DIFFERENT DIMENSIONS OF THE RIGHT TO STRIKE: A CRITICAL AND JURISPRUDENTIAL EXPOSITION

OVUNDA V. C. OKENE, PhD, Rivers State University of Science and Technology, Port Harcourt, Nigeria

Available at: https://works.bepress.com/ovunda_v_c_okene/53/
DIFFERENT DIMENSIONS OF THE RIGHT TO STRIKE: A CRITICAL AND JURISPRUDENTIAL EXPOSITION

BY

O. V. C. OKENE*

1. INTRODUCTION

This article provides a conceptual analysis of key definitions and core concepts relating to the right to strike. It examines the significance of the distinction between the "right to strike" and the "freedom to strike" and the question of whether the right to strike is an individual or a collective right or both. The article further examines the issue of whether the right to strike is simply an economic right or whether it could also have political underpinnings. It shows that, although the classic purpose of the strike is that it is an economic weapon in industrial relations and is therefore tied to the concept of trade dispute, in many situations the dividing line between industrial and political matters is very hard to draw. It is argued that a distinction should be made between purely political strikes, which are not permissible, and strikes with both industrial and political aspects (strikes with mixed motives) which should be permitted in order to give greater protection to the interests of workers.

2. THE RIGHT TO STRIKE OR THE FREEDOM TO STRIKE?

This section examines the distinction between the "right to strike" and the "freedom to strike". The question is whether there are any legal implications which stem from such a distinction. According to Kahn-Freund and Hepple, a worker's power to strike is interpreted in two ways: the right to strike; or the freedom to

*LL.M. (Ile), Ph.D. (UK), BL, FeAt, Senior Lecturer and Dean, Faculty of Law, Rivers State University of Science and Technology, Port Harcourt, Nigeria.
strike.' The difference between the two interpretations is more than a superficial matter of semantics; each interpretation has vastly different implications in terms of how protections for strikers are translated into law. The first interpretation regards striking as a fundamental human right which must be protected by law.\(^2\) This is the "right to strike" interpretation of striking. The second interpretation treats the power to strike as an exemption from criminal or civil liability; the protection of strikers is "expressed in immunities, in the withholding of state intervention."\(^3\) This is the "freedom to strike" interpretation of striking. The choice is, essentially, between the direct recognition of a right to strike and the provision of immunities and guarantees in favour of those resorting to industrial action against eventual claims that they would face.\(^4\) While some countries have opted for direct recognition of a right in favour of strikers (positive regulation), other countries have opted for the elimination of obstacles against strike action (negative regulation).\(^5\) As Novitz explains:

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

---


Ibid.
Ibid.
Ibid.
Ibid.


The positive right to strike can thus be given as a constitutional right, as in France, for example, or an ordinary right to strike provided in a statute, as in Malawi, for example. The difference between the two is that a constitutional right to strike is more supreme, as the constitution cannot easily be amended to abrogate the right, whereas a statutory right to strike can be abrogated or changed with ease by the legislature.

Thus the models of regulation are based on either a right to strike or a freedom to strike. In essence the existing differences are a consequence of treating the strike as a right or as a freedom (or immunity). France, for example, has a positive form of regulation and adopts the strike as a rights approach, whereas Nigeria has a negative form of regulation and adopts the strike as a freedom (or immunity) approach. The immunity approach is also the pattern in the UK. As noted in Chapter 1 of this thesis, the freedom or the immunity approach is one of the legal legacies bequeathed to Nigeria in the wake of British colonialism. Thus, in Nigeria, as in the UK, one cannot use the appellation "right to strike" as is used in other jurisdictions - for example, in Italy or France - where there is a positive


The concept of the freedom to strike rests on the doctrine that immunities are granted to unions and to workers in labour conflicts, provided that their actions are in contemplation or furtherance of a trade dispute. This implies that every action constitutes a wrong. The only consideration is whether or not there is immunity for that wrong. See Ogunniyi, O. Nigerian Labour and Employment Law in Perspective (Lagos: Folio Publishers, 1991), p. 247; section 44 Trade Unions Act 2004.


11 The concept of the freedom to strike rests on the doctrine that immunities are granted to unions and to workers in labour conflicts, provided that their actions are in contemplation or furtherance of a trade dispute. This implies that every action constitutes a wrong. The only consideration is whether or not there is immunity for that wrong. See Ogunniyi, O. Nigerian Labour and Employment Law in Perspective (Lagos: Folio Publishers, 1991), p. 247; section 44 Trade Unions Act 2004.


