From the SelectedWorks of Dr. O. V. C. OKene

March 2007

# The Status of the Right to Strike in Nigeria: A perspective From International and Comparative Law

Contact Author

Start Your Own SelectedWorks

Notify Me of New Work

Available at: http://works.bepress.com/ovunda_v_c_okene/17

# THE STATUS OF THE RIGHT TO STRIKE IN NIGERIA: A PERSPECTIVE FROM INTERNATIONAL AND COMPARATIVE LAW

O. V. C. OKENE*

## I. INTRODUCTION

> The right to strike is a keystone of modern industrial society. No society which lacks that right can be democratic. Any society which seeks to become democratic must secure that right[1]

The question as to whether employees have a fundamental right to strike has been the object of considerable academic debate and is a point on which judicial opinions have continually been expressed. There is no doubt that workers throughout the world are alike in the sense that they desire recognition, satisfaction, fair wages and salaries, job security, redress of wrongs and good working conditions. But often the employer and the union (representing workers) find themselves in sharp disagreement. Such friction or disagreement gives rise to trade disputes and strikes.

The right to strike is a crucial weapon in the armoury of organised labour. The right is a result of several years of struggle by the working class. The history of this struggle is one of constant class battles, fierce reprisals by the management and the authorities against strikers and heroic self-sacrifice by workers. The right to strike has now been accepted as an indispensable component of a democratic society and a fundamental human right.[2]

The strike is an essential tool of trade unions all over the world for the defence

* PhD Candidate, Department of Law, University of Essex, United Kingdom; LL.M. (Ife); LL.B. (Rivers State); Solicitor and Advocate of the Supreme Court of Nigeria, and Senior Lecturer in the Faculty of Law, Rivers State University of Science and Technology, Nigeria. Email: ovcoke@essex.ac.uk. The author is grateful to Chris White of the Flinders University School of Law, Adelaide, Australia, for his responses and discussions on issues in this paper. I would also like to thank the anonymous reviewers for their useful comments on this paper.

1 L. MacFarlane, *The Right to Strike* London, Penguin Books (1981), p. 12.

2 See O. Kahn-Freund and B.A. Hepple, *Laws Against Strikes,* Fabians Research Series (1972), p. 4. See also R. Ben-Israel, *International Labour Standards: The Case of the Freedom to Strike,* Kluwer (1988), pp. 13; V.A. Leary, *The Paradox of Workers Rights as Human Rights*, in L.A. Compa, and S.F Diamond (eds.), *Human Rights, Labour Rights and International Trad*e (1996); J. Gross, (ed.) *Workers' Rights as Human Rights,* Cornell University Press (2003); R .J. Adams, "*Labour Rights as Human Rights: Implications of the International Consensus"*, (1999) <http://www.hartford-hwp.com/archives/26/094.html> Last visited 12 February 2007; B. Barber, "The Future of Trade Unionism"<www.tuc.org.uk> Last visited 10 February 2007.

and promotion of the rights and interests[3] of their members, and is a necessary counter-veiling force to the power of capital. The strike plays the same role in labour negotiations that warfare plays in diplomatic negotiations.[4] Take away the right to strike and workers and their trade unions will be lame ducks. The importance of the right to strike in industrial relations cannot be over-emphasised. In his famous statement in 1942 Lord Wright observed that "where the rights of labour are concerned, the rights of the employers are conditioned by the rights of the men to give or withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining. It is, in other words an essential element not only of the union's bargaining process itself, it is also a necessary sanction for enforcing agreed rules."[5] The right to strike is thus so important to the functioning of a democratic society that its removal would be unjustified.

But how is the right to strike accommodated under Nigerian law? What has been the impact of international labour standards on the nature and status of the right to strike in Nigeria? It is to these questions that this article seeks to reply. We shall examine the labour laws of Nigeria dealing with the right to strike and determine the extent to which it is protected by law. In sum, this article argues that the existence of the vast array of legal constraints to the taking of industrial action in Nigeria render the workers' right to strike nugatory and fictitious. It is further argued that through such behavior, the government of Nigeria infringes workers' right to strike under international law and this does not augur well for the nation's future as a liberal democracy. This article offers some proposals in order to reform strike law in Nigeria. Before going into substantive issues, however, it may be helpful to examine the sources of the right to strike under international law so as to set a framework within which to evaluate the situation in Nigeria.

## A. What is a Strike?

In a wide sense, a strike is a deliberate stoppage of work by workers in order to put pressure on their employer to accede to their demands. There are so many definitions of strike.[6] A number of legal systems define strike by legislation

3 Kahn-Freund refers to these interests as "platitudinous confrontation of expectations and interests". See O. Kahn-Freund, *Labour and the Law* (1977), pp. 48–49.

4 J. G. Getman and F. R. Marshall, *The Continuing Assault on the Right to Strike,* 79(3) Texas Law Review (2000- 2001) 703- 735, at 703–704.

5 *Crofter Hand Woven Harris Tweed Co. v. Veitch* (1942) I ALL E.R. 142 at p. 158–9; (1942) A.C. 435 at p. 463. This statement was echoed by the Constitutional Court of South Africa recently: "[The right to strike] is of both historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system." See *NUMSA v Bader Pop (Pty) Ltd* 2003 (3) SA 513.

6 For example, K.G.J.C. Knowles**,** *Strikes- A Study in Industrial Conflict* (1952), p. 1 defines a strike as "a collective stoppage of work undertaken in order to bring pressure o bear on those who depend on the sale or use of the products of that work. The strike must involve a group of employed workers that, is there must be a definite employer-employee relationship between the

and the definition of a strike has also been developed and elaborated by legal doctrine.[7] Naturally, each definition will reflect the position in one jurisdiction or the other. In *Tram Shipping Corporation V. Greenwich Marine Incorp.*,[8] the indomitable Lord Denning stated that a strike is "a concerted stoppage of work by men, done with a view to improving their wages or conditions of employment, or giving vent to a grievance or making a protest about something or sympathising with other workmen in such endeavour. It is distinct from stoppage brought by an external even such as a bomb scare or by apprehension of danger."[9]

Under Nigerian Law, Section 47 of the Trade Disputes Act[10] states that: "Strike means the cessation of work by a body of persons employed acting in combination, or a concerted refusal or a refusal under a common understanding of any number of persons employed to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any persons or body of persons employed, to accept or not to accept terms of employment and physical conditions of work; and in this definition:- (a) "cessation of work" includes deliberately working at less than usual speed or with less than usual efficiency; and (b) "refusal to continue to work" includes a refusal to work at usual speed or with usual efficiency."

Three elements in the definition of a strike are deemed to be essential. One is the element of concerted action. The second is the stoppage of work. The third is that that the purpose of the cessation must be in connection with a dispute involving the terms of employment and physical conditions of work.

## II. SOURCES OF THE RIGHT TO STRIKE IN INTERNATIONAL LAW

Firm international consensus has evolved on the status of the right to strike as a fundamental human right. There are a number of human rights instruments which acknowledge the right to strike, both at international and regional levels.

### A. The Right to Strike and the International Labour Organization (ILO)

The International Labour Organisation (ILO) is the United Nations Agency responsible for upholding global labour standards. The ILO is undoubtedly the most important source of all international labour law with a long established tradition and rich jurisprudence. It seems surprising, however, that the right to

---

parties involved in the dispute". See also E. T. Hiller, *The Strike: A Study in Collective Action* (1982), p. 12; H. Collins, K.D. Ewing, and A. McColgan, *Labour Law: Text and Materials* (2001); O. Kahn-Freund, *Labour and The Law* (1983), p. 291.

7 See L. Betten, *The Right to Strike in Community Law; The Incorporation of Fundamental Rights in the Legal Order of the European Communities* (1985), pp. 144–147.

8 (1975) ICR 261, at 276. See also *Miles V. Wakefield Metropolitan District Council* (1987)2 ALL E.R 1081, at 1097.

9 *Ibid,* p. 276. See also section 235 the Employment Rights Act 1996, and section 246 of the Trade Unions and Labour Relations (Consolidation) Act 1992.

10 Chapter 432, Laws of the Federation of Nigeria 1990.

strike is not expressly recognised or provided for in any of the numerous International Labour Conventions and Recommendations.

Nevertheless, the absence of explicit provisions does not mean that the ILO disregards the right to strike or refuses to deal with the appropriate means of safeguarding its protection.[11] Significantly, two resolutions of the International Labour Conference which provided guidelines for ILO policy emphasise recognition of the right to strike in member states. The first resolution, "Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation" called for the adoption of "laws … to ensure the effective and unrestricted exercise of trade union rights, including the right to strike by workers."[12] The second resolution, "Resolution Concerning Trade Union Rights and their Relation to Civil Liberties" called for action in a number of ways "with a view to considering further measures to ensure full and universal respect for trade union right in their broadest sense", paying particular attention, *inter alia*, to the right to strike.[13]

There is abundant evidence that the ILO acknowledges the existence of workers' rights to industrial action. This can be seen from the decisions of the ILO Supervisory bodies, especially those of the Committee on the Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The CFA has ruled that strikes are part and parcel of trade union activities.[14] The Committee proclaims the right to strike as one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests.[15] As the CEACR further elucidated:

> these interests not only have to do with obtaining better working conditions and pursing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to workers.[16]

11 The right to strike was mentioned several times in that part of the report describing the history of the problem of freedom of association and outlining the survey of legislation and practice. See ILC, 30th Session, 1947, Report VII, Freedom of Association and Industrial Relations, pp. 30, 31, 34, 46, 52, 73–74.

12 International Labour Office, (1957), p. 783.

13 ILO, 1970, PP. 735–736; See also B. Gernigon, A. Odero, and H. Guido, *ILO Principles Concerning the Right to Strike* 137(4*)* International Labour Review (1996) p. 1; see also J. Hodges-Aeberhard, and O. Odero, *Principles of the Committee on Freedom of Association Concerning Strikes* 126(5) International Labour Review, (1987) 543- 545.

14 ILO Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee Fifth (Revised) edition, Geneva: International Labour Office (2006), para. 521.

15 *Ibid*, para. 522.

16 ILO Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations, Report 111(4B), International Labour Conference 69th Session, Geneva 1983, para. 200.

