

## A Critical Appraisal of the Right to Strike in Nigeria

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### Abstract

*Conflict in industrial relation is almost inevitable because of the divergent interest and aspirations of the two parties in the relationship, that the employer and employee. This most of the times touches on very critical issues like wages and other conditions of employment. Resolving these issues require negations, compromise, concessions which are usually done through the process of collective bargaining. The problem is that the process of collective bargaining is not ordinarily effective and can hardly resolve the differences, if the parties are denied the right to use the weapons within their armoury (lock out for the employer and strike for the employee). So where the problems are not resolved through negations any of the parties can declare an industrial action. When this occurs, it negatively affects industrial peace, particularly if it is allowed to degenerate into strike action. Although strike actions are generally allowed and protected by several international instruments and most states legislations. But because of the negative consequences of the right to strike, states has always controlled or restricted its use through appropriate legislations. A critical examination of the relevant legislations in Nigeria shows that there are too many stringent conditions which have almost denied the worker his right to strike. The paper recommends that these conditions be relaxed, particularly those giving wide powers to the employer to terminate the employee for breach of contract or deny him his other statutory benefits.*

### 1.0 Introduction

Industrial relations and labour law take their roots from the very old practice of labour hiring or employment. The early stages of labour law were concerned with master and servant relationships limited only to the individual contract of hire. The master or employer unilaterally dictated the tune and the worker either danced or was at liberty to quit. There was no middle point. Eventually wage earners began to band together to resist the tyranny of the Master and to further collective bargaining with their employers for it was only by such unity that they could muster the power needed to effectively bargain for the improvement of their working conditions thus the birth of early unionism.

With collective bargaining, trade unions were and still are today, able to obtain for their members through negotiations and dialogue improved or reviewed conditions of service either in the area of emoluments, security of tenure, welfare etc. It is only when the parties have reached an irreconcilable deadlock in these negotiations or when agreements duly reached are breached that the workers resort to one form of industrial action or the other, of which strike is a very significant aspect.

The right to strike is a crucial weapon in the armoury of organized labour. The right is a result of several years of struggle by the working class. The history of this struggle is one of constant class battles, fierce reprisals by the management and the authorities against strikers, who had to make heroic sacrifice.

The right is an essential tool of trade unions all over the world for the defense and promotion of the rights and interests of their members. This is more so because the right to strike is seen as a necessary counter-veiling force to the powers of capital.<sup>1</sup> Take away the right to strike and workers and their trade unions will be lame ducks.

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<sup>1</sup> The strike plays the same role in labour negotiations that warfare plays in diplomatic negotiations. See J.G.Getman and F.R.Marshall, The Continuing Assault on the Right to Strike, Texas Law Review, Pt. 79 VI. 3 (2000) 703.

This was aptly put by Uvieghara when he said that 'collective labour relation finds practical expression in voluntary collective bargaining and that it is through trade unions that the individual employee has been able to attempt to redress the inequalities that arise between him and his employer'.<sup>2</sup> In the same vein Lord Wright in 1942 declared thus "where the rights of labour are concerned, the rights of the employer 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"<sup>3</sup>

Also writing on the same point Professor Kahn Freund in 1954 wrote:

"Collective bargaining as we understand it is unthinkable without social sanctions. By this we mean that neither an employer or employer's association nor a trade union can bargain effectively or hope to 'enforce the observance of collective agreements, unless there is in the background the possibility of using economic and social pressure against the other side of the bargain. Collective bargaining cannot work without the Ultimate sanction of the strike and the lockout"<sup>4</sup>

He re-emphasized this in 1972 when he asserted as follows:

"Effective collective bargaining is impossible where the workers do not have the freedom to stop work collectively and trade Unions cannot exist and function if collective bargaining is impossible. Quite clearly to suppress the freedom to strike means to undermine the existence of trade unions"<sup>5</sup>

Similarly, a German Author writing on right to strike opined:

"As long as employees remain personally dependent on the employer, the unconditional removal of the right to strike would hand them over helpless to the employer. The union could then still, it is true, assert demands, but they could have no means to make the employers agree to them. In this way freedom of association would have been devalued to become a sword without an edge"<sup>6</sup>

It can therefore be seen that the right to strike is an essential element in the principle of collective bargaining. However to protect such a right is not to approve (or disapprove) of its exercise in any particular withdrawal of labour but to recognize the fact that limits have to be set on the right to strike and lock out in order to control the strength which each party can in the last resort bring to bear at the bargaining table, particularly in this country where improvements in the structure of salaries and wages, allowances and other benefits have resulted from collective action on the part of the workers through agitations, demonstrations, strikes or threats of them leading to collective negotiations and agreements or reference to arbitration tribunal or the appointment of Commission of Inquiry but have not come about from the employers' own volition and as a proof of his kindly disposition towards the workers<sup>7</sup>.

To underscore the importance of this right the ILO Governing Body Committee on Freedom of Association has Consistently stressed that the right of workers and their organizations to strike is generally recognized as a legitimate means of defending their occupational interest and that the only restrictions on the freedom to strike can be imposed for groups of workers in sensitive areas of the public service. It however, emphasized that alternative procedures for processing grievance and disputes in such services would then have to be made available.<sup>8</sup> Also two international instruments, the European Social Charter and the International Covenant on Economic, Social and Cultural rights, have express provisions protecting the freedom to strike"<sup>9</sup>.

### **1.1 What is Strike?**

In an ordinary sense, it is a deliberate stoppage of work by workers in order to put pressure on their employer to accede to their demands.

<sup>2</sup> Prof. E. E. Uvieghara: The historical and Legal framework of Trade unionism

<sup>3</sup> HandWoven Harris Tweed Co. Ltd. V Veitch (1942) A.C. 435 at P. 463

<sup>4</sup> The system of industrial Relations in Great Britain (1954) ed. Allan Flanders at P. 101

<sup>5</sup> Otto Kahn-Freund and Bob Hepple, Laws Against Strikes. Fabian Research Series. (1972) at P. 53.

