Rivers State University of Science and Technology, Port Harcourt, Nigeria

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2007

The Right to Strike in A Democratic Society: The Case of Nigeria

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Available at: https://works.bepress.com/ovunda_v_c_okene/21/
THE RIGHT OF WORKERS TO STRIKE IN A DEMOCRATIC SOCIETY: THE CASE OF NIGERIA

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ABSTRACT

"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" - Leslie MacFarlane

1. INTRODUCTION

The question of whether workers generally have a right to strike in a democratic society is a very topical and fascinating aspect of labour relations law which has provoked considerable academic debate as a central feature of many industrial relations systems.

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

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tool of trade unions all over the world for the defence and promotion of the rights and interests\(^3\) of their members, and is a necessary counter-veiling force to the power of capital. In the often-quoted words of Kahn-Freund “there can be no equilibrium in industrial relations without a right to strike”\(^4\) The need for equilibrium is very crucial in order to promote collective bargaining which helps to achieve social justice in the work place. The right to strike is thus so important to the functioning of a democratic society that its removal would be unjustified.

The purpose of this article is to examine the important question of whether Nigerian workers have the right to embark on strike actions. How the right to strike is accommodated under Nigerian law? What is the impact of international labour standards on the nature and scope of the right to strike in Nigeria? We shall examine the labour laws of Nigeria and the various international and regional human rights instruments dealing with the right to strike and determine the extent to which it is protected by law. This article argues that the severe legal limitations and restrictions of this right in Nigeria renders 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.

2. DEFINITION AND NATURE OF 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

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definitions of strike. A number of legal systems define strike by legislation and the definition of a strike has also been developed and elaborated by legal doctrine. Naturally, each definition will reflect the position in one jurisdiction or the other. In *Tram Shipping Corporation V. Greenwich Marine Incorp.* 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.

Under Nigerian Law, Section 47 of the Trade Disputes Act defines a strike as follows:

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

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7 Ibid.

8 (1975) ALL E.R 898, P. 990; (1975) ICR 261, P. 276; See also *Miles V. Wakefield Metropolitan District Council* (1987) 2 ALL ER 1081, P., 1097


10 Chapter 432 Laws of the Federation of Nigeria 1990

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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 issues which clearly bring out the meaning and essence of a strike are apparent in the foregoing definition. The first is that there must be a cessation of work. The second is that the cessation of work must be as a result of a concerted effort brought about by a combination of persons. The third is that the purpose of the cessation must be in connection with a dispute involving the terms of employment and physical conditions of work with a common purpose to withdraw their labour before their action can be regarded as a strike. A number of employees, annoyed by some act of the employer, all giving notice, may do as much damage to the employer as a strike; but unless they act in agreement, it is not a strike.11

3. SOURCES OF THE RIGHT TO STRIKE IN INTERNATIONAL LAW

There is clearly international support for the existence and protection of the right to strike. Article 8(1) (d) of the 1996 International Covenant on Economic, Social and Cultural Rights explicitly recognises the right to strike. As Article 8 (1) (d) affirms:

“The State parties to the present Covenant undertake to ensure...The right to strike, provided that it is exercised in conformity with the laws of the particular country”.


12 One guideline that is provided in Article 8 (2) which permits restriction of the right to strike of members of the armed forces, or the police or the administration of the state. Article 8 (2) reads: “this Article shall not prevent the imposition of lawful restrictions on the exercise of the rights by members of the armed forces or of the police or of the administration of the state.”
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It is pertinent to note that the right to strike conferred by the Covenant is subjected to the laws of particular countries which can lawfully impose restrictions on its exercise. The Covenant does not provide for specific purposes or the extent of such legal restrictions and limitations.\(^\text{12}\) It is worthy of note also 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 progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including the adoption of legislative measures".

