

Human Rights at Work: Measuring the Democratic Rights of Nigerian Workers by International Standards

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“The status of workers’ rights in a country is a bell-weather for the status of human rights in general.”¹

Abstract

In recent years, there has been an upsurge of international attention on the protection of workers’ rights. The growing interest is explained by an increased understanding among states and international organizations that workers rights are also within the vortex of human rights and deserve protection. This paper considers the extent to which Nigerian workers’ enjoy human rights at work. The paper draws on the International Labour Standards established by the International Labour Organization (ILO) to measure the protection of workers’ rights. After briefly reviewing the sources of Nigeria’s obligations to respect workers’ rights, the paper focuses on three key areas, namely membership of trade unions, the promotion of free and voluntary collective bargaining and the right to take industrial action. The paper argues that Nigeria lags far behind internationally accepted standards as there are significant gaps between rhetoric, which stresses the importance of workers’ rights, and practice, which does little to realize it. Consequently, proposals toward reform designed to ensure greater protection for Nigerian workers and to bring Nigerian law and practice in line with minimum international standards are put forward and discussed.

Keywords: Human Rights, Workers Rights, International Standards, Violations, Nigeria.

1. Introductory Remarks

“Man is born free; and yet everywhere he is in chains.”²

One of the issues of overriding concern of current international human rights law is the gap between the formal recognition and the realisation of human rights, the disparity between the promise to “give effect” to treaty provision and the effective implementation of these promises.

The aim of this paper is to examine key aspects of workers rights by reference to Nigeria’s international obligations, especially under the ILO Conventions and the principles of freedom of association and to consider the extent to which Nigerian law might be said to be compatible with Nigeria’s obligations in international law. The discussion centers on three key areas, namely membership of trade unions, collective bargaining and the right to strike. The paper finds that Nigerian law remains largely inconsistent with Nigeria’s obligations under international law and does perpetuate and/or exacerbate a number of pre-existing areas of non-compliance.

Overall, this paper argues that to a significant degree Nigerian labour law still unduly restricts workers rights and that radical amendments are needed to enhance workers’ rights in Nigeria. Before going into substantive issues, however, it may be helpful briefly note the sources of Nigeria’s obligations to respect workers’ rights.

2. Nigeria’s Obligations under International Human Rights Law

Nigeria is a member of the international community³ and she is also a party to several international treaties that impose an obligation to respect, protect, and fulfill the human rights. These treaties include the Convention on the Elimination of All Forms of Discrimination Against Women (the “CEDAW”),⁴ the Convention on the Rights of the Child (the “CRC”),⁵ the International Convention on the Elimination of All Forms of Racial Discrimination (the “ICERD”),⁶ the Convention Against Torture and Other Cruel, Inhuman or Degrading

¹ Virginia A. Leary, “The Paradox of Workers Rights as Human Rights”, in L.A. Compa and S.F. Diamond (eds), *Human Rights, Labour Rights, and International Trade* (Philadelphia: University of Philadelphia Press, 1996), p.2.

² Jean Jacques Rousseau, *The Social Contract*, London, Penguin Classics (1762), p.1.

³ Nigeria joined the United Nations Organisation (UNO) on 7 October 1960, a week after she attained independence. Nigeria is also a member of a dozen or more inter-governmental organisations of a specialised nature related to the UNO, such as the International Labour Organisation (ILO), the World Health Organization, etc.

⁴ Ratified July 13, 1985.

⁵ Ratified April 19, 1991

⁶ Ratified January 4, 1969.

Treatment or Punishment (the “CAT”)¹, the International Covenant on Civil and Political Rights (the “ICCPR”),² and the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”).³ Nigeria is also a member of the ILO⁴ and has ratified both the ILO Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention 1949 (No. 98).⁵ These treaties impose on Nigeria the obligation to deter and prevent violations of those rights, and to investigate, prosecute, and remedy their abuses.⁶

The duty to investigate and punish also derives from the right to a legal remedy that these treaties extend to victims of human rights violations. Under international law, governments have an obligation to provide victims of human rights abuses with an effective remedy—including justice, truth, and adequate reparations—after they suffer a violation. Under the International Covenant on Civil and Political Rights (ICCPR), for example, governments have an obligation “to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.”⁷ The ICCPR imposes on states the duty to ensure that any person shall have their right to an effective remedy “determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.”⁸

At the regional level, the African Charter on Human and Peoples’ Rights (“the African Charter”) states that every individual shall have the right to liberty and to the security of his person and as such no one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.⁹ Furthermore, every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.¹⁰

There are also specific obligations on states to prevent and punish torture and disappearances. Thus the African Charter provides that “every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status, and that all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”¹¹

It is significant to note that the African Charter has not only been ratified by Nigeria but has also been

¹ Ratified July 28, 2001.

² Ratified October 29, 1993.

