FROM CONTRACT TO STATUS IN QUEST FOR SECURITY

BY

A. A. ADEOGUN

LAGOS UNIVERSITY PRESS - 1986
INAUGURAL LECTURE SERIES

Printed at the Lagos University Press

FROM CONTRACT TO STATUS IN QUEST FOR SECURITY

An Inaugural Lecture delivered at the University of Lagos on Wednesday, 9th April, 1986

By

A. A. ADEOGUN
Professor of Law
and
Dean, Faculty of Law
University of Lagos.

Lagos University Press

1986

First Published in 1986 by

Lagos University Press
Unilag P. O. Box 132,
Yaba, Lagos, Nigeria.

ISBN 978–2264–70–9

FROM CONTRACT TO STATUS IN QUEST FOR SECURITY

An inaugural lecture is like an after dinner speech. It is the price one pays for one's seat but in my own case the dinner was taken quite some time back that I can be permitted to say that I was beginning to forget what the dinner tasted like when I received the Acting Registrar's letter informing me that the Vice-Chancellor has requested that I should give my inaugural lecture in April 1986 that is, today. Therefore if, in the process, I fail to pay a proper or adequate price, it can only mean that the meal has been so thoroughly digested and assimilated to my system that I would need a second course to make me perform. But Vice-Chancellor sir, I shall try to pay my due without exacting from you a promise, express or implied, that a second course will be duly served. For I must know as a professor of law in the department of Commercial and Industrial Law that even if you were to make such a promise, there is no chance of my being able to enforce it: it is in law a mere gratuitous promise on your part for which I have given no consideration. But sir, if at the end of the day you were, for any reason, to adjudge the lecture as being an inadequate price for the chair I occupy, I will be entitled to remind you gently but firmly that in the law of contract consideration need not be adequate. I am required to do no more than to give some value and it will surely not be difficult for me to establish that standing here for the next hour or so to address this august assembly constitutes some value in the eyes of the law.

Experts in jurisprudence and there are many of them in this audience will recognise the jurisprudential flavour in the

title of my lecture: it will immediately remind them of that famous statement of Sir Henry Maine in 1861 in his *Ancient Law* that:

> "If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract."

But I am most anxious to emphasise at the outset that I have no desire to venture into that well trodden but to me, inaccessible field of law. My final year students in the Faculty I have no doubt know only too well by now how inaccessible that field is; but unfortunately for them, traverse it they must, if they are to be in possession of the key that will open the gates of the legal profession to them. I have no such encumbrance. What is more, I am lucky in another respect. Professor T. O. Elias, the greatest legal craftsman of them all, delivering the first inaugural law lecture of this University in 1969 had in his usual expertly manner surveyed that field; and it only behoves me, so lately an apprentice of the master, to acknowledge him and move quickly to an area of the law to which I have myself made a modest contribution and where I will not have to operate in the shadow of the master.

Maine's statement occurs at the end of the fifth chapter of his *Ancient Law,* a chapter entitled ***Primitive Society and Ancient Law*** in which he was largely preoccupied with family law in particular and the law of persons in general. Today, I am preoccupied with individual employment law in particular and collective labour law in general. Maine saw "status" as the "sum total of the powers and liabilities, the rights and obligations which society confers or imposes upon individuals irrespective of their own volition." These individuals such as infants and lunatics are in need of protection "on the single

ground that they do not possess the faculty of forming a judgment in their own interest." In other words, "they are wanting in the first essential of an engagement by Contract." But in other cases, it is from the free agreement of individuals that relations arise; thus employment was no longer based on slavery or serfdom but on "the contractual relation of the servant to his master."

Maine, no doubt, was influenced by the developments around him. As Pollock has suggested, many years before he uttered those words, English judges were already trying to reduce as much of the law as they could to terms of contract. "The sort of men", so declared Pollock, "who became judges towards the middle of the [19th] century were imbued with the creed of the "philosophic Radicals" who drove the chariot of reform and for whom the authority of the orthodox economists came second only to Bentham's. Their patron saint was neither Puchta, nor Savigny nor Hegel but Ricardo."[1]

19th century laissez – faire rested on two legs – the freedom and the sanctity of contracts. The courts considered it their bounden duty to foster the freedom and vindicate its sanctity. As Sir George Jessel has put it:[2]

> "If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice."

Bentham had put this same idea across in this way: "No man of ripe years and of sound mind, acting freely and with his eyes open ought to be hindered, with a view to his advantage, from making such a bargain in the way of obtaining money as he thinks fit, nor (what is a necessary consequence) anybody hindered from supplying him, upon any terms he thinks proper to accede to."[3] Individualism thus became

enthroned both as a value in itself and also as a means of social mechanism;[4] but as the statement of Sir Jessel shows it is evident that even during the golden age of laissez – faire some qualifications had come to be put on the freedom of contract; for it was only "men of full age and understanding" who had contracted "freely and voluntarily" that could expect the courts to hold their contracts sacred and have them enforced.

Today, I use the word "status" not as Maine understood it but as Dicey did in 1905 when he remarked that "the rights of workmen in regard to compensation for accidents have become a matter not of contract but of status."[5] That is to say, that it is still feasible to have the concept of "status" in a relationship initially brought about by agreement of the parties. This will arise where they have entered into a legal relation based upon agreement but regulated by law as to its substance and termination. In other words, the substance and termination of the relationship are determined by "legal norms withdrawn from the parties' contractual freedom."[6] Incidents are attached to it which derive their source not from the agreement of the parties but from the State itself. Our main task today will be to show that the rules of contract are not apposite to the contract of employment which is the basis of the relationship between an employer and his employee and that the contract of employment ***qua*** contract is of diminishing importance and may rightly be regarded as a contract ***sui generis.*** Indeed, there appears to be a movement towards status of employment, a realisation of which is the true guarantee of the rights of employees and the outmoded conceptual framework embedded in the label "the law of master and servant" will be discarded with. But first left us set the historical scene.

Short Historical Background

This is not the occasion to trace at length the evolution and development of labour law in this country. But a few points can be made very briefly. It is a fact of Nigeria's

political history that our legal system is deeply rooted in the English law. As a British colony, Nigeria imbibed English law through the medium of the now well known reception laws enacted at various times by the local legislature, the kernel of which is that "the common law of England and the doctrines of equity together with the statutes of general application that were in force in England on the 1st day of January 1900 shall be in force.[7] Before the first world war, the Colonial Office had no clearly defined labour policy and this is not surprising if one remembers that during this period Britain herself was preoccupied with laying down clearly defined principles of labour relations. Consider the various labour legislation of the late 19th and early 20th centuries and the judicial decisions between 1901 and 1909 which could appropriately be declared a cat and mouse game between the legislature and the courts.

It is well known however that since the 1930s the British Government's colonial labour policy had been geared towards deliberate encouragement of the growth of trade unions and the development of the system of industrial relations on the British model. The Colonial Office through its Labour Committee, formulated labour and social policies, drafted model laws and considered the extent to which the Conventions and Recommendations of the International Labour Organisation could be applied to the colonial territories. The results of their deliberations were forwarded, through despatches by the Colonial Secretary, to the colonies for their implementation. In addition, labour advisers were sent out to strengthen labour departments in the colonies. The Colonial Office made it clear that labour relations in the colonies should conform as nearly as possible with the British principles and the international labour standards that were being laid down by the International Labour Organisation (I.L.O.) The position reached as at 1943 was summed up by the Colonial Office in this way:

> "One of the most striking developments which has taken place in the history of the Colonial

Empire is the remarkable progress which has been made in the steps taken in recent years and particularly during the last six years (1937–1943) to ensure the more adequate and efficient supervision of Government of the conditions under which labour is employed in the various territories all over the world. The progress has taken two main forms, namely (i) the appointment of special whole-time staff in the shape of separate Labour Departments or of Labour or Industrial Advisers; and (ii) the enactment of often much-needed protective legislation."[8]

It was during this period that the groundwork of most if not all of our current labour legislation was laid with the enactment in 1938 of the Trade Unions Ordinance, in 1941 of the Trade Disputes (Arbitration and Inquiry) Ordinance, the Workmen's Compensation Act, and the Governments Servants Provident Fund Ordinance, in 1943 of the Labour (Wage Fixing and Registration) Ordinance and in 1945 of the Labour Code Ordinance. Also the Tudor Davies Commission that was set up after the General Strike of 1945 and the Fitzegerald Commission of Enquiry into the Disorders in the Eastern Provinces of Nigeria in 1950 had impressed it upon the government the need to enforce the laws (in both cases the Trade Union Legislation) in the spirit of British interpretation. The result therefore is that there is today an almost complete reliance on English law and British institutional models. In the field of labour law, the transplantation seems total. The common law of employment created by the English judges is applied in Nigeria while the entire legislative framework is closely modelled on relevant English labour statutes.

Another point worthy of note is that the existence of a permanent body of wage earners is comparatively new in Nigeria. During the early parts of this century, Nigerians, often illiterate and unskilled were not keen upon taking up wage-earning occupation on a permanent basis. Subsistence farming was attractive to them; alternatively they could

practise a craft or engage in such cottage industry like weaving or pottery in the comfort of their homes and villages. Wage earning employment necessarily involved leaving their familiar surroundings to go and work in distant plantations, mining industry or in the construction of roads and railways. As Lord Lugard remarked in 1918 the existence of large areas of fertile vacant lands, the fact that the requirements of the peasantry were few and especially in Southern provinces, the existence of sylvan products which could be cultivated without much labour meant that the natives could take up land for themselves or engage in trade and neither remain as slaves nor seek wages for hire.[9]

Up to 1930 this situation militated against the easy flow of voluntary labour for paid employment,[10] and the permanent wage earners were confined to the urban areas where the government which certainly was then the largest employer of labour and private commercial entrepreneurs had offices. Even so, these wage earners constituted, as they still do today, inspite of the drift to the urban areas, a small fraction of the working population. Thus available statistics show that as at 1975 out of the labour force of 27.91 million engaged in gainful occupation[11] only 2.19 million or 7.8% were in wage employment, with the non-agricultural sector providing 1.97 million or 90.6%; in other words, only 0.21 million or 9.5% of the wage employment population were in the agricultural sector. However, out of the 27.91 million engaged in gainful occupation, the agricultural sector provided 17.86 million or 64%. Ten years later in 1985, the position has not changed much. Thus with a labour force of 36.08 million and 34.60 million in gainful occupation, only 3.75 million or 10.9% were in wage employment, with the non-agricultural sector providing 3.45 million or 92% of this figure. In other words, only 0.30 million or 8% of the wage employment population were in the agricultural sector, but of the 34.60 million in gainful employment, the agricultural sector accounted for 20.07 million or 58%[12]. The percentage of those in wage employment in relation to the whole population (based on the grossly out-of-date 1963

census figures of 56,571,688) was only 3.8% in 1975 and 6.62% in 1985. But using the figures produced by the National Population Commission which put the estimated population of Nigeria at the end of 1983 at 92.18 million[13] we get a different picture and the percentage for 1985 will read 4.06%. It can therefore be seen that only a very small but vocal percentage of the working population comes within the purview of the labour laws.

