WORKER'S RIGHT TO STRIKE UNDER INTERNATIONAL LAW: COMPARING POSITIONS IN UNITED KINGDOM, NIGERIA AND SOUTH AFRICA*

Abstract

Strikes are as a result of conflicts in industrial relations. It is an essential tool of trade unions all over the world for the defense and promotion of the rights and interests of their members and thus protected by both international instruments and state legislations. However, because of the perceived adverse consequence of this right on the economy, states have always controlled or restricted its use through legislations. This paper will examine the relevant legislations as regards the right to strike in international Law, vis-a-vis the provision in Nigeria, South Africa and UK to elicit the many conditions which precipitates a lawful strike, to show that these conditions hamper the smooth exercise of this right. It examines the ECHR decisions as regards the right to strike and what it portends for BREXIT.

Keynotes: Employee's Right, Strike, BREXIT, Industrial Action, Worker's Right

1. Introduction

Lord Denning in *Tram Shipping Corporation V. Greenwich Marine Incorp*[1] defined strike as 'a concerted stoppage of work by men, done with a view to improving their wages or conditions of employment, or giving vent to a grievance or making a protest about something or sympathizing with other workmen in such endeavor. It is distinct from stoppage brought by an external event such as a bomb scare or by apprehension of danger'. The right of workmen to strike is an essential element in collective bargaining;[2] however it has been mostly canvassed that this right must be a weapon of last resort, because, if the right is misused, it will create a problem in the production and financial profit of the industries, which will ultimately affect the economy of the country. Some countries like Nigeria, South Africa and the UK have attached conditions which the trade unions and workers must fulfill before the exercise of this right. However, considering all the restrictions attached to the exercise of the said right under the UK Laws, South Africa's Labour Relations Act and the Nigerian Trade Dispute Act 1976 as Amended,[3] could it be said that there is a positive right to strike? Scholars have been of the opinion that there is no positive right to strike; rather there is a freedom to strike.[4] In South Africa however, there has been a positive identification of this right in the constitution. But the South African Labour Relations Act lays down specific procedures which must be followed by employees in order to enjoy the right to strike

This work will analyze the provisions of the extant laws in these jurisdictions with the provisions of International instruments, for the purpose of realizing the position that will better promote industrial peace.

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[1](1975) ICR 261

[2]*HandWoven Harris Tweed Co. Ltd. V. Veitch* (1942) A.C. 435 at P. 463, per Lord Wright

[3]Trade Disputes Act, Cap. 432, Laws of the Federation of Nigeria 1990 Which replaced the Trade Disputes (Emergency Provision) (Amendment No.2) Act of 1969

[4] OVC Okene, Derogations and Restrictions on the Right to Strike Under international Law: a Case of Nigeria https://works.bepress.com/ovunda_v_c_okene/24/ accessed 16th April 2020

This work is divided into six parts. The first part introduces the work. The second part examines the right to strike under international law. The third part discusses right to strike under Nigerian law while the fourth part captures the UK regime while distilling the effect of BREXIT on the decisions of the ECHR's. The fifth part embodies the South African context and the final part will conclude and recommend.

2. Right to Strike under International Law

International Labor Organization (ILO)

The recognition of the right to strike as a fundamental right in the context of the ILO standards has been the result of the work performed mainly by two of its supervisory bodies: the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations. These bodies have held that the right emanates from the content of Convention N°87, particularly from its articles 35 and 106. The interpretation given by both Committees is based on the idea expressed in these articles, that the ILO members are bound to respect and protect the autonomy of employer's and worker's organizations whose purpose is to defend and put forward the interests of their members

European Convention of Human Rights (ECHR)

The European Convention on Human Rights (ECHR) formally the Convention for protection of Human Rights and Fundamental Freedoms is an international convention to protect human rights and political freedom in Europe.[5] Article 11 of this convention provides for freedom of assembly and association.

