenge undemocratic laws and practices. The association often shield these individual

lawyers from the machinations of the state. On the other hand, the profession could act collectively in defence of the larger interest of the society, though factional tendencies are possible. On such occasions, the professional body managed to even carry along its conservative wing. Thus, as a professional body, the lawyers, irrespective of their ideological learning, seem to believe that there is a level of human rights below which a society must not be allowed to fall.

We must mention that the two theoretical possibilities are by no means exhaustive nor are they mutually exclusive. There are individual lawyers that may be difficult to categorise as belonging to either of the ideological divide. If belonging to one camp does not exclude the possibility of acting with the other group, then state policies may decide the position that a legal practitioner would take on a specific occasion. Thus, we cannot easily read off the legal practitioner's behaviour from his or her location in a particular theoretical camp. Most Nigerian legal practitioners are pragmatists. Let us now turn to the lawyers in the colonial setting.

Lawyers in the Colonial Setting

Colonial authorities had expected that western education would serve a supportive role. But this was not often the case. Before long, distrust set in between the colonial authorities and the educated elites who probably regarded themselves as the natural heirs of the colonial legacies, or at best, as allies of the colonialists and for this reason expected to be treated with a measure of respect.

The proponent of British colonialism in Nigeria, Lord Lugard, was himself quoted as saying that: 'The two professions which afford the best opening for the sons of wealthy natives who can afford to send their boys to England are medicine and law' (Adewoye 1977:37). But because the colonial setting itself contained certain contradictory elements, the upholders of the colonial ideology and the educated elites were sometimes at daggers drawn. The colonialists' main mission in the dependent policy was to exploit the people and their resources in order to promote the development of the metropolitan centre. The educated elites on their part desperately sought equal treatment with their white counterparts and the development of the local society, and not the mere exploitation of its resources for the development of the metropolitan centre (for a general discussion of this theme, see Frank 1970).

The colonial authorities thus distrusted lawyers. Adewoye (1977:67) had summarised the contempt in which the colonial authorities held the lawyers:

> If the educated elite were the *bête noire* of the colonial administration, the lawyers in particular, seemed like a menace. Not only could he make a living independent of his white overlords, his position in the society also touched on sensitive aspects of the colonial administration. Mention was made... of the Bar

> and of the exaggerated notion of the powers they were believed capable of wielding. The esteem in which lawyers were generally held was bound to affect the position of the colonial authorities. One administrative officer... concluded that in parts of the eastern and central provinces, lawyers were believed to be more powerful than the British colonial officers.

Generally speaking therefore, there was a measure of uneasiness among the colonial staff on the role of lawyers in local affairs. The colonial agents were disturbed that lawyers were competing with them in terms of prestige and respectability. Adewoye (1977:66-90) recalled an instance whereby the lawyers dictated the pace of change. Some lawyers were even believed by their clients to have their own troops that could be used to carry out their orders. The colonial authorities regarded the courts as aiding and abetting the lawyers in their boldness to de-stabilise the colonial society. There were cases in which the courts argued that there was nothing so sacred about being political officers which the colonial administrators were, and provincial courts were of the view that government officials could be treated as ordinary members of the public.

The colonial state's response to the growing active involvement of lawyers in local affairs was the Supreme Court Ordinance No. 16 of 1914. This Ordinance curtailed in a drastic way the jurisdiction of the Supreme Court and the scope of practice of the legal profession. As at 1925, the Supreme Court was exercising jurisdiction in only 28 towns which were mostly in the South. Even in these towns, the jurisdiction was not over the indigenes but over foreign elements. The idea was to create the impression that lawyers had no influence in local affairs. Legal practitioners were not allowed to appear in the Provincial Courts and in Native Courts as well. The Provincial Courts were presided over by the whites and the Native Courts were presided over by Warrant Chiefs appointed by colonial administrators. This re-organisation was a design to further suppress the public criticisms by lawyers through the courts of the colonial political system. In the view of the white colonial agents, lawyers should serve the interest of the establishment and thereby uphold the *status quo*.

