Derogations and restrictions on the right to strike under international law: the case of Nigeria

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This paper explores a neglected aspect of legislative reform, derogations and restrictions on the exercise of the right to strike in Nigeria. It draws on the international labour standards established by the International Labour Organisation to assess the derogations and restrictions on the right to strike. The paper argues that despite the important function of the right to strike, Nigeria lags far behind international standards and therefore infringes its obligations under international law through excessive derogations and restrictions placed on the right to strike, particularly in the essential services, the oil and gas sectors, export-processing zones, the right to picketing, and in interests disputes. The conclusion is that these violations must be redressed and the right to strike strengthened to enable collective bargaining to perform the important role envisaged in Nigeria’s system of industrial relations.

Keywords: human rights; labour law; right to strike; derogations; restrictions; Nigeria

1. Introduction

The question of workers’ right to strike has over the last several years become a topical issue in international labour law. Scholars and practitioners have published various works on the right to strike, as the right to strike constitutes a central feature of many industrial relations systems. The right to strike is basic to the distribution of power between employers and employees and is essential to individual and group autonomy and the freedom to promote one’s economic interests. In the modern economic system, it is inevitable that the forces of labour and capital must clash. This is because, while the providers of labour (employees) seek to achieve higher wages and better working conditions, the providers of capital (employers) seek to maximise profit by paying lower wages and incurring less expenditure. Where employees have to confront their employers in wage negotiations they have to present a solid front. The only way that they can meet employers as equal partners is when they work through their trade organisations. Negotiation between the two parties is known as collective bargaining. In some cases, however, negotiations do not have a satisfactory outcome. Sometimes the views of the parties are so diametrically opposed that negotiations break down. It is after the breakdown of negotiations that trade unions ballot their members for a mandate to commence strike action. It is the threat of strike or the actual exercise thereof that compels the employer to accede to the demands of the employer. Thus, collective bargaining will not be effective without a credible threat of industrial action to make it impossible to do business without striking workers. The employer could say: “I am putting pressure on the government to do something.”

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creditable threat of industrial action. Indeed, if workers could not in the last resort collectively refuse to work, they could not bargain collectively. As Kahn-Freund asserts, 'The strike is the ultimate sanction without which collective bargaining cannot exist.' As Collins et al. have noted, 'The connection between the right to strike and collective bargaining is easy to understand. Collective bargaining would be rather empty of substance if the employer could say: “this is my offer – take it or leave it”, or if the employer could say: “I am proposing to change the terms of existing collective agreement – and there is nothing you can do about it, whether you agree or not”. The strike enables workers collectively to put pressure on the employer in pursuit of what they see as a just cause and a way of resisting what they see as unjust action by the employer.' In the absence of the right to strike 'collective bargaining' would amount to 'collective begging.'

Striking is a normal, inevitable and necessary consequence of the organisation of the labour market on capitalist lines. In a free market economy no one is able to achieve economic progress except by clever manipulation of the forces of the market. To deprive workers of their right to engage in industrial action is not only to deprive them of a necessary weapon in their bargaining armory, but to leave them economically rudderless and unprotected in fierce economic encounters with employers. The importance of the right to strike in industrial relations cannot be over-emphasised. The strike plays the same role in labour negotiations that warfare plays in diplomatic negotiations. In his famous statement in 1942 Lord Wright observed that 'where the rights of labour are concerned, the rights of the employers are conditioned by the rights of the men to give or withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining. It is, in other words an essential element not only of the union's bargaining process itself, it is also a necessary sanction for enforcing agreed rules.'

The right to strike is thus so important to the functioning of a democratic society that its suppression would be unjustified. The right is now accepted as an indispensable component of a democratic society and a fundamental human right. The approach of the International Labour Organisation (ILO) is to regard the right to strike as a positive right which is subject only to the reasonable restrictions that might be imposed by the law. In Nigeria, on the other hand, there is no positive right to strike. The right to strike in Nigeria, as in the UK, stems from the British post-colonial legacy of granting a series of specific immunities from a general prohibition of strikes. It must be noted also that because the labour movement in Nigeria developed as part of/in alliance with a wider pro-democracy movement, the employer (capital)/employee (labour) relationship was never the exclusive basis upon which the Nigerian trade union movement undertook strike action. Hence, in post-colonial Nigeria, the right to strike has been exercised on the basis of demands and concerns centred upon the political system rather than the workplace. Indeed, most strikes in African countries belong to this category.

Despite the importance of the right to strike, it is generally recognised that derogations or restrictions may be necessary to avoid abuse of the right to strike or its usage contrary to the needs of the community. Such restraints can be imposed by reference to the need to protect essential services or public order. Alternatively, they may be imposed by reference to the need to protect the safety and health of the community or to maintain the integrity of the formal collective-bargaining or arbitration arrangements. There is, therefore, a need to consider the conflicting interests and to strike a balance between the right to strike and other interests. The right to strike should be circumscribed by the harms it causes to employers, to other workers, to consumers and to society. However, the right to strike must not be suppressed to the extent of rendering illusory the rights to associate and to collective bargaining.

The aim of this article is to critically appraise the derogations and restrictions on the right to strike in Nigeria, using international labour law, especially the standards prescribed...
by the ILO. The first part examines the right to strike under international law. The second part examines whether workers in Nigeria enjoy the right to strike. The third part considers the derogations and restrictions on the right to strike, such as those relating to essential services, the oil and gas industries, the export-processing zones, the right to picket, and disputes of interests. In sum, this article argues that the nature and scope of the derogations and restrictions on the right to strike in Nigeria render the right illusory and, most importantly, violate international legal principles of the right to strike. It is further argued that Nigeria should take remedial steps to bring its laws in conformity with international standards.

2. The right to strike in international law

International consensus on the status of the right to strike as a fundamental human right has evolved. A number of human rights instruments acknowledge the existence and protection of the right to strike, at both international and regional levels. A specific provision for the right to strike is contained in Article 8 (1) (d) of the International Covenant on Economic, Social and Cultural Rights 1966. Explicit references to the right to strike are also contained in some regional instruments, notably the European Social Charter 1961 and the European Community Social Charter of Fundamental Social Rights of Workers 1989.

Another regional source of the right to strike is to be found in the African Charter of Human and Peoples Rights (ACHPR). Although the ACHPR does not specifically provide for the right to strike, or for trade union rights for that matter, a conjoint reading of Articles 10 (freedom of association), 11 (freedom of assembly), 5 (right to dignity and prohibition of exploitation) and 15 (right to work) of the Charter provides support and a basis for the right to strike. These provisions give impetus to trade unions to perform their activities in the protection of the legitimate interests of workers, including the right to strike. Furthermore, Article 25 places a duty on states to promote rights contained in the Charter, and Article 26 places a duty on states to ensure their legal system recognises and enforces the rights of the Charter. In addition, 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 the Guidelines, states are obliged to provide information on laws, regulations and court decisions that are designated to promote, regulate or safeguard trade union rights, including the right to collective bargaining and the right to strike. This could be seen as indirect support for the right to strike.

The International Labour Organisation is the United Nations agency responsible for upholding global labour standards. The ILO is considered the chief 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. The absence of explicit provisions does not mean, however, that the ILO has ignored the right to strike or refuses to deal with the means of safeguarding its exercise. The ILO does recognise that worker organisations have several means available to them for the defence of the economic and social interests of their members. These means include the right to strike, which can at times cause prejudice to the employer.

The ILO standards governing strikes may be inferred from the decisions of the ILO supervisory bodies, in particular those of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Governing Body Committee on Freedom of Association (CFA). The Freedom of Association Committee, which is officially concerned relating to the exercise of trade union rights to strike ‘as a means to secure the economic and social policy’ of workers.

The ILO standards in the Protection of the Right of Workers’ Freedom of Association are based on the premise that the law of the country in question should be such as to implement the ILO’s Conventions and Recommendations. In view of the definition of Freedom of Association, it is clear that the ILO’s Conventions and Recommendations are interpreted in such a way that they give effect to the right to organise and bargain collectively. The ILO standards refer to the right to strike, which is considered a fundamental right of workers. The ILO has issued a number of decisions on the right to strike, which are considered to be binding on the states that have ratified the relevant ILO Conventions. The ILO standards relating to the right to strike are based on the principle of worker autonomy and the right to organise and bargain collectively. The ILO has also issued guidelines on the right to strike, which are considered to be binding on the states that have ratified the relevant ILO Conventions. The ILO standards relating to the right to strike are based on the principle of worker autonomy and the right to organise and bargain collectively. The ILO has also issued guidelines on the right to strike, which are considered to be binding on the states that have ratified the relevant ILO Conventions.
officially concerned with the freedom of association concept, has accepted that allegations relating to the right to strike are not outside its competence in so far as they concern the exercise of trade union rights. The Committee on Freedom of Association also believes 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 pursing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to workers.

