THE INTERNATIONALISATION OF NIGERIAN LABOUR LAW; RECENT DEVELOPMENTS IN FREEDON OF ASSOCIATION

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

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ABSTRACT

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

1. INTRODUCTION

"Man is born free; and yet everywhere he is in chains."[1]
"Without freedom of mind and of association a man has no means of self- protection in our social order."[2]

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1. Jean Jacques Rousseau, *The Social Contract*, London, Penguin Classics (1762), p.l.
2. Harold Laski, *Liberty in the Modern State,* London, George Allen & Unwin Ltd ([948), p. 95.

Ni"I'lia recently witnessed monumental reforms to its labour law nnd system of industrial relations.' Before the reforms. hi"IIlY interventionist policies by government had been the nonu, as is the trend in many parts of Africa.' The changes introduced in 2005 w .re intended to promote the democratisation of labour, enhance choice Ior all Nigerian workers in the spirit of the Constitution, and .omply with International Labour Organisation (ILO) requirements concerning democratisation in the organisation of labour and to consolidate the values of accountability and participation.' The new II' w has introduced radical changes to the pattern of regulation of labour and industrial relations and has raised a huge debate about the nature, content and extent of workers' freedom of association in Niucria. The changes would appear to have given more impetus to I'IIiI 'clive bargaining as a crucial mechanism in the determination of wages and other terms and conditions of the employment of workers. However, there are other areas where the law seems to have rolled bacl workers' rights.

.I'he aim of this article is to examine the provisions of the Trade Iuiou (Amendment) Act 2005 by reference to Nigeria's international IhIigutions, especially under the ILO Conventions and the principles 1) I' trcedom of association and to consider the extent to which the new I.iw might be said to be compatible with Nigeria's obligations. How does the new legislation compare with international labour standards? Ilow does the 2005 "reforms" impact on Nigerian workers' freedom of association rights? .It is to these questions that this article seeks to reply. The discussion centres on three key changes brought about hy the 2005 Act relating to the right to form and join trade unions, collective bargaining and the right to strike. It is found that the legislation remains largely inconsistent with Nigeria's obligations under international law and does perpetuate and *lor* exacerbate a number of pre-existing areas of non-compliance.

During 2005, government amended a principal labour Jaw, The Trade Unions Act, 1990 by enacting the Trade Union (Amendment) Act 2005, which was signed into Jaw on IS March 2005, available at http://www.nigeria-law.org/TradeUnion(Amendment)Act2005.htm (last accessed 4 April 2008)

See P. Takirambude, "Protection of Labour Rights in the Age of Democratization and Economic Restructuring in South Africa," 39 *J.A.L* (1995), pp. 39 - 63. See also B. Molatlhegi, "Workers' Freedom of Association in Botswana," 42 *J.A.L* (1998), pp. 64 - 79.

See Content of President Olusegun Obasanjo's Letter to the National Assembly, 8 June 2004 available at http://nlcng.org/objletteronaaonlabourlaw.htm (last accessed 20 March 2008).

() erall 1111. .11 11' I, .11 tuc that 111 .1 SI ' 111111 .1111 degree the III' w legislation ,.Iii I 11 111 111 1 1 I' " Il icts workers freedom o f association .uul that the intended objectives (,rIltl' nr w law cannot he achieved, unless further radical amcud ui 'IIIs arc nuulc to these crucial provisions to enhance workers' freedom Or association in Nigeria. Without further reform there can be no future for an internationalised Nigerian labour law. Before going into substantive issues, however, it may be .helpful briefly to make a note on the concept of freedom of assocration and the sources of Nigeria's obligations to respect workers' freedom of association,

2. A NOTE ON FREEDOM OF ASSOCIATION

Freedom of association is a universally recognised civil liberty and one of the most fundamental rights of workers and employers. Respect for the principles of freedom of association is vital for the proper functioning of a labour relations system and, more broadly, for any democratic system of governance. In turn, freedom of association has an important role to play iii the development and operation of a market economy, which generally functions most efficiently under a democracy." Freedom of ass?ciation promotes the principle that people may do whatever they Wish as long as they do not harm others. Therefore, an individual should be free to join an organisation and to act in association with others as long as no harm is caused by so doing. The right to freedom of association is promoted throughout the world .as a fundamental human right.[7] At the opening of the first ILO Afncan Regional Conference iii Lagos in 1960, then Nigerian Prime Minister, Sir Abubakar Tafawa Balewa declared that, "freedom of association is one of the foundations on which we build our free nations."!

Freedom of association is the key enabling right and the gateway to the exercise of a range of other rights at work." The

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6. See ILO, Labour Legislation Guidelines - The Fundamental Importance of Freedom of Association http://www.ilo.org/public/english/dialogue/ifpdwlf/ilglindex.htm (last accessed 4 Apnl 2008).
7. See for example, Article 23 of the Universal Declaration of Human Rights 1948, Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Article 16 of the American Convention on Human Rights 1969. and Article 10 of the African Charter on Human and Peoples Rights 1981.
8. G. A. Johnston, *The International Labour Organisotion*, London, Europa Publications (1970), p. 150.
9. Press Release *(ILO/00117:* Pioneering ILO Global report calls for more widespread ?rcspect for rights at work www.ilo.org/public/englishlbureau/l0f/prl2000/17.htm (last accessed 3 Apnl 2008). See also, "Your Voice at Work: First global report on Freedom of Association nd Collective Bargaining" www.ilo.orglpubliclenglishlbure;IUh nf/downloadlmagazlne/pdf/mag35.pdf , last accessed 29 March 2008).

