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Protection of trade union rights in Nigeria: Lessons from other jurisdictions

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Abstract

The Constitution gives Nigerian workers the inalienable right to form or join a trade union for the protection of their employment interests at the workplace. International instruments recognize this right. The International Labour Organization (ILO) in its Freedom of Association and the Protection of the Right to Organize Convention No. 87 of 1948 recognized the right to organize and the right to strike as core trade union rights. In spite of these provisions, trade unions in Nigeria have continued to suffer mistreatment and violation of their rights by government and its agencies, which includes unfair labour practices. This paper examined the protection of trade union rights in Nigeria, specifically the right to organize and the right to strike. It also examined the factors militating against the protection of these rights. The paper drew lessons from other jurisdictions and found that the high threshold required for the formation of a trade union is contrary to ILO standards and that there is no positive right to strike in Nigeria. It further found that the wide definition of essential service by the Nigerian law denies many workers the right to strike. The paper recommends, among others, legislative reforms by amending the Constitution and the Trade Union Act to provide for the right to strike and reduce the number of persons required to register a trade union from 50 to 10 respectively.

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Introduction

Trade union rights flow from freedom of association^[1] which in itself refers to the right of workers and employers to organize for the defence of their occupational interests. They are promoted around the world and generally accepted as fundamental human rights. International sources of trade union rights include the Universal Declaration of Human Rights, adopted by the United Nations in 1948, which states that everyone has the right of freedom of peaceful assembly and association. This principle is re-echoed in other several international and regional instruments including the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, both of 1966, the African Charter on Human and Peoples' Rights, 1981 and so on.

The International Labour Organization (ILO) in its Freedom of Association and Protection of the Right to Organize Convention No. 87 of 1948^[2] and the Right to Organize and Collective Bargaining Convention No. 98 of 1949^[3] identified the core trade union rights. They include the right to form, join and participate in trade union activities, right to collective bargaining and collective action and the right to strike.

The Constitution of the Federal Republic of Nigeria 1999 (as amended)^[4] gives workers an inalienable right to organize themselves into trade unions to protect and promote their employment interests in the workplace.

¹ Constitution of the Federal Republic of Nigeria 1999 (as amended), s40.

² FAPROC, arts 2-7.

³ ROCBC, arts 1-6.

⁴ CFRN 1999.

However, in spite of the provisions of the Constitution and international legal instruments that guarantee freedom of association and trade union rights, the Nigerian state has continued to violate the rights of trade union members. The International Trade Union Confederation (ITUC) ^[5] and the ILO Committee on Freedom of Association have continued to condemn Nigeria for these violations. In the 2022 annual report of ITUC, the following trade union rights were listed in order of their degree of violation globally: increasing criminalization of the right to strike, erosion of collective bargaining and exclusion from labour protection. Others are restrictions on access to justice, de-registration of unions, attacks on free speech and assembly, arbitrary arrests, detention and imprisonment, violent attacks on workers and cases of murder ^[6].

In the past, the Nigerian State was notorious in the violation of the civil liberties of trade unionists but that practice is in the decrease now. For instance, in 2022, the Academic Staff Union of Universities (ASUU) went on an eight-month strike without the government violating the civil liberties of their leaders. However, this is not to say that no trade union right was violated during the strike action. Private sector employers are also involved in gross abuses and violations of the rights of trade unions in Nigeria. This paper is therefore to examine the extent to which the core trade union rights, especially the right to organize and the right to strike are protected in Nigeria and to draw lessons from South Africa, the United Kingdom and Canada.

The Right to Strike

Strike is one of the ways in which workers exert pressure on their employer to agree to their demands. The main reason for the formation of trade unions is to enhance the welfare of the members through collective bargaining with the employer. To achieve this, trade unions resort to strikes because of the uncooperative and anti-welfare stance of some employers. The right to strike is therefore a very important weapon in the hand of labour.

Various scholars have commented on the importance of the right to strike in the achievement of trade union goals. Collins, Ewing and McColgan states that it is generally accepted as a lawful way of defending the occupational interests of workers and an important countervailing force to the power of the management ^[7]. Jacobs argued that without the right to strike, organized labour would be powerless to confront management at arm's length ^[8]. For Kahn-Freund, "there can be no equilibrium in industrial relations without a right to strike" ^[9] and equilibrium is required for there to be

collective bargaining.

The right to strike is so essential to workers that it has been said, and rightly too, that when workers are denied the right to strike, they would be bargaining with their hands tied behind their backs because they cannot offer realistic resistance to the power of the employer ^[10]. Thus, strike plays the same role in labour negotiations that warfare plays in diplomatic negotiations ^[11]. That means that strike facilitates agreement because of the costly and unpleasant consequences of failure ^[12]. According to Okene, if you take away the right to strike, workers and their trade unions will be lame ducks or sitting ducks in a shooting range ^[13].

MacFarlane says that the right to strike is the foundation of modern industrial society. No society that lacks that right can be democratic and any society that wants to become democratic must secure that right ^[14]. Adeogun opines that the right to strike plays a crucial role in the collective bargaining process ^[15].

The right to strike is globally recognized as a profound tool of collective bargaining, which safeguards the welfare and interests of workers. It is an indispensable component of a democratic society, modern industrial democracy and indeed a fundamental human right ^[16]. It is not only an essential tool for trade unions for the defense and promotion of the rights and interests of their members but also a necessary countervailing force to the power of capital ^[17]. Strike therefore induces agreement because of the serious implications of failure ^[18].

It is evident that there is a correlation between the right to collective bargaining and the right to strike. This notion, widely accepted by lawyers, further asserts that the right to strike enable workers to exert economic pressure through industrial action to balance the unequal bargaining powers between the employer and the employee thereby promoting social justice in the workplace ^[19]. Thus, collective bargaining will not be effective without a valid threat of industrial action ^[20]. This is so because the workers utilize the tool of industrial action to compel the employer to reach a mutually acceptable agreement on the terms and conditions of employment.