³ *Ibid.*

⁴ See ILO: Alphabetical List of ILO member Countries, available at <http://www.ilo.org/public/english/standards/re/m/country.htm> (last visited 4 March 2015). The ILO was founded in 1919 at the Paris Peace Conference to abolish “injustice, hardship and privation” suffered by workers and to guarantee fair and humane conditions of labour. See ILO Constitution, Preamble and Annex, at <http://www.ilo.org/public/English/about/iloconst.htm> (last visited 4 October 2007).

⁵ Both Conventions were ratified on 17 October 1960. See ILO, List of Ratifications of International Labour Conventions, at <http://webfusion/ilo/org/public/db/standards/normes/applappl-byCtry.cfm/lang=EN&CTYCHOICE=2020> (last visited 2 March 2015). See also: *Official Bulletin of the ILO*, vol.XLIII (No.7) of 1960, p.524.

⁶ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of international Human Rights Law and Serious Violations of International Humanitarian Law, March 21, 2006, adopted by the 60th session of the United Nations General Assembly, A/RES/60/147, paras. 11 (c) and 24. Para. 11: “Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law: (c) Access to relevant information concerning violations and reparation mechanisms.” Para. 24: “States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.”

⁷ ICCPR, art. 2(3)(a).

⁸ ICCPR, art. 2 (3)(b). See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of international Human Rights Law and Serious Violations of International Humanitarian Law, March 21, 2006, adopted by the 60th session of the United Nations General Assembly, A/RES/60/147, principle II.3.(d). “The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: (d) Provide effective remedies to victims, including reparation, as described below.”

⁹ Article 6 of the African Charter.

¹⁰ Article 7, *Ibid.*

¹¹ Article 5, *Ibid.*

incorporated into Nigerian municipal law. The Charter was ratified by Nigeria on 19 January 1981,¹ and was incorporated into Nigerian domestic law on 17 March 1983 as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983² ("the African Charter Act"). The preamble to the African Charter Act proclaims that it is "necessary and expedient to make legislative provisions for the enforcement in Nigeria of the African Charter by way of an Act of the National Assembly."³ The African Charter Act has not been repealed and is deemed to be an existing law enacted by the National Assembly, the Federal legislative organ of Nigeria.⁴ The domesticating provision of the African Charter Act states as follows:

"As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive and judicial powers in Nigeria."⁵

This provision speaks for itself; it demonstrates Nigeria's commitment to be bound by the letter and spirit of the African Charter. Perhaps more importantly, it also means that the African Charter has the status of domestic law in Nigeria and can actually be invoked before a court of law in Nigeria against any breach of the rights and freedoms guaranteed by the African Charter. In *Communication 115/96 SERAC v. Nigeria*,⁶ for example, the African Commission held Nigeria to be in breach of its regional-international obligations under the provisions of the African Charter relating to right to satisfactory environment⁷ stating that, since Nigeria has incorporated the African Charter into her domestic law, all rights contained therein can be invoked in Nigerian courts including those violations alleged by the complainants.⁸

Nigeria is therefore under an obligation to respect, protect and fulfil the rights guaranteed both under these international legal instruments and the African Charter in accordance with the principle of *pacta sunt servanda*, which states that, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".⁹ Moreover, a party may not invoke the provisions of internal law as a justification for its failure to perform a treaty.¹⁰ We shall now proceed to examine the three key areas of workers rights in Nigeria.

3. THE RIGHT TO MEMBERSHIP OF TRADE UNIONS

A major reform introduced by the Trade Union (Amendment) Act 2005 is the democratisation of trade union membership. Prior the reform, trade union membership was virtually compulsory. Workers who worked in particular establishments were more or less conscripted to join the available unions in those establishments. Section 2 of the Act provides that, "Notwithstanding anything to the contrary in this Act, membership of a trade union by employee is voluntary and no employee shall be forced join any trade union or be victimised for refusing to join as member."¹¹

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

¹See Article 26 of the Vienna Convention on the Law of Treaties (VCLT) 8I.L.M.679, which incorporates the time-honoured principle in international law of *pacta sunt servanda* bona fide into the Charter.

²See Cap. 10 Laws of the Federation of Nigeria, 1990.

³See the Second Preamble paragraph to the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983.

⁴Section 315 (1) (a) of the 1999 Constitution of Nigeria provides that: "Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be – (a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws."

⁵See Section 1.

⁶Decided at the 30th Ordinary Session, Banjul, The Gambia, 13-27 Oct. 2001.

⁷See Articles 24 and 16.

⁸*Garba v. Attorney-General of Lagos State* Suit No. ID559M/90 (unreported). See also *Oshivire v. British Caledonian Airways Ltd* (1990) 7 NWLR (Part 163) 507, 519-520; *Abacha v. Fawehinmi* (2000) 6 NWLR (Part 660) 228 (SC); *Ogugua v. The State* (1994) 9 N.W.L.R. (Part 366)1, 26-27.

