

Voluntarism, Trade Union Membership Dichotomy and Collective Bargaining under the Nigerian Labour Law

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Abstract

Trade union movement in Nigeria has been consumed with industrial crisis, partly due to unfair labour practices, and stakeholders are alarmed that this sharp practice, if not nipped in the bud will be a clog in the wheel of progress. Much as they attempt to perform their statutory responsibilities towards their members, trade union movement is under threat as the fulfilment of the sacrosanct duties seem illusory and unrealizable. This study examines the existing Nigerian labour laws as they relate to allowing workers to form and belong to any trade union of their choice in order to promote industrial coherence. The study argues that erosion of fundamental principles and rights at work, particularly freedom of association and collective bargaining occurs increasingly through the use of non-standard forms of trade union membership, which is not receiving adequate administrative attention. It concludes that unless trade unions build strong membership and maintain stable structures, the credibility of the trade union movement would be called to question.

Keywords: Voluntarism, Trade union, membership, collective bargaining

INTRODUCTION

In the trade union parlance, the notion of freedom of association entails that workers can form or be members of any trade union of their choice for the protection of their welfare through their chosen representatives. Workers are therefore at liberty to partake in union activities without restrictions, as enshrined in both domestic and international laws.

Associations of people such as weavers, hunters, blacksmiths, farmers and carvers existed in Nigeria long before the coming of the colonial administration. The functions of these associations, include: regulation of trade practices, offer mutual aid and assistance to colleagues, settlement of disputes, fixing of prices or wages for their services and organizing the payment of tributes or royalties to the Obas, Emirs, Obis, etc. [1]. One of the basic functions of the early craft union was the regulation of apprenticeship, setting of standards of work required and linking it to pay [2].

Trade union movement in Nigeria officially took-off on the 19th August, 1912 when workers in the then colonial administration civil service organized themselves in to trade union, known as Civil Service British Workers Union, later called Nigeria Civil Service Union (NCSU), for the protection and promotion of welfare and interest of indigenous workers of the Nigerian Civil Service.

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The history of Nigerian trade union movement has been one of horrific abuses and violations of rights from the years of military rule to successive democratic governments. Trade unionism in Nigeria had been bedevilled with industrial crisis caused by unfair labour practices emanating from contract staffing/outsourcing, non-recognition of

trade unions by some of employers of labour, conflicts of interest amongst the labour unions, leadership altercations and poaching without recourse to agreed regulations and procedures. Above all, collective bargaining structures are undermined and that even threatened the corporate existence of trade unions.

It is therefore in the best interests of all registered trade unions to build a strong membership, develop and maintain stable trade union structures anchored on the dimensions of globalization that would address emerging socio-economic trends for the potential benefits of all workers.

INSTRUMENTS ON RIGHTS TO FREEDOM OF ASSOCIATION

Basically, the notion of freedom of association is widely recognized as a fundamental human right. The Universal Declaration of Human Rights was adopted by the United Nations General Assembly (UNGA) in 1948, and it stated that "everyone has the right to form and join trade unions for the protection of his interests" [3]. Besides, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) of 1966, both echoed the same principle.

Moreover, Nigeria is a member of and a signatory to the Freedom of Association and Protection of the Right to Organize Convention 1948 and the Right to organise and Collective Bargaining Convention 1949 [4], which the International Labour Organization (ILO) recognised as essential principles. However, the level of compliance among state actors and various governments of the world are not too encouraging and humane enough. In consequence, Nigerian workers have the right to lodge complaints with the world body in the event of impediments of their freedom to associate to carry out union activities.

Furthermore, Nigeria is a signatory to the African (Banjul) Charter of Human and Peoples' Rights [5], which states that "every individual shall have the right to free association provided he abides by the law". As a result, there is no doubt that the right to free association and the right to organise is recognised under international law.

Apart from the instruments mentioned above, there are constitutional and legislative provisions that guaranteed the exercise of freedom of association by workers. The Federal Republic of Nigeria's Constitution contains valuable provisions stating that international treaties become effective once they are domesticated into the body of national law by the National Assembly. Thus, Section 12 (1) of the Constitution has been subjected to various judicial interpretations by the Supreme Court of Nigeria.

