THE CONCEPT OF THE STRIKE AND OTHER FORMS OF INDUSTRIAL ACTION:: A CRITICAL AND JURISPRUDENTIAL EXPOSITION

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THE CONCEPT OF THE STRIKE AND OTHER FORMS OF INDUSTRIAL ACTION: A CRITICAL AND JURISPRUDENTIAL EXPOSITION

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INTRODUCTION

The right to strike occupies a central place in the collective bargaining paradigm. All over the world the right to strike is acknowledged as a veritable tool of collective bargaining to secure the welfare and interests of workers. There is no doubt that all workers are alike in the sense that they desire recognition, satisfaction, fair wages and salaries, job security, redress of wrongs and good working conditions. The process used to attain these goals is through collective bargaining. However, the employer and the union (representing the workers) often find themselves in sharp disagreement; not only on these issues, but also on the interpretation of collective agreement or on how it should be applied. Such friction or disagreement gives rise to trade disputes and strikes.

The right to strike has experienced a chequered history. It is a right that was won with blood and unspeakable toil. Indeed, the right to strike is often the only instrument left in the hands of employees to compel a recalcitrant employer to recognise and bargain with his or her union or representatives, to comply with the terms of a collective agreement or to generally make improvements regarding the terms and conditions of the employment of workers. Over 30 years ago Kahn-Freund noted that: "people do not go on strike without

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a grievance, real or imaginary... Sometimes they have ample justification ... [S]ometimes they do so wantonly. The important thing to do is to find out why strikes occur."

The right to strike is therefore generally recognised as a legitimate means of defending workers' occupational interests, and is a necessary counter-vailing force to the power of capital. Without the right to strike, organised labour would be powerless to deal with management at arm's length. Kahn-Freund describing the main purpose of labour law as redressing any disequilibrium of power, noted that "there can be no equilibrium in industrial relations without a right to strike." Such equilibrium is deemed desirable to promote collective bargaining and achieve social justice in the work place. Indeed, 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. Take away the right to strike and workers and their trade unions will be lame ducks or sitting ducks in a shooting range.

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

"Where the rights of labour are concerned, the rights of the employers are conditioned by the rights of the men to give or withhold their services. The right of workmen to strike is an essential element in the principle of collective

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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.\textsuperscript{12}

Strike is a normal, inevitable and necessary consequence of the organisation of the labour market on capitalist lines.\textsuperscript{13} In a free market economy everyone is only able to achieve economic progress by a clever manipulation of the forces of the market. To deprive the worker of the right to strike is not only to deprive him of a requisite weapon in his bargaining armoury, but is an attempt to leave him economically rudderless and unprotected in fierce economic encounters with the employer.\textsuperscript{14}

Labour lawyers have justified the existence and protection of the right to strike as a fundamental and crucial weapon in the armoury of organised labour in redressing the imbalance of power between the worker and the employer. Anderman, for example, notes that:

"The right to strike is understood as a safeguard against the imbalance of power between individual employee and employer and it provides a necessary underpinning to collective bargaining. It has long been recognised that without a credible threat of damaging industrial action there is little assurance that management will be willing to engage in meaningful negotiation with trade union representatives over disputed issues of management decision-making."\textsuperscript{15}

Providing further rationale for the pivotal role of the right to strike in collective bargaining, Lord Wedderburn said:

"To protect such a right is not to approve or disapprove of its exercise in any particular withdrawal of labour; it is to recognise the fact that the limits set to the right to strike and to lock out are one measure of the strength which each

\textsuperscript{12} Crofter and Woven Harris Tweed Co. v. Veitch (1942) I A L E.R., pp. 158-159. This statement was re-emphasised by the Constitutional Court of South Africa recently: "[T]he right to strike is of both historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system." See: NUMSA v. Bader Pop (Pty) Ltd 2003 (3) SA p. 513. See generally: T. Novitz, International and European Protection of the Rights to Strike (Oxford: Oxford University Press, 2003), pp. 4-5.


\textsuperscript{14} Ibid.

\textsuperscript{15} S.D. Anderman, Labour Law: Management Decisions and Workers' Rights (London: Butterworths 2000), pp. 358-359. Anderman further notes that "by establishing a right to strike, legislators have accepted the principle that to a certain extent industrial action can be justified, despite its costs in terms of loss of production to the striking firm, its employees, customers and suppliers and possibly the public." See: Ibid.
The right to strike is crucial in all modern industrial relations systems. Indeed, the right to strike has been described as "an indispensable component of a democratic society and a fundamental human right." The right to strike is thus so important to the functioning of a democratic society that its denial without reasonable cause would be unjustified.