3
guaranteed constitutional right to strike. In Nigeria and in the UK the appellation "freedom to strike" can only be used because workers and organisers of strikes are immune to both civil and criminal liabilities as opposed to the grant of the actual right to strike.

The option for one or other of the different interpretations of striking has influenced and conditioned the nature of the strike. In France, for example, the right to strike is recognised in the Constitution as a basic human right "which the law must protect by positive action."14 Thus, striking is not only a protected activity in France, it is also a fundamental right by virtue of its inclusion in the Constitution. The French model of recognising the right to strike as a basic human right requires positive state action - the government is acting to protect a worker's fundamental right to strike by including it within the Constitution.16 The importance of the right to strike is evident in the protections given to workers on strike. In France, participation in a strike does not break a striker's employment contract; it merely suspends the employment contract for the duration of the strike.17 Furthermore, French labour law (Code du Travail) prohibits employers from hiring permanent replacements for striking workers.18 Striking employees may only be replaced if they engage in serious misconduct (feute lourdes." Indeed, an employee's right to strike is so significant

18 Seyfarth, Shaw, Fairweather and Geraldson, Labour Relations and the Law in France and the United States: A Comparative Study (Ann Arbor: The University of Michigan Press, 1972), p. 125. However, even if an employee is accused of misconduct, the burden of proof still rests with the employer. The employer must show that the employee was not only aware of the conduct but also that the conduct damaged the interests of their employer. Ibid, p. 126.
that it outweighs an employer’s need to maintain operation of his or her facilities.” Thus, despite any restrictions,” the right to strike in France is a fundamental right that cannot be overridden by an employer’s interest without evidence of serious employee misconduct.”

Unlike the French model, where workers have a fundamental right to strike, Nigerian labour law guarantees the freedom to strike through immunities, rather than elevating the power to strike to the level of a positive right.23 The Nigerian model of freedom to strike implies negative state action - the government must refrain from interfering with workers’ exercise of their freedom to strike.” The difference between the right to strike and the freedom to strike is best illustrated by comparing the protection given to strikers in France with the lack of protection given to strikers in Nigeria. In France, as discussed above, workers have the right to strike without fear of being dismissed for breach of contract of employment or of being permanently replaced by employers. The rationale behind preventing employers from dismissing or replacing strikers is because the right to strike in France is a fundamental, constitutionally-protected right.25 By contrast, workers in

---


23 It must be noted that a constitutional guarantee can take the form of immunity alone: i.e. the constitution would say that no law can be made which makes striking in contemplation and furtherance of a trade dispute illegal.


25 If employers were allowed to dismiss or replace striking workers, it would mean that the exercise of a constitutional right would cost the workers their jobs. Mathombeni, R. “The Right or Freedom to Strike: An Analysis From an International and Comparative Perspective” (1990) 23 Comparative and International Law Journal of Southern Africa, pp. 342. As was once noted, if the right to strike were recognised constitutionally no contractual obligation could impede it since the contract would also have to give way to those fundamental rights. Lord Wedderburn of Charlton, “Law About Strikes" in McCarthy, W. (ed.) Legal Intervention in Industrial Relations: Gains and Losses (Oxford: Blackwell, 1992), p. 152, M. Brassey, “Sam’s Missiles: Entrenching Industrial Action in a Bill of Rights” (1993) 10 Employment Law, pp. 28-29; Obiateri, N.O. “Understanding the Concept of Legal Rights and Duties” (1992) 3: 9 &10 Justice Journal, p. 70.
Nigeria only have the freedom to strike, but, in exercising this freedom, they may be dismissed for breach of contract of employment or may be permanently replaced by temporary workers."

Nigeria's continued adoption of the freedom to strike model means that there is no real protection of workers' right to strike as they can be dismissed, fined, sued or even criminalised. For workers, the right to strike is not a true right in Nigeria. Workers are simply free to strike if they choose to undertake the risks of striking. However, if there was a fundamental, constitutionally-guaranteed right to strike, then there would be greater protection for those who organise and participate in industrial action in Nigeria, as in France. It is submitted that the Nigerian situation is unacceptable. There should be the incorporation of a right to strike in domestic law so as to give Nigerian workers and their trade unions a greater level of protection in improving and enforcing labour standards. Recognition of a right to strike: (a) allows the Nigerian government to act - positive state action - the government is acting to expressly recognise a worker's right to strike (rather than refraining from interference with a worker's freedom to strike); and (b) permits the government to be involved in the strike process as a protector of a worker's right to strike. Providing for a positive right would be a huge step towards protecting Nigerian workers." A guaranteed right to strike, rather than a freedom to strike, is also consistent with how modern democracies protect the right to strike."