Industrial action or the likelihood of its occurrence is seen as one of the necessary conditions for collective bargaining to exist. In this regard, the right to strike helps to balance the workers' bargaining power against that of the employer and provide an opportunity for the workers to withstand the economic compulsion inherent in an otherwise unequal wage bargain ^[21]. By this therefore, strike becomes the ultimate sanction without which collective bargaining cannot exist ^[22].

⁵ 2017 ITUC Global Rights Index Report, 15 <<https://www.survey.ituc-csi.org>> Accessed 18 March 2022.

⁶ 2022 ITUC Global Rights Index Report, 3 <<https://www.survey.ituc-csi.org>> Accessed 20 January 2023.

⁷ H Collins and Others, *Labour Law: Text and Materials* (Oxford and Portland, Oregon: Hart Publishing 2005) 864.

⁸ A J M Jacobs, 'The Law of Strikes and Lock-outs' in R Blanpain and C Engels (eds), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (5th edn, Deventer: Kluwer 1993) 423.

⁹ P Davies and M Freedland, *Kahn-Freund's Labour and the Law* (London: Stevens and Sons 1983) 292.

¹⁰ K D Ewing, 'Citizenship and Employment' in R Blackburn (ed.), *Rights of Citizenship* (London: Mansell 1993) 113.

¹¹ J G Getman and F R Marshall, 'The Continuing Assault on the Right to Strike' (2000-2001) 79(3) *Texas Law Review*; 703-724.

¹² *Ibid.*

¹³ OVC Okene, *Labour Law and Industrial Relations in Nigeria* (4th edn, Owerri: Zubic Infinity Concept 2019) 2.

¹⁴ L MacFarlane, *The Right to Strike* (London: Penguin Books 1981) 12.

¹⁵ A A Adeogun, 'Industrial Relations and the Law' in T O Elias (ed), *Law and Development* (Lagos: University of Lagos Press 1972) 122.

¹⁶ O Kahn-Freund and B A Hepple, *Laws against Strikes: International Comparisons in Social Policy* (London: Fabians Research Series, 1972) 4; R Ben-Israel, *International Labour Standards: The Case of the Freedom to Strike* (Deventer: Kluwer 1988) 13 – 33.

¹⁷ O Kahn-Freund, *Labour and the Law* (London: Stevens and Sons, 1977) 48 – 49.

¹⁸ Getman and Marshall (n 11).

¹⁹ *NUMSA & Others v Bader Bop (Pty) Ltd & Others* (2003) 24 ILJ (CC) 305.

²⁰ *Ibid.*

²¹ S D Anderman, *Labour Law: Management Decisions and Workers' Rights* (London: Butterworths 2000) 307, 358-359.

²² O Kahn-Freund, *Labour Relations: Heritage and Adjustment* (Oxford: Oxford University Press 1979) 77.

It has been noted and rightly, that one of the ironies of collective bargaining is that the attainment of industrial peace should depend on the threat of conflict. The reason for this dependence however, is that the freedom to threaten strike action and, if necessary, to carry out the threat is protected by law because in an imperfect world, the process of collective bargaining requires it^[23].

From the foregoing, it will appear that the right to strike is embedded into the bargaining process. Sykes, summarizing the role and effect of strike in the collective bargaining process states as follows:

The strike is itself a part of the bargaining process. It tests the economic bargaining power of each side and forces each to face squarely the need it has for the other's contribution. As the strike progresses, the worker's savings disappear, the union treasury dwindles, and management faces mounting losses. Demands are tempered, offers are extended, and compromises previously unthinkable become acceptable. The very economic pressure of the strike is the catalyst which makes agreement possible. Even when no strike occurs, it plays its part in the bargaining process, for the very prospect of the hardship which the strike will bring provides a prod to compromise. Collective bargaining is a process of reaching agreement, and strikes are an integral and frequently necessary part of that process^[24].

The link between collective bargaining and the right to strike has received judicial recognition. In the case of *NUMSA & Others v Bader Bop (Pty) Ltd & Others*^[25], the Constitutional Court of South Africa succinctly put the critical nature of the linkage by stating that the right to strike is essential to the process of collective bargaining. It is what makes collective bargaining work and it is to the process of collective bargaining what an engine is to a motor vehicle^[26]. In addition, Lord Wright, in his dictum in 1942, observed in *Crofter Hand Woven Harris Tweed Co. Ltd v Veitch*^[27] that the right of workers to strike is an essential element in the principle of collective bargaining, not only of the union's bargaining process but also a necessary sanction for enforcing agreed rules.

In Nigeria, the court confirmed the link in *Union Bank of Nigeria Ltd v Edet*^[28] when it said that whenever an employer violates or ignores a term of a collective agreement resort could only be had, if at all, to negotiation between the union and the employer and ultimately to a strike action, should the need arise and it is appropriate. The right to strike is the ultimate weapon used by the workers during collective

bargaining. The ability of the union to bring direct economic pressure on the employer depends on the availability or use of the strike weapon^[29]. Without it, collective bargaining would amount to collective begging^[30].

The ILO has also declared that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests^[31]. In spite of the significance of the right to strike to the collective bargaining process and as a trade union right, Nigerian law does not protect the right.

There are many definitions of strike^[32]. Some legal systems define strike by legislation, like Nigeria, while some definitions have been developed by legal doctrine^[33]. Each definition reflects the position of the jurisdiction. In *Train Shipping Corporation v Greenwich Marine Incorporation*^[34], Lord Denning defined a strike as 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 sympathizing 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^[35].