Individual Employment Law

Individual employment law deals, for the most part, with the contract of employment which is the basis of the relationship between the employer and his employee and the ordinary incidents of that relationship. The contract of employment which is the plank of this relationship is however a product of the Industrial Revolution and 19th century laissez-faire its principal justification. The contract of employment, we are therefore asked to believe, is a contract which exists within the sphere of the general law of contract. Under the pure theory of contract therefore, the employer and the employee are free to mould the relationship as they see fit, except in so far as they are hamstrung by illegality and public policy. The contract is concluded between the employer and employee and the network of rights and obligations it creates are personal to these parties. But as I have had occasion to observe before, this thesis "presupposes equality between the parties but tends to ignore other social and economic considerations which may make this equality and its underlying freedom fictitious and hollow. For instance, the economic necessity which may compel an employee to accept a contract of service is not the concern of the law."[14]

During the golden age of laissez-faire, when the rules to govern contractual relationships were being fashioned out, the courts had no reason or urge to treat contracts of employment differently. Their treatment of employees injured in the course of the employment is a good example. Lawyers

will remember that it was this age that gave birth to the doctrine of common employment. First developed by Lord Abinger in ***Priestley v. Fowler***[15] in 1837, the doctrine became firmly enthroned in the law by the decision in ***Hutchinson v. York & Newcastle Railway.***[16] Since 1850 it became firmly established that the master, although vicariously liable to other persons negligently injured by his servant in the course of his employment, was not liable if the injured person was another servant in common employment with the wrongdoer. The argument was that the servant knew he ran the risk of fellow servants' negligence and he must be supposed to have contracted on terms that, as between himself and his master, he would run the risk. The English Parliament cautiously reacted in 1880 by enacting the Employers Liability Act which sought in a narrow way to limit the operation of the doctrine. But to the eternal glory of later judges, they had, long before the English Parliament abolished the doctrine in 1948,[17] developed the concept of personal duty to circumvent the doctrine. The highwater mark of the development was reached in 1938 when Lord Wright declared that an employer has a personal duty to "take reasonable care for the safety of his workmen whether the employer be an individual, a firm or a company and whether or not the employer takes any share in the conduct of operations."[18] Between 1959 and 1962 many state jurisdictions in Nigeria have followed the English example by enacting legislation to abolish the doctrine[19] but for some inexplicable reasons no similar legislation has been enacted to cover the ten Northern States, even though the former Northern Nigeria had blazed the trail in 1957 by being the first jurisdiction to enact a law amending the common law on survival of actions, tortfeasors and contributory negligence.[20] In effect therefore and as pointed out by Read, S.P.J. in ***Hans Schenkel v. A. O. Nig. Ltd. & ATMN Ltd.***[21] "the doctrine of common employment as modified by the Employers Liability Act 1880" still applies.

The doctrine of ***volenti non fit injuria*** could also be used to defeat an employee's claim for compensation for

injuries suffered at work. The argument here was that the employee has either expressly or by his conduct, which is more usual, agreed to run the risk. Before the decision in *Smith v. Baker* in 1891 whether or not there was an agreement by the worker to run the risk was treated as a matter of law with the unpleasant result that by continuing in the employment with knowledge of the danger, the worker was deemed to have agreed to run the risk, a graphic illustration of which is furnished by ***Woodley v. Metropolitan District Railway Co. Ltd.***[22] Application of the rules of contract yielded that result. But thereafter two points have been accepted, and these are (i) that the question is one of fact and (ii) that knowledge of the existence of the risk, though relevant to show agreement to run the risk, is not conclusive. By this time the courts have started to frown upon the use of the doctrine in the master and servant relationship, The courts came to recognise that although theoretically the two parties have equal freedom to contract, in practice, the employee has an inferior bargaining power. The argument that the employee was always free to reject the employment with grave dangers and seek other employment often bears no relation to the reality of things. As Goddard L.J. (as he then was), pointed out is ***Bowater v. Rowley Regis Corporation***[23] a distinction has to be drawn between employments which are by nature intrinsically dangerous and those not. In the former, the worker will be expected to have consented to run risks which are ordinarily incidental to such an employment. In the case of the latter however, it must be shown by positive evidence that the worker agreed to run the risk of the possible dangers arising from work that is not intrinsically dangerous. The plaintiff in ***Bowater v. Rowley Regis Corporation*** had been employed to collect leaves and rubbish from streets and parks and was provided with a horse and cart for the performance of his duty. On the fateful occasion he was asked to take a certain horse which was known to be restive and had run away on previous occasions. The plaintiff protested against the order but ultimately carried it out. In the course of performing his duty, the horse ran away and

the plaintiff was thrown out of the cart and injured. He sued his employers alleging breach of duty to provide him with a horse which was safe and suitable for the performance of his work. The defence of ***Volenti non fit injuria*** was rejected by the Court of Appeal. The plaintiff was a refuse collector not a horse-breaker; it is only a horse-breaker who must take the risk of being thrown or injured by a restive horse as an ordinary risk of his employment. A different consideration must apply to a refuse collector who has had to undertake a risky operation. He cannot be said to be ***"volens"***[24] merely because he has complied with the order or request; the employer must go further to show that the employee has agreed that the risk should lie on him.

These defences, among other things, which stood in the way of an injured employee led to the enactment in England of the Workmen's Compensation Acts in 1897 by which the injured worker was relieved of the need to establish fault by his employer who to that extent became an insurer. As we mentioned earlier Nigeria enacted its own Workmen's Compensation Act in 1941 which unfortunately has become hopelessly out of date because it was revised last in 1957. How out of touch with the present day social and living conditions will be realised from the following facts. The life of a workman under the Act is worth only ₦1,600 to his dependants. If he does not die but is totally and permanently incapacitated he gets, all in all, only ₦4,000. Partial permanent incapacity attracts only a percentage of what is due for total permanent incapacity which in this case is ₦3,200 and not ₦4,000, as the difference of ₦800, being payable only where the totally incapacitated workman needs the constant attention of another person, is not taken into account.[25] Only a maximum of ₦200 can be recovered for medical, surgical and hospital treatment which for this purpose includes both skilled nursing services and supply of drugs. In addition, the cost of the supply, maintenance, repair and renewal of non-articulated artificial limbs and apparatus up to ₦100 but no more can be recovered. If a deceased workman leaves no dependants at all, the only

obligation on the employer is to bear the reasonable burial expenses of the deceased which is not to exceed ₦60! The coverage of the Act in cases of non-manual employees is narrow, for only those earning not more than ₦1,600 p.a. are covered. The upward revision of wages and salaries as a result of the recommendations of various Commissions which were periodically set up to review wages and salaries without a corresponding revision of the ceiling placed on salaries of non-manual employees covered by the Act, has had the unwholesome effect of excluding very many non-manual employees from the provisions of the Act. Certainly in present day Nigeria only very junior non-manual employees are still within the ceiling of ₦1,600 per annum income bracket imposed by the Act way back in 1957! This may however operate as a blessing in disguise for such employees will be at liberty to prosecute their claims at common law, where more generous compensation awaits them provided they are able to establish breach of duty on the part of the employer.

It has recently been said that the Act is being revised — that song has been rendered several times before; and one can only hope that this time around something positive and concrete will be done. That trade unions have not crossed swords with the Government on the issue, the way they did in 1981 over the minimum wage issue, is simply unbelievable. And it is not as though the matter is not of practical significance any more — accidents continue to occur at work and claims are still being settled under the Act. For instance, between January and June 1984, 636 accidents were reported, 160 or 25.1% of which were fatal, but only the sum of ₦42,514.65 was paid out in Compensation.[26] Insurance Companies with whom employers insure their liabilities and who therefore have to pay the compensation, have openly called for its review — that in itself must show how hopeless and unconscionable the matter has become especially when it is remembered that insurance companies are not charitable organisations.

Termination of Employment

It is however in the area of the termination of the contract of employment that we lawyers appear so wedded to the concept of contract that we ignore its serious consequences on the employment relationship. The lawyer's perception of the nature of the employment relationship is seen for the most part in contractual terms. We are prepared, so it will seem, to continue to tinker with the concept of contract, inserting spare parts where the original ones will not work. Fortunately there are recent developments that point to a change of direction and the Supreme Court has led the way in the matter. The dawn of a new era centres around the Supreme Court's decisions in ***Shitta-Bey v. Federal Public Service Commission***[27] and ***Olaniyan & Others v. University of Lagos.***[28]

Before the Supreme Court's decision in ***Shitta-Bey v. Federal Public Service Commission*** in 1981, it used to be said that civil servants as employees of the State were in a peculiar position in that they held their appointments at the pleasure of the State which can dismiss them at will. This right to dismiss at pleasure, it was argued, was one of the Crown's prerogative rights applicable in Nigeria both before and after independence whilst the British monarch remained the Head of State. The fact that Nigeria had a written Constitution which created a Public Service Commission invested with the power to appoint persons to hold or act in offices in the Public Service of the Federation and to dismiss and exercise disciplinary control over such persons did not appear to make any difference; it matters very little also that Nigeria became a Republic in 1963 and the provision for a fair hearing enshrined in the Constitution[29] did not seem to matter. The decision in ***Graham-Douglas v. Attorney General***[30] to the effect that a civil servant in Nigeria held his appointment at the pleasure of the State epitomises the approach of most of the judges.

In view of this prerogative, it has been doubted in England whether civil servants can really be said to have

contracts of service. Lord Goddard C.J. had expressed the position in this way in 1956:[31] "an established civil servant is appointed to an office and is a public officer, remunerated by moneys provided by Parliament, so that his employment depends not on a contract with the Crown but on appointment by the Crown." However, the balance of authority supports the view that they do.[32] But even so, it is agreed that such contracts do not bind the Crown (the State) in the same way and to the same extent as a similar contract of employment would bind any other person. Thus such contracts cannot be enforced by an action for wrongful dismissal, nor until quite recently could a civil servant sue for arrears of pay due to him.[33]

The Nigerian judges, for the most part, insisted that aggrieved civil servants had to sue either by way of the petition of right under the Petitions of Right Act or by joining the Attorney-General as defendant under the rule in ***Dyson v. Attorney-General***[34] although in some cases the Public Service Commission had been sued directly either alone or in conjunction with other defendants. The sum total of all this is that a civil servant in Nigeria was not entitled to a prior hearing before dismissal and no remedy therefor. The law was in this state of flux when ***Shitta-Bey v. Federal Public Service Commission*** came before the Supreme Court in 1981. Shitta-Bey obtained a declaration from Bada J. that his purported compulsory retirement from the Federal Public Service was irregular, null and void but the Commission had ignored the declaration and refused to issue him with a letter to effect his resumption of duties in the Federal Ministry of Justice where he was a legal adviser. He applied to the High Court for an order of mandamus to compel the Public Service Commission to issue the letter. The trial judge refused to make the order on the ground that to do so would amount to an order for reinstatement which the courts will not give in cases of contracts of service. The Court of Appeal sided with the trial judge but the Supreme Court allowed the appeal and by so doing resolved the matter in favour of civil servants with the following clear-cut declaration by Idigbe J.S.C.:[35]

> "It was submitted to and indeed held by both the High Court and the Court of Appeal that the principle of English law which precludes mandamus from issuing against the Crown and servants of the Crown, applies in this country in regard to public officers in the established and pensionable cadre of the Federal Government Service. Indeed it would appear from the lead judgment of the Appeal Court that public servants in the established and pensionable cadre of the Federal Government Service are regarded as employed at the pleasure of the Federal Government. I shudder to think that this is so; but with great respect to their Lordships both in the Court of Appeal and in the High Court, I am of the view that this cannot be correct. As I have already pointed out the Civil Service Rules to which reference has already been made invests in these public servants a legal status and they can be ***properly*** or ***legally removed*** only as provided by the said Rules. Again the principle of law which precludes mandamus from issuing against the Crown has historical justification in English legal history and in my view there is no basis for its application in this country (a Republic) in respect of the Respondent who, being a creature of statute, ***can sue and can be sued;*** there being no provision to the contrary express or implied in any enactment in our statute book"

Then came ***Olaniyan & Others v. University of Lagos***[36] The main issue before the trial court was simple enough and it was whether the University as employer was entitled to terminate the employment of the Professors by giving six months' notice or paying, as in fact they did, salary in lieu. Up to that time and using the concept of contract, certain legal issues appeared to have been settled and these are:-

(i) a contract of service for an indefinite duration is not to be construed as a contract of yearly

hiring which could be terminated only at the end of the year. Greer L.J. in 1938[37] sounded the death-knell of the rule as to yearly hiring which "arose out of the hiring of agricultural labourers which took place at a particular time of the year;" but it was Lord Denning in 1969 who issued its judicial death certificate.[38]

(ii) an employer is entitled to give notice to terminate the employment and the length of notice to be given would of course depend upon the express or implied terms of the contract, and it had been agreed long ago that a term that reasonable notice will be given the length of which will depend upon all the surrounding circumstances — will be implied;[39]

(iii) in giving notice, an employer is not bound to state reasons for so doing and even where he does, the court will not examine the cogency or otherwise of the reasons — what is crucial is whether the notice given accords with the express or implied terms of the contract.[40] Hiding under the cloak of this rule, it has become fashionable for employers to terminate contracts of employment by giving the required notice, or more often than not, paying salary in lieu, thereby putting an immediate end to the relationship — there is instant dismissal, but from the strict legal point of view all the employer has done is to relieve the employee of the obligation to work for his pay, that is, he need not earn it;

(iv) it is only where an employer does not intend to pay compensation represented by the salary for the notice period or keep the

employee in employment for the period of notice, that he has a duty to allege and prove some wrongdoing on the part of the employee justifying an immediate and total severance of the contract of employment. Even here, he does not have to hear him in his own defence before dismissing him; but

(v) there is an ill-defined category of sacred cows who cannot be touched in this way — the employer is enjoined to observe the rules of natural justice towards them — in this area, administrative law and private law (individual employment law) appear to merge, although they do not happily cohabit together. The category of privileged employees are the possessors of a status but as Lord Wilberforce pointed out in ***Malloch v. Aberdeen Corporation***[41] a comparative list of situations in which persons have been held to enjoy or not to enjoy that enviable qualification is illogical and even bizarre. A specialist surgeon is denied protection[42] which is given to a hospital doctor;[43] a University professor,[44] as a servant, has been denied the right to be heard, a dock labourer[45] and an undergraduate[46] have been granted it. Examples can be multiplied.[47] Buckley L.J. in ***Stevenson v. United Road Transport Union***[48] formulated a useful test in this way: "Where one party has a discretionary power to terminate the tenure or enjoyment by another of an employment or an office or a post or a privilege, is that power conditional upon the party invested with the power being first satisfied upon a particular point which involves investigating some matter upon which the other party ought in fairness to be heard or to be allowed to give his explanation or put his case? If the answer to the

question is 'Yes' then unless, before the power purports to have been exercised, the condition has been satisfied after the other party has been given a fair opportunity of being heard or of giving his explanation or putting his case, the power will not have been well exercised."