The above assumption on the role of the lawyer in politics grew from, first, the fact that most lawyers were initially trained in Britain and under the strict view of separation of powers between the different arms of government. It was not any of the judiciary's or lawyers' business to fight an unjust law. A second point that is relevant is that the early entrants into the profession were often from privileged background — indeed children of merchants and prosperous farmers. A third factor relates to the covert and overt restrictions placed on the path of new entrants into the profession. Law remains the only profession where emphasis is placed on good character as a pre-condition for

admission into the Law School (Section 4 of the Legal Practitioners' Act). There were other severe legislative restrictions which the colonial state imposed on the practice of law.

It could be inferred that a number of Nigeria's colonial lawyers employed their profession to fight against the colonial contradictions of the time. This must have been the result of their own exposure/travels and the search for a role in the colonial political setting which thrived on a relation of subordination.

However, the rather active posture of lawyers somewhat subsided in the immediate post-colonial period. The next section looks at lawyers and the struggle for democracy.

Lawyers and Democratic Struggles

Nigerian lawyers as a group did not play any active role during the political crisis that engulfed Nigeria in the early 1960s and up to the end of the civil war on a scale that has been discussed for the colonial period. After the Nigerian civil war in 1970, the country became a major oil producer, (i.e., after the Arab-Israeli war of 1973). Several universities were established and with them more faculties of law. This led to an increase in the number of students pursuing studies in law.

New entrants into the legal profession increased at an unprecedented scale. This weakened the control mechanism over the political activities of new entrants into the profession since they came from different backgrounds. In the period 1886-1960, there were only 967 lawyers in Nigeria; and 1,692 between 1961 and 1970. New entrants totalled 505 in 1981; 673 in 1983; 872 in 1984; 1,235 in 1985; 1,531 in 1986 (Fawehinmi 1988:833-1029). From 1988 to date, the figure has risen to over 2,000 (see statistics on enrolment as published by the Law School). From these figures, it could be observed that whereas only 1,692 students enrolled at the Law School for a ten-year period between 1961 and 1970, in the period 1991-1992, 2,267 were enrolled at the Law School.

This must have contributed to the weakening of the influence of the *status quo* oriented lawyers in the Nigerian Bar Association (NBA). The leadership of the NBA from independence to the early 1980s was under the influence of the conservative group. For example, between 1959 and 1968, Chief Rotimi Williams was the president of the NBA. He is known as a pro-establishment lawyer and in 1975, he was conferred with the prestigious title of the Senior Advocate of Nigeria (SAN) by the state. He was one of those in favour of restricted circulation of the judgements of the Supreme Court. A radical Nigerian Lawyer, Chief Gani Fawehinmi fought relentlessly against this (Fawehinmi 1992).

From 1984 upward, the NBA ceased to be the same. Individual lawyers who constantly attacked the state gained popularity. The Nigerian State also became more oppressive. At this time, the state was experiencing a fall in oil revenue in the face of an oil glut in the international market (Olurode 1991:14-34). This period also coincided with the advent of a number of human rights associations. Most of these associations were formed and dominated by lawyers (Olanrewaju 1992:57-83). Though some Nigerians believed that lawyers can defend human rights since they scored huge successes during the colonial period, others were critical of the role of lawyers. The *Guardian* newspaper in its editorial of December 12, 1983 entitled: 'A Roar, Not a Whimper' was most representative of the critiques against the Bar:

> The NBA's overall performance has been disappointing. On the few occasions when it has raised its voice, it has been more of a whimper whereas it ought to have been a roar. The deportation of Shugaba,[2] constituted a most brazen assault on the civil liberties of everyone, lawyers included. Enlightened self-interest if nothing else dictated that the association does much more than merely issue a press release denouncing the action. And left to the Bar Association, Bakalori[3] never happened, neither do the various incidents where accused persons are locked up in clear violation of constitutional provisions. In all such incidents, the NBA either went to sleep or chose to look the other way. Even in instances where members of the association are directly involved, the association cuts a sorry image.