The recognition of the right to strike as a fundamental human right in the context of the ECHR has been achieved through the evolution of the case-law. The Court's previous position, expressed clearly in the cases *National Union of Belgian Police v Belgium* [6] and *Swedish Engine Drivers' Union v. Sweden*[7], maintained that article 11 protects the right of workers to associate and the right of their associations to be heard but its protection did not extended to the specific forms in which such freedom could be exercised. And thus there was clearly no room for a specific right to strike under the Convention. In 2009, the European Court of Human Rights ruled for the first time that Article 11 of the European Convention included protection of the right to strike, such that any infringements of that right required to be justified in accordance with Article 11(2)[8] In the cases of *NURMT v. SERCO* and *ASLEF v London & Birmingham Railway Limited*[9] however, Elias LJ confirmed that the European Court had ruled in a number of cases' (ie in *Enerji* and subsequent decisions) that Article 11 protects a right to strike. He admitted the existence of the authority which ruled that the legislation regulating industrial action ought to be construed strictly *against* trade unions. In the light of recognition of a right to strike under Article 11, however, this authority was no longer good. A clearer pronouncement was that of Judge Pinto de Albuquerque in a recent case where he mentioned that the right of association of workers includes the following essential elements: The right to form and join a trade union…the right to bargain collectively with the employer and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members. In a democratic society, to persuade the employer to hear the demands of the workers is obviously strike action. If collective action represents the core of the workers' freedom of association, strike action is the core of the core. Indeed, striking predated both unions and collective bargaining. Thus, the taking of strike action should be accorded the status of an essential element of the Article 11 guarantee[10]

[5] Wikipedia, https://en.m.wikipedia.org/wiki/European_Convention_on_Human_Rights >
[6] (1979-80)
[7] (1979-80)
[8] *Enerji Yapi-Yol Sen v Turkey Turkey* Application No 68959/01, 21 April 2009, 'Enerji'
[9] [2011] IRLR 399 at [87] *;see also NURMT v SERCO,*
[10] Separate Opinion of Judge Pinto de Albuquerque in *HRVATSKI LIJE NI KI SINDIKAT V. CROATIA* (2014) App No. 36701/09

3. Right to Strike under Nigerian Law

The earliest Union organized strike in Nigeria is recorded to have taken place on January 9, 1920 when the Nigerian Mechanics Union of the Nigerian Railway stopped work to back their demand for war bonus due to an acute rise in the cost of living arising from the effect of the First World War (1914-1918).[11] However, the rich history of trade unionism in Nigeria leads one to ask if there is a right to strike or a mere freedom to strike? By no stretch of imagination, Rights are those entitlements accruing to an individual as a member of a society and which the law will protect, whereas, freedom is recognized but restricted. Thus, while the Constitution does not expressly provide for the citizens right to strike, the right to freedom of association[12] and the right to freedom of expression[13] acts as the basis for the said right. Under Nigerian law, the conditions which workers must fulfill before embarking on a lawful strike are contained in section 31(6) of the *Trade Unions Act LFN 2004* as amended by the *Trade Unions (Amendment) Act 2005* and sections 4, 18 and 42 of the *Trade Disputes Act LFN 2004* as amended. Thus, while the right to strike in Nigeria is not a constitutional right, it is a legal right. The many restrictions which this condition tends to pose, forms the subject of this discourse.

Condition for Lawful Strike In Nigeria

Section 31(6) of the *Trade Unions Act* provides four *conditions* that workers in Nigeria must fulfill before they can embark on a lawful strike. The first condition under Section 31(6)(a) of the *Trade Unions Act*, as amended requires that the workers and their union must not be engaged in the provision of *essential services*. The First Schedule to the *Trade Disputes Act*, as amended, outlined disciplines regarded as *essential services*. The Freedom of Association Committee of the Governing Body of the International Labor Organization defines 'essential services' in its strict sense as 'services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.'[14] The Committee also decided that restrictions on the right to strike in essential services should be accompanied by speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented. The *Trade Unions (Amendment) Act 2005* did not define *essential services*, nor did it make any provision for speedy conciliation and arbitration of disputes in essential services, but instead the law is that provisions for arbitration in the *Trade Disputes Act, Cap T8, Laws of the Federation of Nigeria, 2004* shall apply in all disputes affecting the provision of essential services.[15] It is submitted that the absence of provisions for speedy arbitration of trade disputes in essential services is most unsatisfactory as such provisions could compensate for the ban on strikes in essential services.

