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**TOWARDS FAIR HEARING FOR ALL NIGERIAN
EMPLOYEES**

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I. INTRODUCTORY

A cursory examination of Nigerian decisions shows that the courts are disposed to lean in favour of management in assessing the grounds for dismissing an employee. For instance, English courts have shifted from 'disobedience of lawful order' to 'disobedience of lawful and *reasonable* order.'¹ Nigerian judges make no reference to the need for the order to be reasonable.² While English decisions indicate that one

¹*Laws v London Chronicle (Indicator Newspapers) Ltd* [1950] 1 WLR 698, 700

² *Sule v Nigerian Cotton Board* [1985] 2 NWLR (Part 5) 17, 38-39; *Olatunbosunn v NISER Council* [1988] 3 NWLR (Part 80) 25, 31; *Ajayi v Texaco Nigeria Ltd* [1987] 3 NWLR (Part 62) 577, 579.

incidence of insubordination would rarely lead to dismissal,³ Nigerian judges have upheld dismissal of employees who are guilty of a singular act of rudeness.⁴ And while the Supreme Court of Nigeria was hesitant to pronounce on the effect of whistleblowing on an employee's contract,⁵ English judges have expressed willingness to protect employees in such circumstances.⁶

The foregoing show that grounds for dismissing employees in Nigeria are harsh in their imposition by employers and something even harsher in their interpretation by the courts. Yet stern disciplinary rules fairly administered are better than unobjectionable, benevolent rules unjustly applied. Even though procedure and substance are intimately intertwined, unjust laws may be administered by impeccable legal process. As a professor of comparative law says:

The quality of the law can be determined by ... the qualities of the judge ... [A] bad statute with a clever judge is a hundred times better than a good statute with a bad judge ... Let us pray for well-drawn statutes but ... let us pray also for judges [who are] clever men with an independent spirit and can stand the weight of honours.⁷

Procedural fairness is used here as analogous to the rule of natural justice which enjoins all persons to observe certain elementary principles of what is fair when deciding anything that affects the interest of another.⁸ The twin stilts upon which natural justice stands are *audi alteram partem* (listen to the opposing party) and *nemo debet esse iudex in propria causa* (a person interested in a matter should not participate in the decision). The concept of natural justice has developed over the past centuries, but in the course of its development it has lost its equitable, flexible character so that today it has almost crystallized into a technical doctrine. In this paper, procedural fairness is preferred to natural justice since the object is to avoid the technicalities inherent in the doctrine. Rather, since the principles discussed here are intended for informal inquiries between employer and employee, fairness writ large is opted for. Generally, fairness implies an elimination of one's own feeling, prejudices, and desires so as to achieve a proper balance of conflicting interests.⁹

³ *Edward v Levy* (1860) 175 ER 974.

⁴ *Ehioghae v Kingsway Stores Nigeria Ltd* [1972] 11 CCHCJ 58; *Lagos University College of Medicine v Adegbite* [1973] (1) ALR Comm 247.

⁵ *African Continental Bank Ltd v Ewarami* (1978) 11 NSCC 269.

⁶ *Re a Company's Application* [1989] WLR 265; *Initial Services Ltd v Putterill* [1985] QB 526.

⁷ Meijers, E M, "Case Law and Codified Systems of Private Law," (1950) 33 *Journal of Comparative Legislation and International Law*, 8, 17-18 quoted in (1978) 95 *South African Law Journal*, 479.

⁸ The more acceptable legal phrase is natural justice; procedural fairness may not be the lexicographer's first choice. Yet natural justice, fair hearing or fair trial sound rather technical.

⁹ Webster's Ninth New Collegiate Dictionary (1991).

A second introductory remark is that this paper focuses solely on private employees. Since the classic Supreme Court decision in *Olaniyan v University of Lagos*¹⁰ it has become settled that confirmed public employees cannot be removed¹¹ from office unless and until they have been given a fair hearing. For employees in the private sector and some in the public sector (as we shall see anon) the current judicial attitude is that they may be removed from office without adducing any reason, without accusation, without a warning, without a hearing.

The issue discussed in this paper extends to some employees in the public sector. Some of these employees are on contract, that is, employed for a fixed term. For these employees, the judicial attitude is that they cannot insist on procedural fairness before they are removed. In *David-Osuagwu v Attorney-General, Anambra State*¹² the appellant, a lecturer in Anambra State University of Technology employed on contract, was removed from office without a hearing. She sought a declaration aimed at reinstating her to office. The Court of Appeal held that she was not entitled to procedural fairness. Awogu JCA said: "A faithful servant may well want to know why he was being sacked without being given a hearing. If his contract of service does not so provide, his being told is a privilege, not a right."¹³

The same attitude is extended to public employees on probation. Many consider that probationary employment is a casual, temporary employment and probationers are treated as such.¹⁴ Even if this were the law in other jurisdictions,¹⁵ it should be different in Nigeria where probationary employment is known to last for as long as

¹⁰[1985] 2 NWLR (Part 9) 599. Over a decade earlier Wheeler J had reached the same conclusion in the less known case of *Oguche v Kano State Civil Service Commission* [1974] (1) NMLR 128.

¹¹This non-technical word is used to indicate summary dismissal, termination and compulsory retirement.

¹²[1993] 4 NWLR (Part 285) 13.

¹³Ibid at 43-44. In a bold dissent, Uwaifo JCA said (at p 56): "I cannot conceive it to be acceptable that merely because a person was employed on contract basis as a principal officer of the University she may be condemned unheard for an alleged dishonesty and removed from office unceremoniously. Her good name is thereby robbed off her and stained only to be told to take her entitlements."

¹⁴Shyllon, F, "Natural Justice for Sacked Professors and Rusticated Students," (1990) 2 *Ibadan University Law Review* 28, 35 says, leaving aside probationary appointments, a university cannot dismiss a member of its academic staff for misconduct without complying with the rules of natural justice," Cf Inegbedion, N A, "Contending Legal Issues in the Determination of Public Employment," (1994) 4 *Edo State University Law Journal* 69, 80-83 who criticizes this position. Using impeccable argument and relying on Civil Service Rules, he shows that probationary employees are entitled to hearing before dismissal. An English writer proffers a similar argument when he argued that to dismiss an employee on probationary contract without giving him a hearing is automatically unfair so long as he has met the minimum unbroken 104 weeks work as set out in s. 28 of the Industrial Relations Act 1971 (England); Thomson, J M, "Unfair Dismissals and Employees on probation," (1973) 36 *Modern Law Review*, 647.

¹⁵ILO Termination of Employment Convention (No 158) 1982 excludes probationers from the protection that employees should be given reason for dismissal and a hearing.

three years,¹⁶ even longer.¹⁷ In *Ondo State University v Folayan*¹⁸ a lecturer who had spent over four years on probation was terminated with no allegation of wrongdoing against him, no reason given, no hearing afforded. Indeed he was recommended for promotion three months prior to the termination. The Supreme Court upheld the termination.

II. THE LAW AS IT NOW STANDS

At common law, the courts are consistent in refusing to read into employers dismissal power any implied duty to afford employees a fair opportunity to be heard.¹⁹ So long as a termination accords with the terms of the contract of employment, an employee is not entitled to a hearing prior to the termination of the relationship. The authority most frequently relied upon is the obiter dictum of Lord Reid in *Ridge v Baldwin*²⁰ “So the question in a pure case of master and servant does not at all depend on whether the master has heard, the servant in his own defence; it depends on whether the facts emerging at the trial prove breach of contract.

If there is any hope that Nigerian judges would depart from this principle the decision of the Supreme Court in *Olanrewaju v Afribank plc*²¹ put paid to that. The appellant’s contract of employment assured him that he would be entitled to query and afforded an opportunity to defend himself before summary dismissal. While investigations of wrongdoing were being carried out against him, he was not afforded a hearing. He contended that not having been given a hearing, his termination was wrongful. His contention did not meet with favour in the Supreme Court. Katsina-Alu JSC made a short shrift of his case when he said, “an employee can lawfully be terminated without

¹⁶*Akpabot v College of Education, Uyo* (1985) Nigerian Current Law Review 45 (lecturer appointed on three- year probationary period).

¹⁷Section 20 of the Ondo State University Law provides for a maximum of six years probationary period for academic and non-academic staff. In Franco-phone African countries the Labour Codes provide for a maximum of six months probationary period: Visiscombat, K, “Individual Employment Contracts in the New Labour Codes of French-speaking Africa, “ (1968) *19 International Labour Review*, 121, 136.

¹⁸[1994] 7 NWLR (Part 354) 1; *Baba v Nigerian Civil Aviation Training Centre* [1991] 5 NWLR (Part 182) 388 (respondent’s regulation stated that while confirmed staff are entitled to pre-removal hearing, probationers may be removed “for any good cause.” Supreme Court upheld termination of appellant who was on probation and as such was not entitled to hearing even though he was promoted during the period); *Ihezukwu v University of Jos* [1990] 3 NSCC 80 (senior academic staff terminated during probation with no allegation against him, no hearing afforded him; Supreme Court upheld the termination).

¹⁹*Tomlinson v LMS Railway Co* [1944] 1 All ER 537.

²⁰[1964] AC 40, 65; Lord Reid repeated the same principle in *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278, 1282.

²¹ (2001) 72 FWLR 2008.

first telling him what is alleged against him and hearing his defence or explanation.”²² Perhaps the most elaborate dictum on the point is Uwaifo JCA’s in *Udemah v Nigeria Coal Corporation*.²³ The appellant was an assistant general manager, having risen to that position after five years of loyal service. In 1982 an administrative inquiry was set up to investigate some allegations of malpractices in the corporation. The appellant was invited twice to appear before the panel but he turned down the invitations. In November 1982 he was suspended and three month’s salary in lieu of notice paid. He unsuccessfully sought a declaration that his suspension was contrary to natural justice and therefore void. On the issue of natural justice, Uwaifo JCA said:

Natural justice or audi alteram partem is not a sleepless and restless ombudsman or an ever weeping Jeremiah prying into or pleading over every private arrangement between parties for it to be modified in its implementation in order to achieve a particular result. When a valid and lawful contract has been entered between two parties, there can be no room for invoking or inviting natural justice to intervene if there are no particular rules and regulations in support of that course; or if there are no special occasions making a hearing or, indeed, that observance of the rules of natural justice imperative. The performance and obedience of such contract may well depend entirely on its terms and conditions, not on the intervention of natural justice, as some hope, descended in white robes through the clouds as an arbiter.

In contrast to the foregoing there are a number of Supreme Court dicta that urge employers to observe procedural fairness before an employee is removed on ground of misconduct. Only a handful is reproduced here. In *University of Calabar v Essien*²⁴ Iguh JSC stated:

Where an employer dismisses or terminates the appointment of an employee on ground of misconduct all that the employer needs establish to justify his action is to show that the allegation was disclosed to the employee, that he was given a fair hearing, that is to say, that the rule of natural justice were not breached and that the disciplinary panel followed the laid down procedure, if any, and accepted that he committed the act after its investigation.