Under the Nigerian law, strike is defined as the cessation of work by a body of persons employed acting in combination, or a concerted 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 to aid other workers in compelling their employer, to accept or not to accept terms or physical conditions of work^[36]. The above definition highlights the following four elements: a) Cessation of work: although this implies a total stoppage of work, the definition however includes go-slow and work-to-rule as strike^[37], contrary to the definition under the common law^[38]. b) Concerted action: the cessation of work must be by a combination of persons acting collectively. A stoppage of work by one person will not constitute a strike^[39]. c) The strike must be against an employer, aimed at compelling the employer to accede to the demands of the employees. It should be noted however that the Act recognizes sympathy strikes^[40]. d) The goal of the strike must be in connection with a dispute involving the terms of employment and physical conditions of work.

Many workers in the public sector in Nigeria are denied the right to strike because the law groups them as engaged in essential services^[41]. The public sector workers are therefore required to go through mandatory arbitration process as provided under the Trade Disputes Act^[42], instead of embarking on strike. The prohibition is a blanket ban on all employees in the public service of the federation, state, local

²³ J F Myburg, '100 Years of Strike Law' (2004) 25 *Industrial Law Journal*, 966.

²⁴ E I Sykes, *Strike Law in Australia* (London: Sweet and Maxwell 1982) 3. [2003] 24 ILJ (CC) 305.

²⁵ *Ibid.*, 367.

²⁶ (1942) AC 435.

²⁷ (1993) 4 NWLR (Pt 287) 288, 291.

²⁸ T Fashoyin, 'Collective Bargaining in the Public Sector: Retrospect and Prospects' in T Fashoyin (ed), *Collective Bargaining in the Public Sector in Nigeria* (Lagos: Macmillan Nigeria Publishers 1987) 12.

²⁹ Jacobs (n 8).

³⁰ ILO: Digest of Decisions and Principles of the Freedom of Association Committee, 5th (revised) edition, Geneva: International Labour Office, 2006, para. 521.

³¹ KGJC Knowles, *Strikes – A Study in Industrial Conflict* (1952) 1; E T Hiller, *The Strike: A Study in Collective Action* (1982) 12; Kahn-Freund (n 22).

³² L Betten, *The Right to Strike in Community Law: The Incorporation of Fundamental Rights in the Legal Order of the European Communities* (1985) 144 – 147.

³³ (1975) ICR 261, 276.

³⁴ (n 34), 276.

³⁵ Trade Disputes Act 1976, s48.

³⁶ TDA 1976, s47(1).

³⁷ *Secretary of State for Employment v ASLEF (No. 2)* [1972] 2 QB 455.

³⁸ *Bowater Containers Ltd v EAT* 522/81 of 27 May 1982; *Coates and Venables v Modern Methods and Materials Ltd* [1982] IRLR 318, 323. (n 36).

³⁹ Trade Disputes (Essential Services) Act 2004, s7.

⁴⁰ *Ibid.*, s9.

governments, ministries, corporations and so on to embark on strike action ^[43]. This law is contrary to the ruling of the Committee on Freedom of Association that prohibition of the right to strike in the public service should be limited to those persons 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 ^[44].

It has been argued that the right to strike in the private sector appears to be only a theoretical possibility. This is because under section 18 of the Trade Disputes Act workers cannot go on strike except they observe the dispute settlement procedures ^[45]. This procedure requires reference, where there is a dispute, to a mediator, industrial arbitration panel and the national industrial court, if the dispute is not resolved at the lower levels ^[46]. Where the compulsory arbitration fails, section 18(3) of the Trade Disputes Act requires that parties to the dispute go through the process of settlement all over again. This indefinite circle of compulsory arbitration, which the workers cannot escape, makes the right to strike in Nigeria a theoretical possibility but a practical impossibility ^[47].

International Labour Organisation and the Right to Strike

The International Labour Organization is the pre-eminent body for the formulation of international labour standards and monitoring of their compliance by member states. These standards are accepted globally as international best practices. In spite of the position of ILO as the defender of international labour standards, it is somehow astonishing to observe that the organization did not expressly provide for the right to strike in its major instruments. However, it is pertinent to note that the absence of an express provision on the right to strike in most of ILO's instruments is not conclusive that the organization does not recognize or approve of the right or forbid ways of guaranteeing its protection. The right to strike was mentioned several times in the part of the report on the history of the problem of freedom of association and an outline of the survey of legislation and practice ^[48].

Some scholars ^[49] have argued that the expression, 'right to strike', appears only tangentially in the Convention on the Abolition of Forced Labour, ^[50] which prohibits the use of forced labour as a punishment for participating in a strike action ^[51]. The expression is again contained in the Voluntary Conciliation and Arbitration Recommendation, ^[52] which states that none of its provisions should be interpreted as limiting in any way whatsoever the right to strike ^[53]. Thus,

the ILO recognizes that workers' organizations have several ways to protect and defend the economic and social interests of their members. One of those means is the right to strike, which often results to pain and extreme discomfort to the employer ^[54].

There are two resolutions of the International Labour Conference that provide guidelines for ILO policies, which recognize the right to strike by workers in their member states. These resolutions include the Resolution on the Abolition of Anti-Trade Union Legislation ^[55] among member states of the International Labour Organisation, which called for the adoption of laws to guarantee the exercise of trade union rights, including the right to strike by workers. Also included is the Resolution Concerning Trade Union Rights and their Relation to Civil Liberties ^[56], which called for several actions with a view to considering more measures to guarantee full and universal respect for trade union rights in their broadest sense, with specific emphasis on the right to strike. The ILO further guarantees protection against acts of discrimination resulting from trade union activities ^[57].