The fourth situation mentioned above, that is, cases of summary dismissal, is a veritable ground for litigation, for an employer may be hard put to establishing before the court sufficient wrongdoing on the part of the employee as to merit summary dismissal. Therefore, in order to save time and expense and to remove the nuisance value of litigation, most employers would prefer to give notice or pay salary in lieu, safe in the knowledge that the courts would not lift the veil to discover the realities of the situation, that is, the events which led to the giving of notice.

Employers do this as a matter of convenience and expediency to short-circuit the process. And this is what the University sought to do in this case and they apparently thought that they were on a strong wicket. After all, did not clause 6 of the memorandum of agreement confer an express power on the University so to do? Haven't the courts, including the Supreme Court itself,[49] in apparent support of this rule of convenience insisted that the only legitimate question to ask in such circumstances is: does the employer have the power to do what he did? If an affirmative answer is given that concludes the inquiry. But as Aniagolu J. S. C. has rightly pointed out, in law, "there is no love lost between justice and convenience."

And this is clearly what Bada J refused to do and for which he was castigated by the Court of Appeal but received the affirmative support and blessings of all the five justices of the Supreme Court who heard the appeal. He investigated the circumstances leading to the giving of notice and found that misconduct had been alleged against the University teachers and therefore insisted that the University could not short-circuit the disciplinary procedure by paying salary in lieu of notice.

But why could not the University short-circuit the legal process on the altar of convenience? After all, common law conferred such a right on them. They could not do so because the University teachers fell within our category (v) above; they were holders of office in the Public Service of the Federation whose appointments and service were regulated by statute and consequently the Act and Regulations conferred on them a legal status beyond that of mere or ordinary master-and-servant relationship and that therefore the termination of their appointments could not be cognisable under the said clause 6 or the common law on the facts and the circumstances leading to the said termination of appointments. Simply put they are sacred cows who are beyond the pale of the ordinary rules governing master and servant relationship.

The Court of Appeal attempted to make a short-shrift of Bada J's position by saying that although the University teachers were public officers, they (that is the court) were "not concerned as such with the status of the respondents as public officers." a statement which brought a sharp rebuke from Oputa J.S.C. to the effect that "the status of each party to these contracts is of paramount importance." His Lordship then went on meticulously to show how on the analogy of ***Shitta-Bey v. Public Service Commission's Case*** which ironically Nasir, President of the Court of Appeal quoted from with relish to say as follows:-

"There is no doubt that in this case the Regulations, the memo. of Appointment and S.17 of the University of Lagos Act all derive from S. 69(1)(b) of the 1963 Constitution. That being so they all have constitutional force and they invest the Appellants over whom they prevail a legal status which make their relationship with the Respondents although one of master and servant certainly beyond the ordinary or mere master and servant relationship. . . the relationship of the Respondents and the Appellants was thus a relationship of

master and servant but with a big difference. The difference being that the Respondents can legally terminate the Appellants contract of service only by complying strictly with the Regulations and S. 17 of the Act."[50]

Once there was a finding of misconduct, they lost the right to act under clause 6 of the memo. of appointment — the University had no option in the matter — they had to proceed to determine the matter via clause 7 of the Agreement and S. 17 of the Act. In his Lordship's view this followed inevitably from the difference between a rule and a principle. A rule determines the outcome of a dispute in one particular way, while a principle merely inclines the outcome one way or the other. A rule makes certain legal results depend upon the establishment of certain factual situations stipulated in the antecedent part of the Rule. This means that once the factual situation is proved to exist the Rule will apply in its entirety. Rules therefore apply in all or nothing dimension. Either the case falls within the ambit of the antecedent portion of the Rule in which case it must be dealt with as the Rule dictates or it does not in which case it is not affected by the Rule. Clause 7 and S. 17 each operates in the same way as a rule. Therefore where there was a finding of misconduct and a conclusion that the removal was a consequence of that misconduct, it was imperative and incumbent on the Respondents to proceed strictly according to the procedure for removal set forth in clause 7 of the Agreement and S. 17(1) of the Act.

An attempt by the Court of Appeal to draw a distinction between serious misconduct and very minor shortcomings did not cut ice with the Supreme Court. And this is not to suggest that the Court of Appeal were not treading on a well known path, for at common law there is high authority for saying that "there is no fixed rule of law defining the degree of misconduct which will justify dismissal" and that not every misbehaviour will suffice.[51] But where the parties have taken the trouble to reduce into writing what acts may constitute misconduct without attaching such labels as minor

and serious, it is not for the court to proceed on a voyage of discovery to find which act is minor misconduct and which is not. To do this is to re-write the contract for the parties and no matter how tempting that voyage may be, they should resist the temptation of embarking on it, otherwise they will be substituting their own opinion for that of the parties.

In order to find for the University, the Court of Appeal without any apparent difficulty, had said that S. 17(1) would apply only to cases of serious accusation but not otherwise. But they did not classify the charge of "incompetence to hold any post of leadership or responsibility in the University of Lagos" which was the charge before them. Instead they turned to the wide definition of misconduct under the Regulations to show that it contained very minor shortcomings upon which the professional future of an academician should not be sacrificed even though the said shortcoming may make it undesirable to keep the academician in the service of the University. If a minor short-coming "which makes it undesirable to keep the academician in the service of the University" does not amount to serious misconduct it is difficult to find what else will.

The Court of Appeal having deceived themselves into believing that S. 17 was intended to come into operation only when there was accusation of serious misconduct as would justify dismissal with loss of benefits, came to hold that the University was being generous by paying the Appellants six months salary in lieu of notice and allowing them their other entitlements. But that, with the greatest respect, was not the issue at stake. The issue at stake, as rightly pointed out by Oputa J.S.C., was whether the University was acting ***ultra vires*** or ***intra vires*** the contractual documents and the 1967 Act. In his words, the University have to be just before they are generous. They have to be just by observing the procedure set out in clause 7 of the Agreement and S. 17(1) of the Act, and act ***intra vires*** before their unsolicited generousity can have legal backing. "A man's good name is worth much more than six months' salary. A man's reputation is the impress which gives this human dross its currency

without which we stand despised, debased and deprecated,"[52] and it is therefore important that it be not trampled upon with impunity or reckless abandon.

Oputa J.S.C. felt compelled to call Shakespeare to his aid:[53]

> "Good name in man or woman
> Is the immediate jewel of their souls
> Who steals my purse steals trash....
> But he who filches from me my good name
> Robs me of that which not enriches him
> And make me poor indeed."

It was also left to Oputa J.S.C. to remind the justices of the Court of Appeal that the word used in S. 17 is removal "which expression includes the termination of appointment" and that S. 17(1) never used the word dismissal and that therefore unless undue violence was going to be done to the words of S 17(1) they would not bear the meaning or interpretation ascribed to it by the Court of Appeal. Indeed clause 7 of the Agreement had specifically provided that the period of notice necessary to terminate the appointment shall be at the discretion of the Council, that is to say, that even in some cases, the Council may, after having given an opportunity to the employee to reply to the grounds alleged against him still serve notice to terminate or pay salary in lieu.

The truth of the matter however is that the words "termination" and "dismissal" are not words of art. They mean the same thing, to wit, removal of the employee from his employment. It is only when the words are being qualified by such words as "wrongful" or "summary" that the differences in legal consequences begin to come to the fore. Accordingly, "loss of benefit is not at the root of dismissal but repudiation of the servants obligations under the contract is. Once there is that repudiation by the master then there is dismissal or termination or removal — it does not matter which expression is used, the effect is the same."

It was also suggested that the effect of termination of the Appelants' appointments upon notice and without

assigning any reason therefor was that they were free to seek employment in other Universities. Indeed, the Visitor had directed that any break in service in consequence thereof be condoned for pension purposes. On the face of it, that argument sounds very attractive and perhaps unassailable, but it conveniently ignored the reality of the Nigerian situation and fortunately the Supreme Court refused to accept the bait. Eso J.S.C. in a most picturesque manner, after taking judicial notice of the fact that the Head of State was Visitor to at least all the leading Universities in the country declared as follows:[54]

> "Probably for a University professor to go from University to University like a travelling Habeas Corpus could be feasible in independent structures of Oxford, Cambridge and Dublin and in the new red bricks of London and even the newly hardly furnished established Buckingham. Sadly one cannot compare our Universities in Nigeria in terms of independence with these Universities. What hangs on a public officer in his official performance in Nigeria hunts him through life and through the length and breadth of the country. This is the society for which our laws are made and within which the laws must be interpreted. And so be it."

Eso J.S.C. has said it all: legal rules even where they are transplanted as most of our rules are, must be applied to fit the social conditions of the society, otherwise they stand a good chance of being rejected or ignored.

Remedies

We now consider the issue of remedies available to an employee where his employment has been wrongfully repudiated. The first major problem in the area of remedies is the application of the general rule of contract that a contract is not determined merely by the wrongful repudiation of it by one party and that it is for the innocent party to decide

whether to treat the contract as having determined or as continuing in existence. In respect of the generality of contracts it is therefore good law recognised more than 100 years ago[55] to say that "repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation on the one side and acceptance of the repudiation on the other."[56] Asquith L.J. had employed a colourful phrase in ***Howard v. Pickford Tool Co. Ltd.***[57] to describe the rule: "An unaccepted repudiation is a thing writ in water and of no value to anybody as it confers no legal rights of any sort or kind."

But we are told however that the rule does not apply to contracts of employment for they are subject to a special exception and that therefore wrongful repudiation puts an immediate end to the contract of service. Under this rule of automatic determination — unlike the normal elective theory which operates in other areas of contract — any contract of employment could at any time be brought to an end by either party repudiating it, although from the practical point of view, employers are more likely to repudiate by dismissing the employee. Indeed all decided cases belong to this category. Jenkins L.J. first flew the kite in ***Vine v. National Dock Labour Board*** in 1956 when he said:[58]

> "In the ordinary case of master and servant however the repudiation or the wrongful dismissal puts an end to the contract and a claim for damages arises. It is necessarily a claim for damages and nothing more. The nature of the bargain is such that it can be nothing more."

That statement was approved by Viscount Kilmuir L.C. in the House of Lords but between 1956 and 1980 the tide of opinion among the judges has remained unsettled. Whilst some judges have agreed with Jenkins L.J.,[59] others have swam strongly against his tide;[60] but surprisingly Lord Dennis in ***Hill v. Parsons***[61] was content to remain in the slack water between ebb and flow. He suggested that the consequence in law of the master insisting on the employment terminating on a named day is that ***in the ordinary course of things***[62] the relationship of master and servant thereupon comes to an end; for it is inconsistent with the confidential nature of the relationship that it should continue contrary to the will of one of the parties thereto. That is the rule in the ordinary course of things but it is not inflexible. Conseqently there may be cases where the de facto dismissal does not always put an end to the relationship. This will be the position where as in ***Hill v. Parsons*** itself, despite the repudiation the mutual confidence between the parties had remained unimpaired. ***Hill v. Parsons*** was therefore an exception to an exception from the general rule for contracts.