freedom to associate entails the right for employ[illegible] workers to establish, without previous authorisation, organisations of their own choosing for the defence of their occupational and industrial interests. It includes the right of these organisations to conduct their internal administration in full freedom. It also comprises the promotion of collective bargaining between workers and employers and the right to strike. Trade union independence from both the employers and the state must also be guaranteed." In sum, freedom of association of workers means an understanding of the fact that it is the autonomous trade union presence at the workplace which guarantees the protection of the individual worker.[11] Indeed, firm international consensus has evolved on the status of the right to associate as a fundamental human right.[12]

Nigeria is a member of the ILO[13] 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), also ratified the International Covenant on Economic, Social and Cultural Rights 1966, and the International Covenant on Civil and Political Rights 1966.[14] As a consequence Nigeria is bound by these instruments to protect the right to freedom of association. This means that workers and trade union organisations in Nigeria, like those in most other countries, have the right to lodge complaints with the ILO Committee on Freedom of Association concerning any abridgments of workers' freedoms.[16] The freedom to associate also has a constitutional and statutory legitimacy in Nigeria. Section 40 of the Constitution of the Federal Republic of Nigeria 1999 provides as follows:

> "Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any association for the protection of his interests."

Section 40 holds great significance for Nigerian workers, as It gives the labour movement a constitutional right to associate. The Constitution further protects the worker's right not only to belong to, but also to form a trade union. Thus, the Constitution bars a "closed shop"[17] agreement or any other arrangement that compels a worker to join a particular union or that excludes the worker from union membership. This covers both private employers and the government itself when acting as employer. It means that a worker can decline to join union X and instead form or join union Y.[18] Finally, the Constitution provides for access to court to remedy any breach of the right to associate. Section 46 of the Constitution states as follows:

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10. See ILO, Labour Legislation Guidelines - The Fundamental Importance of Freedom of Association http://www.ilo.org/public/english/dialogue/ifpdial/llg/index.htm (last accessed 4 April 2008).

11. See K.W., Wedderburn, "Labour Law, Corporate Law and the Worker," 3 *Industrial Law Journal* (1993), pp. 542-575. See also K.W. Wedderburn, "Freedom of Association and the Philosophies of Labour Law," 18 *Industrial Law Journal* (1989), pp. 1-38; C.W. Summers, "Freedom of Association and Compulsory Union Membership in Sweden and the United States," I (112) *University of Pennsylvania Law Review* (1964), pp. 647-691.

12. For an extended discussion of the concept of freedom of association, see L. Swepston, "Human Rights and Freedom of Association: Development through ILO Supervision," 137(2) *International Labour Review* (J998), pp. 169-194; Gillian Morris, "Freedom of Association and the Interests of the State," in K.D. Ewing, C.A Gearty, and B.A Hepple, (eds.) *Human Rights and Labour Law: Essays for Paul O'Higgins*. London and New York, Mansell Publishing Limited (1994), p. 2; Sheldon Leader, *Freedom of Association: A Study in Labour Law and Political Theory*, New Haven and London, Yale University Press (1992), pp. 123-265; N. Valticos, "International Labour Law," in Blanpain, R. (ed.), *International Encyclopaedia for Labour Law and Industrial Relations* Deventer: Kluwer (1984), pp. 79-92; W.B. Creighton, "Freedom of Association," in R. Blanpain, (ed.), *Comparative Labour Law and Industrial Relations*, Deventer, Kluwer (1990), Chapter 17; R. Ben-Israel, *International Labour Standards: The Case of the Freedom to Strike*. Deventer, Kluwer (1988), pp. 13-25; J. Hodges-Aeberhard, and A. Odero de Dios, "Principles of the Committee on Freedom of Association Concerning Strikes," 126 *International Labour Review (1988)*, p. 543; c.w. Jenks, *The International Protection of Trade Union Freedom*, London, Stevens and Sons (1957), pp, 181-183; c.w. Jenks, "International Protection of Freedom of Association for Trade Union Purposes," 87(1) *International Labour Review* (1955), pp. 1-115.

13. See ILO: Alphabetical List of ILO member Countries, available at http://www.ilo.org/public/english/standards/relmlcountry.htm (last visited 4 April 2008). 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 hltp://www.ilo.org/public/english/about/iloconst.htm (last visited 4 October 2007).

14. Both Conventions were ratified on 17 October 1960. See ILO, List of Ratifications of Intemational Labour Conventions, at http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byCtry.cfm?lang=EN&CTYCHOICE=2020 (last visited 2 April 2008). See also: *Official Bulletin of the fLO*, vol. XLIII (No.7) of 1960 (1) p. 524 f.

15. Both Covenants were ratified by Nigeria on 29 July 1993, avble at the Office of the High Commissioner for Human Rizhts, available at http://www.unhchr.ch/TBS/doc.nsf/22b020de61f1ObaOc1256a2a0027bale/S0256404004ff315copendocument> (last accessed 22 April 2008).

16. See generally O.V.C. Okene "Curbing State Interference in Workers' Freedom of Association in Nigeria" 10 (4) *International Journal of Non-Profit Law* (2006) pp 86-96; O.V.c. Okene and G. A. Okpara, "Freedom of Association and the Protection of Trade Union Rights in Africa" 10 (2) *Recht in Afrika* (2007), pp. 175-197.

17. A closed shop is an agreement, usually between a trade union or unions on the one hand and the employer on the other, that makes union membership a condition of employment or continued employment. A closed shop seriously limits a worker's freedom to belong to a union of his choice.

18. See *Basorun v Industrial Arbitration Tribunal*, Unreported suit No. LD/1705/71, High Court of Lagos State, cited in E. E. Uvleghara, *Labour Law in Nigeria* (Lagos and Oxford, Malthouse Press Ltd (2001). p. 319.