<sup>6</sup> Ekkehart Stein. Staatsrecht, 1975. at P. 188

<sup>7</sup> Wogu Ananaba: The Trade Union Movement in Nigeria (1969)

<sup>8</sup> Report of the fact finding and conciliation commission on Freedom of Association concerning persons employed in the Public Sector in Japan; 1966. at P. 490 - 2

<sup>9</sup> Article 6 and Article 8 respectively.

Strike is defined by the Business Dictionary as collective, organized, cessation or slowdown of work by employees, to force acceptance of their demands by the employer<sup>10</sup>. In Wikipedia it is defined as a work stoppage caused by the mass refusal of employees to work, which usually takes place in response to employee grievances.<sup>11</sup> In the Oxford Advance Learners Dictionary<sup>12</sup>, it is defined as organized stopping of work by employees because of a disagreement. Technically it has been defined in Nigeria<sup>13</sup> as 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, to accept or not to accept terms of employment and physical conditions of work; and in this definition:-

- (a) “cessation of work” includes deliberately working at less than usual speed or with less than usual efficiency; and  
 (b) “refusal to continue to work” includes a refusal to work at usual speed or with usual efficiency.”<sup>14</sup>

In the case of *Tram Shipping Corporation V. Greenwich Marine Incorp*<sup>15</sup>. The Lord Denning 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 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”.

From these definitions, it is clear that a strike must satisfy some basic essential elements. One is the element of concerted action, which indicates that it has been planned, arranged, agreed on and settled between parties acting together pursuant to some design or scheme.<sup>16</sup> The emphasis is on acting together and not on pre-planning or prearranging. The parties who resort to strike may come to a common understanding at the time in question without any formal agreement or consultations but nevertheless the concerted action must be collectively combined on the basis of spirit de corps<sup>17</sup> and must be combined together with the community of demands and interest with a view to compel the employer to accede to their demand of wages, bonus, allowances, hours of work, holidays and the likes. The length or duration of the “concerted” action is immaterial.<sup>18</sup>

The second element is the stoppage of work. This is because usually the strike is an instrument of economic coercion that seeks to deprive an “employer” of labour input and, thereby, diminish through loss of production, his earning capacity in the hope that the resulting economic strain would compel him to come round to strikers’ point of view.

The third element is that the purpose of the cessation must be in connection with a dispute involving the terms of employment and physical conditions of work. This means that there must be a dispute between an employer and its workers and the action must be called in contemplation or furtherance of that dispute. There is a relatively broad statutory definition of that dispute. But it is important to bear in mind that it will not cover action in support of disputes any third parties may have with their employees or which are not wholly or mainly about employment-related matters.<sup>19</sup>

<sup>10</sup> What is strike? Definition and meaning in <http://www.businessdictionary.com/definition/strike.html>.

<sup>11</sup> Strike action- Wikipedia, the free encyclopedia on [http://en.wikipedia.org/wiki/strike\\_action](http://en.wikipedia.org/wiki/strike_action).

<sup>12</sup> Oxford Advanced Learners Dictionary, 4<sup>th</sup> Edition.

<sup>13</sup> By Section 47 of the Trade Disputes Act, Cap. 432, Laws of the Federation of Nigeria 1990.

<sup>14</sup> Section 2(q) of the Indian Disputes Act defines it to mean a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are or have been so employed to continue to, work or to accept employment.

<sup>15</sup> (1975) ICR 261. See also *Miles V Wakefield Metropolitan District Council* (1997) 2 All E.R. 1081 where in Strike was defined as a concerted stoppage of work by men, done with a view to improving their wages or conditions of employment or giving employment and physical conditions of work.

<sup>16</sup> See the Indian case of *Shammagar Jute Factory V Their Workmen* (1950) LJ 235 (IT).

<sup>17</sup> This means that the body of persons employed must be shown to be acting in combination, with their psychology directed to particular end, namely, the cessation of work ... and ... that the cessation of work was the direct common object of the body of persons acting in combination.

<sup>18</sup> See generally *Srivastava S.C. Industrial Relations and Labour Laws* (2009) Vikas Publishing House PVT Ltd. Jangpura, New Delhi, India.

<sup>19</sup> So a broader “political” reason for industrial action will not normally be a trade dispute).

At this point, it becomes important to clearly distinguish between a strike and an industrial action. While it is true to say that every strike is an industrial action, it is not every industrial action that is or will be a strike. There are other ways by which workers may draw attention to their plight, which is other forms of protest, other than by a concerted stoppage of work.<sup>20</sup> In fact, in some cases workers may find it more expedient to resort to these other methods of industrial action to exert pressure on the employer while at the same time avoiding the consequences flowing from their contracts being broken which a strike inevitably involves.<sup>21</sup>

### **1.2 Nature of the Right**

The actions that constitute strike, by the relevant provisions of the law, are “cessation of work” and “concerted refusal” to continue to work. These two components of strike are further defined in the laws. “Cessation of work” includes deliberately working at less than usual speed or with less than usual efficiency, while “refusal to continue to work” includes a refusal to work at the usual speed, or with usual efficiency.<sup>22</sup> Basically the legality to the exercise of the right derives from legislations, international conventions or collective agreements.

This right springs from the right to freedom of association and collective bargaining. So it can be seen as a right arising from a failure of collective bargaining, as it is used by trade unions as a weapon of last resort, to drive home their demands from the employer.

The conditional interest of the union and their members is to win wages and other concessions from the employer through collective bargaining. But where the employer fails to agree or refuses to implement the terms of an agreement, the union will be left with the weapon of industrial action as an alternative. So it is an instrument used by the unions either to achieve an agreement or to force the employer to implement an agreement earlier signed through negotiations<sup>23</sup>.

