THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES AND THE FEDERAL REPUBLIC OF NIGERIA: A COMPARISON

I. INTRODUCTION—CHARACTERIZING LEGAL SYSTEMS

The initial point of inquiry into any legal system entails the designation of that system as having either a civil law tradition, a common law tradition or a socialist law tradition.

A nation which embraces the civil law tradition—the most dominant legal tradition—reflects the complex origins and varied developments of Ancient Roman civil law, canon law, commercial law, European revolutions and the concept of legal science.[1] The common law tradition originated approximately in 1066 A.D. as a result of the Norman Conquest of Britain,[2] while the socialist law tradition is generally assumed to have had its beginnings in the Russian Revolution.[3]

The two legal systems analyzed in this paper are those of the United States and the Federal Republic of Nigeria, both of which have adopted strains of the English common law system. The focus will be on each nation's criminal justice system as it relates to the various protections afforded criminals from the time of detention or arrest, until trial. Because American criminal jurisprudence is more familiar than that of Nigeria, the author will more fully examine the latter's criminal justice system, and compare it with its American counterpart where appropriate. Such comparisons, however, will be limited, given the differences in the nations' culture, duration of existence, stage of development, economic stance and sense of social structure.

Generally, nations with civil law traditions follow the deductive process, where judges apply only certain fixed (codified) legal rules without acknowledging previous decisions of other courts or tribunals.[4] This process will sometimes lead to arbitrary results.

Conversely, in common law nations, judges develop laws that establish continuity and enhance applicability to modern situations. These nations use the inductive approach. Here, judges decide cases by reasoning from prior decisions in order to isolate the general principle of law applicable to the present case. The major element in this process is *stare decisis*—the rule of judicial precedent. Thus, common law is sometimes referred to as judge-made law, and is used in most of the Commonwealth countries (former British colonies).[5]

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1. *See generally*, J.H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 1-18, 61-67 (2d ed. 1985).

2. *Id.* at 3-4.

3. *Id.* at 4.

4. This approach is found in most of the countries of continental Europe and in the former colonies of France, Germany, Spain, and Portugal. Aguda, *The Judiciary in Africa*, 9 FLETCHER F. 13, 15 (Winter 1985).

5. *Id.*

II. SOURCES OF LAW—COMMON LAW, CUSTOMARY LAW, AND STATUTORY LAW

The United States and Nigeria are both products of British colonization. While the American colonies gained their political independence from Great Britain in the latter part of the 18th century, Nigeria only recently broke free from Great Britain's hold.[6] Consequently, both the United States and Nigeria follow the English common law tradition, albeit in somewhat different ways.

The United States mirrors Great Britain's common law system to a significant extent, but adds some of its own machinery. Probably the most important deviation from the British model stems from the fact that the American Constitution, unlike its British counterpart, is written. Thus, American judges have the further task of constitutional interpretation.

Nigeria also has a written constitution,[7] and its judges also have the challenging task of interpreting that constitution. In addition, these judges must look to other sources of law, and their common law approach is somewhat different from that of their American peers. In addition to the traditional sources of law—judicial decisions, statutes and norms—Nigerian judges must also look to unwritten sources of customary law,[8] including Islamic law.[9] To fully appreciate the Nigerian legal system, specifically in the context of criminal justice, one must first understand Nigerian history and development.

Precolonial Nigeria was jurisdictionally divided into the North and the South. In addition, each individual community had its own rules of customary law. In the South, customary law emanated from large families and villages. When the British arrived in 1863, they introduced the common law rules concerning crimes, and later drafted the 1904 Criminal Code, to establish a single, clear set of principles.[10]

Although the Criminal Code was applicable to Northern and Southern Nigerians, the native tribunals which applied customary criminal law were exempted from the Code's application. This dual system of criminal law was unworkable in the North, where Maliki law and Moslem law dominated. Hence during 1959-60, the Criminal Code was reformed, and enacted as part of the Federal Provision Act, applicable in the North.[11]

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6. Nigeria gained its independence from Great Britain on October 1, 1960 and became a federal republic on October 1, 1963. Smith, *The Light That Failed*, Time Magazine, Jan. 16, 1984, at 24.

7. In 1963, the first constitution was drafted for the newly independent Federal Republic of Nigeria. A stronger constitution was drafted in 1979, modeled after the American Constitution. *Big Setback for Democracy in Africa*, U.S. News and World Report, Jan. 18, 1984, at 11 [hereinafter *Big Setback*].

8. Customary law is made up of customs under which community members allow themselves to be bound. In pre-colonial Africa, tribal elders selected and held accountable their chiefs. At village meetings, free speech was the norm, and courts used common sense morality instead of formal legal procedures. Customary law remains a part of many of the contemporary legal systems in Africa, including Nigeria's. Howard, *Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons*, 6 HUMAN RIGHTS Q. 160, 174-75 (May 1984) [hereinafter *Human Rights*].

9. *See* A. OBILADE, THE NIGERIAN LEGAL SYSTEM 83 (1979) (Nigeria has continued Great Britain's practice of treating Islamic law as customary law).