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2 Shugaba, a Nigerian politician was deported from Nigeria by the Federal Government and accused of not being a Nigerian. But his 'sin' was that he held dissenting views. This event happened during Nigeria's Second Republic (1979-82). The then leading opposition parties and the UPN supported Shugaba in his legal battles. Shugaba himself was a member of the GNPP and the majority leader in the Borno State House of Assembly. He was deported in January 1980 by the immigration department. But his deportation was definitely master-minded by the ruling NPN. When earlier the then Borno House of Assembly sought the assistance of police to curb the excesses of certain individuals believed to be agents of the Federal Government controlled NPN, the move was rebuffed (Ekoko 1980:108-110; Olurode 1990:76).

3 Bakalori referred to the police killing of hundreds of peasant farmers who protested against government's compulsory acquisition of their farmland for capitalist agricultural enterprises — see Oculi (1982) where the Bakalori crisis was discussed in detail. The event happened on January 26, 1980. This protest was in effect a rejection of rural development strategies as articulated by the World Bank. The strategies only promote agricultural colonialism and not rural development. The strategies deprived peasants of their land and only provided market for imported fertilisers and herbicides from Europe. The benefits to the local economy were minimal.

In another newspaper editorial entitled 'Lawyers and Liberty', the Bar was vehemently criticised for not being on the side of the people. The newspaper said inter alia '... During the Shagari era, the Nigerian Bar Association kept mute as law enforcement agents unleashed terror on the people. Mass arrests, detention without trial or charges did not bother the conscience of our lawyers' (*Sunday Tribune* 1984).

Leading Nigerian lawyers themselves were becoming more and more critical of their profession's conservative posture. A leading Nigerian jurist, Akinola Aguda, early in 1984, called for revolutionary changes in Nigeria (*Guardian* 1984). Moreover, 'The profession has within its fold a discipline which if properly applied, can ensure for every Nigerian consummate opportunity in security and freedom for the realisation of his legitimate aspirations' (*New Nigerian* 1984). Thus from 1984, some lawyers had reached a conclusion that their profession could do a lot more than upholding the law as it is (as the positivists would insist) or act sheepishly in defence of the *status quo*. Lawyers must employ their profession for the service of democratic and popular struggles. The NBA seemed to have accepted these criticisms. At the end of its Calabar Conference in 1984, the NBA described the judiciary as an extension of the federal government (*New Nigerian* 1984).

The precise role of lawyers in the democratic processes could be discussed at two levels. The first in terms of the NBA's opposition to unpopular military enactments since 1984. These decrees, had, in most cases, sought to erode people's fundamental rights. This falls within the area that I prefer to call micro democratic processes. The second relates to the macro level where the NBA and other organisations under lawyers' influence bring tremendous pressure to bear on the military so that popular democracy can be restored. This makes the NBA to take the side of popular democratic bodies such as the workers and the students in periods of crisis. Here we concede that lawyers have indeed contributed to the democratisation processes.

The two struggles are related. The first one is capable of creating self-doubt in the institutions of the state and its laws and could sometimes cause embarrassment to major state actors by making their laws look ridiculous and inhuman. The state's response could be to amend such laws or abrogate them altogether.

Let us take a few examples. The NBA fought strongly against the *Recovery of Public Property (Special Military Tribunals) Decree No. 3* of 1984. The NBA's displeasure against this decree was for two reasons: (a) its composition; the NBA's argument was that the special military tribunal should be headed by a high judicial officer and not a military officer; (b) its powers;

the NBA argued that individuals should have a right of appeal to a higher court. The NBA ordered its members to boycott these military tribunals unless those changes were made. Most lawyers complied even though Gani Fawehinmi did not. This was surprising given his unrepentant opposition to military rule.

In its editorial, the *Daily Times* (a government newspaper) on May 12, 1984, agreed with the NBA about the composition of the tribunal but not with the powers of the decree. In its view: 'making a provision for appeals need not arise under the circumstances because it will most likely bog down the trials to an endless exercise'. This was also the position taken by the Attorney-General of the time, Chike Ofodile. He said:

> It is a settled principle of law that justice delayed is justice denied. Time is of great essence in the dispensation of justice. Because of the abridged and simplified proceedings and lesser bureaucracy involved, justice under the military tribunals is speedy (*Daily Times* 1984).