### **1.3 The Right to Strike and International Labour Organization**

There is no clear guarantee of the right to strike in the ILO Constitution or any of its Conventions or Recommendations<sup>24</sup>. However, it has recognized the importance of the concept of the right to strike and its organs have had numerous occasions to take a position on the subject<sup>25</sup>. They have built up a body of principles recognizing that the right to strike constitutes an intrinsic corollary to the right to organize and a fundamental right of the workers and their organization to collectively bargain. The ILO through the decisions of its supervisory bodies, especially those of the Committee on Freedom of Association (CFA), and the Committee of Experts on the Applications of Conventions and Recommendations (CEACR) has held that the right to strike is one of the essential means available to workers and their organizations for the promotion of their economic and social interest<sup>26</sup>. The jurisprudence of the Committee on Freedom of Association shows an explicit wish for a right to strike to be acknowledged in the ILO Conventions and/or Recommendations. As early as 1952, the Committee declared strike actions to be a right and laid down the basic principles underlying this right. It also made it clear that the right to strike is a right which workers and their organizations are entitled to enjoy.

<sup>20</sup> Examples of these other forms include work to rule or go slow, or ban on overtime whether the overtime is voluntary or compulsory or situations where workers are encouraged to ‘work to contract’ by withdrawing their enthusiasm and cooperation.

<sup>21</sup> In taking industrial action short of a strike, workers remain at work and get paid which is not so with strikes- where the rule of ‘no work, no pay’ may be implemented as provided by Section 42 of the Trade Disputes Act Cap. 432, Laws of the Federation of Nigeria, 1990.

<sup>22</sup> Section 48(1) of the Trade Dispute Act, Cap. T8, Laws of the Federation of Nigeria, 2004.

<sup>23</sup> V.C.Okene, *Collective Bargaining, Strikes and the Quest for Industrial Peace in Nigeria*, Nigerian Journal of Labour Law and Industrial Relations, vol. 2 (2008).

<sup>24</sup> Freedom of Association is stated in the ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize 1948, and Convention No. 98 on the Application of the Principles of the Right to Organize and to Bargain Collectively, 1949 are seen as the fundamental conventions regarding human rights but they do not have explicit provisions on the right to strike.

<sup>25</sup> In fact in the year 2000 there was a suggestion made by the International Trade Union Rights (ICTUR), that it was time to revise and modernize the content of the ILO Conventions, with the aim of clarifying the workers’ rights, including the right to strike. See Novit, *the right to strike*, pg. 122.

<sup>26</sup> ILO Freedom of Association Digest of Decisions and Principles of the Freedom of Association Committee Fifth (Revised) Edition.

The Committee reduced the number of categories of workers who may be deprived of the right to strike, as well as, the legal restrictions on its exercise, which should not be excessive. It linked the exercise of the right to strike to the objective of promoting and defending the economic and social interests of workers.<sup>27</sup> The development on the principle that the right to strike is a vital element of freedom of association can be explained through other international instruments such as the European Social Charter. The right to strike is stated in Article 6 of the Charter, and also in Article 8 of the International Covenant on Economic and Social Rights of Workers.<sup>28</sup>

#### **1.4 The Right to Strike in Nigeria**

A discussion on the right to strike in Nigeria necessarily starts from the position under the common law. This is because of the historical antecedent of the developments in Nigeria<sup>29</sup>. At common law a worker is under a duty to serve his master or employer honestly and faithfully, and to obey all responsible and lawful orders that may be given in the course of his employment. It seems to be fairly clear that at common law a strike amounts to a breach of the contract of employment by those involved. This point was made by Donovan L.J. in *Rookes v. Barnard*<sup>30</sup> when he said that ‘there can be few strikes which do not involve a breach of contract by the strikers’.

This was re-iterated by Cartwright J. in *Canadian Pacific Railway Company v. Zambin*<sup>31</sup> when he said ‘put simply, so far as an employee is concerned, if he refuses to work he is in breach of the contract’.

The question as to whether an employee has a fundamental right to strike has been the object of serious debate in the industrial relations cycle and also in academic discourse. It is also a point on which judicial opinions have continually been expressed<sup>32</sup>. There is no doubt that workers throughout the world are alike in the sense that they desire recognition, satisfaction, fair wages and salaries, job security, redress of wrongs and good working conditions. But often the employer and the union (representing workers) find themselves in sharp disagreement. Such frictions or disagreements give rise to trade disputes and strikes. The law seeks to regulate these conflicts by imposing limits on the lawful nature of the conduct of disputes. Where however industrial action occurs, the individual contract of employment becomes affected. This is so because a contract of employment is one for the provision of services. Consequently, the unilateral and unauthorized stoppage of such service, which a strike necessarily entails, constitutes a breach of contract on the part of the employee under the common law.

Again, it can be argued that every strike is in the nature of war, which necessarily entails that gain on one side implies loss on the other, and so to say that it is lawful to combine to protect this common interest but unlawful to injure the antagonist is taking away with one hand a right given with the other hand. The question therefore arises as to whether there is in fact and in law a right to strike under the common law rules.

Some countries have made the right a constitutional right, while some do not recognize any such rights or freedom in the same way that they recognize freedom of assembly. Whichever is the case, it may not be an exaggeration to say that except the “very insignificant lunatic fringe”<sup>33</sup> outside the vast majority of the citizenry, no – one can seriously argue that all strikes are illegal or unlawful.

In Nigeria, the position at the beginning was that of unequivocal acceptance of the existence of a right to strike. Nigerian trade unions, unlike their British predecessors, enjoyed the Colonial administration’s encouragement and statutory protection from the very beginning.<sup>34</sup> And in response to lack of proper negotiating machinery, especially in the immediate post Second World War years, workers were frequently on strike<sup>35</sup>. It can correctly be said that until the emergence of the military regime, the right to strike was not, save in the case of workers employed in essential services, statutorily regulated in any way.

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<sup>27</sup> *ibid*

<sup>28</sup> See generally The ILO on the Right to Strike on [www.jurisdiction.su.se/juruppa+ser/2011\\_sandra\\_tenggrau.pdf](http://www.jurisdiction.su.se/juruppa+ser/2011_sandra_tenggrau.pdf) visited on 05/17/14.

<sup>29</sup> This because of Nigeria’s colonial experience, which started around 1861 until independence in 1960.

