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The Internationalisation of Nigerian Labour Law: Recent Developments in Freedom of Association

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The Internationalisation of Nigerian Labour Law: Recent Developments in Freedom of Association

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ABSTRACT
This article considers Nigeria’s new labour laws in the light of Nigeria’s obligation under international labour standards, particularly the standards set by the International Labour Organisation (ILO). The Trade Union (Amendment) 2005 Act was introduced with the objective of reducing state interference in the regulation of industrial relations by democratising labour and complying with International Labour Organisation (ILO) requirements. However, this article argues that the Trade Union (Amendment) Act rather exacerbates areas of Nigeria’s non-compliance with ILO standards as significant aspects of the Act still undermine workers’ freedom of association. After briefly noting the concept of freedom of association and reviewing the sources of Nigeria’s obligations to respect workers’ freedom of association, the article focuses on three key areas where changes have been introduced by the Act, namely the right to join organisations, the promotion of free and voluntary collective bargaining and the right to take industrial action. The article concludes that a new reform is needed to internationalise Nigerian labour law in line with ILO requirements in order to protect workers’ freedom of association in Nigeria.

1. INTRODUCTION

"Man is born free; and yet everywhere he is in chains."!
"Without freedom of mind and of association a man has no means of self-protection in our social order."?

Ni"I$n recently witnessed monumental reforms to its labour law and system of industrial relations. Before the reforms, interventionalist policies by government had been the norm, as is the trend in many parts of Africa. The changes introduced in 2005 were intended to promote the democratisation of labour, enhance choice for all Nigerian workers in the spirit of the Constitution, and comply with International Labour Organisation (ILO) requirements concerning democratisation in the organisation of labour and to consolidate the values of accountability and participation. The new law has introduced radical changes to the pattern of regulation of labour and industrial relations and has raised a huge debate about the nature, content and extent of workers' freedom of association in Nigeria. The changes would appear to have given more impetus to live bargaining as a crucial mechanism in the determination of wages and other terms and conditions of the employment of workers. However, there are other areas where the law seems to have rolled back workers' rights.

The aim of this article is to examine the provisions of the Trade Union (Amendment) Act 2005 by reference to Nigeria's international obligations, especially under the ILO Conventions and the principles of freedom of association and to consider the extent to which the new law might be said to be compatible with Nigeria's obligations. How does the new legislation compare with international labour standards? How does the 2005 "reforms" impact on Nigerian workers' freedom of association rights? It is to these questions that this article seeks to reply. The discussion centres on three key changes brought about by the 2005 Act relating to the right to form and join trade unions, collective bargaining and the right to strike. It is found that the legislation remains largely inconsistent with Nigeria's obligations under international law and does perpetuate and exacerbate a number of pre-existing areas of non-compliance.


2. A NOTE ON FREEDOM OF ASSOCIATION

Freedom of association is a universally recognised civil liberty and one of the most fundamental rights of workers and employers. Respect for the principles of freedom of association is vital for the proper functioning of a labour relations system and, more broadly, for any democratic system of governance. In turn, freedom of association has an important role to play in the development and operation of a market economy, which generally functions most efficiently under a democracy. Freedom of association promotes the principle that people may do whatever they wish as long as they do not harm others. Therefore, an individual should be free to join an organisation and to act in association with others as long as no harm is caused by so doing. The right to freedom of association is promoted throughout the world as a fundamental human right. At the opening of the first ILO African Regional Conference in Lagos in 1960, then Nigerian Prime Minister, Sir Abubakar Tafawa Balewa declared that, "freedom of association is one of the foundations on which we build our free nations."

Freedom of association is the key enabling right and the gateway to the exercise of a range of other rights at work. The
freedom to associate entails the right or employers to establish, without previous authorisation, organisations or their own choosing for the defence of their occupational and industrial interests. It includes the right of these organisations to conduct their internal administration in full freedom. It also comprises the promotion of collective bargaining between workers and employers and the right to strike. Trade union independence from both the employers and the state must also be guaranteed." In sum, freedom of association of workers means an understanding of the fact that it is the autonomous trade union presence at the workplace which guarantees the protection of the individual worker. Indeed, firm international consensus has evolved on the status of the right to associate as a fundamental human right.