Four other regional instruments also affirm the importance of right to strike. The European Social Charter is a regional instrument which explicitly provides for the right to strike in Article 6 (4) thus:

"With a view to ensuring the effective exercise of the right to bargain collectively, the contracting parties undertake...to promote...and recognise the right of workers and employers to collective action in cases of conflict of interests, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

The Social Charter, however, allows possible limitations and restrictions on the right to strike. Limitations are permissible so long as they are “prescribed by law, and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.”\(^\text{13}\) The other regional instruments are the Community Charter of Fundamental Social Rights of Workers (CCFSRW) 1989\(^\text{14}\), the European Union Charter of Fundamental Rights (EUCFR) 2000\(^\text{15}\), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988 ((Protocol of San Salvador)\(^\text{16}\)

\(^{13}\) Article 31
\(^{14}\) See Point 13
\(^{15}\) See Article 24
\(^{16}\) See Article 8(1)(b) The American Convention on Human Rights was adopted in 1978 and is known as the “Pact of San José, Costa Rica”
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 pre-eminent authority and 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 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.\(^{17}\) 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.”\(^{18}\) 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\(^{19}\)

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

\(^{17}\) 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

\(^{18}\) ILO, 1957, P.783

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Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The Committee on Freedom of Association has ruled that strikes are part and parcel of trade union activities. 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".

As the Committee of Experts further elucidated:

"these interests not only have to do with obtaining better working conditions and pursuing 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."

Furthermore, the ILO Supervisory bodies have always referred to the right to strike when they have considered applications of Articles 3 and 8 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.

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20 See Freedom of Association: 1985 Digest, Para. 360
21 Ibid. para.200
23 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."
24 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."

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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.\(^{26}\) 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.”\(^{27}\) 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.”\(^{28}\)

4. SOURCES OF 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

\(^{26}\) Freedom of Association: 1985 Digest, paragraphs 540-564; See Generally Convention 98


\(^{28}\) ILO Freedom of Association, 1985 Digest pp.78-79, Para. 394 and 400; See also 1983 Digest, p.66 para.214
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 noted:

"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."\(^{29}\)

But it would appear that there is an overwhelming tendency by many countries to positively recognise the right to strike to strike in line with the demands of international law. 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\(^{30}\). Section 7 of the Act provides as follows:

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:

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"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 effect the limitations or qualifications in that right."31

In *UAW v. O'Brien*32, 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.33 The right to strike is legally protected so that it can provide workers with a source of bargaining power.34

The positive recognition of the right to strike in US appears 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.35

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

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32 329 U.S. 454, 457 (1950)


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.

The right to strike exists in France. Paragraph 6 of the preamble to the 1946 Constitution provides:

“Every man can defend his rights and his interest by collective action and belong to the association of his choice.”

And by Paragraph 7:

“The right to strike is to be exercised within the framework of the laws which regulate it”.

Clearly the right to strike in France has a constitutional value. Such recognition, which makes the right to strike a constitutionally protected principle, limits the restrictions that could be placed by the law on the exercise of this right. But there has been no real legislative regulation: the scope of the right to strike, and the conditions governing the implementation thereof, has been defined principally by case law. The holder of the right to strike is the individual employee. It is not a union prerogative. This means that strikes by a minority of employees, strikes confined to a single workshop and lightning strikes without advance notice (except in the case of the public service sector) are all lawful forms of its exercise. Since strike action is a right, it merely implies a suspension of performance of the contract of employment. Dismissal of an employee who takes part in a lawful strike is automatically null and void and gives rise to entitlement to reinstatement.36

In the Federal Republic of Germany, the right to strike is legalised and guaranteed under Article 9 Paragraph 3 of the Basic Law (i.e. the constitution) which was adopted on 23 May 1949. Article 9, Para.3 of the Basic Law provides:

"The right to form associations for the preservation and advancement of the conditions of labour and business is guaranteed for everyone and for all vocations. Agreements which limit this right or seek to impede it are invalid; measures with this object in view are contrary to Law."

Youngs contends that Paragraph 3 includes the right not only to join such associations, but also to engage in their activities - such as strikes and lockouts. He adds that since the associations’ rights to action are confined to the core area of its activity, some strikes - such as political strikes, wildcats strikes and strikes by officials - are not constitutionally protected. Industrial action can be carried out by employees as well as by the employer. It is not regulated by any Act but ruled by case law, especially through the decisions of the Federal Labour court. Employee strikes are generally recognised industrial actions. There might be an all-out strike, which hits the whole branch of industry, or merely selective strikes, which are concentrated on key firms or key departments.

The cardinal point is that strikes can only be lawful if they are called and conducted by a trade union. The rationale is that the function of strikes is to lead to the conclusion of a collective bargain and only unions can be parties to such bargains. Hence, wildcat strikes and strikes called by works councils are unlawful. The right to strike is clearly allowed in Germany for the purpose of achieving collective agreements.