<sup>30</sup> (1963) 1 QB. 623

<sup>31</sup> (1968) SCR 609

<sup>32</sup> See generally L. MacFarlane, *The Right to Strike* London, Penguin Books (1981).

<sup>33</sup> The expression is borrowed from Kahn – Freund & Happle, *Law of Strikes* (1972) quoted in Davies & Freedland, *Labour Law, Text and Materials* at pg. 591.

<sup>34</sup> See S.4. Trade Unions Act of 1939.

<sup>35</sup> See A.A.Adegun, *Strikes – The Law and the Institutionalization of Labour Protest in Nigeria*, *Indian Journal of Industrial Relations* Vol. 16, No. 1, 1980.

In fact, the word “strike” up to then did not have any statutory meaning ascribed to it. As established above, operating under the rules of the common law, will mean that although mere withdrawal of labour did not amount to a statutory offence, strikers may, however, by their activities, offend against some provisions of Criminal Code<sup>36</sup>, by way of criminal conspiracy<sup>37</sup>. It may also create an action in torts against the strikers, as in the torts of conspiracy<sup>38</sup>, inducing breach of contract<sup>39</sup> or intimidation<sup>40</sup>.

But the occasions when the legality of strike actions has been tested against the network of these legal rules are so few and far between that it can be said that they are peripheral to the practice of labour relations law in Nigeria. It is rare to find employers or other workers suing workers, trade unions and their officials alleging liability for the economic torts of conspiracy, inducing breach of contract and/or intimidation.

The first trade union statute in Nigeria was enacted in 1938<sup>41</sup> and was in all material aspects, in pari materia with the 1891 English Act. Before the 1938 Ordinance, trade union activities, if there were any, were not affected in any significant manner by the law. Indeed, the first semblance of a union had and pursued as its main object the promotion of "the welfare and interest of the native members of the civil service."<sup>42</sup> Uvioghara<sup>43</sup> records that it was not until 1931 that the first two trade unions, properly so called,<sup>44</sup> were formed, and that with the outbreak of the second world war trade unionism received a greater impetus in both membership and activities.

The earliest Union organized strike in Nigeria is recorded to have taken place on January 9, 1920 when the Nigerian Mechanics Union of the Nigerian Railway stopped work to back their demand for war bonus due to an acute rise in the cost of living arising from the effect of the First World War (1914-1918). For the same reason, carpenters in the Public Works Department joined the strike on January 13 and it spread in pockets to such towns as Ibadan, Kaduna, Zaria, Offa and Benin City. The strike was brought to an end on January 19, 1920 through the mediation of Prince Eshugbaye Eleko then Oba of Lagos.<sup>45</sup>

By far the first most significant strike in the Nigerian Labour history in terms of coverage and effect is the General strike of 1945. The first general strike of 1945 was led by Michael Imoudu. The same economic crisis of the second world war resulted to a lot of militancy among the unions especially the blue-collar workers. This militancy of workers, especially that adopted by the railway workers union led to a successful general strike in 1945. Shortly after this general strike (may be because of its success) there were a rapid spread of union activities which equally led to further spread and growth of unions and of course strikes.<sup>46</sup> One writer<sup>47</sup> comments that no dispute has so shaken the foundations of the Nigerian nation as this tremendous incident which began throughout the nation at midnight of June 21st, 1945.<sup>48</sup> The immediate cause of the strike was the un-willingness of the government to honour its pledges. Government had in 1942 supplemented the wages and salaries of its workers with the grant of Cost of Living Allowance<sup>49</sup> and in making the grant, had promised to review the allowance according to trends in the cost of living index. This undertaking was given by Sir Bernard Bourdillon, generally celebrated as a shrewd diplomat, having a disposition and temperament that earned him the respect and admiration of all. He retired as Governor of Nigeria in 1943 and was replaced by Sir Arthur Frederick Richard, the exact opposite of Sir Bernard. Richard viewed every desire for improvement and reform as unnecessary agitation which must be crushed at all costs.

<sup>36</sup> Sections 366, 422 and 516 – 518 of the Code.

<sup>37</sup> As in *R v. Bunn* (1872) 12 Cox 316 where it was held that it amount to criminal conspiracy at common law to coerce or molest the employer in the conduct of his trade or business.

<sup>38</sup> *Quinn v. Leatham* (1901) AC 495.

<sup>39</sup> *Lunley v. Gye* (1953) 118 E.R. 749

<sup>40</sup> *Rookes v. Barnard* (supra).

<sup>41</sup> Trade Union Ordinance 1938

<sup>42</sup> The Southern Nigerian Civil Service Union formed in 1912

<sup>43</sup> loc. cit. p.3

<sup>44</sup> Railway workers Union and Nigerian Union of Teachers

<sup>45</sup> See further Tokunbch, M.A. • Labour Movement in Nigeria: Past and present (1985) p.22

<sup>46</sup> Strike problems in Nigeria- Articles NG. at <http://articlesng.com/strike-problems-nigeria> visited on the 15th May, 2014.

<sup>47</sup> Anaba Wogu: Trade union Movement in Nigeria (1969) p.44 et seq

<sup>48</sup> Note that the writer's opinion is valid only as at 1969 and could not have contemplated the 1994 General strike of the NLC and NUPENG which. in terms of economic loss and duration makes the 1945 strike pale in significance.

<sup>49</sup> Fundly daubed COLA

The cost of living index having risen sharply to 174 by October 1943, there was clearly a need for a review of the COLA as promised by Sir. Bernard but the Government of Sir Arthur Richard refused to make the review.