The ILO standards are founded upon Articles 3, 8 and 10 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). 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'. 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'. Article 10 stipulates that the term 'organisation' means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

In view of the definition 'of workers' organisations' in Article 10, the Committee on Freedom of Association has considered that strikes of a purely political nature do not fall within the scope of the principles of freedom of association. While the Committee has expressly pointed out that 'it is only in so far as trade union organisations do not allow their occupational demands to assume a clearly political aspect that they can legitimately claim that there should be no interference in their activities', it has also noted that it is difficult to draw a clear distinction between what is political and what is, properly speaking, trade union in character, because these two notions overlap. Consequently, in a later decision, the Committee concluded that the occupational and economic interests that workers defend through the exercise of the right to strike include not only better working conditions or other collective claims of an occupational nature but also solutions to economic and social policy questions. In situations where the demands being pursued through strike action include both claims of an occupational or trade union nature, the attitude of the Committee has been to recognise the legitimacy of the strike when the occupational or trade union claims do not appear to be a mere pretext for covering purely political objectives unconnected with the furthering and defence of the workers' interests. When Article 10 limits the organisations covered by the Convention to those established for the purpose of 'furthering and defending the interests of workers', the term 'workers' is to be understood not only in the narrow sense (i.e. workers affiliated to unions) but also in the broad sense of the word. The Committee has always regarded the right to strike as constituting a fundamental right of workers and their organisations. By using the term 'workers' (and their organisations) instead of 'trade unions', the Committee's interpretation seems to make clear that national legislation must not prevent federations or confederations, any more than trade unions, from exercising the right to strike, whether directly (in countries where the right to strike is a trade union right) or indirectly (in countries where it is a workers' right).
Furthermore, it should be pointed out that the Committee on Freedom of Association considers that a proper exercise of the right to strike must not result in penalties or prejudicial measures of any kind that would constitute acts of anti-union discrimination contrary to the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).\textsuperscript{44} The Committee has examined on numerous occasion allegations of anti-union discrimination in the form of various types of reprisals taken by employers or the authorities both during and after strikes as well as prejudicial action taken even before a strike has commenced. The Committee has consistently taken the view that the imposition of penal sanctions for organising or participating in peaceful strikes is incompatible with the principles of freedom of association, that no person should be prejudiced in his employment by reason of his legitimate trade union activities and that protection against anti-union discrimination should apply particularly to acts calculated to cause prejudice against or even the dismissal of a worker.\textsuperscript{45}

The ILO does not, however, 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.\textsuperscript{46} The Committee on Freedom of Association has refused, therefore, to object to legislation banning strikes by such personnel.\textsuperscript{47} The second exception is that certain employees in the public sector 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’.\textsuperscript{48} The Committee on Freedom of Association and the Committee of Experts have declared, however, that if public servants are not allowed to strike, they should be given adequate guarantees that their interests will be protected, for example through appropriate, impartial and speedy conciliation and arbitration procedures in which the parties concerned are able to take part at every stage, the arbitration decisions being binding on both parties and being applied in full and speedily.\textsuperscript{49} 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'.\textsuperscript{50} The Committee on Freedom of Association has declared that, if national legislation denies workers in essential services the right to strike, they should be given adequate protection to compensate for the limitations thereby placed on their freedom of action.\textsuperscript{51}

Nigeria is a member of the ILO\textsuperscript{52} 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{53} Nigeria has also ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR)\textsuperscript{14} and the International Covenant on Civil and Political Rights (ICCPR).\textsuperscript{55} Accordingly, Nigeria is bound by these instruments to protect the right to strike. Therefore, the basis for this article’s critique is to demonstrate the discrepancy between the relevant provisions of the Conventions and the content of Nigeria’s labour laws.

3. The right to strike in Nigeria

The right to strike in Nigeria, as in the UK,\textsuperscript{56} is accorded statutory protection in the guise of immunities\textsuperscript{57} granted to workers and trade unions against civil and criminal liabilities for engaging in industrial action.\textsuperscript{58} The right is subject to what is popularly known as the ‘golden formula’ - acts done in contemplation or furtherance of a trade dispute, immunity signifies dentity is one’s freedom relation.\textsuperscript{60} Immunity does not impose liability for or to strikes gives protection of anti-union. This meaning or be subjected to sanctions is open and does not impose a licence where the right to strike is not accorded. The employment in Nigeria or in a contractual agreement, strike is not accorded. A strike because such liabilities as opposed, however, the right to strike might be important.

Other evidence for the right to strike is that 46 strikes affecting about 23 deaths also show that between 984 strikes and the history of Nigeria. Those statistical reasons for this right to strike are severe impediment to labour, social, and economic intervention in the country. The administration’s pursuit of its commitment to ‘binding response’, ordinate workers’ labour movement (Emergency Provisions 1969) abrogated by the 1972 for the exercise of the freedom of labour movement.
Immunity signifies that a person is not subject to liability for certain legal conduct. Immunity is one’s freedom from the legal power or ‘control’ of another as regards some legal relation. Immunity exempts persons from a legal power on the part of the state to impose liability for certain legal wrongs. The immunity granted by statute with respect to strikes gives protection to strikers against the law of torts, such as intimidation or inducing breach of contract. However, such immunity offers no protection in contract or in criminal law. This means that a striker can be disciplined for breach of contract of employment or be subjected to penal sanctions for exercising the right to strike. Furthermore, an immunity regime is open to employees making contractual agreements not to strike, since this does not impose a legislative prohibition, but only a contractual one. The immunity is preserved. It would be different if there were a claim-right to strike, since the agreement might amount to a licence to interfere with the exercise of the claim right. In France, for example, where the right to strike is recognised by the constitution, the no-strike clause is seen as illegitimate, as it amounts to an interference and unlawful waiver of the constitutional right to strike, which in itself cannot be waived. This is different from the position in Nigeria or in the UK, where there is no constitutional right to strike and therefore contractual agreements not to strike are not unlawful. Thus, in Nigeria, the right to strike is not accorded a fundamental status as a positive right. There is only a freedom to strike because workers and organisers of strikes are immune to both civil and criminal liabilities as opposed to the grant of the actual positive right to strike. In contrast, however, the right to strike is accorded a fundamental status by the ILO. As previously noted, the ILO regards the right to strike as a positive right subject to reasonable limitations that might be imposed on its exercise.

Empirical evidence shows, however, that Nigerian trade unions have made ample use of the right to strike at various points in time. For example, between 1949 and 1950, there were 46 strikes affecting 50,000 workers, including the tragic Enugu coal-miners’ strike which led to about 23 deaths. Furthermore, between 1960 and 1988 there were over 4000 strikes affecting more than three million workers and several million man days were lost. Statistics also show that between 1988 and 1992 a total of 1544 disputes were declared, resulting in 984 strikes and the total man days lost were 2195. These statistical data suggest that in practice official strikes are at best infrequent. The reasons for this are two-fold. First, the existing regulations on the implementation of the right to strike are sufficiently complicated, lengthy and cumbersome to represent a severe impediment to employees exercising their right to strike in defence of their labour, social, and economic rights and interests. Secondly, the Nigerian state’s active intervention in the labour movement hinders the exercise of the right to strike. Since the military intervention in the political process in 1966 and the subsequent commencement of civil war in 1967 government policy towards labour has been interventional. The challenge of General Yakubu Gowon’s administration during the war was to maintain a united country. The administration saw union agitation as a major source of distraction from the pursuit of its commitment to national unity. However, while some unions declared their ‘binding responsibility’ and a no-strike policy during the war, others were unwilling to subordinate workers’ interest for the reason of a civil war. The response of the state to the labour movement was very decisive. The government promulgated the Trade Disputes (Emergency) Provisions Decree 1968 to curb the right to strike. Another decree passed in 1969 abrogated the right to strike. These two decrees were, however, repealed and replaced by the Trade Disputes Act 1976 which provides for cumbersome procedures for the exercise of the right to strike. The year 1968 thus marked a watershed in the history of government active intervention in the labour movement, thus changing from...
the collective laissez-faire values of the former colonial power to an interventionist philosophy. Nowhere, it seems, is this interventionism more pronounced than towards the right to strike. This has resulted in severe suppression of the right to strike, almost to the point of extinction.