" '\ 11 / person wlu: .ill« ies that his ri.'1l1 to form, join or belong to a trade union of hix .hoicc has been, is hcing or is likely to he iulriugcd may apply to a High Court in the State in which the infringement is threatened or has occurred for redress."

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

Another source of freedom of association for workers in Nigeria can be found in the African Charter of Human and Peoples' Rights 1981.[20] Article 10 of the Charter provides that, "Every individual shall have a right to free association provided that he abides by the law." Article 25 of the Charter places a duty on the state to promote rights contained in the Charter, while Article 26 of the Charter enjoins the state to ensure that its legal system recognises and enforces the rights of the Charter. Nigeria has ratified the African Charter and it is part of its national law." In the case of *Abacha* v *Fawehinmi/?* the Supreme Court held that since the African Charter has been incorporated into Nigerian law, it enjoys a status higher than a mere international convention; it is part of Nigeria's *corpus juris.* Nigeria is therefore bound to respect workers' freedom of association pursuant to the Charter. It is significant to note also that the African Commission on Human and Peoples' Rights has provided detailed guidance on trade union rights in its Guidelines for the Submission of State Reports." Under the Guidelines, States are obliged to provide information on

19 Indeed, the judiciary plays a very prominent role in a society governed by the rule of law. The judiciary bas the important tasks of interpreting the constitution and defining the scope and limits of the powers of both the executive and the legislature. COUJ1s represent the last hope of tbe common man against the powers of government, which makes It essentìal for the judiciary to exhibit a high sense of duty and commitment to the cause of justice. As the American Supreme Court Justice Hugo Black pointed out in *Chambers v. Florida* 309 U.S. 227, 241 (1940): "Courts stand as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or victims of prejudice or public excitement." ,

20 Afncan Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CABILEG/67/3 rev. 5, 21 *I.L.M.* 58 (1982), entered into force 21 October 1986.

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

22. (2000) 6 NWLR (Part 660) 228(SC).

23. *Promotion, Protection and Restoration of Human Rights* (Guidelines for National Periodic Reports) ACHPR DOC. AFRICOM/HRP.5 (IV) (October 1988), Section II (10) – (16), reprínted in African Commission on Human and Peoples Rights, Documentation No. I: Activity Reports (1988-1990).

1:1\\', :, H')' II I: 1111111 :. :11 11 1, '1111 1 decisiIII :: 111:11 are designated to prouuitc, regulate or safeguard tr.uk: union ri ghts, which include the right of trad ' unions to function freely, collective bargaining and the right to strikc." We shall now proceed to examine the three key areas where changes have been introduced by the 2005 Act.

·3. THE RIGHT TO FORM AND JOIN ORGANISATIONS

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

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 society." More

24. See *Promotion, Protection and Restoration of Human Rights* (Guidelines for National Periodic Reports) ACHPR DOC. AFRICOM/HRP.5 (IV) (October 1988), Section II (10) – (16), reprinted in African Commission on Human and Peoples Rights, Documentation No. I: Activity Reports (1988-1990), p. 45. See also V.O.Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions,* The Hague/London/New York, Martinus Nijoff Publishers (2001), p. 125. For more discussion, see generally R. Murray and M. Evans, *Documents of the African Commission on Human and Peoples' Rights*, Oxford-Portland Oregon: Hart Publishing (2001), pp. 127-204.

25. Section 2 Trade Union (Amendment) Act 2005.

26. 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.

27. See *Osawe* v *Registrar of Trade Unions* (1985) I NWLR (pt. 4) 775. The point was also emphasised that the amendment was necessary because the principal Act is undemocratic, having been enactes.under the military regime, See President Obasanjo's speech, note 7 above.

ill'lH'lt:llllly, the new reform has al o 11'11 11'V,'d the rcxuicl iou Oil Irccdom or choic« :11i,.ill.' 1111 11 11 ll' ,'lil'ltlalio ll ill the Trade Unions Act[28] that no trade union could be r gistered 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." Whereas *50* members are required to form a trade union of workers, only two persons are required to form a trade union of employers." 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.[31] 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.F 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." 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

28. See Section. 3 (2) and 5(4) of the Trade Unions Act 1990,
29. See J. Erstling, *The Right to Organise*, Geneva, International Labour Office (1977), p. 3.
30. Section 3 (1) (a) (b) of the Trade Unions Act 1990.
31. Convention No. 87 guarantees Freedom of Association and Protection of the Right to Organise. See J. Erstling, *The Right to Organise*, note IS above, p. 3.
12. See: Tripartite Committee on the Reform of Nigerian Labour Law: Collective Labour Relations Conceptual Draft http://www.necang.org/downloads/draftcollective.pdf#search=22collective20 Ilabour20relations20act20nigeria (last accessed 10 March 2008).
33. *Ibid.*

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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." 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

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."
35. *ILO: Digest of Decisions and Principles of the Freedom of Association Committee*, Geneva: International Labour Office (1985), para 255.
16. *ILO: Digest of Decisions and Principles of the Freedom of Association Committee*, Geneva, International Labour Office (2006), para 320.

compulsory unification will 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." [37]

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

4. THE PROMOTION OF FREE AND VOLUNTARY COLLECTIVE BARGAINING

The second significant issue introduced by the new law deals with trade union recognition for the purposes of collective barzaininz. 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 barzainins. Trade unions will be hamstrung to protect their members' interests without due recognition. Thus, union recognition is a *sine qua non* to collective bargaining.

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

37 *Ibid*, para. 319.

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

in the undertaking." 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."

Under Nigerian Labour Law, as in the labour laws of other jurisdictions," the most important step in the collective bargaining procedure is for the employer or the employers' association to recognise the trade union as a bargaining agent for the employees within the bargaining unit, in relation to terms and conditions of employment." 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."