10. In 1901, the British introduced the criminal code into Northern Nigeria. After the unification of Nigeria, this code was extended to the entire country in 1916. The Nigerian Criminal Code was modeled after the Queensland, Australia Criminal Code. AN INTRODUCTION TO NIGERIAN LAW 214 (C.O. OKONKWO, 1980) [hereinafter AN INTRODUCTION].

11. The 1959 Penal Code was the result of the reformation and became applicable in the North on October 1, 1960. *Id.* at 214-15.

The Criminal Code remained applicable in the South, while the Penal Code became effective in the North after 1959. While there are other sources of law, these codes are the only sources of law regarding criminal matters with express provisions. Further, they only cover those offenses that occur within their respective geographic areas—North and South. In the words of the Nigerian Supreme Court:

> [T]he most profitable approach to the interpretation of the Criminal Code is to begin by examining the words of the Code itself, and that decisions on the common law are only of value where the wording of the Code is obscure or capable of bearing more than one meaning, when they may be referred to for the purpose of ascertaining the sense in which words are used in the Code.[12]

Thus, unlike American judges who are required to apply the doctrine of *stare decisis* and follow precedents, Nigerian judges are not forced to follow common law, but may apply common law, if the statutory law is unclear and it would help in construing the terms of the statute. However, empirically, one could say Nigerian judges apply principles of common law in the same way as American judges, in order to arrive at the desired construction of a particular statute. In this respect, the use of common law is not dissimilar in the two countries.

In sum, the Nigerian criminal justice system is a conglomeration of laws stemming from common law principles, customary law—including Islamic law, and British parliamentary law enacted prior to October 1, 1960. This latter source of Nigerian law remains applicable unless it is contrary to or has been effectively repealed by the proper Nigerian authority. It does not matter if the British Parliament has repealed the law.[13] A Nigerian court need not follow British law, and may treat such laws as any rule of common law—for purposes of interpretation.[14]

III. A CONTEMPORARY PROFILE OF NIGERIA

In 1963, Nigeria gained its political freedom from Great Britain and installed its first democratic regime. In January 1966, the acting president and his ministers passed their governmental authority to the military. The military government suspended the 1963 Constitution and subsequently abrogated any provisions concerning the executive and legislative bodies.[15] This was the first of a series of military regimes.

As a result of ethnic persecution and the slaughter of fifty thousand Igbo (Biafrans) in the North, the Nigerian civil war began in 1967.[16] It lasted three

12. Odu v. State, N.M.L.R. 129, 131 (1965), *quoted in* AN INTRODUCTION, *supra* note 10, at 216.

13. The adoption of English law into Nigerian law is recognized in the Law (Miscellaneous Provisions) Act. *See* Interpretation Act of 1964 No. 1-28, *cited in* A. OBILADE, *supra* note 9, at 69.

14. *Id.* at 72.

15. In E.O. Lakanni & Anor v. Attorney-General, 1 UNIV. OF IFE L.R. 201 (West 1971), the Supreme Court of Nigeria unanimously decided that "[w]hat took place in January 1966" was not a revolution, "but a mere handing over of government. . . with a mandate to rule for an unspecified interim period." By so holding, the Court was exercising power authorized by an illegal government, in violation of the 1963 Constitution. Consequently, the military government was forced to declare null and void the Court's judgment, which it did through the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1978. The decree also declared the January 1966 activities a revolution. Aguda, *supra* note 4, at 26-27.

16. *Human Rights, supra* note 8, at 164.

years and was responsible for the deaths of one million people.[17]

In 1979, after thirteen years of military rule, Nigeria produced its second democratic regime by electing as President, Alhaji Shehu Shagari.[18] Also that year, a more effective constitution was drafted. In 1983, Shagari was reelected to a second presidential term,[19] but the change in Nigeria's economic status and the alarming rise in the bureaucratic corruption during his first term led to the overthrow of his government on December 31, 1983.[20] The efficient and almost bloodless coup was led by General Mohammed Buhari, who had been the Oil Minister during the previous military regime.[21]

General Buhari, like former President Shagari, is characterized as a political moderate. Both are Moslims from the North. Buhari was educated in the British and American militaries. He also served as governor of the Nigerian State of Borno. Although he ousted Shagari forcefully, Nigerians seemed to accept his rule readily. Soon after he took his place as leader, Buhari paid sixty million dollars of Nigeria's total debt of two billion dollars it owed to sixty-six different banks. He also set up a military council and prepared for the military trials of the allegedly corrupt bureaucrats from Shagari's regime.[22]

While Shagari was president of the Federal Republic of Nigeria, he removed his country from OPEC, allowed the press great freedom and encouraged the participation of various political parties in the democratic process. When Buhari took over, however, he removed the freedoms enjoyed by the media, outlawed rival political parties, and brought Nigeria back into OPEC.[23]

Buhari promised to improve Nigeria's economic position and to clean up the bureaucracy. But in fact, he made little progress. Thus, in August 1985, Buhari himself was ousted by a military coup, and replaced as the head of state by Army Chief of Staff General Babangida.[24] Babangida remains the present-day leader of Nigeria.

Nigeria is plagued with many of the problems common to all countries of

17. Frons, *Nigeria: A Test for Democracy*, Newsweek, Aug. 8, 1983, at 46.

18. President Shagari, a Moslim from Northern Nigeria and a former school teacher, is described as a mild-mannered political moderate. Smith, *supra* note 6, at 24.