All these go to show that the Nigerian worker enjoyed his right to strike without any serious restriction or consequences under the colonial government. Until late sixties no-one had seriously contended that there was no right to strike in Nigeria. Statutory restrictions began in Nigeria in 1968<sup>50</sup> in the heat of civil war. By the promulgation of the Trade Disputes (Emergency Provisions) Act<sup>51</sup>, the government placed an outright ban on strikes. The following year, the government reinforced the earlier Act by promulgating the Trade Disputes (Emergency Provisions) (Amendment No2) Act of 1969, as a result of the unbridled wave of strikes after the Act of 1968. Presently, the law relating to strikes is to be found in the Trade Disputes Act 1976 as amended.<sup>52</sup> The provisions of that Act have called to question, whether a right to strike exists in Nigeria today<sup>53</sup>. The Act<sup>54</sup> bans strikes or lock outs all together unless, and until the laid down procedures have been exhausted. So the question is not whether there is a right to strike or not in Nigeria, what ought to be the primary consideration in every strike action organized in Nigeria today, should be whether the strike action has been exercised within the prescribed procedure, which makes it lawful or otherwise. Therein lays the legality or the illegality of a strike action.

### **1.5 Lawful Industrial Action**

By lawful industrial strike it is meant that the strikers that will enjoy the protection of the state during the conduct of the strike. This protection in Nigeria, as explained above, stems from the immunities granted to workers and trade unions against civil and criminal liabilities for engaging in the industrial actions. To enjoy these immunities, the trade union or workers must meet certain statutory conditions when organizing the industrial action<sup>55</sup>. The Act<sup>56</sup> provides that an employer shall not declare or take part in a lock out and a worker shall not take part in a strike in connection with any trade dispute unless;

- a) The procedure specified in S. 4 or 6 of this Act has been complied with in relation to the dispute; or
- b) A conciliator has been appointed under S. 8 of this Act for the purpose of effecting a settlement of the dispute;  
or
- c) The dispute has been referred for settlement to the Industrial Arbitration Panel under S,9 of this Act; or
- d) An award by an arbitration tribunal has become binding under S. 13(3) of this Act; or
- e) The dispute has subsequently been referred to the NIC under S. 14(1) or S.17 of this Act; or
- f) The NIC has issued an award on the reference.

The Act then makes it a crime for any worker or employee to engage in a strike action in connection with a trade dispute without first exhausting the procedures listed above.

By these provisions, the Act has severely circumscribed the workers' right to strike and introduced both voluntary and compulsory settlement of disputes. Before workers can go on strike in Nigeria, they are required to have fully exhausted the elaborate statutory procedure for settlement of trade disputes. This procedure starts by the parties attempting a voluntary settlement of their dispute themselves<sup>57</sup>, if no settlement procedure exists or if an attempt at settlement fails, then the parties are to appoint a mediator to look into the dispute with a view to the amicable settlement of the dispute<sup>58</sup>.

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<sup>50</sup> E.E.Uvieghara, Labour Law in Nigeria, Malthouse Law Books, (2001) pg. 390.

<sup>51</sup> No. 21 of 1968.

<sup>52</sup> By the Trade Disputes (Essential Services) Act No. 23 of 1976, and Trade Disputes (Amendment) Act No. 57, of 1977.

<sup>53</sup> There is nothing in the records to show that Nigerian workers consider themselves inhibited by any law in Nigeria against their right to strike and the attitude of the authorities tend to support this stance.

<sup>54</sup> In Section 13.

<sup>55</sup> Every right comes with its own duties. Most powerful rights have more duties attached to them. Today, in each country of the globe, whether it is democratic, capitalist, or socialist, give right to strike to workers. But this right must be used as a weapon of last resort, because, if the right is misused, it will create a problem in the production and financial profit of the industries, which will ultimately affect the economy of the country. It is for these reasons that the state attaches conditions to the exercise of this right.

<sup>56</sup> Section 18.

<sup>57</sup> Section 3 (1).

<sup>58</sup> Section 3 (2).

Where mediation fails, the dispute is to be reported to the Minister of Labour within fourteen days of such failure<sup>59</sup>. The Minister may then appoint a conciliator<sup>60</sup> and if unsuccessful, refer the dispute to the Industrial Arbitration Panel<sup>61</sup>.

To give force to these provisions, the Act<sup>62</sup> further prevents workers from going on strike and employers from imposing a lock out while negotiations or arbitral proceedings are in progress; neither can any industrial action be taken or initiated after the tribunal<sup>63</sup> might have finally determined the issue(s) in controversy<sup>64</sup>. Nigerian workers cannot therefore go on a legal strike unless these conditions stipulated by law are adhered to. Some writers on these provisions have argued that workers in Nigeria have lost their right to strike. Emiola for instance, argues that the legal position is that at no point and under no circumstances can workers or employers employ strikes or lock outs as weapon of coercion against the opponent. The result according to him is that the Nigerian worker has apparently lost his right to strike.<sup>65</sup>

This becomes more apparent if seen from the background of the fact that by the relevant provisions of the Act, where the award of the panel is not acceptable to the parties, the last point of call is the National Industrial Court<sup>66</sup> and the law provides that the decision of the National Industrial Court is final and not subject to an appeal. Also that any rejection of the court's award is to be treated as a fresh dispute.

The Act provides thus;

“It is hereby declared that where a dispute is settled under foregoing provisions of this Act either by agreement or by the acceptance of an award made by an arbitration tribunal under S. 13 of this Act, that dispute shall be deemed for the purposes of this Act to have ended; and accordingly any further trade dispute involving the same matters (including a trade dispute as to the interpretation of an award made aforesaid by which the original dispute was settled) shall be treated for the purposes for this section as a different dispute.”

By the above provisions, if at the end of the processes, workers are dissatisfied with the award of the National Industrial Court, then by virtue of the said provision, the parties must go through the whole process of dispute settlement again because by the relevant provisions of the Act any disagreement at that stage constitute a new dispute. And if settlement fails again, the dispute, presumably goes for another round of settlement and so on. This may just end up creating a vicious circle which may be detrimental to the interest of the employee, who will be forced to remain with his problems. While taking a critical look at these provisions Agomo was very doubtful if it will ever be possible to organize a lawful strike in Nigeria. According to the learned Professor the provisions can only lead to the conclusion that there can never be a lawful exercise of any right to strike in Nigeria as long as these provisions remain in our Act<sup>67</sup>.