However, by virtue of section 5 of the new law, 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 collective 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

39. *Ibid*. para. 618.
40. *Ibid*, paras, 785 and 786.
41. See, for example, Section 50 (1) of the Trade Unions and Employers' Organisations Act, 1992 of Botswana.
42. 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."
43. See *Stadium Hotel* v *National Union of Hotels and Personal Services Workers* (1978/79) NICLR 18; *Nigerian Sugar Company Limited* v *National Union of Food, Beverages and Tobacco Employees* (1978/79) NICLR 12-13.

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

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

The principle of 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."

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

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 organisation bargaining rights. Some kind of balance is needed in industrial relations; hence a majority trade union is preferred. See 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.

involves unequal [illegible] of trade [illegible] union that [illegible] representative" are placed at [illegible] against unjustly.[46]

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 unions 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 new law 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." The Committee further suggests that where the law was involved in the certification of

46. See, for example, the argument of the applicant union in the *National Union of Belgian Police Case*, Judgement of 27 October 1975, Senes 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. Committee on Freedom of Association, 109th Report, para 100, in Freedom of Association and Collective Bargaining, 69th Session, 1987, p. 97.

procedure lor rxcluxiv« 11;11' ':Ii 11111' 1'1' 11 1" III h ('I'I III\I':lli l lll was III be made by all independent body.

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

> "The most representative organisations ... are, of course, those organisations which best represent. .. the workers.. . Numbers are not the only test of the representative character .., but they are an important factor; other things being equal, the most numerous will be the most representative.[50]

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

5. THE RIGHT TO STRIKE

The third important issue dealt with by the new law is the right to strike. The right to strike has been described as "an indispensable

48. ibid.
49. 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 expenence, 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.
50. *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.

component of a d, II II III :111 I it lel and 1 11 11 111:111 11' 111.11 1111111,111 1i ,ltl," ,I The I I 'Itt I I I , u rk«: is clearly a crucial weapon I I I I he nru u u u V of Ol'!':Illi,'1r] luluun. The xlrikv i: an I ssential tool of 11:llh' 1111 11 11 1, all ov 'I' the world for the defence :1111 1 prnmotion of the rights :11 11 1 interests[52] of their members, and is a II .ccssary countcr-vailiuu IIIII''' to the power of capital. In the often-quoted words or Kahn-Freund, "there can be no equilibrium in industrial relations without a right to strike."[53] The need for equilibrium is crucial in order to prumou: collective bargaining which helps to achieve social justice ill the work place. The strike plays the same role in labour negotiations that warfare plays in diplomatic negotiations.[54] Strike facilitates agrccmcIII because the consequences of failure are serious, unpleasant, aml costly.[55] 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.T"

51. 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*, Devcnrcr, Kluwer, (1988), pp. 13-33.
52. Sir Otto Kahn-Freund referred to these interests as "platitudinous confrontation 01 expectations and interests." See O. Kahn-Freund, *Labour and the Law*, London, SII'vens and Sons (1977), pp.48-49.
53. P. Davies and M. Freedland, *Kahn-Freun'ds Labour and the Law,* London, Steven and Sons (1983), p. 292.
54. Julius G, Getman and F. Ray Marshall, "The Continuing Assault on the Right to Stlike" 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 no credible or realistic resistance to the power of the employer." See K.D. Ewing, "Citizenship and Employment" in R. Blackburn, *Rights of Citizenship* London, Mansell, (1993), p. 113.
55. 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.
56. *Crofter Hand Woven Harris Tweed Co. v. Veitch* [1942] I 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.

The right to strike is thus so 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 Organise and Collective Bargaining Convention No. 98 1949. The ILO Committee of Experts on the Applications of Conventions and Recommendations (CEACR)[57] 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.[58] The ILO Committee on Freedom of Association (CFA) has described the obligation to protect the right to strike as an essential requirement of the Freedom of Association Convention." Both the CEACR and the CFA (ILO Supervisory Committees) have consistently reaffirmed the right to strike."

The right to strike is not expressly provided for in the Nigerian Constitution or in labour legislation in Nigeria. It is 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."

57. The CEACR was established by a resolution of the International Labour Conference in 1926 to monitor and report on ILO members' compliance with the provisions of ILO Conventions to which they are a party.
58. CEACR, Conclusions Concerning Reports Received Under Articles 19 and 22 of the Freedom of Association and the Right to Collective Organise and Collective Agreements, Cooperation in the Undertaking (81st session, ILC, 1994) Report III (Part 4b) [179].
59. Jane Hodges-Aeberhard and Alberto Odero de Dios, "Principles of the Committee on Freedom of Association Concerning Strikes," *126 International Labour Review* (1987), pp. 546-578.
60. *Ibid*, p. 544.
61. 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. 307; 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. Seadyand P.S. Benjamin, "The Right to Strike and Freedom of Association: An International Perspective" 11 (3) *Industrial Law Journal* (1990), pp. 439-441; G. England, "Some Thoughts on Constitutionalizing the Right to Strike" 13 *Queen's Law Journal* (1988), pp. 168-213; C. Daoust and F. Delorme, "The Origin of Freedom of Association and the Right to Strike: An Historical Perspective" 36 *Relations Industrielles* (1981), pp. 894-921.
62. See F. von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* London, Mansell Publishing Limited (1987), p. 109.
63. [1970] AC 538 (PC)
64. *Ibid*, p. 548 *per* Lord Donovan.
65. (1980) 1 *EHRR 637*.

There is thus no support for freedom of association which protects industrial action. Indeed, at the collective level or industrial level it is hard to envisage freedom of association without the right to strike.[62] 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*,[63] 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."[64]

Similarly, in the case of *Schmidt and Dahlstrom v Sweden*[65] 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 right 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 [illegible] of these means, but there are others. Such a right, which is [illegible] expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain instances." 66

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

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

"Obviously, the right to strike is essential to the viability of a labour union... [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."?"

