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Current Issues and Developments in Workers' Freedom of Association in Nigeria

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The year 2005 witnessed significant changes to Nigerian labour law and the system of industrial relations. In that year, the government introduced legislative reforms aimed at reducing state interference in the regulation of industrial relations by democratising labour and complying with the International Labour Organization (ILO) requirements. The changes would appear to have given more impetus to collective bargaining as a crucial mechanism in the determination of wages and other terms and conditions of the employment of workers. However, there are other areas where the law seems to have rolled back workers’ rights. This article is a critical assessment of the extent to which the new law affects workers’ freedom of association in Nigeria. The discussion centres on three key changes brought about by the Act, namely membership of trade unions, collective bargaining and the right to strike. This article argues that significant aspects of the law still unduly restrict workers’ freedom of association and that the intended objective cannot be achieved under the present law. It concludes by calling for a new reform, the main purpose of which would be to comply fully with ILO requirements in order to protect workers and their trade unions.

1. INTRODUCTION

Without freedom of mind and of association a man has no means of self-protection in our social order – Harold Laski

Freedom of association is generally regarded as safeguarding individual civil liberties. It promotes the principle that people may do whatever they wish as long as they do not harm others. Therefore, an individual should be free to join an organisation and to act in association with others as long as no harm is caused by so doing. The right to freedom of association is promoted throughout the world as a fundamental human right. At the opening of the first ILO African Regional Conference in Lagos, Nigeria, in 1960, then Nigerian Prime Minister, Sir Abubakar Tafawa Balewa, declared that, ‘Freedom of association is one of the foundations on which we build our free nations.’

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Freedom of association is the key enabling right and the gateway to the exercise of a range of other rights at work. The concept of freedom of association in labour relations means that workers can form, join or belong to a trade union and engage in collective bargaining. It also implies that the workers are entitled to embark on strike whenever it becomes necessary. Trade union independence from both the employers and the state must also be guaranteed. In sum, freedom of association in relation to workers means an understanding and appreciation of the fact that it is the autonomous trade union presence at the workplace that is the sure protection of the individual worker.

The year 2005 will go down in history as a year that witnessed monumental reforms to Nigerian labour law and to that nation’s system of industrial relations. Before the reforms, highly interventionist policies by government had been the norm, as is the trend in many parts of Africa. The changes introduced in 2005 were intended to promote the democratisation of labour, enhance choice for all Nigerian workers in the spirit of the Constitution, and comply with ILO requirements concerning democratisation in the organisation of labour and to consolidate the values of accountability and participation. The new law has introduced radical changes to the pattern of regulation of labour and industrial relations and has raised a huge debate about the nature, content and extent of workers’ freedom of association in Nigeria. The changes would appear to have given more impetus to collective bargaining as a crucial mechanism in the determination of wages and other terms and conditions of the employment of workers. However, there are other areas where the law seems to have rolled back workers’ rights.

The purpose of this article is to examine freedom of association as it applies to workers in Nigeria in the light of changes in the law brought about by the Trade Union (Amendment) Act 2005. After considering the constitutional basis of workers’ freedom of association, the article examines the issue of membership of trade unions in Nigeria. The 2005 Act now provides that membership of a trade union is voluntary, which appears to be an improvement on the erstwhile position; however it is argued that s 2 of the Act falls short of acceptable standards since the high threshold for membership is still retained under Nigerian law. In addition, the article discusses

6 During 2005, government amended a principal labour law: The Trade Unions Act, Chapter 437 Laws of the Federation of Nigeria 1990 by enacting the Trade Union (Amendment) Act 2005, which was signed into law on 15 March 2005.
9 Section 2 of the Trade Union (Amendment) Act 2005.
the issue of workers’ rights to collective bargaining. The new law allows workers to elect their bargaining representatives without any formal criteria for doing so. It is contended that this lacuna could lead to more crises in the system of labour relations in Nigeria and therefore s 5 of the Act needs to be amended to bring it in line with acceptable labour standards. The article also addresses the question of the right of workers to strike which is dealt with under ss 6 and 9 of the new law. These sections seem to have eroded the barely existent right to strike. Indeed, it is argued that these sections have added further nails to the coffin of the right to strike in Nigeria. The article argues that to a significant degree the new legislation still unduly restricts workers freedom of association and that the intended objectives cannot be achieved, except if further radical amendments are made to these crucial provisions to enhance workers’ freedom of association in Nigeria.

