INTERNATIONAL LAW AND THE PROHIBITION OF THE RIGHT TO STRIKE IN ESSENTIAL SERVICES IN NIGERIAN LABOUR LAW: SOME REFLECTIONS

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1. Introduction
The right to strike is generally recognised as a legitimate means of defending workers’ occupational interests, and is a necessary countervailing force to the power of capital. Without the right to strike, organised labour would be powerless to deal with management at arm’s length. Kahn-Freund describing the main purpose of labour law as redressing any disequilibrium of power, noted that “there can be no equilibrium in industrial relations without a right to strike. Such equilibrium is deemed desirable to promote collective bargaining and achieve social justice in the workplace. Indeed, strike plays the same role in labour negotiations that warfare plays in diplomatic negotiations. Strike facilitates agreement because the consequences of failure are serious, unpleasant, and costly. Take away the right to strike and workers and their trade unions will be lame ducks or sitting ducks in a shooting range.

The importance of the right to strike in industrial relations cannot be over-emphasised. In his famous statement in 1942 Lord Wright

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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 a normal, inevitable and necessary consequence of the organisation of the labour market on capitalist lines. In a free market economy everyone is only able to achieve economic progress by a clever manipulation of the forces of the market. To deprive the worker of the right to strike is not only to deprive him of a requisite weapon in his bargaining armory, but is an attempt to leave him economically rudderless and unprotected in fierce economic encounters with the employer." The right to strike is a clearly a crucial weapon in the armory of organised labour. The right to strike has been described as "an indispensable component of a democratic society and fundamental human right." The right to strike is so important to the functioning of a democratic society that its removal without reasonable cause would be unjustified.

This paper argues that, although the sanctity of the right to strike is not absolute," the prohibition placed on the right to strike in essential

6. Crofton Hand Woven Harris Tweed Co. v. Vetch (1942) IALLER, pp. 158-159. This statement was re-emphasised by the Constitutional Court of South Africa recently: "The right to strike is of both historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargainingsystem." See NUMSA v. Bader Pop (Pty) Ltd 2003 (3) SA p. 513. See generally: T. Novitz, International and European Protection of the Rights to Strike (Oxford: Oxford University Press, 2003), pp. A-5.
8. Ibid.
services in Nigeria is far from reasonable. For example, there is absolute prohibition on the right to strike in essential services. It is argued that Nigeria has over-enlarged the definition of essential services and thereby destroyed the right to strike. The list of essential services is exceptional and many workers are denied the right to strike on the ground of essential services when in fact they do not belong to that category. It is further argued that the definition of "essential services" should be narrower and clearer and should be limited to services whose interruption may have especially serious repercussions on society, such as those that may endanger the life, personal safety or health of the whole or part of the population. It is further argued that the prohibition of the right to strike in essential services represents a significant obstacle on the right to strike in the defence of labour, social and economic interests of workers. This is demonstrated by the adverse criticisms and damning conclusions of the ILO supervisory bodies which have, at various times, voiced outrage at the way Nigerian law restricts the right to strike, and they have called for remedial measures to be taken.

2. The Right to Strike in Essential Services: A Conceptual Framework
The concept of "essential service" expresses the idea that certain activities are of fundamental importance to the community, and that their disruption will have particularly harmful consequences. It is common to find prohibitions on the right to strike when it comes to the issue of essential services. However, it is not possible to provide a uniform list of what constitutes essential services. This will arguably vary from one country to another. A developed country and a developing one, for example, cannot agree on a uniform definition due to their different political, economic and other circumstances. Thus, it

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is up to each country to determine which services are to be deemed essential in the light of its own circumstances 13

However, two widely-used approaches to defining essential services are the "list approach" and "the consequences or heat-of-the moment approach". 14 In the list approach," a list of essential services is enumerated, usually by identifying the employers who are considered to be the providers of essential services.