Nigeria is a member of the ILO and has ratified both the ILO Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) and the Right to Organise and Collective

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16 Section 40 holds great significance for Nigerian workers, as it gives the labour movement a constitutional right to associate. The Constitution further protects the worker's right not only to belong, but also to form a trade union. Thus, the Constitution bars a "closed shop" agreement or any other arrangement that compels a worker to join a particular union or that excludes the worker from union membership. This covers both private employers and the government itself when acting as employer. It means that a worker can decline to join union X and instead form or join union Y. Finally, the Constitution provides for access to court to remedy any breach of the right to associate. Section 46 of the Constitution states as follows:

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The court is therefore given the constitutional power to annul and invalidate any governmental or other action that violates the right to freedom of association in Nigeria. The courts must therefore fearlessly ensure that the Constitution and laws of the land are fully complied with.19

Another source of freedom of association for workers in Nigeria can be found in the African Charter of Human and Peoples’ Rights 1981.20 Article 10 of the Charter provides that, “Every individual shall have a right to free association provided that he abides by the law.” Article 25 of the Charter places a duty on the state to promote rights contained in the Charter, while Article 26 of the Charter enjoins the state to ensure that its legal system recognises and enforces the rights of the Charter. Nigeria has ratified the African Charter and it is part of its national law.” In the case of Abacha v Fawehinmi? the Supreme Court held that since the African Charter has been incorporated into Nigerian law, it enjoys a status higher than a mere international convention; it is part of Nigeria’s corpus juris. Nigeria is therefore bound to respect workers’ freedom of association pursuant to the Charter. It is significant to note also that the African Commission on Human and Peoples’ Rights has provided detailed guidance on trade union rights in its Guidelines for the Submission of State Reports.” Under the Guidelines, States are obliged to provide information on

3. THE RIGHT TO FORM AND JOIN ORGANISATIONS

A major reform introduced by the 2005 labour law reform is the democratisation of trade union membership. Prior to the reform, trade union membership was virtually compulsory. Workers who worked in particular establishments were more or less conscripted to join the available unions in those establishments. The new law provides that, "Notwithstanding anything to the contrary in this Act, membership of a trade union by employee is voluntary and no employee shall be forced to join any trade union or be victimised for refusing to join as a member."21

In a true liberal democracy, workers should have the freedom to decide whether they intend to join a trade union or not. This is because freedom of association also means that a worker can choose not to join or belong to a trade union organisation.”22 It could be argued that the new amendment has only brought the Act to conform with the Constitution which already guarantees the right to voluntary membership of trade unions. However, the new law is salutary if only to remove any possible doubts since the court had held the former law which placed restrictions on trade union membership to be a law that is reasonably justified in a democratic society.”23

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19 Indeed, the judiciary plays a very prominent role in a society governed by the rule of law. The judiciary has the important tasks of interpreting the constitution and defining the scope and limits of the powers of both the executive and the legislature. Courts represent the last hope of the common man against the powers of government, which makes it essential for the judiciary to exhibit a high sense of duty and commitment to the cause of justice. As the American Supreme Court Justice Hugo Black pointed out in Chambers v. Florida 309 U.S. 227, 241 (1940): “Courts stand as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or victims of prejudice or public excitement.”


21 See African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act 1990


In many countries, elsewhere that has to survive. Ethnic and religious differences exist in many countries, yet elsewhere that has not been an excuse for not complying with international standards. For example, in Ghana - which is close to Nigeria in more ways than one - a minimum of two persons are required to form a trade union. The ILO has in fact held that "the establishment of a trade union may be considerably hindered, or even rendered impossible, when legislation fixes ... too high a figure, as is the case, for example where legislation requires ... at least 50 founder members." Besides, if the competent authority has the discretionary power to refuse registration of a trade union on account of the 50-member requirement, this can in practice amount to a system of previous authorisation, contrary to the principles of Convention No. 87. The ILO Committee on Freedom of Association believes that while it is generally to the advantage of workers and employers to avoid the proliferation of competing organisations, a monopoly situation imposed by law is at variance with the principle of free choice of workers' and employers' organisations. As the Committee explains:

"While fully appreciating the desire of any government to promote a strong trade union movement by avoiding the defects resulting from an undue multiplicity of small and competing trade unions, whose independence may be endangered by their weakness, the Committee has drawn attention to the fact that it is more desirable in such cases for a government to seek to encourage trade unions to join together voluntarily to form a strong and united organization than to impose upon them by legislation a monopoly situation."
compulsory unionisation within the free exercise of the right of association, and thus runs counter to the principles which are embedded in the international labour Conventions relating to freedom of association. 37

The high threshold of 50 members for the formation of a trade union is clearly inconsistent with international law. What is more, given the fact that over 80 per cent of enterprises employ less than 50 persons in Nigeria, this provision of the Act is tantamount to industrial disenfranchisement. It is therefore suggested that Nigerian law should be amended to stipulate for a minimum of say two persons for the formation of a trade union. Indeed, the ILO has raised its concern over Nigerian law requirement that 50 workers form a trade union and has reiterated that this number is too high. In a recent report in Which It asked to be kept informed of developments, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) has requested Nigeria to take the necessary measures to reduce the minimum membership requirement, and thus ensure the right of workers to form organisations of their own choosing."

4. THE PROMOTION OF FREE AND VOLUNTARY COLLECTIVE BARGAINING

The second significant issue introduced by the new law deals with trade union recognition for the purposes of collective bargaining. Trade union recognition is germane to the very existence of workers' organisations. Freedom of association would be hollow and of no relevance to workers if employers were entitled to refuse to recognise their organisations for purposes of collective bargaining. Trade unions will be hamstrung to protect their members' interests without due recognition. Thus, union recognition is a sine qua non to collective bargaining.

The ILO Committee on Freedom of Association has ruled that recognition by an employer of the main unions represented in his undertaking, or the most representative of these unions is the very basis for any procedure for collective bargaining on conditions

37 Ibid. para. 319.
enhance freedom of association in the workplace. The principle means that a trade union enjoys a majority of members in a particular bargaining unit, it automatically assumes the right to bargain on behalf of all those workers who fall within that bargaining unit to the exclusion of all other trade unions. However, all benefits accruing from the negotiations with management are enjoyed by all workers in the unit. This is an accepted practice in international law and is endorsed by the ILO Freedom of Association Committee when it noted thus:

"...the mere fact that the law of a country draws a distinction between the most representative trade union organisations and other trade union organisations is not in itself a matter for criticism."

On the other hand, the principle of "sufficiently representative trade union" could also be adopted. The difference between the two is that, a majority trade union can be the only union in a unit, while in the case of sufficiently representative union there can be several of such unions in one unit.

The principle of representativeness ensures that employers do not find themselves in a position where they are expected to include in negotiations every single trade union which has members, nor matter how insignificant the membership. Only those trade unions which could, to a meaningful extent, influence relationships between the employer and the body of employees within an agreed bargaining unit are to be allowed at the negotiation table. This means that an employer can refuse to negotiate with very small unions and will not be accountable for any violation or infringement to the members’ right to collective bargaining; after all, no right is absolute. Smaller trade unions must, however, retain their right to exist and to call for new elections for the determination of new bargaining agents after the expiration of a reasonable period.

It has been argued that granting the right of representation in collective bargaining and agreements only to the "most

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procedure for exclusive representation shall be made by all independent bodies. A further reform of the labour law in Nigeria must therefore provide an objective and pre-established criteria for determining representativity. Such criteria will have to take into account a number of factors such as the size of the union, experience and contributions to workers' welfare. In France, for example, the criteria for determining which organisations shall be classified as "most representative" include a number of these factors. However, in seeking to choose a "most representative" trade union, the issue of large membership, contributions and experience can be seen in the light of how much support a union has among the workforce in question. Large membership is an important but not necessarily a deciding factor for this purpose. As the Permanent Court of International Justice noted:

"The most representative organisations...are, of course, those organisations which best represent...the workers...Numbers are not the only test of the representative character..., but they are an important factor; other things being equal, the most numerous will be the most representative."

Undoubtedly, the new law does not meet the requirements of international practice on trade union representation for effective collective bargaining purposes and needs to be amended to conform to international standards.