Secondly, section 31(6)(b) of the *Trade Unions Act*, as amended, also requires as a condition for a lawful strike that the strike must be in contemplation or furtherance of a *labor dispute* that must constitute a *dispute of right* and not of interest. Section 31(9)(a)of the Act defined *disputes of right* as 'any labor dispute arising from the negotiation, application, interpretation or implementation of a contract of employment or collective agreement under this Act or any other enactment or law governing matters relating to terms and condition of employment.' Otuturu submits that by including disputes arising from the 'negotiation' of a contract of employment or collective agreement in the definition of disputes of right, the legislators have defined disputes of right to include disputes of interest[16]. He posited that whereas disputes of right are concerned with the interpretation and implementation of existing rights arising from the individual contracts of

[11] A.B Ahmed, *Critical Appraisal of the Right to Strike in Nigeria,*< http://www.google.com/critical-appriasal-of-right-to-strike-in-Nigeria-pdf > accessed 20/10/2019

[12] Constitution of the Federal Republic of Nigeria (CFRN)1999 as amended, section 40

[13] Ibid. s. 39 CFRN

[14] *Digest of the Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* 5th (revised) edition (Geneva: International Labour Office, 2006) at p. 116 paragraph 564.

[15] Section 31(8) TUA

[16] George O Otuturu, *Trade Union (Amendment) Act 2005 and the right to strike in Nigeria: an international perspective*, <www.google.com/George O Otuturu/Trade Union (Amendment) Act 2005 and the right to strike in Nigeria/pdf > accessed 20th November 2019

employment or collective agreements or statutes; *Disputes of interest*, on the other hand, are concerned with the negotiation of new rights or the variation of contracts of employment or collective agreements.[17] Hence, disputes of right are subjected to arbitration and adjudication procedures, while disputes of interest are left to be resolved through collective bargaining and the respective powers of employers and employees, which could include strikes and lockouts.[18]

The third condition for a lawful strike in Nigeria is the requirement of compulsory arbitration. Section 4, 6 and 18 of the *Trade Disputes Act* as amended provides for compulsory arbitration. Section 31(6)(d) of the *Trade Unions Act*, as amended, further requires as a condition for a lawful strike that the provisions for *arbitration* under the *Trade Disputes Act* must be complied with. Section 4(2) enjoins the parties to settle the dispute by mediation within seven days. Section 6 deals with the formal declaration of a trade dispute; if and when the parties fail to reach an amicable settlement within seven days of the appointment of a mediator. The Minister of Labour is then informed within a number of days. Section 18 of the *Trade Disputes Act* recognizes that workers are supposed to adhere to section 4 or 6, before embarking on a strike, while Sub (2) makes it an offence[19] to contravene that section. It is equally important to note that the use of the word 'or' after each paragraph shows that the requirements of section 18(1) are disjunctive rather than conjunctive. Thus workers who have complied with the requirements of section 4 can legally embark on strike.*[20]* The Freedom of Association Committee of the Governing Body of the ILO considers that a system of compulsory arbitration through the labor authorities, as in Nigeria, if a dispute is not settled by other means, can result in a considerable restriction of the right of workers and their unions to organize their activities and may even involve an absolute prohibition of strikes, contrary to the principles of freedom of association.[21]

The fourth condition for a lawful strike under the *Trade Unions Act* is *balloting.* [22] The Law requires that it must have been conducted in accordance with the rules or constitution of the trade union at which a simple majority of *all* registered members must have voted to go on strike. It has been argued that this requirement that a simple majority of *all* the registered members of the trade union must have voted to go on strike is oppressive and could hinder the possibility of carrying out a lawful strike, particularly by workers in large enterprises.[23]

Finally, is the requirement for Notice under Section 42(1) of the Trade Dispute Act. The section makes it an offence if any worker ceases, whether alone or in combination with others, to perform the work which he is employed to perform without giving his employer at least *fifteen days' notice* of his intention to do so in circumstances involving danger to persons or property. Thus after obtaining a strike ballot, the workers and their union are obliged to give to their employer a notice of their intention to go on strike. This is a cumbersome procedure

4. Right to Strike under the United Kingdom Law

In the UK, there is also not an absolute right to strike; however, there is a procedural requirement for statutory immunity.