Furthermore, the ILO Supervisory bodies have always referred to the right to strike when they have considered applications of Articles 3[17] and 8[18] of the Freedom of Association and Protection of the Right to Organise Convention 1948 (No.87) by the various member states. The Supervisory bodies have reaffirmed the principle of the right to strike subject only to the reasonable restrictions that might be imposed by the law.[19] Other pointers to the protection of the right to strike are the ILO guarantees extended to workers against acts of discrimination based on their trade union activities.[20]

These provisions undoubtedly confirm that the ILO recognises the right to strike as a legitimate trade union activity, for without this potent weapon in the armoury of trade organisations, they cannot function effectively.

However, the ILO does not regard the right to strike as an absolute right and has created some exceptions. Outside these exceptions, a general prohibition or restriction of the right to strike is contrary to international labour law. There are three clear exceptions. The first concerns the right of members of the police and armed forces to strike. The ILO accepts that the members of the police and armed forces can be denied the right to strike. They are thus excluded from the ambit of Convention No. 87 from which the right derives. The second exception is that certain employees in the public service may be prohibited or restricted from exercising the right to strike provided this only covers those public servants "exercising authority in the name of the state."[21] The third exception relates to employees in "essential services", which are restrictively defined as services "whose interruption would endanger the life, personal safety or health of the whole or part of the population".[22]

## B. Other International and Regional Instruments

The International Covenant on Economic, Social and Cultural Rights of 1996 is the major international human rights instrument which explicitly recognises the right to strike in Article 8(1) (d) of the Covenant to the effect that "the States parties to the present Covenant undertake to ensure, *inter alia*, the right to strike, provided that it is exercised in conformity with the laws of the particular country." It is worthy of note that Article 2 (1) of the Covenant provides that "each State Party to the present Covenant undertakes to take steps, with a view to achieving

17 Article 3 lays down the right of workers' organisations to organise their activities and to formulate their programmes freely and states that the public authorities shall "refrain from any interference which would restrict this right or impede the lawful exercise thereof."

18 Article 8 provides that the law of the land which organisations and their members must respect, must not "be such as to impede, nor shall it be applied as to impair, the guarantees provided for in this Convention."

19 'ILO Freedom of Association and Collective Bargaining', *supra* note 16, para. 199–223.

20 'Digest 2006', *supra* note 14, para. 524.

21 ILO Freedom of Association and Collective Bargaining: Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 81st Session, 1994, Geneva , Report 111 (Part 4B), p. 68 para.158

22 Digest 2006, *supra* note 14, para. 576.

progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including the adoption of legislative measures."

At the regional level, article 6(4) of the European Social Charter of 1961(revised 1996) expressly recognizes the right to strike in the event of a conflict of interests, subject to the obligations resulting from collective agreements in force. The Community Charter of Fundamental Social Rights of Workers of 1989 provides another explicit source where the importance of the right to strike is clearly acknowledged by the European Union.[23] The right to strike is also affirmed by the European Union of Charter of Fundamental Rights of 2000.[24]

Furthermore, Article 27 of the Inter-American Charter of Social Guarantees of 1948 stipulates that "Workers have the right to strike. The law shall regulate the conditions and exercise of that right." The right to strike is also recognized in article 8(1) (b) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

Another source of the right to strike is to be found in the African [Banjul] Charter of Human and Peoples Rights (ACHPR) which was adopted on June 27, 1981 and which entered into force on October 21, 1986. The ACHPR does not specifically provide for the right to strike or for trade union rights for that matter. However, it submitted that a conjoint reading of Articles 10, 5, and 15 of the Charter provides support and basis for the right to strike. Article 10 provides that "Every individual shall have the right to associate provided he abides by the law", whereas Article 5 states that "every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status … all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." And by Article 15 "Every individual shall have the right to wok under equitable and satisfactory conditions and shall receive equal pay for equal work." These provisions give impetus to trade unions to perform their activities in the protection of the legitimate interests of workers, including the right to strike. It submitted, however, that there is the need for an express provision on the right to strike as applicable in regional instruments like the European Social Charter, for example.

Nevertheless, notwithstanding the absence of direct provision on trade union rights in the African Charter of Human and Peoples' Rights, the Commission has provided detailed guidance on trade union rights in its Guidelines for the Submission of State Reports. Under the Guidelines, States are obliged to provide information on laws, regulations and court decisions that are designated to promote, regulate or safeguard trade union rights, which include the right of trade unions to function freely, collective bargaining and the right to strike.[25]

23 See point 13. This instrument is now referred to in Article 136 of the EC Treaty alongside the European Social Charter, 1961. See T. Novitz, *International and European Protection of the Right to Strike* (2003), p. 333.

24 See Article 28.

25 See Promotion, Protection and Restoration of Human Rights (Guidelines for National Periodic Reports) ACHPR DOC. AFR/COM/HRP.5 (IV) (Oct. 1988), Section 11 (10) – (16), reprinted

This is a demonstration of support for the right to strike.

It is significant to note that Nigeria has ratified and domesticated this Charter into its laws[26] In *Abacha V. Fawehinmi*,[27] the Supreme Court held that since the African Charter has been incorporated into Nigerian Law it enjoys a status higher than a mere international convention, it is part of Nigerian *corpus juris.*

## III. THE RIGHT TO STRIKE IN OTHER JURISDICTIONS

The response of the law to the question of workers' fundamental right to strike seems to vary from one municipal jurisdiction to another. In some jurisdictions, the workers' right to strike for the defence of their interests is enacted positively in the Constitution as a fundamental right or enacted as a guaranteed right in labour legislation, while in other jurisdictions, there is no explicit right to strike guaranteed as such, there are only immunities given to workers for engaging in industrial action. As Novitz puts it:

> Within some states there is a "positive" entitlement or right to take industrial action guaranteed as a constitutional right or as a key feature of labour legislation. Within others, this is phrased as a "negative" liberty such that workers and organizers are immune from what would otherwise be the legal consequences of industrial action.[28]

Against this background we propose to examine the sources of the right to strike in US, UK and other jurisdictions.

### A. United States of America

The right to strike is guaranteed in the United States (US) law. This is provided for under Sections 7 and 13 of the National Labour Relations Act, 1935[29] Section

---

in African Commission on Human and Peoples Rights, Documentation No. 1: Activity Reports (1988–1990), p. 45. See also V.O. Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions* (2001), p. 36. For more discussion, see generally R. Murray and M. Evans, *Documents of the African Commission on Human and Peoples' Rights* (2001), pp. 127–204.

26 See African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Chapter 10, Laws of the Federal Republic of Nigeria 1990.

27 (2000) 6 NWLR (Part 660), 228S.C.

28 Novitz, *supra* note 23, p. 1. See also R. Ben-Israel, *Introduction to Strikes and Lock-outs: A Comparative Perspective*, in R. Blanpain, and R. Ben-Israel (eds), *Strikes and Lock-outs in Industrialized Market Economies, Bulletin of Comparative Labour Relations* (1994) 8–9.

29 Popularly referred to as the "Wagner Act", after its creator Senator Robert Wagner of New York; in his Bill Senator Wagner promised that the Government enforcement of the right to Organise would bestow upon workers "emancipation from economic slavery and … an opportunity to walk the streets freemen in fact as well as in name. See 79 CONG. REC. 6184 (1935) (Address by Senator Wagner), reprinted in 2 *NLRB, Legislative History of the National Labor Relations Act, 1935*, at 2284 (1949). See also *To Create a National Labor Board: Hearings on S. 2926 Before the Comm. On Education and Labor*, 73 Cong. 467–68 (1934) (statement of Guy L. Harrington), reprinted in 1 Legislative History, *supra*, at 501–02 (quoting Senator Wagner's insistence that "all [the bill] does is to make the worker a free man"); J. G. Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103(3) Michigan Law Review (2004) 519–553, at 524.

7 of the Act provides that employees shall have the right to self-organization, to form, join or assist labour organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 7 of the Act clearly affirms the right of workers to go on strike in the US. The right is further secured and assured by section 13 which states:

> Right to strike preserved – Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications in that right.[30]

In *UAW v. O'Brien,*[31] the Supreme Court construed this language as "expressly recognising the right to strike." Section 13 has been inserted to ensure that the right to strike would not be suppressed as a means of obtaining industrial peace. The right to strike is legally protected so that it can provide workers with a source of bargaining power.[32]

The constitutionality of the law rested on the premise that employer interference with the right of workers to organize themselves into Trade Unions and the refusal of employers to bargain collectively led to labour disputes which in turn interfered with inter-state commerce.[33]

Indeed, the recognition of the right to strike in the USA is acclaimed to have helped the system of labour relations. This is because prior to the passage of the NLRA in the US, long and sometimes violent strikes were the rule rather than the exception. There were massive boycotts and city-wide shut-downs and picketing. The NLRA changed all that because it provided a legitimate forum for the orderly settlement of labour/management difficulties.[34]

### B. Italy

The right to strike is clearly recognised as a constitutional right in the Italian Constitution. Section 40 of the Constitution provides that: "The right to strike may be exercised within the limits of the law which regulates it."

The Constitution gives very wide powers to workers to embark on industrial action. However, case law is of crucial importance in delineating the limits of legit-

30 See National Labour Relations Act< Http://www.nlrb.gov/nlrb/Legal/manuals/rules/act.asp> Last visited 12 February 2007; see also section 13, subsection 163 of title 29 Chapter 7 sub-chapter 11, United States Code.

31 329 U.S. 454, 457 (1950)

32 Pope, *supra* note 30, p. 525. See also G. Anderson, *Strikes and Lock-outs,* in R. Blanpain and R. Ben-Israel (eds), *supra* note 29, p. 126; J. Mccammon, *Legal Limits on Labor Militancy: U.S. Labor Law and the Right to Strike since the New Deal,* 37(2) Social Problems (1990) 206–229.

33 See "The First Sixty Years: The Story of the National Labour Relations Board 1935 – 1995" at< http://www.nlrb.gov/nlrb/shared-files/brochures/60yrs> Last visited 14 February 2007.