This is the genesis of the rule that the primary and almost invariably the only one remedy available to an employee who has established that the employer has wrongfully deprived him of his employment is damages and that the equitable remedies of specific performance, injunction and declaration which are intertwined here are not available; the kernel of the knot lies in the commandment of the Lady of the Common Law that "thou shalt not grant specific performance of a contract of service" which must always be obeyed and the courts will not allow the other two remedies to be used as an escape route to by-pass the rigour of the commandment. Until the ***Shitta-Bey case*** in 1981, the farthest the courts have been prepared to go was to make declaratory judgments in favour of public servants[63] although in ***Ewerami v. African Continental Bank Ltd.***[64] in 1978, the Supreme Court threw the door ajar to let in an employee who was at the periphery of the public service. Indeed these were the exceptions and the majority of the cases have had to deal with the general principles to be followed in awarding damages to the employee.[65]

The protagonists of the automatic determination theory usually offer three reaons to support their stand. A servant, it is said, cannot sue for wages if he has not rendered services and the wrongful dismissal prevents him rendering services; secondly, this leaves him with a claim for damages as his only remedy and thirdly any claim for damages is subject to a

duty to mitigate the loss and the only way to perform this duty is to accept the repudiation as terminating the contract of employment and seek other employment.

But the main fallacy in this reasoning is this: why should not the servant sue for wages if it is the act of the employer which has precluded his performing the condition precedent of rendering services? And if he can sue in debt for his wages, no duty to mitigate would arise and there could be no practical necessity to accept a wrongful dismissal as terminating the contract of employment provided that the employer is solvent and the servant is sure that the dismissal was wrongful.[66]

Oputa J.S.C. in conducting a survey of the ebb and flow of the tide of judicial opinion in England as I have outlined, drew up a balance sheet for the University teachers. On the credit side he found that the University teachers at the earliest opportunity (that is, on the same day that they received their letters) unequivocally made it clear that they did not accept the University's repudiation — in other words, they themselves repudiated the University's repudiation. They still regarded their contracts as still subsisting and immediately sued, claiming that they are still professors and should be restored to their offices in the University and asking for a court order restraining the defendants from preventing them from performing any of their functions.

In the words of Oputa J.S.C. "there was no delay, no indecision, no vacillation on the part of the Appellants. It is not their fault that the case has taken so long." He then declared, "In some cases, specific performance in lieu of damages may be the only appropriate remedy to give the innocent party his due namely justice — thus providing him with a fulfilment of his expectations under the contract which is still executory and specific performance applies only to executory contracts."[67]

Then, he turned to the debit side of the account and found as the main hurdle the courts' reluctance to make an order for specific performance of a contract of service. After referring to Sachs L.J. in ***Decro-Wall*** and Shaw L.J. in ***Gaunton's case*** he declared:

> "Suppose the master in breach refuses to employ the servant, can the court force him to? An order that cannot be enforced will rather not be made by the court. The preservation of the contractual relationship is thus necessarily coterminous with the ability of the law to compel observance."

If I may be permitted to strain his lordship's metaphor a little further, he declared a profit for the appellants by drawing a distinction between a contract of personal service and ordinary contract of service like in ***Vine's case*** or ***Shitta-Bey's case.*** In contracts of personal service — personal pride, personal feelings, personal confidence and confidentiality may all be involved — all these make it difficult to compel performance of a contract of personal service against an unwilling master. Therefore it is only in such cases — When the master is an ordinary human being with pride, feelings etc — that it will not be appropriate to grant specific performance or other order that would produce the same result. The Respondents are creatures of the law and the self same law will not find it difficult to compel their performance of the contract. His lordship concluded:—

> "In ***Shitta Bey's case*** performance was ordered by a writ of mandamus and the heavens did not fall. In the case, I do not think the heavens will fall if the orders for injunction made by the court of first instance are restored."

Security of Employment

The decision of the Supreme Court in ***Olaniyan & Others v. University of Lagos*** has been hailed as proclaiming and protecting, once and for all the security of tenure of University staff in the same way that ***Shitta Bey v. Public Service Commission*** has done for the civil servants properly so called. Without being an alarmist, I beg to sound a note of warning, for a careful analysis of the lead judgment by Oputa J.S.C. and the concurring judgments of three other justices — Eso, Aniagolu and Obaseki — reveals quite clearly

that they predicated their decision squarely on the issue of misconduct without fair hearing. That is to say, that where the circumstances show allegation of misconduct, the University is disentitled from removing the employees otherwise than through compliance with S. 17. But if no such circumstances exist, then the University is entitled to rely on clause 6 to terminate by giving six months' notice or paying salary in lieu. Oputa J.S.C. made this clear beyond any iota of doubt when he declared as follows:[68]

> "If there was no finding that the Appointee is being removed on the ground of misconduct, then the employment of the Appointee is terminable by six months' notice or six months' salary in lieu of notice according to Clause 6 of the agreement. But where as in this case there was an allegation that each and everyone of the officers had rendered himself unfit for any position of leadership or responsibility in the University of Lagos... followed by a finding by the trial court that the above recommendation of the Visitation Panel against the plaintiffs in my view amounts to misconduct cognisable as such under S. 17 of the University of Lagos Act and Clause 7 of the Memorandum of Agreement of each, then my answer will be that the provision contained in the Agreement aforesaid enables the University to terminate the employment of each Appellant validly if and only if each Appellant has had an opportunity of replying to the grounds alleged against him as stipulated in Clause 7 of the contract."

In the same vein, Kayode Eso J.S.C. had declared as follows:

> "The termination of the appointments of the appellants by six months' notice provided for by the contract of service is subject to the provision about misconduct stated above.' In other effects,

> both under the ordinary terms of his employment and by statute which governs the University itself the Appellants are protected in the terms of their employment from being sent out of the University without being heard as to the allegation of fraud, misconduct, gross inefficiency, wilful refusal to fulfil his duties or incapability by reasons of inefficiency or infirmity either of mind or body"[69]

It was left to Karibi-Whyte J.S.C. who himself had started off his distinguished career as an academic in the Faculty of Law of this University some 21 years ago, to plunge himself into the danger zone as it were, step over the trip-wires of previous cases and came to safety in favour of security of tenure. One wonders how many times he, robed as he was, in the splendour of a justice of the Supreme Court, sitting in the highest temple of justice and looking across the well of the court at his erstwhile colleagues of some twenty years past, would have said to himself "there goes I but for the grace of God." In a 31-page judgment — and he was only delivering a concurring judgment — he went a little further than his colleagues by addressing himself squarely to the issue of whether or not the University was entitled under any circumstances to give notice or pay salary in lieu. For his lordship the issue was under whether the Regulations governing service made under the powers vested in the Council by the Act, the University was entitled to terminate the employement of the teachers. Paragraph 13 of the Regulations delimits the extent of the powers of termination and by so doing the University would not remove except on the specific grounds laid down there-under. In other words, his lordship found the situation similar to the one which the House of Lords found itself in 1957 in ***McClelland v. Northern Ireland General Health Services Board.***[70] Therefore the University can only terminate for cause. That pronouncement, it is submitted, constitutes the charter of job security for University employees, a situation reminiscent of the position in

Oyenuga v. Provisional Council of Ife[71] in 1964, although ironically the issue of security of tenure was not pressed in that case. The decision thus makes it clear that University employees hold their appointments *quandiu se bene gesserint* Indeed, it can be said that Karibi-Whyte J.S.C. had the whole of the public service in mind when he declared as follows:—

> "This is undoubtedly a realistic approach to the problems of public employment and travels far towards reversing the anachronistic and somewhat illogical common law position. In public employment where the employee is qualified by appointment to a permanent and pensionable position and has actually satisfied the conditions, there should in the interest of justice be a presumption that the employment cannot be terminated by mere notice, but should be terminable only for misconduct or other specified reasons."[72]

Justices Oputa and Karibi-Whyte's distinction between a contract of personal service and a contract of service is very significant and has, it is submitted, destroyed the myth surrounding the so-called rule of non-application of specific performance in employment generally. The commandment of the Lady of the Common Law that "Thou shalt not order specific performance of contracts of service" should be confined to only contracts of personal service which involve continuous daily physical contact between the parties. But if the truth must be told, the reality of the day is that in most establishments today the so-called employer who hires and fires is himself an employee of another higher organ of the establishments. In the public sector this admits of no argument at all; and even in the private sector, the division of the corporate enterprise between management and shareholding ensures that the Managing Director is not the employer and is himself an employee of the company. Heavens will not fall if a wrongfully dismissed employee is reinstated for that is the surest way to enthrone security of employment. Karibi-Whyte J.S.C. had no doubt in his mind about the matter when he declared as follows:[73]

> "The law has arrived at the stage where the principle should be adopted that the right to a job is analogous to right to property. Accordingly where a man is entitled to a particular job, I cannot conceive of any juridical or logical reason against the view that where the termination of appointment is invalid and consequently alters nothing, a reinstatement of the employee barring legal obstacles intervening between the period of purported dismissal and the date of judgment is the only just remedy. Normally, damages are rarely adequate remedies for wrongful dismissal."

His lordship did not give examples of the "legal obstacles" he had in mind, but it is submitted with great respect that frustration is a clear example. Frustration as a doctrine is reserved for impossibility of performance "for which neither contracting party was in any way responsible."[74] Accordingly, events such as illness,[75] the outbreak of war,[76] the destruction of the place of work, the death of the employer or the winding-up of a company are regarded as frustrating events. But reliance cannot be placed on a self-induced frustration.[77] In other words, a person who has himself created the situation which has made further performance of the contract impossible cannot be heard to say that the contract has thereby been frustrated. Therefore, in our present context, an employer who has found a replacement for the employee cannot be permitted to plead that as an intervening legal obstacle.

Once job is regarded as analogous to property — and we now have the Supreme Court's stamp of approval on the matter — it ought to be recognised that a man is entitled to a particular job just as the courts of equity acknowledged the right to a particular piece of property. He has a right to undisturbed possession of a job which cannot be taken away without due process of law.[78] A confirmed employee should be deemed to have property in his job such that he cannot lose it except for casuse. It must be recognised that just as a property owner has a right in his property and when he is deprived he is entitled to compensation, so a long-term

employee should be considered to have a right analogous to a right of property in his job; he has a right to security and his rights gain in value with years.[79] We must seek to protect by giving a measure of security against abrupt or unfair dismissal and to provide a large measure of compensation when jobs disappear for economic reasons.

In the public sector, an employee is required to serve a probation of at least two years before his employment becomes permanent and pensionable, the same yardstick should apply to the private sector with the result that all confirmed employees cannot be deprived of their jobs except for cause, failing which the affected employee, at his option, will be entitled to reinstatement or generous compensation. Reinstatement it must be pointed out is not a word of art. Its ordinary and primary meaning is to replace the person to the exact position in which he was before his removal. That is, to restore him to his ***status quo ante.*** It is therefore retroactive in effect and involves a revocation of the act of dismissal. The Industrial Arbitration Panel has never felt inhibited in ordering reinstatement in deserving cases,[80] although the National Industrial Court has been more circumspect.[81] As a member of the Industrial Arbitration Panel between 1976 and 1979 I contributed to that development: on each occasion, I was convinced in the light of the evidence before the tribunal which on some occasions I had to dig out by adopting the inquisitorial method, that an order of reinstatement was the only appropriate remedy. I even stepped out on my own by making awards to ensure a measure of security of employment for the reinstated employee by providing that it shall not be open to the employer, within at least six months of the reinstatement, to terminate his employment by giving notice or payment of salary in lieu.[82] It is also important to bear in mind that order of specific performance is not completely alien to our individual employment law. Under Section 81(1)(b) of the Labour Act,[83] the court, in this case, the magistrate court, is empowered to order that a contract of service governed by the Act be specifically carried out. And apparently either party to the contract can ask for the order to be made; therefore it is possible for the employer

in theory at any rate, to compel the employee to perform – a situation not far removed from compulsory or forced labour which as you may be aware is forbidden not only by the Labour Act[84] but also by Section 31(1)(c) of the Constitution. Section 81(1)(b) is however hardly used in practice.