The Supreme Court considered the issue of the Constitution's supremacy over the African Charter on Human and Peoples' Rights in the case of *Sani Abacha v. Gani Fawehinmi*, and concluded as follows:

"No doubt Cap 10 of the African Charter on Human and Peoples' Rights (ratification and Enforcement Act) is a statute with international flavour. Being so therefore, if there is a conflict between it and another statute, its provision will prevail over those of that other statute for reason that it is presumed that the legislature does not intend to breach an international obligation."

According to the Supreme Court, since the African Charter on Human and Peoples' Rights has been domesticated in to the Nigerian law, it has prominence over mere International Convention. The Court continued by asserting that the Charter is more powerful than any other domestic statute. However, this neither suggests that the Charter is superior to the Constitution nor the international flavour precludes the National Assembly from deleting it from the National law.

The Court of Appeal held in *Chief J.E Oshevire v. British Caledonian Airways Limited* [6], that international treaties have precedence over domestic law where they are inconsistent with domestic

statute. The Court concluded that any international agreement embodied in a treaty is superior to domestic legislation, and thus any domestic legislation that contradicts such convention is null and void.

There have also been decisions that interpret Section 12 (1) of the Constitution as superseding the International Charter. The Court ruled in *Capital Bancorp Ltd. v. Shelter Savings & Loans Ltd.* that "the provisions of the Federal Republic of Nigeria's Constitution are supreme over international conventions". In addition, in *Oloruntoba Oju v. Dopomu*, [7], "Any provision of any existing law which is in conflict with the provisions of the 1999 Constitution must be deemed unconstitutional to the extent of discrepancy", the Supreme Court said.

There seems to be no posture as to whether international treaty prevails over domestic law, irrespective of whether Nigeria ratified the treaty or whether it is necessary for domestication of treaty to be effective as a law. Essentially, it would seem that applying international provisions is to ensure that justice is not only done, but seen to be done. In consequence therefore, the Supreme Court and all other Courts in Nigeria derived their legitimacies from the Constitution and thus cannot surpass the provisions of the Constitution [8].

The Federal Republic of Nigeria's Constitution [9] serves as another foundation for the protection of the right to freedom of association. Others are the Trade Unions Act [10] and the Labour Act [11]. The provisions of the Constitution and these laws make it clear that the right to form and join trade unions is available to all workers, regardless of their circumstances.

TRADE UNIONS MEMBERSHIP DICHOTOMY AND JURISDICTIONAL SCOPE

The Labour Act precludes employers from making it a condition of employment for employees to join or leave a trade union [12]. It also precludes an employer from dismissing an employee due to his relationship with the trade union. It follows that, subject to the terms of the Third Schedule to the Trade Unions Act, membership in a registered trade union is automatic for all eligible employees. However, only financial members shall be entitled to benefit from the trade union. Any member who has resigned his membership, or who has been dismissed or expelled from membership of the trade union for any act that is inimical to the interest of the trade union, after being given fair hearing before appropriate disciplinary committee shall forfeit his membership and shall have no claim in the assets of the trade union concerned, in the event of dissolution [13].

It is advisable that a worker must join a union because there is power in collective struggle, where workers come together to agitate for better conditions of service instead of individual struggle. Some of the advantages of trade union membership are: job security, representation during negotiation, declaration of trade dispute when workers' rights are being violated upon by the employer, protecting workers terms and conditions of employment, better health care and safety conditions, etc.

The issue of membership and erosion of jurisdictional scope amongst registered trade unions in Nigeria has been a recurrent matter of dispute within the trade union circle. However, some solace can be found in the following passage from the Federal Republic of Nigeria's 1999 Constitution [14]:

"Every person shall be entitled to assembly 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."

While interpreting Section 37 of the 1979 Constitution (now Section 40 of the 1999 Constitution) in relation to freedom of association, the Supreme Court in *Erasmus Osawe v. Registrar of Trade Unions* [15] unequivocally re-emphasized this position.