34 J. J. Sweeney, *A Need to Amend the NLRA?* L11. (6) Fordham Law Review (1984), p. 1143. Other sources of the right to strike in the United States include the Railway Labor Act of 1926 (RLA), the Norris-LaGuardia Act of 1932 and the Labor Management Relations Act of 1947 (LMRA or Taft-Hartley Act).

imate industrial action, particularly that of the Constitutional Court. The "limits" identified by case law have traditionally been divided into "external" limits, i.e. those deriving from the presence of other constitutionally recognised rights, and "internal" limits, i.e. those inherent in the intrinsic structure and very notion of a strike.[35] It is significant to note also that Italy recognises workers' entitlement to 'protest strikes' on matters concerning economic and social policy.[36]

## C. United Kingdom

The UK does not have a constitution and there is no positive right to participate in industrial action in the UK. However, the law does provide certain immunities from liability at common law for the civil wrong of "torts" most frequently committed in the course of taking industrial action. The availability of these immunities is subject to a number of restrictions and mandatory rules, which are contained in the Trade Unions and Labour Relations ( Consolidation ) Act 1992 (TULRCA).

To be protected, the industrial action must be "in contemplation or furtherance of a trade dispute." Even if such a trade dispute exists the union will lose its statutory immunity unless the industrial action has been properly instigated in accordance with the procedures laid down in TULRCA and the Code of Practice on Industrial Action and Ballot and Notice to Employers 2000.

The fact remains, however, that there is no positive right to strike in the United Kingdom. Honeyball and Bowers, for example note that, "it is virtually impossible in modern Britain to take industrial action which is lawful. … The consequences of this are naturally serious. To take part in industrial action may mean the worker can be dismissed or lose pay and lack qualification for job seeker's allowance or other benefits. This is so even if the employer is totally to blame for the breakdown in relations that leads to the action".[37] Indeed most labour law scholars[38] agree that in UK law there is no positive right to strike and that a change was desirable. Sheldon Leader's conclusion is apposite:

> Consequently, those who feel that changes in legislation or developments in common law unduly restrict their ability to strike can only

35 See *The Right to Strike in Italy* <http://www.eurofound.eu.int/emire/ITALY/REGULATIONOFTHERIGHTTOSTRIKE-IT.html>Last visited 13 December 2006. See also T. Treu, *Italy,* in R. Blanpain (ed.) *International Encyclopaedia for Labour Law and Industrial Relations* (2004), para. 479–488.

36 *Ibid.* See also S. Clauwerts, *Fundamental Social Rights in the European Union: Comparative Tables and Documents* (1988); Novitz, *supra* note 24, p. 275.

37 S. Honeyball, and J. Bowers, *Textbook on Labour Law*, 8th edition (2004), p. 388.

38 See for example, J. McMullen, *Rights at Work* (1978), p. 286. See also B. Heppel, and S. Freedman, *Labour Law and Industrial Relations in Great Britain* (1992), pp. 474–475; K.W. Wedderburn, *The Worker and the Law* (1986), p. 245; S. Leader, *Freedom of Association: A Study in Labour Law and Political Theory* (1992), p. 182; S. Anderman, *Labour Law: Management Decisions and Workers Rights* (2000); K.D. Ewing, *The Right to Strike* (1991); H. Collins, K.D. Ewing, and A. McColgan, *Labour Law: Text and Materials* (2001), p. 885.

> fall back on the various international treaties and conventions to which the United Kingdom is a party.[39]

The point surely cannot have been better expressed. However, it must be noted that not all such treaties and conventions protect the right to strike. One outstanding Convention which has been held not to protect the right to strike is the European Convention on Human Rights (ECHR). The argument that freedom of association as guaranteed by Article 11 of the ECHR must include the right to strike was rejected in *Schmidt and Dahlstrom v. Sweden*.[40] In that case, the applicants who were members of a striking union were subsequently denied certain benefits on account of the strike. They argued that the policy of denying benefits to the members of striking unions violated their right to freedom of association as provided by Article 11. But the European Court of Human Rights held that while Article 11 specifically mentions the right to join trade unions as a species of the more general right of association, this does not imply that it necessarily includes the right to strike. As the Court further elucidated:

> The Article does not secure any particular treatment of trade union members by the State …. [It] leaves each State a free choice of the means to be used towards this end. The grant of a right to strike represents without any doubt one of the most important of these means, but there are others. Such a right, which is not expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain instances.[41]

The UK therefore may wish to rely on other treaties and conventions such as the ICESCR and the ESC which explicitly recognises the right to strike to make the necessary changes to provide for a positive right to strike.

## D. South Africa

The Constitution of South Africa, Act 108 of 1996 was adopted on 10 May 1996 and came into effect on 4 February 1997. The right to strike is entrenched in section 23(c) of the Constitution which provides that "every worker has the right … to strike."

The Constitution places no restrictions on the right to strike. Limitations, however, are provided in the Labour Relations Act 1995 (LRA) as to procedure,[42] subject-matter of the issue in dispute,[43] and persons entitled to exercise the right.[44] In *NUMSA & Others v. Bader Bop (Pty) Ltd & Others*[45] the South African Court said, "the right to strike is essential to the process of collective bargaining.

39 Leader, *supra* note 38, p. 182.
40 (1980) 1 EHRR 637.
41 *Ibid,* paras. 34- 45. For more discussion, see generally Leader, *supra* note 38.
42 Section 64.
43 Section 65 (1) (C).
44 Section 65 (1) (a) ( b) and (d).
45 (2003 ) 24 ILJ ( CC ) 305 at 367.

It is what makes collective bargaining work. It is to the process of collective bargaining what an engine is to a motor vehicle."[46] There is no doubt therefore that the South African legal system clearly recognises the right to strike.[47]

## E. Kenya

The right to strike is also recognised in Kenya. The Trade Disputes Act 2003 confers the right to strike which it interprets as "the cessation of work by a body of persons employed in any trade or industry acting in combination … including any action commonly known as a sit down strike or a go slow.[48]

However, a lawful strike takes place only when the procedure laid down in the Trade Disputes Act is exhausted. This procedure goes through the reporting, the decision of the Minister, conciliation, investigation, the Board of Inquiry, and the Industrial Court procedure.[49]

In the case of strikes in the public sector, the Minister may take such appropriate action that would effect settlement of disputes in line with the specific set regulation. He or she may also order the parties to adhere to their agreements or any court award.[50] Workers in essential services are also denied the right to strike in Kenya. The list of essential services is very broad and does not conform to ILO standards.[51] Finally, the Trade Disputes Act provide for the reinstatement of dismissed workers who exercise the right to strike.[52]

## F. Ghana

The right to strike is recognised under the Ghanaian Labour Act of 2003. The parties to a trade dispute are first encouraged to negotiate in good faith to settle the dispute using their own agreed procedures. The National Labour Commission can also intervene in disputes and seek settlement by mediation and thereafter by arbitration.[53] However, where a trade dispute remains unsettled at the end of arbitration, either party may give seven days notice of intention to strike or lockout.[54]

Section 160 of the Labour Act which contains the substantive provision on right to strike provides that a worker can go on strike subject to the giving of seven day's notice which must expire before the strike action is embarked upon. The right to strike is, however, absolutely prohibited in essential service which

46 *ibid,* p. 367, *per* Ngcobo J.
47 For more discussion, see generally L. Madhuku, *The Right to Strike in Southern Africa* 136(4) International Labour Review (1997) 509–530; see also J. F. Myburgh, *100 Years of Strike Law* 25 Industrial Law Journal (SA*)* (2003) 962–976.
48 Trade Disputes Act 2003 (Kenya).
49 *Ibid,* section 27.
50 *Ibid,* section 5–21.
51 *Ibid*, sections 36 and 43.
52 *Ibid*, section 15.
53 Labour Act 2003 (Ghana), section 153.
54 *Ibid*, section 159.

is defined strictly in line with the ILO standards.[55] Furthermore, Ghanaian law protects against dismissal and hiring of replacement labour during a lawful strike.[56]

### G. Other African Countries

It must be noted also that so many other African countries such as Malawi[57], Namibia,[58] Zambia,[59] Swaziland,[60] Lesotho,[61] Tanzania[62] and Mauritius[63] also clearly recognise the right to strike in their respective constitutions.

What emerges without any doubt is that the obligation to ensure the right to strike is taken seriously by many Western and Third World countries. It would appear that most constitutions have provisions respecting the right of workers to industrial action. As David Ziskind noted "The extent to which constitutions have determined or affected labour legislation differs from country to country, and more particularly in different historic periods or stages of industrial development, but concern for constitutional labour law is ubiquitous. … despite differences in modes of expression, there is a common declaration of goal – the universality of labour law principles in the constitutions of the world."[64]

## IV. LEGAL SOURCES OF THE RIGHT TO STRIKE IN NIGERIA

Do Nigerian workers have a guaranteed fundamental right to strike? There is no guaranteed positive constitutional or statutory right to strike in Nigeria as there is in the French, South African, Italian and other national constitutions where this right is clearly and explicitly provided for in the Constitution or in a labour statute.

The right to strike in Nigeria, as in the UK, stems from the immunities granted to workers and trade unions against civil and criminal liabilities for engaging in industrial action. Although there was no express provision on the matter, before 1968 the British-flavoured amalgam of common law and legislation which immune's trade unions and workers from criminal and civil liabilities attendant upon strike actions had become part of our legal system[65] These immunities are

55 *Ibid*, section 175.
56 *Ibid*, section 170.
57 Constitution of Malawi 1990, Article 21(1).
58 Constitution of Namibia 1994, Section 31(4).
59 Industrial and Labour Relations Act 1993, section 78 (1) (b).
60 Industrial Relations Act 1995, section 61 (3) (c).
61 Labour Code 1992, sections 229 and 230.
62 Employment and Labour Relations Act 2004, section 75.
63 Industrial Relations Act 2003, sections 2 and 92.
64 D. Ziskind, *Concerning Human Aspiration: Essays in Comparative Labour Law* (1985), pp. 138, 145.
65 The year 1968 marked the beginning of legislations affecting the right to strike in Nigeria with the promulgation of the Trade Disputes Emergency Provisions Act of 1968 banning the right to strike during the war in order to sustain the war efforts. Although there was no express provision on the matter, before 1968 the British-flavoured amalgam of common law and legislation

now contained in sections 23[66] and 43[67] of the Trade Unions Act and section 518A of the Criminal Code.[68]

Other sources of the right to strike can also be referred to. For example, a conjoint reading of section 4(1) and paragraph of the first schedule of the Trade Unions Act impliedly recognises the right to strike in Nigeria. First, section 4(1) of the Act provides that every trade union must have registered rules which must contain provisions with respect to matters mentioned in the first schedule of the Act. And paragraph 14 of the first schedule provides that the Rules Book of trade unions must contain a provision that no member of a trade union shall take part in a strike unless a majority of the members has in a secret ballot voted in favour of the strike. One wonders what this rule would be doing in the Rules Book of trade unions if workers have no right to strike!