19. Shagari won the 1979 election by 47% of the popular vote and 25% of the ballots in 16 of the 19 states that constitute Nigeria. Unlike many other Black African nations, Nigeria has attempted to set an example by implementing democratic principles within its governmental process. During the 1983 election, there were five presidential candidates and several participating political parties, including Shagari's own National Party of Nigeria (NPN), the Unity Party of Nigeria (UPN), and the Organization of African Unity (OAU), the military-controlled party of Africa. *Id.*

20. When Shagari was elected as president in 1979, Nigeria was economically prosperous as a result of the oil boom and received $26 billion per year in oil revenues. During his first term, several members of Shagari's bureaucracy grew wealthy from expanded corruption. By 1983, the world suffered an oil glut which brought down oil prices and Nigerian revenues plummeted to approximately $10 billion per year. Furthermore, Nigeria's foreign debt to banks skyrocketed to $15 billion per year. Consequently, food prices were extremely high and inflation stood at about 50%. *Id.*

21. The military coup of December 31, 1983 occurred between 2:30 and 7:30 of the same morning. *Id.*

22. When asked whether Shagari and other prior officials would be tried, Buhari replied that his military council believed that, "you are innocent until proved (*sic*) guilty, . . . but our technique may prove to be a bit unorthodox." Smith, *supra* note 6 at 25. *But see* Cronje, *Secrets of Corruption*, 10 New Statesman, June 8, 1984 at 17.

23. *Big Setback*, *supra* note 7, at 11.

24. Wall St. J., Sept. 4, 1985, at 26(W), 24 (E).

Black Africa: extreme poverty, extensive corruption, tribal antagonism, gross mismanagement and an uncontrolled population growth. One out of every five Africans is Nigerian.[25]

Nigeria stands out in Africa in many ways. First, Nigeria is one of the wealthiest Black African nations, with a gross national product (GNP) of more than one half of the combined GNPs of the other nations of Black Africa. Second, Nigeria, unlike many other African countries, has a sizable class of educated people. Finally, Nigeria has implemented democratic principles into its government, and has given the western world hope in dealing with a democracy, albeit African, in a continent full of authoritarian regimes.[26]

Despite all of its accomplishments, Nigeria remains a struggling nation, subject to the legally and politically unstable impact of military coups and regimes. This introduction to Nigeria's history and development should place the following analysis of the Nigerian criminal justice system in the proper context, as it is compared with the American criminal justice system.

IV. THE AMERICAN AND NIGERIAN CRIMINAL JUSTICE SYSTEMS—AN ANALYSIS

This section is an analysis of the various steps in the criminal justice process. Comparisons of the American and Nigerian systems will begin at the time of arrest and detention, and continue through interrogation, investigation, preliminary inquiry, charge, indictment, and trial. Emphasis will be placed on the criminal defendant's rights, especially those constitutional rights which are afforded to defendants during the various stages of criminal procedure.

The next section (Part V) discusses the role judges and attorneys play in the administration of criminal justice in Nigeria, in contrast to the American system.

The final section (Part VI) points out the difficulties in comparing Nigeria's system with western systems.

A. *Offenses*

Criminal offenses in Nigeria are classified differently in the North and the South. Based on the federal system of government, there is a distinction between federal offenses and state offenses. If there is a violation of an Act of Parliament or a Military Decree, and the constitution vests jurisdiction in the federal authorities, then it is a federal offense, falling under the prosecution of the Attorney-General of the Federation. If it is a state offense, then it falls under the prosecution of the attorney-general of the state. The same classifications determine which court will hear the case.[27]

The classifications of offenses in Nigeria are strikingly similar to the scheme used in the United States. This is not surprising in light of the fact that Nigeria used the American Constitution as its model when it drafted its constitution in 1979. Nigeria also encompasses a similar American scheme of classifying offenses in terms of felonies, misdemeanors, and simple offenses.

25. In 1985, Nigeria's population was estimated to be one hundred million. *Id.*.
26. *See generally*, Smith, *supra* note 6, at 24.
27. AN INTRODUCTION, *supra* note 10, at 357-58.

B. *The Summons, Arrest With a Warrant, and Arrest Without a Warrant*

As is the case in the United States, the method of bringing the accused before the court begins with a summons or an arrest. The summons in Nigeria is a document, usually used in cases where the offense is minor. The police officer normally applies for it by submitting a complaint to a magistrate or justice of the peace. The summons must be in writing, in duplicate, signed by the magistrate, and state the substance of the alleged complaint or offense. The summons also must require the presence of the person named in the complaint to appear in court at a specified time.[28]

A warrant of arrest, in Nigeria, is directed to the police. The warrant is a written document, issued by the court of the justice of the peace, and authorizes the police (occasionally other public officers and rarely private persons) to arrest the named offender and bring him before the court. The specific requirements of the warrant of arrest are the same in both Nigeria and the United States—it must: be in writing, be signed by the judge or magistrate, contain the date issued, state precisely the offense for which it was issued, and name or describe the person(s) to be arrested and brought before the court.[29]