Sections 9(6) and 19 of the Labour Act dealing with termination of contracts of employment on grounds of trade union activities and redundancy respectively are aimed at protecting workers but the provisions will have to be drastically reviewed if they are to serve useful purpose in practice. S. 9(6) is an attempt by Nigeria to give effect municipally to her international obligation under Article One of the Right to Organise and Collective Bargaining Convention.[85] But that attempt has not satisfied the main purport and substance of the Convention which is to protect workers against unfair dismissal or what the Americans call unfair labour practices; and consequently, more elaborate provisions are needed to bring this about. We will also need to pay due attention to the Termination of Employment Recommendation (No. 119) adopted by the I.L.O. Power to order reinstatement should be expressly conferred by law on the arbitral tribunals, that is, the Industrial Arbitration Panel and the National Industrial Court to whom individuals should have direct access.

As to redundancy, S. 19(2) empowers the Minister of Employment, Labour and Productivity to make regulations providing for the compulsory payment of redundancy allowance on the termination of a worker's employment because of redundancy. But up to now, that is, almost twelve years after the Act has come into force, no such regulations have been made. In this circumstance, redundancy payments can be made in pursuance of S. 19(1)(c); unfortunately however, the subsection does not lay down any specific scales; all that it contains is a mere exhortation to the employer to "use his best endeavours to negotiate redundancy payments to any discharged workers not protected by regulations under S. 19(2)." As there are no such regulations in existence, it follows that all workers, at least for the time being, come under S. 19(1)(c), which means that redundancy payments have to be negotiated. Some collective agreements

make provisions for redundancy payments; indeed with the serious encroachment by the Productivity Prices and Incomes Board on collective bargaining, schemes for redundancy payments now feature as the only major item in collective agreements. Thus, out of the six collective agreements deposited with the Ministry in 1984 four dealt with schemes for redundancy payments only.[86] The time has now come for the Minister to make the regulations and he has the awards of the Industrial Arbitration Panel from which a general pattern has emerged to guide him in the matter.[87] Above all, the coverage of the Act itself should be widened to take in all employees except those employed under contracts of personal service as defined by the Supreme Court in ***Olaniyan & Others v. University of Lagos.***

Job security as is being pleaded here will at least ensure that the State is taking steps to fulfil the provision of S. 17 (3)(a) of the 1979 Constitution, to the effect that "The State shall direct its policy towards ensuring that all citizens without discrimination on any ground whatsoever have the opportunity for securing adequate means of livelihood as well as adequate opportunities to secure suitable employment." Admittedly, the provision is not justiciable in the sense that a citizen cannot insist that he be found a suitable job but surely, those who have suitable jobs can be protected from losing them.

It may be objected that our position is a clear invitation to employees, once confirmed, to do as they please and that employers will be forced to keep undeserving employees on their pay roll. It will do no nothing of the kind. All we are saying is that no confirmed employee should lose his job except for a valid reason given at the time which is connected with the capacity or conduct of the employee or based on the operational requirements of the employment concerned. This will surely mean that employers will have to be more careful in dealing with their employees and that they will have to keep better records; but bad employees will still have to go but only after due process of law. Our position is fortified by another 1985 decision of the Supreme Court. This is the case of ***Sule v. Nigerian Cotton Board.***[88] The appellant was transferred from Lagos to Funtua but he

refused to vacate his apartment in Lagos (he put his family there) in spite of repeated demands which led to his being compulsorily retired. In affirming the decision of the employer the Supreme Court was firmly of the view that he should thank his lucky stars that they were not his employers. Oputa J.S.C. put the position thus:

> "No one seised of the facts of this case can seriously urge this ground. The rules of natural justice are two — impartiality and fairness. How can the defendant/Board which had good cause to dismiss the plaintiff summarily but which on humanitarian grounds only retired him with full benefit be accused of bias against the plaintiff/appellant? With regard to fairness and fair hearing, the plaintiff/appellant was given the undue licence to write Exhibits F K M O & P. I only wish this court had the power to replace the retirement with summary dismissal."[89]

It is evident to me therefore that the Federal Military Government does not need the Public Officers (Special Provisions) Decree 1984[90] which gives the appropriate authority power, ***inter alia*** to dismiss, remove or compulsorily retire public officers; and bars civil proceedings in respect of any act, matter or thing done or purported to be done by any person thereunder; the provisions of the Pensions Act 1979[91] are in my view, sufficient to deal with any situation which may arise. What is more, the provisions of the Decree are in conflict with fundamental human rights; in fact the whole of Chapter IV of the Constitution is suspended for the purposes of the Decree. The present Government, ***proprio motu,*** has made the observance of fundamental rights one of its cardinal policies and therefore if it is to maintain its credibility, that Decree should not stay a day longer on the statute book.

Collective Labour Law

Collective labour law is concerned for the most part with the collective relations of management and labour and the vital question here is what part ought law to play in the regulation of labour relations. Both management and labour are bearers of power and the law should therefore seek to regulate and restrain resort to the use of these powers to ensure as far as possible industrial peace thereby energizing the production activitiy of the country. What the proper role of the law should be depends on one's view or perception about the nature of the industrial organisation and the role of unions within it. Sociologists use the term 'frame of reference' to describe the combination of some factors — attitudes, values and assumptions — which determine one's conception of labour relations and they distinguish between a unitary, pluralist and radical perspective of industry. The unitary view enjoins us to see an industrial enterprise as one "where management and workers strive to achieve a common objective; in other words, there is a community of interests between the employer and the workers in the commercial success of the undertaking." Consequently, formation of trade unions, except for the low cadre of workers, had no place here. Even when such unions exist, their activities are confined only to the regulation of purely market relations and not managerial relations. On this view, it is an anathema for management staff to form any union — "the focus of loyalty resides in the senior management who must in turn inspire it." The pluralist view recognises that there are two sides in the industry and that consequently conflict is inevitable. The interests of workers, represented by trade unions differ from that of the management and so unions must take part in the regulation of both market and managerial relations. The pluralist view recognises that the short-term objectives of both management and organised labour are different; but it concedes that in the long run, the two sides have a common long-term objective in seeing to it that the goose — the enterprise — that lays the golden egg is not killed in the process of haggling. So they must of necessity

both learn to live together like husband and wife for better, though not for worse, to ensure the continued production of the golden egg that would make life better for both of them. But the radical frame of reference rejects both analyses. On this view, it is said that it is entirely an illusion to talk of a system of checks and balances reconciling the conflicting interests of employers and workers; the radical frame of reference asserts that "fundamentally, capitalism is the exploitation of the property-less classes by the propertied and that the so-called notion of a balance of power is simply illusory; and that all it does in actual fact is to help legitimise a system of gross inequality and privilege." Consequently, no institutional arrangements can alter the fundamental imbalance of control. All that collective bargaining achieves is to resolve the marginal disputes whilst leaving untouched the roots of the conflict between capital and labour. The only way out therefore is to have a system of socialism and a transfer of wealth to the property-less and under-privileged.[92]

The pattern of regulation of labour relations in Nigeria clearly shows a bias for the pluralist approach. Trade unions have been recognised to have vital roles to play in the scheme of things, and to this end, elaborate legal provisions have been made to ensure their independence and strength both numerically and financially. The period between 1975 and 1979 witnessed a number of enactments which have left a permanent impression upon the industrial relations system of the country. This is not the occasion to examine in detail the provisions of these enactments. But some of them clearly call for comment and to these we now turn.

Trade Unions

By the enactment of the Trade Unions (Amendment) Act No. 22 of 1978, the military administration seemed determined to prescribe a permanent cure for the disease which has afflicted trade unions in Nigeria for so long: multiplicity. Apart from reducing the number of trade unions which as at June 1975 stood at 1,027 with 765,377

members (i.e. 35.1% of the wage earning population) to 70 comprising, 42 workers' organisations of junior employees all affliated to the Nigeria Labour Congress (NLC), 19 senior staff associations and nine employers' association, S. 3(2) provides that:

> "No combination of workers or employers shall be registered as a trade union save with the approval of the Minister on his being satisfied that it is expedient to register the union either by regrouping existing trade unions, registering a new trade union or otherwise howsoever, but no trade union shall be registered to represent workers or employers in a place where there already exists a trade union."

The constitutionality of this provision was tested in ***Osawe & Others v. Registrar of Trade Unions.***[93] The appellants' application to register the Nigerian Unified Teaching Service Workers Union later renamed Nigerian Administrative Staff Union of Primary and Post-Primary Schools was refused by the Registrar of Trade Unions on the ground that there was already in existence a recognised trade union — The Non-Academic Staff Union of Educational & Administrative Institutions — which caters for the class of people who intend to form the new union. The appellants sued contending that the Registrar's decision was unconstitutional, invalid, null and void and of no effect being contrary to S. 37(1) of the Constitution which guarantees the right, ***inter alia,*** to form or belong to a trade union. They won in the High Court but lost both in the Court of Appeal and in the Supreme Court.

The Supreme Court, on May 31, 1985, held that S. 37 of the Constitution was subject to S. 41 and that S. 3(2) of the 1978 Act was saved because it is a law reasonably justified in a democratic society in the interest of public order and for the purpose of protecting the rights and freedom of other persons. According to Kazeem J.S.C. who delivered the lead judgment, it was to maintain public order and good government that the restructuring exercise that led to the

enactment of the law took place. To Aniagolu J.S.C. proliferation of trade unions clearly lends itself to chaos in labour circles; a fact which in his lordship's view has "a tendency of destabilizing society by its tendency to wild-cat strikes and work-stoppages called by all sorts of disparate and unviable trade unions. It is therefore in the interest of public order that systematised, cohesive and responsible trade unions be established for the good of society."[94].

Unknown to his lordship, however, the truth of the matter is that multiplicity sows its own weakness and "the disparate and unviable trade unions are simply not in a position to make credible threats of industrial action to move the employer to their position which squarely explains why during the era of multiplicity of unions, trade unions tended to be ignored by employers and the Government alike except on the few occasions when, because of the underlying general discontent, workers successfully organised effective though temporary protests. But his lordship put his finger on the right key when he observed that many of those mushroom unions emerge after personality clashes in the leadership echelon — each leader wanting in most cases to carve out an empire of his own. Therefore an existing trade union has a vested right to cater for the interests of its members within the registered objects, rules and regulations. Such a registered trade union has a right which the law courts should protect, that its organised labour is not thrown into confusion to the detriment of its registered trade union by mushroom unions, ostensibly aimed for the same purpose, springing up here and there. S. 3(2) seeks to do this and is therefore valid being a law enacted "for the purposes of protecting the rights and freedom of other persons" under S. 41(1)(b) of the Constitution.[95] This accord between the courts and the law maker augurs well for the future of trade union law in Nigeria, as it will seem that they are both prepared to protect the unions against themselves. It is to be noted that since 1978, 16 new trade unions have been registered comprising 14 employers' associations and two senior staff associations. It seems fairly certain that junior employees stand very little chance of persuading the Minister to register a

new union. What is possible and which is already beginning to happen is that junior employees may move from one registered union into another. Such a movement, although it may deplete the membership of one union, is perfectly legitimate as long as the receiving union is a registered trade union and caters for the class of workers to which these putative members belong.

The issue of recognition of trade unions by employers appears to have been settled by S. 22 of the Act. Registered trade unions now enjoy automatic recognition once at least two persons in the employment of an employer are its members. Deliberate refusal to do so constitutes an offence punishable on summary conviction by a fine of ₦1,000.00 But the vital issue which does arise here is whether an employer who has been found guilty and has paid the fine still has a duty nevertheless to recognise the union. The argument may be advanced that since that is the only remedy provided by the statute there is no further duty upon the convicted employer to recognise the union. But such an approach leaves the problem unresolved for what the union wants and what the law sought to give to unions is a right to recognition once the motion of registration has been gone through. The courts should feel able to make the consequential order[96] for recognition in addition to the imposition of fine.

The effect of the Labour (Amendment) Act No. 21 of 1978 is that the operation of the check-off system is now compulsory as between the trade union and the particular employer or employers. But as between the workers and trade unions however, a different consideration applies. Workers are still at liberty to decide whether or not they will take part in the "compulsory" check-off system. This is because the proviso to the subsection allows them to contract out of the system. In effect therefore, the applicability of the system to workers still largely remains as it was before 1978, the only difference being that workers are now to be presumed to be part of it unless they evince an intention to the contrary in writing

Undoubtedly, the new provision constitutes a much desired improvement on the erstwhile position, but it does,

nevertheless, wear an unsatisfactory appearance in some respects. Why must a worker be allowed to contract out when, in fact, he enjoys the benefits arising from the activities of the trade unions? If the argument is that a provision for contracting out is essential to guarantee to the worker his constituional right of freedom of association, it must follow that those who are members of a trade union in exercise of their constitutional right are entitled to insist that the benefits accruing from collective bargaining be confined to their members only. No Nigerian worker should be allowed to hide under the cloak of freedom of association to reap where he has not sown.