---


3. THE RIGHT TO STRIKE: AN INDIVIDUAL OR A COLLECTIVE RIGHT?

Who has the right to strike? A relevant question in itself is whether the exercise of the right to strike should vest in trade unions (or professional representatives of the workers) or whether it should vest in individuals or in both trade unions and individuals. Ordinarily, the right to strike is an individual right, although it is exercised collectively; the characterization of the right to strike as an individual right does not alter the fact that it can only be exercised collectively. "The bearer of the right to strike therefore is primarily the individual." The right to strike, consequently, often does not depend on one's membership of an association. As Kahn-Freund noted:

"There have always been and that there will always be strikes organised by amorphous groups that are not trade unions, and spontaneous strikes not organized by anyone at all, or by groups formed ad hoc."

In practice, however, the question of the bearer of the right to strike may depend on national legislation. Different states have adopted different approaches to this issue. Thus there appears to be no uniform bearer of the right to strike. "Generally, there are two major types of systems: organic systems which attribute strike facilities to trade unions and workers' representatives; and individualist systems which recognise the right to strike to lie directly with the workers." In

---

Germany and Switzerland, for example, the right to strike is treated solely as a collective right to be exercised by trade unions for collective bargaining purposes. Conversely, in Italy, France, and the Netherlands, for example, the right to strike is recognised as an individual right. However, sometimes the characteristics overlap, and sometimes there are combined systems which have the characteristics of both types of system.

With regards to the position in Nigeria, it must be stressed that Nigerian law has not effectively addressed this issue, because neither the worker nor the union have a right to strike, but only a freedom to do so. However, the immunities which exist are immunities given to the trade unions. Traditionally, the immunities pertain to the collective and this is a consequence of the nature and development of the trade union movement between 1850 and 1906. The individual worker remains

34 Clauwert, S. "Fundamental Social Rights in the European Union: Comparative Tables and Documents" (Brussels: ETUI, 1998), p. 91; Murcia, J.G. and Villiers, C. "Strikes and the Contract of Employment: A Comparison of the Laws of Spain and England" (1997) 17(1) Legal Studies: The Journal of the Society of Legal Scholars, pp.111-113. In the organic systems, such as Germany and Switzerland, industrial conflict is exclusively understood as complementary to collective bargaining. Thus, industrial action is only allowed in so far as its purpose is the achievement of a collective bargaining agreement and the achievement of aims that can be regulated by collective agreements. However, such a functional approach to the right to strike entails an important limitation on the right to strike: it makes the right a union’s right and not an individual right. As a consequence, unofficial strikes (wild-cat strikes) are unlawful, as the workers outside the official trade unions cannot conclude collective agreements. Birk, R. "The Law of Strikes and Lock-outs" in Blanpain, R. and Engels, C. (eds.), Comparative Labour Law and Industrial Relations in Industrialized Economies (The Hague: Kluwer Law International, 1998), p. 467.


37 Section 44 Trade Unions Act 2004.

38 Lord Wedderburn, "Laws about Strikes" in McCarthy, W. (ed.), Legal Intervention in Industrial Relations: Gains and Losses (UK: Basil Blackwell Ltd, 1992), p. 160. This account is about the UK. However, because of the historical ties between Nigeria and the UK - Nigeria was a former British colony - the account here is also relevant in the Nigerian context.
Different Dimensions of the Right to Strike: A Critical and Jurisprudential Exposition

without protection and, strictly, is in a position of breach of contract. It is submitted, however, that the right to strike in Nigeria should be made both an individual and a collective right, in order to broaden the scope and protection of the right to strike. The right to strike should not be the sale prerogative of trade unions. If the right to strike is only conferred upon a union and not on the individual, as is the case in Germany and Switzerland, for example, then the right to is strictly limited to a group. But when the right to strike is granted to the individual, as does article 40 of the Italian Constitution, for example, then unofficial strikes and unorganised strikes would not be unlawful." In France and Italy a strike does not have to be union-organised to be lawful." The French Cour de Cassation has held explicitly that the right to strike is an individual right and not a union privilege. The Italian Corte di Cassazione held that the intention of Article 40 of the Constitution was not only to recognise the right to strike by taking away the illegal and penal character of strikes, but also to create a personal right to strike." Indeed, the general view in both countries is that a strike may be called by any group of workers in order to defend

---


a common interest." It is submitted that making the right to strike also as an 
individual right, and not the sole preserve of trade union organisations, will broaden 
the scope of the right to strike and enable it to perform its proper functions for all 
those who may need to have recourse to it.