⁹Article 26 of the Vienna Convention on the Law of Treaties, entered into force on 27 January, 1980 <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> (15 January 2009).

¹⁰*Ibid*, Article 27.

¹¹Section 2 Trade Union (Amendment) Act 2005.

See generally, W. Gould, "Solidarity Forever – Or Hardly Ever; Union Discipline, Taft-Hartley, and the Right of Union Members to Resign," 66 *Cornell Law Review* (1980), pp.74-98.

society.¹ More importantly, the new reform has also removed the restriction on freedom of choice arising from the stipulation in the Trade Unions Act² that no trade union could be registered to represent employees where a trade union already existed.

The new reform is certainly an improvement. However, it is not adequate because it fails to address the issue of restrictions on the number of persons required to form a union. Where the minimum number of persons required for the registration of a functional trade union is pegged too high, workers' freedom of association will be impaired. In this regard, the ILO seems to support a minimum of twenty workers for the formation of a trade union.³ Whereas 50 members are required to form a trade union of workers, only two persons are required to form a trade union of employers.⁴ The law is obviously discriminatory in the treatment of the two parties to the industrial relationship, i.e. employers and workers. This requirement would appear to unduly restrain workers, and is in conflict with ILO Convention No. 87.⁵ The failure to relax the membership requirement may not be unconnected with the argument put forward by the Tripartite Committee on the Reform of Nigerian labour law that, for Nigeria, compliance with the ILO requirements on minimum membership is not viable.⁶ The argument is that the low threshold and the formal requirements for registration would lead to the proliferation of trade unions and undermine the solidarity of trade unions and employers' associations in Nigeria. It would permit, if not encourage, the formation of trade unions and employers' associations on ethnic, religious, regional and factional lines, which could feed into the regional and factional rivalries that characterise Nigerian politics.⁷ However, the argument to sustain the high threshold for membership of trade unions in Nigeria does not appear to be a justifiable reason to deviate from the requirements of international labour standards. We must not always allow ethnic and religious sentiments to dissuade us from what is proper and necessary in a democratic society. If Nigeria is to make progress as a democratic nation it must be prepared to adopt international standards and allow freedom of association to survive. Ethnic and religious differences exist in many countries, yet elsewhere that has not been an excuse for not comply with International standards. For example, in Ghana - which is close to Nigeria in more ways than one - a minimum of two persons are required to form a trade union.⁸ The ILO has in fact held that "the establishment of a trade union may be considerably hindered, or even rendered impossible, where legislation fixes... too high a figure, as is the case, for example where legislation requires...at least 50 founder members."⁹ Besides, if the competent authority has the discretionary power to refuse registration of a trade union on account of the 50-member requirement, this can in practice amount to a system of previous authorisation, contrary to the principles of Convention No.87. Article 2 of Convention 87 provides that workers, "without distinction whatsoever shall have the right to establish, and subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorization."

Furthermore, the ILO Committee on Freedom of Association believes that while it is generally to the advantage of workers and employers to avoid the proliferation of competing organisations, a monopoly situation imposed by law is at variance with the principle of free choice of workers' and employers' organisations.¹⁰ As the Committee explains:

"While fully appreciating the desire of any government to promote a strong trade union movement by avoiding the defects resulting from an undue multiplicity of small and competing trade unions, whose independence may be endangered by their weakness, the Committee has drawn attention to the fact that it is more desirable in such cases for a government to seek to encourage trade unions to join together voluntarily to form a strong and united organization than to impose upon them by legislation a compulsory

¹ See *Osawe v Registrar of Trade Unions* (1985) 1 NWLR (pt.775). The point was also emphasized that the amendment was necessary because the principal Act is undemocratic, having been enacted under the military regime, See President Obasanjo's speech, note 7 above

² See Section, 4(2) and 5(4) of the Trade Unions Act 2004.

³ See J. Erstling, *The Right to Organise*, Geneva, International Labour Office (1977), p.3.

⁴ Section 3(1) (a)(b) of the Trade Unions Act 1990.

⁵ Convention No.87 guarantees Freedom of Association and Protection of the Right to Organise. See J. Erstling. *The Right to Organise*, note 15 above, p.3.

⁶ See: Tripartite Committee on the Reform of Nigerian Labour Law: Collective Labour Relations Conceptual Draft <http://www/necang.org/downloads/draftcollective.pdf#search=22collective20relations20act20nigeria> (last accessed 2 March 2015).

⁷ *Ibid*

⁸ Section 80(1) of the Labour Act 2003 (Ghana) provides that "Two or more workers employed in the same undertaking may form a trade union."

⁹ *ILO: Digest of Decisions and Principles of the Freedom of Association Committee*, Geneva: International Labour Office (1985), para 255.