4. Derogations and restrictions on the right to strike

'Derogation' indicates more than a restriction upon the right to strike. In the event of derogation, this right may not be exercised at all or for the period of time deemed necessary. Moreover, it applies to all workers, not only a portion. Thus the legal effect of derogation is an absolute prohibition of any strike. On the other hand, if national law does not permit such a total abolition of the right to strike, then any curtailment could only be a restriction, rather than a derogation/prohibition. It must be noted that these notions of derogation and restriction of the right to strike only have pertinence within the framework of the ILO international law, as the Nigerian national law has developed from an alternative conception of the right to strike. However, the conflict between the two basic conceptions is transported into Nigerian law once Nigeria becomes a signatory, and ratifies, the relevant ILO Conventions.

While upholding the principle of the right to strike, the ILO has agreed that it is permissible for certain temporary restrictions to be placed upon its exercise. Such restrictions may consist in a requirement of prior notification to the authorities or the exhaustion of the existing procedures for negotiation, conciliation and arbitration before a strike may be called. Furthermore, the ILO has accepted that in specified cases legislation can prohibit recourse to strike action on a permanent basis. The ILO, for example, allows national laws or regulations to determine the extent to which the armed forces and the police are to be covered by the guarantees provided in Convention No. 87. The ILO has, therefore, refused to object to legislation banning strikes by such personnel. I shall now examine the derogations and restrictions of the right to strike in Nigeria under this section of the article.

4.1 The right to strike and essential services

Essential services are services that are crucial to prevent immediate and serious danger to the health, safety or welfare of members of the public. 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. 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, in 1979, 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.'

Two widely used approaches to defining essential services are the 'list approach' and the 'consequences or heat-of-the-moment approach'. In the list approach, a list of essential services is enumerated, usually by identifying the employers who are considered to be providers of essential services. Under the second approach, 'the consequences or heat-of-the-moment approach', essential services are defined with reference to the potential consequences of industrial action rather than to the identity of the employer or the nature of the work performed. Thus, in areas where strike action is deemed to constitute a threat to various defined interests, for example national health or safety (as in the US), the needs of the nation (as in France) or the preservation of life (as in Germany), certain public authorities are empowered to prohibit or limit such action.
In terms of international law, the ILO has provided a strict list of essential services, including the hospital sector, electricity services, water supply services, the telephone service, the police and the armed forces, the fire-fighting services, public or private prison services, the provision of food to pupils of school age and the cleaning of schools and air traffic control. 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. Conversely, the ILO has found that generally, in line with its criterion, the following are not essential services: aircraft repairs, banking, agricultural activities, the metal industry, teaching, the supply and distribution of foodstuffs, the Mint, government printing services, state alcohol, salt and tobacco monopolies, the petroleum industry and offshore petroleum installations, mining, general transport (including metropolitan transport), production, transport and distribution of fuel, refuse collection services, postal services, hotel services, the education sector, refrigeration enterprises and postal services.

In Nigeria, the Trade Disputes (Essential Services) Act 1990 prohibits workers in essential services from going on strike. The Act empowers the head of state (the president) to proscribe any trade union or association with any members employed in essential services to prevent actions calculated to disrupt the economy or the smooth running of any essential service. Furthermore, such association can be proscribed where workers in an essential service willfully fail to comply with the procedure specified in the Trade Disputes Act in relation to the reporting and settlement of trade disputes. It is further provided that at least six months must elapse before a similar body can be registered and no person who was an official of the body at the date of proscription can ever be an official of any union in any essential service. In addition, a union leader or member found to be involved in acts prejudicial to industrial peace may be detained indefinitely in a prison or in police custody. Also, any person so detained will have lost their right to institute legal action against any matter that may be brought against them as the Act ousts the jurisdiction of the courts to entertain any action in respect of anything done in pursuance of the Act.

Furthermore, apart from the proscription of the worker's trade union and the detention of the officials of the union for engaging in activities prohibited by the Act, individual workers are also subject to criminal sanctions that may impose up to five years' imprisonment. The ban on strikes in essential services is reinforced by the Trade Union (Amendment) Act 2005. The Act also makes clear that disputes in essential services are subject to compulsory arbitration and that the determination of the National Industrial Court in all such disputes shall be final. In addition, the Trade Union (Amendment) Act 2005 also provides for a fine of ₦10,000 (US$84.38) or six months' imprisonment or both the fine and imprisonment for exercising the right to strike in essential services. Thus, not only is the right to strike in essential services prohibited, but its infringement is criminalised.

Nigerian law favours the list approach to the definition of essential services. According to section 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 Federation or persons employed in an industry or undertaking (corporate or unincorporated) which deals or is connected with the manufacture or production of materials for use in the armed forces, services established, provided or maintained by the Government of the Federation or of a State, a local government council or any municipal or statutory, or by private enterprise for the supply of electricity, power or water, fuel of any kind, sound broadcasting or postal, telegraphic, cable, wireless or telephonic communications, maintaining ports, harbours, docks or aerodromes, transportation of persons, goods or livestock by road, rail sea, river or air, the burial of the dead, hospitals, the treatment of the sick, the prevention of disease, sanitation, road-cleansing and the
disposal of night-soil and rubbish, 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, any corporate body licensed to carry on banking business under the Banking Act. Furthermore, the Teaching (Essential Services) Act that came into existence as a result of the trade dispute between the Academic Staff Union of Nigerian Universities (ASUU) and the federal government added teaching to the list of essential services.

The Nigerian notion of ‘essential services’ appears to be as a catch-all phrase that is used as a mechanism to proscribe rather than qualify the right to strike. The Nigerian definition of essential service has a rather expansive scope that makes nonsense of the basic concept of essential services. Essential service is – according to its baseline definition – ‘a service whose disruption would endanger human life, public health or safety of the whole or part of the population’. However, in Nigeria, the whole public sector and the parastatals fall within the concept of essential services regardless of job description. The net is cast even wider to include the private sector, for example, transportation, and financial institutions licensed to carry on banking business under the Banking Act. Many workers in Nigeria are denied the freedom to strike under the guise of their work being 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. Otobo has criticised the Nigerian list of essential services as being fake and politicised. According to Otobo,

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.

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 those services in too broad a manner. In particular, the ILO has criticised Nigeria’s definition of essential services as falling below international labour standards. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEAR) notes with concern that section 6 of the Trade Union (Amendment) Act 2005 relies on the definition of ‘essential services’ provided for in the Trade Disputes Act 1990 to restrict participation in a strike. The CEAR stated that the definition of essential service is overly broad and should be amended to conform to the true notion of essential services – which are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population.

Similarly, the ILO Committee on Freedom of Association has condemned the abnormal classification of essential services in Nigeria under the Trade Disputes Act 1990 and the Trade Union (Amendment) Act 2005. The CFA reiterated that any law banning strikes in essential services should limit the definition of such services to its strict sense, as the principle regarding the prohibition of strikes in essential services might lose its meaning if a strike were declared illegal in one or more undertakings that were not performing essential services in the strict line with the provisions of essential services development, it may as to limit them to the safety or health of to Nigeria that in occupational injury, namely the user of the authorities of public utility and essential services.

Considering the ILO Committee, it can be argued that constitutes an essential service to applied the ban on who perform essential to strike for large must hope the Nigerian essential services.

4.2 The right to strike

Derogation of the right to strike under the Trade Disputes Act 2005, The Petroleum Production and transportation Act under the Trade Disputes Act 2005. The Act prevents obstruct or procure products for distribution wilfully to do public highway in Nigeria. In a highway, there is no public highway for distribution for industry. Thus a strike by affects the production law. Also a highway for such

The penalty court, but by a
In any of the community printing and banking business Act that came into force in Nigeria, list of essential services in the strict sense of the term. More specifically, the CFA has urged that Nigeria should amend the Trade Disputes Act 1990 and the Trade Union (Amendment) Act 2005 in line with the provisions of Conventions No. 87 and 98 to comply with the appropriate scope of essential services. In a recent report in which the Committee asked to be kept informed of developments, it requested the government to amend the definition of essential services 'so as to limit them to situations where there is a clear and imminent threat to the life, personal safety or health of the whole or part of the population'. The ILO has, however, suggested to Nigeria that in order to avoid damage that is irreversible or out of proportion to the occupational interests of the parties to the dispute, as well as damage to third parties, namely the users or consumers who suffer the economic effects of collective disputes, the authorities could establish a system of minimum service in other services that are of public utility rather than impose an outright ban on strikes, which should be limited to essential services in the strict sense of the term.