The Trade Unions (Amendment) Act, 2005 is another important legislation that recognizes the right to strike of a Nigerian worker and steaming from the provisions contained in other relevant laws in Nigerian industrial relations, this Act provides;

“No person, trade union or employee shall take part in a strike or lockout or engage in any conduct in contemplation or furtherance of a strike or lockout unless;

- a) The person, trade union or employee is not engaged in the provision of essential services;
- b) The strike or lockout concerns a labour dispute that constitute a right;

<sup>59</sup> Section 4 (1).

<sup>60</sup> Section 7.

<sup>61</sup> Section 8.

<sup>62</sup> In Section 17

<sup>63</sup> This refers to the Industrial Arbitration Panel and the National Industrial Court.

<sup>64</sup> Contravention of these provisions is punished by a fine of N100 or to imprisonment for six months in case of an individual  
<sup>65</sup> Adeogun, supra note 24, p. 6 has similarly suggested that Section 17 has in effect placed an outright ban on strikes in Nigeria. Uvieghara, supra note 35, p. 7 and C.K.Agomo, Federal Republic of Nigeria, in R.Blanpain (ed.), International Encyclopedia of Labour Law and Industrial Relations (2000), para. 270 also lean in favour of this interpretation. The same opinion was expressed by J.A.M. Audi in her Strikes and the Law in Nigeria, Ahmadu Bello University Law Journal Vol. 9 (1991-1992), p. 84.

<sup>66</sup> Section 10.

<sup>67</sup> C. Agomo, Nigerian Employment and Labour Relations; Law and Practice, 2011 Concept Publications Ltd. Pg 297

- c) The strike or lockout concerns a dispute arising from a collective and fundamental breach on the part of the employee, trade union or employer;
- d) The provisions for arbitration in the Trade Dispute Act Cap. 432, Laws of the Federation of Nigeria, 1990 have first been complied with;
- e) In the case of an employee or trade union, a ballot has been conducted in accordance with the rules and constitution of the trade union at which a simple majority of all registered members voted to go on strike.

By the above provisions it has become a requirement of the law that every registered trade union must have a provision in its rule book<sup>68</sup> to the effect that no strike shall take place unless a majority of the members have in a secret ballot voted in favour of the strike. U.J. Umoh<sup>69</sup>, pointed out how difficult it will be to organize a strike action in the face of this provision. He wrote;

“Since virtually every company has branches all over the country, so also are union members scattered in the various states. It is doubtful whether any company will give all its employees time off to assemble at one place for the purpose of voting by secret ballot to embark on a strike action. The alternative is to post ballot papers to various branches of the union for secret voting. But how efficient is our postal system. By the time the ballot papers are returned to the headquarters of the union the purpose for which the strike was to be organized may have been overtaken by events.”

The union organizing the industrial action must also ensure that the employer receives a written notice from the union which;

- i) Reaches the employer after the union has taken steps to notify the employer of the result of the industrial action ballot, but not less than 7 days before the day or the first of the days specified in the notice;
- ii) Specifies whether the union intends the industrial action to be “continuous” or “discontinuous”. The notice must also to give the date on which any of the affected employees will be called on to begin the action

It is important to note that a different procedure applies to workers in “essential services” because their activities are said to be very important to the community such that their disruption will have particularly harmful consequences to the community generally. Defining essential services the Act<sup>70</sup> provides that “*essential service*” signifies;

- (a) the public service of the Federation or of a State which shall for the purposes of this Act include service, in a civil capacity, of persons employed in the armed forces of the Federation or any part thereof and also, of persons employed in an industry or undertaking (corporate or unincorporated) which deals or is connected with the manufacture or production of materials for use in the armed forces of the Federation or any part thereof;
- (b) any service established, provided or maintained by the Government of the Federation or of a State, by a local government council or any municipal or statutory, or by private enterprise – (i) for, or in connection with, the supply of electricity, power or water, or fuel of any kind, (ii) for, or in connection with, sound broadcasting or postal, telegraphic, cable, wireless or telephonic communications, (iii) for maintaining ports, harbours, docks or aerodromes, or for, or in connection with, transportation of persons, goods or livestock by road, rail, sea, river or air, (iv) for, or in connection with, the burial of the dead, hospitals, the treatment of the sick, the prevention of disease, or any of the following public health matters, namely, sanitation, road-cleansing and the disposal of night-soil and rubbish, (v) for dealing with outbreaks of fire;
- (c) Service in any capacity in any of the following organizations – (i) the Central Bank of Nigeria, (ii) the Nigeria Security Printing and Minting Company Limited, (iii) any corporate body licensed to carry on banking business under the Banking Act. Furthermore, the Teaching (Essential Services) Decree 1993 which came into existence sequel to the trade dispute between the Academic Staff Union of Nigerian Universities (ASUU) and the federal government added teaching to the list of essential services.

As can be seen, the list of essential services comprises a whole gamut of services that could legitimately come under the law.

<sup>68</sup> Section 4 of the Trade Unions (Amendment) Act, 1978.

<sup>69</sup> A labour correspondent of the Daily Times.

<sup>70</sup> Section 9(1) Trade Dispute Act

For workers in this very wide definition of essential services the procedure is to make a direct reference to the Industrial Arbitration Panel<sup>71</sup> and finally to the National Industrial Court. The Head of State is then given the power to proscribe any trade union or association, any of whose members are employed in any essential service and is or has been engaged in acts calculated to disrupt the economy or act calculated to obstruct the smooth running of any essential service<sup>72</sup>.

All these make the right to strike in Nigeria to be only a theoretical possibility. In practical terms, it is difficult to see how trade unions could cross all the ingenious and well calculated obstacles placed in their way before embarking on strike actions.