¹⁰ *ILO: Digest of Decisions and Principles of the Freedom of Association Committee*, Geneva, International Labour Office (2006), para 320.

unification which deprives the workers of the free exercise of their right of association and thus runs counter to the principles which are embedded in the international labour Conventions relating to freedom of association.”¹

The high threshold of 50 members for the formation of a trade union is clearly inconsistent with international law. What is more, given the fact that over 80 per cent of enterprises employ less than 50 persons in Nigeria, this provision of the Act is tantamount to industrial disenfranchisement. It is therefore suggested that Nigerian law should be amended to stipulate for a minimum of say two persons for the formation of a trade union. Indeed, the ILO has raised its concern over Nigerian law requirement that 50 workers form a trade union and has reiterated that this number is too high. In a recent report in which it asked to be kept informed of developments, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has requested Nigeria to take the necessary measures to reduce the minimum membership requirement, and thus ensure the right of workers to form organisations of their own choosing.²

4. THE PROMOTION OF COLLECTIVE BARGAINING

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

The ILO Committee on Freedom of Association has ruled that recognition by an employer of the main unions represented in his undertaking, or the most representative of these unions, is the very basis for any procedure for collective bargaining on conditions of employment in the undertaking.³ Where there is no union organisation in an industry, the representatives of the unorganised workers duly elected and authorised by the workers will conduct bargaining on their behalf.⁴

Under Nigerian Labour Law, as in the labour laws of other jurisdictions,⁵ the most important step in the collective bargaining procedure is for the employer or the employers’ association recognise the trade union as a bargaining agent for the employees within the bargaining unit, in relation to terms and conditions of employment.⁶ This is a matter of statutory obligation for employers, provided that a trade union has more than one of its members in the employment of an employer.⁷

However, by virtue of section 5 of the Trade Union (Amendment) Act 2005, all registered trade unions shall constitute an electoral college to elect members who will represent them in negotiations with the employer in collective bargaining. By the same token, for the purposes of representation in tripartite bodies, all the registered federation of trade unions shall constitute an electoral college taking into account the size of each registered federation of trade unions.

This amendment raises a number of concerns. First, the amendment does not prescribe the modalities for constituting an electoral college. This lacuna will have the tendency to encourage favouritism as employers will try to influence the criteria for the assessment of representatives who would be disposed to management during negotiations. This is likely to generate more industrial strife. Secondly, the law does not prescribe the procedure to resolve likely disputes on which union should represent workers in collect bargaining.

In our view, it would have been better for the law to have clearly adopted either the “majoritarian principle” or the principle of the “sufficiently representative union” to avoid possible problems and enhance freedom of association in the work place. The majoritarian principle means that because a trade union enjoys a majority of members in a particular bargaining unit, it automatically assumes the right to bargain on behalf of all those workers who fall within that bargaining unit to the exclusion of all other trade unions. However, all benefits accruing from the negotiations with management are enjoyed by all workers in the unit. This is an accepted practice in international law and is endorsed by the ILO Freedom of Association Committee when it noted thus:

“...the mere fact that the law of a country draws a distinction

¹ *Ibid*, para.319.

² ILO, CEAR, 2007, 96th Session: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87) Nigeria.

³ *Ibid*, para. 618.

⁴ *Ibid*, paras. 785 and 786.

⁵ See, for example, Section 50(1) of the Trade Unions and Employers’ Organisations Act, 1992 of Botswana.

⁶ Section 24 of the Trade Unions Act provides that “Where there is a trade union of which persons in the employment of an employer are members, that trade union shall, without further assurance, on registration in accordance with the provisions of this Act, be entitled to recognition by the employer.”

⁷ See *Stadium Hotel v National Union of Hotels and Personal Services Workers* (1978/79) NICLR 18; *Nigeria Sugar Company Limited v National Union of Food, Beverages and Tobacco Employees* (1978/79) NICLR 12-13.

between the most representative trade union organisations and other trade union organisations is not in itself a matter for criticism.”¹

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

The principle of representativity ensures that employers do not find themselves in a position where they are expected to include in negotiations every single trade union which has members, no matter how insignificant the membership. Only those trade unions which could, to a meaningful extent, influence relationships between the employer and the body of employees within an agreed bargaining unit are to be allowed at the negotiation table. This means that an employer can refuse to negotiate with very small unions and will not be accountable for any violation or infringement to the members’ right to collective bargaining; after all, no right is absolute. Smaller trade unions must, however, retain their right to exist and to call for new elections for the determination of new bargaining agents after the expiration of a reasonable period.²

It has been argued that granting the right of representation in collective bargaining and agreements only to the “most representative” union involves the unequal treatment of trade unions since unions that are not “most representative” are placed a distinct disadvantage and discriminated against unfairly.³ Nevertheless, it is submitted that union representation would be more productive if one union is allowed to represent and speak for a particular group of workers. It will be counter-productive to grant bargaining status to every trade union that demands bargaining rights. This will create serious problem if the numerous union decided to invoke the bargaining right simultaneously. For example, confusion and conflict could arise if rival teachers’ unions holding quite different views as to proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employers agreement. Without doubt, an excessive number of rival unions at the workplace would render worker representation ineffective.