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38 Ibid.
Suffice it to say that right to strike is also recognised and protected in the constitutions of several other jurisdictions such as the Russian Federation\textsuperscript{40}, South Africa\textsuperscript{41}, Spain\textsuperscript{42} and so on. There is almost a ubiquitous constitutional recognition of the right to strike. As David Ziskind rightly observed:

"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."\textsuperscript{43}

In sum, there seems to be a global consensus on the importance of the right to strike in a democratic society.

5. SOURCES OF THE RIGHT TO STRIKE IN NIGERIA

There is no constitutional right to strike in Nigeria as there is in the French, Russian, Italian and other national constitutions where this right is clearly and explicitly provided for in the Constitution.

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. Sections 23 and 43 of the Trade Unions Act\textsuperscript{44} give legal immunity to workers both in their personal capacities and as trade unions for acts done in contemplation or furtherance of a trade dispute. Before 1968, it was generally

\textsuperscript{40} See Article 37 of the 1993 Constitution
\textsuperscript{41} Section 23 of the 1996 Constitution
\textsuperscript{42} Article 28 (2) of the 1978 Constitution
\textsuperscript{44} Chapter 437, Laws of the Federation of Nigeria 1990
assumed that there was a right to strike in Nigeria. The common law position ably articulated by Lord Wright in *Crofter Hand Woven Tweed v. Veitch*\(^{45}\) was very applicable to Nigeria. Thus Nigerian trade unions made ample use of that right in response to lack of proper negotiating machinery, particularly in the aftermath of the Second World War. Thus 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.\(^{46}\) But 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\(^{47}\) The government placed an outright ban on strikes by promulgating the Trade Disputes (Emergency Provisions) Act.\(^{48}\) The following year, the government reinforced the earlier Act by promulgating the Trade Disputes (Emergency Provisions) (Amendment No. 2) Act, 1969\(^{49}\) 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) 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 has now become entrenched in the law by virtue of the Trade Disputes Act\(^{50}\). The Act has severely circumscribed the workers right to strike and introduced both voluntary and compulsory settlement of disputes. The Act provides an elaborate procedure for

\(^{45}\) 91942) ALL E.R. 142 at 157


\(^{47}\) Although there was no 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. See also A.A. Adeogun, *From Contract to Status in Quest for Security* (Lagos: University of Lagos Press 1986), p. 43

\(^{48}\) 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.

\(^{49}\) Act No. 53 of 1969

\(^{50}\) 1976 Chapter 432 Laws of the Federation of Nigeria 1990
settlement of trade disputes in Sections 1-17 which includes the process of Mediation, Conciliation, Arbitration and National Industrial Court.

Section 17 of the Trade Disputes Act makes it an offence for an employer to declare or take part in a lock-out or for a worker to take part in a strike action or perform any act preparatory to organising a strike. 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. Section 17 seems to have completely impaired the right of workers to strike in Nigeria.

*Did the legislature intend to put a complete ban on strikes?*

It might be argued, looking at the marginal notes to section 17 which read “Prohibition of lock-outs and strike before issue of award of National Industrial Court”, that it is not the intention of the legislature to ban strikes generally. There is no doubt that marginal notes do not form part of the law of a statute, but one might be persuaded by the view of Kayode Eso, JSC in *Olowo v. Alegbe*51 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.”52

My contention, however, is that the wordings of section 17 seem not to leave any room for a lawful strike. Its effect, it is submitted, is to prohibit strikes completely. By virtue of section 17(1), workers cannot go on strikes unless they observe the dispute settlement procedures. If, at the end of the processes, workers are dissatisfied with the award of the National Industrial Court whose decision is final, then by virtue of section 17(3) they must go through the whole process of dispute settlement all over again. The law has apparently created a vicious circle of compulsory arbitration from which the workers cannot escape. By implication,

51 (1983) 2 S.C.N.L.R. 35
the right to strike seems to have been smartly circumvented by the legislature. This view is supported by Ben-Israel. As she posited:

"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."\(^{53}\)

This is also clearly the position of the ILO. The Committee on Freedom of Association has ruled that:

"The substitution of compulsory arbitration for the right to strike, by legislative means, as a manner of resolving labour disputes, is a violation of Article 3 of Convention 87, which guarantees the workers' organisations the right to organise their activities."\(^{54}\)