In *Olatunbosun v NISER Council*²⁵ Oputa JSC, after reaffirming the rule that where a contract has been terminate motive is irrelevant, said that where an employer pleads that a plaintiff is removed for misconduct, his removal cannot be justified in the absence of an adequate opportunity being offered to him to explain, justify or else defend the alleged misconduct. In *Yusuf v Union Bank of Nigeria*²⁶ Wali JSC states

²²Ibid at 2018. In *Central Bank of Nigeria v Jidda* (2001) 7 WRN 24 a confirmed CBN senior staff who had served for 16 years was summarily dismissed without hearing; Court of Appeal held that he was not entitled to hearing as his employment had no statutory flavour.

²³[1991] 3 NWLR 477, 490, followed in *Tadugoronno v Gotom* [2002] 4 NWLR (Part 757) 453.

²⁴[1996] 10 NWLR (Part 477) 225, 262.

²⁵[1988] 3 NWLR (Part 80) 25, 48, at p 58 Eso JSC said: “once misconduct is alleged there must be the element of fair hearing .”

²⁶(1996) 39 LRCN 1139, 115.

that before an employer can dispense with the service of his employee under the common law he needs to afford the employee an opportunity of being heard before exercising his power of summary dismissal. The first two of the foregoing dicta are of limited value as they are *obiter* made in cases involving public employees; the last was made in a case where the employer actually granted the employee fair hearing prior to his dismissal so the court was not indicting the employer for failure to do what he ought to do.

In *Akumechiel v Benue Cement Co Ltd*²⁷ it appeared in evidence that the appellant was accused of certain misconduct for which he was not given a hearing. His appointment was terminated with no reason assigned. The appellant argued for pre-termination hearing, but the Court of Appeal believed the employer's testimony that he was not terminated as a result of any allegation of misconduct. The termination was upheld, yet in the course of his judgment, Munkata-Coomassie JSC stated that where an employer "removes" an employee for misconduct, his "removal" cannot be justified in the absence of an adequate opportunity being offered to him to explain, justify or else defend that alleged misconduct. The use of the non-committal word "removal" robs the dictum of its force. Is removal same as retirement, summary dismissal or termination? In *Danmole v AG Leventis & Co (Nigeri) Ltd*²⁸ Ilorii J stated that absence from duty without leave is misconduct that justifies dismissal, but "the audi alteram partem principle imposes a duty upon [an] employer to act fairly by giving [the employee] an opportunity to explain himself before taking any decision which affect the employee's proprietary right."

It may be stated in parenthesis that Nigerian text writers have not been of much help to private employees. Most of them state that a private employer may terminate or dismiss an employee without affording him hearing and without incurring any liability thereby Uvieghara says "the relationship of employer and employee does not give rise, at common law, to the application of the rules of natural justice."²⁹ Idubor off-handedly writes that it serves no purpose for a private employee to insist on fair hearing before he is removed from office.³⁰ No reason is adduced for his assertion; the issue is not discussed in any detail. Inegbedion suggests that unless a contract of service expressly excludes the rule of natural justice, an employee may not be removed from office unless he is given fair hearing.³¹

²⁷[1997] 1 NWLR (Part 484) 695, 703.

²⁸[1981] 1-3 CCHCJ 227.

²⁹Uvieghara, E E , *Labour Law in Niegria*, Lagos, Malthouse, 2001, 89.

³⁰Idubor, R, *Employment and Trade Dispute Law in Nigeria*, Bini City, Sylva Publications, 1999. 84.

³¹Inegbedion, NA, "Contending Legal Issues in the Determination of Public Employment." (1994) 4 *Edo State University Law Journal*, 69.

Emiola alone argues strenuously that in light of the constitutional provision for fair hearing and the common law rules of natural justice, any determination of an employment contract without procedural fairness should be declared invalid.³²

The dicta in the penultimate paragraph are desiderata as they sound more appealing to noble minds. Yet, there is need for legal substrata upon which to found the rule that all employers of labour should accord all employees fair hearing prior to removal from office. This is indispensable as the application of judicial statements without due regard for the facts of the case in which the statement is made, is a pregnant and perennial source of error which should be avoided. Attempt is made here to hoist a right to procedural fairness prior to any removal from office on three foundations:

- (a) principles of contract law,
- (b) rules of natural justice as espoused at common law and under the constitution, and
- (c) adjudications of international instruments.

III. CONTRACT REGIME

III.I *Express Contract to Afford Procedural Fairness*

It is submitted that principle in the law of contract upon which procedural fairness can be foisted on an employer prior to termination, dismissal or compulsory retirement. One possibility is where the contract of employment contains express assurance that an employee shall be given hearing prior to his removal from office. The starting point again is the dictum of Lord Reid in *Ridge v Baldwin*³³ Immediately after the dictum reproduced above, the Law Lord said:

But this kind case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants or the grounds on which it can dismiss him.³⁴

In other words, an employer who is bound by statute “or other restriction” is not at liberty to remove an employee where he has bound himself to afford him pre-removal hearing. What this other restriction is, is not indicated. However, less than a decade later, the House of Lords had opportunity to discuss the issue afresh and Lord Wilberforce indicates that agreement may serve as such restriction. In *Malloch v Aberdeen Corporation*³⁵ he suggested that there are relationships in which all requirements of the observance of the rules of natural justice may arise because of regulations or code of employment laid down by statute, or regulations or code of

³²Emiola, A, *Nigerian Labour Law*, Ibadan, University Press, 88-92.

³³ [1964] AC 40.

³⁴Ibid at 65 (emphasis supplied).

³⁵[1971] 2 All ER 1278.

employment or agreement.³⁶ This was after he had noted that the common law which gives an employer power to remove an employee without hearing is illogical and bizarre.

After this decision came *Stevenson v United Road Transport Union*.³⁷ The plaintiff, a trade union official, was dismissed after disciplinary proceedings, in which he was denied an opportunity to defend himself. He successfully claimed a declaration that the decision to dismiss him from office was *ultra vires*. Although the court may have been affected by the fact that members of trade union have always been afforded natural justice by the courts, the Court of Appeal approached the case as that of a “special” employee. The discretionary power to terminate the plaintiff’s employment, which was conditional upon investigation, led the Court to imply natural justice.³⁸

It has come to be recognized as part of the English common law, outside the scope of employment protection statutes,³⁹ that where a contract contains an express procedure for termination, this serves as an effective restraint on the employer’s power to terminate without affording an employee hearing. In *Jones v Lee*⁴⁰ a headmaster was denied his contractual right to a hearing before the local education authority dismissed him. The Court of Appeal granted him an injunction. As Roskill LJ commented, the underlining implication of the decision is that the right to correct pre-dismissal procedure should be upheld. The injunction does not prevent the employer from dismissing the employee, provided it follows the correct procedure.

In *Gunton v London Borough of Richmond-upon-Thames*⁴¹ the registrar of a college dismissed in breach of procedure was granted a declaration that the purported dismissal was ineffective and awarded increased damages to reflect the salary he would have received during the time it would have taken to operate the disciplinary procedure. It was argued for the defendant that to interpret the disciplinary procedure as restraining the power to terminate would be inconsistent with another term in the contract allowing termination by either party on giving a month’s notice. Buckley LJ met this argument by stating that the adoption of the disciplinary procedure into the contract did not affect the power of the council to terminate on one month’s notice on

³⁶Ibid at 1295. Emphasis supplied.

³⁷[1977] 2 ALL ER 941.

³⁸At pp 948-949 Buckley LJ suggests that natural justice should apply in any case where some restriction exists on the grounds for dismissal from employment.

³⁹Unfair dismissal statutes protect only employees who have worked for an unbroken period of 104 weeks: s.28 Industrial Relations Act 1971 (as subsequently amended). So employees outside the scheme are governed by the common law.

⁴⁰[1980] ICR 310. Just in case any thinks this case is of little value because it involved a public employee, it should be appreciated that English public employees do not enjoy the security of tenure their Nigerian counterparts enjoy; they are subject to the doctrine of dismissal at will as private employees in Nigeria. See Fredman, S and Morris, G, “Public or private? State Employees and Judicial Review,” (1991) 107 *Law Quarterly Review* 298.

⁴¹[1980] 3 All ER 577. In *R v Derbyshire Council, ex p Noble* [1990] IRLR 332 Woolf LJ suggests that procedural fairness should be implied into all contracts of employment.

other grounds but did “disenable the council from dismissing the plaintiff on disciplinary grounds until the procedure prescribed by those regulations had been carried out.”

The closest that a Nigerian judge has come to recognizing the liability of an employer for removing an employee without hearing is the dictum of Cole J in *Fajemirokun v Nigeria Airways Ltd*⁴² where he stated:

If there is provision in the contract of employment that the appointment of any employee cannot be terminate unless and until certain procedures are gone through, then a failure to go through those procedures before terminating the employee’s appointment renders the employer liable to pay damages to the employee for the breach of his contract of employment.

It is uncertain whether his Lordship had employment with statutory flavour in mind or he was stating what he perceived to be the common law. Since there is nothing in the facts of the case that his Lordship adverted to public employment, it may be assumed that he was stating a general principle of law applicable to private employment.

It is a surprise that while Nigerian courts insist that an employee should faithfully comply with the terms of the contract of employment, employers are relieved of their obligation to abide by pre-removal procedure they themselves inserted. The law of contract is essentially ordained to see that reasonable expectations come true by the fulfillment of solemn promises.⁴³ Where the law is found to be a caricature of what labour relations are in the world of reality, the law loses the awe in which it should be held.

A learned writer has urged that whether or not an employee should be afforded the right to a hearing before his appointment is terminated is dependant on whether the right to a hearing is a term of the employment contract.⁴⁴ In other words, where the contract of employment provides for an investigating panel either prior to dismissal where there has been misconduct or following suspension, the court should uphold it, holding the employer to his contract.

Nor is it enough that an employee is not summarily dismissed, but terminated or compulsorily retired.⁴⁵ Removal from office (whether on notice or summarily) entails grave consequences for the individual concerned, his family and the nation. A writer lists the following: poverty, broken families increase in the number of street children,

⁴²(1979) 2 Law Rep of Nig 238, 242.

⁴³Per Fakayode J in *Adebule v West African Breweries Ltd* [1971] 2 ALR (Comm) 363, 375.

⁴⁴Okpaluba, C, “A Trade Union’s Right to Dismiss: A West Indian Decision” (1973) 22 *International and Comparative Quarterly* 557, 563.