To the credit of the NBA, this decree was later amended to reflect the NBA's position. Another legislation, *Public Officers (Protection Against False Accusation) Decree No. 4* of 1984 also incurred the NBA's wrath. The decree was meant to protect public officers against 'false' accusations. Under the decree, a journalist could even be jailed for publishing the truth if it embarrasses a government official. Two Nigerian journalists were each jailed for one year under this decree which allowed no appeal. The opposition to Decree 4 by lawyers and journalists alike must have facilitated the ease with which the then military government of Buhari and Idiagbon was overthrown. The regime actually antagonised all the major interest groups in the society. It was least surprising that the decree's abrogation was one of the very first acts of Babangida's administration.

The NBA's opposition to Decree 2 was equally vociferous. Decree 2 empowered the state to arrest and detain any individual for security reasons without being charged to court. The NBA called for the abrogation of this decree which prevented people from agitating against military dictatorship and thus against popular participation. In response to severe criticisms of the decree by the NBA, the military has amended it on several occasions (Olurode 1990).

During the 1985 NBA Annual Conference, the then Chief Justice of the Federation, Justice George Sowemimo was criticised for his inability to prevail on the military to abrogate this legislation. Though he was not physically present to present his paper at the conference, shouts of 'shame' greeted the presentation of his address (*Sunday Vanguard* 1985). There were rumours at this time, of plans by the military to proscribe the NBA as it did

the NMA in 1985. NBA was then regarded as a subversive institution under the influence of political fugitives.

It would be recalled that Chief Justice Mohammed Bello admitted in late 1989 that Decree 2 was normal (*African Concord* 1989). The Chief Justice was quoted as follows: It (Decree 2) is all over the world. Any military regime without detention decree will collapse. If a judge orders someone to be released, the attorney-general will ask the government not to comply'. The Chief Justice was taken up on this matter by the Nigerian Association of Democratic Lawyers (NALD) (*Daily Times* 1990).

The NBA under Alao Aka-Bashorun was perhaps most radical with regard to the challenges it posed to the military dictatorship. The NBA threw its support behind the May 1989 students' Anti-Structural Adjustment Programme demonstration. The NBA described the riots as normal and that they were a legitimate reaction to SAP. Soon after this, a Lagos radical lawyer, Chief Gani Fawehinmi was detained for over 5 months on July 17, 1989 merely for attempting to organise a conference on finding alternatives to SAP.

The NBA blamed the frequent military coups for the endemic culture of violence. The then NBA President, Alao Aka-Bashorun, took a critical view of the military in government. He said:

> There is hardly any bank, government parastatal or institution without its dose of the armed forces serving or retired. Coup plotters are at the commanding heights of the society and this has given the youths the impression that force is the only avenue to wealth and power (*Lagos News* 1989).

The other level at which the role of lawyers in the democratisation processes can be discussed is what we term the macro aspect of the struggle. As the time draws closer for the regime to wind up, some obscure Nigerians started to call for an extension of military rule. The call for an extension of military rule first took the form of underground circulation of anonymous pieces of information. But soon after the new civilian governors were sworn in, one faceless Dr. Keith Atkins in a two-page advertisement in the reputable *Guardian* (1992) openly called for an extension of military rule. Rather than terminating military rule by January 2, 1993, he called for a diarchy. He argued that if a diarchy was not introduced,

> ...there is a feeling in many quarters at the present time that the Third Republic will be dead before it is born — that it will be still-born. *It will Collapse in a Matter of Months if not Weeks. This we Predict.*
>
> ...There will be continuity both on the political and economic fronts epitomised by the presence of *General Ibrahim Badamosi Babangida* who will then step down on 2 January 1997 having ushered in a civilian President on a well foundationed third Republic (emphasis his).

This advertisement coincided with Babangida's visit to Western Germany. A group which calls itself the League of Patriots also placed a two-page advertisement in the *Guardian* (1992) which it entitled: *In Pursuit of Enduring Democracy*:

> Indeed, General Babangida himself may not be willing to remain in office beyond the tentative terminal date of 2 January 1993. But we believe that he can be persuaded to remain in office for another four years to complete the laudable programmes he has initiated. General Babangida owes this country a duty to handover to an elected civilian government, but it should be to a government that must be seen to survive the volatile terrain of Nigerian politics...
>
> ... General Babangida remains our best option at this time, that is why we urge all Nigerians to support the present diarchical form of government which, indeed, should remain in practice till Nigeria's political class has learned the necessary lesson required for the sustenance of an enduring democracy.
>
> General Babangida at the helms of affairs will be the person to teach that lesson. He has been doing it, and we think he should do it over the next four years by which time a solid foundation would have been laid for political stability, peace and prosperity and an enduring democracy.