Considering the conclusions of the ILO Committee on Freedom of Association and the ILO Committee of Experts on the Application of Conventions and Recommendations, it can be argued that the definition of essential services in such an exceptionally wide manner constitutes an abuse of the right to strike in international law. While the goal of protecting essential services is legitimate in principle, Nigerian law is disproportionate in that it has applied the ban on the right to strike to a large group of workers instead of separating those who perform essential services from those who do not. Indeed, such prohibition of the right to strike for large groups of employees is not in line with liberal democratic norms. One must hope that Nigeria will comply with these observations and therefore bring its laws on essential services in conformity with international law.

4.2 The right to strike in the oil and gas industries

Derogation of the right to strike in oil and gas industries is contained in the Petroleum Production and Distribution (Anti-Sabotage) Act 1990. It must be noted, however, that workers in the oil and gas industries fall within the definition of essential service under the Trade Disputes (Essential Services) Act 1990 and the Trade Union (Amendment) Act 2005. Therefore, the statutory prohibition on the right to strike contained in the Petroleum Production and Distribution (Anti-Sabotage) Act 1990 represents a more specific intervention that equates strike action in these industries with sabotage.

The Act makes it an offence for anybody who does anything wilfully with intent to obstruct or prevent the production, distribution or the procurement of petroleum products in any part of Nigeria. Furthermore, it is an offence for anybody wilfully to do anything with intent to obstruct or prevent the use of any vehicle or any public highway employed in the distribution of petroleum products in any part of Nigeria. In addition, any person who causes or contributes or aids or incites, counsels or procures another person to obstruct or prevent the procurement of petroleum products for distribution in any part of Nigeria shall be guilty of the offence of sabotage. Clearly, industrial actions by workers in the oil industry come within this provision. Thus, a strike by workers, particularly tanker drivers and petroleum workers, which affects the production, distribution or procurement of petroleum products is proscribed by the law. Also proscribed is any strike that may affect the use of any vehicle or any highway for such distribution.

The penalty is either a death sentence or imprisonment for a term not exceeding 21 years. Furthermore, the Act provides that such persons will not be tried in an ordinary court, but by a military tribunal consisting of a president who must be an officer in the
Nigerian Army of above the rank of major, or an officer in the Nigerian Navy or Air Force above the corresponding rank, and two or four other officers appointed by the head of state. In addition, the jurisdiction of all other courts to try cases under the Act is removed. As stated in section 4 of the Act, ‘A military tribunal constituted under this Act shall, to the exclusion of all other courts of law in Nigeria, have jurisdiction to try any person charged with an offence of sabotage under this Act.’ The Act also provides that a sentence of death imposed by a military tribunal shall, if confirmed, be executed by hanging the offender by the neck till they are dead or by causing them to suffer death by a firing squad. The Act further went on to suspend the provisions of Chapter IV of the Constitution of the Federal Republic of Nigeria, which deals with fundamental human rights, such as the right to life (section 33), the right to dignity of human persons (section 34), the right to personal liberty (section 35); the right to fair hearing (section 36), freedom of expression and the press (section 39), among others, also nullifies the jurisdiction of the courts to enquire into violations of such fundamental rights. According to section 8 of the Act,

The question whether any provision of Chapter IV of the Constitution of the Federal Republic of Nigeria has been, is being or would be contravened by anything done or proposed to be done in pursuance of any provision of this Act shall not be inquired into in any court of law.

The use of military tribunals, which remove the enforcement of the legislation from the civilian legal system, and the imposition of stiff penalties must be criticised not only as irregular and draconian but also because it undermines any claim that the right to strike in Nigeria exists within a general liberal democratic framework. Indeed, the penalty for the contravention of the law is not only stiff but also quite intimidatory. Workers may be sentenced to death or sent to prison for 21 years for embarking on a strike that affects the petroleum business. This is extreme and blood-curdling legislation intended as a strategy by the state to intimidate labour from the legitimate pursuit of their interests, especially through the exercise of the right to strike. The penalties for the infringement of the legislation appear disproportionate to the fault or offence committed.

Although the ILO is yet to make specific remarks on this legislation, in Brazil, where a complaint was lodged by Brazilian oil workers’ unions in 1995 against the restrictions on the right to strike in the oil and gas industry, the ILO criticised the Brazilian authorities for such restrictions and drew the attention of the government to the principles upon which restrictions on or prohibitions of the right to strike can only be accepted in the public service or in essential services in the strict sense of the term. The ILO further noted that it was not convinced that any danger that may have been occasioned by work stoppages in the oil and gas industry was of such a character as to meet the criteria established by the principles of freedom of association, i.e. that there existed a clear and imminent threat to the life, personal safety or health of the whole or part of the population. In addition, the ILO has warned that the use of extremely serious measures against strikers implies a serious risk of abuse and constitutes a violation of freedom of association. Furthermore, the ILO has ruled that even where penalties are in order the sanctions imposed should be proportionate to the offences committed, and sentences of imprisonment should never be imposed for organising or participating in strikes. Not only does the Nigerian legislation impose a severe term of imprisonment; there is also the possibility of a death sentence for exercising the right to strike. This seems outright draconian.

It could be argued that the Petroleum Production (Anti-Sabotage) Act 1990 is justified in order to prevent strikes by workers which may sabotage a vital and essential sector of the economy. However, an essential service view of the ILO:

The Committee has been critical of the long-term impact of the legislation on the development of the oil industry in Nigeria. The Nigerian government has been accused of using the Act to suppress trade union activity and to stifle the democratic rights of workers. In addition, the use of military tribunals and the imposition of stiff penalties must be considered irregular and draconian. Workers may be sentenced to death or sent to prison for 21 years for embarking on a strike that affects the petroleum business. This is extreme and blood-curdling legislation intended as a strategy by the state to intimidate labour from the legitimate pursuit of their interests, especially through the exercise of the right to strike. The penalties for the infringement of the legislation appear disproportionate to the fault or offence committed.

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The Committee is of the view that the withdrawal of services by workers in petrol-producing
installations, while possibly leading to a close-down in production and serious consequences in
the long term for the national economy, would not endanger the life, personal safety or health of
the whole or part of the population and therefore cannot be considered as essential services in
the strict sense of the term. 113

In Norway, for example, following the comments of the ILO Committee of Experts on the
Application of Conventions and Recommendations, the government amended its legisla­
tion and removed restrictions on the right to strike in the oil industry. The Committee
had explicitly judged the petroleum sector not to constitute an essential service, like
hospitals, electricity, water supply and air traffic control. 114 The same applies to Nigeria.
The Nigerian legislation must therefore be repealed in order to protect the right to strike
in the oil and gas industries in Nigeria.

4.3 The right to strike in export-processing zones (EPZs)

In the early 1990s, Nigeria took steps to establish export-processing zones to advance econ­
omic development. The first step was taken in 1991 with the promulgation of the Nigerian
Export Processing Zones Decree. 115 The Decree was replaced in 1992. 116 Furthermore, in
1996, the federal government promulgated the Oil and Gas Export Free Zone (OGEFZ)
Decree. 117 These led to the establishment of one EPZ and one OGEFZ. The EPZ is sited
in Calabar, Cross Rivers State, while the OGEFZ is sited in Oron/Ikpokiri, Rivers
State. 118 The Nigerian Export Processing Zones Decree 1992 119 makes provision for the
establishment of EPZs in Nigeria. The Decree provides for three types of EPZs. The first
are EPZs that are operated and managed by a public authority. The second type are operated
and managed by a private entity. The third are EPZs operated and managed jointly by a
public authority and a private entity. 120 All three are nevertheless brought under the
supervision of the Nigerian Export Processing Zone Authority (NEPZA) created by the
Decree. 121 An EPZ is created with the approval of the NEPZA. 122 So far, over 22 EPZs
has been established pursuant to the Decree. There are now EPZs in Calabar, Lagos,
Kano, Barki and Maigatari which are wholly owned, developed, operated and managed
by the federal government through the NEPZA. 123 While the Decree generally provides
for the establishment of EPZs, the Oil and Gas Export Free Zone Decree (the OGEFZ
Decree) establishes the OGEFZ at Oron/Ikpokiri. The OGEFZ Decree also establishes
an authority to administer and manage the zone. The OGEFZ Decree and the EPZs
Decree are substantially the same. The OGEFZ is located in an oil-producing area of Nigeria. The functions of administering and managing EPZs in
Nigeria are vested in the NEPZA. This function involves the supervision and coordination of the functions of various public and private sector organisations operating within the EPZs and the granting of all requisite permits and approvals to enterprises seeking to operate and
operating within the zones. 124 The NEPZA also has power to designate EPZ activities and
to establish immigration, customs, police and similar posts in the zones. 125 To make these
functions effective, the NEPZA has power, by order, to prescribe regulations governing the
zones or any particular zone 126 and may also establish Zone Administrations for the

economy. However, such an argument cannot be justified, since petroleum production is not
an essential service and no threat to life, safety or health is directly in issue. This is also the
view of the ILO:

The Committee is of the view that the withdrawal of services by workers in petrol-producing
installations, while possibly leading to a close-down in production and serious consequences in
the long term for the national economy, would not endanger the life, personal safety or health of
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purpose of managing the zones. It must be noted, however, that the function and position of the EPZA effectively removes the enforcement of the legislation from the civilian legal system, which seems odd in a liberal democratic society like Nigeria.

EPZs have a few general characteristics, such as unlimited duty-free imports of raw goods which are necessary for the production of exports. They are also given special legislative and administrative regimes independent of what exists in other parts of the country. Furthermore, EPZs enjoy generous and long-term tax holidays and concessions as well as above-average communications services and infrastructure. These special regimes are offered as incentives to create a favourable investment climate. These incentives are usually not available to enterprises operating outside the EPZs. The arrangements also help to alleviate unemployment by generating direct and indirect employment opportunities in the country and assist in income creation. Another objective is to attract foreign direct investment (FDI) and bring technology transfer, knowledge spill-over and managerial skills that will assist domestic entrepreneurs to engage in the production of export-led goods. EPZs also function as a means of attracting foreign investors to engage in infrastructural developments such as roads, seaports, airports, energy and telecommunications.

A principal justification for prohibiting the right to strike is that EPZs are so important to the nation’s economy that the exercise of workers’ rights, particularly to collective bargaining and to strike, will have damaging effects. However, it is well known that workers in the EPZs labour under adverse working conditions with respect to the level of wages, hours and intensity of work, job security, occupational safety, and health. These prohibitions not only prevent Nigerian workers from effectively pursuing their rights, but also render them liable to exploitation by some of the firms operating in these zones. Indeed, in Nigeria, as is the case for workers in Madagascar, Kenya, Malawi, Morocco, Lesotho, Mozambique and Mauritius, working conditions and pay are often especially poor in the export-processing zones, where investors come out smiling at the expense of union rights.

In Nigeria, workers employed in the EPZs are denied the right to strike. In addition, the EPZ Authority is given the mandate to handle the resolution of all disputes between employers and employees arising from the workplace and the contract of employment, in the place of workers’ organisations or unions. Also, the law restricts the right of any person to enter, remain in or reside in the zone without the prior permission of the EPZ Authority. This restriction violates the constitutional right of freedom of movement, which makes it very difficult for workers’ organisations to have reasonable access to the zones to communicate with workers in them.

The prohibition of the right to strike in export-processing zones in Nigeria is inconsistent with international law. The ILO has ruled against the prohibition of the right to strike in export-processing zones: ‘Such a prohibition is incompatible with the provisions of the Convention which provide that all workers, without distinction whatsoever, shall have the right to establish organizations of their own choosing and organise their activities and to formulate their programmes.’

Furthermore, Convention No. 98 provides that ‘workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment’ and that ‘such protection apply more particularly in respect of acts calculated to make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership or cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours’. It is not out of place to argue that the words ‘acts of anti-union discrimination’ could include the prohibition of strikes or dismissal of striking workers, more especially given the fact that strike...
and position the civilian legal and diplomatic posts of the country. These incentives are also so important to attract foreign direct and managerial investment of export-led enterprises as well as to engage in infra- and telecommunications. Indeed, in a recent report in which it asked to be kept informed of developments, the Committee of Experts on the Application of Recommendations and Conventions (CEARC) has requested the Nigerian government to take steps to ensure that workers in the EPZs have the right to establish organisations in the EPZs and the right to organise their activities without interference from the public authorities. Nigeria must therefore amend its laws in line with international standards by removing the prohibitions on the right to strike in the export-processing zones. It must be noted, however, that the OGEFZ/EPZ Acts relate to the exercise of the right to strike, which is already effectively proscribed by the Petroleum Production and Distribution (Anti-Sabotage) Act 1990. As previously noted, the exercise of the right to strike in the oil industry and gas industry is generally proscribed under the Trade Disputes (Essential) Services Act 1990. It is suggested therefore that the regulation of the right to strike be excised completely from the OGEFZ/EPZ Decrees since it is already regulated under the Trade Disputes (Essential) Services Act. In the same vein, it is suggested that the Petroleum Production and Distribution (Anti-Sabotage) Act 1990 be repealed.

4.4 Restrictions on picketing

In Nigeria, the law regulating picketing provides that it is lawful for one or more persons on their own behalf or on behalf of a trade union or an individual employer to carry out picketing for the purpose of peacefully obtaining or communicating information or peacefully persuading any person to work or abstain from working so long as this is done either in contemplation or in furtherance of a trade dispute.

Picketing is evidently a demonstration involving workers. The definition of picketing also shows that picketing is a means by which to peacefully communicate information or persuade other workers in the course of prosecuting a strike. Furthermore, the definition of picketing indicates that it is permissible only when a trade dispute is being contemplated or furthered. Secondly, the law authorises a picket to attend at or near one of the places of work described only for the purposes of peacefully obtaining or communicating information or peacefully persuading any person to work or abstain from working. Section 42 of the Trade Unions Act 1990 does not authorise 'as a matter of right an invasion into a man's house, or entry against the will of the owner into a place of business'. In addition, picketing that involves rioting, breach of the peace, assault, intimidation and malicious injury to property and other criminal offences is declared unlawful. In the case of Queen v. Inomudu & Ors, an union leader, was convicted along with five others on a charge of taking part in a riot. The men became riotous in order to compel all the railway workers to join in the demonstration intended to draw the attention of the employers to certain demands made by the union. However, so long as picketing is peacefully carried out for the stated objectives it is legal. Section 42(2) reinforces this point by declaring that peaceful picketing shall not constitute an offence under any law in Nigeria or any part thereof.

However, restrictions have been placed on the right to picket in Nigeria which appear to affect the scope of the right to strike. The Trade Union (Amendment) Act 2005 provides, that in the course of a strike, 'a trade union must not compel any person who is not a member of its union to join the strike or in any manner whatsoever, prevent aircrafts from flying or obstruct public highways, institutions or premises of any kind for the purposes of giving effect to the strike'. Two restrictions seem to be provided by the law,
firstly, the restriction on compelling non-union members to participate in a strike action and, secondly, the restriction on obstructing public highways, institutions or premises with the aim of making the strike effective. With regard to the first arm of the restrictions, I would submit that there is nothing wrong in compelling non-union members to participate in a strike action as a form of sympathy or solidarity for the strike so long as the strike itself is legitimate. This provision effectively denies workers the right to persuade fellow employees who may not be members of their union to join an industrial action. It seems to be targeted at workers' and trade unions' ability to attract sufficient solidarity and sympathy for strike actions. Peaceful incitement of workers to participate in strike action should not be forbidden. Concerning the second arm of the restrictions, the provision appears to be too broad and could be used to outlaw strike picket or any gathering of workers. For example, any group of workers on strike who have gathered on the premises or on the streets, however peaceful, may be accused of obstructing premises and highways just by grouping themselves there. Moreover, aircraft-related services should not be the subject of an overall ban, because they are not considered essential services. The provision seems inhibitive and reflects a policy geared towards repressing the right to strike.

Picketing has long being recognised as crucial in the conduct by workers of industrial action. Where a claim by a trade union is rejected by an employer, the unions call for a strike can only be meaningful if it stops the employer from continuing their business. The strike will not be effective if the employer is able to recruit non-union labour ('blacklegs') or make do with those who may not want to join the strike ('scabs') in order to continue in business. This makes the factory gate the focal point of the strike. Can the strikers persuade others not to go in? (And can it persuade any fellow members who are still working to come out?) The success of the strike depend on persuading such other workers that it is, in the long term, against their own interests to undermine the strike. Picketing is thus clearly 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 undermined.