Apart from the foregoing, there are other ILO instruments that indicate the importance of the right to strike in industrial relations. Among this is Freedom of Association and Protection of the Right to Organize Convention No. 87 of 1948, which guarantees the right of workers, without restriction, to organize their activities and formulate their programmes. It is obvious that one of the trade union activities covered by the Convention is strike.

Further indicators on the importance of the right to strike are the decisions of ILO supervisory bodies, which are the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) ^[58]. The CFA acknowledges firmly that strikes are integral part of trade union activities ^[59] and that the right of workers and their organizations to strike is a legitimate and essential means of protecting their occupational interests ^[60]. The CEACR ^[61], on its part, confirms that the right to strike is one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests. The interests are about not only obtaining better working conditions and pursuing collective demands of an occupational nature, but also seeking solutions to economic and social policy and solving labour problems that are of direct concern to the workers ^[62].

Right to Strike Under Nigerian Law

⁴³ TDA 1976, s47(1).

⁴⁴ ILO: Digest of Decisions and Principles of the Freedom of Association Committee, 5th (revised) edition, Geneva: International Labour Office, 2006, paras 575 and 576.

⁴⁵ OVC Okene, 'The Status of the Right to Strike in Nigeria: A Perspective from International and Comparative Law' (2007) (15) (1) *African Journal of International and Comparative Law*; 46.

⁴⁶ (n 43) ss3, 5, 7, 8 and 13.

⁴⁷ Okene (n 45).

⁴⁸ ILC, 30th Session, 1947, Report VII, Freedom of Association and Industrial Relations; 30-74; OVC Okene, *Law of Strikes* (VDM 2010) 89.

⁴⁹ B Gernigon and Others, 'ILO Principles Concerning the Right to Strike' (1998) 137(4) *International Labour Review*; 441; J Hodges-Aeberhard and O de Dios, 'Principles of the Committee on Freedom of Association Concerning Strikes' (1987) 126(5) *International Labour Review*; 543-561.

⁵⁰ Convention No. 105, 1957.

⁵¹ *Ibid*, art 1(d).

⁵² ILO Convention No. 92 of 1951.

⁵³ *Ibid*, para 7.

⁵⁴ ILO, Report of the Committee of Experts on the Application of Convention and Recommendations, ILO Conference, 6th Session, 1982, para 199.

⁵⁵ ILO, 1957, para 783.

⁵⁶ ILO, 1970, para 735-736.

⁵⁷ Hodges-Aeberhard and de Dios (n 49).

⁵⁸ ILO: Freedom of Association: Digest of Decisions and Principles of the Committee on Freedom of Association (5th edn, Geneva: International Labour Office 2006) para 520.

⁵⁹ *Ibid*, para 521.

⁶⁰ *Ibid*, para 522.

⁶¹ ILO: Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts, Report 111(4B), International Labour Conference, 6th Session (Geneva: International Labour Office 1983) para 200.

⁶² (n 61).

The national legal framework discussed in this article comprises of the Constitution of the Federal Republic of Nigeria, 1999, the Labour Act 1974 and the Trade Unions Act 1973. It also includes the Trade Disputes (Emergency Provisions) Act 1968, the Trade Disputes Act 1976, the Trade Union (Amendment) Act 2005 and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983, which examines the effect of the charter on trade union rights in Africa.

There are different responses to the right to strike in different jurisdictions, depending on how the government sees the right. In some jurisdictions, the right to strike is a fundamental right enshrined in the Constitution, which guarantees it, like South Africa, while in other jurisdictions the right is not enshrined in the Constitution but in their labour laws. There are some jurisdictions where the right to strike is not expressly stated but immunities are granted to workers who embark on strike [63].

In Nigeria, there is no express provision in the Constitution or a labour statute that provides positively for the right to strike. Therefore, the right to strike in Nigeria can be said to be derived from the following:

1. Immunities granted to workers and trade unions against civil and criminal liabilities for engaging in industrial action, pursuant to sections 23 and 43 of the Trade Unions Act 1973 and section 518A of the Criminal Code [64]. Section 23 of the Trade Unions Act [65] provides that an action against a trade union, whether of workers or employers, in respect of any tortious act alleged to have been committed in contemplation or in furtherance of an action of a trade dispute shall not be entertained by any court in Nigeria. Section 43(1) of the Act [66] provides that an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on anyone or more of the grounds specified under the Act.
2. A combined effect of section 4(1) and paragraph 14 of the First Schedule of the Trade Unions Act 1973 gives an implied recognition of the right to strike in Nigeria. Section 4(1) of the Act provides that every trade union must have registered rules, which must contain provisions with respect to matters mentioned in the first schedule of the Act. Paragraph 14 on its part states that the Rules Book of trade unions must contain a provision that no member of a trade union shall take part in a strike unless majority of the members have voted in favour of the strike in a secret ballot. It has been argued [67] that this rule should not be in the Rule Book if the workers have no right to strike.
3. The Banks and Other Financial Institutions Act [68] recognizes the right of bank workers to go on strike but absolves the bank from liability due to their inability to open to their customers as a result of the strike by their employees.

4. The Trade Unions Act [69] provides for peaceful picketing.
5. Judicial recognition – In *Union Bank of Nigeria Plc v Edet* [70], Uwaifo, JCA, stated that the failure to act in strict compliance with collective labour agreement is not justiciable as its enforcement lies in negotiations between the union and the employer, and ultimately, in strike action should the need arise and it be appropriate [71].

It is arguable from the foregoing that there is the right to strike in Nigeria, which the trade unions have utilized in the past and presently. However, the question is whether the protection of the right to strike is adequate or not. It is the view of this paper that there is no express positive right to strike in Nigeria.

