THE BIG BAN THEORY: THE PUBLIC SECTOR AND THE RIGHT TO STRIKE - ISSUES AND PERSPECTIVE

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1. Prefatory Remarks

This article examines the prohibition of the right to strike in the public sector and argues that the total ban on all public sector workers in exercising the right to strike is unjustifiable and should be reformed. Generally, the public sector economy varies from country to country, largely due to the historical factors that have served to condition and determine the scope of the state's direct economic activities as reflected in public investments. In Nigeria, the state has been particularly active in the economy, accounting for over 70 per cent of total investments, just as it has always been the largest employer of labour. This dominant role was made possible by the oil boom in 1974, which ensured investible capital, and the drive for indigenisation of the economy whereby foreign investments in certain sectors of the economy were prohibited. However, due to the limited resources of potential and actual indigenous investors, the state completely took over the oil industry, and acquired controlling shares in enterprises that ranged from banking and insurance to manufacturing, the generation and distribution of electricity, the mining of all minerals, domestic air and rail transport, and many other activities described as social services.

The net result is the visible presence of the state in many areas of economic activity. A logical development was the growth of quasi-governmental bodies, charged with the responsibility of overseeing and monitoring various public investments, some of which have traditionally offered important services to the community. Typical examples include the Central Bank of Nigeria (CBN), the Nigerian National Petroleum Corporation (NNPC), the Nigerian Railways Corporation (NRC), the Nigerian Ports Authority (NPA) and the National Electric Power Authority (NEPA). The public sector therefore covers different types of employment including: the public service of the federation or of a state or of a local government; the armed forces; the police; the judiciary; universities; and also of persons employed in industry (corporate or unincorporated) and any service established, or maintained by the government of the federation.
the state, or local government council. In all, those engaged in public service in Nigeria form the largest number of the entire working population."

2. The Public Sector and the Right to Strike
Public sector workers are prohibited from exercising the right to strike by section 7(1) of the Trade Disputes Act 2004. Their disqualification stems from their categorisation as employees in essential services and therefore subject to compulsory arbitration in lieu of exercising the right to strike. The essential service criterion is one of the many reasons for the prohibition of strikes in the public sector. However, the idea that public sector workers should not engage in industrial action is not only anchored on the essential service criterion.

It is pertinent to examine the arguments against the right to strike in the public sector. A principal argument is that a strike by public employees is tantamount to denial of governmental sovereignty and authority. Sovereignty means that the government is not ready to share its power and authority with any group or groups representing particular interests, such as trade unions, and that any strike against the government can be seen as an attack on the state, a vote of no confidence and a challenge to the authority of the government. As Ozaki puts it:

"The doctrine is that ... as the representative of the popular will (or general interest), the state has an unassailable right to act unilaterally in matters coming within its legislative power, a right that cannot be challenged by groups representing particular interests, such as public servants' organisation."

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2. Section 7(1) Trade Disputes (Essential Services) Act 2004.
The sovereignty doctrine thus maintains that the government is represented by the people and those who are chosen to carry out its functions must not hinder it. Moreover, the government exercises its sovereign power in trust for all citizens, a part to which the government employees belong. The sovereignty of the state is said to preclude it from negotiating with its subjects on conditions of service. In Nigeria, the Morgan Commission on the Review of Wages and Salaries noted that the sovereignty doctrine was one reason for the failure of the government to bargain with public servants. The Morgan Commission said:

"...it appears that in dealing with their employees, the Governments are unduly conscious of their prerogative to determine the levels of remuneration and conditions of service, irrespective of their acceptability to the workers. This runs counter to the acceptance by the Governments of their responsibility to foster collective bargaining, and, indeed; detracts from the commendable efforts which have been made by them in some respects."