Furthermore, although the Trade Disputes Act does not specifically refer to a right to strike, a couple of its provisions acknowledge the existence of the right to strike. The Act defines the meaning of strike in Nigeria and also contains provisions dealing with the procedures for strike action.[69] The same goes for provisions of the Trade Union (Amendment) Act which prohibits employees or any other person to "take part in a strike or engage in any conduct in furtherance or contemplation of a strike …"[70]

The same conclusion can be drawn in respect of the Banks and other Financial Institutions Act which specifically recognised the right of bank workers to go on strike but it protected the banks from incurring liability by reason of their inability to open to customers due to strike action by their employers. Section 42 of the Act provides that "no bank shall incur any liability to any of its customers by reason only of failure on the part of the bank to open for business during a strike." Mention can also be made of Section 42(1) of the Trade Unions Act which provides for peaceful picketing. In the recent case of *Union Bank of Nigeria Plc V. Edet*[71] Uwaifo, JCA, declared that:

---

which immune's trade unions and workers from criminal and civil liabilities attendant upon strike actions had become part of our legal system. See A.A. Adeogun, *From Contract to Status in Quest for Security,* University of Lagos Press (1986), p. 4.

66 Section 23 provides that "an action against a trade union (whether of workers or employers) in respect of any tortuous act alleged to have been committed by or on behalf of the trade union in contemplation of or in furtherance An action of a trade dispute shall not be entertained by any court in Nigeria.

67 Section 43(1) of the Trade Unions Act provides that "an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on anyone or more of the following grounds only, (a) That it induces some other person to break a contract of employment; or (b) That it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or his labour as he wishes; or (c) That it consists in his threatening that a contract of employment (whether one to which he is a party or not) will be broken; or(d) That it consists in his threatening that he will induce some other person to break a contract of employment to which that other person is a party.

68 Chapter 77, Laws of the Federation of Nigeria 1990.

69 See sections 17, 42 and 47 of the Trade Disputes Act, Chapter 432 of the Laws of Federation of Nigeria 1990.

70 Section 6 of the Trade Union (Amendment) Act 2005.

71 (1993) 4 N.W.L.R (pt 287), 288 at 291 C.A.

> The failure to act in strict compliance with collective labour agreement is not justiciable. Its enforcement lies in negotiations between the union and the employer, and ultimately, in strike action should the need arise and it be appropriate.[72]

This seems to be a judicial recognition of the right to strike. These provisions clearly preclude the employer from taking legal action for damages or an injunction against those individuals or trade unions that commit the tort or crime and therefore contemplates a right to strike. That the right to strike exists in Nigeria is beyond doubt. Evidence shows that Nigerian trade unions have made ample use of the right to strike at several points in time. For example, between 1949 and 1950, there were 46 strikes affecting 50,000 workers including the tragic Enugu Coal-Miners strike which led to about 23 deaths.[73] The question, however, of whether this protection of the right to strike is adequate or not is a different matter altogether.

Nevertheless, there is clearly no fundamental right to strike in Nigeria. As we have seen, the liberty of industrial action in Nigeria, as in the UK, is subject to what is popularly known as the "golden formula"- acts done in contemplation or furtherance of a trade dispute. This is different from the position in other jurisdictions where the fundamental right to strike is positively and expressly provided for in the constitution or in a labour statute.

It is submitted that the mere fact that the Trade Unions Act gives immunity to both workers and unions for acts performed in contemplation or furtherance of a trade dispute does not *ipso facto* guarantee a right to strike by workers in Nigeria. It simply allows them some form of limited privilege to take industrial action, and does not imply in any way a right. A "right" presupposes something more fundamental than mere privilege. Right is a just claim or title to something. Right signifies a claim guaranteed by the law of a particular country, defined by that law and protected by it.[74] Where there is a just claim or title to do something, the law is usually not restrictive but protective.

Essentially, therefore, the right to strike refers to a situation where the worker has a just claim to strike that is fully recognised by law. What this means is that neither case law nor the contract of employment can legitimately deny the worker this right. As Pitt further elucidates:

> It is important to distinguish between a liberty to take strike action, and a right to do so. If you have a right to do something, not only are you legally able to do it, but others are under a duty not to interfere with your action. If you have only a liberty to do something, then all it means is that you are not under a duty to refrain from such action. It does not mean that other people are necessarily wrong in attempting

72 *Ibid.*

73 See A. Emiola, *Nigerian Labour Law* (1982), p. 152. See also C. K. Agomo, *Federal Republic of Nigeria,* in R. Blanpain, (ed.) *International Encyclopaedia for Labour Law and Industrial Relations* (2000), para. 265.

74 See *The Right to Strike* (1979), p. 7.

> to stop you: they have no duty to let you behave in this way. Thus a liberty is more precarious than a right would be.[75]

There can be little doubt therefore that the Nigerian worker does not possess the fundamental "right to strike." Although he is free to strike, the law only protects him or his trade union against action in certain torts. This means that any person affected by a strike is free to take legal action against the striker in contract or in tort not protected by trade union legislation. The striker may also be pursued under the law of crime if he has done something that warrants criminal prosecution.[76]

## V. LIMITATIONS AND RESTRICTIONS OF THE RIGHT TO STRIKE

Limitations and restrictions on the right to strike in Nigeria are of two kinds, conditional or general prohibitions and absolute prohibitions. This is the general trend in most African countries.[77] From 1968 the legal status of strikes in Nigeria received serious statutory attention. There are now severe limitations and restrictions on the right to strike under Nigerian law.

### A. General Prohibition of the Right to Strike

While upholding the principle of the right to strike, the ILO has agreed that it is permissible for certain temporary restrictions to be placed upon its exercise. Such restrictions may consist in a requirement of prior notification to the authorities or the exhaustion of the existing procedures for negotiation, conciliation and arbitration before a strike may be called.[78]

In 1968, and for the first time in Nigeria's labour relations history, the government made a conscious attempt to curb the hitherto presumed right to strike. The government placed an outright ban on strikes by promulgating the Trade Disputes (Emergency Provisions) Act.[79] The following year, the government reinforced the earlier Act by promulgating the Trade Disputes (Emergency Provisions) (Amendment No.2) Act, 1969[80] as a result of the unbridled wave of strikes after the first Act. These laws were enacted in the wake of the Nigerian civil war (1967–1970)

75 G. Pitt, *Employment Law* (2004), p. 329.

76 O'Higgins has expressed a similar view. See P. O'Higgins, *The Right to Strike-Some International Reflections,* in J.R. Carby-Hall, (ed.) *Studies in Labour Law* (1976), p. 112. For more discussion, see generally K.D. Ewing, *The Right to Strike*, 15 Industrial Law Journal (1986), pp. 144–160; P. Hoefer-van Dongen, *The Right to Strike within the Framework of the ILO*, 24 Netherlands International Law Review (1977), pp. 109–119; J. A. Spector, *Replacement and Reinstatement of Strikers in the United States, Great Britain, and Canada*, 13(184) Comparative Labour Law Journal, pp. 185–232; K. Block, *The Legal Status of Strikes in U.S.S.R.*, 12(133) Comparative Labor Law Journal (1991) 133–150.

77 See B. O. Nwabueze, *Presidentialism in Commonwealth Africa* (1974), p. 37.

78 Digest 2006, *supra* note 14, para 549.

79 Act No. 21 of 1968. This was during the Nigerian Civil War. It was done apparently to sustain production of goods and services and to ensure industrial peace to reinforce the war effort.

80 Act No. 53 of 1969.

and were thought to be justified – apparently to sustain production of goods and services and to ensure industrial peace to reinforce the war effort.

However, what was thought to be a temporary wartime measure seems to have been entrenched in the law by virtue of the Trade Disputes Act.[81] The Act has severely circumscribed the workers right to strike and introduced both voluntary and compulsory settlement of disputes. Before workers can go on strike in Nigeria, they are required to have fully exhausted the elaborate statutory procedure for settlement of trade disputes. If the attempt to settle the dispute by the internal grievance machinery fails, the parties are expected to resort to mediation by coming together under a mediator mutually agreed upon by them.[82] If there is failure to reach an agreement, the matter is reported to the Minister of Employment, Labour and Productivity, who appoints a conciliator, and when conciliation fails, the Minister is required to refer the matter within 14 days to the Industrial Arbitration Panel. Where the award of the Industrial Arbitration Panel is objected to, the Minister must refer the dispute to the National Industrial Court, whose award shall be final and binding on the parties to whom it relates.[83]

To give force to these provisions, Section 17 (1) of the Trade Disputes Act further prevents workers from going on strike and employers from imposing a lock-out while negotiations or arbitral proceedings are in progress; neither can any industrial action be taken or initiated after the tribunal[84] might have finally determined the issue to be in controversy. It is an offence to do otherwise.[85] Nigerian workers cannot therefore go on a legal strike unless these conditions stipulated by law are first adhered to. However, lawful industrial actions are difficult to obtain in Nigeria under these regulations.

Indeed, section 17 of the Trade Disputes Act has elicited an avalanche of arguments on whether Nigerian employees retain a right to proceed with a strike. Most labour law writers contend that workers in Nigeria have lost the right to strike.[86] Emiola, for example, argues that the legal position is that at no point and

81 Trade Disputes Act, *supra* note 71

82 *Ibid*, section 3(2).

83 *Ibid*, sections 5, 7, 8, and 13.