The Constitution also provides thus [16]:

1. Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society.
 - a. In the interest of defence, public safety, public order, public morality or public health; or
 - b. For the purpose of protecting the rights and freedom of other persons.

It is worthy of note that Section 40 is very significant to the workers, for it gives them the constitutional rights to freely associate for union activities. It also protects their rights not only to join a trade union of their choice, but also to form a trade union. In order to appreciate the effect of section 40 on freedom of association, it has to be read in conjunction with Section 45. The two sections must be married together. As a result, the combined effect of Sections 40 and 45 is that freedom of association or membership in a trade union, as guaranteed by Section 40, cannot be exercised outside the Third Schedule of the Trade Unions Act, which is an existing law under Section 315 of the 1999 Constitution, subject to the provisions of Section 45 of the same Constitution, namely, in the interest of public order, public safety, public morality, and or for the purpose of protecting the rights and freedoms guaranteed by Section 40.

In the case of *Osakwe v. Registrar of Trade Unions* [17], the Court stated that "the fundamental right guaranteed in Chapter IV of the 1999 Constitution is not absolute". Section 45 (1) (a) and (b) allow for exceptions to these rights.

Given the aforementioned clauses, it is evident that the right granted by Section 40 of the 1999 Constitution is a qualified right and not an absolute one, and that it is subject to Section 45's clauses. Certainly, the right to form and belong to a political party or trade union exists, but its exercise must be within the borders of all existing and relevant laws of the land for the purpose of instilling public order within the trade unions circle.

This was confirmed by the National Industrial Court in the land mark case of *ASCSN v. NCSU*, [18] where it held that:

"Trade Unions were restructured into named unions listed out and their respective jurisdictional scope provided for, all in Third Schedule Part A–C to the Trade Unions Act as amended.... The jurisdictional scope as contained in the Third Schedule Parts A–B and C to the Trade Unions Act is still applicable to all the Trade Unions. The right to choose which union to belong is a qualified right."

However, certain categories of workers are exempted from forming and belonging to a trade union of their choice due the peculiarity of their works. These are: workers of armed forces, which include the Police, Immigration, Customs, National Drugs Law Enforcement Agency (NDLEA) and Correctional Service. Others are: Central Bank of Nigeria, Nigeria Security Printing and Minting and Nigerian Communication Commission (formally Telecommunications) and certain government institutions, as well as young persons under the age 16 years.

VOLUNTARISM FROM THE PERSPECTIVES OF ILO STANDARDS

The major responsibility of the ILO as a specialized agency of the United Nations (UN) is the establishment of labour and social standards, and one of its major achievements is that it has formulated far-reaching labour codes through Conventions, Protocols and Recommendations adopted by international community, thus reflects common ethics and values that served as guidelines for national policy on work related matters.

Managing trade union under voluntarism encourages expansionist tendencies as the jurisdiction and membership categorizations, and sectoral structures of the unions have impliedly been tempered with. Voluntarism became a political tool in 1978 when it was used against Senior Staff Associations (SSA)

in Nigeria. With the promulgation of the Trade Unions Act in 1978, oppositions of senior staff bodies who ensured the latter's non-affiliation with Nigeria Labour Congress (NLC) stood their grounds to further insist that (SSAs) should not enjoy the automatic monthly check-off dues. SSAs were seen as projection of management, thus not labour unions and therefore not qualified for voluntary membership and monthly check-off dues. This position prevailed until 1999 when the Military Government headed by General Abdulsalam Abubakar promulgated the Trade Unions (Amendment) Act of 1999. Under the Act, the automatic membership and check-off dues rights denied the SSAs in 1978 were restored [19].

In 2005, the Trade Unions Act was amended with the objective to provide for the registration of another Central Labour Organization (now Federation of Trade Unions) besides the almighty NLC and also allowing workers the right to belong to any trade union of their choice [20]. The above objective appears plausible especially when viewed from the background of international labour standards, which allows workers to form and join union of their choice without prior authorization [21].