The power to arrest an offender without a warrant is set out in sections 26-28 of the Criminal Code (applicable in the South) and sections 10 and 12 of the Act (Penal Code) (applicable in the North). Either the police or private citizens may arrest the accused, using only the force necessary to prevent the offender's escape. The arresting persons must inform the offender of the cause for arrest if there is a time span between the alleged offense and the arrest. As in the United States, the Nigerian Constitution requires the arresting party to make certain that the offender understands, in the appropriate language, the reason for the arrest or detention.[30]

While the offender is in custody, he should be provided with reasonable facilities for obtaining legal advice and for securing his or her release on bail.[31]

C. *Searches and Search Warrants*

In Nigeria, the power to conduct searches of an arrested or suspected person's body, building, or receptacle is given to the police under the Criminal Act, Criminal Code, and Police Act.[32] Just as American police need probable cause to search buildings, which justifies the issuance of a search warrant by a magistrate, Nigerian police need similar justification for searching buildings. The requirements necessary to obtain a legitimate warrant are the same in both countries.[33]

D. *Bail Pending Trial*

The bail process in Nigeria is similar to that of the United States. How-

28. *Id.* at 360-61.

29. *Id.* at 362.

30. *Id.*, (construing § 212. *Cf.* § 32 (3) of the 1979 Constitution). *See also* Miranda v. Arizona, 384 U.S. 436 (1966).

31. AN INTRODUCTION, *supra* note 10, at 362.

32. *See also* §§ 20, 24, and 25 of the Police Act, *construed in* AN INTRODUCTION, *supra* note 10, at 363-64.

33. *See id.* at 364-65. Nigeria, however, does not have an exclusionary rule as does the United States, but the arresting person may be held criminally liable if he uses excessive force. *Id.* at 363.

ever, unlike the United States, Nigeria has several types of bail. The police may grant bail to an arrested person if they can ensure that person's presence in court at the appropriate time.

Sections 17 and 18 of the Criminal Act, section 340 of the Code, and section 23 of the Police Act allow the police to grant bail to a person arrested without a warrant, unless the offense is punishable by death. If the offense is not serious, then the offender is released on bail under the condition that he or she will, if the investigation is pending, appear at the police station or in court at the specified time.[34]

The court which authorized the arrest of an offender may put stipulations on the granting of bail by endorsing the warrant issued for the offender's arrest. Trial courts may also grant bail, and the circumstances surrounding the offense and the corresponding punishments will vary according to whether the courts are in the North or South.[35]

In Nigeria, as in the United States, bail may be revoked for various reasons, and the offender thereafter may be arrested again. This happens only under limited circumstances, such as when the offender commits other serious offenses, fails to appear in court or at the police station at a specified time, or is unable to produce sureties.[36]

E. *Charging the Defendant*

In Nigeria, the prosecution prepares the charge and gives copies of it to the court and defendant. The primary purpose of the charge is to notify the defendant of the case against him.[37] It also informs the court. Sections 151-52 of the Criminal Procedure Act and section 201 of the Criminal Procedure Code set out the necessary contents of a charge. The charge must include the titled offense, and the law which creates it, or at least enough of the definition of the offense to give the defendant notice of the crime with which he is charged.[38]

The charge must also include the time and place of the offense, the person or thing upon which the offense was committed, and every element of the offense.[39] These requirements also exist in the United States.

F. *The Preliminary Inquiry*

In Nigeria, the preliminary inquiry constitutes an investigation by the magistrate's court of the criminal charge. It is not a trial. Its limited purpose is to determine whether there is enough evidence to bring the criminal defendant to trial in the High Court.[40] Part thirty-one of the Criminal Procedure Act and Chapter seventeen of the Criminal Procedure Code set out the procedure for preliminary inquiry in Nigeria. They are substantially similar in content.

The Criminal Procedure Act does not require the proceedings to be in

34. *Id.* at 365.
35. *Id.*
36. *Id.* at 366-67.
37. *Id.* at 367 (citing Faro v. I.G.P., [1964] 1 All N.L.R. 6.)
38. *Id.*
39. *Id.* at 368.
40. *Id.* at 369.

open court, but it does require the defendant's presence at the preliminary inquiry. The defendant is read the substance of the charge without replying. The prosecution then calls its witnesses, which are examined-in-chief by the prosecutor, cross-examinied by the defendant or defense counsel, and, if necessary, re-examined by the prosecutor. If the defendant has no counsel, then the magistrate will inform him/her of the right to cross-examine the witnesses. After the prosecution has concluded its case, the court must consider whether the evidence constitutes a prima facie case against the defendant. If the magistrate believes so, then he reads the charge, and in this instance gives the defendant an opportunity to respond. If the magistrate opines that there is enough evidence to constitute a prima facie case against the defendant, then the magistrate makes an order committing the defendant for trial in the High Court.[41]

The proceedings just described are quite similar to the procedure in the United States that determines whether there is enough evidence against a criminal defendant to constitute an indictment, namely, the presentation of evidence to the grand jury. Defendants in Nigeria may or may not have counsel at the preliminary inquiry, but there is no right to counsel at that particular stage of the criminal justice system. Similarly, there is no right to counsel in the United States when the grand jury is considering an indictment against an accused person. However, the American defendant has more limitations at this stage. In addition to no right to counsel, the American defendant has no right, but may be permitted by the grand jury, to present evidence in his own behalf. He has no right to confront or cross-examine witnesses. Nigerian defendants do have the latter two rights. A further distinction in the two systems is found in who makes the evidentiary determination as to whether to proceed to trial. In the United States it is the grand jury, and in Nigeria, it is the magistrate.