[17] G.O otuturu, ibid
[18] A.T.J.M. Jacobs "The Law of Strikes and Lockouts" in R. Blanpain, *op. cit.*, at p. 673.
[19] Emphasis are added to point out the criminal sanction attending a breach of Section 18(1)
[20] Eche v. State Education Commission (1983) 1 FNR 386.
[21] See Digest of the Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO 5th (revised) edition (Geneva: International Labour Office, 2006) at pp. 117 paragraph 568.
[22] Ibid, s.31 (6)(e) TUA
[23] Ibid, at p. 115 paragraph 556.

Right to Strike under Employment Relationship Act (ERA), Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) and the Trade Union Act 2016

UK law does not provide for rights to strike. It grants immunities, currently contained in section 219 TULRCA, from specific tortuous liabilities which are inevitably incurred through the organization of industrial action. The pre-condition for attracting immunity is that the industrial action is 'in contemplation or furtherance of a trade dispute'. However, as a result of Acts passed in 1980, 1982 and 1990 this immunity is removed if industrial action is taken for purposes deemed 'political', or taken in support of other workers engaged in industrial action, as such disputes can no longer be considered 'trade disputes'. These restrictions on 'rights to strike' have been deemed contrary to ILO Convention 87. Additionally, the ILO has observed that these restrictions, as part and parcel of a system of immunities, render the law unduly complex and uncertain. The ERA introduced important changes contained in its Schedule3, which render it automatically unfair for an employer to dismiss strikers engaged in lawful industrial action. However, workers may lose this protection if the action continues for more than eight weeks. The Trade Union Act 2016 introduced a further requirement on Notice and Balloting which a closer examination reveals that it appears to be a clog on the right to strike, this will be examined below.

Notice and Ballot Requirement as a clog on the Right to Strike Under the UK Law

In the case of *RMT v. SERCO & ASLEF v. London Birmingham Railway ltd* Elias LJ noted that Article 11 of the European Convention on Human Right (ECHR) protects the right to strike. The existence of this right however did not legitimize or legalize industrial actions called by union. Rather the provisions regarding notice and ballot are construed the way they are with regard to both the Union and Employers interest.[24]

In respect of balloting, previously a bare majority[25] of those voting had to endorse their union's industrial Action in a ballot,[26] but since the adoption of TUA there became a further requirement regarding turnout.[27] 50% of those who were entitled to vote in the ballot have to vote for the ballot to be valid. Then for essential services, the TUA introduced additional balloting requirement, whereby at least 40% those entitled to vote in ballot must have given their approval[28] (in addition to the 50% turnout threshold).[29] A seven-day notice is then given the employer as well as the ballot paper. There must be sufficient information on the notice of ballot to tell the employer the categories of employee and work places affected. The ballot paper must also include the reasonable detail of the matters in issue, these acts as sufficient information to the voters and employers, to make them ascertain if that is a lawful trade dispute.[30] A two weeks' notice of the industrial action is then given the employer.[31] Then the mandate given by the ballot to proceed to industrial action expires after 6 months from the date of the ballot (or a further nine months if parties agree) and a fresh ballot has to take place to authorize the industrial action after this time.[32] In the UK, small accidental failures that do not affect the result of the ballot are disregarded.[33]This provision still stands. In respect of notice, minor error or omission is not taken to invalidate the notice, when trade union have done what is reasonable to comply with the statutory requirement. This is known as *de minimis* rule.[34]It is seen from the above that the further requirement would further clog the smooth right of a worker to strike.

[24]No v i t z , T . A . (2016). *UK regulation of strike ballots and notices – Moving beyond 'democracy'? Australian Journal of Labour Law*, < http://research-information.bristol.ac.uk/files/73568578> accessed 19th November 2019
[25] Emphasis are added
[26] Section 226(2)(b) Trade Union and Labor Relation (consolidation) Act 1992 (TULRCA)
[27] Section 2 Trade Union Act 2016 (TUA)
[28] Emphasis are added
[29] Ibid. s.3 TUA
[30] Ibid. s. 5TUA; s.225 TULRCA
[31] Ibid. s.8 TUA
[32] Ibid s. 9 TUA (which amended section 234 TULCRA)
[33] Ibid. s232 B TULRCA
[34] Ibid, RMT v. SERCO; ASLEF v. London Birmingham Railway ltd