Ibid, paras. 34- 45. For more discussion, see J. Hendy, 'The Human Rights Act, Article II and the Right to Strike," 5 *European Human Rights Law Review (1998)*, pp. 582-60 1. 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) I SCR 313; 38 DLR (4th) 161. See also *Saskatchewan* v *Retail and Department Store Union* (1987) I SCR 460; 38 DLR (4th) 277; *Public Service Alliance* v *Canada* (1987) I SCR 424; 38 DLR (4th) 249; *Professional Institute of the Public Service of Canada* v *Northwest Territories* (1990) 2 SCR 367; 72 DLR (4th).

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

68. *United Federation of Postal Clerks* v *Blount*, 588 (197 1) 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 fulfilment of the right begins with the fulfilment of the purpose for which the association is formed" See S. S. Visweswaraiah, "A Critical Exposition of the Strike Law in India," 4 (I) *Central India Law Quarterly* (1991), pp. 69-95, available at http://www.cili.in/articie/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 Rights 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), pp. 439-459; 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 S. Leader, *Freedom of Association:* A *Study in Labor Law and Political Theory*, New Haven, Yale University Press (1992), pp. 180-198.

69. 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 (I) *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.

[illegible] trade [illegible] without the right [illegible] like [illegible] "weak" trade [illegible] ...

However, Nigeria's new law contains serious legislated [illegible] to strike which seems to have rendered the right illusory [illegible]. Three areas which are examined here are first. the preconditions for the exercise of a legal strike, secondly, the question of strikes in essential services and thirdly, the issue of picketing.

5.1 Preconditions for the Exercise of the Right to Strike

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

a mediator 11111111:111 ' :1 greed upon by the m.[70] If there is failure to reach an agreement, the nuutcr is reported to the Miuisu-r of Employment, Labour and Productivity, who appoints a conciliator, and when conciliation fails, the Minister is required to refer the matter within 14 days to the Industrial Arbitration Panel. Where the award of the Industrial Arbitration Panel is objected to, the Minister must refer the dispute to the National Industrial Court, whose award shall be final and binding on the parties to whom it relates."

It must be noted, however, that the stipulation that the decision of the National Industrial Court in compulsory arbitration is final appears to be unconstitutional in view of the National Industrial Court Act 2006. The Act confers exclusive jurisdiction on the National Industrial Court in labour matters." The decisions of the court whether in its original or appellate jurisdictions shall be final as no appeal shall lie from the decision of the court to the Court of Appeal or any other court except on questions of fundamental rights as contained in chapter 1V of the 1999 Constitution."

A literal interpretation of Section 7 of the Act which confers exclusive jurisdiction on the National Industrial Court appears to be inconsistent with sections 251[74] and 272[75] of the 1999 Constitution." Under section 272 the state High Courts have unlimited jurisdiction to try civil causes and matters, subject only to section 252.[77] The exclusive jurisdiction accorded to the National Industrial Court appears to be unconstitutional as it conflicts with the jurisdiction granted by the Constitution to the state High Courts. Section 1 of the Constitution affirms that the Constitution is supreme and binding on all authorities and persons in Nigeria. Section 1(3) of the Constitution states that "if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and the other law shall to the extent of inconsistency be void." In the case of *Adisa v Oyinwola'"* the Supreme Court of Nigeria held

70. Section 3(2) Trade Disputes Act, 1990.
71. *Ibid.* Sections 5, 7, 8, and 13.
72. Section 7 National Industrial Court Act, 2006.
73. *Ibid,* section 9 (I) and (2).
74. Section 251 gives exclusive jurisdiction to the Federal High Court in respect of certain matters,
75. Section 272(1) confers on state High Courts unlimited jurisdiction to hear and determine "any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, or claim is in issue,"
76. Constitution of the Federal Republic of Nigeria 1999.
77. *Ibid,* section 6(5) (c) (j).
78. (2000) 10 NWLR (pt. 674) 116.

that .111 ' I 1111 ' II ' I 1111 11'11 \ annot I uruul the jurisdiction vested iu a ," Hili l.y III, ("111 ,11111 11111 :IIld 111:11 :11 1 " Xislill ' !:IW that purports 10 do so is void."

Furthermore, apart from the issue of jurisdictional conflict with stutc lliuh Courts, removing the right of appeal from any decision of the National Industrial Court seems problematic. The court could be wrong in law in its decision and the only wayan aggrieved person can secure redress is through the appellate process of the Court of Appeal. If allowed, all complaints against errors and misdirection of the court on law shall pass without redress. This is dangerous and clearly a breach of the constitutional right to fair hearing. It is submitted that a right to appeal against a decision that is unfavourable by a superior court of record ought to be available up to the highest court in the land. The provisions of section 241[80] of the Constitution are supreme and should be binding on the National Industrial Court as a court of co-ordinatejurisdiction with the High Courts. However, section 17(1) of the Trade Disputes Act 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 has determined the issue in controversy. If, at the end of the processes, workers are dissatisfied with the award of the National Industrial Court whose decision is final, then by virtue of section 17(3) they must go through the whole process of dispute settlement all over and *ad infinitum*. The law has apparently created a vicious circle of compulsory arbitration from which the workers cannot escape. By implication, the right to strike seems to have been smartly circumvented by the legislature.