84 This refers to the Industrial Arbitration Panel and the National Industrial Court.

85 Any person who contravenes this provision is liable to a fine of ₦100 or to imprisonment for six months. In the case of a body corporate, a fine of ₦1, 000 is prescribed. The provisions of section 17 of the Trade Disputes Act are reinforced by section 7 of the Trade Union (Amendment) Act 2005 whose provision is on all fours with section 17.

86 Adeogun, *supra* note 67, p. 43. See also C. K. Agomuo and E. E. Uvieghara ,*The Future of Law and Labour Relations in Nigeria*, a paper presented by the Faculty of Law, University of Lagos at the 34th Annual Conference of the Nigerian Association of Law Teachers (1998), p. 31 where it was stated that "considering the totality of the provisions of the Trade Unions Acts 1973–1996, Trade Disputes Act, 1976 and the Trade Disputes ( Essential Services ) Act 1976 as well as the common law positions as it applies to Nigeria, one can safely conclude that the right to strike has been rendered nugatory and fictitious"; S. Erugo, *Exploding the Myth of Strike-A Review of the 'no strike clause' of Decree No 26 of 1996*, 7 Abia State University Law Journal (1996), p. 59 where the author concluded that "perhaps the so called right or freedom to strike like the right to work is a controversial political right yet to be sanctioned by the state" ; J. A. M. Audi, *Strikes and the Law in Nigeria*, 9–10 Ahmadu Bello University Law Journal (1991–1992), p. 84; N. Nwebo, *The Proprietary Right to Strike,* in I.O. Agbede, and E. O. Akanki, *Current Themes in Law* (1997), pp. 329.

under no circumstances can workers or employers employ strikes or lock-outs as weapon of coercion against the opponent. The result according to him is that "the Nigerian worker has therefore apparently lost forever-at least until amended the right to strike"[87] Adeogun has similarly suggested that section 17 has in effect placed an outright ban on strikes in Nigeria.[88] Uvieghara[89] and Agomuo[90] also lean in favour of this interpretation.

Did the legislature intend to put a complete ban on strikes? It is submitted with due respect that it is wrong to assume that the section 17 of the Trade Disputes Act[91] out rightly outlaws strikes in Nigeria. What the Act has done is to cripple the right to strike. The Act attempted merely to sustain the integrity of formal collective bargaining or conciliation and arbitration arrangements by proscribing illegal strike action, that is strikes during the currency of conciliation, arbitration and reference of disputes to the National Industrial Court.[92]

Furthermore, a critical look at the marginal notes to section 17 demonstrates that it is not the intention of the legislature to place a total ban on strikes. The marginal note to section 17 reads: "Prohibition of lock-outs and strike before issue of award of National Industrial Court." There is no doubt that marginal notes do not form part of the law of a statute, but one must be persuaded by the view of Kayode Eso, JSC in *Olowo v. Alegbe*[93] where his Lordship observed as follows:

> Though in modern times marginal notes do not generally afford legitimate aid to the construction of a statute, at least it is permissible to consider the general purpose of a section … with the marginal notes in mind.[94]

Bearing in mind therefore that the marginal notes to section 17 does not suggest a general prohibition of strikes; it is plain that the section only prohibits strikes occurring during the existence of conciliation and arbitral proceedings as listed in section 17(1).

However, if what was intended to be achieved by section 17 is an absolute ban on strikes, it is submitted that the section needs to be amended accordingly. By virtue of section 17, workers cannot go on strike unless they observe the dispute settlement procedures highlighted above. If, at the end of the processes, workers are dissatisfied with the award of the National Industrial Court, then by virtue

87 A. Emiola, *Nigerian Labour Law* (1982), p. 225.
88 Adeogun, *supra* note 67, p. 43.
89 E. E. Uvieghara, *Labour Law in Nigeria* (2001), p. 446.
90 C. K. Agomuo, Federal Republic of Nigeria, in R. Blanpain (ed.), *International Encyclopaedia of Labour Law and Industrial Relations* (2000), para. 270.
91 As earlier stated, the provision of section 17 is on all fours with section 6(d) of the Trade Union (Amendment) Act 2005.
92 Omokaye shares this view. See O. Omokaye, *The Legal Implications of Strikes in Nigeria*, 2(7) Justice Journal (1991), p. 35.
93 (1983 ) 2 S.C.N.L.R. 35.
94 *ibid* at p. 57.

of section 17(3)[95] they must go through the whole process of dispute settlement again as any disagreement constitutes a new dispute. And if settlement fails again, the dispute presumably goes for another round of settlement and so on. This is a sort of merry go round and a vicious circle of compulsory arbitration from which the workers cannot escape, as any possibility of strike action is pre-empted. This seems to make the right to strike to be only a theoretical possibility. In practical terms, it is difficult to see how trade unions could get could sidestep the ingenious and well calculated obstacles placed in their way before embarking on strike actions. Consequently, it may be right to conclude that strikes are banned by the Trade Disputes Act. Ben-Israel has expressed a similar view:

> A general prohibition of strikes can be attained indirectly, as a result of the settlement of labour disputes by means of compulsory conciliation and arbitration procedures, the final award of which is binding upon the parties concerned. By such procedures it is possible in practice to put a stop to any strike.[96]

This shrewd system of offering something in theory and restricting its realization is not limited to Nigeria. M'Baye and Ndiaye note the same with respect to other African countries:

> The right to strike is generally recognised, but is regulated in such a way that it scarcely exists, given that in most countries the exercise of that right is subject to government authorities not adopting a solution of conciliation in regard to collective disputes.[97]

As Nwabueze noted of Commonwealth Africa:

> Many governments had passed legislation to regulate strikes, either prohibiting them or subjecting them to rather stringent conditions.[98]

ILO law condemns any sort of provision which, rather than simply creating reasonable conditions which are to be fulfilled before a strike can be called, make it virtually impossible to hold a legal strike. The ILO has stressed that the imposition of compulsory arbitration is only acceptable in cases of strike in essential services in the strict sense of the term, or in cases of acute national emergency … a system of compulsory arbitration can result in considerable restriction of the right of workers' organizations to organise their activities and may even

95 Section 17(3) provides thus "It is hereby declared that where a dispute is settled under the foregoing provisions of this Act either by agreement or by the acceptance of an award made by an arbitration tribunal under section 12 of this Act, that dispute shall be deemed for the purpose of this Act to have ended; and accordingly, any further trade dispute involving the same matters (including a trade dispute as to the interpretation of an award made as aforesaid by which the original dispute was settled ) shall be treated for the purposes of this section as a different trade dispute".

96 R. Ben-Israel, *International Labour Standards: The Case of the Freedom to Strike* (1988), p. 98.

97 K. M'Baye and B. Ndiaye, *The Organization of African Unity (OAU)*, in Karel Vasak and Philip Alston (eds), *The International Dimensions of Human Rights* (1982), p. 598.

98 B. O. Nwabueze, *supra* note 77, p. 37.

involve an absolute prohibition of strikes, contrary to the principles of freedom of association.[99]

## B. Absolute Prohibition of the exercise of the Right to Strike

The ILO has accepted that in specified cases legislation can prohibit recourse to strike action on a permanent basis. The ILO, for example, allows national laws or regulations to determine the extent to which the armed forces and the police are to be covered by the guarantees provided in Convention No. 87.[100] The ILO has, therefore, refused to object to legislation banning strikes by such personnel.[101] We shall now examine the various prohibitions on the right to strike in Nigeria under this section of the article.

### *1. The Right to Strike and Public Servants*

Some workers are specifically denied the right to strike. The ILO Committee on Freedom of Association has stated that though public servants have the right to organise, this does not ipso facto imply that they have the right to strike guaranteed to them.[102]

However, not all public servants are prohibited from industrial action. It is those who actually act in the name of the state that are affected by the prohibition of the right to strike. These are those civil servants employed in various capacities in government ministries and other comparable bodies supporting government activities. All others should have their right to strike guaranteed to them.[103]

In order to cater for the civil servants who are unable to exercise the right to strike, the ILO Committee on Freedom of Association has prescribed that such public servants should be afforded adequate compensatory guarantees to protect their occupational interests. This, according to the Committee, should be a speedy and impartial conciliation and arbitration.[104]

However, there is a complete prohibition of the right to strike by public servants in Nigeria. Their disqualification stems from their categorisation as employees in essential services.[105] It is submitted that Nigerian law is in breach of international standards. This is because the ILO, as we have stated above, does not support the idea of placing a complete ban on the right to strike by all public servants and besides, to categorise all public sector institutions and agencies as

99 Digest 2006, *supra* note 16, para. 568. See also ILO Committee on Freedom of Association, 226th Report, Case No. 1140 (Colombia) Para. 293; 236th Report Case No. 1140 (Colombia), para 145.

100 See Article 9(1).

101 ILO Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee 3rd edition (Geneva: International Labour Office, 1985), para. 221.

102 Ibid, para 365. See also ILO Committee on Freedom of Association, 6th Report, Case No. 55 (Greece), para. 919; 127th Report, Case No. 660 (Mauritania), para. 303.

103 Freedom of Association and Collective Bargaining, International Labour Conference 69th Session ( Geneva 1983), para 255.

104 Digest 2006, *supra* note 14, para. 596.

105 Section 9(1) Trade Disputes (Essential Services) Act, Chapter 433, Laws of the Federation of Nigeria 1990

essential services is far-fetched and impracticable, because there are a number of public institutions whose services are no more essential than those of the private sector.