G. *The Trial, and Fundamental Human Rights*

In Nigeria, as in the United States, criminal trials are usually brought by the state. The prosecution may be in the name of the Commissioner of Police if it is a state offense, or "The State" or "The Republic" if on information, depending upon whether the offense was state or federal in nature.[42]

Section twenty-two of the first Nigerian Constitution (1963) required a fair hearing in the determination of a person's civil rights, and the court and other tribunals were to be independent and impartial.[43] Section twenty-two has its American counterpart in the due process provisions of the fifth and fourteenth amendments to the Constitution.

Similarly, criminal defendants are afforded certain protections in the area commonly referred to as fundamental human rights. Many of Nigeria's fundamental concepts of human rights emanated from the right to a fair hearing, mandated by section twenty-two of the Nigerian Republican Constitution of

41. *Id.* at 370-71.

42. *Id.* at 371. Under § 342 of the Criminal Procedure Act, private citizens in Nigeria may also institute the prosecution of a criminal case if the State refuses to do so, but they must prosecute the case to its end. Ifeacho v. Bd. of Customs and Excise, All N.L.R. 153, 155 (1966), *cited in* AN INTRODUCTION, *supra* note 10, at 372.

43. *Id.*

1963, and the doctrine of natural justice.[44] These rights include the right to counsel, the right to a fair trial, privileged evidence, and the right to confrontation and cross-examination.

In *Awolowo v. Federal Minister of Internal Affairs*, the criminal defendants in another case brought suit against Immigration (and other) officials, alleging that their right to be defended by counsel of their choice had been violated. These plaintiffs argued that section 22 (5) (c) of the 1963 Constitution provides for this right to counsel, and that by denying their chosen counsel entry into Nigeria for the trial, Immigration officials had violated this right. The court found that the Immigration Act conferred broad discretionary powers upon certain officials when determining who may or may not enter Nigeria, and that because plaintiffs' chosen counsel was non-Nigerian, he had no unconditional right to enter Nigeria. The High Court, therefore, held that the Immigration officials had acted within the scope of their power under the Immigration Act.[45]

Thus in Nigeria, there is a constitutional right to counsel, but it has limitations. This right does not extend to a counsel of the defendant's choice in criminal cases. It is not clear what the other limitations are on this right to counsel.

In the United States there are also several limitations on the sixth and fourteenth amendment rights to counsel.[46] As in Nigeria, this right does not give criminal defendants the unconditional right to counsel of their choice.[47] The right to counsel applies only in criminal cases,[48] and brings with it a right to appointed counsel in cases where the defendant is indigent.[49]

The Nigerian doctrine of natural justice is implicitly asserted in section 22(1) of the Federal Republican Constitution of 1963. While there is no exact definition for this concept, it "connotes an inherent right of man to have fair and just treatment in the hands of the rulers or their agents," and acts as a modern "natural law" limitation on the powers of the State.[50]

Section 22(2) of the 1963 Constitution provides criminal defendants with the right to a fair hearing. Implicit in this is the right to a fair trial. In *Dixon Gokpa v. Inspector-General of Police*,[51] appellant was tried and convicted for

44. D.O. AIHE & P.A. OLUYEDE, CASES AND MATERIALS ON CONSTITUTIONAL LAW IN NIGERIA 94 (1979) [hereinafter CASES AND MATERIALS].

45. Section 21(5)(c) stated that "[e]very person who is charged with a criminal offense shall be entitled to defend himself in person or by legal representatives of his own choice." The court, however, believed that "[t]he constitution is a Nigerian Constitution, meant for Nigerians in Nigeria. It only runs in Nigeria. The natural consequences of this is that the legal representative contemplated in § 21(5)(c) ought to be someone in Nigeria and not outside it." Awolowo v. Federal Minister of Internal Affairs, L.L.R. 177, *reprinted in* CASES AND MATERIALS, *supra* note 44, at 88, 92.

46. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (criminal defendants charged with felonies have a right to counsel under the sixth and fourteenth amendments). *See also*, Argersinger v. Hamlin, 407 U.S. 25 (1972), Johnson v. Zerbst, 304 U.S. 458 (1938), and Powell v. Alabama, 287 U.S. 45 (1932).

47. There are several state court and circuit court decisions on this issue. *See* D. MELLINKOFF, LAWYERS AND THE SYSTEM OF JUSTICE; CASES AND NOTES ON THE PROFESSION OF LAW 24 nn. 3,4 (1979) [hereinafter MELLINKOFF].

48. The sixth amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have [a]ssistance of [c]ounsel for his defense." U.S. CONST. amend VI. *See also* Gideon, *supra* note 46.

49. *See, e.g.*, Douglass v. California, 372 U.S. 353 (1963).