The advantages of the list approach are that there is certainty over which services are included." Secondly, a set list avoids decisions on which services are essential from having to be made on the spur of the moment when a dispute is imminent or has broken out. 17 Thirdly, it makes possible the implementation of set procedures for dealing with those workers who are excluded from striking - because they fall under the essential service definition. 18

The list approach has a number of disadvantages. First of all, it excludes from the right to strike all workers in an industry, sector or occupation, and fails to recognise that there are different categories of workers in an industry or service, some of which are more critical than others to the continued operation of that industry or service. 19 Furthermore, the list approach also fails to take cognizance of the fact that a service or industry not normally defined as essential could become so under certain conditions." This could occur, for example, if

15. This is the case of Nigeria and of countries in Asia, Africa, Latin America and the Caribbean, for example. See G. S. Morris Strikes in Essential Services (London: Mansell Publishing, 1986), p. 188.
16. Ibid.
17. Ibid.
18. Ibid.
20. Ibid.
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 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 USA), 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." The advantages of this approach are that it allows for more flexibility; it also means that no groups are automatically excluded from taking some action."

One problem with this approach relates to deciding at which point a prohibition should be imposed and by whom. One possibility is to establish an independent body comprising labour, employers and the state or a body of labour relations experts or to grant power to an individual with experience in arbitration or mediation. The decision about when to impose the prohibition could be taken by the relevant body in the light of the particular circumstances of the strike in question. This could be before the action starts, or during the strike, if consequences should arise which could endanger human life and safety." Where a body, rather than an individual, is given this task one problem would be for its members to reach agreement in a short period of time. Morris points to the problem in allocating this task to the minister or government of the day as "political considerations might then intrude on what should be an objective decision.';"
A second problem which could affect the body which has to make a
decision in the heat of the moment would be the pressure of public
opinion. In such circumstances, "such decisions may be influenced
more by political considerations and the pressure of public opinion
than by the nature of the disruption." As Cardova has noted:
"The reaction of public opinion is not necessarily commensurate with
the essentialness of the service or services concerned, but rather with
the degree of inconvenience caused by the strike. A strike in a hospital
or ambulance service, for instance, arouses less hostility than a strike
in the urban transport system, because many regular users of the latter
feel that they are not going to need the former services." 

There is no doubt that essential services must be protected in the
interests of the community as a whole. Therefore the right to strike in
bona fide essential services may, understandably, be subject to
prohibition. However, as shall be seen later in this work, the Nigerian
list of essential services is exceptional and beyond what the ordinary
man in the street would regard as essential services. This paper argues
that the concept of essential services in Nigeria is used as a strategy to
profundly undermine the right to strike and therefore that there is a
need for a reclassification of "essential services" to services that are
actually essential in order to protect the right to strike.

3. The Right to Strike in Essential Services in International Law
The ILO is the United Nation's Agency responsible for upholding
global labour standards. The ILO was established in 1919 as a
specialised agency of the United Nations and it is the most prominent
and most important international organisation of representatives of
management, governments and labour in the whole world. " The ILO's
chief role is to formulate international standards in the field of
employment and social security for workers, and to monitor
compliance by member states." These standards are agreed upon by
governments and are acknowledged globally as a code of "best
practice.' In this way; the ILO acts as the global repertory and watchdog of labour standards. It seems surprising, however, that the right to strike is not expressly recognised or provided for in any of the ILO Conventions and Recommendations.

Gernigon et al contend that the word "right to strike" appears only incidentally in the Convention on the Abolition of Forced Labour 35 which prohibits the use of forced or compulsory labour as a punishment for participating in strikes.46 The "right to strike" is also contained in the Voluntary Conciliation and Arbitration Recommendation 37 which declares that none of its provisions is to be interpreted as limiting in any way whatsoever the right to strike. 38 However, the absence of explicit provisions does not mean that the ILO disregards the right to strike or refuses to deal with the appropriate means of safeguarding its exercise." The ILO does recognise that workers' 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."

Significantly, two resolutions of the International Labour Conference which provided guidelines for ILO policy emphasise recognition of the right to strike in member states. The first resolution, Resolution Concerning the Abolition of Anti-Trade Union Legislation in the States' Members of the International Labour Organisation, called for the adoption of "laws ... to ensure the effective and unrestricted exercise of trade union rights, including the right to strike by workers." The second resolution, Resolution Concerning Trade Union Rights and ...
their Relation to Civil Liberties, called for action in a number of ways "with a view to considering further measures to ensure full and universal respect for trade union rights in their broadest sense", paying particular attention, inter alia, to the right to strike. In addition, the ILO guarantees which extend to workers against acts of discrimination based on their trade union activities is another indication of the protection of the right to strike.