5. THE RIGHT TO STRIKE

The third important issue dealt with by the new law is the right to strike. The right to strike has been described as "an indispensable tool in the world for the defence and promotion of the interests of their members, and is a necessary counter-weapon to the power of capital. In the often-quoted words of Kahn-Freund, "there can be no equilibrium in industrial relations without a right to strike." The need for equilibrium is crucial in order to promote collective bargaining which helps to achieve social justice in the work place. The 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. It was in apparent recognition of this fact that Lord Wright in his famous dictum in 1942 observed:

"Where the rights of labour are concerned, the rights of the employers are conditioned by the rights of the men to give or withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining. It is, in other words, an essential element not only of the union's bargaining process itself; it is also a necessary sanction for enforcing agreed rules."
The right to 

strike is thus of crucial importance in the functioning of a democratic society that its removal would be unjustifiable.

Although the right to strike is not explicitly contained in any of the ILO conventions, it arises due to the necessary implication from two ILO Conventions: the Freedom of Association and Protection of the Right to Organise Convention No. 87 (1948) and the Right to Organise and Collective Bargaining Convention No. 98 (1949). The ILO Committee of Experts on the Applications of Conventions and Recommendations (CEACR) has interpreted these two conventions broadly, stating that the right to strike is an intrinsic corollary of the rights contained in the two ILO conventions. The ILO Committee on Freedom of Association (CFA) has described the obligation to protect the right to strike as an essential requirement of the Freedom of Association Convention. Both the CEACR and the ILO (ILO Supervisory Committees) have consistently reaffirmed the right to strike.

The right to strike is not expressly provided for in the Nigerian Constitution or in labour legislation in Nigeria. It is recognized and protected in labour legislation on the basis of assumed conflicting interests between employers and employees, who are the two parties to labour relations. The absence of constitutional recognition could mean that the Constitution has failed to protect the right to strike. However, the Constitution guarantees the right to freedom of association and, given that international treaties to which Nigeria is a signatory recognize the right to strike as a species of the right to freedom of association, this would appear to give constitutional status to the right to strike. As noted above, the ILO jurisprudence shows that the right to strike is a key part of the freedom of association.

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57. The CEACR was established by a resolution of the International Labour Conference in 1926 to monitor and report on ILO members’ compliance with the provisions of ILO Conventions to which they are a party.


60. Ibid, p. 544.

any doubt one of the most 01 these means; but there are others. Such a right, which is expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain instances."

It is submitted that, unless freedom of association is interpreted as purposive in nature, it will be rendered useless. To accept these decisions would be to deny the purposive role of freedom of association. The protection of members’ interests would be difficult for an association which has no sanctions to employ."

Thus, while it is vital to protect the ability of workers to form, join and maintain unions, unless workers are also protected in their pursuance of the objects for which they have associated, such as the right to collective bargaining and the right to strike, the freedom is meaningless. As Skelly J has said:

"Obviously, the right to strike is essential to the viability of a labour union... [If] the inherent purpose of a labour organisation is to bring the workers' interests to bear on management, the right to strike is, historically and practically, an important means of effectuating that purpose. A union that never strikes, or which can make no credible threat to strike, may wither away in effectiveness... and cannot survive the pressures in the present-day industrial world."

Ibid, paras. 34-45. For more discussion, see J. Hendy, 'The Human Rights Act, Article II and the Right to Strike,' 5 European Human Rights Law Review (1998), pp. 582-601. This trend has been followed in other jurisdictions as well, notably in Canada where the Canadian Supreme Court has held that freedom of association as provided for in the Canadian Charter of Rights and Freedoms does not incorporate the right to strike or the right to bargain collectively. See Reference re Public Service Employee Relations Act (1987) 1 SCR 313; 38 DLR (4th) 161. See also Saskatchewan Retail and Department Store Union (1987) 1 SCR 460; 38 DLR (4th) 277; Public Service Alliance v Canada (1987) 1 SCR 424; 38 DLR (4th) 249; Professional Institute of the Public Service of Canada v Northwest Territories (1990) 2 SCR 367; 72 DLR (4th) 301.