Right to Strike, Not More than a Slogan in the UK

The existence of the right to strike in UK has been subject to judicial debate and the courts have always strictly interpreted the 1992 Act. In the case of *Metrobus v Unite the Union*[35] *the court of Appeal in UK challenged the above decision of the Court of Human Rights. It denied that the decision of the European Court of Human Rights in Enerji was authority for the existence of a right to strike under Article 11 and The Trade Union and Labour Relations (Consolidation*) Act 1992 was thus interpreted by the Court strictly, without further reference to the Convention, and the trade union was found to be in breach of them on a number of grounds. Maurice Kay LJ stated his view that, 'the right to strike [in the UK] has never been much more than a slogan or a legal metaphor'.[36] The Law and the judicial decision in the UK have favored a restricted right to strike and these have understandable reason, even though prejudicial to the workers. However the ECHR have been of the opposite view. One would ask what this portends for UK with the BREXIT, seeing that the UK Human Rights Act (HRA) provides that UK courts or tribunal in determining a question which has arisen in connection with a Convention right 'must take into account' any Judgments and decisions of the European Court of Human Rights.[37] A brief conjecture of the likely outcome is examined below.

Effect of BREXIT on the Right to strike in UK

BREXIT will likely not prevent cases being taken to the ECHR. However, the UK government plans to replace the Human Right Act (which states that the UK courts 'must take into account' not necessarily follow any judgment, decision, declaration, or advisory opinion of the European court of HR) with the Bill of Rights.[38] Therefore, the European Court of Human Right (ECHR) decisions may still be relevant to UK laws but the Bill of Rights will determine how relevant they would be.

5. Right to Strike in South Africa

For so many years, the right to strike has remained at the front burner of legal conversations in South Africa. When one considers the nature of the South African economy ─ especially the superlative role of its labour force in its economy ─ it becomes clear why there has been heavy legislative and judicial involvement in the right to strike. Thus the first positive recognition of this right is under Section 23(2) of the Constitution of the Republic of South Africa which provides for a worker's right to strike vis; *Every worker has the right – (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike*. And consequent upon the constitutional provision that national legislations may be enacted to regulate this fundamental right, the Labour Relations Act 66 of 1995 was enacted specifically to give effect to the labour rights entrenched in section 23 of the Constitution. Consequently, the Labor Relations Act provides in section 64(1) that *'every employee has the right to strike and every employer has the recourse to lock-out.'* Needless to say, these laws constitute the legal impetus for employees to collectively come together to form trade unions for the purpose of collective bargaining and to mobilize action for common causes such as wage negotiations, better conditions at workplaces, welfare concerns and so on. The Constitutional Court of South Africa[39] has stressed the importance of the right to strike to be an essential component of collective bargaining while describing same as including a right on the part of those who engage in collective bargaining to exercise economic power against their adversaries. It is noteworthy however that the same law that gives vent to this right has also laid down certain rules which must be piously followed. By implication, the threat to strike and strike action must be made within the confines of the law; otherwise it will amount to violation of the rules of the game. As explained by Romeyn[40], the International Labour

[35] [2009] EWCA Civ 829

[36]R Dukes, *'The Right to Strike under UK Law: Not Much More than a Slogan?*'
<www.academia.edu/22469219/the_right_to_strike_under_UK/pdf > accessed 24th November 2019

[37] S. 2(1)a UK Human Rights Act 1998

[38] Disability righs UKhttps://www.disabilityrightsuk.org/brexit-and-european-convention-human-rights

[39] Re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)

[40]Romeyn Date, *Striking a Balance: the Need for Further Reform of the Law Relating to Industrial Action.* http://aphnew.aph.gov.au/binaries/library/pubs/rp/2007-08/08rp33.pdf. Accessed 20th August 2020.