50. CASES AND MATERIALS, *supra* note 44, at 94.

51. 1 All Nig. L. Rep. (1961), *reprinted in* CASES AND MATERIALS, *supra* note 44, at 96.

committing felonies. Appellant appealed the conviction on the sole ground that he was denied a fair trial. According to the trial record, the trial was unusual. Appellant was charged five months before his first court appearance, and had given no plea at that court appearance. The court adjourned for a month so that the prosecution could obtain a handwriting expert, but on the date of return to trial the record was silent. A month later the case was again called to trial, but neither the appellant nor his counsel was present. On the next day, the appellant was brought to court without his counsel, and the magistrate did not inquire into why defendant and counsel had not appeared in court the day before, or why counsel was not present that day. Although appellant explained that he had counsel, and asked for an adjournment in order to have his lawyer present in court, the record reflected that the magistrate adjourned until later in the afternoon. Appellant would have had to go twenty-three miles in order to retain an attorney for trial that afternoon. He had no attorney, at all, that afternoon in court.

After appellant was refused adjournment, he declined to take further part in the proceedings, did not cross-examine any of the prosecution's witnesses and refused to present evidence in his defense. The magistrate went on with the case, found defendant guilty and sentenced him. The High Court in Eastern Nigeria held that the defendant/appellant had been denied the opportunity of a fair trial when he was deprived the right to defense by counsel.[52] The court based its holding on the fact that there was no reliable evidence that appellant or counsel knew that the case was coming up for trial, or that the appellant had adequate opportunity of getting in touch with his counsel after he had been brought to trial.[53]

In the United States, due process affords criminal defendants the right to a fair trial, including the right to trial before an impartial judicial officer. Also, in cases where criminal defendants represent themselves, they must *knowingly*, *intelligently*, and *freely* waive their right to counsel.[54] If *Dixon Gokpa* were tried in the United States, the conviction, likewise, would have been overturned and the case would have been remanded to the trial court.[55]

In *Hameed Apampa & Or. v. Balogun*,[56] the Ibadan High Court in Nigeria addressed the issue of whether section 219(2) of the Evidence Act (Cap. 62, Laws of the Federation) violated section 22(1) of the 1963 Constitution, which mandated criminal defendants' right to a fair hearing. Section 219(2) of the Evidence Code denied criminal defendants the power to withhold privileged evidence. The court held that this section was indeed in conflict with section 22(1), and thus void to that extent. The court also held that while a certificate issued by a commissioner to produce privileged evidence under section 219(2) of the Evidence Code should be given great weight by the court,

> where an objection to production is shown (a) not to have been taken in good faith or (b) to have been actuated by some irrelevant or improper con-

52. *Id.*

53. *Id.*

54. *See* Faretta v. California, 422 U.S. 806 (1975).

55. Unless an accused has voluntarily waived her right, she is entitled to counsel. Powell, *supra* note 46; Betts v. Brady, 316 U.S. 455 (1942), *overruled in Gideon*, 372 U.S. 335; *see also* Walker v. Johnston, 312 U.S. 275 (1941).

56. Suit No. I/211/65, Oct. 20, 1970 (unreported), *reprinted in* CASES AND MATERIALS, *supra* note 44, at 97-99.

sideration or (c) to have been founded on a false premise, then a certificate issued by the commissioner would not be final or conclusive, and could be overriden by the Court.[57]

As discussed earlier, criminal defendants have a right of confrontation and cross-examination at the preliminary inquiry in Nigeria. Defendants also have this right at the trial stage.[58] In the United States, the sixth amendment to the Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with the witnesses against him." Under the sixth amendment, this right applies in all federal courts. Under the sixth and fourteenth amendments, the right of confrontation exists in all state courts as well.

Under this right of confrontation, the defendant must also have the opportunity to cross-examine all witnesses.[59] With respect to these fundamental rights—the right to counsel, a fair trial, privileged evidence, and confrontation and cross-examination of witnesses, the United States and Nigeria are substantially similar in their treatment of criminal defendants.

V. THE ROLE OF ATTORNEYS AND JUDGES IN NIGERIA AND THE UNITED STATES

A. *The Attorney's Role in Contemporary Nigeria*

In the United States and Great Britain, the lawyer is an officer of the court, with the duty of assisting in the administration of justice under the dictates of the law. His particular concern is the promotion of impartial justice in view of individual facts and legal principles.[60] While the lawyer's role may seem quite complex at times, his role is relatively stable in the United States and Great Britain.[61]

In Nigeria, however, the lawyer's role is more complex. In addition to the traditional duties of representing criminal defendants in and out of court, advising them of their rights, and the many other responsibilities American lawyers have, Nigerian attorneys must be familiar with any British law that may still be in effect in Nigeria, as well as Nigerian law. Nigerian law includes common law, statutory law, customary law, and Islamic law (applicable in the North).

To assist Nigerian attorneys in learning British law, it has been the practice to send them to Great Britain for their training.[62] This training also assists them in mastering Nigerian common and statutory law. With respect to Nigerian customary law, including Islamic law, Nigerian attorneys should be familiar with the norms and codes that apply to their legal subdivisions. Thus, in addition to knowing the local customs and rules, lawyers practicing in the North must also understand the workings of the 1960 Criminal Procedure

57. *Id.* at 99.

58. *See* Dr. Denloye v. Medical & Dental Practitioners Disciplinary Tribunal, Suit No. SC. 91/1968, (1968) (unreported), *reprinted in* CASES AND MATERIALS, *supra* note 44, at 99-102.