It is not only the above-cited pointers which demonstrate the importance of the right to strike in labour relations. The Freedom of Association and Protection of the Right to Organise Convention guarantees the right of workers without restriction to organise their administration and activities and to formulate their programmes. The question here is whether strike action constitutes trade union activity. It is submitted that there is little doubt that it does, considering how ineffective trade unions would be without their most potent weapon.

The ILO standards governing the right to strike are also 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 CFA believes that strikes are part and parcel of trade union activities. The right to strike, both of workers and their organisations, is generally recognised by the CFA, not only as a legitimate means of defending their occupational interests, but as an essential one. As the CEACR has further elucidated:

"The committee considers that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests

44. No 87 of 1948.
46. Ibid, para. 521.
47. Ibid, para. 522.
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 the workers."

Furthermore, the ILO Supervisory bodies have always referred to the
right to strike when they have considered applications of Articles 3, 4,
8, 50 and 1051 of the Right to Organise Convention 1948 (No. 87) by
the various member states. These bodies have reaffirmed the principle
of the right to strike subject only to the reasonable restrictions that
might be imposed by the law. 52

The ILO does not, however, regard the right to strike as an absolute
right and has created some exceptions. The first concerns the right of
members of the police and armed forces to strike. The ILO accepts that
the members of the police and armed forces can be denied the right to
strike. They are thus excluded from the ambit of Convention No. 87
from which the right derives." The CFA has refused, therefore, to
object to legislation banning strikes by such personnel. 54 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." The CFA and the CEACR 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

48. ILO: Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the
49. 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."
50. 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."
51. 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.
paras. 199-223.
53. 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.
54. ILO: Digest of Decisions and Principles of the Freedom of Association Committee (International Labour Office,
55. ILO: Digest of Decisions and Principles of the Freedom of Association Committee Fifth (Revised) edition
procedures in which the parties concerned are able to take part at every stage, with the arbitration decisions being binding on both parties and being applied in full and speedily." 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." The CFA has pointed out, however, 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." Outside these exceptions, a general prohibition or restriction of the right to strike is contrary to international labour law.

4. The Right to Strike in Essential Services in Nigeria

Essential services are services that are of crucial importance which must be maintained to prevent immediate and serious danger to the health, safety or welfare of members of the public. 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, any of the members of which are employed in any essential service who has been engaged in acts calculated to disrupt the economy or disrupt the smooth-running of any essential service." Furthermore, such an 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

56. Ibid, paras. 595 and 596.
57. Ibid, para. 583.
58. Ibid, para. 583.
60. 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.
61. Section 9 Trade Disputes Act 1990.
62. Ibid.
63. Ibid, section 1.
64. Ibid, sections 2 and 3.
member found to be involved in acts prejudicial to industrial peace may be detained indefinitely in a prison or in police custody." The penalty for contravention, upon conviction, is imprisonment for a term not exceeding five years. 66

Furthermore, the Act ousts the jurisdiction of the courts as no legal proceedings shall lie against any person for anything done in pursuance thereof." The Act also suspends the Constitution and stipulates that the question whether any provision of the Constitution shall be contravened in pursuance of the Act is not to be inquired into in any court of law. 67 It is also provided that a detained person cannot enjoy the benefits of the writ of habeas corpus and subjecitendum, by which a legal process may be set in motion for the court to order the physical production, in court, of a detainee who is alleged to have been wrongfully detained. 68

In addition, the Trade Union (Amendment) Act 2005 reinforces the prohibition of strikes in essential services and further provides for a fine of N10,000 (US$84.38) or six months imprisonment or both for exercising the right to strike in essential services." It also provides that the provisions for arbitration in the Trade Disputes Act 1990 shall apply in all disputes affecting the provision of essential services, and that the determination of the National Industrial Court in all such disputes shall be final. 71 Thus, not only is the right to strike in essential services prohibited, but its infringement is criminalised.