5.1 Preconditions for the Exercise of the Right to Strike

Section 6(d) of the 2005 Act provides that before workers can go on strike in Nigeria, they are required to have fully exhausted the elaborate statutory procedure for settlement of trade disputes under the Trade Disputes Act 1990. The Trade Disputes Act introduced both voluntary and compulsory settlement procedures which include the process of voluntary grievance settlement, mediation, conciliation, arbitration and ultimate determination of the issues in controversy by the National Industrial Court. By these procedures, if the attempt to settle the dispute by the internal grievance machinery fails, the parties are expected to resort to mediation by coming together under


It must be noted, however, that the stipulation that the decision of the National Industrial Court in compulsory arbitration is final appears to be unconstitutional in view of the National Industrial Court Act 2006. The Act confers exclusive jurisdiction on the National Industrial Court in labour matters. The decisions of the court whether in its original or appellate jurisdictions shall be final as no appeal shall lie from the decision of the court to the Court of Appeal or any other court except on questions of fundamental rights as contained in chapter IV of the 1999 Constitution.

A literal interpretation of Section 7 of the Act which confers exclusive jurisdiction on the National Industrial Court appears to be inconsistent with sections 251 and 272 of the 1999 Constitution. Under section 272 the state High Courts have unlimited jurisdiction to try civil causes and matters, subject only to section 252. The exclusive jurisdiction accorded to the National Industrial Court appears to be unconstitutional as it conflicts with the jurisdiction granted by the Constitution to the state High Courts. Section 1 of the Constitution affirms that the Constitution is supreme and binding on all authorities and persons in Nigeria. Section 1(3) of the Constitution states that "if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and the other law shall to the extent of inconsistency be void." In the case of Adisa v Oyinwola the Supreme Court of Nigeria held

70. Section 3(2) Trade Disputes Act, 1990.
71. Ibid, Sections 5, 7, 8, and 13.
73. Ibid, section 9 (1) and (2).
74. Section 251 gives exclusive jurisdiction to the Federal High Court in respect of certain matters,
75. Section 272(1) confers on state High Courts unlimited jurisdiction to hear and determine "...any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, or claim is in issue.
77. Ibid, section 6(5) (c) (i).
80. Section 241 provides that "An appeal shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal as of right...
how trade unions could sidestep the ingenious and well-calculated obstacles placed in their way before embarking on strikes. Consequently, it may be right to conclude that strikes are prohibited by the new law. Ben-Israel has expressed a similar view thus: "A general prohibition of strikes can be attained indirectly, as a result of the settlement of labour disputes by means of compulsory conciliation and arbitration procedures, the final award of which is binding upon the parties concerned. By such procedures it is possible in practice to put a stop to any strike?"

This shrewd system of offering something in theory and restricting it in reality is not limited to Nigeria. The experiences of other countries suggest that what was happening in Nigeria was part of a wider phenomenon in industrial relations. M'Baye and Ndiiaye note the same with respect to other African countries:

"The right to strike is generally recognised, but is regulated in such a way that it scarcely exists, given that in most countries the exercise of that right is subject to government authorities not adopting a solution of conciliation in regard to collective disputes."

As Nwabueze noted of Commonwealth Africa:

"Many governments had passed legislation to regulate strikes, either prohibiting them or subjecting them to rather stringent conditions."

Indeed, the ILO condemns any sort of provision which, rather than simply creating reasonable conditions which are to be fulfilled before a strike can be called, makes it virtually impossible to hold a legal strike. The ILO has also stressed that the imposition of compulsory arbitration is only acceptable in cases of strike in essential services in the strict sense of the term, or in cases of acute national emergency, and that a system of compulsory arbitration can result in considerable restriction of the right of workers' organisations to organise their activities and may even involve an absolute prohibition of strikes, with the result that the right to strike is a legal and not a sociological concept, and where strikes are forbidden as in our present situation, there is no such right however frequently they may occur." But criminal

sanctions [illegible] cannot solve the [illegible] of foreclosing strikes b
workers when they are determined to do so at all costs. A similar
view was taken by Sir Hartley Shawcross in connection with the
wartime industrial legislation in Great Britain. In 1946 he explained
to the House of Commons:

"You might as well try to bring down a rocket bomb
with a pea shooter, as try to stop a strike by the process
of the criminal law. The way to stop strikes is not by
policemen but by a conciliation officer, not by assize
courts, but by the arbitration tribunals."

The imposition of criminal sanctions for strike activity is a serious
violation of international law. There is no doubt that the new law
has added further nails to its coffin of the smothered right to strike.
It is indeed a sad reflection that at a time when most countries of
the world are taking steps to ensure and protect the right to strike,"
Nigeria is instead taking a retrograde step to abridge the right of its
workers to such a legitimate claim.