### **1.6 Effectiveness of the Restrictions**

Despite all these provisions there have been strikes in Nigeria. Not a single day passes without the news of a strike action or an impending one somewhere in Nigeria, either in the public sector or in a private sector. Almost every sector of the economy, whether public or private, essential service or non-essential service, has witnessed one form of industrial action or another. This trend lends support to the view, that restriction or not, “Nigerian workers have made ample use of this freedom to strike”.<sup>73</sup>

Records show that within the first five years at least forty percent of the disputes declared in each year involved strike action. 1964 witnessed several strike actions. In that year alone, seventy- three percent of the declared disputes involved strike actions which included a general strike over the Morgan Commission on the review of wages.<sup>74</sup> In the period following war time restrictions, strikes still occurred. In 1969, in an instance, Central Bank workers defied the government’s order and stayed out on strike.<sup>75</sup> The period between 1974 to 1975 saw a total number of three hundred and fifty four (354) strikes, and about one hundred and fifty (150) of them were in the industries alone, following the Public Service Review Commission (Udoji Commission). Some of the strikes were resorted to before the disputes were reported as required by law. In fact the figures from official records kept increasing.<sup>76</sup> The conclusion made by Agomo from all the facts is that restrictions are not the necessarily the best recipe for industrial peace.<sup>77</sup>

### **1.7 Liability for Exercising the Right to Strike**

#### **1.7.1 Breach of Contract**

Nigerian law appears to follow the orthodox English common law that a strike by an individual worker amount to a fundamental breach of contract of employment leading to dismissal.<sup>78</sup> This means that the stoppage of work can have some serious impact on the contract of employment of the individual employee. In particular, the impact upon pay, time off in lieu, determination of the relationship or even dismissal in extreme cases.<sup>79</sup> In *Anene v J.Allen & CO.Ltd*<sup>80</sup> on the effect of strike on the contract of employment, Brett, JSC said<sup>81</sup>:

<sup>71</sup> This was introduced by the Trade Disputes (Essential Services) Act No. 23 of 1976 because of the delay in setting up the National Industrial Court.

<sup>72</sup> Section 1 (1) of the Trade Disputes (Essential Services) Act No. 23 of 1976.

<sup>73</sup> Adeogun, supra, note 24, pg. 6.

<sup>74</sup> Ibid at pg. 5

<sup>75</sup> Ibid at pg. 7

<sup>76</sup> The records from the Federal Ministry of Labour, if anything, show that the number of strikes have been on the increase since statutory restrictions began.

<sup>77</sup> C. Agomo, *Nigerian Employment and Labour Relations*; Law and Practice, 2011 Concept Publications Ltd. Pg 297.

<sup>78</sup> As in *Simon v Hoover* (1977) 1 ALL E.R. 777, and *National Coal Board v Galley* (1958) 1 WLR 16.

<sup>79</sup> Arabella, Stewart and Markbell, *The Right to Strike: A Comparative Perspective: A Study of national laws in six EU states*; The Institute of Employment Rights. Available on line at

<http://www.ier.org.uk/systems/file/The/Right+to+strike+at+comparative+perspective.pdf>. Accessed on 30/06/2013.

<sup>80</sup> (1975) 5 UILR(Part IV) pg. 404.

<sup>81</sup> *ibid*

Prima facie, a striker intends to return to work once the objects of the strike have been attained and although this may involve a fresh contract of service an intention to repudiate the existing contract is not necessary to be presumed; on the other hand, the whole of the circumstances, including the duration of the strike, may be such as to warrant the employer in treating the striker as having manifested an intention to repudiate. It is therefore impossible to lay down any rule of universal application, and each case must depend on its own fact.<sup>82</sup>

At worst from these decisions it can be said that for that period of strike the employer/employee relationship is suspended. This was the position taken in the by Lord Denning M.R. in the case of *Morgan v. Fry*.<sup>83</sup> These decisions show that employees taking part in a strike are liable to be dismissed for a fundamental breach of the contract of employment. This remain so even where the conditions for which trade union are immuned from liability for industrial action are complied with, such the fact that the action was in contemplation and furtherance of a trade dispute, supported by a ballot, and with proper notice given to the employer. In order words, the contractual liability of the individual striker is such that, despite such immunities, he can be dismissed and can be sued for damages caused by the industrial action.

### **1.7.2 Penal Sanctions**

At common law it was possible to contend as some judges in fact did that a trade union being a combination in restraint of trade was a criminal conspiracy so that if the members went on strike they could be prosecuted accordingly.<sup>84</sup> In *R. v. Bunn*<sup>85</sup> the court held that it amount to criminal conspiracy at common law to coerce or molest the employer in the conduct of his trade or business, notwithstanding that no individual criminal acts were involved. But parliament intervened by the enactment of the Conspiracy and Protection of Property Act in 1875<sup>86</sup> which nullifies the decision in *R. v. Bunn*. The Act became part of our legal system with the enactment of Trade Union Ordinance in 1939 and the amendment of the Criminal Code in 1939.<sup>87</sup> Penal sanctions are still maintained in the Nigerian labour legislations as the Trade Disputes Act<sup>88</sup> provides penalty of a fine of N 1,000 or a six months' imprisonment or to both the fine and imprisonment for participating in a strike.<sup>89</sup>

### **1.8 The Way Forward**

It must be said that there is the need to close these serious gaps in the legislations on the right to strike in Nigeria in order to protect and strengthen the legitimate interests of workers to embark on industrial actions. Democracy requires that the interests of all citizens are adequately protected and safeguarded. So Nigeria must take steps to safeguard a fair and equitable equilibrium of power within the employer/employee relationship to guarantee its democratic efforts. Legislations on the right to strike must be clearly improved upon to give adequate protection to the legitimate interests of Nigerian workers, particularly, in their efforts to effectively bargain for improved terms and conditions of service in their employment relationships. Consequently the following recommendations become necessary for the improvement of the Nigerian laws on industrial relations generally and right to bargain specifically.