It is submitted that the effect of the new law is to impair the right to strike in Nigeria." In practical terms, it is difficult to see

79. For more discussion, see LN. Erne Worugji, J. A. Archibong and E. Alobo, "The NIC Act 2006 and the Jurisdictional Conflict in Adjudicatory Settlement of Labour Disputes in Nigeria: An Unresolved Issue," 1 (2) *Nigerian Journal of Labour Law and Industrial Relations* (2007), pp. 25-42.
80. Section 241 provides that "An appeal shall lie from decisions of the Federal High Court or a Hish Court to the Court of Appeal as of right.... "
81. Since the law"retains the compulsory and interminable arbitration procedure of section 17 of the Trade Disputes Act, it means that strike action is presumed to be prohibited in Nigeria. See O. V. C. Okene, "The Status of the Right to Strike in Nigeria: A Perspective from International and Comparative Law," 15 (I) *African Journal of International and Comparative Law* (2007), pp. 29-60. Agornoalso shares this view; See C.K. Agomo, "Federal Republic of Nigeria," in R. Blanpain (ed.), *International Encyclopaedia of Labour Law and Industrial Relations,* Kluwer Law International (2000), para. 270

how trade unions could sidestep the ingenious and well calculated obstacles placed ill th .ir way before embarking Oil slrikl' actions. Consequently, it may be right to conclude that strikes arc prohibited by the new law. Ben-Israel has expressed a similar view thus:

> "A general prohibition of strikes can be attained indirectly, as a result of the settlement of labour disputes by means of compulsory conciliation and arbitration procedures, the final award of which is binding upon the parties concerned. By such procedures it is possible in practice to put a stop to any strike?"

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

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

As Nwabueze noted of Commonwealth Africa:

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

Indeed, the ILO condemns any sort of provision which, rather than simply creating reasonable conditions which are to be fulfilled before a strike can be called, makes it virtually impossible to hold a legal strike." The ILO has also stressed that the imposition of compulsory arbitration is only acceptable in cases of strike in essential services in the strict sense of the term, or in cases of acute national emergency, and that a system of compulsory arbitration can result in considerable restriction of the right of workers' organisations to organise their activities and may even involve an absolute prohibition of strikes,

82. R. Ben-Israel, *International Labour Standards: The Case of the Freedom to Strike*, Deventer, Kluwer (1988), p. 98.

83. Keba M'Baye and Birame Ndiaye "The Organization of African Unity (OAU)," in Karel Vasak and Philip Alston (eds.) *The International Dimensions of Human Rights*, Westport Connecticut, Greenwood Press (1982), p. 598.

84. B. O. Nwabueze, *Presideniialism in Commonwealth Africa*, London, C. Hurst (1974), p.37.

85. *fLO: Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee* Fifth (Revised) edition Geneva, International Labour Office (2006), para. 568

are imposed by . I'lillll / nir the new 11W iP':li11SI those wlu: exercis the riotll to stik«. The section provicdx a penalty 111 N10,000[87] or six months' illlprisonment or to both the fine and IllIpnslllllll'll for participation in a strike. There can be little doubt .that workers on strike because they have real grievances about important issues which affect their well being in the world of work. It is therefore important to find ways of solving the problems of workers rather than punishing them when they are constrained to go ,on strike bid to realise such legitimate demands, Imposing criminal sanct« for exercising the right to strike will not help the developlll'lll of healthy industrial relations and may well create more problems they resolve." As Adeogun noted:

> "That workers resort to industrial action even in the face of these stiff penalties vividly reminds us of what strikes are about. They are about grievances, actual or imagined, arising from industrial life. Unless "; a speedy and effective system is devised for resolving such grievances, strikes will surely take place, if only to focus the attention of the government and SOCIety at large on grievances. It is therefore unrealistic to put a total ban on strikes.?"

However, although workers still embark on strikes, it must he noted that the right to strike is a legal and not a sociological concept, and where strikes are forbidden as in our present situation, there is no such right however frequently they may occur.?"But criminal

86. */LO' Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee* Fifth (Revised) edition Geneva, International Labour Office (2006), para. 568. See also */LO: Digest of the Decisions and Principles of the Free dom of Association Committee of the Governl11g Body*, 4th Edition, eneva, International Labour Office (1996), para 517 and 521; *ILO: Committee on Freedom of Associauon,* 1140 (Colombia) para. 293; 236th Report Case No, 1140 (Colombia), para 145

87. Approximalely US$86,194.

88. *ILO: Freedom of Association and Collective Bargaisung: The Right to Strik* eral Survey 1994 Report III part 4B, para. 177.

89. A.A. Adeogun, "Strikes - The Law and the Institutionalization of Labour Protests in Nigeria," 16 (1) *Indian Journal of Industrial Relations* (1980), p.1. This is also confirmed by worldwide experience, which shows that legal prohibitions and restrictions have been powerless to prevent strikes and that penal sanctions which remain on the statute book are of "theoretical, educational or residual value." E. Cordova, "Strikes in the Public Service: Some Determinants and Trends," 124 *International Labour Review* (1985), pp. 167-195. As one commentator noted: "Let the punishment be capital, workers will continue to exercise this right, after all, the freedom of workers to even combine was acquired through toil and blood bath. Let the workers who exercise this right be tied to the stakes and burnt, the right to strike will always arise from the ashes of their own holocaust." See, G. Akpang"The Right of Workl'ls to Strike in Nigeria," 3(1) *Lawyer's Bi-Annual* (1996), pp. 71-86.

90. O. Kahn-Freund and B.A. Hepple, *Laws against Strikes: International Comparisons*,

sanctions l'l'llailily cannot solve the 111:I)'i,' of foreclosing strikes b workers when they ar d itermiucd to do so at all costs. A similar view was taken by Sir Hartley Shawcross in connection with the wartime industrial legislation in Great Britain. In 1946 he explained to the House of Commons:

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

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

5.2 The Right to Strike and Essential Services

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

in Social Policy, London, Fabians Research Series (1972), pp. 5-8.