*2. The Right to Strike and Export Processing Zones (EPZs)*

An export processing zone could be defined as "a clearly demarcated industrial zone which constitutes a free trade enclave outside a country's normal customs and trading system where foreign enterprises produce principally for export and benefit from certain tax and financial incentives".[106]

From the beginning this seductive idea had a major drawback. It requires the sealing off of the zone or of designated factories, often behind high fences, to prevent untaxed goods being smuggled into the rest of the economy. As the EPZ concept spread around the world, governments found that they had to add further incentives to attract footloose investors to their enclave; subsidised factory buildings, telecommunication links, energy supplies and most worrying of all, guarantees that the labour force would stay cheap and uncomplaining.[107]

In Nigeria, workers' employed in the Export Processing Zones are absolutely denied the right to form unions, bargain collectively and exercise the right to strike. In addition, the EPZ Authority is given the mandate to handle the resolution of all disputes between employers and employees arising from the workplace and contract of employment, instead of workers' organizations or unions.[108]

It is submitted that the absolute prohibition of the right to strike in Export Processing Zones in Nigeria is incompatible with international labour standards which demands that no restrictions should be placed on the workers in the way of organizing their activities to protect their interests in the workplace. The ILO Convention No. 87 guarantees that all workers, without distinction whatsoever, shall have the right to establish organizations of their own choosing and that such organizations shall have the right to organize their activities and to formulate their programmes,[109] including the right to strike. In Mauritius, for example, there is no such restriction in their EPZs. There are nearly 300 active trade unions in the EPZs of Mauritius representing 22 per cent of workers.[110]

*3. The Right to Strike and Essential Services*

It is common to find absolute restrictions on the right to industrial action when it comes to the issue of essential services. The concept of the "essential service"

106 International Confederation of Free Trade Unions <http://www.itcilo.it/english/actrav/telearn/global/ilo/frame/epzicftu.htm> Last visited 12 January 2007.

107 *Ibid.*

108 See section 4 (e) of the Nigeria Export Processing Zones Act 1992 published as Federal Republic of Nigeria Official Gazette No. 67 Vol. 79, 21st December 1992.

109 See Articles 2 and 3 of the Freedom of Association and Protection of the Right to Organize Convention, No. 87 of 1948. See also Freedom of Association and Collective Bargaining (Report 111, Part 4B, 1994), para. 169.

110 See International Confederation of Free Trade Unions: Anti-union repression in the export processing zones<http://www.itcilo.it/english/actrav/telearn/global/ilo/frame/epzicftu.htm> 23 January 2007.

expresses the idea that certain activities are of fundamental importance to the community, and that their disruption will have particularly harmful consequences.[111]

The Freedom of Association Committee of the ILO defined essential services as those whose interruption may cause public hardship[112] or serious hardship to the community.[113] The definition was later revised to read:

> Essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population.[114]

Nigerian law prohibits workers in essential services from going on strike[115] and adopts the definition of essential service under the Trade Disputes Act.[116] According to Section 9(1) of the Act "*essential service"* signifies – (a) the public service of the Federation or of a State which shall for the purposes of this Act include service, in a civil capacity, of persons employed in the armed forces of the Federation or any part thereof and also, of persons employed in an industry or undertaking(corporate or unincorporated) which deals or is connected with the manufacture or production of materials for use in the armed forces of the Federation or any part thereof; (b) any service established, provided or maintained by the Government of the Federation or of a State, by a local government council or any municipal or statutory, or by private enterprise – (i) for, or in connection with, the supply of electricity, power or water, or fuel of any kind, (ii) for, or in connection with, sound broadcasting or postal, telegraphic, cable, wireless or telephonic communications, (iii) for maintaining ports, harbours, docks or aerodromes, or for, or in connection with, transportation of persons, goods or livestock by road, rail sea, river or air, (iv) for, or in connection with, the burial of the dead, hospitals , the treatment of the sick, the prevention of disease, or any of the following public health matters, namely, sanitation, road-cleansing and the disposal of night-soil and rubbish, (v) for dealing with outbreaks of fire; (c) Service in any capacity in any of the following organisations – (i) the Central Bank of Nigeria, (ii) the Nigeria Security Printing and Minting Company Limited, (iii) any corporate body licensed to carry on banking business under the Banking Act. Furthermore, the Teaching (Essential Services) Decree 1993[117] which came into existence sequel to the trade dispute between the Academic Staff Union of

111 G.S. Morris, "*The Regulation of Industrial Action in Essential Services*" 12 Industrial Law Journal (1983)69; See also G.S. Morris, *Strikes in Essential Services* (1986), p. 7.

112 Official Bulletin Vol XL1V No. 3, 54th Report, Case No. 179 (1961), para 55.

113 1985 Digest 1985, *supra* note 101, para 393.

114 Freedom of Association and Collective Bargaining: 1994 Report Part 4B para 159; See also B. Gernigon, A. Odero, and H. Gudo, *ILO Principles Concerning the Right to Strike* 137(4) International Labour Review (1998) 437–481, p. 443.

115 See section 6 (a) of the Trade Union (Amendment) Act 2005

116 Trade Disputes Act, *supra* note 10.

117 No. 30 1993.

Nigerian Universities (ASUU) and the federal government added teaching to the list of essential services.[118]

As can be seen, the list of essential services comprises a whole gamut of services that could legitimately come under the law. Indeed, it seems correct to suggest that any service, irrespective of the sector or industry can be deemed "essential" depending on how the service came to be rendered. For example, if an essential service say the Power Holding Company of Nigeria (PHCN), contracts a business to another firm whose primary function is not power generation, say, building or construction, the latter firm will come under the provisions of the law. Similarly, if a local government council (an essential service) hires the services of a private cleaning company to sweep the streets and workers in this company strike, they will be enjoined by the law. The law therefore provides rather legalistic conditions for any service in Nigeria to be regarded as essential, depending on the particular circumstance.

The Nigerian definition of essential services must be criticised not only as being grotesque but also as it makes nonsense of the basic concept of essential services. Essential service has as its base-line definition a service whose disruption would endanger human life, public health or safety or cause serious bodily injury or expose any valuable property to destruction or serious damage. The list of essential services is arguably over-inclusive and strongly questionable. Most of the services or industries included do not seem to merit the special distinction of being treated as an essential service. For example, while the prohibition on the armed forces, electricity, health, water and telecommunications sectors may seem justified, it is difficult to agree that such other services such as ports, petroleum and private corporate bodies undertaking banking business constitute essential services.

It is submitted that a more useful and practical categorization would be the one that looks at the particular type of service being performed or provided in order to determine its essentiality. For this purpose a re-classification of the list of essential services in Nigeria is suggested to distil the true essential services from the non-essential ones as follows:

(i) Essential Services

These will include the electricity, water supply, health care delivery including the burial of the dead, hospitals , the treatment of the sick, the prevention of disease, or any of the following public health matters, namely sanitation, road-cleansing and the disposal of night-soil and rubbish, dealing with outbreaks of fire and the armed forces. It is submitted that the occurrence of a strike in these sectors would endanger public health and safety of the community and it may be reasonable to prohibit strikes in these services.

118 Section 2 of the Decree provides that "no member of staff, whether teaching or non-teaching, employed in any primary, secondary or tertiary educational institution in Nigeria shall embark on an industrial action in the form of strike, sit-down-strike, work-to-rule or any other kind of individual action calculated to disrupt the smooth running of teaching or educational services in any of those educational institutions".

(ii) Non-essential services

These services include radio and television, postal services, services involving "fuel of any kind", ports, harbours, transport of persons, goods or livestock by road, rail, sea, river or air, aircraft repairs, banking, teaching, education and communication. Also to be included here are the civil services of the federal, state and local authorities and statutory corporations not involved in (i) above. It is submitted that strikes by workers in these services, though inconvenient, would not necessarily harm society in terms of posing an immediate threat to public health and safety, and can therefore be tolerated.

It must be noted however that these categories are not absolute; the important determinant is the nature of the services being rendered. Furthermore, it is absolutely important to take into account the effect of strike action on public health and safety. But certainly it is inappropriate for all state-owned undertaking to be treated on the same basis in respect of limitations of the right to strike, without distinguishing between those which are genuinely essential and those which are not.[119]

It seems regrettable that many workers in Nigeria are denied the freedom to strike under the guise of essential services when many employees in these industries are only tangentially related to the delivery of service, and their participation in a work stoppage would have little effect on the public. This is a clear violation of the ILO standards which demands that essential services should be interpreted very strictly.

The ILO has warned that the principle whereby the right to strike may be limited or even prohibited in essential services would loose all meaning if national legislation defined these services in too broad a manner.[120] In Ghana, for example, essential service is defined strictly in line with the ILO standard.[121] Otobo has condemned the Nigerian list of essential services as being excessively fake and politicised:

> Nigeria has the widest definition of essential services in the world because of its politicisation by successive military regimes, which, since the mid–1970s, expected the classification itself to be a sufficient anti-strike medicine instead of a more sensible compensation and employment policies.[122]

As has been noted, "the trade union act completely outlaws the right of workers in education sectors, health sector and all other sectors categorized as essential services. This, to say the least, constitutes a violent violation of the constitutional and democratic rights of Nigerian workers as well as international status."[123]

119 Digest 2006, *supra* note 14, Para. 584.
120 Freedom of Association and Collective bargaining: 1994 General Survey, para. 159.
121 See section 175 of the Labour Act of Ghana, 2003.
122 D. Otobo, "The Generals, NLC and Trade Union Bill"> http://www.nigerdeltacongress.com/garticles/generals_n/c_trade_union_bill.htm ≥ Last accessed 12 January 2007.
123 Campaign for Democratic and Workers' Rights in Nigeria, "Abrogate the 2005 Trade Union Act Now!"< http://www.nigeriasolidarity.org/art026.htm< Last accessed 2nd December 2006.

It is submitted therefore that the essential services legislation must be modified to conform to international labour standards. A progressive approach to industrial relations does not lie in the criminalisation of strikes and a bogus list of essential services which denies workers the right to strike but in speedy identification of the causes of workers' discontent and the effective means of mutually satisfactory solutions.