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 Trade Disputes Act. As Agomo further explained:

_A literal construction of section 17 suggests that there is a right to strike although severely circumscribed. However, it seems more reasonable to say that there can never be a lawful exercise of any right to strike in Nigeria as long as section 17 remains on the Statute Book. Strikes and lock-outs are prohibited until all the procedures laid down in the Act are exhausted. Subsection (3) of the same section stipulates that any disagreement at any stage constitutes a new dispute. This is a sort of merry-go-round, where one can never differentiate one stage from another. It can therefore be said that section 17 constitutes, in effect, a total ban on the right to strike._\(^{55}\)

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\(^{52}\) Ibid. at p.57


\(^{54}\) See ILO Committee on Freedom of Association, 226th Report, Case No. 1140 (Colombia) Para. 293; 236th Report Case No. 1140 (Colombia), Para 145.

This shrewd system of offering something in theory and restricting its realization is not limited to Nigeria. Keba M'Baye and Birame Ndiaye have noted the similar position in other African countries. According to them:

"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."

Emiola argues that there is nothing in any law in Nigeria that affects the right to strike. With the greatest respect, this view does not represent the true position of the law in Nigeria. In the first place, there is no fundamental or positive right to strike in Nigeria like in other jurisdictions. Secondly, the so-called immunities extended to workers for acts done in contemplation or furtherance of a trade dispute seems to have been scuttled by section 17 of the Trade Disputes Act which clearly places an embargo on strikes and has effectively annihilated the so-called freedom to strike in Nigeria. One therefore wonders how any one can validly posit that "there is nothing in any law that affects the right to strike."

Supporting the view that there is a right to strike in Nigeria, Oggunniyi submits that the right to go on strike is fundamental to the employment relationship and is compatible with the traditional values of a society which professes democracy. The general statement that the right to go on strike is fundamental to employment relationship and compatible with democracy is very true. Unfortunately, however, Oggunniyi has failed to show us how the right to strike is provided for under Nigerian

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57 A. Emiolo, Nigerian Labour Law, 2nd Ed (Ibadan: Ibadan University Press 1982) P.239; see also Emiola, A, “The Legal Approach to Industrial Relations in Nigeria” (1988) Calabar law Journal Vol.2. P.31 at 32- where the learned Professor supporting the view that there is a right to strike under Nigerian Law further justifies his belief on the basis of the Trade Unions Act which gives immunity to both workers and unions for acts done in contemplation or furtherance of a trade dispute so far as the acts and disputes are legitimate.

58 Oggunniyi, O., Nigeria Labour and Employment Law in Perspective, (Lagos; Folio Publishers Ltd, 1991)P.286
law. This view gives us very little and seems hardly adequate in dealing with the important issue of the legal foundation or basis of the right to strike in Nigeria. One could search in vain for evidence to support this unequivocal statement. My argument is that there is no right to strike. A right to strike has to be provided *expressis verbis* (expressly) in the constitution or labour legislation in Nigeria as in other jurisdictions before one can contend that there is a right to strike in Nigeria.

*The Trade Union (Amendment) Act 2005 and the Right to Strike*

If there were doubts as to the non-existence of the right to strike in Nigeria, the recent legislation in this area leaves no one in any doubt. The recent Trade Union (Amendment) Act 2005 contains further serious restrictions on the freedom to strike in Nigeria. Section 6(d) of the Act amends Section 30 of the Trade Unions Act 1990 by inserting new subsections (6), (7), (8) and (9) immediately after the existing subsection (5). The new section 30(6), (7), (8) and (9) now stipulates the conditions that must be satisfied before strikes and lock-outs can take place and would appear to have dealt a further blow to any trace of the right to strike in Nigeria. In the first place, workers in essential services are expressly barred from embarking on strike action by section 30(6) (a). In any event, workers in essential services must go through arbitration and the determination of the National Industrial Court shall be final in such disputes. This clearly forecloses the possibility of a strike action by workers in essential services, as contravention of the conditions is made an offence punishable with a fine of N10, 000 or six months’ imprisonment - or with both fine and imprisonment.