2. CONSTITUTIONAL BASIS FOR WORKERS’ FREEDOM OF ASSOCIATION

The freedom to associate enjoys a constitutional and statutory legitimacy in Nigeria. Section 40 of the Constitution of the Federal Republic of Nigeria 1999 provides as follows:

Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any association for the protection of his interests.

Section 40 holds great significance, for it gives the labour movement a constitutional right to associate. The Constitution further protects the worker’s right not only to belong to, but also to form, a trade union. Thus the Constitution bars a ‘closed shop’ agreement, ‘yellow dog’ contract, or any other arrangement that compels a worker to join a particular union or that excludes the worker from union membership. This covers both private employers and the government itself when acting as employer. This means that a worker can decline to join union X and instead form or join union Y. Finally, the Constitution provides for access to court to remedy any breach of the right to associate. Section 46 of the Constitution stipulates that: ‘any person who alleges that his right to form, join or belong to a trade union of his choice has been, is being or is likely to be infringed may apply to a High Court in the State in which the infringement is threatened or has occurred for redress.’

The African Banjul Charter on Human and Peoples Rights

Another source of freedom of association of workers in Nigeria can be found in the African [Banjul] Charter of Human and Peoples Rights 1981. Article 10 of the

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10 A closed shop is an agreement, usually between a trade union or unions on the one hand and the employer on the other, that makes union membership a condition of employment or continued employment. A closed shop seriously limits a worker’s freedom to belong to a union of their choice.

11 A yellow dog contract is an agreement between an employer and an employee in which the employer agrees, as a condition of employment, not to be a member of a trade union.

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Charter provides that: ‘every individual shall have a right to free association provided that he abides by the law.’ Nigeria has ratified this Charter and made it a part of national law.\textsuperscript{12} In Abacha v Fawehinmi,\textsuperscript{13} the Supreme Court of Nigeria 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.

There is clear support for workers’ freedom of association pursuant to the Charter. This is because the African Commission on Human and Peoples Rights has provided detailed guidance on trade union rights in its Guidelines for the Submission of State Reports, under which 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.\textsuperscript{14}

Indeed, firm international consensus has evolved on the status of the freedom to associate as a fundamental human right.\textsuperscript{15} Nigeria is a member of the Governing Body of the ILO\textsuperscript{16} and has ratified both the ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).\textsuperscript{17} Nigeria has also ratified both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.\textsuperscript{18} Accordingly, Nigeria is bound by these instruments to respect freedom of association. This article will now proceed to examine the three key areas where changes have been introduced by the 2005 Act.


\textsuperscript{13} (2000) 6 NWLR (Part 660) 228 (SC).


\textsuperscript{18} \textit{Ibid.}
3. MEMBERSHIP OF TRADE UNIONS

One noticeable reform introduced by the 2005 labour law reform is the democratisation of trade union membership. Prior to the reform, trade union membership was virtually compulsory. Workers who worked in particular establishments were more or less conscripted to join the available unions in those establishments. The new law provides that:

Notwithstanding anything to the contrary in this Act, membership of a trade union by employee is voluntary and no employee shall be forced to join any trade union or be victimized for refusing to join as a member.¹⁹

In a true liberal democracy, workers should have the freedom to decide whether they wish to join a trade union or not. This is because freedom of association also means that a worker can choose not to join or belong to a trade union organisation. It could be argued that the new amendment has only made the Act conform with the Constitution which already guarantees the right to voluntary membership of trade unions. However, the law is salutary if only to remove any possible doubts since the court had held the former law which placed restrictions on trade union membership to be a law that is reasonably justified in a democratic society.²⁰

More importantly, the new reform has also removed the restriction on freedom of choice arising from the stipulation in the Trade Unions Act²¹ that no trade union could be registered to represent employees where a trade union already existed.