⁴⁵“There [is] reason why procedural protection should be accorded to workers summarily dismissed for misconduct but denied to those whose employment was terminated on notice through no fault of their own:” Grogan J, [Dismissals in the Public Sector: Triumph of Audi?] (1991) 108 *South African Law Journal*, 599, 600.

low esteem, modification of self-image, rebellion or retreatism, retarded development in children, deaths; for the country serious brain drains.⁴⁶ What is the justice in ruling that an employer may not summarily dismiss an employee without providing him opportunity to clear his name, to defend himself, whereas under the guise of sanctity of contract he may be terminated with a month's salary in lieu of notice without more? Such principle of law does not square with common sense, it is alien to human reason, to man's wit and all men's wisdom. The thesis proposed is that, save in the case of termination as a result of economic adversity on the undertaking (so-called redundancy or retrenchment) whenever a contract of employment is brought to an end at the instance of the employer, the employee should be given a hearing. Termination or retirement should attract the principles of procedural fairness, at least where the would lead to the loss of pension rights.⁴⁷

Legitimate Expectations – Bringing Law in Embrace with Practice

Decisions from the courts give the impression that procedural fairness is alien to the thinking of private employers. However, a careful reading of facts of cases in Nigerian decisions shown that many employers have imbibed the concept of procedural fairness. These procedures include such features as warning employees prior to dismissal, written notification of alleged offence with an opportunity to make representations either in writing or at a hearing, a range of penalties from warning, demotion, transfer, and suspension to dismissal and a right to appeal to higher levels of management. What is expected of judges is to mould and shape principles of law to meet the social necessities and industrial opinion of the day; what decisions teach is that the law is far removed from employers' disciplinary practice.

The truth is that where law is treated as logic, the words in a contract are sacrosanct so that where a contract of employment is silent on dismissal procedure the courts assume that the employer does not want to be burdened by it. Whereas the courts give practice prominence if judicial lawmaking is grounded on experience. As the well-known jurist, Wendell Holmes, sagaciously said, "The life of law has not been logic; it has been experience. In other words the felt necessity of time, prevalent moral and political theories, as well as intuitions of public policy have had a good deal more to do than syllogism in determining the rules by which men should be governed."⁴⁸ Modesty

⁴⁶Awosika, K, "Of 'Isms' and 'Absolute-isms,'" *The Guardian*, August 21, 2002, 51

⁴⁷Elias, D, "Summary Dismissal upon Allegation of a Crime – An Overview," (2000) 4 (No 3) *Modern Practice Journal of Finance & Investment Law*, 134, 145 (Urges employers to use the device of termination of shut employees out of the need for pre-dismissal hearing); cf Grogan, J, "Natural justice and Employment Contracts: A Rearguard Action," (1992) 109 *South African Law Journal*, 186 (hereafter Grogan, Natural Justice").

⁴⁸Biwas, A R, "Property in a Changing Society," (1973) 25 *Journal of the Indian Law Institute* 1. Dean Roscoe Pound wrote: "To the creative era following the Renaissance and the Reformation the life' of the law seemed to be reason. To the organizing era of the nineteenth century it seemed to be experience. In

would teach judges that sometimes the best judgment of distinguished men in other field of endeavour dwarf the highest expressions of the law in moral and common sense.⁴⁹ Judges pre-suppose that as a result of their training and experience they are better determinants of facts and what policy requires in some particular sphere of human activity. While that may not be so in , perhaps many fields and on some topics that may not be necessarily be a justified assumption.

Take for example the facts of *Oseni v Brossette (Nig) Ltd*.⁵⁰ The plaintiff, without being afforded hearing, was dismissed for selling his employer's goods below the stated price. The local trade union executive intervened and pressed the employer to set up a panel to look into the matter. The employer obliged. On an appraisal of the facts, the panel recommended a less severe sanction than dismissal. The employer stuck to its guns and dismissed the plaintiff. Remarkable, the court upheld the panel's conclusion and awarded the plaintiff damages for wrongful dismissal. Speaking of this panel, Onalaja J said: it is not a judicial proceeding, but since its decision is likely to affect the civil rights of another person it is bound in law to observe the principles of natural justice.⁵¹

In *Ezaga v Embechem Ltd*⁵² the appellant terminated the appointment of a lady who worked in his department. She protested to her union, the National Union of Chemical and Non-Metallic Workers on the ground that she was terminated because she would

truth, it is reason tested by long experience, and developed by reason." Quoted in Lord Morris, "Natural Justice" (1973) *Current Legal Problems*, 1, 5.

⁴⁹The following letter from the Pro-chancellor of the University of Lagos to the Vice-Chancellor is instructive: In the two terminations I have seen so far, the appointments and promotions committee failed to follow the regulations for disciplinary action against the university staff be they administrative or academic. For example, (1) the employee being notified in writing of the grounds on which consideration is being given to the termination of his appointments: (2) that the employee has had the opportunity of replying to the grounds alleged against him, and of appearing in person at a meeting of the Council, in his case appointments and promotions committee, at which the termination of his appointments is to be considered. I should like you to stress upon the appointments and promotions committee that it is expedient that they follow the regulations strictly when terminating anybody's appointment or dismissing him. Very often the wish of the Heads of Departments and Deans are followed and carried out without considering the regulations and moral aspect of the whole exercise." Reproduced in *Aigoro v University of Lagos* [1979] 10-12 CCHCJ 9, 27-28. Another example is circular letter No SEMG. 38/1 of February 7, 1984 from Secretary to the Federal Military Government (reproduced in *Okoro v Delta Steel Co Ltd* [1990] 2 NWLR (Part 130) 87, 98). The writer conveyed the anxiety of the then Head of State, Major-General Buhari, over the arbitrary removal of public employees using Public officers (Special Provisions) Decree No 17 of 1984 (now repealed): " I am to assure all public officers that the on-going exercise is not intended to be arbitrary or in the nature of a witch-hunt or to provide an opportunity for the victimisation of any public persons." Sadly, in no known case did a judge have the courage to strike down the removal from office on the ground that the exercise was arbitrary or vindictive. The trend in the decisions was a surrender on the ground that the Decree ousted the court's jurisdiction.

⁵⁰ [1981] 1-3 CCHCHJ 310.

⁵¹ Ibid at 324.

⁵²[1981] 1-3 CCHCJ 119.

not succumb to appellant' lecherous advances. The union called out its members on strike in protest. Management responded by setting up a panel that investigated the allegations of appellant' escapades at which four ladies, three of them married, testified against the appellant. In the meantime, the lady clerk was reinstated and transferred to another department. Based on the panel' report, the appellant was terminated; his action for wrongful termination was dismissed.

In *Tata v Attorney-General, Bauchi State*⁵³ the appellant was dismissed from service for alleged complicity in importation of non-addictive, mind-altering drugs belonging to the respondent government. He protested the dismissal on the ground that he was not afforded a hearing. Thereupon an investigation was instituted, the appellant was given a hearing and he was absolved of complicity in the matter. In consequence his dismissal was commuted to retirement some two years after the initial dismissal.

Who will doubt the shrewdness of management's humble response in the above cases? If an employer manifests this level of responsiveness, why should a court of law not impose interlocutory injunction to restrain an employer from dismissing an employee until due dismissal procedures are complied with? At worst, such an order can be made subject to the employee undertaking to pay the employer damages for any loss sustained by reason of the order if it should be held at the trial that the employee was lawfully dismissed.⁵⁴

The law should keep its perceptive organs open so as to keep pace with social needs, opinions and aspirations. That way law as an instrument of social control can continue to function by regulating interpersonal conduct, keeping in view the objectives of social orderliness and individual welfare. Once the courts insist on pre-dismissal procedural fairness, employers will kowtow and since human mind develops habit by repetition, sooner than later the law would have some positive effects, giving all employees the right environment to work.

What is proposed is this: where a contract of employment is silent on disciplinary procedure but an employee is able to prove that a modicum of procedural fairness has been applied in favour of some employees in the past, the court should insist that it should be applied equitably for the benefit of all employees. Nothing would be worse in a community if the grievance of one person is dealt within one manner and a precisely similar grievance of another persons is dealt with in a different manner. The courts should not endure an employer to apply palm tree justice.

This is the substratum of the doctrine of "legitimate expectations."⁵⁵ By this doctrine, if a person sets out a practice which other rely upon he is disabled from unilaterally

⁵³[1993] 9 NWLR (Part 317) 358.

⁵⁴Sholanke, O O, "Termination of Contracts of Employment: Are University Lecturers Sacred Cows? (1991) (No 5) *Justice*, 136, 152.

⁵⁵The phrase is traceable to Lord Denning, MR in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170 where he said that a right to be heard exists to protect a 'right, interest...or legitimate expectation.' Essentially the doctrine of legitimate expectations enables courts to come to the aid of

altering it midway to the detriment of those who put faith in it. His discretionary power would be ignored for the reason that a legitimate expectation has been created that the practice would not be changed in the course of the transaction. “Legitimate expectation may arise ... from the existence of a regular practice which the claimant can reasonably expect to continue.⁵⁶ Forsyth submits that “if a legitimate expectation is aroused, then save in exceptional circumstances the body that aroused the expectation should fulfill that expectation.”⁵⁷

This flexible doctrine should incline a judge to invoke procedural fairness not on proof of the actual or potential infringement of some legal right but on considerations of consistency. In most cases, excluding, of course, casual employees, employers and employees enter into what they both consider to be long-term relationships. The usual expectation of an employee on entering into an employment contract is that his employer will not terminate his appointment without good reason – and this expectation gets reinforced with the effluxion of time. It has been urged that this should be regarded as sufficient weight to justify his expectation to be heard before removal from office.⁵⁸

If judicial authority is sought for this, perhaps some may be gleaned from *Morakinyo v Ibadan City Council*⁵⁹ where Brett JSC stated that in a contract of service, there may be benefits (such as promotion) of which the employer is not obliged to grant in the first place, but which he cannot discontinue without good cause when once he has granted them. The Courts should recognize legitimate right of employees to pin faith on their employers’ practice. Where judges choose to be discerning and percipient, they would notice that “the actions of the parties subsequent to the execution of the agreement are often far more revealing of consensual intent than are quite explicit contract terms that are not acted upon.”⁶⁰

Suppose all that is contained in an employment handbook is an assurance that prior to dismissal or suspension management shall investigate an allegation of misconduct affecting an employee? That was the question before the court in the popular case of *Taiwo v Kingsway Stores Ltd*⁶¹ where the plaintiff was terminated with a month’s

persons who would have in normal situations been unable to obtain redress. The literature on the doctrine is growing. See Hlope, J, “Legitimate Expectation and Natural Justice: English, Australian and South African Law,” (1987) 96 *South African Law Journal*, 165; Caldwell, T L, “Legitimate Expectation and the Rules of Natural Justice,” (1983) 2 *Canterbury Law Review*, 45; Craig, P P, “Legitimate Expectation: A Conceptual Analysis,”(1992) 108 *Law Quarterly Review* 79. M.A Ikhariale “ Legitimate Expectations: Prospects and problems in Constitutional Litigation in South Africa,” (2001) 45 *Journal of African Law*, 1.

⁵⁶Per Lord Fraser in *Central Civil Service Union v Minister for the Civil Service* [1985] AC 374, 401.

⁵⁷Forsyth, C, “The Provenance and Protection of Legitimate Expectation: A Confusion of Concepts,” (1980) *Cambridge Law Journal*, 238, 241.

⁵⁸Grogan, “*Natural Justice*,” 194.

⁵⁹[1964] (1) ALR Comm 149, 154.

⁶⁰Etukudo, A J, *Waging Industrial Peace in Nigeria*, New York, Exposition Press, 1977, 23.