2. DEFINITION AND THE CONCEPT OF THE OF STRIKE

There is no universal definitive concept of "strike." However, in legal doctrine the classical notion of "strike" is usually understood to be a deliberate stoppage of work by workers in order to put pressure on their employer to accede to their demands. A number of legal systems define strike in legislation and the definition of a strike has also been


21. In the UK, for example, section 235(5) of the Employment Rights Act 1996, defines a strike as: "the cessation of work by a body of employed persons acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of employed persons to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any employed person or body of employed persons, or to aid other employees in compelling their employer or any employed person or body of employed persons, to accept or not to accept terms or conditions of or affecting employment." A shorter definition is contained in section 245 of the Trade Union and Labour Relation (Consolidation) Act 1992 which states that a strike is "any concerted stoppage of work."
developed and elaborated by legal doctrine. In *Tram Shipping Corporation v. Greenwich Marine Incorp.*, Lord Denning MR stated that a strike is:

"A concerted stoppage of work by men, done with a view to improving their wages or conditions of employment, or giving vent to a grievance or making a protest about something or sympathising with other workmen in such endeavour. It is distinct from stoppage brought by an external event such as a bomb scare or by apprehension of danger."

In Nigeria, the presence of a generic strike definition makes for certainty as to what type of conduct or action can constitute a strike. The Trade Disputes Act 1990 stipulates that:

"Strike means the cessation of work by a body of persons employed acting in combination, or a concerted refusal or a refusal under a common understanding of any number of persons employed to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any persons or body of persons employed, or to aid other workers in compelling their employer or any persons or body of persons employed, to accept or not to accept terms of employment and physical conditions of work."

The Act further states that "cessation of work" includes deliberately working at less than usual speed or with less than usual efficiency and "refusal to continue to work" includes a refusal to work at usual speed or with usual efficiency.

Four elements which clearly bring out the meaning and essence of a strike are apparent in the foregoing definition. The first element informs us that there must be a cessation of work. The second makes clear that the cessation of work must be as a result of a concerted effort brought about by a combination of persons. The third is that the strike must be against an employer. The fourth element in the definition emphasises that the goal for which the tool of strike is employed must be in connection with a dispute involving the terms of employment and physical conditions of work. These four elements are considered in turn in the following sections.

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24 Ibid., p. 276.

25 *Trade Disputes Act* 1990, section 47.

26 Ibid. This definition of strike was given judicial approval in *Federal Government of Nigeria v. Adams Oshiomhole* [2004] 3 NWLR (Pt. 860), 305.
Cessation of Work

Cessation of work signifies that there is a total stoppage of work; otherwise it is not a strike. It further means that strikers are not only to stay away from work, but are also not to be at the place of work. The importance of total absence from the place of work is that it distinguishes a strike from other forms of industrial action. In these other aspects of industrial action there may be a concerted effort to demand the improvement of the terms and conditions of work but without a concurrent cessation of work. They include, for example, go-slow, which is a situation where workers work slowly to reduce output; and work-to-rule, which involves a situation in which workers pay unnecessarily deliberate and exaggerated attention to rules and regulations so as to slow down productivity.

These other aspects of industrial action may be responsible for the broad definition of a strike in the Trade Disputes Act 1990. The definition encompasses any refusal to work in concert. As noted above, the Act explains that "cessation of work" includes "deliberately working at less than usual speed or with less than usual efficiency." It seems that this explanation is intended to include go-slow and work-to-rule in the definition of a strike. In this respect, the definition of a strike in Nigeria is at variance with the position at common law. Whereas under the common law, a "work-to-rule" or "go-slow" is not a strike, it is regarded as a strike under the Nigerian statute. Odumosu has expressed a similar view:

"This definition of strike appears to be comprehensive, and it must have been intended to cover all cases including those which fall short of a full blown strike."

However, this wide definition of a strike is not necessarily intended to protect the right to strike, even if this may be the prima facie effect. On the contrary, it is a strategy aimed at prohibiting various forms of industrial action by subjecting them to the inhibiting regulatory framework of the law.