The new reform is certainly an improvement. However, it is not adequate because it fails to address the issue of restrictions on the number of persons required to form a union. Where the minimum number of persons required for the registration of a functional trade union is pegged too high, workers’ freedom of association will be impaired. In this regard, the ILO seems to support a minimum of 20 workers for the formation of a trade union.²²

Whereas 50 members are required to form a trade union of workers, only two persons are required to form a trade union of employers.²³ The law is obviously discriminatory in the treatment of the two parties to the industrial relationship, employers and workers. This requirement would appear to unduly restrain workers and this is in conflict with Convention 87.²⁴

The failure to relax the membership requirement may not be unconnected with the argument by the tripartite committee on the reform of Nigerian labour law that, for Nigeria, compliance with the ILO requirements on minimum membership is not viable. The argument is that the low threshold and the formal requirements for registration would lead to the proliferation of trade unions and undermine the

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¹⁹ Section 2 of the Trade Union (Amendment) Act 2005.
²⁰ See Osaw v Registrar of Trade Unions (1985) 1 NWLR (PT4) 775. The point was also emphasised that the amendment was necessary because the Principal Act was undemocratic having been enacted under the military regime. See President Obasanjo’s Speech, fn 8 above.
²¹ See ss 3(2) and 5(4) of the Trade Unions Act 1990.
²³ Section 3(1)(a)(b) of the Trade Unions Act, Chapter 437 Laws of the Federation of Nigeria 1990.
²⁴ Op cit, fn 22.
solidarity of trade unions and employers’ associations in Nigeria. It would permit, if not encourage, the formation of trade unions and employers’ associations on ethnic, religious, regional and factional lines, which could feed into the regional and factional rivalries that characterise Nigerian politics.\(^{25}\)

It is submitted, nevertheless, that the argument to sustain the high threshold for membership of trade unions in Nigeria is not justifiable in a country in a hurry to catch up with all the trappings of democracy. We must not always allow ethnic and religious sentiments to dissuade us from what is proper and necessary in a democratic society. If Nigeria is to move forward as a democratic nation it must be prepared to adopt international standards and allow freedom of association in order to survive. Ethnic and religious differences exist in many countries, yet elsewhere that has not been an excuse for not complying with international standards. In Ghana, for example, a minimum of two persons are required to form a trade union.\(^{26}\) The ILO has in fact held that: ‘the establishment of a trade union may be considerably hindered, or even rendered impossible, when legislation fixes … too high a figure, as is the case, for example where legislation requires … at least 50 founder members.’\(^{27}\)

Nigeria is in violation of workers’ freedom of association by prescribing a high threshold of 50 members for the formation of a trade union. What is more, given the fact that over 80% of enterprises employ less than 50 persons in Nigeria, this provision in the Act is tantamount to industrial disenfranchisement. It is therefore suggested that Nigerian law should be amended to stipulate a minimum of, say, two persons for the formation of a trade union.

4. TRADE UNION RECOGNITION FOR COLLECTIVE BARGAINING PURPOSES

The second area dealt with by the new law relates to trade union recognition for the purposes of collective bargaining. Trade union recognition is germane to the very existence of workers’ organisations. Freedom of association would be hollow and of no relevance to workers if employers were entitled to refuse to recognise their organisations for purposes of collective bargaining. Trade unions will be thwarted in their attempts to protect their members interests without due recognition. Thus union recognition is a \textit{sine qua non} to collective bargaining.

The Committee on Freedom of Association has declared that recognition by an employer of the main unions represented in its undertaking, or the most representative of these unions, is the very basis for any procedure for collective bargaining on


\(^{26}\) Section 80(1) of the Labour Act 2003 (Ghana) provides that: ‘Two or more workers employed in the same undertaking may form a trade union.’

conditions of employment in the undertaking. Where there is no union organisation in an industry, the representatives of the unorganised workers duly elected and authorised by the workers will conduct bargaining on their behalf.