⁶¹(1950) 19 NLR 122.

salary in lieu of notice. He sued for wrongful termination, contending that he was terminated due to false accusation of misappropriation of goods made against him. A term of his employment provides that an employee charged with serious misconduct or a criminal offence may be suspended until investigations have made. An investigation was carried out but the plaintiff was neither invited to testify nor was he accused. In essence the plaintiff urged that implied in this provision was an obligation on the employer to give him a hearing prior to termination. But de Comarmond SPJ made a short shrift of plaintiff's contention, saying, "This...does not ...affect the case before me because the motive which impels an employer to terminate lawfully a contract of employment is not relevant."⁶² In other words, an employer's self-imposed obligation to investigate a case of misconduct does not ensure for the benefit of an employee so as to confer upon him a right to be heard before termination.

With great respect, his Lordship's reasoning process seems to have proceeded on the wrong track: either he did not understand the issue raised or he chose to ignore it. It is one thing to say an employer can terminate an employee's contract without reason, it is another thing altogether to urge that where an employer has set out a couple of clauses in a contract, it may whimsically pick and choose which one he would comply with and which one to jettison, without regard to the expectations of his employee.⁶³

The former relates to substantive ground for removal, the latter to procedural ground. Where there is no allegation of wrongdoing and an employer wakes up one morning to terminate an employee that is one clause in the agreement. It is a different kettle of fish where an employee is suspected of wrongdoing, his colleagues know of this, may be the police arrests him and with the stigma and infamy of being a suspect hanging over his head, he is removed from office with no opportunity to clear his precious name. This point was made writ large in *Baba v Nigerian Civil Aviation Training Centre*⁶⁴ where the regulation under which the appellant was employed provided that an employee on probation may be removed from office "for good cause." After an investigation panel indicted the appellant he was dismissed without a hearing. He argued that the removal was contrary to natural justice; that he was entitled to cross-examine the persons who testified against him. Nnaemeka-Agu JSC rejected this contention, saying,

⁶²Ibid at 123.

⁶³In *Okpeke v Nigeria Security Printing & Minting Co Ltd* [1999] 12 NWLR (Part 629) 16 appellant was accused of stealing, he was suspended and later retired with no hearing afforded him. The Court of Appeal held that the employer was not obligated to oblige him a hearing so long as he gave him his due one month's salary in lieu of notice. Okuribido J fell into the same error in *Akinbule v United Bank for Africa* [1980] 1-3 CCHCJ 363, 370 where he said that failure to accord an employee hearing as set out in the contract of employment does not make a dismissal wrongful because the court cannot inquire into the rightfulness or otherwise of the dismissal. See also *Strabag Construction (Nig) Ltd v Adeyefa* [2001] NWLR (Part 735) 1 (CA held employee not entitled to hearing before retirement so long as employer complies with Conditions of service).

⁶⁴[1991] 5 NWLR (Part 192) 88.

[T]he respondents were entitled to look at the whole circumstances and come to the conclusion, as they did, and be satisfied that there were good grounds for terminating the appellant. If their decision is challenged, the main issue would be whether the grounds for the terminating were reasonable not whether there was a hearing.

The implication of the decision in *Taiwo* and the cases that have followed it in the past half a hundred years is the grotesque practice of employers adopting disciplinary procedure in the contract of employment but being permitted by the courts to ignore it. What becomes of the cardinal principle that parties to a contract intend what they stand?⁶⁵ The decision is high-water mark of an employer using his superior economic strength to dismiss an employee and the courts acquiescing in the name of freedom of contract.

Agreed, a promise to investigate is not in the same pedestal as an agreement to afford an employee a hearing. Yet inherent in an investigation is a promise to give an employee an opportunity to clear his name, to defend himself. Investigations conducted behind an accused employee are unorthodox management relations practice; they open way for vilification, victimization and witch hunting. It is only when an investigation panel hear both sides that it is possible to discern the facts behind the facts. Where an employee who is to be disciplined is bypassed the whole authority of management gets eroded on the periphery. On the other hand, an all-involving investigation commands the willing obedience and respect of those whose conduct it is meant to regulate.

The idea of imposing fair terms into employment contracts is not novel. An example is the rule that even where a contract of employment provides that an employer reserves the right to terminate without notice, the courts have held that that does not mean his employee has forgone his right to receive reasonable notice of termination, and in default of notice, adequate compensation.⁶⁶ Second is the power of employers to dismiss employees summarily without giving warning as expressly provide in the contract where an employee's misconduct is gross.⁶⁷ So also is the imposing on employers of a duty to pay employees who absent themselves from duty due to temporary sickness. In *Mears v Safecar Security Ltd*⁶⁸ Stephenson LJ expressed preparedness to "treat as an agreed term a term which would not have been assented

⁶⁵*Solicitor General v Adebonojo* [1971] (1) ALR (Comm) 6, per Coker JSC.

⁶⁶*Green v Wright* (1879) 1 CPD 519; *Re African Association Ltd* [1910] 1 KB 396; *Kusamotu v Wemabod Estate Ltd* [1979] NSCC 588, *Rejendram v Gunasekara* [1979] 10-12 CCHCJ 242, 249.

⁶⁷*Cooperative & Commerce Bank Ltd v Essien* [2001] 4 NWLR (Part 704) 479; *New Nigeria Bank Ltd v Obevudiri* [1986] 3 NWLR (Part 29), 400-401.

⁶⁸[1982] ICR 626, 651. Examples can further be multiplied: In *Armstrong v South London Tramways Co Ltd* (1890) 64 LT 96 it was held that an employer must give his employee a hearing before forfeiting his wages. The earlier case of *London Tramways Co Ltd v Bailey* (1877) 3 QBD 217 was not followed. In *Palmer v Inverness Hospitals Board* [1963] Session Cases 311 the ministerial circular providing for appeals against dismissal was held to import the rules of natural justice into the dismissal procedure

to by both parties at the time when they made the contract.” Another is the implied duty imposed on employees to serve in good faith. In *Peters v Symmons*⁶⁹ an employee was transferred from Calabar to Oron. His pay at Calabar was higher than what his colleagues in Oron earned. The issue turned on whether he should be paid his Calabar wages or what his colleagues were paid. Berkeley Ag J resorted to public policy to hold that it would be unjust to order a higher scale of pay for the plaintiff over what his colleagues were earning. The doctrines of mutuality and reciprocity offer the court basis to limit the employer’s power to dismiss on notice for unacceptable or inadequate reasons, and without following fair procedure. In these examples judges make a contract for the parties, though it is almost blasphemy to say so.⁷⁰

A value-oriented approach to legal issues leads to a narrowing of the cleavage that at present exists between “law in books” and “law in action” by inducing an appreciation of law as a living social phenomenon.⁷¹ In this regard, a learned writer notes that in the United States employers’ power to terminate at will without procedural fairness is checked by implying the procedure into the contract having regard to the practice of the industry or of the company, that the employee received commendations or promotions, and longevity of service.⁷² *Pugh v See’s Candies*⁷³ illustrates this principle. The plaintiff had served for 31 years, rising from pot-washer to become a vice-president with the respondent company. Although the company’s sales of candy surpassed all previous records on St Valentine’s Day 1973, Pugh was summarily dismissed a few months later. The court held that there was implied terms in his contract that he would not be dismissed in an arbitrary manner. Evidence to support the imposition of this term were: the duration of his employment, the commendations and promotions he had received, the lack of direct Criticism of his performance, the assurances he had been given over the years and the acknowledged policies of the employer. This approach enables judges to consider the nature of the act committed by an employee against the background of the circumstance under which he did it and the precedents of the person committing the said act.

*In R V BBC, ex p Lavelle*⁷⁴ the appellant alleged that he was dismissed for having in his possession some of his employer’s tapes in his residence contrary to work ethics. His employer failed to follow the rules of natural justice prior to the dismissal. Woolf J held that the appeals framework in his employer’s handbook restricted its power as an employer to terminate the employee without hearing. The elaborate framework of

⁶⁹(1924) 5 NLR 79.

⁷⁰Lord Wright, *Legal Essays and Addresses*, 257.

⁷¹Dias, R W M, “The Value of a Value-Study of Law,” (1965) 28 *Modern Law Review*, 397, 410.

⁷²See Pitt, G’s critical article, “Dismissal at Common Law: Relevance in Britain of American Developments,” (1989) 52 *Modern Law Review*, 22, 27.

⁷³171 Cal Rptr 917 (Cal 1981).

⁷⁴[1983] 1 WLR 23.

appeals took the case out of the “pure” servant category and opened up the possibility that some remedies other than damages were available to the applicant.⁷⁵

These decisions may contrast with the decision in *Cooperative & Commerce Bank Ltd v Essien*⁷⁶ where the respondent contended that an employee who committed misconduct similar to the one that led to his summary dismissal was terminated and pleaded for equal treatment. Opene JCA rejected his contention. It does not lie in the mouth of an employee to dictate to the employer what it should do with an employee whose conduct amounted to a gross misconduct; it is entirely up to the employer to treat the matter as it deems fit and proper, his Lordship said.

Why should an employer be at liberty to be capricious, arbitrary or discriminatory and all the court does is to wink at him? Ajose-Adeogun J does not think that should be so. In *Osu v Nigerian Railway Corporation*⁷⁷ the defendant reserved the discretion to pay an employee on suspension part or his full remuneration. In this case the defendant refused to pay plaintiff his full salary for the months he was on suspension but adduced no reason for the exercise of its refusal. His Lordship overruled the defendant, saying, “such a discretion is to be exercised judiciously. If it is not so exercised, the court can examine the particular circumstances and use its own discretion to achieve justice.”⁷⁸

And in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd*⁷⁹ Browne-Wilkinson VC held that the discretion given to an employer to agree to increases in pensions was not unqualified; that employer was not obliged to agree to an increase, but it was obliged to exercise its powers in good faith and avoid an arbitrary or capricious result.

Rather than insist on express contractual right to procedural fairness, the courts should la emphasis on the factors which should influence employers such as sound civic traditions, a philosophy based on cooperation, a mutual commitment to regimes, ideals or ways of life which are prevalent in the community as a whole.⁸⁰ When an employer becomes so inebriated with his own comfort and well-being that he forgets that his fellow humans have their own ideas upon the same lines, judges should restore him to sobriety. Whether the principle is that power must not be used oppressively or due to the dictates of procedural fairness, in the interests of the community as a whole there should be restrictions upon the freedom to contract which employers resort to in terminating employment so long as the termination accords with the four corners of

⁷⁵ *West Midlands Co-operative v Tipton* [1986] 2 WLR 306 (HL) (in the absence of undisputed serious misconduct, a refusal by an employer to allow an employee to appeal could by itself justify a finding of unfair dismissal).

⁷⁶[2001] 4 NWLR (Part 704) 479.

⁷⁷[1978] 10-12 CCHCJ 326.

⁷⁸Ibid at 331.

⁷⁹[1991] IRLR 66.