Opponents of picketing argue, however, that picketing coerces other individuals and causes public disorder. They contend that picketing by its very nature is designed to intimidate and deter other men from seeking employment in places vacated by strikers and involves the illegitimate means of physical intimidation and fear. As they further contend, many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual peacefully endeavouring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason.

Conversely, proponents of picketing argue that picketing is not necessarily intimidatory and illegitimate. They contend that picketing can be a peaceful means of obtaining or communicating information concerning an ongoing strike action. They further contend that picketing helps the strike to be effective by gathering the support of other workers and ensuring the interruption of supplies and deliveries to the employer, which ultimately will compel the employer to settle the workers' grievances. Picketing has been accepted as a means of communicating the facts of a labour dispute and an exercise of freedom of speech. As we have seen, however, Nigerian law has virtually smothered the right to peaceful picketing. Nigerian workers are debarred from persuading fellow workers to join a strike or gathering to form strike pickets at any premises for the purpose of giving effect to a strike. It is submitted that the wording of the Act could, potentially, weaken the right to peaceful
The ILO ruled that the right to picketing should not be subject to interference by the public authorities and that the prohibition of strike pickets is justified only if the strike ceases to be peaceful. According to the ILO,

"... The action of pickets organized in accordance with the law should not be subject to interference by the public authorities, who should not resort to force during strikes except in grave situations where law and order are seriously threatened ... taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful."

The case is different, however, when picketing is accompanied by violence or coercion of non-strikers in an attempt to interfere with their freedom to work; such acts constitute criminal offences in many countries. The requirement that strike pickets can only be set up near an enterprise does not infringe the principles of freedom of association.

The ILO Committee of Experts, after recalling that strike picketing aims at ensuring the success of the strike by persuading as many persons as possible to stay away from work, has noted that, while in some countries pickets are merely a means of information, ruling out any possibility of preventing non-strikers from entering the workplace, in other countries they may be regarded as a form of the right to strike, and the occupation of the workplace as its natural extension, aspects that are rarely questioned in practice, except in extreme cases of violence against persons or damage to property. The Committee considers in this respect that restrictions on strike pickets and workplace occupation should be limited to cases where the action ceases to be peaceful.

With regard to the ILO's position on Nigerian law, the ILO has adversely criticised the way in which Nigerian law places undue restrictions on the use of picketing to facilitate strike action and concludes that such law could potentially restrict the exercise of an otherwise legal strike or any peaceful meeting. In relation to the provision of the law which prohibits compelling non-union members to participate in a strike, the ILO recalls that taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace should not be considered unlawful. With regard to the second prohibition, on obstructing public highways, institutions or premises of any kind for the purpose of giving effect to the strike, the ILO considers that the broad wording of this section could potentially outlaw any gathering or strike picket and recalls that the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and, in any event, not such as to place a substantial limitation on the means of action open to trade union organisations. In addition, according to the ILO, given that aircraft-related services, with the exception of air traffic controllers, are not in themselves considered to be essential services, a strike of workers in that sector or related services should not be the subject of an overall ban, as could be implied from the wording of this section.

Indeed, considering the report of the ILO Committee on Freedom of Association, it can be argued that onerous requirements have been established in the law on picketing. In a recent report in which the Committee demanded to be kept informed of developments, it requested that the legislation should be amended in conformity with the established principles of freedom of association so as to ensure that any restrictions placed on strike actions aimed at guaranteeing the maintenance of public order are not such as to render such action impossible. This view is reiterated by the ILO Committee of Experts on the Application of Recommendations and Conventions (CEAR), which requests the government to 'take the necessary measures to amend section 42 (1) (b) so as to ensure that any restrictions placed on
strike actions aimed at guaranteeing the maintenance of public order are not such as to render any such action relatively impossible or ban it for certain workers beyond those in essential services.\footnote{216} One must hope therefore that Nigeria will comply with the ILO request and bring its laws into line with international standards.

4.5 Disputes of rights versus disputes of interests

Nigerian law maintains a distinction between the disputes of rights and the disputes of interests. In Nigeria, the Trade Union (Amendment) Act 2005 restricts legal strikes to ‘disputes of right’, which is interpreted as referring to ‘any labour dispute arising from the negotiation, application, interpretation of a contract of employment or collective agreement under this Act or any other enactment or law governing matters relating to terms and conditions of employment’.\footnote{163}

The Act has in effect imposed a substantial limitation of the scope of the issues over which trade unions can exercise the right to strike. One would expect that disputes of rights should be made subject to arbitration or adjudication, since the rights are already defined. It is disputes of interests that are commonly reserved for strike action in order to give effect to the underlying principle of power relations in industrial matters. In Federal Government of Nigeria v. Adams Oshiomhole\footnote{64}, the plaintiffs claimed that the pricing policy in respect of petroleum including the N1.50K (US $0.01) price fuel tax on every litre of petrol did not qualify as a trade dispute about which the defendants could go on strike and that a notice served on the President intimating that the Nigerian Labour Congress (NLC) would go on strike was misconceived. The main contention of the defendants was that the introduction of N1.50K fuel tax has led to sharp increases in the prices of food, transportation and school fees, thereby exposing Nigerian workers to untold hardship. The defendants further contended that the dispute was connected with the employment of Nigerian workers and their conditions of work and therefore the intended strike was in contemplation or furtherance of a trade dispute under section 47 of the Trade Disputes Act. The defendants also contended that, in any case, they had the right to protest against unpopular policies of the plaintiffs as part of their fundamental right to freedom of association and freedom of expression under the Constitution of the Federal Republic of Nigeria and the African Charter of Human and Peoples’ Rights. The plaintiffs, however, obtained a ruling from the Federal High Court which held that the NLC could not exercise the right to strike over fuel price increases, as this was not, in the view of the court, a matter within the scope of collective bargaining concerning workers’ terms and conditions of employment.\footnote{165} The court held, inter alia, that the pricing policy for petroleum and the introduction of N1.50K fuel tax do not qualify as a trade dispute about which the defendants as a trade union could go on strike.\footnote{166} In conclusion the court stated,

From all the foregoing, I find that the defendants’ anger with the introduction of fuel tax is not a trade dispute within the meaning of section 47 of the Trade Disputes Act or section 52 of the Trade Unions Act... Notwithstanding that the defendants may be dissatisfied or ‘bitter’ with the policy of deregulation, such grouse or bitterness can therefore not ground or sustain a strike.\footnote{167}

This decision clearly follows the distinction under Nigerian law between disputes of rights and disputes of interests, since workers are thus debarred from raising concerns on government policies that may affect their working lives. It therefore reinforces the Trade Union (Amendment) Act 2005. I would submit, however, that the Act clearly deviates from the practice in other jurisdictions whereby restriction on the right to strike is placed on rights...
such as to render the disputes of legal strikes to arising from the collective agreement differing to terms and the issues over which rights should be ascribed rather than the underlying of Nigeria v. Adams petroleum including as a trade dispute of the President imminent concepted. The main law has led to simply exposing Nigerian dispute was connected and therefore the under section 47 of which they had the right fundamental right to of the Federal Republic plaintiffs, however, could not exercise the court, a matter within conditions of employ and the introduction defendants as a trade of fuel tax is not a or section 52 of the defined or ‘bitter’ with ground or sustain a seen disputes of rights concerns on govern the Trade Union by deviates from the not is placed on

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The rationale for the distinction is that a dispute of interest would be settled by collective bargaining, which would involve the right to strike, and would result in an agreement between the parties which would determine some hitherto disputed conditions and terms of employment. That agreement would be legally enforceable and would create rights for the parties. The law would then require that disputes over rights be settled by the court and not through strike action. Thus whereas disputes of rights can be settled by court action without strikes, disputes of interests are not suitable for judicial decision and may therefore justify strike action. The distinction also shows that striking is used to create rights and not necessarily to enforce existing rights, although disputes of rights may also be settled by strikes. A further justification is the fact that disputes of right are matters of fact which result from explicit agreement and can therefore be objectively determined by impartial judges, whereas disputes of interests are about values that ought to be left for determination by free markets, as they are subjective matters that cannot be determined objectively.