Under Nigerian labour law, as under labour law in many other jurisdictions, the most important step in the collective bargaining procedure is for the employer or the employers’ association to recognise the trade union as a bargaining agent for the employees within the bargaining unit in relation to terms and conditions of employment.

This is a matter of statutory obligation for employers, provided that a trade union has more than one of its members in the employment of an employer. However, the old s 24 of the Principal Act which conferred this right has been amended by the new law. By virtue of s 5, all registered trade unions shall constitute an electoral college to elect members who will represent them in negotiations with the employer in collective bargaining. By the same token, for the purposes of representation in tripartite bodies, all the registered federation of trade unions shall constitute an electoral college taking into account the size of each registered federation of trade unions.

This amendment raises a number of issues. First, the Act does not prescribe the modalities for constituting the electoral college. This lacuna will have the tendency to encourage favouritism as employers will try to influence the criteria for the assessment of representatives who would be disposed to management during negotiations. This is likely to generate more industrial strife. Also missing in the law is a procedure to resolve likely disputes on which union should represent workers in collective bargaining.

In my view, it would have been much better for the Act to have clearly adopted either the ‘majoritarian principle’ or the principle of the ‘sufficiently representative union’ to avoid possible problems and enhance freedom of association in the work place. The majoritarian principle means that because a trade union enjoys a majority of members in a particular bargaining unit it automatically assumes the right to bargain on behalf of all those workers who fall within that bargaining unit to the exclusion of all other trade unions. However, all benefits accruing from the negotiations with management are enjoyed by all workers in the unit. This is an accepted practice in international law and is endorsed by the ILO Freedom of Association Committee which has noted that:

29 Ibid, paras 785 and 786.
30 See, for example, s 50(1) of the Trade Unions and Employers’ Organizations Act 1992 of Botswana.
31 Section 24 of the Trade Unions Act provides that: ‘Where there is a trade union of which persons in the employment of an employer are members, that trade union shall, without further assurance, on registration in accordance with the provisions of this Act, be entitled to recognition by the employer.’
33 Trade Union Act 1990.
the mere fact that the law of a country draws a distinction between the most representative trade union organisations and other trade union organisations is not in itself a matter for criticism.\footnote{See ILO Freedom of Association: 1985 Digest of Decisions, para 236. It is not in the best interest of workers to grant every trade organisation bargaining rights. Some kind of balance is needed in industrial relations; hence a majority trade union organisation is preferred.}

Conversely, the principle of ‘sufficiently representative trade union’ could also be adopted. The difference between the two is that that a majority trade union can be the only union in a unit while in the case of sufficiently representative union, there can be several of such unions in one unit.

The principle of representativity ensures that employers do not find themselves in a position where they are expected to include in negotiations every single trade union that has members, no matter how insignificant the membership. Only those trade unions that could, to a meaningful extent, influence relationships between the employer and the body of employees within an agreed bargaining unit are to be allowed at the negotiation table. This means that an employer can refuse to negotiate with very small unions and will not be accountable for any violation or infringement to the members right to collective bargaining – after all no right is absolute. Smaller trade unions must however retain their right to exist and to call for new elections for the determination of new bargaining agents after the expiration of a reasonable period.\footnote{See ILO Committee on Freedom of Association, 109th Report, para 100, in Freedom of Association and Collective Bargaining, 69th Session, 1987, p 97. See also von Potobsky, G (1972) ‘Protection of trade union rights: Twenty years’ work by the Committee on Freedom of Association, International Labour Review 105, p 73.}


Nevertheless, it is submitted that union representation would be most productive if one union is allowed to represent and speak for a particular group of workers. It will be counterproductive to grant bargaining status to every trade union that demands bargaining rights. This will create serious problems if the numerous unions decide to invoke the bargaining right simultaneously. For example, confusion and conflict could arise if rival teachers’ unions holding quite different views as to proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employers agreement. Without doubt, an excessive number of rival unions at the workplace would render worker representation ineffective.