⁸⁰De Givry, L “Comparative Observations on Legal Effects of Collective Agreements.” (1958) 21 *Modern Law Review*, 501, 507.

the contract. That way, employment contracts should be made subservient to more exalted inspiration of procedural fairness, to the majestic concept of natural justice.

Employers are keenly concerned about efficiency and stability at the work place, yet judges should realize that there is need to delicately counterbalance that with considerations of efficiency in the administration of justice. Procedural fairness can serve as an impregnable bulwark against employer's exercise of power in order to protect employees from victimization.

IV. NATURAL JUSTICE REGIME⁸¹

Another avenue to urge Nigerian courts to impose procedural fairness on employers prior to removing employees from office is the application of the rules of natural justice. What is the legal substratum for procedural fairness generally? Wade says on statute and contract.⁸² Where recourse is made to it in administrative law, there must have been an empowering statute under which an official acts. And it is presumed that parliament confers power on the implied condition that it is to be used fairly, the persons affected given due hearing. But where a non-statutory body exercises power, its duty to observe procedural fairness is contractual. The member, in consideration of paying his dues and observing the rules, is entitled to fair and just application of the rules, in accordance with his contract of membership.⁸³

However, procedural fairness is not simply to be regarded as an implied term in a contract otherwise it would be expressly excluded. Thus Lloyd's suggestion that the law imposes procedural fairness *ab extra* in the name of public policy appears more convincing.⁸⁴ In the same vein, Friedmann posits that the judicial insistence on procedural fairness – whether this is referred to as natural justice, fair hearing or due process is immaterial – means in effect a power of almost unlimited sweep to lay down principles of administration for all category of persons, in accordance with changing ideas of public policy.⁸⁵ Nnaemeka-Agu JSC favours this view when he said that fair

⁸¹Some two decades ago Emiola, A, *Nigerian Labour Law*, Ibadan University Press, 1982, 88-92 had urged that any determination of private employment contract without regard to the fair hearing provisions in the Constitution and common law rules of natural justice should be declared invalid. What appears in the following pages builds on that substratum.

⁸²Wade, H W R, "Judicial Control of Universities," (1969) 85 *Law Quarterly Review*, 168.

⁸³*Lee v Showmen's Guild* [1952] 2 QB 329.

⁸⁴Lloyd, D, "Disqualifications Imposed by Trade Associations – Jurisdiction of Court and Natural Justice," (1958) 21 *Modern Law Review*, 661, 664.

⁸⁵Friedmann, W, "Limits of Judicial Lawmaking and Prospective Overruling," (1966) 29 *Modern Law Review*, 593, 600.

hearing is an essential pre-requisite to peace and stability in society, else chaos and jungle justice would have the upper hand.⁸⁶

It is intended to show in this sub-head that the application of the rules of natural justice are catholic; also democratic philosophy as well as the fundamental rights provisions in the Constitution can be resorted to, to import procedural fairness into employment contracts.

IV.I *Universality of Procedural Fairness*

For centuries the common law has insisted on fair adjudicating of all matters involving civil consequences on individuals. Fundamentals of fair play require that no person shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. It is a can binding on judges and all.⁸⁷

Thus in almost all common law jurisdictions it has been recognized that students are entitled to a fair hearing before discipline is imposed on them⁸⁸. The leading local case on this is *Garba v University of Maiduguri*⁸⁹ where the Supreme Court held that the appellants should be reinstated to their studies as the panel that inquired into the allegation against them was not free from bias. In *Onwumechili v Akintem*⁹⁰ some University of Ife law students were rusticated for a limited period is imposed, elementary principles of natural justice must observed. In another case involving a university student, he was notified to see two lecturer independently who asked him questions. Later he was dismissed from the institution for alleged examination malpractice. The Court of Appeal annulled the dismissal for want of fair hearing.⁹¹

Traditional rulers have also benefited from the application of the rules of natural justice. In *Oyeyemi v Commissioner for Local Government*⁹² the respondent withdrew the appellant as Baale (chief) of Oro without cause. The Supreme Court struck down the order on the ground that it offends the rule against fair hearing. Nnaemeka-Agu

⁸⁶*Enigwe v Akaigwe* [1992] 2 NWLR (Part 225) 505, 536.

⁸⁷Per Kelly CB in *Wood v Wood* (1874) LR 9 Ex 190, 196.

⁸⁸*R v Aston University Senate ex p Roffey* [1969] 2 WLR 1418 (students entitled to hearing before being required to withdraw from university). See Seavey, W A "Dismissal of Students: Due Process" (1957) 70 *Harvard Law Review* 1406; Emiko, AA, "Comparative Discourse on Student' Fair-Hearing in Two Jurisdictions – USA and Nigeria," (1991) 2 (No 4) *Justice*, 127; Essien, E "Fair Hearing and University Discipline; An Appraisal," (1991) 2 (No 6) *Justice*, 51.

⁸⁹[1985] 2 NWLR 599.

⁹⁰[1985] 3 NWLR (Part 13) 504; *University of Ibadan v Asein* (unreported) CA/1/63/84 of 22/5/85 discussed in Shyllon, H, "Natural Justice for Sacked Professors and Rusticated Students" (1990)2 *Ibadan University Law Review*, 28; *West African Post-Graduate Medical College v Okojie* (2003) 11 WRN 42 (student who alleges unfairness in assessing her examination scripts is entitled to fair hearing; but must exhaust internal remedies before proceeding to court).

⁹¹*Egwu v University of Port Harcourt* [1995] 8 NWLR (Part 414) 419.

⁹²[1992] 2 NWLR (Part 226) 661.

JSC affirmed that the principle that a man should not be sanctioned without hearing is incorporated in our jurisprudence and applies in all cases in which a decision is to be taken by any mater involving a person's interest in a property, right or personal liberty.⁹³

Why the high tide litigation over procedural fairness has reached town unions. The Court of Appeal has held that the right to hearing subsists in favour of members of a town union before a government official dissolves it. In *Onwuzulike v Commissioner for Special Duties, Anambra State*⁹⁴ the court of Appeal was called upon to construe the phrase where it appears to the Commissioner that the continued existence of a town union is not in the interest of the peace of the community for which it is instituted, he may dissolve it.⁹⁵ The Commissioner for Special Duties dissolved the Achalla Improvement Union without affording it a hearing. A certiorari was issued to quash the dissolution. On the need for fair hearing, Oguntade JCA stated that a duty to act fairly is implied in the statutory provision since the exercise of that power may adversely affect the interest of individuals, and the duty connotes that the Commissioner must give a union which is being accusation upon which he acts.⁹⁶

Nor does a person need to prove that he has a right to a rest before the rules of natural justice may be extended to him. In *Nagle v Fielden*⁹⁷ a female trainer was refused a trainer's licence by a Jockey Club which had the monopoly of control over flat racing. The Court of Appeal upheld her claim for a declaration that their act of refusal was void as being contrary to public policy; the defendants were contractually bound to consider her application reasonably, and not capriciously. The substrata of the decision are the changed conditions of society and the importance of the licence to her livelihood. "Just as the courts will intervene to protect his right to property, they will also intervene to protect his right to work,"⁹⁸ Lord Denning MR said.

Commenting on the point about right to work as being akin to property, Goodhart suggests that there may be a distinction between a so-called right to work and a right to property. In the case of property the right is a claim to a specific thing which is protected against interference by all third persons. The plaintiff has a title to the

⁹³Ibid at 678. His Lordship relied on *R v Chancellor of Cambridge* (1723) 92 ER 370, 378; *Cooper v Wandsworth Board of Works* a CBNS 180, 194; *Broadbent v Rotherham Corporation* [1917] 2 Ch 31. Other Cases where natural Justice was applied for the benefit of traditional chiefs include *Sadiq v Bundi* [1991] 5 NWLR (Part 210) 443 (village head removed for alleged misappropriation of public funds, no hearing afforded him, Court of Appeal restored him to his position); *Aromolaran v Kupoluyi* [1994] 2 NWLR (Part 325) 221. Karibi-Wyde JSC in a notable dissent in *Ex p Olakunrin* [[1985] 1 NWLR (part 4) 652, 691-692 said the feudal features of our traditional system which endow chiefs with immense powers should not stand in the face of an egalitarian and democratic constitution the country operates.

⁹⁴[1992] 3 NWLR (Part 232) 791.

⁹⁵Section 22B(1) of the Rural Development Fund Management (Amendment) Edict No 44 of 1987 (Anambra State).

⁹⁶[1992] 3 NWLR (Part 232 at 823-824.

⁹⁷[1966] 2 WLR 1027 (CA).

⁹⁸Ibid at 1034. Salmon LJ also used the phrase "right to work."

property which the court will enforce against the defendant. If the right to work implicates a right to be given employment, the issue would be by whom and under what circumstances?⁹⁹ In the context of this paper, right to work should be taken to mean a right not be deprived of employment whimsically: without sound reason and without procedural fairness.

In *Law v National Greyhound Racing Club*¹⁰⁰ the English Court of Appeal held that it was seised with jurisdiction to declare that a private club should not abuse its powers when suspending a member's licence. The executive members of the club must act reasonably and fairly. Again, in *Central Council for Education & Training in Social Work v Edwards*¹⁰¹ a student was refused admission to a polytechnic without being afforded a hearing or being given reasons for the refusal. Slade J held that although the applicant could not expect the polytechnic to act judicially (since he was only applying for a place, not being deprived of one), he was nevertheless entitled to a fair hearing, as the polytechnic was under a "duty to act fairly" because the refusal could seriously affect the applicant's career.

In the local case of *West African Examination Council v Mbamalu*¹⁰² the respondent was apprehended for malpractice during a General Certificate of Education examination. The invigilator who apprehended her as well as the supervisor who was called in filled the form the appellant designed. The respondent read these statements and made her own on the same form; she denied one of the allegations (talking during the examination) but not peeping, trying to copy from another candidate and assaulting the officials which were also alleged against her in the form. Based on these facts, her examination result was withheld and she was barred from writing the Council's examination for three years. She sued for the release of her result on the ground that she not given a fair hearing prior to the decision. The Court of Appeal held that she was entitled to fair hearing since the appellant was invested with authority to hear and determine a dispute. However, it held that since the Council relied on its Regulation 3(7) in reaching its decision, the decision could only be impugned where there has been breach of the rules of natural justice or where bias is shown or where it is shown that it acted on no evidence. In this case, the evidence the Council relied on was adequate.

The lesson learnt from the decisions relating to students, examination candidates, town union, club, et cetera is that all kinds of persons in authority should respect the fundamentals of fair procedure; and where they fail, judges have valiantly and

⁹⁹Goodhart, A L, "The Right to Work," (1966) 82 *Law Quarterly Review*, 319.

¹⁰⁰[1983] 3 All ER 300 (CA).

¹⁰¹The Times, 5 May 1978 noted in Baxter, L G, "Fairness and Natural Justice in English and South African Law," (1979) 96 *South African Law Journal*, 607, 622 (hereinafter Baxter, "Fairness").