Concerted Refusal to Work

A strike action must be by a body of workers or employees acting collectively. Thus a concerted refusal to work presupposes a combined action or effort of two or more workers at bringing about a cessation of work. It is not left for individuals to act alone or a group of

28 Section 47(1) Trade Disputes Act 1990.
29 See: Secretary of State for Employment v. ASLEF (No.2) [1972] 2 Q B 455.
individuals acting independently of each other, or at cross purposes. As a matter of fact, a stoppage of work by just one person does not constitute a strike.32 The employees must act as a group with a common purpose to withdraw their labour before their action can be regarded as a strike. Thus, a number of employees annoyed by some act of the employer and all giving notice may do as much damage to the employer as a strike; but, unless they act in agreement, it is not a strike.33

Strike Against an Employer

The definition of “strike” makes it clear that a strike has to be aimed at compelling an employer to comply with some demand by the employees. This is self-evident since only employees or former employees can engage in a strike. In addition, the Trade Disputes Act 1990 expressly recognises sympathy strikes, which are defined as those “to aid other workers in compelling their employer or any persons or body of persons employed, to accept or not to accept terms of employment and physical conditions of work.”34 The recognition of sympathy strikes is in line with international labour standards which accept that workers should be able to take such action, provided the initial strike they are supporting is itself lawful.35 Moreover, the capacity for sympathy strikes seems desirable because of the move towards the concentration of enterprises, the globalization of the economy and the delocalization of work centres.36 Furthermore, the drift to contracting out of operations to other corporations and changes in employers due to privatisation further justify sympathy strikes.37

Purpose of Cessation of Work

The strike must be for a recognised purpose. The concept of strike in Nigeria revolves around the notion of trade disputes.38 The aim of any strike must revolve around the terms

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33 As Deakin and Morris have noted, “industrial action is a collective activity which cannot be taken by one employee alone, a view which corresponds both with the emphasis upon combination and concert in the statutory definitions of strike and with industrial reality.” See S. Deakin, and G.S. Morris, Labour Law (Oxford and Portland, Oregon: Hart Publishing, 2005), p. 1067.
35 Section 47 Trade Disputes Act 1990.
of employment and the physical conditions of work. Unsatisfactory terms and work conditions normally generate discord in industrial relations. 39 There is no doubt that employment terms range from remuneration, such as basic pay and allowances, to social security benefits, such as gratuities and pensions. Physical conditions of work include the provision of a safe workplace, good and adequate working materials and the employment of competent staff. 40 Workers must therefore intend their strike action to remedy or resolve a grievance or dispute concerning the terms of employment and physical conditions of work. 41

OTHER FORMS OF INDUSTRIAL ACTION

The wide definition of a strike does not include other aspects of industrial action, such as overtime ban, work-in, picketing and lock-out. However, it may be pertinent to discuss these briefly. Industrial action has “many manifestations.” 42

Overtime Ban

An overtime ban involves the refusal of workers to work overtime. The ban remains in force even if overtime work is compulsory. A strike is different from an overtime ban because a strike envisages cessation of work during contractual hours whereas overtime is work done after contractual hours, and the ban inducing a cessation of work does not make it a strike. 43

However, where overtime is compulsory and as such is agreed to be part of the contract of service, then overtime becomes part of the contractual hours. 44 The implication here is that individual workers who are affected by this agreement are entitled to work overtime as of right and the employer is entitled to demand that they work overtime in line with the contract of service. It is a breach of contract if either party fails to comply with the overtime agreement. In this circumstance, an overtime ban can be treated as a strike, as it has become withdrawal of labour or cessation of work during contractual hours. For example, in one engineering department of a manufacturing company in Lagos, Nigeria, a ban on weekend work had a disastrous effect on the production of the company because its machines were normally serviced on Sundays. 45

39 Section 47 Trade Disputes Act 1990.
Work-in

Another form of industrial action is a “work-in.” This is a situation where workers take steps to interfere with the employer’s business by seizing control of either the whole or part of the premises in order to put pressure on the employer to concede to their request(s). For example, in a manufacturing company in Abuja, Nigeria, the workers took control of the premises and held the top management staff hostage for several hours before they were persuaded to release them. The difference between a strike and a work-in is that in the former the strikers stay at home, whereas in the latter the workers occupy the place of work.

Picketing

The right to picket is generally regarded as intrinsic to the process of industrial action. Picketing is employed by workers on strike to persuade non-strikers to join the strike. It involves a situation where a group of workers go to the factory gate or any other place of work during a strike to persuade others not to go to work. The rationale for picketing is that a strike, alone, may not always be sufficient to secure its objectives. Some workers (“scabs”) may not join the strike. Replacement workers (“blacklegs”) may be readily available. Therefore, in order to ensure the effectiveness of the strike, it may be necessary to get the “scabs” to join the strike or dissuade them from continuing to work and to prevent the “blacklegs” from being used as replacements. Furthermore, it may be necessary to dissuade customers and suppliers from dealing with the employer in dispute and to secure public sympathy for the strike. Picketing is thus the physical means employed either to intensify the economic pressure mounted on the employer or to ensure that the concerted stoppage of work is not undermined.

Opponents of picketing argue, however, that picketing coerces other individuals and causes public disorder. They contend that picketing by its very nature is designed to intimidate and deter other men from seeking employment in places vacated by strikers which involves the illegitimate means of physical intimidation and fear. As the opponents further contend:

50 Ibid.
"Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual peacefully endeavouring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason."