The problems associated with bargaining with each and every worker or trade union in one bargaining unit are well known. Bargaining with too many trade unions in one bargaining unit leads to undercutting of wages, disparities in salaries and conditions of service for workers. Secondly, it gives room to employers to involve themselves in the internal affairs of unions by trying to manipulate their sweet heart unions so as to undermine the stronger unions. In addition, bargaining with too many unions is time-consuming and also very costly to the employer.

More importantly, the lacuna created by the Trade Union (Amendment) Act 2005 raises the question of how exactly the issue of representativity should be determined. It is suggested that Nigeria should adopt either of the two principles discussed above, to give workers a clear focus on establishing a collective bargaining body for the protection of their interests. Whichever principle is adopted, it is imperative to have a definitive method of choosing representatives and an independent or neutral body to carry it out. The ILO Committee on Freedom of Association has opined that the determination of such representation should be based on “objective and pre-established criteria” so as to avoid opportunity for partiality or abuse.⁴ The Committee further suggests that where the law was involved in the certification of procedure for exclusive bargaining agent, such certification was to be made by an independent body.⁵

A further reform of the labour law in Nigeria must therefore provide an objective and pre-established criteria for determining representativity. Such criteria will have to take into account a number of factors such as the size of the union, experience and contributions to workers’ welfare. In France, for example, the criteria for determining which organisations shall be classified as “most representative” include a number of these factors.⁶ However, in seeking to choose a “most representative” trade union, the issue of large membership, contributions

¹ ILO: *Digest of Decisions and Principles of the Freedom of Association Committee* Geneva, International Labour Office (1985), para 236. It is of course not in the best interest of workers to grant every trade organization bargaining rights. Some kind of balance is needed in industrial relations; hence a majority trade union is preferred.

² ILO: Committee on Freedom of Association 109th Report, para.100, in *Freedom of Association and Collective Bargaining*, 69th Session, (1987), p.97. See also g. von Potobsky, “Protection of Trade Union Rights: Twenty Years’ Work by the Committee on Freedom of Association,” 105 *International Labour Review* (1972), pp.73-98.

³ See, for example, the argument of the applicant union in the *National Union of Belgian Police Case*, Judgement of 27 October 1975, Series A, Vol. 19 (1980) 1 E.H.R.R. 578. See also *Swedish Drivers Union case*, Eur. Ct. H.R., Judgement of 6 Feb. 1976, Series A, Vol.20 (1980) 1 E.H.R.R. 617, and *Schmidt and Dahlstrom case* (1980) 1 E.H.R.R. 637; M. Forde, “The European Convention on Human Rights and Labour Law,” 31 *American Journal of Comparative Law* (1983), pp.301-329.

⁴ Committee on Freedom of Association, 109th Report, para 100, in *Freedom of Association and Collective Bargaining*, 69th Session, 1987, p.97.

⁵ *Ibid.*

⁶ Article L. 133-2 of the Labour Code provides that the representativeness of trade unions shall be determined in accordance with the following criteria: membership, independence, contributions, the union’s experience, age, and its patriotic stance during the (Nazi) occupation. See generally, M. Forde, “Trade Union Pluralism and Labour Law in France,” 33 *International and Comparative Law Quarterly* (1984) pp.135-157.

and experience can be seen in the light of how much support a union has among the workforce in question. Large membership is an important but not necessarily a deciding factor for this purpose. As the Permanent Court of International Justice noted:

“The most representative organisations... are, of course, those organisations which best represent...the workers... Numbers are not the only test of the representative character..., but they are an important factor; other things being equal, the most numerous will be the most representative.¹”

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

5. THE RIGHT TO STRIKE

The third important issue considered here is the right to strike. The right to strike has been described as “an indispensable component of a democratic society and a fundamental human right.”² The right to strike is clearly a crucial weapon in the armoury of organised labour. The strike is an essential tool of trade union all over the world for the defence and promotion of the rights and interests³ of their members, and is a necessary counter-vailing force to the power of capital. In the often-quoted words of Kahn-Freund “there can be no equilibrium in industrial relations without a right to strike.”⁴ The need for equilibrium is crucial in order to promote collective bargaining which helps to achieve social justice in the work place. The strike plays the same role in labour negotiations that warfare plays in diplomatic negotiations⁵. Strike facilitates agreement because the consequences of failure are serious, unpleasant, and costly.⁶ It was in apparent recognition of this fact that Lord Wright in his famous dictum in 1942 observed:

“Where the rights of labour are concerned, the rights of the employers are conditioned by the rights of the men to give or withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining. It is, in other words, an essential element not only of the union’s bargaining process itself; it is also a necessary sanction for enforcing agreed rules.”⁷

The right to strike is thus important to the functioning of a democratic society that its removal would be unjustified.