However, a critical look at the provisions would reveal that the amendments were occasioned by ulterior motives other than bringing the labour laws in conformity with international standards, particularly when one considers that most of the amendments were targeted at NLC due to its refusal to compromise in fuel price hike strike of 2005 and the fact that a technical Committee set up to review the entire labour laws in the country had already submitted its report which was yet to be implemented before the amendments took effect [22].

However, while Freedom of Association and Protection of the Right to Organize Convention promotes trade union voluntarism, the Nigeria's labour law does not accommodate extreme voluntarism of the ILO [23]. In line with the application of ILO standard, which allows for multiplicity Federation of Trade Unions, the Trade Unions (Amendment) Act broke the monopoly hitherto enjoyed by the NLC as the sole Central Labour Organization or Federation of Trade Unions. The Act brought about the democratization of trade union movement in Nigeria and guaranteed the right of workers and employers to belong to any trade union of their choices [24].

The passage of the Act paved way for the registration of Trade Union Congress of Nigeria (TUC) as a Federation of Trade Unions, alongside the NLC and other affiliate senior staff unions which were hitherto, not allowed to be affiliated to the NLC. Currently, there are two Federations of Trade Unions in Nigeria, viz; the NLC and the TUC. Trade unions are also structured according cadre with senior and junior staff dichotomy, in exceptional cases. The unions affiliated to NLC are those in the junior staff category, while senior staff unions are affiliated to the TUC.

The Trade Unions Act prohibits the formation of a Federation of Trade Unions where one already exists. This was tested when the United Labour Congress (ULC), a faction of the NLC led by Comrade Joe Ajaero, attempted to be registered as a Federation of Trade Unions as a result of the leadership tussle that engulfed NLC during its National Delegates' Conference in 2017 and the Registrar of Trade Unions refused to oblige such registration.

The Court in *Precision, Electrical and Related Equipment Senior Staff Association v. SSASCGOC & Ors*, "voluntarism and the freedom to choose which union to join are limited to unions authorised to operate within a clearly defined jurisdictional scope". Voluntarism must exist within, not outside, all applicable laws and regulations.

It is argued that voluntarism, like many other recommendations of the ILO is a mere standard or a guide to achieve industrial peace and harmony. It is therefore ill-conceived to assume that the right to belong to any union of one's choice in Nigeria is an absolute right. It is a qualified right, subject to conditions precedent. For instance, for one to be a member of National Association of Nigerian

Nurses and Midwives (NANNMS), one must be qualified to practice as a Nurse in Nigeria. It is an exercise in futility to suggest that ILO Conventions has overriding force than an Act of the National Assembly or the Constitution, which is the ground norm in Nigeria.

Although founded on the principles of liberal democracy, voluntarism in the Nigerian context can arguably be summarized as the trade union ill wind which will blow no worker any good. Workers need not be told that what they may have seen as freedom under voluntarism is nothing but a mere bait to assist them weakens the trade union movement, thus making them vulnerable to attacks by the employer when the union has been jointly putdown. Voluntary membership of trade union in Nigeria as the outcome of deregulation of trade union movement has endangered deep rooted acrimony between unions, particularly among those in the same economic sector or industry, who see each other as rivals rather than Comrades to the advantage of management and at the detriments of members, whom they claim to be protecting from the said management.

The system had aggravated the highest degree of unionization and organization competition ever noted in trade union movement in Nigeria. This is so because voluntarism as the operative word of change entails freedom of choice and fluid membership in unions. It is also instructive to note that under such arrangement, jurisdictions of unions are threatened as it implies no-hard and fast rules on this matter [25].

It is a welcome argument that voluntary membership of workers in and out of unions make for good industrial democracy. Unfortunately, proponents of this philosophy do not seem to see that the principle contradicts itself. On close examination of the application, it seems, though absurd that voluntary membership of union tends to imply that despite the fact that a worker may choose not to be a member of any union, all the same he should be entitled to enjoy negotiated benefits arising from union efforts. Indeed, there is absurdity in voluntarism [26].

MONTHLY CHECK-OFF DUES/UNION SUBSCRIPTIONS

Trade Union is a self-sustaining and non-for-profit organization that exists for the betterment of its members. Same as taxes, union dues are automatic monthly deductions from an employee's wages by an employer to pay to the union. Trade unions derive financial strength from monthly union dues which is the percentage of money contributed by individual members as may be contained in the union's Constitution.