The sponsors of these expensive media advertisement are believed to be beneficiaries of the present regime. Though the army denied (*Guardian* 1992) its involvement in these publications, it did not order any probe into the activities of those calling for extension. The National Association of Nigeria Students (NANS) had called on government to prosecute those advocating the extension of military rule (*National Concord* 1992). Instead, the military regime responded by suggesting that human rights associations are being sponsored by external sources, hence, should be regarded as security risks (*African Guardian* 1991), Aikhomu, the then chief of Naval staff, reportedly asked: 'Have we ever asked how these so-called self-styled human rights organisations are funded? Who are their backers, what are their particular interests in society?'

This reaction came after the human rights associations, particularly the Civil Liberties Organisation (CLO) and the Committee for the Defence of Human Rights (CDHR) had opposed the candidature of former head of state, General Obasanjo as the Secretary-General of the United Nations and that of Ajibola, a former Minister of Justice of the World Court because of atrocities committed by them while in office.

Many Nigerians believed that those calling for the extension of military rule have the support of the military regime. These advocates in fact provided what amounts to a powerful critique of all the socio-economic and political

measures embarked upon by the military since 1985. According to them, the transition agenda and SAP have failed. But these criticisms were not taken as destructive but sympathetic as they have an objective in view: a justification of continued military rule. The president himself endorsed this unimpressive assessment of the Nigerian economy when he admitted that our economy defies all logic (*Daily Times* 1993). Babangida was quoted as having said:

> Frankly, I have kept on asking my economists why is it that the economy of this country has not collapsed up till now? What is it that is keeping it up? Surely, it is not our knowledge, it is not anything we have read. I still have not found an answer.

This response may be interpreted to mean that the military regime need more years to find answers to Nigeria's economic problem.

It should be mentioned that the Campaign for Democracy (CD) which is an umbrella organisation comprising some human rights and other democratic non-governmental bodies in Nigeria and under its interim chairman, Aka-Bashorun, responded angrily to the supporters of the extension of military rule. Rather than extending military rule because of the failure of the transition programme, in which election and primaries were massively rigged, the Campaign for Democracy called for an interim government. It said that if the military accepted that it has failed '... the only viable and humanly responsible route to democratic rule is to ask the military and President Babangida to handover to an interim government committed to implementing a democratically chosen programme' (*Guardian* 1992).

The call for the termination of military rule had reached its climax when the military regime called for the dissolution of the two government-imposed political parties. In his speech announcing the dissolution of the executives of the two government-sponsored political parties, the Social Democratic Party (SDP) and the National Republican Convention (NRC), the military leader, Babangida, was silent on the much publicised handover date of 2 January 1993 (*Daily Sketch* 1992).

A group which called itself Concerned Citizens (*Guardian* 1992) then gave a detailed programme that the military government was advised to follow in order to handover on January 3. Chief Gani Fawehinmi, also went to court to seek an injunction against the possible extension of the military's transition programme (*Guardian* 1992). Though a number of prominent Nigerian commentators had called for a post-transition national conference (*Guardian* 1992), this call was not as popular as the one for the termination of military rule by January, 1993.

The role of the courts, especially of the Supreme Court, may also be taken as part of the struggles at the macro level to enhance the democratisation processes. Let us now turn to a few notable pronouncements of the Supreme Court which touched on the fundamental elements of democracy as set out by Anyang Nyong'o as being 'equality before the law, citizenship and citizenship rights for all, the rights of citizens to elect or make a choice among others' (Anyang Nyong'o AAPS Research Agenda 1991, 1993:1; Olurode 1990; Oyovbaire 1987). The Supreme Court had used some cases to launch attacks on the executive infringements of the courts' powers.