To start with, dismissal of employee participating in a strike action is not healthy for an effective and efficient industrial relations and collective right to bargain by the trade unions. It is submitted that this is harsh and patently unfair to regard strike actions by employees as a breach of the contract of employment leading to their dismissal. In actual fact, workers do not see strike as a way of leaving their employment, but merely use it as a weapon to ensure employers meet their legitimate demands. So it will help if the laws in Nigeria can be in tune with the international standard, which clearly protects the workers right to strike. At worst the suspension theory can be recommended as it seems commonly acceptable and reasonable. Dismissing workers for exercising the right to strike ignores the reality that strikes are an accepted incident of the continuing collective bargaining relationship between employer and employee.

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<sup>82</sup> Similar decision was reached in the case of *Federated Motor Industries (Division) of U.A.C. Ltd v. Automobile Boatyard, Transport, Equipment and Allied Workers Union* (1978-79) NICR 152 -169.

<sup>83</sup> (1968) 3 ALL E.R. 152.

<sup>84</sup> *R v. Bykerdike* (1832) 174 E.R. 61 and *Swain v. Wilson* (1890) 24 Q.B.D. 252.

<sup>85</sup> (1872) 12 Cox 316.

<sup>86</sup> Section 3 of the Act.

<sup>87</sup> See generally Adeogun, *Right to Strike: A Legal Status*, pg. 23.

<sup>88</sup> Section 17 (1) of the Trade Disputes Act, Cap. 432 Laws of the Federation of Nigeria 1990.

<sup>89</sup> Section 7 of the Trade Union (Amendment) Act 2005 has increased the fine payable to N 10,000.

The law can be such that for the duration of the legal strike, there would be no obligations on the part of the employee to give his services to the employer and so payment of wages on the part of the employer can be suspended while the strike lasts. Another defect in Nigerian law is that workers lose their right to seniority and are deprived of other benefits such as pension schemes, co-partnership schemes and promotion structures on account of lack of continuity due to industrial action.

In other jurisdictions<sup>90</sup>, protection is given to the individual worker against sanctions for participation in a lawful strike. There is judicial presumption that the strike is not a rescission of the employment relations in the United States of America and employees have a right to participate in “concerted activities” for the purposes of collective bargaining<sup>91</sup>. In Canada, the position is that the act of participation in a lawful strike does not thereby render a worker liable to discharge for misconduct<sup>92</sup>. The right to strike in France is so fundamental such that workers cannot be dismissed on grounds of their participation in a strike<sup>93</sup>. Similar position is contained in the laws of South Africa, where there is a guaranteed right to strike provided by Constitution<sup>94</sup>. In Ghana the right to strike is recognized<sup>95</sup> subject to the giving of seven (7) days notice, which must expire before the strike action is embarked upon<sup>96</sup>. Similar provision is also contained in the laws of Malawi<sup>97</sup> and Kenya.<sup>98</sup> The United Kingdom does not have a Constitution written and there is no positive right to participate in industrial action. However the law does provide certain immunities from liability at common law for the civil wrong of “torts” must frequently committed in the course of taking industrial action.<sup>99</sup>

Again, there is no doubt that workers go on strike because they have real grievances about important issues which affect their well being in the place of work. So it is important to find ways of resolving the problems rather than punishing the workers for pursuing their legitimate demands.

### **1.9 Conclusion**

In conclusion it can be seen that the right to strike is an essential element in the system of free collective bargaining. So Nigeria must provide a positive right to strike both in the collective and individual levels. As it is now Nigerian laws fail to recognize that employees have a positive right to strike, because as observed by the paper above, the conditions precedent to the exercise of the right to strike in Nigeria are virtually impossible to be satisfied. So, providing for a right to strike would be meaningless if too stringent conditions are attached to its exercise, particularly considering the fact that even after satisfying all the conditions workers on strike can still be said to be in breach of their contract and therefore liable to be dismissed. There is the need for Nigeria, as it is in other jurisdictions and also in line with its international obligations, to provide a right to strike regime which will expressly protect lawful strike actions and give it precedence over the performance of contractual and other civil obligations. There has to be a return to a freer, not necessarily completely free, collective bargaining, which can only be guaranteed by a right to strike. Time has come for the right to strike by workers and unions to be plainly recognized by statute. The legal regime in Nigeria must be reformed to ensure that for the duration of a lawful strike, there should be no breach of contract on the part of the employee that will warrant his dismissal, at worst, the suspension theory can be used, such that the main obligations of the contract which involves the willingness to work on the part of the employee and payment of wages on the part of the employer can remain suspended, until when the strike is over. This seems commonly acceptable, being the practice in many other jurisdictions.

It is also very unfair that workers lose their seniority while on strike, and are also denied other benefits, particularly rights in relation to promotion issues, all on account of lack of continuity of employment during the strike period. The laws on essential services also need to be reformed particularly on the definition of essential services, which is apparently too wide, as it is currently under the relevant laws in Nigeria.

<sup>90</sup> See generally Okene, O.V.C., *The Status of the Right to Strike in Nigeria: A Perspective from International and Comparative Law*, 15 RADIC (2007) pg. 54.

<sup>91</sup> Section 7 of the National Labour Relations Act and the case of *N.L.R.B. v. Mackay Radio & Telegraph* 304 U.S. 333 (1938), pg. 345.

<sup>92</sup> H.W. Arthurs, D.D. Carter and H.J. Glasser, *Labour Law and Industrial Relations in Canada* (1981), pg. 215.

<sup>93</sup> Article 521-1-1 Of the Labour Code of France.

<sup>94</sup> The Constitution of South Africa, Act 108 Of 1996, adopted on the 10<sup>th</sup> of May 1996 but came into effect on the 4<sup>th</sup> of February, 1997. The right to strike is entrenched in section 23(c) of the Constitution.

<sup>95</sup> Under the Ghanaian Labour Act of 2003.

<sup>96</sup> Section 160 of the Act. Section 170 absolutely prohibit strike of essential services workers.

<sup>97</sup> Section 48 of the Labour Relations Act, 1996,

<sup>98</sup> Trade Dispute Act, 2003.

<sup>99</sup> The availability of these immunities is subject to a number of restrictions and mandatory rules, which are contained in the Trade Unions and Labour Relations (Consolidation) Act, 1992.