For other workers, the restrictions seem to be of the same effect. As with section 17 of the Trade Disputes Act, it will be difficult to embark on a legal strike, since the provisions for arbitration under section 17 of the Trade Disputes Act must be complied with before any strike action can take place. As we have argued, the arbitration procedure is rather circuitous and interminable and it must be taken to have been intended as a measure to forestall the possibility of legitimate industrial action by workers. It is submitted that this is the true position, more so given the severity of sanctions attached to any breach of the stipulated conditions.
In our view, the provision of restrictions on the right to participate in a strike or lock out has been done inelegantly and incongruously. Why should strikes be regulated under section 30 of the Trade Unions Act dealing with admission of trade unions to an existing federation of trade unions? The proper thing, it is submitted, would have been to amend section 17 of the Trade Disputes Act which already deals with the issue of strikes and lock outs. In any case, this new law is definitely not in favour of a positive right to strike. 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 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."  

Since the law retains the compulsory and interminable arbitration procedure of section 17 of the Trade Disputes Act, it means that strike action is presumed to be prohibited in Nigeria. As we have argued, it will be practically impossible for any legitimate strike action to take place in the country.

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’ organisations to organise their activities and may even involve an absolute prohibition of strikes, contrary to the principles of freedom of association.  

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There is no doubt that the Trade Union (Amendment) Act 2005 has added 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 rights of its workers to such a legitimate claim.

The Public / Private Sector Dichotomy

Some workers are specifically denied the right to strike. Those employed in the "public service" are subject to restrictions. 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.61 The right of public employees to strike is not even mentioned or dealt with in the Convention and Recommendation which deals with labour relations in the public service.62 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. Other civil servants ought to have the right to strike guaranteed to them.63

Unfortunately, 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.64 In our view, Nigerian law is in breach of international standards. This is because the ILO, as we have stated above, does

61 Freedom of Association and Collective Bargaining: 1985 Digest, 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; See also R. Ben-Israel, supra, p. 106.
62 Labour Relations (Public Service) Convention No. 151 and No. 159 of 1978 respectively.
64 Section 9(1) Trade Disputes (Essential Services) Act, Chapter 433, Laws of the Federation of Nigeria 1990
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 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.

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. It is not possible to provide a uniform list of what constitutes essential services. This will arguably vary from one country to another. A developed country and a developing one, for example, cannot agree on a uniform definition due to their different political, economic and other circumstances. Thus, it is up to each country to determine which services are to be deemed essential in the light of its own circumstances.

At first, the Freedom of Association Committee of the ILO defined essential services as those whose interruption may cause public hardship or serious hardship to the community. 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”

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66 Almost all legal systems however seem to agree that certain essential services should be protected. See A. Pankert, “Settlement of Labour Disputes in Essential Services” (1980) 119 International Labour Review 723


68 Freedom of Association and Collective Bargaining: 1985 Digest, Para 393

Notwithstanding the lack of a consensus view, the ILO has provided a strict list of essential services to include the hospital sector, electricity services, water supply services, the telephone service, and air traffic control.\(^{70}\) However, the ILO list is not exhaustive and a state can add other services to its national legislation if it is deemed essential to its particular circumstances.\(^{71}\)

Clearly, an outright ban on strikes in essential services as strictly defined by the ILO is permissible. Based on the argument that public policy demands that such services should be operated without interruption, only very few people will quarrel with the idea of placing some restrictions on the freedom of workers in bona fide essential services to withdraw their labour.\(^{72}\) Thus, prohibitions of the right to strike applying to air-traffic controllers, medical and health staff and water supply workers have been held permissible, while the banking sector, teachers, fishing and mining have been deemed not to be essential in the strict sense.\(^{73}\)

In Nigeria, the Trade Disputes (Essential Services) Act\(^{74}\) prohibits workers in essential services from going on strike. The list of “essential service” includes, \textit{inter alia}, the public service of the Federation and the States, workers involved in electricity, power or water, transportation, wireless and telephonic communications, health and sanitation, fire service, Central Bank of Nigeria and corporate bodies carrying on banking business.