Clearly, the Nigerian legislation deprives workers of their right to promote their interests and to protest against social and labour consequences of the government’s economic policy, and is therefore not in conformity with ILO standards that demand that the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their interests.

The ILO has also reiterated that organisations responsible for defending workers’ socioeconomic and occupational interests must be allowed to use strike action not only to support their position regarding better working conditions or collective claims of an occupational nature, but also in the search for solutions to major social and economic policy

The right to strike should not be limited to industrial disputes rather than interests disputes. A common restriction on the right to strike consists in granting the right only with respect to disputes of interests and not disputes of rights. A dispute of rights involves the existence, validity or interpretation of a collective agreement or its violation. It thus deals with the application and interpretation of existing legal rights. A dispute of interests, on the other hand, relates to the establishment of a new right by fixing the terms and conditions of employment through collective bargaining. The distinction is also described in terms of ‘phase one disputes’ and ‘phase two disputes’. Phase one disputes are interests disputes and phase two disputes are rights disputes. Therefore strikes, as a general rule, should be accepted as legitimate and lawful in the first phase, but they would not be legitimate in the second phase. On the other hand the court’s or tribunal’s power of adjudication would effectively be limited to rights disputes. Indeed, the distinction between rights disputes and interest disputes is a well-known industrial relations practice in other jurisdictions whereby restriction on the right to strike is placed on rights disputes rather than on interests disputes. As Duffy and Mulvey have noted, in many countries — including Sweden, Germany and the USA — a distinction is drawn between ‘rights’ disputes and ‘interest’ disputes. Strikes are usually lawful in relation to interest disputes but are unlawful in relation to rights disputes. Interest disputes concern a dispute over the fixing of the terms and conditions of employment whereas rights dispute refer to the interpretation or application of the terms of the agreement.

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trends that have a direct impact on workers’ employment, social protection and standards of living.\textsuperscript{177} This would allow for the reconciliation of conflicting economic interests, which is the essence of allowing ‘disputes of interests’ to be a legitimate subject matter for the right to strike. Furthermore, in situations where the demands being pursued through strike action include both claims of an occupational or trade union nature and claims of a political nature the attitude of the ILO has been to recognise the legitimacy of the strike when the occupational or trade union claims do not appear to be a mere pretext for covering purely political objectives unconnected with the furthering and defence of the workers’ interests.\textsuperscript{178} The ILO therefore bases its position on the right to strike not on the addressee of the action but on the objectives pursued by it and justifies a strike action directed at the government but actually aimed at protecting workers’ rights.\textsuperscript{179} In addition, a strike would also appear legitimate if it were aimed at a government in order to bring pressure to bear on an employer with whom the union is in dispute. This would also be the case for strikes against government policies that have special and unique effects on a group of workers. An example of such a case would be a strike by mineworkers to force the government to introduce better safety requirements in the mines. The concern of the ILO is that workers should be able to exercise the right to strike in relation to matters that affect them, even though the direct employer may not be a party to the dispute.\textsuperscript{180}

Indeed, the ILO has criticised the restrictions imposed by the Nigerian legislation which ‘exclude any possibility of a legitimate strike action to protest against the Government’s social and economic policy affecting workers’ interests’.\textsuperscript{181} The ILO has called on Nigeria to amend its legislation to bring it into line with international standards. In a recent report in which it requested to be kept informed of developments, the ILO Committee on Freedom of Association asked the Nigerian government to amend the Act in order to ensure that workers’ organisations may have recourse to protest strikes aimed at criticising government economic and social policies that have direct impact on employment, social protection and standards of living, as well as in disputes of interest, without sanctions.\textsuperscript{182} This view is restated by the CEARC, which has requested the government to ‘amend section 6 of the new Act so as to ensure that workers enjoy the full right to strike’.\textsuperscript{183}  

5. Concluding remarks

This paper has examined the derogations and restrictions on the exercise of the right to strike in Nigeria, with a view to indicating the degree of discrepancy between ILO standards and existing Nigerian labour law. The right to strike is an 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 recognised in international law and in the laws and constitutions of many countries of the world, thus making it legally available as a 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.\textsuperscript{184} This is understandable because people are people, work is work and labour problems have universality.\textsuperscript{185}
Unfortunately, as we have seen, Nigerian law lags behind international standards, as it does not protect the right of its workers to this essential right. As has been seen, there is a widening gap between international labour standards and Nigerian labour law. Indeed, in terms of its international obligations, Nigeria has maintained and continues to compound various areas of non-compliance. However, Nigeria has ratified the entire core ILO Conventions, in particular Nos 87 and 98, and is a signatory to the International Covenant of Economic, Social and Cultural Rights 1966 and the International Covenant on Civil and Political Rights 1966 and is therefore bound to protect and comply with the full scope of the right in international law, particularly as it relates to essential services, oil and gas industries, picketing, export-processing zones and in interests versus rights disputes. The adverse criticisms and damning conclusions of the ILO supervisory bodies — the Committee on Freedom of Association and the Committee of Experts on the Applications of Recommendations and Conventions raise significant concerns that undoubtedly strengthen the case for changing Nigerian labour law.

Labour standards have become the subject of international rules through bodies such as the International Labour Organisation. Such standards are an increasing part of the global economy of which Nigeria is a part. One must hope that Nigeria will unleash its workers and translate these standards into Nigerian labour law and industrial relations in order to protect workers and their trade unions.

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I would like to thank Professor Sheldon Leader of the Department of Law and the Human Rights Centre, University of Essex, for his responses and discussions on aspects of this paper. I would also like to thank the anonymous referees for their helpful assistance and guidance.

Notes

3. It was accordingly held in *Union Bank of Nigeria Ltd. v. Edet* (1993) 4 NWLR (Pl. 287) 288, that a strike of this kind was functional to collective bargaining.


5. O. Kahn-Freund, *Labour and the Law* (London: Stevens, 1983), 292. Lending support to the necessity of the right to strike in collective bargaining, Lord Wedderburn of Charlton further reasoned, ‘To protect such a right is not to approve or disapprove of its exercise in any particular withdrawal of labour; it is to recognise the fact that the limits set to the right to strike and to lockout are one measure of the strength which each party can in the last resort bring to bear at the bargaining table. The strength of a union is bound to be related to its power and its right to call out its members, so long as any semblance of collective bargaining survives.’ See K.W. Wedderburn, *The Worker and the Law* (London: Penguin Books, 1986), 245.


10. *Crofter Hand Woven Harris Tweed Co. v. Veitch* (1942) 1 ALL ER 142 at 158–9; (1942) AC 435 at 463. This statement was echoed by the Constitutional Court of South Africa recently: ‘[T]he right to strike is of both historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system.’ See *NUMSA v. Bader Pop (Pty) Ltd* (2003) (3) SA 513 at 520.


13. These immunities are provided in sections 23 and 43 of the Trade Unions Act 1990. Section 23 provides that '...An action against a trade union (whether of workers or employers) in respect of any tortious act alleged to have been committed by or on behalf of the trade union in contemplation of or in furtherance of a trade dispute shall not be entertained by any court in Nigeria.' Section 43 stipulates that '(1) An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on any one or more of the following grounds only, that is to say: (a) that it induces some other person to break a contract of employment; or (b) that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or labour as he wishes; or (c) that it consists in his threatening that a contract of employment (whether one to which he is a party or not) will be broken; or (d) that it consists in his threatening that he will induce some other person to break a contract of employment to which that other person is a party. (2) Nothing in subsection (1) above shall prevent an act done in contemplation or furtherance of a trade dispute from being actionable in tort on any ground not mentioned in that subsection.' See O.V.C. Okene, 'The Status of the Right to Strike in Nigeria: A Perspective from International and Comparative Law', African Journal of International and Comparative Law 15, no. 1 (2007): 35; A.A. Adeogun, From Contract to Status in Quest for Security (Lagos: University of Lagos Press 1986), 4.


17. Since the ILO accepts that workers have a fundamental right to strike, the debate is about not the existence of the right, but the extent of the right and the limitations on its exercise.

18. Article 6 (4) provides as follows: '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.'

19. Article 13 provides thus: 'The right to resort to collective action in the event of conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements.'


21. Article 10 provides that 'Every individual shall have the right to associate provided he abides by the law.'

22. Article 11 provides that 'Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.'

23. Article 5 states that 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status ... all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

24. Article 15 provides that 'Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.'

25. There is, however, the need for an express provision on the right to strike in the African Charter as is done in other regional instruments like the European Social Charter, for example.
Article 25 provides that 'States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.'