Apart from this however, there are other objections. The proviso, as it stands, does not distinguish between a worker who holds a union card and one who does not with the result that it is even permissible for a unionised worker to contract out. And apparently, he can do this without informing the union? This is wholly indefensible and is open to abuse by employers who may be opposed to trade unionism within their establishments. Even where employers are progressive and are willing to treat with trade unions, the reality of trade unionism in Nigeria is that many workers have not yet cultivated the habit of supporting their unions by prompt payment of union dues. Consequently, trade union leaders have tended to rely almost exclusively upon foreign sources for financial support, a trend that clearly confirmed by the findings of the Judicial Commission of Inquiry into the Activities of Trade Unions in 1976[97] of which the author was a member.

The far-reaching reforms of the labour movement between 1976 and 1978 were carried out on the fundamental assumption that Nigeria needed strong independent trade unions, which could be self-reliant financially. S. 5(3) of the Labour Act derogates from this fundamental assumption, and it is submitted that it should be amended to make it clear that deductions for union dues shall be made from the wages of all workers eligible to be members of a union with proviso that any eligible worker who does not wish to be unionised

should be allowed to nominate a charitable organisation to whom his contributions should be paid. That way, we would be able to distinguish between the genuine conscientious objectors and the free riders, that is, those who want something for nothing. I should also draw attention to the fact that all the senior staff associations registered as trade unions are not ***legally*** entitled to operate the check-off system in pursuance of this subsection. This is by virtue of the provision limiting its operation to workers who under section 90 of the Labour Act do not include senior staff employees. Therefore until the amendment which we have earlier in this lecture advocated is implemented, such senior staff associations will have to negotiate with employers for the operation of the scheme. The subsection, as it stands, does not make them entitled as of right. It remains to add that accountability should from now be the watchword of trade union officials and that therefore they should comply strictly with the provisions of sections 39 to 44 of the Trade Unions Act relating to filing of account and annual returns. They will thereby be able to demonstrate, in a practical way, that the funds generated by the check-off scheme are judiciously spent and that members rather than trade union officials are the real beneficiaries of the scheme.

Collective Bargaining and Strikes

Collective bargaining machineries and collective agreements resulting therefrom have received legal recognition and support under S. 18 of the Wages Boards and Industrial Council Act 1973 and section 2 of the Trade Disputes Act No. 7 of 1976; but very little use has been made of S. 18 of the 1973 Act which postulates the setting up of joint industrial councils and this, in spite of the restructuring of trade unions along industrial lines and the registration of at least 23 employers' associations. Many reasons suggest themselves for the ineffectiveness of collective bargaining in Nigeria in spite of the fact that successive governments, in varying degrees, have proclaimed its acceptance as the focal point of

our system of industrial relations. For a start, the hallmark of Government's practice is to have recourse to the appointment of Review Wages Commission at regular intervals to settle wages and salaries in the public sector with attendant strain and stress upon collective bargaining in the private sector. Secondly, the operation of an incomes policy in one form or another[98] since 1969 has not only emasculated the autonomy of collective bargaining but has also stunted its growth. Thus in 1982, only 21 collective agreements were deposited with the Federal Ministry of Employment, Labour and Productivity; but by 1984 however, the number had gone down drastically to six and it is significant to note that four out of the six dealt with only redundancy payments.[99]

There can be little doubt that the right of workers to strike constitutes one of the essential elements of the principles of free and voluntary collective bargaining; and before 1968 it could be said without contradiction that although there was no express statutory provision in the matter, Nigerian workers enjoyed this freedom, for by that year, the British-flavoured amalgam of common law and legislation which immunes trade unions and workers from civil and criminal liabilities attendant upon strike actions had become part of our legal system. But the occasions when the legality of strike actions have been tested against the network of these legal rules have been so few and far between that it can be said that they are peripheral to the practice of labour law in Nigeria. It is rare to find employers or other workers suing workers, trade unions and their officials alleging liability for the economic torts of conspiracy, inducing breach of contract and intimidation.

But the civil war (1967–1970) provided the immediate occasion for direct governmental intervention in this area. S. 16 of the Trade Disputes (Emergency Provisions) Act[100] sought to curb severely the freedom to strike but it was repealed by Act No. 53 of 1969 which substituted a more stringent provision by placing a total ban on strikes and lockout and thereby took away the ultimate pressurizing

power of the "collective parties" which is accepted as a legitimate weapon of warfare in the battle field of collective bargaining.

Act No. 53 of 1969 has been repealed and the law governing the position is now to be found in S. 13 of the Trade Disputes Act No. 7 of 1976. The section bans strikes and lockouts under pain of penalty and the few loopholes which it allowed for strike actions to be taken legally were plugged by S. 1(h) of the Trade Disputes (Amendment) Act No. 54 of 1977. In effect therefore strikes and lockouts have once again been totally banned; but they nonetheless still occur and no prosecutions have taken place. It is an arguable point, however, that its continued presence on the statute book operates as a deterrent. This may well be so, but it must be said that its effect as a deterrent has weakened rapidly in the face of strikes by workers, the latest being that of bank workers, none of which led to prosecutions. Freedom to strike is a legal, not a sociological concept, and, where strikes are forbidden, as in our case, there is no such freedom, however frequently they may occur.[101]

Our experience has shown that criminal sanctions have no appreciable or substantial effect on an existing strike nor do they have much effect as a deterrent from striking. Some statistics will illustrate what I mean. Thus between 1970 and 1975 when the Trade Disputes (Emergency Provisions) Act No. 53 of 1969 which imposed stiff penalties — terms of imprisonment without any option of fine — was in force, a total of 2,015 trade disputes were declared, 1,038 of which (that is 51.5%) resulted in stoppages of work.[102] The then Federal Military Government did not have recourse to the stiff penalties to compel observance of the law. Perhaps the Government realised the grave difficulties surrounding the execution of criminal sanctions, such as imprisonment, against a large number of people: sending thousands of workers to prison for five years may not be a practical proposition.[103] The position has not been much different under the present law, that is, S. 13 of the Trade Disputes Act No. 7 of 1976 as amended. Available statistics[104] show that between 1976 and 1983, 2,030 disputes were declared

ith 1,354 resulting in strikes (that is 66.69%) and the total man-days lost stood at 23,473,492. During the six months of 1984, 45 disputes were declared, with 44 of them resulting in strike (that is 97.7%) and 286,450 man-days lost. It must be realised that at this level of human relations criminal sactions derive most of their effect not from the degree of penalty but from the social stigma attaching to them. And surely, if instead the effect is to produce acclamation of the criminal, then their value not only is lost but is reversed.

The apparent ineffectiveness of criminal sanctions in this area may explain the reasoning for the enactment of the Trade Disputes (Essential Services) Act No. 23 of 1976 as amended by No. 69 of 1977 by which Government has armed itself with the power to proscribe unions and associations any of the members of which are employed in essential service, a widely defined term under the Act. A strike in essence is a concerted action by workers typically operating through a collective body such as a trade union and if that collective base is destroyed, the workers are put in disarray and the strike soon fizzles out.

The Government has used this lethal power sparingly[105] resting for its efficacy on its shock effect, the latest occasion being the strike action by medical doctors.[106] No one ever dreamt, let alone believed, that the Nigeria Medical Association could be proscribed. After all, it was not a trade union. But many people forgot that section one of the Act governs not only trade unions but also associations as well, which, in the context of the Act, means "any body or persons, by whatever name called associated for a common purpose but does not include a trade union". Given that kind of definition and in the hands of a government determined to show that it had absolute powers of coercion to make everyone fall into line, there was no hiding place for the Nigeria Medical Association or any other association for that matter provided any of its members are employed in any essential service as defined by the Act, which believe it or not, includes any service established, provided or maintained by ***private enterprise***[107] for, inter alia, the treatment of the sick or in connection with transportation of persons, goods

or livestock by road etc. Therefore an association of self-employed persons whose members are engaged in any essential service can be proscribed!

And in view of the interpretation which the Supreme Court gave to S. 37 of the Constitution vis-a-vis S. 41 in ***Osawe v. Registrar of Trade Unions,*** it will be futile for any one to argue that proscription of a trade union or association is a violation of his fundamental right under S. 37. Be it noted that this is quite apart from the fact that the right guaranteed by S. 37 is an individual and not a collective one. But as to the detention of the officers of the proscribed association under S. 4 of the Act a different consideration will apply. The detention was a clear violation of the fundamental right of personal liberty guaranteed by S. 32(1) of the Constitution. Section 32 is not made subject to S. 41 and therefore any argument that the Trade Dispute (Essential Services) Act is a law reasonably justifiable in a democratic society in the interest of public order or for the purpose of protecting the rights and freedom of other persons is clearly untenable. S. 32(1) has not been suspended by the Constitution (Suspension and Modification) Decree No. 1 of 1984; only S. 32(3) to (7) were suspended. Government did not act under the State Security (Detention of Persons) Decree No. 2 of 1984. It is therefore clear that the detention was palpably and patently unconstitutional.[108]

Happily however the present Government has announced the de-poscription of the Nigerian Medical Association[109] and the "villains" of February 1985 who had no other abode except the detention cells have now become the "heroes" of February 1986 fit to receive the warm embrace of the Head of State and Government of the Federation. How times do change and the discarded brick has now become the cornerstone of the edifice! But problems still remain. The Trade Disputes (Nigeria Medical Association and National Association of Resident Doctors) (Proscription) Order 1985[110] has not been repealed; and although the officers have regained their freedom, they are still technically barred from continuing as officers or in any way perform or assume leadership role in any association or faction of any

association of the essential service affected by the Order. What is more, all property (whether movable or immovable) of the proscribed association have been forfeited to the Federal Military Government and vested in that Government free of encumbrances without any further assurance. It has been suggested that the effect of S. 3(3) of the Constitution (Suspension and Modification) Decree No. 1 of 1984 as amended is to give the force of law to any policy statement made by the President. That may well be true in the sense that no one will dare go against the grain of such a policy statement once it is made, even if not subsequently backed up by a decree; but the truth in this case is that it will require more than the policy statement of the President to restore to the association property which, by operation of law, has become vested in the Federal Military Government.

The basic concept of essential service expresses the idea that certain activities are of fundamental importance to the community the disruption of which will have particularly harmful consequences.[111] Essential service therefore has as its base-line definition a service whose disruption would endanger life, public health or safety or cause serious bodily injury or expose any valuable property to destruction or serious damage. This definition is reflected in sections 31 and 32 of the Trade Disputes Act 1976 which have been suspended by the Trade Dispute (Essential Services) Act. Based on the argument that public policy demands that such services should be operated without interruption, only very few people will quarrel with the idea of placing some restrictions on the freedom of workers in essential services properly so called to withdraw their labour. But in return such workers must receive adequate compensation. Schemes for a guaranteed annual pay rise will have to be worked out. It should not be difficult to have a built-in formula in their conditions of service which will ensure an annual uprating of their salaries linked to the monthly index of average earnings.

Alternatively, whilst leaving intact the right of workers in essential services to go on strike, the Government may, in recognition of its duty to preserve to the community these essentials of life in the face of disruption by strikes, arm

itself with a statutory power to declare a state of emergency[112] so that it can intervene to ensure the continuity of the particular essential service – volunteers and personnel of the armed forces can be used. This may be equated with occasions of natural disaster or war except for the realisation that the disruption is being caused by a section of the community.