¹⁰²[1992] 2 NWLR (Part 230) 481. The right of procedural fairness has been accorded soldiers as well as other members of the Nigerian armed forces: *Mohammed v Nigerian Army* [1998] 7 NWLR (Part 557) 232 (CA); *Edet v Chief of Air Staff* [1994] 2 (Part 324) 41 (CA).

beneficently applied principles of procedural fairness to defeat inconsiderate exercise of power. The mere classification of a body as 'private' (as opposed to statutory) is not enough to shield it from adhering to procedural fairness. The principle is clear: what is sauce for chiefs, professional, town unions students, examination candidates et cetera should be sauce for private employees. Karibi-Whyte JSC's immortal words are

The rule [of natural justice] is not only fundamental to the administration of justice but also seems invariably common to all know legal jurisprudence and is rooted in the minds of all fair minded person... it has been held to be application to wherever a person or authority is concerned in the determination of the rights of another in such a manner that the version of the person against who the determination is to be made is an essential requirement of the process of determination. Hence the application of the principle is not confined to final determinations of a judicial nature. It is applicable even to those determinations referred to as administrative where no particular rules of procedure have been provided.¹⁰³

Underlying the foregoing decisions is the idea that the concept of procedural fairness goes beyond the express provision in any regulation or statute. It is part of the common law tradition which has been handed down from time long lasting and which we have inherited and adopted.¹⁰⁴ The present practice denies an employee the protected a petty thief has, it denies a professor the right open to a teenage examination candidate, it robs a general manager an opportunity open to a titular chief. This is acute injustice, a practice repugnant to the conscience of mankind that our policy should not endure. In these cases, imposition of sanctions may mean not only a loss of a particular position or post, also but also loss of the opportunity to pursue one's profession, ideals or career.

IV.II *Democratic Philosophy*

The general conception is that democracy is all about majority rule. On contrary, democratic rule is founded on the ideals of rule of law, the absence of caprice, presumption of innocence as well as fair hearing.¹⁰⁵ And this binds not only

¹⁰³ *Aiyetan v Nigerian Institute for Oil Palm Research* [1987] NWLR (Part 59) 48, 76-77. The fact that the dictum comes from a case relating to an employee with statutory flavour is of no moment. The principle stated is of universal import.

¹⁰⁴Susu, B A, "Retroactive Decrees, The Constitution (1979) and the Issue of Due Process," (1992) 3 (Nos 8 & 9) *Justice*, 15, 27. "The observance of the rules of natural justice ... is not restricted to the Courts or quasi-judicial tribunals. The rules of natural justice are primordial and as old as nature itself. Before the Almighty Creator sent Adam and Eve away from the Garden of Eden, he gave them a hearing;" *Federal College of Education v Anyanwu* [1997] 4 NWLR (Part 501) 533, 552 Per Orah JCA.

¹⁰⁵Wokocha, R A, "Democratic Governance, The Rule of Law Sustainable Democracy in Nigeria in Nigeria" (1999) 1 *Port Harcourt Law Journal*, 122. "It is essential in a constitutional democracy ... that for the protection of the rights of citizens, for the guarantee of the rule of law which includes according fair trial to the citizen under procedural regularity, and for checking arbitrary use of power ... the

government officials, but all within the domain. Democracy enjoins procedures that conform to “those canons of decency and fairness which express the notices of justice of English-speaking people even toward those charged with the most heinous offenses.”¹⁰⁶ This Kantian notice of fairness is expressed by the exhortation to observance of procedures on the basis that we “attach value to the individual’s being told why the agent is treating him unfavorably and to his having a part in the decision.”¹⁰⁷ There should be absence of arbitrariness; in its place there should be a sticking to principle of legality. In all spheres of life the rule of law should displace the rule of personal discretion and despotic power as well as indistinct, ill-understood and fluctuating customs in a village community, work place and everywhere else.¹⁰⁸

While speaking on the value of procedural fairness in a democracy, Justice Frankfurter of the US Supreme Court stated:

The heart of the matter is that democracy implies respect for the elementary rights of man however suspect or unworthy. A democratic government must therefore practice fairness, and fairness can rarely be obtained by a secret one-sided determination of facts decisive of rights ... The requirement of ‘due process’ is not a fair weather or timid assurance. It must be respected in periods of calm and in times of trouble... Representing a profound attitude of fairness between man and man, ‘due process’ is compounded of history, reason, the past course of decision and stout confidence in the strength of the democratic faith, which we profess.¹⁰⁹

As another judge said in the same case, “It is procedure that spells the difference between rule by law or rule by whim or caprice.”¹¹⁰

No one will for a moment doubt that one of the chief justifications for the existence of a democratic State is to protect its citizens. It is therefore part of government’s responsibility to see that all employees are treated with a modicum of dignity in their

power and jurisdiction of the courts ... must not be nibbled at” *Sofekun v Akinyemi* [1980] Federation of Nig R 184, 197 per Anigolu JSC. “The duty of the courts is to protect the rights of the individual in a democratic society governed by the rule of law:” *Federal Civil Service Commission v Laoye* [1989] 2 NWLR (Part 106) 652 per Eso JSC. In *Federal Civil Service Commission v Garba* [1986] 2 NWLR (Part 22) 395 the respondent was dismissed after 29 years of service under the Public Officers (Special Provisions) Decree No 17 of 1984; no charge of misconduct was leveled against him. The Court of Appeal dismissed his action on the ground that the lower court’s jurisdiction was ousted. Even so, Kolawole JCA observed: “I have no doubt that in a democratic society as ours is proclaimed to be under the present regime such injustice as has been meted to the respondent ought to be obviated.”

¹⁰⁶Per Frankfurter J in *Rochin v California* 342 US 165, 169 (1952).

¹⁰⁷ Quoted in Baxter, “Fairness,” 637.

¹⁰⁸ Singh, C, “The Ideological Roots of Legal Paternalism in India,” (1982) 24 *Journal of the Indian Law Institute*, 84, 96.

¹⁰⁹*Joint Anti-Fascists Refugee Commissioner v McGrath* 341 US 123 (1951).

¹¹⁰Ibid at 151 per Justice William Doug. “Without fair hearing, the principles of natural justice are abandoned and without the principles of natural justice the concept of rule of law cannot be established and grow in the society:” *Nigeria-Arab Bank Ltd v Comex Ltd* [1999] 6 NWLR (Part 608) 648, 663-664. Per Pats-Acholonu JCA.

employment and receive meaningful safeguards against arbitrary dismissal. Allan Flanders remarks:

Social values are changing and with them the expectations of workers with regard to their rights in industry. Differences of treatment between workmen and staff and other reflections of a social class structure in industry are increasingly resented. So too are autocratic and manipulative methods of management which offend the dignity of workers as human beings. When they claim a greater measure of control over managerial decisions effecting their working life and access to knowledge which management refuses to give, they may be seeking to protect their legitimate concern that they should not be treated in industry as irresponsible second-class citizens.¹¹¹

Whatever authority an employer retains trammled or untrammled, and whatever are the duties, responsibilities and limitations that he must discharge or accept to ensure that those authorities are retained, they are all as nothing when compared with the authority of the courts which own no master save that of the law. The community expects the courts to insist on a lofty standard of fairness from all that exercise authority over others. The good of the community should take precedence over whatever motive an employer has to dismiss without procedural fairness.

Democracy implies that all have leapt from twilight to a new dawn, that caprice has been scrapped and that green pastures of fairness lie ahead. It should teach employers that their desire for efficiency at the work place should kowtow to these higher ideals.

IV. III *Constitutional Provisions*¹²

Each time a judge is called upon to resolve a novel issue, he is faced with conflicting values to apply.¹¹³ What determines what choice of value he puts to the fore in resolving the issue? As each judge contends with the issue, consciously or half consciously a judge who has a constitution with entrenched fundamental rights cannot but give that exalted instrument prime consideration; the national conscience has been expressed in the values set out in the constitution and it should have the first place for all in authority. The people, the objects of these fundamental rights, should see in judges a commitment to ensure that these values are translated into reality for their benefit, that fundamental rights provisions are not mere baubles.

Everything in the 1999 Constitution (and those prior to it) – the preamble, the fundamental objectives and directive principles of state policy, the rights to life,

¹¹¹Flanders, A, *Collective Bargaining: Prescription for Change*, London, Faber & Faber, 1965, 62 quoted in Levy, H M, "The Role of the Law in the United States and England in Protecting the Worker from Discharge and Discrimination," (1969) 18 *International & Comparative Law Quarterly*, 558, 603.

¹¹²Unless otherwise indicated, sections in this subhead refer to the 1999 Nigerian Constitution.

¹¹³Shand, J, "Unblinking the Unruly Horse: Public Policy in the Law of Contract," (1972)(A) *Cambridge Law Journal*, 144, 159 suggests that on such occasions judges draw on the reserves of analogy, history and custom, Justice, morals and social welfare, and the principles of public policy.

dignity, and fair hearing, indeed the spirit of the Constitution itself – revolt at the very suggestion of the idea that a person can lose his employment, no matter how minuscule, without a hearing.

Consider the directive principles of state policy. True, it is not justiciable;¹¹⁴ yet it is not in the Constitution for decorative purpose. An imaginative judge who is minded to provide an employee a right of pre-removal hearing can lean on the slim reed of section 17(1)(2)(a) which provides that the State social order is founded on equality and in furtherance of this, every citizen shall have equality, This equality should be extended to equal opportunity on employment. This may sound radical, but judges who have molded the law over the ages are those with a deep passion for fairness that frequently requires departure from common law rules.

We have the courageous judgment of Pepple J as a guide in this regard. In *Amadi v Governor of Rivers State*¹¹⁵ the defendant removed some permanent secretaries from office (as he was entitled to do) without giving them a hearing. When this was challenged, counsel for the Governor contended that a Governor can remove permanent secretaries without regard to the principles of natural justice. Relying on sections 14 and 17 of the 1979 Constitution,¹¹⁶ Pepple J exhibited that he did not have a supine mind; he annulled the removal. All powers are to be exercised in the manner the Constitution directs, his Lordship insisted.

Another is the right to life (section 33). Even in England where no elaborate human rights provisions exist, it has long been recognized that life without a means of livelihood is animal, not human life. In *Lee v Showmen's Guild*¹¹⁷ Denning LJ (as he then was) took the view that a provision in union rules purporting to oust the rules of natural justice would be void.¹¹⁸ A man cannot be expelled without a hearing: "A man's right to work is just as important, if not more important, to him than his right to property," he asserted. Drawing on this decision, a learned writer suggests that where a man's livelihood or reputation is concerned, considerations of public policy will not permit of contractual stipulation limiting the application of the rules of natural justice or preventing recourse to the courts being accepted as valid.¹¹⁹

Without referring to the constitutional provision, the Supreme Court has recognized that the threat of loss of means of livelihood is sufficient to raise the need for procedural fairness. In *Olatunbosun v Nigerian Institute for Social & Economic*

¹¹⁴Section 6(6)(c); *Okogie v Attorney-General Lagos State* (1981) 2 Nig Const LR 337.

¹¹⁵[1982] 2 Federation of Nig LR 156.