Furthermore, bargaining with too many trade unions in one bargaining unit leads to undercutting of wages, and disparities in salaries and conditions of service for workers. It also gives room to employers to involve themselves in the internal affairs
of unions by trying to manipulate their ‘sweetheart’ unions so as to weaken the stronger unions. Again, bargaining with too many unions is time consuming and also very costly to the employer.

The lacuna created by the law raises the question of how exactly the issue of representativity should be determined. The adoption of either the majoritarian principal or the principal of representativity is recommended for Nigeria in order to facilitate the establishment of a collective bargaining body for the protection of their interests.

Whichever principle is adopted, it is imperative that a definitive modality and an independent or neutral body are established to carry it out. The ILO Committee on Freedom of Association has opined that the determination of such representation should be based on ‘objective and pre-established criteria’ so as to avoid opportunity for partiality or abuse. The Committee further suggests that where the law is involved in the certification of procedure for exclusive bargaining agent, such certification is to be made by an independent body.

Any reform of the law in Nigeria must therefore provide objective and pre-established criteria for determining representativity. Such criteria will have to take into account a number of factors such as the size of the union, experience and contributions to workers’ welfare, for example. In France, for example, the criteria for determining which organisations should be classified as ‘most representative’ include a number of these factors. However, in Nigeria’s bid to choose a ‘most representative’ trade union, the issue of large membership, contributions and experience can be seen in the light of how much support a union has among the workforce in question. Large membership is an important, but not necessarily a deciding factor for this purpose. As the Permanent Court of International Justice noted:

The most representative organisations … are, of course, those organisations which best represent … the workers … Numbers are not the only test of the representative character … but they are an important factor; other things being equal, the most numerous will be the most representative.

Clearly, the new law does not meet the requirements of international practice on trade union representation for effective collective bargaining purposes and needs to be amended.

5. THE RIGHT TO STRIKE

Another important area dealt with by the new law is the right to strike. The right to strike has been described as ‘an indispensable component of a democratic society and
a fundamental human right’. The right to strike is clearly a crucial weapon in the armoury of organised labour. The strike is an essential tool of trade unions all over the world for the defence and promotion of the rights and interests of their members, and is a necessary countervailing force against the power of capital. The strike plays the same role in labour negotiations that warfare plays in diplomatic negotiations; take away the right to strike and workers and their trade unions will be lame ducks. In the often-quoted words of Kahn-Freund: ‘there can be no equilibrium in industrial relations without a right to strike.’ The need for equilibrium is crucial in order to promote collective bargaining which helps to achieve social justice in the work place. It is in apparent recognition of this fact that Lord Wright, in his famous dictum in 1942, observed that:

Where the rights of labour are concerned, the rights of employers are conditioned by the right of men to give or withhold their services. The right of the 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 unions bargaining power, that is for the bargaining process itself, it is also a necessary sanction for enforcing agreed rules.

The right to strike is thus so important to the functioning of a democratic society that its removal would be unjustified. However, Nigeria’s new law contains serious attacks on the right to strike which seems to have rendered the right nugatory and fictitious. Three areas that are examined here are, first, the preconditions for the exercise of a legal strike, second, the question of strikes in essential services, and third, the issue of picketing.

(a) Conditions for the exercise of a legal strike

Section 6(d) of the 2005 Act provides that before workers can go on strike in Nigeria they are required to have fully exhausted the elaborate statutory procedure for settlement of trade disputes under the Trade Disputes Act. The Trade Disputes Act

45 Crofter Hand Woven Harris Tweed Co Ltd v Veitch (1942) A.C. 435, 463. This view was also echoed by the Constitutional Court of South Africa relatively recently in NUMSA v Bader Bop (Pty) Ltd 2003 (3) SA 513. As the Court stated: ‘[The right to strike] is of both historical and contemporary 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 bargaining system.’
46 Chapter 432 of the Laws of the Federation of Nigeria 1990.
introduced both voluntary and compulsory settlement procedures which include the
process of voluntary grievance settlement, mediation, conciliation, arbitration and
ultimate determination of the issues in dispute by the National Industrial Court.