The activities of trade union include organizing meetings, seminars and workshops, scouting for prospective members, organizing of strikes, payment of strike allowances, printing newsletters, payment of salaries, payment of rebates and honorariums, training of members and staff, payment of gratuities and pension, payment of legal fees, making savings for the union, etc.

It is a duty imposed by law on the employers to deduct union dues from workers' salaries directly and pay in to the coffers of a registered trade union existing within that sector or ministry or agency, as the case may be.

The Trade Unions Act authorizes deduction and remittance of monthly union dues to only registered trade unions. It does not allow sharing of dues for a union by a third party, except as the Rules of the Trade Union may permit. In accordance with the Act, once a trade union is registered and recognised as described in the Third Schedule to the Act, the employer is required to deduct contributions from the salaries of every employee who claims to be a member of a particular trade union, and these deductions must be made and remitted to the registered trade union's bank account within a reasonable amount of time or within a time frame that may be approved by the Registrar of Trade Unions. Usually, the deductions are done at the end of every month after payment of salaries.

On duty of employer to deduct check-off dues from employee's wages, the Court of Appeal in *Udoh v. O.H.M.B.* [27] stated that under the provisions of the Labour Act [28], every employer is required to deduct check-off dues from a worker's wages and pay them to the trade union of which the worker is a member. It is not the employer's concern whether or not the employee is a member of the trade union in the strict sense, once the employer can determine that the worker under reference is an eligible member of the trade union that is recognized by the employer. The Court also ruled that a worker may opt out of the check-off system in writing.

COLLECTIVE BARGAINING AND DISPUTES SETTLEMENT MECHANISMS

There can be no doubt that collective bargaining reduces inequality and ensures that more workers are protected. The basic roles of the union will be to seek to improve the take-home pay and working conditions of their members and campaign for improvements in the living standards and the quality of life. Unions by their structure and statutory objectives will continue to campaign on many issues affecting people's lives, both inside and outside the workplace.

As opposed to workers' welfare, employers are sceptical of the union, seeing it as parallel management rather than partners in progress and always unilaterally decide matters relating to jobs and other working conditions, thereby rendering collective bargaining processes and outcomes ineffective.

Recent development has shown that membership of trade union and collective bargaining coverage are declining at arithmetic progression, often times under pressure from employers due to lack of respect for fundamental principles and rights at work and other labour standards, inequality and social exclusion. Thus, wages are stagnating and job insecurity is on the rise. In attempting to reconcile the seeming conflicts of interest between trade unions and the employers of labour, parties therefore nominate their representatives to negotiate. Below are some categories of trade disputes that are common within the trade union circle in Nigeria, they are:

- i. *Inter Union Trade Dispute*: This is when there is a face-off or disagreement between two unions which could be based on poaching, jurisdictional scope, etc.
- ii. *Intra Union Trade Dispute*: Is the face-off within the union that is among the members of the same union.

There are also different mechanisms for dispute resolution, these include:

- i. *Negotiation*: It is an internal mutual settlement between the employers and the employees, in such case; a third party is not required.
- ii. *Mediation*: The disputants bring in an experienced third party from Ministry of Labour and Employment. The Mediator settles the two parties without imposing solutions on them.
- iii. *Conciliation*: If the mediator could not settle the two parties, the Ministry of labour is expected to appoint an experienced conciliator whose function is to reconcile the parties.
- iv. *Arbitration*: This could be compared to a court because the judgment (award) is always binding on the both disputants. Where the dispute cannot be settled by the conciliator, the Ministry of Labour has the prerogative to forward the case to the Industrial Arbitration Panel (IAP) by appointing one or two Arbiters who after listening to both sides has/have the right to pass a judgment (award).
- v. *Adjudication*: If the both parties could not be settled then the Ministry of Labour can now give a directive for the case to be transferred to the National Industrial Court (NIC) which is the apex court in industrial relations. NIC judgment is binding on both parties.