27. Article 26 provides that 'States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.'


30. Germigon, Odero and Guido contend that the 'right to strike' appears incidentally in Article 1 (d) of the Convention on the Abolition of Forced Labour Convention No. 105, 1957, which prohibits the implementation of compulsory labour as punishment for participating in strikes. The same term is also contained in paragraph 7 of the Voluntary Conciliation and Arbitration Recommendation, No. 92 of 1951, which declares that none of it provisions is to be interpreted as limiting in any way whatsoever the right to strike. See J. Germigon, A. Odero and H. Guido, 'ILO Principles Concerning the Right to Strike', International Labour Review 137, no. 4 (1998): 441. See also Hodges-Aeberhard and Odero de Dios, 'Principles of the Committee on Freedom of Association Concerning Strikes', 501.

31. 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, 30, 31, 34, 46, 52. 73-4.


34. Ibid.


38. Ibid., para. 359.

39. Ibid., para. 368.


44. Ibid.


46. Article 9 (1) of Convention 87 allows national laws or regulations to determine to what extent the armed forces and the police are to be covered by the guarantees provided for in the Convention.

the duty to promote rights and freedoms as well as
the duty to guarantee and improvement of the rights
for National Periodic
More discussion, see Human and Peoples’
Problems and Recommendations
Committee, 3rd edn
Committee, 5th edn.
Committee, 3rd edn,
Part 450.
on Freedom of
Fundamental Rights
(1985), 199.
on Freedom of
Committee, 3rd edn.
time to what extent provided for in the
Committee, 3rd edn,

49. Ibid., para 595.
51. Ibid., para. 593.
57. These immunities are contained in sections 23 and 43 of the Trade Unions Act 1990 and section 51A of the Criminal Code 1990.
58. The year 1968 marked the beginning of legislation affecting the right to strike in Nigeria with the promulgation of the Trade Disputes Emergency Provisions Act of 1968, banning the right to strike during the war in order to sustain the war efforts. Although there was no express provision on the matter, before 1968 the British-flavoured amalgam of common law and legislation which immunises trade unions and workers from criminal and civil liabilities attendant upon strike actions had become part of Nigeria’s legal system. See O.V.C. Okene, ‘The Status of the Right to Strike in Nigeria: A Perspective from International and Comparative Law’, African Journal of International and Comparative Law 15, no. 1 (2007): 40–3; A.A. Adeogun, From Contract to Status in Quest for Security (Lagos: University of Lagos Press, 1986), 4.
61. Ibid.
63. In Nigeria, in order for the parties to be bound by the no-strike clause, it has to be inserted into the collective agreement and incorporated in individual contracts of employment. See Uniorral Bank of Nigeria v. Edet [1993] 4NWLR (pt 287), 288. See also: Agbo v. Central Bank of...
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66. Ibid.


68. Decree No. 23, 1968.


73. See Article 9(1).


79. This is the case of Nigeria and of other countries in Asia, Africa, Latin America and the Caribbean, for example.


81. Ibid., para. 545.


83. Chapter 433, Laws of the Federation of Nigeria, 1990. Note that the same definition of essential services is also contained in schedule 1 of the Trade Disputes Act Chapter 432, Laws of the Federation of Nigeria. See also section 6(a) of the Trade Union (Amendment) Act 2005.

84. Ibid., section 1.

85. Ibid., sections 2 and 3.

86. Ibid., section 5(1).

87. Ibid., section 8.

88. Ibid., section 4(2).

89. See section 6(a), 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 error or omission of the employee or employer on an individual or collective basis or in any other manner contrary to the provisions of this Act or the terms of the collective agreement if any’.

90. Ibid., section 3.

91. Act No. 30 1975.

92. Section 2 of the Trade Disputes Act 1990.


95. Ibid., paras 664.

96. Ibid., section 7.

97. Ibid., section 8.

98. Ibid., section 9.

99. Ibid., section 10.

100. Ibid., section 11.

101. Ibid., section 12.

102. Ibid., section 13.

103. Ibid., section 14.

104. Ibid., section 15.

105. Ibid., section 16.

106. Ibid., section 17.

107. Ibid., section 18.


110. Ibid.


112. Ibid., para. 546.
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.'

90. Ibid., section 8.

91. Act No. 30 1993

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


94. D. Otobo, 'The Generals NLC and Trade Union Bill', http://www.nigerdelacongress.com/garticles/generals_nlc_trade_union_bill.htm (accessed 2 November 2007). As has also been noted by the Campaign for Democratic and Workers' Rights in Nigeria (CDWR), '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.' See Campaign for Democratic and Workers' Rights in Nigeria, 'Abrogate the 2005 Trade Union Act Now!', http://www.nigeriasolidarity.org/art026.htm (accessed 2 November 2007).


100. The justification for prohibiting the right to strike in essential services is that the workers perform special functions in the interest of the entire community. The concept of essential services therefore balances the right to strike with the public interest. The concept of 'public interest' is used to refer to the interests of those damaged by industrial action who are not direct participants. Thus, it is assumed that the public has an interest in continued production, or the maintenance of essential services, and strikes that interrupt these are said to be against the public interest. For an extended discussion, see R. Hyman, 'The Concept of “Public Interest” in Industrial Relations', in Labour Law and the Community: Perspectives for the 1980's, ed. Lord Wedderburn of Charlton and W.T. Murphy (London: Institute of Advanced Legal Studies, 1982), 95–106.


103. Ibid., section 1 (a) (b) and (c).

104. Petroleum Production and Distribution (Anti-Sabotage) Act 1990, section 1(2) (a) and (b).


106. Ibid., section 3.

107. Ibid., section 7(1)


110. Ibid.


112. Ibid., para. 668. Ihorvbere and Shaw have also criticised this legislation, which they argue indicates the extent to which oil companies exercise coercive labour controls under a triple

113. ILO, Digest of Decisions and Principles of the Freedom of Association Committee, 4th edn, para. 402. See also 278th Report, para. 185 (Case No. 1175).


117. Oil and Gas Free Zone Decree No. 8 of 1996.


120. See...
144. Larkin v. Belfast Harbour Commissioners (1908) 2 IR 214, per O'Brien, C.J.
145. Section 42 (2) Trade Unions Act, 1990.
148. This is by virtue of 9 Trade Union (Amendment) Act 2005, which amends section 42 (1) (A) and (B) of the Trade Unions Act 1990.
156. Section 9 Trade Union (Amendment) Act 2005.
158. Ibid.
161. Ibid.
162. Ibid.
163. Ibid. A similar distinction is sometimes referred to using different terminology. In Italy, for example, the distinction is made between 'economic disputes' and 'legal disputes'. The latter are problems of interpretation or of application of rules of law or of collective or individual contract, while the former are those which do not have legal questions as their subject, but demands about new work conditions. See R. Ricci, Manuale di Relazioni Sindicali (Milan: Etas Libri, 1978), 160. In the US, disputes over interests are referred to as 'major disputes', while disputes over rights are referred to as 'minor disputes'. See Marley, S. Weiss, 'The Right to Strike in Essential Services under United States Labour Law', 2000, http://www.bibliojuridica.org/libros/1/43/7.pdf (accessed 2 October 2007).
In the jurisdictions where the distinction is accepted, industrial action involving the interpretation, administration and violation of collective agreements is unlawful, as procedures for the settlement of disputes are provided by legislation. However, in other jurisdictions the distinction between disputes of rights and disputes of interests seems irrelevant. See A.J.M. Jacobs, ‘The Law of Strikes and Lock-outs’, in R. Blanpain and C. Engels (eds.), Comparative Labour Law and Industrial Relations in Industrialized Economies (The Hague: Kluwer Law International, 1998), p. 115. In the UK, for example, this distinction appears irrelevant, since collective agreements are generally unenforceable. See B. Hepple and S. Freedman, Labour Law and Industrial Relations in Great Britain (The Hague: Kluwer, 1992), 253. Collective agreements may, however, be enforceable under certain conditions. See Section 178 and Schedule 3, paragraph 5 of Trade Unions and Labour Relations (Consolidation) Act 1992.


Ibid., para. 527.


See CEACR, Individual Observation Concerning Convention No. 87. See also Novitz, International and European Protection of the Right to Strike, 292.

ILO, Committee on Freedom of Association, 343rd Report, para 1029.


ILO, Committee on Freedom of Association, 343rd Report, para. 1029.