For example, in the leading case of the Governor of Lagos State vs. Ojukwu (1986), *Nigerian Weekly Law Review* (NWLR) at p. 622, Justice Kayode Eso in his lead judgement said the refusal of the Lagos State Government to comply with the Court of Appeal order had created a 'dreadful situation'. He said among others:

> I think it is a very serious matter for anyone to flout a positive order of a court and proceed to taunt the court further by seeking a remedy in a higher court while still in contempt of the lower court. It is more serious when the act of flouting the order of the court, the contempt of the court, is by the Executive. Under the Constitution of the Federal Republic of Nigeria, 1979, the Executive, the Legislative (while it lasts) and the Judiciary are equal partners in the running of a successful government.... The organs wield those powers and one must never exist in sabotage of the other or else there is chaos. Indeed there will be no Federal Government, I think, for one organ, and more especially the Executive, which holds all the physical powers, to put itself in sabotage or deliberate contempt of the other is to stage an executive subversion of the constitution it is to uphold. When the Executive is the Military Government which blends both the Executive and the Legislative together and which permits the Judiciary to coexist with it in the administration of the country, then it is more serious than imagined.

And in another case, Obeya Memorial Hospital vs. A.G. Federation (1987), 3 NWLR at pp. 342-343, Justice Obaseki who delivered the lead judgement in that case said, among others:

> The seizure of the hospital buildings by heavily armed Army and Air force personnel from unarmed law-abiding citizens should not be encouraged or applauded in a democratic society. It is more honourable to follow the due process of law. It is also more respectful and more rewarding to follow such a course.... A force of 30 army and 10 air force personnel heavily armed is surely not needed by the panel to take possession of the hospital from Obande Obeya if Obande Obeya alone were running the hospital and in occupation himself. The development of such a force is like using a sledge hammer to kill a fly.... The courts of law are established both for the people and the

> government or authority. The government should not shy away from making use and taking advantage of the procedure of the court of law. It is a misconception to think that the measured speed with which the processes of the court travel is too slow for the military government. Since the government has taken the civilised stand of observing the Human Rights provision of the 1979 Constitution and the Rule of law, it cannot allow its image to be tarnished, stained and mutilated by abandoning the Rule of Law and resorting to the rule of force which, in the peculiar circumstances, is very barren. The rule of force wearing the kid glove of an Edict can never usher in social justice. It only wears the condemned face of the law. Let the Benue State Government return to the Rule of Law (pp. 342-343).

The case of Garba vs. FCSC (1988) 1 NWLR (pt. 71) was to the same effect. Justice Eso of the Supreme Court, held on that case that it is contemptuous of the judiciary for the executive to dismiss the appellant from office during the pendency of the action. The Supreme Court warned further that for the judiciary, a powerful arm of government to operate under the rule of law, full confidence, and this must be unadulterated, must exist in that institution. The Court stressed further that 'it must indeed be demonstrably shown especially if it is the other arm of government that is involved' (pp. 469-470).

The courts in Nigeria are indeed a forum for fighting a political struggle against the executive. On May 19, 1992, three human rights activists that had been prominent in the call for termination of the military rule were arrested allegedly for anti-government activities. They employed Chief Gani Fawehinmi as their counsel. The Government refused to produce the detainees in court in spite of court orders to that effect. Gani Fawehinmi himself was arrested on 29 May 1992.

The Lagos State branch of the Bar Association then directed its members to boycott courts as a means of protesting government refusal to obey court orders and thus the rule of law. The executive, through its justice minister, Clement Akpamgbo, also asked the court to grant it an interim injunction to restrain the lawyers from boycotting courts. The interim injunction was granted. But when the substantive case came up, the attorney-general suit was dismissed by Justice Afolabi Adeyinka who opined that the federal government's disobedience of court orders could lead to the country's 'ultimate dismemberment'. The court went on:

> If the citizens, whose rights the Federal Government now seeks to protect, follow the government's bad example, and refuse to obey court orders, it will lead not only to the disruption of the due administration of justice and the transition to civil rule programme, but also to chaos, anarchy and ultimate dismemberment of the Federal Republic of Nigeria (*Guardian* 1992).