## VI. LIABILITY FOR EXERCISING THE RIGHT TO STRIKE

### A. Dismissal for Breach of Contract

Nigerian Law appears to follow the orthodox English common law rule that a strike by an individual worker amount to a fundamental breach of contract of employment leading to dismissal.[124] The first reported case on the point appears to be the Supreme Court decision in *Anene v. J. Allen & Co. Ltd.*[125] In that case; the appellant along with other employees went on strike from 5–16 July, 1960. After the intervention of the Federal Ministry of Labour, it was agreed that the striking workers should apply for re-engagement. The appellant's application was turned down and he sued, *inter alia*, for salary in lieu of notice. The appellant's counsel argued that the employee's service contract was terminated on July 28, 1960 when the company wrote to reject the application for re-engagement. But this was rejected in favour of the company's contention that the application for re-engagement implicates that when the workers went on strike the contract was repudiated and having withdrawn his services he could not claim a salary in lieu of notice. On the effect of strike on the contract of employment, Brett, JSC said:

> *Prima facie*, a striker intends to return to work once the objects of the strike have been attained and although this may involve a fresh contract of service an intention to repudiate the existing contract is not necessarily to be presumed; on the other hand, the whole of the circumstances, including the duration of the strike, may be such as to warrant the employer in treating the striker as having manifested an intention to repudiate. It is therefore impossible to lay down any rule of universal application, and each case must depend on its own facts.[126]

124 See *Simon v. Hoover* (1977) 1 ALL E.R. 777; *National Coal Board v. Galley* (1958) 1 WLR 16. See also K. Foster, *Strikes and Employment Contracts* 34 Modern Law Review, (1971), p. 275; P. O'Higgins, *Legal Effect of Strike Notice,* 26 Cambridge Law Journal (1968), p. 223; N. Lewis, *Strikes and the Contract of Employment, Journal of Business Law* (1968), p. 24. However, some reforms were introduced by section 62 of the Employment Protection Consolidation Act 1978 which provided that it is unfair for an employer to dismiss an employee who takes part in a strike. It would, however, not be unfair if the employer dismissed all the strikers and does not re-engage any of them within three months of the strike. Since then several changes were made into the law by new legislations. The present position as provided under section 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 is that it is automatically unfair to dismiss an employee for taking part in a lawful strike.

125 (1975) 5 UILR (Part IV), p. 404. The decision was in 1965 though reported in 1975.

126 *Ibid.*

Akpan[127] has advocated from this decision that the Supreme Court adopted the suspension theory propounded by Lord Denning, MR in *Morgan v. Fry*.[128]But it is submitted that there is nothing from the *ratio decidendi* in the judgment to suggest that the contract was suspended. On the contrary, the Supreme Court held that by proceeding on strike the appellant had repudiated his contract of employment. That is why the case failed. The actual decision confirmed the common law repudiation position. Similar decision was reached in *Federated Motor Industries (Division) of U.A.C. Ltd v. Automobile Boatyard*, *Transport, Equipment and Allied Workers Union.*[129]

These decisions show that employees taking part in a strike are liable to be dismissed for a fundamental breach of the contract of employment. This remains so even where the conditions for which trade unions are immune from liability for industrial action are complied with, such as the fact that the action was in contemplation and furtherance of a trade dispute, supported by a ballot, and with proper notice given to the employer. In other words, the contractual liability of the individual striker is such that, despite such immunities, he can be dismissed and can be sued for damages caused by industrial action.

But should strike by employees be taken as a breach of the contract of employment? It is submitted that it is harsh and patently unfair to regard strike action by employees as a breach of the contract of employment leading to their dismissal. In actual fact, workers do not see strike as a way of leaving their employment. Strike does not put an end to the employer and employer relationship because definitely the strikers intend to return and resume work. Strike is merely used as a weapon to ensure that the demands of workers are met by the employer. In truth, a strike is intended to exert greater and more effective pressure upon an employer; strikers want to continue with the existing but improved contracts of employment.[130] It is therefore very wrong to perceive strike as a termination of contract or to insist that it should have that effect. The dismissal of workers because of strike is a serious violation of international law.[131]

It is submitted that Nigerian law must be reformed to change this trend. The law must ensure that for the duration of the legal strike, there would be no breach of contract on the part of the employee to warrant his dismissal. Thus during a strike action, the main obligations of the contract which involves the willingness to work on the part of the employee and payment of wages on the part of the employer must be suspended.[132] In fact, the predicament of the worker in Nigeria is aptly summarised by Kahn-Freund:

127 G. Akpan, *The Right of Workers to Strike in Nigeria* 3(1) Lawyers' Bi-Annual (1996) 62–67, p. 62.

128 (1968) 3 ALL E.R. 452 at 458.

129 (1978–79) NICLR 152–169.

130 *Boxfoldia Ltd v The National Graphical Association* (1988) ICR 753, 756 *per Saville, J.*

131 Digest 2006, *supra* note 14, para. 661–666.

132 However, where the employees commit dismissable offences *supra* note 14, para. 661. However, where employees commit dismissable while on strike they can be dismissed.

> Does a strike or a lock out put an end to the [workers'] contracts of [employment]? Does it suspend them? Do those taking part in a strike break their contracts so that the employer may dismiss them without notice?
>
> At this point the difference between "right" and a "mere freedom" to strike becomes decisive. If – as in France and Italy-the workers have a "right" to strike then they cannot, by exercising it, break their contracts. Moreover, if the contract was terminated by a strike or if the mere fact that there was a strike allowed the employer to terminate it, the right to strike would be frustrated, because the workers could exercise it only at the risk of sacrificing their jobs. Hence-and this conclusion was drawn in Italy as well as in France – the contract of employment is only suspended by the strike, and after its end, the employee is entitled to re-instatement with full seniority.[133]

The suspension theory is strongly recommended as it seems commonly acceptable and reasonable. Dismissing workers for exercising the right to strike ignores the reality that strikes are an accepted incident of the continuing collective bargaining relationship between employer and employee. Another defect in Nigerian law is that workers loose their right to seniority and are deprived of other benefits such as pension schemes, co-partnership schemes and promotion structures on account of lack of continuity due to industrial action.[134]

In other jurisdictions,[135] protection is given to the individual worker against sanctions for participation in a lawful strike. In the U.S.A., for example, this protection is in the form of judicial presumption that the act of striking is not a rescission of the employment relation.[136] Furthermore, under section 7 of the National Labor Relations Act, employers have the right to participate in "concerted activities" for the purposes of collective bargaining. Indeed, a basic principle of American law is that while workers are not paid during strikes and while the employer is free to recruit replacements for those on strike, the workers can legitimately expect not to be disciplined for their participation in a lawful strike.[137] Furthermore, in Canada, the position is that the act of participation in a lawful strike does not thereby render a worker liable to discharge for misconduct.[138] Similar position is contained in the laws of South Africa,[139] Malawi,[140] Kenya[141] and Ghana,[142] among others. In the absence of legal protec-

133 P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (1983), p. 355 *ellipsis added*.
134 Trade Disputes Act, *supra* note 10, s.42.
135 In addition to France and Italy already referred to by Kahn-Freund.
136 See *N.L.R.B. v. Mackay Radio & Telegraph* 304 U.S. 333 (1938), p. 345.
137 See P. Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harvard Law Review (1984) 351, 388.
138 See H.W. Arthurs, D. D. Carter and H.J. Glaser, *Labour Law and Industrial Relations in Canada* (1981), p. 215; I. Christine, *Employment Law in Canada* (1980), p. 272.
139 See section 67(2) of the Labour Relations Act, 1995.
140 See section 48 of the Labour Relations Act, 1996.
141 Trade Disputes Act, *supra* note 48, section 15.
142 Labour Act, *supra* note 53, section 70.

tion for strikers a determined employer can very effectively deal with workers by deciding to resort to his remedies under the law.

### B. Penal Sanctions

Sections 17(1) of the Trade Disputes Act[143] provides penalty of a fine penalty of a fine of ₦1, 000 or six months' imprisonment or to both the fine and imprisonment for participation in a strike.

There can be little doubt that workers go on strike because they have real grievances about important issues which affect their well being in the world of work. So it is important to find ways of solving the problems of workers rather than punishing them when they are constrained to go on strike in a bid to realise such legitimate demands. Penal sanctions for exercising the right to strike are a grave violation of international law.[144] Imposing criminal sanctions for exercising the right to strikes will not help the development of healthy industrial relations and may well create more problems than they resolve.[145] As Adeogun noted:

> That workers resort to industrial action even in the face of these stiff penalties vividly reminds us of what strikes are about. They are about grievances, actual or imagined, arising from industrial life. Unless … a speedy and effective system is devised for resolving such grievances, strikes will surely take place, if only to focus the attention of the government and society at large on grievances. It is therefore unrealistic to put a total ban on strikes.[146]

Though workers still embark on strikes, it must be noted that the right to strike is a legal and not a sociological concept, and where strikes are forbidden as in our present situation, there is no such right – however frequently they may occur.[147] But criminal sanctions certainly cannot solve the magic of foreclosing strikes by workers when they are determined to do so at all costs. A similar view was taken by Sir Hartley Shawcross in connection with the wartime industrial legislation in Great Britain. In 1946 he explained to the House of Commons:

> You might as well try to bring down a rocket bomb with a pea shooter, as try to stop a strike by the process of the criminal law. The

143 Trade Disputes Act, *supra* note 10. Section 7 of the Trade Union (Amendment) Act 2005 has merely increased the amount payable to N10, 000.

144 Digest 2006, *supra* note 14, para. 658.

145 ILO Freedom of Association and Collective Bargaining: The Right to strike, General Survey, 1994 Report III part 4B, Para. 177.

146 A. A. Adeogun, *Strikes – The Law and the Institutionalization of Labour Protests in Nigeria,* 16 (1) Indian Journal of Industrial Relations (1980*)* 1–23, p. 10. See also T. Fashoyin, *Industrial Relations in Nigeria* (1991), p. 198; T. Yesufu, *Introduction to Industrial Relations in Nigeria* (1984), p. 210; T.A. Aguda, *Nigeria in Search of Social Justice Through the Law,* Nigerian Institute of Advanced Legal Studies Occasional Paper 1 (1979), pp. 17–18.

147 O. Kahn-Freund, and B. A. Hepple, *supra* note 2, pp. 5–8.

> way to stop strikes is not by policemen but by a conciliation officer, not by assize courts, but by the arbitration tribunals.[148]

There is no doubt that penal sanctions add further nails to the coffin of the non-existent right to strike. It is indeed a sad reflection that at a time when most countries of the world are taking steps to ensure and protect the right to strike, Nigeria is instead taking a retrograde step to abridge the right of its workers to such a legitimate claim.