However, it is submitted that, while the sovereignty theory may have had some merit in the past, it has become archaic and old-fashioned in modern industrial relations. For example, there are many government corporations, such as the Power Holding Company of Nigeria (PHCN), the Federal Airways Authority of Nigeria (FAAN) and the National Fertilizer Company of Nigeria (NAFCON). These companies undoubtedly have similar features to the films in the private sector where labour relations issues are the same. Therefore, the prohibition of the right to strike cannot be legitimately extended to employees in quasi-government corporations. For workers in these corporations, the sovereignty theory does not serve as a good alternative for restricting the right to strike. It is submitted that the the sovereignty theory is a subterfuge for denying the rights of employees to participate effectively in the determination of their employment conditions. In any event, to negotiate with accredited representatives of employees does not amount to loss of power, since the government retains the power to accept, modify or reject any agreement reached at the negotiation table. Clearly the right to strike is essential to redress the imbalances in collective bargaining within the public sector." As Edwards noted:

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Footnotes:

13 Ibid.
17 Ibid.
"The application of a strict sovereignty notion ... that governmental power can never be opposed by employee organisations is clearly a vestige from another era, an era of unexpanded government. With the rapid growth of the government, both in sheer size as well as in terms of assuming services not traditionally associated with the 'sovereign,' government employees understandably no longer feel constrained by a notion that 'The king can do no wrong.' The distraught cries by public unions of disparate treatment merely reflect the fact that, for all intents and purposes, public employees occupy essentially the same position vis-a-vis the employer as their private counterparts."

Indeed, the fact of the state being a sovereign entity cannot give it a free rein in its relationship with its employees. The logical conclusion to the argument would be to exclude collective bargaining and the right to strike in the public service and allow the state to determine conditions of employment at will. This view is long outdated in industrial relations thinking.

The sovereignty doctrine may, however, be relevant in limited areas of sovereign matters, which may be described as non-negotiable issues. In other words, it is conceivable to confine the sovereignty principle to specific areas of government business on which the authority of the state cannot, or should not, be challenged or negotiated. This may include, for example, the armed forces, the police, the judiciary and other areas where security issues are involved.

A second closely-related argument is that public employees owe extra loyalty to their employer and therefore have a commitment to further the programmes of government even at the sacrifice of their interests.
of their own interests. However, this view is based on a false premise which confuses the role of the state as an employer and as a political entity. The extra loyalty theory is vague, conclusory and not adequately founded in the realities of the modern situation. In addition, it also does not offer any reason for the sacrifice expected of public sector workers. As Edwards notes:

"It outrages modern notions of industrial democracy to relegate a large segment of the work force to dependence upon the conscience of government. A degree of self-determination has become a way of life for the worker, and nowhere is it more necessary than in the public sector..."

A third common argument is that public servants provide essential services to the community. Wellington and Winter, for example, argue that the essentiality criterion is not confined to the immediate endangerment of public health and safety through the cessation of services of public employees. They contend that the services are always essential owing to their potential on cessation to injure the economy and the physical welfare of the citizens. However, the essentiality argument can only apply to essential or emergency services and not the whole of the...
public sector. Moreover, the essentiality argument need not apply exclusively to the public sector as there may be essential or emergency services, for example ambulance and fire services, in the private sector as well. The services regarded as essential must therefore be narrowly specified.

3. Should Strikes by all Public Servants be prohibited?
As has been shown, a major problem in the public sector relates to the question of whether public employees should have the right to strike. Is the strike weapon as a method for resolving differences between the parties which has been so well accepted in the private sector properly applicable to the public sector?

Of the arguments advanced against strike by public employees, the most important seems to be that it would be undesirable to grant public employees the right to strike owing to the essential nature of the services provided by them. Thus, the argument against strike in the public sector seems to rest more on the impact of the strike on public health and safety than on the sovereignty doctrine and other reasons.

However, while the essentiality criterion may be fundamental for prohibiting strike in the public sector, it is submitted that the essentiality criterion should be limited to services the interruption of which would affect public health and safety. To categorise all public sector institutions as essential appears far-fetched and impracticable, because there are a number of public institutions whose services are no more essential than those of the private sector. Indeed, to accept the essentiality criterion as if it were an immutable rule for every service provided by public employees would mean depriving all of them of the right to strike, even those patently not engaged in providing essential services. There is therefore a need for a distinction between services that are essential, in that any interruption might cause public hardship, and those that are not.

This distinction was made, for example, in *County Sanitation District v. Los Angeles County Employers Association* where the court held that a flat ban on all public employees' strikes is no longer supportable. The court said:

"We tolerate strikes by private employees in many of the same areas in which government is engaged, such as transportation, health, education and utilities; in many employment fields, public and private activity largely overlaps."