Even where government had chosen to ignore court rulings, the fear of the court sanction always hang on any piece of legislation. As a matter of fact, some human rights activists, especially, Gani Fawehinmi, had gone to court on several occasions to challenge unpopular legislation. Though the court is substantially a creation of the state, it (court) does not always act to protect the state's interest. The court, as a fraction of the legal profession sometimes act in favour of enlarged political participation and against the curtailment of political and civil rights. The courts do champion a widening of the civil political space in Nigeria.

In the next part, we examine what the state's response to the active role of some individual lawyers, the Bar Association, the human rights community and the courts.

State's Response to the Active Involvement of the Legal Profession in the Democratisation processes

In order to curtail what is considered in government circles as judicial activism on the part of some justices, government has been careful in recruiting personnel to man the highest court in the land. Government now recruits young legal professionals with a conservative leaning and capable of serving for several years on the bench in order to create an impact. The retirement age of justices to the Supreme Court may be increased soon but that debate was revived only after the exit of those justices that were considered as radical and forthright. Several frustrations have been levelled against 'deviant justices'. Lawyers who are considered as radical have been attacked on several occasions and arrested. Chief Gani Fawehinmi has probably suffered more arrests than others (Olurode 1991:119).

Only on rare occasions are lawyers with radical credentials conferred with the prestigious award of the Senior Advocate of Nigeria (SAN). Non-practising but pro-establishment lawyers could be crowned with this prestigious title while the non-conformist but intellectually sound lawyers are often excluded. It has also been alleged that pro-establishment lawyers receive bribes from government and its agents.

By co-opting radical lawyers into the executive arm, government has sought to silence the voice of dissent. In this connection, it would be recalled that a former attorney-general and Minister of Justice, Bola Ajibola, was before his appointment, the president of the NBA under the Buhari-Idiagbon military regime. In fact, he earned his prominence by his opposition to the excesses of that military regime. He was later appointed minister of justice when the regime which he strongly opposed was overthrown. During his time,

the executive showed more than an ordinary interest in the affairs of the NBA.

In the last botched conference of the NBA in Port Harcourt in 1992, many Nigerians believed that one of the candidates for the post of the president of the NBA was supported by government. Before then, government had given a donation of N10 million (about US$ 500,000) to the NBA. Notwithstanding, the NBA continued to champion popular causes amidst allegations of misappropriation of funds. The conference itself came soon after the NBA, under the leadership of Priscilla Kuye, had taken a stand to support the human rights activists that were arrested. The president of the Bar Association described the unsuccessful conference as follows:

> There was disorder in the conference hall. It was alleged that there were students and non-lawyers from various places present in the conference hall. The cameras of some journalists were broken and some were beaten up at the conference hall. Microphones too were broken (*Guardian* 1992).

There were allegations also that government agents sent to the conference venue to support the candidature of Alhaji Dalhatu distributed local and foreign currencies at the conference hall. As a means of whittling down the power of the Bar at this critical time, conservative lawyers set up a committee to resolve the impasse. But most of the committee members were alleged to be supporters of one of the pro-government presidential candidates and who by implication was a government agent (*Guardian* 1992). The committee was allegedly designed to frustrate the role of the NBA in its future support for the human right activists. This strategy of intervention in the affairs of the NBA was regarded by the NBA president as attempts to de-stabilise and muzzle it at a time that it should be vocal on national issues.

Apart from seeking to co-opt radical lawyers into government, the executive had also restrictive legislation to close down newspaper houses that reported in favour of human right activities. In several instances government deprived radical lawyers from travelling out of the country by seizing their passports (*Vanguard* 1990).

It could be said that the government's strategy of coopting radicals did not always produce the desired result. Though it worked in the case of Ajibola and later on in the case of Tai Solarin, who was appointed as the Chairman of the People's Bank, the strategy failed in the case of Dr. Beko Kuti (a medical practitioner) who was appointed to the board of the Lagos University Teaching Hospital. He maintained a critical stand after his appointment and he was subsequently removed.