Organisation (ILO) attempts to ensure that the right of parties to take industrial action is balanced against other fundamental rights of workers, employers and the public—such as the freedom of non-strikers to work and the right to protection of property and personal safety. Thus, to balance these competing interests, they have been such mechanisms as collective bargaining and the legislative concept of protected or unprotected strikes

The Concept of Protected and Unprotected Strikes under South African Law

The Labour Relations Act lays down specific procedures which must be followed by employees in order to enjoy the right to strike. Section 67(1) provides that 'protected strike' means a strike that complies with the provisions of this Chapter and 'protected lock-out' means a *lock-out* that complies with the provisions of this Chapter (that is chapter IV; Strikes and Lock-outs). Suffice it to conclude that unprotected strikes are strikes that do not comply with the provisions of the Labour Relations Act. This is corroborated by the court ruling in *SA Chemical Workers Union and others v Sentrachem Ltd*[41], where the Industrial Court applied this logic in drawing a distinction between legitimate and illegitimate strikes. However, a protected strike is subject to the qualification in Section 67(5) which reserves an employer's right to dismiss workers based on their conducts during the strike, or for reasons based on employer's operational requirements.[42] But in any case, striking workers are especially protected against dismissal and civil legal proceedings by the employer as provided in Section 67 of the Labour Relations Act. There are other requirements in Section 64 which enable an employer's right to lock out where the issue in dispute has been referred to a Council, or to the Commission as required by the Act; in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer; in the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in previous paragraphs, among others.

In *County Fair foods (Pty) Ltd v Food and Allied Workers Union*[43], the Labour Appeal Court demonstrated the critical importance of complying with these statutory requirements, such as notice of intention to embark on a strike as provided in Section 64 of the Act. The court has even went as far as holding that where strikers do not comply with the provisions of a collective agreement before striking but nevertheless comply with the Labour Relations Act, the strike will be protected, while relying on section 187(1)(a) of the Act which renders automatically unfair dismissal for participation in a protected strike. The Labour court possesses exclusive jurisdiction to restrain or interdict an unprotected strike, typically called wildcat strikes. Because they do not comply with extant procedural requirements, participation in an unprotected strike may thus constitute a fair reason for an employee's dismissal[44]. However, the provision of Section 68(5) of the Labour Relations Act is instructive here. It says that 'participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not a dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account'. On this question, a cursory look into what item 6(1) of the Code of Good Practice provides becomes imperative. It provides that: (1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including – (a) the seriousness of the contravention of this Act; (b) attempts to comply with this Act; and (c) whether or not the strike was in response to unjustified conduct by the employer. Although some quarters have argued that these provisions muddle up the murky waters of the right to strike in South Africa, they however represent the last straws that striking workers often hold on to where they embark on unprotected strikes, especially where there is a

[41] (2001) 22 ILJ 1103 (LAC)
[42] See FAWU v National Co-operative Dairies Ltd (1989) 10 ILJ 490 (IC); Black Allied Workers Union v Prestige Hotels CC t/a Blue Waters Hotel (1993) 14 ILJ 963 (LAC); SACWU v Afrox Ltd (1999) 20 ILJ 1718 (LAC)
[43] County Fair foods (Pty) Ltd v Food and Allied Workers Union (2001) 22 ILJ 1103 (LAC)
[44] Section 67(4) of the Labour Relations Act

looming threat or high likelihood of dismissal. Therefore, while considerable level of uncertainty may exists in the status of unprotected rights in terms of warranting a dismissal, the limitations to the right to strike are far more certain.

Limitations to the Right to Strike in South Africa

As with every right, there are limitations to the right to strike in South Africa, as provided in Section 65 of the Act. Section 65 (1) of the Act that 'no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-*out* if - (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute. By implication, the existence of a binding collective agreement prohibiting a strike in respect of the issue in dispute precludes a worker from embarking a strike.[45] Also, Section 65 (1)(b) and (c) provide that where a person is bound by an agreement that requires the *issue in dispute* to be referred to arbitration, or where the *issue in dispute* is one that a party has the right to refer to arbitration or to the Labour Court in terms of the Act, such a person is precluded from taking part in a strike action. Thus, where, for example, there is an arbitration award that prohibits a strike in respect of the issue in dispute, a worker cannot embark on a strike action. Furthermore, Section 65(1)(d) provides that no person may take part in a strike if that person is engaged in an essential service or a maintenance service. Maintenance service is described under section 75 as the service the interruption of which has the effect of material physical destruction to any working area, plant or machinery. The act also creates a dispute resolution system. As seen in Chapter 7, the Commission for Conciliation Mediation and Arbitration (the CCMA) are the most important structure charged with conciliation of most disputes.[46]. Thus, strike actions can only be embarked on where conciliation has failed, unless there is a prior agreement to subject the matter to arbitration.[47].