The ILO is quite comfortable with either the workers themselves or their 
organisations bearing the right to strike. This is evident from the words "workers 
and their organisations" throughout the Convention." It also means that the right 
to strike can be enjoyed by workers within or without a trade union." In addition, it 
can also be inferred that, not only do trade unions and workers have the right to 
strike but also federations and confederations.

4. THE RIGHT TO STRIKE: AN ECONOMIC OR A POLITICAL RIGHT?

Generally, in the light of industrial relations a strike normally occurs in the course 
of a conflict between employers and employees concerning wages and working 
conditions." The reasons behind strikes or threats of strikes are predominantly 
socio-economic. The socio-economic conditions of workers are always subject to 
change. There is no gainsaying the fact that workers want a pay rise commensurate 
with the rate of inflation. They would want to render their services in a proper and 
safe place of work, utilizing good and adequate materials, and working among

concerning Convention No. 87 (Egypt) (Geneva: ILO, 2002).

Article 3 of Convention No. 87; ILO: Digest of Decisions and Principles of the Freedom of 
Association Committee of the Governing Body, Fifth (Revised) edition (Geneva: International Labour 
Office, 2006), paras. 520-522. The European Committee on Social Rights (ECSR) has frowned at 
states prohibiting strikes on the ground that they are not organized by a Trade Union as breaching 
article 6(4). According to the committee "all workers must be allowed to call a strike, even outside 
of a Trade Union framework". Just as 'an ordinary group of workers' without any special legal 
status may engage in such bargaining, it can and should be given the right to strike...so that it can 
effectively exercise its right to bargain effectively. ESCR, Conclusions I, p. 185; Conclusions II 
p.28-29; Conclusions XIV-I p. 662; Conclusions IV p. 50; 1. Novitz, International and European 

Ibid

Ibid.


Ibid.
Different Dimensions of the Right to Strike: A Critical and Jurisprudential Exposition

competent members of staff." However, not every strike is intended to support a demand directed at an employer. The strike can be used as a political weapon in order to protest, for example, about the enactment of a statute, or an unpopular measure of foreign, economic or educational policy; in such a case the demand is in fact directed at either the parliament or the government or both. Such strikes are often referred to as "political strikes," as it is generally understood as a strike against the government or parliament or both in order to bring about a change in policy." The strike is termed "political" because it applies to a "policy." 52

The question as to whether the right to strike is purely an economic right or whether it also has political aspects is a controversial and contested industrial relations and labour law issue." However, in some jurisdictions the legitimate purpose and function of the right to strike is clearly built into the collective bargaining process - as a tactic to be used to press bargaining demands or to ensure that agreements are honoured, but in other jurisdictions the right to strike is not limited to its use in collective bargaining. In France, for example, the right to strike is not limited to its use as a component of collective bargaining and political strikes are

not unlawful." There is no legal condemnation of political strikes because the Constitution recognises the right to strike without any distinction." Similarly, in Italy the right to strike on matters relating to economic and social policies is recognised. Article 40 of the Italian Constitution protects strikes with mainly, but not exclusively, economic and professional aims. Here the argument of State interference with the interests of workers is used to deny the possibility of a clear-cut distinction between professional and political strikes. Mixed strikes are therefore considered to be compatible with the aim of Article 3(2) of the Constitution, which states that economic and social obstacles, limiting the freedom and equality of citizens, the full development of human beings and the effective participation of all workers should be removed."

In Nigeria, the right to strike seems to be purposively limited to its legitimate Lise in collective bargaining with employers." In Nigeria, the freedom to strike depends on statutory immunities, without which industrial action would be unlawful. However, to attract immunity, industrial action must be taken "in contemplation or furtherance of a trade dispute"—the so-called 'golden formula.' By virtue of the Trade Disputes Act 2004, a 'trade dispute' must be between workers and their employer. As far as the subject-matter is concerned, a dispute must be 'connected with' one of the objects of 'collective bargaining' as legislatively defined to

---

56 Ibid.
57 section 48 of the Trade Disputes Act 2004.
60 Section 48 Trade Disputes Act 2004.
Different Dimensions of the Right to Strike: A Critical and Jurisprudential Exposition

constitute a 'trade dispute' "Thus, if disputes were primarily to further purposes other than collective bargaining matters, the golden formula would not apply."