¹¹⁶The sections are the same under the 1999 Constitution and so is the verbiage. Respectively, they provide that Nigeria shall be a State based on principles of social justice, and the State social order is funded on ideals of freedom, equality and justice.

¹¹⁷[1952] 2 QB 329.

¹¹⁸The closed shop system is practiced in England. By this practice, only members of a union may be employed so that the expulsion of a person from a union means he cannot be employed; his means of livelihood is deprived him.

¹¹⁹ Miller, J B, "Problems of Natural Justice," (1960) 5 *Juridical Review*, 29, 43.

*Research*¹²⁰ Oputa JSC asserted that the right to fair hearing arises where there is an allegation of misconduct, which may result and in fact did result in some form of punishment, deprivation of some right or loss of means of livelihood to the appellant. In every case of dismissal or termination of appointment which may vitally affect a man's career or his pension in such a case it is equally vitally important that the appellant afforded ample opportunity to defend himself.

In the Indian case of *D K Yadav v J M A Industries Ltd*¹²¹ the appellant was absent from duty for more than eight days in breach of his contract of employment. His name was struck off the roll of employees without a hearing. The Supreme Court (*Per Ramaswamy J*) held that right to life enshrined under article 21 of the Indian Constitution (equivalent of our section 33) includes the right to livelihood, and an order of termination of the service of an employee visits with civil consequences of jeopardizing not only his livelihood but also the career and livelihood of dependants. Therefore, before taking any action that puts an end to the tenure of an employee fair play requires that a reasonable opportunity to put fort his case is given and domestic inquiry conducted complying with the principles of natural justice. The Court held that principles of natural justice had to be read into the contract of employment, otherwise it would become arbitrary, unjust, unfair and violative of article 14 of the Indian Constitution (equivalent of our section 36).

It appears to be a principle firmly rooted in the judicial soil that to decide an important matter which seriously affects a man without a hearing is arbitrary and unreasonable. An employer should not retain a liberty to hide behind the screen of discretion to deprive a man of his livelihood without giving him opportunity to explain himself. Keeton concludes his article on natural justice almost half a hundred years ago by urging the courts to be on the *qui vive* that individuals rights are not trampled upon by the unfettered and arbitrary exercise of powers, and that a man should not be deprived of his livelihood without recourse to a proceeding before an independent panel bearing some recognizable resemblance to the proceedings of the ordinary courts.¹²²

Another social value upon which democracy is funded is the dignity of the human person. Section 34(1) preserves for every person the right to the dignity of his person and should not be treated degradingly or lend their support to transactions which shock this fundamental order upon which the state is based. Where a person is stigmatized as a criminal, a thief, a fraudster and so forth and he seeks to do nothing other than have his name cleared of that odium, there is everything wrong with the judicial system when the court tells him that his employer can do that and all he is entitled to is one month salary in lieu of notice to terminate his employment or, when

¹²⁰[1988] 3 NWLR (Part 80) 25, 52.

¹²¹ [1993] 3 SCC 259. The Supreme Court had earlier given right to life greater potential in *Francis Mullen v Union of India* AIR (1981) SC 746 where it observed that the right includes the right to life with human dignity and to enjoy the basic necessities of life.

¹²²Keeton, G.W "Natural Justice in English Law" (1955) *Current Legal Problems*, 24, 41.

he brings an action, he is paid one month salary as damages for wrongful dismissal. It is submitted that an employer should be driven away from the judgment seat where he attempts to deprive his employee of his dignity reducing him to the status of a serf.¹²³

In *Olaniyan v University of Lagos*¹²⁴ Oputa JSC said the appellants' good name was worth much more than six months' salary paid to them in lieu of notice without hearing. Quoting Charles Phillips, he asked: "Who shall estimate the cost of priceless reputation – that impress which gives his human dress its currency, without which we stand despised, debased, depreciated? Who shall repair it injured? Who can redeem it lost?" Why should this verity be limited to employment with statutory flavour and not to all employees? Who says that only public employees have reputation that may forever be tarnished? What is the rationale for excluding private employees?

After an extensive field work on why some Indian factory workers absent themselves from work, the researcher found that among other things, some factory owners seek to exploit employees many of whom leave rural setting for urban factories for the first time. In protest, some employees simply absent themselves in order to obtain some respite. In sum their attitude is "A man without money can live, but those having no status and respect die many times in one life. Work is necessary, but it should not take away one's dignity."¹²⁵

In this regard the prime right is the right to fair hearing entrenched in section 36. If the right to hearing – as other fundamental rights – "is a right which stands above the ordinary laws of the land and ... is antecedent to the political society ... enshrined in the Constitution so that [it] could be immutable' to the extent of the 'non-immutability' of the Constitution itself,"¹²⁶ why should contracts of employment be the hoisted above it? An Indian Supreme Court judge put it another way when he asserted that the constitutional duty to afford procedural fairness which conforms to the required standard of reasonableness is not discretionary but mandatory, and no person, no matter how exalted, should be permitted to transform it into a discretionary function.¹²⁷ Nnamani JSC after referring to section 33(1) 1979 Constitution said, as public and private institutions have to deal with matters of discipline as they affect long serving staff, the courts have a duty to point to the proper procedures that must be used in such matters.¹²⁸

There is no dearth of dicta indicating that the right to fair hearing can be far reaching. Here are a few. In *Osakwe v Nigerian Paper Mill Ltd*¹²⁹ Ogwuegbu JSC said: "I have no

¹²³*Horwood v Millar's Timber Co Ltd* [1917] 1 KB 305.

¹²⁴[1985] 2 NWLR (Part 9) 599, 625.

¹²⁵Vaid, K N, "The Chronic Absentee Worker," (1966) 2 *Indian Journal of Industrial Relations*, 443, 452.

¹²⁶*Ransome-Kuti v Attorney General of the Federation* [1985] 2 NWLR (Part 6) 211, 226 230 *per* Eso JSC.

¹²⁷*Muniswamy v State of Mysore* 1964 Mys 250, 261 *Per* Somantha Iyer J.

¹²⁸*Aiyetan v Nigeria Institute for Oil Palm Research* [1987] 3 NWLR (Part 59) 48, 59.

¹²⁹[1998] 10 NWLR (Part 568) 1, 15. In *Bakare v Lagos State Civil Service Commission* 1992] 8 NWLR (Part 262) 641, 699 Nnaemeka-Agu JSC stated that s. 33 of the 1979 Constitution (s. 36 1999

hesitation in agreeing with the court below that the appellant was given fair hearing as enshrined in section 33 of the [1979] Constitution.” In *Union Bank of Nigeria v Ogboh*¹³⁰ Ogundere JCA said that appellant’s failure to give the respondent fair hearing constituted a violation of section 33 of the 1979 Constitution. In *Phoenix Motors Ltd v National Provident Fund Mgt Board*¹³¹ Tobi JCA said: “The Constitution is the highest law of the land. All other laws bow or kowtow to it for ‘salvation.’ No law, which is inconsistent with it, can survive. That law must die and for the good of the society.” If the Constitution invalidates an inconsistent law parliament passes, why should a contract of employment that is inconsistent with it be enforced? In *Egwu v University of Port Harcourt*¹³² Munkata-Coomassie JCA noted that the general trend has been to extend the application of the rules of natural justice entrenched in section 33(1) 1979 Constitution to any decision maker who determines questions affecting the right or legitimate expectations of individuals. These dicta can only implicate that our courts are not averse to recourse to the use of human rights provisions to protect private employees. It may be that when the issue is fully argued, employees may obtain the favour of the courts.

Although the Constitution does not provide for a general right to property, the trend around the world is towards recognition of this right. After a review of post-world war two labour legislation in Holland, Germany and France, a learned writer concludes that the laws are premised on the principle that through his labour an employee invests his ‘asset’ in a particular job, that when he is deprived of that ‘asset’ though no fault of his own he should be compensated and that he should not lose his ‘asset’ arbitrarily.¹³³ This is the principle of an employee’s property-right in his job.

Some are surprised to learn that employment is property because they perceive property as wealth or possessions. However, property includes both concrete and abstract right; it includes the right to control, to exploit, to use, or to enjoy wealth or possessions.¹³⁴ It connotes (i) whatever a man produces by the labour of his brawn or brain, and (ii) whatever he obtains in exchange for something of his own.¹³⁵ In this sense an employee has a proprietary right in his employment. With an increasing army of workers, divorced from the land and almost completely dependent (as never before) upon wage-earning as a means of livelihood for themselves and their families, only a judge who resides in a balloon, not in *firma terra*, will deny the fact that an

Constitution) deals with determination of civil rights and obligations by a court or a tribunal established by law, not non-judicial bodies which decide rights and obligations. This dictum is of doubtful value.

¹³⁰[1991] 1 NWLR (Part 167) 369, 386.

¹³¹[1993]1 NWLR (Part 272) 718, 730.

¹³²[1995] 8 NWLR (Part 414) 419, 447.

¹³³Rubenstein, M, Dismissal and the law: Britain and Europe,” in Torrington, D (ed) *Comparative Industrial Relations in Europe*, London, Associated Business Programmers, 1978, 147.

¹³⁴Mclver, *The Web of Government*, 83 (1947) quoted in Singh, J “Property in a Changing Society,” (1973) 15 *Journal of the Indian Law Institute*, 40

¹³⁵Ibid at 43.

employee's job is of a proprietary nature. For these workers, the only property they have is their own labour. Thus their right to keep the work must be protected alike other properties.

In *Lapointe v L' Association de Bienfaisance et de Retraite dela Police de Montreal*¹³⁶ the rules of the association provided that every application for a pension should be fully gone into by the Board of Directors, and that any member entitled thereto who had been dismissed from the police force should have his case considered by the Board. Without making any inquiry into the circumstances of the plaintiff's dismissal, the Board refused his claim for pension. Allowing the appellant's appeal, the Privy Council through Lord Macnaghten said: "The Board of Directors must bear in mind that they are judges, not inquisitors."¹³⁷ Commenting on this decision, Goodhart notes that the directors were not obliged to perform an administrative function; they were to decide a private claim of right.¹³⁸ Even so, the Privy Council was apparently influenced by the principle that where a person is to be deprived of his property rights, justice requires that he should be given hearing.

Even if it is conceded that a private employee has no right to his job, that his is not a property, he still retains a right to be treated fairly. In many cases, such aggrieved employees do not demand that they succeed in their claim; merely that they be treated in accordance with common law standards of fair procedure. As Justice Jackson put it in *Joint Anti-Fascist Refugee Committee v McGrayh*¹³⁹ "The fact that one may not have a legal right to get or keep a government post does not mean that he can be judged ineligible illegally." Procedural fairness is a requirement of the common law that binds everybody, and observance of natural justice "is a duty lying upon everyone who decides anything."¹⁴⁰

There is no better way to bring this subhead to a conclusion than to quote the following dictum of Budd, J an Irish judge in a case where the application of constitutional right to an employment contract was in issue:

If an established right in law exists a citizen has the right to assert it and it is the duty of the courts to aid and assist him in the assertion of his right. The Courts will therefore assist and uphold a citizen's constitutional rights. *Obedience to the law is required of every citizen and it follows that if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it.* To say otherwise would be tantamount to saying that a citizen can set the Constitution at naught and that a right solemnly given by our fundamental law is valueless ... *The courts will not so act as to permit any body of citizens to deprive another of his constitutional rights*

¹³⁶[1906] AC 535.