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.\textsuperscript{47} If there is failure to reach an agreement, the
matter is reported to the Minister of Labour, who appoints a conciliator, and if
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.\textsuperscript{48}

To give force to these provisions, s 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 has finally determined the issue in
controversy. If, at the end of the processes, workers are dissatisfied with the award of
the National Industrial Court, then by virtue of s 17(3) the dispute presumably goes
for another round of adjudication and so on. The law has apparently created a vicious
circle of compulsory arbitration from which the workers cannot escape. By implica-
tion, the right to strike seems to have been circumvented by the legislature.

It is submitted that the effect of the law is to ban the right to strike in Nigeria.\textsuperscript{49} In
practical terms, it is difficult to see how trade unions 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 new law.
Ben-Israel has expressed a similar view:

\begin{quote}
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.\textsuperscript{50}
\end{quote}

This shrewd system of offering something in theory and restricting it in reality is not
limited to Nigeria. M’Baye and Ndiaye note the same position 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

\textsuperscript{47} Ibid, s 3(2).
\textsuperscript{48} Ibid, ss 5, 7, 8, and 13.
\textsuperscript{49} Since the law retains the compulsory and interminable arbitration procedure of s 17 of the Trade
Disputes Act, it means that strike action is presumed to be prohibited in Nigeria. See Agomo, CK
the right to strike in Nigeria: A perspective from international and comparative law’, \textit{RADIC}
\textsuperscript{50} Ben-Israel, R (1988) \textit{International Labour Standards: The Case of the Freedom to Strike}, Deventer:
Kluwer. p 98.
government authorities not adopting a solution of conciliation in regard to collective disputes.51

As Nwabueze noted of Commonwealth Africa:

Many governments had passed legislation to regulate strikes, either prohibiting them or subjecting them to rather stringent conditions.52

The ILO 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 and that a system of compulsory arbitration can result in considerable restriction of the right of workers’ organisations to organise their activities and may even involve an absolute prohibition of strikes, contrary to the principles of freedom of association.53

Furthermore, another problematic issue here is the fact that criminal sanctions are imposed by s 7 of the new law against those who exercise the right to strike. The section provides a fine of N10, 000 or six months’ imprisonment for participation in a strike. There can be little doubt that workers go on strike because they have real grievances about important issues that 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 legitimate demands. The imposition of criminal sanctions for exercising the right to strike will not help the development of healthy industrial relations and may well create more problems than they resolve.54 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.55

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 strikes may occur.\textsuperscript{56} But criminal sanctions certainly cannot solve the magic of foreclosing strikes by workers. 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 way to stop strikes is not by policemen but by a conciliation officer, not by assize courts, but by the arbitration tribunals.\textsuperscript{57}

There is no doubt that the new law has added further nails to the coffin of the barely existent right to strike. It is indeed a sad reflection that at a time when most countries 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.

(b) 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’ expresses the idea that certain activities are of fundamental importance to the community, and that their disruption will have particularly harmful consequences.\textsuperscript{58}

The Freedom of Association Committee of the ILO defined essential services as those whose interruption may cause public hardship\textsuperscript{59} or serious hardship to the community.\textsuperscript{60} 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.\textsuperscript{61}

Section 6(a) of the new law prohibits workers in essential services from going on strike and adopts the definition of essential service under the Trade Disputes Act.\textsuperscript{62} According to s 9(1) of the Act, ‘essential service’ signifies –

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


\textsuperscript{60} Freedom of Association and Collective Bargaining: 1985 Digest, para 393.


\textsuperscript{62} Chapter 432 of the Laws of the Federation of Nigeria 1990.
Federation or persons employed in an industry or undertaking which deals or is connected with the manufacture or production of materials for use in the armed forces or any service established by the Government of the Federation or of a State, local government council or any municipal or statutory, or by private enterprise, in connection with the supply of electricity, water, fuel of any kind, sound broadcasting, postal, telegraphic, telephonic communications, ports, harbours, docks, transportation of persons, goods or livestock by road, rail sea, river or air, the burial of the dead, hospitals, the prevention of disease, or any of the following public health matters, namely sanitation, road-cleansing, disposal of night-soil and rubbish, dealing with outbreaks of fire; Service in any capacity in any of the following organisations—the Central Bank of Nigeria, the Nigeria Security Printing and Minting Company Limited, and any corporate body licensed to carry on banking business under the Banking Act.