It is therefore advisable that parties to a trade dispute attempt to settle their differences by any dispute resolution mechanism discussed above. Where it fails, parties must mutually appoint a mediator within 7 days to resolve their differences. If that fails, it is reported to the Minister of Labour within 3 days, who then appoints a mediator to settle the matter within 7 days.

Alternatively, the Minister refers the matter to the IAP, who shall establish an arbitration tribunal to pass an award within 21 days. The Minister can refer the award for reconsideration and once the award is made, the parties have 7 days to object. Otherwise, the award is published and becomes binding on parties thereto. Where the award is objected to, the issue is referred to the NIC for final determination. The Minister may refer the matter directly to the court without going through arbitration tribunal processes [29].

However, there is statutory provision making recourse to arbitration compulsory. Under the Trade Disputes Act [30], industrial disputes are required to be referred, in the first instance, to the IAP. The NIC becomes seized of jurisdiction only if the IAP is not able to resolve the dispute at hand.

The Trade Disputes Act precludes any person from instituting a proceeding in court in which the subject matter is trade dispute or an intra-union dispute, and actions pending prior to the commencement of this Act shall abate and are null and void [31]. By the provision of sub section 2 of this section, only the NIC has the jurisdiction to entertain trade disputes and associated matters.

Collective bargaining, in most cases has proved unworkable due to the egocentric nature of the leadership of the unions and the management. More often, different agreements, at different times by different unions are negotiated with the same employer for workers in the same sector. The unions hardly speak with one voice. Sometimes, trade disputes are declared against the employer by one union and the other union will be in solidarity with the employer against its fellow union. While this is going on, the employer is having a field day, hiring and firing workers indiscriminately and at an alarming dimension. The leadership of the union is overwhelmed with envy and greed rather than solidarity for the collective welfare of teaming members, thereby making the process of collective bargaining difficult to achieve at the detriment of the members.

DUTIES AND OBLIGATIONS OF THE REGISTRAR OF TRADE UNIONS [32]

The Trade Unions Act established the office of the Registrar of Trade Unions as a department within the Federal Ministry of Labour and Employment, with the overall goal of ensuring the Trade Unions Act's effective execution and implementation. The followings are some of the functions attributable to the office:

- i. Receipt of applications for registration accompanied by the Rules/Constitution of the prospective union.
- ii. Recommendation of applications to the Honourable Minister for conferment of approval after ensuring that the application and rules of the proposed union have satisfied the requirements of schedule 1 of the Trade Union Act.
- iii. Registration of Trade Unions and Federation of Trade Unions.
- iv. Issue guidelines to all registered Trade Unions, among others.

Going by the provisions above, it is the responsibility of the Registrar of Trade Unions to ensure the effective administration of the registered unions, etc. by virtue of provisions of 315 of the Constitution, taking into cognizance the overriding provisions of Sections 40 and 45 of the Constitution.

However, the issue of trade unions' membership dichotomy has been a recurrent matter of dispute and in numerous cases, the attention of the Ministry of Labour and Employment was drawn for clarification, but it refused, failed, neglected and or deliberately avoided to respond adequately. More often, the Ministry is accused of complacency in the discharge of its duties.

CONCLUSION

It has become a tradition for trade unions to violate the existing classification of membership or jurisdictional scope under which their registration should have been anchored and have championed

the misinterpretation of freedom of association, to continue to illegally collect monthly check off dues without regard to the law.

Trade unions should renew their commitments to the welfare of workers. The Ministry of labour and employment should play its supervisory role and issue the needed clarifications on classification of membership and direct its immediate implementation.

The erosion of fundamental rights to associate, form and belong to a trade union occurs increasingly through the use of non-standard forms of membership, which are not receiving adequate administrative attention, thus the number of trade disputes that keeps rising should be addressed in its entirety because of its disruptive tendencies to industrial harmony.

The Ministry of labour and employment should be professional in grievance handling and also show effective leadership in policy coherence with employers' organizations to ensure respect for fundamental principles, rights at work and extant labour laws, as well as judicial enforcement.

A holistic amendment of the Trade Unions Act to meet present-day realities is therefore fundamental to the development of the Nigeria's economy.

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