¹³⁷Ibid at 540.

¹³⁸Goodhart, A L, "*Ridge v Baldwin: Administrative and Natural Justice*," (1964) 80 *Law Quarterly Review*, 105, 111.

¹³⁹341 US 123, 185 (1961).

¹⁴⁰Per Lord Loreburn, *Board of Education v Rice* [1911] Ac 179, 182.

*and will... see that these rights are protected, whether they be assailed under the guise of a statutory right or otherwise.*¹⁴¹

V. INTERNATIONAL INSTRUMENTS

Procedural fairness can be extended to employees of all categories if Nigerian judges were willing to apply international instruments to attenuate the common law. One of such international instruments of import is the ILO Philadelphia Declaration of 1944 which proclaims: All human beings, irrespective of race, creed or sex, have the right to both their material well-being and their spiritual development in conditions of freedom, dignity, of economic security and equal opportunity.¹⁴²

Article 4 of the ILO Termination of Employment Convention 1982 provides that “the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker.” And article 7 provides that “the employment of a worker shall not be terminated for reasons related to the worker’s conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.”¹⁴³ These provisions and proclamations are a provenance of an ever-widening opportunity of comparative study and appreciation of human rights jurisprudence as developed by the courts in various jurisdictions against a background of diversity of social and economic circumstances and of political culture and experience.¹⁴⁴ Judges have opportunity of being brought up-to-date on emerging and ever-widening human rights jurisprudence as developed by international institutions and as embodied in international instruments.

Where these international instruments are brought to the attention of judges, new vistas open in the human rights sphere. Municipal judges who feel shackled by precedent can be emboldened as they perceive a new vision of law to assure litigants not merely freedom, liberty and equality but also a better life founded on the ideals of the concept of human rights.¹⁴⁵ Municipal law should respond to the humanizing and

¹⁴¹ *Educational Co v Fitzpatrick* (No 2) [1961] IR 345, 365 (italics supplied).

¹⁴² Adapted from Lee, “The Declaration of Philadelphia: Retrospect and Prospect,” (1994) 133 (No 4) *International Labour Review*, 467. On the strength of this provision it may be argued that if directors are entitled to a full-dress hearing prior to removal (s. 262 CAMA 1990) why should employees under them not enjoy same right?

¹⁴³ Convention 158 of 1982; It came into force on November 3 1985. This Convention replaces Termination of Employment Recommendation 1963 (Recommendation 119).

¹⁴⁴ Expressing the foresight of an eagle, a writer had in 1965 urged that industrial dispute settlement machinery should conform with international obligations in regard to ratified International Labour Conventions: Yesufu, T M, “Legal Aspects of Labour Relations in Nigeria (2),” (1965) *International & Comparative Law Quarterly*, (Supplementary Publication No 10), 94, 108.

¹⁴⁵ Justice Ayoola, “Fundamental Human Rights and the Judiciary,” (1990) 1 (No 8) *Justice*, 119, 120.

reforming provisions of international documents using them as a formative element in the liberalizing of national systems of law.¹⁴⁶

A tragic truth of Nigerian employment law is that it is inextricably imbued with decisions which serve the interests of only capitalist employers. An even greater tragedy is that it still continues to be so, with little or no hope for radical improvements so necessary for a changing society and a developing economy. The masses are not aware of its grave pitfalls and dysfunctions; the absence of employers' willingness to adopt the norm of fairness co-exists with the lack of judicial will to enforce the same. Even in legal writing, with deep respect, no concrete thinking of major importance is done in this regard, much less suggesting steps in the direction of positive improvement. Innovative thought in this direction is conspicuous by its absence.

VI. ADVANTAGES TO EMPLOYERS

Some employers may feel that adopting procedural requirements would make it difficult to remove bad employees. They may count such management costs as instituting procedures, fighting cases, and loss of management time.¹⁴⁷ However, these fears are raised because the advantages to the employer of a doctrine of procedural fairness can serve as a carrot rather than a stick in the hands of a skillful administrator.

Self-enforcing rules have two immediate advantages over externally enforced rules through the courts: they are less expensive to enforce, and usually cause less antagonism as they can be used to win a reward. Where open pre-dismissal procedures are non-existent or are not followed, pretence replaces reports, witch hunting replaces investigation, sermons replace discussion, nothing is known with accuracy and much that is false is believed true.¹⁴⁸ A constructive, progressive and harmonious working environment can be built from within the work community by fairness, and not by force or sanctions imposed externally.

Plah-hotep, philosopher-statesman of ancient Egypt, said: "Be kindly as though listenest to what the petitioner has to say ... A good hearing is soothing to the heart."¹⁴⁹

¹⁴⁶Lloyd, D, "Law and Public Policy," (1955) *Current Legal Problems*, 42, 60.

¹⁴⁷Removal procedure "May appear cumbersome ... in relation to [an employee] in whom [an employer] has lost confidence and the temptation may be there for the [employer] to opt to remove such a person by the easier lieu of notice.. [This procedure] may be quick, convenient and time saving but the dictates of justice demand that the legal principles of *audi alteram partem* must be obeyed no matter how cumbersome and inconvenient it may appear [employer]" *per* Aniagolu JSC in *Olaniyan v University of Lagos* [1985] 2 NWLR (Part 9) 599, 654.

¹⁴⁸Munson, F C, "From Law to Action: The Administrative Dimension to Labour Laws," 91965) 1 *Indian Journal of Industrial Relations*, 415, 413.

¹⁴⁹Quoted in (1975) 92 *South African Law Journal*, 143.

Where an aggrieved employee is given fair hearing, the chances of his proceeding to court involving the employer in wasteful litigation costs in money and time are reduced. It is damaging to the image of employers to appear in court time without number to defend its labour practice in public. Some of these litigations give aggrieved employees who have little to lose an opportunity to disclose management policies, which employers would ordinarily want to keep secret.

Another advantage employers reap by observing procedural fairness is that it serves to educate and reform top management staff on the importance of civilized treatment of employees through corrective and non-punitive measures.¹⁵⁰ Over time management staff who sit in such committees get addicted to the rules of possessing noble industrial relations practice, a factor that may attract industrious and skilled personnel. Where employees are cast away like rag no longer useful for even a dirty job, this can sap the morale of those left on the job; there would be nothing motivate them to give their best.

CONCLUSION

Contrary to prevailing thinking, employees seek procedural fairness for reasons other than retention of their job. Hearing enables them to disprove the charge against them, or at least to plead something in mitigation; it also affords them opportunity to urge the employer to consider alternatives to dismissal such as transfer, termination or retirement rather than summary dismissal or sometimes all they ask of the courts is to assuage their sense of injustice at not having been given a fair opportunity to defend themselves against allegations which gravely impeach their future prospects.

We have seen that many employees set out procedural rules to protect employees, that where these are absent or employers fail to follow them and their trade unions intervene, or an employee's counsel writes to threaten court action against an employer, the employer follows the process to the letter. The courts should respond by adopting and adapting legal norms to meet the millieu. Such an adjustment in the judicial attitude would uphold the basic principles of legality and maintain the rule of law while allowing for a more functional approach to labour disputes.

Many perceive that where a dismissed employee obtains a declaration that procedural fairness has not been adopted this would lead to reinstatement- a remedy many consider inapt for private employment.¹⁵¹ On the contrary, a declaration that an employee is guiltless of alleged wrongdoing serves to keep his reputation or

¹⁵⁰Mcmullen, J, " The Resurgence of Proceduralism in Unfair Dismissal Law-The Law of the British Labour Pump Principle," (1988) 51 *Modern Law Review*, 651, 658.

¹⁵¹*Odigie v Nigerian Paper Mills* [1993] 8 NWLR (Part 311) 338 is remarkable. The Court of Appeal applied public law cases such as *Federal Civil Service Commission v Laoye* [1989] 2 NWLR 652 and *Sofekun v Akinyemi* [1980] NSCC 175 to a private employee and ordered his reinstatement for employer's failure to observe pre-dismissal procedure.

professional career prospects unimpeached and that may be all that the employee seeks.¹⁵² And an award of damages against an employer for his failure to adhere to norms of procedure may suffice.¹⁵³ Where the allegation borders on fraud or dishonesty or other impropriety that may tarnish an employee's career prospects,¹⁵⁴ the employer can be ordered to reinstate the plaintiff and give him an opportunity to present his case in accord with fairness. If at the end the employee is found guilty he can be dismissed; if otherwise, he should be reinstated with aliquot or full back pay. Indeed, there is no end to the variety of remedies the court can order, relying on its equity jurisdiction.

Procedural fairness is acclaimed as a principle of divine justice with its origin in the Garden of Eden¹⁵⁵ Fortescue J noted that God gave Adam and Eve an opportunity to make their defence before they were condemned.¹⁵⁶ Indeed the principle is so catholic that no one has questioned its pedigree. If the Almighty

One is humble enough to give mere mortals a hearing, what audacity do puny humans have to terminate a relationship punitively without affording their fellows a hearing merely because they are in control transiently, of pecuniary power?

¹⁵²“ If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in courts. It is a prejudice to any man to be denied justice. He will not, of course, be entitled to damages if he suffered none. But he can always ask for the decision against him to be set aside.” per Lord Denning in *Annamunthodo v Oilfield Workers Trade Union* [1961] AC 945, 956.

¹⁵³*Olatunbosun v NISER Council* [1988] 3 NWLR (Part 80) 25 (six months salary awarded as damages for employer's failure to adhere to procedure); *Nze v Nigerian Ports Authority* [1997] 11 NWLR (Part 528) 210, 222; *Adewunmi v Nigerian Produce Marketing Board* [1972] NCLR 451 (Adedipe J found that appellant did not observe the principles of natural justice prior to dismissing the respondent; he awarded damages for this, but the Supreme Court reversed him on the quantum of damages only: *Nigerian Produce Marketing Board v Adewunmi* [1973] 3 ALR (Comm)1. *Gunton v London Borough of Richmond on Thames* [1980] 3 All Er 577 (two months was considered adequate for the procedure to take place and salary for this period was awarded as damages for employer's failure to give plaintiff hearing.)

¹⁵⁴*General Medical Council v Spackman* [1943] AC 627 (doctor found guilty of adultery with a female patient; the House of Lords held that the Council must give him an opportunity to state his case and exculpate himself); *Sofekun v Akinyemi* [1980] NSCC 175 (appellant accused of indecent assault on a female patient, dismissal without fair hearing annulled).

¹⁵⁵Genesis chapter 3 in the Holy Bible.

¹⁵⁶*R V Chancellor of the University of Cambridge* (1723) 92 ER 370, 378; *Olatunbosun v NISER Council* [1988] 3 NWLR (Part 80) 25, 49. The serpent was not called upon to human hearing, could it be that he was queried in the spirit realm beyond the hearing of flesh and blood