It could also be said that government response, though sometimes drastic, was not sufficient to deter individual lawyers and their associations from participating in the enthronement of democratic rights. Though the executive had through monetary donations created the problems of resource management and accountability for some organisations, it is yet early to predict the future role of the NBA following the alleged government intervention in its affairs. But at present, the statement has created a situation whereby the body has not been able to take a stand on pending national issues, especially as to when the military should go.

The state could decide to deal with a dissenting lawyer by a threat to withdraw the lawyer's licence. For instance, Chief Gani Fawehinmi almost had his licence withdrawn for an offence, which according to the Legal Practitioners' Disciplinary Committee (LPDC), amounted to an infamous conduct (Gani Fawehinmi vs. NBA No. 2, 1989; 2 NWLR, pt 105).

It is clear however that government response to the Bar's active involvement in democratic struggles may not be sufficient to deter the activities of the association in the turbulent days ahead.

We now turn to the conclusions where we set out the place of professionals and especially lawyers in democratisation processes.

Conclusions

In a way, our discussions can be said to centre around the role of the legal profession in the on-going democratisation processes. The form which the processes are taking varies depending on the historical antecedents.

Undoubtedly, the professionals do have a place in the democratisation processes. The legal profession, probably more than any other one, has a somewhat historical mission. This is so because through the activities of lawyers, 'laws will be steady and predictable, making it easier for the entrepreneur to plan for the future, and decide on investment opportunities' (Nyong'o 1991:7).

The detachment of most lawyers from state institutions gives them a potentiality and indeed, a capacity to challenge unpopular government measures. But the issue of detachment cannot be pushed too far as the scope of private practice for lawyers is limited in an economy that has reached a cul-de-sac. The few of them that have displayed a measure of radicalism have been able to do so for long probably because they get support elsewhere in the struggle against despotism with the state. Only a small group of lawyers show interest and active involvement in challenging the *status quo* or pressurising for democratisation. The question then is why do the majority of

lawyers appear pro-establishment? It must be mentioned that the Nigerian State is powerful since it has been able to centralise most of its valuable economic resources and at the same time, disburse fat patronage to its agents. It creates profitable access to some and withdraws same from those it considers as hostile.

The democratisation processes in Nigeria is more elaborate than in most countries in Africa. At each of the different stages, legal practitioners have been involved. In fact, the entire democratisation processes would have collapsed if legal practitioners had withdrawn their support. It seems that in Nigeria, the lawyers' association (the NBA) is most feared by government. Other professional associations such as the Nigerian Medical Association (NMA) and the Academic Staff Union of Universities (ASUU) had been banned on several occasions, but the NBA seems untouchable. Aguda's (1992:21) fear that since few lawyers have practised under a democratic government, they may tremble at the mere sight of an official Gazette is unjustified in the light of current happenings and, particularly, the landmark judgements emanating from our courts.

The present struggle of the legal profession has its origin in the colonial epoch. But the agents of oppression as well as the economic base and opportunities have changed. The clamour by lawyers for change in the *status quo* remains vibrant.

Moreover, the opportunities which are open to consensus (conservative) lawyers through government patronage are substantial and may be tempting for the dissenting (radical) lawyers. This may explain why only a few lawyers identify with popular struggle. In future, the NBA may be divided along two ideological camps if it becomes difficult for one body to accommodate the two competing interests. Generally, the larger society identifies with the interest of the radical but minority lawyers.

The main problem is how to harness the resources of the different human rights organisations (each competing for prominence or is it co-option?) in order to constitute a formidable institution which can then vigorously fight for the enthronement of democracy of western persuasion with all its defects (Benn 1981:4).

From the above discussions, it is evident that the detachment of a particular professional group from the state is not sufficient to predict that the professional body would play an active role in democratisation processes. Rather, the disposition of the leadership as well as the general orientation of at least some members of the profession are key factors. But detachment from

the state's apparatus is a *sine qua non.* It creates a capacity or a potentiality which when utilised, can bring about change in the political processes.

It must be stated, however, that the material detachment from the state or its institutions is one dimension. But material detachment may not imply ideological detachment from the state. In fact, a number of Nigeria's prominent and prosperous lawyers who are materially detached from the state are among the ardent defenders of the *status quo.* Their support of state political practices further enlarge their material base — a vicious cycle of a sort.

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