Nigeria adopts the "list" approach to the definition of essential services. Section 9(1) of the Trade Disputes Act lists the following as "essential services":

"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

65. Ibid, section 5(1).
67. Ibid, section 8.
68. Ibid, section 8(2)(a).
69. Ibid.
70. Section 6(a) Trade Union (Amendment) Act 2005.
71. Ibid, section 6(7).
employed in the armed forces of the Federation or any part thereof and also, of persons employed in an industry or undertaking (corporate or unincorporated) which deals or is connected with the manufacture or production of materials for use in the armed forces of the Federation or any part thereof; services established, provided or maintained by the Government of the Federation or of a State, a local government council or any municipal or statutory authority, or by private enterprise-for the supply of electricity, power or water, fuel of any kind; for, or in connection with, 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 1993 which 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 approach to the concept of essential services raises a number of issues. In the first place, the list of essential services comprises a whole gamut of services that could legitimately come under the law. Indeed, it seems correct to suggest that any service irrespective of the sector or industry can be deemed "essential" depending on how the service came to be rendered. For example, if an essential service, say the Power Holding Company of Nigeria (PHCN), contracts a business to another firm whose primary function is not power generation, say building or construction, the latter firm will come under the provisions of the law. Similarly, if a local government

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73. 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 industrial action calculated to disrupt the smooth running of teaching or educational services in any of those educational institutions."
council (an essential service) hires the services of a private cleaning company to sweep the streets and workers in that company strike, they will be enjoined by the law. The law therefore provides rather flexible conditions for any service to be regarded as essential, depending on the particular circumstances. 74

Secondly, the definition of essential services must be criticised as not only being grotesque, but also for making a nonsense of the basic concept of essential services. Essential service is (at its base-line definition) a service whose disruption would endanger human life, or the public health or safety of the whole or part of the population. 75

The services included in the list are beyond the limits of what the ordinary man on the street would regard as essential services. For example, the Act prohibits strikes by workers employed by a local government council or a statutory authority that provides electricity, water, fuel, sanitation, fire service and transportation services. By specifying employers in local councils, the Act excludes from the right to strike employees as diverse as refuse collectors, gardeners, library personnel and cleaners, to mention a few. The net is cast even wider by including the private sector, for example transportation and financial institutions licensed to carry on banking business under the Banking Act. If follows, for example, that the union of taxi drivers is as much discharging essential services as are workers in the hospitals or in the ports. All these cannot be considered as truly essential services. 76

It is submitted that Nigeria has used the notion of essential services as a mechanism to proscribe rather than to qualify the right to strike. This is because the definition of essential services is broad enough to cover

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A third problem is that the provisions of the Trade Disputes (Essential Services) Act 1990 ousting the jurisdiction of the courts, preventing the issuance of the writ of habeas corpus and subjiciendum, giving power to proscribe unions and detain persons are undoubtedly absolutist, authoritarian and draconian. They are unquestionably incompatible with the tenets of a democratic society. The right to personal liberty, save in execution of a court order, and the right to a fair hearing are guaranteed by the Constitution. Access to the court for the determination of rights is also guaranteed by the Constitution. In the same vein, Article 6 of the African Charter on Human and Peoples' Rights provides guarantees against arbitrary arrest and detention while Article 7 protects the right to a fair hearing, presumption of innocence until the contrary is proved by a competent court or tribunal and the right of defence, including defence by a counsel freely chosen by an accused person. The Trade Disputes (Essential Services) Act is clearly in contravention of these guarantees. Indeed, the Act in its construct was decidedly anti-union and this is reflected in its one-sidedness; it explicitly gives the impression that the onus for industrial unrest in the essential services rest squarely on workers and trade unions. The Act is thus partial for failing to put a cost on employers for contravening the provisions of the Act."

A fourth problem is that the Trade Disputes (Essential Services) Act 1990 regards the entire service as essential without recognising that it is possible that certain persons or elements of the service are not essential." Thus, the whole public service and parastatals fall within the concept of essential service, regardless of job description." While the goal of protecting essential services is legitimate in principle, it is submitted that the Act is disproportionate in that it has applied the ban

83. F. Adewunmi and S. Fajana, Workers' Rights and Labour Standards in Nigeria (Lagos: University of Lagos Press, 2008), pp. 77-78
84. Sections 34 and 36 of the 1999 Constitution respectively.
85. Sections 6 and 17(2); Ibid.
87. Ibid.
on the right to strike by a large group of workers instead of separating those who perform essential services from those who do not. Such prohibition of the right to strike by large groups of employees is not in line with liberal democratic norms."