The court also criticised the sovereignty doctrine, stating that there is no rational basis for the sovereignty doctrine, except that it is a technique for avoiding dealing with the merits of the issue of whether public employees may exercise the right to strike. The court concluded that:

"the conflict of real social forces cannot be solved by the invocation of magical phrases like 'sovereignty.'... [T]he use of this archaic concept to justify a *per se* prohibition against public employee strike is inconsistent with modern social reality and should be laid to rest."

Similarly, in *Anderson Federation of Teachers v. School City of Anderson* the court said:

"There is no difference in impact on the community between a strike by employees of a public utility and employees of a private utility; not between employees of a municipal bus company and a privately owned bus company; nor between public school teachers and parochial school teachers. The form of ownership and management of the enterprises does not determine the amount of disruption caused by a strike of the employees of that enterprise... It seems so obvious...that a strike by some private employees would be far more disruptive of the society than [a strike by certain public employees]."

These cases clearly demonstrate that, since the line between the private and public sector in terms of services is difficult to draw sharply, an absolute prohibition of strikes in the public service appears to be arbitrary.

Applying these cases to the Nigerian context, I would advance the argument that this position holds good for Nigeria too, and so a ban on all public sector employees, as is provided in section 7(1) of the Trade Disputes (Essential Services) Act 2004, should not exist. As has been seen, public employees in Nigeria comprise a very long list of workers in the federal, state, local
government ministries and corporations. It also includes staff of the Central Bank of Nigeria, customs, the police, the armed forces, amongst others. Indeed, the whole public sector and arastatals are deprived of the right to strike. However, it is clear that not all public employees provide services the absence of which would endanger public health and safety. For example, gardeners or cleaners employed by a local government authority do not provide essential services and should not be deprived of the right to strike. This argument also holds good for those in many types of employment.

In view of the above distinction, it is submitted that there is a need to clearly define the class of public servants whose right to strike is restricted. This then raises the question of what criteria should be used to decide whether services provided by public employees are essential. It is suggested that the determination of such public servants should be made with the following three-way approach in mind:

1) The nature of the services that they perform.
The nature of the services performed by the relevant arm of the public sector is crucial to determining its essentiality as to justify prohibition on the right to strike. For example, strikes by gardeners or cleaners employed by a local government authority or by those who work in public supermarkets would not harm society. These are less important services and by their nature are not so essential as to justify prohibition of the right to strike. Suppose workers at a grocery store decide to exercise their right to strike. The strike does little more than inconvenience consumers because so many alternatives exist.

2) The likely impact of disruption to that service in the event of a strike.
The second approach is that the right to strike can be restrained where the exercise of such a right would have an especially critical impact on the services enjoyed by members of the public. For example, a strike in the transport sector or postal service would undoubtedly inconvenience members of the public. This would be the case whether such strike is by public or private sector workers.

3) Essential services.
The right to strike should be prohibited in respect of essential services in order to secure the life, personal safety and health of the community. The essential services here would include the hospital sector, electricity services, water supply services, the police and the armed forces, the fire-fighting services, public or private prison services. Y

4. Concluding Arguments

This article examines the prohibition of the right to strike in the public sector and argues that the total ban on all public sector workers in exercising the right to strike is unjustifiable and should be reformed. It is submitted that the suggested three-way approach would be of great assistance in determining how important and essential a particular service is, and so may justify the prohibition of the right to strike by public servants in such services. Conversely, such a classification would remove restrictions on the right to strike for many public sector employees in accordance with international labour law.

It is submitted that Nigerian law is deficient in the lack of protection of the right to strike in the public sector and that there is a need for reform in order to protect the right to strike. An outright prohibition of strike action in the public sector without a distinction being drawn according to the nature or impact of the services, particularly where the sector is broadly defined, is not a measure proportionate to the demands of the sector in question. Nigerian law is clearly contrary to acceptable labour standards. The ILO has ruled that not all public servants are prohibited from industrial action. It is only those who act in the name of the state who are affected by the prohibition on the right to strike. According to the Committee on Freedom of Association:

"Too broad a definition of the concept of public servants is likely to result in a very wide restriction or even prohibition of the right to strike for these workers. The prohibition of the right to strike in the public service should be limited to public servants exercising authority in the name of the state or to services which would endanger the life, personal safety or health of the whole or part of the population." 46

The Committee on Freedom of Association has identified these civil servants as those employed in various capacities in government ministries and other comparable bodies, as well as officials acting as supporting elements in these activities. All other public sector workers should have the right to strike guaranteed to them."