But the right to strike by all other non-essential employees wherever they may be (that is whether in the public or private sector of the economy) must be plainly recognised. For it must be realised as Professors Kahn-Freund and Hepple have rightly pointed out that if the workers are not free by concerted action to withdraw their labour, their organisations do not wield a credible social force. "The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to differnt places. A legal system which suppresses the freedom to strike puts the workers at the mercy of their employers. This – in all its simplicity – is the essence of the matter."[113]

In formulating policies in this area, and for as long as we retain our present economic system, it behoves us to constantly remind ourselves of the words of Oliver Wendell Holmes spoken some nine decades ago, but which are as valid today as when they were first uttered in 1896:

> "Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way .... If it be true that working men may combine with a view, among other things, to getting as much as they can for their labour, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control."[114]

We must also draw attention to the fact that when workers go on strike, they run at least two economic risks. First, there is the threat of loss of wages and for Nigerian workers this is a very grave risk for two reasons: trade unions do not provide strike pay to their members to cushion the effect of loss of wages; and secondly section 32A of the Trade Disputes Act 1976 now provides that any worker who takes part in a strike shall not be entitled to his wages for the period of the strike. Therefore, the employer is not under any obligation to pay and where he refuses to pay, the worker cannot insist on payment. But certainly the section does not prohibit payment and consequently voluntary payment of wages by the employer does not involve any illegality and such payment in the hands of the worker is not tainted with any illegality. The decision of the National Industrial Court in ***Management of Union Bank of Nigeria Ltd. v. National Union of Banks, Insurance and Financial Institution Employees***[115] has now confirmed our view in this respect. The Court had observed as follows:

> "From all the evidence before the Court, it is clear that the Appellants voluntarily made to the workers payments for the periods of the strikes (sic). They must also have been fully cognisant of their rights under the law, which is patently unambigous. The Court therefore accepts the submission of the learned counsel for the Respondents that it might not promote good industrial relations if the Court orders deductions of the money from the workers' wages and salaries and that the Appellants by their conduct are estopped in law from claiming such deductions."

The second economic risk that workers run is that at the end of the economic conflict they may find that they have no more jobs to go back to. The employer may have recruited new workers to replace the strikers – a potent weapon in the hands of employers especially where the strikers are unskilled workers for whom ready replacements are waiting

outise the factory gates. Even where the strikers are not replaced, the strike may have inflicted so much permanent economic damage that the enterprise can no longer operate viably at the pre-strike level and is therefore no longer in a position to sustain its pre-strike work force. It can therefore be readily appreciated that these risks constitute sufficient built-in restraining factors on the right of workers to resort to strike actions and help to explain why as a rule, strike actions are usually of short duration in Nigeria.

The Arbitral Tribunals

The present compulsory system of settling trade disputes institutionalised by the Trade Disputes Act 1976 as amended is very dilatory — a feature that helps to explain why it has failed so far to achieve the desired goal of providing an effective and speedy means of settling trade disputes. Accordingly the machinery for settling trade disputes should be completely overhauled such that both the Industrial Arbitration Panel (IAP) and the National Industrial Court (NIC) are completely divorced from the apron strings of the Ministry of Employment, Labour and Productivity. Direct access should be given to the parties to approach the tribunals once there is failure to settle at the conciliation stage. Routing compliants through the Minister wastes a lot of time and has no advantage since the Minister has no input in the matter — the points of dispute as submitted by the party declaring a trade dispute are sent raw (that is, without any modification) to the arbitral tribunals. The rule that the Industrial Arbitration Panel must not communicate the awards directly to the parties should be reconsidered for even now, the Minister cannot compel the Industrial Arbitration Panel (IAP) to change its stand. It is not sufficient to say that these arbitral tribunals are independent — they must be seen to be so in practice. It will surely be more meaningful and better for the system if the attention of the IAP is drawn to any matters of public interest or to the effect its awards may have on the economy before the award

is made. Therefore the Minister (in practice, the Federal Ministry of Employment, Labour and Productivity) should have the power to intervene in matters before the I.A.P. and the N.I.C. And, parties should be compelled to send copies of the papers filed at the I.A.P. and N.I.C. to the Minister as soon as they are filed there.

In order to protect the arbitral tribunals from being swamped with frivolous or vexatious claims at the instance of ill-disposed individuals who may wish to embarrass their employers, the tribunals should have power to award costs, which power they do not have at the moment. Rules of procedure of the tribunal should allow them ***proprio motu,*** when claims are filed to ask for further and better particulars of the claim to enable them determine whether there is an arguable case to go for hearing. Indeed, the tribunals should feel free to hold pre-trial hearings if they are convinced from the papers filed that the applicant's case appears to be weak; at such preliminary hearings the applicant may be advised of the likelihodd of costs being awarded against him should he insist on going on with a full hearing. Indeed there is no reason why the tribunals should not have power to strike out such cases after a preliminary hearing. The discretion should then be theirs whether to strike out the case after the preliminary hearing or allow the case to go on to a full-scale hearing and award appropriate costs against the party for bringing or conducting case unreasonably.

The I.A.P. should be decentralised — the country should be divided into four or five zones with a tribunal of three members sitting on a permanent basis in a central location within the zone. The tripartite nature of each tribunal should be retained, that is, an independent person, preferably a lawyer as Chairman, and one member to be chosen to represent the interests of employers and of workers respectively. The appointment of assessors is an unnecessary luxury; in any case, my experience on the I.A.P. has clearly indicated that the practice of the I.A.P. has been at variance with the express provisions of the law. Whilst I was there, no tribunal was constituted in the manner laid down by S. 7(4) of the Act. The practice was for the chairman of the Panel to

constitute a tribunal of three members to handle a trade dispute. I am informed that the practice still persists. Both the I.A.P. and the N.I.C. should adopt the inquisitorial method of adjudication – this will ensure that they get at the root causes of the dispute and so be in a better position to give the appropriate remedy, and they must state reasons for their decisions. The tribunal's awards should be enrolled in the High Court so that the awards become enforceable in the ordinary way as "judgments" of the High Court. A right of appeal should lie from the awards of the I.A.P. to the N.I.C. from where appeals on matters of law only should go to the Supreme Court. Admittedly, both the I.A.P. and the N.I.C. are not superior courts of record – they are subordinate tribunals; but all the same it is desirable that the High Courts should not be allowed to exercise supervisory powers over them. The supervisory powers should in this case be exercised if need be by the Supreme Court itself. In our proposed legal regime the N.I.C. will exercise supervisory powers over the tribunals of the I.A.P. and the Supreme Court itself will exercise supervisory powers over the N.I.C.

But in exercising this supervisory power the Supreme Court should bear in mind that its general inherent right to supervise and monitor the work of these subordinate tribunals only goes so far as keeping them in order in relation to matters of law is concerned. It does not extend to matters of fact and opinion and this is because it is recognised that other people are better fitted than the Supreme Court is to deal with questions of that kind. In the result the Supreme Court will only intervene under its inherent power if (1) the arbitral tribunal has exceeded its jurisdiction, (2) if it has acted unfairly and deprived a party of the principles of natural justice and (3) where on the face of the record an error of law can be detected, in which case the Supreme Court will step in to quash the order so made. But that is as far as the Supreme Court can go, for certainly it has no jurisdiction to re-try the case on the affidavits.

In concluding this lecture a final point must be made and this relates to industrial democracy or what is known in Germany as co-determination. In a country where collective

bargaining has not taken firm root it is, in my view, premature to start talking of the incorporation of industrial democracy into our system of labour relations. Industrial democracy means employee participation in corporate decision making other than by the process of collective bargainning. The famous 2x + y formula proposed by the Bullock Committee[116] whereby employee representatives should sit in equal numbers with share holders' representatives on the boards of large companies balanced by a third category of co-opted members is not for us. At best, what is feasible at this stage of our development is the establishment of consultative committees for the discussion of non-negotiable matters, e.g. safety, welfare facilities and training or manpower development. Employees should also be encouraged, through profit-sharing, to buy shares in their companies. In that way, they may cultivate the culture of togetherness and see themselves as having a direct stake – apart from their jobs – in the fate of the company. I know that S. 11(1)(d) of the Nigerian Enterprises Promotion Act No. 3 of 1977 has achieved this for employees of enterprises falling within schedule two or three of the Act but the scheme should be extended to all companies. In that way, employees could thereby have a say through the Annual General Meetings and perhaps in the long run eventually obtain a controlling interest in the companies whilst leaving their management structure intact, although such a management inevitably will become more receptive to the views and wishes of the "controlling" interest.

Vice-Chancellor, this, then, is my inaugural lecture. If I have packed it with too much of the lawyers' technical language, please forgive me but I must ask you to remember that law is my discipline and that is what the University pays me to profess.

Vice-Chancellor, before I resume my seat, please allow me to pay another price. It is to my wife whose love, devotion and unalloyed loyalty I have enjoyed for almost twenty-one years. We have certainly come of age and I want her to know that she is my everything.

REFERENCES

1. Pollock, *A plea for historical interpretation* 39 L.Q.R. 163 at p. 165.
2. *Printing and Numerical Registering Co. v. Sampson* (1875) L.R. 19 Eq. 462 at p. 465.
3. J. Bentham's *Economic Writings* ed. Stask (London 1952) p. 129.
4. P. S. Atiyah: *The Rise and Fall of Freedom of Contract* (Clarendon Press Oxford 1979) p. 324.
5. A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England During the 19th Century* (1926) p. 284.
6. Otto Kahn – Freund: *A Note on Status and Contract in British Labour Law* 30 M. LR. 635.
7. See S. 45 of the Interpretation Act., Cap. 89
8. See Labour Supervision in the Colonial Empire 1937–1943 (HMSO 1943) Colonial No. 185 para. 1
9. F. D. Lugard, *Political Memoranda* HMSO 1918 at p. 224.
10. In order to resolve the problem resort was first had to the recruitment of alien labour from Sierra Leone and Gold Coast (now Ghana); but later, forced labour was resorted to but this had to be paid for. Lugard sought to justify resort to forced labour on the ground that it was an educative process to remove fear and suspicion. (op. cit. p. 243) In this he ignored the fact that "existing practice in the tribes was designed to provide labour normally for communual work executed by men as part of their responsibility to the local polity not imposed wage labour which was performed for alien governments and whose benefits were anything but clear – I. Davies, *African Trade Unions* (1966) p. 36.
11. The whole labour force was 29.22 million.
12. *Source:* 3rd and 4th National Development Plans 1975–1980; 1981–85 respectively.
13. See *Quarterly Bulletin of Labour Statistics* 1983 (3 & 4) p. 11.
14. Adeogun, *Legal Framework of Industrial Relations in Nigeria* 1969, N.L.J. 13.
15. (1837) 3 M & W 1; 150 ER. 1030.
16. (1850) 5 Ex. 343; 155 ER. 150.
17. Law Reform (Personal Injuries) Act.
18. *Wilson & Clyde Coal Co. v. English* [1938] A.C. 59.
19. See for example the Torts Law Cap. 164 (1973) of the Lagos State.

20. Civil Liability (Survival of Actions, Tort Feasors and Contributory Negligence) Law No. 20 of 1957.
21. Suit No. JD/117/63 of 7/5/65.
22. (1874-80) All. ER. 125.
23. [1944] All ER. 465.
24. But consider *Imperial Chemical Industries Ltd. v. Shatwell* [1964] 2. All E.R. 999; and see Brodetsky: *Employers Joint Breach of Statutory Duty: Volenti not barred,* 27 M.L.R.
25. See Sections 6–11 of the Workmen's Compensation Act Cap. 222 of the 1958 Edition of the Laws.
26. See *Quarterly Bulletin of Labour Statistics* 1984 1 & 2 pp. 38 – 43.
27. (1981) 1 S.C. 40.
28. [1985] 2 N.W.L.R. (Pt. 9) 599.
29. See now S. 33(1) of the 1979 Constitution.
30. (1973) 1 N.M.L.R. 77.
31. *I.R.C. v. Hambrook* (1956) 2 Q.B. 641 at p. 654.
32. *Gallagher v. The Post Office* [1970] 3 All. E.R. 712;
Brandy v. Duners of SS. Raphael [1911] AC. 413;
Sutton v. Att. General (1923) 39 TLR 294; *Reilly v. The King* (1934) AC. 176; *Att. General of Guyana v. Nobrega* (1969) 3 All. E.R. 1604; *Kodeeswaran v. Att. General of Ceylon* (1970) 2 W.L.R. 456;
33. *Kodeeswaran v. Att. General of Ceylon* [1970] 2 W.L.R. 456.
34. [1911] 1K.B. 410
35. [1981] 1 S.C. 40 at pp. 57 – 58
36. [1985] 2 N.W.L.R. 599
37. *De Stampel v. Dankels* (1938) 1 All. E.R. 238 at p. 247.
38. *Richardson v. Koefod* (1969) 1 W.L.R. 1812 at p. 1816; see also *Ahuronge v. U.C.H.* (1959) W.R.N.L.R. 232; *International Drilling Co. v. Ajijala* (1976) 2 SC. 115 at pp. 125 – 127.
39. *Hamlyn & Co. v. Wood & Co.* [1891] 2 Q.B. 488; *Re African Association & Allen* [1910] 1 K.B. 396; *Fisher v. W.B. Dick & Co. Ltd.* [1938] 4 All. E.R. 467; *Ogunsami v. C. F. Furniture & Co.* [1961] 1 All N.L.R. 862; *Chidozie v. U.A.C. Ltd.* [1956] 1 E.R.L.R. 28; *G.B.O. Ltd. v. Agbabiaka* [1927] 2 S.C. 137

40. *Taiwo v. Kingsway Stores Ltd.* [1959] 19 N.L.R. 122; *Nwaokoro v. Sapele Urban District Council* [1965] 1 All. N.L.R. 862; *Yana v. U.M.C. (Nig.) Ltd.* (1972) 10/CCHCJ/53; *Oladebo v. Bata (Nig.) Ltd.* (1973) 6/CCHCJ/34; *Sogbetun v. Sterling Products (Nig.) Ltd.* (1973) 1/CCHCJ/49; and *Adebule v. UTA French Airlines* (1975 5/CCHCJ/761.