Although the right to strike is not explicitly contained in any of the ILO conventions, it arises by necessary implication from two ILO Conventions; the Freedom of Association and Protection of the Right to Organise Convention No.87 1948 and the Right to Organize and Collective Bargaining Convention No.98 1949. The ILO Committee of Experts on the Applications of Conventions and Recommendations (CEACR)⁸ has interpreted these two conventions broadly, stating that the right to strike is an intrinsic corollary of the rights contained in the two ILO conventions.⁹ The ILO Committee on Freedom of Association (CFA) has described the

¹ *Advisory Opinion No.1, Concerning the Netherlands’ Workers’ Delegate to the Third Session of the International Labour Conference*, July 31 1992 (1992) P.C.I.J., Series B, 1, 26.

² O. Kahn-Freund and B.A. Hepple, *Laws Against Strikes: International Comparisons in Social Policy*, London, Fabians Research Series (1972), p.4. See also R. ben-Israel, *International Labour Standards: The Case of the Freedom to Strike*, Deventer, Kluwer, (1988), pp.13-33.

³ Sir Otto Kahn-Freund referred to these interests as “platitudinous confrontation of expectations and interests.” See O. Kahn-Freund, *Labour and the Law*, London, Stevens and Sons (1977), pp.48-49.

⁴ P. Davies and M. Freedland, *Kahn-Freund’s Labour and the Law*, London, Stevens and Sons (1983), p.292.

⁵ Julius G. Getman and F. Ray Marshall, “The Continuing Assault on the Right to Strike” 79(3) *Texas Law Review* (2000-2001), pp. 703-724. As Ewing noted: “Denied the power to strike, workers would be bargaining with their hands tied behind their backs; they could offer on credible or realistic resistance to the power of the employer.” See K.D. Ewing, “Citizenship and Employment” in R. Blackburn, *Right of Citizenship* London, Mansell, (1993), p.113.

⁶ Julius G. Getman and F. Ray Marshall, “The Continuing Assault on the Right to Strike,” 79(3) *Texas Law Review* (2000-2001), p.703-724.

⁷ *Crofters Hand Woven Harris Tweed Co. v. Veitch* (1942) 1 ALL E.R., pp.158-9. This statement was re-emphasised by the Constitutional Court of South Africa recently: “(The right to strike) is of both historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. “See *NUMSA v. Bader Pop (Pty) Ltd* 2003(3) SA p.513.

⁸ The CEACR was established by a resolution of the International Labour Conference in 1926 to monitor and report on ILO members’ compliance with the provisions of ILO Conventions to which they are a party.

⁹ CEACR, Conclusions Concerning Reports Received Under Articles 19 and 22 of the Freedom of Association and the Right

obligation to protect the right to strike as an essential requirement of the Freedom of Association Convention.¹ Both the CEACR and the CFA (ILO Supervisory Committees) have consistently reaffirmed the right to strike.²

The right to strike is not expressly provided for in the Nigerian Constitution or in labour legislation in Nigeria. It is recognised and protected in labour legislation on the basis of assumed conflicting interests between employers and employees, who are the two parties to labour relations. The absence of constitutional recognition could mean that the Constitution has failed to protect the right to strike. However, the Constitution guarantees the right to freedom of association and, given that international treaties to which Nigeria is a signatory recognise the right to strike as a species of the right to freedom of association, this would appear to give constitutional status to the right to strike. As noted above, the ILO jurisprudence shows that the right to strike is a key part of the freedom of association.³

There is therefore a clear support or a freedom of association which protects industrial action. Indeed, at the collective level of industrial relations it is hard to envisage freedom of association without the right to strike.⁴ However, some decisions outside Nigeria have taken a different approach to freedom of association and the right to strike. The leading example is the case of *Collymore v. Attorney-General of Trinidad and Tobago*⁵ where the Privy Council held, in 1970, that there was no necessary link between freedom of association and the right to strike. The court said:

“It...seems to their Lordships inaccurate to contend that the abridgement of the right to free collective bargaining and of the freedom to strike leaves the assurance of ‘freedom of association’ empty of worthwhile content.”⁶

Similarly, in the case of *Schmidt and Dahlstrom v Sweden*⁷ the European Court of Human Rights held that while Article 11 of the European Convention for the Protection of Human Rights (ECHR) specifically mentions the rights to join trade unions as a species of the broader right of association, this does not *ipso facto* include the right to strike. The court said:

“The Article does not secure any particular treatment of trade union members by the State...(It) leaves each State a free choice of the means to be used towards this end. The grant of a right to strike represents without any doubt one of the most important of these means, but there are others. Such a right, which is not expressly enshrined in Article II, may be subject under national law to regulation of a kind that limits its exercise in certain instances.”⁸

to Collective Organise and Collective agreements, Cooperation in the Undertaking (81 st session, ILC, 1994) Report III (Part 4b) (179).