5.2 The Right to Strike and Essential Services

Essential services are services that are crucial to prevent immediate
and serious danger to the health, safety or welfare of members of
the public. The concept of "essential service" expresses the idea that
certain activities are of fundamental importance to the community
that their disruption will have particularly harmful consequences."

91. Hansard, Feb. 12, 1946, cob. 199-200. See also Bretten, R., "The Right to Strike in
New Zealand.", 17 International and Comparative Law Quarterly (1968), pp. 750-762.
92. G. Morris, Strikes in Essential Services, London, Mansell Publishing Limited,
(1956), p. 192; and E. Cordova, "Strikes in the Public Service: Some Determinants
concluded that "legal prohibitions and restrictions have been powerless to prevent
strikes and that penal sanctions which remain on statute books are of theoretical
educational or of residual value.

Fifth (Revised) edition, Geneva, International Labour Office (2006), paras 661-
666.
94. This can be evidenced by the fact that many national constitutions in Europe and Af-
nerica now expressly provide for the right to strike. See "International Observatory
of Labour Law http://www.ilo.org/public/english/dialogue/ifdial/iloobservatory/pro-
files/ger.htm (last accessed 14 January 2007).

96. G.S. Morris, 'The Regulation of Industrial Action in Essential Services,' 12 Indus-
trial Labour Journal (1983), pp. 69-85. 69. See also Monix, G.S., Strikes in Essential
Right to Strike and the Law in Britain, with special reference to Workers in Essential

100. Monix, G.S. and B. Ohno, "ILO Principles Concerning the Right to Strike," 157 (4) International
under the Banking Act."

As is apparent, the list of essential services comprises a whole range 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 council (an essential service) hires the services of a private cleaning company to sweep the streets and workers in this company strike, they will be enjoined by the law. The law therefore provides rather elastic conditions for any service in Nigeria to be regarded as essential, depending on the particular circumstance.

The definition of essential services must be criticised as it makes nonsense of the basic concept of essential services. Essential service is (at its base-line definition) a service whose disruption would endanger human life, public health or safety of the whole or part of the population."? The list of essential services is arguably over-inclusive and strongly questionable. Most of the services or industries included do not seem to merit the special distinction of being treated as an essential service. For example, while the prohibition on the armed forces, electricity, health, water and telecommunications sectors may seem justified, it is difficult to agree that other services such as ports, petroleum and private corporate bodies undertaking banking business constitute essential services.

It is submitted that a more useful and practical categorisation would be the one that looks at the particular type of service being performed or provided in order to determine its essentiality. A re-classification of the list of essential services in Nigeria is therefore suggested to distil the true essential services from the non-essential ones as follows:

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These services include the treatment of the sick, the prevention of disease, or any of the following public health matters, namely sanitation, the disposal of night-soil and rubbish, outbreaks of fire, the police and the armed forces. It is submitted that the occurrence of a strike in these sectors would endanger public health and safety of the community and it may be reasonable to prohibit strikes in these services.

5.2.2 Non-essential services

These services include radio and television, postal services, services involving "fuel of any kind," ports, harbours, transport of persons, goods or livestock by road, rail, sea, river or air, aircraft, repairs, banking, teaching, education and communication. Also to be included here are the civil services of the federal, state and local authorities and statutory corporations not involved in (i) above. It is submitted that strikes by workers in these services, though inconvenient, would not necessarily harm society in terms of posing an immediate threat to public health and safety, and can therefore be tolerated.