Before 1968, there was the assumption that the right to strike which exists in Nigeria was derivable from the common law in the absence of a contrary legislation. However, in 1968, the government made a deliberate effort to check the hitherto presumed right to strike by promulgating the Trade Disputes (Emergency Provisions) Act [72] which placed an outright ban on strikes. The Act was promulgated to ensure industrial peace and sustain the production of goods and services to reinforce the civil war effort going on then. Following the unrestrained wave of the strike the following year, the government reinforced the earlier Act by promulgating the Trade Disputes (Emergency Provisions) (Amendment No. 2) Act, 1969 [73]. These two laws banned strikes and lockouts.

The Trade Disputes Act 1976 entrenched the provisions of the above laws into the Nigerian industrial relations system contrary to the expectations that they were temporary wartime measures. The Act seriously restricts the right of the workers to strike by introducing both the voluntary and compulsory settlement of trade disputes. Specifically, the Act requires that before workers can go on strike they must fully exhaust the statutory procedure for settlement of trade disputes. If the attempt to settle the dispute by the internal grievance machinery fails, the parties are required to resort to mediation by a mediator agreed upon by them [74]. If that fails, the matter should be reported to the Minister of Labour, who will appoint a conciliator and where conciliation fails, to refer the matter to the Industrial Arbitration Panel within 14 days. Where either party objects to the award of the Industrial Arbitration Panel, the Minister must refer the dispute to the National Industrial Court, whose award shall be binding on the parties to it [75].

Furthermore, section 18(1) of the Trade Disputes Act bars workers from going on strike and employers from declaring a lockout while arbitral proceedings are going on neither can any industrial action be initiated after the Industrial Arbitration Panel and the National Industrial Court have determined the issue in controversy. A violation of this provision is an offence punishable by fine or imprisonment [76]. Unless these conditions stipulated by the Act [77] are met,

⁶³ IN E Worugji and J A Archibong, 'Legal Response to Strike in Nigeria: A Call for a New Legal Regime' (2009) 3(1) *Labour Law Review*; 23.

⁶⁴ Cap 77, LFN, 1990.

⁶⁵ TUA 1973.

⁶⁶ *Ibid*.

⁶⁷ OVC Okene, *Labour Law in Nigeria (Selected Essays)* (Owerri: Zubic Infinity Concept 2019) 37.

⁶⁸ BOFIA 2004, s42.

⁶⁹ TUA 1973, s42(1).

⁷⁰ (1993) 4 NWLR (Pt 287) 288, 291.

⁷¹ *Ibid*, 291.

⁷² Act No. 21 of 1968.

⁷³ Act No. 53 of 1969.

⁷⁴ TDA 1976, s4(2).

⁷⁵ *Ibid*, ss6, 8, 9 and 14.

⁷⁶ *Ibid*, s18(2); Trade Union (Amendment) Act 2005, s7.

⁷⁷ *Ibid*, s18(1).

Nigerian workers cannot go on a legal strike, making it very difficult to have a lawful industrial action in Nigeria.

Several scholars have argued whether in the light of section 18 of the Trade Disputes Act the Nigeria worker still has the right to strike. Majority of them contend that there is no right to strike in Nigeria^[78]. Emiola, for instance, posits that under no circumstances can workers or employers utilize strike or lockout as weapon of coercion against the opponent in view of the provision. The result is that “the Nigerian worker has therefore apparently lost forever – at least until amended the right to strike^[79].” Agreeing with the position, Adeogun suggested that section 18 of the Act has placed an outright ban on strike in Nigeria^[80]. Both Uvieghara^[81] and Agomuo^[82] agrees with this interpretation.

According to Agomuo^[83], a literal interpretation of section 18 suggests that there is a right to strike although severely circumscribed. However, it appears more reasonable to say that there can never be a lawful exercise of any right to strike in Nigeria as long as section 18 remains in the statute book. Okene^[84] concluded that by virtue of the section, workers can no longer go on strike unless they observe the dispute settlement procedures and if at the end of the process the workers are dissatisfied with the award of the National Industrial Court, whose decision is final, then by virtue of section 18(3) they must go through the whole process all over again. The law has therefore created a vicious circle of compulsory arbitration, which the workers cannot escape and by implication, the right to strike appears to have been smartly circumvented by the legislature^[85].

The Trade Union (Amendment) Act, 2005 reinforced the provisions of the Trade Disputes Act, 1976 on prohibiting the right to strike. The Act provides that no person, trade union or employer shall take part in a strike or lockout or engage in any conduct in contemplation or furtherance of a strike or lockout unless:

1. The person, trade union or employer is not engaged in the provision of essential services,
2. The strike or lockout concerns a labour dispute that constitutes a dispute of right,
3. The strike or lockout is a dispute arising from a collective and fundamental breach of contract of employment or collective agreement on the part of the employee, trade union or employer,
4. The provisions for arbitration in the Trade Disputes Act have first been complied with and
5. In the case of a trade union, a ballot must be conducted in which a simple majority of all registered members voted to go on strike^[86].

This law prohibits strike in Nigeria for workers engaged in

the provision of essential services while those who are not engaged in essential services are required first to exhaust the arbitration processes already discussed above before embarking on strike. Contravention of the Act attracts a fine of N10,000 or six months imprisonment or both^[87].

Based on the foregoing, it is submitted that the combined effect of sections 18(1) of the Trade Disputes Act 2004 and section 6(6) of the Trade Union (Amendment) Act 2005, is to prejudicially curtail the workers’ right to strike. It appears therefore that there is no right to strike in Nigeria. This submission agrees with the ILO position, which although accepts that legislations can prohibit strike action in certain cases, however, it condemns any provision which instead of providing reasonable conditions to be fulfilled before a strike action can be embarked on, makes it almost impossible to go on a legal strike. The ILO reiterates that imposition of compulsory arbitration is only acceptable in cases of strike in essential services, strictly speaking, as defined by the ILO^[88].