41. (1971) 1 W.L.R. 1578

42. *Barber v. Machester Regional Hospital Board* (1958) 1 W.L.R. 181.

43. *Palmer v. Inverness Hospitals' Board of Management* (1963) SC. 311.

44. *Vidyodaya University Council v. Silva* (1965) 1 W.L.R. 77 But Lord Wilberforce expressly said he would not follow it in England.

45. *Vine v. National Dock Labour Board [1957] AC. 488.*

46. *Glyan v. Keele University* (1971) 1 W.L.R. 487 and see the recent decision of the Supreme Court in *Garba v. University of Maiduguri* [1986] 1 MWLR (Pt. 18) 550.

47. See *Cooper v. Wilson* (1913) 2 KB. 319; *Ridge v. Baldwin* (1963) 2 All. ER. 66 for police officers; *Stevenson v. United Road Transport Union* (1976) 3 All ER. 29 for full time paid union officials; *R. v. Post Office Ex parte Byme* (1975) 1 CR 221 for post office workers. For older cases the *Bagg's Case (1615) 11 Co. Rep. 936 and* Fisher v. Jackson *(1891) 2 Ch. 84.*

48. (1976) 3 All. ER. 29; (1977) 2 All. ER. 941.

49. See *Nwaokoro v. Sapele Urban District Council* [1965] 1 All. N.L.R. 862

50. (1985) 2 N.W.L.R. 599 at p. 618.

51. Per Lord James of Hereford in *Clouston & Co. Ltd. v. Corry* [1906] AC. 122 at p. 123.

52. Charles Phillips in his speech for the plaintiff in *O'Mullan v. Mc'Korkill* quoted by Oputa JSC at p. 625.

53. (1985) 2 N.W.L.R. 599 at p. 625 quoting obervation of Board of Avon in Othello.

54. (1985) 2 N.W.L.R. 599 at p. 646.

55. *Hochester v. De la Tour* (1853) 2 E. & B 178; 118 E.R. 922; *Johnstone v. Milling* (1886) 16 Q.B.D. 460.

56. Viscount Simon L. C. in *Heyman v. Darwins Ltd.* [1942] 1 All E.R. 337 at p. 341; [1942] A.C. 356 at p. 361.

57. [1951] 1 K.B. 417 at p. 421.

58. [1956] All E.R. 1 at p. 8.

59. *Francis v. Municipal Councillors of Kuala Lumpar* [1962] 3 All E. R. 633; *Denmark Productions Ltd. v. Boscobel Productions Ltd* [1968] 3 All. E. R. 513.

60. *Sanders v. Earnest A. Neale Ltd.* [1974] 3 All E.R. 327; *Thomas Marshall (Exports) Ltd. v. Guinle* [1978] 3 All. E. R. 193.

61. [1971] 3 All. E. R. 1345 at pp. 1349 – 1350.

62. Emphasis is his.

63. *Adedeji v. Police Service Commission* (1968) N.M.L.R. 1021; *Hart v. Public Service Commission* (1976) 11 S.C. 211; *Head of the F.M.G. Exparte Kubeinje* (1974) 11 S.C. 79, *Olunloyo v. The Polytechnic* (1974) N.M.L.R. 142; *Bankole v. N.B.C.* (1968) 2 ALL N.L.R. 377 *N.R.C. v. Odemuyiwa* (1974) 1 S.C. 13.

64. (1978) 4 S.C. 99.

65. See *W.N.D.C. v. Abimbola* (1966) N.M.L.R. 381, *N.B.C. v. Adeyemi, S.C.* 45/1969; *National Bank v. Ilaka; N.P.M.B. v. Adewunmi* (1972) 11 S.C. 111; *E.C.N. v. Nicol.* (1968) 1 All N.L.R. 201.

66. See *Sanders v. Earnest A. Neale Ltd.* (1974) 3 All. E.R. 327.

67. (1985) 2 N.W.L.R. 599 at p. 631.

68. (1985) 2 N.W.L.R. 599 at p. 621.

69. (1985) 2 N.W.L.R. 599 at p. 648; see also Aniagolu, J. S. C. at p. 653.

70. [1957] 2 All E.R. 125.

71. (1965) N.M.L.R. 9; (1964) 2 A.L.R. (Comm.) 327.

72. (1985) 2 N.W.L.R. 599 at p. 677.

73. (1985) 2 N.W.L.R. 599 at p. 685

74. *Davis Contractors Ltd. v. Fareham UDC* [1965] AC. 696 at p. 728–9; *Krell v. Henry* [1903] 2 KB 740 at p. 748; *Denmark Production Ltd. v. Boscobel Productions Ltd.* [1969] 1 QB 699 at p. 725; see further Cheshire & Fifoot *Law of Contract* 10th Ed. (Butterworths 1981) pp. 512–514 and Treitel, *Law of Contract* (4th Ed. Stevens 1976) pp. 600 – 601.

75. *Marshall v. Harland & Wolff Ltd.* (1972) W.L.R. 899; *Farner v. Willow Dye Works Ltd.* (1972) I.T.R. 226; *Adekugbe v. Public Service Commission* (1972) 9/CCHCJ/ 128 *Poussard v. Spicers and Pond* (1876) 1 Q.B.D. 410; *Bettini v. Crye* (1876) 1 QBD 183 *Loates v. Maple (1903) 88 L.T. 288 and Candor v. The Baron Knights Ltd.* (1966) 1 W.L.R. 87.

76. *Johnson v. UAC. Ltd.* (1975) 5/CCHCJ/ 75; *Metropolitan Industries Ltd. v. Obi* (1975) 9/CCHCJ/ 1397; *Crusader Insurance Ltd. v. Anunike* (1975) 3 S.C. 71 and *Araka v. Monier Construction Ltd.* (1978) 9–10 S.C. 9.

77. *Olunloyo v. The Polytechnic Ibadan* (1974) N.M.L.R. 142; *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.* (1935) AC. 524 at p. 530 and *Denmark Productions Ltd. v. Boscobel Productions Ltd.* (1969) 1 Q.B. 698 at p. 756.

78. *Myers,* Ownership of Jobs: A Comparative Study. *Los Angeles 1964 p. 1.*

79. *Wynes v. Southrepps Hail Broiler Farm Ltd.* (1968) I.T.R. 407; *Lloyd v. Brassey* (1969) 2 Q.B. 98 at p. 101.

80. See for Instance *Nigerian Union of Hotels Restaurant & Night Club Workers & Management of Domo Hotel IAP/L 14/ 77* and *Railway and Ports Transport & Clerical Staff Union v. Nigerian Ports Authority IAP/L 19/ 77.*

81. *Industrial Cartons Ltd. v. National Union of Paper & Paper Products Workers* (1980–81) N.I.C.L.R. 54; *Metal Products Workers' Union of Nigeria v. Alzico Ltd.* (1978/79) *N.I.C.L.R. and Nigerian Sugar Company v. National Union of Food, Beverages & Tobacco Employees (1978–79)* N.I.C.L.R. 12 and *The Austrian–Nigerian Lace Manufacturing Co. Ltd.' v. National Union of Textile Garment and Tailoring Workers of Nigeria* (1982/83) N.I.C.L.R. 60.

82. See for instance the *Nigerian Union of Hotels, Restaurant and Night Club Workers v. Management of Domo Hotels Award* No. IAP/I 14/77.

83. No. 21 of 1974.

84. See S. 72 of the Act.

85. No. 98 of 1949.

86. See *Quarterly Bulletin of Labour Statistics* 1984 – 1 & 2 p. 69.

87. See for instance *Workers of Nigeria Textile Mills Ltd. & Nigerian Textile Mills Ltd.* No. IAP/L34/78.

88. (1985) 2 N.W.L.R. (Pt. 5) 17.

89. [1985] 2 N.W.L.R. (Pt. 5) 17 at p. 29.

90. No. 17 of 1984.

91. No. 102 of 1979.

92. See Further Elias Napier and Wallington, *Labour Law Cases and Materials* (Butterworths) 1980 pp. 16–18 from which I have derived assistance.

93. [1985] 1 N.W.L.R. (Pt. 4) 755.

94. [1985] 1 N.W.L.R. (Pt. 4) 755 at p. 766.

95. See also *Nigerian Nurses Association & Okezie v. Att. General* (1981) 11 – 12 S.C. 1

96. As to the power of a Superior Court under the 1979 Constitution to make a consequential order, see *Abaye v. Ofili* [1986] 1 N.W.L.R. (P.f 15) 134 (S.C.).

97. See the Report of the Commission, Federal Ministry of Information Publication 1977.

98. See S. 5 of the Act No. 53 of 1969, now re-enacted by S. 13A of Act No. 54 of 1977; Act. No. 30 of 1977 established a Productivity Prices and Incomes Board with far-reaching powers and issues annual incomes policy guidelines to be followed under pain of serious penalty in all sectors of the economy.

99. See *Quarterly Bulletin of Labour Statistics* 1983 – 1 & 2 p. 69; 1984 – 1 & 2 p. 69 respectively.

100. No. 21 of 1968.

101. See Otto Kahn-Freund and Bob Hepple, *Laws Against Strikes* (Fabian Research Series 305) pp. 5 – 8.

102. Source: Figures supplied by the Federal Ministry of Labour to the Judicial Commission of Inquiry into the Activities of Trade Unions (1976)

103. A point well illustrated by the written evidence of Sir Harold Emerson on the dispute at the Betteshanger Colliery in Kent in Dec. 1941 to the Royal Commission on Trade Unions and Employers' Associations; (Cond. 3623) otherwise called the Donovan Commission.

104. See *Quarterly Bulletin of Labour Statistics* 1984 – 1 & 2 p. 33.

105. See Trade Disputes (Essential Services) Proscription Order 1976 proscribing the National Union of Nigeria Bank Employees; Trade Disputes (Essential Services) Proscription Order 1977 proscribing the Shell – B.P. & Allied Workers Union and Shell – B.P Senior Staff Association; Trade Disputes (Essential Services) Proscription Order (No. 2) 1977 proscribing Pan Ocean Branch of the Consolidated Petroleum Chemical and General Workers Union of Nigeria.

106. Trade Disputes Nigerian Medical Association and the National Association of Resident Doctors (Proscription) Order 1985.

107. The emphasis is mine.

108. S. 7 of the Trade Disputes (Essential Services) Act excluding application of the fundamental rights provision of the Constitution is of no avail in this context.

109. The National Association of Resident Doctors was also covered by the announcement.

110. Statutory Instrument No. 8 of 1985.

111. See Gillian Morris, *The Regulation of Industrial Actions is Essential Services* (1983) 12 I.L.J. 69.

112. See for instance the English Emergency Powers Act 1920 as amended by the Emergency Powers Act 1964.

113. Otto Kahn-Freund and Bob Hepple, *Laws Against Strikes* (Fabian Research Series 305) pp. 5 – 8)

114. *Vegelahn v. Guntner* 167 Massachusetts 92, 42 NE 1077 at p. 1081. Holmes was giving a dissenting opinion in the Supreme Judicial Court of Massachucetts.

115. [1982/83] N.I.C.L.R. 213 at pp. 247–248.

116. Cmnd. 6706.