\begin{footnotesize}
\begin{itemize}
\item also General Survey 1983, Para 213-214; See also Gernigon, B., Odero, A., and Gudo, H., “ILO Principles Concerning the Right to Strike” (1998) 137 No.4 \textit{International Labour Review} 1-32, 7
\item ILO 1996 Digest Para 544
\item Ibid Para 545
\item Some centuries back, John Stuart Mill reminded trade unionists that they owe moral duties to the community at large and it behoves them to take care that the conditions they make for their own separate interest do not conflict with their obligations to the community. See Lee, E., “Trade Union Rights: An Economic Perspective”, (1998 ) 137 (No. 3) \textit{International Labour Review} 313,316
\item Chapter 433, Laws of the Federation of Nigeria, 1990.
\end{itemize}
\end{footnotesize}
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The Law provides penalty by way of a fine of ₦10,000 for employers and a fine of ₦200 and/or six months’ imprisonment for members and officials of trade unions who violate the law.\textsuperscript{75} The complete prohibition of strikes in essential services is reinforced by the Trade Union (Amendment) Act\textsuperscript{76} and provides for a fine of ₦10,000 or six months’ imprisonment for any contravention. The only remarkable difference here is that whereas the former law provides for ₦10,000 for employers and ₦2,000 or six months’ imprisonment against members and officials of trade unions, the new law penalty is applicable across the board to any person, trade union or employer who may violate the law.

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. While the prohibition on the armed forces, electricity, health, water and telecommunications sectors may seem justified, it is difficult to completely agree that ports, petroleum and private corporate bodies undertaking banking business constitute essential services. It is submitted that strikes of a short duration 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. Furthermore, a complete ban on all public sector institutions and agencies is unrealistic because strikes in these areas do not seriously harm society. The Nigerian 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. This seems to be a clear violation of the ILO standards which demands that essential services should be interpreted very strictly.

\textsuperscript{75} Ibid, Section 2(2)

\textsuperscript{76} 2005. See section 6 which provides for a new section 30(6) (a) of the Trade Unions Act 1990 to read "No person, trade union or employer shall take part in a strike or lock out or engage in any conduct in contemplation or furtherance of a strike or lock out unless that person, trade union or employer is not engaged in the provision of essential services."
It is thus 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. One commentator has also condemned the 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."\(^77\)

The ILO has warned that the principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services in too broad a manner. As an exception to the general principle of the right to strike essential services in which this principle may be entirely or partly waived should be defined restrictively: the Committee therefore considers that essential services are only those the interpretation of which would endanger the life, personal safety or health of the whole or part of the population.\(^78\)

6. PENAL SANCTIONS FOR STRIKES\(^79\)

The essence of a right to strike is that those exercising the right are protected against any prejudice or detriment as a result of embarking on a strike action. This is not the case under Nigerian law. Section 17(1) of the Trade Disputes Act\(^80\)


\(^78\) See Freedom of Association and Collective bargaining 1994 General Survey, Para. 159

\(^79\) Apart from being subjected to penal sanctions, strikers in Nigeria are also liable to be dismissed from employment as a consequence of the common law position that is still applicable. Besides, there is no guarantee of continuity in employment, no salary or wages for the duration of strikes See section 42 of the Trade Disputes Act, 1990.

\(^80\) Cap. 432, LFN, 1990
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prevents workers from going on strike, and employers from imposing lock-outs. It is a criminal offence to embark on a strike or lock-out in contravention of the aforesaid section. A worker who goes on strike is liable on conviction to a fine of N100.00 or six months’ imprisonment, whereas for a corporate body, a fine of N1, 000.00 is imposed on conviction. The Trade Union (Amendment) Act, 2005 also provides for a new section 30(7) to the Principal Act which further imposes criminal sanctions for participation in a strike. The section states “Any person, trade union or employer who contravenes any of the provisions of this section commits an offence and is liable on conviction to a fine of N10, 000 or six months’ imprisonment or to both the fine and imprisonment.

Has the ban on strikes been effective?

The question may be asked at this stage as to how effective and realistic are the laws banning strikes in Nigeria. The penal sanctions attached to strikes and lock-outs were apparently introduced by government to deter workers and employers from embarking on strikes and lock-outs. But over a decade after the promulgation of the first Act, strikes have continued unabated in Nigeria as trade unions and workers have continued to ignore the provisions. Rather than succeeding in stopping strikes, there has been an upsurge in strikes or at least the threat of strikes in one form or another. Why should strikes be criminalised when the proper thing to do would be to seek for ways of reconciling the cause of conflict between the parties? In any case, the various penalties set out in the Acts have not been effective as evidence shows that strikes have continued unabated both in the public and private sectors of the economy despite the ban. According to Tayo Fashoyin:

"...the first year of the operation of the statute has shown the contemptuous attitude of trade unions to the provisions. Indeed, the statute had not stopped strikes and lock outs; rather there is an upward surge in the number of strikes." 83

81 Our argument is that the practical effect of section 17 is to ban strikes and lock outs completely.
82 The Principal Act is the Trade Unions Act, Chapter 437 Laws of the Federation of Nigeria 1990.
And as Adeogun argued;

"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." 84

Justice Aguda also posited that:

"... The rate and intensity of strikes have escalated and the Government has not found it possible to make resort to the penalties laid down in the Acts. In other words, both workers and employers... have been breaching the provisions with impunity... this has distracted considerably from the majesty of Law and the cause of social justice which is the intention of the Government to foster is to a very large extent thereby defeated." 85

The current stand of the law must be condemned whatever the intention of the government might be. 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. 86 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 way to stop strikes is not by policemen but by a conciliation officer, not by assize courts, but by the arbitration tribunals." 87

86 O. Kahn-Freund, O., and Hepple, B.A., The Laws Against Strikes op. cit. pp.5-8
87 Hansard, Feb. 12, 1946, cols. 199-200; See also Bretten, R., "The Right to Strike in New Zealand" (1968) 17 International and Comparative Law Quarterly, p. 756. An oft-
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The Committee of Experts of the ILO has also observed that:

"...the existence of heavy sanctions for strike action may well create more problems than they resolve... the application of penal sanctions does not favour the development of harmonious and stable industrial relations..."  

It is sad that at a time when many countries of the world are increasingly realising this need and taking appropriate steps to protect workers, Nigerian law is being more repressive. This certainly will not make the workers happy, and puts them at a disadvantage in labour-management relationship.

7. 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 right to strike is clearly recognised in international law and in the laws and constitutions of many countries of the world, thus making it legally available as a

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quoted British example of the futility of prosecuting strikers arose from events at Betteshanger Colliery in Kent in 1941, when 4,000 miners went on strike in breach of wartime legislation. Summons was served on 1,000 underground workers, but, as described to the Donovan Commission “Charges against 1,000 persons could only be handled satisfactorily if the men pleaded guilty. If each man pleaded ‘not guilty’ the proceedings might last for months. The Union was asked if they would instruct their employers to plead guilty, and accept a decision on a few test cases. The workers obligingly did so.” See G. Morris, Strikes in Essential Services (London and New York: Mansell Publishing Limited, 1986), p. 192; For the Donovan Commission, this episode proved the fruitlessness of the use of penal sanctions for the purpose of enforcing industrial peace. See Morris, G., ibid.; See also Cordova, E., “Strikes in the Public Service: Some Determinants and Trends”, (1985)124 International Labour Review, pp.166, 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.


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viable tool for labour in the inevitable conflict of interests between labour and capital. 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. Despite differences in conditions of particular countries ILO expectation of labour standards is uniform.\(^{89}\) This is understandable because men are men, work is work and labour problems have universality.\(^{90}\)

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. Another unfortunate issue in industrial relations in Nigeria is that the employer still retains the common law right to dismiss striking workers. The situation would be different where there is a positive guaranteed right to strike. Thus the right to strike in Nigeria is a \textit{desideratum}. The continued suppression of workers right to strike must be seriously addressed and urgently too. As Kahn-Freund admirably noted:

\begin{quote}
\textit{"No country I know of suppresses the freedom to strike in peace time except dictatorships and countries practicing racial discrimination... A}\end{quote}

\footnote{89 See Report III (Part 4A), International Labour Conference, 63\textsuperscript{rd} Session, 19977, General Report, Para. 31.}


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legal system which suppresses the freedom to strike puts the workers at the mercy of the employers. "91

Nigeria has ratified the entire core ILO Conventions, particularly Nos. 87 and 98, 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 positive right to strike as enshrined in Article 8 (1) (d), through legislative measures or by other appropriate means. The right to strike may be regulated by law but not curbed, and still less destroyed as Nigerian law has sought to do. Nigeria has to file a report on its observance of the provisions of the Conventions every five years. What face will Nigeria’s attorney—general show to the human rights committee when it hears the report? The need for immediate reform of the right to strike in Nigeria cannot be overemphasised.

Finally, 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. This must be done quickly because the right to strike is the only democratic safety that can effectively eliminate the eventuality of a revolution.