6. Conclusion and Recommendations

The International Organizations and Conventions have consistently maintained that there existed a Right to Strike. The two supervisory bodies of ILO have held that the right emanates from the content of Convention N°87, particularly from its articles 35 and 106. Also, through judicial pronouncement in *Enerji* case, Article 11 of the European Convention of Human Right has equally been deemed to incorporate the right to strike. However, the opinions of Elias LJ in the ASLEF case has set the ball rolling on the positive right to strike contained in the ECHR.[48] South African has taken a proactive steps in the jurisdictions examined, by constitutionally providing for the right and also where the court in *Re Certification of the Constitution of the Republic of South Africa*[49] recognized and reiterated the right to strike. The UK law such as the Nigerian Regime, places so many restriction on trade disputes, and where the trade union has not followed correct procedures regarding balloting and notice, then liability in economic torts of inducement of breach of contract, interference with contract, conspiracy and intimidation follows.[50] The UK TUA 2016 introduced further clogs to this right. An argument for the many restrictions under UK law has given economic objectives and welfare as reason for some of the restrictions placed by the law.[51] It is our opinion that the threshold turnout requirement of 50% and the more detailed voting paper requirements, both limits potential access to strikes and the bargaining power of the worker generally. While it is important that the democratic intention of balloting and notices be maintained, the provision

[45] See NUMSA and others v Hendor Mining Supplies [2003] 10 BLLR 1057 (LC)
[46] Chapter 7, section 112-126 of the Labour Relations Act.
[47] CCMA's powers to resolve disputes may be found in sections 133-144 of the Labour Relations Act
[48] the separate opinion of Pinto de Albuquerque in the case of *Hrvatski lije ni ki sindikat v. Croatia* is instructive on this, where he maintained that the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members presupposes the existence of the right to strike
[49] Re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)
[50] Ibid. s.219 TULRCA
[51] Ibid. Novits TA. P 9. See also ILO Committee on Freedom of Association (CFA) *Digest of Decisions*, 5th ed, ILO, Geneva, 2006, at [585]. See also the specific observation of the ILO Committee of Experts (CEACR) on UK compliance with Convention No. 87
<http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3255351 > accessed 20th November 2019

should not be interpreted stringently as have been by UK courts. Hence, a neutral approach is suggested.[52] In *RMT and ASLEF*, the Court of Appeal ruled that the approach suggested by Smith LJ and Millett LJ was to be preferred. More than that: by reason of the European Court's decisions in *Enerji* and related cases, a neutral approach to interpretation of the 1992 Act is now *required*. To construe the UK 1992 Act as creating unnecessary hurdles or pitfalls for a union planning industrial action would be to deny that union and its members the right to strike as guaranteed to them by the Convention. To ensure the continuity of this right, even after BREXIT, the Bill of Rights should be accommodative of these decisions of the European Court of Human Right (ECHR) and the courts should actively apply same. The same applies to Nigeria. Strike is recognized under international labour law as an integral part of the freedom of association and the right of trade unions to organize their activities. What we need is a law that will strengthen the protection granted to trade unions and their members. A law that will protect workers from dismissal or criminal prosecution for organizing or participating in strikes and other forms of industrial action in contemplation of or in furtherance of a trade dispute. Thus, in accordance to the resolve of the Committee on Freedom of Association of the Governing Body of the ILO, employees should not be dismissed or refused re-employment on account of their having participated in a strike. This is because, the right to strike is one of the essential means through which workers' organizations may promote and defend the economic and social interests of employees.[53] Thus, the judicial interpretations coupled with the recognition of the right to strike by the international community demands that a more elaborate and positive statutory presence be given the 'Right to Strike.' The South African regime is the most welcomed approach, as the right is constitutionally guaranteed and this should be emulated. The South African framework is not all that perfect as considering the nature of South Africa's economic landscape; there is a need for the labor courts and constitutional court in south africa to create clear precedents that the average South African worker can run to for cover, thus clarifying the murky waters around the dismissal of an employee for embarking in an unprotected strike.

[52] Ibid. Ruth dukes

[53] See *Digest*, at p. 109, paragraph 520-522.