Right to Strike and Essential Services

The notion of essential service conveys the idea that certain activities are of basic importance to the society that their disruption will have extremely harmful consequences^[89]. The Freedom of Association Committee of the ILO defines essential services as only those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population^[90]. The ILO recommends that the following areas should be regarded as essential services^[91] hospital services, electricity supply and services, water supply and services, air traffic control and services. The ILO suggests that more areas may be added depending on the domestic needs and circumstances.

In Nigeria, the Trade Disputes (Essential Services) Act^[92] prohibits workers in essential services from embarking on strike or participating in industrial action. The Act lists the following as essential services: the public service of the federation and the states, workers involved in electricity supplies, power and water, transportation, wireless and telecommunications, health and sanitation, fire services, Central Bank of Nigeria and other corporate bodies carrying on banking business. The Act empowers the President of the Federal Republic of Nigeria to proscribe any trade union or association, whose members are employed in any essential services and such union or association has been engaged in industrial unrest or acts calculated to disrupt the smooth running of such service^[93].

The Trade Dispute (Essential Services) Act defines essential services broadly to include all workers in the public services of the federation or the state involved in the services listed

⁷⁸ Adeogun (n 15) 43; C K Agomuo and E E Uvieghara, *The Future of Law and Labour Relations in Nigeria*, a paper presented by the Faculty of Law Teachers (1998) 31; S Erugo, ‘Exploding the Myth of Strike – A Review of the ‘no strike clause’ of Decree No. 26 of 1976’ (1996) 7 *Abia State University Law Journal*; 59; J A M Audi, ‘Strikes and the Law in Nigeria’ (1991 – 1992) 9 – 10 *Ahmadu Bello University Law Journal*; 84; N Nwebo, ‘The Proprietary Right to Strike’ in I O Agbede and E O Akanki, *Current Themes in Law* (1997); 329.

⁷⁹ A Emiola, *Nigeria Labour Law* (Benin City: Amfitop 2008) 225.

⁸⁰ Adeogun (n 15).

⁸¹ E E Uvieghara, *Labour Law in Nigeria* (2001) 446.

⁸² C K Agomuo, *Employment and Labour Relations Law and Practice* (Concept Publications Ltd 2011) 44.

⁸³ *Ibid.*

⁸⁴ OVC Okene, ‘The Right of Workers to Strike in a Democratic Society: The Case of Nigeria’ (2007) 17(1) *Sri Lanka Journal of International Law*; 193-221.

⁸⁵ *Ibid.*

⁸⁶ TUA 2005, s6(6).

⁸⁷ *Ibid.*, s7.

⁸⁸ ILO Digest 2006, para 568.

⁸⁹ G S Morris, ‘The Regulation of Industrial Action in Essential Services’ (1983) 12 *Industrial Law Journal*; 69; G S Morris, *Strikes in Essential Services* (1986) 7.

⁹⁰ Freedom of Association and Collective Bargaining: 1994 Report, Part 4B, para 159; B Gernigon and Others, ILO Principles Concerning the Right to Strike (1998) 137(4) *International Labour Review*; 437-481, 443.

⁹¹ ILO Digest 1996, paras 544 and 545.

⁹² Cap T9 LFN, 2004.

⁹³ TDA 1976, s1(1)(a) and (b).

above^[94]. From the foregoing, it is clear that the list of essential services in Nigeria consist of every range of services imaginable under the law. Any service could be regarded as essential, depending on how it came to be rendered. The definition has therefore been criticized as not only grotesque but also makes a nonsense of the basic concept of essential services^[95].

According to Otobo^[96], it is the widest definition of essential services in the world because of its politicization 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^[97]. While the prohibition on the armed forces, electricity, health, water and telecommunications sectors may seem justified, it is difficult to completely agree that ports, petroleum and commercial banks constitute essential services. It appears that the Nigerian notion of essential services is a catch-all phrase that is used as a mechanism to proscribe rather than qualify the right to strike^[98].

Many workers in Nigeria are denied the freedom to strike under the guise of essential services when their work is only related peripherally to the delivery of service and their stoppage of work would have little impact on the public. This is an obvious violation of the ILO standards, which demands that essential services should be defined very strictly. The ILO has cautioned against the principle where the right to strike is limited or even prohibited in essential services, stating that the right would lose all meaning if national legislation defines these services in a very broad manner^[99]. The Committee on Freedom of Association condemned the unusual classification of essential services in Nigeria by the Trade Disputes Act and the Trade Union (Amendment) Act, 2005 and specifically urged Nigeria to amend the two Acts in line with the provisions of Conventions No. 87 and 98 to comply with ILO definition of essential services.

Picketing

Picketing is the action of workers carried out to convince other workers who have not joined in a strike action to do so. The Trade Union Act^[100] provides that it is lawful for one or more persons to carry out picketing for the purpose of peacefully persuading any person to work or abstain from working so long as this is done either in contemplation or in furtherance of a trade dispute.

From the above, picketing is only lawful when carried out in contemplation or furtherance of a strike. In addition, the law allows a picket to go near a place of work for the purpose of picketing. The provision does not permit a picket to invade the home or place of business of a person^[101]. Similarly, picketing which entails intimidation, rioting, assault, malicious injury to property, breach of peace and other

criminal acts is usually declared unlawful^[102].

Picketing is lawful if carried out peacefully and such picketing cannot become an offence anywhere in Nigeria^[103]. However, the Trade Union (Amendment) Act has imposed several restrictions on picketing, thereby further narrowing the scope of strike in the country. The Act provides that a trade union must not compel any person who is not a member of its union to join a strike or prevent aircrafts from flying or obstruct public highways, institutions or premises for the purposes of giving effect to a strike^[104].