¹ Jane Hodges-Aeberhard and Alberto Otero de Dios, “Principles of the Committee on Freedom of Association Concerning Strikes,” 126 *International Labour Review* (1987), pp.546-578.

² *Ibid*, p.544.

³ Thus the ILO Committee on Freedom of Association and the Committee of Experts have established a right to strike from the provisions of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No.98). See ILO, *Digest of Decisions and Principles of the Freedom of Association Committee* Fifth (Revised) edition, Geneva: International Labour Office, (2006), para.523. A confirmation of this trend can be found in States such as the Federal Republic of Germany which merely guarantee freedom of association explicitly in their constitutions, yet at the same time derive a guarantee of the right to strike therefrom. In Germany, for example, the right to strike is derived from Article 9, section 3 of the German Constitution 1949. See M. Weiss “Federal Republic of Germany,” in R. Blanpain (ed.) *International Encyclopaedia of Labour Law and Industrial Relations* (Deventer: Kluwer, 1986), para.407; R. Ben-Israel, “Introduction to Strikes and lock-Outs: A Comparative Perspective,” in R. Blanpain (ed.) *Bulletin of Comparative Labour Relations*, Deventer, Kluwer (1994), p.6; R. Youngs, *English, French, and German Comparative Law*, London, Cavendish Publishing Ltd (1998), pp.197-198; H.G. Bartolomei de la Cruz, *Comparative Law in a Changing World*, London, Cavendish Publishing Ltd (1999), p.462. See also H.M. Seady and P.S. Benjamin, “The Right to Strike and Freedom of Association: An International Perspective” 11(5) *Industrial Law Journal* (1990), pp.439-441; G. England, “Some Thoughts on Constitutionalizing the Right to Strike” 13 *Queen’ Law Journal* (1988), pp.168-213; C.D’aoust and F. Delorme, “The Origin of Freedom of Association and the Right to Strike: An Historical Perspective” 36 *Relations Industrielles* (1981), pp.894-921.

⁴ See F. Von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* London, Mansell Publishing Limited (1987), p.109.

⁵ (1970) AC 538 (PC)

⁶ *Ibid*, p.548 per Lord Donovan.

⁷ (1980) 1 EHRR 637.

⁸ *Ibid*, paras. 34-45. For more discussion, see J. Hendy, “The Human Rights Act, Article 11 and the Right to Strike,” 5 *European Human Rights Law Review* (1998), pp.582-601. This trend has been followed in other jurisdictions as well, notably in Canada where the Canadian Supreme Court has held that freedom of association as provided for in the Canadian Charter of Rights and Freedoms does not incorporate the right to strike or the right to bargain collectively. See *Reference re Public Service Employee Relations Act (1987)* 1 SCR 313; 38 DLR (4th) 161. See also *Saskatchewan v Retail and Department Store*

It is submitted that, unless freedom of association is interpreted as purposive in nature, it will be rendered useless. To accept these decisions would be to deny the purposive role of freedom of association. The protection of members' interests would be difficult for an association which has no sanctions to employ.¹

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

“Obviously, the right to strike is essential to the viability of a labour union... (I)f the inherent purpose of a labour organisation is to bring the workers' interests to bear on management, the right to strike is , historically and practically, an important means of effectuating that purpose. A union that never strikes, or which can make no credible threat to strike, may wither away in effectiveness... and cannot survive the pressures in the present-day industrial world.”²

A trade union without the right to strike is a “poor” and “weak” trade union indeed.³ However, Nigerian labour law contains serious legislated attacks on the right to strike which seems to have rendered the right nugatory and fictitious.

6. CONCLUDING REMARKS

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

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

With regards to collective bargaining, the Trade Union (Amendment) Act 2005 has merely provided a basis for trade unions to elect their representatives for purposes of collective bargaining with employers in the workplace without any laid down criteria for doing same. Because of obvious reasons of conflict and confusion that may result where numerous unions struggle for recognition and bargaining rights with the employer, there must be a criteria by which a more mature and representative trade union is selected to protect the interests of all workers in the bargaining unit. It has been argued that the law must be reformed to adopt either the “majoritarian

Union (1987) 1 SCR 460; 38 DLR (4th) 277; *Public Service Alliance v Canada* (1987) 1 SCR 424; 38 DLR (4th) 249; *Professional Institute of the Public Service of Canada v Northwest Territories* (1990) 2 SCR 367; 72 DLR (4th).