From the foregoing, strikes solely designed to attack Government policy or proposed legislation unconnected with industrial matters have always stood outside the "golden formula" because of their subject-matter and because the Government cannot be a party to a trade dispute other than as an employer. The classical purpose of strike therefore is that it is an economic weapon in industrial relations and this is clearly reflected in the concept of trade dispute in Nigerian law. Thus, political strikes are unlawful in the Nigerian context. However, it must be noted that in many situations the dividing line between what is political and what is industrial relations in character is very difficult to draw. There could be strikes in which the political and occupational aspects are so intertwined to the extent that it is almost impossible to separate one from the other. In the words of Kahn-Freund:

"Whatever the political colour of Government, it is involved in industry, and the organisations of both sides of industry are involved in Government.

Is not every major industrial problem a problem of government economic policy? Is it not true that, not only in publicly owned industries, governmental decisions on wages policies - whether statutory or not - on credits and subsidies, on the distribution of industry and on housing and town planning, and on a thousand other things, affect terms and conditions of employment at least as much as decisions of individual firms? Where is the line between a strike to induce an employer to raise, or not to reduce wages, and a strike to press the government for measures which would enable the employer to do so?"

---

63 section 48 Trade Disputes Act 2004.
As Otobo also contends:

"Someone has to take responsibility for and make amends for the fact that inflation, official economic mismanagement, corruption (and I do not know why the prefix 'political' is so often attached), go a long way in determining the supply of living space, transport and health facilities, education, food, and whatever other conditions affect 'working lives'... In sum, the trade union movement of today and of tomorrow must move to secure workers interests on these important issues. Otherwise, it would render itself superfluous and subsequently obsolete..."

These statements are extremely significant. There is no doubt that the economic and social interests of workers encompass a wide range of legitimate issues that are interrelated to government as well as employer policies." If the government is carrying on economic policies which workers consider inimical to their well-being, workers may resort to strikes either to force the government to retrace its steps or indeed make a u-turn in respect of its unpopular policies." Therefore workers can engage in politics, and take controversial political positions, but only as a means to the realisation of collective bargaining ends of seeking to improve the working conditions of their members." Indeed, the concern of the ILO is that workers should be able to exercise the right to strike in relation to matters which affect them, even though the direct employer may not be a party to the dispute."

Consequently, it is submitted that the right to strike should not be limited only to collective claims of an occupational nature, but should be extended to the seeking of solutions to specific economic and social policy questions and problems which

---

68 Ibid.
have a direct bearing on the workers." Secondly, the right to strike need not be restricted solely to industrial disputes likely to be solved through the signing of collective agreements." This approach is accepted in France and Italy, for example, where workers have the right to strike in respect of socio-economic issues that are of common interest to them."

It is submitted that Nigerian law should be reformed so that the number of objectives attainable through industrial action will have to be expanded beyond the immediate monetary compensation to embrace far-reaching socio-economic goals. However, it is generally stressed that political strikes might affect the system of representative democracy or the competence of constitutional organs, especially when aimed at subverting the constitutional order, or where the mode of expression endangers the sovereignty of public institutions and prevent them from freely evaluating the requests advanced by other groups. Therefore, generally speaking, strikes which are purely political in nature should not fall within the scope of the guaranteed right to strike. In this context, Nigerian law should make a distinction between purely political strikes which seek to achieve wider political ends, and industrial cum political strikes which must be allowed for the greater protection of the social interests of Nigerian workers.

---


5. CONCLUDING REMARKS

This article has examined the key definitions, concepts and different dimensions of the right to strike. It has shown that the concept of the strike is a crucial weapon through which workers seek necessary improvements to the terms and conditions of employment.

The article has also examined the issue of the distinction between "the right to strike" and "the freedom to strike." As has been shown, the distinction is not superficial as there are significant differences and implications between the two classifications. A "right to strike" model means that the state positively recognises the right of workers' to strike and therefore workers cannot be dismissed or otherwise suffer any reprimand for exercising the right. Conversely, the "freedom to strike" model is fundamentally different from the "right to strike" model because it does not offer any protection to workers as they can be dismissed or replaced. Therefore, in order to protect Nigerian workers' this writer submits that Nigeria must depart from the "freedom to strike" model and adopt that of the "right to strike."

The article also considered the question of whether the right to strike is an individual or a collective right or both an individual and a collective right. It has been argued that in order to give workers greater power to enjoy the right to strike, the right to strike should be made both as an individual and a collective right so that the right can be available to all those who may want to make use of it.

The article further considered the question of whether the right to strike is simply an economic right or whether it could also involve political aspects. As has been shown, the classical function of the strike is that it is essentially a right to be used in the process of collective bargaining. However, as it is sometimes difficult to draw a distinction between economic and political issues because of their interdependence, a distinction should be drawn between purely political strikes and strikes with mixed motives which impact on issues relevant to the world of work.