91. Hansard, Feb. 12, 1946, cob. 199-200. See also Bretten, R., "The Right to Strike in New Zealand?' 17 *International and Comparative Law Quarterly* (1968), pp. 756-782; G. Morns, *Strikes in Essential Services*, London, Mansell Publishing Limited, (1986), p. 192; and E. Cordova, "Strikes in the Public Service: Some Determinants and Trends," 124 *International Labour Review* (1985) pp.167-195, where the author concluded that "legal prohibitions and restrictions have been powerless to prevent strikes and that penal sanctions which remain on statute books are of theoretical educational or of residual value."

92. *ILO:. Digest of Decisions and Principles of the Freedom of Association Committee* Fifth (Revised) edition, Geneva, International Labour Office (2006), paras 661-666.

93. This can be evidenced by the fact that many nationai constitutions in Europe and Africa now expressly provide for the right to strike. See "International Observatory of Labour Law http://www.llo.org/public/englishidialogue/ifpdiai/l Iobservatory/profiles/ger.htm (last accessed 14 January 2007).

94. G:S. Morris, "The Regulation of Industrial Action in Essential Services," 12 *Industrlal.Law Journal* (1983), pp. 69-85. 69. See also Monis, G.S., *Strikes in Essential Services*, L?ndon, Mansell Publishing Limited (1986), p.7; and B. Simpson, *The Right /0 Strike and the Law in Britain, with special reference to Workers in Essential Services*, London, London School of Economics, (1993), p. 10.

ociation Committee of the 11.() defined I," ntial .rvices :IS those whoxc uucrruption may cause public h.m]: hip" III „l'riolls hardship to the community." The dcliu itiou was later revised, in 1979, to read:

> "Essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population"97

Section 6 (a) of the new law prohibits workers in essential services from going on strike and adopts the definition of essential service under the Trade Disputes Act 1990. According to Section 9(1) of this Act "essential service" signifies:

> "the public service of the Federation or of a State which shall for the purposes of this Act include service, 10 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 10 the armed forces of the Federation or any part thereof; (b) any service established, provided or maintained by the Government of the Federation or ofa State, by a local government councilor any municipal or statutory, or by private enterprise-for, or in connection With, the supply of electricity, power or water, fuel of any kind, sound broadcasting or postal, telegraphic, cable, wireless or telephonic communications, ports, harbours, docks or aerodromes, transportation of persons, goods or livestock by road, rail sea, river or air, the burial of the dead, hospitals, the treatment of the sick, the prevention of disease, sanitation, road-cleansing and the disposal of night-soil and rubbish, dealing with outbreaks. of fire' Service in any capacity in any of the following organisations - the Central Bank of Nigeria, the Nigeria Security Printing and Minting Company Limited, any corporate body licensed to carry on banking business

95. *Official Bulletin*, Vol XLI V, 1961, No. 3, 54th Report, Case No. 179, para 55.

96. *ILO: Freedom of Association and Collective Bargaining*, 1985 Digest: para 393.

97. */LO: Freedom of Association and Collective Bargarming*, 1994 Report Part 4B para 159. See also *ILO: General Survey* 1983, para 213·214: and B. Germgon, A. Odero, and H. Gudo, "ILO Principles Concerrung the Right to Stnke," 137 (4) *Intem otional Labour Review* (1998), pp. 1-32.

under the Banking Act."

As is apparent, the list of essential services comprises a whole range of services that could legitimately come under the law. Indeed, it seems correct to suggest that any service, irrespective of the sector or industry can be deemed "essential" depending on how the service came to be rendered. For example, if an essential service say the Power Holding Company of Nigeria (PHCN), contracts a business to another firm whose primary function is not power generation, say, building or construction, the latter firm will come under the provisions of the law. Similarly, if a local government council (an essential service) hires the services of a private cleaning company to sweep the streets and workers in this company strike, they will be enjoined by the law. The law therefore provides rather elastic conditions for any service in Nigeria to be regarded as essential, depending on the particular circumstance.

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

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

98. *ILO: Freedom of Association and Collective Bargaining:* 1994 Report Part 4B Para 159; See also General Survey 1983, Para 213-214; See also Gernigon, B., Odero, A., and Gudo, H., "ILO Principles Concerning the Right to Strike." 137(4) *International Labour Review*, pp 1-32.

ential services

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

5.2.2 Non-essential services

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

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

> "Nigeria has the widest definition of essential services in the world because of its politicisation by successive military regimes, which, since the mid-1970s, expected the classification itself to be a sufficient anti-strike medicine instead of a more sensible compensation and employment policies. The Abacha regime, for example, extended the label to include all educational institutions in its bid to muzzle ASUU and other protesting teachers. It is not merely a question of these public servants having their own trade unions or associations

99. *ILO: Freedom of Association and Collective bargaining*, 1994 General Survey, para. 159.

;IS vl scwlu-u- ill the world, but ,",,I ,,/ the II d I'IIIII'I:IIil' righl and the fact tha(historical evidence indicates the denial of these rights to them by rcxtrielIiv. I'gist'IIion, 'in the public interest', merely served to render most of the essential services unattractive places to work in for a majority of workers ... [T]hus, aside from the military (and intelligence agencies), which is not a voluntary institution, the freedom of association and right to organise and collective bargain should be enjoyed by all public servants. "[100]

Indeed, considering the conclusions of the Committee on Freedom of Association, it can be argued that the definition of essential services in such an exceptionally wide manner constitutes an abuse of the right to strike, as it falls short of ILO guidelines. The Committee has urged that the legislation should be amended in line with the provisions of Conventions No. 87 and 98 to comply with the appropriate scope of essential services. In a recent report in which the Committee asked to be kept informed of developments, it requested the government to amend the definition of essential services "so as to limit them to situations where there is a clear and imminent threat to the life, personal safety or health of the whole or part of the population."[101] This view is reiterated by the Committee on the Application of Conventions and Recommendations (CEAR) which, "once again requests the government to take the necessary measures to amend the Trade Disputes Act's definition of essential services,"[102]

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

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

101. *ILO: Committee on Freedom of Association*. 343rd Report, Case No. 2432 (2006) (Nigeria), paras. 1024 and 1029.