This law provides two restrictions. The first restriction denies workers the right to persuade their fellow employees who are not union members but may likely benefit from the union's demand, to join the strike and thereby affect the ability of the workers and their union to attract sufficient solidarity and sympathy for the strike. It is submitted that peaceful incitement of workers, whether union members or not, to participate in strike action should not be forbidden.

The second restriction is on obstructing premises, aircraft landing and highways. This provision appears to be too wide for the purpose and could be used to make strike picket action illegal. For instance, a group of workers that gathered on company premises or on the street or somewhere else, may be accused of obstructing premises or highway, no matter how peaceful. In addition, aircraft related services should not be subject to a complete ban because the ILO does not classify such services as essential services^[105].

The provisions of the Act appear quite obstructive and shows a policy aimed at repressing the right to strike. This is because strike will only be effective if it stops the employer from continuing their business during the strike. That is why workers gather at the factory gate during industrial action. Picketing is therefore the clear physical means employed by employees either to intensify the economic pressure on the employer or to ensure that the concerted stoppage of work is not undermined^[106].

The Nigerian law therefore places undue restriction on the right to picketing under the guise of maintaining public order. The International Labour Organization has ruled that the right to picketing should not be subject to interference by the public authorities and that the prohibition of strike pickets is justified only if the strike ceases to be peaceful^[107]. The ILO has criticized the undue restrictions placed by Nigeria on the use of picketing to facilitate strike action and concluded that such municipal laws could potentially restrict or hamper the exercise of an otherwise legal strike or any peaceful meeting. Contrary to section 9 of the Trade Union (Amendment) Act, 2005, which prohibits compelling non-union members to participate in a strike, the ILO reaffirms its earlier position that peaceful picketing should not be considered unlawful^[108], except where it is accompanied with violence and forcing non-strikers to join^[109].

⁹⁴ TDESA 2004, s7(a)(b) and (c).

⁹⁵ Okene (n 84).

⁹⁶ D Otobo, 'The Generals, NLC and Trade Union Bill' <<https://www.nigerdeltacongress.com/garticles/generals-n/c-trade-union-bill.htm>> Accessed 16 April 2023.

⁹⁷ *Ibid*.

⁹⁸ OVC Okene, 'Derogations and Restrictions on the Right to Strike under International Law: The Case of Nigeria' (2009) 13(4) *International Journal of Human Rights*; 127-140.

⁹⁹ Freedom of Association and Collective Bargaining: 1994 General Survey, para 159.

¹⁰⁰ TUA 1973, s43(1); *Uke v Ogie* (1955) 15 WACA 15.

¹⁰¹ *Larkin v Belfast Harbour Commissioners* (1908) 2 IR 214.

¹⁰² *Queen v Imoudu & Ors* (1961) All NLR 13.

¹⁰³ Criminal Code Act, s366.

¹⁰⁴ TUA 2005, s9 (amended TUA 1973, s42(1)(A) and (B)).

¹⁰⁵ ILO, Digest of Decisions and Principles of the Freedom of Association Committee (5th revised edn, 2006) para 587.

¹⁰⁶ P Elias and Others, *Labour Law: Cases and Materials* (London: Butterworth 1979) 272.

¹⁰⁷ ILO, 1994, General Survey on Freedom of Association and Collective Bargaining, para 174.

¹⁰⁸ ILO Committee on Freedom of Association, 343rd Report, Case No. 2432 (2006) (Nigeria) para 1026.

¹⁰⁹ *Ibid*

Factors Militating Against the Protection of Trade Union Rights in Nigeria

The following factors militate against the protection of trade union rights in Nigeria:

1. Constraints to effective membership of trade unions in Nigeria, especially the requirement of minimum membership. The Trade Union Act 2004^[110] provides that an application for the registration of a trade union shall be signed by at least 50 members of the union, while that of employers shall be signed by at least 2 members. This requirement is discriminatory and will unduly restrict the participation of workers in trade unionism in Nigeria.

It has been argued^[111] that where the minimum number of persons required for the registration of a trade union is fixed too high, workers' freedom of association will be weakened as such a high threshold is tantamount to industrial disenfranchisement. This agrees with the position of the ILO, which supports a far less number of about 20 workers for the formation of a trade union and therefore contrary to Convention No. 87^[112]. However, the failure to relax the membership requirement in Nigeria may be based on the argument that a low threshold would lead to proliferation of trade unions and consequently undermine their solidarity, which could further fuel regional and factional rivalries^[113]. The ILO has described a situation where legislation fixes a very high threshold, like 50 founding members, as considerably hindering or even rendering impossible the establishment of a trade union^[114].

2. Constraints to the Right to Strike in Nigeria: The following factors impede the exercise of the right to strike in Nigeria:

1. The existence of multiple legal constraints to embark on strike action makes it clear that the right to strike does not truly exist in Nigeria^[115].
2. There is no positive guaranteed right to strike in Nigeria, unlike in South Africa, Ghana, Malawi and other African countries, and Italy, France, USA and so on, where the right to strike is positively enshrined in the Constitution. A positive guaranteed right to strike is a necessity in Nigeria to protect strike action and give it precedence over the performance of contractual and other civil obligations.
3. The broad definition of essential services by Nigerian laws^[116] denies many workers the right to strike.
4. The introduction of compulsory arbitration before embarking on strike are all intended to frustrate the workers' right to strike.
5. vii) The Trade Union (Amendment) Act^[117] imposes several restrictions on picketing to narrow the scope of strike in Nigeria.