¹ F. Von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study*, London, Mansell Publishing Limited (1987), p.109.

² *United Federation of Postal Clerks v Blount*, 588 (1971) 404 u.s. 802, p.885. Similarly, in *Uttar Pradeshia Shramik Maha Sangh v State or Uttar Pradesh* (1960) A.I.R 45, 49 when presented with the question of whether freedom to associate can be equated with freedom to pursue without restrictions the objects of the association the court said:

“The purpose of an association is an integral part of the right, and if the purpose is restricted, the right is inevitably restricted. The right to form an association is not a right to be exercised in a vacuum or an empty or a paper right. The enjoyment and fulfillment of the right begins with the fulfillment of the purpose for which the association is fored” See S.S. Visweswaraiah, “A Critical Exposition of the Strike Law in India,” 4(1) *Central India Law Quarterly* 1991, pp.69-95, available at <http://www.cili.in/article/view/1805/1216> (last accessed 23 April 2008). According to Birk, “Freedom of Association is a classic case of implied fundamental right to strike,” See R. Birk, “Derogations and Restrictions on the Right to Strike under international Law,” in R. Blanpain (ed.) *Labour Law, Human Right and Social Justice* Deventer, Kluwer Law International (2001), p.96. See generally, H.M. Seady and P.s. Benjamin, “The Right to Strike and Freedom of Association; An International Perspective,” 11(3) *Industrial Law Journal* (1990), \pg.39-459; C.D'aoust and F. Delorine, “The Origin of Freedom of Association and the Right to Strike: An Historical Perspective,” 36 *Relations Industrielles* (1981), pp.894-921; and S. Leader, *Freedom of Association: A Study in Labor Law and Political Theory*, New Haven, Yale University Press (1992), pp.180-198.

³ It is suggested that the solution to the controversy surrounding the link between freedom of association and the right to strike lies in giving express recognition to the right to strike in the constitution or in a labour statute. See O.V.C. Okene, “The Status of the Right to Strike in Nigeria: A Perspective from International and Comparative Law,” 15(1) *African Journal of International and Comparative Law* (2007), pp.29-60; G. England, “Some Thoughts on Constitutionalizing the Right to Strike,” 13 *Queens Law Journal* (1988), pp.180-191. Cf. C. D'aoust and F. Delorme, “The Origin of Freedom of Association and the Right to Strike: An Historical Perspective,” 36 *Relations Industrielles* (1981), pp.894-921; and T. Sheppard, “Liberalism and the Charter: Freedom of Association and the Right to Strike,” 5 *Dalhousie Law Journal* (1996), p.117.

principle” or the “principle of sufficiently representative trade union” to strengthen the process of collective bargaining and enhance freedom of association.

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

“No country I know of suppresses the freedom to strike in peace time except dictatorships and countries practicing racial discrimination... a legal system which suppresses the freedom to strike puts the workers at the mercy of the employers.”¹

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

One measure of the health of any society is the extent to which its legal system and administration are in time with contemporary realities and contemporary public opinion.² It is submitted that the 2005 Act does not meet its expressed aims of, inter alia, complying with ILO requirements concerning democratisation in the organisation of labour.³ There is therefore a need for more reform in this labour law and industrial relations system to make a reality out of the constitutionally guaranteed freedom of association. Freedom of association as a human right is indivisible. This means that it cannot be guaranteed to one section of the society, while workers are lagging behind. Indeed, the adverse criticisms and damning conclusions of the ILO supervisory bodies - the Committee on Freedom of Association (CFA) and the Committee of Experts on the Applications of Conventions and Recommendations (CEACR) raises significant concerns-which undoubtedly strengthen the case for changing Nigerian labour law.

Labour standards have become the subject of international rules through bodies such as the ILO. Such standards are an increasing part of the global economy of which Nigeria is a part. One must hope that Nigeria will unleash its workers and translate these standards into Nigerian labour law and industrial relations system in order to fully secure workers rights. In fact, given Nigeria’s prominent membership of the African Union and its important role and status as a member of the Governing Body of the ILO, it must be expected to show a very positive example in all spheres of respect for global labour standards.

¹ O. Khan-Freund, *Labour and the Law*, London, Steven and Son (1977), p.234.

² See the Hon. Sir Samuel Cookey, “The Scope of Judicial Development of the Law in Commonwealth Law Bulletin: Proceedings of the Commonwealth Lawyers Conference 1988, cited in A.N. Nnamani “The Role of Law Reform in the Development of the Law,” 3 *Calabar Law Journal* (1990), pp.31-46

³ See Content of President Olusegun Obasanjo’s Letter to the National Assembly, 8 June 2004 available at <http://nlcng.org/objletteronlabourlaw.htm> (last accessed 2 March 2015).

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