The ILO has warned that the principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services in too broad a manner. Otobo has criticised the Nigerian list of essential services as fake and politicised. According to Otobo:

"Nigeria has the widest definition of essential services in the world because of its politicisation by successive military regimes, which, since the mid-1970s, expected the classification itself to be a sufficient anti-strike medicine instead of a more sensible compensation and employment policies. The Abacha regime, for example, extended the label to include all educational institutions in its bid to muzzle ASUU and other protesting teachers. It is not merely a question of these public servants having their own trade unions or associations
Indeed, considering the conclusions of the Committee on Freedom of Association, it can be argued that the definition of essential services in such an exceptionally wide manner constitutes an abuse of the right to strike, as it falls short of ILO guidelines. The Committee has urged that the legislation should be amended in line with the provisions of Conventions No. 87 and 98 to comply with the appropriate scope of essential services. In a recent report in which the Committee asked to be kept informed of developments, it requested the government to amend the definition of essential services "so as to limit them to situations where there is a clear and imminent threat to the life, personal safety or health of the whole or part of the population." This view is reiterated by the Committee on the Application of Conventions and Recommendations (CEAR) which, "once again requests the government to take the necessary measures to amend the Trade Disputes Act's definition of essential services."  

In order to properly regulate the right to strike in essential services in Nigeria, it is suggested that Nigeria could emulate the

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100 D. Otobo, "The Generals, NLC and Trade Union Bill" http://wwwnigerdelacongress.com\ganicles_nc/trade_union_bill.htm last accessed 23 April 2008. As has been noted, "apart from several provisions which practically tend to undermine the right of trade unions to embark on industrial actions, provisions which arbitrarily determine issues which workers can go on strike for and which issues they could never go on strike for, the Trade Union Act completely outlaws the right of workers in education sectors, health sector and all other sectors categorised as essential services, This, to say the least, constitutes a violent violation of the constitutional and democratic rights of Nigerian workers as well as international status." See Campaign for Democratic and Workers' Rights in Nigeria, "Abrogate the 2005 Trade Union Act Now!" http://www.nigeriasolidarity.org/ar1026.htm last accessed 2 April 2008.


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5.3 Picketing

Picketing has long been recognised as very crucial in the conduct of industrial action. Where a claim by a trade union is rejected by an employer, the unions' call for strike can only be meaningful if it stops the employer from continuing his business. The strike will not be effective if the employer is able to recruit non-union labour ("black legs") or makes do with those who may not want to join the strike ("scab") to continue in business. This makes the factory gate to become the focal point of the strike. Picketing is thus clearly the physical means employed by employees either to intensify the economic pressure mounted on the employer or to ensure that the

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103 Section 70(1) Labour Relations Act, 1995.


105 ibid.

106 For more detailed discussion of these procedures, see D. Pillay, "Essential Services under the New LRA," 22 Industrial Law Journal (2001), pp. 1-36.
concert a stoppage or work is unlawful. Th II (c) has stated its positions as follows:

"The action of pickets organised in accordance with the law should not be subject to interference by the public authorities...taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful." 109

However, serious restrictions have been entrenched into the law as a means of further limiting the scope for strike action. Section 9 of the new Act amending section 42(1) of the Principal Act (The Trade Union Act 1990) requires that a trade union must not in the course of a strike action compel any person who is not a member of its union to join any strike or in any manner whatsoever, prevent aircrafts from flying or obstruct public highways, institutions or premises of any kind for the purposes of giving effect to the strike. 109

Two restrictions seem to be provided by the law; firstly, the issue of compelling non-union members to participate in a strike action and, secondly, the prohibition to obstruct public highways, institutions or premises of any kind for the purpose of giving effect to the strike. On the first limb of the restrictions, it must be noted that there is nothing wrong in compelling non-union members to participate in a strike action as a form of sympathy or solidarity for the strike so long as the strike itself is legitimate. Thus, peaceful incitement of workers to participate in strike action should not be forbidden. However, section 9 seems to effectively deny workers the right to persuade fellow employees to join an industrial action. This provision is clearly targeted at workers' and trade unions' ability to attract sufficient solidarity and sympathy for strike actions and therefore tends to restrict the scope for strike action. As noted above, the ILO has accepted that taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful. 110

With regards to the second limb of the restrictions, this provision appears too broad and could be outlaw strike picketing or "". 111 ILO, "LIII and Will. IS. For example, any group of workers be accused of violating the law by obstructing premises highways gathering on the streets or on the work premises. However, the gathering may be. Moreover, aircraft-related services should not be the subject of an overall ban because they are not considered essential services. Overall, the provision seems to reflect a policy towards repressing the right to strike and must be considered as exceptional. This provision must therefore be further amended to comply with international labour standards and ensure that undue restrictions are not placed on the right to strike actions under the guise of maintaining public order.