Conversely, the proponents contend that picketing is not necessarily intimidating and illegitimate. They contend that picketing can be a peaceful means of obtaining or communicating information concerning an ongoing strike action. The proponents further contend that picketing helps the strike to be effective by gathering the support of other workers and ensuring the interruption of supplies and deliveries to the employer which ultimately compels the employer to redress the workers' grievances.

However, although picketing is sometimes accompanied by boisterousness, vulgarity, violence, and other types of behaviour which are not acceptable in a civilised society, peaceful picketing is usually permitted as a key part of an effective right to strike. The underlying justification for picketing is that the law should allow peaceful persuasion and information on the part of those with a legitimate interest in a trade dispute which concerns them, but should not allow outside interference, and meddling in other people's disputes, violence and hooliganism. In Nigeria, picketing is lawful where workers picket

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52 Ibid.
55 Ibid.
56 Ibid.
57 As Bercuson noted a range of activities may be involved in picketing: "The pickets may limit themselves to merely observing scabs; they may attempt to communicate information to them as to the existence of a strike; they may go beyond this an attempt to persuade them not to aid the employer by working for him (or in the case of customers, doing business with him) - using placards, speaking, shouting. They may go beyond persuasion to where their behaviours amounts to a threat - through their mere presence, by physical violence, social ostracism or economic boycott; or they may engage in actual assaults, destruction of property or the physical blocking of entrances and interference with traffic. Picketing activity may range from one extreme to the other on this spectrum." See B. Bercussion, "One Hundred Years of Conspiracy and Protection of Property: Time for a Change" (1977) 40 Modern Law Review, pp. 271-272. See generally: H. Carty, "The Legality of Peaceful Picketing on the Highway" (1984) Public Law, p. 500; P. Wallington, "Policing the Miners Strike" (1985) 14 Industrial Law Journal, p. 145; F. Bennion, "Mass Picketing and the 1875 Act" (1985) Criminal Law Review, p. 64; P. Khan, N. Lewis, R. Livock and P. Whiles, Picketing: Industrial Disputes, Tactics and the Law (London: Routledge and Kegan Paul Limited, 1983), pp. 53-75.
for the purpose of obtaining or communicating information or persuading any person to work or abstain from working. The central point therefore is that picketing is about “peacefully persuading and communicating information relating to strike.”

However, as shall be seen later in this work, restrictions have been placed on the right to picket in Nigeria by the Trade Unions Act 1990 and the Trade Union (Amendment) Act 2005. This thesis argues that these restrictions constitute a substantial limitation on the right to strike.

Lock-Out

A lock-out is the converse of a strike. It is the right of the employer to lock his employees out of his business premises in order to compel them to accept his terms and conditions of employment. A lock-out is a self-help effort and perhaps the only effective form of industrial action which the employer may resort to at the crucial moment. It appears that most lock-outs are preceded by a strike or other form of industrial action. Often, when workers embark on an industrial action which the employer or third party intervention has failed to resolve, the employer might find it expedient to lock-out the workers, either to reduce overhead costs or to safeguard life and property. For example, in a manufacturing company on the outskirts of Lagos in 1986, the management locked-out the workers, switched off the lights in the company premises and shut down production for several days before the workers were persuaded to return to work. This action was ostensibly taken to protect the company’s property from destruction by the irate workers. It is for this reason that it is difficult to separate the two phenomena in labour relations. Indeed, the features of a lock-out give it the semblance of a strike. It can be argued that a lock-out and a strike are symmetrical opposites in law.

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50 Section 42(1) of the Trade Unions Act 1990 provides that peaceful picketing shall not constitute an offence under any law in force in Nigeria or any part thereof, particularly under Section 366 of the Criminal Code 1990, dealing with compelling action by intimidation.


52 See section 42 of the Trade Unions Act 1990 and section 9 of the Trade Union (Amendment) Act 2005 which amends section 42 (1) (A) and (B) of the Trade Unions Act 1990.

53 A lock-out is defined as “the closing of a place of employment, or the suspension of work, or the refusal of an employer to continue to employ persons in consequence of a dispute, so as to compel such employees, or to aid another employer in compelling her own employees to accept terms of employment and physical conditions of work.” See Section 47, Trade Disputes Act 1990.


56 Ibid.
There is no doubt that the exercise of the right to strike affects the employer, the state, and the economy. Furthermore, the public or the consumer can also be affected. There is therefore the need to consider the conflicting interests and to strike a balance between the right to strike and other interests. However, the right to strike must not be suppressed to the extent of rendering illusory the right to associate and the right to collective bargaining.