Lessons for Nigeria

From the review of the legal and institutional frameworks for the protection of trade union rights in South Africa, United

Kingdom and Canada, the following are lessons for Nigeria:

1. The South African labour law does not require a membership threshold for the registration of a trade union or that members of a trade union must belong to a particular sector or sectors of the economy. The United Kingdom also has no requirement on the minimum number of employees required for the registration of a trade union. In Canada, the number of persons required to register a trade union is seven. However, in Nigeria, the number is fifty.
2. To protect trade union rights, the Constitution of South Africa provides a vast array of labour rights under the right to fair labour practices. The Constitution provides expressly for the right to collective bargaining and the right to strike including the right to demonstration and picketing^[118]. This provides a constitutional safeguard and protection of the core trade union rights. In Canada, the Supreme Court has given a constitutional backing to the right to collective bargaining and the right to strike.
3. Both in the United Kingdom^[119], and South Africa, the procedure to follow before embarking on a legitimate strike action is clear and simple^[120], and not intended to make it impossible for the union to go on strike or to frustrate the union as is the case under the Nigerian Trade Disputes Act. In South Africa, a dismissal for participating in a lawful strike constitutes an automatically unfair dismissal. In Canada, there is a constitutional right to strike as part of the right to collective bargaining. This is the decision of the Supreme Court of Canada in *Saskatchewan case*^[121] that freedom of association includes the right to strike.
4. The Labour Relations Act of South Africa protects a picket in support of a protected strike or in opposition to a lockout. Picketing may take place outside the employer's premises or inside the premises with the permission of the employer, which permission may not be unreasonably withheld. Secondary picketing is also legal in Canada, provided no criminal or tortious conduct is involved. This is the decision of the Supreme Court of Canada in *RWDSU Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*^[122].
5. The definition of essential services in South Africa is in consonance with the ILO definition^[123]. The South African law established an Essential Services Committee, which determines services that are essential or not. Same is applicable in Canada, where employers and the union negotiate and agree on positions that provide essential services during a strike, which leads to the signing of an Essential Services Agreement^[124].

Conclusion

Trade Union membership especially the issue of the minimum number of fifty members for the registration of a trade union as against two members for an employers'

¹¹⁰ TUA 1973, s3(1)(a) and (b).

¹¹¹ OVC Okene, 'Legal Constraints to Membership of a Trade Union in Nigeria' (2007) 5(3) *International Journal of Civil Society Law*; 29.

¹¹² J Erstling, *The Right to Organize 3* (International Labour Office 1977).

¹¹³ Nigeria: Collective Labour Relations Conceptual Draft <<https://www.necang.org/downloads/draftcollective.pdf>> Accessed 24 April 2023.

¹¹⁴ ILO Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee (Geneva: International Labour Office 1985) para 255.

¹¹⁵ TDA 1976, s18(1); TUA 2005, s6(6)(a).

¹¹⁶ TDA 1976, s1(1); TDESA 2004, s7.

¹¹⁷ TUA 2005, s9.

¹¹⁸ CRSA 1996, ss17, 18, and 23.

¹¹⁹ TULRCA 1992, S224.

¹²⁰ LRA 1995, s64.

¹²¹ *Saskatchewan Federation of Labour v Saskatchewan* (2015) SCC 4, para 3.

¹²² Canadian Labour Relations Code 1996, s65(4).

¹²³ LRA 1995, s213.

¹²⁴ TUAC 1985, s73.

association is too wide and has been criticized by the ILO. Apart from denying many workers the right to union membership, it is also discriminatory and contrary to ILO recommendation.

There are conflicting views whether the right to strike exists in Nigeria or not. The existence of multiple legal constraints to embark on strike action makes it difficult to accept that the right to strike exists in Nigeria. The Trade Disputes Act prohibits employees from taking part in a strike action while arbitral proceedings are going on and such dispute settlement procedures must be exhausted first. If a party is dissatisfied with the arbitral award, they must go through the whole process all over again. In addition, the Trade Union (Amendment) Act bars workers on essential services from going on strike. The combined effect of these provisions is to effectively curtail the workers' right to strike in Nigeria.

The broad definition of essential services by the Nigerian law denies many Nigerian workers the right to strike. The Trade Disputes Act and The Trade Dispute (Essential Services) Act provide an over-inclusive and bogus list of essential service providers contrary to the ILO standards and definition of essential services.

Recommendations

1. The National Assembly should amend the Constitution of the Federal Republic of Nigeria 1999, using the Constitution of South Africa as a guide, to provide expressly for the right to collective bargaining, the right to strike, the right to demonstration and picketing. This will provide a constitutional safeguard and protection for the core trade union rights and activate the current dormant provision on fair labour practices in the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010.
2. The National Assembly should amend section 3(1) of the Trade Unions Act by replacing the minimum number of persons required to register a trade union from fifty to ten. Although this does not remove the present discriminatory provision that requires fifty members for trade unions and two for employers' associations, it appears realistic in the Nigerian situation and complies with the ILO principle of not more than twenty members. It is also close to the Canadian threshold of seven.
3. By virtue of section 18(1) of the Trade Disputes Act, it is difficult, if not impossible to have a lawful industrial action in Nigeria. The National Assembly should therefore amend the section to make the procedure for strike clear and simple.
4. The definition of essential services as contained in section 7 of the Trade Disputes (Essential Services) Act is very wide and contrary to ILO principles. The law should be amended to define essential services restrictively in accordance with the ILO definition. In addition, an Essential Services Committee should be established, using the Canadian model, to determine services that are essential or not rather than leaving the decision to the discretion of the government.
5. Section 9 of the Trade Union (Amendment) Act 2005, makes picketing very restrictive to narrow the scope of strike and make it ineffective, contrary to ILO regulations. The law should be amended, for a purposeful right to strike. The National Assembly may be guided by the practice in Canada where the Commissioner makes rules to regulate picketing or the

United Kingdom where a Code of Practice on Picketing provides safeguards including recommendation on the size of pickets, for a successful and hitch free picketing.

It is expected that there will be remarkable improvements in labour law relations in Nigeria if the few recommendations and suggestions proffered in this work are accepted and implemented by the government.

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