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 flexible 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 a nonsense of the basic concept of essential services. Essential service is – at its base-line definition – a service the disruption of which would endanger human life, public health or safety.63 The list of essential services is arguably over-inclusive and 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 other services, such as ports, petroleum and private corporate bodies undertaking banking business, constitute essential services.

It is submitted therefore that a more useful and practical categorisation would be one that looks at the particular type of service being performed or provided in order to determine its essentiality. For this purpose a reclassification 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 hospitals, the burial of the dead, 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 the public health and safety of the community and it may be reasonable to prohibit strikes in these services.

(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 the essential services listed 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 important to take into account the effect of strike action on public health and safety. But certainly it is inappropriate for all state-owned undertakings to be treated on the same basis in respect of limitations of the right to strike, without distinguishing between those that are genuinely essential and those that are not.64

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 violation of the ILO standards which demand 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. The ILO insists that 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.65

Otobo has condemned the list of essential services as being as 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. It is not merely a question of these public servants having their own trade unions or associations as elsewhere in the world, but also of their democratic right and the fact that historical evidence indicates the denial of these rights to them by restrictive legislation, ‘in the public interest’, merely served to render most of the essential services unattractive places to work in for a majority of workers … thus aside from the Military (and intelligence agencies), which is not a

voluntary institution, the freedom of association and the right to organise and bargain collectively should be enjoyed by all public servants.66

As has been noted, ‘apart from several provisions which practically tend to undermine the right of trade unions to embark on industrial actions, provisions which arbitrarily determine issues which workers can go on strike for and which issues they could never go on strike for, the trade union act completely outlaw 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.67

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. Prohibition of large groups of employees’ right to strike is not in line with liberal democratic norms.68

(c) Picketing

Picketing is an aspect of a strike. It is employed by workers on strike to persuade non-strikers to join the strike. It is where a worker or group of workers go to the factory gate or any other place of work during a strike to persuade others not to go to work.

The truth is that a strike, alone, may not always be sufficient to secure the objective of the strikers. Some workers (‘scabs’) may not join the strike. Replacement workers (‘blacklegs’) may be readily available. Therefore, in order to ensure the effectiveness of the strike, it may be necessary to persuade the ‘scabs’ to join the strike or dissuade them from continuing to work, and to prevent the ‘blacklegs’ from being used as replacements. Furthermore, it may be necessary to dissuade customers and suppliers from dealing with the employer and to secure public sympathy for the strike. Picketing is thus the physical means employed by employees either to intensify the economic pressure mounted on the employer or to ensure that the concerted stoppage of work is not undermined69

Section 9 of the new Act amending section 42(1) of the Principal Act requires that ‘no trade union or registered Federation of Trade Unions or any member thereof shall in the course of any strike action compel any person who is not a member of its union to join any strike or in any manner whatsoever, prevent aircrafts from flying or

68 Woolfson and Beck have expressed a similar view. See Woolfson, C and Beck, M (2002–03) ‘The right to strike, labour market liberalization and the new labour code in pre-accession Lithuania’, Review of Central and East European Law 28(1), p 83.
obstruct public highways, institutions or premises of any kind for the purposes of giving effect to the strike’.

The new provision seems to be targeted at the ability of workers and trade unions to attract sufficient solidarity and sympathy for strike actions. It is submitted that this provision is too broad and could be used to outlaw otherwise peaceful gatherings of trade unions and workers. For example, any group of workers on strike could be accused of violating the law by obstructing premises and highways for gathering on the streets or on the work premises, however peaceful the gathering may be. Moreover, aircraft-related services should not be the subject of an overall ban because they are not considered essential services.70

The ILO law requires that any pre-conditions for the calling of a strike should be reasonable and in any event should not place a substantial limitation on the means of action open to trade union organisations.71 This provision in s 9 could ‘potentially outlaw any gathering or strike picket’.72 This provision must therefore be further amended to comply with international labour standards and ensure that undue restrictions are not placed on the right to strike actions under the guise of maintaining public order.