Another issue is that the notion of essential services is employed as a control measure to curb the perceived excesses of some trade unions disliked by the government. 91 This is achieved through the power given to the President to proscribe unions or associations involved in essential services, and thereby destroy their ability to undertake industrial action. 92 As Adeogun noted:

"The rationale for this provision is that since a strike is a concerted action by workers typically operating through a collective umbrella such as a trade union, if the collective base is destroyed, workers will be put in disarray and the strike soon fizzles out. 93

Indeed, the government has, at one time or another used its control powers under the Trade Disputes (Essential Services) Act to proscribe workers' organisations' that could not be said to belong to essential services in the real sense and has thereby diminished the right to strike. One such organisation that was proscribed was the National Union of Nigerian Bank Employees (NUNBE). In making the proscription order the government claimed that:

"The action of the employees of the Bank is ... considered by the government as a wilful act calculated by the union not only to disrupt the smooth running of the economy but also to block the way of the government to enforce the law. 94

Several other unions have also been proscribed under the guise of violating the essential services' legislation. Such unions include Shell-BP and Allied Workers Union of Nigeria and the Senior Staff

92. According to Agomo, "the main purport of the concept of essential services seems obviously to be the truncating of activities of some virile trade unions in order to prevent them from industrial action leading to the stoppage of work." Ibid.
Association of the Shell-BP Company." More recently, the Nigerian Medical Association, the National Association of Resident Doctors and the Academic Staff Union of Universities (ASUU) were proscribed. In the case of ASUU, for example, ASUU had embarked on a strike on 1 July 1988 to back up its demand that its members and other university staff be paid under the Elongated Salary Structure (ESS) which the government introduced in January 1988 as a pain-relieving economic measure and which civil servants had received. ASUU had also demanded restoration to the university senates of the power to open and close universities. It asked for the reopening of the universities which had been closed as a result of the April students' demonstration against the removal of the oil subsidy. Lastly it demanded the setting up of a National Joint Negotiating Council. "The refusal of ASUU to call off the strike ignoring the Minister of Education's order that they do so within 48 hours, in addition to a similar order from the Industrial Arbitration Panel (IAP), led to the government's proscription of ASUU. "Similarly, the Nigerian Labour Congress (NLC), the National Union of Petroleum and Natural Gas Workers (NUPENG), and the Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN) had their national executives dissolved. Clearly, the reason for proscription of these unions was to weaken the collective strength of workers and thereby destroy the right to strike.

*It is submitted that the essential services legislation should be modified to conform to acceptable labour standards. A progressive approach to*

99. Ibid.
102. I. N. Obasi, State-Labour Relations under SAP in Nigeria (Enugu: Afrorbi Publishers, 1997), p. 26. Furthermore, the government attempted to enforce the provisions of the statute in the recent case of what is now known as the case of the 'eleven NEPA men.' Eleven employees of the National Electric Power Authority (NEPA) were tried by a military tribunal for causing a national blackout by embarking on a strike in September 1988 and they were sentenced to life imprisonment. The workers, due to a public outcry, were released after serving a few years in prison. It must be observed, though, that the workers were clearly under a service classified as essential but they were not convicted under the provisions of the Trade Disputes (Essential Services) Act 1990. This is because the maximum punishment provided therein is five years imprisonment. This case clearly shows some of the excesses of military rulers who have no regard for the rule of law.
industrial relations does not lie in the criminalisation of strikes, prescription of unions and a bogus list of essential services which denies workers the right to strike, but in the speedy identification of the causes of workers' discontent and the effective means of mutually satisfactory solutions.

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

Clearly workers are denied the right to strike under the guise of essential services when many employees in these industries are only tangentially related to the delivery of services, and their participation in a work stoppage would have little effect on the public. This is contrary to acceptable labour standards and demonstrates that Nigerian law is deficient. The ILO has ruled that the principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services in too broad a manner; and that essential services must be limited to those the interruption of which would endanger the life, personal safety or health of the whole or part of the population. Indeed, considering the conclusions of the Committee on Freedom of Association it is submitted that the definition of essential services in such an exceptionally wide manner constitutes an abuse of the right to strike. The Committee has criticised such broad provisions as being contrary to the right to strike enshrined in the concept of freedom of association. It has therefore urged that the Trade Disputes (Essential Services) Act 1990 be amended in line with the provisions of Conventions Nos. 87 and 98 to...