102. See ILO, CEACR, 2007, 96'hSession: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Nigeria.

approach adopted by 11111 I fri .111 .uuiu icx such as South Africa, in dealing \ IIII the Ij III',:IiIIII of xuikes nntl workers in essential service». III South A II i,';I, 101' .x.unplc, an independent body (the Essential Services Committee) comprising labour, employers and the state or a body of labour relations experts is established under the Labour Relations Act (LRA).[103] The members of the committee are required to have "knowledge and experience of labour law and labour relations.:"?' Formal qualifications are not prescribed. They should, however, be trained in the techniques of making reasoned, structured and principled decisions.l" In addition, they should also have dispute resolution process skills. Overall, the committee determines disputes as to whether a part of a service is essential or whether an employee is engaged in an essential service. The decision about when to impose the prohibition could be taken by the committee in the light of the particular circumstances of the strike In question. This could be before the action starts, or during the strike if consequences should arise which could endanger human life and safety.[106] Nigeria can take a cue from this procedure to regulate the right to strike in essential services rather than imposing an outright ban.

5.3 Picketing

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

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

104. See D. Pillay, "Essential Services Under the New LRA," 22 *Industrial Law Journal* (2001), pp 1-36. See also C. Cooper, "Strikes in Essential Services," 15 (5) *Industrial Law Journal* (1994), pp. 903-929.

105. *Ibid.*

106. For more detailed discussion of these procedures, see D. Pillay, "Essential Services under the New LRA," 22 *Industrial Law Journal* (2001), pp 1-36.

concert xl stoppage or work is nol urulcimin -d'lll i Th - II,() has stated its positions as follows:

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

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

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

With regards to the second limb of the restrictions, this provision

101. P. Elias, B. Napier and P. Wellington, *Labour Law: Cases and Materials*, London, Butterworth (1979), p.272

108. */LO: Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body,* Fifth (Revised) edition, Geneva, International Labour Office (2006), paras. 648 and 651.

109. This is by virtue of section 42 (1) (A) and (B) as provided by section 9 Trade Union (Amendment) Act 2005.

110. *ILO: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body*, 5th ed., Geneva, International Labour Office (2006), para. 651.

appear III 1'1 too broad and could be 11. 1'" III outlaw strike picket or ':111 11'1111 - 11 1 11 ,11 1, 1111111.' and Will k" IS, For example, any group 01 workers 1111 .11" " 111:1 be accused of violarinu the law by obstructing prcmisrx :1l1d highways 1'01' gathering on the streets or on the work premises. however peaceful the gathering may be. Moreover, aircraft-related services should not be the subject of an overall ban because they are not considered essential services. Overall, the provision seems to reflect a policy towards repressing the right to strike and must be considered as exceptional. This provision must therefore be further amended to comply with international labour standards and ensure that undue restrictions are not placed on the right to strike actions under the guise of maintaining public order.

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

6. CONCLUSION

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

111. *ILO: Committee* on *Freedom of Association,* 343rd Report, Case No. 2432 (2006) (Nigeria), paras. 1026 and 1029.

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

existing areas of non compliance.

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

The other area where the new law fails completely to make any positive impact is the right to strike. The new law seriously undermines the right to strike. In the first place, by adopting an overly broad list of essential services, workers in essential services, which in the case of Nigeria constitute more than half of the entire working population, are denied the right to strike. Secondly, the preconditions for a lawful strike including picketing are such that it will practically be impossible for strike to take place. The conclusion must that the Nigerian worker has been denied the right to strike, This tilts the bargaining power more and more in favour of the employers. In a free market economy every one is only able to achieve economic progress by a clever manipulation of the forces of the market. To deprive the worker of his right to organise industrial action is not only to deprive him of a requisite weapon in his bargaining armoury, but an attempt to leave him economically rudderless and unprotected in the fierce economic encounters with the employer. There is therefore a need to amend the law to guarantee the right to strike in line with international standard [113] workers' freedom of association. As Kahn Freund once noted:

> "No country [has] suppressed 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."[114]

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

One measure of the health of any society is the extent to which its legal system and administration are in tune with contemporary realities and contemporary public opinion.[115] 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.[115] There is therefore a need for more reform in this labour law and industrial relations system to make a reality out of the constitutionally guaranteed freedom of association. Freedom of association as a human right is indivisible. This means that it cannot be guaranteed to one section of the society, while workers are lagging behind. Indeed, the adverse criticisms and damning conclusions of the ILO supervisory bodies - the Committee on Freedom of Association (CFA) and the Committee of Experts on the Applications of Conventions and Recommendations (CEACR) raises significant concerns-which undoubtedly strengthen the case for changing Nigerian labour law.

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

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

114. See The Han. Sir Samuel Cookey, "The Scope of Judicial Development of the Law" in Commonwealth Law Bulletin: Proceedings of the Commonwealth Lawyers Conference 1977, cited in A. N. Nnamani, "The Role of Law Reform In the Development of the Law" 3 *Calabar Law Journal* (1990), pp. 31-46.

115. See Content of President Olusegun Obasanjo's Letter to the National Assembly, 8 June 2004 available at http://nlcng.org/objletteronassonlabourlaw.htm (last accessed 20 March 2008).

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