6. CONCLUSION

One cannot say without the fear of contradiction that Nigerian workers enjoy a high degree of freedom of association. There is still the need for more reform in our labour law and industrial relations system to make a reality out of the constitutionally guaranteed freedom of association. Freedom of association is indivisible. This means that it cannot be guaranteed to other sections of the society while workers are lagging behind.

The 2005 Act has serious implications for labour relations in Nigeria. Its provisions infringe on critical rights of workers and trade unions. There is a marked incongruity between the provisions of the Act and the expressed objectives and justifications for passing it.

As we have seen, the new law has made an improvement in that workers now have the right to belong to a union of their choice. There is no longer compulsory membership of any sort. However, the reform is not complete because the minimum number for the formation of a trade union is still pegged at 50 members. This makes it difficult to realise the dream of belonging to or forming a union of one’s choice because more than 80% of establishments in Nigeria have fewer than 50 workers.

Consequently more reform is needed in this area if workers are to enjoy freedom of association in the real sense.

On the issue of recognition of trade unions for purposes of collective bargaining, the new law has merely provided a basis for trade unions to elect their representatives for purposes of collective bargaining with employers in the workplace without any laid-down criteria for the election of such representatives. Because of obvious reasons of conflict and confusion that may result where numerous unions struggle for recognition and bargaining rights with the employer, there must be criteria by which a more mature and representative trade union is selected to recognise the interests of all workers in the bargaining unit. As has been argued, the law must be reformed to adopt either the majoritarian principle or the principle of sufficiently representative trade unions, both of which are accepted in international law to strengthen the process of collective bargaining and enhance freedom of association.

The other area where the new law failed completely to make any positive impact is on the right to strike. The new law contains legislated attacks on the right to strike. In the first place, apart from adopting a bogus and over-inclusive list of essential services, the new law denies workers in essential services the right to strike. Second, the preconditions for a lawful strike, including picketing, are such that it will practically be impossible for strikes to take place.

The conclusion must be that the Nigerian worker has been denied the right to strike. This tilts the bargaining power more and more in favour of employers. But in a free-market economy every one is only able to achieve economic progress by a clever manipulation of the forces of the market. To deprive the worker of their right to organise industrial action is not only to deprive them of a requisite weapon in their bargaining armory, but is an attempt to leave them economically rudderless and unprotected in the fierce economic encounters with the employer. There is therefore need to amend the law to guarantee the right to strike, remove obstacles and redefine the concept of essential services in line with international standards. As Kahn-Freund once noted: ‘No country I know of suppresses the freedom to strike in peace time except dictatorships and countries practising racial discrimination ... A legal system which suppresses the freedom to strike puts the workers at the mercy of the employers.”73 In truth, Nigeria is not a dictatorship nor does it practise racial discrimination. To take away the right to strike is to make workers lame ducks or sitting ducks in a shooting range. The continued suppression of the right to strike must therefore be addressed, and urgently too.

One measure of the health of any society is the extent to which its legal system and administration are in tune with contemporary realities and contemporary public opinion. It is submitted that the 2005 Act does not meet its expressed aims of inter alia complying with ILO requirements concerning democratisation in the organisation of labour and consolidating the values of accountability and participation.74 Another major law reform is needed in Nigeria to address these issues adequately and to correct most of the imbalances that have been highlighted in this article.

Labour standards have become the subject of international rules through bodies such as the ILO. Such standards are an increasing part of the global economy of which Nigeria is a part. These standards must therefore be translated into Nigerian labour law and industrial relations. In fact, 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 Organization, it must be expected to show very positive examples in all spheres of respect for labour standards, especially the right to freedom of association.

References