103. More will be said of the need to protect the interests of the public in due course.
In terms of specific services, the ILO has provided a strict list of essential services to include 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. 109

Conversely, the ILO has found that generally, in line with its criterion, that 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; hotel services; the education sector; refrigeration enterprises and the postal services.109

It is submitted that the list of essential services in Nigeria is over-inclusive and strongly questionable; most of the listed services do not merit the special distinction of being treated as essential, yet they result in the prohibition of the right to strike. Such prohibition of the right to strike by large groups of workers is against liberal democratic norms.110

107. Ibid.
110. Ibid, para. 587.
4.2 Why Protect Essential Services?

Ought strikes by workers in essential services to be regarded in precisely the same way as industrial action by workers in less sensitive fields? There is no doubt that workers are clearly opposed to any form of restriction on their ability to take industrial action in essential services. However, the right to strike in essential services is one area where it is certain that the right generally conflicts with other rights and raises the issue of the need to balance the apparent conflict in such a way as to safeguard the legitimate interests of the community at large.

For example, the right to strike may run counter to the right to life, as with an all-out strike by doctors, or to the vital needs of the community (essential services). Suppose, for example, workers in the electricity, water and the health sectors were allowed to strike. Suppose a man takes his child to hospital for an emergency operation and is told that nothing can be done because the hospital is closed due to industrial action. Suppose again a man’s house catches fire and upon calling the fire brigade he is told that his home has to burn down because workers in the fire brigade are on strike. There is no doubt that the result of such industrial actions would be very damaging to the interests of the whole community.

In 2004, for example, members of the Nigerian Medical Association embarked on a nation-wide strike in protest against a law barring doctors in the government service from private practice. This strike paralysed medical care delivery in the country because both government and private hospitals participated in the action. The sick were in many cases taken to neighbouring countries by their relatives, while, in some cases, incidences of unavoidable death occurred. In a particular incident, which took place at the Lagos Island Maternity Hospital, a pregnant woman died because no medical attention was forthcoming. Similar cases have occurred in the electricity, water, airways and other sectors regarded as essential services. It should be

113. Ibid.
115. Ibid.
116. Ibid. Recently also, six persons have been reported dead at the University of Port Harcourt Teaching Hospital, as a result of the strike by resident doctors. See The Punch (Nigeria) 13 February 2008.
emphasised that in these and other disputes delicate issues of public interest; health and safety were involved.

There is no doubt that the essential services arguments are indisputable (particularly in certain areas of government activities) such as the police, armed forces, fire services and health care. In these services any stoppage of work due to strikes would pose a serious threat to the health and safety of citizens, and adversely affect the economic fortunes of a nation. In rationalising the consideration which underscores the prevention of the armed forces from joining trade unions and embarking on strikes, for example, Grunfeld noted:

"The power to repel domestic as well as foreign enemies of the state depends on the command and obedience of the armed forces and the police force. Therefore these major components of state power must be protected by law from any attempt to weaken them through direct approach to individuals to abandon their allegiance or through membership of organisation loyalty to which may conflict with loyalty to the state."  

Indeed, the importance of the survival of essential services in the community cannot be overemphasised. It is for this reason that one UK study group, for example, proposed that strikes in the fire, health, nuclear power, sewage services and public utilities be prohibited altogether, with particularly severe punishment where the withdrawal of service could lead to death or serious injury.  

As the study group argued:

"Indeed, providing that the living standards of those employed in the essential services are adequately safeguarded, there can be no justification for allowing the interest of those whose life, health or safety may be endangered by such action to be subordinated to the
right to strike. In our view the exercise of that right in essential services is incompatible with the maintenance of civilised society. The right to strike is a basic freedom, but when its exercise can result in suffering or even death, we do not believe that it is a right which should be regarded as superior to all others."

Clearly the justification for prohibiting the right to strike in essential services is that the workers perform special functions in the interests of the entire community. The concept of essential services therefore balances the right to strike with the public interest. Thus, based on the argument that public policy demands that such services should be operated without interruption, only very few people would quarrel with the idea of placing some restrictions on the right of workers in bonafide essential services to withdraw their labour. However, such workers must receive adequate compensation for giving up the right to strike.