Indeed, the ILO has ruled that the wide wording of this provision could "potentially outlaw any gathering or strike picket." The Committee on Freedom of Association has therefore advised that the Act be amended to comply with the principles of freedom of association. In a recent report in which the Committee requested to be kept informed of developments, it requested the Government to amend the legislation to bring it in conformity with the established principles of freedom of association so as to ensure that any restrictions placed on strike actions including picketing aimed at guaranteeing the maintenance of public order are not such as to render any such action relatively impossible." This view is reiterated by the Committee of Experts on the Applications of Conventions and Recommendations (CEACR). 112

6. CONCLUSION

This paper has examined the extent to which the Trade Union (Amendment) Act 2005 complies with international labour standards, especially the standards set by the ILO. One cannot claim that Nigerian workers enjoy a high degree of freedom of association. As has been seen, there is a widening gap between international labour standards and Nigerian labour law. In terms of Nigeria's international obligations, the 2005 Act has maintained, and indeed compounded,
existing areas of non-compliance.

The new law has made all individuals who work now have the right to belong to a union of their choice. There is no longer compulsory trade union membership of any sort. However, reform is not complete because the minimum number for the formation of a trade union is still pegged at 50 members. This makes it difficult to realise the dream of belonging or forming a union of one's choice because more than 80% of establishments in Nigeria have less than 50 workers. Consequently, more reform is needed in this area if workers are to enjoy freedom of association in the real sense.

With regards to collective bargaining, the new law has merely provided a basis for trade unions to elect their representatives for purposes of collective bargaining with employers in the workplace without any laid down criteria for doing same. Because of obvious reasons of conflict and confusion that may result where numerous unions struggle for recognition and bargaining rights with the employer, there must be a criteria by which a more mature and representative trade union is selected to protect the interests of all workers in the bargaining unit. It has been argued that the law must be reformed to adopt either the "majoritarian principle" or the "principle of sufficiently representative trade union" to strengthen the process of collective bargaining and enhance freedom of association.

The other area where the new law fails completely to make any positive impact is the right to strike. The new law seriously undermines the right to strike. In the first place, by adopting an overly broad list of essential services, workers in essential services, which in the case of Nigeria constitute more than half of the entire working population, are denied the right to strike. Secondly, the preconditions for a lawful strike including picketing are such that it will practically be impossible for strike to take place. The conclusion must that the Nigerian worker has been denied the right to strike. This tilts the bargaining power more and more in favour of the employers. In a free market economy every one is only able to achieve economic progress by a clever manipulation of the forces of the market. To deprive the worker of his right to organise industrial action is not only to deprive him of a requisite weapon in his bargaining armoury, but an attempt to leave him economically rudderless and unprotected in the fierce economic encounters with the employer. There is therefore a need to amend the law to guarantee the right to strike in line with existing international standards.

To be fair, Nigeria cannot be described as a dictatorship and she is not known for a policy of racial discrimination. To take away the right to strike therefore is to make workers and their trade unions lame ducks or guinea pigs in a shooting range.

One measure of the health of any society is the extent to which its legal system and administration are in tune with contemporary realities and contemporary public opinion. It is submitted that the 2005 Act does not meet its expressed aims of, inter alia, complying with ILO requirements concerning democrazation in the organisation of labour. There is therefore a need for more reform in this labour law and industrial relations system to make a reality out of the constitutionally guaranteed freedom of association. Freedom of association as a human right is indivisible. This means that it cannot be guaranteed to one section of the society, while workers are lagging behind. Indeed, the adverse criticisms and damning conclusions of the ILO supervisory bodies - the Committee on Freedom of Association (CFA) and the Committee of Experts on the Applications of Conventions and Recommendations (CEACR) raises significant concerns - which undoubtedly strengthen the case for changing Nigerian labour law.

Labour standards have become the subject of international rules through bodies such as the ILO. Such standards are an increasing part of the global economy of which Nigeria is a part. One must hope that Nigeria will unleash its workers and translate these standards into Nigerian labour law and industrial relations system in order to fully secure the future of an internationalised labour law. In fact, given Nigeria's leadership of the African Union and its Important

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role and status as a member of the Governing Body of the ILO, it must be expected to show a very positive example in all spheres of respect for global labour standards, especially the light to freedom of association.