59. *See* Pointer v. Texas, 380 U.S. 400 (1965).

60. INTERNATIONAL COMMISSION OF JURISTS, AFRICAN CONFERENCE OF THE RULE OF LAW, at 46 (Lagos, Nigeria 1961) (a report on the proceedings of the conference) [hereinafter AFRICAN CONFERENCE].

61. Attorneys in Great Britain are called barristers and solicitors and have well-defined and mutually exclusive duties. *See* MELLINKOFF, *supra* note 47, at 210.

62. AFRICAN CONFERENCE, *supra* note 60, at 53.

Code, while lawyers practicing in the South must know the Criminal Procudure Act. The two statutes are the primary sources of the Nigerian rules of the criminal procedure.[63]

Additionally, Nigerian attorneys must grapple with the many military decrees proclaimed during military regimes. Under the present military regime, at least five special tribunals are in operation. The apparent purposes of the tribunals are "to speed up the administration of justice," and "to deter the commission of crimes."[64] The military regime sees the criminal justice system in Nigeria as slow and full of technicalities (not unlike its American counterpart).

One of the five special military tribunals set up in the present regime is called the Recovery of the Public Property Special Military Tribunal, 1984. This tribunal is being boycotted by the Bar Association because it does not have a judge to head it. Three other tribunals set up are the Robbery and Firearms Tribunal, 1984, the Exchange Control Tribunal, 1984, and the Public Offenders (Protection Against False Accusation) Tribunal, 1984, all created by Decree 4. The fifth special tribunal is the Miscellaneous Offenses Tribunal, 1984, created by Decree 20.[65]

The three special military tribunals created under Decree 4 have been challenged by the Nigerian press.[66] Under the decisions of those tribunals, two *Guardian* newspapermen have been jailed, while the paper had been fined fifty thousand nairas for publishing false information on diplomatic postings. The Miscellaneous Tribunal created by Decree 20 has caused a great deal of fear in Nigeria. The listed offenses range from "arson of public buildings, destruction of highways and tampering with postal matters, to illegal exportation of foodstuffs, selling prohibited goods, dealing in cocaine or other similar drugs, cheating in [sic] examinations and unlawful dealing in petroleum products."[67]

The fear that Decree 20 instills in Nigerians is very real and quite understandable. The penalties for most of the offenses are stiff, ranging from jail sentences between five to twenty-one years to death by firing squad. These decisions by the tribunals, furthermore, are not subject to the review of regular courts, but in most cases, may be reviewed and confirmed only by the Federal Republic of Nigeria's supreme law-making body—the Supreme Military Council (SMC).[68]

The resultant adjudication of cases coming within the jurisdiction of Decree 20 and the Miscellaneous Offenses Tribunal has been nothing short of startling. In April 1985, three men were shot to death as a result of their conviction for smuggling cocaine, a harsh sentence in view of the crime. By the middle of 1985, a total of nine people were convicted for the same offense.

63. AN INTRODUCTION, *supra* note 10, at 356. *See generally supra* note 11 and accompanying text.

64. Momoh, *Lawyers Assess Their Role*, West Africa, Mar. 11, 1985, at 461 (a report on the Nigerian Bar Association's Law Week).

65. *Id.*

66. For example, Aliko Mohammed, former chariman of Nigeria's most popular journal, *Daily Times*, and the present chairman of the board of directors of the Bank of Northern Nigeria, requested the review of Decree No. 4. Cronje, *supra* note 22, at 18.

67. Momoh, *supra* note 64, at 462.

68. *Id.*

Three of those convicted were women, and the facts present in their cases reflect the gross unfairness of the application of the death sentence to their cases, and also probably reflects the inferior treatment women are generally afforded in Africa.[69]

It is important to note that the present regime did not set up these military tribunals by decrees. They were created under General Buhari's preceding military regime. Buhari was also responsible for suspending the Nigerian Constitution of 1979.

B. *Corruption: A Case Study on the Present Military Regime and Nigerian Criminal Justice*

The Buhari military regime was preoccupied with the corruption cases and tribunals.[70] Corruption remains a major problem in Nigeria, although many past regimes have attempted to reduce the level of corruption.[71] The Buhari military regime, however, dealt with corruption in a very persistent way,[72] and subsequently rearranged the Nigerian criminal justice system. The result: fundamental human rights in Nigeria have all but disappeared.

When General Buhari ousted President Shagari as a result of the December 31, 1983 coup, he justified his actions in terms of reducing the Nigerian debt, and attempting to eliminate bureaucratic corruption, which was rampant during Shagari's regime. After setting up his military councils, Buhari scouted out former bureaucrats who may have fattened their pockets during the Shagari regime. Many ex-bureaucrats went into exile with their fortunes, while many others reported to police headquarters, by request or by their own volition. Several hundred remain in detention today.[73]

During February, 1984, Chief of Staff, Supreme Headquarters, Brigadier Tunde Idiagbon alleged that three former State governors accepted 2.8 million nairas[74] from French contractors in order "to corruptly enrich" the Unity Party of Nigeria (UPN). All three men were prominent UPN members.[75]

The steps of criminal procedure in this notorious prosecution were quite different from those set up during the previous democratic regime under President Shagari. The Supreme Military Council had all three defendants de-