4.3 Maintenance of Minimum Services

In order to give workers a greater power to carry out legitimate industrial action, it is suggested that a "minimum service" could be required, instead of a total ban on strikes in essential services. This would mean that some workers would be required to ensure that certain "minimum services" are maintained at the workplace during the period of industrial action. The maintenance of minimum services has the advantage of ensuring that the basic needs of the population are met during a strike in a public utility of fundamental importance.

It is suggested that a board could be established for the purpose of regulating and supervising the maintenance of minimum services.

121. 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 which interrupt these are said to be against the public interest. For an extended discussion, see B. Hyman, "The Concept of 'Public Interest' in Industrial Relations," in Lord Wedderburn of Charlton and W. J. Murphy (eds.), Labour Law and the Community: Perspectives for the 1980's (London: Institute of Advanced Legal Studies, 1982), pp. 95-106.

122. Some centuries ago, John Stuart Mill reminded trade unionists that they owe moral duties to the community at large and it behoves them to take care that the conditions they make for their own separate interests do not conflict with their obligations to the community. See E. Lee, "Trade Union Rights: An Economic Perspective" (1998) (3) International Labour Review, p. 316; Cf P. Benjamin, "The Big Ban Theory: Strikes in Essential Services" (1989) 6 Employment Law, p. 44.


during strikes. The board could be given the responsibility to decide which services should be maintained and the percentage of workers that should remain at work during a strike. Alternatively, such decisions could be taken as a routine measure during collective bargaining or once notice of a strike action has been given to the employer.

The supervisory bodies of the ILO have considered that this can be an appropriate alternative in such services, provided that it is not such as to call into question the right to strike of the large majority of workers. Such minimum service provisions would have to meet at least two requirements: (1) the service required must genuinely and exclusively be a minimum service, that is one which is limited to the operations that are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear; and (2) the workers' organisations concerned should be able to participate in defining such a service, together with the employers and the public authorities. In addition the minimum services to be maintained in the event of a strike must be defined clearly, applied strictly and made known to those who may be affected by it.

4.4 Graduated Strikes
Another approach which could be followed in Nigeria instead of an outright ban on the right to strike in essential services is the use of the "graduated strike". This is a form of controlled work stoppage designed to cushion the impact of an interruption in essential services while still prodding the negotiators towards compromise. The graduated strike allows workers to partially withdraw their labour for an initial period.


126. Ibid.


129. Ibid.


which is then escalated for a further period if no agreement is reached. This would continue until there is a settlement or there is a complete shutdown.\textsuperscript{132}

The advantage of this approach is that it would allow for pressure to build up on both sides. The employees will lose wages for each day they are on strike and the public will gradually lose more services, thereby avoiding the immediate crisis effect of a complete shutdown. This would give both parties time to consider their positions without the "popular pressure which inevitably accompanies a total shutdown from impinging too much on the bargaining process." \textsuperscript{133} This approach seems commendable since it would ensure that the public continues to enjoy important services, although at a reduced level, instead of suffering the shock and the inconvenience of immediate and total deprivation.\textsuperscript{134}

5. Concluding Remarks
The central theme of this study is that Nigerian law does not adequately protect the right to strike in essential services and that there is a need for reform. It is submitted that the wide range of prohibitions demonstrates that there is no real protection of the right to strike in essential services in Nigeria. It is not surprising, therefore, that the ILO supervisory bodies - the Committee on Freedom of Association (CFA) and the Committee of Experts on the Applications of Conventions and Recommendations (CEACR) have voiced outrage at the extent to which, and the manner in which, Nigerian law prohibits the exercise of the right to strike in essential service. This undoubtedly strengthens the case for changing Nigerian labour law in this area.

The right to strike in essential services must be strengthened to enable collective bargaining to perform the important role envisaged in Nigeria's system of industrial relations. It is submitted that, if Nigeria is to meet minimum international standards on the protection of the right to strike in essential services, radical reforms will be required of its

\textsuperscript{132} Ibid.
\textsuperscript{133} Ibid.
\textsuperscript{134} Ibid.
labour law and policy. The status of the strike in essential services reflects a legislative policy that severely restricts the right almost to the point of extinction and there is indeed a need for urgent reform of the right to strike in essential services in Nigeria.