## VI. PROPOSALS FOR REFORM

This article has clearly stated out the existing gaps on the right to strike in Nigeria and the need to close the gaps in order to protect and strengthen the legitimate interests of workers to embark on industrial actions. Nigeria must take steps to safeguard a fair and equitable equilibrium of power within the employer-employee relationship, and the preservation of a smooth and efficient system of industrial relations as it marches forward into the twenty first century. One measure of the health of any society is the extent to which its legal system is in tune with contemporary realities and contemporary public opinion. International instruments which Nigeria has ratified do claim fundamental status for the right to strike. It seems sad that forty seven years after independence these gaps still exist in the law on strikes in Nigeria. The right to strike must be strengthened to enable collective bargaining perform the important role envisaged in Nigeria's system of industrial relations. Consequently, this article recommends the following reforms as a modest step towards ensuring the effective protection of the right to strike in Nigeria.

### A. The Content of the Reform

#### *1. The Right to Strike*

The right to strike is an essential element in the system of free collective bargaining and Nigeria must provide a positive right to strike both at the collective and individual level. Nigerian law fails to recognise that employees have the positive right to strike. Trade unions and their officials are liable under various torts for engaging in a strike. Individual strikers breach their contracts of employment and are liable to be dismissed for striking. Nigeria must protect the right to strike. For an effective protection of the right to strike in Nigeria, it is hereby submitted that a clear provision for a positive right to strike must be stipulated in the Constitution or in a labour legislation. A further possibility is to make an amendment to

148 Hansard cols. 199–200, 12 February (1946). See also R. Bretten, *The Right to Strike in New Zealand* 17 International and Comparative Law Quarterly (1968) 749–760, p. 756; E. Cordova, *Strikes in the Public Service: Some Determinants and Trends,* 124 International Labour Review (1985) 163–179, p. 167, where the author concluded that "legal prohibitions and restrictions have been powerless to prevent strikes and that penal sanctions which remain on statute books are of theoretical, educational or of residual value".

the Constitution to provide for the right to strike under freedom of association. As we have seen, freedom of association *simpliciter* does not guarantee the right to strike.[149] Lamenting on the need for a positive right to strike Weiss said:

> Absent a legal right to strike, most employees … may be fired or disciplined in the unfettered discretion of their employer … When a statute affirmatively protects the right to strike, the employer violates the law if it fires or otherwise penalizes the worker for exercising that right … the worker will win relief including reinstatement to the worker's prior position, and back pay and benefits lost in the interim.[150]

*2. Preservation of Employment Status/ Protection against Dismissal*

Providing for a positive right to strike would be meaningless if the law still regards the exercise of the right to strike as a breach of contract. Thus the proposed legislation must expressly provide that an employee who exercises his or her right to strike or who has been dismissed contrary to the provisions of the relevant statute remains an employee entitled to the protection of the statute. In short, participation in a strike shall not constitute a breach of contract.

A right to strike regime will expressly protect strike action and give it precedence over the performance of contractual and other civil obligations. As already discussed, in common law, there is no protection for workers who go on strike since a strike is regarded as constituting a material breach of contract of employment, the consequence of which is summary dismissal. Also, common law does not recognise a strike as a suspension of the contract, but a termination of the relationship.

However, a legal right to strike should mean that workers and trade union members can no longer be dismissed for participating in a lawful strike. This also implies that the contract of employment will be deemed suspended during the period of the strike and would be revived when the strike is over. Clearly such legal provision will guarantee the employees' right to take collective action since the employer will be prohibited from taking retaliatory action designed to punish strikers. A legal right to strike is desirable in Nigeria to protect workers from being punished by employers when they embark on legitimate industrial action.

It must be noted however that merely preserving a striker's individual status as an employee would not prevent an employer from dismissing the employee provided that the employer complies with the statutory notice requirements. In other words, even if Nigerian law declares that an employee who participates in a strike does not breach his contract of employment, an employer who gives proper notice of dismissal can dismiss all the employees and this would not be regarded

149 *Schmidt and Dahlstrom v. Sweden*, *supra* note 40. See also *Collymore v. Attorney General of Trinidad and Tobago* (1969) 2 ALL E.R. 1207, pp. 1210–11. Cf. C. D'aoust and F. Delorme, *The Origin of Freedom of Association and the Right to Strike*, 36(4) Relations Industrielles (1981) 894–920, at 916; G. England, *Some Thoughts on Constitutionalizing the Right to Strike*, 13 Queens Law Journal 168–213, pp. 180–191.

150 Weiss, M.S., *"The Right to Strike in Essential Services Under United States Labor Law* (2000) > http://www.bibliojuridica.org/libros/i/47/7.pdf< Last visited 14 January 2006.

as unfair. The law must therefore prevent the dismissal of employees who engage in a strike. However, to prevent strike-induced termination, it is suggested that there should be a provision to guarantee a reasonable tenure after the expiration of strike, for example, a clause such as "employment will be guaranteed for 2 years after any strike action".

*3. The Right to Reinstatement*

Even where the law protects an employee against dismissal for exercising his right to strike, it will be failing to offer adequate protection to the individual striker if it fails to require the employer to reinstate the returning strikers at the end of the strike. Thus legislation is required to prohibit employers from hiring permanent replacements for employees who engage in lawful strikes and to require employers to reinstate the strikers upon their unconditional offer to return to work or at the conclusion of the strike. A legal right to strike would also guarantee a right to automatic reinstatement after the strike and the calculation of the period of continuity in employment for the purposes of seniority, pensions and other beneficial schemes shall not be prejudicially affected by the strike.

The doctrine of suspension of the contract of employment favoured in the labour laws of some countries makes reinstatement of striking workers automatic at the end of the strike. Thus, in South Africa, Malawi, Namibia and Swaziland for example, the legislation specifically provides for automatic reinstatement at the end of a lawful strike.[151] This is also the legal position in the US[152] and Ghana,[153] among many others.

It is regrettable that in computing a worker's total period of service for retirement benefits, he will not be credited with the strike periods; but to hold that each time he goes on strike he forfeits all his previous service and that a fresh count of continuous service has to begin seems wholly indefensible. Thus ensuring the right of the striker to reinstatement after the strike ends will ensure continuity of service. The employer must also be prevented from hiring permanent replacements, although he may be free to hire temporary workers to cover the job of those on strike.

*4. Proper Delineation of the Scope of Essential Services*

There is the need to redefine the scope of what constitutes essential service. As already highlighted, the present list of essential service in Nigeria is over-inclusive and too bogus. A more useful and practical categorization would be the one that looks at the particular type of service being rendered in order to

151 For South Africa, see section 67(4) of the Labour Relations Act, 1995; for Malawi, see section 50 of the Labour Relations Act, 1996; for Namibia, see section 81(5) of the Labour Act, 1992; for Swaziland, see section 75 of the Industrial Relations Act, 1995; See Generally, L. Madhuku, *The Right to Strike in Southern Africa,* 136(4) International Labour Review (1997) 509–529; See also J. F. Myburg, *100 Years of Strike Law*, 25 Industrial Law Journal ( SA ) (2004) 962–976.

152 M. S. Weiss, *The Right to Strike in Essential Services Under United States Labor Law* ( 2000 ) > http://www.bibliojuridica.org/libros/i/47/7.pdf< Last visited 14 January 2007.

153 Labour Act, *supra* note 53, section 170.

determine essentiality. For this purpose, a re-classification of the list of essential services in Nigeria is suggested to distil the true essential services from the non-essential ones.

Finally, the advantages of a rights-based approach to strike are salutary as it seeks to provide a complete protection to workers and trade unions in the conduct of legitimate industrial action, which is inevitable in the relationship between labour and management in any market economy. For Nigeria, this approach is far better than the present system of restrictive immunity. A rights-based approach would remove all common law liabilities and expressly recognise and protect workers' right to industrial action.

## VII. CONCLUSION

The right to strike is a very important weapon in the armoury of organised labour in any democratic society. The function of a right to strike is to enhance justice in the workplace and society; it is to protect the legitimate rights and interests of the workers.

The ILO attaches great importance to the need to secure and protect the right to strike throughout the whole world, and has demonstrated its concern to all workers by insisting that this right must be protected at all times and can only be denied in very exceptional circumstances in the interest of the community as a whole.

The right to strike is clearly recognised in international law and in the laws and constitutions of many countries of the world from Europe to USA, Africa and elsewhere, thus making it legally available as a viable tool for labour in the inevitable conflict of interests between labour and capital.

Unfortunately, however, there is in Nigeria at the present time no right to strike as a matter of law. Nigeria lags far behind the rest of the world in this area. Nigeria clearly infringes its obligations under international law by failing to ensure a right to strike. Not only does Nigerian law not contain a positive expression of the right to strike, it subjects participants to severe penal sanctions and other liabilities.

The existence of the vast array of legal constraints to the taking of strike action in Nigeria makes it clear that no one can speak truly of a right to strike. Unions may be crushed financially, and deprived of their legal personality and their ability to represent their members in conciliation and arbitration procedures. Furthermore, what is patently unfair is the fact workers lose their seniority while on strike, and are denied other benefits such as pension schemes, co-partnership schemes and promotion structures on account of lack of continuity due to industrial action. Again, the broad definition of essential services deprives a sizeable ratio of Nigerian workers of this basic human right at work.

Another unfortunate issue in industrial relations in Nigeria is that, in contrast with what obtains in most other countries of the world, workers in Nigeria can be sacked without redress for taking part in lawful industrial action. To permit the dismissal of those who participate in lawful strikes is destructive and incon-

sistent with the policy of promoting collective bargaining. The situation would be different where there is a positive guaranteed right to strike. The right to strike in Nigeria is a *desideratum.*

Nigeria has ratified the entire core ILO Conventions, particularly Nos. 87 and 98, the African Charter on Human and Peoples' Rights and is a signatory to the International Covenant of Economic, Social and Cultural Rights, and therefore bound by Article 2(1) to provide for the right to strike as enshrined in Article 8(1)(d), through legislative measures or by other appropriate means.

Nigeria must unleash its workers by adopting a positive and vibrant right to strike. Given Nigeria's leadership of the African Union and its important role and status as a member of the Governing Body of the International Labour Organisation, it must be expected to show very positive examples in all spheres of respect of global standards, especially the right to strike.