69. *The Cocaine Women*, West Africa, June 10, 1985, at 1166. Two of the women—Gladys Iyamah and Sidikatu Tairu—were mothers, while the third—Sola Oguntayo—was a 19-year-old pregnant schoolgirl, who gave birth while in detention. Iyamah was the 21-year-old mother of three severely crippled children, only two of which survived. She thought that the cocaine she was carrying in her vagina was medicine for her children, and it was her neighbor who told her to hide it there. Further testimony made it clear that Iyamah was a good mother who taught her deformed children to write. In fact, her "crippled 11-year-old daughter wrote a heart-rending plea to the military government, published in some newspapers, in which she said, '[i]f our mother is killed there will be no other hope for us in this world. . . .' " *Id.*

70. *Kidnapping and Corruption*, New Statesman, Feb. 22, 1985, at 20.

71. *See generally* Aina, *Bureaucratic Corruption in Nigeria: The Continuing Search for Causes and Cures*, 48 INT'L REV. OF AD. SCI. 70-72 (a case study on corruption in Nigeria).

72. Agents of Buhari's regime even went so far as to authorize the kidnapping of Alhaji Dikko, a prominent figure in the Shagari regime's ovethrow, in order to return him to Nigeria to stand trial for engaging in corruption. *See generally Kidnapping and Corruption, supra* note 70; Dikko: The *Three-Way Stretch*, West Africa, Feb. 4, 1985. 199; Agbabiaka, *Kidnap Trial Verdict*, West Africa, Feb. 18, 1985, 295.

73. Cronje, *supra* note 22, at 17-18.

74. One naira is approximately the value of one British pound, at the official rate of exchange.

75. Cronje, *supra* note 22, at 17.

tained and investigated. They were not allowed access to the documents necessary to prepare their cases, nor were they allowed contact with possible defense witnesses. The three defendants applied for and were granted an order to halt the tribunal. However, *minutes* later, the Attorney General's office announced that General Buhari had signed Military Decree 13, which placed the authority of his government above normal judicial process.

There was very little known at all about the trials in light of Military Decree 4, the so-called Entitled Protection of Public Officers Against False Publication. This decree made it a crime to publish rumors or reports which damaged the reputation of the government or its officials. The tribunal sat *in camera* and not even the defendants' families were admitted. There were no defense attorneys because the Nigerian Bar Association was boycotting the tribunal in protest to its nature and mode of establishment. The first case that went to trial involved Onabisi Onabanjo, ex-governor of Ogun State. The maximum prison sentence for a conviction was life imprisonment, while the minimum was twenty-one years. Onabanjo received a sentence of twenty-two years, while the other two defendants were acquitted, confirmation of those acquittals are now pending in the SMC.[76] As one can clearly see, very little remains of the democratic process set up in Nigeria in 1979 by the Shagari regime.

C. *The Diminished Role of the Attorney and the Judiciary in Nigeria*

A Nigerian scenario familiar to most Americans presents itself when one recognizes that the average Nigerian assumes that lawyers are avaricious and worthless. According to one trader, "[a]ll (*sic*) lawyers know is money, money, money."[77]

Thus, approximately one hundred members of the Nigerian Bar gathered together for Law Week, February 17-23, 1986. They examined their societal role and problems in the judicial process. This meeting of the bar was not broadly attended, but the quality of the attendance was impressive. Those addressing the bar were Mr. Justice Mohammed Bello (representing the Chief Justice of the Supreme Court of Nigeria), Court of Appeal president Dr. Mudiage Odje (SAN), former director of the Nigerian Law School and former chief judge of the State of Ondo, Dr. Olakunle Orojo, Federal Attorney-General and Minister of Justice, Chike Ofodile (SAN), Chief Rotini Williams, Professor Jadesola Akande of the Nigerian Institute of Advanced Legal Studies, University of Lagos, Dr. Emmanuel Urbobo, Mr. Fola Sasegbon and Supreme Court Justice Chukwudifu Oputa.[78]

The topics of the papers presented by these distinguished people varied, and attempted to address the hopes and realities of the Nigerian administration of (criminal) justice at a time when the military regime was making "crucial developments in Nigeria's legal system and legal institutions," in the words of Mr. Justice Mohammed Bello of the Supreme Court.[79] The role of

76. *Id.*

77. The trader, from the Nigerian State of Bendel, expressed this view to *Times International* on February 18, 1985. Momoh, *supra* note 64, at 461.

78. The theme of the meeting was "The Legal Profession in the Service of Nigerian Society." *Id.* at 461-62.

79. *Id.* at 461.

both the attorney and the judge in Nigeria has greatly diminished in recent years with the imposition of military regimes and the elimination of fundamental democratic principles. Such safeguards afforded criminal defendants will probably remain dormant until the next democratic regime is inaugurated.

VI. CONCLUSION

Nigeria and the United States possess remarkably similar criminal justice systems when Nigeria is under a democratic regime. It is when one attempts to look at the criminal justice system in Nigeria today—under the rule of military government—that the comparison breaks down. Given the extreme differences in background, culture, social structure, and level of development, which truly distinguish the two nations, the contrasts seem justified. And in light of the number of military regimes Nigeria has had in the past, perhaps there is a need for contrast from the American model of criminal justice.

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